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08 October 2015

Dear Convenor,

## **EDUCATION (SCOTLAND) BILL: STAGE 1**

I would like to thank the Education and Culture Committee, Finance Committee and Delegated Powers and Law Reform Committee for their consideration of this legislation at Stage 1. I welcome the Stage 1 report and the Education and Culture Committee's support for the general principles of the Education (Scotland) Bill and its views on how the Bill could be improved.

The Bill is central to the Scottish Government's ambition for every child in every community in Scotland to reach their full potential. From the early years through school and into the college and university sector we are making progress but there is much to be done.

During my evidence I made clear that we will continue to consider all views and I note the Committee's comments and desire for further information in some areas. I am keen to clarify as many of these issues as I can and the attached response seeks to address all of the key points raised in the Stage 1 report.

I look forward to the on-going consideration of the Bill by the Committee and by the Parliament as a whole.

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# **Education (Scotland) Bill**

## **Scottish Government Response Stage 1 Report**

**October 2015**

## **INTRODUCTION**

Ministers acknowledge the concern raised within the report that detailed consultation should be carried out by the Scottish Government in advance of a Bill's publication. Ministers wish to reassure the Committee that it is, and will continue to be, normal practice for the Scottish Government to consult fully on the content of Bills prior to introduction – that didn't happen with all elements of this Bill in particular because of Ministers' desire to strengthen the focus the Bill places on raising attainment. We have however continued to engage with and consult key partners on all of the provisions in the Bill since its introduction, and this has informed our developing thinking as we move towards Stage 2.

Ministers have noted the Committee's concerns and comments about the Bill's Policy Memorandum. The Scottish Government is committed to ensuring that each Policy Memorandum is high quality and provides the Parliament and interested parties with clear information about, and a clear rationale for, the Bill. The Committee's comments have been brought to the attention of the Minister for Parliamentary Business, who will in turn ensure this is taken into account in the development of future Government legislation. The Committee may also wish to be aware that the Minister for Parliamentary Business has agreed, in the context of the Standards, Procedures and Public Appointments Committee's inquiry into the legislative process, that Scottish Government officials will work with the parliamentary authorities with a view to ensuring that the accompanying documentation to Bills continues to be of a high standard.

For ease of reference, the response includes the text from relevant paragraphs in the Stage 1 Report and also includes the paragraph numbering from the report.

## RESPONSE TO STAGE 1 REPORT KEY POINTS

### PART 1 - INEQUALITIES OF OUTCOME

#### Clarity of terminology

**35. It is vital that all those with an interest in education have a clear understanding of the Scottish Government’s ambition and exactly what would be required to deliver improvement. However, there is evidence that this is not always the case and also that some terms used in the Bill and elsewhere are not fully understood. The First Minister has made further policy statements since our evidence-taking closed and we consider the Scottish Government should fully address the points we have highlighted above, in order to provide the clarity such a fundamentally important area of policy requires.**

The term “attainment” denotes educational performance and the acquisition of the valuable skills, knowledge and attributes needed to succeed in life.

When we talk about “narrowing the attainment gap” or “promoting equity of attainment for disadvantaged children”, we are referring to the need to address the disparity in educational outcomes experienced as a result of socio-economic disadvantage. Those outcomes are wide-ranging and will of course vary from child to child, reflecting their individual strengths and interests. However, they will always rely on strong foundations for learning, namely:

- Reading, writing and numeracy
- Positive health and wellbeing

The term “socio-economic disadvantage” is not defined on the face of the Bill. Instead, we will use statutory guidance to support education authorities in identifying those children who must be supported as a result of the new duties. The guidance will also make clear what is meant by “inequalities of outcome” and “decisions of a strategic nature” as well as other relevant terminology. It will build on learning from the Scottish Attainment Challenge and will take account of the specific challenges that some authorities face in relation to deprivation due to, for example, their geography. The guidance will be developed with direct input from a multi-agency working group and will be the subject of full public consultation in 2016.

The First Minister has made absolutely clear, both in her speech at Wester Hailes Education centre on 18 August and in the 2015 Programme for Government, that closing the gap in educational attainment is an absolute priority for this Government.

Through the draft National Improvement Framework, launched by the First Minister on 1 September, we have set out our key priorities for the education system – one of

which is to narrow the attainment gap between our most and least disadvantaged learners. Further, the Framework sets out the drivers for improvement which will underpin our approach.

The availability of improved data through the Framework will assist Ministers, education authorities and individual teachers in measuring the progress being made and in identifying “what works” in achieving equity. The publication of annual reports will ensure collective accountability (both locally and nationally) for our efforts and we are proposing that the Scottish Parliament’s role in scrutinising those reports be recognised in statute.

We will take a balanced approach to measuring progress, working with partners to avoid the known pitfalls that can come with high-stakes testing and we will not rely solely on a test result to judge performance.

The Cabinet Secretary for Education and Lifelong Learning wrote to the Convener of the Committee on 1 September confirming her intention to bring forward a series of Stage 2 amendments to place the National Improvement Framework on a statutory footing. These amendments propose new duties on both Scottish Ministers and education authorities and would deliver a number of key benefits which could not otherwise be realised. Further information on the amendments, the intended benefits and the Framework more generally was provided to the Committee by officials in a letter dated 18 September.

### **What improvements are expected?**

**36. We agree there should be greater support for the most disadvantaged children, but this does not mean that all pupils will achieve exactly the same results. We also agree all children should be encouraged to achieve their full potential.**

Curriculum for Excellence recognises that each and every child is an individual with their own strengths and interests and teaching needs to be tailored accordingly. Ministers fully recognise that children and young people’s achievements will vary and it is important that our approach is flexible enough to ensure that every child can fulfil their potential, no matter where that lies.

The key aim of the duties included in Part 1 of the Bill is to ensure that, moving forward, there is no direct correlation between socio-economic disadvantage and educational outcomes. This will complement the work that is already underway in schools across the country to raise attainment for all children. Nationally, the Government is supporting this through initiatives like the appointment of Attainment Advisers in every local authority and the Raising Attainment for All programme.

**37. Education authorities and Scottish Ministers are to have “due regard to the desirability” of reducing inequalities of outcome. Given the consensus amongst the Scottish Government, local authorities and other stakeholders that narrowing the attainment gap is of fundamental importance, it is difficult to imagine a scenario where an education authority would not consider a reduction in inequality to be desirable. We therefore ask the Scottish Government to look at how the provision can be made more effective.**

It is our view that the currently proposed duties already require significantly more than a passive recognition of the need to “narrow the attainment gap” on the part of Ministers and education authorities. Instead, the duties require that Ministers and authorities continuously consider how they can reduce the attainment gap when taking decisions of a strategic nature and, in the case of education authorities, that they include schools, pupils, parents and communities in that process. Further, they are required to be able to clearly evidence their efforts in this regard.

When we talk about decisions of a “strategic nature” we are referring to the key, high-level decisions that determine how education services are delivered over a prolonged period.

It is important that the Bill strikes the correct balance (which as currently drafted we consider it does). The duty is not designed to override the existing framework within which Ministers and education authorities operate. Instead, it recognises the need to balance the specific requirements of the duty against the range of other legal requirements placed on the duty bearer. In doing so, it recognises, amongst other things, that an education authority also has responsibility to ensure that each and every child achieves their full potential.

The statutory guidance will provide guidance and support to education authorities in carrying out the new duties.

Of course, if the Committee feel that the proposed duty could be improved whilst continuing to satisfy the principles set out above then Ministers would be happy to consider their suggestions or indeed those of other stakeholders.

