



# Autonomy, Rights and Children with Special Needs: A New Paradigm?

## Working Paper 2

### Legislative and Policy Developments in Special Educational Needs in England and Additional Support Needs in Scotland: Advancing Children and Young People's Rights

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# 1. Introduction

1.1 The pursuit of specific policy goals concerned with identifying and responding to the needs of children and young people who face educational barriers due to learning difficulties and disabilities is well established in both England and Scotland. The legislation of the early 1980s – the Education (Scotland) Act 1980 and, in England, the Warnock-inspired Education Act 1981<sup>1</sup> – reflected new thinking around the way children’s special educational needs were defined and the potential role of parents in assisting education providers to ensure that children’s needs were met via suitable and effective arrangements.

1.2. Both jurisdictions recognised the value of parental involvement, but policy advanced more rapidly in England than in Scotland, not least in the extension of parental rights. In England that process took a significant step forward with the Education Act 1993, which introduced new parental rights of choice and a more robust and independent appeal process. By the time of the Special Educational Needs and Disability Act 2001 in England and the Education (Additional Support for Learning) (Scotland) Act 2004, parental rights were firmly embedded and incorporated within most of the key areas of decision-making concerning children with special educational needs (SEN) – or additional support needs (ASN) in Scotland. Important developments have occurred since then, as outlined below.

1.3. While this policy review does not attempt to chart the entire history of law and policy concerning SEN and ASN over the past four decades in each jurisdiction, it seeks to trace the development of children and young people’s independent rights that has gathered pace since the 2001 and 2004 Acts, set in the context of the statutory regimes that have to some extent sought to tilt the balance of power away from local authorities, and the dominance of professional judgment, and towards the empowerment of families.

1.4. This shift has been extended, in England, under the Children and Families Act 2014, and in Scotland, via the Education (Scotland) Act 2016. This policy review is concerned to explain how and why, and to what extent, this legislation is giving practical impetus to a policy purporting to go beyond the mere recognition of the importance of children and young people’s views on ASN/SEN and special provision and which is seeking to ensure that the voice of the child or young person is able to influence all key decisions affecting them. The review also aims to set national policy and legislation against international expectations regarding recognition of children and young people’s rights in this context, as reflected in the standards or benchmarks set out in international legal instruments and in particular, treaty obligations, particularly those in the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities.

1.5. Since the institutional frameworks that have been established and adapted under the legislation differ in England and Scotland, this review provides a separate discussion of developments in the respective jurisdictions (Parts 2 and 3 below), before outlining the international framework (Part 4). The review then provides some comparative analysis of the two national jurisdictions, set against this background of international standards, in its concluding comments (Part 5). Since the focus of the ESRC research is specifically on England and Scotland, the review does not cover the legal and policy frameworks and reforms in Wales or Northern Ireland. However, there is some reference to particular developments in Wales, where there have been some important advances in the recognition of children and young people’s rights.

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<sup>1</sup> Warnock/Department of Education and Science (1978).

## 2. SEN Policy and Legislation in England

2.1. Before the implementation of the current legislative and policy framework on SEN in England, under the Children and Families Act 2014 and the 0-25 Code of Practice, the obligations of local authorities and schools and the rights of parents in this field were enshrined in the Education Act 1996, as amended, and explained in the 2001 SEN Code of Practice.<sup>2</sup> The 1996 Act was a consolidating statute, incorporating all of Part III of the Education Act 1993 (below). It did not alter the substantive law, including the pivotal definitions of 'special educational needs', 'learning difficulty' and 'special educational provision', and the requirement for a 'statement' of SEN for some of the children with SEN (broadly those whose needs were considered to require the input of specific resources from the local authority).

### ***The Education Act 1993***

2.2. Through the reforms in Part III of the Education Act 1993 the first major substantive changes were introduced to the legislative requirements originating in the Education Act 1981, which was the first discrete and all-encompassing statutory measure on SEN. The 1993 Act repealed the 1981 Act and set in place the key features of the SEN legal framework: a duty on the Secretary of State to establish a Code of Practice; provision for inter-agency co-operation; a right for parents to request local authority assessments of their child; a duty on local authorities to make a statement of SEN when considering that the determination of the special education provision called for by the child's SEN was 'necessary'; a right for a parent to express a preference for a (state) school to be named in a statement; and various rights to appeal to what was then the Special Educational Needs Tribunal. Many of these elements had been promised in the White Paper *Choice and Diversity*.<sup>3</sup> They sought to address problems highlighted in the Government's own review of the system.<sup>4</sup> For the first time, time limits were imposed on local authorities for the completion of assessments and the issuing of statements, to combat delays, which were common and problematic.<sup>5</sup> Time limits, which were set out in regulations,<sup>6</sup> remain part of the legal structure governing SEN.

### ***The Special Educational Needs and Disability Act (SENDA) 2001 and the SEN Code (2001)***

2.3. Further amendments to the statutory framework were made by the Special Educational Needs and Disability Act (SENDA) 2001. SENDA extended the protection afforded by the Disability Discrimination Act 1995 beyond the workplace and services to include provision by schools. It enabled complaints of discrimination to be heard by the SEN Tribunal, re-named by the Act the Special Educational Needs and Disability Tribunal (SENDIST) to reflect the tribunal's broader jurisdiction. On SEN specifically, SENDA also made key changes to the inclusion duty first established by the 1981 Act and subsequently extended under the 1993 Act – the duty to educate children with SEN in mainstream schools.

2.4. Under the 1981 Act the inclusion duty related only to children with statements. Local education authorities (LEAs), as they were then known, were under a duty to ensure such children were educated in a mainstream (i.e. non-special) school provided account was taken of the views of the

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<sup>2</sup> Department for Education and Skills (2001).

<sup>3</sup> Department for Education (1992a).

<sup>4</sup> Department for Education (1992b).

<sup>5</sup> House of Commons Education Select Committee (1987) and (1993).

<sup>6</sup> Education (Special Educational Needs) Regulations 1994 (SI 1994/1047).

parents and such a placement was compatible with all of: the child receiving the special education he/she required; the provision of efficient education for other children; and the efficient use of resources. The 1993 Act, however, stipulated that regardless of whether or not a child had a statement he or she had to be educated in a mainstream school unless it would be incompatible with the parent's wishes as well as meeting the above compatibility conditions. Therefore this inclusion duty was extended to all children by the 1993 Act, and parental wishes became pivotal.

2.5. The 2001 Act took inclusion yet a stage further by specifically requiring all non-statemented children to be educated in mainstream schools and limiting the circumstances where such a placement was not required for statemented children to where it would be incompatible with the parent's wishes or the provision of efficient education for other children.<sup>7</sup> Moreover, a local authority could now only rely on the latter head of incompatibility if there were 'no reasonable steps' that could be taken to prevent the incompatibility.<sup>8</sup> The Government's policy was premised in part on the belief that extending inclusion within schools would lead to the greater social inclusion of people with SEND more generally.<sup>9</sup>

2.6. SENDA also assisted with the enforcement of parental rights. It amended the 1996 Act to require LEAs to inform the parent in cases where the child, because he or she was believed to have SEN, was receiving special educational provision at school.<sup>10</sup> Parents of children with SEN were also to be provided with advice and information about any matters relating to their child's needs; and LEAs had to make the advice and information services known to parents, headteachers or proprietors and such other persons as they considered appropriate.<sup>11</sup>

2.7. Despite the advances in their rights as a result of the 1993 and 2001 legislation, parents were still facing considerable barriers in making effective use of them. This was not merely an issue of how LEAs, under increasing budgetary pressures, were responding to the demands made by parents, but also concerned the limited support available to parents and the complexity of the various processes involved in the identification and assessment of needs and the drawing up and finalisation of statements. There were also shown to be limitations to the rights themselves, since it was difficult to overcome the dominant influence of professional judgment and discretion as applied to needs assessment and resource allocation. The pursuit of human rights arguments in the courts after October 2000, when the Human Rights Act 1998 came into force, proved mostly unsuccessful, because the jurisprudence emanating from the European Court of Human Rights in Strasbourg, which the 1998 Act obliged UK judges to consider,<sup>12</sup> largely supported the state's authority over resource management and confirmed that the European Convention on Human Rights offered parents limited guarantees of choice.<sup>13</sup>

2.8. The principle of engagement with children to ensure their views are fed into decision-making was at least acknowledged. The SEN Code of Practice (2001) contained a discrete chapter on 'Pupil Participation', making specific reference to the rights of children and young people. It emphasised children and young people's 'unique knowledge of their own needs and circumstances' and stressed that these individuals:

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<sup>7</sup> Education Act 1996, s.316, as substituted by SENDA s.1.

<sup>8</sup> Education Act 1996 s.316A(6), inserted by SENDA s.1.

<sup>9</sup> Department for Education and Employment (1998).

<sup>10</sup> Education Act 1996 s.317A, inserted by SENDA s.3.

<sup>11</sup> Education Act 1996, s.332A, inserted by SENDA s.2.

<sup>12</sup> Human Rights Act 1998, s.2.

<sup>13</sup> Harris (2007), ch.6.

should, where possible, participate in all the decision-making processes that occur in education including the setting of learning targets and contributing to IEPs, discussions about choice of schools,... the assessment of their needs and to the annual review and transition processes.<sup>14</sup>

It also highlighted the need for children and young people to ‘feel confident that they will be listened to and that their views are valued’.<sup>15</sup> The importance of the principle of ‘seeking and taking into account of the ascertainable views of the child or young person’ was stressed, although the fact that ascertaining those views may be difficult was also acknowledged.<sup>16</sup>

2.9. While explaining the particular stages at which children and young people’s input should be sought, the Code offered very little guidance on ways of facilitating and supporting participation. Nevertheless, it referred to the SEN Toolkit<sup>17</sup> as a source of further advice. The Toolkit offered 47 paragraphs on children’s individual and collective participation in a wide range of policy and decision-making processes. However, LEAs and schools were only required to have regard to the Code,<sup>18</sup> not the Toolkit. Furthermore, the Toolkit’s advice was somewhat limited on the issues of how children’s views should be treated when reaching decisions and how to resolve conflicts between children’s and their parents’ views.

