

SCHOOLS (CONSULTATION) (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

General

Section 18 – Ancillary provision

61. This section introduces schedule 3 to the Act, which modifies and repeals legislation and makes transitional, transitory and saving provision.

Section 19 – Guidance

62. This section enables the Scottish Ministers to issue guidance, to which an education authority, in exercising its functions under the Act, must have regard.

Section 20 – Regulations

63. **Section 20(1)** enables the Scottish Ministers to make, by way of regulations, such supplemental, incidental, consequential, transitional, transitory or saving provision in connection with the Act, as they consider necessary or expedient. Such regulations may elaborate on any aspect of the process set out in sections 1 to 17 of the Act, and may also confer functions on authorities or the Scottish Ministers. If such provision involves textually amending an Act it will be subject to affirmative procedure in the Scottish Parliament, otherwise to negative procedure (as set out in section 20(6)(b) and (c)).
64. Under section 20(2) regulations may modify schedule 1 or 2 by adding or removing an entry, or altering the terms of any entry in those schedules. Any such modification of schedule 1 or 2 will be subject to affirmative procedure in the Scottish Parliament (as set out in section 20(6)(a)). The regulation powers in both section 20(1) and (2) include power to make different provision for different purposes.

Section 21 – Definitions

65. This section provides definitions of terms used in the Act (or, in some cases, where terms are defined). The term “education authority” has the same meaning as in section 135(1) of the 1980 Act and therefore means the 32 councils in Scotland. “School” means any school managed by an education authority (i.e. what is often called a local authority school) and also, in relation to a proposal of the type mentioned paragraph 10 of schedule 1, includes a local authority managed further education centre. The terms “educational benefits statement”, “proposal paper”, “public meeting” and “consultation report” are to be construed by reference to section 1(3) and (4) of the Act. Section 21(3) provides that expressions undefined in the Act are construed by reference to section 135(1) of the 1980 Act (but only if they are defined in that section and unless the context of this Act requires otherwise).

Section 22 – Commencement and short title

66. Section 22(1) provides that sections 19 to 21 (Guidance, Regulations and Definitions) and section 22 itself (Commencement and short title) come into force on the day after Royal Assent.
67. Section 22(2), (3) and (4) provide for the rest of the Act to be commenced by order (made by statutory instrument) on such day or days that the Scottish Ministers appoint. Such commencement orders may appoint different days for different provisions and may include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with commencement.

Schedule 1 – Relevant proposals

68. This schedule is introduced by section 2. It sets out the categories of proposal in respect of which authorities must conduct consultations according to the Act's provisions.
69. In the 1981 Regulations, (which will be revoked as a result of the repeal of sections 22A and 22B of the 1980 Act), there are 23 “kinds of proposal” in respect of which authorities must conduct consultations in the manner set out in those Regulations. In schedule 1 those 23 categories have been consolidated and grouped into 10 broad categories, but without loss of any of the 23 current categories.
70. Paragraphs 1 to 10 of the schedule set out the “grouped” categories of relevant proposals.

Closure (paragraph 1)

71. These are proposals for the permanent discontinuation of: a school; all the nursery classes in a school; a stage of education in a school; or the provision of either Gaelic or English medium education in all of the nursery classes in a school or in a stage of education, whether or not it is to be continued in the other medium. Section 21(1) (a) of the Act defines school as meaning any school under the management of an education authority, which means a public school as defined in section 135(1) of the 1980 Act. Under section 135(1) this therefore means that, in addition to primary and secondary schools, the following are also included within the meaning of “school”: a stand-alone special school; a special class within a mainstream school¹; and a nursery school. Nursery classes in a school and stage of education in a school are as defined in paragraph 12 of schedule 1 to the Act. Also caught within paragraph 1(4) and (5) are proposals to make arrangements, howsoever described, which would result or be likely to result in the permanent discontinuation of a school, stage of education or the provision of Gaelic or English medium education in all the nursery classes or a stage of education (apart from a nursery class) in a school. Permanent discontinuation excludes temporary discontinuance, for instance, in an emergency, by way of planned decant for a period, or because the school roll has meantime fallen to zero.
72. If a relevant proposal falls within more than one of the categories set out in paragraphs 1 to 9 (ie proposals affecting schools not FE centres) of this schedule, it is to be regarded as falling solely within paragraph 1. In other words it is to be treated as a closure proposal.

