

EDUCATION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: School Education

8. This Part introduces a series of new duties on education authorities and the Scottish Ministers which are designed to promote a reduction in inequalities of educational outcome experienced by pupils as a result of socio-economic disadvantage or otherwise. Further, it introduces a series of new duties on education authorities and the Scottish Ministers to establish, and work with a view to delivering, the priorities of the National Improvement Framework for Scottish education.

Section 1: Pupils experiencing inequalities of outcome

9. This section inserts new sections 3A and 3B into the Standards in Scotland's Schools etc. Act 2000 ("the 2000 Act"). Section 3A places a duty on the Scottish Ministers to have due regard to the need to reduce inequalities of educational outcome experienced by pupils as a result of socio-economic disadvantage. The Scottish Ministers must fulfil this duty when exercising their powers in relation to the delivery of school education. The duty extends to both the Scottish Government and its agencies.
10. Section 3B of the 2000 Act places an equivalent duty on education authorities. Such authorities must satisfy this duty when making strategic decisions about how to carry out their functions for the delivery of school education and when considering what steps to take to implement such decisions. Section 3B(3) requires the education authority to seek and have regard to the views of head teachers, trade unions representing teachers, pupils, parents, voluntary organisations and others when seeking to carry out their duty.
11. Section 3A(2)(b)(ii) (as read with section 3B(2)) of the 2000 Act provides for the Scottish Ministers to extend, through regulations, the scope of the duties placed on them and education authorities so as to capture other groups of children experiencing inequalities of educational outcome in addition to those who are impacted by socio-economic disadvantage. This enabling power is subject to affirmative procedure.
12. The term 'school education' (which is defined in section 58(2) of the 2000 Act as having the meaning given in section 135(1) of the 1980 Act) extends to the delivery of early learning and childcare as defined in section 46 of the Children and Young People (Scotland) Act 2014.

Section 2: National Improvement Framework

13. This section inserts new sections 3C and 3D into the 2000 Act. Section 3C requires the Scottish Ministers to prepare a statutory National Improvement Framework for Scottish education, to be published and annually reviewed by the Scottish Ministers. The National Improvement Framework is prepared in pursuance of the duty imposed on the Scottish Ministers by section 3(1) of the 2000 Act (duty to endeavour to secure improvement in the quality of school education provided in Scotland). In reviewing the Framework, the Scottish Ministers must seek and have regard to the views of specified

persons (education authorities, representatives of teachers, pupils and parents) and must evidence the way in which this has been achieved.

14. Section 3D of the 2000 Act requires that where education authorities endeavour to secure improvement in the quality of school education under section 3(2) of the 2000 Act, they must do so with a view to achieving the strategic priorities set out in the National Improvement Framework. In this context, school education requires to be education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential (as described in section 2 of the 2000 Act).
15. Finally, section 2(3) repeals section 4 (national priorities in education) and section 5 (education authority's annual statement of improvement objectives) of the 2000 Act and section 2(4) makes consequential amendments to the interpretation provisions in section 58(1) of the 2000 Act.

Section 3: Plans and reports

16. **Section 3** inserts new sections 3E, 3F, 3G, 3H and 3I into the 2000 Act.
17. Section 3E requires the Scottish Ministers, before the beginning of “the planning period”, to prepare and publish a plan describing the steps they intend to take during that period to reduce the inequalities of outcome experienced by pupils mentioned in section 3A(2) and the educational benefits they intend to secure as a result of taking those steps. This annual plan may form part of the National Improvement Framework. The “planning period” is defined as the period of 12 months beginning with such day as the Scottish Ministers may prescribe by regulations. The regulations would be subject to the negative procedure.
18. Section 3F requires education authorities, before the beginning of the planning period, to prepare and publish “annual plans” describing the steps they intend to take during the planning period in pursuance of the National Improvement Framework for Scottish education. The annual plan will also describe the steps they intend to take to reduce the inequalities of outcome experienced by pupils mentioned in section 3A(2) and the ways in which they will consult key partners when deciding how this should be achieved. Finally, the plan must set out any educational benefits they intend to secure as a result of taking all of these steps. Education authorities must give a copy of the annual plan to the Scottish Ministers as soon as reasonably practicable after publishing the plan. Where a new National Improvement Framework has been published, education authorities must review and, where necessary, revise their annual plan. Such a revised plan must be published and a copy given to the Scottish Ministers.
19. Sections 3G and 3H require both education authorities and the Scottish Ministers to prepare and publish “annual reports” setting out the steps they have taken in pursuance of the National Improvement Framework for Scottish education. These reports will also describe the steps they have taken to reduce the inequalities of outcome experienced by pupils mentioned in section 3A(2). Further, they will set out any educational benefits secured as a result of taking these steps. In preparing their annual report, Scottish Ministers must take account of relevant international benchmarking data. In addition, an education authority's annual report must set out the steps taken by the education authority to fulfil its duty under section 3B(3) of the 2000 Act (duty to seek and have regard to the views of, and provide appropriate advice and support to, specified persons). It may also set out steps taken by a person other than the education authority with a view to reducing inequalities of outcome experienced by pupils mentioned in section 3A(2) where that activity was included in the children's services plan for the authority's area (required by section 8 of the Children and Young People (Scotland) Act 2014). The education authority's annual report must be given to the Scottish Ministers as soon as reasonably practicable after publishing. The Scottish Ministers must, as soon as reasonably practicable after publishing an annual report, lay a copy before the Scottish Parliament.

