

These notes relate to the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 (asp 12) which received Royal Assent on 12 November 2004

SCHOOL EDUCATION (MINISTERIAL POWERS AND INDEPENDENT SCHOOLS) (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Power of Scottish Ministers to require action by managers of certain schools

8. **Part 1** inserts sections 66B, 66C and 66D after section 66A of the 1980 Act and sections 10A, 10B and 10C after section 10 of the Standards in Scotland's Schools etc. Act 2000 (the "2000 Act"). It provides the Scottish Ministers with new powers to direct education authorities and managers of grant-aided schools to take specific action to secure improvement as identified after inspection by HMIE. It sets out the circumstances in which the Scottish Ministers may use these powers and the procedure that must be followed.

Section 1 – Power of Scottish Ministers to require action by managers of certain schools

9. **Section 1** inserts sections 66B, 66C and 66D after section 66A of the 1980 Act. Section 66B sets out the procedure to be followed where HMIE identify in relation to a grant-aided or local authority school that satisfactory action has not been taken by the relevant person to secure improvement. For the purposes of this section, "relevant person" when relating to a grant-aided school means the managers of the school, and when relating to an authority school, means the education authority.
10. Section 66B(1) provides that, before reaching that view, HMIE must have inspected the school and, as a result, identified action that the relevant person should take to secure improvement in relation to the school, or the school education provided in it.
11. Section 66B(2) places a duty on HMIE to make a reference to the Scottish Ministers if it appears to them that the relevant person has failed to take satisfactory steps to address the matters where a need for improvement has been identified. It provides that HMIE can make such a reference only if the relevant person has had sufficient opportunity to take action to secure improvement, and if HMIE consider that, having taken into account the seriousness of the failure, an enforcement direction is justified.
12. Section 66C provides for a preliminary notice procedure, to be followed by the Scottish Ministers on receipt of a reference by HMIE under section 66B(2), where Ministers consider that further action is justified. Such a notice requires a written response to be provided by the relevant person within the period which is specified in the notice. The response should detail the reasons why the person considers they have not failed in taking action to secure improvement or, alternatively, accept that there has been a failure but give reasons why an enforcement direction should not be issued.

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13. Section 66D provides the Scottish Ministers with the power to direct the relevant person to take action to address, or prevent a recurrence of, the failure identified by HMIE in section 66B. Subsection (1) provides that the Scottish Ministers will have the power to issue an enforcement direction only after the deadline for offering a response to the preliminary notice has expired. However, the preliminary notice procedure need not necessarily be followed by an enforcement direction if Ministers no longer consider a direction to be justified or if they consider that satisfactory action has been taken.
14. Subsections (5) and (6) allow the Scottish Ministers to vary any enforcement direction and to do so without having to repeat the preliminary notice procedure.
15. Subsection (9) places a duty on the relevant person to comply with any direction made to them by the Scottish Ministers. Failure to do so, being a breach of statutory duty, would enable Ministers to take action, in an appropriate case, under section 70 of the 1980 Act. Subsection (11) imposes an obligation on Scottish Ministers, where they give, vary or revoke an enforcement direction, to lay a report on the exercise of that power before the Scottish Parliament.

Section 2 – Power of Scottish Ministers to require action by education authorities

16. Section 2 inserts sections 10A, 10B and 10C after section 10 of the 2000 Act. These new sections set out the procedure to be followed where HMIE identify through their inspection of an education authority that the authority has failed to take satisfactory action to secure improvement in the way they exercise their functions in relation to the provision of school education.
17. The provisions contained within sections 10A, 10B and 10C are in similar terms to those contained within sections 66B, 66C and 66D of the 1980 Act.

Part 2 – Independent schools

18. Part 2 amends the legislation relating to independent schools in the 1980 Act. Section 3 amends the definition of an independent school in section 135(1) of the 1980 Act and has the effect of extending the definition to schools having fewer than five pupils receiving full-time education.
19. The provisions for registration of an independent school are contained within section 4, which makes amendments to section 98 of the 1980 Act, substitutes a new section 98A and inserts sections 98B, 98C and 98D into that Act. Section 5 makes provision for regulating independent schools, inserting a new section 98E and making amendments to sections 99, 100 and 101. The Independent Schools Tribunal is abolished and appeals will now go to the sheriff principal as detailed in section 6. This section makes amendments to section 102 and substitutes a new section 103. Section 7 inserts two new sections: 103A and 103B. Section 103A applies the provisions concerning independent schools to proprietors who are not individuals. Section 103B provides for the dates on which the registration of a school or its removal from the register will come into effect.