2.10. The emphasis placed by the SEN Code on children and young people’s participation was important and in a sense presaged a broader policy thrust reflected in the Education Act 2002 requirement that LEAs and schools should have regard to central guidance about consultation with pupils in connection with decisions affecting them.<sup>19</sup> The guidance, *Working Together. Giving children and young people a say*, was published in 2004.<sup>20</sup> However, this area of policy was concerned with children’s collective input into decisions, policies and processes rather than rights to influence decisions about arrangements for an individual child.

2.11. It is in the area of dispute resolution that the principal barrier to children’s participation – arising from a general paternalistic perception that parents are best placed to represent their children’s interests and advance their cause – has been most at the fore.<sup>21</sup> But it is also an area where efforts to ensure the child’s view is fed into the decision-making process have been strongest. SENDA provided for LEAs to make arrangements for the resolution and avoidance of ‘disagreements’ between LEAs and parents, or between parents and schools, including the appointment of independent persons as facilitators.<sup>22</sup> The SEN Toolkit was keen to stress how the child should be consulted in order to ascertain their views and wishes as part of this ‘disagreement resolution’ process, but at the same time it rejected their personal involvement in any meetings that formed part of it: ‘In most cases, it will not be appropriate to involve children in the disagreement resolution discussions... between their parents and their school or LEA.’<sup>23</sup> No reasons were articulated in support of this advice.

2.12. The arrangements for resolving disputes introduced by SENDA,<sup>24</sup> as spelled out more fully in the 2001 SEN Code of Practice, included independent mediation as an alternative to appeal to the

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<sup>14</sup> Department for Education and Skills (2001), para 3:2.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid, para 3:3.

<sup>17</sup> Department for Education and Skills (2002).

<sup>18</sup> EA 1996 s.313.

<sup>19</sup> EA 2002 s.176.

<sup>20</sup> Department for Education and Skills (2004).

<sup>21</sup> See Harris and Riddell (2011), ch.1.

<sup>22</sup> Education Act 1996, s.332B, inserted by SENDA s.3.

<sup>23</sup> Department for Education and Skills (2002), section 3 para 45.

<sup>24</sup> Section 3, inserting s.332B into the Education Act 1996.

SENDIST. Research revealed that mediation was under-utilised, in part because parents did not fully understand it and LEAs did too little to promote it, and that informal negotiation or a formal appeal were preferred to it by parents and their advisers;<sup>25</sup> furthermore, children and young people did not participate in mediations and there was little attempt, and no legislative requirement, to ensure that they did so.

2.13. SENDA did not alter the appeal system and rights attached to it, as enshrined in the Education Act 1996, although it added to the existing grounds of appeal one concerning decisions on the amendment of statements of SEN. It also, as noted above, extended the SENDIST's jurisdiction to include complaints of disability discrimination in schools, brought under the Disability Discrimination Act 1995 (later replaced by the Equality Act 2010). Disability discrimination complaints could only be brought by a child's parent.<sup>26</sup> This was also true of appeals,<sup>27</sup> although it was recognised as problematic in relation to children in care, because there was a clear conflict of interest arising from the local authority's position as both the legal parent of the child and the respondent to an appeal.

2.14. There were provisions offering a degree of support to children's participation, however. The tribunal's procedural regulations<sup>28</sup> permitted the child's views to be set out within the parent's statement of case and also required a local authority opposing the appeal to set out in its case statement either the child's views on the issues raised by the appeal or the reasons why the local authority had not ascertained them. The regulations also permitted the child to attend the hearing and with permission give evidence, although he or she could be excluded by the tribunal if his or her presence was likely to result in disruption to the proceedings or 'make it difficult for any person to adduce evidence or make the representations necessary for the proper conduct of the appeal'.<sup>29</sup> The concern that attendance might be stressful for the child or psychologically damaging (due, for example, to a risk of hearing something that might appear demeaning or undermine their self-confidence) seems to underlie the latter rule as well being a major factor in the common unwillingness by parents and their representatives to bring the child to the hearing.<sup>30</sup>

2.15. When the SENDIST was replaced by the First-tier Tribunal (Health, Education and Social Care) Chamber in 2008 as part of a general reform of tribunals under the Tribunals, Courts and Enforcement Act 2007, children's participation was instead covered by a President's Practice Direction,<sup>31</sup> although the new Chamber rules governing attendance gave the child a right to attend, subject to the tribunal's power to exclude.<sup>32</sup> This is still the current position.

2.16. In practice, children have only attended a minority of hearings. The child has never been a party to the appeal (although today young people aged 16 or over may appeal in their own right) and this is a factor in the dominance of the parent's view in a case. The conflict inherent in the position of the local authority where looked-after children are concerned, noted above, creates a risk, recognised by the UN Committee on the Rights of the Child among others, of undermining the

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<sup>25</sup> Harris and Riddell (2011).

<sup>26</sup> Disability Discrimination Act 1995, s.28I(1), inserted by SENDA s.18.

<sup>27</sup> As confirmed by the Court of Appeal in *S v SENDIST and the City of Westminster* [1996] ELR 226.

<sup>28</sup> The Special Educational Needs Tribunal Regulations 2001 (SI 2001/600), as amended.

<sup>29</sup> Special Educational Needs Tribunal Regulations 2001 (SI 2001/600), as amended, reg.30.

<sup>30</sup> See Harris (1997).

<sup>31</sup> Health, Education and Social Care Chamber, *Practice Direction, Health Education and Social Care Chamber, Special Educational Needs or Disability Discrimination in School Cases* (2008).

<sup>32</sup> Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699), reg.24.

rights of the child.<sup>33</sup> There is further discussion of dispute resolution below, covering the position under the Children and Families Act 2014.

### ***The Lamb Inquiry***

2.17. In 2009, three reports were published covering aspects of the SEN framework in England – or four, if one includes the more broadly focused report by Capita Strategic Services, which was acknowledged in the first of the SEN reports, by Sir Brian Lamb, as informing his inquiry’s findings.<sup>34</sup> The first report by Lamb, commissioned by the Department for Children, Schools and Families (DCSF), was concerned primarily with the information needs of parents in relation to SEN provision and policies. It made little reference to the information needs of children and young people, apart from in relation to annual review meetings in respect of those with statements of SEN.<sup>35</sup>

2.18. Lamb’s main report was the second of these reports. Entitled *Special Educational Needs and Parental Confidence*,<sup>36</sup> it was informed by another of the reports, by Penfold et al.<sup>37</sup> Lamb’s report greatly influenced the SEN reforms instituted by the Coalition Government under the Children and Families Act 2014 (below). Lamb called for a ‘recasting’ of the relationship between parents, schools, local authorities in this field to ensure a focus on improved outcomes for children. The report found dissatisfaction on the part of parents, who were often confused by or lacked confidence in the system governing assessment and determination of needs and provision. It was considered that the system needed to operate in a more timely, responsive, strategic and co-ordinated way to ensure children’s needs were met effectively. It recommended giving parents better information and more control over how their children’s needs were being met. Resolution of issues of disagreement between parents and schools or local authorities should, it recommended, occur in a less adversarial way.

2.19. With regard to children and young people’s participation, Lamb found that in connection with statementing it was ‘rare’ or ‘tokenistic’.<sup>38</sup> The report not only called for the strengthening of children and young people’s involvement in decision-making but also for the child’s voice to be heard and to inform understanding of the standard of provision that was required.<sup>39</sup> It also recommended that a right of appeal should be conferred on children and young people.<sup>40</sup>

### ***The proposed SEN Reforms under the Coalition Government post-2010***

2.20. The Coalition Government’s 2010 White Paper on schools, *The Importance of Teaching*,<sup>41</sup> said very little about special educational needs although confirmed the continuing role of local authorities (the ‘local education authority’ having ceased to exist after April 2010).<sup>42</sup> However, the same year, Ofsted published the report of its review of the special educational needs framework.<sup>43</sup>

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<sup>33</sup> See Harris (2009), 355-357.

<sup>34</sup> Capita (2009).

<sup>35</sup> Lamb (2009b).

<sup>36</sup> Lamb (2009a).

<sup>37</sup> Penfold et al (2009).

<sup>38</sup> Lamb (2009a), para 4.70.

<sup>39</sup> Ibid para 5.3.

<sup>40</sup> Ibid para.5.28.

<sup>41</sup> Department for Education (2010).

<sup>42</sup> As a result of the Apprenticeships, Skills, Children and Learning Act 2009, s.162; the Local Education Authorities and Children’s Services Authorities (Integration of Functions) Order 2010 (SI 2010/1158); and the Local Education Authorities and Children’s Services Authorities (Integration of Functions) (Local and Subordinate Legislation) Order 2010 (SI 2010/1172).

<sup>43</sup> Ofsted (2010).

Ofsted found, inter alia, variations across different areas in the identification of SEN and in the quality of additional support provided. One feature of this detailed research was that it elicited and reported on the views of young people themselves, although it did not make any specific recommendations on young people's or children's participation in this field.

2.21. In March 2011 the Government published its Green Paper on SEN, *Support and Aspiration: A New Approach to Special Educational Needs and Disability*,<sup>44</sup> containing many of the policies subsequently embodied in Part 3 of the Children and Families Act 2014. The 2014 Act, along with the regulations, forms the current legislative framework, supplemented by the new Code of Practice, published in 2015.<sup>45</sup> Among the specific proposals in the Green Paper were the creation of a single, school-based category of support in schools; improved co-ordination between education, health and other agencies; a new integrated 'education, health and care plan' (EHCP) to replace statements of SEN; extension of the statutory assessment and plan stage up to the age of 25; the option of a 'personal budget' for families, giving parents more control; a duty to be placed on local authorities to publish a 'Local Offer' on the provision in its area for meeting SEN; better choice of school; and promotion of mediation before appealing.

