

SECTION 70 OF THE EDUCATION (SCOTLAND) ACT 1980

15 December 2017

A guidance document for users of the
section 70 process

Section 70 of the Education (Scotland) Act 1980 was amended by section 24 of the Education (Scotland) Act 2016.

This guidance document outlines those changes and explains the new process for making a reference to the Scottish Ministers.

Section 70 of the Education (Scotland) Act 1980

A GUIDANCE DOCUMENT FOR USERS OF THE SECTION 70 PROCESS

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INTRODUCTION

This guidance document explains the changes made by section 24 of the Education (Scotland) Act 2016 and the Section 70 (Procedure) (Scotland) Regulations 2017 to the process by which any interested party can make a reference to the Scottish Ministers under section 70 of the Education (Scotland) Act 1980. A reference can be made under section 70 where any interested party believes that a responsible body (an education authority, managers of a school or any other educational establishment, or other persons) has failed to carry out a duty they are required to carry out under an education related enactment.

WHO SHOULD READ THIS GUIDANCE DOCUMENT?

Under section 70 of the Education (Scotland) Act 1980, any interested party can make a reference to the Scottish Ministers. The section 70 process requires the Scottish Ministers to consider evidence and take a decision on whether, in Ministers' view, a responsible body has failed to carry out a statutory duty imposed on it by an education related enactment. Evidence is required to be provided by the person making the reference and the responsible body concerned. In some instances, the Scottish Ministers may ask Her Majesty's Inspectors of Education to act as an advisor during the process. This document should be used by anyone involved in the section 70 process.

That may be:

- Parents or carers;
- Children or young people;
- A relative or family friend;
- Head teachers;
- School managers;
- Education authorities, and
- Her Majesty's Inspectors of Education

DEFINITIONS

Responsible Body

A responsible body may refer to an education authority, the managers of a school or educational establishment or any other persons who have duties under legislation related to education.

Complainer

A complainer is any interested party who has made a reference to the Scottish Ministers under section 70 of the Education (Scotland) Act 1980.

Complaine

The complaine is the responsible body about whom the reference to the Scottish Ministers is made; the body alleged to have failed to carry out its statutory duties.

HMI

HMI (Her Majesty's Inspectors of Education) are part of the organisation Education Scotland. Each year, HMI inspect and report on the quality of education in a sample of pre-school centres, primary schools, secondary schools, special schools, community learning and development services, colleges, and residential educational provision.

Education Authority

Education Authority is defined in the Education (Scotland) Act 1980 as a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994. This guidance refers specifically to education authorities. In practical terms this means the local authority or council when exercising its education related functions.

SUMMARY OF SECTION 70 OF THE EDUCATION (SCOTLAND) ACT 1980

Under section 70 of the Education (Scotland) Act 1980, any interested party can make a reference to the Scottish Ministers that a responsible body (the managers of a school or education establishment, an education authority or other

persons) has failed to discharge a duty imposed on them by or for the purposes of any enactment relating to education.

Following an investigation of the reference the Scottish Ministers may make an order declaring the responsible body to be in default in respect of the duty and requiring them to discharge the duty.

Section 70 also allows the Scottish Ministers to make such an order, following an investigation, without there first having been a reference made by any interested person.

The Education (Scotland) Act 2016 amended section 70 of the Education (Scotland) Act 1980 to provide the Scottish Ministers with a regulation-making power to make provision in connection with the procedure to be followed in relation to the section 70 process (including prescribing timescales for each stage). This document provides guidance on these timescales and process.

Further amendments were also made to section 70 to ensure that no order could be made by the Scottish Ministers under section 70 in respect of matters which are under the jurisdiction of the Additional Support Needs Tribunals for Scotland (“ASNTS”). As a result, the Scottish Ministers will not consider an issue or reconsider a decision which would be considered by the ASNTS.

The Section 70 (Procedure) (Scotland) Regulations 2017 was introduced on <date> and provides for certain timescales to apply to the process. The regulations addressed a consistent concern that the current process is overly lengthy and does not bring direct benefits. The introduction of statutory timescales allows the process to continue to be robust whilst significantly shortening the time taken to reach a decision.

