

# EDUCATION (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **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.