



The Bulletin



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Edition 6
May 2021

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Foreword

May Dunsmuir

Chamber President

Dear members,

I continue to write to you from my home office, some 14 months on from the first national lockdown on 23 March 2020. We are now entering a period of cautious 'unlocking' - a time when we can re-connect with family and friends and, finally, an opportunity to hug. My son is 6 foot 3 inches—I will shortly be visiting him at his home—indoors—and finally hugging him, although at my 5 foot 2 inches, that tends to be a hug around his waist. It can sometimes be hard to assert my mothering role to a boy who towers above you!

I know you will each gradually be getting used to these new freedoms, while watching carefully at all that is happening around the globe, not least in India. Will we ever take hugs and sharing company for granted again? I hope not. The pandemic has highlighted the many freedoms we once shared without thought and brought into sharp focus the things that really matter—health, people, relationships, sharing—and adventure. I hope that as the clouds part we don't forget how to be adventurous. I include our work in the HEC here. Taking measured risks and stepping out into the sometimes unknown has been a key feature in some of our work—the sensory hearing suites, our remote hearings, listening and learning from children and challenging traditions and practices which don't fit with our model of child inclusivity.

I hope you will remain engaged and energised in your work with the Chamber. For my part, I will continue to ensure that you are supported in your development through member review and training. My (virtual) door always remains open and I am available to listen when needed. I hope you will always stretch the judicial boundaries of possibility and apply your expert mind to the problems before you with thought and courage but also with a spirit of adventure. If a child needs her rabbit to be in the room when giving her evidence, enjoy meeting the rabbit! If an unrepresented party needs to be nudged back on track, do so decisively.

Some of you will shortly be attending complex cases training on the Equality Act and unrepresented parties. These two types of cases often raise the most complexities. By providing this training I hope to be able to equip you to handle the hard questions which arise and to give you guidelines and signposts to follow. I realise that training does not answer every problem which can arise in cases but it offers a good foundation. Remember, you can contact my office for peer discussion

if you would find it helpful.

By now, most of you will have sat on a remote hearing; some of you on a few. I hope you are settling into this. As I have said before, the remote hearing appears to provide a positive alternative to a physical hearing and it will therefore have a permanent place in our range of hearing options in the future. But for now, how do you cope during your remote hearing? Here are some tips that I use:

- Check your backdrop—make sure it is as ‘blank’ as it can be—remove or cover over any pictures or images
- Keep an eye on time and make sure you break after each hour—get up and walk about—go out for some fresh air if you can
- Children with autism particularly like the ‘rules’ to be followed, so if lunch is at 1 pm—stop then and not 5 minutes later
- If there are persistent network connections, adjourn for a short period and let the clerk do her work to try to resolve them
- Don’t speak to one another during adjournments until the clerk specifies that you are in the private waiting room

Keeping up to date

Use what you can to help you to remain informed. Law and policy have always been constant in their changing shapes but especially now. I commend the Bulletin to you in this regard. I have taken to storing earlier editions in a folder so that I can go backwards and forwards to check points of law and practice. Muriel’s excellent articles on the 2010 Act remain a well dog eared and annotated resource for me. Lesley’s and now Hazel’s articles on communication are also excellent. Hazel is encouraging us to complete e-learning on Communication Access (page 20), which I am sure will be beneficial.

My thanks go to Deirdre for her usual hard work and diligence in identifying excellent articles of relevance for us, many of them inspiring, such as Kirsten Campbell’s (page 15).

I was struck by Megan Farr’s (CYPCS) remark (page 7) about the sacrifices every generation has made during the pandemic but perhaps the most under-appreciated are those our children and young people have had to endure. This reminds me of how important it is to always persevere to be the best judicial officers we can be in this most important Chamber.

Until we meet again, my very best wishes.

May



Health and Education Chamber Update

Paul Stewart, Operations Manager

Scottish Courts and Tribunals Service

Paul Stewart, Operations Manager for Glasgow with the Scottish Courts and Tribunal Service, reports on HEC recent developments and case numbers.

Since my last update in November 2020, the HEC administrative team has continued to adapt to the new ways of working that we have implemented as a result of the COVID-19 pandemic.

The team have continued to work remotely during this time and it has now been over a year since we were all working from the Glasgow Tribunals Centre. There has been challenges with this but the team has shown great resilience and has continued to deliver an excellent level of service to all of our users during a very challenging period.

We continue to refine aspects of our remote working processes, including our use of Cisco WebEx for remote video hearings and updates to how we are preparing the electronic bundles in accordance with the President's guidance on documentary evidence. This will hopefully lead to smaller electronic bundles with less duplication and only the relevant excerpts of large documents instead of the whole document.

During my last update I highlighted that the caseload of the Additional Support Needs jurisdiction had appeared to have been impacted as a result of the pandemic. During the 2020/21 reporting year, the Chamber received 83 new applications which can be broken down into 71 references and 12 claims. This is 65 fewer applications than we received during the 2019/20 reporting year — and the lowest number of new applications received by the Chamber in a reporting year since 2016/17. This is also the first decrease in applications received since 2012/13. We are mindful that the decrease is likely to be a result of the pandemic and school closures as the total number of applications received has increased year on year between 2012/13 and 2019/20. We may well see an increase in applications over the next year as the vaccination rollout continues and there is a reduction in the restrictions that have impacted schools.

Since my last update we have also had a new member of staff join the team. I am pleased to announce that Amy Richardson has joined the HEC administrative team

and will be working alongside Sarah and Megan in the casework team as well as supporting Lynsey in the President's Office.



Amy joined us in 2020 as a case officer. Prior to joining us she spent 2 years working as a Travel Agent for TUI, starting there when she left school.

