

SCHOOL EDUCATION (MINISTERIAL POWERS AND INDEPENDENT SCHOOLS) (SCOTLAND) ACT 2004 (asp 12)

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Scottish Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act introduces new ministerial powers covering education authorities and grant-aided schools, and revises and amends existing legislation governing independent schools.
4. The Act is in 3 parts.
5. **Part 1 – Power of Scottish Ministers to require action by schools and education authorities** – provides the Scottish Ministers with powers to direct education authorities and the managers of grant-aided schools to take specific action to secure improvement following inspections by HMIE.
6. **Part 2 – Independent Schools** – revises and amends the legislation governing independent schools within the Education (Scotland) Act 1980 (the “1980 Act”). It:
 - amends the definition of an independent school;
 - revises and amends the existing provisions for registration of an independent school;
 - revises and amends the existing provisions for regulating independent schools;
 - abolishes the Independent Schools Tribunal; and
 - provides that appeals against decisions made by the Scottish Ministers in relation to independent schools are to be made to the sheriff principal.
7. **Part 3 – General** – provides for the short title, commencement, minor and consequential amendments and repeals.

COMMENTARY ON SECTIONS

Part 1 – Power of Scottish Ministers to require action by managers of certain schools

8. Part 1 inserts sections 66B, 66C and 66D after section 66A of the 1980 Act and sections 10A, 10B and 10C after section 10 of the Standards in Scotland’s Schools etc. Act 2000 (the “2000 Act”). It provides the Scottish Ministers with new powers to direct education authorities and managers of grant-aided schools to take specific action to secure improvement as identified after inspection by HMIE. It sets out the circumstances in which the Scottish Ministers may use these powers and the procedure that must be followed.

Section 1 – Power of Scottish Ministers to require action by managers of certain schools

9. Section 1 inserts sections 66B, 66C and 66D after section 66A of the 1980 Act. Section 66B sets out the procedure to be followed where HMIE identify in relation to a grant-aided or local authority school that satisfactory action has not been taken by the relevant person to secure improvement. For the purposes of this section, “relevant person” when relating to a grant-aided school means the managers of the school, and when relating to an authority school, means the education authority.

10. Section 66B(1) provides that, before reaching that view, HMIE must have inspected the school and, as a result, identified action that the relevant person should take to secure improvement in relation to the school, or the school education provided in it.

11. Section 66B(2) places a duty on HMIE to make a reference to the Scottish Ministers if it appears to them that the relevant person has failed to take satisfactory steps to address the matters where a need for improvement has been identified. It provides that HMIE can make such a reference only if the relevant person has had sufficient opportunity to take action to secure improvement, and if HMIE consider that, having taken into account the seriousness of the failure, an enforcement direction is justified.

12. Section 66C provides for a preliminary notice procedure, to be followed by the Scottish Ministers on receipt of a reference by HMIE under section 66B(2), where Ministers consider that further action is justified. Such a notice requires a written response to be provided by the relevant person within the period which is specified in the notice. The response should detail the reasons why the person considers they have not failed in taking action to secure improvement or, alternatively, accept that there has been a failure but give reasons why an enforcement direction should not be issued.

13. Section 66D provides the Scottish Ministers with the power to direct the relevant person to take action to address, or prevent a recurrence of, the failure identified by HMIE in section 66B. Subsection (1) provides that the Scottish Ministers will have the power to issue an enforcement direction only after the deadline for offering a response to the preliminary notice has expired. However, the preliminary notice procedure need not necessarily be followed by an enforcement direction if Ministers no longer consider a direction to be justified or if they consider that satisfactory action has been taken.

14. Subsections (5) and (6) allow the Scottish Ministers to vary any enforcement direction and to do so without having to repeat the preliminary notice procedure.

15. Subsection (9) places a duty on the relevant person to comply with any direction made to them by the Scottish Ministers. Failure to do so, being a breach of statutory duty, would enable Ministers to take action, in an appropriate case, under section 70 of the 1980 Act. Subsection (11) imposes an obligation on Scottish Ministers, where they give, vary or revoke an enforcement direction, to lay a report on the exercise of that power before the Scottish Parliament.

Section 2 – Power of Scottish Ministers to require action by education authorities

16. Section 2 inserts sections 10A, 10B and 10C after section 10 of the 2000 Act. These new sections set out the procedure to be followed where HMIE identify through their inspection of an education authority that the authority has failed to take satisfactory action to secure improvement in the way they exercise their functions in relation to the provision of school education.

17. The provisions contained within sections 10A, 10B and 10C are in similar terms to those contained within sections 66B, 66C and 66D of the 1980 Act.

Part 2 – Independent schools

18. Part 2 amends the legislation relating to independent schools in the 1980 Act. Section 3 amends the definition of an independent school in section 135(1) of the 1980 Act and has the effect of extending the definition to schools having fewer than five pupils receiving full-time education.

19. The provisions for registration of an independent school are contained within section 4, which makes amendments to section 98 of the 1980 Act, substitutes a new section 98A and inserts sections 98B, 98C and 98D into that Act. Section 5 makes provision for regulating independent schools, inserting a new section 98E and making amendments to sections 99, 100 and 101. The Independent Schools Tribunal is abolished and appeals will now go to the sheriff principal as detailed in section 6. This section makes amendments to section 102 and substitutes a new section 103. Section 7 inserts two new sections: 103A and 103B. Section 103A applies the provisions concerning independent schools to proprietors who are not individuals. Section 103B provides for the dates on which the registration of a school or its removal from the register will come into effect.

Section 3 – Meaning of “independent school”

20. Section 3 extends the existing definition of an independent school in section 135(1) of the 1980 Act by removing the words “five or more” where they appear before “pupils”. The definition of an independent school will now read: “a school at which full-time education is provided for pupils of school age (whether or not such education is also provided for pupils under or over that age), not being a public school, a grant-aided school or a self-governing school”. As a result, any establishment meeting these criteria is subject to the legislation governing independent schools, whatever the number of pupils on the school roll.

Section 4 – Registration of independent schools

21. Section 4 revises the provisions for registering independent schools. It makes amendments to section 98 of the 1980 Act, substitutes a new section 98A and inserts sections 98B, 98C and 98D into the 1980 Act.