20. Section 3I places a duty on education authorities to prepare and publish an annual statement which sets out the way in which they will encourage equal opportunities and, in particular, the observance of the “equal opportunity requirements and to report thereon. Section 3I restates the previous duty which was contained in section 5 of the 2000 Act and which is repealed by section 2(3) of the Act. “Equal opportunities” and “equal opportunity requirements” are defined for the purposes of section 3I by reference to the meanings given to those expressions in Schedule 5 to the Scotland Act 1998.
21. Subsections (3), (4), (6) and (7) of section 3 amend section 6, section 8 and section 58(1) of the 2000 Act, re-naming “school development plans” as “school improvement plans”, and requiring that those plans take account of the relevant education authority’s annual plan (including any revised plan) and annual report, thereby aligning those plans with the National Improvement Framework.
22. Subsection (5) amends section 7 of the 2000 Act, requiring that education authorities take into account both the National Improvement Framework and their annual plan (published under section 3F of the 2000 Act) when defining and publishing measures and standards of performance for schools in their area.

Section 4: Guidance

23. **Section 4** amends section 13 of the 2000 Act to require that the Scottish Ministers consult specified persons before issuing any guidance relating to an education authority’s duties under sections 3B (pupils experiencing inequalities of outcome) and 3D (carrying out of education authority duty under section 3(2)) of the 2000 Act (as inserted by sections 1 and 2 respectively of the Act). Those persons include education authorities, parents of pupils, voluntary organisations and any other persons that the Scottish Ministers think appropriate.

Section 5: Duties in relation to promotion of health

24. **Section 5** amends section 2A of the 2000 Act. New subsection (4A) requires an education authority to publish an annual statement setting out the ways in which the authority proposes to carry out its health-promoting duties in section 2A(2) of that Act. New subsection (4B) imposes a requirement on education authorities to prepare and publish an annual report describing the ways in which the education authority has fulfilled its health-promoting duties during the “relevant period” (defined in new subsection (4C) as meaning the period of 12 months beginning with the day after the day on which the annual statement is published). The section restates duties previously set out under section 5 of the 2000 Act (repealed by section 2(3) of this Act).

Section 6: Parental involvement

25. **Section 6** amends section 2 of the Scottish Schools (Parental Involvement) Act 2006 (the “2006 Act”) so as to insert a new subsection (4A), requiring an education authority to publish its strategy for parental involvement prepared under section 2(1) of that Act. An education authority must also publish any such strategy revised by it under section 2(3)(b) of the 2006 Act.
26. Subsection (3) inserts a new section 2A into the 2006 Act, requiring an education authority to prepare and publish an annual report on the activities undertaken by the authority during “the relevant period” in pursuance of the general policies contained within the strategy. The “relevant period” is defined as meaning the 12 month period ending with the day on which the annual report is published. The section restates duties previously set out under section 5 of the 2000 Act (repealed by section 2(3) of this Act).

Part 2: Gaelic Medium Education

Assessments: primary education

27. This Part sets out the assessment process to be followed by an education authority following receipt of a parental request to assess the need for GMPE, as well as imposing duties on an education authority to promote and support GME and GLE and on Bòrd na Gàidhlig to publish guidance on GME and GLE.

Section 7: Assessment requests

28. Subsection (1) provides that the parent of a child who is under school age and who has not commenced attendance at a primary school may make a request to the education authority in whose area the child is resident for an assessment of the need for GMPE. Section 18(1) explains that the term “parent” has the same meaning as in the 1980 Act and so such a request can be made by the guardian of, or any person who has parental responsibilities in relation to, such a child.
29. Subsection (2)(a) states that a parental request under subsection (1) can only be made in relation to one child, who must be specified in the request. However, subsection (2)(b) states that a request under subsection (1) must contain, or be accompanied by, evidence that there is a demand for GMPE from other parents of children resident in that same education authority area and who are in the same year group as the specified child. Subsection (3) provides that a parental request may also contain evidence that there is a demand for GMPE from parents of other children under school age who are resident in the same education authority area but who are in a different year group to the specified child.
30. Subsection (4) provides for the meaning of “year group” to be the group of children under school age who will be in the same yearly stage of education on commencing primary school in the area of the education authority that has received the request.
31. Subsections (5) and (6) state that the Scottish Ministers may, by regulations, make further provision about parental requests under section 7(1), including provision about the form of the request and how it should be made; information to be included in, or accompany, the request; and evidence for the purposes of subsections (2) and (3). These regulations are subject to the negative procedure.

Section 8: GMPE assessment areas

32. Subsections (1) and (2) require that, on receipt of a parental request, an education authority must designate the area in relation to which it will undertake its assessment of the need for GMPE. Subsection (3) states that that area will be referred to as a ‘GMPE assessment area’. Subsections (4) and (5) stipulate the broad approach that the education authority must take to designating a GMPE assessment area. An education authority must, so far as reasonable, seek to accommodate the demand for GMPE evidenced in the request and any other demand that the authority knows about from parents of children resident in that education authority area who are under school age and have not yet commenced attendance at a primary school. An education authority must also take into account factors that might affect how that demand could reasonably be met, such as the residence of the children who the demand relates to, accessibility in relation to the potential provision of GMPE in that GMPE assessment area and guidance issued by Bòrd na Gàidhlig.

Section 9: Initial assessments

33. Subsection (1) states that this section applies where an education authority receives a parental request under section 7(1). Subsection (2) further explains that, on receipt of such a request, an education authority must make an initial assessment of the need for

GMPE in relation to the designated GMPE assessment area and the year group of the child specified in the request.

