

# **Section 70 of the Education (Scotland) Act 1980:**

**A guidance document for users of the  
section 70 process**

# SECTION 70 OF THE EDUCATION (SCOTLAND) ACT 1980

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 complaint to the Scottish Ministers.

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# 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 complaint to the Scottish Ministers under section 70 of the Education (Scotland) Act 1980. A complaint 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 that 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 complaint to the Scottish Ministers. An interested party may be anybody who has an interest in the child or young person whom the complaint concerns. Although this can be anyone, in practice this is likely to be someone who is in close contact with the child or young person. The section 70 process requires the Scottish Ministers to consider evidence and make a determination 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 must be provided by the person making the complaint 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;
- 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 (including grant aided and independent schools) or any other persons who have duties under legislation related to education.

### **Complainer**

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

### **Complainee**

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

### **HMIE**

HMIE (Her Majesty's Inspectors of Education) are part of the organisation Education Scotland. Each year, HMIE 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.

### **Working day**

A working day is defined as a day that is not a Saturday; a Sunday; a day from 27th December to 31st December (inclusive); a day in July; or a day specified as a bank holiday in Scotland in or by virtue of the Banking and Financial Dealings Act 1971(2).

## **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 complaint 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 complaint, 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 complaint made by any interested person. These instances are rare.

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). This document provides guidance on these timescales and process.

Further amendments were made to section 70 to ensure that no order could be made by the Scottish Ministers under section 70 in respect of Additional Support for Learning matters which are under the jurisdiction of the First-Tier Tribunal for Scotland Health and Education Chamber (“FTT”). As a result, the Scottish Ministers will not consider an issue or reconsider a decision which would be considered by the FTT.

However, the President of the FTT Health and Education Chamber has a power to monitor decisions of the Tribunal and refer matters of non-compliance to Scottish Ministers under the First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2017. Where the President becomes aware that a responsible body is not complying with a decision of the Tribunal, the matter could be referred to Scottish Ministers.

The Section 70 (Procedure) (Scotland) Regulations 2017 will be commenced on 10 January 2018 and provide 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 determination.

## **BEFORE MAKING A COMPLAINT 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, child 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 should be followed in the first instance. Depending on the nature of the complaint 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 a reference to the First-Tier Tribunal ([FTT](#)).

For example, in certain circumstances, an education authority's decision on a placing request can be appealed to the Tribunal.

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%20Talk%20ASN%20Flyer.pdf>

Further advice is also available via [Enquire](#), whom 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 may also be able to signpost you to other organisations that may be able to help. Enquire's confidential helpline is available to be contacted directly on 0345 123 2303.

## **OTHER COMPLAINTS MECHANISMS AVAILABLE**

The section 70 process can only be used in certain circumstances where it is alleged that a responsible body has failed to carry out a statutory duty relating to education. Before making a complaint under section 70, you may like to consider if it is the most appropriate course of action.

## **Section 70 of the Education (Scotland) Act 1980**

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Noted below are some of the other mechanisms available for resolving complaints or disputes.

### **Schools (Consultation) (Scotland) Act 2010**

A complaint 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 can be accessed via their website or obtained from 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, impose conditions on the running of an independent school where a school is at risk of becoming objectionable on one or more of the grounds set out in section 99(1A) of the 1980 Act. Further, where Ministers are satisfied that the school is objectionable on one or more of those grounds, they must serve a Notice of Complaint on the proprietor of an independent school.

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

Functions relating to the named person and child's plan are set out in the Children and Young People Act 2014. As complaints to Scottish Ministers under section 70 must relate to an education related enactment, complaints cannot be made under

section 70 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 on a policy basis, 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 generally 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 (SPSO) is the final stage for complaints about public services in Scotland. The SPSO considers complaints where a member of the public has suffered injustice or hardship as a result of maladministration or service failure by a public service. Generally, the SPSO expects the person to have

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completed the public service organisation's full complaints procedure before it considers their complaint.

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

### **Children and Young People's Commissioner Scotland**

The Children and Young People's Commissioner Scotland has a power of formal investigation where it appears that the rights of individual children and young people or groups of children and young people might have been breached. However, it is important to note that the Commissioner cannot carry out an investigation if; the concern relates to matters which are reserved to the UK Government; it concerns the decision-making of a court of tribunal in a particular case; or it concerns a case currently before a court or tribunal. The Commissioner also cannot investigate a complaint if another body in Scotland has the power to carry out an investigation.

## THE SECTION 70 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 complaint. The second relates to where a complaint has been received from any interested party. This document deals with the latter. In the former, the same overall timescales applies.