Section 3 – Meaning of “independent school”

20. Section 3 extends the existing definition of an independent school in section 135(1) of the 1980 Act by removing the words “five or more” where they appear before “pupils”. The definition of an independent school will now read: “a school at which full-time education is provided for pupils of school age (whether or not such education is also provided for pupils under or over that age), not being a public school, a grant-aided school or a self-governing school”. As a result, any establishment meeting these criteria is subject to the legislation governing independent schools, whatever the number of pupils on the school roll.

Section 4 – Registration of independent schools

21. **Section 4** revises the provisions for registering independent schools. It makes amendments to section 98 of the 1980 Act, substitutes a new section 98A and inserts sections 98B, 98C and 98D into the 1980 Act.
22. Subsection (1) of section 4 replaces section 98(2) and sets out the information that the Registrar of Independent Schools in Scotland (the Registrar) must record in the Register of Independent Schools in Scotland.
23. The new section 98(2)(a) provides that the Registrar is required to record in the register, in relation to an application for registration of an independent school, such information as Scottish Ministers direct. Subsection (2)(b) provides that the Scottish Ministers will also direct what information concerning any conditions imposed on a school, including variations and revocations, should be recorded. Subsection (2)(c) makes provision for every order imposing a disqualification of a proprietor, teacher, premises or accommodation by the Independent Schools Tribunal, or by the Scottish Ministers, to be recorded. The Independent Schools Tribunal is referred to in this provision to ensure that any orders which have been made by that Tribunal before its abolition and which are still in force are still recorded. Subsection (2)(d) provides that the Scottish Ministers will direct which elements of the information (relating to particulars prescribed under subsection (3)(a)) provided to the Registrar by registered schools require to be placed on the register. Subsection (2A) provides that where an order removing a disqualification is made by Scottish Ministers or by the sheriff principal the Registrar is required to remove the order imposing the disqualification from the register.
24. Section 98A sets out the procedure for persons to apply for registration of a proposed independent school. It details the basis on which Scottish Ministers will reach a decision about whether or not to grant an application for registration.
25. Subsection (1) stipulates that any person intending to open and run an independent school must apply to the Scottish Ministers for registration.
26. Subsection (2) provides for Scottish Ministers to define by regulations the form which an application for registration of an independent school is to take, and the information which it is to include.
27. Subsection (3) outlines the matters on which Scottish Ministers will require to be satisfied when considering an application for registration: these are detailed in paragraphs (a) to (e). The Scottish Ministers must be satisfied that the school will provide efficient and suitable instruction, taking account of the age and sex of the pupils who are to attend the school; that the welfare of the pupils will be adequately safeguarded and promoted; that the proprietor of the school and every proposed teacher in the school is a proper person to be a proprietor or teacher (subject to the provisions in subsection (5)); that the school premises are suitable for use as a school; and that the accommodation at the school will be adequate and suitable taking account of the number, age and sex of the pupils. When determining, in relation to an application for registration, whether a person is a proper person to be a proprietor or teacher consideration will be had to whether that person is disqualified from being such a proprietor or teacher, under Part 2 of the Act. Regard will also be had, for example, to the Protection of Children (Scotland) Act 2003 (the “2003 Act”) which makes provision in respect of all people working with children, and requires Scottish Ministers to keep a list of individuals whom they consider to be unsuitable to work with children, and prohibits those on that list from working with children. Similarly, compliance with the 2003 Act will be one of the factors which Scottish Ministers will have regard to in considering the adequacy of the arrangements, generally, to safeguard the welfare of pupils in the school.
28. If the Scottish Ministers are satisfied as to these matters they may then grant an application for registration. However, subsection (5) details the circumstances in

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which the Scottish Ministers would not be satisfied and would not therefore grant an application, namely, where the proprietor or teacher is not a proper person, either because they are disqualified from being a proprietor or teacher, disqualified from working with children, or because they are a “prescribed person”; where the proposed premises or the accommodation to be provided at those premises is disqualified from being used as such; or where that accommodation is disqualified for the proposed number, age or sex of the pupils.

