

EDUCATION AND SKILLS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Local education authority

Legal background

Part 1: Duty to participate in education or training: England

Sections 1 and 2: Duty to participate in education or training

14. The first two sections establish a duty on young people to participate in a form of education or training, and set out the young people to whom that duty applies. *Section 2* creates the central duty (“the duty to participate in education or training”) and details the ways in which young people may fulfil that duty. The eligible forms of education or training are:
- a) appropriate full-time education or training;
 - b) a contract of apprenticeship; or
 - c) part-time education or training towards an accredited qualification as part of full-time occupation or alongside occupation of more than 20 hours a week.
15. *Section 1* sets out the people subject to the duty to participate in education or training. It applies to any person who is resident in England, has ceased to be of compulsory school age but not yet reached the age of 18, and has not attained a prescribed qualification at level 3.

Sections 3 to 9: Interpretation

16. In *section 3*, level 3 is defined as the level of attainment which is demonstrated by two A levels. The section enables regulations to set out the qualifications that will count for this purpose. It is intended that these will include the Progression Diploma and the Advanced Diploma once these are available. *Sections 4 to 9* provide detail and definitions for the types of participation that will fulfil the duty. *Section 4* defines appropriate full-time education or training as full-time education or training suitable to the person’s age, ability, aptitude and any learning difficulty he or she has, provided at a school, college of further education or otherwise. For example, this provides that home education and programmes of learning provided by voluntary sector organisations would fulfil the central duty to participate. “Full-time” in relation to a particular description of education provided otherwise than at school or training, may be defined in regulations under *subsection (2)* of *section 4*. “Full-time” is not defined in legislation for compulsory school age, but, otherwise, this section substantially mirrors *section 7* of the 1996 Act which provides for compulsory education pre-16.
17. For the purposes of this Part, *section 5* defines full-time occupation as working for 20 hours or more per week under a contract of employment or in any other way which may

be prescribed in regulations. Section 5 provides for regulations to be made determining whether people should be treated as working 20 hours where their normal working hours vary from week to week. Regulations made under *subsection (1)(b)* can prescribe any other kinds of occupation that should count for these purposes, including volunteering, agency work and working as the holder of an office (for example, police officers or public appointees). By virtue of *section 62*, Crown employment (for example, civil servants or those in the armed forces) counts as work under a contract of employment.

18. *Section 6* defines relevant training or education for people who are fulfilling the duty to participate through the route described in *subsection (1)(c)* of section 2. It must consist of a course or courses leading towards a qualification accredited by the QCA.
19. Where a person is not fulfilling the duty to participate through full-time education or training or under a contract of apprenticeship, the person should be fulfilling the duty in accordance with section 2(1)(c). The time when the person should be fulfilling the duty in this way is divided into relevant periods and the person must participate in sufficient relevant training or education in each of those periods. *Section 7* provides for the dates on which relevant periods begin and end to be set by regulations (except in the case of relevant periods at the beginning or end of a time when the person should be fulfilling the duty in this way).
20. *Section 8* provides that if a person fulfils the duty to participate by working and pursuing part time education or training towards an accredited qualification, then the training provided by a person's employer, or any other education or training towards accredited qualifications, must be equivalent to 280 guided learning hours per year. It establishes that those guided learning hours may be actual hours of guided learning or a value assigned to an accredited qualification by the QCA. Regulations will prescribe what constitutes sufficient education or training where this option is pursued for relevant periods of less than a whole year, for instance where a young person changes the way he or she is fulfilling the duty mid-way through a year, or because their 18th birthday falls before the end of the year. *Section 9* requires the QCA to assign guided learning hours in accrediting qualifications.

Chapter 2: Local education authorities and educational institutions etc

Section 10: Duty to promote fulfilment of duty imposed by section 2

21. *Section 10* establishes a duty on local education authorities to promote participation in education or training of young people in their area who are subject to the duty to participate under section 2.

