Health and Education Chamber
First-tier Tribunal for Scotland

The Bulletin

Edition 4

May 2020

Contents

P2 President's Foreword

P4 HEC Update (Paul Stewart) & Contact Details

P7 Mediation (Adam O' Brien)

P9 HEC Sensory Hearing Suites (Deirdre Hanlon)

P11 Equality Act 2010 (Muriel Robison)

P15 Non-Instructed Advocacy (Pauline Cavanagh)

P18 Mental Health Act Review: Impact (Derek Auchie)

P21 Inclusive Communication (Lesley Sargent)

P24 Peripheral Thinking: Beyond the Usual Provisions (Derek Auchie)

P28 News

Foreword

May Dunsmuir

Chamber President

Dear members,

As I write this, working from home, we remain under lockdown restrictions. This year is one which will certainly remain etched on our minds.

Extraordinary times. The coronavirus has altered our personal, social and professional lives – and in such haste. In the short time since lockdown began on 23 March 2020, we have had to adjust our style and pattern of life. Each of us will have had to stop physical contact with many of our family members, friends and neighbours. Our shopping habits will have altered, with rationing of items and limits on entry to supermarkets. Your hands may now have aged 10 years, with frequent washing, which no amount of hand cream can absolve.

Despite all of this, I have witnessed some marvellous acts of generosity and kindness - from all of the key workers, including waste disposal, postal, delivery, retail, care staff, nurses and doctors - to Colonel Tom Moore, aged 100, whose walk for the NHS raised £32 million.

It is clear that extraordinary times require extraordinary efforts. I have been moved and impressed by the extraordinary commitment of our members and staff since we introduced new ways of working and delivering justice; which has included new practice guidance, a case triage system, suspensions/postponements of non-essential cases/hearings and remote hearings.

Not one among you has complained. Not once. You have attended to our business with the same diligence and professionalism as always. I am proud of your commitment to our work. I have been inspired by some of the ways you have remained optimistic; and the creative ways you have stayed socially connected - whether from virtual chats with your families, or virtual walking tours in Venice! This commitment, in no small way, is a tremendous encouragement to me and to our staff as we work through solutions for the present and the future.

The staff of the SCTS have been equally impressive. Despite our small team size, there has been a mountainous effort by caseworkers, administrators and senior

staff to ensure that Chamber business continues with minimal interruption – and this, despite now working from home and with limited access to any physical papers. They are selfless and inspirational. I have asked much of them but no-one has complained or even asked for extra time. They, like us, recognise the valuable and important work of the Additional Support Needs jurisdiction and the wider work of the Chamber.

Our Bulletin Editor, Deirdre Hanlon, has continued to work hard in the background of all of this to ensure that we remain connected through our Newsletter. I am grateful to her for producing such an interesting and energising edition, with articles from our own members and others, ranging from mediation; and non-instructed advocacy; through to inclusive communication. The series on the Equality Act concludes, which I have found very instructive. I have had Muriel's articles to hand when working through some claims.

As we move towards summer, I hope that your community of family, friends and neighbours will remain safe, well and connected and I hope that we will emerge from this outbreak reflective, wiser and stronger. I am confident of this.

For now, and the future, we will continue to identify new and better ways of conducting virtual hearings, so that these become well embedded processes. We will continue to review all of our cases to ensure that time-critical matters do not become lost. We will continue to equip our members with necessary knowledge and information – and we will continue to overcome.

Until we meet again, my very best wishes.

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, takes us through recent developments within the Health and Education Chamber including details of the increasing caseload of the Chamber.

Since my last update in November 2019, the Additional Support Needs jurisdiction has faced significant challenges as a result of the COVID-19 outbreak. In March 2020, various decisions were made which saw operations scaled back across all Tribunals in Scotland. However, as a result of efficiencies previously identified and implemented by the HEC administrative team we were in a good position to continue processing time critical references and claims remotely – working closely with the President, In-House Convener and Tribunal members on all cases. With that said, I recognise there is scope for further efficiencies to be made in the wake of the COVID-19 outbreak, including new measures which will help to facilitate digital working where possible. I am looking forward to identifying and implementing these efficiencies as we move forward.

Aside from the challenges we have faced as a result of COVID-19, we have also had the challenge of managing an increased workload this year.

The caseload of the ASN jurisdiction has once again continued to increase and in total we received 146 applications during the 2019/20 business year. This is an increase of 33 applications on last year (113) and is the highest number of applications that we have received in a single year since the former Additional Support Needs Tribunal for Scotland was established in 2005.

To help us manage this increased workload we have continued to work closely with the President and In-House Convener on changes to the case management process. The new documentary evidence process has been in place since 30th September 2019 and we are now starting to see the benefits of this change, which include smaller, more concise bundles prepared by the respondent/responsible body. We have also been pursuing additional data analysis throughout the reporting year and this led to us reviewing some of our existing administrative processes and our case management systems to ensure we are working as effectively as possible while maximising the ability of our small, specialist team.

Since my last update I would also like to note that Duncan Millar has left the Scottish Courts and Tribunals Service after taking up a promoted post within the Scottish Government. Duncan provided casework and clerking support. I would like to thank Duncan for the support he has provided to the Health and Education Chamber and wish him well in his new role.