29. Subsection (4) allows the Scottish Ministers to register an independent school subject to conditions. This may be appropriate, for example, where teachers at the school require particular training, or where certificates are required to verify the suitability and adequacy of premises and accommodation for a particular group of pupils.
30. Subsection (6) provides that “disqualified from working with children” is to be construed in accordance with section 17 of the 2003 Act, and provides Scottish Ministers with the power to prescribe in regulations what a “prescribed person” is, in relation to a proprietor and a teacher, or proposed teacher. Scottish Ministers are required to consult such persons as they think fit on these regulations, which are also to be subject to affirmative Parliamentary procedure (see section 133 of the 1980 Act as amended by schedule 1 to this Act).
31. Section 98B covers the disqualification orders that the Scottish Ministers may make if they decide to refuse an application to register an independent school under section 98A. Subsection (1) provides that a disqualification order may be made where the refusal to register is on the grounds that the Scottish Ministers are not satisfied in regard to any of the following, namely that the proposed premises are suitable for use as a school; that the accommodation is adequate and suitable taking account of the number, sex and ages of the pupils; or that the proprietor, or a proposed teacher in the school, is a proper person.
32. Subsection (2) allows the Scottish Ministers to disqualify school premises. Subsection (3) covers disqualification of accommodation. Subsections (4) and (5) allow the Scottish Ministers to disqualify a proprietor from being a proprietor of an independent school on the grounds that the proprietor is not a proper person, or to disqualify a teacher from being a teacher in any school, if that teacher is not a proper person.
33. Section 98C covers the system of notification and appeals with regard to applications for registration of an independent school. Subsections (1) and (2) make provision for the Scottish Ministers to notify the proprietor and the Registrar of any decision they make on such an application. If the application is refused on the grounds that Scottish Ministers are not satisfied that a proposed teacher is a proper person, the Scottish Ministers must also notify that proposed teacher of their decision. In addition, Scottish Ministers are required to notify any other person or body they think fit.
34. Subsections (4) and (5) specify those persons whom the Scottish Ministers are required to notify should they make a disqualification order under section 98B. In terms of subsection (4) they are required to notify the proprietor, the Registrar and any other person or body they think fit, if they make a disqualification order under section 98B(2), (3) or (4). Section 98C(5) provides that where the Scottish Ministers make an order disqualifying a proposed teacher from being a teacher at any school (under section 98B(5)), they are required to notify the proposed teacher, the Registrar, and any other person or body they think fit of that order.
35. Subsections (6) and (7) provide for appeals to the sheriff principal by a proprietor against a decision made by the Scottish Ministers to refuse an application, to set conditions on registration, or to make a disqualification order; and subsection (8) provides for an appeal by a proposed teacher against a disqualification order relating to that teacher.

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36. Section 98D details the procedure for removing a school from the register when it is no longer operating.

