FACULTY OF ADVOCATES

**Response from the Faculty of Advocates**

**to**

**the Consultation on transfer of the functions of education appeal committees to the Scottish Tribunals**

## Introduction

The Faculty of Advocates welcomes the opportunity to comment on the Scottish Government consultation on transfer of the functions of education appeal committees to the Scottish Tribunals. We welcome the proposal that functions should be transferred. We do however have comments to offer on the steps required to make the transition effective.

## The need to transfer to the Scottish Tribunals

The Faculty agrees that the current procedures for appeals in respect of placing requests and exclusion of children from school are unsatisfactory. Reform could be regarded as overdue. Criticism of the procedures goes back to 2000 when the Scottish Committee of the Council on Tribunals were sufficiently concerned to prepare a special report on appeal committees. They made a number of recommendations, including adherence to the CoSLA *Code of Practice for Constitution and Procedures of Education Appeal Committees in Scotland,* which was already in existence (although revised in 2001 following publication of the Committee's report). Even with the benefit of the revised Code there remained the fundamental difficulty of the relationship between the appeal committee and the education authority. The following year the *Leggatt Report* (*Tribunals for Users, One System, One*

*Service, Report on Review of Tribunals*, March 2001) concluded that "Responsibility for tribunals and their administration should not lie with those whose policies or decisions, it is the tribunals' duty to consider. Otherwise for users, as has been said, 'Every appeal is an away game.' "

Concerns about appeal committees were mentioned in the Scottish Committee of the Council on Tribunals annual reports of 2005/6 and 2006/7. In November 2006 the Scottish Ministers launched a consultation on improving these committees but no radical proposals emerged and no action was taken. The Scottish Committee of the Administrative Justice & Tribunals Council continued to air concerns about education appeal committees. In their annual report of 2010/11 the Scottish Committee of the Administrative Justice & Tribunals Council included a section devoted to education appeal committees. They repeated fundamental concerns that the appeal committees were not fit for purpose and their practices did not satisfy the requirements of impartiality, fairness or transparency. The report contained a further concern about the diversity of practice among appeal committees in different parts of the country. The Administrative Justice & Tribunals Council ceased to operate on 19 August 2013. The Tribunals (Scotland) Act 2014 came into force on 1 April 2015.

The problems include the location of hearings in education authority premises, the clerking by education authority employees, the lack of training for committee members, the lack of opportunities for professional assistance to appellants, the lack of structure to decision-making by committees and the lack of reasoned and well-explained decisions.[1] None of this is acceptable in a modern system, where independence and impartiality require to be both present and a fair-minded and informed observer should be in a position to conclude that there is no real possibility of bias (see *Porter v Magill* [2002] 2 AC 357).

While challenge under article 6 of the European Convention on Human Rights was unlikely so long as the position remained as set out in the decision of the Commission in *Simpson v UK* (1989) 64 DR 188, and matters of education were treated as 'public law' rather than 'civil

[1] See, for example the series of cases reported at 1999 Fam LR 119, in particular *Inderhaug v Grampian Regional Council, Crawford v Strathclyde Regional Council* and *McDonald v Grampian Regional Council,* where sheriffs were critical of reasons provided by appeal committees

rights', this is no longer the case. In *Orsus v Croatia* (2011) 52 EHRR 7, the Grand Chamber of the European Court of Human Rights held that the case law relying on the Commission in *Simpson v United Kingdom* no longer applied and that Article 6 applies in the context of primary education. There is therefore the potential for a human rights challenge to the procedures of appeal committees. This reinforces the need for change.

A further reason for reform is that it removes the complexity of dual decision-making that applies to children with additional support needs, where some placing requests are made to the appeal committee and some to the First-tier Tribunal. Placing requests for special schools (or their equivalent in England, Wales or Northern Ireland) and placing requests in respect of children with additional support needs and a co-ordinated support plan are now made to the Health and Education Chamber of the First-tier Tribunal. There is material complexity in cases where there is a challenge to refusal of a co-ordinated support plan (which will be decided by the tribunal) and a challenge to refusal of a placing request (which will be determined by the appeal committee, unless the tribunal allows the appeal against refusal of the co-ordinated support plan). At present cases can be passed between the appeal committee and the tribunal (in terms of the Education (Additional Support for Learning) (Scotland) Act 2004, schedule 2 paras 6 and 7). Combining the decision-making will obviate the need for some of the complex provisions found in section 19(5) of the 2004 Act, regulation 5 of the Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005 (SSI 2005/515), and the almost incomprehensible regulation 6A of the Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005 which applies where an out-of-area placing request is made in respect of a child with a co-ordinated support plan.