DATES FOR YOUR DIARY

Tuesday 29 September 2020

Tribunal (Additional Support Needs) Forum

The forum will be conducted 'virtually' at this stage

Thursday 1 October 2020

Legal Member Evening Training

Glasgow Tribunals Centre

Health and Education Chamber
Contact Details

0141 302 5863 President's Office

Lynsey Brown, PA to the Chamber President

HEChamberPresident@scotcourtstribunals.gov.uk

0141 302 5904 Paul Stewart, Operations Manager

0141 302 5860 Casework Team

Hugh Delaney, Team Leader/Senior Case Officer

Megan Wilkinson, Team Leader/acting Senior Case Officer

Sarah Tracey, Case Officer

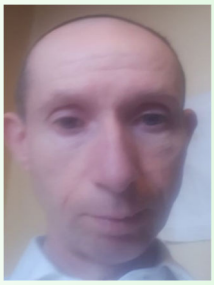
ASNTribunal@scotcourtstribunals.gov.uk

0141 302 5999 Member Scheduling

HECscheduling@scotcourtstribunals.gov.uk

0141 302 5999 Glasgow Expenses

glasgowexpenses@scotcourtstribunals.gov.uk



Mediation - Local Authority Perspective

Adam O'Brien

City of Edinburgh Council

Adam O'Brien, from the City of Edinburgh Council, shares his experiences of mediation in his role within the education authority. Adam's article concludes the series produced in the Bulletin on the mediation process, as it relates to the Additional Support Needs jurisdiction.

This subject brings to my mind the late, great TV chef Keith Floyd. He had a fractious relationship with his producer and director of whom Keith said; 'our relationship is based on trust and understanding – I don't trust him and he doesn't understand me.'

In my experience, mediation frequently does not lead to agreement. However, also in my experience, it almost always improves trust and understanding between the parties.

In cases where it does lead to agreement, that agreement in my experience, is almost always some kind of compromise. Any such compromise could not have been achieved without trust and understanding because neither party will be willing to concede something if they don't trust and understand the other party to some degree.

I have been around since the inception of mediation under the terms of the Education (Additional Support for Learning) (Scotland) Act 2004 (2004 Act). This Act required education authorities to outsource mediation to independent providers. I commissioned the mediation service for my local authority in this respect.

My local authority has a high number of Tribunal appeals, which frequently give rise to mediation in an attempt to avert the need for a Tribunal hearing. In the great majority of mediation cases that proceed to a face to face meeting, I attend the meeting for my education authority. I have been to dozens over the years and I am pleased to say that the trend is rising.

I cannot recall a single mediation meeting that I considered to be counterproductive. That is due in great part to the skill of the mediator in chairing the meeting. It is also due in great part to the work that the mediator puts into preparing for the meeting which usually comprises the mediator meeting the parents in person without the education authority representative – I sometimes forget this because that preparation goes on outwith my sight.

I have been to many mediation meetings where parents are supported by an

independent advocate and it has been my experience that such advocates are very helpful to the mediation process.

If there is one danger to mediation, I would say that it can inadvertently but unduly raise the expectations of parents. This can happen despite the expertise of the mediator in managing such expectations.

This leads me on to the element of mediation which I find most challenging - which is to myself manage the expectations of parents. I have no doubt there have been cases where the parents have left the meeting disappointed that I have not made as clear a commitment as they wished for, regarding measures to be taken by the education authority. However, even in such cases, I believe the parents feel satisfied that I have come away with a clearer understanding of their point of view.

I believe in the great majority of cases parents come away from mediation with the belief that points of disagreement between them and the education authority are based on differing, but sincerely held points of view and that it is not the case that the education authority is acting in bad faith. I hope I am not deluding myself in this belief and I hope that this reduces stress for parents.

In conclusion, I have found it to be a great privilege to be part of mediation. I can only imagine how difficult it must be for parents to discuss very personal matters about their child and family life with people who are not friends or family and therefore the willingness of so many parents to enter into the process is humbling and inspirational.

Adam O'Brien is currently employed as the Parent and Pupil Support Manager for Additional Support for Learning for the City of Edinburgh Council. This post includes a remit for managing Tribunal work and mediation. He grew up in London and graduated from Edinburgh University.

HEC New Sensory Hearing Facility Official Launch Tuesday 25 February 2020

Deirdre Hanlon, Health and Education Chamber, Legal Member

Deirdre Hanlon, legal member and Editor of Health and Education Chamber (HEC) Bulletin, reports on the opening of the sensory hearing facilities in Glasgow.

Our President has routinely updated us on the progress and development of the new sensory hearing rooms. Now complete and located with the Glasgow Tribunals Centre, the hearing rooms are designed to reduce 'sensory overload' for children and young people with autism or sensory sensitivities who attend Additional Support Needs tribunals.

The facilities will also be used for the recording of children's evidence in advance of certain criminal proceedings. The official launch of the new facility took place on 25 February 2020 and was well attended by a range of professionals, children and young people all eager for a look around.

A number of keynote speakers spoke during the morning event. Kerrie McLeod, one of the Young Consultants involved in the suite's development, spoke about her role and how the experience had been a valuable one for her. Our own President paid tribute to the many children she had worked with throughout her career and in particular thanked the contribution of the Young Consultants who had played such a central role in the creation, design and layout of the hearing facilities. Mrs Dunsmuir reiterated her commitment to keep children and young people at the centre of everything that the Tribunal does. Joanna McCreadie, formerly from Seamab School, echoed the President's comments and reminded us all of why we were gathered together at the launch. Finally, Ms Maree Todd, Minister for Children and Young People, spoke of the work that the Scottish Government continued to do with children and young people in Scotland and the role that the new facility would play in this process.

All of the new hearing rooms are purpose built, with every aspect of their design and layout focussing on the child or young person who may be in attendance, giving their views or giving evidence to a tribunal. From sound-proof areas with one-way glass, to the calming colour palette chosen by children, the smaller round tables to the breakout areas with sensory equipment; all of the rooms have been designed

around the needs of the children who will be attending. Keeping a focus on the child or young person is entirely in keeping with the work that takes place across our jurisdiction.