Establishment (paragraph 2)

73. These are proposals to establish a new school or a new stage of education in a school. Given the meaning of “school” (as in paragraph 72 above) paragraph 2 of schedule 1 therefore also covers a proposal to establish a special class within a mainstream school.

¹ A special class is a class for pupils with additional support needs within a mainstream school. Paragraph 12 of the schedule defines “special school” and “special class”.

Relocation (paragraph 3)

74. These are proposals to relocate a school or a nursery class in whole or in part. In the 1981 Regulations such proposals were described as “change of site”.

Admission arrangements (paragraph 4)

75. These are proposals to vary any of the admission arrangements for a school, including its catchment area (replacing the term “delineated area” used in the 1981 Regulations) or placing request guidelines formulated under section 28B(1)(c) of the 1980 Act. Other types of proposal included here would be a change in selection procedures for schools or converting a school which is a single sex school to a “mixed” school or *vice versa*.

Transfer from primary to secondary school (paragraph 5)

76. Included here are proposals to vary, for instance, the relationship between a secondary school and its “feeder” primary schools, or to change the age and time at which primary pupils transfer to secondary school.

Primary school commencement date (paragraph 6)

77. These are proposals to vary the number or other details of commencement dates (for starting primary school) fixed under section 32 of the 1980 Act.

Special class outwith a special school (paragraph 7)

78. These are proposals for varying the arrangements for special classes in a mainstream school.

Transport to a denominational school (paragraph 8)

79. These are proposals specifically to discontinue arrangements for the provision of school transport (provided under section 51 of the 1980 Act) to and from a denominational school.

Changing from denominational to non-denominational school (paragraph 9)

80. These are proposals for a denominational school to become a non-denominational school in terms of section 22(4) of the 1980 Act.

Discontinuance of a further education centre (paragraph 10)

81. These are proposals to discontinue a local authority managed further education centre. Such centres now exist only in Orkney and Shetland. Further education colleges and centres elsewhere in Scotland are no longer run by local authorities. Paragraph 10 sets out what sort of a facility is included within the term “further education centre” and what is not.

Meaning of expressions used in this schedule (paragraphs 11 & 12)

82. Paragraph 11(1) defines what is meant by a school “affected” by a proposal and sub-paragraph (2) offers examples such as the school proposed for closure and the schools to which its pupils would transfer; or the schools whose pupils would transfer to a newly established school. Sub-paragraph (3) excludes from the definition of an “affected” school one where the only impact would be the likelihood of its being subject to placing requests as a result of the implementation of the proposal.
83. Paragraph 12 defines the terms “catchment area”, “nursery class”, “primary school”, “primary education”, “secondary school”, “secondary education”, “further education” and “school commencement date” by reference to section 135(1) and (2) of the 1980 Act. “Denominational school” is defined by reference to section 21 of the 1980 Act,

which in turn makes reference to sections 16(1) and 17(2) of the 1980 Act.² “Special school” and “special class” are defined by reference to the Education (Additional Support for Learning) (Scotland) Act 2004. “English medium education”, “Gaelic medium education” and “stage of education” are defined within paragraph 12 itself.

