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In 2014 Scotland Welcomes the  
World

Mr Stewart Maxwell MSP  
Convenor  
Education & Culture Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP



23 April 2015

*Dear Stewart,*

Thank you for your letter of 13 April with factual questions from the Education and Culture committee on the Education (Scotland) Bill. Please see the attached annex which responds to each of your questions in turn.

**ANGELA CONSTANCE**

Committee Question	SG Response
<b>Attainment Provisions</b>	
<p>Under section 4, education authorities are to report individually to Scottish Ministers, and Scottish Ministers are to report to the Scottish Parliament. Will the Scottish Ministers' report include an analysis that will allow readers to understand the progress being made across Scotland by local authorities?</p>	<p>The exact structure of the report to be produced by Scottish Ministers is yet to be agreed. Irrespective, it will be important for that report to provide parliamentarians and other partners with a clear understanding of the progress we are making as a country to narrow the attainment gap. Further, we see the report playing an important role in highlighting local examples of good practice which have led to a narrowing of that gap. Given these aims, it will be important for our report to build on the information provided to us by local councils. At the same time, it remains our view that it would not be helpful to introduce "league tables" which directly compare performance across local authorities. Such a comparison often does not take full account of the range of differing factors which influence performance in local authority areas and can stifle rather than support improvement.</p>
<p>Please confirm whether any analysis is available of the success of the Standards in Scotland's Schools etc. Act 2000 in improving attainment over the period.</p>	<p>The 2000 Act places obligations on Scottish Ministers and education authorities to raise the standard of education in Scotland. It has been a key statutory driver for many of the improvements which have been delivered since the Act was commenced. At the national level, those improvements have included, for example, further changes to primary legislation around parental involvement and additional support for learning and non-statutory measures including the development and implementation of Curriculum for Excellence. These changes have resulted in an education system which is delivering record exam results and supporting more school leavers than ever before in securing positive destinations. 90% pupils who left school in 2012/13 went on to further or higher education, training or employment.</p> <p>That being said, there are elements of the 2000 Act which would benefit from a fresh look. For example the National Priorities for Education were introduced in order to ensure the proper alignment of local and national improvement activity, but they have not been updated to reflect the changes in our approach to education. This means that the framework for measuring success is inconsistent with, for example, the delivery of a 3-18 curriculum.</p>



	<p>Further, it does not reflect the changes which have been made to national qualifications or the National Outcomes which are central to Scotland's National Performance Framework. It is our intention to look again at the national priorities as we give further thought to the reporting duties imposed in section 4 of the Bill.</p>
<p><b>Gaelic Medium Education Provisions</b></p>	
<p>Part 2 creates a process whereby parents can request that an education authority assess the need for Gaelic medium primary education (GMPE). How do education authorities currently assess likely demand, as this could provide us with an indication of the Bill's possible impact?</p>	<p>A number of local authorities have given consideration to parental demand for Gaelic medium primary education over recent years. The nature of this consideration, however, does vary throughout the country and the assessment process in the Bill aims to regularise these assessments by introducing consistency, transparency and timescales. A statutory assessment process will provide reassurance to parents about how their request will be handled.</p> <p>The Education Bill lists a number of considerations that a local authority must- take into account as it assesses the need for GMPE. Before compiling this list we approached local authorities to ask them what were the key considerations for them when they received a demand for GMPE in their area so, in this way, the Bill reflects and universally applies the best aspects of the divergent approaches currently taken to assessing the need for GMPE.</p> <p>Under the Standards in Scotland's Schools etc Act 2000, section 5, education authorities must publish an annual statement of improvement objectives which must be set in respect of each of the national priorities in education which are set by the Scottish Ministers and include a national priority:</p> <p>"...to promote equality and help every pupil benefit from education, with particular regard paid to pupils with disabilities and special educational needs, and to Gaelic and other lesser used languages..."</p> <p>The measure for whether objectives are met in relation to this priority and Gaelic medium education is the number of written requests for Gaelic medium teaching and the percentage of these which are met each year. This measure has not provided particularly reliable information.</p> <p>SG, working with Bòrd na Gàidhlig has a sense of where there may be likely demand for GMPE</p>

