

# **CHILDREN AND YOUNG PEOPLE (SCOTLAND) ACT 2014**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 18 - General**

##### ***Section 96 – Assessment of wellbeing***

288. Subsection (1) applies where a person is to assess whether the wellbeing of a child or young person is being, or would be, promoted, safeguarded, supported, or adversely affected.
289. Subsection (2) provides that the person should assess the wellbeing of the child or young person by reference to the extent to which the child or young person would be safe, healthy, achieving, nurtured, active, respected, responsible and included (these concepts being known in practice as “the SHANARRI indicators”).
290. Subsection (3) provides that the Scottish Ministers must issue guidance on how the wellbeing indicators listed in subsection (2) are to be used to assess the wellbeing of a child or young person.
291. Subsections (4) and (5) provide that the Scottish Ministers must consult with local authorities, health boards and any other persons they think appropriate before a person issues or revises guidance and that, in measuring the wellbeing of a child or young person, they must have regard to the guidance issued in subsection (3).
292. Subsections (6) and (7) provide that Scottish Ministers can, by order, modify the list of wellbeing indicators in subsection (2) and before making an order must consult with each local authority, health board and any other people they think are appropriate.

##### ***Section 98 – Modification of enactments***

293. This section introduces schedule 5 which contains minor amendments to enactments and otherwise modifies enactments for the purposes of or in consequence of this Act.

##### ***Section 99 – Subordinate legislation***

294. Subsection (1) provides that any power of the Scottish Ministers to make an order or regulations includes powers to make different provision for different purposes and such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate.
295. Subsection (2) states that an order made under the following sections is subject to the affirmative procedure – sections 3(2), 7(5), 30(1), 31(2), 37(7), 43(1), 44(2), 47(2)(c) (ii), 47(4), 48(2), 51(2), 56(2), 57(2)(b), 58(2), 68(3)(b), 71(5)(b) and 96(6).

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296. Subsection (3) provides that an order made under section 101 containing provisions which add to, replace or omit any part of the text of this or any other Act is subject to affirmative procedure.
297. Subsection (4) provides that other orders made under this Act, and any regulations made under this Act, are subject to negative procedure.
298. Subsection (5) provides that this section does not apply to an order made under section 102(3).

***Section 100 – Guidance and directions***

299. This section provides that any guidance or directions issued by the Scottish Ministers in exercise of their powers under the Act can be issued either generally or for particular purposes and different guidance or directions can be issued to different persons or otherwise for different purposes. Subsection (2) requires the Scottish Ministers to publish (in a manner they consider appropriate) any guidance or directions issued by them under the Act. Subsection (3) makes clear that the requirement to publish includes a requirement to publish any revised guidance and revised or revoked directions.

***Section 101 – Ancillary provision***

300. This section allows the Scottish Ministers, by order, to make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, or in connection with or for the purposes of giving full effect to, any provision made by, or by virtue of, this Act. Such an order may also make such transitional, transitory or savings provision as Scottish Ministers consider appropriate for the purposes of, or in connection with, the coming into force of any provision.

***Section 102 – Commencement***

301. This section provides for this Part (except for sections 96, 97 and 98) to come into force on the day after Royal Assent and for the other provisions of the Act to be commenced by order made by the Scottish Ministers. Such an order may include transitional, transitory or savings provision. Subsections (2) to (5) of section 47 come into force on the day after Royal Assent thereby enabling laying of secondary legislation on the definition of children eligible for early learning and childcare at the earliest possible opportunity.

***Section 103 – Short title***

302. This section states the short title of the Act as being the Children and Young People (Scotland) Act 2014.

***Schedule 1 – Authorities to which section 2 applies***

303. **Schedule 1** lists the authorities to which the duty in section 2 of the Act (duties of public authorities in relation to the UNCRC) applies. Schedule 1 is introduced by section 3. The persons included in this schedule are those persons who it is considered are likely to, in the course of their function, engage directly with children and young people, and as such should be taking steps to secure better or further effect, within the area of its responsibility, of the UNCRC requirements.