Amy is enjoying learning about the work that is carried out within the Tribunal and is adjusting into her new role well. She is looking forward to working on more live cases and building her skills and knowledge.

In her spare time Amy enjoys riding horses both competitively and for fun! She also enjoys spending time with her friends and family and going on holiday too.

Sarah joined the Chamber in 2019 as a case officer and has recently been promoted to Casework Team Leader. Prior to joining us she spent 2 years working within the Glasgow Scheduling Team where she scheduled hearings for both the Health and Education Chamber and Housing and Property Chamber and worked very closely with Tribunal members throughout the roll out of the automated expenses project.



Sarah is enjoying her new role and is looking forward to the future within The Health and Education Chamber.

In her spare time Sarah enjoys spending time with her friends, family and new French Bulldog Puppy, Hugo.

DATES FOR YOUR DIARY

Thursday 9 September 2021

Legal Member Evening Training

The training will be conducted virtually

Tuesday 5 October 2021

Ordinary Member Evening Training

The training will be conducted virtually



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Children and Young People and the Impact of Coronavirus.

Megan Farr
CYPCS

Megan Farr, Policy Officer for the Children and Young People's Commissioner Scotland (CYPCS), considers some of the consequences of lockdown on our children and young people with a focus on those with additional support needs.

The last year has been one of uncertainty, change, and sacrifice. Every generation has made sacrifices, but perhaps the most under-appreciated are those our children and young people have had to endure.

Their right to education has been hugely disrupted. Their rights to health, to socialise, to play, and in some cases their right to a family life, have all been impacted. Digital exclusion and inconsistent provision of online learning continues to hugely impact on children's right to an education, particularly during periods where children are not able to attend school. As we emerge from the COVID-19 pandemic, it's clear that a rights-based approach is the only way we, as a society, can truly recover.

We know children and young people have experienced loss and isolation due to the restrictions and closure of schools to most children during the last year, but we don't yet know the full effects or the lasting impact of the pandemic. The voices and lived experience of children and young people must be at the heart of the government response.

Scotland has made a significant development in children's rights by passing the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill in March 2021*. When implemented, this will particularly benefit children and young people whose rights are most at risk. The rights of those living in poverty, young carers, those from black and minority ethnic backgrounds, and of course, disabled children and children with additional support needs must be at the heart of the recovery.

[*The Supreme Court has listed the UK government's challenge for 28 and 29 of June.](#)

Impact on additional support needs

Children with additional support needs are entitled to support whether they are attending school in person or learning remotely. We are concerned there has been an inconsistency of provision for additional support and differentiated learning during periods of remote learning. With no national approach, schools and teachers were required to adapt teaching and learning to an online model.

The Scottish Government's Equity Audit highlighted children with additional support needs as a group who have been disproportionately affected by school closures. Children with additional support needs may need help to manage the transition back into school and their support must be prioritised. Yet we have heard of instances where children returned to the mainstream classroom full-time but children in additional support units were only back part-time.

Children with additional support needs also need support when it comes to transition points in education – starting nursery, primary one, S1, and leaving school. The pandemic has reduced opportunities to plan and support these transitions. There has not been the same ability to make assessments, to have visits, to settle in.

Article 23 of the UNCRC gives disabled children specific rights to ensure they are properly supported. The Scottish Government announced plans in March 2021, pending the outcome of the election, to incorporate three additional human rights treaties, including the UN Convention of the Rights of Persons With Disabilities, further strengthening the rights framework around which recovery will be built.

Effect of exam cancellations

Children's human rights have been impacted by decision-makers' actions throughout the pandemic.

In March, three of our Young Advisers gave powerful evidence to the Scottish Parliament's Education and Skills Committee on the ways young people's right to education has been affected. Our office has consistently highlighted the effect of cancelling the 2020 and 2021 exam diets and replacing them with alternatives.

We highlighted the ways in which the 2020 SQA exam appeals process failed to realise children's right to due process and to an effective remedy, including cases where there was a failure to make reasonable adjustments for children with additional support needs. We remain concerned that alternative assessment arrangements put in place in 2021 are causing significant stress and could further disadvantage children with additional support needs.

The right to good mental health

Children and young people's mental health is of huge concern. The Government's commitment to an additional 350 school counsellors was welcome, as young people have told us they want to access mental health services in school, before they reach crisis point – but in many areas these services are hard to access.

There are many already in crisis with recent figures showing more than 1,500 children waiting for a first appointment with the Children and Adolescent Mental Health Service (CAMHS) – an increase of 165%.

Those numbers include many disabled children and children with additional support needs waiting for diagnoses, and again, this is only going to have been adversely affected by the pandemic. The UNCRC says that the state must make maximum use of all available resources to realise children's rights. Children's mental health services must be properly funded with resources targeted and ringfenced.

How CRIA can be used

As we recover from the pandemic, decision-makers should make full use of child rights impact assessments (CRIA). These are an important way to look at the potential impact (positive and negative) on children and young people of laws, policies, budget decisions and services as they are being developed, and suggest ways to avoid or mitigate any negative impact.

In May 2020 we commissioned the Observatory of Children's Human Rights in Scotland to carry out an independent CRIA on the impacts of the pandemic and made high-level recommendations around what Scottish Government and others needed to change, including addressing the lack of recognition of children and young people as rights-holders during the pandemic response.

Our Young Advisers carried out a rapid impact assessment on the cancellation of the exams which was shared with MSPs, SQA and researchers. CRIA is an important tool in holding duty-bearers to account.

