

Analysis Report:

Extending the Rights of Children with Capacity Under the Education (Additional Support for Learning) (Scotland) Act 2004 and Repealing Section 70 of the Education (Scotland) Act 1980

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Introduction

This report provides an analysis of responses to the Scottish Government's Consultation on extending the rights of children and young people with additional support needs. The consultation also sought views on the dispute resolution framework under the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) and repealing section 70 of the Education (Scotland) Act 1980.

59 responses were received from a broad range of consultees. Those responses for which consent to publish has been received have been published on the Scottish Government's website, and can be viewed at:

<http://www.scotland.gov.uk/Publications/2014/04/7613/0>

Definition of terms used in this analysis

Within this analysis the term 'few', 'less than half', 'majority', 'most', 'almost all' and 'all' refer to specific percentage values as follows:

Definition of terms used in this analysis	
All	100%
Almost All	90-99%
Most	75-89%
Majority	50-74%
Less than Half	15-49%
Few	Up to 15%

The term 'Key Stakeholders' refers to a select group of respondents. This group has been compiled from the responses of voluntary organisations, professional organisations and non-departmental public bodies.

Background

Children's Rights under Additional Support for Learning

Currently, in terms of the Education (Additional Support for Learning)(Scotland) Act 2004 ("the 2004 Act") parents of children with additional support needs hold certain rights on behalf of their children. Young people (defined in the 2004 Act as "a person over school age who has not attained the age of eighteen years") with capacity hold rights on their own behalf. Where a young person does not have capacity, their rights are in effect transferred to their parent.

The consultation document sought views on extending the appeal rights of children with capacity under the additional support for learning legislation as well as the possibility of fully extending the rights currently afforded to parents and to young people (aged 16 over) with capacity to children who also have capacity under the 2004 Act.

Education legislation gives certain rights to parents and young people rather than to children in their own right. However, the Standards in Scotland's Schools etc. Act 2000 ("the 2000 Act") recognises that children should have the right to express views on the issues that affect them. Education authorities have a duty in section 2 of the 2000 Act to secure that the education they provide to a child or young person, is directed to the development of their personality, talents and mental and physical abilities to their fullest potential. In complying with this duty, education authorities are also required to have due regard, as far as is reasonably practicable, to the views (if there is a wish to express them) of the child or young person in decisions that significantly affect them, taking account of the child or young person's age and maturity.

The 2004 Act also sits alongside legislation which recognises that children with legal capacity are able to make some decisions on their own behalf. For example, section 2(4) and (4A) of the Age of Legal Capacity (Scotland) Act 2000 provide that a child under the age of 16 may consent to any medical procedure or treatment and instruct a solicitor in relation to civil matters so long as he or she is considered capable of understanding the nature and possible consequences of what it means to do so.

Under section 3(1) of the 2004 Act a child or young person lacks capacity to do something if the child or young person is incapable of doing it by reason of mental illness, developmental disorder or learning disability or of inability to communicate because of a physical disability.

However, in terms of section 3(2) of the 2004 Act, a child or young person is not to be treated as lacking capacity by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise). In practice, children's families and those who work with them will have formed a view, over time, as to whether a child has capacity.

Children's Rights

On 20 October 2008 The United Nations Committee on the Rights of the Child (UNCRC) issued recommendations in a report for the United Kingdom that the state party:

“Ensure that children who are able to express their views have the right to appeal against their exclusion as well as the right, in particular for those in alternative care, to appeal to special educational need tribunals”

At that time, the Scottish Government's response to the UNCRC report did not include proposals to extend the rights of appeal in additional support needs cases to children with capacity as it was considered that the rights of the child were already served in terms of the 2004 Act. Under the 2004 Act, when establishing whether a child has additional support needs, or requires a co-ordinated support plan, an education authority has a duty to seek and take account of the views of the child, unless the authority are satisfied that the child lacks capacity to express a view (section 12), as well as the child's parent.

However, following changes made by the Equality Act 2010, from 18 March 2011 a child with capacity can bring a disability discrimination case to the Additional Support Needs Tribunal (“The Tribunal”). Therefore, currently, a child with capacity could bring a disability discrimination case to the Additional Support Needs Tribunal but not bring an additional support for learning case before the Tribunal.