***Schedule 2 – Relevant authorities***

304. **Schedule 2** lists relevant authorities for the purposes of Part 4 (Named Persons) of the Act. The persons included in this schedule are those persons who it is considered are likely to, in the course of their function, engage directly with children, families and adults.

### ***Schedule 3 – Listed Authorities***

305. **Schedule 3** contains listed authorities for the purposes of Part 5, who must comply with any reasonable request made of them to provide a person exercising Child’s Plan functions under Part 5 with information, advice or assistance for that purpose. The persons included in this schedule are those persons who it is considered are likely to, in the course of their functions, engage directly with children, families and adults.

### ***Schedule 4 – Corporate parents***

306. **Schedule 4** lists the persons who are “corporate parents” for the purposes of Part 9 (corporate parenting) of the Act and is introduced by section 56. The persons included in this schedule are those bodies who it is considered are likely to, in the course of exercising their functions, engage directly with looked after children.

### ***Schedule 5 – Modification of enactments***

307. **Schedule 5** makes minor amendments to enactments and otherwise modifies enactments for the purposes of or in consequence of this Act. Schedule 5 is introduced by section 98.
308. **Paragraph 1** amends the Social Work (Scotland) Act 1968 (the 1968 Act). Section 5(1) of the 1968 Act provides that local authorities shall perform their functions under certain enactments under the general guidance of the Scottish Ministers. Further, section 5(1A) enables the Scottish Ministers to issue directions to local authorities (either individually or collectively) as to the manner in which they are to exercise their functions under the enactments mentioned in subsection (1B); and a local authority is required to comply with any direction made.
309. Paragraph 1(a)(i) and (ii) of schedule 5 amend section 5 of the 1968 Act so as to bring the provisions relating to early learning and childcare (Part 6), services in relation to children at risk of becoming looked after etc (Part 12) and support for kinship care (Part 13) within the ambit of section 5(1) of the 1968 Act; the effect will be that local authorities must perform their functions in relation to early learning and childcare in so far as they apply to children falling within section 47(3)(a) of the Act (that is looked after 2 year olds), and in relation to the provision of support to kinship carers and the provision of services to those eligible to receive it under the general guidance of the Scottish Ministers. Paragraph 1(b) amends section 5(1B) of the 1968 Act so as to include the provisions on early learning and childcare in so far as they relate to looked after 2 year olds within subsection (1B) of the 1968 Act; the effect being that the Scottish Ministers will be able to issue directions to local authorities as to the manner in which they exercise their functions in relation to early learning and childcare for looked after 2 year olds. Paragraph 1(c) inserts a definition of looked after children into section 5 of the 1968 Act.
310. **Paragraph 2** amends the Education (Scotland) Act 1980 (the 1980 Act) in consequence of the provisions on early learning and childcare in Part 6 of the Act. Paragraph 2(2)(a) amends section 1(1A) of the 1980 Act so as to provide that the duty to provide adequate and effective provision of school education conferred on education authorities under section 1(1) of the 1980 Act, in relation to children who are under school age, is to be exercisable only to the extent required by section 47(1). Under the current law, the duty to provide adequate and effective school education in relation to children who are under school age is exercisable only in respect of children described in an order made under subsection (1A) of section 1 of the 1980 Act.
311. **Paragraph 2(2)(b)** removes subsections (1B) and (4A) from section 1 of the 1980 Act; those provisions set out that an order made under subsection (1A) could set out the amount of school education which children described in the order are to be provided with (subsection (1B)) and that such an order was subject to negative procedure (subsection (4A)).

