

# **Consultation on 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**

**Analysis of Responses**

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## **Background**

1. The Scottish Government opened a 12 week consultation on *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*, on 25 August 2017. The consultation closed on 17 November 2017.
2. The consultation sought views from those involved in supporting children and young people with additional support needs. This included: 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 would also have been of interest to those organisations and individuals who have an interest in the promotion of children's rights in Scotland.
3. The Education (Additional Support for Learning) (Scotland) Act 2004 ("the Act") has been amended by the Education (Scotland) Act 2016. This extension provides that children will have largely 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.
4. As well as providing this non-statutory guidance on extended children's rights, the amendments to the Act have also required the statutory guidance to the Act (*The Supporting Children's Learning Code of Practice*) and associated regulations to be updated, which were part of a separate consultation held earlier this year. An analysis report and a link to the published consultation responses can be found at: <http://www.gov.scot/Publications/2017/11/2376>
5. The purpose of this guidance is to provide education authorities and schools with non-statutory guidance on the assessment of capacity and adverse impact on wellbeing, which is a requirement introduced as part of the extension of children's rights. This guidance is primarily for staff in education authorities and schools, and complements that which is provided in the statutory Code of Practice on Supporting Children's Learning.

## **Overview of Consultation responses**

6. There were a total of 27 responses received for this consultation. 25 of those responses came from organisations, whilst the remaining 2 were submitted by individuals.

7. 17 out of 27 respondents agreed to have their responses published. These responses have been published on the Scottish Government's Consultation Hub and they can be viewed by accessing the following link:  
[https://consult.gov.scot/supporting-learners/extending-childrens-rights/consultation/published\\_select\\_respondent](https://consult.gov.scot/supporting-learners/extending-childrens-rights/consultation/published_select_respondent)  
All responses were taken account of and have been considered within this report, but the percentages used in the report refer to those whose responses were able to be captured against the structure of the consultation questionnaire and completed a RIF.
8. All respondents were given the opportunity to submit their responses anonymously, or for their responses to be anonymised in reporting. Prior to publication, all responses were moderated to ensure no inappropriate language or information which could potentially identify individuals by name.

### **Action as a result of consultation**

9. Overall the guidance has been received positively. However, the consultation suggested that a number of areas could be further improved, particularly in relation to the case studies, and that Chapter 6's purpose was unclear in places. As a result of the consultation the guidance has been significantly amended, although the fundamental presentation of the guidance has not changed. An overview of updates to the guidance following the consultation include:
  - Clarifying the role of the children's support service.
  - Have drawn out in the guidance sources of information for parents.
  - Have clarified the interaction between the child and parent's rights, including in the guidance that an agreement must be reached about whose rights should be used, particularly in the circumstances where there is disagreement between the eligible child and their parent.
  - Included the definition of eligible child.
  - Have included information on the format in which requests from children to exercise their rights can be made.
  - Have clarified the factors that can be taken into account when making the evidence based decisions regarding the assessment of capacity, making it clear that those working and living with the child may use any evidence they consider appropriate to establish maturity and understanding.
  - Have added references to young carers and looked after children within the guidance, given that the extension of children's rights will benefit looked after children and young people and young carers particularly.
  - Resources have been added based on stakeholder requests, as appropriate.
  - The relevance of Chapter 6 was reassessed and relevant information was moved to more suitable areas of the guidance, with the remainder of the chapter being removed.
  - The case studies have been rewritten to provide even further clarity.
10. In addition to the public consultation, the guidance has been developed taking note of comments received from representatives of the Advisory Group for Additional Support for Learning, the ADES Children's Services Group, and the Association of Support for Learning Officers in a focus group, and during routine

meetings of these groups. Relevant comments from the recent consultation on the *Supporting Children's Learning Code of Practice* have also helped inform the further development of this guidance.

11. We would like to thank everyone who responded to the consultation and gave their time to make a contribution to it.

### **Next Steps**

12. It is intended that the non-statutory guidance (which this consultation referred to), the revised Code of Practice, and guidance on the section 70 complaints procedure will be published on 20 December 2017. This is ahead of the commencement of the changes to the Act, which will be on 10 January 2018.