Section 11: Duty to promote good attendance

22. *Section 11* places a new duty on certain educational institutions in England to promote attendance for the purpose of enabling young people to meet the duty to participate under section 2. The duty applies to the governing body of community, foundation or voluntary schools, of community or foundation special schools, of pupil referral units, and of further education institutions. The LSC will be asked to place the same duty on the private providers that it funds, through its existing power to attach conditions to funding under section 6 of the 2000 Act.

Section 12: Duty to make arrangements to identify persons not fulfilling duty imposed by section 2

23. This section places a duty on local education authorities to identify those young people in their area who are subject to the duty to participate and are not participating.

Sections 13 to 17: Information

24. Educational institutions are under a duty to notify the appropriate service provider if a person is not participating in education or training and they believe that the person is not fulfilling the duty (*section 13*). If the young person belongs to a different local authority area, the notification should be passed on to the service provider for that other area. The local education authority is responsible for ensuring that this happens, either by passing on the notification, where it receives it itself, or by arranging for its service provider to do so. The section sets out to which institutions the duty applies, and who is the appropriate service provider. “Service provider” means the local education authority, where the authority provides services in exercise of its functions under *section 68* or, alternatively, where, in the exercise of those functions, the authority makes arrangements for the provision of those services, the person providing those services. These services are currently provided under arrangements made by the Secretary of State and are known as “Connexions”. This name will be retained when the responsibility for providing the Connexions service is transferred to local education authorities in accordance with the provisions in Part 2. An institution’s local Connexions office will be the “appropriate service provider” for the purposes of this section.
25. *Section 14* sets out the information that educational institutions must provide to enable local education authorities to identify those young people who are not participating, and what information the young person (or their parent, where the young person is younger than 16) can instruct not to be provided.
26. Under *section 15*, social security information may be supplied by the Secretary of State (or a person providing services to the Secretary of State) to enable a local education authority to fulfil its functions under this Part. The section sets out under what circumstances further disclosure of this information is permissible, under what circumstances it is a criminal offence and the penalty that may be imposed.
27. *Section 16* sets out certain public bodies that may share information about a young person with a local education authority in order for it to fulfil its duty. It is primarily an enabling provision as, without it, there might be doubt as to whether the particular public body involved had the legal power to share information for the purposes of fulfilling local authority functions under Part 1. *Section 17* allows information held by local education authorities and information held by their service providers to be shared and used, either for purposes under Part 1 of the Act, or for the purposes of sections 68 to 79. The intention is that local education authorities or service providers will continue to maintain the database currently established and maintained under the 2000 Act to help them provide the right support services to young people (under Part 2 of this Act) and promote and ensure fulfilment of the duty to participate (under Part 1).

Section 18: Guidance

28. This section requires local education authorities when exercising their functions under this Part to have regard to any guidance given by the Secretary of State.

Chapter 3: Employers

Sections 19 and 20: Interpretation

29. *Section 19* defines the contracts of employment to which duties in this Chapter apply. These are contracts with a duration of more than eight weeks and which include more than 20 hours work per week. *Section 20* explains what counts as making appropriate arrangements. A person has made appropriate arrangements if he or she has enrolled on a course or courses constituting relevant education or training (defined in section 6), or arrangements have otherwise been made for him or her to receive relevant education or training, or if he or she is participating in full-time education or training. A person does not need to have enrolled for sufficient (that is, enough) hours in the relevant

period) relevant education or training in order to count as having made appropriate arrangements. For example, he or she may be waiting for a course to end before enrolling on another.