22. Subsection (1) of section 4 replaces section 98(2) and sets out the information that the Registrar of Independent Schools in Scotland (the Registrar) must record in the Register of Independent Schools in Scotland.

23. The new section 98(2)(a) provides that the Registrar is required to record in the register, in relation to an application for registration of an independent school, such information as Scottish Ministers direct. Subsection (2)(b) provides that the Scottish Ministers will also direct what information concerning any conditions imposed on a school, including variations and revocations, should be recorded. Subsection (2)(c) makes provision for every order imposing a disqualification of a proprietor, teacher, premises or accommodation by the Independent Schools Tribunal, or by the Scottish Ministers, to be recorded. The Independent Schools Tribunal is referred to in this provision to ensure that any orders which have been made by that Tribunal before its abolition and which are still in force are still recorded. Subsection (2)(d) provides that the Scottish Ministers will direct which elements of the information (relating to particulars prescribed under subsection (3)(a)) provided to the Registrar by registered schools require to be placed on the register. Subsection (2A) provides that where an order removing a disqualification is made by Scottish

Ministers or by the sheriff principal the Registrar is required to remove the order imposing the disqualification from the register.

24. Section 98A sets out the procedure for persons to apply for registration of a proposed independent school. It details the basis on which Scottish Ministers will reach a decision about whether or not to grant an application for registration.

25. Subsection (1) stipulates that any person intending to open and run an independent school must apply to the Scottish Ministers for registration.

26. Subsection (2) provides for Scottish Ministers to define by regulations the form which an application for registration of an independent school is to take, and the information which it is to include.

27. Subsection (3) outlines the matters on which Scottish Ministers will require to be satisfied when considering an application for registration: these are detailed in paragraphs (a) to (e). The Scottish Ministers must be satisfied that the school will provide efficient and suitable instruction, taking account of the age and sex of the pupils who are to attend the school; that the welfare of the pupils will be adequately safeguarded and promoted; that the proprietor of the school and every proposed teacher in the school is a proper person to be a proprietor or teacher (subject to the provisions in subsection (5)); that the school premises are suitable for use as a school; and that the accommodation at the school will be adequate and suitable taking account of the number, age and sex of the pupils. When determining, in relation to an application for registration, whether a person is a proper person to be a proprietor or teacher consideration will be had to whether that person is disqualified from being such a proprietor or teacher, under Part 2 of the Act. Regard will also be had, for example, to the Protection of Children (Scotland) Act 2003 (the “2003 Act”) which makes provision in respect of all people working with children, and requires Scottish Ministers to keep a list of individuals whom they consider to be unsuitable to work with children, and prohibits those on that list from working with children. Similarly, compliance with the 2003 Act will be one of the factors which Scottish Ministers will have regard to in considering the adequacy of the arrangements, generally, to safeguard the welfare of pupils in the school.

28. If the Scottish Ministers are satisfied as to these matters they may then grant an application for registration. However, subsection (5) details the circumstances in which the Scottish Ministers would not be satisfied and would not therefore grant an application, namely, where the proprietor or teacher is not a proper person, either because they are disqualified from being a proprietor or teacher, disqualified from working with children, or because they are a “prescribed person”; where the proposed premises or the accommodation to be provided at those premises is disqualified from being used as such; or where that accommodation is disqualified for the proposed number, age or sex of the pupils.

29. Subsection (4) allows the Scottish Ministers to register an independent school subject to conditions. This may be appropriate, for example, where teachers at the school require particular training, or where certificates are required to verify the suitability and adequacy of premises and accommodation for a particular group of pupils.

30. Subsection (6) provides that “disqualified from working with children” is to be construed in accordance with section 17 of the 2003 Act, and provides Scottish Ministers with the power to prescribe in regulations what a “prescribed person” is, in relation to a proprietor and a teacher, or proposed teacher. Scottish Ministers are required to consult such persons as they think fit on these regulations, which are also to be subject to affirmative

Parliamentary procedure (see section 133 of the 1980 Act as amended by schedule 1 to this Act).

31. Section 98B covers the disqualification orders that the Scottish Ministers may make if they decide to refuse an application to register an independent school under section 98A. Subsection (1) provides that a disqualification order may be made where the refusal to register is on the grounds that the Scottish Ministers are not satisfied in regard to any of the following, namely that the proposed premises are suitable for use as a school; that the accommodation is adequate and suitable taking account of the number, sex and ages of the pupils; or that the proprietor, or a proposed teacher in the school, is a proper person.

32. Subsection (2) allows the Scottish Ministers to disqualify school premises. Subsection (3) covers disqualification of accommodation. Subsections (4) and (5) allow the Scottish Ministers to disqualify a proprietor from being a proprietor of an independent school on the grounds that the proprietor is not a proper person, or to disqualify a teacher from being a teacher in any school, if that teacher is not a proper person.

33. Section 98C covers the system of notification and appeals with regard to applications for registration of an independent school. Subsections (1) and (2) make provision for the Scottish Ministers to notify the proprietor and the Registrar of any decision they make on such an application. If the application is refused on the grounds that Scottish Ministers are not satisfied that a proposed teacher is a proper person, the Scottish Ministers must also notify that proposed teacher of their decision. In addition, Scottish Ministers are required to notify any other person or body they think fit.

34. Subsections (4) and (5) specify those persons whom the Scottish Ministers are required to notify should they make a disqualification order under section 98B. In terms of subsection (4) they are required to notify the proprietor, the Registrar and any other person or body they think fit, if they make a disqualification order under section 98B(2), (3) or (4). Section 98C(5) provides that where the Scottish Ministers make an order disqualifying a proposed teacher from being a teacher at any school (under section 98B(5)), they are required to notify the proposed teacher, the Registrar, and any other person or body they think fit of that order.

35. Subsections (6) and (7) provide for appeals to the sheriff principal by a proprietor against a decision made by the Scottish Ministers to refuse an application, to set conditions on registration, or to make a disqualification order; and subsection (8) provides for an appeal by a proposed teacher against a disqualification order relating to that teacher.

