

# Report

Report to:	<b>Education Resources Committee</b>
Date of Meeting:	<b>14 February 2023</b>
Report by:	<b>Executive Director (Education Resources) Executive Director (Finance and Corporate Resources)</b>

Subject:	<b>Scottish Government Consultation – Transfer of the Functions of Education Appeals Committees to the Scottish Tribunals</b>
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## 1. Purpose of Report

1.1. The purpose of the report is to: -

- ♦ provide an update on the Scottish Government's consultation – Transfer of the functions of education appeals committees to the Scottish Tribunals.

## 2. Recommendation(s)

2.1. The Committee is asked to approve the following recommendation(s): -

- (1) that the case for the transfer of the functions of education appeals committees to the Scottish Tribunals presented by the Scottish Government as shown in appendix 1 is noted.
- (2) that the council's response to the Scottish Government's consultation on the transfer of the functions of education appeals committees to the Scottish Tribunals, by 6 February 2023, as shown in Appendix 2 be approved with any additions or qualifications as may be approved, for onward transmission to the Government.

## 3. Background

3.1. *Education Appeal Committees*

Local authorities are required to set up and maintain education appeal committees ("appeal committees"). The great majority of the appeals considered by these appeal committees relate to school admission placing requests and a smaller number to exclusions from school.

3.2. Appeal committees are established by a local authority under section 28D of the Education (Scotland) 1980 Act. Schedule A1 to the 1980 Act makes further provision in respect of appeal committees. This includes providing that the membership of the appeal committee is to consist of both members of the authority and persons who are not members, including parents of children of school age or persons whom the authority considers to have experience in education or who are acquainted with the educational conditions in the area of the authority. The persons appointed may not be employees of the authority in an administrative or advisory capacity in relation to the delivery of education.

- 3.3. In practice, appeal committees usually consist of elected councillors and local persons with strong experience in the education sector, such as parents of children of school age.
- 3.4. *What types of appeals are heard by appeal committees?*  
Appeal committees deal with two different types of appeal:–
- ♦ placing requests (except those heard by the First-tier Tribunal's Health and Education Chamber, Additional Support Needs jurisdiction)
  - ♦ exclusions from school (except those heard by the First- tier Tribunal)
- 3.5. *What is the role of a Tribunal?*  
The Tribunals (Scotland) Act 2014 ("the 2014 Act") created a new two-tier structure for devolved tribunals, organised into the First-tier Tribunal which is a tribunal of first instance and the Upper Tribunal which specifically hears appeals from the First-tier Tribunal.
- 3.6. These are known collectively as the Scottish Tribunals. In Schedule 1 of the 2014 Act, Education Appeal Committees are listed as one of the tribunals, which will transfer to the Scottish Tribunals in so far as Scottish Ministers consider it appropriate. The 2014 Act contains powers to make the secondary legislation required to amend the Education (Scotland) Act 1980 ("the 1980 Act") and transfer the functions of appeal committees to the First-tier Tribunal. Those functions would be transferred to the Health and Education Chamber, which also houses the functions of the former Additional Support Needs Tribunals for Scotland (generally referred to as the Additional Support Needs jurisdiction).
- 3.7. The consultation on the Bill for the 2014 Act set out the Scottish Government's intention to create a structure to enable a range of tribunals to move under the umbrella of the Scottish Tribunals, if appropriate, and following discussions with interested parties. Subsequently, the 2014 Act included education appeal committees in the list of tribunals whose functions would transfer.

#### **4. Consultation Proposals**

- 4.1. In 2000, the Scottish Council of the Committee of Tribunals found that the existing appeal committee processes were unsatisfactory and recommended that all involved with the appeal committees should be properly trained, and neutral venues should be used for hearings. In response to these concerns, COSLA created a code of practice to improve practice among local authorities.
- 4.2. In 2004, interviews were carried out by then Scottish Executive with parents whose appeals had been heard by an appeal committee. This research highlighted a number of concerns from parents, including concerns about a lack of impartiality, an imbalance of power between the local authority and parents, and concerns relating to the standard of training for panel members.
- 4.3. A public consultation in 2006 found that appellants thought the appeal process could be stressful and upsetting and had concerns about the impact on their child and family. The consultation outcome also reported that negative experiences led to appellants dropping their appeals due to concerns around the time, cost and stress of appearing at the Sheriff Court to appeal a decision of the appeal committee.
- 4.4. The Scottish Government has intimated that the evidence base cited above is relatively old, dating back to the early to mid-2000s. Similar points were also made

during scrutiny of the Tribunals (Scotland) Bill during its passage through Parliament in 2013.