Looking forward

Children, parents, teachers and schools have worked incredibly hard together over the last year to ensure that education continued, even in very challenging circumstances. We would caution against language describing children as now “being behind” or having to “catch up”. It simply piles on more pressure. Undoubtedly schools will need to identify and support learning needs, particularly for those children who have been disproportionately impacted. But it is also vital that children are given the opportunity to address the gaps in childhood they have experienced – including time to socialise with friends and family, time to play, and time to create new routines.

We must ask children and young people what they need and listen to what they tell us. Abigail, one of our Young Advisers, summed it up as: “Life-changing decisions being made during coronavirus have felt like playing a game. Every time it should be our turn, someone skips over us and we end up left behind and forgotten.”

Indirect Discrimination Claims in Schools

Muriel Robison, Health and Education Chamber, Legal Member

Muriel Robison, HEC legal member, shares some thoughts on the requirements that must be established in a successful claim having regard to the existing guidance and established case law.

The indirect discrimination provisions as applied to disability were introduced in an unpopular attempt to fill the so called ‘Malcolm gap’ created by the decision of the House of Lords in *London Borough of Lewisham v Malcolm* 2008 UKHL 43. That decision essentially reduced the discrimination ‘related to’ disability concept in the Disability Discrimination Act 1995 to nothing more than another form of direct discrimination.

However since it was first introduced in the Equality Act 2010 more than 10 years ago, there have been very few decisions reported or otherwise on the indirect discrimination provisions as they apply to disability, let alone cases in the education context.

Because of concerns expressed about the unsuitability of the concept for disability, the Government added the section 15 provisions to the Equality Act 2010 (discussed in some detail in May 2019 Bulletin¹), which, with the focus not on comparative treatment but on unfavourable treatment, will be much easier for a disabled pupil to establish.

Indeed, it is difficult to envisage circumstances when the indirect discrimination provisions might provide a remedy when other disability provisions fail. The most obvious one is where the respondent lacks knowledge of a claimant’s disability. This is because, unlike reasonable adjustments and discrimination arising from disability where knowledge is explicitly required and direct where it is at least implicitly required, knowledge is not per se required to succeed in an indirect discrimination claim².

Given that in the schools context it is at least unlikely that the respondent will lack knowledge, you might ask why a claimant would complicate their case by adding an indirect claim at all. It is perhaps significant to note that none of the examples in the chapter of the EHRC’s Technical Guidance for Schools in Scotland on indirect

¹ <https://www.healthandeducationchamber.scot/sites/default/files/publications/40/Bulletin%202020-%20May%2019.pdf>

² see *Bevan v Bridgend County Borough Council* ET Case No1602784/12

discrimination relate to disabled pupils.

Misgivings about the value of adding an indirect discrimination claim are underlined when you consider the various elements which require to be established for a successful claim and their application to the disability protected characteristic. As confirmed by Lady Hale in *Essop v Home Office*,³ there is no finding of unlawful discrimination until all four of the elements are met.

Relevant provisions

Thus in order to establish indirect discrimination, four requirements must be satisfied (the onus being on the claimant in respect of the first three) (to paraphrase section 19 of the Equality Act 2010):

1. A school applies (or would apply) a provision, criterion or practice (PCP) equally to all pupils, including a pupil with a protected characteristic;
2. That PCP puts or would put pupils sharing a protected characteristic at a particular disadvantage compared to relevant pupils who do not share that characteristic;
3. That PCP puts or would put, the particular pupil at that disadvantage;
4. The school cannot show that the PCP is justified as a proportionate means of achieving a legitimate aim.

What this means

Thus indirect discrimination will be established where a policy or practice, applied equally to all pupils, has the effect of putting certain disabled pupils at a particular disadvantage compared with others, and the school is not able to objectively justify the practice. The focus of the enquiry is the disparate impact or effect of the practice on the disadvantaged group.

Identifying the PCP

It is for the claimant to first identify the PCP which they argue is discriminatory. This should not prove a difficult hurdle, for although the words PCP are not defined, they must be construed broadly, and are likely to be relatively obvious in a disability claim. For example, excluding a pupil whose behaviour likely to be severely detrimental to order of discipline (caused by a mental impairment) can be categorised as the application of a disciplinary policy to that pupil.

The EHRC's Technical Guidance states that a PCP can include 'arrangements (for example for deciding who to admit); the way in which education, or access to any benefit, service or facility is offered or provided; one-off decisions; and proposals or directions to do something in a particular way. They may be written out formally or they may simply have developed as the school worked out the best of way of achieving its aims.'⁴

³ [2017 IRLR 558](#) at [29]

⁴ [EHRC's Technical Guidance for Schools in Scotland](#) at para. 5.24

Comparative disadvantage

A pupil must show that those in the group who share the same protected characteristic, are put (or would be put) at a particular disadvantage when compared with others in the comparator group who do not.

The application of this stage of the test has particular difficulties when applied to the protected characteristic of disability. That is because the focus of this provision is on those who share the same disability as the claimant, not the same impairment. Disability is often particular to an individual, given the need to consider the impact of an impairment on the ability of an individual to carry out day to day activities. An example given in the EHRC's Technical Guidance is pupils with an equivalent visual impairment⁵.

There can thus be difficulties in identifying who should be in (or not) that comparator group (often called the 'pool for comparison'). EHRC recommends that in general the pool should consist of all those who are potentially (not necessarily actually) affected by the PCP in issue, either positively or negatively, while excluding those who are not affected by it positively or negatively⁶.

A claimant must establish that the protected group is at a particular disadvantage. Again this is not defined, but is a broad concept, with the EHRC Technical Guidance suggesting that 'it could include denial or an opportunity or choice, deterrence, rejection or exclusion', that it is similar to detriment, concluding that 'It is enough that the pupil can reasonably say that he or she would have preferred to be treated differently'⁷.