## **Reporting**

**54. Efforts to address the attainment gap have been underway for decades but considerable progress is still required. This suggests that at least some approaches have failed and may also suggest that far more radical change is needed. These considerations go beyond the Bill, which is simply one part of a much wider programme of ongoing reform. Nevertheless, it is reasonable to suggest that this legislation could be most effective if it helped to establish a comprehensive and transparent reporting structure that: effectively identified successful and unsuccessful practice; helped to establish a more strategic**

**and coordinated approach to tackling the attainment gap; and clearly demonstrated whether positive outcomes were being delivered. It would be in no one's interests for reports simply to list policies and programmes that have been adopted.**

**55. We do not consider legislation to be the correct place to specify detailed policies on attainment that education authorities or the Scottish Government should adopt, as this would be too prescriptive and run the risk of becoming out-dated. Rather, the Scottish Government, education authorities, COSLA and all others with an interest in education should have detailed and open discussions about the information that could most usefully be reported on, taking into account current gaps in research knowledge.**

The intention is to adjust the provisions in section 3 of the Bill by way of amendment at Stage 2 so as to provide for statutory guidance covering the new reporting functions of education authorities. It is also our intention to integrate those reporting functions with the new reporting arrangements which will support the implementation of the National Improvement Framework.

Ministers share the Committee's view that the reports produced need to provide detailed and meaningful information about the progress made, and that they should set out the detailed and specific activity planned to address the issues and concerns identified. Our starting point for the information provided by the new arrangements is that it must support teachers, education authorities and Scottish Ministers in understanding "what works" and should inform all future activity to improve outcomes for those learners impacted by socio-economic disadvantage.

The guidance will be developed with direct input from a multi-agency working group, including representation from local government, and will be the subject of full public consultation in 2016. Once finalised, it will provide a detailed summary of the expected content of reports, taking full account of learning from the reporting processes linked to the Attainment Scotland Fund.

**56. The Bill does not currently require guidance to be issued or consultation to be undertaken before the reporting structure is established and reports published. In light of paragraphs 47 to 52 above, we invite the Scottish Government to consider the merits of creating such a requirement. The Scottish Government should also explain the extent to which relevant education authorities will be expected to report specifically on the outcomes arising from their Attainment Scotland funding. This would be a useful indicator of the Fund's success.**

We are currently working with key partners to agree the reporting arrangements for the National Improvement Framework and the links with the reporting requirements

in Part 1 of the Bill. The detailed amendments we bring forward at Stage 2 will reflect the outcome of those discussions.

As above, Ministers also propose to adjust the provisions in section 3 of the Bill by way of amendment at Stage 2 so as to provide for statutory guidance covering the new reporting functions of education authorities. Section 3 already provides that in preparing guidance under this section, Ministers must consult education authorities, parents, voluntary organisations and others as appropriate.

With respect to the Attainment Scotland Fund, as part of the national governance arrangements, each authority in receipt of funding will provide regular progress reports against their Improvement Plans, which include bespoke impact measurement plans. These arrangements are not provided for through the Bill but will link closely with the planning and reporting requirements set out in Part 1.

**57. Finally, the Scottish Government should provide examples of how, in exercising its powers in relation to school education, it intends to take into account inequalities of outcome. For example, we are interested in whether and how the duty will alter the Scottish Government's approach to the funding allocations it proposes in its draft budgets.**

The First Minister has made clear that closing the gap in educational attainment is viewed as an absolute priority for the Scottish Government. This is demonstrated through the wide range of activity currently being taken forward by Ministers in this area.

One example of the priority we are attaching to "narrowing the gap" is the Attainment Scotland Fund, which targets support on areas and schools with high concentrations of deprivation. In addition, the £1.5m Access to Education Fund is available to schools to support them to remove any barriers to learning experienced by children and young people from disadvantaged backgrounds.

Our commitment to addressing this challenge is also reflected in our existing approach to the funding of education services through the Block Grant.

The Block Grant is distributed between Scotland's local authorities on the basis of a needs-based grant distribution system known as the "client-group approach", developed over many years through consultation between the Scottish Government and local government. Several indicators of deprivation are used to increase funds for those local authorities with higher levels of deprivation and specific arrangements are in place to recognise the challenges facing those local authorities with higher numbers of deprived children. Of course, it is ultimately for local authorities to determine their own budget allocations with a view to meeting their statutory requirements, nationally agreed objectives, and local priorities.

Moving forward, we will continue to develop and implement policies and funding arrangements which prioritise the need to address the disparity in educational outcomes experienced as a result of socio-economic disadvantage.

### **Extending the duty**

**64. It is understandable that the Scottish Government, in tackling the educational attainment gap, would seek to prioritise action for the largest group of people who would benefit. However, we ask the Scottish Government to consider whether it would be logical to extend the duty to other groups of children whose educational attainment levels are particularly low.**

As has been previously expressed, Ministers are keen to use the opportunity offered by the Bill to focus on the particular educational challenges faced by learners as a result of socio-economic disadvantage. Ministers have considered the Committee's views on the potential extension of this duty, but have decided not to extend it at this point.

In reaching this view, Ministers took account of existing protections for other groups of children whose educational attainment levels are particularly low. In particular, the Education (Additional Support for Learning) (Scotland) Act 2004, as amended, places duties on education authorities to identify, make and review provision for the additional support needs of children and young people for whose education they are responsible, including those who are looked after.

As the Cabinet Secretary indicated to the Committee in her oral evidence however, Ministers remain open minded about using this provision at some point in the future to better support other groups of children.

### **Funding**

**69. The new duty does not bring increased resources for education authorities but does require them to prioritise narrowing the attainment gap. Our budget scrutiny this year will involve consideration of spending on schools and, as part of this work, we will consider the effect this prioritisation may have on education authorities.**

**70. £100m of funding is available through the Attainment Scotland Fund but we do not know how much is spent in total on the many other ongoing initiatives to narrow the gap. Given how much of a strategic priority this is for the Scottish Government, we expect there to be evidence of a fully-costed plan and look forward to hearing details of the resources that would be needed to eliminate the link between disadvantage and educational attainment.**

Ministers have noted the Committee's comments about funding and its intention to look at spending on schools as part of its budget scrutiny this year.

Given the complexity and multi-faceted nature of the link between educational outcomes and socio-economic disadvantage, it would not be realistic to attempt to put a figure on the amount of resources which are required to address this issue. More than £4.8 billion is invested through local authorities annually in education and, as the 2014 Audit Scotland report on school education noted, it is how this expenditure is used that will make the biggest difference in closing the gap. The £100m Attainment Scotland Fund over four years is additional to this expenditure and will support targeted interventions in those local authorities and schools facing the greatest challenge due to the impact of poverty. The universal support element of the Challenge will also help ensure that all local authorities have access to help in closing the attainment gap.

In addition, expenditure from other areas such as health, social work and justice will also have an impact on improving educational attainment for children and young people from more deprived backgrounds. That is why our refreshed Child Poverty Strategy, published last year, sets out the Government's broad approach to tackling child poverty, re-emphasising the need to focus on preventative approaches to achieve better outcomes and promote equality. Through its emphasis on three broad outcomes, the Strategy helps to bring together a range of policies which impact on levels of child poverty, including those relating to raising educational attainment.

## **Early years**

**71. We therefore call on the Scottish Government to explain why this part of the Bill does not include pre-school education and what the implications would be if it did.**

Part 1 of the Bill focuses on the delivery of an education authority's functions relating to school education. "School education" is defined under section 1(5)(a) of the Education (Scotland) Act 1980 and extends to the provision of early learning and childcare. Consequently, education authorities will be under a legal requirement to offer detailed, on-going consideration to the ways in which they can close the attainment gap when planning and delivering early learning and childcare once the relevant Bill provisions are commenced.

Ministers are clear that the provision of high quality early learning and childcare can make a significant contribution to closing the gap. Evidence shows that all children benefit from high quality early learning and childcare; that children who are more disadvantaged benefit the most; and that those benefits continue in primary school, through secondary school, and thereafter.

While the terms “pupil” and “school education” have been used in the drafting of the legislation, the statutory guidance which Ministers are empowered to issue in this regard will describe how it is intended the new duty will operate in relation to young children in early learning and childcare.

## **PART 2 - GAELIC EDUCATION**

### **Entitlement**

**79. Given the level of interest in this point, particularly within the Gaelic community, the Scottish Government should confirm whether it is still examining how to introduce an entitlement to Gaelic medium education where reasonable demand exists. (also paras 90 and 91 are relevant)**

It is Ministers' view that the Bill puts in place a clear, transparent and consistent process for assessing parental requests for Gaelic medium primary education.