Sections 21 to 26: Commencement of employment

30. *Section 21* places a duty on employers not to employ a person unless they have taken reasonable steps to check that the person has made appropriate arrangements to participate in relevant education or training. The duty does not require the employer to check that the arrangements cover relevant training or education that is sufficient (that is enough hours in the relevant period). For example, an employer would check that a potential employee could produce a letter from a learning provider indicating that he or she had enrolled on a course. The section provides for an exception to this if the contract is made conditional on the person making arrangements to undertake appropriate education or training, in which case he or she must have done so before employment commences. This enables an employer to have a role in a young person's decision about the type of education or training to pursue.
31. If an employer does not fulfil this duty, *section 22* provides for a local education authority to serve a penalty notice on the employer and sets out the circumstances in which the notice can be given. It provides for the amount of the financial penalty to be determined by regulations, and sets out the requirements for what is included in the notice. Should the employer fail to pay the financial penalty, the local authority could pursue the debt in a county court.
32. *Section 23* provides for an employer to object to a penalty notice within two weeks of being given the notice under section 22. The local education authority must consider the employer's notice of objection and either withdraw the penalty notice, reduce the amount of the penalty (if the amount was incorrect) or confirm the penalty notice. The local education authority must then notify the employer of its decision within a prescribed time period.
33. *Section 24* enables an employer to appeal to the First-tier Tribunal against a penalty notice given under section 22. The employer could appeal on the grounds that: they did not commit the contravention stated in the penalty notice; the circumstances in which the contravention took place make the penalty notice unreasonable; or the amount stated in the penalty notice is too high. Any appeal must be made within the time limit set by the Tribunal Procedure Rules under paragraph 4 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal has the power to: allow the appeal and cancel the penalty notice; replace the penalty with a smaller amount (if the amount was incorrect); or dismiss the appeal. If an appeal has been made, but not yet determined, *section 25* provides the local education authority with the power to withdraw the penalty notice. *Section 26* sets out the sums that must be repaid to an employer if a penalty notice is withdrawn under sections 23 or 25.

Sections 27 to 36: Employer to enable participation in education or training

34. These sections place a duty on employers to permit an employee, who is subject to the duty in section 2, to participate in education or training. *Sections 27* and *28* set out how a young person can notify an employer of the arrangements for appropriate education or training that he or she has made, what form that notification should take and what information the young person must tell the employer. Where a young person notifies the employer before beginning employment, the employer may fulfil the duty by arranging the employee's working hours around the time he or she is required to attend training, by allowing the employee time off to participate, or through a combination of these two mechanisms. Hours spent training will not count towards the 20 hours of work per week a young person must be doing to be counted as being in full-time occupation. This may mean that the employee needs the employer to rearrange working hours rather than

allowing time off during working hours, in order not to take the employee below the 20 hours per week required.

35. If notification is given after employment has begun, for example where arrangements have changed, under section 28 the employer must, so far as is reasonable, permit the employee to participate in education or training in accordance with appropriate arrangements. The employer may fulfil the duty by offering to vary the terms and conditions of the employment contract, or by permitting the employee to take time off to participate, as far as is reasonable. What is reasonable is determined by having regard to the needs of the young person in fulfilling the duty to participate, the circumstances of the employer's business and the effect of the person's absence from work on the running of the business.
36. *Section 29* provides that if a person reaches 18 years of age, remains in employment and has been participating in education or training in order to fulfil the main duty, the duty on the employer remains in place until the course finishes, the young person ceases to be resident in England, the person attains a level 3 qualification or the person attains the age of 19.
37. *Section 30* provides that an enforcement notice may be issued by the local education authority where the employer has not fulfilled the duty to enable participation. The Government's intention is to issue guidance to local education authorities to the effect that an employer should first be asked to fulfil the duty and given the chance to remedy the mistake voluntarily before an enforcement notice is issued. The notice sets out the steps the employer must take in order to meet the duty. Section 18 requires local education authorities to have regard to such guidance issued by the Secretary of State.
38. If the employer fails to comply with the requirements in an enforcement notice, *section 31* provides that a local education authority can issue a penalty notice and states what information the penalty notice must contain. Should the employer fail to pay the financial penalty, the local education authority could pursue the debt in a county court.
39. *Section 32* enables a local education authority to withdraw an enforcement notice (provided that, if a penalty notice has been issued, any appeal against it has not yet been determined). Where an enforcement notice is withdrawn, no penalty notice can be issued and any penalty notice already issued ceases to have effect.
40. *Section 33* provides for an employer to object to a penalty notice within two weeks of being given the notice under section 31. The local education authority must consider the employer's notice of objection and either withdraw the penalty notice, reduce the amount of the penalty (if the amount was incorrect) or confirm the penalty notice. The local education authority must then notify the employer of its decision within a prescribed time period. Under *section 34* an employer may appeal to the First-tier Tribunal against a penalty notice given under section 31. The employer could appeal on the grounds that: they did not commit the contravention stated in the penalty notice; the circumstances in which the contravention took place make the penalty notice unreasonable; or the amount stated in the penalty notice is too high. Any appeal must be made within the time limit set by the Tribunal Procedure Rules under paragraph 4 of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal has the power to: allow the appeal and cancel the penalty notice; replace the penalty with a smaller amount (if the amount was incorrect); or dismiss the appeal.
41. *Section 35* provides that a penalty notice can be withdrawn by a local education authority, until any appeal under section 34 has been determined, regardless of whether a notice of objection has been given. If a penalty is reduced or withdrawn, *section 36* provides that any sums of money already paid must be repaid to the employer with interest at the appropriate rate.