36. Section 98D details the procedure for removing a school from the register when it is no longer operating.

Section 5 – Regulation of registered schools

37. Section 5 revises the provisions for regulating independent schools. It inserts a new section 98E and makes amendments to sections 99, 100 and 101 of the 1980 Act.

38. Section 98E gives the Scottish Ministers power to impose, vary or revoke any condition on a registered school if they are satisfied that it is necessary in order to prevent that school becoming objectionable on any of the grounds set out in section 99(1A). Scottish Ministers can also vary or revoke conditions on the application by the proprietor of the school. Provision is also made for appeal by the proprietor, to the sheriff principal, against the imposition or variation of a condition or against a refusal to vary or revoke a condition.

39. Section 5(2) amends section 99 of the 1980 Act and specifies the grounds on which the Scottish Ministers can serve a notice of complaint, the circumstances in which they do not require to serve such a notice, the contents of a notice, and the rights of appeal attached to it.

40. Section 99(1A) adds a number of new grounds to those contained within section 99 of the 1980 Act. Those existing grounds are as follows: that efficient and suitable instruction is not being provided at the school; that the welfare of a pupil attending the school is not adequately safeguarded and promoted; that the premises or any part of them are unsuitable for a school; and that the accommodation provided is inadequate or unsuitable for the number, ages and sex of the pupils attending the school.

41. The additional grounds are set out in paragraphs (d) to (j) of section 99(1A). Under paragraphs (d), (e) and (f), notices of complaint require to be served in the event that the Scottish Ministers are satisfied that any condition imposed on the carrying on of the school has not been complied with; that any part of the school premises has been disqualified from being used as a school; that any accommodation at the school premises is disqualified from being used as such, or is being used for a number of pupils or pupils of an age or sex for which it has been disqualified.

42. Paragraphs (g) and (h) require a notice of complaint to be served where Scottish Ministers are satisfied that the proprietor of, or a teacher at, the school has been disqualified under the Act, is disqualified from working with children, is a prescribed person or is otherwise not a proper person to be a proprietor or a teacher.

43. Paragraph (j) requires a notice of complaint to be served where the proprietor of a school has not provided the Registrar with information required under section 98(3), or has not notified the Registrar of any change in information previously submitted.

44. Section 99(1B) allows the Scottish Ministers to act without serving a notice of complaint if they are satisfied that the circumstances require urgent action, for example, where the welfare of the pupils is at risk. This section allows Ministers to make an order under section 100(2) without first serving a notice of complaint.

45. Section 99(1C) outlines the form which a notice of complaint is to take. It is to specify the ground of the complaint, with a full description of the matter complained of, the remedial measures to be taken, and the period for compliance. Section 99(2) remains, although the wording is amended by paragraph 1(3) of schedule 1 to the Act, and provides for a copy of the notice to be served on the teacher, where the notice is served on the grounds that the teacher is disqualified, is a prescribed person or is not a proper person. Section 99(3) provides for an appeal by a proprietor to the sheriff principal against a notice of complaint.

46. Section 100 of the 1980 Act deals with the determination of complaints. It specifies the circumstances in which the Scottish Ministers can make orders as a result of a notice of complaint having been served against a registered school, and the rights of appeal open to proprietors and teachers against any such order.

47. The new section 100(1) which the Act introduces describes the circumstances in which the Scottish Ministers can make an order as the result of a notice of complaint. There are three such circumstances. Firstly, an order can be made after a notice of complaint has been served on the proprietor and no appeal has been made, or alternatively where an appeal has been made but refused, and the period in the notice has expired and the Scottish Ministers are not satisfied that the proprietor has taken satisfactory action to remedy the matter. Secondly, an order can be made where a notice of complaint has been served, an appeal has been lodged but no decision has yet been made and where, pending that decision, the Scottish Ministers

are satisfied that there is a serious risk of harm to any pupil attending the school. Finally, there is also provision for the Scottish Ministers to make an order without a prior notice of complaint if they are satisfied that urgent action is required.

48. Subsection (2) details the different forms of order which the Scottish Ministers may make. They can make an order directing the Registrar to remove the school from the register. Disqualification orders can also be made with regard to premises, accommodation, proprietors or teachers. In addition, orders can be made imposing, or varying conditions on the school.

49. Subsection (3) details the persons who are to be notified by Scottish Ministers when they make an order under subsection (2). They are required to notify the proprietor, the Registrar and any other person or body they think fit. Where the order is one to disqualify a teacher, Scottish Ministers must also notify that teacher.

50. Subsections (3A) to (3C) deal with appeals which can be made against disqualification orders.

51. Section 100(4) of the 1980 Act remains, although modified to remove the reference to the Tribunal and the Secretary of State, substituting reference to an order made under this Part of the Act. This provides that any proprietor disqualified from being a proprietor, or any teacher disqualified from being a teacher, will unless specifically stated otherwise, be disqualified from being both a proprietor of an independent school and a teacher at any school.

52. Section 101 of the 1980 Act covers the enforcement of orders and describes the penalties available. The penalties relating to each offence remain the same: the individual will be liable on summary conviction to a fine not exceeding level 4 on the standard scale or to imprisonment for up to three months, or to both. The offences apply in relation to the following: under subsection (1), any person running an independent school that is not registered; under subsection (2), a person using school premises, any part of such premises, or accommodation subject to a disqualification order made under this Act; under subsection (3), any person acting as the proprietor of an independent school when disqualified from doing so by an order; and, under subsection (3A), any person disqualified from being a teacher in any school if they endeavour to get a position as a teacher, accept such a position or teach in any school.

53. Section 101(4) is amended and updated (by schedule 1 to the Act) to refer to the current provision on disqualification in England and Wales, so that a person disqualified in England and Wales would automatically be disqualified for the purposes of this Part of the 1980 Act.

Section 6 – Appeals

54. Section 6 contains provisions for the removal of disqualifications by the Scottish Ministers and also deals with the sheriff principal's powers in relation to appeals.

55. Section 6(1) amends section 102 of the 1980 Act, dealing with the removal of disqualifications. There are existing provisions in section 102 enabling any person to apply to the Scottish Ministers for the removal of a disqualification order. The new subsection (1A) provides that the Scottish Ministers must inform the person, the Registrar and any other person or body they think fit of any decision they reach on an application to remove a disqualification. Subsection (2) provides for an appeal by a person who is aggrieved by the decision of the Scottish Ministers to refuse to remove a disqualification. Such an appeal is to be made to the sheriff principal within 28 days of the applicant being notified of the decision.