The new sensory hearing facilities will undoubtedly strengthen further our President's commitment to keep children and young people at the centre of everything that we do as a Tribunal.

Equality Act 2010 Update on Section 15

Muriel Robison, Health and Education, Legal Member

Muriel Robison, HEC legal member, concludes her series focussing on section 15 of the Equality Act 2010. This article considers some of the possible defences that might be argued by a respondent in any claim before the Tribunal.

This is the third and final article in this series considering section 15 of the Equality Act 2010 (2010 Act), discrimination arising from disability, and its application in the education context. In this article, I consider defences available to the respondent.

Even if a claimant can show that they have been unfavourably treated because of something arising in consequence of their disability, a respondent will not be liable if they can show (the burden of proof being on them) either:

> They did not know, or could not have reasonably been expected to know, that the claimant had the disability[1]; or
>
> The treatment was a proportionate means of achieving a legitimate aim[2].

Knowledge

It is for a respondent to show that they did not know, or could not reasonably be expected to know, that a pupil was disabled. The Equality and Human Rights Commission Technical Guidance for Schools (EHRC guidance) states that "the required knowledge is of the facts of the pupil's disability, but the school does not need to realise that those particular facts meet the legal definition of disability"[3].

The question whether the school knows the pupil is disabled is a separate one from whether the pupil meets the definition of disability such that they can rely on the 2010 Act[4]. That question will usually be considered as a preliminary issue, to be determined before any claim can progress further. The question of knowledge however will usually be determined at a final hearing, after a tribunal has heard all the relevant evidence.

This is not least because a school can have "constructive" knowledge of the disability. Consideration requires to be given to whether the respondent ought to

[1] section 15(2) Equality Act 2010
[2] section 15(1)(b) Equality Act 2010
[3] EHRC Technical Guidance for Schools, paragraph 5.51.
[4] section 6 Equality Act 2010

have known, even if they say they were not aware that a pupil was disabled. The technical guidance states that "A school must do all that it can reasonably be expected to do to find out whether a pupil has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, schools should consider issues of dignity and privacy, and ensure that personal information is dealt with confidentially"[5].

If the school's agent (that is someone who undertakes tasks on the school's behalf) or employee knows of a pupil's disability, the school will not usually be able to claim that it does not know of the disability. The technical guidance gives the example of a pupil advising a school secretary that she has diabetes and that she needs to carry biscuits to eat when her blood sugar levels fall. If that child is subsequently disciplined by a teacher, who does not know this, for eating in the classroom, the school is unlikely to be able to argue that it did not know about her condition[6].

Objective justification

In practice many claims in the education context will turn on the question of objective justification. A respondent council will be able to justify any treatment if it is "a proportionate means of achieving a legitimate aim"[7]. This is the standard defence which applies in the case of indirect discrimination and the approach will almost certainly be the same. There are two separate elements to the test which should be considered separately[8].

Legitimate aim

This phrase is not defined in domestic or European law. The EHRC guidance, which cross references to the guidance on indirect discrimination, states that "To be legitimate, the aim of the provision, criterion or practice (PCP) must be legal and non-discriminatory, and must represent a real objective consideration"[9]. It should be noted that for section 15 the question is whether the treatment achieves a legitimate aim, and not whether a PCP is justified, since the focus is on whether the unfavourable treatment is justifiable.

Drawing from cases decided in the employment context, whether an aim is legitimate is a question of fact for the tribunal[10]. The legitimate aim relied on must in fact be pursued by the measure in question[11]. However, and perhaps surprisingly, the aim need not have been articulated or even realised at the time when the measure was first adopted, so it can be an ex post facto rationalisation[12].

[5] EHRC Technical Guidance paragraph 5.52
[6] EHRC Technical Guidance paragraph 5.51
[7] section 15(1)(b) Equality Act 2010
[8] By analogy with cases decided in the employment context, see MacCulloch v ICI 2008 IRLR 846 EAT
[9] EHRC Technical Guidance paragraph 5.33
[10] Ladele v London Borough of Islington 2010 IRLR 211 CA.
[11] R v Secretary of State for Employment ex parte EOC 1994 IRLR 176 HL. For a Scottish example in the education context, see Inclusion and Disability: the claim against School A, 2017 EDLaw 36
[12] Seldon v Clarkson Wright and Jakes 2012 IRLR 590 SC

The EHRC guidance gives the following examples of aims likely to be considered legitimate:

- Ensuring that education, benefits, facilities and services are targeted at those who most need them;
- The fair exercise of powers;
- Ensuring the health and safety of pupils and staff, provided that risks are clearly specified;
- Maintaining academic behaviour standards; and
- Ensuring the wellbeing and dignity of pupils[13].

Note that the EHRC guidance states, in regard to relying on budgetary considerations, that "Although the financial cost of using a less discriminatory approach cannot, by itself, provide a justification, cost can be taken into account as part of the school's justification if there are other good reasons for adopting the chosen practice"[14].

Proportionality

In general it will not be difficult for a respondent to identify a legitimate aim. Usually the focus of this defence is the question whether means used to achieve any legitimate aim are proportionate.

Proportionality is again not defined. It involves a consideration of whether the treatment is appropriate and necessary. "Necessary does not mean [the means chosen] is the only possible way of achieving the legitimate aim"[15]. It is however sufficient that the same aim could not be achieved by a less discriminatory means. Tribunals are advised to carry out a balancing exercise, since this requires an objective balance to be struck between the discriminatory effect of the measure on the pupil and the reasonable needs of the school[16]. The EHRC guidance states that "The more serious the disadvantage caused by the [unfavourable treatment], the more convincing the justification must be"[17].

