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No.	Description	Date	Explanation of redactions	Clause
001	FW: Human Rights Education Effective Remedies and SQA Appeals 2020	15 May 2021 09:35	Personal information	38(1)(b)

Enclosure 001 – Email: FW: Human Rights Education Effective Remedies and SQA Appeals 2020

From: [Redacted s38(1)(b)]@cypcs.org.uk>
Sent: 15 May 2021 09:35
To: [Redacted s38(1)(b)]@gov.scot>; [Redacted s38(1)(b)]@gov.scot>
Cc: [Redacted s38(1)(b)]@gov.scot>
Subject: Human Rights Education Effective Remedies and SQA Appeals 2020

Good morning [Redacted s38(1)(b)]

Further to your message of 25 March, could we please arrange a meeting between our office and your Director and/or colleagues, to discuss the outstanding and now critical question which Mr Swinney said he was 'considering' since last September?

You will be aware that during recess we received correspondence from the SQA to the effect that it will not permit any 2020 student a right to appeal or challenge the outcome from the ACM.

The SQA has also still not published the findings from its consultation and the final ACM (including the section relating to appeals), for this year, and we are very concerned by the failure to take a human rights based approach to the guidance, administration and substance of the ACM, for 2021, just as we were for 2020. We consider that this lack of transparency and certainty is not only inequitable but is a breach of individuals' human rights to an effective remedy, to education, to procedural fairness, due process, and contrary to the principles of natural justice.

We made suggested solutions both to you and to SQA which are informed not only by the views and voices of children and young people adversely affected, but also international human rights law and standards and the Scottish Government's commitment to making rights 'real' in Scotland.

The SQA has refused to adopt our suggested solutions, and refused to engage in any discussions with the young people to resolve their individual cases and complaints, stating that they will only permit these young people's grades from 2020 to be reviewed if the DFM directs them to do so.

As we noted in communications with you, with the Director of Children and Families, and with the SQA, going back to last Summer, and as was highlighted in Professor Priestley's Rapid Review, and in the Committee, it is essential that the mistakes and errors of the emergency measures taken by Scottish Government, (and specifically the ACM) last year are learned from, which includes giving the rights-holders access to justice to challenge their individual determinations. This has not happened.

These young people have been left disadvantaged by decisions taken within a national system, crucial to the delivery of their rights to education, which in reality prevents them exercising their rights to participate in decision-making, and to seek an effective remedy for the State's failures to act compatibly with its international

obligations. This includes the ECHR, the Human Rights Act 1998, the UNCRC, the Equality Act 2000, the UNCRPD, the Convention Against Discrimination in Education, ICESCR, and of course the forthcoming UNCRC (Incorporation) Act 2021. The right to education, is, as you will be aware echoed in SDG 4 to “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”.

As you know we have had significant engagement with your policy and legal colleagues regarding the systemic human rights issues and areas of Scots law which do not meet the requisite international human rights standards, and for which consequential amendments, to ensure compatibility with existing obligations, will be required. This is one of those issues.

We have all seen first-hand the devastating impact the pandemic has had on many of our young people, and for this group, this has been exacerbated by the Government’s failure to take steps to protect their rights. As we prepare for implementation of the Incorporation Act, it is crucial that these young people are confident that the Scottish Government has their best interests and human rights at the heart of all decision-making, and trust that Mr Swinney and the new Cabinet Secretary, will now take steps to support them to resolve this injustice.

The Commissioner has written to Mr Swinney and not received a reply to confirm whether he will fulfil the Government’s human rights duties and make the s9 Direction or not.

I look forward to hearing from you as a matter of urgency and thank you for your assistance.

Regards

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From: [Redacted s38(1)(b)]@gov.scot [Redacted s38(1)(b)]@gov.scot>

Sent: Thursday, March 25, 2021 5:21 pm

To: [Redacted s38(1)(b)]; [Redacted s38(1)(b)]@gov.scot

Subject: RE: Human Rights Education Effective Remedies and SQA Appeals 2020

Dear [Redacted s38(1)(b)]

Thank you for your email. Yes, well here and enjoying the slightly better weather when I get the chance. I hope you are well too.