34. Subsections (3) and (4) state that, in making an initial assessment, an education authority must take into account any information it holds - including any information contained in the parental request - that relates to the demand for GMPE in the designated GMPE assessment area from parents of children resident in that area and who are in either the same or a different year group as the child specified in the request, provided that the children in those year groups are under school age (see the definition of “year group” in subsection (4) of section 7).
35. Subsection (5) provides that, following an initial assessment, an education authority must decide that there is a potential need for GMPE in the GMPE assessment area if it is satisfied that the condition in subsection (6) is met. If an education authority is not satisfied that that condition is met, the authority must decide that there is no potential need for GMPE in that area. The condition in subsection (6) is that the child specified in the request and the children resident in that GMPE assessment area who are in the same year group as the specified child and in respect of whose parents the authority holds information about demand as mentioned in section 9(3)(a), total 5 or more in number.
36. Subsection (7) gives the Scottish Ministers the power to amend subsection (6) by regulations so as to substitute a different total number of children. The Scottish Ministers may exercise this power so that a different number applies in different education authority areas. These regulations are subject to the affirmative procedure.
37. Subsection (8) highlights that this section is subject to section 11 (which explains the circumstances in which there is no duty on an education authority to undertake an initial assessment following receipt of a parental request).

Section 10: Duties of education authority

38. This section explains the duties that apply to an education authority after it has undertaken an initial assessment of the need for GMPE in relation to a GMPE assessment area.
39. Subsection (1) states that, where an education authority decides under section 9(5)(a) that there is a potential need for GMPE in the GMPE assessment area, the authority must either carry out a full assessment of the need for GMPE in accordance with section 12 or, without carrying out such an assessment, simply exercise its discretion to take such steps as are necessary to secure the provision of such GMPE as it considers appropriate in the GMPE assessment area.
40. Subsection (2) states that where an education authority decides under section 9(5)(b) that there is no potential need for GMPE in the GMPE assessment area, the authority must either take no further action to provide GMPE in relation to that parental request, carry out a full assessment of the need for GMPE in that area in accordance with section 12 or, without carrying out such an assessment, take such steps as are necessary to secure the provision of such GMPE as it considers appropriate in the area.
41. Whatever action an education authority decides to take following an initial assessment of the need for GMPE, subsections (3) and (4) make it clear that the authority is obliged to notify the parent who made the request, the parents of other children in the same year group who requested GMPE and the parents of other children who were included in the parental request as evidence of demand in a different year group. According to subsection (5), the authority is also obliged to publish its determination as to whether or not there is a potential need for GMPE, its decision about what action to take, the reasons for its determination and decision and information about the GMPE assessment area in respect of which it made its determination. Such information must be published on the authority’s website no later than 6 weeks after receipt of the request that triggered the assessment.

42. Where an education authority decides under either subsection (1) or (2) to take steps to secure the provision of GMPE, subsection (6) requires that the authority must ensure that the GMPE is provided in the GMPE assessment area within such period after making the decision as is reasonable in all the circumstances.

Section 11: Requests that need not be considered

43. Subsection (2) states that an education authority need not comply with the duty in section 9(2) to undertake an initial assessment in relation to a parental request under section 7(1) (a “further request”) where the conditions in subsection (1) apply. These are that a parental request under section 7(1) (the “original request”) was made within the preceding 2 years in relation to the same GMPE assessment area and an initial assessment was carried out in relation to that request. This exemption from the duty in section 9(2) applies whatever the outcome of the earlier initial assessment.
44. Subsection (3) clarifies that the exception in subsection (2) applies irrespective of whether the further request is made by the same person who made the original request or by another person, or is made by a parent of a child in the same or a different year group from the child whose parent made the original request, or whether or not GMPE is in fact being provided in that GMPE assessment area.
45. However, subsection (4) gives the Scottish Ministers the power to direct that an education authority must comply with its duty under section 9(2) to undertake an initial assessment, even if the conditions in subsection (1) are met, where the Scottish Ministers consider this appropriate.

Section 12: Full assessments

46. This section applies where an education authority has received a parental request under section 7(1) and has decided, under section 10, to carry out a full assessment of the need for GMPE in a GMPE assessment area.
47. Subsections (2) and (3) state that, in undertaking a full assessment, an education authority must provide Her Majesty’s inspectors of schools (in practice this means Education Scotland), Bòrd na Gàidhlig, Comann nam Pàrant and the National Parent Forum of Scotland with details of the request and the information the authority took into account under section 9(3) in making an initial assessment. The education authority must seek the views of those bodies on those matters and on the authority’s determination under section 9(5) as to whether there is, or is not, a potential need for GMPE in the GMPE assessment area. Subsection (4) provides that Education Scotland and Bòrd na Gàidhlig must provide these views within 4 weeks of being asked. Comann nam Pàrant and the National Parent Forum of Scotland are under no duty to provide these views, but may do so; and subsection (6)(a) of this section requires that the education authority must have regard to all views provided within that 4 week period, including any of Comann nam Pàrant and the National Parent Forum of Scotland, when undertaking the full assessment.
48. Subsection (5) explains that, at the completion of a full assessment, an education authority must decide whether or not to secure the provision of GMPE in the GMPE assessment area. Subsection (5) is subject to subsection (7), which provides that the authority must decide to secure the provision of GMPE in the GMPE assessment area unless, having regard to the matters in subsection (6), the authority considers it would be unreasonable to do so.
49. Subsection (6) states that an education authority must have regard to a number of mandatory factors in making the decision under subsection (5). The mandatory factors are set out in paragraphs (a) to (l) of subsection (6). Because education authorities have the power under section 23 of the 1980 Act to provide education to pupils belonging to other education authority areas, these factors include, at paragraphs (f) and (g), a requirement for education authorities to have regard to the location of GMPE

provision in neighbouring education authorities as well as the extent to which children resident in another education authority, adjacent to the GMPE assessment area, could access GMPE in that area and the extent to which children resident in the GMPE assessment area could access GMPE in another education authority, adjacent to the GMPE assessment area.