2.22 The 2011 Green Paper also proposed the piloting of a right for children to appeal against an SEN decision or to bring a complaint of disability discrimination. The pilot would be undertaken in two or three local authority areas. The Green Paper cited three drivers for such a reform: the recommendations of the UN Committee on the Rights of the Child (see below); the situation of children in care, noted above; and the fact that a separate consultation (in 2009) on giving an independent right of appeal to children of secondary school age had shown overall support for it.<sup>46</sup>

2.23. The Government's follow-up report outlining the consultation responses to the Green Paper and setting out its determinations confirmed that the pilots for an independent right of appeal would proceed.<sup>47</sup> It was also announced that arrangements for a new single assessment process and EHCPs would be piloted in 20 Pathfinder areas covering 31 local authorities and their health partners. Among matters to be tested out would be the '[f]ull engagement of children, young people, and their parents in the process'.<sup>48</sup>

### ***The new system under the Children and Families Act 2014 and new SEN code***

2.24. The Children and Families Bill was published and completed its Parliamentary stages before the Pathfinder pilots ended. The Bill received the Royal Assent on 13 March 2014. Most of Part 3 of the Act, covering SEN, which includes the new duties on children and young people's participation (below), came into force in September 2014 although there has been a transition period of three years for implementing the reforms.

2.25. Rights for children, and especially young people, are key features of the legislation. A distinction is made under the 2014 Act between young people – defined as those aged 16 or over and below 25<sup>49</sup> – and children, meaning in the context of this legislation those who are not over compulsory school age (i.e. under 16). Young people are for the first time given independent rights equivalent to those enjoyed by parents in the case of children under 16. They include a right to

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<sup>44</sup> Department for Education (2011).

<sup>45</sup> Department for Education (2015).

<sup>46</sup> Department for Education (2011), paras.2.67 and 2.68

<sup>47</sup> Department for Education (2012), paras 2.46 and 2.47.

<sup>48</sup> Ibid, para 1.30.

<sup>49</sup> 2014 Act, s.83.



express views about an assessment,<sup>50</sup> express a preference for a school to be named in an EHCP and, if certain conditions are met, to have that preference granted,<sup>51</sup> and a right to appeal<sup>52</sup> or participate in mediation.<sup>53</sup> In the case of children, the Act makes provision for a right of appeal to be piloted and extended to them by order of the Secretary of State.<sup>54</sup> The 'dispute resolution' process previously covered by the Education Act 1996 as amended by SENDA 2001 is preserved in the 2014 Act and now also covers disagreements between, on the one hand, young people or the parents of children and, on the other, the local authority, a school or further education institution. Where the dispute relates to EHC needs assessments, EHC plans and re-assessment of health or social care needs, the process also covers disagreement with a health care provider (viz. a 'responsible commissioning body').<sup>55</sup>

2.26. A key provision in the 2014 Act is section 19, which sets out a range of specific principles on children and young people's participation that local authorities must take into account. It had no equivalent under the previous legislation. It states:

'In exercising their functions under [part 3] in the case of a child or young person, a local authority in England must have regard to the following matters in particular –

- (a) The views, wishes and feelings of the child and his or her parent, or the young person;
- (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
- (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
- (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.'

Local authorities are also under a duty to consult with the children and young people in its area in fulfilling its duty to keep its education, training and social care provision for children and young people with SEN or a disability under review, and authorities must also publish any comments from children and young people about its 'local offer'.<sup>56</sup>

2.27. The SEN Code amplifies the obligations on local authorities and schools to ensure children and young people's involvement in the range of decisions about their SEN and special educational provision. The SEND Regulations 2014 have established various procedural rights for parents and young people through obligations imposed on local authorities.<sup>57</sup> They relate to the provision of information and notifications of various matters such as the time limits for assessment, issuing a draft plan and so on. They also include an obligation to consult with the child over an EHC assessment and to take into account their views, wishes and feelings. The regulations also state that

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<sup>50</sup> 2014 Act s.36.

<sup>51</sup> 2014 Act ss 38 and 39.

<sup>52</sup> The right to appeal covers a range of specific grounds (2014 Act, s.51), including a refusal to assess, a refusal to make an EHCP plan and disagreement over the contents of the EHCP plan. Note that the tribunal can make a binding ruling on education matters. Under a new power, being introduced in April 2018, after being piloted, the tribunal will also be able to make recommendations (but not a binding decision) on any health needs or care needs relevant to the child: Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 (SI 2017/1306).

<sup>53</sup> 2014 Act ss.51 and 52.

<sup>54</sup> 2014 Act s.58.

<sup>55</sup> 2014 Act s.57.

<sup>56</sup> 2014 Act ss.27 and 30.

<sup>57</sup> Special Educational Needs and Disability (SEND) Regulations 2014 (SI 2014/1530).

the local authority must give consideration to the need for information, advice and support to be provided to a young person to enable them to participate effectively in an EHC needs assessment.

2.28. An important issue regarding children and young people's participation that the legislation now addresses concerns their mental capacity. Under the Act and regulations, the legal requirements may be adjusted in cases where the young person, or parent in the case of a child, lacks capacity. Capacity is defined with reference to the Mental Capacity Act 2005. The rights of the parent or young person who lacks capacity are exercisable through a representative (or, if the young person does not have one, the young person's parent or parent's representative).<sup>58</sup> Two decisions of the Upper Tribunal in 2016, *Buckinghamshire County Council v SJ*<sup>59</sup> and *London Borough of Hillingdon v WW*,<sup>60</sup> clarified the meaning of these provisions on capacity as well as confirming that, in relation to an appeal coming before it, a young person should be assumed to have capacity unless it is shown not to be the case; and it is for the tribunal to determine whether the young person has or lacks capacity to bring an appeal or to make a decision about other matters that may arise in the course of proceedings.

2.29. Evidence on the implementation of the 2014 reforms is still emerging. Research focusing on the degree of readiness for the SEN reforms, in both the Pathfinder and non-Pathfinder areas, was published in March 2014 and painted a mixed picture.<sup>61</sup> Among its findings was a general lack of involvement of children and young people in the local preparations for the reforms: 'only 6% (n=7) of SEN respondents, 5% (n=5) of social care respondents and 10% (n=10) of health respondents reported significant involvement of children and young people in development activities by October-December 2013.'<sup>62</sup> The interim findings in the evaluation of the Pathfinder programme, published at the end of 2014, also indicated an issue in relation to the involvement of children and young people: it found there was no significant improvement with regard to their 'having a say in the support planning process'.<sup>63</sup>

2.30. The Pathfinder programme final impact research report was published in July 2015.<sup>64</sup> This provides more detailed findings on the involvement of children and young people in the support planning process, although the findings are based on parent perspectives alone. The report indicates that in the Pathfinder areas the child or young person's views were taken into account to a greater degree than previously but still to a relatively low extent. In Pathfinder areas 37% of parents agreed that the child/young person's views had been taken into account, compared to 29% in the comparison cases. Parents were positive about the benefits of the child/young person's involvement where it had occurred. The report indicates that the initial qualitative research showed that non-participation of the majority of children and young people was 'because they were too young or the nature/severity of their disability was seen to prevent them from participating'.<sup>65</sup>

2.31. A detailed survey focusing on the experience of EHCPs was carried out by Adams et al for the DfE in 2016.<sup>66</sup> It was based on children and young people for whom a plan was created in 2015. The research considered the views of parents and young people. The research report reveals a more positive picture of children and young people's participation than the Pathfinder findings and is

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<sup>58</sup> 2014 Act s.80. SEND Regulations 2014 (SI 2014/1530), Part 6.

<sup>59</sup> [2016] ELR 350; [2016] UKUT 254 (AAC).

<sup>60</sup> [2016] ELR 431; [2016] UKUT 253 (AAC).

<sup>61</sup> Hill et al (2014). See also Craston et al (2013).

<sup>62</sup> Hill et al (2014), 34.

<sup>63</sup> Craston et al (2014).

<sup>64</sup> Thom et al (2015).

<sup>65</sup> Ibid, p.42.

<sup>66</sup> Adams et al (2017).

particularly useful because it includes findings related to specific age bands. The findings are presented as a combination of responses from parents and young people, so one cannot differentiate the young person's from the parents' perception. Overall, it was reported that in 58% of cases an effort had been made to listen to the child/young person and understand their views, and in 51% of cases the child or young person had been included in meetings. However, the rates were lower where the child or young person was aged 10 or under or from a BME background. This research also examines whether support was offered to the child or young person during the EHCP process, in the form of communication aids, visual aids or an advocate/supporter. An advocate was offered in 41% of cases but the other forms of assistance were much less commonly offered.

2.32. Research by Cullen et al for the Department for Education that was specifically focused on disagreement resolution was published in March 2017.<sup>67</sup> It offers some useful insights into the exercise by young people of their right of appeal, based on 79 interviews with parents and evidence from local authority focus groups and representatives of tribunal panels and parent support organisations. The 18 parents reporting on young people indicated that the young people's experiences of the processes of mediation and appeal 'were largely negative'.<sup>68</sup> In some of the highlighted case study examples there was patently insufficient attention to the needs of the young people that affected their ability to attend and participate in mediation and appeals. Anxiety is a particular problem and was also identified as a barrier to participation in a small study by Walsh, conducted 18 months from the start of the introduction of the new framework.<sup>69</sup> Nevertheless, there was evidence in the research by Cullen et al that young people's participation is conducive to an outcome consistent with the young person's wishes. One young person preferred not to attend his disagreement resolution session but sent power point slides outlining his views, thereby illustrating how sometimes alternative strategies may be needed to ensure children and young people's participation.