56. The Act substitutes a new section 103 of the 1980 Act, providing for the appeals that may be made to the sheriff principal and the orders available to the sheriff principal when considering any such appeal. Subsection (1) deals with the jurisdiction for appeals.
57. Subsection (2) details the orders the sheriff principal can make if allowing an appeal against a decision by the Scottish Ministers to refuse an application to register a school.
58. Subsection (3) details the orders the sheriff principal can make after hearing an appeal against a decision by the Scottish Ministers with regard to the imposition, variation or revocation of conditions. Whether or not the sheriff principal grants or refuses the appeal, the sheriff principal can make an order imposing any condition on the school, or an order varying or revoking a condition previously imposed on the school.
59. Subsection (4) sets out the orders the sheriff principal can make after hearing an appeal against a notice of complaint.
60. Subsection (5) sets out the orders that the sheriff principal can make after hearing an appeal by the proprietor of an independent school against any order made against the school under section 100(2) (whether or not as a result of a notice of complaint being served).
61. Subsection (6) provides that where the sheriff principal allows an appeal against any of the disqualifications imposed when registration is refused (under section 98B(2) to (5)), or when a teacher is disqualified following a notice of complaint (under section 100(2)(e)), or when an application to remove a disqualification is refused (under section 102(2)), the sheriff principal must in any of those circumstances make an order removing the disqualification.

Section 7 – Supplementary

62. Section 7 makes provision for the application of Part V of the 1980 Act to proprietors of independent schools who are not individuals, and also makes provision for the dates on which registrations and removals from the register will come into effect.
63. Section 103A specifies that all the powers and provisions within Part V of the 1980 Act relating to the proprietor of an independent school relate also to a “relevant person”. Subsection (6) defines “relevant person” in relation to the proprietor of an independent school so that where the proprietor is a body corporate, the relevant person will be any person who is a director, manager or secretary of the body corporate, or any person who purports to act as such. Where the proprietor is a partnership, the “relevant person” will be any person who is a partner, or purports to be such. Where the proprietor is an unincorporated association, other than a partnership, the “relevant person” will be any person who is concerned in the management or control of the association, or any person who purports to act in such a capacity.
64. Section 103B sets out the date on which the registration of an independent school or the removal of an independent school from the register is to come into effect.

Part 3 – General

65. Section 8 brings into effect the minor and consequential amendments contained in schedule 1 (relating to the 1980 Act and to the 2000 Act) and the repeals contained in schedule 2 (relating to the 1980 Act, the 2000 Act, and the Scottish Public Services Ombudsman Act 2002). Section 9 allows the Scottish Ministers to bring the Act into force by order made by statutory instrument and allows for transitional provisions and savings to be made in that order.

EFFECT OF PART 2 OF THE ACT ON PART V OF THE EDUCATION (SCOTLAND) ACT 1980

1. Part V of the 1980 Act as amended by the provisions in Part 2 of this Act is set out below. The attached is included in the explanatory notes to assist the reader to understand the provisions and how they integrate into the other provisions in Part V. The amendments are shown as italics and where text has been deleted this is indicated by [...].
2. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46) and therefore any reference to the Secretary of State should be taken to be a reference to the Scottish Ministers.

PART V

INDEPENDENT SCHOOLS

98 Registration of independent schools¹

- (1) The Secretary of State shall appoint one of his officers to be the Registrar of Independent Schools in Scotland (hereinafter in this Part of this Act referred to as "the Registrar"), and it shall be the duty of the Registrar to keep a register of independent schools, which shall be open to public inspection at all times,

[...]

[(1A)...]

- (2) *The Registrar shall record in the register—*

- (a) in relation to every application under section 98A(1) of this Act for registration of an independent school, such information as the Scottish Ministers may direct;*

- (b) in relation to any conditions imposed by virtue of this Part of this Act on the carrying on of a registered school, such information (including information relating to any variation and revocation of such conditions) as the Scottish Ministers may direct;*

- (c) every order of an Independent Schools Tribunal or the Scottish Ministers imposing any disqualification under this Part of this Act; and*

- (d) in relation to every registered school, such information relating to particulars prescribed under paragraph (a) of subsection (3) below—*

- (i) furnished by virtue of that paragraph; and*

- (ii) notified by virtue of paragraph (b) of that subsection,*

to the Registrar as the Scottish Ministers may direct.

- (2A) *Where an order removing any disqualification under this Part of this Act is made by—*

- (a) the Scottish Ministers; or*

- (b) the sheriff principal,*

the Registrar shall remove the order imposing that disqualification from the register.

¹ Text amended by section 4(1) of and schedule 1 to the Act.

- (3) The Secretary of State shall make regulations—
- (a) prescribing the particulars information as to which is to be furnished to the Registrar by the proprietors of *registered* schools and the manner in which it shall be so furnished;
 - (b) requiring the notification to the Registrar of any changes in such particulars;
 - (c) [...]; and
 - (d) dealing with such incidental matters as the Secretary of State may deem expedient.

98A *Application for registration of independent school*²

- (1) *Any person proposing to carry on an independent school shall apply to the Scottish Ministers for registration of that school.*
- (2) *An application for registration shall—*
- (a) *be in such form; and*
 - (b) *include such information,*
- as the Scottish Ministers may, by regulations, prescribe.*
- (3) *The Scottish Ministers may, subject to subsection (4) below, grant an application for registration if they are satisfied that—*
- (a) *efficient and suitable instruction will be provided at the school, having regard to the ages and sex of the pupils who shall be attending the school;*
 - (b) *the welfare of such pupils will be adequately safeguarded and promoted;*
 - (c) *subject to subsection (5)(a) below—*
 - (i) *the proprietor of the school is a proper person to be the proprietor of an independent school; and*
 - (ii) *every proposed teacher in the school is a proper person to be a teacher in any school;*
 - (d) *subject to subsection (5)(b) below, the proposed school premises are suitable for use as a school; and*
 - (e) *subject to subsection (5)(c) below, the accommodation to be provided at the school premises is adequate and suitable, having regard to the number, ages and sex of the pupils who shall be attending the school.*
- (4) *The Scottish Ministers may, on granting an application for registration, impose such conditions on the carrying on of the registered school as they think fit.*
- (5) *The Scottish Ministers shall not be satisfied that—*
- (a) *the proprietor of an independent school is a proper person to be the proprietor of such a school or, as the case may be, that a proposed teacher in such a school is a proper person to be a teacher in any school if that proprietor or, as the case may be, proposed teacher—*

² Text amended by section 4(2) of the Act.