50. Subsection (8) gives the Scottish Ministers the power by regulations to modify subsections (3) and (6). This power may be exercised to change the bodies from whom views must be sought during the full assessment or to amend, remove or add a factor to the list of factors that an education authority must have regard to in deciding whether or not to secure the provision of GMPE in that GMPE assessment area.

Section 13: Procedure following full assessment

51. This section explains the duties that apply to an education authority following completion of a full assessment of the need for GMPE in a GMPE assessment area under section 12.
52. Subsections (2), (4) and (5) provide that an education authority must publish on its website, no later than 10 weeks after deciding to carry out a full assessment, a report that sets out its decision on whether or not to secure the provision of GMPE in that GMPE assessment area. The report must also set out the reasons for the authority's decision with reference to its duty under section 12(7) and each of the factors listed in section 12(6). Finally, the report must set out the period within which the authority thinks it would be reasonable for GMPE to be provided where it has taken the decision to secure GMPE provision. Therefore, an education authority must complete a full assessment no later than 10 weeks after deciding to carry out a full assessment.
53. Subsection (3) requires the authority to send a copy of the report to the parent who made the request and to other parents who were considered in the authority's assessment of the level of demand for GMPE at the initial assessment stage.
54. Subsections (6) and (7) state that, where a full assessment leads to the authority deciding to secure the provision of GMPE in the GMPE assessment area, it must take the necessary steps to secure the provision of such GMPE as it considers appropriate. The authority must do this within such a period as is reasonable in all the circumstances.

Early learning and childcare

Section 14: Power to extend Part to early learning and childcare

55. This section gives the Scottish Ministers the power, by regulations, to require an education authority to treat a parental request made under section 7(1) as a request to assess the need for GME at the level of early learning and childcare. As enacted, the Act provides that the assessment process applies only to primary school education. Specifically, subsections (1) and (2) provide that the Scottish Ministers may, by regulations, make such provision as they consider necessary or expedient to require an education authority to treat a parental request made under section 7(1) as a request to assess the need for GME at the level of early learning and childcare provided under sections 1(1) and 1(1A) of the 1980 Act. This means the mandatory amount of early learning and childcare that an education authority is required to secure under section 47(1) of the Children and Young People (Scotland) Act 2014. Section 14(4)(a) provides that such regulations may do so by modifying Part 2 of the Act or any other enactment. Section 14(4)(b) provides that such regulations may do so by providing that the Act or any other enactment applies with or without such modifications as may be stated in the regulations. These regulations will be subject to the affirmative procedure.

Promotion, support and guidance

Section 15: Duty to promote and support Gaelic medium education and learning

56. Subsection (1) provides that, irrespective of whether GME and GLE are in fact provided in an education authority area, an education authority must promote the potential provision of school education in its area by means of GME by publicising the right to make a request under section 7(1) and promote the potential provision of school education in its area by means of GLE in such manner as it thinks appropriate.
57. Subsections (2) to (4) provide that, where an education authority secures the provision of GME or GLE in pursuance of its duty under the 1980 Act to secure the provision of school education, including mandatory early learning and childcare, it must promote and support that provision so far as reasonably practicable.
58. Subsection (5) provides that the duty of promotion under subsection (2) includes a duty to take reasonable steps to publicise the existing provision of GME and GLE in its area, in such manner as it thinks appropriate.
59. Subsection (6) provides that the duty of support under subsection (2) requires an education authority to take reasonable steps to ensure that teachers in any class providing GME or GLE have such resources, training and opportunities as are reasonably necessary to adequately and effectively provide that education, and that pupils in any such class have such resources as are reasonably necessary to adequately and effectively receive and benefit from that education. An education authority must also have regard to any guidance on Gaelic education published by Bòrd na Gàidhlig under section 9 of the Gaelic Language (Scotland) Act 2005 (“the 2005 Act”) when carrying out its duty of support.

Section 16: Guidance

60. This section amends section 9 of the 2005 Act (guidance on Gaelic education) to convert the existing power of Bòrd na Gàidhlig to issue guidance on Gaelic education into a duty. Subsection (3) clarifies that this guidance may, in particular, cover the provision of Gaelic education in schools. Subsection (4) ensures that any relevant public authority having functions relating to Gaelic education must have regard to the guidance in carrying out its functions. A “relevant public authority” is defined in section 10(2) of the 2005 Act to mean a Scottish public authority, the Scottish Parliamentary Corporate Body or a cross-border public authority in relation to functions exercisable in Scotland that do not relate to a reserved matter. The meaning of “Scottish public authority” is given by section 126 of the Scotland Act 1998 to be “any public body, public office or holder of such an office whose functions are exercisable only in or as regards Scotland”.

Definitions: other Acts

Section 17: Meaning of “Gaelic education” and “Gaelic medium education”

61. This section makes amendments to the 2005 Act and the Schools (Consultation) (Scotland) Act 2010 to ensure that the definitions of “Gaelic education” and “Gaelic medium education” in those Acts are consistent with the definitions given in this Act.