2.33. The present Government took over the implementation of the 2014 Act reforms and in November 2017 the Minister for Children and Families, Robert Goodwill, announced some extra government funding for SEND, running to nearly £45 million. He reported that local authorities were 'making encouraging progress, but there is still work to be done to fully embed this improved system across education, health and care sectors'.<sup>70</sup> The main item of extra funding that was announced comprises £29 million for local authorities and local partners to help with further implementing the reforms. There was also an allocation of £9.7 million for 'local supported internship forums' to create work placements for young people with SEND, and £4.6 million for Parent Carer Forums, 'which bring parents together with local decision makers and help to provide them with a voice in the process'<sup>71</sup> – but no specific reference to helping to give young people a 'voice'. It was also confirmed that there would be further allocations of funding, on the basis of bids from local authorities, to 'build capacity in the system and support the ongoing delivery of the SEND reforms over the next two years'.<sup>72</sup> This support would include provision of access to information, advice and support for families. The National Children's Bureau is quoted in the announcement as voicing support for the extra government financial support for SEND. It remains to be seen how much of this extra allocation of funding will support children and young people's participation.

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<sup>67</sup> Cullen et al (2017).

<sup>68</sup> Ibid, 157.

<sup>69</sup> Walsh (2017).

<sup>70</sup> 30 November 2017, at <https://www.gov.uk/government/news/45m-boost-for-young-people-with-send>

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

### ***Conclusion on legal and policy developments in England***

2.34. The SEN framework that is now in place in England reflects a clear commitment to recognise the benefits, in this field, of hearing from children and young people and acting in response to their autonomous voice. Much progress has been made, at least on the basis of principle and structure. There is no doubt that, for the most part, central government, local authorities and professionals are enthusiastic supporters of this inclusive approach towards needs determination and outcome planning for children with SEND in England.<sup>73</sup> But the relatively limited evidence to date reveals a somewhat mixed picture on how effectively the children and young people's rights provisions in the 2014 Act and SEN Code are being implemented on the ground. More evidence is needed on the extent of progress and barriers to it, something which the ESRC project aims to provide.

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<sup>73</sup> As also confirmed by Walsh (2017).

### 3. ASN Policy and Legislation in Scotland

3.1. In Scotland, the break-through legislation with regard to the establishment of a more rights-based framework responsive to the needs of children with disabilities and disadvantages was the Education (Additional Support for Learning) Act 2004, although mention is also needed of the Standards in Scotland's Schools Etc Act 2000, which formally provided for all children to hold a right to education and for education authorities to ensure that education is 'directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.'<sup>74</sup> The first developments, however, occurred in the 1980s.

#### *The 1980s legislation*

3.2. The Education (Scotland) Act 1980, as originally enacted, contained a framework for identifying children who require special education but also incorporated some parental rights. 'Special education' was defined in the Act as:

education by special methods appropriate to the requirements of pupils whose physical, intellectual, emotional or social development cannot, in the opinion of the education authority, be adequately promoted by ordinary methods of education, and shall be given in special schools or by other appropriate means.<sup>75</sup>

Authorities could only reach a determination that such provision was required after carrying out a medical and psychological assessment of the child. Parents had a right to have their views taken into account by the authority and to be notified of the authority's decision.

3.3. If the authority decided that the child required special education it was under a duty to provide it. The parent had a right to request a review of the decision that a child required special education once 12 months had elapsed from the decision or any previous review. A parent was entitled to receive reasons for the local authority's decision but only if he or she requested them. Parents could refer to the Secretary of State a decision that special education was required or when the revocation of such a decision was refused. The Secretary of State's decision was, in effect, binding. Parents' rights were therefore present but rather limited, and in that respect Scotland did not at this stage follow the Warnock model to any degree.<sup>76</sup> Children and young people had no specific participation rights.

3.4. The Education (Scotland) Act 1981 introduced some Warnock-influenced changes. It incorporated the concept of 'special educational needs' into the legislation.<sup>77</sup> Education authorities' duty to make school provision was extended to include 'provision for special educational needs', namely provision 'additional to, or otherwise different from' that made for children/young people in general in their area. The definition of 'special educational needs' was almost an exact copy of the one adopted in England, based on having a learning difficulty or disability that prevented or hindered access to mainstream education facilities.

3.5. The 1981 Act also replaced the special education framework in the 1980 Act<sup>78</sup> with one that imposed wider responsibilities on Scottish education authorities – including, most significantly, duties concerned with assessment and records of need for children or young persons with

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<sup>74</sup> Section 2(1).

<sup>75</sup> Education (Scotland) Act 1980, s.1(5)(c).

<sup>76</sup> Lange and Riddell (2000), 133.

<sup>77</sup> Amending s.1 of the 1980 Act.

<sup>78</sup> Education (Scotland) Act 1981, s.4, inserting new ss.60-65F into the 1980 Act.

‘pronounced, specific or complex special educational needs’. The parent was to be invited to submit his or her views in connection with the assessment. There were future needs assessments (FNAs) of all children with records of special educational needs, from the age of 14.

3.6. The Scottish legislation distinguished between children – those of compulsory school age – and young persons – those aged over compulsory school age but under 18.<sup>79</sup> The legislation now precluded the classification of a young person as having pronounced (etc) needs and recording the person<sup>80</sup> unless, inter alia, he or she had been invited to express his or her views (or, if judged not capable of expressing them, his/her parent had been invited to do so).<sup>81</sup> In coming to its decision the education authority was required to consider any such expressed views. However, research indicated that while most young people attended the meeting for their FNA and were invited to express views, they made ‘little contribution’ and were constrained by the way the meetings were structured and conducted around professional and bureaucratic agendas.<sup>82</sup> Young persons also had an independent right to be informed of the decision and the terms of the record along with information about the right of appeal. Under some very complicated provisions, young persons were given an independent right of appeal to a local appeal committee, with a further right of appeal to a sheriff over certain matters, including the decision whether to record and the school preferred (a ‘placing request’). In respect of children, these rights were held by parents.

### ***The Additional Support for Learning (Scotland) Acts 2004 and 2009***

3.7. Very significant changes were made to the legislative framework by the Additional Support for Learning (Scotland) Act (ASLA) 2004. There was also a new Code of Practice.<sup>83</sup> The 2004 legislation emerged from a consultation process undertaken by the Scottish Government<sup>84</sup> and has been described as ‘trade-off’ between the demands of two sets of interest groups<sup>85</sup> – the first comprised parents and voluntary organisations, who favoured a more legalistic and rights-orientated framework as one offering greater assurances of appropriate provision for individual children, and the second consisted of local authorities, who saw inherent inequities arising from legislation that gave better placed parents opportunities to secure advantages for their children and undermined local authorities’ capacity to allocate resources fairly.<sup>86</sup>

3.8. The 2004 Act introduced the concept of ‘additional support needs’ (ASN) in place of SEN. A child would have such needs where ‘for whatever reason, [he or she] is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person’.<sup>87</sup> ‘Additional support’ was defined in similar terms to SEN, but ASN was a broader concept than the one it replaced.<sup>88</sup> The record of needs was replaced by the ‘co-ordinated support plan’ (CSP) for the provision of additional support,<sup>89</sup> which would be required where: (a) a child or young person had ASN likely to continue for more than a year, (b) the ASN arose from one

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<sup>79</sup> Education (Scotland) Act 1980, s.135.

<sup>80</sup> Namely, children with ‘pronounced, specific or complex needs’ for whom the education authority was required to open and maintain a ‘record of needs’. See Education (Scotland) Act 1980 ss 60 and 61, as inserted by the Education (Scotland) Act 1981, s.4.

<sup>81</sup> Education (Scotland) Act 1980 s.61(7), as inserted by the Education (Scotland) Act 1981, s.4

<sup>82</sup> Tisdall (1996), at 29.

<sup>83</sup> Scottish Executive (2005).

<sup>84</sup> Scottish Executive (2001), (2002) and (2003).

<sup>85</sup> Riddell and Weedon (2010), at 118.

<sup>86</sup> Ibid, 116-117.

<sup>87</sup> ASLA 2004, s.1(1).

<sup>88</sup> ASLA 2004, s.1(3).

<sup>89</sup> ASLA 2004, s.2.

or more 'complex factors' or from 'multiple factors', and (c) the needs required additional support to be provided by education authorities or certain other agencies (another local authority, a health board or other prescribed body).<sup>90</sup> Local authorities were given duties to identify children and young people within their area with ASN and those with ASN and who also needed a CSP. Young people and the parents of children were given a right to request the authority to establish if the child or young person had ASN and if so may require a CSP. If the authority concluded that the child or young person had ASN or would require a CSP the authority had to provide them with appropriate information and advice about the additional support that may be available. Young people also acquired an independent right to request an assessment to determine if they had ASN or required a CSP and the authority was placed under a duty to comply with it unless considering it 'unreasonable'.<sup>91</sup>

3.9. The 2004 Act, which remains in force in an amended form, established a duty to take account of children and young people's views, unless the authority is satisfied there is a lack of capacity to express a view, in which case it would be their parent's view. The duty applies when determining if the child/young person has ASN, or requires a CSP, or (following a review) still requires a CSP, when preparing a plan or when determining what additional support provision to make for a child with ASN.<sup>92</sup> The 2004 Act also makes provision for 'supporters' and 'advocates' to, in the case of the former, present discussions with the authority, and in the case of the latter, conduct discussions or make representations on the young person's (or child's parent's) behalf.<sup>93</sup>

3.10. Young people also have independent rights under the dispute resolution framework provided for under the 2004 Act: to refer a disagreement concerning the authority's exercise of functions relating to ASN to mediation;<sup>94</sup> or to appeal to the Additional Support Needs Tribunal for Scotland (ASNTS) (now the First-tier Tribunal: see below) <sup>95</sup> over decisions on the making or continuation/termination of CSPs. The Act empowers the Scottish Ministers to extend the right of appeal and the tribunal's jurisdiction to other decisions, such as whether a child/young person had ASN or whether to assess the child/young person. Placing request decisions, however, would have to be dealt with by local appeal committees (as under the old system).<sup>96</sup>

3.11. The Act also empowered the Scottish Ministers to make provision, via regulations,<sup>97</sup> for a separate dispute resolution process,<sup>98</sup> known as independent adjudication; the local authority must refer a request for this process to the Secretary of State to nominate an adjudicator, to be appointed and remunerated by the authority. The adjudicator makes a recommendation to the authority but cannot compel the authority to act on it.