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

In practice, the section 70 process is broken down into 4 functions:

1. A *Complaint Establishment Period*, comprising a maximum of 15 working days
2. An *Investigative Period*
3. A *Decision Making Period*
4. A *Discharge of Duty Period* which will be determined by a Ministerial Order

### Complaint Establishment Period (Maximum of 15 working days)

The Complaint Establishment Period will be used as an opportunity for the Scottish Ministers to establish if, as is outlined in the regulations (see Regulation 2 (2)), the complaint 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 complaint to an investigation by HMIE. It is expected this would happen rarely and only in circumstances where the evidence provided by an interested party indicates that there is an immediate need for a fast tracked investigation. Further information about the role of HMIE is provided later in the guidance.

Most significantly, the complaint establishment period will be used to ensure that Scottish Government officials, and the complainer, are clear about the reasons for the complaint. This approach will ensure that the details of the complaint are focused when provided to the complaine. It is anticipated that this will ensure that evidence

is sought from the complainee on the specific reasons for the alleged failure of duty or duties.

### **Investigative Period**

During the Investigative Period, Scottish Government officials will firstly confirm with both parties the 'complaint establishment date'. This is the date that Scottish Ministers have determined that the complaint to Ministers is appropriate to be considered under section 70. Following this decision, Scottish Ministers have a maximum period of 105 working days **from the date the complaint was received** to determine whether to make an order under section 70(1) of the Education (Scotland) Act 1980.

Scottish Government officials will request written evidence from the parties involved (complainer and complainee) with a view to establishing if a failure of duty has occurred. Depending on the evidence provided, the Scottish Government may need to contact the parties more than once. 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**

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 complainee will receive the order from Scottish Ministers during this period.

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

Where a failure to discharge a duty or duties has occurred and an order has been made by the Scottish Ministers under section 70, the complainee will be required, by a 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 complainee to establish if the duty or duties has now been discharged. In the situation where the duty or duties have not been discharged, arrangements may be taken to ensure the duty is discharged by the Scottish Ministers. Further, the Lord Advocate may apply to the Court of Session to order that the complainee fulfill their statutory duty (an order of specific performance).

## HOW TO MAKE A COMPLAINT

You can make a complaint to the Scottish Ministers by writing directly to the Scottish Government. An application form is available at the end of this guidance and on the Scottish Government website at the following link:

<http://www.gov.scot/Resource/0041/00418795.pdf>

Complaints can be made to the address detailed below.

The Scottish Ministers  
Learning Directorate  
Victoria Quay  
Edinburgh  
EH6 6QQ  
E: [EdSSection70@gov.scot](mailto:EdSSection70@gov.scot)

The 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 complaints. Anyone considering making a complaint under section 70 may wish to contact the Education Law Unit on 0141 445 1955.

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. As such, you should ask yourself the following questions before submitting a complaint:

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

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

Where it is not clear which sections of the legislation you believe the responsible body has failed to carry out, the complaint will be returned to you with a request for clarification.

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

The section 70 process is evidence based and the Scottish Ministers will consider the 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. 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.

If the complaint refers to an alleged failure of more than one section of the legislation, you must provide evidence in support of each of the alleged failures. The evidence should be clearly labeled to show which section of the legislation it refers to, although it may refer to more than one section. As you may want to provide a large volume of evidence, you may want to consider presenting the evidence in chronological order with a covering summary or contents page.

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

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 5-8) 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.

As section 70 can only investigate alleged failures of responsible bodies in relation to their duties under education legislation, it cannot be used to investigate matters that fall outside of this. You may wish to consider if the other mechanisms outlined on pages 5-8 would be more appropriate.

In addition, as the section 70 process can only investigate current, alleged failures, it cannot be used to investigate historic matters. For example, it may be alleged that a

responsible body has previously failed to carry out an assessment of a child's additional support needs. However, if the responsible body has now carried out this assessment, the previous alleged failure cannot be investigated under section 70.

## **HOW RESPONSIBLE BODIES WILL RESPOND TO A COMPLAINT**

Responsible Bodies will be provided with a letter from Scottish Government officials to advise that a section 70 complaint has been received. Under the cover of that letter the full complaint, including all evidence, will be provided. The timescales for responding will also be detailed. These timescales will be determined by officials to comply with the overall timescale of 105 working days.

The responsible body will be asked 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 discharged the duties which it is alleged have not been carried out. 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 HMIE which otherwise would not have occurred.

