

# EDUCATION (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3: Miscellaneous**

#### *Section 19: Additional support for learning*

63. Currently under the 2004 Act, when establishing whether a child has additional support needs or the level of provision required, an education authority has a duty to seek and take account of the views of the child, unless the authority is satisfied that the child lacks capacity to express a view (section 12). Parents and young people (aged 16-18 and in school) have a series of rights under the 2004 Act. The schedule to the Act amends the 2004 Act to extend some of these rights to children aged 12 or over with capacity.
64. A ‘Keeling schedule’ which sets out the amendments made by this Act in the context of the 2004 Act is available at <http://www.gov.scot/Topics/Education/Schools/welfare/ASL>. This document is provided to assist in the understanding of the Act and is for illustrative purposes only.

#### **New section 3: Children and young persons: capacity**

65. Paragraph 2 of the schedule substitutes a new section 3 into the 2004 Act. This new section defines what is meant by a child “having capacity” and a young person “lacking capacity” for the purposes of the 2004 Act, and expands on the definition of capacity included in the original section 3, by specifying what “capacity” means with reference to the particular action being carried out by the child or by the education authority. Section 3(1) provides that a child has capacity:
- a. in relation to an act that may be carried out by them under the 2004 Act, if they have sufficient maturity and understanding to carry out the act;
  - b. in relation to a decision they may make under the 2004 Act, if they have sufficient maturity and understanding to make, communicate, understand and retain memory of that decision (including understanding the implications of the decision);
  - c. in relation to the provision of any information or advice, or of a co-ordinated support plan, by the education authority under the 2004 Act, if they have sufficient maturity and understanding to understand the advice, information or plan; and
  - d. in relation to any view they might express as mentioned in the 2004 Act, if they have sufficient maturity and understanding to express the view.
66. New section 3(2) of the 2004 Act provides that, for the purposes of the Act, a young person lacks capacity to do something if they do not have sufficient understanding to do it.
67. New section 3(3) provides that a child or young person is not to be treated as lacking capacity due to a communication difficulty if the child or young person can communicate through human, electronic or mechanical aid.

**New section 3A: Children: assessment of capacity, etc.**

68. Paragraph 3 of the schedule to the Act inserts new section 3A into the 2004 Act. Section 3A(3) requires education authorities:
- (a) to carry out an assessment of the **capacity** of the child to do something (such as to request an assessment of their additional support needs under section 6 as amended by paragraph 4 of the schedule to the Act), or to have something done in relation to them (such as the requirement on an authority to provide the child with information and advice as to the additional support the child requires under section 7(8)(aa) as inserted by paragraph 5 of the schedule), and
  - (b) to consider whether a child's doing something or having something done in relation to the child would adversely impact on the child's wellbeing. "Wellbeing" is defined within new section 3B which is described below. (In the first example in (a) above, this consideration would apply to whether the assessment of a child's additional support needs would adversely impact their wellbeing; e.g. the authority must consider whether the child will manage the process of assessment. In the second example this would be whether the child's wellbeing would be adversely affected if they were provided with information and advice).
69. New section 3A(1) (as read with section 3A(3)) provides that a child may only do something and the authority may (where it has a power) or must (where it has a duty) only do something, if the authority is satisfied that the child has capacity to do that thing (e.g. to exercise their rights,) or for the authority to do the thing in relation to that child.
70. New section 3A(2) provides that, before a child can exercise a right under the 2004 Act as mentioned in subsection (1)(a) or (c), they must notify the education authority of their intention to exercise that right. This is consistent with the practice followed by young people and parents in relation to the 2004 Act.
71. New section 3A(4) and 3A(5) provide that where an education authority, having carried out the capacity assessment and considered the impact on wellbeing (as required by subsection (3)), is satisfied that the child lacks capacity to do something or have something done in relation to them, or that it would adversely impact their wellbeing to do something or have something done in relation to them, the child or education authority (as the case may be) may not do the thing.
72. New section 3A(6) provides that where an education authority is notified that a child proposes to do something under the 2004 Act, the education authority must notify the child's parents that the authority intend to assess the child's capacity to do that thing and consider whether would have an adverse impact on the child's wellbeing to do so. Further to that, following the assessment and consideration of capacity and impact on wellbeing, the education authority must notify both the child and the child's parents of the results of the assessment and consideration.

**New section 3B: Assessment of wellbeing**

73. Paragraph 3 of the schedule to the Act also inserts new section 3B into the 2004 Act. This provides that where an education authority or Additional Support Needs Tribunal for Scotland is required to consider whether the wellbeing of a child aged 12 years or over would or would not be adversely affected, it is required to do so by reference to the extent to which the child is or would be safe, healthy, achieving, nurtured, active, respected, responsible and included (section 3B(2)). These factors replicate those specified in section 96 of the Children and Young People (Scotland) Act 2014, which are to be considered where any person is required to assess the wellbeing of a child under that Act. New section 3B(3) and (4) makes provision for Scottish Ministers to be able to adjust the list of factors determining wellbeing in section 3B(2) by regulation, and to require Scottish Ministers to consult such persons as they consider

appropriate prior to making any such regulations, which will be considered through the affirmative procedure.

### **New section 3C: Rights of parents of children aged 12 or over**

74. Paragraph 3 of the schedule to the Act also inserts new section 3C into the 2004 Act to provide that where a right is conferred on both a child who is aged 12 years or over and a parent of such a child under the 2004 Act, the parent may exercise that right if the parent wishes to do so. This includes the circumstances where their child does not wish to exercise that right and does not wish their parents to exercise that right.