	<p>across Scotland. This information does not come from any combined local authority assessment of demand but more from our experience of working with 0-3 Gaelic groups and parent groups in different parts of the country.</p>
<p>Are education authorities currently able to carry out pro-actively an assessment of need, or is legislation required for this?</p>	<p>An education authority is currently able to carry out an assessment of the need for GMPE in its area. However, there are no agreed steps or considerations for this process and, without legislation, it is not possible to ensure transparency and consistency in such assessments or that they will be carried out within a given time. The Bill will establish an open process to be carried out in a fixed time, requiring clear information to be provided to parents at different stages and relevant input from parents and bodies with expertise in this field.</p>
<p>Applicants at 5(2) are required to provide evidence of demand for GMPE, how is it envisaged they will be able to ascertain that information? Similar information re 5(3) would also be helpful.</p>	<p>As provided at section 5(5) and (6), Scottish Ministers may, by regulations, make further provision about parental requests under section 5(1). This includes provision about the form of the request and how it should be made and the information to be included in, or accompany, the request. The form will assist parents with the information needed.</p>
<p>In relation to section 7(3), will education authorities be able to take into account any information received, or only that which is provided under section 5?</p>	<p>In the initial assessment under section 7(3), an education authority will have to take into account any information at all that it has about the demand from parents for GMPE, where those parents have children resident in the relevant GMPE assessment area. This information must include the information accompanying a request under section 5 but if the local authority has such information from other sources, it must also take that into account.</p>
<p>Education authorities are to designate an area in which the need for GMPE is to be assessed. Could the entire area of the education authority be so designated, or is it designed to be on a school by school or area by area basis?</p>	<p>The entire area of a education authority could be designated as a GMPE assessment area. This would depend on the size of the education authority area and the criteria in section 6 i.e. how demand in the entire area could reasonably be met having regard to accessibility of any existing or potential provision and the residence of the children in relation to whom there is evidence of demand. We expect that these criteria could mean that a smaller authority (in terms of area) could be designated as one GMPE assessment area but this would be less likely in a larger authority.</p>



<p>In relation to section 7(6)(a), is the number of parents expected to be five regardless of the size of the local authority and the number of parents therein?</p>	<p>The number of children is expected to be five regardless of the size of the authority. It is not the number of parents, it is the number of children in relation to whom there is demand. It is considered that the existence of demand for GMPE from the parents of five or more children in the same year group and resident in the same GMPE assessment area represents the point that it becomes viable to deliver GMPE in that area. That viability test is then the trigger for a fuller, more sensitive, assessment of whether to secure the provision of GMPE. However, in practice, some education authorities have been willing to establish GMPE provision for class sizes below five and experience may demonstrate that what is viable in one education authority area may not represent viability in another education authority area with a different geography and population. In order to retain the flexibility to adapt to developments in practice and movements in population, the Bill also contains a power for Scottish Ministers, by regulations, to change the numerical threshold of five or more children and also to prescribe a different figure for different education authorities.</p>
<p>In what circumstances could an authority find there is no “need” for GMPE and the conditions in 7(6) are not met given the requirements set out in section 7(3)(b)?</p>	<p>Section 7(6)(b) ensures that, in relation to the GMPE assessment area determined on receipt of a request, education authorities take into account the demand for GMPE in relation to children under school age and any indications of growth in that demand. If there isn’t a reasonable level of demand in relation to children under school age in <i>different</i> year groups from the child specified in the request – as well as demand from the parents of 5 or more children in the same year group as the specified child – then the authority must determine that there is no potential need for GMPE.</p>
<p>In relation to section 7(6)(b), will any guidance be provided to help local authorities determine what would be “reasonable”?</p>	<p>Guidance will be provided on this subject under section 9 of the Gaelic Language (Scotland) Act 2005 as amended by section 14 of the Bill.</p>
<p>In what circumstances would a local authority take the action set out in section 8(2)(b) or (c), given it will already have</p>	<p>The criteria to demonstrate the need for GMPE is a minimum of 5 children in a year group and reasonable demand in different year groups. It may be the case that this level of evidence is not</p>