- (i) is, by virtue of this Part of this Act, disqualified from being such a proprietor or, as the case may be, such a teacher;*
 - (ii) is disqualified from working with children; or*
 - (iii) is a prescribed person;*
 - (b) proposed school premises are suitable for use as a school if any part of such premises is, by virtue of this Part of this Act, disqualified from being so used; and*
 - (c) accommodation to be provided at school premises is adequate and suitable if any such accommodation is, by virtue of this Part of this Act, disqualified from being used as such or from being used as such for pupils of—*
 - (i) such number; or*
 - (ii) such age or sex,**for which it is proposed it be used.*
- (6) In this Part of this Act—*
 - “disqualified from working with children” shall be construed in accordance with section 17 of the Protection of Children (Scotland) Act 2003 (asp 5);*
 - “prescribed person” means—*
 - (a) in relation to a proprietor of an independent school, a person falling within such class of persons as the Scottish Ministers may, by regulations, prescribe; and*
 - (b) in relation to a teacher or proposed teacher in such a school, a person falling within such class of persons as may be so prescribed; and*
 - “proposed teacher” means a person that the proprietor of an independent school proposes will, on the registration of that school, be a teacher in it.*

98B Refusal of application for registration: disqualifications³

- (1) This section applies where the Scottish Ministers refuse an application for registration on the ground that they are not satisfied that—*
 - (a) the proposed school premises are suitable for use as a school;*
 - (b) accommodation to be provided at the proposed school premises is adequate and suitable, having regard to the number, ages and sex of the pupils who shall be attending the school;*
 - (c) the proprietor of the independent school is a proper person to be the proprietor of such a school; or*
 - (d) a proposed teacher in the school is a proper person to be a teacher in any school.*
- (2) Where the Scottish Ministers refuse an application for registration on the ground mentioned in subsection (1)(a) above they may make an order disqualifying the proposed school premises or any part of them from being used as a school.*

³ Text inserted by section 4(2) of the Act.

These notes relate to the School Education (Ministerial Powers and Independent Schools) Scotland Act 2004 (asp 12) which received Royal Assent on 12 November 2004

- (3) *Where the Scottish Ministers refuse an application for registration on the ground mentioned in subsection (1)(b) above they may make an order disqualifying the accommodation from being used as such or from being used as such for pupils—*
 - (a) *exceeding such number; or*
 - (b) *of such age or sex,**as they may specify.*
- (4) *Where the Scottish Ministers refuse an application for registration on the ground mentioned in subsection (1)(c) above they may make an order disqualifying the proprietor from being the proprietor of an independent school.*
- (5) *Where the Scottish Ministers refuse an application for registration on the ground mentioned in subsection (1)(d) above they may make an order disqualifying the proposed teacher from being a teacher in any school.*

98C Registration: notification and appeals⁴

- (1) *The Scottish Ministers shall give notice to the persons mentioned in subsection (2) below of their decision on an application for registration of an independent school.*
- (2) *The persons referred to in subsection (1) above are—*
 - (a) *the proprietor;*
 - (b) *where the application for registration is refused on the ground that the Scottish Ministers are not satisfied that a proposed teacher in the school is a proper person to be a teacher in any school, that proposed teacher;*
 - (c) *the Registrar; and*
 - (d) *any other person or body the Scottish Ministers think fit.*
- (3) *Where, under section 98A(3) of this Act, the Scottish Ministers grant an application for registration of an independent school, they shall direct the Registrar to register that school.*
- (4) *Where an order is made under section 98B(2), (3) or (4) of this Act, the Scottish Ministers shall, as soon as reasonably practicable after making the order, give notice to—*
 - (a) *the proprietor;*
 - (b) *the Registrar; and*
 - (c) *any other person or body the Scottish Ministers think fit,**of the order.*
- (5) *Where an order is made under section 98B(5) of this Act, the Scottish Ministers shall, as soon as reasonably practicable after making the order, give notice to—*
 - (a) *the proposed teacher to whom the notice relates;*
 - (b) *the Registrar; and*
 - (c) *any other person or body the Scottish Ministers think fit,**of the order.*

⁴ Text inserted by section 4(2) of the Act.

- (6) *The proprietor of an independent school may, before the expiry of the period of 28 days beginning with the day on which that proprietor is given notice under subsection (1) above, appeal to the sheriff principal—*
- (a) where the application for registration of the school is, under subsection (3) of section 98A of this Act, refused, against that refusal; or*
 - (b) where such application is, under that subsection, granted and conditions are, under subsection (4) of that section, imposed on the carrying on of the school, against the imposition of any such condition.*
- (7) *Where an order is made under section 98B(2), (3) or (4) of this Act, the proprietor may, before the expiry of the period of 28 days beginning with the day on which that proprietor is given notice under subsection (4)(a) above, appeal to the sheriff principal against the order.*
- (8) *Where an order is made under section 98B(5) of this Act, the proposed teacher may, before the expiry of the period of 28 days beginning with the day on which that proposed teacher is given notice under subsection (5)(a) above, appeal to the sheriff principal against the order.*

98D Removal from register where school no longer being carried on⁵

- (1) *Where the Scottish Ministers are satisfied that a registered school is no longer being carried on as such, they may make an order directing the Registrar to remove the school from the register.*
- (2) *Where an order is made under subsection (1) above, the Scottish Ministers shall, as soon as reasonably practicable after so doing, give notice to—*
- (a) the proprietor;*
 - (b) the Registrar; and*
 - (c) any other person or body the Scottish Ministers think fit,*
of the order.
- (3) *The Registrar may, on the application of the proprietor of a registered school, remove that school from the register.*
- (4) *Where, under subsection (3) above, the Registrar removes a school from the register, the Registrar shall give notice to—*
- (a) the proprietor; and*
 - (b) any other person or body the Registrar thinks fit,*
of that fact.