The demand for a right to GME has been a long standing request from Gaelic interests. The manifesto commitment which was behind the Gaelic Bill provisions committed the Scottish Government to explore an entitlement to GME where reasonable demand exists. As the Committee is aware however, a number of Gaelic interests felt that the proposed assessment process in the Bill did not go far enough to satisfy this manifesto commitment – they argue that it gives too much discretion to local authorities. It has also been argued that the assessment process is too neutral and that there should be a presumption in favour of the provision of Gaelic.

Much of this comment, however, has emphasised entitlement but played down the need for there to be reasonable demand. The Scottish Government position remains that in order to establish reasonable demand a good process is needed and the Bill provides one. Ministers have recognised the strength of the concerns that exist and have requested that amendments to the Bill are instructed and prepared to include a presumption in favour of GMPE.

### **CoSLA and imposition**

**88. The Minister also stressed that the legislation “is not about forcing local authorities to provide Gaelic. If there is no demand for Gaelic-medium education in a local community, nobody will make use of the bill”. This may have been a reference to comments made by COSLA, who thought the Bill may give Scottish Ministers powers to overturn local authority decisions on this decision-making process. We would welcome clarification from the Scottish Government on this point.**

On this occasion the Minister was making a general point about the principle behind the Bill; parental demand should be the trigger rather than ministerial imposition. This was not a reference to earlier CoSLA comments.

In connection with the CoSLA comments, the Bill makes clear that an authority does not need to comply with the duty to assess a parental request, if another request was

made within the preceding two years in the same area and the outcome was that the authority decided not to establish GMPE.

It would appear that CoSLA's comments misunderstand the ministerial power of direction, presuming it means that if an authority decided not to establish GMPE then Ministers could overrule this decision and require GMPE to be provided. This is not the case. The provisions only allow Ministers to direct an authority to carry out a further assessment even when this is still within the two year exemption period. Ministers can only make such a direction where this is considered appropriate, for example, if there was a change of circumstances and this was brought to Ministers' attention.

### **Entitlement and burden on parents**

**90. We acknowledge the Bill does not create an entitlement to Gaelic medium education. However, there is merit in creating and enforcing a clearly-defined process for establishing parental demand. The process appears to take the necessary considerations into account, although it may place considerable demands on the parents who take part.**

**91. It is not exactly clear how the Scottish Government could strengthen the Bill "to go further along the line of entitlement" without actually creating an entitlement or "forcing local authorities to provide Gaelic". One possible option would be to introduce a presumption that Gaelic be provided if certain conditions were met. However, significant concerns have been expressed about a lack of teachers, which may make such a presumption difficult to deliver.**

As set out above, Ministers have recognised the strength of the concerns that exist about creating an entitlement to GMPE and have requested that amendments to the Bill are instructed and prepared to include a presumption in favour of GMPE.

Any process of this nature will place considerable importance on the role of parents requesting GMPE. It is however expected that there will be support for such parents from both the Gaelic parents' society, Comann nam Parant and from Bòrd na Gàidhlig. We also understand that local authorities that have Gaelic medium education provision have commenced work on a tool-kit to provide practical information on how the process will operate. This will also be useful support for parents.

As for Gaelic teachers, there has been good growth in Gaelic teachers entering the profession in recent years. This has resulted from both an increased level of promotion of GM teaching and the creation of new routes and pathways into Gaelic teaching. New routes include, UHI Gaelic Initial Teacher Education courses, the

Gaelic Immersion for Teachers (GIFT) course, the Streap (teacher transfer to Gaelic course) and the new MA degree at the University of Edinburgh which includes Gaelic teacher education.

This has led to the highest numbers of teachers being recruited into the sector. Although numbers are improving, the sector has been aware of the need to recruit, educate and retain more teachers. This is seen as one of the key elements to the growth of the sector.

The provisions of the Bill will not directly influence GM teacher numbers. These matters are, however, a priority and good progress is being made working with key bodies such as the Scottish Funding Council, Bòrd na Gàidhlig and Initial Teacher Education providers.

### **Early Learning and Childcare**

**101. While we recognise the frustrations felt by those who wish the Bill to go further, we note the rationale for limiting this provision to primary schools rather than including secondary schools, although there are concerns about the number of teachers at both levels. The Bill's provisions on early learning and childcare are different again and the Scottish Government should explain the circumstances in which it would seek to make regulations in this area (as described in paragraph 92).**

During development of the Bill provisions, it was decided that the parental request and authority duty to assess that request should apply only to Gaelic medium primary education. Ministers welcome the Committee's recognition of the difficulties involved in the provision of GME in secondary schools.

It is clear that GME is most effective when provided from a young age. At the time that we were considering the Bill there was active consideration of extending the Bill provisions to include early learning and childcare. There were however, and there continue to be, significant developments taking place in early learning and childcare and it was agreed that this was not the right time to introduce another duty that would impact on a sector that was already undergoing considerable change.

But, there is a clear recognition that we need to do more for GME in early learning and childcare. It was therefore decided to include the regulation making power at section 12 of the Bill to allow the Parliament to extend the provisions to cover early learning and childcare when it is considered that the timing is right, without the need for more primary legislation. We will keep this under review and will continue to engage with key partners about the most appropriate time to bring forward regulations under this power.

In the meantime, local authorities already have powers to deliver Gaelic medium education in early learning and childcare. The proposed duties in the Bill to promote and support Gaelic learning include early learning and childcare. In addition, there are plans for GME to be included in the statutory guidance on the consultation process for education authorities in relation to early learning and childcare and out of school care.

### **Support for GME and GLE**

**106. This new duty suggests that at least some existing provision of GLE and GME is not properly resourced. However, there is only a passing mention of this duty in the Policy Memorandum (in paragraph 31). There is no indication of the extent to which existing GLE/GME provision is not adequately supported; whether this is more of an issue for primary or secondary schools; the impact this is having on pupils and teachers; whether there are resourcing difficulties for particular local authorities; and the specific improvement the duty is likely to delivery.**

**107. We call on the Scottish Government to address the issues we have highlighted above (supporting GME and GLE).**

Over the last fifteen years there has been a marked improvement in resources and support for Gaelic teachers. Storlann now provides resources for Gaelic education at all levels and Education Scotland also has a range of resources available in Gaelic. The situation is still improving and in September 2015 there was another important step forward with the publication of the Go! Gaelic resources to support the teaching and learning of Gaelic as an additional language.

This momentum needs to be maintained. There are still areas where GM teachers and CLAS (the Gaelic teachers representative association) feel that support and resources are inadequate. This can be at times when a new curriculum initiative is introduced or when career-long professional learning programmes are being considered or when advice to support teachers with, eg, literacy or numeracy is produced and it is available only in English. GM teachers will say a lot of their time is taken up with translating material to use in the classroom.

The lack of support and resources is more of an issue for GM secondary. The growth of GME has been most marked in primary and as a result the provision of resources and support for teachers has followed this growth. In addition, there is a wider area to cover at secondary because provision is by subject with some schools offering one or two subjects and others aiming to offer four, five or six. GM secondary has also faced the added challenge of recent curriculum change. While this is a general concern, we are not aware of this being a difficulty for particular authorities.

The Scottish Government want GME to be seen as good quality education that is attractive to pupils, parents and teachers. In principle, when something is done for the majority sector in Scottish education it should also be available for the minority sector. This requires good support to be in place in Gaelic at all stages. This will enhance the appeal of Gaelic and contribute to the growth that we need to see both at primary and secondary.

## **Guidance**

**110. The Scottish Government will produce guidance to local authorities on promoting GME and GLE. We consider this should encourage local authorities to work together more closely on promoting Gaelic.**

**113. Given some of the concerns it has expressed about this Bill, we are surprised that Bord na Gaidhlig has not used its existing power to issue guidance “in relation to the provision of Gaelic education and the development of such provision”. We welcome that this is now a duty and trust it will lead to an improvement in Gaelic provision.**

Ministers welcome the Committee’s support for the duty to prepare guidance and share the belief that this guidance will help bring about improvements. A working group has been set up to prepare this guidance and work has commenced.