- 4.5. This consultation provides an opportunity for users of appeal committees and those involved in their delivery to provide up to date evidence of the operation of appeal committees. It provides an opportunity to give views on the future of the education appeals process in Scotland.

## **5. The Proposal**

- 5.1. The proposal is to take forward the transfer of the jurisdiction of appeal committees to the Scottish Tribunals as provided for by the 2014 Act. If approved, this process would require secondary legislation governing the operation of appeal committees to be put in place. This process would be expected to take at least 18 to 24 months from the date a decision is made to progress the transfer.

- 5.2. The consultation questions for consideration are:-

1. *Do you agree that appeal committees should transfer to the Scottish Tribunals? And if so, why?*
2. *Do you consider that appeal committees should remain with local authorities but with improvements to how they operate? And if so, what changes would you like to see?*
3. *Do you consider that no changes should be made to how appeal committees operate? And if so, why*

- 5.3. Appendix 1 highlights parts of the consultation presented by the Scottish Government for the proposal on transfer of the functions of education appeals committees to the Scottish Tribunals.

- 5.4. Appendix 2 sets out the Council's response to the consultation questions listed in paragraph 5.2 above. The deadline for responses is Monday 6 February 2023 with local authorities invited to give their views along with as wide a range of stakeholders as possible.

- 5.5. The Council submitted its response by the deadline, accordingly, explaining that this Committee wished to comment on the Consultation and consider the Council's response, that the Committee meeting was not until after the deadline and that the Council might wish to submit a supplementary response consequently. The Committee is invited to approve the response as submitted, with any additional comment or revision.

## **6. Employee Implications**

- 6.1. None

## **7. Financial Implications**

- 7.1. The Scottish Government in their consultation document have set out the following:

- 7.1.1 Whilst there has not been a comprehensive costing exercise carried out at this stage, based upon other transfers it would seem likely that the annual cost of the education appeals being heard within the Scottish Tribunals would be around £500,000 to £700,000 (note this is not the costs to Councils). This figure is based on current estimates and running costs and is subject to change by the time any transfer is implemented. This annual figure is intended as a guide only for the purposes of this consultation. Additional set up costs may be required, for example in

terms of adapting case management systems already in use within the Scottish Tribunals.

7.1.2. Accessing the appeals process would continue to be free for all parties involved. There would be additional financial costs to central and local government associated with the transfer of the functions of appeal committees to the Health and Education Chamber. Currently, appeal committees are staffed by volunteers whereas tribunal members are paid a fee for their participation. In addition, local authorities are either represented by their own officers or in some cases by a solicitor (invariably of the local authority), with resultant costs to local authorities. We also expect local authorities may choose to have legal representation in cases before the Tribunal at least in the initial period while a new system was bedding in.

7.2 However, on the council's current experience of the Tribunal system, it is anticipated that the council would wish to have legal representation (principally from its solicitors, but on occasion the council might wish to engage external Counsel) in all cases at the Tribunal.

7.3 The point is made in the response that councils are not anticipating any cut to their budget in relation to this move. Also, it is anticipated that any additional costs to local government should be considered and funding provided as part of this process of review and consultation.

## **8. Climate Change, Sustainability and Environmental Implications**

8.1. There are no significant implications for climate change, sustainability and the environment arising from the recommendations in this report.

## **9. Other Implications**

9.1. There are no implications for risk in terms of the information contained in this report.

## **10. Equality Impact Assessment and Consultation Arrangements**

10.1. This report does not introduce a new policy, function or strategy or recommend a change to an existing policy, function or strategy and, therefore, no impact assessment is required.