3.12. The rights of young people (and parents) under the 2004 Act were strengthened and extended as a result of amendments made by the Additional Support for Learning (Scotland) Act 2009, in part to address failings over a two year period identified in the review of the 2004 Act by Her Majesty's

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<sup>90</sup> ASLA 2004 s.2.

<sup>91</sup> ASLA 2004 s.7.

<sup>92</sup> ASLA 2004, s.12.

<sup>93</sup> ASLA 2004, s.14.

<sup>94</sup> ASLA 2004, s.15.

<sup>95</sup> ASLA 2004 ss.17-20.

<sup>96</sup> ASLA Schedule 2.

<sup>97</sup> See the Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005 (SSI 2005/501), as amended (see SSI 2010/144).

<sup>98</sup> ASLA 2004, s.16.

Inspectorate of Education, published in 2007, particularly with regard to information for, and engagement with, parents and young people.<sup>99</sup>

3.13. The 2009 Act's amendments to the 2004 Act include changes to the definition of 'additional support' so that it could include non-educational provision.<sup>100</sup> The other amendments of particular significance to the present research include:

- enabling a decision regarding a placement request concerning a special school to be referred to the tribunal and extending the power of the tribunal in such cases;
- disputes over out of area placing request decisions can be dealt with via mediation in the area where the provision would be made;
- enabling a child being educated in another local authority's area to use the local authority's dispute resolution procedure in that area;
- enabling a young person (or parent of a child) to request at any time an assessment or examination (including an educational, psychological or medical assessment or examination) – the request to be granted unless unreasonable;
- classing looked-after children as having ASN<sup>101</sup> and requiring the local authority to consider whether any such child requires a CSP;
- requiring the Scottish Ministers to ensure an advocacy service is available to parents and young people on request, free of charge, for tribunal appeals;<sup>102</sup>
- strengthening the independence of mediation provision;<sup>103</sup>
- strengthening the provision/publication of information about various matters, including dispute resolution;
- requiring account to be taken of the views of the child, to be sought by the local authority, about information to be provided by the local authority to an appropriate agency no later than six months before a child with ASN is due to cease receiving school education;<sup>104</sup> and
- enabling a reference to be made regarding a failure to make the provision for additional support required in a CSP, and extending the power of the tribunal in such cases.<sup>105</sup>

3.14. Clearly, improvements were made in 2009 although the changes did not address all of the fundamental concerns that had arisen, such as the restrictive interpretation of the requirement to make a CSP and the wide inconsistency between local authorities in applying parts of the legislation.<sup>106</sup> It was also unclear that sufficient assistance was available to support young people in exercising their independent rights, including to dispute resolution.

### ***The Children and Young People (Scotland) Act 2014***

3.15. In 2014 the Scottish Government launched its *Getting it Right for Every Child* ('GIRFEC') programme designed to improve the wellbeing and prospects for children. It places a focus on the right of children and young people to be listened to and be assured that their wishes have been taken into account in relation to a range of services including education and social care, drawing for its underpinning rationale on the UN Convention on the Rights of the Child (UN CRC) (in particular

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<sup>99</sup> HMIE (2007).

<sup>100</sup> ASLA 2009, s.6.

<sup>101</sup> ASLA 2004, s.1(1A) and (1B), inserted by ASLA 2009 s.8.

<sup>102</sup> ASLA 2004 s.14A, inserted by ASLA 2009 s.10.

<sup>103</sup> ASLA 2009 s.11, amending ASLA 2004 s.15.

<sup>104</sup> ASLA 2009, s.17, amending ASLA 2004 s.13.

<sup>105</sup> ASLA 2009 s.18, amending ss18 and 19 of the 2004 Act.

<sup>106</sup> Riddell and Weedon (2010).



Article 12: see section 4 below). The Children and Young People (Scotland) Act 2014 imposes a duty on the Scottish Ministers to keep under consideration and implement any steps to give better or further effect to the implementation of the UN CRC in Scotland.<sup>107</sup> In complying with this duty the Ministers must ‘take such account as they consider appropriate of any relevant views of children of which they are aware’<sup>108</sup> (a duty which has an unfortunately passive character to it). There is also a duty to promote public awareness and understanding of children’s rights.<sup>109</sup> Both the Ministers and other authorities are under a duty to report every three years on their progress in securing better or further effect of the Convention requirements.

3.16. The Children and Young People (Scotland) Act 2014 also provides, inter alia, for a ‘child’s plan’ setting out the additional support – ‘targeted intervention’<sup>110</sup> – that the child needs and identifying a lead co-ordinator for the support. There will be a ‘lead professional’ drawn from one of the services supporting the child, whose role will be to ensure the support is provided. Implementation of the provisions relating to the child’s plan in part 5 and the named person, in part 4, was originally scheduled for August 2016. Under the named person provisions, the child and his/her family would have a specific person to listen to them and advise and support them. That person is expected to be a designated member of school staff (or the health board for the area where the child lives, in the case of children not yet of school age). However, there was a postponement following the litigation which culminated in the ruling by the UK Supreme Court in *The Christian Institute and others v Lord Advocate* in July 2016 declaring that the information-sharing elements which were central to the role of the named person were unlawful.<sup>111</sup> Following consultation the Scottish Government published a new Children and Young People (Information Sharing) (Scotland) Bill which deals with the problems identified by the Supreme Court and also makes an adjustment in relation to information sharing in relation to the child’s plan. At the time of writing, the Bill is still at stage 1 of the legislative process.

### ***The Education (Scotland) Act 2016 and Tribunals (Scotland) Act 2014***

3.17. The Education (Scotland) Act 2016 has advanced children and young people’s rights further through changes it has made to the 2004 Act. Broadly speaking, children aged 12 or over with ASN who are judged to have ‘sufficient maturity and understanding’ will have the same rights as those currently held by parents and young people, with the exception of requesting mediation and making a placement request (and appealing the placement decision).<sup>112</sup> The Act in effect places a positive obligation on the child to notify the education authority of their wish to exercise their right.<sup>113</sup> Such requests would need to be made in writing,<sup>114</sup> but the guidance indicates that email or other electronic communication, or audio or video recording, would suffice.<sup>115</sup> Before the child may exercise his or her right the education authority must assess and confirm the child’s capacity to do so and must be satisfied that it would not ‘adversely affect the wellbeing of the child’ to exercise

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<sup>107</sup> Children and Young People (Scotland) Act 2014, s.1.

<sup>108</sup> Ibid, subs (2).

<sup>109</sup> Ibid, sus.(3).

<sup>110</sup> Children and Young People (Scotland) Act 2014, s.34.

<sup>111</sup> [2016] UKSC 51. This case arose out of concern about the role of the ‘named person’ and the provision for information sharing under Part 4 of the 2014 Act.

<sup>112</sup> See the helpful list in Scottish Government (2017c) para 10.

<sup>113</sup> 2004 Act s.3A(2), as inserted by the Education (Scotland) Act 2016, Schedule.

<sup>114</sup> 2004 Act, s.28.

<sup>115</sup> Scottish Government (2017c) para 11.

the right in question.<sup>116</sup> These matters are covered by detailed guidance for education authorities and schools published by the Scottish Government.<sup>117</sup> The guidance identifies the factors that the Government wants local authorities to consider in determining whether a child aged 12-15 has ‘sufficient maturity and understanding’ and thus capacity, whether wellbeing would be adversely affected, and on ensuring children are able to participate actively. It reflects and outlines a broad policy ambition that:

Scotland is the best place to grow up and bring up children. This ambition requires a positive culture towards children. One where children are welcomed and nurtured. One where we all are alert to their needs and look out for them. Where children are listened to, where their views are heard and their rights protected. They should be respected as people in their own right, with rights to a life that allows them to fulfil their potential.<sup>118</sup>

3.18. The age threshold of 12 for the holding of these independent statutory rights is intended to align with Age of Legal Capacity (Scotland) Act 1991. (In Scotland, children aged at least 12 may consent to medical treatment or to being adopted and can independently instruct legal counsel.) If the child does not want to exercise their right independently, their parents will have a right to exercise it. A child aged 12 or over, with capacity, will also be able to make a reference to the tribunal, provided the tribunal is satisfied that the child’s welfare would not be adversely affected (see below). Disputes over questions of capacity and wellbeing have been brought within the tribunal’s jurisdiction.<sup>119</sup>

3.19. Recognising that children aged 12-15 would need support to be able to exercise their rights under the legislation as a whole, provision has been made for a support service to be available free of charge for them or for their parent if exercising rights on their behalf.<sup>120</sup> This is additional to the information and advice provided by Enquire, the Government-funded advice service for additional support for learning.<sup>121</sup> The new service is to cover advice, attendance at meetings with the education authority, and conducting discussions with or making representations to the authority. There is also provision for advocacy.<sup>122</sup> The Policy Memorandum on the Bill explains that there will be ‘legal advice and representation services to support and represent the child in any aspect concerning education law’.<sup>123</sup> A new Children’s Support Service is being established by the Scottish Government for these purposes.<sup>124</sup>

3.20. Turning to dispute resolution, ‘independent adjudication’ is affected by amendments made to the Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005<sup>125</sup> via amendment regulations which came into force on 10 January 2018.<sup>126</sup> The regulations now provide that where a child aged 12 or over applies for this process (as distinct from appeal to the tribunal) the education authority must assess the capacity of the child ‘as respects views or decisions relating to the purpose of resolving disputes’ and notify him/her and his/her parent as soon as possible after

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<sup>116</sup> 2004 Act s.3A(3), as inserted by the Education (Scotland) Act 2016, Schedule

<sup>117</sup> Scottish Government (2017c). A consultation draft was issued earlier: Scottish Government (2017d).

<sup>118</sup> Ibid, para 7.

<sup>119</sup> Via amendment of s.18(3) of the 2004 Act.

<sup>120</sup> New s.31A inserted into the 2004 Act.