The guidance will cover issues in the Bill that could benefit from further description. This could include, for example, further detail on the threshold for GMPE, the establishing of assessment areas, the matters that authorities must consider in a full assessment and what is involved in the duty to promote and support GME. The guidance will also deal with issues that have needed definition and clarification for some time, for example, guidance on the nature and extent of immersion in the early stages of primary, the desirability of continuity in GME and GME school ethos and environment.

We understand that there was a delay in Bòrd na Gàidhlig preparing guidance on Gaelic education under its existing power because the Bòrd was aware that Education Scotland was working on Gaelic Advice. The guidance required by this Bill will build on the ES Advice and respond to the new Gaelic provisions in the Bill.

## **Growth Projections**

**125. There are mixed messages about whether, and the extent to which, the Bill itself will directly lead to increased Gaelic provision. Further, the discussion about increased provision was sometimes about primary education**

**and sometimes in more general terms. There also seem to be different ways of measuring the growth of GMPE.**

**126. It is not possible to state with certainty the exact level of growth that will occur as a result of the Bill. However, we believe that any growth in GMPE, however modest, will be valuable given the Scottish Government's wider policy aim of restoring the number of Gaelic speakers to 2001 levels. In order to help evaluate the Bill's future impact, the Scottish Government should state its projections of the likely increase in Gaelic speakers arising from these provisions.**

The Scottish Government's aim is to create a secure future for Gaelic in Scotland and increasing the numbers speaking, learning and using the language is crucial to this. We are aware that GME is a slowly expanding sector and confident that the provisions in the Bill have the potential to lead to a faster rate of growth for GMPE.

Growth can, indeed, be measured in different ways, for example the numbers in a GME unit, the transition from GME unit to GME school or indeed the establishment of new GME units. We are confident that a combination of factors will promote the growth of GME. This includes elements that are included in this Bill and other elements that do not feature such as the activity of local parent groups, the support offered by the national Gaelic parent body, Comann nam Pàrant and the activity of Bòrd na Gàidhlig.

As detailed in the Financial Memorandum, we estimate there to be one new unit opening every two years. This would be in addition to those which we would describe as normal growth. This is based on past experience of the last six years rather than sure future knowledge and planning. The associated projection of Gaelic speakers from this provision in the Bill is difficult to measure. At present we have Gaelic 0-3 centres in a number of areas that do not have GME primary provision. Some examples of this would be Airdrie, Balquidder, Kinlochbervie, Roybridge, Dumfries and Fionnphort. These centres could contain parents that might be interested in GMPE for their children. The numbers attending these centres are, at this stage, not collected and even if they could be provided accurately would not provide a reliable indication of how many parents would like to have access to Gaelic medium provision for their children. We have said elsewhere that we recognise that GMPE is a key factor in increasing the numbers speaking and using the language. There is, however, not a direct correlation between GMPE and increasing the numbers of Gaelic speakers as there are other factors that contribute to this ambition.

## **Teachers and Digital Learning**

**132. It is striking that the organisations that provided oral evidence to us on the Gaelic provisions all talked of the need for creative ideas and solutions to increasing Gaelic provision. We are not sure, however, what is preventing these creative ideas from being implemented effectively. The Scottish Government should explain how, through the Bill or otherwise, it could help to improve teacher numbers and the use of digital technology in secondary schools.**

As mentioned in the response above at paragraph 91, there has been good growth in Gaelic teachers entering the profession in recent years resulting from an increased level of promotion and the creation of new routes into Gaelic teaching. The Gaelic medium sector has been aware of the need to recruit, educate and retain more teachers. This is seen as one of the key obstacles to the growth of the sector.

There are still significant gaps in teacher numbers though, particularly in secondary. Steps are being taken to look at creative solutions to this issue that involve digital learning and work is taking place at Education Scotland to explore this. The provisions of the Bill will not directly influence GM teacher numbers or advances in GM digital learning. These matters are, however, a priority and good progress is being made working with key bodies such as the Scottish Funding Council, Bòrd na Gàidhlig and Initial Teacher Education providers. GM teacher provision remains a priority and initiatives are being put in place to address the gaps.

## **PART 3 – MISCELLANEOUS MODIFICATIONS OF ENACTMENT**

### **ADDITIONAL SUPPORT FOR LEARNING**

Ministers recognise that the provisions in the Bill to amend the Education (Additional Support for Learning (Scotland) Act 2004 (“the Act”) are complex and technical in nature. We welcome the engagement of the Committee on these provisions and understand the concerns that have been raised within the Stage 1 report. Scottish Government officials have benefitted from significant discussions with stakeholders in both the development of the initial proposals within the Bill and subsequently, following the evidence provided to the Committee. As a result of those discussions Ministers have agreed to bring forward some amendments to the Bill provisions at Stage 2. These will, in summary:

- Remove any assessment of the capacity and best interests of young people;
- Amend the definition of what is considered to mean lacking capacity;
- Replace assessment of ‘best interests’ with assessment of whether exercising a right adversely affects the child’s ‘wellbeing’
- Ensure that young people in school continue to receive support regardless of their age;
- Ensure that only one placing request reference can be made to the Additional Support Needs Tribunal in any 12 month period.
- Allow Ministers to vary the information that must be collected and published in relation to additional support for learning;
- Allow a single convener of the Tribunal to consider appeals regarding decisions of capacity and wellbeing without a hearing, and allow for appeals against these decisions to be made to a full Tribunal. Also to require Tribunals to consider the views of children as part of references made to the Tribunal.

Further details of these are set out within the responses to the points raised by the Committee as appropriate.

#### **Parents’ role**

**153. There are children for whom the local authority is effectively acting as a parent and parents can exercise rights on their children’s behalf under this Bill. We ask the Scottish Government to consider whether any safeguards are required so that an education authority, in making decisions around capacity and best interests, would be able to do so fairly and effectively for the children it looks after.**

The need to ensure that looked after children are able to access their rights under the additional support for learning framework currently exists, and is addressed currently by the Code of Practice for the Additional Support for Learning Act and through work to support implementation of the Act. In addition, the Bill contains safeguards in relation to capacity and best interests (wellbeing) assessments.

These safeguards allow a child, young person or parent to appeal to the Tribunal against a decision of the education authority on capacity and best interests (wellbeing). These safeguards will particularly be of benefit to looked after children. It is our intention to ensure the statutory support service focuses on what can be done to ensure that looked after children nationally are appropriately supported to use their rights under the Act, including in relation to the capacity and best interest (wellbeing) assessment. It is our view that this can be achieved through non-legislative means.

From officials' discussions with stakeholders it is also recognised that children and young people affected by parental imprisonment may require additional support for their learning. As a result it is intended that the code of practice for additional support for learning which will be revised following the passage of the Education Bill will recognise this particular group of children and young people.

## **Capacity**

**154. This Bill and the existing Act contain provisions about capacity for children and young people, but they do not provide for assessments of parental capacity. Where a parent exercises a right on behalf of their child (whether the child wishes them to do so or not) we understand that the tests around the child's capacity and best interest do not have to be met. Where a parent wishes to exercise a right on their child's behalf but the child does not wish them to do so, we understand that the child will not be able to appeal their parent's decision.**

**157. There was some uncertainty in the answers provided about determinations of parental capacity, particularly in instances where a parent and a child with capacity may be in dispute. We therefore request clarification on this point and the other points raised in paragraph 154.**

In relation to the first point in paragraph 154, we can confirm that where a parent exercises a right in relation to a child the assessments of capacity and best interests (wellbeing) will not be undertaken. This is currently the position within the provisions of the Additional Support for Learning Act, reflecting parental responsibility in relation to their child's education.

In relation to the second point in paragraph 154, we can confirm that where a parent wishes to exercise a right in relation to their child, but the child does not wish them to do so, the child will not be able to appeal their parent's decision to exercise the right. The child will however be able to appeal any decision that the education authority reaches in relation to the child's additional support needs.