Dispute Resolution Framework under the Education Additional Support for Learning) (Scotland) Act 2004

Under the 2004 Act, a parent or young person, depending on the nature of the complaint, has the right to:

- access independent mediation
- make a referral to independent adjudication
- appeal to the Tribunal

As part of their proposal to repeal section 70, the Scottish Ministers sought views on making amendments to the 2004 Act, which will ensure complainants have attempted to resolve their complaint at as local a level as possible. This proposal entails complainants having “attempted” to resolve their complaint through independent mediation before accessing further formal dispute resolution mechanisms . The proposal also aimed to ensure that complaints which fall under the jurisdiction of the Tribunal will remain with the Tribunal and will not be considered by the Scottish Ministers.

Section 70 of the Education (Scotland) Act 1980

Under section 70 of the Education (Scotland) Act 1980 any interested party can make a complaint to the Scottish Ministers that an education authority, the managers of a school or education establishment, or other persons have failed to discharge a

duty imposed on them by or for the purposes of any enactment relating to education. Following an investigation of the complaint the Scottish Ministers may make an order declaring the person or body to be in default in respect of that duty and requiring them before a date specified to discharge the duty. Section 70 also allows the Scottish Ministers to make such an order, following an investigation, without their first having been a complaint by any interested person.

At the Education and Culture Committee on 26 June 2012 Michael Russell, Cabinet Secretary for Education and Lifelong Learning, expressed dissatisfaction with the complaints mechanism under section 70 and committed to look carefully at how such complaints are handled and how restitution is sought. Following consideration of this issue, the Scottish Ministers sought views through the consultation on repealing section 70 of the Education (Scotland) Act 1980 with the exception of provisions of the Schools (Consultation) (Scotland) Act 2010, thus removing the complaints mechanism under this section. Repealing section 70 would not however remove the right to make a complaint regarding education issues.

The Consultation Paper

The consultation focused on three separate matters, the extension of children's rights, the dispute resolution framework under the additional support for learning legislation and section 70 of the Education (Scotland) Act 1980. However, a small minority of consultees have responded only to a specific section of the consultation questions, relating to just one of the three matters referred to above. It was hoped that by consulting on these three issues as part of the one larger consultation document, a higher volume of responses would be collated on these important matters.

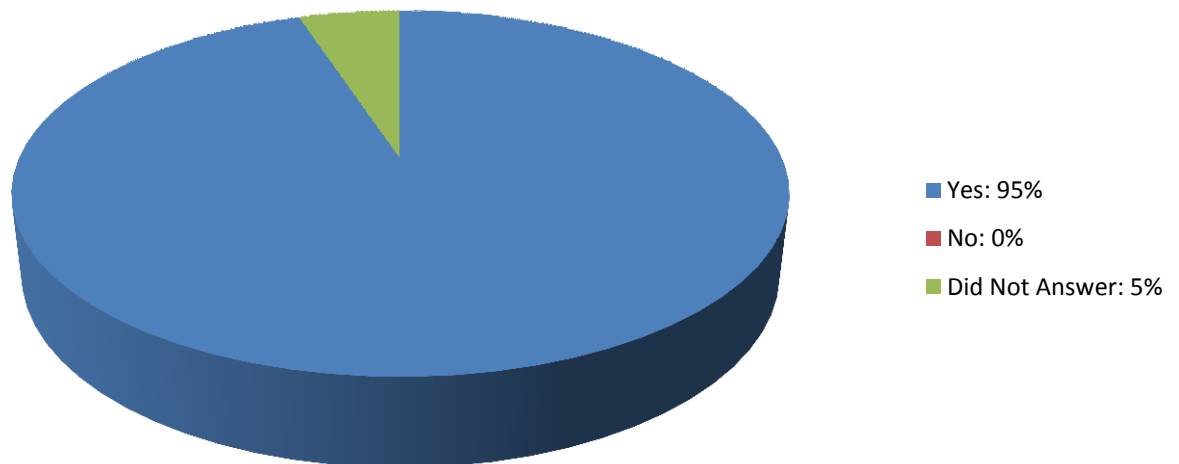
Consultation Analysis Report – Part 1

Children’s Rights under the Education (Additional Support for Learning) (Scotland) Act 2004

The majority of respondents were content with the proposals contained in the consultation paper relating to extending the rights of children with additional support needs with capacity. The consultation report reflects, through graphs, how consultees responded to the questions on children’s rights relating to additional support for learning. Each question asked respondents to offer their comments on the proposals. Given the trend of the answers and the nature in which the responses were set out, comments offered by respondents are summarised below, following the graphs.