<sup>121</sup> <http://enquire.org.uk/>

<sup>122</sup> This is linked back to s.14A of the 2004 Act and therefore relates to appeals. See para 3.20 below.

<sup>123</sup> Scottish Government (2015), para 54.

<sup>124</sup> Scottish Government (2017c) para 17.

<sup>125</sup> SI 2005/501 (as previously amended by SSI 2010/144).

<sup>126</sup> Additional Support for Learning Dispute Resolution (Scotland) Amendment Regulations 2017 (SSI 2017/356).

completion of the assessment. If the application itself is defective or is considered 'unreasonable' the authority must notify the applicant child of this conclusion within 10 working days of the determination regarding capacity. The same time limit applies for notifying the child that the application has been accepted.

3.21. So far as appeals (or 'references'<sup>127</sup>) are concerned, in 2016 the ASNTS President issued important guidance to tribunals on 'Independent Advocacy'.<sup>128</sup> It stresses that:

An independent advocate will support the child or young person to express their views, opinions and feelings. Independent advocates may write statements which set out the views of the child or young person....[The tribunal] may instruct a report from an independent advocate, setting out the child or young person's views in relation to the matters which are the subject of the reference or claim.

Independent advocates may also speak for the child or young person at the tribunal hearing. This guidance is still in force even though, following the reform of the tribunals structure in Scotland under the Tribunals (Scotland) Act 2014, the jurisdiction of the ASNTS was transferred into the First-tier Tribunal for Scotland Health and Education Chamber on 12 January 2018.

3.22. Under new procedure regulations, made under the Tribunals (Scotland) Act 2014, the child or young person who is a party to the reference is entitled to attend the hearing unless 'in respect of the whole or any part of the proceedings the welfare, wellbeing, or interests of that child would be prejudiced by being present'.<sup>129</sup> He or she may be accompanied by a 'supporter'.<sup>130</sup> It is also provided that 'a parent of a child or young person who is not a party' may attend.<sup>131</sup> The rules set out similar powers to those applicable to the First-tier Tribunal in England to exclude anyone whose conduct might disrupt the proceedings or whose presence might make it difficult for any person to present evidence or make representations. The child (aged 12 or over) or young person, as the person making the reference, would have a right to make representations and give evidence. For this to happen in the case of children under 12, the rules require the tribunal to be satisfied that 'the evidence of the child is necessary to enable a fair and just hearing of the reference' and that the child's welfare, wellbeing and interests would not be prejudiced by doing so.<sup>132</sup> If the under-12 child is permitted to give evidence, the tribunal or a legal member of it may, for the purposes of the hearing, appoint a person with appropriate skills or experience in facilitating the evidence of children. That person would be paid by the tribunal for their services. Where it is the parent who is making the reference (which would be either because the child is aged under 12 or the child or young person lacks capacity), the tribunal will nevertheless have a duty to seek the views of the child.<sup>133</sup>

3.23. There is similar provision to the above in respect of children and young people's participation in hearings of disability discrimination claims before the tribunal;<sup>134</sup> however, as the child (of any

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<sup>127</sup> They are made under s.18 of the 2004 Act.

<sup>128</sup> Guidance to Tribunal Members No.1/2016.

<sup>129</sup> Rule 38(7)(a).

<sup>130</sup> As defined in rule 5.

<sup>131</sup> Ibid reg.38(7)(b).

<sup>132</sup> Ibid re.43.

<sup>133</sup> Ibid reg.44.

<sup>134</sup> In particular, ibid regs 84, 89 and 90.

age) may, if having capacity to do so, make the claim,<sup>135</sup> the procedure rules also accord the child who is a claimant a specific right to give evidence.<sup>136</sup>

3.24. The Scottish Government's Policy Memorandum drew attention to the former anomaly by which a child aged 12 could bring a complaint of disability discrimination under the Equality Act 2010 but could not pursue a reference to the ASNT and now the First-tier Tribunal.<sup>137</sup> So the 2016 Act has corrected that situation and in doing so conforms with a recommendation of the UN Committee on the Rights of the Child in 2008.<sup>138</sup> The rationale for not, however, extending to children a right to make a placing request was that they might select a school outside the area or even abroad and that could be disruptive to family life. It was also considered that it would potentially conflict with the parent's duty to ensure their child's education.<sup>139</sup> Not extending a right to opt for mediation was intended to avoid the child facing too much pressure and responsibility; but the child's view will have to be taken into account in the mediation.<sup>140</sup>

3.25. Heralding the reforms under the 2016 Act as representing 'a significant development in the landscape of children's rights', the Policy Memorandum asserts that they go much further than developments in England and Wales – 'giving children with capacity the opportunity to directly influence and ask for support to be put in place for them'.<sup>141</sup>

### **'Mainstreaming'**

3.26. The realisation of children and young people's participation rights is being reinforced in relation to decisions about school placement by the Scottish Government's inclusion and mainstreaming initiative launched via a consultation in November 2017. The *Consultation on Excellence and Equity for All: Guidance on the Presumption of Mainstreaming*<sup>142</sup> identifies 'four key features of inclusion' which 'support the creation of an inclusive learning environment for all children and young people that enables them to reach their full potential'.<sup>143</sup> These features are: 'present' (involvement in suitable education, engagement in school life), 'participating' (having their voices heard in relation to placement and generally), 'achieving' (reaching their full potential and accessing a suitable curriculum) and 'supported' (receiving support to overcome barriers, realise potential and ensure well-being). Of these, 'participating' is the most relevant to rights underpinning autonomy, although as expressed in the consultation it is limited to hearing the voice of the child or young person in relation to matters such as placement decisions, but not to the need to respect and give due weight to the views expressed. The importance of listening to children and young people is briefly mentioned in relation to learning plans<sup>144</sup> and there is also a more general reference to a need for a 'strong focus on children's participation' in delivering inclusion, stating that 'it is essential that they are active participants in the decisions which are being made about their education'.<sup>145</sup>

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<sup>135</sup> Equality Act 2010 Schedule 17 para 8.

<sup>136</sup> Rule 89(1).

<sup>137</sup> Scottish Government (2015), paras 46-48.

<sup>138</sup> Committee on the Rights of the Child (2008), para 67.

<sup>139</sup> Scottish Government (2015), para.66 (referring to the Education (Scotland) Act 1980, s.30).

<sup>140</sup> Ibid para 51.

<sup>141</sup> Ibid para 56.

<sup>142</sup> Scottish Government (2017a).

<sup>143</sup> Ibid para 9.

<sup>144</sup> Ibid para 63.

<sup>145</sup> Ibid para 38.

## ***The Supporting Children’s Learning Code of Practice and Regulations***

3.27. The Scottish Government consulted on a new Supporting Children’s Learning Code of Practice and related regulations between June and September 2017, publishing an analysis of the responses in November 2017.<sup>146</sup> Most of the consultation questions were more about the quality, including clarity, of the information and guidance than the underlying policy. The updating of the code of practice is designed to take account of the extension of children and young people’s rights, including the determination of capacity and potential impact on well-being in the case of rights to be exercised by children aged 12 or over. The individual responses to the consultation were published separately.<sup>147</sup> The Scottish Government’s analysis of the responses indicates a broadly positive view of how the code deals with the new policy and rights framework.<sup>148</sup>

3.28. In the new code,<sup>149</sup> to which education authorities and appropriate agencies must have regard when exercising their functions under the additional support legislation,<sup>150</sup> chapter 7 deals with children and young people and their parents’ involvement in their education and learning. Some interesting amendments are incorporated, including: (i) sensibly moving the Children and Young People’s Commissioner for Scotland’s resource, *The 7 Golden Rules for Participation*,<sup>151</sup> which reflect UN General Comment No.12 on ‘The right of the child to be heard’,<sup>152</sup> into the section of the chapter covering on the views of children and young people; and (ii) including a reference to the non-statutory guidance *Extending Children’s Rights*.<sup>153</sup> The code not only refers to children’s right to be heard and listened to, and for their opinions to be ‘taken seriously’, but also calls for positive action to encourage children’s participation in decisions affecting them.<sup>154</sup> It also makes it clear that there is a presumption that children with ASN should be given an opportunity to discuss their needs and the support that is required. It addresses the question of parental consultation and covers the role of supporters. A strong emphasis is placed throughout on communication, its importance, and the steps needed to facilitate it.

## ***Conclusion on the legal and policy developments in Scotland***

3.29. There is no doubt that following the latest reforms there is in place an ambitious legal and policy framework aiming to ensure that children and young people’s right to participate and have influence in a range of ASN decision making areas and dispute resolution processes is maximised both in principle and in practice. Scotland has gone further than England in extending independent rights to children, by recognising children as independent rights holders – subject to various safeguards – at age 12. As in England, however, there are questions to be asked about whether the critically important arrangements needed and resources to be allocated for supporting the children and young people in question in exercising these rights will be at an adequate level.

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<sup>146</sup> Scottish Government (2017b)

<sup>147</sup> At [https://consult.gov.scot/supporting-learners/code-of-practice/consultation/published\\_select\\_respondent](https://consult.gov.scot/supporting-learners/code-of-practice/consultation/published_select_respondent)

<sup>148</sup> Scottish Government (2017b).

<sup>149</sup> Scottish Government (2017f).

<sup>150</sup> 2004 Act, s.27(8).

<sup>151</sup> They are set out, in separate versions aimed at both children and young people, at <https://www.cypcs.org.uk/education/golden-rules>

<sup>152</sup> Committee on the Rights of the Child (2009).

<sup>153</sup> Scottish Government (2017c).

<sup>154</sup> Scottish Government (2017f), ch.7 para 2.