Section 5 – Regulation of registered schools

37. **Section 5** revises the provisions for regulating independent schools. It inserts a new section 98E and makes amendments to sections 99, 100 and 101 of the 1980 Act.
38. Section 98E gives the Scottish Ministers power to impose, vary or revoke any condition on a registered school if they are satisfied that it is necessary in order to prevent that school becoming objectionable on any of the grounds set out in section 99(1A). Scottish Ministers can also vary or revoke conditions on the application by the proprietor of the school. Provision is also made for appeal by the proprietor, to the sheriff principal, against the imposition or variation of a condition or against a refusal to vary or revoke a condition.
39. **Section 5(2)** amends section 99 of the 1980 Act and specifies the grounds on which the Scottish Ministers can serve a notice of complaint, the circumstances in which they do not require to serve such a notice, the contents of a notice, and the rights of appeal attached to it.
40. Section 99(1A) adds a number of new grounds to those contained within section 99 of the 1980 Act. Those existing grounds are as follows: that efficient and suitable instruction is not being provided at the school; that the welfare of a pupil attending the school is not adequately safeguarded and promoted; that the premises or any part of them are unsuitable for a school; and that the accommodation provided is inadequate or unsuitable for the number, ages and sex of the pupils attending the school.
41. The additional grounds are set out in paragraphs (d) to (j) of section 99(1A). Under paragraphs (d), (e) and (f), notices of complaint require to be served in the event that the Scottish Ministers are satisfied that any condition imposed on the carrying on of the school has not been complied with; that any part of the school premises has been disqualified from being used as a school; that any accommodation at the school premises is disqualified from being used as such, or is being used for a number of pupils or pupils of an age or sex for which it has been disqualified.
42. Paragraphs (g) and (h) require a notice of complaint to be served where Scottish Ministers are satisfied that the proprietor of, or a teacher at, the school has been disqualified under the Act, is disqualified from working with children, is a prescribed person or is otherwise not a proper person to be a proprietor or a teacher.
43. Paragraph (j) requires a notice of complaint to be served where the proprietor of a school has not provided the Registrar with information required under section 98(3), or has not notified the Registrar of any change in information previously submitted.
44. Section 99(1B) allows the Scottish Ministers to act without serving a notice of complaint if they are satisfied that the circumstances require urgent action, for example, where the welfare of the pupils is at risk. This section allows Ministers to make an order under section 100(2) without first serving a notice of complaint.
45. Section 99(1C) outlines the form which a notice of complaint is to take. It is to specify the ground of the complaint, with a full description of the matter complained of, the remedial measures to be taken, and the period for compliance. Section 99(2) remains, although the wording is amended by paragraph 1(3) of schedule 1 to the Act, and provides for a copy of the notice to be served on the teacher, where the notice is served on the grounds that the teacher is disqualified, is a prescribed person or is not a proper person. Section 99(3) provides for an appeal by a proprietor to the sheriff principal against a notice of complaint.
46. Section 100 of the 1980 Act deals with the determination of complaints. It specifies the circumstances in which the Scottish Ministers can make orders as a result of a notice

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of complaint having been served against a registered school, and the rights of appeal open to proprietors and teachers against any such order.

47. The new section 100(1) which the Act introduces describes the circumstances in which the Scottish Ministers can make an order as the result of a notice of complaint. There are three such circumstances. Firstly, an order can be made after a notice of complaint has been served on the proprietor and no appeal has been made, or alternatively where an appeal has been made but refused, and the period in the notice has expired and the Scottish Ministers are not satisfied that the proprietor has taken satisfactory action to remedy the matter. Secondly, an order can be made where a notice of complaint has been served, an appeal has been lodged but no decision has yet been made and where, pending that decision, the Scottish Ministers are satisfied that there is a serious risk of harm to any pupil attending the school. Finally, there is also provision for the Scottish Ministers to make an order without a prior notice of complaint if they are satisfied that urgent action is required.
48. Subsection (2) details the different forms of order which the Scottish Ministers may make. They can make an order directing the Registrar to remove the school from the register. Disqualification orders can also be made with regard to premises, accommodation, proprietors or teachers. In addition, orders can be made imposing, or varying conditions on the school.
49. Subsection (3) details the persons who are to be notified by Scottish Ministers when they make an order under subsection (2). They are required to notify the proprietor, the Registrar and any other person or body they think fit. Where the order is one to disqualify a teacher, Scottish Ministers must also notify that teacher.
50. Subsections (3A) to (3C) deal with appeals which can be made against disqualification orders.
51. Section 100(4) of the 1980 Act remains, although modified to remove the reference to the Tribunal and the Secretary of State, substituting reference to an order made under this Part of the Act. This provides that any proprietor disqualified from being a proprietor, or any teacher disqualified from being a teacher, will unless specifically stated otherwise, be disqualified from being both a proprietor of an independent school and a teacher at any school.
52. Section 101 of the 1980 Act covers the enforcement of orders and describes the penalties available. The penalties relating to each offence remain the same: the individual will be liable on summary conviction to a fine not exceeding level 4 on the standard scale or to imprisonment for up to three months, or to both. The offences apply in relation to the following: under subsection (1), any person running an independent school that is not registered; under subsection (2), a person using school premises, any part of such premises, or accommodation subject to a disqualification order made under this Act; under subsection (3), any person acting as the proprietor of an independent school when disqualified from doing so by an order; and, under subsection (3A), any person disqualified from being a teacher in any school if they endeavour to get a position as a teacher, accept such a position or teach in any school.
53. [Section 101\(4\)](#) is amended and updated (by schedule 1 to the Act) to refer to the current provision on disqualification in England and Wales, so that a person disqualified in England and Wales would automatically be disqualified for the purposes of this Part of the 1980 Act.