10.2. The closing date for responses to the consultation was set as 6 February 2023.

**Tony McDaid**  
**Executive Director (Education Resources)**

**Paul Manning**  
**Executive Director (Finance and Corporate Resources)**

24 January 2023

## **Link(s) to Council Values/Priorities/Outcomes**

- ◆ Education and learning: Inspiring learners, transforming learners and strengthening partnerships.

## **Previous References**

- ◆ None

**List of Background Papers**

- ◆ Scottish Government consultation – Transfer of the functions of education appeals committees to the Scottish Tribunals
- ◆ Education (Scotland) Act 1980 (section 28D)
- ◆ Tribunals (Scotland) Act 2014

**Contact for Further Information**

If you would like to inspect the background papers or want further information, please contact: - Anne Donaldson, Head of Education, Education Resources

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**Scottish Government consultation – Transfer of the functions of education appeals committees to the Scottish Tribunals: Considerations**

*Deadline: 6 February 2023*

1.	<b>Local accountability</b>	<p>An advantage of the current appeal committee system is that decisions on placing requests and exclusion appeals are taken relatively locally, with the strong involvement of local elected councillors and other representatives with knowledge of the local area. Local authorities are concerned that transferring these cases to the Scottish Tribunals could make the process more remote from families and less accessible as the decision-making would take place away from the local authority. Local authorities are also concerned that this could increase the risk that decisions are taken which do not properly take into account local education delivery and resources and therefore place new burdens on local authorities.</p> <p>Scottish Tribunal members would continue to be drawn from across Scottish local communities to ensure fair representation. The allocation of cases to members also reflects locality. Members are generally allocated cases within specified miles of their local communities. It would be important to ensure that training and induction of members is updated to ensure that members had a good understanding of the local delivery of education.</p>
2.	<b>Appeals in relation to placing requests and school exclusions</b>	<p>Currently appeals against decisions of an authority in relation to placing requests and exclusions are heard by an appeal committee specific to each of the 32 local authorities in Scotland.</p> <p>Transferring the jurisdiction of appeal committees to the Scottish Tribunals has the potential to improve access to justice by placing responsibility for this function under a single body with increased rigour, transparency, judicial independence and objectivity in appeal committee decisions.</p> <p>Concerns have been raised in research cited above about the current system and a perception of a lack of impartiality (particularly as hearings are usually held in Council premises), an imbalance of power between the local authority and parents and inconsistencies in the standard of training for panel members.</p> <p>Transferring into the Scottish Tribunals structure would ensure greater consistency across all</p>

		<p>appeal hearings in relation to both practice and procedure. Scottish Tribunal members are judicial office holders and are independent of the local authority. They are recruited through an independent appointments process by the Judicial Appointments Board for Scotland.</p> <p>The appeals process across Scotland would have common leadership, with the Health and Education Chamber President having overall responsibility for the efficient disposal of education appeals. The transfer would also support standardised specialist training, procedures and terms and conditions for members, in line with other jurisdictions within the Scottish Tribunals.</p>
3.	<b>Appeals Process</b>	<p>Currently appeals against decisions of an authority in relation to placing requests and exclusions are heard by an appeal committee specific to each of the 32 local authorities in Scotland.</p> <p>Transferring the jurisdiction of appeal committees to the Scottish Tribunals has the potential to improve access to justice by placing responsibility for this function under a single body with increased rigour, transparency, judicial independence and objectivity in appeal committee decisions.</p> <p>Concerns highlighted by the Scottish Government are that currently appeals against decisions of an authority in relation to placing requests and exclusions are heard by an appeal committee specific to each of the 32 local authorities in Scotland.</p>
4.	<b>The case for transferring to the Scottish Tribunals structure</b>	<p>Transferring into the Scottish Tribunals structure would ensure greater consistency across all appeal hearings in relation to both practice and procedure. Scottish Tribunal members are judicial office holders and are independent of the local authority. They are recruited through an independent appointments process by the Judicial Appointments Board for Scotland. The appeals process across Scotland would have common leadership, with the Health and Education Chamber President having overall responsibility for the efficient disposal of education appeals. The transfer would also support standardised specialist training, procedures and terms and conditions for members, in line with other jurisdictions within the Scottish Tribunals.</p>
5.	<b>New approach – the need to retain direct local involvement</b>	<p>Any new approach that is adopted would need to take into account the need to retain direct local involvement as far as possible and provide a process that remains close to the children, young people and families affected by the decisions of appeal committees.</p>
6.	<b>Role of local councillors</b>	<p>Currently, local councillors – as stipulated in the 1980 Act – are members of appeal committees as are members of the local community, including members of local school Parent Councils. This has led to concerns, as shown in previous research/consultations, about appeal committees' impartiality and potential conflicts of interest which the transfer of this function to the Scottish Tribunals would address. The current approach to membership of appeal committees has the</p>