As part of the consultation, through work carried out by Children in Scotland, the Scottish Ministers obtained the views of children with additional support needs on the questions asked. These views are also reflected in the analysis. In addition to this, the Scottish Youth Parliament submitted a response and their comments are also reflected in the analysis.

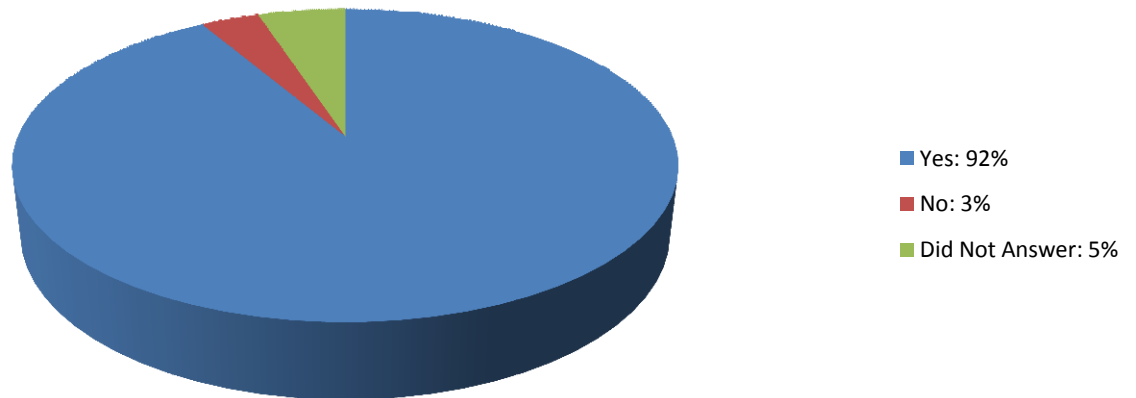
Do you think children with capacity should have their own rights in relation to Additional Support for Learning?



Almost all the respondents agreed that children with capacity should have their own rights in relation to Additional Support for Learning. None of the responses indicated that they should not. However, the majority of respondents provided caveats to their answers. A summary of these is provided as part of the comments section.

The majority of children consulted wanted the proposed extension to their rights. They felt that having these rights would provide them with more choice and more control.

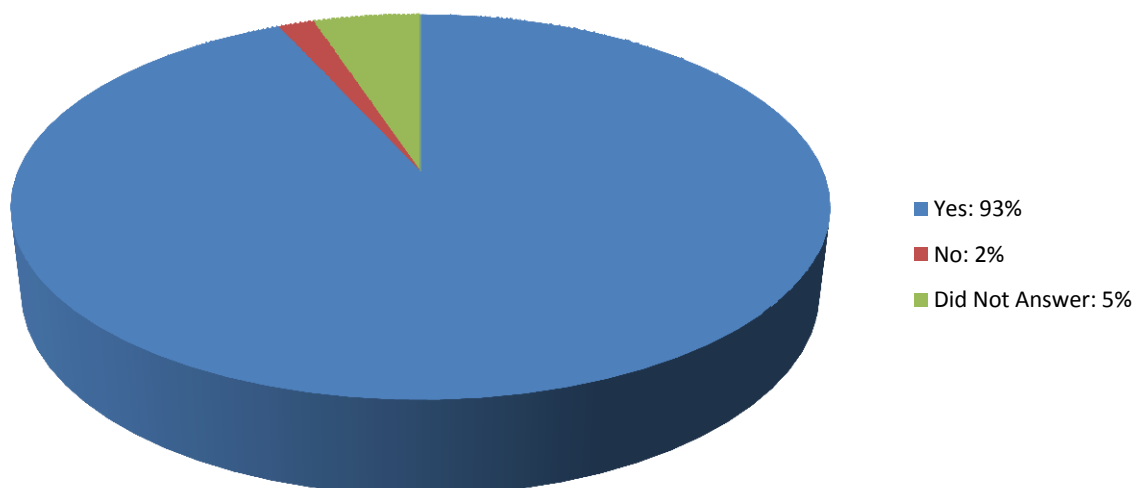
Do you think Scottish Ministers should extend the right to enable children to make an appeal to the Additional Support Needs Tribunals for Scotland under the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) ?