It is important when responding that responsible bodies do not respond to every single allegation but focus specifically on the alleged failure to discharge their duties. As detailed above, the evidence responsible bodies provide in response will be dependent on the duties which are alleged to have been failed. In most circumstances evidence could include 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

As noted above, the complaint may refer to an alleged failure of more than one section of the legislation. In these cases, evidence should be provided in response to each alleged failure. The evidence should be clearly labeled to show which section of the legislation it refers to. Although it may refer to more than one section. Where possible, this evidence should be presented in a chronological order with a covering summary and contents page.

## **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. This inspection must be carried out within the overall 105 working day timescale.

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 complaint
- 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>



# COMPLAINT TO THE SCOTTISH MINISTERS UNDER SECTION 70 OF THE EDUCATION (SCOTLAND) ACT 1980



Scottish Government  
Riaghaltas na h-Alba  
gov.scot

**The Scottish Ministers  
Learning Directorate  
Victoria Quay  
Edinburgh  
EH6 6QQ**

Under section 70 of the Education (Scotland) Act 1980 any interested party can make a complaint to Scottish Ministers where they believe 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 that they are required to carry out under an education enactment.

Section 70 complaints can only be made in certain circumstances, as described above. Before making a complaint under section 70, you may like to consider if it is the most appropriate course of action. Further information is provided in the guidance for users of the section 70 process.

Section 70 gives a discretionary power to the Scottish Ministers to make an order to enforce a statutory duty to be carried out. To establish that there is a current failure, evidence will be requested from both the responsible body concerned and the complainant to establish the validity of the complaint. Where it appears that there has been a failure, Education Scotland will investigate the case and act as advisors to the Scottish Ministers. If, after investigation, the Scottish Ministers are satisfied that the responsible body has failed to discharge a duty, they may make an order under section 70:

- a. declaring the responsible body concerned to be in default of a statutory duty in relation to education: and
- b. requiring the responsible body concerned to discharge that duty.

If the responsible body concerned fails to discharge the duty by a specified date, the Scottish Ministers may make arrangements for the discharge of the duty.

**Before making a reference under section 70, you are advised to read the accompanying guidance on the section 70 process.**

# COMPLAINT TO THE SCOTTISH MINISTERS UNDER SECTION 70 OF THE EDUCATION (SCOTLAND) ACT 1980

## Section 1: Your Details

Please tick one of the following:

1. I am a parent of a child
2. I am a young person
3. I represent the complainant
4. I am a person making a complaint (none of the above)

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

If you have ticked box number 3, please provide your details in the box provided at (e)

**(a) Name of Complainant**

**(b) Name of Child  
(if different from above)**

**(c) Education authority**

**(d) School**

**(e) Address for response  
from Scottish Government**

**(f) Telephone number**

**(g) Email address**

**Your signature**

**Date**

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## Section 2: Your Complaint

### Complaint 1.

Please state below which duty under education legislation you consider has not been carried out

e.g. Section 5 of the Education (Additional Support for Learning) (Scotland) Act 2004

Please use the following box to tell us about the complaint. Please include the following:

- What your complaint is
- An outline of the evidence you have provided and how it supports your complaint

Please attach the evidence which supports your complaint, ensuring this is marked complaint number 1.

# COMPLAINT TO THE SCOTTISH MINISTERS UNDER SECTION 70 OF THE EDUCATION (SCOTLAND) ACT 1980

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## Complaint 2.

Please state below which duty under education legislation you consider has not been carried out

e.g. Section 5 of the Education (Additional Support for Learning) (Scotland) Act 2004

Please use the following box to tell us about the complaint. Please include the following:

- What your complaint is
- An outline of the evidence you have provided and how it supports your complaint

Please attach the evidence which supports your complaint, ensuring this is marked complaint number 2.

# COMPLAINT TO THE SCOTTISH MINISTERS UNDER SECTION 70 OF THE EDUCATION (SCOTLAND) ACT 1980

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## Complaint 3.

Please state below which duty under education legislation you consider has not been carried out

e.g. Section 5 of the Education (Additional Support for Learning) (Scotland) Act 2004

Please use the following box to tell us about the complaint. Please include the following:

- What your complaint is
- An outline of the evidence you have provided and how it supports your complaint

Please attach the evidence which supports your complaint, ensuring this is marked complaint number 3.

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## Complaint 4.

Please state below which duty under education legislation you consider has not been carried out

e.g. Section 5 of the Education (Additional Support for Learning) (Scotland) Act 2004

Please use the following box to tell us about the complaint. Please include the following:

- What your complaint is
- An outline of the evidence you have provided and how it supports your complaint

Please attach the evidence which supports your complaint, ensuring this is marked complaint number 4.



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