## **Analysis of responses : Extending Children’s Rights guidance**

### **Introduction**

Respondents were asked, Is the information provided in the Introduction appropriate? They also had the opportunity to suggest potential improvements.

### **Results**

Option	Total	Percentage
Yes	13	61.90%
No	6	28.57%
Don't Know	0	0%
Did not answer	2	9.52%

As reflected in the results above, the majority of responses with regards to the introduction were positive, for example, “This is clear and appropriate”.

Clarification based on consultation comments, resulted in the following amendments being made to the introduction, including the below.

### **Definitions**

- The term eligible child<sup>1</sup> being used, as in the revised *Supporting Children’s Learning Code of Practice* (third edition 2017), to provide further clarity as to who can exercise the extended rights.
- It has been clarified that in the guidance, the term parent, refers the definition defined in the 2004 Act, as having the same meaning as in the Education (Scotland) Act 1980, and includes “guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of, a child or young person.”

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<sup>1</sup> eligible child” refers to a child in school education who has attained the age of 12 but not 16 and who has been assessed as having capacity (sufficient maturity and understanding) to exercise their rights under the Act, and that the education authority (or Tribunal) considers the wellbeing of the child would not be adversely affected by the child exercising their rights.

**Other clarifications included:**

- Clarity that this guidance does not provide advice in relation to capacity of young people in relation to the Education (Additional Support for Learning) (Scotland) Act.
- Further information has been added regarding the new Children's Support Service. This has been included in Chapter 2, Children's Rights.
- It has been made clear within the examples of who the guidance is for that this would also include those who work with looked after children.

## **Chapter 2 Children’s Rights**

Respondents were asked Is the information provided in Chapter 2 appropriate. They also had the opportunity to suggest potential improvements.

### **Results**

Option	Total	Percentage
Yes	11	52.38%
No	6	28.57%
Don’t Know	0	0%
Did not answer	4	19.05%

As reflected in the results above, the majority of responses with regards to the introduction were positive, for example “The information provided is appropriate....” There were however opportunities for further clarification within Chapter 2. Which included:

### **Clarity regarding the assessment process**

- With regards to a query as to how requests can be made, it was clarified that the 2004 Act (as amended) requires that requests are made in writing or another permanent form, and are able to be referred back to.
- In response to queries on timescales it was added that there is no timescale set in statute for these decisions to be completed, but as this decision is made in relation to a child who in almost all cases will already be known to the education authority through its schools, this decision should be able to be made quickly.

### **Clarity regarding Children and Parental rights**

- The support available to parents and children has been clarified, referencing the Scottish advice service for additional support for learning, Enquire, in this chapter.
- With regards to queries about potential disagreements when using rights and whether children’s/parent’s rights could be used in parallel, it was added to this chapter that, ‘In practice, families will require to consider who will use their rights in the circumstances that rights are being prepared to be used. It is not intended that eligible children and their parents can use their rights on the same issue at the same time, or indeed consequentially (to overturn the earlier effect). It is therefore essential that a decision is taken about whether the eligible child’s rights will be used or the parent’s rights will be used in each circumstance. An agreement should be reached about whose rights should be used, particularly in the circumstances where there is disagreement between the eligible child and their parent.’



### **General clarification**

- The list of rights that have been extended to eligible children includes making use of dispute resolution arrangements for matters about additional support needs that are specified in regulations, generally matters not eligible to be considered by the Additional Support Needs Tribunal for Scotland. The regulations specified (The Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005) have now been referenced.

### **Chapter 3 Assessment of capacity**

Respondents were asked Is the information provided in Chapter 3 appropriate.