Interpretation of Part 2

Section 18: Interpretation of Part 2

62. This section contains definitions relevant to Part 2, including definitions of “full assessment”, “Gaelic language”, “Gaelic learner education”, “Gaelic medium education”, “Gaelic medium primary education”, “GMPE”, “GMPE assessment area”, “initial assessment”, “primary education”, “primary school”, “specified child” and

“year group”. Various other expressions are ascribed the meanings given to them by section 135 of the 1980 Act.

Part 3: Miscellaneous

Section 19: Additional support for learning

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

New section 3: Children and young persons: capacity

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

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

68. Paragraph 3 of the schedule to the Act inserts new section 3A into the 2004 Act. Section 3A(3) requires education authorities:
 - (a) to carry out an assessment of the **capacity** of the child to do something (such as to request an assessment of their additional support needs under section 6 as amended by paragraph 4 of the schedule to the Act), or to have something done in relation to them (such as the requirement on an authority to provide the child with information and advice as to the additional support the child requires under section 7(8)(aa) as inserted by paragraph 5 of the schedule), and

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

New section 3B: Assessment of wellbeing

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

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

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

Amendment of [section 6](#): children and young persons for whom education authority is responsible

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

Amendment of [section 7](#): children and young persons for whose school education an education authority is not responsible

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

Amendment of [section 8](#): assessments and examinations

79. Section 8(1) of the 2004 Act applies where an education authority proposes to establish whether a child or young person has additional support needs or requires, or would require, a co-ordinated support plan or a review of such a plan, and where "an appropriate person" requests that the education authority arranges for a child or young person to undergo an assessment or examination to establish this. In that case the authority must comply with such an assessment request unless it is unreasonable.
80. Paragraph 6(a) of the schedule to the Act inserts new section 8(2)(b)(ia) into the 2004 Act, the effect of which is that a child aged 12 years or over is "an appropriate person" for the purposes of subsection (1) and may therefore make an assessment request. Paragraph 6(b) of the schedule inserts new subsection (2A) into section 8 to provide that a child aged 12 years or over is only an appropriate person and therefore able to make an assessment request if:
- a. the education authority is satisfied there *has not been* a significant change in the circumstances of the child since the child made a request referred to in section 6(2), 7(1) or 10(4) of the 2004 Act. That is to establish if the child has additional support needs, if the child requires, or would require a co-ordinated support plan, or if the child requires a review of such a plan was made, thus

indicating a significant change which might have affected the child's capacity since it was assessed by the authority under those sections;

- b. where the authority consider that *there has been* a significant change in the circumstances of the child since the child made a request in section 6(2), 7(1) or 10(4), the authority is satisfied that the child has capacity to make the assessment request under section 8(1) at the time the request is made; or
- c. no such request was made by the child under section 6(2), 7(1), or 10(4), and the authority is satisfied that the child has capacity to make an assessment request under section 8(1).

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

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

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

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

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

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

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

- 84. Paragraph 10 of the schedule to the Act amends section 11 of the 2004 Act which specifies further matters in relation to the establishment and review of co-ordinated support plans. This section enables parents and young people to be informed: (a) that it is proposed by the education authority to establish whether the child or young person requires a co-ordinated support plan or a review of the co-ordinated support plan prepared; and (b) of the outcome of those proposals and, as a result of the outcome, any rights to make a reference to the Additional Support Needs Tribunal for Scotland under section 18 of the 2004 Act. The effect of new section 11(3)(aa) is to require an authority to provide this information to a child aged 12 or over (provided the child has capacity to understand the information and where it would not adversely impact their wellbeing to receive information as previously set out by section 6(3)(aa), 7(3)(aa) and 10(5)(aa)) where the authority's proposal arises as a result of a request to:
 - establish whether the child has additional support needs or requires a co-ordinated support plan under section 6(2), or,

- establish whether the child has additional support needs or would require a co-ordinated support plan if the education authority were responsible for the education of the child under section 7(2), or,
 - review a co-ordinated support plan under section 10(4).
85. [Section 11\(5\)](#) requires education authorities to provide a copy of any co-ordinated support plan or amended plan prepared to parents and young people. The effect of new section 11(5)(a)(ia) is to require authorities to provide copies of these plans to children aged 12 or over with capacity where they have made the original request either to establish that they require a co-ordinated support plan or that it should be reviewed. Section 11(5)(a) will still require the authority to give a copies of these plans to their parents in this scenario.

Amendment of [section 12](#): duties to seek and take account of information

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

Amendment of [section 13](#): provision of information etc. on occurrence of certain events

87. Paragraph 12(a) of the schedule to the Act is a technical consequential amendment to section 13(4A) of the 2004 Act required as a result of the new definition of “capacity” in the substituted section 3 of the 2004 Act
88. Paragraph 12(b) of the schedule to the Act inserts new section 13(5)(za) which requires an education authority to obtain consent from a child who is aged 12 years or over and who has capacity to give consent to the authority providing an appropriate agency or agencies with information in relation to post-school transition. Paragraph 12(b) also makes a consequential amendment to subsection (5)(a) to make it clear that, in relation to a child who is younger than 12 years, the parent requires to give this consent.

Amendment of [section 14](#): supporters and advocacy

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

Amendment of [section 15](#): mediation services

90. Paragraph 14 of the schedule to the Act inserts new subsection (1A) into section 15 which places a duty on education authorities to seek and take account of the views of a child in respect of a matter disagreed upon which is the subject of mediation (for example in a mediation between the parent of the child and the education authority in relation to a concern about the provision to meet the child’s additional support needs).

