



The Bulletin



The Bulletin

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Foreword

May Dunsmuir

Chamber President

Dear members,

As I write, I hear the radio announcing the number of days until Christmas! I am not sure about you, but I feel as if spring was just yesterday. I hear my mother's voice as I write – she always reminded us how many days were left until Christmas – but she also said “It won't be long until springtime”. It is my habit to start to count the extra minutes of daylight once the shortest day has passed. I realise in this that I must prefer the lighter nights to the darker ones. However, I do enjoy my log burner (now loved even more as it is compensating for the reduction in the central heating dial) and I do enjoy a good read in the darker evenings. I appreciate that I am in a far more fortunate position than those who are struggling during this cost of living crisis. We read in this Bulletin that the Scottish Children's Services Coalition (SCSC) is warning of a child mental health 'emergency' caused by the cost-of-living crisis, driven by increasing energy costs (page 27). This is a stark reminder of how external events, outwith our control, can fracture our children's' health.

We reflect on this in our pandemic report, *Justice Delivered*, (published in October) and we see this in our case types. I have never known a time when there is evidence of so many extenuating factors. Proof that whatever is shaping society has an impact on our children, especially those with additional support needs. Angela Morgan's article is very compelling here (page 8). I cannot agree with her more that, “We need to move away from conceptualising those with additional support needs as a costly afterthought, continuing to deny reality and failing to meet the needs of nearly a third of our school-age children. Instead, we need to refocus the vision on the children my review considered, understanding them as mainstream, not 'additional'”.

Case volume

You will read from Elaine Forbes (page 5) that our case volume continues to increase and as I write, we have now exceeded all previous year totals, with five months remaining in this reporting year. This is placing us under some pressure but we have systems in place to shore us up. Our casework team has more support. Our legal members are increasing their capacity where possible and our specialist members are making themselves available for more hearings.

Some parties, including education authorities and the national representation agency, Let's Talk: ASN, are feeling the effects of this rise. However, we must

remain mindful that our overriding objective (rule 2) places a duty on us to decide cases efficiently, without delay. With that in mind, we must resist motions for extension or delay which are based on a party's "workload". This is a matter for parties to resolve within their own agencies.

Hearing cancellations

We have seen a number more hearings cancelled late. As an example, in the past month, three of my cases have settled, two within the week before the hearing.

I am monitoring this to identify whether there is a place for President's guidance. Some jurisdictions have guidance, which bars motions the week before a hearing, including motions to withdraw. This means that parties have to work within a slightly shorter time to settle their cases, and it could reduce the amount of preparation work for Tribunal members.

I will also be monitoring the reasons for cancellation, to identify if there are any patterns, for example, late settlement with placing requests granted in specific education authority areas.

Phase 2 hearings

Phase 2 hearings commenced on 1 October 2022 and a number of these have been booked. I will monitor these before deciding when we can return to a fully in-person hearing option. When phase 2 has been completed, I will issue new guidance in 2023, setting out the different hearing types (remote, hybrid, in-person).

Member re-appointment process

A number of you will receive emails from Lynsey prompting you to complete your re-appointment and Disclosure forms (the class of 2018 is about to become due for re-appointment). Please attend to these promptly. The good news is that our re-appointment process is now more straightforward, but we do need to make sure that we have everything administratively in place, in time.

Member training and review

Despite all of the challenges this year, our training model remains topical and relevant and our member reviews continue to take place. Our member reviews feed directly into our training plans. So please continue to highlight areas you would like to see covered.

Our next all member training will take place in-person – the first since 2019. We have a very interesting day lined up for you. We listen carefully to member feedback and the National Autism Implementation Team (NAIT), who were commended in one of our earlier training days, will form the foundation of this event. I look forward to seeing you in Glasgow and to finally having an opportunity to say hello in person, to hear how your families are growing, the books you are enjoying and the holidays you have planned! There is also an opportunity to chat to

me about any thorny issues or any improvements you would like to see.

Until March, have a lovely festive break when it arrives. I hope you have time to rest, to recuperate and to enjoy time with the people who matter most to you. For the readers, find a good book (and let me know any you would recommend) and relax. For the readers of 'tartan noire' I have just finished a run of Lin Anderson books. I met her when I popped out after our 'new' member induction-training event in Glasgow in 2018 and bought her new book (signed to my husband) as a gift. You never know what extra bonuses your training will bring!