The Deputy First Minister is aware of your correspondence, but we have not yet had an update from the Deputy First Minister yet, however we will ensure that as soon as we do we will pass it on.

Regards

[Redacted s38(1)(b)]

From: [Redacted s38(1)(b)]@cypcs.org.uk>

Sent: 23 March 2021 21:23

To: [Redacted s38(1)(b)]@gov.scot>; [Redacted s38(1)(b)]@gov.scot>

Subject: Human Rights Education Effective Remedies and SQA Appeals 2020

Importance: High

Dear [Redacted s38(1)(b)]

I hope this finds you both well.

I want to firstly take this opportunity to congratulate you and your colleagues on the landmark legislation incorporating the UNCRC into Scots law. This maximalist approach to the realisation and justiciability of children's human rights will ensure that all public authorities act compatibly with the UNCRC, as they already must do with the ECHR, in fulfilling their functions in law, policy and practice. We all sincerely hope that this momentous achievement will lead to widespread cultural improvements and outcomes for children, across all public services.

This hope extends to this one group of young people, whose rights were breached in the aftermath of the decisions to cancel the 2020 exams. This was caused by the imposition in the first place of an inequitable and discriminatory ACM, compounded by the failure of the Scottish Government to provide a direct, fair and effective

remedy in law for those young people who remained disadvantaged following the decision to base grades solely on Centre estimates and to limit both the grounds for appeal and access to the appeal process itself.

We are conscious that the basis for the rights argument around appeals has been consistently misunderstood by the SQA. It has been unhelpful and inaccurate for the SQA to assert that we were suggesting the UNCRC itself confers an explicit 'right of appeal' for children. Rather we attempted to explain the indivisibility of human rights across the international legal framework, which clearly applies to children as it does to adults. This requires considering and interpreting UNCRC rights (particularly Articles 2, 3, 12, 28 and 29) alongside, and in the context of, other international human rights instruments, for example Article 2 ICCPR, and Articles 6 & 14 ECHR.

As you know, the only non-judicial remedy now available for these young people is for the DFM to issue a direction to the SQA. Accordingly, in order to expedite matters, and to ensure compatibility with the new legislation, I am now writing to request, on behalf of the Commissioner that the **Deputy First Minister fulfils his promise and confirms his decision on whether he will take further action on the 2020 ACM.**

As we have noted previously, the cases of which we are aware include young people who believe evidence of attainment and/or extenuating circumstances were not taken into account in their assessment due to the ACM excluding them from involvement in the assessment process. The appeal grounds we proposed to the DFM in September were intended to cover these cases but place a reasonable and proportionate limit on appeal numbers. We are concerned that the DFM appears not to have sought SQA's position on these proposed grounds and has not responded to us with his view – positive or negative – of their practicality.

Given the DFM's promise to young people that he was keeping this matter under review, I trust you and your colleagues would agree that fairness and common courtesy mean that they are entitled to a decision and an explanation as to why the Scottish Government has taken more than 7 months to make a decision on whether to provide them with a remedy. In the event the DFM's decision is to refuse to issue a direction, please therefore provide details of the process followed, and the reasoning, rationale and evidence used to inform same? This is particularly important in assessing whether and to what extent the DFM has taken account not only of academic opinion from leading education and human rights experts, such as Dr Katie Boyle, Professor Laura Lundy, Professor Jeanette Elwood, Dr Tracy Kirk, and importantly the team involved in the Priestley Review, but also the wealth of evidence, including from our office, SQA and the views, voices, best interests and lived experiences of children and young people.

I am confident that in the current challenging circumstances, the DFM appreciates the importance of a timely response, and I therefore look forward to hearing from you with the DFM's decision by return, and no later than **25 March 2021** in the hope that these young people can now take immediate steps to rectify the injustice of 2020, before completing their education and assessment for 2021.

I am very grateful for your assistance in this matter.

Please do not hesitate to telephone me should you wish to discuss.

Kind regards

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