One way to do that is to rely on statistics, but there may be no reliable statistics which can be relied on given the range of disabilities which may be considered. A claimant may seek to rely on judicial knowledge but that could be risky since the onus is on the claimant, so that evidence such as personal testimony or expert evidence may be required.

Finally, the claimant must show that they themselves have been put at that same disadvantage.

One important clarification in recent case law is that there is no requirement to show a causal link between disadvantage suffered and the protected characteristic⁸. In other words a disabled pupil does not need to show why the PCP puts them at that disadvantage, but simply to show that they are (although that reason may be relevant for the justification question).

To illustrate, where the PCP is that pupils who had previously been excluded are not

⁵ [EHRC'S Technical Guidance for Schools in Scotland](#) at para 5.27

⁶ See [EHRC'S Employment Statutory Code of Practice](#) at para 4.18

⁷ [EHRC's Technical Guidance for Schools in Scotland](#) at para 5.21

⁸ [Essop v Home Office 2017 UKSC 27](#)

permitted to go on school trips, if the school trip was only open to first to third years, the pupils who can and cannot go on the trip in those years are in the pool. If the pupil has ASD, the question would be whether the policy that denied them the opportunity to go on the trip operated to exclude more pupils in the comparator group with that disability than those without.

Justifying the PCP

Even if the claimant is able to establish disproportionate disadvantage, they will not succeed if the respondent can show that the PCP is objectively justified.

The relevant provision means that a respondent must be able to identify a legitimate aim and to show that the means adopted to achieve that aim are proportionate.

The focus will normally be on the proportionality question, because it should not be difficult for a respondent to identify a legitimate aim. Again legitimate aim is not defined but the EHRC Technical Guidance states ‘aim of the PCP must be legal and non discriminatory in and must represent a real, objective consideration’⁹.

The EHRC’s Technical Guidance gives some examples in the schools context: ‘ensuring that education, benefits facilities and services are targeted at those who must need them; the fair exercise of powers; ensuring health and safety of pupils and staff, provided that risks are clearly specified; maintaining academic and behaviour standards; and ensuring the well being and dignity of pupils’¹⁰.

When it comes to proportionality again this is not defined, but essentially involves an objective balance between the discriminatory effect of the measure and the reasonable needs of the undertaking. This means that the more serious the disadvantage, the more convincing the justification for it must be¹¹. A blanket ban will almost always be disproportionate, and PCPs should normally build in discretion to allow for exceptions, for example for pupils with additional support needs. It is important to be aware that if a school has not complied with its duty to make reasonable adjustments, it will be difficult for it to show that the treatment was proportionate¹².

Conclusion

Careful consideration should be given to the appropriateness of including a claim for indirect discrimination, as this may take away the focus from stronger claims, without improving prospects of success.

⁹ [EHRC’S Technical Guidance for Schools in Scotland](#) para 5.33

¹⁰ [EHRC’S Technical Guidance for Schools in Scotland](#) para 5.34

¹¹ [EHRC’S Technical Guidance for Schools in Scotland](#) para 5.37

¹² [EHRC’S Technical Guidance for Schools in Scotland](#) para 5.38



Dyslexic students: hidden strengths and struggles

Kirsten Campbell

Recent law graduate Kirsten Campbell shares her personal experience of having dyslexia and its impact on her learning experience

The standard application form for a legal traineeship asks candidates to list their strengths. At the end of my first year of law school, I found myself listing the same 'achievements' on each. I left school with grades that included ten 10 A* grades at GCSE and three A*s at A level. I won a place at Oxford University where I was awarded an upper-second degree in History and Economics. Two years later, I passed my LLB with distinction at Edinburgh University.

Yet the story of my education written on these applications was incomplete. The forms made no reference to the fact that I am dyslexic. They didn't mention that my primary school education started with daily fights about reading and ended with a spelling club of which I was the only member. My applications didn't note that I was placed in english and science classes far below my ability due to a placement test that largely focused on spelling. These applications listed my GCSE grades, but not that the teachers couldn't believe them. These applications included lists of A-level grades that I did not revise for, as instead I spent weeks practicing against the clock, not the harder material, as I struggled to write or process fast enough. Despite my best efforts, I could not finish my maths, geography, or history papers and missed my predicted grades. There was no mention that the first thing I did at university was to ask my college for extra time in exams, where I was then sent straight to disability services. Here, an educational psychologist conducted a four-hour assessment with me, looked at my family history, and diagnosed me as dyslexic. These applications listed my degree, but it did not mention the incredible support I received after my diagnosis including weekly study skills sessions with an expert in learning difficulties. I do not personally know any law students that chose to list learning difficulties on their legal applications.

Receiving a diagnosis at eighteen forced some basic re-evaluation. Fundamentally, I came to question three core myths. First, the idea that dyslexia is rare. In reality, it

is estimated to affect 10-15% of the population. Second, any notion that dyslexia does not affect intelligent people. I have to admit that my basic understanding was formed from the limited sample of pupils receiving adjustments at school. In reality, dyslexia is spread across the population from those who really struggle to the dyslexics like Albert Einstein. Study support later explained to me that the problem, particularly in the state sector, is that schools are under pressure to massively under diagnose specific learning difficulties. Each diagnosed pupil costs them dearly as the support is not in place. In my experience, if performing to at least an average level, students are left to it, regardless of their real potential. This was really highlighted to me when my brother was assessed at his school. When I was diagnosed, my parents asked the school to also assess him. He presented with all of the same characteristics and family history. The school carried out a five minute screening test and said he was fine and needed to work harder. He has since been diagnosed with both dyslexia and dyspraxia and benefited from adjustments and study support at university.