BEFORE MAKING A REFERENCE UNDER SECTION 70

The Scottish Ministers strongly believe that any issues which arise between parents, carers or young people and schools and education authorities should be resolved at as local a level as possible. Maintaining a positive relationship between school and family is key to ensuring that the child or young person concerned continues to benefit from school education. Therefore the Scottish Ministers consider that any issue which a parent, carer or young person feels should be addressed should initially be discussed with a teacher or the head

teacher at school. Independent schools and education authorities have their own complaints procedures which can be followed. Depending on the nature of the reference there are further methods of resolving concerns, these are set out below.

Additional Support for Learning

There are a range of dispute resolution mechanisms available under the additional support for learning legislation; including independent mediation and adjudication, and referral to the Additional Support Needs Tribunals for Scotland (ASNTS).

For example, an education authority's decision on a placing request can be appealed to the ASNTS.

Scottish Government provide funding to Let's Talk ASN to provide support, advice and representation where required on this matter. Further information can be found at the following link:

<https://www.asntscotland.gov.uk/sites/default/files/files/Lets Talk ASN Flyer.pdf>

Further advice is also available via Enquire, who the Scottish Government fund to provide advice to parents on additional support for learning matters. Their confidential helpline can discuss the details of your situation and provide advice to parents and practitioners on the rights of children, young people and parents under the Education (Additional Support for Learning) (Scotland) Act 2004. Enquire's confidential helpline is available to be contacted directly on 0345 123 2303.

INTERACTION WITH OTHER COMPLAINTS MECHANISMS

Schools (Consultation) (Scotland) Act 2010

A reference under section 70 of the Education (Scotland) Act 1980 may be made by an interested party where they have evidence that:

- An education authority has made a change to its school estate without undertaking a statutory consultation about its proposals in accordance with the requirements of the Schools (Consultation) (Scotland) Act 2010 (the 2010 Act), or

- Where such a consultation has been held, the authority has failed to comply with certain obligations placed upon it by the 2010 Act; this could include, for example, the situation where an authority has failed to comply with any of the conditions which the School Closure Review Panel may have imposed when granting its consent for the authority to close a school.

Otherwise the 2010 Act has its own mechanisms which can be used by interested parties where it is considered for example that an authority has failed to comply with the requirements imposed on it by that Act in relation to school closure proposals

Grant Aided Schools (including Special Schools)

Each Grant Aided School has their own complaints procedure which you can access via their website or through discussion with the school.

Independent Schools

Each Independent School has their own complaints procedure which can be accessed through contact with the school or their website.

In addition, the Scottish Ministers may, in accordance with part V of the Education (Scotland) Act 1980, serve a Notice of Complaint on the proprietor of an independent school where their school is objectionable on one or more of the grounds set out in section 99 of the Education (Scotland) Act 1980.

Additionally, where a school is at risk of becoming objectionable, the Scottish Ministers have powers to impose conditions on the running of an independent school.

Complaints Concerning Functions Relating to the Named Person and Child's Plan

As references to Scottish Ministers under section 70 must relate to an education related enactment, complaints cannot be made under this provision regarding the named person or a child's plan. Once the relevant legislation is commenced, guidance on making a complaint in relation to a named person or a child's plan will be made available. Until then, complaints regarding the named person or a child's plan, where these exist, can be made through the relevant health board, local authority or organisation's normal complaints procedures.

Education Appeals Committee

The education appeal committee hears and makes decisions on appeals made by parents and young people regarding decisions made by a school or education authority related to:

- exclusion from school
- placing request refusals which are not related to a child with additional support needs.

You can access more information regarding the education appeals committee from your child's school or local authority website.

Education Authority Complaints Procedures

Each education authority has their own complaints procedure which you can access via their website or through discussion with your child's school or education authority.

There are traditionally 2 routes to resolution within education authorities:

Front Line Resolution (Stage 1)

For issues that are straightforward and easily resolved.

Investigation (Stage 2)

Undertaken for issues that have not been resolved at the front line or are complex, serious or 'high risk'. The need for an investigation may arise as a result of stage 1, or a complaint may require an investigation from the start.