### **Amendment of section 6: children and young persons for whom education authority is responsible**

75. Paragraph 4(a) of the schedule to the Act amends section 6(3) of the 2004 Act by inserting a new paragraph (aa) which allows a child aged 12 or over for whose school education an education authority is responsible, and who the authority is satisfied has capacity and where it would not adversely impact their wellbeing, to request that the education authority establish whether the child has additional support needs or requires a co-ordinated support plan. Paragraph 4(b) of the schedule to the Act amends section 6(4) of the 2004 Act to provide that, where an education authority establishes that a child has additional support needs following a request made by a child, it must inform both the child and the child's parent of that.

### **Amendment of section 7: children and young persons for whose school education an education authority is not responsible**

76. Paragraph 5(a) of the schedule to the Act amends section 7(3) of the 2004 Act to insert a new paragraph (aa) which allows a child aged 12 or over for whose school education the education authority is *not* responsible, and who the authority is satisfied has capacity and where it would not adversely impact their wellbeing, to request that an education authority establish whether the child has additional support needs or would require a co-ordinated support plan if the education authority were responsible for the child's education.
77. Paragraph 5(b) of the schedule to the Act amends section 7(8) of the 2004 Act. The effect is that where an authority establishes under section 7 that a child has additional support needs, or would if the authority were responsible for their school education require a co-ordinated support plan, the authority is required under subsection (7) to provide a child that makes a request (referred to under section 7(3)(aa)) with information and advice. That information and advice would be on the additional support required by the child, if the authority is satisfied that the child has capacity to understand it and if it is not considered to have an adverse impact on the child's wellbeing to receive the advice and information.
78. Paragraph 5(c) inserts new subsections (9) and (10) into section 7 of the 2004 Act to allow an education authority to request information and advice from the managers of an independent or grant-aided school for the purposes of assessing the child's capacity where a request is made by a child under section 7(1).

### **Amendment of section 8: assessments and examinations**

79. Section 8(1) of the 2004 Act applies where an education authority proposes to establish whether a child or young person has additional support needs or requires, or would require, a co-ordinated support plan or a review of such a plan, and where "an appropriate person" requests that the education authority arranges for a child or young person to undergo an assessment or examination to establish this. In that case the authority must comply with such an assessment request unless it is unreasonable.

80. Paragraph 6(a) of the schedule to the Act inserts new section 8(2)(b)(ia) into the 2004 Act, the effect of which is that a child aged 12 years or over is “an appropriate person” for the purposes of subsection (1) and may therefore make an assessment request. Paragraph 6(b) of the schedule inserts new subsection (2A) into section 8 to provide that a child aged 12 years or over is only an appropriate person and therefore able to make an assessment request if:
- a. the education authority is satisfied there *has not been* a significant change in the circumstances of the child since the child made a request referred to in section 6(2), 7(1) or 10(4) of the 2004 Act. That is to establish if the child has additional support needs, if the child requires, or would require a co-ordinated support plan, or if the child requires a review of such a plan was made, thus indicating a significant change which might have affected the child’s capacity since it was assessed by the authority under those sections;
  - b. where the authority consider that *there has been* a significant change in the circumstances of the child since the child made a request in section 6(2), 7(1) or 10(4), the authority is satisfied that the child has capacity to make the assessment request under section 8(1) at the time the request is made; or
  - c. no such request was made by the child under section 6(2), 7(1), or 10(4), and the authority is satisfied that the child has capacity to make an assessment request under section 8(1).

#### **Amendments of section 8A: assessments and examinations: further provision**

81. Paragraph 7 of the schedule to the Act amends section 8A of the 2004 Act to allow a child aged 12 years or over, for whose school education an education authority is responsible, to request that the education authority arranges for the child to undergo a process of assessment or examination for the purpose of considering their additional support needs as long as the authority is satisfied the child has capacity to make the request.

#### **Amendments of section 9: duty to prepare co-ordinated support plans**

82. Paragraph 8 of the schedule to the Act amends section 9(2)(d) of the 2004 Act. The effect is that, where an authority establishes under the 2004 Act that a child for whose school education it is responsible requires a co-ordinated support plan, the plan prepared must contain the name and contact details of an officer of the authority from whom the child can obtain advice and further information. The duty to include such contact details applies only if the authority is satisfied that the child has capacity to understand the advice and information and where receiving the information would not adversely impact their wellbeing. Paragraph 8 also makes various other minor textual amendments to section 9(2)(d).

#### **Amendments of section 10: reviews of co-ordinated support plans**

83. Paragraph 9 of the schedule to the Act amends section 10 of the 2004 Act which relates to the requirements on education authorities to review co-ordinated support plans previously prepared. Paragraph 9 inserts new section 10(5)(aa) which enables children aged 12 or over to request a review of their co-ordinated support plan, where the authority is satisfied the child has capacity and where it would not adversely impact their wellbeing to do so.

#### **Amendments of section 11: co-ordinated support plans: further provision**

84. Paragraph 10 of the schedule to the Act amends section 11 of the 2004 Act which specifies further matters in relation to the establishment and review of co-ordinated support plans. This section enables parents and young people to be informed: (a) that it is proposed by the education authority to establish whether the child or young person

requires a co-ordinated support plan or a review of the co-ordinated support plan prepared; and (b) of the outcome of those proposals and, as a result of the outcome, any rights to make a reference to the Additional Support Needs Tribunal for Scotland under section 18 of the 2004 Act. The effect of new section 11(3)(aa) is to require an authority to provide this information to a child aged 12 or over (provided the child has capacity to understand the information and where it would not adversely impact their wellbeing to receive information as previously set out by section 6(3)(aa), 7(3)(aa) and 10(5)(aa)) where the authority's proposal arises as a result of a request to:

- establish whether the child has additional support needs or requires a co-ordinated support plan under section 6(2), or,
- establish whether the child has additional support needs or would require a co-ordinated support plan if the education authority were responsible for the education of the child under section 7(2), or,
- review a co-ordinated support plan under section 10(4).