The third idea I have come to confront is that dyslexia is always a disability. It can actually be a great strength. Dyslexia doesn't mean that you're bad at everything. It means that disproportionate weakness in some areas does not match real strength in others, for example scoring 98 for visual puzzles but 25 for digit span memory, as I did. Dyslexics therefore think in a different way. They tend to be highly visual people who can think laterally around problems in a multi-dimensional way. They can make big picture connections in a way that others are slower to see.

Society, however, is not designed with this in mind. The challenges of being dyslexic are different for everyone. We need to help dyslexic children and adults get past these hurdles, to realise the potential of this different way of thinking.

I'd like to conclude that learning difficulties should be listed on applications, not as a mitigating factor, but among the achievements.

Kirsten Campbell studied History & Economics at Christ Church, University of Oxford, before completing the graduate LLB at the University of Edinburgh. She starts training to be a solicitor with Turcan Connell in October.

The Additional Support for Learning Review

Iain Nisbet

Iain Nisbet, solicitor with Cairn Legal, takes us through some of the key points of the recent Additional Support for Learning review following the response from the Scottish Government and COSLA and considers the importance of some the recommendations.

Back in June 2020, the report of the independent review of the implementation of Additional Support for Learning legislation in Scotland was published. The review was chaired by Angela Morgan, and the report, which is worth reading in its entirety, is titled “Support for Learning: All our Children and All their Potential”.¹

A formal response from Scottish Government and COSLA was issued, which accepted all of the recommendations (save for those which required external input, e.g. involving the Universities delivering initial teacher education) and set up a monitoring framework.

What did Children and Young people tell the Review?

The report begins with a statement of what children and young people might think about the implementation of the law on additional support needs. This is, undoubtedly, a very good place to start. However, it also laments the smaller than hoped for numbers of young contributors to the review.

The Young Ambassadors for Inclusion provided the headlines for this section of the report, highlighting from the outset: “Meaningful relationships between children and young people and staff are important for learning;”²

This is a key point, which the review returns to time and time again.

Children and young people also underlined the importance of “willingness to adapt teaching methods to children and young people’s learning styles”³ and the importance of school being a safe place for them.

Other points noted by the younger contributors included:

- school staff need to have more knowledge and understanding of additional support needs;

¹ <https://www.gov.scot/publications/review-additional-support-learning-implementation/>

² [Support for Learning: All our Children and All their Potential](#) at page 13

³ [Support for Learning: All our Children and All their Potential](#) at page 13

- the ability and capability of pupils with additional support needs must not be underestimated;
- more understanding and empathy from peers is needed;
- timely (and, I presume, effective) responses to bullying are important;
- consistency of support is required; and
- communication needs to improve.

Participation

Central to all of this is involving children and young people with additional support needs:

“Children and young people have their own views on what works for them and what kind of support they need.”⁴

For children aged 12 to 15 with additional support needs, My Rights, My Say provides free, independent advocacy to assist children in making use of their legal rights under this legislation. However, that is only the tip of the iceberg, and pupil participation needs to be embedded within the education system.

Indeed, the first, and overarching, recommendation from the review is on Children and Young People’s Participation:

“Children and young people must be listened to and involved in all decision making relating to additional support for learning. Co-creation and collaboration with children, young people and their families will support more coherent, inclusive and all-encompassing policy making, which improves implementation, impact and experience.”⁵

The good practice of the Tribunal in this area is specifically noted elsewhere in the report: “the needs and preferences of the small number of children and young people who engage with the Tribunal, are evident in the detail of the architectural and interior design of the Tribunal offices, and the operational processes developed to reduce stress and distress.”⁶

Resources – and relationships

The ASL review does not shy away from difficult issues, nor from stepping beyond its strict boundaries when it is necessary to do so. It does therefore, highlight the many concerns that exist around funding for additional support for learning as well as the impact of pressure on local authority resources more generally (the term “austerity” is used seven times in the report).

⁴ [Support for Learning: All our Children and All their Potential](#) at page 14

⁵ [Support for Learning: All our Children and All their Potential](#) at page 14

⁶ [Support for Learning: All our Children and All their Potential](#) at page 56

This was also a point that was made by the children and young people who contributed to the report: “Additional Support for Learning needs to be adequately funded to ensure everyone gets the support they need, when they need it.”⁷

The report therefore recommends that its own findings are considered as part of the forthcoming Audit Scotland thematic review of Additional Support for Learning.

However, as important, if not more so, are the staff resources actually delivering the support to children and young people day by day. The commitment and understanding of those staff and the quality of the relationship between staff, pupil and parents can make or break the educational experience. Parents contributing to the review spoke of the importance of a professional who “just gets it”.⁸

Time and time again, the review returns to the importance of relationships. Indeed, two of the reports nine themes have “relationships” in the title. Especially in those chapters, but also throughout the report, the fundamental importance of honest trusting relationships is stated again and again.

While this is something that can be taught (and learned), it is much more difficult to legislate for, let alone enforce.

The Tribunal (and those of us who practise within the Tribunal jurisdictions) has a part to play. Indeed, the review notes that “it is essential that rights and associated processes for .. the Tribunal should be clear and understood and barriers to access removed”,⁹ while also recognising the heavy drain on resources (both financial and emotional) that it can be for all involved.

Ultimately, it is the success or otherwise of the measures and recommendations from the report as a whole which will determine which cases (and how many) still require to be adjudicated in this way.

The first report on progress against the various recommendations is due from the Additional Support for Learning Implementation Group (ASLIG) in October 2021. It is important that the report is not just accepted, but actually leads to significant and lasting change for the children and young people whose interests and rights lie at the heart of it.