		benefit of providing people with knowledge of the local schools system and wider community, which is also present within the Scottish Tribunals.
7.	<b>Additional Support Needs tribunals</b>	Currently Additional Support Needs tribunals are made up of three members, with expertise in the law, education and health or social work. They are drawn from communities across Scotland, and they have experience of rural, island and urban education delivery. The pool of available tribunal members could grow to address the volume of cases transferred from appeal committees if resourcing required this. Members would continue to be drawn from across Scottish local communities. It would be important to ensure that training and induction of members is updated to ensure members have a good understanding of the local delivery of education.
8.	<b>Decision-making</b>	Currently Additional Support Needs tribunals are made up of three members, with expertise in the law, education and health or social work. They are drawn from communities across Scotland, and they have experience of rural, island and urban education delivery. The pool of available tribunal members could grow to address the volume of cases transferred from appeal committees if resourcing required this. Members would continue to be drawn from across Scottish local communities. It would be important to ensure that training and induction of members is updated to ensure members have a good understanding of the local delivery of education.
9.	<b>Appeals Committees</b>	Appeal committees have significant experience of decision making in relation to school placing request appeals under the 1980 Act and exclusion appeals. Given the existing culture and expertise of the Health and Education Chamber, it would take some work to recreate this initially within the Scottish Tribunals however the experience gained with the Additional Support Needs Tribunals demonstrates this can be quickly achieved.
10.	<b>Accessibility</b>	Public authorities, courts and tribunals have a duty to make reasonable adjustments when appropriate, in terms of the Equality Act 2010. This includes making sure that the accommodation provided for hearings is accessible, including the use of the sensory hearing suites developed by the Health and Education Chamber, where appropriate.
11.	<b>The overarching aim of the 2014 Act</b>	<p>The overarching aim of the 2014 Act is to provide a system that deals with proceedings fairly and justly, in a manner proportionate to the complexity of the case. The First-tier Tribunal is designed to avoid unnecessary formality and seeks flexibility and accessibility in proceedings. The intention is that the transfer would provide improved access to justice through increased rigour, judicial independence, transparency and objectivity in education appeal decisions.</p> <p>There are Tribunal/Justice Centres in Glasgow, Edinburgh and Inverness, which offer access to a number of hearings rooms. Other Scottish tribunals accommodation could be made available</p>



		across the country to provide neutral hearing venues and the use of remote hearings could be considered where appropriate. Remote hearings (using video link) have been conducted successfully since 2020 by the Health and Education Chamber's Additional Support Needs jurisdiction and can be used where circumstances require them.
12.	<b>The Health and Education Chamber and the Scottish Tribunals</b>	The Health and Education Chamber and the Scottish Tribunals have good experience of ensuring hearings are accessible and have the capacity to be adaptable to the needs of those participating in them, including those with additional support needs. For example, a bespoke hearing type for education appeals could be developed in readiness for transfer, including, where necessary, trauma informed sensory hearing suites, designed to meet the needs of children and young people with neuro-diverse conditions. The Chamber President would be able to consult with local authorities, children, young people and parents/carers before developing any different hearing types. Requirements could be reflected in the regulations that would support the transfer.
13.	<b>Concerns re Appeal venues</b>	<p>There have been concerns that a move to a smaller number of tribunal centres could discourage some parents, particularly those on low incomes, from choosing to pursue an appeal, and may be seen as much less accessible than existing local arrangements if they involve travel to venues outside of their home local authority or venues, they are unfamiliar with.</p> <p>While these concerns are acknowledged, being part of the Scottish Tribunals could also allow for wider sharing of resources. Scottish Tribunals accommodation would be made available across the country to provide neutral hearing venues and the use of remote hearings could be considered where appropriate, which is now a well embedded process in the Health and Education Chamber. Further details around the existing sensory hearing facilities of the Health and Education Chamber can be found <a href="#">here</a>. Additional Support Needs First-tier Tribunal for Scotland (Health and Education Chamber).</p>
14.	<b>Capacity to meet demand</b>	There are practical challenges in delivering a high volume of appeals in a short time. As shown above, it is likely that Scottish Tribunals would need to process significant numbers of placing request appeals each year. We estimate around 2000 appeal requests are made per year with approximately 600 – 700 appeals resulting in an appeal hearing. In the great majority of cases appeals must be heard during May and June to ensure that school placing decisions can be made in time for the new school year. It is the responsibility of local authorities to manage the availability of the appeal committee members, but each authority has practical arrangements in place to deliver and both the authorities and appeal committees fully understand the need to meet this timetable. However, processing a high number of appeals in a short period of time in itself places a burden on local authorities and transfer of education appeals to the Scottish