Schedule 2 – Relevant consultees

84. This schedule is also introduced by section 2. Paragraphs 1 to 10 list the relevant consultees – the people and bodies whom the authority must consult – for each of the categories of proposal set out in paragraphs 1 to 10 of schedule 1. The list of relevant consultees are set out in this schedule in parallel to the schedule 1 list of proposals (adopting the same numbering) and each paragraph therein reads across to the corresponding paragraph in schedule 1 – for example, a local authority must consider those listed in paragraph 1 of schedule 2 as relevant consultees when they are consulting on a proposal set out in paragraph 1 of schedule 1.
85. The lists of consultees set out in respect of the 23 categories of proposal in the 1981 Regulations have been extended in this Act. The Scottish Schools (Parental Involvement) Act 2006 amended the 1981 Regulations by adding the requirement to consult Parent Councils (or Combined Parent Council) in appropriate places. Several entirely new categories of consultee are included in this schedule – namely the staff and pupils at affected schools, community bodies (the community council and community planning partnership), trade unions representative of staff at any affected schools, Bòrd na Gàidhlig, other users of any affected schools, and other education authorities, as the authority considers appropriate.

Those to be consulted on proposals relating to schools (paragraphs 1 to 9)

86. For the first 9 out of the 10 proposals (which cover all the proposals relating to schools) the first six categories of consultee are identical in every case. The authority must consult – in respect of affected schools – the Parent Council (or Combined Parent Council), the parents of pupils, the pupils (who are mature enough to be consulted), the staff and the trade unions that represent those staff. In addition the parents of children (the term “children” is used here instead of pupils because some may be of pre-school age) expected to be in attendance at any affected school within two years of the date of publication of the proposal paper are to be consulted. In addition, the lists specify that the authority must consult any community council, or community planning partnership (established under the Local Government in Scotland Act 2003) in respect of those proposals listed in paragraphs 1 to 5 of schedule 1, which are those proposals where there may be a “community interest”. The authority must also consult such other users of any affected school as the authority considers relevant, but only in cases of closure, establishment and relocation proposals (paragraphs 1, 2 and 3 of schedule 1). Such persons may be adult users of the school’s educational facilities, community users of the buildings or users of the sports facilities both indoor and outdoor. Finally, the authority must also consult such other education authorities as it considers relevant.

Those to be consulted on a proposal to discontinue a further education centre (paragraph 10)

87. Paragraph 10 of the schedule sets out a list of those who must be consulted on a proposal to discontinue a further education centre. As well as many of the categories already mentioned above – the pupils, parents, Parent Council, staff of any school whose pupils attend the centre, trade unions that represent those staff, the community council and community planning partnership – the authority in this case must also consult the centre’s staff and students, any employers of the students and finally also any other users of the centre which the authority considers relevant.

² Denominational schools are either as: transferred to education authorities under section 16(1); or provided by education authorities under section 17(2).

Gaelic and denominational consultees (paragraphs 11 & 12)

88. Where a proposal affects the provision of Gaelic medium education, Bòrd na Gàidhlig must be consulted.
89. Where a proposal affects a denominational school, the person duly authorised for the purpose by the relevant church or denominational body must be consulted.

Meaning of expressions used in this schedule (paragraph 13)

90. The term “community council” is defined by reference to the Local Government (Scotland) Act 1973 whilst “Parent Council” and “Combined Parent Council” are defined by reference to the Scottish Schools (Parental Involvement) Act 2006.

Schedule 3 – Ancillary provision

Modification of enactments (paragraphs 1 and 2)

91. Paragraph 1(2) repeals sections 22A (Consultation on certain changes in educational matters) and 22B (Consent for certain changes in educational matters) of the 1980 Act. Section 22A contains the power to prescribe proposals in respect of which education authorities are required to consult and the manner of those consultations. Section 22B requires authorities to submit to the Scottish Ministers, for their consent, certain types of proposals concerning educational provision and such proposals cannot be implemented without the Scottish Ministers’ consent. Section 22A and 22B provided the enabling powers to make the 1981 Regulations, which are revoked on the repeal of sections 22A and 22B. Paragraph 1(1) makes amendments to section 22 (discontinuance and moves of educational establishments) of the 1980 Act in consequence of the repeal of sections 22A and 22B and replaces references to those sections with references to the Act.
92. Paragraph 2 repeals section 143 of the Local Government etc. (Scotland) Act 1994 in consequence of the repeal of sections 22A and 22B of the 1980 Act.