While convincing factual evidence is required to support a justification argument[18], concrete evidence is however not always necessary: "Justification may be established in an appropriate case by reasoned and rational judgement. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions"[19]. Where treatment is justified by a general rule, then the existence of

[13] paragraph 5.34
[14] paragraph 5.36
[15] paragraph 5.35
[16] Hardys & Hansons plc v Lax 2005 IRLR 726 CA.
[17] Paragraph 5.37
[18] R v Secretary of for Employment ex p EOC 1994 IRLR 176
[19] See EAT in CC of West Yorkshire Police v Homer 2009 IRLR 233 at [480] (considered on other grounds by SC 2012 IRLR 601)

that rule will usually justify the treatment which results from it[20].

The application of the principle of proportionality is illustrated by two cases, both involving the refusal of a school to allow a disabled pupil to go on a school trip. In a Scottish case[21] the tribunal did not accept that the school had failed to show a rational connection between the treatment and the legitimate aim (protecting health and safety). The tribunal accepted the evidence that risk assessments were undertaken by the school, that medical advice had been sought and the teacher had valid concerns about the child's health because of the weather forecast.

This can be contrasted with the *White v Clitheroe Royal Grammar School*[22], a decision of the English county court decided under antecedent legislation, where to exclude the child from the trip was found to be a "knee jerk reaction", with no risk assessment undertaken, no reasoned assessment of the implications of any increased risk, and no attempt to consult the child or parents and no attempt to obtain a medical report, and therefore not justified.

Although there is now no specific provision making a requirement to consider the reasonable adjustments duty first[23], it is advisable to do so because, as confirmed by EHRC guidance:

"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 proportionate"[24].

Conclusion

Tribunals will require to consider, taking a structured approach, each of the four elements of the test, as well as the knowledge question, in order to determine whether discrimination arising from disability has been established. The focus however is likely to be on the question of proportionality, so it will be important to consider carefully the evidence led by both sides in carrying out that balancing exercise.

---

[20] Seldon v Clarkson Wright & Jakes [2012] ICR 716, SC per Lady Hale at [64]
[21] Health and Education Chamber website—Decisions DDC 20.06.2017
[22] unreported, Preston County Court, 6 May 2002, BB002640
[23] Unlike Disability Discrimination Act 1995 section 3A(6)
[24] Paragraph 5.38. See also ASN tribunal decision DDC/03/02/2016, where the tribunal decided that the defence was not made out because there were reasonable adjustments which should have been made that could have prevented disadvantage suffered by the child.

Non-Instructed Advocacy

Pauline Cavanagh, Partners in Advocacy

Pauline Cavanagh, Glasgow Manager for Partners in Advocacy, outlines some features of non-instructed advocacy and the role that it might play in a reference or claim before the Tribunal.

Background

Non-Instructed Advocacy happens when a person has complex communication needs or a long term illness or disability that prevents them from forming or clearly stating their wishes or desires. The Principles and Standards for Independent Advocacy[1] apply to non-instructed advocacy in the same way as they do to instructed advocacy.

The Scottish Independent Advocacy Alliance (SIAA) states that non-instructed advocacy is about:

- ◊ *Where possible, spending time getting to know the advocacy partner observing how the partner interacts with others and their environment, and building a picture of the partner's life, likes and dislikes*
- ◊ *Trying different methods of communicating with the partner*
- ◊ *Gathering information from the advocacy partner or through a variety of measures. This may include identifying 'past wishes' or any Advance Statement made*
- ◊ *Speaking to the significant others in the partner's life*
- ◊ *Ensuring that the partner's rights are respected*
- ◊ *Ensuring that account is taken of the partner's likes and dislikes when decisions are being made and that the partner is enabled to make choices as far as possible*
- ◊ *Ensuring that all options are explored and no particular agenda is followed*[2]

[1] www.siaa.org.uk

[2] Non-Instructed Advocacy Guidelines, SIAA 2009

Practice

When a referral is made for independent advocacy for a child with complex communication difficulties or cognitive impairment where they cannot clearly state their wishes, a non-instructed advocacy approach would most likely be adopted. In practice, this could be a situation where a placing request to a specialist provision has been refused by an education authority and the tribunal make a referral to advocacy to establish the views, where possible, of the child about the situation.

The advocate would meet with the child and explain in very simple terms why they were there. The advocate would attempt communication by whatever means the child was most comfortable with, and try to establish as much as possible about their life, their likes and dislikes and what is important to them. They would talk to the other people involved in their life, such as their parents and carers and support staff to build a picture of the current situation.

Ideally, the advocate will arrange to observe the child in their current school placement, and will record what they see objectively and without bias. They will look to see how the child engages in this environment, how much support they receive from staff, how they interact with their peers and their non-verbal communication. This gives a unique and independent view of the child's experience in school.

In some cases, the tribunal may suggest that the child is given the opportunity to visit the educational establishment that is the subject of the placing request. Again, the advocate would take notes of how the child appeared in this environment and what the school could offer to support their assessed needs.

Bringing it all together

When the advocate has spoken to the child, relevant people in their life and undertaken observations of them, they will produce a non-instructed advocacy report for the tribunal. This will document the background to the original referral, who the advocate spoke to, summaries of these discussions and accounts of any observations they have undertaken.