In relation to the assessment of parental capacity, there is no requirement within the Act for the assessment of parental capacity and it is not intended that there should be. However, if the education authority does have concerns about the capacity of the parent, then, as ADES said in their evidence to the Committee, and is noted in

paragraph 156 of the report, the school may need to seek advice and support from the authority's social work department. In cases of this nature, the welfare and wellbeing of the child is paramount and the social work department would need to assess what action, if any, should be taken to safeguard and promote the child's welfare.

Further, there is no need to address parental capacity within the Additional Support for Learning Act or the Education Bill as there is legislation already in place, the Adults with Incapacity (Scotland) Act 2000, which deals with adults with incapacity. This legislation applies to people aged 16 and over.

## **Young people**

**175. We are concerned about the circularity of a provision in a Bill concerned with ASN, that decisions about whether a young person has the capacity to exercise their rights around ASN may depend on whether that young person has ASN. We therefore ask for an explanation of the need for this provision.**

The term 'additional support needs' was included within the definition of 'lacking capacity' in the Education Bill as it was recognised that the definition of 'lacking capacity' within the Additional Support for Learning Act referred to certain descriptions of disabilities but did not reflect that a lack of capacity may arise as a result of an additional support need which would not be considered a disability. For example, as a result of a factor arising from a child's learning environment, family circumstances or a social and emotional factor.

However, following discussions with stakeholders and in light of concerns raised as part of the evidence to the Committee, and by the Committee itself, Ministers have decided that an amendment will be brought forward by the Scottish Government at Stage 2 which will remove the subsections (section 3(2)(a) to (e)) within the definition of lacking capacity and therefore the references to certain disabilities and additional support needs will be removed. The reference to maturity will also be removed from the definition of 'capacity' in relation to young people.

## **Response to Criticisms**

**185. We welcome the extension of rights to children. However, we have concerns about the complexity of these provisions and how they will be understood by the children who are supposed to benefit from them.**

This is an issue which was recognised in the development of the proposals as part of the Bill. As a result, we will put in place a children's support service. The service will have responsibility for the provision of advice and information to children. It is intended that the service will produce information which is accessible to children and that the functions of the named person will be used to draw their attention to this information and to the support service itself. This is in addition to the responsibilities

of education authorities currently, to publish and review information about their duties and functions in relation to children with additional support needs, under section 26 of the Additional Support for Learning Act.

**186. We understand the Scottish Government disputes the factual basis of some comments made by stakeholders, particularly around the child's right to appeal and an education authority's role in this process, but we remain concerned by the serious nature of some of these comments. In advance of the Stage One debate, the Scottish Government should seek to resolve such concerns by discussing the factual position with relevant stakeholders. This will ensure that the parliamentary debate focuses on the substantive policy issues.**

The specific area of concern relates to the misunderstanding from some stakeholders that the education authority will assess the capacity and best interests of children and young people in relation to their rights to make references to the Additional Support Needs Tribunals for Scotland. The effect of this would be to allow an education authority to potentially prevent the use of the Tribunal as a mechanism within which to resolve concerns or to uphold rights. This position is a clear misunderstanding. The requirement to assess a child's capacity and best interests (wellbeing) rests with education authorities when a child seeks to exercise a right under the Additional Support for Learning Act (in relation to those rights for children which the education authority would be responsible for responding to and delivering and is set out at new section 3A(3) of the Additional Support for Learning Act as inserted by paragraph 3 of the Schedule to the Bill). Whereas the Additional Support Needs Tribunals is required to assess a child's capacity and best interests (wellbeing) when a child wishes to make a reference to the Additional Support Needs Tribunals. The relevant provisions are contained within section 18(2A) of the Additional Support for Learning Act as inserted by paragraph 17 of the schedule to the Bill).

There have been a range of discussions with stakeholders following the conclusion of the Committee's call for Evidence and subsequent concerns raised, which have led to further consideration, much of which is noted within this response. This particular issue was raised by, and subsequently discussed with, the Equality and Human Rights Commission, Scotland's Commissioner for Children and Young People, The Law Society, and Inclusion Scotland. These organisations accept this was a misunderstanding of the position. However, Inclusion Scotland and Scotland's Commissioner for Children and Young People, continue to have concerns regarding the education authority's role in assessing capacity and best interests in relation to children exercising their rights under the Act.

**187. One key issue in the debate will be whether the limitations attached to the extension of children's rights should be considered as a safeguard or as a barrier to children's effective exercise of their rights. In other words, whether the best interests and capacity tests are merited.**

It is our belief that the assessment of capacity and best interests (wellbeing) are merited, and provide an important safeguard against the potentially significant impact that exercising the rights may have on a child. It is not intended that the

assessments act as a barrier to children using rights, but instead as a check to make sure that the child will not be adversely affected by using their rights. For example, in the circumstance where a child is using their right to request assessment of their additional support needs. It is correct that it is established that the child will cope with the assessment process associated with their potential additional support needs and will they cope with being told the outcome directly themselves, before proceeding with that process. Currently, it is likely that this is supported and moderated by their parent or carer or a supporter, and whilst this may be the case also going forward, it cannot be assumed that it will be the case in all circumstances. For some children, there may be wider circumstances which will mean that these things are more challenging for them than others.

However, as a result of discussions with stakeholders and in light of the concerns expressed by them in their evidence to Committee, we are proposing to bring forward an amendment at Stage 2 to move away from the ‘best interests test’. It is our intention to replace that assessment with a requirement to consider whether using a right would adversely affect the child’s wellbeing. As part of this amendment, it is proposed that education authorities will assess a child’s wellbeing with reference to the same wellbeing indicators as provided for in section 96 of the Children and Young People (Scotland) Act 2014 (the extent to which a child is or would be safe, healthy, achieving, nurtured, active, respected, responsible and included if they exercised a particular right).

**188. It is not clear why the Bill defines both when a child has capacity and when a child does not have capacity. Unless there is a clear rationale for doing so, we consider it would be simpler to state when a child has capacity. Depending on the Scottish Government’s response, we also question why the Bill defines ‘lack of capacity’ by reference to various reasons. It would appear simpler to say that lack of capacity is due to a lack of maturity or understanding, without also stating particular reasons.**

We recognise the concern that the Committee notes in relation to this issue. However the Bill provisions extend various different rights to children, such as the right to carry out certain acts, make decisions, receive certain information and advice, or to express a view. The Bill therefore requires to make it clear that a child has capacity if they have sufficient maturity and understanding in relation to these actions, decisions, receipt of information and expression of views. The Bill provisions then expand on this, by specifying the reasons why a child may lack sufficient maturity and understanding in relation to these actions, decisions, information and views .

However, in response to the concerns raised by stakeholders and the Committee regarding the amended definition of ‘lacking capacity’ we have taken steps to review this definition for a child and will propose an amendment to the definition of lacking capacity for both children and young people at Stage 2. The specific terms of the amendment have not been decided upon yet but it may instead define lack of capacity for children as simply when a child lacks “sufficient maturity and understanding” (the definition for young people may simply refer to a young person lacking “sufficient understanding” only, due to their age).

**189. Young people already have rights under the Act. This Bill seeks to introduce a best interests test for young people and modify the existing definition of capacity. The Scottish Government should explain the rationale for this decision and the particular problem the change was designed to address.**

Initially, these provisions were introduced to ensure a consistent approach was taken and that authorities should therefore consider the capacity and best interests of both children and young people wishing to use their rights under the Additional Support for Learning Act. Our intention was to provide a safeguard against children or young people using their rights in a way which may adversely affect their wellbeing.

However, in light of the evidence provided by stakeholders, Ministers recognise that this is a very serious concern. We intend therefore to bring forward an amendment at Stage 2 to remove the requirement on education authorities to assess the capacity and best interests of young people. However, there remains the need to retain references to “lacking capacity” in relation to young people to ensure that their rights can continue to be transferred to their parents, where it is established that they lack capacity, as is the current position in the Additional Support for Learning Act. As already indicated, we also intend to review and bring forward an amendment at Stage 2 in relation to the definition of “lacking capacity” for a young person.