		<p>Tribunals would remove this burden. The Scottish Tribunals are also able to provide clear signposting to regulations and procedures from a centralised source and produce material to inform parents of the regulations in a consistent manner across all local authority areas.</p>
15.	<b>Impact and benefits</b>	<p>Transfer of placing request appeals to the Scottish Tribunals would result in a highly cyclical workload, which would need to be concluded in a short period to avoid disrupting local authority arrangements. Any lengthening of the period for appeals to be heard would result in longer delays and uncertainty for families. Exclusions appeals can be made at any time during the year and in comparison, to placing request appeals are far fewer in number, so there is unlikely to be any additional practical challenges in processing these appeals.</p> <p>The Health and Education Chamber has experience of conducting placing request appeal hearings (in relation to children with additional support needs) and the need for decisions to be made swiftly so that children can be given a suitable school place as soon as possible. This expedited approach would need to be extended to education appeals. Arrangements to ensure that judicial resources are ready and available to be deployed to process a high caseload over a very short period would need to be made as part of future planning for any expansion. These arrangements could be operated in tandem with an expedited decision-making framework. There is also an option within the tribunals system to decide a matter on the written evidence alone (without the need for an oral hearing) where the parties agree.</p> <p>Tribunal members already within the Health and Education Chamber, and the wider Scottish Tribunals structure, can be assigned to additional jurisdictions such as education appeals when required, with appropriate training provided. This would provide a robust and resilient system for consideration of placing request and exclusion appeals, enabling Scottish Tribunals to better respond to resourcing and scheduling issues. The Chamber President has indicated that there would be sufficient capacity to deal with the volume of appeals anticipated. A recruitment exercise would be carried out in advance of any transfer and this, together with the assignment of members from within the Scottish Tribunals, would ensure adequate numbers of members are available. Appealing against decisions</p> <p>Currently the Sheriff Court hears appeals against decisions of appeal committees. This can be perceived as a formal and adversarial forum for those less familiar with legal proceedings.</p> <p>Upon transfer of appeal committees to the Scottish Tribunals, appeals against decisions of the First-tier Tribunal would be heard by the Upper Tribunal. The Upper Tribunal when sitting as an</p>

		<p>appeal tribunal would be comprised of legal members including the Chamber Presidents. Hearings take place in Tribunal buildings.</p> <p>Tribunals are a central part of the Scottish justice system and play a vital role in protecting people's rights. People can go to a tribunal if they want to challenge certain decisions that affect them, and tribunals tend to be less formal and more accessible than the courts.</p>
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## Scottish Government consultation – Transfer of the functions of education appeals committees to the Scottish Tribunals

Deadline: 6 February 2023

The response made by South Lanarkshire Council to the consultation questions.