Almost all respondents agreed that the Scottish Ministers should extend the right to enable children to make an appeal to the Additional Support Needs Tribunals for Scotland under the Education (Additional Support for Learning) (Scotland) Act 2004 .

It acknowledged that all respondents who answered "no" to the above question, noted that it would not be logical to extend the right to appeal to the Additional Support Needs Tribunal, without extending all rights, including the right to request an assessment on the provision of support in the first instance.

Do you think Scottish Ministers should extend the rights which are currently afforded to parents and young people (with capacity) under the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) to children to enable them to take up their own right where they have capacity to do so?



Almost all the respondents agreed that the Scottish Ministers should extend the rights which are currently afforded to parents and young people with capacity under the Education (Additional Support for Learning) (Scotland) Act 2004 to children to enable them to take up their own rights where appropriate. Again, the majority of respondents provided caveats to their answer, a summary of which can be found below.

The majority of children consulted by Children in Scotland wanted the proposed extension to their rights. Pupils felt that having these rights would provide them with more choice and more control. In addition, the response from the Scottish Youth Parliament indicated that children with capacity should have their own rights in relation to additional support for learning.

Summary of comments

Most respondents agreed on a number of aspects regarding the extension of children's rights under additional support for learning legislation:

- Almost all noted that extending the rights of children with additional support needs will be in line with the recommendations of the United Nations Convention on the Rights of the Child (UNCRC).
- Almost all highlighted the potential positive effect this change may have on those children who are looked after as this would allow them to take up their own rights.
- Almost all highlighted that the term "capacity" will require further, clearer definition and where the capacity of the child is disputed, the majority of respondents requested that an independent mechanism or assessment process is available to determine this.
- The majority of respondents agreed that, for the extension of rights to be meaningful, access to independent advocacy is essential.
- Children consulted, noted that it would help if someone could tell them about their rights and help them to understand their rights better. One child suggested an advocate or support would be helpful, with local advice also highlighted as useful.
- Most respondents noted that extending the rights of children with capacity would result in dual rights being available to children and parents. Respondents requested that consideration is given as to how a decision would be taken on who can exercise the rights.
- The majority of respondents highlighted that accessible, child-friendly information would be required, clearly setting out timescales involved with relevant processes and likely outcomes.

- Although a majority of respondents agree that the rights of children with additional support needs who have capacity should be extended, the Scottish Ministers are urged by respondents to consider areas it may not be appropriate to extend these rights. The right to make a placing request was highlighted as an area for which it may not be appropriate for children to hold rights.

Conclusion Part 1: Extension of Children's Rights under the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended)