#### **Results**

Option	Total	Percentage
Yes	11	52.38%
No	8	38.10%
Don't Know	0	0%
Did not answer	2	9.52%

As the consultation responses suggest, the chapter was responded to positively, with comments such as, “The guidance is again clear here.” Although, there was a theme within comments on this chapter for greater clarity being needed on the assessment of capacity. This led to the following being added to the chapter:

- When carrying out an assessment of capacity, the factors given as examples within Chapter 3, that can be taken into account are not exhaustive and the child and those working and living with the child may use any evidence they consider appropriate to establish maturity and understanding. This was to address concerns about the factors being taken into account as part of the assessment of capacity, which were given as examples.
- The reference to a child’s level of achievement being a factor that can be taken into account was amended to a child’s ‘skills and experiences.’ This was to address concerns about reference to a child’s level of achievement, which was reflected throughout the consultation.
- With regards to the questions from the *Supporting Children’s Learning Code of Practice* (Third Edition) 2017 which can be used as part of this assessment, it has been added that it is not intended that every question should be answered and that the choice of question to be used will be informed by the right which the child wishes to use. This was to address a query as to whether all of the questions need to be answered as yes.
- With regards to a comment that there should be no significant bureaucracy as a result of this process, it was added to the chapter that it is not intended that this should be a bureaucratic exercise, it is intended to confirm what is already known about the child.
- A link to the Education Scotland website on the Curriculum for Excellence Experience and Outcomes was added.

## **Chapter 4 Consideration of adverse impact on wellbeing**

Respondents were asked Is the information provided in Chapter 4 appropriate. They also had the opportunity to suggest potential improvements.

### **Results**

Option	Total	Percentage
Yes	10	47.62%
No	9	42.86%
Don't Know	0	0%
Did not answer	2	9.52%

The responses on this chapter were more finely balanced, with a slight preference towards the chapter being appropriate. The positive responses regarding this chapter included (e.g. “The clarity here on the assessment process is helpful.”), although as the results suggest the feedback suggested that there were areas within this chapter that required clarification. One of the themes in responses relating to this chapter concerned requests for clarification on the consideration of wellbeing. As a result the following was added to this chapter:

### **Information added to clarify the consideration of Wellbeing**

- Information which was originally in Chapter 6 (Key Principles of Assessment ) about assessing using a wide variety of sources for both the assessment of capacity and consideration of wellbeing was added to this chapter. Also taken from Chapter 6 and added to this chapter was, ‘Assessment in health and wellbeing should also link with other areas of the curriculum, within and beyond the classroom, offering children and young people opportunities to apply their knowledge and skills in more complex, demanding or unfamiliar learning or social contexts.’
- That it is expected that education authorities’ consideration will be informed by the knowledge and experiences of the child which is known by those who work most closely with them. This will allow a range of perspectives and information to be taken into account in reaching a rounded, evidence based, decision about any potential adverse impact to the child’s wellbeing as a result of using a particular right.
- A weblink has been included to where further information can be found on the wellbeing indicators.

**Other actions taken as a result of comments included:**

- It has been added to this chapter that parents should be involved and informed as part of the assessment of capacity and consideration of wellbeing, with a signpost to Chapter 7 (Working with Children and Families) of the *Supporting Children's Learning Code of Practice*. This was based on comments relating to parental involvement in the process.
- As requested, the purpose of the flowchart outlining the assessment process for the assessment of capacity and consideration of wellbeing was clarified, adding that this flowchart sets out the process when a child wants to exercise a right.
- The flowchart has also been amended to clarify that both an assessment of capacity and consideration of wellbeing need to be carried out, when a child requests to exercise a right.
- Information was added to this chapter on what parents/ children can do if they disagree with the outcome of the consideration of wellbeing, in that they may refer this to the Tribunal. (This was also added to Chapter 3, Assessment of Capacity.)

## **Chapter 5 Assessment of change of circumstances**

Respondents were asked Is the information provided in Chapter 5 appropriate? They also had the opportunity to suggest potential improvements.

### **Results**

Option	Total	Percentage
Yes	12	57.14%
No	6	28.57%
Don't Know	1	4.76%
Did not answer	2	9.52%

As the results above suggest the majority of responses within this chapter were positive, for example, "Feel the information provided is appropriate and has the child at the centre of change and decision making throughout the chapter."