The Scottish Public Service Ombudsman

The Scottish Public Services Ombudsman considers complaints where a member of the public claims to have suffered injustice or hardship as a result of maladministration or service failure in relation to public bodies or organisations providing public services. Before making any complaint to the Ombudsman, complainers must have been through the formal complaints procedure of the organisation concerned. Ombudsman complaints reviewers are fully aware of the

dispute resolution mechanisms available under Education legislation and therefore will advise complainants to access the appropriate Education dispute resolution mechanism before they will then consider any complaints further.

Further information on the Scottish Public Service Ombudsman can be accessed on its website: <http://www.spsso.org.uk/>

Scotland's Commissioner for Children and Young People

Scotland's Commissioner for Children and Young People has a power of formal investigation where it seems that the rights of individual children and young people or groups of children and young people might have been breached.

THE S70 PROCESS

There are two processes which can be followed under section 70. The first relates to where Scottish Ministers have initiated an investigation without having received a reference. The second relates to where a reference has been received from any interested party. This document deals with the latter. In the former the same timescales and procedures apply.

The section 70 process is broken down into 4 time periods:

- *A Reference Establishment Period*, comprising a maximum of 15 working days
- *An Investigative Period* comprising a maximum of 80 working days
- *A Decisions Making Period* comprising a maximum of 25 working days
- *A Discharge of Duty Period* which will be determined by a Ministerial Order

In the Regulation, there are 2 timeframes specified. The 15 working days of the Reference Establishment Period (bullet point 1 above) and then 105 working days. These 105 working days relate to the actions to be taken, if required, under the bullet points 2, 3 and 4 above. The 105 days is the maximum timescale for these actions. Where these are completed earlier, the complaint will conclude ahead of the maximum timescale.

Reference Establishment Period (Maximum of 15 working days)

The Reference Establishment Period will be used as an opportunity to establish if, as is outlined in the regulations (see Regulation 2 (2), the reference to Ministers is appropriate to be considered under section 70. It will also be an opportunity to determine if alternative dispute resolution mechanisms have been considered before using section 70.

It may be used to consider whether it would be appropriate to fast track the reference to an investigation by HMIE.

Most significantly, the reference establishment period will be used to ensure that the Scottish Ministers and the complainant are clear about the reasons for the reference to Scottish Ministers. This approach will ensure that the details of the reference are focused when provided to the complainee. It is anticipated that this

will ensure that evidence is sought from the complaine on the specific reasons for the alleged failure of duty or duties.

Investigative Period (Maximum of 80 working days)

During the Investigative Period Scottish Government will firstly confirm with both parties the 'complaint establishment date'. This is the date that Scottish Ministers have determined that the reference to Ministers is appropriate to be consider under section 70. This decision commences the statutory 105 working days in which Scottish Ministers are required to determine whether to make an order under section 70(1) of the Education (Scotland) Act 1980.

Scottish Government request evidence from the parties involved (complainer and complaine) with a view to establishing if a failure of duty has occurred. Depending on the evidence provided, the Scottish Government may require to contact the parties more than once. It is anticipated that most references to the Scottish Ministers will not require the maximum of 80 working days for the Ministers to carry out their considerations. However, this period may also be used to allow the Scottish Ministers to request HMIE carry out their own investigation into the alleged failure of duty or duties and make recommendations to the Scottish Ministers following their findings.

Decision Making Period (Maximum of 25 working days)

The Decision Making Period will be used to allow the Scottish Ministers to consider and reach a conclusion in relation to the evidence provided by both parties and, where appropriate, recommendations from HMIE. Within this period Scottish Ministers will advise both parties of the outcome of the process.

If it is considered that a failure of duty has occurred, and an order is required, the complaine will receive the order from Scottish Ministers during this period.

Discharge of Duty Period (To be determined by an Order)

Where a failure of duty or duties has occurred and an order has been made by the Scottish Ministers under section 70, the complaine will have been required, before a specific date specified in the section 70 order, to discharge the duty or duties. During the Discharge of Duty Period, the Scottish Ministers will contact the complaine to establish if the duty or duties has now been discharged. In the situation where the duty or duties has not been discharged arrangements may be

taken to ensure the duty is discharged by the Scottish Ministers, or the Lord Advocate may apply to the Court of Session to order that the complainees fulfill their statutory duty (an order of specific performance).

