



James Dornan
Convener
Education & Skills Committee
Scottish Parliament
EDINBURGH
EH99 1SP

11 December 2017

Dear Convener

Scrutiny of Draft Budget 2018-2019

We welcome the opportunity to comment on the key budgetary priorities for education highlighted by the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP.

Article 4 of the UN Convention on the Rights of the Child (UNCRC)¹ and targets 10.2 and 10.4 of the Sustainable Development Goals require that the UK and devolved governments allocate the maximum extent of available resources to the implementation of children's rights. Further, the UN Committee on the Rights of the Child has produced General Comment 19² which explores the concept of 'maximum extent of available resources' in more detail, stating that governments *'are expected to demonstrate that they have made every effort to mobilize, allocate and spend budget resources to fulfil the economic, social and cultural rights of all children. The Committee underlines the fact that children's rights are interdependent and indivisible and that caution should be exercised in differentiating between economic, social and cultural rights on the one hand, and civil and political rights on the other'*.

The UN Committee on the Rights of the Child regularly reviews the progress by States Parties of implementation of the Convention. When Scotland was last examined, as part of the wider UK examination in 2016, several key education issues were identified in the Committee's Concluding Observations.

The Committee expressed particular concern that budgetary cuts were *'contributing to inequality in children's enjoyment of their rights'*³ and recommended that a child-rights based approach should be taken towards budget allocation, with a tracking system being put in place to ensure that resources allocated to children were used for that purpose.⁴ The

¹ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

²

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f19&Lang=en

³ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

⁴ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

Committee recognised that specific provision should be made for children in disadvantaged or vulnerable situations and that those budgetary lines should be protected in situations of economic recession.⁵

The Committee highlighted Article 4 (in relation to allocating the maximum extent of resources) and stated that the UK and devolved governments should have '*a special focus on eradicating child poverty and reducing inequalities*'.⁶

The Committee recommended that budgetary processes should be participatory and transparent, and be informed by the views of stakeholders, including children and young people.⁷ Participatory budgeting is an approach that has already been successfully adopted by some local authorities in Scotland, including the City of Edinburgh Council.⁸

The Committee highlighted the need to ensure that budgetary considerations took into account the differing needs of a wide range of children and young people. It recommended that Scotland '*regularly conduct child rights impact assessments of budget and economic decision-making processes and outcomes, including austerity measures, in areas that are directly or indirectly related to children's rights*'.⁹

We would be keen to establish which of these methods (if any) have been employed in the creation of the 2018-2019 draft budget.

Additional Support for Learning (ASL)

We welcome the Deputy First Minister and Cabinet Secretary for Education and Skills' statement that additional support for learning is a specific priority for the Scottish Government and that spending on additional support needs (ASN) increased by 16% between 2012 and 2016.

However, we would point out that the number of children identified as having additional support needs has more than doubled from 69,587 in 2010 to 170,329 in 2016. As such, whilst spending on additional support for learning appears to have increased, in reality per capita spending is likely to have significantly decreased.¹⁰ At the same time, the number of children with the most complex and severe needs has increased, as recognised by the Doran Review.¹¹ We note that this is an issue previously highlighted by you in your work.¹²

We are also concerned that the number of ASN teachers and support workers appears to be decreasing, whilst need continues to rise.

⁵ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

⁶ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

⁷ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

⁸ <https://pbscotland.scot/blog/2017/6/30/watch-participatory-budgeting-in-edinburgh-choose-youth-work>

⁹ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

¹⁰ <http://www.gov.scot/Topics/Statistics/Browse/Local-Government-Finance/PubScottishLGFStats>

¹¹ <http://www.gov.scot/Resource/0040/00408307.pdf>

¹² <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/103397.aspx>

Extension of ASL Rights

The Deputy First Minister and Cabinet Secretary's letter also highlights proposed spend in relation to provisions of the Education (Scotland) Act 2016 designed to allow children aged 12-15 years to exercise rights under Additional Support for Learning legislation independently. These rights include the right to ask a local authority to determine whether they have additional support needs or not, the right to request an assessment and the right to refer a matter to dispute resolution. Prior to the 2016 Act, children aged 12-15 years were reliant on adults (usually parents) to progress these issues on their behalf.

However, as the Act was progressing through the Scottish Parliament, we repeatedly raised concerns that a child's ability to exercise their rights was dependent on the child passing two new tests created by the 2016 Act, one of capacity and another of well-being. The latter was grounded in the belief that the current system had the potential to be harmful to children, and so allowed professionals to restrict a child's ability to exercise their rights, where adults felt to do so would be 'damaging' to them. We believe that in focusing on 'protecting' children from current systems, the Scottish Government missed an opportunity to look at how systems could be made more 'child-friendly' and accommodating of children and young people's needs.

More recently, we have raised concerns with the Scottish Government about how the capacity test will operate in practice. The Scottish Government has suggested that a child's capacity be assessed, at least partly, on the basis of their academic performance. This has the potential to lead to a circular situation where a child is struggling academically as a result of their support needs not being met, only to be told they cannot challenge that lack of support or request an assessment, as their academic performance is insufficient. This approach risks contravening a child's right to education¹³ and may constitute indirect discrimination against pupils with disabilities and should therefore be revisited.

Looked After Children

Looked after children and young people experience particular difficulties in ensuring their additional support needs are recognised and met.