85. **Section 11(5)** requires education authorities to provide a copy of any co-ordinated support plan or amended plan prepared to parents and young people. The effect of new section 11(5)(a)(ia) is to require authorities to provide copies of these plans to children aged 12 or over with capacity where they have made the original request either to establish that they require a co-ordinated support plan or that it should be reviewed. Section 11(5)(a) will still require the authority to give a copies of these plans to their parents in this scenario.

#### **Amendment of section 12: duties to seek and take account of information**

86. Paragraph 11 of the schedule to the Act is a technical consequential amendment of section 12 of the 2004 Act required as a result of the new definition of “capacity” in the substituted section 3 of the 2004 Act.

#### **Amendment of section 13: provision of information etc. on occurrence of certain events**

87. Paragraph 12(a) of the schedule to the Act is a technical consequential amendment to section 13(4A) of the 2004 Act required as a result of the new definition of “capacity” in the substituted section 3 of the 2004 Act

88. Paragraph 12(b) of the schedule to the Act inserts new section 13(5)(za) which requires an education authority to obtain consent from a child who is aged 12 years or over and who has capacity to give consent to the authority providing an appropriate agency or agencies with information in relation to post-school transition. Paragraph 12(b) also makes a consequential amendment to subsection (5)(a) to make it clear that, in relation to a child who is younger than 12 years, the parent requires to give this consent.

#### **Amendment of section 14: supporters and advocacy**

89. Paragraph 13 of the schedule to the Act amends section 14(2) of the 2004 Act, the effect of which is to allow a child who is 12 years or over to have a supporter present at discussions, or an advocate to conduct discussions on the child's behalf with the education authority regarding the child's education provision. This request can be made only if the education authority is satisfied that (a) the wishes of the child are not unreasonable, and (b) the child has capacity to participate in discussions or make representations.

#### **Amendment of section 15: mediation services**

90. Paragraph 14 of the schedule to the Act inserts new subsection (1A) into section 15 which places a duty on education authorities to seek and take account of the views of a child in respect of a matter disagreed upon which is the subject of mediation (for

example in a mediation between the parent of the child and the education authority in relation to a concern about the provision to meet the child's additional support needs).

### **Amendment of section 16: dispute resolution**

91. Paragraph 15(a) of the schedule to the Act amends section 16(1) of the 2004 Act to allow the Scottish Ministers by regulations to make provision about the resolution of disputes between an education authority and a child aged 12 or over (who the authority is satisfied has capacity to express a view or make a decision for the purpose of resolving disputes to do so) concerning the exercise of the authority's functions under the 2004 Act.
92. Paragraph 15(b) of the schedule to the Act amends section 16(3) to make it clear that such regulations (a) must not require any child to use any procedure established in accordance with the regulations to resolve any dispute with the authority, nor pay any fee or charge for using any procedure, and (b) do not affect the child's entitlement to refer any matter to the Tribunal.

### **Amendment of section 18: references to Tribunal**

93. Paragraph 16(a) of the schedule to the Act amends section 18(2) of the 2004 Act, the effect of which is to allow a child referred to in new subsection (2A) to make a reference to an Additional Support Needs Tribunal for Scotland in connection with any education authority decisions, the provision of information by authorities or any education authority failures under the 2004 Act.
94. Paragraph 16(b) of the schedule to the Act inserts new subsection (2A) into section 18. New subsection (2A) provides that a child may only make a reference to the Tribunal under new section 18(1) if the child is aged 12 or over, and if the Tribunal is satisfied that the child has capacity to make the reference and that it would not have an adverse impact on the child's wellbeing. The effect of this new subsection is to require the Tribunal to assess the capacity and consider the impact on the child's wellbeing if they seek to make a reference to the Tribunal.
95. Paragraph 16(c) of the schedule to the Act amends section 18(3) of the 2004 Act to make it clear that an education authority decision (a) in relation to the capacity of a child aged 12 or over to exercise a right and (b) that the authority is satisfied in relation to a matter relating to the impact on the wellbeing of a child are decisions which may be referred to the Tribunal under section 18.
96. Paragraph 16(d) of the schedule to the Act inserts new subsections (8), (9), (10) and (11) into section 18 of the 2004 Act. Section 18(7) prevents a second reference being made to the Tribunal within 12 months of a previous reference having been made in relation to a decision referred to in section 18(3)(d) or (e) (references in relation to information, decisions and failures relating to coordinated support plans and decisions refusing placing requests), subject to the excepted circumstances listed. The effect of new subsection (8), for example, is to make it clear that a second or subsequent placing request reference to the Tribunal within a 12 month period cannot be made regardless of whether the reference is in relation to a placing request at the same school or a different school.
97. The effect of subsections (9) and (10) is that an exception is made to the general provision in section 18(7), where a placing request reference has been made within the 12 month period but withdrawn prior to any hearing. In such circumstances, a further request can be made within the 12 month period and the President of the Tribunal will have discretion to agree to its proceeding.
98. Subsection (11) provides that subsection (7) also applies in relation to decisions referred to in subsection (3)(ea) or (eb) (decisions of an education authority in relation to the capacity of a child aged 12 or over to exercise a right under the Act and decisions

of an education authority that it is or is not satisfied as respects a matter relating to the wellbeing of such a child), but only where any further reference would relate to the same right as mentioned in subsection (3)(ea) or the same matter as mentioned in subsection (3)(eb).

99. This therefore means that it will be competent to make a reference to the Tribunal in relation to an education authority decision referred to in section 18(3)(ea) or (eb) on a child's capacity and wellbeing if it relates to the exercise of a different right under the 2004 Act (for example right to request assessment and right to express a view) within 12 months.