With every good wish,

May



Health and Education Chamber Update

Elaine Forbes, Operations Manager

Scottish Courts and Tribunals Service (SCTS)

Elaine Forbes, Operations Manager for Glasgow with the Scottish Courts and Tribunal Service, highlights developments and staffing changes within HEC.

I have really enjoyed my time in the HEC since the last Bulletin and have been involved in various projects that will further enhance the service we provide to the Chamber. The casework team have spent time conducting continuous improvement events to ensure they provide an efficient service. In previous roles, both within the SCTS and prior to this with HMCTS, as a fully qualified Continuous Improvement Officer, I supported the team alongside the Improvement and Learning Officer to facilitate a value stream mapping event. This event allowed the team to work together to identify any improvements to the processes with the overall aim to provide a better service to our stakeholders.

Team and performance

During the first half of this reporting year, there has been a rapid increase in the receipt of applications with a total of 132, by the end of September which can be broken down into 123 references and 9 claims. This is 35 more than our highest rate received in the year 2019/2020 (97).

To support the casework team due to the sharp rise in applications, we have appointed two part time case officers, Margaret Scally and Julie Burton, who have been trained and will assist with key tasks.

The casework team continues to work remotely with some days in the office at the Glasgow Tribunals Centre (GTC).

Hearings

The first Phase 1 hearing took place during May 2022. The team worked alongside the hearings team to ensure the sensory hearing suite and equipment were ready and conducted a practice session to test the hybrid hearing platform. The hearing took place successfully.

Phase 2 hearings commenced in October 2022. The casework team are working directly with the hearings team to ensure the hearings clerk is prepared, as well as ensuring the sensory hearings suite facilities are ready for use.

HEC Needs to Learn Animations

A working group was formed earlier in the year to plan for the creation of four short animations that will be uploaded to the *needs to learn* website, using the existing



range of *needs to learn* images. It will see the characters brought to life.

These animations will assist children and young people with additional support needs to learn about the tribunal process and bring the concept of a tribunal to life based on social stories.

A specialist company was appointed to create the videos. To support them in the bespoke requirements and with the use of the social stories, the group created four scripts.

The first draft of the four videos have been created and we provided a demonstration of one of these at this year's Tribunal Forum.

The videos will be launched on our *needs to learn* website in the near future.

DATES FOR YOUR DIARY

All Members' Conference (in-person) **23 March 2023**

Hilton Hotel, William Street Glasgow



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Rise to the challenge

Real change for children with support needs will only happen when we challenge the status quo

Angela Morgan, OBE CQSW and Independent Chair of the Review of Additional Support for Learning in Scotland 2019 - 2020

Two years on from her independent review, Angela Morgan reflects on the importance of a values-driven approach, and what inclusion really looks like. This article was originally published in the summer 2022 edition of Insight, the membership magazine of national charity Children in Scotland.

At the end of February 2020, I submitted my report ¹ on the Review of the Implementation of the Additional Support for Learning (ASL) legislation in Scotland to the Deputy First Minister. Two years later, I still have very strong recollections of the distress and frustration shared with me by children, parents, teachers and other frontline practitioners. Many of them evidenced Additional Support for Learning as not equally valued or visible within Scotland's education system.

In the context of continuing political and media obsession with measuring attainment in the form of qualifications (as a proxy for education and learning), one of the primary consequences is a performance measurement which drives and disguises exclusion. It has led to processes which label, stigmatise and set thresholds for access to help only when at crisis levels, instead of supporting and facilitating early intervention.

Many of the implementation processes are in complete contradiction to the spirit and ethos of the ASL legislation. Fundamentally, the legislation is about the right of all our children and young people for recognition, inclusion, and help to flourish and succeed on their own terms. Yet I found thresholds requiring clinical diagnosis even for acknowledgement of a need and a focus on planning. These bore little relation to consequent action though complied with plan completion targets – a prime example of the wrong measures driving the wrong behaviours.

Behind these contradictions and implicit in the current approach to implementation of Additional Support for Learning is a deficit model of thinking. The belief that the purpose of 'additional support' is to supplement or replace a deficit in the child which prevents them from succeeding by narrow standards of attainment and qualifications. While there is no shortage of good – sometimes excellent – policy and guidance on inclusion, what actually gets measured, and the standards by which children, teachers, school leaders are judged and compared as 'successful', are exam results.