Amendment of [section 16](#): dispute resolution

91. Paragraph 15(a) of the schedule to the Act amends section 16(1) of the 2004 Act to allow the Scottish Ministers by regulations to make provision about the resolution of disputes between an education authority and a child aged 12 or over (who the authority is satisfied has capacity to express a view or make a decision for the purpose of resolving disputes to do so) concerning the exercise of the authority’s functions under the 2004 Act.

92. Paragraph 15(b) of the schedule to the Act amends section 16(3) to make it clear that such regulations (a) must not require any child to use any procedure established in accordance with the regulations to resolve any dispute with the authority, nor pay any fee or charge for using any procedure, and (b) do not affect the child's entitlement to refer any matter to the Tribunal.

Amendment of [section 18](#): references to Tribunal

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

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

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

Amendment of section 26: publication of information by education authority

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

Amendment of section 27: code of practice and directions

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

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

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

Amendment of section 29: interpretation

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

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

106. Paragraph 22 of the schedule to the Act amends section 31 of the 2004 Act which requires education authorities, where they have to inform parents or young persons of any matter, to do so in writing or alternative permanent form. The amendment extends this requirement to apply also in relation to children aged 12 or over.

Section 31A: Provision of support service

107. Paragraph 23 of the schedule to the Act inserts new section 31A into the 2004 Act which requires the Scottish Ministers to secure the provision of a support service to be available free of charge to children aged 12 or over who wish to exercise, or are considering exercising, their rights or whose parents wish to exercise, or are considering exercising, their rights in relation to their children under the 2004 Act.
108. Section 31A(2) describes a support service as a service under which:

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

Orders, regulations and rules

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

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

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

[Section 20: Children unable to attend early learning and childcare](#)

113. Section 14 of the 1980 Act gives the Scottish Ministers the power (where a pupil is unable, or it would be unreasonable to expect a pupil, to attend a suitable educational establishment to receive education due to some extraordinary circumstance) and the duty (where a pupil is unable, or it would be unreasonable to expect a pupil, to attend a suitable educational establishment to receive education due to the child’s prolonged ill health) to make special arrangements for the pupil to receive education elsewhere than at an educational establishment.

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

Section 21: Learning hours

118. **Section 21** inserts new section 2ZA into the Education (Scotland) Act 1980, and makes amendments of section 133 of that Act.
119. Section 2ZA(1) places a duty on education authorities and managers of grant-aided schools to make available each year to pupils for whose education they are responsible no fewer than the number of learning hours prescribed by Scottish Ministers.
120. Section 2ZA(2) provides that education authorities are responsible for the school education of pupils who belong to their authority area (a concept which is determined by the residence of their parents), and who either attend a school managed by that authority, or are educated by virtue of arrangements made by that authority. Managers of grant-aided schools are responsible for the school education of pupils who attend their schools, other than where the pupil is attending in consequence of arrangements made by that pupil's education authority; in which case, the authority remains responsible.
121. Section 2ZA(3) allows that education authorities may make available fewer than the prescribed hours to a pupil in the circumstances outlined in section 2ZA(4).
122. Section 2ZA(4) identifies the circumstances in which education authorities may make available fewer than the prescribed hours as being: where the authority is satisfied that making available the prescribed hours to the pupil would adversely affect that pupil's wellbeing; where matters outwith the control of the authority make it impracticable to make available the prescribed number of hours during the relevant year; and in other circumstances prescribed by Scottish Ministers in regulations.
123. Section 2ZA(5) provides that where an education authority makes available fewer than the prescribed hours, no fewer than the reduced hours must be made available.

124. Section 2ZA(6) defines “reduced hours” as being the prescribed hours less the number of learning hours not made available to the pupil during the relevant year due to the circumstances identified in section 2ZA(4). The prescribed hours can thereby only be reduced in so far as they need to be, directly to address those circumstances.
125. Section 2ZA(7) requires that education authorities assess any potential adverse impact of the prescribed number of hours on a child’s wellbeing with reference to the factors listed; i.e. the extent to which the pupil is or would be safe, healthy, achieving, nurtured, active, respected, responsible and included.
126. Section 2ZA(8) provides that subsections (3) to (7) apply to the managers of grant aided schools as they apply to education authorities.
127. Section 2ZA(9) provides that regulations prescribing the number of learning hours (under 2ZA(1)); prescribing the additional circumstances in which education authorities and managers of grant-aided schools may provide fewer than the prescribed hours (under section 2ZA(4)(c)); or defining “learning hours” (under section 2ZA(12)) may include transitional or transitory provision, and make different provision for different purposes and for different types of pupil.
128. Section 2ZA(10) allows Scottish Ministers to modify, by regulations, the list of factors in subsection (7) to which education authorities and managers of grant-aided schools should have regard when considering whether providing a child with the prescribed number of learning hours would adversely affect their wellbeing.
129. Section 2ZA(11) requires Scottish Ministers to consult before making regulations prescribing the number of learning hours (under 2ZA(1)); prescribing the additional circumstances in which education authorities and managers of grant-aided schools may provide fewer than the prescribed hours (under section 2ZA(4)(c)); modifying the list of factors to which education authorities and managers of grant-aided schools should have regard when considering whether providing a child with the prescribed number of learning hours would adversely affect their wellbeing (under section 2ZA(10); or defining “learning hours” (under section 2ZA(12).
130. Section 2ZA(12) defines “learning hours” as hours of school education of a type prescribed by Scottish Ministers by regulations. “School education” is defined to exclude early learning and childcare. A “school year” is defined as the 12 month period beginning on 1 August.
131. [Sections 21\(3\)\(a\)](#) and (b) amend section 133 of the 1980 Act (regulations, etc.) to provide that regulations made under new section 2ZA(1) are subject to the affirmative procedure.
132. [Sections 21\(3\)\(c\)](#) and (d) amend section 133 of the 1980 Act to extend to managers of grant-aided schools, as well as to education authorities, the right to apply to Scottish Ministers for a direction that any regulations made under section 2ZA(1) shall not apply to those managers or that authority, or shall only apply subject to such modification as the Scottish Ministers may specify. The Scottish Ministers may only make such a direction if it appears to them that application of the regulations would be unreasonable.