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312. Section 1(5)(a)(i) of the 1980 Act defines school education in relation to pupils who are under school age. Paragraph 2(2)(c) of schedule 5 replaces that definition with the concept of early learning and childcare which has the meaning given in Part 6 of the Act (see the definition of “early learning and childcare” inserted into section 135 of the 1980 Act by paragraph 2(6)(a) of schedule 5).
313. Paragraph 2(6) amends section 135 of the 1980 Act which is an interpretation section. Paragraph 2(6)(a) inserts a definition of “early learning and childcare” which has the same meaning as in Part 6. Paragraph 2(6)(b) substitutes the definitions of “nursery school” and “nursery classes” and replaces the current definition (which gives them the same meaning in section 1(5)(a)(i) of the 1980 Act) with a definition which states that they are schools and classes which provide early learning and childcare.
314. Paragraphs 2(3) to (5) make a number of amendments to the 1980 Act in consequence of the changes made by section 93 (provision of school lunches) of this Act. Section 53A of the 1980 Act places a duty on an education authority to ensure that, through the promotion of school lunches, children who are entitled to free school lunches take up those lunches. Further, section 53A(2) requires an education authority to take reasonable steps to ensure that every pupil who is entitled to free school lunches, by virtue of section 53(3) (i.e. because they, or their parent, are in receipt of certain benefits), receives those school lunches. Paragraph 2(3) which substitutes “53” for 53(3) in section 53A(2) ensures that this duty also applies to free school lunches provided by virtue of section 95 of this Act.
315. Section 53B of the 1980 Act imposes a duty on education authorities to take reasonable steps to protect the identity of pupils receiving free school lunches. Paragraph 2(4)(a)(ii) and (c) which substitute “53” for 53(3) in both subsections (1) and (5)(b) of section 53B ensures that this duty applies to free school lunches provided by virtue of section 93 of this Act; that is by virtue of children being entitled because they are prescribed by regulations made by the Scottish Ministers; or by virtue of free school lunches being provided by an education authority under its power to provide food or drink (including school lunches) free of charge.
316. As section 93 means that free school lunches may be provided to more pupils than those who receive, or whose parents receive, certain benefits, there may be circumstances where the potential stigma associated with free school lunches will not arise, for example in the implementation of the policy to provide free school lunches to primary 1 to 3 children in Scotland. In such cases it will be neither necessary, nor possible, to protect the identity of pupils receiving free school lunches and therefore it would be inappropriate to impose that duty on education authorities. Therefore, paragraph 2(4)(a)(i) and (b) amend section 53B of the 1980 Act by inserting a new subsection (1A) to enable Ministers to prescribe, through regulations, circumstances when the duty to protect identity will not apply. Education authorities will not therefore need to take steps to protect the identity of pupils taking free school lunches when there is no risk of stigma and therefore no benefit to the pupils in doing so.
317. Paragraph 2(5) amends section 133 of the 1980 Act to provide that any regulations made under section 53(3)(c) (power of Ministers to prescribe children who are to be eligible for free school lunches) will be subject to affirmative procedure.
318. Paragraph 3 amends the Legal Aid (Scotland) Act 1986. Specifically, it amends sections 28F(1)(b) to provide that children's legal aid is available in relation to the changes made by section 84 of this Act, and it amends section 37(2) of the 1986 Act to provide that affirmative procedure applies to the powers of Scottish Ministers under the new section 28LA of the 1986 Act (inserted by section 92 of this Act).
319. Paragraph 4 amends the Children (Scotland) Act 1995 (“the 1995 Act”). Paragraph 4(2) repeals section 19 (local authority plans for services for children) of the 1995 Act in consequence of the provisions in Part 3 of the Act relating to children's services planning. Paragraph 4(3) amends section 20 (publication of information about services

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for children) of the 1995 Act to substitute a new subsection (2) which defines “relevant services” for the purposes of that section which means services provided by a local authority under or by virtue of Part II of the 1995 Act, the Children’s Hearings (Scotland) Act 2011, Part 9 or 10 of the Children and Young People (Scotland) Act 2014 or any of the enactments mentioned in section 5(1B)(a) to (n), (r) or (t) of the 1968 Act. A further connected amendment is made in paragraphs 5 and 9 of schedule 5 and is explained below.