#### **Amendment of section 19: powers of Tribunal in relation to reference**

100. Paragraph 17 of the schedule to the Act amends section 19(2) of the 2004 Act to allow the Tribunal to confirm or overturn the decision of an education authority in relation to the child's capacity and wellbeing.

#### **Amendment of section 26: publication of information by education authority**

101. Paragraph 18(a) of the schedule to the Act amends section 26(2) of the 2004 Act, the effect of which is to require education authorities to publish and keep under review information on the officer or officers from whom children aged 12 and over with additional support needs can obtain advice and information about the provision for such needs.
102. Paragraph 18(b) of the schedule to the Act amends section 26(2A) of the 2004 Act, the effect of which is to require education authorities to provide children aged 12 or over with the information (or revised information) referred to in section 26(2).

#### **Amendment of section 27: code of practice and directions**

103. Paragraph 19 of the schedule to the Act amends section 27 of the 2004 Act to provide that the code of practice published by the Scottish Ministers under section 27 (which code provides guidance as to the exercise by authorities and agencies of the functions conferred on them by virtue of the 2004 Act) may include provision as to:
- the carrying out of capacity assessments (in terms of new section 3A(3)(a));
  - the consideration of whether something would adversely impact on the wellbeing of the child (in terms of new section 3A(3)(b)); and
  - the assessment of whether there has been a significant change in the circumstances of a child (in terms of new section 8(2A)(a)).

#### **Amendment of section 27A: collection of data on additional support needs**

104. Paragraph 20 of the schedule to the Act amends section 27A of the 2004 Act to remove the current provision at section 27A(1) and to introduce a regulation-making power to place requirements on Scottish Ministers to collect data. Section 27A(1A) requires Scottish Ministers to consult prior to making a regulation using the power.

#### **Amendment of section 29: interpretation**

105. Paragraph 21 of the schedule to the Act introduces a new definition of 'young person' to the 2004 Act and deletes the definition of young person currently within the 2004 Act.

#### **Amendment of section 31: duty to inform in writing or alternative permanent form**

106. Paragraph 22 of the schedule to the Act amends section 31 of the 2004 Act which requires education authorities, where they have to inform parents or young persons of

any matter, to do so in writing or alternative permanent form. The amendment extends this requirement to apply also in relation to children aged 12 or over.

### **Section 31A: Provision of support service**

107. Paragraph 23 of the schedule to the Act inserts new section 31A into the 2004 Act which requires the Scottish Ministers to secure the provision of a support service to be available free of charge to children aged 12 or over who wish to exercise, or are considering exercising, their rights or whose parents wish to exercise, or are considering exercising, their rights in relation to their children under the 2004 Act.
108. Section 31A(2) describes a support service as a service under which:
- a. advice, assistance and information including legal advice in relation to relevant rights are provided to children aged 12 or over;
  - b. a person (supporter or advocate) is provided who could be *present at* discussions with the education authority or could conduct discussions or make representations on behalf of such a child in relation to the relevant rights of that child;
  - c. a person (for example an advocate) is provided *to conduct* discussions with education authorities or make representations to them on behalf of such a child; and
  - d. an advocacy service is provided to such children whereby a person conducts discussions and makes representations to the Additional Support Needs Tribunals for Scotland.
109. Section 31A(5) defines the “relevant rights” in relation to which children can seek information and advice. These are, for a child who is aged 12 years, any right which is conferred on the child by the 2004 Act including the right to receive any document and information or the right to give consent in relation to any matter. In relation to the parents of such a child, “relevant rights” means any rights conferred on the parents by or under the 2004 Act.
110. New section 31A(3) and (4) provide that any person providing the support service may seek the views of the child as respect the exercise of relevant rights or an action to be carried out in relation to the child under the 2004 Act.

### **Orders, regulations and rules**

111. Paragraph 24(a) and (b) of the schedule to the Act amends sections 34(4) and 34(5) of the 2004 Act to include a reference to new section 3B(3) – “assessment of wellbeing” - inserted by paragraph 3 of the schedule to the Act. The effect of this is to require any regulations under new section 3B(3) to be subject to the affirmative procedure.

### **Amendment of [schedule 1: Additional Support Needs Tribunal for Scotland](#)**

112. Paragraph 25 of the schedule to the Act amends paragraph 11 of schedule 1 to the 2004 Act which requires the Scottish Ministers to make rules as to the practice and procedure of the Additional Support Needs Tribunal for Scotland. New paragraph (fa) provides that rules under paragraph 11 may include provision which requires the seeking of the views of children in the circumstances where their parent is making a reference to the Tribunals. New paragraph (kb) provides that the rules may include provision enabling the decision of an authority as to whether a child aged 12 or over has capacity, or whether something would adversely impact their wellbeing, to be decided by a convener of a Tribunal alone, without holding a hearing. New paragraphs (kc) and (kd) provide that rules may include provision in relation to the practice and procedures relating to matters which will be decided by a convener alone, the determinations reached by a convener alone and applying the methods of disposal referred to in section 19(2) to such determinations.