Iain Nisbet is a solicitor with Cairn Legal, and part of the My Rights, My Say service. Parts of the article have been taken and adapted from Iain’s blogs on the review, which you can find in full here:

<https://additionalneeds.co.uk/category/asl-review/>

⁷ [Support for Learning: All our Children and All their Potential](#) at page 14

⁸ [Support for Learning: All our Children and All their Potential](#) at page 68

⁹ [Support for Learning: All our Children and All their Potential](#) at page 56

Case Report: Decision Reasons

Lady Carmichael in the Upper Tribunal for Scotland (UT) case *Midlothian Council v PD*¹ has provided some guidance on the proper content of decision reasons. The case itself (a reference challenging the refusal of a placing request) has recently been finally concluded.²

A particular area of focus in Lady Carmichael's decision was the guidance offered on decision reasons. The UT decision was issued on 11 November 2019. The original tribunal decision was issued on 14 March 2019. These dates are significant for a particular reason: the HEC President issued to tribunal members a detailed 67-page *Judicial Decision Writing Toolkit* (Toolkit) in July 2019.³ What is interesting is that all of the points made by Lady Carmichael are addressed in the Toolkit.

Turning to those points, there are eight, found in paragraphs 57-62 of the decision:

1. Tribunals such as the HEC are under no obligation to narrate in detail all of the evidence led, or even all of the evidence rejected. Indeed, such an exercise should be avoided.
2. The FtT's decision is the primary source of information for the appeal courts on the oral evidence led.
3. A reader of the tribunal's decision who is unconnected with the case⁴ should be able to understand, from the decision, why it was reached. This is an aspect of open justice and comprehensible written reasons contribute to the maintenance of public confidence in the judicial process.
4. Findings in fact should not include narrations of the evidence led, nor conclusions in law.
5. The evidence upon which the findings in fact are based should be explained,

¹ [2021] UT 17. The decision was issued on 11 November 2019. It would appear that this UT decision and the final UT decision on permission to appeal (following the second tribunal decision) were published at the same time, both in 2021, since they are linked.

² Following the appeal against the tribunal's first decision, the reference was remitted by Lady Carmichael. Following a re-hearing, a second decision was issued. Permission to appeal the second decision was refused by both the First-Tier Tribunal for Scotland (FTT) and in the UT: that refusal, by Lord Erich, is reported: [2021] UT 18.

³ A revised edition of the Toolkit will be published in 2021.

⁴ This comment was made explicitly in the context of the publication of certain decisions.

but not within the findings themselves.

6. Evidence led which contradicts the accepted evidence should be explained, and reasons for accepting certain evidence and rejecting other evidence should be concisely set out.

7. The reader of the decision should be able to see how the evidence leads to the facts found and how those facts found have been used to consider whether the legal tests have been met.

8. A rigorous focus on the facts found and how they are relevant to the legal tests is helpful as an approach to decision writing.

The Toolkit (among many other things) deals extensively with findings in fact, both primary and inferential, including examples of each. The hierarchy of reasoning from evidence to facts to legal tests is discussed. Sample decisions are appended to the Toolkit, annotated in order to highlight the salient features. Much more is provided in the Toolkit, but it is heartening to see that the points made by Lady Carmichael have been addressed in detail by the Chamber, despite that happening independently to the *PD* decision, and in between the FtT and UT decisions on this reference.



Communication Access UK

Hazel McKellar, Health and Education Chamber, Ordinary Member

Hazel McKellar, HEC ordinary member (speech and language specialist), shares her involvement in the training and development of Communication Access UK.

In our May 2020 edition of the Bulletin, HEC specialist member Lesley Sargent introduced us to Inclusive Communication. Lesley's article told us about this communication approach that seeks to create a supportive and effective environment using every available means of communication to understand and be understood.

You may have noticed this symbol alongside the title of Lesley's article:



This symbol is called the Communication Access symbol. At the formal launch held virtually in November 2020, Nick Hower (of "The Apprentice" fame), President of the Royal College of Speech & Language Therapists, described the symbol as:

"...akin to the wheelchair access symbol ... to demonstrate commitment to inclusivity...the aim is that it will become part of the fabric of our society".

The Communication Access symbol is designed to make life easier and more equitable for the millions of people living with a communication difficulty across the UK. It was developed following a national consultation from people with communication difficulties and a group of expert Speech & Language Therapists.

Look again at the symbol. The eyes represent eye contact, looking and paying attention. The ears represent listening and paying attention. The mouth represents speech, the most common but not the only way of communicating. The arrows

represent shared understanding; reminding us that communication is a two-way process.

Following the launch of the symbol, an accompanying package of free online training and resources is now available to UK businesses, organisations and individuals in order that they can provide a more inclusive experience and environment for all their customers and service users. The training package enables individuals to:

1. Identify and understand communication difficulties;
2. Improve their own communication;
3. Improve the lives of people who experience communication difficulties.

Over 60 charities who support people with communication difficulties have been involved in the development of the symbol and the training.

I recently completed the e-learning training package and would highly recommend it to all HEC colleagues. It took me about an hour to complete and is easy to access and very helpful.

The training is underpinned by four key elements summarised in the mnemonic TALK:

TIME - take time to communicate

ASK - about each person's preferred methods of communication

LISTEN - and look at the person

KEEP TRYING - effective communication requires effort on both sides.

There are four modules: an introduction to communication difficulties; one to support face-to-face communication; one to support communication over the phone and one to support written communication and include practical examples and advice. The e-learning has been developed with complimentary guidance and a free accreditation scheme. Accreditation lasts for 12 months. Early adopters report an increase in confidence in interacting with people who have communication difficulties and that they feel better equipped to listen to what people's needs are.