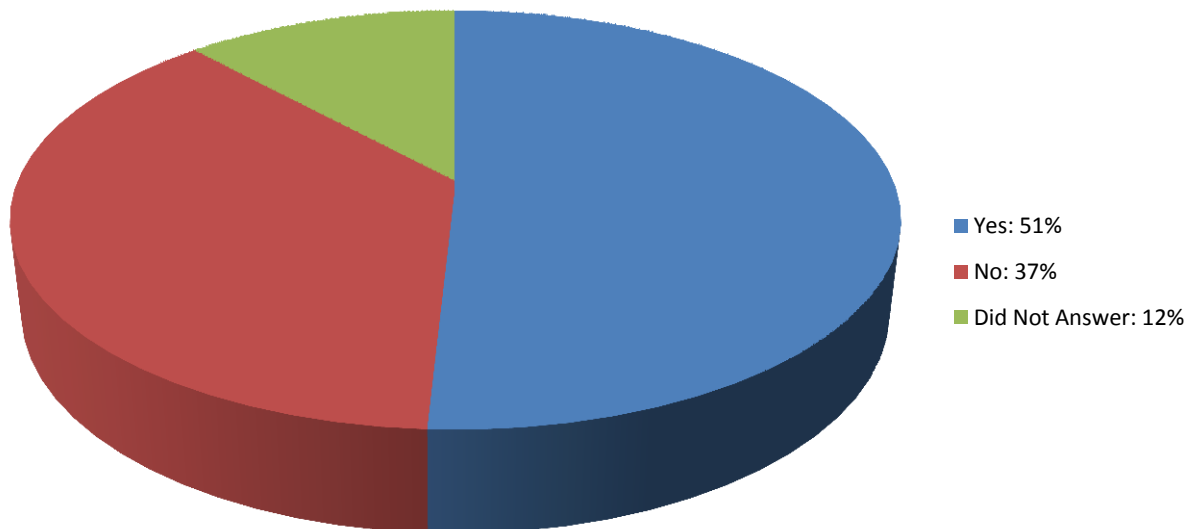
It is clear that those who responded to the consultation are in agreement that children with additional support needs, who have capacity to do so, should have their own rights under the additional support for learning legislation. However, it is also clear that the additional support for learning legislation is extremely complex and that if these rights are to be extended then it is vital that children affected by this change are aware of their rights and given the opportunity to take them up.

Therefore, the Scottish Ministers commit to working closely with key stakeholders to consider and understand the implications of making such a change before making any decision on future particular legislative amendments..

Consultation Analysis Report – Part 2

Dispute Resolution under the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended)

Do you think the Scottish Ministers should amend the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) to ensure that disagreements are resolved at as local a level as possible therefore ensuring a complainant has attempted independent mediation?



As evidenced by the chart above, the majority of respondents agreed with the proposals that those accessing formal dispute resolution mechanisms should have attempted to resolve their disagreement with the school or education authority through independent mediation. Less than half stated that they did not agree with that approach. Although a majority agreed with the proposal, many provided caveats to their agreement.

The majority of children consulted by Children in Scotland stated that they would prefer to sort out any problems in school. None of the children consulted wanted to make use of the dispute resolution options beyond their school, local authority and mediation.

Comments offered by respondents are summarised below.

Summary of comments

The majority of respondents agreed that mediation allows parties involved to work together to address issues relating to children's additional support needs, therefore allowing for the maintaining of relationships. The majority also agree that resolution of a disagreement is more likely to be amicably reached through mediation than through a more formal route like the Additional Support Needs Tribunals for Scotland.

However, it is acknowledged that a majority of respondents also noted that mediation is most effective when it is entered into voluntarily by both parties. Concerns are noted that it is not always appropriate to use mediation and taking steps to ensure families have attempted mediation may in fact create a delay in resolving the dispute.

A number of respondents outlined that although they do not support the proposal they would support raised awareness of the right to access independent mediation and their options regarding the dispute resolution mechanisms available.

It is noted that the Additional Support Needs Mediation Services Providers Scotland state that they would support legislation stating that any persons who have a disagreement must be given the contact details of the independent mediation service in their area and should consider using this as an option of resolution . A majority of the responses received by individuals also supports this approach.

Conclusion Part 2: Changes to the Dispute Resolution under the Education (Additional Support for Learning) (Scotland) Act 2004

Although a wide range of responses to this question was received, it is clear that respondents agree that mediation is an important mechanism **when appropriate**. It is also clear that respondents agree that awareness of families and guardians rights to access independent mediation requires improvement.

Therefore, the Scottish Ministers will work closely with key stakeholders to determine the most appropriate way to ensure that disagreements are resolved at an appropriate level. Following further consideration on this, a decision will be taken on the most appropriate means of implementing this strategy.