***Section 20: Children unable to attend early learning and childcare***

113. Section 14 of the 1980 Act gives the Scottish Ministers the power (where a pupil is unable, or it would be unreasonable to expect a pupil, to attend a suitable educational establishment to receive education due to some extraordinary circumstance) and the duty (where a pupil is unable, or it would be unreasonable to expect a pupil, to attend a suitable educational establishment to receive education due to the child's prolonged ill health) to make special arrangements for the pupil to receive education elsewhere than at an educational establishment.
114. Section 20 of the Act inserts a new subsection (4) into section 14 of the 1980 Act, to provide that this power and duty also apply in relation to eligible pre-school children who receive their early learning and childcare entitlement under section 35 of the Standards in Scotland's Schools etc. Act 2000; that is, those children receiving their early learning and childcare entitlement at a partner provider setting. Section 35 allows education authorities to enter in to arrangements with providers in the private or third sector to deliver the funded statutory entitlement to early learning and childcare.
115. New subsection (4)(a) provides that section 14(1)(a) applies in relation to eligible pre-school children receiving their early learning and childcare entitlement at partner provider settings, but as if the reference in that section to "a suitable educational establishment for the purpose of receiving education" were a reference to "a place where early learning and childcare is provided for the purposes of receiving early learning and childcare". This change is required as not all eligible pre-school children will be attending "educational establishments" as defined in section 135 of the 1980 Act: some of them will attend childminders and playgroups, which are not covered by the expression "educational establishment".
116. New subsection (4)(b) provides that section 14(1)(b) applies in relation to eligible pre-school children receiving their early learning and childcare entitlement at partner provider settings, but as if the reference in subsection (1)(b) to "an establishment" were a reference to "a place", and is required for the same reason.
117. New subsection (4)(c) provides that section 14(1) applies in relation to eligible pre-school children receiving their early learning and childcare entitlement at partner provider settings, but as if the reference in that section to "education elsewhere than at an educational establishment" were a reference to "early learning and childcare at a place other than a place where such learning and childcare is normally provided". This amendment is also required for the same reason.

***Section 21: Learning hours***

118. **Section 21** inserts new section 2ZA into the Education (Scotland) Act 1980, and makes amendments of section 133 of that Act.
119. Section 2ZA(1) places a duty on education authorities and managers of grant-aided schools to make available each year to pupils for whose education they are responsible no fewer than the number of learning hours prescribed by Scottish Ministers.
120. Section 2ZA(2) provides that education authorities are responsible for the school education of pupils who belong to their authority area (a concept which is determined by the residence of their parents), and who either attend a school managed by that authority, or are educated by virtue of arrangements made by that authority. Managers of grant-aided schools are responsible for the school education of pupils who attend their schools, other than where the pupil is attending in consequence of arrangements made by that pupil's education authority; in which case, the authority remains responsible.
121. Section 2ZA(3) allows that education authorities may make available fewer than the prescribed hours to a pupil in the circumstances outlined in section 2ZA(4).

*These notes relate to the Education (Scotland) Act 2016  
(asp 8) which received Royal Assent on 8 March 2016*

122. Section 2ZA(4) identifies the circumstances in which education authorities may make available fewer than the prescribed hours as being: where the authority is satisfied that making available the prescribed hours to the pupil would adversely affect that pupil's wellbeing; where matters outwith the control of the authority make it impracticable to make available the prescribed number of hours during the relevant year; and in other circumstances prescribed by Scottish Ministers in regulations.
123. Section 2ZA(5) provides that where an education authority makes available fewer than the prescribed hours, no fewer than the reduced hours must be made available.
124. Section 2ZA(6) defines "reduced hours" as being the prescribed hours less the number of learning hours not made available to the pupil during the relevant year due to the circumstances identified in section 2ZA(4). The prescribed hours can thereby only be reduced in so far as they need to be, directly to address those circumstances.
125. Section 2ZA(7) requires that education authorities assess any potential adverse impact of the prescribed number of hours on a child's wellbeing with reference to the factors listed; i.e. the extent to which the pupil is or would be safe, healthy, achieving, nurtured, active, respected, responsible and included.
126. Section 2ZA(8) provides that subsections (3) to (7) apply to the managers of grant aided schools as they apply to education authorities.
127. Section 2ZA(9) provides that regulations prescribing the number of learning hours (under 2ZA(1)); prescribing the additional circumstances in which education authorities and managers of grant-aided schools may provide fewer than the prescribed hours (under section 2ZA(4)(c)); or defining "learning hours" (under section 2ZA(12)) may include transitional or transitory provision, and make different provision for different purposes and for different types of pupil.
128. Section 2ZA(10) allows Scottish Ministers to modify, by regulations, the list of factors in subsection (7) to which education authorities and managers of grant-aided schools should have regard when considering whether providing a child with the prescribed number of learning hours would adversely affect their wellbeing.
129. Section 2ZA(11) requires Scottish Ministers to consult before making regulations prescribing the number of learning hours (under 2ZA(1)); prescribing the additional circumstances in which education authorities and managers of grant-aided schools may provide fewer than the prescribed hours (under section 2ZA(4)(c)); modifying the list of factors to which education authorities and managers of grant-aided schools should have regard when considering whether providing a child with the prescribed number of learning hours would adversely affect their wellbeing (under section 2ZA(10)); or defining "learning hours" (under section 2ZA(12)).
130. Section 2ZA(12) defines "learning hours" as hours of school education of a type prescribed by Scottish Ministers by regulations. "School education" is defined to exclude early learning and childcare. A "school year" is defined as the 12 month period beginning on 1 August.
131. [Sections 21\(3\)\(a\)](#) and (b) amend section 133 of the 1980 Act (regulations, etc.) to provide that regulations made under new section 2ZA(1) are subject to the affirmative procedure.
132. [Sections 21\(3\)\(c\)](#) and (d) amend section 133 of the 1980 Act to extend to managers of grant-aided schools, as well as to education authorities, the right to apply to Scottish Ministers for a direction that any regulations made under section 2ZA(1) shall not apply to those managers or that authority, or shall only apply subject to such modification as the Scottish Ministers may specify. The Scottish Ministers may only make such a direction if it appears to them that application of the regulations would be unreasonable.