determined (under section 7(5)(b)) that no there is no potential need for GMPE?	forthcoming, yet the local authority still wishes to establish GMPE based on local priorities. It is not intended that this threshold should act as a deterrent if an education authority nevertheless wishes to establish GMPE. Section 8(2)(c) protects the existing discretion of the local authority to simply take steps to provide GMPE and section 8(2)(b) allows an education authority to follow the procedure for a full assessment under the Bill. It would be for the education authority to ensure that it exercised its discretion reasonably.
Section 8(3) requires notification to be made to all parents of children mentioned in an application under sections 5(2) & (3). What other involvement will those parents have in the assessment process, for example will they receive notification and be asked for supplementary information? Is it also intended that section 8(4) will override any data protection restrictions?	<p>The initial assessment process is for the education authority. The parental involvement will be that of providing the authority with evidence of demand and it is not considered appropriate to allow supplementary information to be provided by parents as the information which the education authority will be considering would have been provided very recently via the parental request; the form for which will regulate exactly what information must be provided.</p> <p>It is not intended that section 8 (4) will override data protection restrictions. It is the determination and reasons that will be published and circulated, not the identities of the parents or children.</p>
Given the young ages of the children what period does the Scottish Government consider to be reasonable under 8(6)?	What is reasonable in all the circumstances will be discussed in guidance. The Bill does not give parents a right to obtain GMPE for their children, rather the Bill gives parents a route to express their demand and a right to request an assessment of the need to provide GMPE based on that demand and demand from other parents of children under school age in the same area. There should be no expectation that any GMPE that is provided as a consequence of an assessment under the Bill will be available to the child specified in the request that triggered the assessment or any other children who have factored into the assessment. GMPE provision may take some time to establish (although the Bill requires that this should be within such period as is reasonable in all the circumstances) and access to that provision will be dependent on the placing request system in that education authority area.
Will the applicants have any rights to be involved in the full	The information that the education authority took into account at the initial assessment stage



assessment process before a final decision is made?	including the parental request that triggered the assessment is a mandatory factor that the education authority must consider in the full assessment process. The National Parent Forum of Scotland will also be asked for their views and, if provided, those are also a mandatory factor that the education authority must consider at the full assessment stage.
Under section 10(2)(d) local authorities are to seek the views of certain bodies on certain information. Could these bodies also provide their views on whether the education authority should provide GMPE?	These bodies will be asked to provide their views on the parental request, the demand for GMPE in the GMPE assessment area, and the decision that the authority came to in the initial assessment. The Bill does not seek to strictly delineate the extent of the views provided and the relevant bodies may, in providing a view on those matters, also consider it appropriate to provide a view on whether the authority should provide GMPE. However, the relevant bodies will not be able to provide a full view on this matter as there are other factors that the local authority will consider in its full assessment (such as resource considerations).
[is there a typo in 10(7)(b)?]	Section 10(7)(b) is intended to cover any views provided by the National Parent Forum of Scotland following a request under section 10(2)(d). While Education Scotland and Bòrd na Gàidhlig are required, under section 10(4), to provide views within 4 weeks of such a request, there is no such obligation on the National Parent Forum of Scotland. We will consider, for Stage 2, whether this provision could be stated more clearly.
Will any guidance be provided to local authorities on the weight they should attach to the various factors they must consider under section 10(7)?	The matters listed in section 10(7) will be considered further in the guidance. It will generally be for education authorities to attach the appropriate weight to each factor in the same way that they are used to taking other reasonable and rational decisions.
Will there be an appeals process when a local authority determines that it need not provide GMPE?	The Bill does not provide for an appeals process. Education authorities have their own appeal procedures and both section 70 of the 1980 Act and judicial review may be relevant here.
Within what time-limit is it anticipated an authority must commence the full assessment, noting the requirement under 11(5) to	This will be dealt with in the guidance but, given the requirement to conclude and report on a full assessment within 10 weeks of a decision to proceed to full assessment, it will be in the interests of the local authority to commence a full