Sections 37 to 39: Supplementary

42. *Sections 37, 38 and 39* amend existing legislation to add taking time off or seeking to take time off (or to rearrange working hours) in order to participate in education or training as a result of the duty in section 2 to the grounds on which a person has a right not to suffer detriment, to the grounds on which dismissal is to be treated as automatically unfair, and to the grounds on which selection for redundancy is to be treated as automatically unfair. In order to claim unfair dismissal a person does not need to have the usual period of one year's continuous employment. Section 39 provides that section 63A of the Employment Rights Act 1996, which establishes a right to paid time off for young people aged 16-19 if they do not already have a level 2 qualification, does not apply to people subject to the duty to participate and will continue to apply only in Wales and Scotland.

Chapter 4: Parenting contracts and parenting orders

43. This Chapter enables local education authorities to take certain enforcement action against parents of young people who are not fulfilling their duty to participate, where this would be in the interests of ensuring that the young person participates.
44. *Section 40* confers on local education authorities in England the power to enter into parenting contracts with a parent of a young person who is not fulfilling their duty to participate and where the authority considers that such a contract would be in the interests of the young person's fulfilment of that duty.
45. A parenting contract is a voluntary agreement. *Subsection (6)* means that parenting contracts cannot result in certain types of legal action by either party. Those types of legal action are for breach of contract and for civil damages. A parenting contract is a document signed by the parent and on behalf of the local education authority, containing a statement by the parent agreeing to comply with the requirements in the contract, and a statement by the local education authority that it agrees to provide support to the parent for the purpose of complying with the contract's requirements. The aim is to ensure that the young person fulfils their duty to participate. Parenting contracts under section 40 are similar to parenting contracts under the Anti-Social Behaviour Act 2003. If a parent does not enter into a parenting contract when it is offered, or fails to comply with one, a court must take this into account in deciding whether to make a parenting order (see *section 42*).
46. *Section 41* enables local education authorities to apply to a magistrates' court for a parenting order in respect of a parent of a young person who is subject to the duty to participate and is not fulfilling that duty. A parenting order requires the parent to comply with the requirements specified in the order, for a specified period not exceeding 12 months. The requirements can include a counselling or guidance programme, part of which may be residential if certain conditions are met. A parent may, under *section 43*, appeal to the Crown Court against a parenting order. Failure to comply with a parenting order is an offence.
47. *Section 42* requires the court, in making a parenting order, to take into account any refusal by the parent to enter into a parenting contract, or any failure to comply with a parenting contract he or she has entered into. But a parenting order can be made without a parenting contract having been entered into.
48. *Section 44* provides that local education authorities and responsible officers, in exercising their functions in relation to parenting contracts and parenting orders, must have regard to how a parent's actions, or lack of, affect a young person's duty to participate. A responsible officer in relation to a parenting order means an officer of a local education authority who is specified in the order. This section also allows regulations to make provision about the exercise by local education authorities of their functions in relation to parenting contracts and parenting orders, and to require information to be provided by one local education authority to another. The reason for

this provision is that a young person who is failing to fulfil the duty may be in the area of one local education authority, but his parent may be in the area of another, and it will need to be clear which authority should lead, and to ensure that both authorities cannot take action against the same parent for the same reason at the same time.