The Education (Additional Support for Learning) (Scotland) Act 2009 created a presumption that every looked after child had additional support needs, unless they were assessed otherwise. However, there appears to be significant variation in how that presumption is currently being applied by local authorities across Scotland.

A Freedom of Information request made by the Education Law Unit of Govan Law Centre in 2015 found a range of approaches taken by local authorities towards the additional support needs of looked after children in their care.¹⁴ Ten local authorities regarded all their looked after children as having additional support needs, whilst 3 local authorities stated that more than half of their looked after children had no additional support needs. Looked after children

¹³ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

¹⁴ <https://www.celcis.org/files/4214/6177/4261/SHASS.pdf>

and young people were also much less likely to appeal to the Additional Support Needs Tribunal. This is perhaps unsurprising, given that a looked after child or young person would be reliant on a corporate parent to support them in doing so. This may be the same local authority the child or young person is trying to challenge.

In 2016, the UN Committee on the Rights of the Child expressed concern that looked after children were amongst those children most likely to experience '*substantial inequalities....in educational attainment*'.¹⁵

Given the Scottish Government's current focus on improving educational attainment, we would welcome a commitment from the Deputy First Minister and Cabinet Secretary for Education and Skills that he will prioritise a review of the application of the 2009 Act to ensure that the needs of looked after children and young people are met on an equitable basis across Scotland.

Pupil Equity Funding

We are concerned by the Scottish Government's over reliance on Scottish Index of Multiple Deprivation (SIMD) data when allocating funding designed to improve educational attainment, e.g. Scottish Attainment Challenge funding and Pupil Equity Funding. We believe that SIMD data does not accurately reflect the reality of living in poverty in rural or Island communities in Scotland. As such, children and young people living in those areas are less likely to receive the funding they require, despite their need being as great as those living in urban areas.

We would be interested to know what measures the Deputy First Minister and Cabinet Secretary for Education and Skills has put in place to ensure that the specific needs of pupils living in rural and remote areas are recognised and met.

Early Learning and Childcare

In 2016, the UN Committee on the Rights of the Child expressed concern that '*many children living in poverty, particularly boys, do not meet the expected level of language development at the preschool level, which has a negative impact on their primary education, hindering their development throughout their life*'.¹⁶

We are supportive of the Scottish Government's plans to continue their expansion of early learning and childcare. We would be keen to know, however, what additional resource will be made available for the provision of specialist services. For example, extending speech and language provision in early years may help prevent some of the difficulties identified by the UN Committee when a child transitions from nursery into primary school education.

¹⁵ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

¹⁶ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

School Inspections

The UN Committee on the Rights of the Child identified several issues relevant to school inspections, which we would be keen to see progressed.

In 2016, the Committee highlighted that some disabled children, in particular those with learning disabilities, were subject to 'informal exclusion' or 'taught off-site' in order to control their behaviour.¹⁷ As informal exclusions are effectively illegal exclusions they are not recorded, making it difficult to know the extent of this problem, but we continue to hear of instances of this happening.

The Committee identified that boys, Roma and Gypsy Traveller children, BME children, children living in poverty, disabled children and looked after children were most likely to be formally excluded from school.

Evidence received via our Advice and Investigations helpline shows that some children with emotional and behavioural difficulties may be receiving very limited education (e.g. a few hours per week) due to a lack of specialist provision. We are concerned that such arrangements exist, continue for many months with limited opportunity for review. Again, as this should not be occurring, it is not recorded and there are no statistics available to monitor its prevalence.

We would be keen to hear how the Deputy First Minister and Cabinet Secretary for Education and Skills plans to address these issues via improvements to school inspections programmes.

Participation

We welcome the commitment in the most recent Programme for Government to increase opportunities for parents, carers and pupils to be more closely involved in decision-making processes within educational settings.

The UN Committee on the Rights of the Child has highlighted the importance of the UK and devolved governments establishing '*structures for the active and meaningful participation of children*', in order to '*give due weight to their views in designing laws, policies, programmes and services*'.¹⁸ In 2016, the Committee drew particular attention to the need to consult with younger children and disabled children, as their views were often not sought or were under-represented. The Committee also recommended that human rights education should become mandatory.¹⁹

Pupils interviewed for our 'How Young People's Participation in School Supports Achievement and Attainment' report in 2015 stated that opportunities to participate in all

¹⁷ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

¹⁸ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

¹⁹ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En

areas of school life were something they highly valued.²⁰ The report also found a clear link between schools performing better than expected and a school ethos embracing pupil participation.

We would be interested to know how the Deputy First Minister and Cabinet Secretary for Education and Skills plans to ensure that pupil participation in school is meaningful and inclusive of all pupils.

UNCRC Incorporation

A key recommendation of the UN Committee on the Rights of the Child in 2016 was that the UK and devolved governments should expedite the incorporation of the UN Convention on the Rights of the Child (UNCRC) into domestic law, to ensure that the principles and provisions of the Convention were directly applicable and justiciable under domestic law.²¹ We are therefore pleased to note the Scottish Government's commitment in their Plan for Government 2017-2018 to explore how the UNCRC could be incorporated into Scots Law.

Further Information

Should you require any further information in relation to this briefing, please contact Pauline McIntyre, Parliamentary & Policy Officer in the first instance via pauline.mcintyre@cypcs.org.uk.

Bruce Adamson
Children and Young People's Commissioner Scotland

²⁰ <https://www.cypcs.org.uk/ufiles/achievement-and-attainment.pdf>

²¹ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/GBR/CO/5&Lang=En