⁵ Text inserted by section 4(2) of the Act.

98E Imposition, variation and revocation of conditions⁶

- (1) *The Scottish Ministers may, if they are satisfied that it is necessary to prevent a registered school from becoming objectionable upon any of the grounds mentioned in section 99(1A) of this Act—
 - (a) impose any condition on the carrying on of that registered school; or
 - (b) vary or revoke any such condition imposed by virtue of this Part of this Act,as they think fit.*
- (2) *The Scottish Ministers may, on the application of the proprietor of a registered school, vary or revoke any condition imposed by virtue of this Part of this Act on the carrying on of that school.*
- (3) *An application such as is mentioned in subsection (2) above shall—
 - (a) be in writing; and
 - (b) specify the variation or revocation sought together with the reasons for seeking it.*
- (4) *Where, under this section, the Scottish Ministers impose, vary, revoke or refuse to vary or revoke a condition on the carrying on of a registered school, they shall, as soon as reasonably practicable after so doing, give notice to—
 - (a) the proprietor;
 - (b) the Registrar; and
 - (c) any other person or body the Scottish Ministers think fit,of that imposition, variation, revocation or, as the case may be, refusal.*
- (5) *The proprietor of a registered school may, before the expiry of the period of 28 days beginning with the day on which that proprietor is given notice under subsection (4)(a) above, appeal to the sheriff principal against the imposition, variation or, as the case may be, refusal to vary or revoke.*

99 Complaints⁷

- (1) *If at any time the Secretary of State is satisfied that any registered [...]school is objectionable upon all or any of the grounds mentioned in subsection (1A) below, the Scottish Ministers shall, subject to subsection (1B) below, serve upon the proprietor of the school a notice of complaint.*
- (1A) *The grounds referred to in subsection (1) above are—
 - (a) that efficient and suitable instruction is not being provided at the school, having regard to the ages and sex of the pupils attending thereat;
 - (aa) that the welfare of a pupil attending the school is not adequately safeguarded and promoted there;
 - (b) that the school premises or any parts thereof are unsuitable for a school;*

⁶ Text inserted by section 5(1) of the Act

⁷ Text amended by section 5(2) of and schedule 1 to the Act

- (c) that the accommodation provided at the school premises is inadequate or unsuitable, having regard to the number, ages and sex of the pupils attending the school;
 - (d) that a condition imposed by virtue of this Part of this Act upon the carrying on of the school is not being or has not been complied with;
 - (e) that any part of the school premises is, by virtue of this Part of this Act, disqualified from being used as a school;
 - (f) that any accommodation provided at the school premises is, by virtue of this Part of this Act, disqualified from being used as such or is being used as such for pupils of—
 - (i) such number; or
 - (ii) such age or sex,from which use it is so disqualified;
 - (g) that the proprietor of the school is—
 - (i) by virtue of this Part of this Act, disqualified from being the proprietor of an independent school;
 - (ii) disqualified from working with children;
 - (iii) a prescribed person; or
 - (iv) otherwise not a proper person to be the proprietor of an independent school;
 - (h) that a teacher in the school is—
 - (i) by virtue of this Part of this Act, disqualified from being a teacher in any school;
 - (ii) disqualified from working with children;
 - (iii) a prescribed person; or
 - (iv) otherwise not a proper person to be a teacher in any school; or
 - (j) that the proprietor of the school has not, in relation to particulars prescribed under paragraph (a) of section 98(3) of this Act—
 - (i) furnished information required by virtue of that paragraph; or
 - (ii) notified, by virtue of paragraph (b) of that subsection, any change in such particulars,to the Registrar.
- (1B) *The Scottish Ministers need not serve a notice of complaint under subsection (1) above where they are satisfied that they urgently require to make an order under section 100(2) of this Act.*
- (1C) *A notice of complaint is a notice—*
- (a) *stating the ground of the complaint together with the full particulars of the matter complained of; and*
 - (b) *specifying—*

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- (i) the measures which, in the opinion of the Scottish Ministers, are necessary to remedy the matter complained of; and*
 - (ii) the period, beginning with the day on which the notice is served, before the expiry of which such measures require to be taken.*
- (2) If it is alleged by any notice of complaint served under this section that any [...]teacher in the school is—*
 - (a) disqualified as mentioned in sub-paragraph (i) or (ii) of subsection (1A)(h) above;*
 - (b) a prescribed person; or*
 - (c) otherwise not a proper person to be a teacher in any school,*

that [...]teacher shall be named in the notice and the particulars contained in the notice shall specify the grounds of the allegation, and a copy of the notice shall be served upon him at the same time as the notice is served.
- (3) The proprietor of a registered school may, before the expiry of the period mentioned in subsection (4) below, appeal to the sheriff principal against a notice of complaint.*
- (4) The period referred to in subsection (3) above is—*
 - (a) the period of 28 days beginning with the day on which the notice of complaint is served; or*
 - (b) the period specified under subsection (1C)(b)(ii) above,*

whichever is the shorter.

100 Determination of complaints⁸

- (1) This section applies—*
 - (a) in a case where—*
 - (i) a notice of complaint has been served under section 99(1) of this Act;*
 - (ii) no appeal under section 99(3) of this Act has been made or such an appeal has been refused;*
 - (iii) the period specified in the notice has expired; and*
 - (iv) the Scottish Ministers are not satisfied that the proprietor of the school on whom the notice is served has taken satisfactory action to remedy the matter complained of;*
 - (b) in a case where—*
 - (i) such a notice has been served;*
 - (ii) such an appeal has been made but not determined; and*
 - (iii) pending such determination, the Scottish Ministers are satisfied that there is a serious risk of harm to any pupil attending the school; or*
 - (c) where, by virtue of section 99(1B) of this Act, no such notice has been served.*
- (2) The Scottish Ministers may—*

⁸ Text amended by section 5(3) of and schedule 1 to the Act.