conclude within 10 weeks of commencement?	assessment as soon as this decision is taken.
In relation to section 13, education authorities that already provide GME or GLE must 'promote and support' that provision. How can an education authority provide GME or GLE but not support it?	Support can involve many things; providing adequate resources/materials for pupils and teachers, CPD for teachers, steps to recruit teachers, support for GME in larger initiatives on literacy, numeracy, curriculum change and more. Currently, it could be possible to provide GME or GLE and not take a number of the steps above but section 13(6) of the Bill will require that, at a minimum, that support must include taking reasonable steps to ensure GME and GLE teachers have such resources, training and opportunities as are reasonably necessary to adequately and effectively provide that education and pupils have such resources as are reasonably necessary to adequately and effectively receive and benefit from that education.
Is it the case that some local authorities could be considered to have promoted GME (by publicising the new assessment procedure) but not actually provide any GME?	Yes, this is possible; the duty to promote GME by publicising the right to request an assessment of the need for GMPE will apply irrespective of whether or not GMPE is already provided in an education authority area. Of course, if a request is then made, the authority will have to undertake the statutory assessment process which may result in the provision of GMPE.
<p>Please clarify:</p> <p>the meaning of the term 'Gaelic units', as used in the Financial Memorandum;</p> <p>What the figures in paragraph 29 of the Policy Memorandum, provided in the context of the discussion of the "decline" of the Gaelic language, refer to.</p>	<p>A Gaelic unit is where Gaelic medium education is available in a two stream school. The two streams are GME and EME. In such a school the classes where GME takes place are referred to as a Gaelic unit.</p> <p>The figures refer to the decline of those who claim to be Gaelic speakers. The total figures behind the decline are; 1981 – 82,620; 1991 – 65,978; 2001 – 58,653; 2011 – 57,602.</p> <p>The amount by which they have declined are as below; 1981 – 1991 16,642 1991-2001 7,326, 2001-11 1,050.</p>
<b>Section 70 Provisions</b>	
Paragraph 74 of the Policy Memorandum sets out possible new deadlines for investigating and deciding on complaints. What data are available on the time currently taken for dealing with	Between 2009 and 2012, 20 complaints were made to Scottish Ministers under section 70 of the Education (Scotland) Act 1980 about duties under the Education (Additional Support for Learning) (Scotland) Act 2004, the Scottish Schools (Parental Involvement) Act 2006 and the Parental Involvement in Headteacher and Deputy