Section 6 – Appeals

54. [Section 6](#) contains provisions for the removal of disqualifications by the Scottish Ministers and also deals with the sheriff principal's powers in relation to appeals.
55. [Section 6\(1\)](#) amends section 102 of the 1980 Act, dealing with the removal of disqualifications. There are existing provisions in section 102 enabling any person

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to apply to the Scottish Ministers for the removal of a disqualification order. The new subsection (1A) provides that the Scottish Ministers must inform the person, the Registrar and any other person or body they think fit of any decision they reach on an application to remove a disqualification. Subsection (2) provides for an appeal by a person who is aggrieved by the decision of the Scottish Ministers to refuse to remove a disqualification. Such an appeal is to be made to the sheriff principal within 28 days of the applicant being notified of the decision.

56. The Act substitutes a new section 103 of the 1980 Act, providing for the appeals that may be made to the sheriff principal and the orders available to the sheriff principal when considering any such appeal. Subsection (1) deals with the jurisdiction for appeals.
57. Subsection (2) details the orders the sheriff principal can make if allowing an appeal against a decision by the Scottish Ministers to refuse an application to register a school.
58. Subsection (3) details the orders the sheriff principal can make after hearing an appeal against a decision by the Scottish Ministers with regard to the imposition, variation or revocation of conditions. Whether or not the sheriff principal grants or refuses the appeal, the sheriff principal can make an order imposing any condition on the school, or an order varying or revoking a condition previously imposed on the school.
59. Subsection (4) sets out the orders the sheriff principal can make after hearing an appeal against a notice of complaint.
60. Subsection (5) sets out the orders that the sheriff principal can make after hearing an appeal by the proprietor of an independent school against any order made against the school under section 100(2) (whether or not as a result of a notice of complaint being served).
61. Subsection (6) provides that where the sheriff principal allows an appeal against any of the disqualifications imposed when registration is refused (under section 98B(2) to (5)), or when a teacher is disqualified following a notice of complaint (under section 100(2)(e)), or when an application to remove a disqualification is refused (under section 102(2)), the sheriff principal must in any of those circumstances make an order removing the disqualification.

Section 7 – Supplementary

62. **Section 7** makes provision for the application of Part V of the 1980 Act to proprietors of independent schools who are not individuals, and also makes provision for the dates on which registrations and removals from the register will come into effect.
63. Section 103A specifies that all the powers and provisions within Part V of the 1980 Act relating to the proprietor of an independent school relate also to a “relevant person”. Subsection (6) defines “relevant person” in relation to the proprietor of an independent school so that where the proprietor is a body corporate, the relevant person will be any person who is a director, manager or secretary of the body corporate, or any person who purports to act as such. Where the proprietor is a partnership, the “relevant person” will be any person who is a partner, or purports to be such. Where the proprietor is an unincorporated association, other than a partnership, the “relevant person” will be any person who is concerned in the management or control of the association, or any person who purports to act in such a capacity.
64. Section 103B sets out the date on which the registration of an independent school or the removal of an independent school from the register is to come into effect.

Part 3 – General

65. **Section 8** brings into effect the minor and consequential amendments contained in schedule 1 (relating to the 1980 Act and to the 2000 Act) and the repeals contained in

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schedule 2 (relating to the 1980 Act, the 2000 Act, and the Scottish Public Services Ombudsman Act 2002). Section 9 allows the Scottish Ministers to bring the Act into force by order made by statutory instrument and allows for transitional provisions and savings to be made in that order.