- (a) make an order directing the Registrar to remove the school from the register;*
 - (b) if satisfied that the school premises or any part of them are unsuitable for use as a school, make an order disqualifying those premises or any part of them from being so used;*
 - (c) if satisfied that any accommodation provided at the school premises is inadequate or unsuitable, having regard to the number, ages and sex of the pupils attending the school, make an order disqualifying that accommodation from being used as such or from being used as such for pupils—*
 - (i) exceeding such number; or*
 - (ii) of such age or sex,**as the Scottish Ministers may specify;*
 - (d) make an order—*
 - (i) imposing such conditions on the carrying on of the school; or*
 - (ii) varying any such conditions imposed by virtue of this Part of this Act,**as the Scottish Ministers think fit; or*
 - (e) if satisfied that—*
 - (i) the proprietor is not a proper person to be the proprietor of an independent school; or*
 - (ii) a teacher in the school is not a proper person to be a teacher in any school,**make an order disqualifying that proprietor from being the proprietor of an independent school or, as the case may be, that teacher from being a teacher in any school.*
- (3) Where the Scottish Ministers make an order under subsection (2) above, they shall, as soon as reasonably practicable after so doing, give notice to—*
- (a) the proprietor;*
 - (b) where, under paragraph (e) of that subsection, an order is made disqualifying a teacher, that teacher;*
 - (c) the Registrar; and*
 - (d) any other person or body the Scottish Ministers think fit,*
- of the order.*
- (3A) Subject to subsection (3C) below, the proprietor of an independent school may, before the expiry of the period of 28 days beginning with the day on which that proprietor is given notice under subsection (3)(a) above, appeal to the sheriff principal against an order under subsection (2) above.*
- (3B) A teacher disqualified by an order under subsection (2)(e) above may, before the expiry of the period of 28 days beginning with the day on which that teacher is given notice under subsection (3)(b) above, appeal to the sheriff principal against the order.*

- (3C) *The proprietor of an independent school may not appeal against an order under subsection (2)(e) above disqualifying a teacher from being a teacher in any school.*
- (4) Where by virtue of an order made [...] *under this Part of this Act* any person is disqualified either from being the proprietor of an independent school or from being a teacher in any school, then, unless the order otherwise directs, that person shall, by virtue of the order, be disqualified both from being the proprietor of an independent school and from being a teacher in any school.

101 Enforcement of orders⁹

- (1) *Any person who carries on an independent school which is not registered shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale or to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.*

- (2) If any person uses [...]—

- (a) *school premises which are or any part of such premises which is; or*
(b) *any accommodation provided at such premises which is,*

disqualified by virtue of any order made under this Part of this Act, that person shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale, or to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

- (3) If any person acts as the proprietor of an independent school, [...], while he is disqualified from so acting [...] by any such order as aforesaid, he shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale, or to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

- (3A) *If any person who is, by virtue of this Part of this Act, disqualified from being a teacher in any school—*

- (a) *endeavours to obtain a position as a teacher;*
(b) *accepts such a position; or*
(c) *teaches,*

in any school, that person shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale, or to imprisonment for a term not exceeding three months or to both such fine and such imprisonment.

- (4) For the purposes of the foregoing provisions of this Part of this Act, a person who is *subject to or deemed to be subject to a direction given under section 142 of the Education Act 2002 (c.32)* shall be deemed to be disqualified from being the proprietor of an independent school or from being a teacher in any school[...] by an order made under this Part of this Act.

102 Removal of disqualifications¹⁰

- (1) If on the application of any person the Secretary of State is satisfied that any disqualification imposed by an order made under [...] this Part of this Act is, by

⁹ Text amended by section 5(4) of and schedule 1 to the Act.

¹⁰ Text amended by section 6(1) of and schedule 1 to the Act.

reason of any change of circumstances, no longer necessary, the Secretary of State shall by order remove the disqualification.

(1A) *The Scottish Ministers shall, as soon as reasonably practicable after making a decision under subsection (1) above, give notice to—*

- (a) the applicant;*
- (b) the Registrar; and*
- (c) any other person or body the Scottish Ministers think fit, of that decision.*

(2) Any person who is aggrieved by the refusal of the Secretary of State to remove a disqualification so imposed may, *before the expiry of the period of 28 days beginning with the day on which the applicant is given notice under subsection (1A)(a) above, appeal to the sheriff principal against that refusal.*

103 Appeals under this Part¹¹

(1) *An appeal—*

(a) made under—

- (i) section 98C(6) of this Act;*
- (ii) section 97C(7) against an order made under section 98B(2) or (3) of this Act;*
- (iii) section 98E(5) of this Act;*
- (iv) section 99(3); or*
- (v) section 100(3A) against an order made under section 100(2)(a) to (d) of this Act; or*
- (vi) section 102(2) of this Act against a refusal to remove a disqualification relating to school premises or accommodation provided at such premises,*

shall be to the sheriff principal of the sheriffdom in which the school to which the appeal relates is situated; and

(b) made under—

- (i) section 98C(7) against an order made under section 98B(4) of this Act;*
- (ii) section 98C(6) of this Act;*
- (iii) section 100(3A) against an order made under section 100(2)(e) of this Act disqualifying a proprietor;*
- (iv) section 100(3B) of this Act; or*
- (v) section 102(2) of this Act against a refusal to remove a disqualification relating to a proprietor or a teacher,*

shall be to the sheriff principal of the sheriffdom in which the appellant resides or, if the appellant resides outwith Scotland, the sheriff principal of Lothian and Borders at Edinburgh.

¹¹ Text amended by section 6(2) of the Act.