¹ Additional Support for Learning Review Report - <https://webarchive.nrscotland.gov.uk/web/20210425012928/https://www.gov.scot/groups/additional-support-for-learning-review/>

My heart sank when I read that the Scottish Conservatives have called for school funding to be more closely linked to ‘pupil performance’, presented as an incentive for schools to innovate. This is another contradiction. During my review, senior advisors told me that all politicians’ postbags are stuffed with letters from desperate parents and carers of children who do not fit in, yet we still see this mindset that assumes children are units of formal learning ability. This approach also does nothing to acknowledge, account for and respond to the corrosive effects of poverty and inequality in family and community life outwith the control of education. Nor does it account for the increase in children expressing distress through behaviours which cause harm to themselves and to others. During the review I heard some shocking comments about “bad” and “undeserving” poor children and their families and a strong and unapologetic lobby for their exclusion.

There are deeply uncomfortable issues around behaviours which must be openly debated and considered in the context of all children’s rights and employer responsibilities. There are hard questions with no right answers in a world where there will never be enough resources. A huge part of school and learning experience is social; it is a public service delivered in a group setting. But what are the limits and where are the edges?

A headteacher once said to me:

“Schools need to be ready for children and young people as they are, not as we think they should be...there is a fantasy that someone out there can fix things... sprinkle magic dust and make the challenges go away”.

So what *do* schools need to look like now that 32.3% of children in Scotland are identified as in need of additional support for learning? How do we protect and ensure the right to flourish equally whether in or out of mainstream provision?

What inclusion is *not*, is a veneer of performance measurement focused on keeping bodies in buildings, too often resulting in senior school staff containing distressed, disruptive children in their offices.

You needn’t look far to see where there is a fundamental breakdown in delivery of the values underpinning rights and inclusion. News earlier this year around the Andrew G Webster QC report to Borders Council on their handling of school assault allegations is a lesson in the consequence of leadership disconnected from values and purpose.

What I found repeatedly was that protection against system failures for children who do not fit the standard model came from principle-driven individuals and teams showing leadership at all levels. It came from people who really knew and *liked* the children, who valued their own role and responsibility and who were determined to do the best for them.

He “just cared”, or “she just got it”. These are the human connections and relationships creating value and visibility for children who do not fit the mould.

The future of education is currently under scrutiny in Scotland. This is a chance for change. We need to move away from conceptualising those with additional support needs as a costly afterthought, continuing to deny reality and failing to meet the needs of nearly a third of our school-age children. Instead, we need to refocus the vision on the children my review considered, understanding them as mainstream, not ‘additional’. Then, as the children and young people in the review told me, we can be confident of benefit to *all* children.

For more information, including how to subscribe to the bi-annual publication, please visit <https://childreninscotland.org.uk/insight-landing-page-public/>

Health and Education Chamber Legal Members appointed to new roles at Mental Health Tribunal for Scotland

HEC legal members Collette Gallagher and Deirdre Hanlon were appointed as in-house conveners (IHC) to the Mental Health Tribunal for Scotland (MHTS) in May of this year. They have shared some insights into the role and the benefits it has brought to their work within HEC.

Deirdre

Having sat as a Convener at MHTS since 2013 I hope to bring that experience along with that of the HEC to my new appointment as IHC at MHTS.

The work is varied and involves amongst other things supporting and advising caseworkers, clerks and other legal members as well as working with the President's Office. Decisions require to be made on certain cases, often very quickly.

I have gained an invaluable insight into the amount and quality of the work required when applications and appeals are first submitted to the Tribunal. The role of casework, IT, scheduling and other support services often remains unseen to Tribunal members. This has made me think more about all of the work that takes place within the inner workings of HEC, particularly within our own casework team. Given the increase in the volume of work within our Chamber at present, I appreciate more than before, how challenging this must be for the HEC casework team and I have a great deal more insight into the amount of work required by our caseworkers before the tribunal are presented with the bundle.

One of the other benefits of sitting across a number of jurisdictions (as a number of our members do), is that the learning and experiences in one jurisdiction can support and positively influence our work within another. I am sure this will continue to be the case for me.

Collette

Having only been appointed to the MHTS in January of this year, I was not expecting to be appointed as an IHC when I applied in May. However, having sat within HEC since 2018, I was able to demonstrate that I had developed the transferable skills needed for this role.

Within the IHC role I regularly use my experience from HEC cases across to the MHTS, particularly in relation to case management. Often as an IHC we require to support caseworkers with complex cases. I have used the skills gained within HEC for this purpose. It is clear that a huge amount of experience is gained from sitting in a different jurisdiction

Like Deirdre, I have a much better appreciation now for how hard the President, the HEC In-House Legal Member, and HEC caseworkers work to ensure we are all supported in our roles.