Chapter 5: Attendance notices

Sections 45 to 50: Initial steps, attendance notices, attendance panels and appeals

49. These sections set out the procedure that a local education authority may follow should it believe that a person is failing without reasonable excuse to fulfil the main duty to participate under section 2. The Government intends to issue guidance to local education authorities to assist them in interpreting what would be a reasonable excuse. [Section 45](#) makes clear that before commencing this process, the local education authority must ensure that appropriate support has been made available and that the young person has been given the opportunity to take advantage of services designed to support participation. It provides that the local education authority must then give the young person 15 days' notice in writing of its intention to issue an attendance notice. If the only way in which the young person is failing to fulfil the duty is that the relevant education or training in which he or she is participating is not "sufficient" (not enough hours in the relevant period), it is for the local education authority to show that there is no reasonable excuse for not having made such arrangements, putting the burden of proof on the local education authority rather than on the young person. This may arise, for example, where a young person needs to await results for one course before enrolling on a subsequent course.
50. If the young person fails to participate without reasonable excuse after the local education authority has given 15 days' notice in writing, [section 46](#) enables the local education authority to issue an attendance notice. The attendance notice must specify the type of provision that should be undertaken, a description of the course, and details of where and when the young person should attend. An attendance notice ceases to have effect when a young person is no longer subject to the duty to participate, for whatever reason.
51. [Section 47](#) provides that the education or training specified in the attendance notice must be a course provided at a school, college or other education establishment or a contract of apprenticeship, and be a way of fulfilling the section 2 duty. It must be suitable to the person, having regard to their age, ability and aptitude and any learning difficulty he or she may have, and the local education authority must consult the provider of education or training.
52. [Section 48](#) requires a local education authority to set up an attendance panel in accordance with regulations, with a chair that is not a member of the authority. The panel's functions include hearing appeals against attendance notices (as set out in [section 49](#)), appeals against penalty notices (set out in [section 54](#)), making recommendations to local education authorities, and considering local education authorities' intentions to commence court proceedings. Regulations will specify how the panel must be constituted and its procedures in carrying out those functions. Regulations under section 48 may also apply sections 173 to 174 of the Local Government Act 1972 in relation to an appeals panel which put beyond doubt the kinds of allowances that could be paid.
53. [Section 50](#) provides that a local education authority can vary or revoke an attendance notice in certain circumstances, and can specify additional education or training. In particular, where the education or training specified in the notice ends, and the young person is still subject to the duty, the local education authority may specify additional education or training.