Finally, the advocate will consider the proposal against the wellbeing indicators detailed in the national GIRFEC framework (Getting it Right for Every Child); this approach asks questions of decision makers that the child, if able, might reasonably ask themselves. They will look at the existing school and the proposed alternative and ask how the child's needs, views and wishes will be addressed, whilst ensuring that they are safe, healthy, achieving, nurtured, active, responsible, respected and included (SHANARRI). Importantly, the advocate makes no comment, draws no conclusions and makes no recommendations.

Conclusion

Most independent advocacy is instructed by the advocacy partner and a course of

action is agreed between partner and advocate and they will be supported to ensure that their voice is heard, views respected and rights upheld.

Where an individual is unable to instruct an advocate, they should be afforded these same rights and the role of the advocate will be to defend their rights, ensure that their preferences are made known where possible, and the people who know them best inform decision makers to act in their best interests.

Underpinning good independent advocacy practice is the defence of a person's human rights; treating every individual with the dignity and respect that they deserve, putting them first at all times, and ensuring that they remain at the centre of any decisions affecting them.

Pauline Cavanagh is Glasgow Manager with Partners in Advocacy, an independent advocacy organisation delivering advocacy services to children, young people and adults across Scotland. She has worked in the field of independent advocacy for 15 years; for the past 7 years, the focus of her work has been managing advocacy services for children and young people with a range of additional support needs, including autism, learning disabilities and mental health issues. Pauline believes passionately in the rights of children and young people to have their views heard and respected especially within education, to help them to access the support that they are entitled to fulfil their potential.

Independent Review of Learning Disability and Autism in the Mental Health Act, December 2019: HEC Impact

Derek Auchie, Health and Education Chamber, Legal Member

The Independent Review of Learning Disability and Autism in the Mental Health Act in Scotland published its final report following a major review of mental health law for autistic people and people with intellectual disability in December 2019. This report makes a number of key recommendations and major changes to the law in Scotland. Here, Professor Derek Auchie considers the possible impact that some of these changes may have within our jurisdiction.

This was a major review in this area and sweeping changes to the legal and practical environment for those with relevant conditions are recommended. Major legislative change would be required to implement the recommendations.

The main changes suggested in this review, if enacted, and which would affect Health and Education Chamber (HEC) cases are now discussed.

1. Autism and learning disabilities definition and rights (sections 1.3 - 1.4 of the Review)

The Review suggests that the term 'learning disability' should be replaced by 'intellectual disability'. In addition, 'learning disability' should be removed as part of the definition of 'mental disorder' under the Scottish mental health legislation.

In considering what an 'intellectual disability' is, the Review recommends that reliance is placed on the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) definition of disability (contained within Article 1):

> 'Disability results from the interactions between persons with impairments, and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.'

Both autism and intellectual disability are to be defined with reference to a professional medical diagnosis.

New legislation would be required to set out the rights of persons with autism and intellectual disabilities.

Predicted HEC impact

(a) There would be new statutory protection of the rights of people with autism and/ or an intellectual disability. These rights might include rights around the provision of

education to children, in which case they will impact directly on the Chamber's cases. Even where specific education rights are not included, general rights (for example, a right to promotion of health and welfare) are likely to impact on all cases within this jurisdiction.

(b) The ability to base an argument on equality legislation would be enhanced where, at the very least, legislative change would highlight the nature of autism and intellectual disabilities as disabilities; this would make claims under the Equality Act 2010 more common.

(c) There would be a requirement for a medical diagnosis of autism or intellectual disability before rights would apply.

2. Legal capacity (section 2.3 of the Review)

It is suggested that the test for considering legal capacity (the authority to use legal rights) for everyone should be the same. This means that the legal authority of persons with autism or an intellectual disability to exercise a right would not be judged with reference to their diagnosis, but rather with reference to whether it is necessary and proportionate for the state to limit the person's authority to exercise that right. That test would be the same test for every citizen.

Predicted HEC impact

This change would have an impact on how capacity is assessed for those with autism or an intellectual disability. The UNCRPD 'rights, will and preferences' ('RW&P') test will be the key factor. It would lead to a different approach to assessment of the right of a child or young person to make a co-ordinated Support Plan (CSP) reference or to make a claim under the Equality Act 2010.

3. Children (section 4.5 of the Review)

The following is recommended:

> "All autistic children and children with intellectual disability who need services for their mental health should have a right to be offered a Coordinated Support Plan. Statutory duties towards children who have a Co-ordinated Support Plan should extend to all agencies including NHS Boards, and Health and Social Care Partnerships."

In addition, the review recommends that all children's service planning should be based on the rights bestowed under the United Nations Convention on the Rights of the Child as well as those in the European Convention on Human Rights and the UNCRPD.

Predicted HEC impact

This is obvious – there would be many more CSPs than currently and many more challenges to decisions on creation, review and content of CSPs than is currently the case.

In addition, a focus on the international conventions as the basis for planning would lead to different and novel questions around whether education authorities had complied with their statutory duties.

4. Human rights assessments (section 6.1 of the Review)

The review recommends that all professionals should adopt the approach of making a 'human rights assessment' when taking a decision which may impact on any person. Although this recommendation is discussed mainly in the context of mental health law, it seems that it would apply to all persons with autism or an intellectual disability, whatever the context.

This suggestion requires that consideration of 'rights, will and preferences' would not be enough; special regard should be had to them in decision making. This would involve a proportionality assessment which would pit the limitations of a decision against its benefits.

Predicted HEC impact

It is probable that such a concept would be extended across all decision making tasks in relation to those with relevant conditions (or even for all children and certain adults). Such an assessment (presumably recorded in writing) would require to be carried out whenever a decision is being made by an education authority about the education of a child/young person.