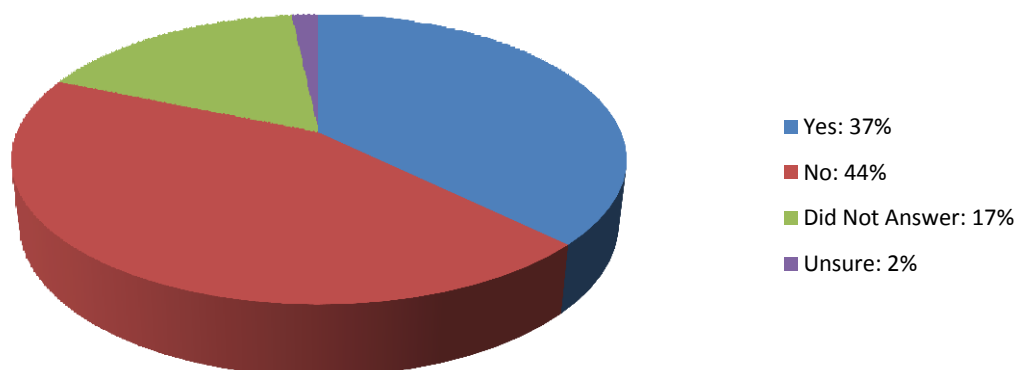
Consultation Analysis Report – Part 3

Section 70 of the Education (Scotland) Act 1980

The consultation report reflects, through graphs, how consultees responded to the questions on repealing section 70 and the potential approach of replacing this mechanism. Given the trend of the answers and the nature in which the responses were set out, comments offered by respondents are summarised below, following the graphs.

As part of the consultation, through work carried out by Children in Scotland, the Scottish Ministers obtained the views of children with additional support needs on the questions asked. These views are also reflected in the analysis.

Do you think the Scottish Ministers should repeal section 70 of the Education (Scotland) Act 1980, removing the opportunity to complain directly to the Scottish Ministers with the exception of provisions of the Schools (Consultation) (Scotland) Act 2010?

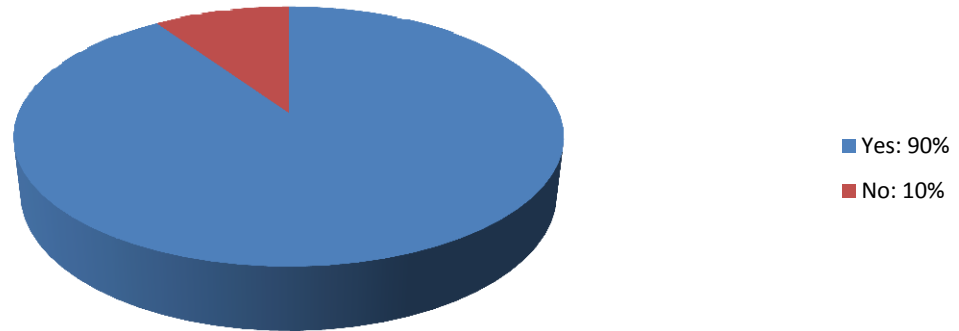


Of those who responded to the proposals on repealing section 70 of the Education (Scotland) Act 2004 (as amended) less than half (44%) were not content with the proposals contained in the consultation paper. Less than half (37%) stated that they were, however, content with the proposals made by the Scottish Ministers.

The majority of children consulted by Children in Scotland stated that they would prefer to sort out any problems in school. None of the children consulted wanted to make use of the dispute resolution options beyond their school, local authority and mediation.

However, it is noted that the young people in the Scottish Youth Parliament's response stated that they supported the repealing of section 70 of the Education (Scotland) Act 1980.

If yes, do you agree that, in future, the Scottish Public Service Ombudsman should consider failure of duty complaints which are currently considered under section 70 of the Education (Scotland) Act 1980?

