

# **Transfer of the functions of education appeal committees to the Scottish Tribunals - Consultation Paper**

November 2022

## **Responding to this Consultation**

We are inviting responses to this consultation by 6 February 2023.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space ([Scottish Government - Citizen Space \(consult.gov.scot\)](https://consult.gov.scot)). Access and respond to this consultation online at <https://consult.gov.scot/learning-directorate/transfer-of-education-appeal-committees>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 6 February 2023.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

School Organisation  
Scottish Government  
Area 2B North  
Victoria Quay  
Edinburgh, EH6 6QQ

## **Handling your response**

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: [Privacy - gov.scot \(www.gov.scot\)](https://www.gov.scot/privacy)

## **Next steps in the process**

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at [Scottish Government - Citizen Space \(consult.gov.scot\)](https://consult.gov.scot). If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

## **Comments and complaints**

If you have any comments about how this consultation exercise has been conducted,

please send them to the contact address above or at [christopher.vincent@gov.scot](mailto:christopher.vincent@gov.scot).

### **Scottish Government consultation process**

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: [Scottish Government - Citizen Space \(consult.gov.scot\)](https://www.scotland.gov.uk/consult). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## **Transfer of the functions of education appeal committees to the Scottish Tribunals - Consultation Paper**

### **Ministerial Foreword**

Having a choice about which school your child will attend is a fundamental feature of our education system. Choosing which school your child will attend is one of the most important decisions parents/carers will make. Most parents opt for their local catchment school while others will apply for a place at another school.

There are times when a local authority rejects a placing request. Under such circumstances, and when families do not agree with such a decision, they may wish to appeal it. Appeals related to exclusions – though used only rarely in comparison to placing requests appeals - can also impact greatly on a child's education. It is important to have a robust and fair process in place for any appeals that may arise from placing requests and exclusions.

The Tribunals (Scotland) Act 2014 envisages that the work of education appeal committees will transfer to the Scottish Tribunals. However, a change of this importance warrants careful consideration. Importantly, this consultation provides an opportunity for parents, children and young people to find out more about the implications of these proposals on their experience of choosing a place at school.

Alongside this, it will allow the views of those involved in the current, and proposed system, for school admission and exclusion appeals to be fully explored.

This consultation will enable the Scottish Government to decide on whether to proceed with the transfer on the basis of as broad a range of viewpoints as possible.

I invite you to consider the proposals within this consultation and to give your views by 6 February 2023.

**Shirley-Anne Somerville MSP – Cabinet Secretary for Education and Skills**

**Elena Whitham MSP – Minister for Community Safety**

## 1. Background

### Education Appeal Committees

1.1 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.<sup>1</sup>

### Tribunals (Scotland) Act 2014

1.2 The Tribunals (Scotland) Act 2014<sup>2</sup> (“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. These are known collectively as the Scottish Tribunals. In Schedule 1 of the 2014 Act<sup>3</sup>, 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).

1.3 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 appeal committees in the list of tribunals whose functions would transfer.

## 2. What is an Education Appeal Committee?

### Membership

2.1 Appeal committees are established by a local authority under section 28D of the 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 relation to the delivery of education. In practice, appeal committees usually consist of elected councillors and local persons, often parent representatives, with a strong interest/experience in the education sector.

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<sup>1</sup> See section 28D of the Education (Scotland) Act 1980

<sup>2</sup> [Tribunals \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2014/12/schedule/1)

<sup>3</sup> [Tribunals \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2014/12/schedule/1)

## What types of appeals are heard by appeal committees?

2.2 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<sup>4</sup>)
- exclusions from school (except those heard by the First-tier Tribunal).

### **3. Discussion**

3.1 The operation of appeal committees has been a topic of debate over a number of years and has attracted comment about their composition and procedures.

3.2 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.<sup>5</sup> In response to these concerns, COSLA created a code of practice to improve practice among local authorities.

3.3 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.

3.4 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. 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.<sup>6</sup>

3.5 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<sup>7</sup>. 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.

### The Proposal

3.6 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.

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<sup>4</sup> Under [section 18 of the Education \(Additional Support for Learning\) \(Scotland\) Act 2004](#)

<sup>5</sup> [Education Appeal Committees: Proposals for Reform: A Consultation \(ioe.ac.uk\)](#)

<sup>6</sup> See Above

<sup>7</sup> [Official Report - Parliamentary Business : Scottish Parliament](#)

## 4. Considerations

### Local accountability

4.1 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.

4.2 However, 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.

### Governance structures

4.3 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.

4.4 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.

4.5 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.

4.6 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.

4.7 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.

### Membership

4.8 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 benefit of providing people with knowledge of the local schools system and wider community, which is also present within the Scottish Tribunals.

4.9 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.

### Decision making

4.10 The Health and Education Chamber would apply the same provisions of the 1980 Act to their decisions as are currently applied by appeal committees. Transfer of jurisdiction to the Scottish Tribunals would not result in any changes to the powers currently available. The statutory defences in placing requests which the Additional Support Needs jurisdiction considers under the Education (Additional Support for Learning) (Scotland) Act 2004 are the same as those available to local authorities in relation to appeal committee placing request appeals under the 1980 Act. In terms of its jurisdiction under the Equality Act 2010, the Chamber also hears appeals on exclusions involving disability discrimination. As a result, there would be a measure of consistency in how the legislation is applied. Strong familiarity with equivalent statutory provisions, case law and commentaries to be applied in appeals relating to education already exists in the Chamber's judicial membership due to its current caseload.

4.11 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.



## Accessibility

4.12 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.

4.13 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.

4.14 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 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.

4.15 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.

## Appeal Venues

4.16 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.

4.17 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 here. [Additional Support Needs | First-tier Tribunal for Scotland \(Health and Education Chamber\)](#).

## Capacity to meet demand

4.18 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.

4.19 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 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.

4.20 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. Exclusion 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.

4.21 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.

4.22 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

4.23 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.

4.24 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 appeal tribunal would be comprised of legal members including the Chamber Presidents. Hearings take place in Tribunal buildings. 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.

### Financial Implications

4.25 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, 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.

4.26 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. 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.

4.27 At present, most parents represent themselves at appeal committees, and although it is not considered necessary for parents to access any kind of representation before Scottish Tribunals, it is possible that some parents may choose to seek legal representation (although this may be in a small minority of cases) for hearings before the Tribunal and so may face associated costs. This may put off some parents from pursuing an appeal, at least initially following the transfer.

## Consultation Questions

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?



## Transfer of Education Appeal Committees to Scottish Tribunals

### Respondent Information Form

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy: [Privacy - gov.scot \(www.gov.scot\)](http://www.gov.scot/privacy)

Are you responding as an individual or an organisation?

- Individual  
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Full name or organisation's name

Phone number

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

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#### Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

## Questionnaire

### Question 1

Do you agree that appeal committees **should transfer** to the Scottish Tribunals?  
And if so, why?

- Yes
- No
- Not Sure

Please explain your answer in the text box.

### Question 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?

- Yes
- No
- Not Sure

Please explain your answer in the text box.

### Question 3

Do you consider that **no changes** should be made to how appeal committees operate? And if so, why?

- Yes, no changes should be made
- No, changes should be made
- Not Sure

Please explain your answer in the text box.





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