Section 22: Provision of school meals

133. Section 22(1) and (2) of the Act substitutes a new section 53 (provision of school meals) into the 1980 Act.
134. Section 53(1) provides that the section applies to pupils in attendance at public schools and other educational establishments under the management of an education authority (this includes eligible pre-school children receiving early learning and childcare at education authority managed providers) and to pupils who receive their funded entitlement to early learning and childcare under section 35 of the Standards in Scotland’s Schools etc. Act 2000; that is, those who attend a partner provider setting.

135. Subsection (2) of the replacement section 53 requires an education authority to provide pupils with a free school lunch if they meet one of the income-related criteria set out in subsection (7). An authority may also *secure* the provision of free school lunches to such pupils. This means that education authorities can provide the lunches directly themselves, or they can pass on funding or arrangements to others, including partner providers delivering the entitlement to early learning and childcare. The option of securing a free school lunch is especially important for eligible pre-school children receiving their early learning and childcare entitlement at a partner provider, as those can be small businesses, third sector organisations or childminders; and it is important to ensure that, while the legal responsibility is on the education authority to provide a free school lunch to those eligible, allowing the authority to secure the provision of the lunches by others, gives it flexibility in terms of the delivery or physical provision of the meals.
136. Subsection (3) provides that an education authority has power to provide or secure the provision of other food and drink to pupils already receiving a free school lunch under subsection (2), because they satisfy the eligibility criteria set out in subsection (7). Further, an education authority has power to provide or secure the provision of food and drink, including school lunches, to pupils who are not entitled to a free school lunch under subsection (2).
137. Subsection (4) provides that where an education authority chooses to provide or secure the provision of food or drink to pupils under subsection (3), it can either do so free of charge or charge pupils for it.
138. Subsection (5) provides that an education authority may exercise its power under subsection (4) to provide or secure the provision food and drink free of charge to pupils who satisfy such conditions as the authority sees fit. For example, the education authority could choose to provide or secure free food and drink to pupils who are in a particular yearly stage of education. It also allows education authorities to provide or secure food and drink at such times of the day as they see fit, for example, at lunchtime or at a breakfast club.
139. Subsection (6) makes clear that an education authority which chooses to charge for food or drink under subsection (4) must charge the same amount for the same quantity of food and drink at each school within the education authority. This means they cannot charge one pupil one amount and another pupil a different amount for the same product (within the same school or another school within the same local authority); for example, a sandwich.
140. Subsection (7) sets out the criteria for eligibility for those children to whom the education authority is obliged to provide a free school lunch under subsection (2). A pupil falls within subsection (7)(a) where they, or their parents, are in receipt of income support, an income-based job seekers allowance, or an income-related allowance. A pupil will fall within subsection (7)(b) if their parents are in receipt of support provided under Part 6 of the Immigration and Asylum Act 1999 (support given to those whose asylum claims are on-going and support given to refused asylum seekers).
141. Subsection (8) enables the Scottish Ministers, by regulations, to modify the eligibility criteria for free school lunches set out in subsection (7). This means that the Scottish Ministers can make changes to the eligibility criteria resulting from, for example, changes to the welfare system, or where they wish to extend free school lunches to a new category of pupil; for example, an additional yearly stage of primary school.
142. Subsection (9) provides that an education authority must provide facilities, as it considers appropriate, for pupils who bring their own food and drink to schools and other educational establishments under their management: for example, seating for pupils who bring packed lunches. This duty does not extend to partner provider premises; therefore education authorities do not have a duty to provide or to secure the provision of facilities for pupils at partner provider settings.

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

Section 23: Clothing grants

149. This section inserts new section 54A into the 1980 Act. Section 54A introduces a regulation-making power enabling the Scottish Ministers to make regulations requiring an education authority to provide grants of a specified amount for school clothing for

certain specified pupils. Subsection (4) defines “specified” as meaning specified in regulations.

150. Subsection (2) provides that such regulations may make the payment of a grant subject to specified conditions (including conditions as to repayment). Subsection (3) provides that the regulations can make different provision for different purposes. For example, a different amount might be specified for secondary school pupils compared with primary school pupils.
151. As stated above, section 22(6) of the Act amends section 133 of the 1980 Act (regulations etc.) to provide that the section 54A regulation-making power will be subject to affirmative procedure.