**190. Given the complexity of the legislation and the arguments expressed, the Scottish Government should also provide an update on the following issues in advance of the Stage One debate—**

- **The particular circumstances in which – as stated by the Minister presuming children’s capacity —could have had a range of potential unintended consequences;**
- **The likelihood, in practice, of an educational authority determining that a child does not meet the capacity and best interests tests;**

In relation to the first point, a presumption of capacity would mean that there would be no safeguard to ensure that a child would be able to manage all of the requirements upon them in relation to using their rights. This would mean that any concerns about whether or not the child could cope with the processes associated with that right would emerge once the child was undertaking that process, and their ability to cope is already compromised, giving rise to a further need for additional support. That would be the unintended consequence of a presumption of capacity. We have set out in response to the question at paragraph 187 an example of how this may occur which is hopefully helpful here also.

As indicated earlier, it is Ministers’ intention to bring forward a Stage 2 amendment to replace the best interests assessment with an assessment of whether the use of a right by a child would adversely affect the child’s wellbeing. The intention is to safeguard children’s wellbeing whilst also enabling use of rights, where that is appropriate.

In relation to the second point, the decisions as a result of assessment of capacity and best interests (wellbeing) would be taken on an individual case by case basis, reflecting the individual needs and circumstances of each child. This reflects the education authorities duties to identify and meet the individual additional support needs of the children and young people. As a result it is not possible to indicate how many children are likely or otherwise to be considered not to have capacity or how often an authority would consider that use of rights would adversely affect their wellbeing.

**191. Given stakeholder concerns, whether the guidance on capacity and best interests will—**

- **State that these should be assumed in any particular circumstances;**
- **Identify any circumstances in which a child aged under 12 could have capacity.**

It is not intended that the introduction of an assessment of capacity and best interests (wellbeing) as part of these provisions implies that a child does not or would not have capacity or that it would not be in their best interests to exercise the rights. Instead, it is intended that the education authority or as the case may be the Additional Support Needs Tribunals should make an assessment of whether there is capacity and whether the use of their rights would adversely impact the wellbeing of the child. It is our intention to describe in detail in guidance how these decisions should be made and the information which should be used to form that view.

It is not intended that there should be an assumption of capacity and best interests (wellbeing) in any particular circumstances as this would prevent there being the safeguard in place. Authorities will be required to carry out these assessments in relation to each child that seeks to exercise a right, and on each occasion that a child seeks to exercise a right. We will therefore, make it clear that authorities are not to assume capacity and best interest in relation to any child or in relation to the exercise of any particular right.

Under section 12 of the Additional Support for Learning Act education authorities are currently required to seek and take account of the views of the child regardless of their age (unless they lack capacity to give it) in a range of circumstances. These are:

- when establishing that the child has additional support needs, or requires or may require a co-ordinated support plan,
- when following a review of a co-ordinated support plan whether a child still requires the co-ordinated support plan,
- in preparing a co-ordinated support plan,
- when determining the provision that is needed to meet the child's additional support needs.

This duty applies in relation to children of any age, including those under 12. Further, it is the Scottish Government's intention to bring forward an amendment at Stage 2 to extend the matters which can be considered as part of the Rules and

Procedures for the Additional Support Needs Tribunals For Scotland. This will enable an amendment to be made subsequently to the Rules and Procedures of the Additional Support Needs Tribunals to introduce an obligation on the Tribunal to seek and take account of the views of the child as part of the Tribunal hearing process.

### **Limits on extending rights**

**196. We welcome the support service that will help children exercise their new rights and consider it crucial that organisations involved explain these rights to children as clearly as possible.**

Ministers fully agree that the level of advice and engagement is crucial to supporting children to use their rights. As stated in the accompanying Financial Memorandum to the Bill, it is our intention to meet the demands for a children's support service through the extension of existing services where that is appropriate and practicable. We intend to extend the services currently provided by Children in Scotland through the Enquire service to meet the need to provide appropriate advice and information and to obtain views of children independently. Ministers are confident therefore that the organisations engaging directly with children wishing to use the service will do so at an appropriate level.

**197. We agree that extending rights on placing requests could be unnecessarily disruptive to family life. However, there is not such clear support for the Scottish Government's position on mediation. The Scottish Government should explain why there is a blanket presumption against children – even those with capacity – participating in mediation, when they will be able to access other aspects of the support service.**

During the development of the Bill, policy officials met directly with 'Resolve: ASL Mediation Service' a service managed by Children in Scotland who provide mediation services to 12 of the 32 local authorities. They advised that the demands on children to negotiate and compromise towards an agreement are significant and therefore the process could be detrimental to the child's mental health, wellbeing and on-going relationships with the adults they would mediate with. Further, we understand that introducing representation or support to the mediation process would not remove the responsibility on the child at all stages of the process including to reach a resolution, which is a key part of this process.

It should be noted that we have taken steps to ensure that through this Bill children of any age can continue to participate in, and are required to have their views considered, as part of the mediation process to ensure that the child informs any decisions taken as a result of mediation.

**198. We noted in paragraph 182 the Scottish Government's justification for introducing the best interests element, namely to avoid children being put under pressure or being unable to cope. We question why the statutory**

**support service would be unable to assist such children, who may have been determined to have capacity.**

By introducing an assessment of best interests, it was our intention to provide a safeguard against children or young people using their rights in a way which may adversely affect their wellbeing. The statutory support service may be able to assist children who are unable to cope with a process of using their rights, however for some particularly vulnerable children with additional support needs, even that support may not be enough to help them to cope with making potentially life-changing decisions. It is for these particularly vulnerable children that the safeguard has been introduced.

**199. With the exception of the two rights discussed above, the Bill creates a similar system for children and young people. However, the support system for children will be statutory, while the support for young people and parents is not all statutory. We ask the Scottish Government to explain the implications of creating a fully statutory support service for all concerned.**

The proposed statutory support service for children will provide the following three services: advice and information, advocacy and legal representation and anyone providing the service may also seek the children's views in relation to the exercise of any of the rights and provide them to the relevant service provider. Currently under the Additional Support for Learning Act, Scottish Ministers are required to provide advocacy, support and legal representation for young people and parents in relation to matters which are considered by the Additional Support Needs Tribunals Scotland. The Let's Talk ASN service fulfils this function.

Advice and information on additional support for learning for parents, young people and children is currently provided by Children in Scotland via the Enquire service. The service produces accessible information on a wide range of issues which are commonly raised, and advice can be obtained from the Enquire helpline on specific issues. This service will be strengthened to provide further accessible information and advice for children.

The issue of creating a single support service was considered, however, due to the recognition that parents and young people and children will require advice and advocacy and legal support in relation to dispute resolution it is necessary for there to be two distinct services, to ensure that there is no conflict of interest for the service in the circumstances where a parent is appealing against the education authority's decision in relation to capacity or best interests which may be a source of challenge within the family. For this reason, it is intended that there should be two strands of service as set out above.

## **Equity**

**204. The ASN provisions are, in part, designed to provide equity with other relevant legislation. Various stakeholders are not convinced this has been fully achieved. We have not been able to discuss in depth all such points, including those listed above. We ask the Scottish Government whether it**

**proposes to use the Bill to address any of the points highlighted about equity. The Scottish Government should also clarify the Bill's definition of young people' as there was some confusion about this in evidence.**

The initial points regarding the presumption of capacity and whether or not any pupils under 12 are likely to have capacity are addressed earlier in this response.

In relation to the evidence provided in written submissions summarised in this section our response is as follows:

The right to make a disability discrimination claim arises from the Equality Act 2010. This Act makes no reference to advocacy or support services for the claim process before the Additional Support Needs Tribunals for Scotland and therefore it is presumed that this was not the intention. This may be because ABWOR (Assistance by Way of Representation) applies in relation to a claim and therefore legal assistance is available and therefore advocacy support is less likely to be required. Advocacy support is provided in relation to the rights to children extended under the Additional Support for Learning Act as a result of their being a number of different rights available and a variety of differing processes for the use of these rights. Therefore it is likely that some support to understand and negotiate these processes is needed. This is in comparison to a single right to make a claim which is supported by a legal representative.