The consultation questions for consideration and our response are as follows: -

<b>1.</b>	<b><i>Do you agree that appeal committees should transfer to the Scottish Tribunals? And if so, why?</i></b>
	No.
<b>2.</b>	<b><i>Do you consider that appeal committees should remain with local authorities but with improvements to how they operate? And if so, what changes would you like to see?</i></b>
	<p><i>Yes. Firstly, it is this Authority's experience that the Authority and Appeal Committee are very much aware of their respective roles, that the Appeal Committees are not part of the local authorities, but only administered by them. The administration of the Committee is carried out by Legal Services which is part of the department of Finance and Corporate Resources, and distinct to Education Resources. The Committee members are well aware of the importance of impartiality in fulfilling their role.</i></p> <p><i>It is considered that there are many benefits in having the functions remain with the Education Appeal Committees:</i></p> <ul style="list-style-type: none"> <li><i>♦ The Appeal Committee members are fully aware of the local policies and procedures relevant to the Committee's functions, as well as the Rules of Procedure contained in the 1982 Regulations and have all undergone training.</i></li> <li><i>♦ The Appeal Committee members have significant local knowledge of the schools and communities in the Authority's Area.</i></li> <li><i>♦ The Appeal process though structured is not overly formal, with many parents representing themselves and officers from the Education Department representing the Authority; it is argued the degree of informality helps Appellants feel more at ease and more likely to pursue their right of appeal. The Rules of Procedure in the 1982 Regulations mirror the rules for hearings held at the Tribunal and court. The Committee is well aware of the procedure to be followed in hearings and the Authority considers that the Committee strikes the right balance between allowing each party a fair hearing and ensuring natural justice is followed whilst not being overly formal in its approach. The Authority only has one of its solicitors represent it where the Appellant has a solicitor represent them; a different solicitor from the Authority gives advice to the Committee. The solicitors where involved in the appeals, are very mindful of their respective roles;</i></li> <li><i>♦ Whereas the power to hold appeals virtually has been welcome, and continues to operate well, should any Appellant wish to have a hearing held in person, this would be easier to accommodate at local level – South Lanarkshire covers a large</i></li> </ul>

*geographical area including various rural areas where Council offices are located;*

- ◆ *Appeal dates can be set up and changed (usually consequent to the request of the Appellant) fairly quickly; and it is difficult to see how this flexibility and speed would be retained by the Tribunal when it would require to deal with appeals within a short timeframe for all 32 local authorities, noting the recognition from all parties of the desire to have the appeals process concluded for the start of the immediately following summer term;*
  - ◆ *Costs of the current process are cheaper than they would be if transferred to the Tribunal: The Tribunal Rules of Procedure are more detailed than those governing the Committee.*
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- *From the authority's experience of the current Tribunal jurisdiction, it is anticipated that more parents would wish to be legally represented at Tribunal. It is not clear what level of access to free representation Appellants would have. There would be increased costs either to the public purse or, to Appellants if privately funding an appeal. Appellants who did not qualify for free legal representation might be dissuaded from appealing to the Tribunal.*
  - *Also, it is noted the Government recognises that in all likelihood following transfer, Authorities would wish to have legal representation at the Tribunal, at least initially; this would lead to a greater amount of officer time requiring to be deployed to deal with appeals as regards legal representation. This would increase further if the Tribunal were to hear appeals in tandem for an authority to ensure expeditious progress of appeals.*
  - *In addition, from the Authority's experience of the current Tribunal jurisdiction, it is anticipated appeal hearings would take longer on average to be heard and so more education officers' time would be spent in appeals. Increased officer time would be at a cost to the Authority in a challenging financial climate across local authorities. Further, appeals would be taking place during a period when the education officers involved would be dealing with allocation of places, which is a constantly evolving process, timetabling, arranging transition of children from primary to secondary and in general preparing for commencement of the new academic year*
  - *The current Committee members are not paid, whereas, with reference to the current Tribunal jurisdiction, it is anticipated the Tribunal members would be remunerated. The estimated costs of transfer appear only to relate to the costs to the Tribunal and are not supported by any empirical evidence.*
  - *Councils are not anticipating any cut to their budget in relation to this move. Also, it is anticipated that any additional costs to local government should be considered, and funding provided as part of this process of review and consultation.*

*It is considered that the following changes would enhance the operation of the Appeal Committees and the perception of their fairness;*

- ◆ *National training by independent body, annually and as otherwise required;*
- ◆ *Increased pool of independent observers, and increased use of them;*
- ◆ *Government Guidance on the administration of the Committees e.g. making clear the separation of roles of officers*

3.	<i>Do you consider that no changes should be made to how appeal committees operate? And if so, why?</i>
	No