Focus on Inclusive Communication

Lesley Sargent, Health and Education, Ordinary Member

Lesley Sargent, HEC ordinary member (specialism in speech and language), introduces the approach of "Inclusive Communication" following a recent conference of the issue.

Inclusive Communication is a communication approach that seeks to 'create a supportive and effective communication environment using every available means of communication to understand and be understood'.

At a recent conference in Glasgow, organised by the Scotland Office of the Royal College of Speech and Language Therapists (RCSLT Scotland), SLT representatives from across the country gathered to reflect on the current situation and to explore what actions are being taken at a local and national level to support Inclusive Communication in Scotland and to develop and promote the concept of Scotland as the first Inclusive Communication Nation.

An Inclusive Communication approach

- ◊ Recognises that all human beings use many ways of understanding and expressing themselves
- ◊ Encourages, supports and enables people to use whatever ways of understanding and expressing themselves they find easiest
- ◊ Encourages and enables all organisations that serve people to use whatever ways of communicating with the public that people find easiest.

The requirement for services and organisations to adopt an Inclusive Communication approach has been enshrined in multiple pieces of international and national legislation pertaining to Equality and Human Rights, including United Nations Convention on the Rights of the Child (1989), United Nations Convention on the Rights of Persons with Disabilities (2007), Education (Additional Support for Learning) (Scotland) Act 2004, The Equality Act 2010 and the Children and Young People (Scotland) Act 2014.

An Inclusive Communication approach is also embedded in local and national policy, which requires organisations and services to ensure that service users' communication needs are considered in the same way as their physical needs.

So, what does the concept of an Inclusive Communication Nation mean and what progress has been made towards achieving this in Scotland?

The concept of an Inclusive Communication Nation is one where communicating

with others is made easy for everyone, everywhere, all of the time.

Since 2006, there has been a groundswell in organisations and stakeholder groups driving forward a vision of Scotland as the first Inclusive Communication Nation. Their work has included the development of standards and indicators, such as RCSLT Five Good Communication Standards; awareness-raising campaigns, such as Now Hear Me and Talk for Scotland; and the development of an Inclusive Communication Alliance and an Inclusive Communication Hub.

In 2011, the Scottish Government produced an information and self-assessment tool on inclusive communication for public authorities.

More recently, the Social Security Act (2018) included an item on 'Recognition of the importance of inclusive communication', which noted that:

'….in fulfilling their duty under section 3(a), the Scottish Ministers must have regard to the importance of communicating in an inclusive way'.

Further… **"**communicating in an inclusive way" means communicating in a way that ensures individuals who have difficulty communicating (in relation to speech, language or otherwise) can receive information and express themselves in ways that best meet each individual's needs.'

In other words, there is a legal requirement to ensure that individuals who have difficulty with any aspect of speech, language or communication are consistently supported to receive accessible information and to express themselves in ways that best meet their individual needs.

In response, 2018 also saw the launch of the UK Communication Access symbol, which can be used by organisations to advertise that they meet defined standards and that they welcome people with communication support needs.

Despite the positive progress being made with these developments, Kim Hartley Kean, RCSLT Scotland Officer, is clear that more work remains to be done. She identifies a number of key actions as part of a call for a funded Inclusive Communication strategy for Scotland:

- ◊ To establish a single, consistent set of evidence-based standards and quality operational indicators, rather than having to refer to multiple standards with regard to different communication needs;
- ◊ To establish the development of a single toolkit of resources, e.g. visuals/ symbols for universal use;
- ◊ To ensure that these are widely implemented across organisations and used as the basis for training, self-assessment and audit;
- ◊ To ensure that the standards and indicators provide an effective tool for measuring outcomes and impact on people's lives;
- ◊ To enshrine these standards and indicators in the legislation.

What are the implications for Health and Education Chamber Tribunal members? Clearly, it behoves us all, in our professional capacities, to reflect on how we can contribute within our organisations. The development of the children's section of the Health and Education Chamber's website, (*needs to learn*), is a positive example of accessible information; it also reminds us of the challenges organisations face in ensuring that their communications are accessible and inclusive. There is ongoing work to ensure that tribunal processes and documentation are accessible to users. We can all keep ourselves informed about the principles of good communication and mindful of both our own communication with others and the needs of the people we encounter, which may not always be evident.

Standards for Inclusive Communication

1	**Make me welcome** **Respect** my communication difficulty, **engage** and **support** me and **don't make assumptions**
2	**Give me time** Be **patient,** give me time to communicate, do not rush or ignore me
	Speak directly to me Speak **to me** (rather than to the person with me) with appropriate **eye contact**
4	**Listen carefully** Pay attention and **ask me to repeat** if you do not understand**. Check I have understood.**
5	**Adapt your communication if needed** You may need to use **gesture**, slow your speech and emphasise important words. Ask what helps.
6	**Use written or picture information to support the communication** When needed, use **pictures**, write things down in plain English, and provide **accessible information** in the appropriate form. Offer alternative ways of communication.

References:

http://inclusivecommunication.scot/ Scotland's Inclusive Communication Hub

http://www.scod.org.uk/scotdeaf/wp-content/uploads/2015/04/Inclusive-Communication-Nation_2015-1.pdf Essay on Inclusive Communication
http://www.legislation.gov.uk/asp/2018/9/contents/enacted Social Security (Scotland) Act 2018

https://www.rcslt.org/home/policy/communication-access-uk Communication Access UK

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

Derek Auchie, Health and Education Chamber, Legal Member

In the second part of this series of discussions (to be dealt with across the next few bulletins), Professor Derek P Auchie, HEC In-House Convener, points to some provisions which exist in UK legislation other than the 2004 and 2010 Acts, and which could be relevant to consideration of HEC references and claims.