We recognise the concern raised by the President of the Additional Support Needs Tribunals for Scotland in relation to the equity of assessment and best interests provisions within the Tribunal's jurisdiction. We understand the concern of the President of the Additional Support Needs Tribunals for Scotland, on this issue. It is not our intention to apply the capacity and best interest (wellbeing) assessments to the right to make a claim of disability discrimination to the Additional Support Needs Tribunals, as this is the only right available in relation to disability discrimination. The right does not carry the same risks as the extension of rights proposed under the Additional Support for Learning Act, of which the right to make a reference to the Additional Support Needs Tribunals is a part. This means that it will be necessary, in particular, to consider and address the circumstances where a disability discrimination claim and a reference under the Additional Support for Learning Act will become consolidated.

In relation to young people, the definition of young people relied upon in the Additional Support for Learning Act and in the amending provisions introduced by the Bill is that set out at section 135 of the Education (Scotland) Act 1980. Which states that 'young person means a person over school age who has not attained the age of eighteen years'. School age is defined by section 31 of the Education (Scotland) Act 1980. It states 'a person is of school age if he has attained the age of five years and has not attained the age of sixteen years'. Therefore young people may be considered to be aged sixteen and seventeen and in school education.

In light of the concerns raised in evidence, and the fact that this may mean that those who are eighteen years of age and who are in school may not get the support that they need it is our intention to amend the definition. This will be achieved through an amendment to be introduced at Stage 2 which will define the term young person

specifically for the purposes of the Additional Support for Learning Act, to address this issue.

We recognise the concerns regarding the support for looked after children and young people. It is our view that looked after children and young people are one of the groups of children and young people who have the most to gain as a result of the extension of children's rights. They are likely to particularly benefit from the services provided by the children's support service which will support them in accessing their rights. This is in addition to the on-going work, which is unrelated to the Bill, to continue to support improved implementation of the provisions of the Additional Support for Learning Act to improve looked after children's learning outcomes.

## **SECTION 70 COMPLAINTS**

**209. There was a majority view that the Bill would make clearer the respective roles of the Scottish Government and ASNTS in relation to section 70. However, some respondents questioned this—**

- **“in relation to sections 4,5 and 18 of the Children and Young People (Scotland) Act 2014 there could be an overlap between an additional support need and a wellbeing need which could lead to confusion so it will not always be clear cut when a complaint is solely for the ASNTs.” (Renfrewshire Council)**
- **ENABLE said there was a possibility of cross-cutting issues arising in complex situations where it was not clear who should deal with the complaint.**
- **The Faculty of Advocates gave the specific example of transport, saying it may be a matter for the Tribunal (if specified in a co-ordinated support plan) and possibly also subject to section 70.**

**210. We agree with the Scottish Government that there should be no confusion about the roles of Scottish Ministers and the Tribunal with regard to section 70 complaints. The Scottish Government should therefore investigate the specific concerns summarised above and confirm whether these will be addressed by the Bill.**

Ministers agree that there may be instances where an alleged failure of duty which could be considered under section 70 will be appropriate to be considered by the Additional Support Needs Tribunals for Scotland (ASNTS). However, to avoid duplication, the measures in the Bill will ensure that where any matter is under the jurisdiction of the ASNTS, that matter will not be considered under section 70 by Scottish Ministers. It is our intention to produce non-statutory guidance on the revised section 70 process which will outline what is and what is not an appropriate complaint to make to Ministers.

In relation to the first point on the named person and child’s plan under the Children and Young People (Scotland) Act 2014, these do not fall within the remit of either section 70 or the ASNTS. This position is reiterated within the consultation which is currently underway on Consultation on Complaints Concerning Functions Relating to the Named Person and Child’s Plan and will also be restated within the guidance indicated above.

In relation to the point made by Enable, it is felt that the guidance which will be brought forward as a result of the Bill will address this issue. However, in addition, Enquire the national advice and information service for additional support for learning, currently provides information for parents on the routes available to resolve concerns. This information will be updated in light of the amendments brought forward within the Bill.

The example highlighted by the Faculty of Advocates falls within the remit of the ASNTS as it would relate to a co-ordinated support plan, and therefore would not be considered under Section 70.

In conclusion it is our view that the matters which can come before an Additional Support Needs Tribunal are sufficiently well defined that it should be clear whether or not section 70 applies to these matters. Also as stated, guidance will be produced which makes it clear what is a competent complaint to make to Ministers and what is not.

**216. We welcome the Scottish Government's intention to revise the process so that the time taken for a complaint to be resolved is reduced. It is unclear exactly how this will be achieved and what redress may be available if timescales were not met. We would welcome further information from the Scottish Government on these points.**

It is Ministers' intention, through regulations, to introduce strict timescales on the relevant parties affected by the section 70 process including Scottish Ministers. It is our view that by introducing these timescales to the process and reducing the volume of correspondence which is entered into as part of the current process, we can reach a swifter resolution of the issue. Where timescales are not met, it is our intention to provide Ministers with the power to request that HMIE carry out an investigation into the complaint immediately. It is our intention to publicly consult on these regulations.

**219. As noted, the Bill provides for regulations to be made to specify the complaints process. In devising these regulations, we consider it essential that the Scottish Government consult fully with the SPSO, likely users of the new system and all other interested parties, to ensure that the process established is as simple and easy to use as possible. The process established should also be communicated very clearly to all relevant parties.**

In developing the Bill proposals, Scottish Government consulted directly with a number of key stakeholders who will be users of the new system, including Education Scotland, National Parents Forum for Scotland, ADES and COSLA. It is our intention to publicly consult on the regulations and will consult directly with SPSO as recommended by Committee as part of this. It is also our intention to produce non-statutory guidance on the revised section 70 process which will outline what is and what is not an appropriate complaint.

## CHIEF EDUCATION OFFICER

**232. Given the importance and complexity of their educational functions, we agree that all education authorities should appoint an officer to provide them with advice on these functions. Almost all authorities, we were told, already have a person in post that provides such advice and the Bill may therefore simply have a nominal effect. We cannot be definite, however, about the number of local authorities that would be affected given the differing accounts provided by ADES, the Scottish Government and COSLA. In particular, we note ADES' evidence that "four authorities now potentially do not have the appropriate post in their structures" and question whether this would create any financial costs for local authorities that are not covered in the Financial Memorandum.**

Ministers welcome the Committee's support for the appointment of an officer to provide authorities with advice on carrying out their education functions.

We have no wish however to tell local authorities how they should structure their organisations or deliver their services. These provisions are not intended to force local authorities to have a Chief Education Officer in overall charge of the education service. Nor will they prevent authorities from moving to a model of shared service delivery of functions such as education, whether within or across councils. The establishment of a Chief Education Officer role is simply intended to ensure there is someone with an education background within the senior management team of every education authority who can advise the authority on the carrying out of their statutory education functions. As such, there should be sufficient flexibility for local authorities to ensure the requirement is met without recruiting additional staff or creating additional financial costs.

**233. Further, it would have been helpful had the Policy Memorandum provided more detail on the problem the Bill is seeking to address. This could have included key information such as: how councils currently access advice on education functions; the number of councils that do not have an experienced and qualified educationalist in their senior teams; and the specific problems that have arisen or may arise from not having such a post.**

Councils access the majority of advice on education functions in-house, though there are instances where centrally deployed 3rd party organisations or individuals will be contracted to provide advice on particular issues (for example in relation to proposals on the school estate). Ministers believe that the establishment of the Chief Education Officer role could provide a vehicle for encouraging greater inter-authority collaboration in relation to the delivery of education functions.

Scottish Government officials are aware of four local authorities in which the education service is headed by someone from a non-education background. It is understood, however, that at least three of those authorities do have an educationalist in their senior management teams. The Chief Education Officer post is not being introduced to tackle a widespread or immediate problem. Rather, it is intended to safeguard the future presence of appropriately qualified and experienced educationalists in local authority senior management teams, in light of increasing moves towards shared service delivery in local government.