I look forward to continue to develop my tribunal craft in both jurisdictions and sharing the learning gained from each.

Cowie and Others v Scottish Fire and Rescue Service

Muriel Robison

Health and Education Chamber, Legal Member

Muriel Robison, Health and Education Chamber Legal Member, full-time Employment Judge, and regular contributor to our Bulletin, provides some useful commentary on the question of what might constitute ‘unfavourable treatment’ in terms of section 15 of the Equality Act 2010.

We might assume that identifying ‘unfavourable treatment’ is the easiest part of fulfilling the test to establish discrimination arising from disability under section 15 of the Equality Act 2010 (the Act), but a recent decision of the Employment Appeal Tribunal (EAT) cautions us to give careful consideration to that question.¹

In the recent Bulletin² on COVID-19 related issues in the employment tribunal, I discussed the case of *Cowie and others v Scottish Fire and Rescue Service*³ which concerns the response of the Scottish Fire and Rescue services to difficulties encountered because of the pandemic. In particular, given the need for a number of staff to remain at home because they were shielding or for childcare reasons, in respect of those who were unable to work from home, the respondent adapted their pre-existing paid special leave policy to allow such employees to continue to be paid notwithstanding their inability to work at home.

To be entitled to paid special leave under the policy, employees were required to use any accrued annual leave and time off in lieu (TOIL) first. The employment tribunal decided this was unfavourable treatment because the claimants had no choice over when to use their TOIL and annual leave, when others had special leave paid immediately and had the benefit of a payment for the time they had worked.

When considering an appeal on whether this amounted to unfavourable treatment, the EAT confirmed the correct approach to section 15 by reference to dicta of Lord Carnwarth in the Supreme Court’s decision in *Williams v Trustees of Swansea University Pension & Assurance Scheme*,⁴ that section 15 “appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to

¹ *Cowie and others v Scottish Fire and Rescue Service* [2022] EAT 121

² [HEC Bulletin 8th edition at page 14](#)

³ [ET/4105098/2020](#)

⁴ [Williams v Trustees of Swansea University Pension & Assurance Scheme](#) [2018] UKSC 65

the claimant”.⁵ [see discussion in previous bulletin]

The crucial question, the EAT identified in this case, was that posed at (1), namely what was the relevant treatment? Was the relevant treatment the need to use TOIL and/or annual leave at a time not of their choosing, which the EAT accepted was unfavourable treatment, or was the relevant treatment access to the paid special leave policy (paying a worker to stay at home and not carry out any work), which as the EAT pointed out, the employment tribunal had accepted was favourable treatment.

The EAT decided that the employment tribunal had erred in concluding that the relevant treatment was the requirement to use TOIL/annual leave as a precondition of entitlement to paid special leave. This was because there was no general requirement for the claimants to use TOIL and/or leave at a time of the respondent’s choosing; rather the specific requirement to exhaust any accrued TOIL and or leave arose only when the claimants sought to access paid special leave. The two matters, the EAT concluded, were inextricably linked, and it would be artificial to consider the requirement to use accrued TOIL and/or annual leave separately from the entitlement to paid special leave.

In *Williams* the Supreme Court concluded that to focus on the method of calculation of the pension was to artificially separate that treatment from the award of a pension to which it gave rise, which the claimant was only entitled to because of his disabilities. Similarly, here the claimants were granted an entitlement to paid special leave when they were unable to work because of their disabilities. That was an advantage they would otherwise not have enjoyed during those periods of absence.

While the employment tribunal had made comparisons with the treatment of the claimants if different terms of entitlement had applied, that, said the EAT, was not the question. The advantage provided by the paid special leave could have been improved by removing the preconditions for entitlement but that did not amount to unfavourable treatment by virtue of the fact that it could, hypothetically, have been even more favourable. Further, the favourable treatment of the special leave policy did not become unfavourable because some beneficiaries (including those in the same position as the claimants) might not have had to give up any accrued TOIL or annual leave because they had already used it up. The EAT found that the preconditions of entitlement were the same for all potential beneficiaries and the claimants suffered no disadvantage because of something arising in consequence of their disabilities.

⁵ <https://www.supremecourt.uk/cases/docs/uksc-2017-0141-judgment.pdf> (at paragraph 12, page 6)

Thus this case is a good illustration of the application of the principle established by the Supreme Court in *Williams*, where Lord Carnwarth confirmed that treatment would not be unfavourable simply because a claimant thinks he should have been treated better.