One of the disadvantages to operating within a particular statutory regime is that it is easy to overlook provisions in statutes falling outside that regime. In this and subsequent articles, I will discuss provisions in other Acts which could be relevant to some 2004 and 2010 Act questions.

In this article, I will discuss certain sections of the Children (Scotland) Act 1995 ('the 1995 Act').

(a) Relevant provisions of the 1995 Act

Under s.22 of the 1995 Act, headed 'Promotion of welfare of children in need', local authorities are required to safeguard and promote the welfare of children in their area who are in need. This duty is to be met by providing a range and level of need appropriate services[1]. Among the factors to be taken into account in complying with this duty are the child's cultural and linguistic backgrounds.[2]

The 1995 Act defines a child who is 'in need':

"[a child being in need means] being in need of care and attention because -

(i) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development unless there are provided for him, under or by virtue of this Part, services by a local authority;

(ii) his health or development is likely significantly to be impaired, or further impaired, unless such services are so provided;

(iii) he is disabled; or

(iv) he is affected adversely by the disability of any other person in his family"[3]

[1] 1995 Act, s.22(1)
[2] 1995 Act, s.22(2)
[3] 1995 Act, s.93(4)

It seems clear that 'development' includes educational development. In addition, the term 'local authority' is a reference to the local authority as a whole[4], including in the performance of its education, social work and health functions.

The term 'cultural background' is not defined, but it might include way in which the child has been raised and the views of the child's parents around the type of education the child requires. If viewed in this sense, it could include the educational aspirations of both the child and her/his parents, including on the question of whether child should be educated within a strong academic framework on one hand or within one which emphasises vocational skills on the other.

The term 'linguistic background' might be properly interpreted as a reference to the native tongue of a child; but it could also refer to a child's linguistic ability: the ability to communicate by language.

Further, services provided under s.22 must be designed:

"(a) to minimise the effect on any -

(i) disabled child who is within the authority's area, of his disability; and

(ii) child who is within that area and is affected adversely by the disability of any other person in his family, of that other person's disability; and

(b) to give those children the opportunity to lead lives which are as normal as possible."[5]

For present purposes, 'disabled' means chronically sick or disabled or has a mental disorder (as defined in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)).[6]

There is no requirement for the child to be disabled in order for s.22 to apply (although that definition as in s.23(1) *might* apply); all that is required is that the child is 'in need'. Given the breadth of the definition of this term, many of the children whose education the HEC considers would fall within that group.

(b) Nature of the duties under the 1995 Act, s.22

It is clear from case law under the 1995 Act that the relevant duties are general in scope and should not be viewed purely in the context of the needs of an individual child. Lady Smith explained this in an Outer House judicial review decision:

"In providing, in section 22(1), that a local authority has a duty to

[4] 1995 Act, s.93(1).
[5] 1995 Act, s. 23(1).
[6] 1995 Act, s.23(2).

> 'safeguard and promote the welfare of children in their area who are in need' by 'providing a range and level of services appropriate to the children's needs', Parliament has chosen to use the language of generality. The subsection is not concerned with the needs of individual children. It refers only to a class, 'children in need', and not to the needs of the individuals within that class, which are liable to vary and may conflict. The use of the word 'appropriate' clearly confers discretion on the local authority…. The import of the statutory provisions is that every local authority can be expected to have a system for the provision of reasonable services to children in need in such a way that, as a generality, it can be said to be providing what is appropriate for that class of children in their area to promote their welfare. Not everything that every child needs requires to be provided for by the local authority."[7]

This does not mean that the duties are not applicable in individual cases, it means that they should be viewed generally, as relating to the group of children in need within the particular local authority area.

Where this issue is raised in any HEC case, this means that the tribunal ought to seek evidence of how provision in the relevant subject area is made by the particular local authority. Then the impact of that general approach should then be considered in the context of the particular child.

With this in mind, I will consider some examples.

(c) Relevance of the 1995 Act provisions to HEC cases

In a placing request reference, the question of whether the local authority has complied with the duties could affect the appropriateness of placing the child in the specified school (stage 2 of consideration of such a reference). It could be argued that the necessary provision would be in place in the specified school, and failure to comply with a duty under s.22 in relation to a child's education in the current school is a factor in the appropriateness balance.

In a co-ordinated support plan (CSP) reference, the duties on the local authority under the 1995 Act might be relevant in considering the content of that plan as it relates to, for example, social work or health input. Where a duty to make provision for a child in need under s.22 exists, it would not be difficult to argue that such provision ought to be recorded in the child's CSP, where it would contribute to the child's educational objectives. In addition, a duty under s.22 of the 1995 Act may fall upon the education authority (as part of the local authority); once again, this

[7] *Crossan v South Lanarkshire Council* 2006 SLT 441; 2006 Fam LR 28 at para [20], cited with approval in Kenneth Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edn, SULI 2013) at para 15.03.

could translate into material in a CSP.

For Equality Act 2010 claims, a responsible body might be acting in a discriminatory manner in the way in which it provides services in compliance with its s.22 duties. This could be argued especially if, in doing so, it could be said to be putting children without a disability at an advantage compared to disabled children.

(d) Conclusion

It seems that the application of the 1995 Act s.22 duty (as interpreted in s.23) is rarely applied in the context of the education function of a local authority[8]. There is no obvious reason for this, other than the fact that it does not appear in education legislation. That may be an obvious reason, but it is not an acceptable one; all relevant statutory duties ought to be in discussion in all of our cases.

