Written submission from the Additional Support Needs Tribunals for Scotland

The Additional Support Needs Tribunals for Scotland

The Additional Support Needs Tribunals for Scotland (“ASNTS”) was established by section 17 of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”). The ASNTS became operational in November 2005. The ASNTS hears cases involving children and young people who face the biggest barrier to learning. The ASNTS considers appeals (references) made by parents and young people against decisions of education authorities regarding the provision of educational support.

Co-ordinated support plans are now prepared for children with additional support needs, arising from complex multiple factors; requiring a range of support from different services; and enduring for one year or more. The ASNTS hears references involving children and young people who either have, or are potentially entitled to have, a co-ordinated support plan. The ASNTS will also in certain circumstances hear references about placing requests.

From 18 March 2011, the ASNTS can also consider appeals (claims) made by a parent or a child (where the child has capacity to make a claim) against a responsible body, on the basis that the responsible body has discriminated against a child because of a disability in an education setting. Schools must not treat disabled pupils less favourably because of their disability. Discrimination can also occur when a disabled pupil is placed at a substantial disadvantage because reasonable adjustments have not been made to account for their disability.

In March 2012, the Scottish Government published its consultation on the Scottish Government’s Proposals for a New Tribunal System in Scotland. The ASNTS had some concerns in relation to the proposal in the Scottish Government’s consultation document to create “two new, generic tribunals”.

This was on the basis that the ASNTS was only fairly recently created as a specialist tribunal to deal with education matters in relation to children who have additional support needs. Some of these children are among the most vulnerable members of society. The issues involved in the ASNTS cases can be sensitive, emotive and complex. By the time cases are referred to the ASNTS, there is often little scope for resolving the matters as positions have become entrenched and relations between the parents or the child and the education authorities have often broken down. Decisions made by the ASNTS can have a life changing effect in relation to the children and young persons involved. The decision of the ASNTS can also result in substantial expenditure for the education authority concerned.

The ASNTS made a detailed response to the Scottish Government’s Proposals for a New Tribunal System and the ASNTS reiterated its view in that document that it is crucial that tribunal reform does not lead to any loss of identity and expertise within
the ASNTS and that there should be no dilution of the particular culture and ethos within which the ASNTS operates. The maintenance and development of the specialism of the ASNTS is a crucial factor to be considered in any proposal for the reform of the tribunal system.

**The Tribunals (Scotland) Bill**

The ASNTS has considered carefully the provisions in the Tribunals (Scotland) Bill (“the Bill”), its accompanying Explanatory Notes, the Policy Memorandum and the Delegated Powers Memorandum.

The ASNTS is of the view that the Bill forms an important part of the reform of the civil justice system in Scotland. In establishing the Scottish Tribunals (i.e. the First-tier Tribunal and the Upper Tribunal), the Bill provides a coherent and consistent structure within which tribunals judiciary can discharge their functions. Such a structure is also likely to benefit tribunal users, who will not require to navigate through the disjointed and haphazard system of tribunals in operation at present.

**Key issues**

The ASNTS responds to the key issues identified in the call for evidence on the Bill by the Scottish Parliament’s Justice Committee as follows:

(1) **Whether the new structure is an improvement on the existing structure?**

The ASNTS recognises that its functions can be discharged effectively within the context of a structure other than the existing structure.

As mentioned, the present system has developed in a haphazard fashion and such a system may not best meet the needs of tribunal users. The ASNTS considers that the provisions of the Bill do represent an improvement on the existing fragmented and confusing structure of tribunals in Scotland. A single First-tier Tribunal divided into chambers should facilitate a more flexible and coherent approach to the delivery of tribunal justice in Scotland. The ASNTS recognises the potential benefits in transferring the functions of a number of disparate tribunals to one institution, namely the Scottish Tribunals. The ASNTS is of the view that these benefits will be best secured by all of the listed tribunals in schedule 1 to the Bill transferring in to a chamber in the First-tier Tribunal or a division in the Upper Tribunal. If this is not the case, then the Scottish devolved tribunal landscape could become just as complex and fragmented as the current system the Bill seeks to address.