If you are interested in finding out more about Communication Access UK or taking part in the training or accreditation the website is www.communication-access.co.uk. There are also helpful videos which can be accessed on YouTube.

The coronavirus pandemic and the subsequent restrictions have brought communication difficulties to the fore. For instance, wearing masks has put many barriers in the way of communication. It is the responsibility of each of us to support those who we interact with to be understood and to understand. In the HEC, we use a number of ways to do this especially with and for the children and young people who access our website, paperwork, building or hearings. There are always things for us to learn from Tribunal users of all ages and in all roles. We all benefit from offering a truly inclusive experience for those with communication difficulties. This applies at all stages of the users' journey, from initial enquiry to communicating

a decision. It also applies to every member of the HEC who communicates with users.

Work is currently underway to develop the next phase of Communication Access UK, find out more on the website, and we will keep you updated. If you as an individual or company or organisation undertake the training, please let me know how you find it and if you have changed anything as a result. I'd love to hear about your experiences.

Hazel McKellar was appointed as a specialist member to the ASNTS in 2010. Qualified in Speech and Language Therapy since 1995, she has worked across a range of services on a UK-wide basis and is currently involved in direct therapy and the provision of training amongst other things, for parents, carers and practitioners working with pre-school children



Peripheral Thinking: Beyond the Usual Provisions: Part 2(c)

Derek Auchie, Health and Education Chamber, Legal Member

In the fourth part of this series of discussions, Professor Derek P Auchie, HEC Legal Member, continues to explore HEC-relevant provisions in UK legislation other than the 2004 and 2010 Acts. Here, the Tribunals (Scotland) Act 2014 and the Standards in Scotland's Schools etc. Act 2000 are considered.

A. Tribunals (Scotland) Act 2014 ('2014 Act')

I will deal with only one provision in this Act here. Most of the Act is about the framework within which the First-tier Tribunal for Scotland and Upper Tribunal for Scotland are to operate. There are also provisions about appeals and reviews of First-tier Tribunal for Scotland decisions.

The provision I want to mention here is peripheral in that it is tucked away in s.12, under Chapter 2 on 'Overarching Responsibilities'. Section 12 is headed 'Principle to be observed' and provides that in making regulations under the 2014 Act, Scottish Ministers must have regard to the principle of the need for Tribunal proceedings to be accessible and fair and handled quickly and effectively.

The current HEC rules¹ are made under the powers in the 2014 Act². This means that the principle in s.12 applies to the HEC rules of process.

What is interesting is that while fairness, speed and (arguably) effectiveness are all included in the overriding objective in rule 2 of the rules, accessibility is not.

In my view, accessibility applies not only to who may make an application to a Tribunal; it applies to how process decisions are taken in connection with a case. That approach is supported by the wording of s.12(3) of the 2014 Act where it refers to that quality as applying to (presumably all) Tribunal proceedings.

What does this all mean? It means that in interpreting the overriding objective, regard must be had to the concept of accessibility. The requirement to do so arises from the use of the word 'need' in s.12(3).

To put it another way, when the HEC rules (in particular the overriding objective) were written, we must assume that accessibility was something the framers of the rules intended to instill.

¹ The [First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018, schedule to SSI 2017/366](#) ('Tribunal rules').

² [Schedule 9, para 4\(3\) of the 2014 Act](#).

Accessibility in the process context relates to being able to participate on a full and equal basis before, during and after the hearing. It could relate to how evidence is to be taken from a child, or a decision to assist a non-represented party (as is specifically allowed³), for example.

Using s.12 of the 2014 Act as an interpretative guide to rule 2 of the Tribunal rules is not straightforward, since the temptation might be to ignore the parent legislation once the offspring rules have been enacted. However, in an argument on a procedural point where the overriding objective does not directly assist, the concept of accessibility in s.12 could be relevant. Alternatively, in narrow or contested process decisions, accessibility under s.12 may tip the tribunal one way or another.

Not a tool to be used in every case, but one to bear in mind for some of those difficult process decisions.

B. Standards in Scotland's Schools etc. Act 2000 ('2000 Act')

This legislation is notable for the use of 'etc.' in its title – certainly unusual and possibly unique.

But moving away from the trivial, this Act contains some important provisions which could be directly relevant to HEC cases.

Development of the child/young person (s.2)

The obligation on education authorities to secure that education is directed to the development of the personality, talents and mental and physical abilities of the child/young person to their fullest potential can be found in s.2(1). The explanatory note to s.2 indicates that this provision requires education authorities to:

'...look beyond general provision to the development of the individual child.'⁴

This is a powerful duty. It is not limited or conditional, the wording is absolute.

It is not difficult to see how this duty is relevant to all HEC cases. For placing request references, at stage 2 (assuming that a ground or refusal is held to exist). In CSP cases, in considering the support a child/young person needs to enable his/her full potential to be realised. In Equality Act 2010 claims, in considering whether enough has been done to counter the pupil's disability, whether by reasonable adjustment or otherwise.

The key qualities are: personality, talents and abilities. These qualities must be 'central to the direction of school education'.

In considering this duty, the question is:

Has the education authority directed (aimed) the education being provided to the development of each of these three qualities such that the child/young person can reach their fullest potential?

³ [Tribunal rules, included in rule 2\(2\)\(c\).](#)

⁴ [Para 6 of the explanatory notes.](#)

⁵ 2000 Act, s.2 explanatory notes, para 6.

If the answer is 'no', this statutory duty has been breached; if 'yes' it has been complied with. The answer is clearly relevant to the function of each HEC case.