320. [Paragraph 4\(4\)](#) amends section 44 of the 1995 Act to prevent a person publishing information which would identify a child, their address or school only in respect of proceedings before a sheriff on an application for an exclusion order under section 76(1) of the 1995 Act. This is connected to the amendment made in paragraph 12 of schedule 5 which is explained below.
321. [Paragraph 5](#) makes minor drafting amendments to the Criminal Procedure (Scotland) Act 1995.
322. [Paragraph 6](#) repeals paragraph 11 of section 37 of the Education (Scotland) Act 1996 in consequence of the repeal of section 38 of the Children & Young Persons Act 1963 which is achieved through section 94 of this Act.
323. [Paragraph 7](#) amends the Standards in Scotland’s Schools Act 2000 (the 2000 Act) in consequence of the provisions on early learning and childcare in Part 6 of the Act. Section 34 of the 2000 Act contains a power for the Scottish Ministers to issue guidance to education authorities as respects the discharge of their functions under the 1980 Act and education authorities must in discharging those functions have regard to such guidance. Paragraph 7(a) and (b) of schedule 5 amend section 34 to enable guidance to be issued by the Scottish Ministers to local authorities about their functions in relation to the provision of early learning and childcare under Part 6 of the Act.
324. [Paragraph 8](#) amends section 73(2)(a) of the Regulation of Care (Scotland) Act 2001 in consequence of the provision made at 60 of the Act relating to the provision of aftercare to young people. Section 73(2) is a power for the Scottish Ministers to make regulations to specify the manner in which assistance may be provided under subsections (1) and (2) of section 29 of the Children (Scotland) Act 1995. Section 73(2)(a) is amended so that this power may be exercised in relation to assistance provided under new subsections (5A) and (5B) which are inserted by section 60 of the Act.
325. [Paragraph 9](#) amends the Mental Health (Care and Treatment) (Scotland) Act 2003 so as to make a change to the definition of “relevant services” consequential on the repeal of section 19 of the Children (Scotland) Act 1995 by paragraph 4(2) of schedule 5 explained above.
326. [Paragraph 10](#) amends the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) in consequence of the provisions on early learning and childcare in Part 6 of the Act. Paragraph 10(2), (3) and (4)(a) amends sections 1(3), 5(3)(a) and 29(1) of the 2004 Act respectively so as to replace the concept of “prescribed pre-school child” (as under current law such children are prescribed under an order section 1(1A) and (1C) of the 1980 Act) with the concept of “eligible pre-school child” as defined in section 43(2) of the Act. Paragraph 10(4)(b) of schedule 5 removes the definition of “prescribed pre-school child” in consequence of the other amendments made by paragraph 8. It should be noted that an “eligible pre-school child” for the purposes of the early learning and childcare provisions in Part 6 of the Act will fall squarely within the definition of “pre-school child” in the 2000 Act and other enactments which refer to that concept.
327. [Paragraph 11](#) amends the Adoption and Children (Scotland) Act 2007 to provide that any orders or regulations made under section 13A(2) or 13E(1) respectively, are not to be made unless a draft of the instrument has been laid before and approved by resolution of the Scottish Parliament (affirmative procedure instruments).

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328. **Paragraph 12** amends sections 80(1), 81, 142 and 160 of the Children's Hearings (Scotland) Act 2011 in consequence of the changes made by section 84 (power to determine that deeming of person as relevant person to end) of this Act. It also amends sections 94(3), 105, 106 and 202(1) of the 2011 Act in consequence of the changes made by section 85 (grounds hearing: non-acceptance of facts supporting ground) of this Act. Further, it amends schedule 6 (repeals) of the Children's Hearings (Scotland) Act 2011 (the 2011 Act) to omit the repeal of section 44 of the Children (Scotland) Act 1995 (prohibition of publication of proceedings at children's hearing) from the list of repealed provisions in that Act. Section 44, whilst broadly replaced by provision made at section 182 of the 2011 Act, requires to be retained in relation to proceedings for exclusion orders under section 76(1) of the 1995 Act. Paragraph 4(4) of schedule 5 makes amendments to section 44 of the 1995 Act to limit its effect in this regard.