The correct identification of the relevant ‘treatment’ is important for the other elements of the test, because a tribunal must go on to determine whether the treatment was because of something connected with the disability. Here the something arising in consequence of the claimant’s disabilities was the inability to work and the treatment meted out by the respondent because of that inability to work (the something) took the form of the paid special leave policy.

It is important to note that, so long as the relevant ‘treatment’ is identified, the threshold to establish whether it was unfavourable is a low one, and while objective, it has a subjective element, so the claimant’s perception is relevant.

Often the relevant treatment and the fact that it is unfavourable will be self-evident, such as an exclusion from school, but there will be occasions when the question relates to an opportunity or benefit targeted at those with disabilities, but accessible only to those who fulfil certain conditions. One example might be where a school offered extra classes on a particular literacy system to pupils with dyslexia, which might require certain conditions to access or where the pupil might benefit from more such classes.⁶ In such a case, a tribunal must avoid the trap of focussing on the conditions for the entitlement of a school pupil to the benefit, rather than the benefit or opportunity itself.

⁶ See for example the conclusion of the tribunal in [ASN D 20 08 2020](#) at paragraph 162

Draft Guidance on the Use of Physical Intervention in Schools

Iain Nisbet, Solicitor, Cairn Legal

Iain Nisbet, a regular contributor to our Bulletin, provides a useful update and commentary on new draft guidance.

The Scottish Government has recently issued a consultation on draft guidance on the use of physical intervention in schools. It is planned that the guidance would form Part 3 of the *Included, Engaged and Involved* guidance suite (Part 1 dealt with attendance and absence, and Part 2 exclusions).

This follows a call for national guidance, which was one of the key recommendations of the *No Safe Place* report, issued in December 2018 by the Children and Young People's Commissioner Scotland (CYPCS). This was the Commissioner's first statutory investigation and focused on the issue of restraint and seclusion in Scotland's schools.

The report was critical of the position it found:

“...we are deeply concerned that significant physical interventions may be taking place in some authorities without any kind of policy or procedure at local authority level to ensure the lawful and rights-compliant treatment of children.”¹

The draft guidance aims to be both ‘relationship based’ and ‘rights based’ and includes an Annex on the legal framework for restraint in schools, which notes, “Education providers must therefore ensure that they comply with the provisions of the 2010 Act in relation to any use of physical restraint in schools.”² This is a matter which has been considered by the Additional Support Needs Tribunal in relation to both independent and public schools.

The most recent case from the decisions database to consider these issues was a case brought against an education authority as the responsible body for a mainstream primary school ([FTS-HEC-21-AC-0072-MERITS](#)). The case was brought by the father of a disabled child who had been subject to several incidences of physical intervention at school and had been formally excluded from school on one occasion.

¹ [No Safe Place: Restraint and Seclusion in Scotland's Schools](#), page 14

² [Included, engaged and involved part 3: A relationship and rights based approach to physical intervention in Scottish schools](#) (Scottish Government, draft, June 2022), page 41

Cases brought to the Tribunal in relation to physical intervention are likely to rely on section 15 of the Equality Act 2010 (discrimination arising from disability). There are three elements:

- Has the school treated the pupil unfavourably? (s.15(1)(a))
- Was the unfavourable treatment because of something arising in consequence of the pupil's disability? (s.15(1)(a))
- Can the school show that the treatment was a proportionate means of achieving a legitimate aim? (s.15(1)(b))

Unfavourable Treatment

The Tribunal has found that the use of restraint on a vulnerable child is intrinsically unfavourable. In the case [ASN D 14 01 2021](#), the tribunal noted:

“In some cases it is possible to proceed with the view that some treatments are automatically unfavourable. This is one such case. The use of any form of physical restraint (whether standing, sitting or floor – supine or prone) on a vulnerable child is intrinsically unfavourable. We agree that it is difficult to think of a reason why it could be considered otherwise.”³

This aligns closely with the approach taken by the Commissioner in the *No Safe Place* report: “Restraint is an interference with the child’s right to respect for their private life under Article 17 of the Convention on the Rights of Persons with Disabilities, Article 16 of the United Nations Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights. These rights also include the right to respect for bodily integrity, a principle which sums up the right of every human being to autonomy and self-determination in regard to their own body.”⁴

The *FTS-HEC-21-AC-0072-MERITS* case also specifically considers the unfavourable treatment of missed opportunities, finding that the responsible body “...denied the child the opportunity to benefit from a proper recording system of distressed behaviours...” and “..denied the child the opportunity to benefit from being handled by staff members of school A who were adequately trained in accordance with the responsible body’s policy on the use of restraint..”⁵