Sections 51 to 60: Failure to comply with attendance notice

54. *Section 53* enables a local education authority to issue a penalty notice which gives the young person the opportunity to make a payment to the local education authority in order to release him or her from the possibility of being convicted for the offence of failing to comply with an attendance notice. Regulations can be made to specify the contents of penalty notices and to set out the amount of the penalty (which can be different in different circumstances). The amount of the financial penalty must not exceed the maximum fine that could be imposed on conviction of the offence, which is level 1 on the standard scale of fines for summary offences.
55. There is an enforcement procedure if a young person fails to comply with an attendance notice. *Section 51* sets out that non-compliance is a criminal offence and liable to a fine of a maximum of level 1 on the standard scale. Currently level 1 is a maximum of £200, with the actual amount in each case being decided by the court in light of individual circumstances. *Section 52* provides that proceedings cannot be commenced unless a penalty notice has first been given under *section 53* and has not been paid. The attendance panel must have recommended that proceedings be instituted. Proceedings cannot be started after the young person has ceased to be subject to the duty to participate, or if the young person is participating in some way that is different from the provision specified in the notice but nevertheless fulfils the duty to participate.
56. *Section 54* sets up the procedure for appealing to an attendance panel against a penalty notice, which may be further provided for in regulations made under this section.
57. *Sections 55 to 60* provide that ordinary adult fine enforcement procedures will not apply in the case of a person who received a fine for an offence under clause 51 of failure to comply with an attendance notice without reasonable excuse.
58. *Section 56* applies to a person who reaches 18 after being given a fine. Once the individual turns 18, fine enforcement is transferred from the magistrates' court to a county court, provided that the magistrates' court is satisfied that the young person has the means to pay the fine (and any enforcement processes already begun have been completed). The magistrates' court's powers (apart from those relating to enforcement processes already started) cease when the person reaches 18, so that subsequent enforcement can take place only in a county court. The county court has no power to impose custody for non-payment. Any amount outstanding in relation to the surcharge and costs orders is transferred to the county court, together with the amount of the fine.
59. *Section 57* makes similar provision in respect of a person who is 18 when given a fine. In that case the fine (and associated surcharge and costs) is enforceable from the outset only in a county court.
60. *Subsection (9)* of section 56 and *section 58* provide for the Lord Chancellor to make further detailed provision by subordinate legislation about the orders, warrants and statutory provisions relating to enforcement of fines, costs or surcharges or to any power to enforce payment of such sums that continue and cease to have effect after the young person reaches 18.
61. Where a person aged under 18 fails to pay a fine, a youth default order could be made under section 39 of the Criminal Justice and Immigration Act 2008. Paragraph 90 of Part 2 of Schedule 1 will amend Schedule 7 to that Act to allow the magistrates' court to revoke a youth default order relating to a fine in respect of an offence under section 51 once the young person reached the age of 18, and to state how much of the original fine is to be treated as remaining outstanding. In doing that the court can take into account the extent to which the young person has complied with the youth default order. That amount would (if the magistrates' court so ordered under section 56) be enforceable only in a county court.

Section 60: Review of initial operation of Chapter

62. Chapter 5 of Part 1 makes provision about the actions and proceedings that may be taken if a young person fails to fulfil their duty under clause 2 to participate in education or training. *Section 60* provides for a review of, and report on, the initial operation of that Chapter. It is the Government's intention that this review will be conducted by a person independent of the Government. Under clause 173, Part 1 must be fully in force by the school leaving date for 2015 (and will have come into force for certain year groups before then). The period reviewed will, therefore, cover the first full year for which Part 1 is in force.

Chapter 6: Miscellaneous

63. For the purposes of Part 1, *section 61* enables regulations to state who is to be treated as the employer in relation to ways of working prescribed under section 5, and to modify provisions in their application to these prescribed ways of working, to reflect different circumstances. One effect of this section is that persons who are not normally regarded as employers (for example, the person in charge of a young person's voluntary work) could be treated as employers for these purposes.
64. *Section 62* sets out how Crown employees are to be treated in relation to Part 1 of the Act. They are to be treated as if employed under contracts of employment.
65. Although the duties on employers in Chapter 3 of Part 1 apply in relation to employment in the House of Lords and House of Commons respectively in the same way that they do to employment of all other young people, *section 63* and *subsection (3) of section 64* provide that the powers for local authorities to take enforcement action not to apply.
66. *Section 65* provides that financial penalties are payable to the local education authority and that funds from them can only be used for specified functions, which it is intended will be the process of giving and administering of penalty notices, or paid to the Secretary of State. Where a penalty notice has been given to an employer, it is not enforceable whilst a notice of objection or an appeal is outstanding.
67. *Section 67* enables the Secretary of State, by order, to make provision for Wales corresponding to the duties on employers in sections 19 to 36, and related provisions in sections 37, 38, 39, 61, 62 and 65. This power would apply only if the National Assembly for Wales made a Measure that appeared to the Secretary of State to correspond to section 2 of the Bill – effectively a Measure raising the participation age in Wales. The National Assembly for Wales could not currently make such a Measure, but could gain the competence to do so in future through a Legislative Competence Order under section 95 of the Government of Wales Act 2006. This section ensures that if the participation age were raised in Wales in future, the duties on employers could be applied in Wales too, and would apply in the same way to employers on either side of the border. Before an order can be made under this section the Welsh Ministers must be consulted.