Education (Scotland) Bill (as introduced)
Written Submissions

Additional Support Needs Tribunals for Scotland

1. The Additional Support Needs Tribunals for Scotland ("the Tribunal") hears references from parents\(^1\) or young people\(^2\) against decisions of education authorities regarding the provision of educational support under the Education (Additional Support for Learning) (Scotland) Act 2004, as amended ("the 2004 Act"). The Equality Act 2010 ("the 2010 Act") introduced the right to make a claim to the Tribunal in respect of disability discrimination relating to persons in school education. Claims may be made by the parent, the young person or the child\(^3\) (where the child has the capacity to make the claim).

Education (Scotland) Bill: Additional Support for Learning

2. While the Education (Scotland) Bill ("the Bill") is set out in four parts, this response is limited to the provisions which will have a direct effect on the Tribunal; namely Part 3, section 17 Modifications of Education (Additional Support for Learning) (Scotland) Act 2004, section 19 Enforcement of statutory duties and the Schedule (introduced by section 17) to the Bill.

3. The Tribunal supported the proposal to extend rights under the 2004 Act to children with capacity in its response to the Scottish Government consultation\(^4\).

4. The Tribunal welcomes the provisions of the Bill, which will introduce parity in providing a right to children with capacity to make a reference to the Tribunal under the 2004 Act as well as a claim under the 2010 Act. This will improve

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\(^1\) Education (Additional Support for Learning) (Scotland) Act 2004, as amended, section 29: “parent” includes guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act) in relation to, or has care of a child or young person.

\(^2\) Education (Scotland) Act, section 135(1) “young person” means a person over school age (5 to 15 years), who has not attained the age of 18 years.

\(^3\) Ibid. “child” means a person not over school age.

\(^4\) Extending the Rights of Children with Capacity under the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) and Repealing Section 70 of the Education (Scotland) Act 1980 Consultation Paper

5. Any references in this submission to “child” are intended to mean a child who has attained the age of 12 years, as set out in the Bill.

6. The Tribunal acknowledges the importance of the assessment of capacity and “best interests” by the education authority (subject to comments below) and agrees that the Tribunal should adjudicate in any dispute arising from the education authority decision, using an efficient process of a convener sitting alone.

7. It is of equal importance that the Tribunal be satisfied on the child’s capacity and “best interests” when determining the competence of a reference. However, no parallel provisions exist in relation to the making of a claim by a child under the 2010 Act. The Tribunal recommends that mirror provisions are made to address this; otherwise a child exercising a right to make a reference to the Tribunal will be subject to different processes than a child exercising a right to make a claim.

**Section 3: Children and young persons: capacity**

8. The Tribunal welcomes the proposed statutory provision in relation to capacity and the recognition of the importance of “sufficient maturity and understanding”. The *Adults with Incapacity (Scotland) Act (2000)* defines “incapable” as incapable of:
   1. acting; or
   2. making decisions; or
   3. communicating decisions; or
   4. understanding decisions; or
   5. retaining the memory of decisions

   - which section 3(1)(b) largely mirrors. It is helpful to have the range of rights which may be exercised set out separately, as they are at section 3(1)(a) to (d).

**Section 3A: Children and young persons: assessment of capacity, etc.**

9. The Bill would extend rights under the 2004 Act to children with capacity. The references throughout section 3A to “do something” and “the thing” are vague and uncertain terms. The assessment of capacity will be required where a right (by the child aged 12 years or the young person) or responsibility (on the education authority) is being exercised. The Tribunal is of the view that this section would benefit from the use of conventional statutory language. In relation to the child, this would mean removing the reference to “something” and “the thing” and replacing this with “exercise a right under the Act”, or words to that effect; and for the education authority, substituting with “exercises or responds to the exercise of the right”, or words to that effect.

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5 section 1(6).
10. The Tribunal agrees that it is appropriate for the child or young person to notify the education authority of the proposal to exercise a right.

11. The Tribunal agrees that it is appropriate for the education authority to conduct the assessment of capacity, however the assessment of “best interests” may give rise to a perception of bias as the right is being exercised in relation to the education authority. It will be important for the education authority to demonstrate impartiality and objectivity. This may be assisted by allocating the assessment to a person or agency within the education authority who is not ordinarily engaged with the child or young person. The Tribunal understands that statutory and non-statutory guidance will be issued following amendment to the 2004 Act, which may address some of these concerns.

12. Where the education authority, having completed the assessment, is satisfied that the child or young person lacks capacity or it is not in their best interests to exercise the right, the education authority appears to have a discretion not to do “the thing in question”, which is inferred by the use of “may not” in subsection 5 (and supported in the explanatory notes). Where either of the tests are met, the Tribunal would expect the child or young person not to exercise the particular right, and in this respect the words “shall not” would ordinarily appear.

13. There is no timescale proposed for completion of the assessment by the education authority. It would be helpful to specify a reasonable timescale for this.

**Section 18 (references to the Tribunal)**

14. The Tribunal agrees that the proposed amendments to section 18 are appropriate. The requirement on the Tribunal to be satisfied that the child has capacity and it is in the child’s best interests to make the reference are consistent with the duties imposed on the education authority. It is anticipated that this will initially be raised during the case management stage of the reference at the case conference call (by parties with the convener); and decided as a preliminary matter (of competence) at a Tribunal hearing.

15. The Bill introduces a right for the parent, child or young person with capacity to make a reference to the Tribunal on the decision of an education authority in relation to the capacity and best interests of a child or young person. The Tribunal agrees that this can be decided by a convener, which will be an expedient process.
Definition of Young People

17. The Explanatory Notes\textsuperscript{6} describe “young people” as “aged 16-18 and in school”, and the Policy Memorandum\textsuperscript{7} describes as “aged 16-18 in education”; whereas the \textit{Education (Scotland) Act}\textsuperscript{8}, “defines a young person as a person over school age (5 to 15 years), who has not attained the age of 18 years. It would be helpful to clarify this in order to prevent confusion.

The Committee’s Questions

Question 18. What are your views on the statutory children’s support service proposed by the Scottish Government?

16. The Tribunal welcomes the proposal to introduce a statutory children’s support service. It is important that children with capacity are supported to exercise rights under the 2004 Act and that there are no barriers to accessing justice.

17. The Tribunal welcomes the different services to be delivered, however it is important to distinguish between the provision of advocacy and representation. It is the Tribunal’s view that this requires to be addressed elsewhere in the 2004 Act at section 14A.

Question 24. The policy intention is that Scottish Ministers should not consider an issue or reconsider a decision which should be dealt with by the Additional Support Needs Tribunals for Scotland (ASNTS). Do you agree with this proposal and will it always be clear cut when a complaint is solely for the ASNTS?

18. The Tribunal agrees that Scottish Ministers should not consider an issue or reconsider a decision which should be dealt with by the Tribunal.

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\textbf{May Dunsmuir} \\
President \\
Additional Support Needs Tribunals for Scotland \\
14 May 2015
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