

EDUCATION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Miscellaneous

Section 19: Additional support for learning

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

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

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

and consider whether would have an adverse impact on the child's wellbeing to do so. Further to that, following the assessment and consideration of capacity and impact on wellbeing, the education authority must notify both the child and the child's parents of the results of the assessment and consideration.