We would make one brief corrective comment. There are material differences between grounds for refusal of placing requests under the Education (Scotland) Act 1980 and the Education (Additional Support for Learning) (Scotland) Act 2004. The 2004 Act allows placing requests to independent schools, provided these are special schools (or equivalent in other parts of the United Kingdom).[2] There are then additional grounds to refuse the request where the specified school is not a public school, the education authority are able, and have

[2] 2004 Act, sch 2, para 2(2).

offered, to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school and it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school and in the school proposed by the authority to place the child in the school proposed in the request.[3] There is also a ground for refusal if placing the child in the special school requested would breach the requirement that education should be provided in a mainstream school, save in certain exceptional circumstances.[4]

Similarly, in the case of exclusions, if a child has additional support needs there may be a dilemma as to the appropriate remedy. The exclusion could either be appealed to the appeal committee, or there may be a challenge under the Equality Act 2010, based on disability discrimination. This gives rise to a need to choose, or to embark on duplicate proceedings in different forums under different legislation. If all exclusions can be appealed to the Health and Education Chamber of the First-tier Tribunal, then the problem is resolved as appeals in relation to these children can be made together. This is a clear benefit to some of the most vulnerable children.

**Issues to consider on transfer**

The consultation paper indicates that consideration will require to be given to making tribunals geographically (or virtually) accessible to parents and young people. It is noted that the President of the Health and Education Chamber of the First-tier Tribunal indicates that there is sufficient capacity to deal with an anticipated 600 – 700 appeals, most of which will require to be heard between 30 April and (say) 30 June in each school year. We mention that timescale, because there should be time for a further appeal to the Upper Tribunal[5] before the commencement of the school year in the middle of August. The number of applications to the Chamber under the current law has ranged from 76 in 2016/17 to 146 in 2019/20, although figures by October 2022 indicated there may be more applications in the current year. The Chamber is however looking at a potential quadrupling of its case load, all to be heard within 2 months. It would be prudent to ascertain how many further tribunal judges

[3] 2004 Act, sch 2, para 3(1)(f).
[4] 2004 Act, sch 2, para 3(1)(g), read with Standards in Scotland's Schools etc. Act 2000, s15.
[5] See below in relation to the necessity to make provision for appeal to the Upper Tribunal.

will be required, whether there is space (physical or virtual) and whether administrative support will be available to manage these cases. We are mindful of the constrained SCTS budget, and conscious of the need to fund the changes, without adverse effect on the rest of the justice system. A realistic budget would give reassurance that the proposed change will be achieved without adverse effect on pupils and parents.

Similar comments may be made in relation to the capacity of the Upper Tribunal to deal with appeals from the First-tier Tribunal. There will require to be scope for appeal from the First-tier Tribunal to the Upper Tribunal to replicate the current opportunity for further appeal to the sheriff. Appeal to the Upper Tribunal is in any event an important aspect of tribunal procedure. Consideration requires to be given to the number of likely appeals, the facilities for hearing appeals and the cost of the extension of the Upper Tribunal.

It will also be necessary to look at the deemed refusal provisions in the Education (Placing in Schools etc.. Deemed Decisions) (Scotland) Regulations 1982 (SI 1982/1733).[6] Regulation 5 provides:

> 5.— Deemed decision of an appeal committee
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> (1) Where with respect to any reference, being a reference made under section 28C, that section as applied by section 28G of the Act, or section 28H of the Act3 , an appeal committee have—
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> (a) failed to hold a hearing within a period of 1 month, in the case of a reference made under section 28H of the Act, and 2 months, in the case of any other reference mentioned above, immediately following receipt by them of the reference;
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> (b) failed within the period of 14 days immediately following an adjournment of a hearing, to fix a date for a resumed hearing of the reference; or
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> (c) failed to comply with such of the following provisions of the Act as are relevant to the reference in question, namely subsection (3) of section 28E, that subsection as applied by section 28G, or as the case may be section 28H(3) , within the period of 14 days immediately following the conclusion of the hearing or, as the case may be, resumed hearing of that reference; the committee shall be deemed for the purposes of the Act to have confirmed the decision of the education authority in relation to the subject matter of the reference, on the expiry of such period of 1 month, 2 months or, as the case may be, 14 days.

[6] The Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005 (SSI 2005/515) regulation 4 contains similar provisions in respect of children with additional support needs to whom the Education (Additional Support for Learning) (Scotland) Act 2004, schedule 2 applies.

The deemed refusal provisions were designed to allow an appeal to the sheriff, if the appeal committee failed to make a decision within what were regarded as acceptable time limits. These provisions will not sit well with a reference to the tribunal. It is one thing to operate them against the authority concerned. It would be another to impose a sanction of refusal in the event that the tribunal failed to make a decision. On the other hand, education authorities will not welcome deemed allowance of appeals in the event the tribunal delays.

The current regulations do indicate the importance of the time limits mentioned. The solution may be to provide for strict time limits for procedure in the tribunal. That will however demand the resources to meet those time limits.

Finally, the move to the tribunal system will involve some loss of the informality of the current appeal committee system. Consideration will require to be given to supporting parents and young people referring cases to the tribunal. There is already an advocacy service for persons making a reference under the 2004 Act, and means-tested advice and assistance is available under the legal aid scheme for references under the Equality Act 2010. Some form of advocacy service is required to assist in accessing the tribunal and presenting cases to the tribunal. Assistance is likely to make tribunal hearings themselves more efficient and effective. Building in provision for support for appellants should therefore be a cost-effective measure.