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- (2) *Where the sheriff principal allows an appeal under section 98C(6)(a) of this Act, the sheriff principal—*
- (a) shall make an order directing the Registrar to register the school; and*
 - (b) may make an order imposing such conditions on the carrying on of the school as the sheriff principal thinks fit.*
- (3) *On an appeal under section 98C(6)(b) or 98E(5) of this Act, the sheriff principal may, whether or not the sheriff principal allows or refuses the appeal, make an order—*
- (a) imposing any condition on the carrying on of the school; or*
 - (b) varying or revoking any such condition imposed by virtue of this Part of this Act,*
- as the sheriff principal thinks fit.*
- (4) *On an appeal under section 99(3) of this Act—*
- (a) where the sheriff principal allows the appeal, the sheriff principal shall make an order annulling the notice of complaint; and*
 - (b) where the Scottish Ministers have, pending the determination of the appeal, made an order under section 100(2) of this Act, the sheriff principal may make an order—*
 - (i) directing the Registrar to register the school;*
 - (ii) imposing such conditions on the carrying on of the school as the sheriff principal thinks fit;*
 - (iii) varying or revoking such conditions imposed by virtue of this Part of this Act as the sheriff principal thinks fit; or*
 - (iv) removing any disqualification imposed under section 100(2)(b), (c) or (e) of this Act.*
- (5) *Where, on an appeal under section 100(3A) of this Act—*
- (a) the sheriff principal allows the appeal, the sheriff principal may make an order—*
 - (i) directing the Registrar to register the school;*
 - (ii) imposing such conditions on the carrying on of the school as the sheriff principal thinks fit;*
 - (iii) varying or revoking such conditions imposed by virtue of this Part of this Act as the sheriff principal thinks fit; or*
 - (iv) removing any disqualification imposed under section 100(2)(b), (c) or (e) of this Act; or*
 - (b) the sheriff principal refuses the appeal, the sheriff principal may make any order—*
 - (i) imposing such conditions on the carrying on of the school as the sheriff principal thinks fit; or*

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(ii) varying or revoking such conditions imposed by virtue of this Part of this Act as the sheriff principal thinks fit.

(6) Where the sheriff principal allows an appeal under section 98C(7) or (8), 100(3B) or 102(2) of this Act, the sheriff principal shall make an order removing the disqualification.

(7) A person to whom an order made by the sheriff principal under subsections (2) to (6) above relates may, before the expiry of the period of 28 days beginning with the day on which the order is made, appeal on point of law only to the Court of Session.

103A Proprietor which is body corporate etc.¹²

(1) This section applies where the proprietor of an independent school is not an individual.

(2) Any power in this Part of this Act, by virtue of which the Scottish Ministers may disqualify the proprietor of an independent school from being the proprietor of such a school includes power to so disqualify a relevant person.

(3) For the purposes of any provision in this Part of this Act relating to the disqualification of the proprietor of an independent school from being the proprietor of such a school, the proprietor shall be so disqualified if a relevant person is so disqualified.

(4) Any reference in this Part of this Act to the disqualification of the proprietor of an independent school from working with children, shall be construed as a reference to any relevant person's being so disqualified.

(5) Any reference in this Part of this Act to the proprietor of an independent school's being (or not being) a proper person to be the proprietor of such a school, shall be construed as including a reference to any relevant person's being (or not being) such a proper person.

(6) In this section, "relevant person", in relation to the proprietor of an independent school, means—

(a) in the case of such a proprietor which is a body corporate, any person who—

(i) is a director, manager or secretary of the body corporate; or

(ii) purports to act in any such capacity;

(b) in the case of such a proprietor which is a Scottish partnership, any person who—

(i) is a partner; or

(ii) purports to act in that capacity; and

(c) in the case of such a proprietor which is an unincorporated association other than a Scottish partnership, any person who—

(i) is concerned in the management or control of the association; or

(ii) purports to act in the capacity of a person so concerned.

¹² Text inserted by section 7 of the Act.

103B Date of registration or removal from register¹³

- (1) *Where, under section 98A(3) of this Act, the Scottish Ministers grant an application for registration of an independent school, the registration of that school shall, unless the Scottish Ministers otherwise direct, have effect from the beginning of the day on which the proprietor is, under section 98C(1) of this Act, given notice of the grant of the application.*
- (2) *Where, under section 103(2)(a), (4)(b)(i) or (5)(a)(i) of this Act, the sheriff principal makes an order directing the Registrar to register an independent school, the registration of that school shall, unless the sheriff principal otherwise directs, have effect from the beginning of the day on which such an order is made.*
- (3) *Where, under section 98D(3) of this Act, the Registrar removes a registered school from the register, that removal shall have effect from the beginning of the day following the day on which notice under section 98D(4) of this Act is given.*
- (4) *Where, under section 98D(1) or 100(2)(a) of this Act, the Scottish Ministers make an order directing the Registrar to remove an independent school from the register that removal shall, unless the Scottish Ministers otherwise direct, have effect from the beginning of the day following the day on which the order is made.*

PARLIAMENTARY HISTORY

66. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for the Act, the dates on which proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports were published and the references to those Reports.

Proceedings and Reports	Reference
Introduction	
29 March 2004	SP Bill 22
Stage 1	
<i>(a) Education Committee</i>	
10 th Meeting 2004	24 March 2004, cols 1203-1208
13 th Meeting 2004	5 May 2004, cols 1305-1328
14 th Meeting 2004	12 May 2004, cols 1330-1362, 1373-1404
7 th Report (15 June): Stage 1 Report on School Education (Ministerial Powers and Independent Schools) (Scotland) Bill	SP Paper 177
<i>(b) Finance Committee</i>	
12 th Meeting 2004	20 April 2004, cols 1271-1276
13 th Meeting 2004	27 April 2004, cols 1304-1308
12 May: Report on School Education (Ministerial Powers and Independent Schools) (Scotland) Bill	SP Paper SE-001
<i>(c) Subordinate Legislation Committee</i>	
17 th Meeting 2004	17 May 2004, cols 443-446
18 th Meeting 2004	25 May 2004, cols 451-453
<i>(d) Consideration by the Parliament</i>	

¹³ Text inserted by section 7 of the Act.

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24 June 2004	Cols 9591-9620, 9625-9628
Stage 2	
<i>(a) Education Committee</i>	
19 th Meeting 2004	15 September 2004, cols 1587-1610
<i>(b) Subordinate Legislation Committee</i>	
26 th Meeting 2004	28 September 2004, col 582
35 th Report (4 October): School Education (Ministerial Powers and Independent Schools) (Scotland) Bill as amended at Stage 2	SP Paper 218
Stage 3	
<i>Consideration by the Parliament</i>	
6 October 2004	Cols 10942-10965, 11058-11060
Royal Assent	
12 November 2004	

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