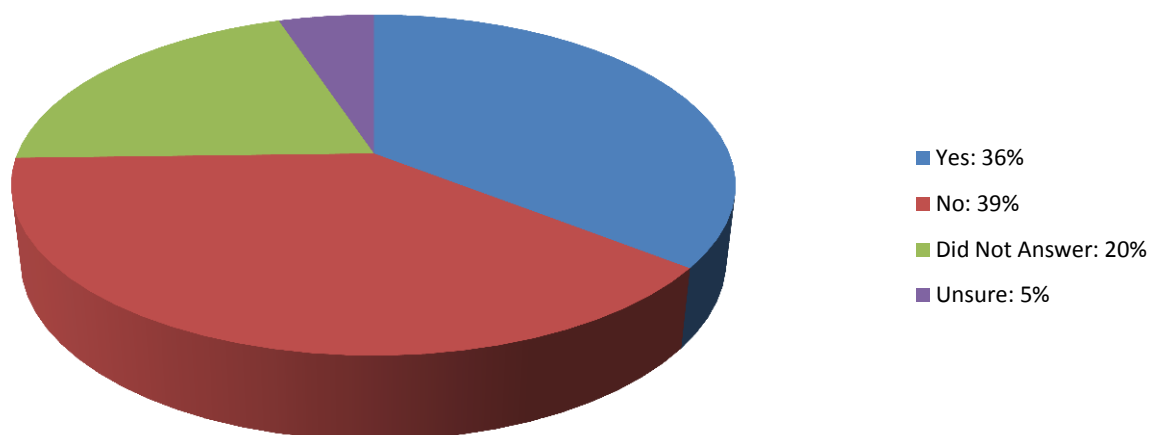


It should be noted that the graph above represents those who answered **yes** to repealing Section 70 of the Education (Scotland) Act 1980 only.

Of those who answered yes to repealing section 70 of the Education (Scotland) Act 1980, the majority agreed with the proposal that the Scottish Public Service Ombudsman should consider failure of duty complaints which are currently considered under section 70 of the Education (Scotland) Act 1980.

A majority of the children consulted by Children in Scotland stated that they did not agree with the proposals, indicating that they had confidence in the Government to make decisions.

With the exception of provisions of the Schools (Consultation) (Scotland) Act 2010, do you think that the Ministerial powers under section 70 to make an order to carry out a duty should be transferred to the Scottish Public Service Ombudsman ?



As evidenced by the chart above, less than half (39%) of respondents did not agree that the current powers afforded by the Scottish Ministers to make an order to carry out a duty should be transferred to the Scottish Public Service Ombudsman. Less than half (36%) stated that they did, however, agree with that approach.

Summary of Selected Comments

Of the majority who did not agree with the proposals to repeal section 70 of the Education (Scotland) Act 1980, the following summarises the comments provided:

- A high volume of respondents proposed implementing strict timescales to ensure a swift resolution is reached.
- All dispute resolution avenues should be available to families, children and young people, removing the right to refer to Ministers would place limitations on choices available.
- Section 70 of the Education (Scotland) 1980 Act represents a valuable safety net in the event that education authorities have failed to carry out their duties. In these instances it offers a valuable opportunity to raise these concerns with the Scottish Ministers.
- Transferring Ministerial powers to the Scottish Public Service Ombudsman in respect of education complaints would represent a disparity in the way SPSO deal with complaints relating to planning, housing, environment or social work.

A consistent comment from those who did agree with the proposals was that to repeal section 70 and replace it with consideration by the SPSO, would represent a more transparent, streamlined process which outlines a consistent approach. In

addition, it was noted that this proposal is in line with proposals to resolve disputes at as local a level as possible.

A handful of respondents noted the important role carried out by Education Scotland as part of the process. Those respondents requested that Education Scotland continue to be included as part of the process.

A small number of respondents proposed an alternate mechanism for handling these particular referrals. A handful of respondents proposed the Additional Support Needs Tribunals for Scotland (ASNTS) would have the expertise and focused procedures to appropriately handle these cases.

Welcome comments were received from Jim Martin, Scottish Public Service Ombudsman. Mr Martin did not comment on whether or not Scottish Government should proceed with the proposals, however he provided constructive comments on the impacts the changes may have. Mr Martin noted having powers of enforcement or compulsion would change the ombudsman's relationship with bodies under their jurisdiction as, at present, they cannot compel any organisations to carry out recommendations.

Conclusion Part 3: Section 70 of the Education (Scotland) Act 1980

Given that there is no clear majority agreeing with the proposal to repeal section 70, the Scottish Ministers will consider further the most appropriate approach to ensuring failure of duty complaints are handled appropriately. It is clear that, regardless of what mechanism is used, the majority of respondents would like to see strict timescales incorporated to ensure a swift resolution to concerns raised. Ministers will consult further with key stakeholders on this before taking any decision.



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