**Section 22: Provision of school meals**

133. Section 22(1) and (2) of the Act substitutes a new section 53 (provision of school meals) into the 1980 Act.
134. Section 53(1) provides that the section applies to pupils in attendance at public schools and other educational establishments under the management of an education authority (this includes eligible pre-school children receiving early learning and childcare at education authority managed providers) and to pupils who receive their funded entitlement to early learning and childcare under section 35 of the Standards in Scotland's Schools etc. Act 2000; that is, those who attend a partner provider setting.
135. Subsection (2) of the replacement section 53 requires an education authority to provide pupils with a free school lunch if they meet one of the income-related criteria set out in subsection (7). An authority may also *secure* the provision of free school lunches to such pupils. This means that education authorities can provide the lunches directly themselves, or they can pass on funding or arrangements to others, including partner providers delivering the entitlement to early learning and childcare. The option of securing a free school lunch is especially important for eligible pre-school children receiving their early learning and childcare entitlement at a partner provider, as those can be small businesses, third sector organisations or childminders; and it is important to ensure that, while the legal responsibility is on the education authority to provide a free school lunch to those eligible, allowing the authority to secure the provision of the lunches by others, gives it flexibility in terms of the delivery or physical provision of the meals.
136. Subsection (3) provides that an education authority has power to provide or secure the provision of other food and drink to pupils already receiving a free school lunch under subsection (2), because they satisfy the eligibility criteria set out in subsection (7). Further, an education authority has power to provide or secure the provision of food and drink, including school lunches, to pupils who are not entitled to a free school lunch under subsection (2).
137. Subsection (4) provides that where an education authority chooses to provide or secure the provision of food or drink to pupils under subsection (3), it can either do so free of charge or charge pupils for it.
138. Subsection (5) provides that an education authority may exercise its power under subsection (4) to provide or secure the provision food and drink free of charge to pupils who satisfy such conditions as the authority sees fit. For example, the education authority could choose to provide or secure free food and drink to pupils who are in a particular yearly stage of education. It also allows education authorities to provide or secure food and drink at such times of the day as they see fit, for example, at lunchtime or at a breakfast club.
139. Subsection (6) makes clear that an education authority which chooses to charge for food or drink under subsection (4) must charge the same amount for the same quantity of food and drink at each school within the education authority. This means they cannot charge one pupil one amount and another pupil a different amount for the same product (within the same school or another school within the same local authority); for example, a sandwich.
140. Subsection (7) sets out the criteria for eligibility for those children to whom the education authority is obliged to provide a free school lunch under subsection (2). A pupil falls within subsection (7)(a) where they, or their parents, are in receipt of income support, an income-based job seekers allowance, or an income-related allowance. A pupil will fall within subsection (7)(b) if their parents are in receipt of support provided under Part 6 of the Immigration and Asylum Act 1999 (support given to those whose asylum claims are on-going and support given to refused asylum seekers).

*These notes relate to the Education (Scotland) Act 2016  
(asp 8) which received Royal Assent on 8 March 2016*

141. Subsection (8) enables the Scottish Ministers, by regulations, to modify the eligibility criteria for free school lunches set out in subsection (7). This means that the Scottish Ministers can make changes to the eligibility criteria resulting from, for example, changes to the welfare system, or where they wish to extend free school lunches to a new category of pupil; for example, an additional yearly stage of primary school.
142. Subsection (9) provides that an education authority must provide facilities, as it considers appropriate, for pupils who bring their own food and drink to schools and other educational establishments under their management: for example, seating for pupils who bring packed lunches. This duty does not extend to partner provider premises; therefore education authorities do not have a duty to provide or to secure the provision of facilities for pupils at partner provider settings.
143. Subsection (10) sets out the places where an education authority can provide or secure the provision of food and drink, namely, on the premises of the school, at other educational establishments under their management, at any place used by partner providers to provide early learning and childcare, or at any other place, for example, a community centre within the local authority.
144. Subsection (11) specifies that, in relation to the provision of food and drink under the new section 53, any pupil for whom the education authority has made special arrangements under section 14 of the 1980 Act (for example, placement at a private educational establishment) may nevertheless be deemed to be in attendance at a public school. This decision is at the discretion of the education authority. This means that if an education authority places an excluded pupil in an educational facility run by a voluntary organisation, the education authority would still be able to provide food and drink, free of charge, to that pupil, in the same way as it provides food and drink to other pupils in schools or educational establishments under its management.
145. Subsection (12) of the new section 53 defines “school lunch” for the purposes of sections 53, 53A and 53B of the 1980 Act as meaning anything provided or the provision of which is secured by the education authority (for example at partner providers) in the middle of the day that the education authority deems to be appropriate for pupils to consume as a meal at that time of day.
146. Section 22(3) of the Act also inserts a new section 53ZA into the 1980 Act. Section 53ZA allows Scottish Ministers to make regulations imposing a requirement on education authorities to provide or secure the provision of a free meal (of a description prescribed in the regulations and at a time of day prescribed in the regulations) other than a free school lunch for eligible pre-school children who meet the free school lunch criteria at section 53(7). For example, Scottish Ministers could require education authorities to provide a breakfast or evening meal for eligible pre-school children who meet the free school lunch criteria, which suits the timing of their session.
147. [Section 22\(6\)](#) makes an amendment of section 133(2YA) of the 1980 Act (regulations etc.), which ensures that regulations made under subsection (8)(a)(iii) and (8)(b) of the new section 53 are subject to affirmative procedure (for example, where a description of a pupil is added to subsection (7) by reference to their yearly stage of education or another description is added). It also ensures that any regulations made under section 53ZA(1) and 54A(1) (“Clothing grants”) are also subject to the affirmative procedure; for example, regulations that require education authorities to provide meals other than school lunches, or regulations requiring an education authority to pay a grant of a specified amount to or in respect of a pupil of a specified description for the provision of clothing for the pupil. This procedure does not apply to regulations made under subsection (8)(a)(i) and (ii) which add a description of a pupil by reference to any benefit, allowance, or tax credit. These regulations will be subject to negative procedure by virtue of section 133(2) of the 1980 Act.
148. Consequential amendments have been made by section 22(4) and (5) of the Act to update the references in sections 56A and 56E to the appropriate subsections of the

new section 53. They are required as a result of the restructuring of section 53. These amendments will maintain the current position in relation to who the nutritional requirements and sustainable development guidance applies to. The duties will not be extended to partner providers. This is because nutritional regulations have already been made under section 56A, which exempt pre-school children who have different nutritional needs from school children; and, it would be too onerous to expect partner providers, which include childminders, to adhere to sustainable development guidance.