complaints, which would allow a comparison to be made?	Headteacher Appointments (Scotland) Regulations 2007. Of those 20 complaints, 4 took up to 6 months to resolve, 8 took 6-12 months to resolve, with the remainder taking in excess of 12 months. We are confident that the possible new deadlines outlined by the policy memorandum would represent a significant, positive change to the length of time it takes for a complaint to be investigated and a decision taken on whether a Ministerial Order is required.
Are there any types of complaint that take a particularly long time to resolve?	<p>Each complaint under section 70 concerns unique, specific circumstances and therefore it is difficult to identify a specific type of complaint which takes a particularly long time to resolve. Generally, statutory duties on responsible bodies relate to the broad group of children and young people for whom they are responsible or parents as a whole.</p> <p>However, under the Education (Additional Support for Learning) (Scotland) Act 2004, education authorities hold specific duties in relation to the children or young people for whom they are responsible, complaints are therefore concerned with a failure by the education authority to carry out a duty in respect of one specific child or young person rather than children or young people as a whole. This can result in the consideration of evidence being extensive as parties may have been attempting to resolve the dispute for months or even years before making the complaint to the Minister. Parties often provide a high volume of paperwork as evidence due to the complex nature of their child's ongoing circumstances. This can result in the exchange of information taking a long length of time to allow parties to review the evidence and respond.</p> <p>As a result, the consideration by Scottish Ministers on whether an investigation by Education Scotland is required and then whether a Ministerial Order is appropriate can also take a long length of time due to the high volume of evidence amassed from both parties.</p>
Other than simply reducing the time to deal with a complaint, what other measures will be taken to improve the process?	Non-statutory guidance will be produced to provide clarity on what a section 70 complaint is, what it can be used for and what are the likely outcomes. Guidance will also outline the detail of any new statutory timescales implemented.
<b>Kinship Care Provisions</b>	
The Scottish Government	The Scottish Government does not hold information

doesn't have any information on the numbers of children affected by the unintentional exclusion from early learning and childcare provisions. However, do you know the total number who could possibly have been affected i.e. who have or have had a guardian appointed under the 1995 Act?	on how many children could have been affected by this unintentional exclusion. Section 7 of the 1995 Act is a private legal arrangement and outlines how guardians can be appointed by a parent or another guardian in writing (usually in a will). As this process is private and does not involve the courts, it is not possible to collect the numbers of children who could have been affected. The new statutory guidance on early learning and childcare indicated that it would only affect an extremely small number of children.
<b>Additional Support for Learning Provisions</b>	
Paragraph 48 of the policy memorandum states that "a child can bring a disability discrimination claim to the ASNTS" (but not appeal). Is that the case for all disabled children over 12?	Under the Equality Act 2010 the Additional Support Needs Tribunals for Scotland (ASNTS) hear and decide claims of disability discrimination in relation to pupils in school education in Scotland. A claim can be made by any person who has capacity. Technical guidance produced by the Equality and Human Rights Commission outlines that a child aged 12 or over is presumed to have capacity and therefore a disabled pupil who is 12 or over could make a claim that he or she has been discriminated against.
According to paragraph 49 of the policy memorandum, the majority of rights are to be extended to children aged 12 and over who have capacity and who may have additional support needs. However, parents' rights will remain. How will both parents and children having rights work in practice?	<p>The extension of children's rights is not about undermining parents' role in their family or in relation to their child's education, therefore the parents' rights under the 2004 Act will remain. These changes are about enabling children, who want to and who can, to have a direct influence on the support they receive. It also provides an opportunity for those vulnerable children whose parents are unable to look after their interest to use their rights and serve their own interests.</p> <p>Where both parent and child wish to use their rights, it is expected that they will decide who uses the right in light of their own circumstances. In the situation where a parent disagrees with a decision taken by a child they will have the right to ask the ASNTS to review the decision by the education authority that the child has capacity to use their right or that the child is using their right in their own best interest. Similarly, where a child is unhappy with the provision of support they are being provided they will have the right to make an application to independent adjudication or appeal to the ASNTS.</p>
<b>School Meals Provisions</b>	
What evidence is there of "confusion	During the drafting of amendments to section 53 via the Children and Young People Act 2014, section



<p>misinterpretation” on the part of those using existing legislation?</p>	<p>53 was identified as a candidate for restatement due to the number of times the section has been amended which might open the section up to differing interpretations.</p> <p>Anecdotally, we know that education authority teams responsible for the administration of school meals have issues with interpreting this legislation. Policy officials in Scottish Government are regularly asked to clarify section 53. The main source of confusion relates to what education authorities can and can't do with regards to the provision of free school meals. The legislation needs to be simplified to enable education authorities to efficiently administer school meals.</p>
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