Section 24: Enforcement of statutory duties

152. Section 24 of the Act amends section 70 of the 1980 Act. Currently, section 70(1) of the 1980 Act allows the Scottish Ministers to make an order declaring an education authority, the managers of a school or educational establishment or other persons to be in default of a duty following a complaint by any person that the body concerned has failed to comply with a duty imposed on them by or for the purposes of an education-related enactment. The order may require the body concerned to comply with the relevant duty before a date stated in the order.
153. New subsection (3) provides that, despite subsection (2) (in relation to what an education enactment includes), no order can be made regarding the types of duty failures specified in new subsection (4) (which are under the jurisdiction of the Additional Support Needs Tribunals for Scotland in terms of section 18 of the 2004 Act). These duties only apply to education authorities.
154. Subsection (4)(a) relates to:
- a failure by an education authority to prepare a co-ordinated support plan for a child or young person who requires one,
 - a failure to prepare one by the time required by regulations made under section 11(8)(f)(i) of the 2004 Act,
 - a failure by an education authority to provide additional support as outlined by section 9(2)(a)(iii) of the 2004 Act,
 - a failure by an education authority to carry out a review of a co-ordinated support plan as required by section 10(2) of the 2004 Act,
 - a failure by an education authority to carry out a review of a co-ordinated support plan, within the time required by regulations made under section 11(8)(f)(ii) of the 2004 Act, and
 - a failure by an education authority to comply with its duties under sections 12(6) and 13 of that Act in respect of a child or young person.
155. Subsection (4)(b) relates to a failure by an education authority in relation to a decision or information mentioned in section 18(3) of the 2004 Act (such as a decision that a child or young person does or does not require a co-ordinated support plan, whether or not a review has taken place). This subsection also relates to a failure by an education authority to include information detailed by section 9(2)(a) of the 2004 Act where a co-ordinated support plan exists.
156. Subsection (4)(c) relates to a failure by the education authority to inform the child or young person, or the child or young person’s parent, of its intention to establish whether a co-ordinated support plan is required, where a request has been received by the education authority to establish if a child or young person requires a co-ordinated support plan, by the time required by regulations under section 11(8) of the 2004 Act.

The subsection also relates to a failure by an education authority to inform the child or young person, or the child or young person's parent, of its decision not to comply with the request within the regulated timescale.

157. Subsection (4)(c) also relates to a failure to establish whether the child or young person requires a co-ordinated support plan within the timescales required by regulations made under section 11(8) of the 2004 Act, where the education authority has informed a child or young person, or a child or young person's parent, of its intention to establish if the child or young person requires a co-ordinated support plan.
158. Subsection (4)(d) relates to any failure by an education authority under subsection (4) (a), (b) or (c) (as referred to above) which also amounts to a failure to provide adequate and efficient provision for the additional support needs of each child or young person for whose school education it is responsible, or a failure to make appropriate arrangements for keeping the additional support needs of each such child under consideration (as required by section 4 of the 2004 Act).
159. Subsection (5) allows the Scottish Ministers, by regulations, to prescribe a procedure to be followed in relation to the investigation of a complaint, or in relation to the determination as to whether or not an order should be made.
160. Subsection (6) allows for regulations to make provision for different purposes (such as for different timescales to be provided for in relation to different types of complaint). Subsection (7) requires the Scottish Ministers to consult such persons as they consider appropriate before making regulations.

Section 25: Appointment of Chief Education Officer

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

Section 26: Registration of independent schools

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

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

Section 27: Employment of teachers in grant-aided schools

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

Section 28: Head teachers: education and training standards

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

Section 90A: Head teachers: education and training standards

168. Subsections (1) and (2) of section 90A extend the regulation-making power in sections 2 and 74(1) of the 1980 Act to allow the Scottish Ministers to specify the standards of education and training which prospective head teachers at grant-aided and education authority-managed schools are required to have before they can be appointed to the position.
169. Subsection (3) provides the Scottish Ministers with flexibility in such regulations to make different provision for different purposes while allowing for exceptions and exemptions from the general rule that prospective head teachers will be required to have obtained the standards and training specified, before being permanently appointed. It also allows the regulations to make consequential, transitional, transitory or savings provision.

Section 98DA: Head teachers: education and training standards

170. Section 98DA(1) gives the Scottish Ministers a regulation-making power to make provision for the education and training which prospective head teachers at independent schools are required to have before they can be appointed to the position. Section 98DA(2) makes it clear that such provision can apply to independent schools that are

already registered or to a school which is the subject of an application for registration as an independent school (under section 98A of the 1980 Act).

171. Subsection (3) provides the Scottish Ministers with flexibility in regulations under section 98DA(1) to make different provision for different purposes while allowing for exceptions and exemptions from the general rule that prospective head teachers will be required to have obtained the standards of education and training specified before being permanently appointed.
172. [Section 28\(3\)](#) amends section 133 of the 1980 Act (regulations). New subsection (2BA) of section 133 disapplies section 133(2) (the default negative procedure) from applying to regulations under section 2 and 74(1) that make provision under section 90A or to regulations under section 98DA(1) and provides that such regulations will instead be subject to the affirmative procedure.

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

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

Part 4: General

Section 31: Regulations

176. This section relates to the powers of the Scottish Ministers contained in the Act to make subordinate legislation. It provides standard powers for regulations to make such ancillary provision as the Scottish Ministers consider appropriate and to make different provision for different purposes. Subordinate legislation is subject to the negative procedure under the Act unless specific contrary provision is made in relation to particular sections of the Act (subsections (2) and (3)). This section does not apply to regulations made under section 33(2) (commencement). This prevents commencement regulations, which are made without any parliamentary procedure, from making incidental, consequential or supplementary provisions.

Section 32: Ancillary provision

177. This section allows the Scottish Ministers, by regulations, to make consequential, supplementary, incidental, transitional, transitory or savings provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of the Act. Such regulations may modify any enactment (including the Act itself). If the regulations make textual changes to an Act, they will be subject to the affirmative procedure (in accordance with section 31(3)).

Section 33: Commencement

178. This section provides for Part 4 of the Act (other than section 30 (defining the “1980 Act”)) to come into force the day following Royal Assent, with the remaining sections of the Act being commenced by regulations made by the Scottish Ministers. Regulations made under subsection (2) may include transitional, transitory or saving provisions and appoint different days for different purposes.