### ***Section 23: Clothing grants***

149. This section inserts new section 54A into the 1980 Act. Section 54A introduces a regulation-making power enabling the Scottish Ministers to make regulations requiring an education authority to provide grants of a specified amount for school clothing for certain specified pupils. Subsection (4) defines “specified” as meaning specified in regulations.
150. Subsection (2) provides that such regulations may make the payment of a grant subject to specified conditions (including conditions as to repayment). Subsection (3) provides that the regulations can make different provision for different purposes. For example, a different amount might be specified for secondary school pupils compared with primary school pupils.
151. As stated above, section 22(6) of the Act amends section 133 of the 1980 Act (regulations etc.) to provide that the section 54A regulation-making power will be subject to affirmative procedure.

### ***Section 24: Enforcement of statutory duties***

152. Section 24 of the Act amends section 70 of the 1980 Act. Currently, section 70(1) of the 1980 Act allows the Scottish Ministers to make an order declaring an education authority, the managers of a school or educational establishment or other persons to be in default of a duty following a complaint by any person that the body concerned has failed to comply with a duty imposed on them by or for the purposes of an education-related enactment. The order may require the body concerned to comply with the relevant duty before a date stated in the order.
153. New subsection (3) provides that, despite subsection (2) (in relation to what an education enactment includes), no order can be made regarding the types of duty failures specified in new subsection (4) (which are under the jurisdiction of the Additional Support Needs Tribunals for Scotland in terms of section 18 of the 2004 Act). These duties only apply to education authorities.
154. Subsection (4)(a) relates to:
  - a failure by an education authority to prepare a co-ordinated support plan for a child or young person who requires one,
  - a failure to prepare one by the time required by regulations made under section 11(8)(f)(i) of the 2004 Act,
  - a failure by an education authority to provide additional support as outlined by section 9(2)(a)(iii) of the 2004 Act,
  - a failure by an education authority to carry out a review of a co-ordinated support plan as required by section 10(2) of the 2004 Act,
  - a failure by an education authority to carry out a review of a co-ordinated support plan, within the time required by regulations made under section 11(8)(f)(ii) of the 2004 Act, and
  - a failure by an education authority to comply with its duties under sections 12(6) and 13 of that Act in respect of a child or young person.

155. Subsection (4)(b) relates to a failure by an education authority in relation to a decision or information mentioned in section 18(3) of the 2004 Act (such as a decision that a child or young person does or does not require a co-ordinated support plan, whether or not a review has taken place). This subsection also relates to a failure by an education authority to include information detailed by section 9(2)(a) of the 2004 Act where a co-ordinated support plan exists.
156. Subsection (4)(c) relates to a failure by the education authority to inform the child or young person, or the child or young person's parent, of its intention to establish whether a co-ordinated support plan is required, where a request has been received by the education authority to establish if a child or young person requires a co-ordinated support plan, by the time required by regulations under section 11(8) of the 2004 Act. The subsection also relates to a failure by an education authority to inform the child or young person, or the child or young person's parent, of its decision not to comply with the request within the regulated timescale.
157. Subsection (4)(c) also relates to a failure to establish whether the child or young person requires a co-ordinated support plan within the timescales required by regulations made under section 11(8) of the 2004 Act, where the education authority has informed a child or young person, or a child or young person's parent, of its intention to establish if the child or young person requires a co-ordinated support plan.
158. Subsection (4)(d) relates to any failure by an education authority under subsection (4) (a), (b) or (c) (as referred to above) which also amounts to a failure to provide adequate and efficient provision for the additional support needs of each child or young person for whose school education it is responsible, or a failure to make appropriate arrangements for keeping the additional support needs of each such child under consideration (as required by section 4 of the 2004 Act).
159. Subsection (5) allows the Scottish Ministers, by regulations, to prescribe a procedure to be followed in relation to the investigation of a complaint, or in relation to the determination as to whether or not an order should be made.
160. Subsection (6) allows for regulations to make provision for different purposes (such as for different timescales to be provided for in relation to different types of complaint). Subsection (7) requires the Scottish Ministers to consult such persons as they consider appropriate before making regulations.

### ***Section 25: Appointment of Chief Education Officer***

161. This section inserts new section 78 into the 1980 Act. New section 78 requires all education authorities to appoint a Chief Education Officer to advise the authority on the carrying out of its legislative functions under this Act and other legislation. Subsection (3) provides that the Scottish Ministers may prescribe the qualifications required for this role by regulations and that the Chief Education Officer must be appropriately experienced, as determined by the authority.
162. This provision will not prevent authorities from moving to a model of shared service delivery of functions such as education, whether within or across authorities. Nor will it compel authorities to have a Chief Education Officer in overall charge of the education service. It will simply ensure that the senior management team includes someone with an education background.
163. Councils are already required by law to designate senior managers to be Head of Paid Service (the Chief Executive), Monitoring Officer, Chief Financial Officer and Chief Social Work Officer.