[8]The *Crossan* case, note 7 above, was about after school care provision. Other reported cases relate to, for example, housing, adoption and fostering, asylum and parental contact.

Children and Young People: News and Developments

COVID-19 has understandably dominated the headlines over recent months. There are however some interesting developments in areas of law and policy in Scotland in relation to children and young people that members may find useful or of interest. Members should note that some of the timescales stated may be subject to change at the time of publication.

The Additional Support for Learning Review

The review of the implementation of additional support for learning (ASL) in schools was announced in January 2019. This review, led by Angela Morgan, considered current evidence and engaged with a range of people (including our President) and groups to identify good practice and further improvement in ways that children and young people with additional support needs progress their learning. A report was submitted to Scottish Ministers and COSLA at the end of February and it is anticipated that a further report with recommendations for next steps will be published in the Spring of 2020.

https://www.gov.scot/groups/additional-support-for-learning-review/

Scottish Government responds to Commissioner for Children and Young People's (CCYP) investigation into the use of restraint and seclusion in schools

Members will recall a previous article we published highlighting the 'No Safe Place' report produced by the CCYP last year. This report recommended, amongst other things, that the Scottish Government produce effective and human rights compliant national guidance to direct local authorities, schools and staff in the lawful use of restraint and seclusion. This was followed by intervention taken by the Equality and Human Rights Commission (EHRC) in August 2019, where the EHRC also supported a Judicial Review raised in the Scottish courts.

The Scottish Government has now agreed to produce human rights-based guidance on restraint and seclusion which will also involve children, young people and their families. The Government has also agreed to consider statutory action should the guidance be ineffective and to further develop a standard dataset across Scotland to ensure consistent recording and monitoring of such incidents.

The guidance is expected to be developed and available later this year. Our President is a member of the guidance drafting group.

https://cypcs.org.uk/news-and-stories/scottish-government-heeds-calls-to-protect-children-from-unlawful-restraint-and-seclusion-in-schools/

Access to Counselling in Secondary Schools -Scottish Government Guidance

New guidance was issued by the Scottish Government in March this year for

education authorities on access to counselling within schools. The guidance aims to provide an overarching framework and context for designing and developing access to counsellors in schools service. Education authorities are now expected to develop their own policy and guidance and can draw on the new document as a guide.

The counselling service is a universal service and should be available to all secondary school pupils and primary, additional support needs school pupils aged 10 and over. These services are expected to complement the range of other whole-school and targeted approaches already available in schools to help support the mental, emotional, social and physical wellbeing of children and young people.

https://www.gov.scot/publications/guidance-education-authorities-establishing-access-counselling-secondary-schools/

Mental Health Law Review:

A review is currently underway of mental health law in Scotland. Set up by the Scottish Government in March 2019, the review is being conducted independently under the chairmanship of John Scott QC. The review plans to examine the rights and protections for people with mental health conditions (which includes children and young people) along with how to remove barriers to those caring for their health and welfare. It seeks to reflect people's social, economic and cultural rights in its consideration of mental health, incapacity and adult support and protection legislation. Organisations and individuals are encouraged to respond and recount their experiences to the review with a deadline set for the 29 May 2020. Any members who wish to respond should do in their own personal capacity.

https://consult.gov.scot/mental-health-law-secretariat/review-of-mental-health-law-in-scotland/

Pre-recording of child evidence in now in force:

New legislation ensuring that any child witness in the most serious criminal cases will have their evidence pre-recorded came into force on the 20 January 2020.

The change, which applies to certain cases in the High Court, will spare under 18s the potential trauma of giving evidence during a trial. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act was passed unanimously in May 2019.

The changes mean that more children will be able to give pre-recorded evidence in an environment more suitable to their needs and reduces the time that they may have had to wait in court to give evidence or the need to face the accused. Pre-recording of children's evidence will take place within the new Health and Education Chamber sensory hearing rooms.

The Scottish Government are closely following the Scandinavian "Barnahus" model, which HEC members will be familiar with from previous training events.

https://news.gov.scot/news/vulnerable-witnesses-act

Membership News

Sheriff Joseph Hughes, former member of the HEC, was installed as Sheriff at Greenock Sheriff Court on 18 November 2019.

HEALTH AND EDUCATION CHAMBER GUIDANCE

To Members

PGN 01 2018 Views of the Child

PGN 02 2018 Capacity and Wellbeing

PGN 03 2018 Independent Advocacy

PGN 04 2018 Adjournments

PGN 05 2018 Postponements, Suspensions and Procedure

PGN 06 2018 Conference Calls

PGN 01 2019 Asking the Child Questions

PGN 02 2019 The Child and the Hearing

PGN 01 2020 Hearings and the COVID-19 Outbreak

PGN 02 2020 Remote hearings and COVID-19

To Administration

PGN *to Administration and Parties* 01 2019 Documentary Evidence

Information Notes

01 2018 Parties, Representatives, Witnesses and Supporters

02 2018 Claiming Expenses—Representatives

03 2018 Making a Disability Discrimination Claim

04 2018 Making a Reference

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@scotcourtstribunals.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 2020** and any contributions must be submitted no later than **mid-September 2020.**

Disclaimer

The Health and Education Chamber (HEC) seeks to ensure that the information published in the Bulletin is up to date and accurate, however, the information in the Bulletin does not constitute legal or professional advice and the HEC cannot accept any liability for actions arising from its use.

The views of individual authors are theirs alone and are not intended to reflect the views of HEC.