HOW TO MAKE A REFERENCE

You can make a reference to the Scottish Ministers by writing directly to the Scottish Government. References can be made to the address detailed below.

The Scottish Ministers
Learning Directorate
Victoria Quay
Edinburgh
EH6 6QQ

Scottish Government currently fund Govan Law Centre's Education Law Unit (<http://www.edlaw.org.uk>) to provide advice and support to parents or young people on any aspect of education law, which includes Section 70 references. Anyone considering making a reference under section 70 may wish to contact the Education Law Unit on 0141 445 1955.

As the section 70 process is an evidence-based process which may result in an order being made by the Scottish Ministers to carry out the duty, you should ask yourself the following questions before submitting a reference:

Have I detailed the sections of legislation which you believe the responsible body has failed to carry out?

It is important that when making a reference, it is clear which sections of legislation you believe the responsible body has failed to carry out. Providing this information will ensure that your reference is focused specifically on the failed duties and will allow the responsible body to respond directly to the claim.

Have I provided evidence to support my claims and does it relate specifically to the alleged failed duties?

The Scottish Ministers will consider evidence provided to determine whether or not they believe a responsible body has failed to carry out a duty. Therefore, it is important that the evidence you provide relates specifically to the duties you believe have not been complied with. The evidence you provide should relate directly to the alleged duty failure however, in most circumstances evidence could be any of the following:

- Minutes of meetings
- Educational Plan

- Official correspondence from the school or education authority
- Copies of correspondence to school or education authority

These should support your summary of the alleged failure.

What do I want to happen as a result of making a section 70 reference?

If the Scottish Ministers are satisfied that a responsible body has failed to carry out their statutory duties, they may make an order declaring the responsible body to be in default in respect of the duty and requiring them to discharge the duty. Where they make such an order, the responsible body will be required to discharge that duty by a specified timescale.

Potential users of the section 70 process may wish to consider if there are alternate mechanisms (detailed on pages 4 & 5) they can use which:

- Are able to resolve their concern at a more local level;
- May result in a more agreeable outcome to them (apology from responsible body, recommendations from education professionals, decision from Tribunal, financial compensation etc);
- Will resolve their concerns in a faster timescale.

HOW TO RESPOND TO A REFERENCE

Responsible Bodies will be provided with a letter from Scottish Government officials to advise that a section 70 reference has been received. Under the cover of that letter the full reference, including all evidence, will be provided. The timescales for responding will be also detailed.

The responsible body will be requested to respond to the allegations of the specific failures of duty. The responsible body will wish to provide evidence which clearly shows that they have carried out the duties which are alleged to have been failed. Providing general statements without supporting evidence is unlikely to be sufficient in response to a complaint. If evidence is not provided this may lead to the complaint being considered solely on the information provided. Alternatively insufficient evidence may lead to an investigation being carried out by HMI which otherwise would not have occurred. It is important when responding that responsible bodies **do not respond to every single allegation** and that they focus specifically on the alleged failure of duties. As detailed above, the evidence responsible bodies provide in response will be dependent on the

duties which are alleged to have been failed, however, in most circumstances evidence could be any of the following:

- Minutes of meetings
- Educational Plan
- Official correspondence from the school or education authority
- Copies of correspondence to school or education authority

THE ROLE OF HM INSPECTORS OF EDUCATION IN THE PROCESS

If the Scottish Ministers believe that a failure of duty has occurred, or if it is not clear from the evidence provided, they may ask Her Majesty's Inspectors of Education (HMIE) to carry out an inspection into the alleged failed duties. As part of this inspection they may:

- Review the documents already submitted
- Arrange to meet with you to discuss your allegations
- Arrange to meet with your child if appropriate
- Arrange to meet with school and education authority staff to discuss specific issues related to the reference
- Arrange to meet with any relevant group who is contributing to your child's education through a partnership with the education authority
- Review school and/or education authority practice
- Provide Scottish Ministers with a report with their findings
- Provide Scottish Ministers with recommendations on whether the responsible body has failed to carry out its duties.

APPLICATION FORM

An application form is available below and on the Scottish Government website at the following link: <http://www.gov.scot/Resource/0041/00418795.pdf>