The ASNTS is satisfied that it can continue to discharge its functions appropriately within the new structure proposed in the Bill. The ASNTS’s concerns are to ensure that its expertise (i.e. utilising the specialist knowledge of general members with the convenership of an appropriately qualified legal member), its ethos (i.e. keeping the child and young person at the centre of the ASNTS proceedings) and the substantive law (i.e. the provisions of the 2004 Act) are not compromised by the transfer of the ASNTS into a new structure. Any dilution of the specialism of the ASNTS or the culture and ethos within which the ASNTS operates or any unintended drift towards generalised arrangements as a result of tribunal reform in Scotland (or indeed the
The amalgamation of the Scottish Tribunals Service and the Scottish Courts Service would have a detrimental effect on children whose cases come before the ASNTS.

The ASNTS is of the view that the ASNTS should be transferred into a chamber in the First-tier Tribunal whose subject matter is education.

(2) Whether the Bill will guarantee openness, fairness and impartiality in tribunal procedures, and whether it will allow for sufficient specialisation?

The ASNTS welcomes the fact that the Lord President of the Court of Session will be designated as the Head of the Scottish Tribunals under the Bill (see section 2 of the Bill). This brings the Scottish Tribunals directly under the judicial leadership of the Lord President, strengthening the perception of the independence of the Scottish Tribunals, and firmly places tribunals within an integrated Scottish civil justice system. The ASNTS also welcomes section 3 of the Bill, which makes provision for upholding the independence of the members of the Scottish Tribunals and imposes specific duties on the First Minister, the Lord Advocate and the Scottish Ministers amongst others to uphold the independence of the members of the Scottish Tribunals.

Independence of members is further strengthened by the provision in section 13 of the Bill, which provides that membership of the Scottish Tribunals as an ordinary or legal member will have the effect of granting all members judicial status and capacity for the purpose of making decisions in cases.

The ASNTS also welcomes the provisions in section 4 of the Bill establishing the office of President of the Scottish Tribunals. The ASNTS considers that it is important for the tribunal system to be overseen by a judicial head with a particular responsibility for tribunals. The existence of this post will help to ensure that there is a proper distinction and separation of tribunals from courts.

The provision in the Bill on the appointments, reappointment and removal from office all provide a consistent approach to these issues for all members of the Scottish Tribunals and ensure the necessary security of tenure for members, again enhancing the independence of tribunal members. These provisions will enhance the standing of tribunals in the Scottish civil justice arena. The ASNTS notes that nothing in the Bill appears to impact on the expertise of the ASNTS, the ethos within which the ASNTS operates or the substantive law applicable to the ASNTS, i.e. the 2004 Act. That, taken with the matters referred to above, means that the ASNTS is satisfied that the Bill will guarantee openness, fairness and impartiality as currently exercised in the additional support needs jurisdiction. In providing leadership as the Head of the Scottish Tribunals, the Lord President will be in a position to ensure that specialism, ethos and desirable distinctiveness are retained, in addition to supporting coherence across the new structure.

The Bill makes provision for the appointment of Chamber Presidents to preside over individual chambers. The ASNTS notes that in paragraph 19 of the Policy Memorandum which accompanied the Bill it is stated that the Chamber Presidents will be expected to have expertise in the jurisdictions over which they will preside. The fact the Chamber Presidents are to be subject experts in the jurisdictions over
which they will preside is an important mechanism in safeguarding the distinctive nature and ethos of the individual jurisdictions which are transferred in to the Scottish Tribunals. For these reasons, the ASNTS is satisfied that the Bill will allow for sufficient specialisation.

(3) The rules relating to appeals

Section 41 of the Bill makes provision for a general right to appeal a decision of the First-tier Tribunal to the Upper Tribunal. Such an appeal can only be made by a party in the case on a point of law and with the permission of the First-tier Tribunal. The general right to appeal does not apply to excluded decisions (see sections 46 to 49 of the Bill).

Decisions of the ASNTS can be appealed to the Court of Session under the 2004 Act. The ASNTS is of the view that the route of appeal to the Court of Session has worked well in practice and the ASNTS has received useful opinions from the Court of Session which have clarified the law in the area of additional support needs. The one disadvantage of appeals to the Court of Session tends to be that an appeal to the Court of Session is expensive and it can take some time for an appeal to be heard.

The ASNTS understands that the Scottish Government’s intention is that appeals against decisions of the ASNTS will be to the Upper Tribunal. The ASNTS is content with the Bill’s provisions for appeals to be heard by the Upper Tribunal. The composition of the Upper Tribunal will ensure that, when hearing appeals, the Upper Tribunal will provide the level of expertise necessary to ensure appropriate scrutiny of decisions of the ASNTS which are appealed against.