### ***Section 26: Registration of independent schools***

164. Part 5 of the 1980 Act provides the legal framework for the registration and regulation of independent schools. Section 98 of the 1980 Act provides for the Scottish Ministers

to consider applications for registration as independent schools. Section 98A(5) sets out the grounds on which the Scottish Ministers may not be satisfied in relation to certain matters. These grounds include that a teacher (or proposed teacher) is not a proper person to be a teacher in any school in that s/he is disqualified in terms of Part 5, is barred from regulated work with children in accordance with the Protection of Vulnerable Groups (Scotland) Act 2007 or is a “prescribed person”. Section 98A(6) enables the Scottish Ministers by regulations (subject to the affirmative procedure in accordance with section 133(2C) of the 1980 Act) to set out what a “prescribed person” is. The Scottish Ministers intend to exercise this power to require that all teachers in independent schools should be General Teaching Council for Scotland (GTCS) registered.

165. Section 26 of the Act amends section 133 of the 1980 Act (regulations etc) to insert new subsections (2D) and (2E). Subsection (2D) will allow the Scottish Ministers, when making regulations under section 98A(6) of the 1980 Act (to set out who is a prescribed person), to also make different provision for different purposes and to make incidental, supplementary, consequential, transitional, transitory or saving provisions and to modify any enactment. The purpose of that is to enable a phased implementation of the policy to require that all teachers in independent schools are to be GTCS registered; the Scottish Ministers will be able to make exceptions to be applied in respect of the current teacher workforce, should that be necessary to secure an effective transition to the new arrangements. Subsection (2E) makes it clear that “enactment” includes an Act of the Scottish Parliament (or any instrument made under an Act of the Scottish Parliament); without this, the Interpretation Act 1978 (which governs the 1980 Act) would have the effect that “enactment” would exclude an Act of the Scottish Parliament.

### ***Section 27: Employment of teachers in grant-aided schools***

166. **Section 27** amends section 90(1) of the 1980 Act (employment of teachers). Section 90(1) currently enables the Scottish Ministers, by regulations made under section 2 (Scottish Ministers may prescribe standards etc. for education authorities) or 74(1) (payment of grants to be subject to conditions), to prescribe that only registered teachers (defined in section 135(1) of the 1980 Act as a teacher registered under the Public Services Reform (General Teaching Council for Scotland) Order 2011 (i.e. registered with the GTCS)) shall be employed or continue to be employed as teachers by education authorities in the educational establishments to which the regulations apply. Section 27 extends section 90(1) to cover managers of grant-aided schools with the effect that regulations under section 2 or 74(1) of the 1980 Act can prescribe that only teachers registered with the GTCS shall be employed as teachers in grant-aided schools. Section 90(1) enables regulations to make exceptions, thereby retaining flexibility (similar to independent schools) to make exceptions to the requirement that teachers in grant-aided schools must be GTCS registered which will support a phased implementation of the requirement.

### ***Section 28: Head teachers: education and training standards***

167. Section 28(1) and (2) of the Act insert new sections 90A and 98DA into the 1980 Act, and section 28(3) amends section 133 (regulations) of that Act.

### **Section 90A: Head teachers: education and training standards**

168. Subsections (1) and (2) of section 90A extend the regulation-making power in sections 2 and 74(1) of the 1980 Act to allow the Scottish Ministers to specify the standards of education and training which prospective head teachers at grant-aided and education authority-managed schools are required to have before they can be appointed to the position.

169. Subsection (3) provides the Scottish Ministers with flexibility in such regulations to make different provision for different purposes while allowing for exceptions and exemptions from the general rule that prospective head teachers will be required to have obtained the standards and training specified, before being permanently appointed. It also allows the regulations to make consequential, transitional, transitory or savings provision.

### **Section 98DA: Head teachers: education and training standards**

170. Section 98DA(1) gives the Scottish Ministers a regulation-making power to make provision for the education and training which prospective head teachers at independent schools are required to have before they can be appointed to the position. Section 98DA(2) makes it clear that such provision can apply to independent schools that are already registered or to a school which is the subject of an application for registration as an independent school (under section 98A of the 1980 Act).
171. Subsection (3) provides the Scottish Ministers with flexibility in regulations under section 98DA(1) to make different provision for different purposes while allowing for exceptions and exemptions from the general rule that prospective head teachers will be required to have obtained the standards of education and training specified before being permanently appointed.
172. [Section 28\(3\)](#) amends section 133 of the 1980 Act (regulations). New subsection (2BA) of section 133 disapplies section 133(2) (the default negative procedure) from applying to regulations under section 2 and 74(1) that make provision under section 90A or to regulations under section 98DA(1) and provides that such regulations will instead be subject to the affirmative procedure.

### ***Section 29: Provision of early learning and childcare: children with guardians***

173. This section amends section 47(3) of the 2014 Act.
174. Subsection (2) amends section 47(3) to ensure that all children aged 2 and over who have, or have had, a guardian appointed under section 7 of the Children (Scotland) Act 1995 (“the 1995 Act”) are entitled to the mandatory amount of early learning and childcare provided for under Part 6 of the 2014 Act. The provision captures the small group of children who were excluded from the mandatory amount of early learning and childcare; those children described in section 71(3)(f) of the 2014 Act, who had a guardian appointed under section 7 of the 1995 Act, but who were not at risk of becoming looked after. The amendment puts these children on a par with others who are looked after, the subject of a kinship care order or who have a court-appointed guardian under section 11 of the 1995 Act.
175. Subsection (3) makes a consequential amendment to section 49(1)(a) of the 2014 Act, which refers to section 47(3)(a) of the 2014 Act. This subsection substitutes the reference to section 47(3)(a) with a reference to section 47(3)(a)(i).