## 4. The rights of children and young people with ASN/SEN under international legal and policy frameworks

4.1. Children and young people's independent right to education is widely recognised under a range of international legal instruments to which the UK is a party, including the European Convention on Human Rights<sup>155</sup> and the UN Convention on the Rights of the Child.<sup>156</sup> It is not intended in this section of the review to replicate previous discussion of the right to education,<sup>157</sup> save to note the absence of firm standards or requirements as to the particular form of provision to be made for those with SEN/ASN but at the same time acknowledge the emphasis placed on equality for all in the enjoyment of this right. In view of the focus of our research, the intention is to examine the key issue of children and young people's right to participate in decisions affecting their education and for their views to be given appropriate weight by decision makers. For this reason particular attention is given to Article 12 of the UN CRC and to the monitoring of its implementation by the Committee of the Rights of the Child. It is also important to consider the special protections afforded to children with SEN and disabilities (SEND) under the UN Convention on the Rights of Persons with Disabilities, in a context in which equality principles have a particular relevance.

### ***Article 12 UN Convention on the Rights of the Child (CRC)***

4.2. The expressed policy intention underpinning the framework of rights for children and young people set out in legislation in England and Scotland, and reflected in the codes on SEN in England and ASN in Scotland (and also Wales<sup>158</sup>), is in part to ensure consistency with the key principles in Art.12 of the UN CRC.<sup>159</sup> Article 12 provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In its periodic report to the Committee on the Rights of the Child in 2014 the UK confirmed that it 'fully endorses and promotes the principle that children and young people should have opportunities to express their opinion in matters that affect their lives'.<sup>160</sup>

4.3. Article 12 is of particular importance in relation to education. The General Comment on Article 12 explains: 'Respect for right of the child to be heard within education is fundamental to the realization of the right to education'.<sup>161</sup> As Lundy argues, when, in education, Article 12 is properly implemented, 'other rights fall into place naturally'.<sup>162</sup>

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<sup>155</sup> Article 2 of the First Protocol.

<sup>156</sup> Articles 28 and 29.

<sup>157</sup> See further Harris (2013), at 884-895.

<sup>158</sup> See Welsh Assembly Government (2008); and Drummond (2016).

<sup>159</sup> See, for example, the references to it in the SEN Code (Department for Education (2015), para 1.16) and Scottish Government's draft code (Annex A).

<sup>160</sup> Committee on the Rights of the Child (2015), para.53.

<sup>161</sup> Committee on the Rights of the Child (2009), para.105.

<sup>162</sup> Lundy (2007), 940.

4.4. The reference to 'age and maturity' in Art.12.2 as factors affecting the weight to be given to the child's view reflects the idea of children's 'evolving capacities' that the UN CRC adopts.<sup>163</sup> Yet it seems inappropriate where children with SEND are concerned, at least without reference to other factors, since their capacity to form and communicate a viewpoint would not be dependent on age and maturity alone. It also seems inconsistent with Art.12.1, which makes reference to the child's capability to form his or her own views. The General Comment on Article 12 advises that 'maturity' here refers, in the Article 12 context, to the 'capacity of a child to express her or his views on issues in a reasonable and independent manner'.<sup>164</sup> But if that is correct, it could be better expressed in the wording of the Article itself. The General Comment also states that a child should be assumed to be capable of forming his or her own view but that the state would nevertheless have an obligation 'to assess the capacity of the child to form an autonomous opinion to the greatest extent possible'.<sup>165</sup> The General Comment also addresses specifically, albeit very briefly, the issue of children with disabilities, indicating States Parties' obligation to ensure that such children are 'equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views'.<sup>166</sup> There are psychological risks to children when being asked their views and the General Comment implicitly recognises this by stressing that although the child has a right to be heard they should not be 'interviewed more often than necessary'.<sup>167</sup>

4.5. One of the other key points covered by the General Comment on Article 12 is the importance of providing feedback to children; this means that they should be told the outcome of the relevant decision making process and informed how their views were considered.<sup>168</sup> This important issue is only partly addressed in the English and Scottish legislation. In the case of young people in England and children aged 12 or over with capacity in Scotland, there is a duty to inform them of the relevant decision and the reasons for it, which ought to address the particular views expressed. In the case of children, however, there is no specific provision for direct feedback. Local authorities in England must, however, from time to time publish (anonymised) comments by children and young people with SEND about its 'local offer' and 'the authority's response to those comments'.<sup>169</sup>

4.6. The UN Committee on the Rights of the Child highlighted, in its 2008 monitoring report, the 'little progress' made by the UK 'in enshrining article 12 in education law and policy' and was particularly 'concerned that insufficient action has been taken to ensure that the rights enshrined in article 12 are applied to children with disabilities'.<sup>170</sup> In its report in 2016 it reiterated the latter concern: 'Many children with disabilities do not see that their views are given due weight in making personal decisions in their life, including choice of support and future'.<sup>171</sup> The Committee has also been critical of a failure to ensure participation in a range of processes for redress in this field.<sup>172</sup> As noted above,<sup>173</sup> the introduction of a right to make a tribunal reference for children aged 12 or over in Scotland was stated to be in response to the Committee's report's recommendation to the UK to

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<sup>163</sup> See Lansdown (2012).

<sup>164</sup> Committee on the Rights of the Child (2009), para.30.

<sup>165</sup> Ibid, para.20

<sup>166</sup> Ibid para.21.

<sup>167</sup> Ibid para.24.

<sup>168</sup> Ibid para.45.

<sup>169</sup> Children and Families Act 2014, s.30(6) and (7).

<sup>170</sup> Committee on the Rights of the Child (2008), paras 32 and 67.

<sup>171</sup> Committee on the Rights of the Child (2016), para 56.

<sup>172</sup> Committee on the Rights of the Child (2008), para 67.

<sup>173</sup> At para 3.21.

Ensure that children who are able to express their views have the right to appeal against their exclusion as well as the right, in particular for those in alternative care, to appeal to special educational need tribunals.<sup>174</sup>

The position of children in care, or ‘looked after’ children, has long raised justice concerns arising from the fact that the local authority is in law their parent but also responsible for ensuring their SEN are met and, in any appeal or reference case, is the respondent. The child’s birth parents may legally retain their parental responsibility but, while the child is in care, be unable to utilise it by bringing an appeal.

4.7. Lundy has explained that in the education context there is a need for an effective application of the principles in Article 12 – that children’s views are taken seriously and that hearing them is not a tokenistic process – at three separate junctures: (i) when decisions affecting individual children are made; (ii) when school level policies are developed; and (iii) in the making of government policy and legislation.<sup>175</sup> One can assume that local authority policy making should also sit within this framework. We have seen how the new matrix of children and young people’s rights in England under the Children and Families Act 2014 extends beyond participation in decisions about their own education but has a collective element too, related to local policy, through the requirement that children and young people with SEN are consulted by local authorities when they are reviewing the educational, training and social care provision in their area and when they prepare and review the ‘Local Offer’. This contrasts with the holistic approach, explicitly related to the UN CRC, taken in Wales. The Additional Learning Needs and Education Tribunal (Wales) Bill, recently agreed by the Welsh Assembly,<sup>176</sup> will require local authorities and NHS bodies to have due regard to the Convention (and be guided by the additional learning needs code made under the Bill<sup>177</sup> in doing so) when exercising their additional learning needs functions,<sup>178</sup> although the Bill seeks eschew a mechanistic or tokenistic approach to this obligation by stating that it ‘does not require specific consideration of the Convention on each occasion that a function is exercised’.<sup>179</sup>

4.8. *National* policy making in England and Scotland is not yet governed by a consultation duty in relation to children and young people, although as noted above, the Children and Young People (Scotland) Act 2014 requires the Scottish Ministers to take account of children’s views when undertaking the state’s duty to take steps to give better or further effect to the implementation of the UN CRC in its jurisdiction.<sup>180</sup> In its fifth monitoring report on the UK in 2016 the UN Committee on the Rights of the Child expressed concern that the views of children were ‘not systematically heard in policymaking on issues that affect them’ and called on the UK to establish ‘structures for the active and meaningful participation of children’ and to give ‘due weight to their views in designing laws, policies, programmes and services at the local and national level’.<sup>181</sup> Some progress has, however, been made in Wales, where the Rights of Children and Young Persons (Wales) Measure 2011 provides expressly for ‘due regard’ to be given to the UN CRC (and the Optional Protocols) when formulating, making or altering a policy. It also requires the Welsh Government to make a ‘children’s scheme’ setting out the arrangements made or proposed to secure compliance

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<sup>174</sup> Committee on the Rights of the Child (2008), para.67.

<sup>175</sup> Lundy (2007).

<sup>176</sup> On 12 December 2017.

<sup>177</sup> Additional Learning Needs and Education Tribunal (Wales) Bill, as agreed by the Welsh Assembly, clauses 4 and 7(4).

<sup>178</sup> Ibid, clause 7(1).

<sup>179</sup> Ibid, clause 7(3).

<sup>180</sup> See para 3.15 above.

<sup>181</sup> Committee on the Rights of the Child (2016), paras 30 and 31.



with this duty.<sup>182</sup> The children's scheme has been published under the title 'Children's Rights Scheme'. While the Welsh legislation, as currently in force, does not impose any strict duties on the state as regards compliance with the UN CRC, it has at least established a statutory obligation that is potentially enforceable in the courts as well as placing children and young people's rights more firmly within the policy making framework.<sup>183</sup>

4.9. There has been considerable academic analysis by Lundy and others of how the rights embodied in Article 12 can be fully realised – part of a broader discourse around ensuring the realisation of children and young people's effective participation as a facet of upholding their autonomic interests. This has included the development of various models of participation,<sup>184</sup> which have considerable value as tools for developing and evaluating policy and practice on children's participation. However, the precise policy influence in England and Scotland of the academic analysis is difficult to gauge because there is little explicit acknowledgement of this literature in official policy or explanatory material linked to the legislation.