### **Changes to Chapter 5 included:**

- Based on a consultation comment on this chapter, it was added to both chapters 3 and 4 (Assessment of Capacity/Consideration of Wellbeing) that it is recognised that Looked After Children who have recently moved placement may not be well known by their school, and that information to support decision making should be drawn from information which is known about the child from their child's plan, and from those who know them well outside of school, for example their social worker.
- There were also comments regarding timescales, where a child has requested to exercise their rights within a short period of time after an earlier request to use similar right. A section on timescales was added to Chapter 3 and 4, which clarifies that, there is no timescale set in statute for these decisions to be completed.

## **Chapter 6 Key Principles of assessment**

Respondents were asked Is the information provided in Chapter 6 appropriate. They also had the opportunity to suggest potential improvements.

### **Results**

Option	Total	Percentage
Yes	11	52.38%
No	8	38.10%
Don't Know	0	0%
Did not answer	2	9.52%

Although as the results above suggest there was a positive response to this chapter, there was a theme in responses that the purpose of the information included in this chapter was not always clear.

### **Changes to Chapter 6**

On this basis the information within Chapter 6 was reviewed, and based on consultation comments some text was redistributed as appropriate, for example:

- Information on the participation of children in their rights was added to Chapter 2 (Children's Rights).
- Following Chapter 3 (Assessment of Capacity) and Chapter 4 (Consideration of Wellbeing), information was added to the end of Chapter 4 on further advice on both assessments.

After reviewing Chapter 6 and relocating relevant material, the remaining text and chapter was deleted.

## **Annexes and Resources**

Respondents were asked Is the information provided in the Annexes appropriate. They also had the opportunity to suggest potential improvements.

### **Results**

Option	Total	Percentage
Yes	8	38.10%
No	10	47.62%
Don't Know	0	0%
Did not answer	3	14.29%

As the responses above suggest, the annexes were an area that required further clarification, the responses mainly focussed on suggested improvements to the cases studies (e.g. "Consider reviewing and amending case studies."), although there were some comments relating to the resources section.

### **Annex A: Case Studies**

All of the case studies in the document were rewritten or amended. Based on consultation comments the reworking of the case studies included:

- The process of the child making the request, through to the child and parents being informed of the outcome, being clearly explained, with greater clarity on the stages at which parents are notified.
- Subheadings have been added to make all the case studies' purposes clearer.
- A clear distinction between the assessments of capacity and consideration of wellbeing.
- Including an examples where it is found that a child cannot exercise a requested right. 2 examples have been added, 1 which includes reference to the Tribunal and another where an application of Independent Adjudication is made.
- The case study outside Annex A in Chapter 3 ('Eilidh') has also been rewritten to make it more closely aligned to a decision related to a right.

### **Annex B: Resources**

The resources section was described in one response as "robust", however there were still opportunities to make further improvements based on consultation requests; this included adding the following resources:

- Link to the Centre for excellence for looked after children in Scotland (CELCIS) website.
- Link to the Who Cares? Scotland website.

- Link to the Scottish Independent Advocacy Alliance publications webpage.

In addition to this signposts have been added, as appropriate, to further information in the *Supporting Children's Learning Code of Practice* (2017, third edition), throughout the document.

### **Format**

Respondents were asked is the format of the document appropriate? They also had the opportunity to suggest potential improvements.

### **Results**

Option	Total	Percentage
Yes	11	52.38%
No	5	23.81%
Don't Know	0	0%
Did not answer	5	23.81%

The majority of respondents responded positively to the format of the document, although as requested improvements were made to the format of the case studies, with sub-headings being added to make them easier to navigate.

There was a comment within the consultation about providing this guidance in an alternative format for parents and children. The guidance is primarily aimed at local authorities and practitioners, although further information which is specifically designed for parents on a range of Additional Support for Learning issues can be obtained via Enquire, whose contact details are provided within the guidance.

Enquire will also provide advice and information to children on the use of their rights (or their parent's use of them), as part of the new Children's Support Service.





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