The reference to 'fullest potential' is interesting. The correct viewpoint is not about what can be provided by the education authority; instead it is measured by the extent of the maximum potential of the individual. Available resource appears to be irrelevant.

Of course, even in cases where the view is taken that this duty has not been complied with, that does not provide a direct answer to any case; the HEC does not have jurisdiction over breaches of s.2 of the 2000 Act as such. However, where an education authority is not complying with its statutory duties, that is a matter to be taken into account.

The reverse is where the education authority sets out a case that it is compliant with s.2(1). Where this is accepted, that will, of course, assist the education authority in establishing its case.

Inequality of outcome (ss.3A-B)

The Education (Scotland) Act 2016 added sections 3A-I to the 2000 Act. Section 3B may apply in HEC hearings.

It imposes a duty on education authorities, when making strategic decisions about school education, to have due regard to carrying out its functions in a way designed to reduce inequalities of outcome where those inequalities are experienced as a result of socio-economic disadvantage.

The duty also applies to decisions about steps to take to implement such a decision.

There is no definition of 'strategic' or 'socio-economic' or 'inequalities of outcome'. However, one can see that where a decision is taken by an education authority around for example general policy on resources, school admissions or education priorities, these decisions could impact on the issues in an individual HEC case. The obligation is not to reduce the inequalities, only to have due regard to the need to reduce. Even then, the aim is not to eliminate inequalities, only to reduce them. This makes a decision that the duty has been breached more difficult.

There is an obligation, set out in s.3B(3) and (4), to consult with and take account of the views of certain groups of individuals in taking the strategic decision (or a decision on steps to implement it).

Under s.3A(2)(b), regulations can be passed to apply these duties to inequalities which are not socio-economic in nature, but no such regulations currently exist.

Equal opportunities statement (s.3I)

Under s.3I of the 2000 Act, all education authorities have a duty to publish an annual equal opportunities statement ('EOS') setting out the ways in which the authority will, in providing school education, encourage equal opportunities in the

coming year.

The EOS must, in particular, set out the ways in which the authority will observe the equal opportunity requirements.

Both 'equal opportunities' and 'equal opportunity requirements' are, under s.31(3), defined with reference to the definitions in L2 of schedule 5 to the Scotland Act 1988 as follows:

'Equal opportunities' means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.'

'Equal opportunity requirements' means the requirements of the law for the time being relating to equal opportunities.'

Such a statement, having a statutory basis, would be a clear statement of intent which, although not binding, could be relied upon as an indication of what the education authority believes it should be doing in relation to equality in the provision of education.

The EOS for the relevant period may be relevant, in particular, to a 2010 Act claim. It may also be relevant to references, where it could be argued that the EOS was not complied with in a particular respect.

Children and Young People: News and Developments

Members will recall from our November training, the intention of the Scottish Government to incorporate international children's rights into Scots law; there is now likely to be delay in this process. We also report on the reduction in the numbers of co-ordinated support plans across Scotland.

United Nations Convention of the Rights of the Child

Following the Scottish Parliament voting unanimously on 16 March 2021 to incorporate the **United Nations Convention of the Rights of the Child (UNCRC)** into Scots law, the UK Government has now referred the Bill to the Supreme Court for a ruling on its competence. The UK Government had previously expressed concerns that the Bill could potentially put legal duties on UK Ministers, which would be out with the remit of the Scottish Parliament.

This means that the UNCRC Bill will not now become law until judges in the Supreme Court have considered the legislative competence of the Bill following legal arguments to be made by both the Scottish and UK Governments. It is expected that the Supreme Court will be hearing these arguments in the coming months* and it is not yet clear when a decision will be made here.

**The Supreme Court has listed the UK government's challenge for 28 and 29 of June.*

The Supreme Court justices can decide to either uphold the Bill or refer it back to Holyrood for further amendment and members will no doubt follow these proceedings with interest.

Scottish Children's Services Coalition

The Scottish Children's Services Coalition (SCSC) has expressed concern on the reduction in the number of children receiving support via co-ordinated support plans (CSP). This follows the latest statistics which highlight a dramatic decline in the number of children with additional support needs (ASN) being in receipt of a CSP.

According to the SCSC, there has been a significant fall in the number of pupils with CSPs, from 3,448 in 2012 to 1,534 in 2020, amounting to a drop of 55.5 per cent (publicly funded primary, secondary and special schools). This is a reduction from 2.9 per cent to 0.7 per cent of those with ASN and currently amounts to 0.2 per cent of the pupil population.

The SCSC further advise that this is against the background of an increase in the number of those with ASN from 118,034 in 2012 to 226,838 pupils in 2020, amounting to 32.3 per cent of pupils.

COSLA, which represents Scotland's councils, have advised that they are currently working with a range of partners to examine how CSP's are being used. It is expected that the conclusions of this review will be reported to Scottish ministers in October of this year. This follows the Scottish Government proposals to review co-ordinated support plans (CSPs) which were announced in May 2019.

HEALTH AND EDUCATION CHAMBER GUIDANCE

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[Children's Guide to Making a Claim](#)

[Children's Guide to Making a Reference](#)

[Guide to the Glasgow Tribunals Centre Sensory Floor](#)

Member Contributions to the Bulletin

Members are encouraged to contribute to the Bulletin and should contact Lynsey Brown at HEChamberPresident@scotcourtsribunals.gov.uk if they wish to contribute in any way. Any contributions must be typed in Arial, font size 12, with justified margins, two spaces after each full stop and with all necessary references set out as a footnote.

Please note that all contributions may be subject to editing. Our next publication will be in **November 2021** and any contributions must be submitted no later than **mid-September 2021**.



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