Transitional and transitory provision (for consultations which “straddle” the date of commencement) (paragraph 3)

93. Paragraph 3 of schedule 3 provides for the transitional handling of consultations which are “ongoing” at the time of commencement of this Act – i.e. consultations upon which authorities have embarked (under the 1981 Regulations and section 22A of the 1980 Act), but in respect of which no final decision (on whether or not to implement the proposal consulted on) has been taken by the authority by the time of the commencement date of this Act.
94. Sub-paragraphs (2) and (3) specify that the authority may not proceed further with the proposal, upon commencement of this Act, unless the consultation which has been undertaken prior to, and straddling, the commencement date has consisted of or included the matters set out in sections 1 to 11 of the Act. Such a consultation can only proceed further, after the date of commencement of the Act, if the authority has in effect conducted the consultations in accordance with the provisions in sections 1 to 11 of the Act, as though they had been in force at the time. If those requirements have been met, the consultation may proceed; if not, the consultation process falls and the authority must recommence a new consultation in accordance with the procedures provided in this Act.
95. If the consultation is one that may proceed, and also relates to a closure proposal in respect of a rural school, sub-paragraph (4) additionally specifies that whatever consultation documents remain to be published after the commencement date of the Act – in some cases the proposal paper and the consultation report and in other cases, where the consultations have progressed further, only the consultation report – must contain an explanation of the extent to which the authority has, up to that stage, taken account

of the three “rural factors” which are set out in section 12(2) to (5) of the Act. When the consultations are concluded and the authority comes to take a decision on whether to implement the closure proposal, as respect a rural school, (it being a proposal that may proceed under the terms set out in sub-paragraphs (2) and (3)), then, at the time of taking its decision, the authority must have special regard to the three “rural factors” set out in section 12(3) of the Act. This is provided for by sub-paragraph (4)(b).

96. Sub-paragraph (5) finally provides that all closure proposals, which proceed according to the terms of paragraph 3 of the schedule, will be subject to the new call-in procedures set out in sections 15 to 17 of the Act – rather than to the requirements in schedule 2 to the 1981 Regulations regarding referral to the Scottish Ministers for consent.

Transitional and transitory provision (for consultations which are completed prior to the date of commencement) (paragraph 4)

97. Paragraph 4 of schedule 3 addresses the situation where consultations have been conducted and completed, under the 1981 Regulations and section 22A of the 1980 Act, and the authority has taken the final decision to implement the proposal prior to the date of commencement of this Act. In these circumstances the authority may proceed or continue to proceed to implement their decision (as set out in sub-paragraph (2)) except in the circumstances set out in sub-paragraphs (3) and (4).
98. There are two such circumstances. Firstly where the authority modifies the proposal in a material way (sub-paragraph (3)). And secondly where (under section 22B of the Education (Scotland) Act 1980) the proposal requires the consent of the Scottish Ministers (being a closure proposal or a change of site or of catchment area which requires to be referred to the Scottish Ministers according to the distance or occupancy criteria set out in schedule 2 to the 1981 regulations), and that consent has not yet been given or has been refused (sub-paragraph (4)). If either of these two circumstances pertain, the authority may not proceed to implement their decision.

Saving provision (paragraphs 5 & 6)

99. Notwithstanding paragraph 1(2) (which repeals sections 22A and 22B of the 1980 Act), paragraph 5 of schedule 3 “saves” both these sections, and the 1981 Regulations, to the extent that they are required for the purposes of the transitional and transitory provisions in paragraphs 3 and 4 of schedule 3. Sections 22A and 22B and the 1981 Regulations continue to operate, to the extent required, as they did immediately before the commencement of the Act until all the transitional proposals and consultations have reached their conclusion. This conclusion is either authorities reaching their final decisions (for non-referable proposals under section 22A) or the Scottish Ministers having reached their decision on whether or not to grant consent in respect of any outstanding referrals (under section 22B and schedule 2 to the 1981 Regulations).
100. Paragraph 6 of schedule 3 defines “proceeding with the proposal” for the purposes of schedule 3 and makes full reference to the 1981 Regulations.