Education authorities have a range of complex statutory functions, which require a sound, working knowledge, and understanding of the practical implications of decisions. In the absence of that knowledge and understanding, mistakes or errors of omission can be made which could incur reputational and financial damage to the council, and potentially discriminate against or disadvantage (educationally or otherwise) children and young people.

Some examples are provided below:

- If a council fails to fulfil its obligations under the Schools (Consultation) (Scotland) Act 2010, it could have its decision to close a school successfully appealed to the School Closure Review Panels, and ultimately the sheriff court.
- The Additional Support for Learning (Scotland) Act 2004 contains complex requirements, which need to be delivered within the broader context of children's services. Failure to consider appropriately in this context and to comply with their duties may lead to increasing concerns for a child or young person which may impact on the child or young person's learning outcomes and indeed wellbeing.
- If placing requests procedures are not appropriately followed, in line with section 28(1) of the Education (Scotland) Act 1980 and accompanying regulations, parents' rights to express a preference for a particular school may not be properly observed, and education authorities could have their decision appealed ultimately to the sheriff court (with the associated implications of losing a case).
- Without considerable knowledge, not just of legislation, but of what works in practice, and how local and national agencies work together, it would be extremely difficult to translate the requirement under section 3 of the Standards in Scotland's Schools etc Act 2000 to "endeavour to secure improvement in the quality of school education which is provided in the schools managed by them" into practice.

**245. Whether the Bill requires to be amended if the CEO role is wider than providing advice; whether the CEO will actually be responsible for "ensuring" any relevant education authority matters are delivered; and the ways in which the provisions would increase "the accountability of the entire education system.**

Officials are in on-going discussions with stakeholders regarding the appropriate role of the Chief Education Officer, and whether the Bill as currently drafted sufficiently captures that role. If those discussions highlight any particular issues which need resolving we will bring forward the necessary amendments to the Bill.

It is not however the intention to assign specific statutory duties to the CEO, as it is recognised that education authorities' various statutory duties cannot and should not be fulfilled by one individual.

Nonetheless, the advice provided by the CEO is expected to be firmly directed towards ensuring that the authorities' statutory functions are delivered effectively, and with the best interests of children and young people at their heart. The CEO should be positioned at a level of seniority commensurate with being able to advise the local authority on its full range of statutory duties, and when required, having the influence necessary to affect change.

The CEO provisions will secure a greater consistency across education services in Scotland; ensuring that all authorities have access to high quality educational expertise, grounded in experience; and that the delivery of education is based on a sound understanding and implementation of statutory duties. In so doing, the CEO provisions – along with the other provisions of the Education Bill – will enhance the accountability of the education system.

## **REGISTERING TEACHERS WITH THE GTCS**

### **Transition period**

**260. We consider that requiring all teachers to register with the GTCS could bring benefits to the teachers concerned and could also provide some reassurance to parents.**

**261. As we have noted, no formal consultation was undertaken on these provisions in advance of the Bill's publication albeit the Scottish Government did hold discussions with the independent school sector. We consider that a formal consultation would have fully identified, and perhaps resolved, the practical concerns that were highlighted to us. At this stage, we are still not certain about the transitional arrangements that will apply and whether they will assuage all concerns.**

**262. In advance of the Stage One debate, the Scottish Government should provide a further update on the state of discussions, including whether it agrees with the GTCS that the transition period should last for three rather than two years. The Scottish Government should also confirm that registration will not operate in a way that threatens the existence of any particular school.**

Ministers welcome the recognition by the Committee that moving to compulsory registration could bring benefits to teachers and reassurances to parents. However, we would like to assure the Committee that in the absence of a full consultation of the proposal prior to the enabling power being included in the Bill that every school in the sector will have the opportunity to comment on the proposed transitional arrangements and the routes to registration as they affect their individual circumstances.

Officials are engaged in regular discussions with the GTCS, SCIS and Education Scotland with a view to ensuring that the sector is kept fully informed of the routes to registration which are being developed and options available to gain registration. The GTCS Working Group of which Scottish Government is a member along with a cross section of schools is making good progress in identifying specific types of posts which may require consideration for special attention such as chaplains who deliver parts of the curriculum and teachers in special schools.

It is not our intention that moving to full registration of teachers in the independent sector will threaten the existence of individual schools and that is why we want schools to actively engage with us in implementing this policy.

In respect of the proposed transition period, we have an open mind as to the most appropriate period. Subject to the provisions within the Bill being passed, the

subsequent regulations will be subject to wide consultation including with individual independent schools, the Scottish Council of Independent Schools, the Care Inspectorate and local authorities (who often place children in independent schools). That consultation will inform a final decision as to the most appropriate length of time required for the transition towards the mandatory registration.

### **Cost of transition**

#### **266. We call on the Scottish Government to confirm whether—**

- **All the factors likely to result in costs to independent schools have been identified and agreed on by relevant parties**
- **If so, whether costs additional to the Financial Memorandum will fall on the Scottish Government or any other bodies**
- **Some teachers will incur costs as a result of the registration requirement, for example, in having to obtain qualifications that were not required when they were first awarded the post.**

The Scottish Government is satisfied that it has identified the factors (noted below) likely to result in costs to independent schools and these have been shared with representatives of the sector who have not identified any additional factors.

Potential costs associated with the move towards mandatory registration will vary across establishments and will be influenced by a number of factors including:

- the number of teachers employed in the establishment who are not currently registered with the GTCS;
- The training needs of those teachers who are not currently required; and
- The level of financial support (if any) that the establishment chooses to provide to those teachers.

It is not anticipated there will be any additional costs to the Scottish Government or any other bodies beyond those outlined in the Financial Memorandum.

With regards to the likely costs falling to individual teachers, it remains our understanding that the number of unregistered teachers in the sector is relatively small. We recognise that, in order to meet the standards for registration, some individuals may require to undertake further training or possibly some form of equivalence test and this is likely to have a cost attached. However, those costs will vary depending on the current qualifications, skills and experience of the individual in question. It would be for the teacher and their employer to consider how these costs are met. There is an expectation that schools will consider this in the wider context of the operation of the school and may have to adjust their CPD programmes.

## **Defining 'teacher'**

**267. During our separate inquiry into the attainment of pupils with a sensory impairment, we were told that the GTCS considered some educational staff to be additional support workers rather than teachers of the visually impaired.**

**268. Given such concerns, we ask the Scottish Government to clarify who would be considered as a teacher under this legislation.**

**270. The Scottish Government should provide the clarity requested by the GTCS and confirm whether this will necessitate an amendment to the Bill.**

Ministers noted the comments made to the Committee by the General Teaching Council for Scotland, in particular around the definition of a teacher and whether the Bill's provisions relating to GTCS registration would cover those individuals who deliver extra-curricular activities in schools. Further discussion has been undertaken with the GTCS which considers that it is important to recognise that a teacher is someone who delivers either all or part of a school's curriculum. We would therefore suggest that, for the purposes of the Bill, a teacher is "anybody who is employed to teach all or part of a school's curriculum and has the appropriate professional skills and knowledge necessary to enable them to undertake the teaching duties allocated to them". This definition takes account of regulation 3 of the Requirements For Teachers (Scotland) Regulations 2005 (<http://www.legislation.gov.uk/ssi/2005/355/made>) as well as the normal dictionary definition of the term "teacher".

Those who only deliver extra-curricular activities would not therefore be classed as teachers and would not require to be GTCS registered. We do not consider an amendment to the Bill is necessary.

The Committee also indicated its report on the "Attainment of pupils with a sensory impairment" that stakeholders had concerns that 'the GTCS considered some educational staff to be additional support workers rather than teachers of the visually impaired' and sought clarification on the position. We can clarify that where teachers meet the criteria for registration of teachers they would be considered as such, including Teachers of the Deaf and Qualified Teachers of the Visually Impaired.

However, there are some staff who work with these pupils in schools who do not meet the criteria and would not be considered to be teachers. We understand that there are specific concerns in relation to the categorisation by GTCS of teachers of sensory impaired children. Officials and GTCS will look at the issue further as part of a broader consideration of the categorisation of registration of teachers, for those working in additional support for learning.