### **Articles 7 and 24 UN Convention on the Rights of Persons with Disabilities (CRPD)**

4.10. Both the Scottish and English policy frameworks on SEN make reference to the UN CRPD.<sup>185</sup> There is, however, no legislative equivalent to the new statutory obligation in Wales, which in addition to the duty on local authorities and NHS bodies to give 'due regard' to the UN CRC, noted above, also requires them to do likewise in relation to the CRPD.<sup>186</sup>

4.11. Article 7.3 of the CRPD makes similar provision to Article 12 of the UN CRC but with a subtle difference. It states:

States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

As with Article 12 of the UN CRC it identifies age and maturity as factors determinative of the weight to be given to the views of the child – although, significantly, the weight to be attached is not linked to the degree of disability. Where Article 7.3 CRPD goes further than Article 12 CRC is in the explicit requirement that children with disabilities should receive assistance which is appropriate to their disability and age to enable them to realise the right. This places a specific obligation on the state to provide resources for this purpose.

4.12. The Article 7.3 obligation is in furtherance of the CRPD's general principles of 'full and effective participation in society', 'respect for the evolving capacities of children with disabilities' and 'respect for the right of children with disabilities to preserve their identities'.<sup>187</sup> There are, however, risks in

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<sup>182</sup> Rights of Children and Young Persons (Wales) Measure 2011 (nawm 2), articles 1 and 2. Children and young persons are among those to be consulted in making the scheme: *ibid* article 3.

<sup>183</sup> The Welsh Government has reported on compliance with the Measure and the methodology for embedding children's rights: Welsh Government (2015).

<sup>184</sup> For a useful discussion of the different models by Lundy (*op cit*), Arnstein, Hart, Shier and others, see Parkes (2012), ch.1.

<sup>185</sup> See in particular the draft Supporting Children's Learning draft code (Scottish Government 2017d, at p.145) and the SEN Code in England: Department for Education (2015), para.1.26.

<sup>186</sup> Additional Learning Needs and Education Tribunal (Wales) Bill, as agreed by the Welsh Assembly, clause 8.

<sup>187</sup> UN CRPD Article 3.

relation to Article 7 of a tokenistic adherence to participatory obligations for disabled children – of States Parties giving ‘a voice only to those children who can be accommodated easily’, with the effect of widening ‘the exclusionary gap for those children who have impairments that are (often wrongly) deemed to be too difficult or expensive to accommodate, particularly those who have profound intellectual impairments’.<sup>188</sup> Callus and Farugia argue that even children with complex needs may be able to participate in decisions to some degree: they say that participation in decision-making may be regarded as a ‘continuum’ and that the CRPD means that it ‘should be assumed that the disabled child has capacity’.<sup>189</sup>

4.13. Article 7 CRPD also provides for full enjoyment of human rights and fundamental freedoms by children with disabilities on an equal basis with other children and makes the best interests of disabled children a ‘primary consideration’ in all actions concerning them.<sup>190</sup> There has been some criticism of the UK by the UN Committee on the Rights of Persons with Disabilities in not incorporating a ‘human rights model of disability in public policies and legislation concerning children and young people with disabilities’.<sup>191</sup> The human rights model is essentially a variation of the social model of disability, in that it also focuses on the social environment and social attitudes that impact on the individual, but at the same time it reflects certain fundamental principles and values that accord with the notion of the individual as, inherently, a holder of human rights.<sup>192</sup>

4.14. The CRPD also has educational relevance to children and young people with disabilities as a result of its obligations on states under Article 24 to ensure ‘an inclusive education system at all levels’ which is directed to, inter alia, ‘enabling persons with disabilities to participate in a free society’<sup>193</sup> and to ensuring that such children and young people have access to primary and secondary education ‘on an equal basis with others in the communities in which they live’.<sup>194</sup> However, the UK entered a reservation to the effect that children with disabilities could be educated outside their local community if ‘more appropriate education provision is available elsewhere’. Article 24 also deals in very specific terms with the measures to be taken by the state to ensure that those with disabilities are able to participate effectively in education, including being able to go on to tertiary education. General Comment No.4 on the right to inclusive education, in identifying the ‘core features of inclusive education’, refers to ensuring that students ‘feel valued, respected, included and listened to.’<sup>195</sup> It also places considerable emphasis on the importance of ensuring that children with disabilities receive all appropriate assistance and support with communication.

4.15. Having regard to both Articles 7 and 24, one would thus expect that processes concerned with both learning and education decision-making afford children and young people with disabilities appropriate opportunities to express their views and wishes and that these opportunities are equal to those of other children. Also, in recognising the relationship between different parts of the Convention, and referring to the connections between Arts 7 and 24, the General Comment notes the relevance of the ‘best interests’ principle. It says that determination of that issue in the case of a child with a disability must, inter alia, ‘consider the child’s views’.<sup>196</sup> The Comment also explains

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<sup>188</sup> Broderick (2017), at 211.

<sup>189</sup> Callus and Farugia (2016), 11.

<sup>190</sup> Article 7.1. and 7.2.

<sup>191</sup> UN Committee on the Rights of Persons with Disabilities (2017), paras 20 and 21.

<sup>192</sup> Degener (2017).

<sup>193</sup> Article 24.1(c).

<sup>194</sup> Article 24.2(b).

<sup>195</sup> UN Committee on the Rights of Persons with Disabilities (2016), para 12(e).

<sup>196</sup> *Ibid*, para 47.

that the right of children with disabilities under Article 7.3 to participate extends, in the context of education, to participation 'in their own learning and individualized education plans, within the classroom pedagogy, through school councils, in the development of school policies and systems, and in the development of the wider educational policy.'<sup>197</sup>

4.16. It is also important to note that States Parties are required to ensure that the obligations in the Convention are acted upon and reflected in 'appropriate legal, administrative and other measures'.<sup>198</sup> In explaining how the Convention's obligations are to be implemented at national level, the General Comment sets an expectation that there will be:

Legislation to guarantee to all persons with disabilities, including children with disabilities, the right to be heard and to have their opinion be given due consideration within the education system, including through school councils, governing bodies, local and national governments, and mechanisms through which to challenge and appeal decisions concerning education.<sup>199</sup>

As we have seen, this expectation has only partly been met in England and Scotland although recent legislation has brought the position in these jurisdictions closer to the ideal. Even so, legislation is only part of the story where disabled children and young people's participation in the relevant processes and opportunities to influence decision-making outcomes are concerned.

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<sup>197</sup> Ibid.

<sup>198</sup> Article 4.1. Note, however, that social, economic and cultural rights only have to be implemented via measures 'to the maximum of... available resources': Article 4.2. The UN CRC contains a similar caveat.

<sup>199</sup> UN Committee on the Rights of Persons with Disabilities (2016), para 63(I).

## 5. Conclusion

5.1. The legal and policy frameworks governing special education in England and Scotland have evolved considerably since the 1980s and especially since the turn of the century. The reforms reveal evidence of a determined policy push towards the incorporation of rights for children and young people within the increasingly detailed bureaucratic legal frameworks in these two jurisdictions, although neither have extended independent rights to *all* children, regardless of age, as the Welsh Government has done (albeit subject to a test of the child's capacity to understand).<sup>200</sup>

5.2. The factors behind this policy momentum in England and Scotland towards recognition of children and especially young people as independent actors within this area of education decision-making, including within the processes for redress of grievance, are not clearly delineated. They seem to be in part scientifically based, reflecting professional understanding of the clear social and developmental benefits to children and young people from being active participants in education decision making processes. There is also a degree of ideological support among education and child professionals for children's rights and their advancement within policy frameworks and practice, notwithstanding any concern that professional power and autonomy may be weakened by this trend – and regardless of the general lack of training in or knowledge of children's rights themselves.<sup>201</sup> (In Wales, children and young people's increased participation underpinned by new legislation is also considered to be consistent an existing ideal of a 'person-centred approach' to identifying and meeting needs.<sup>202</sup>) The lexicography of 'rights' may also be influential, since education, especially special education, is a field where 'terminology has and continues to have an impact on educators... and society at large'.<sup>203</sup> At a level of governance and policy making, the international legal frameworks of rights have probably also been influential, although it is also likely that the relevant obligations they set out also form the major justification for what are essentially pragmatic changes within this sometimes more controversial policy field. It is tempting to view the policy trend as also as an extension of the choice/consumerism paradigm (and the provider accountability linked to it) that has had such an influence on the extension of parental rights in this field over the past three or so decades.<sup>204</sup>

5.3. Regardless of the underlying factors to this extension of children and young people's rights in this field, what has yet to be properly determined, and would be the true indicator of a paradigm shift, is whether the ideal of maximised participation by children and young people with SEND or ASN that is reflected in the relevant English and Scottish legislation has also been realised in practice – that the involvement of children and young people with SEND has become an 'embedded practice' in the provision of education services.<sup>205</sup>

5.4. It is well known, as highlighted by the Lamb Inquiry and numerous studies, that parents find the SEN and ASN systems difficult to navigate and that many find that the barriers to participation, often related in part to their own social needs and mental capacity, are insurmountable. Even greater barriers may hinder the effective participation by children and young people with SEN/ASN, who

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<sup>200</sup> See the Additional Learning Needs and Education Tribunal (Wales) Bill, as agreed by the Welsh Assembly on 12 December 2017, clause 84.

<sup>201</sup> See Jerome et al (2015).

<sup>202</sup> Welsh Government (2016), para.3.99.

<sup>203</sup> Saleh (2001), at 120.

<sup>204</sup> See Davie (1996), at 10; and Harris (2005).

<sup>205</sup> Callus and Farugia (2016), p.12.

may thus in practice be 'twice removed from the decision-making process'.<sup>206</sup> Nevertheless, if the developing law and policy in England is Scotland is indeed matched by, and helping to precipitate, a cultural shift among professionals in terms of how children and young people's autonomy is recognised, then the prospects for real progress in practice will have been greatly increased. Riddell and Brown, among others, have noted the potential dissonance between, on the one hand, legislation and stated policy on special education, and on the other, and the smooth and uncontested implementation of the changes such measures seek to direct.<sup>207</sup> Our research is seeking to gather evidence on whether or to what extent this is exemplified by the reforms to children and young people's rights in this field.

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<sup>206</sup> *Ibid*, 59.

<sup>207</sup> Riddell and Brown (1994), 6.

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