The ASNTS welcomes the provisions of the Bill providing powers for the First-tier and Upper Tribunals to review their own decisions without the need for a full onward appeal.

(4) The rules relating to appointments/membership

The provisions of section 28 (transfer-in of members) as read with the provisions of schedule 2 to the Bill, – given that paragraph 1(1) of schedule 2 confers a discretion on the Scottish Ministers to by regulations provide for “some or all of the transferable persons” to become holders of the particular named or other membership positions within the Scottish Tribunals” – appears to allow the Scottish Ministers a discretion as to which of the current members of the ASNTS, or indeed any of the other listed tribunals, may be transferred in to the First-tier Tribunal. The ASNTS notes, however, that this does not appear to be the policy intention, given that at paragraph 51 of the Policy Memorandum it is noted that “The functions of listed tribunals along with their members and caseload will transfer-in separately to the new structure by regulations (which are subject to the affirmative procedure)”. On that basis, the ASNTS understands that at the time the ASNTS is transferred in to the First-tier Tribunal, its President and all of its general and legal members will be transferred in to the First-tier Tribunal.
The ASNTS notes that in addition to transfer-in under section 28 of the Bill of existing members, a person is an ordinary or legal member of the First-tier Tribunal through appointment as such by virtue of section 29(1) of the Bill. Schedule 3 contains detailed provision in relation to the First-tier Tribunal about eligibility for an appointment to ordinary or legal membership of the First-tier Tribunal. In relation to ordinary members, a person will be eligible for such appointment only if the person meets relevant criteria as are prescribed by the Scottish Ministers in regulations. It is an important part of retaining the specialism of the ASNTS that the qualifications for general membership of the Tribunal are maintained. These are currently set out in the Additional Support Needs Tribunals for Scotland (Appointment of President, Conveners and Members and Disqualification) Regulations 2005 (SSI 2005/155). Members of the ASNTS require to have knowledge and experience of children or young persons with additional support needs within the meaning of section 1(1) of the 2004 Act or a disability within the meaning of section 6 of the Equality Act 2010. The ASNTS notes, however, that it is not anticipated that the eligibility criteria for non-legal members of the ASNTS will be changed.

The ASNTS notes that sections 16, 17 and 18 of the Bill make provision for the judiciary to be eligible to sit as members of tribunals. For example, a sheriff (including a part-time sheriff) may act as a member of the First-tier Tribunal if authorised to do so by the President of Tribunals. The ASNTS is of the view that it might also be beneficial to include statutory provision to the effect that, before authorising a sheriff to act as a member of the First-tier Tribunal, the President of the Tribunal should consult with the relevant Chamber President in order to ensure that there is no perception that the expertise of the membership of a particular tribunal such as the ASNTS is not being maintained.

Finally, the ASNTS welcomes the fact that the appointment of ordinary and legal members of the First-tier Tribunal or Upper Tribunal will be brought within the remit of the Judicial Appointments Board for Scotland (see paragraph 11 of schedule 9 to the Bill).

(5) The rule-making power granted to the Scottish Civil Justice Council

Sections 62 to 67 of the Bill make provision in relation to rules regulating the practice and procedure to be followed in proceedings before the First-tier Tribunal and the Upper Tribunal. Tribunal rules are to be made by the Court of Session by Act of Sederunt and in accordance with Part 1 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The Scottish Civil Justice Council (SCJC) has the function of reviewing the practice and procedure used in the Scottish Tribunals and the function of preparing and submitting draft tribunal rules to the Court of Session (see paragraph 12 of schedule 9 to the Bill, which amends Part 1 of the 2013 Act). Further amendments to the 2013 Act are made in the Bill with the effect of increasing the membership of the SCJC so as to include members representing the Scottish Tribunals and providing for the SCJC to establish a committee in pursuance of its functions in relation to the Scottish Tribunals. That committee is to be chaired by one of the members of the SCJC representing the Scottish Tribunals, and its members are to be selected by the President of Tribunals.
The ASNTS is of the view that it is important that people with specific experience of the area for which the rules are being made are included in the Tribunals committee. There is recognition in the Policy Memorandum at paragraph 72 that one generic set of tribunal rules would not suit all. The inclusion of those with relevant expertise in the particular jurisdiction will help to ensure that the distinctiveness and ethos of Tribunals is protected in the new structure and the tribunal rules.

(6) Any other aspects of the Bill

The ASNTS has no comment to make on any other aspects of the Bill in this written response.

Additional Support Needs Tribunals for Scotland
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