Arising in consequence of B’s disability

This is, of course, a question of fact to be determined in each individual case. The task of determining whether conduct by a pupil arose in consequence of the pupil’s disability is not an easy one. In many cases, however, there will be sufficient

³ <https://www.healthandeducationchamber.scot/additional-support-needs/decisions/332>, paragraph 42

⁴ No Safe Place: Restraint and Seclusion in Scotland's Schools, page 23

⁵ <https://www.healthandeducationchamber.scot/additional-support-needs/decisions/379>, paragraph 2

evidence suggesting a link between (for example) a child's ADHD and their distressed behaviour. In such cases, this evidence may be sufficient to place the onus of proving that the pupil's behaviour did not arise from their disability on the education authority (section 136 of the Equality Act 2010, cf. *Akerman-Livingstone v Aster Communities Ltd.* [2015] UKSC 15, per Lady Hale at para 19.)

There is a danger of schools trying too hard to categorise a child's behaviour as 'deliberate' or 'wilful' which can lead to both practical and legal difficulties. In the *FTS-HEC-21-AC-0072-MERITS* case, the tribunal noted:

"This unreliable approach to attributing the cause of the child's behaviour led to treating the child unfavourably. In essence, [it] amounted to blaming the child for behaviour which arose from a disability preventing him from exercising control over his actions. ...This is the language of negative consequences for actions, not the language of support for behaviours driven by a disability." ⁶

Proportionate means of achieving a legitimate aim

In most cases, the responsible body will be advancing an argument that physical intervention was used in pursuance of a legitimate aim e.g. keeping the child or others safe. This is not likely to be in dispute. The point of disagreement will be in relation to whether physical intervention was a proportionate means of achieving that aim.

The Supreme Court case of *Akerman-Livingstone v Aster Communities Ltd.* [2015] UKSC 15 sets out the correct approach to proportionality:

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?" ⁷

Added to this is "whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure." ⁸

In considering the question of proportionality it is important to consider the balance of power between school staff and pupils. As noted in the CYPSC report, "There is an inherent imbalance of power between adults and children. Children are entitled to higher standards of protection due to their age and vulnerability. .. This power imbalance is exacerbated when adults are in positions of authority and trust, and when children are particularly vulnerable due to disability or other Additional

⁶ <https://www.healthandeducationchamber.scot/additional-support-needs/decisions/379>, paragraph 80

⁷ per Lady Hale at para 28, quoting Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213

⁸ per Lady Hale at para 28, quoting Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39

Support Needs.”⁹

Questions of staff training, policies which provide adequate safeguards for disabled children, and accurate and detailed recording of incidents will all be important for any school seeking to persuade the Tribunal that the use of physical intervention was proportionate. In an earlier decision about the use of seclusion, the tribunal noted:

“There was no proper record of the use of these seclusions kept at any time by the school. Whilst the [education authority] has since devised a new policy which requires that seclusion is a risk-assessed, personalised, reported, recorded and reviewed strategy this policy was not in place when the child was secluded. The tribunal were unable to conclude upon what basis the seclusion was used as there are no records of its use, purpose or outcome in respect of it being used for the Child. In the absence of these safeguards the [education authority] were unable to demonstrate to the tribunal that the use of seclusion could be justified as proportionate to a legitimate aim in these circumstances.”¹⁰

Conclusion

National guidance will undoubtedly be of assistance to tribunals considering claims of disability discrimination in cases of physical intervention or restraint. The rights based approach adopted by the Scottish Government aligns well with the Tribunal's existing decisions.

In the review decision *FTS-HEC-AC-21-0072-REVIEW*,¹¹ we learn that the tribunal's decision would lead to 400 members of staff in one education authority undertaking relevant externally provided training with a focus on avoiding and reducing the use of physical intervention, restraint and exclusion from school and to the wholesale revision of the authority's policies on physical intervention and restraint, involving direct, meaningful input from disabled pupils who have been affected by restraint.

This is likely to have a widespread, beneficial effect on all disabled children within that local authority area and demonstrates the impact that a tribunal decision can have. Future decisions, taken in light of the new guidance, are likely to be just as important – if not more so.

Iain Nisbet is a solicitor with Cairn Legal, and part of the My Rights, My Say service. Iain also blogs on additional support needs law and policy: www.additionalsupportneeds.co.uk

⁹ No Safe Place: Restraint and Seclusion in Scotland's Schools, page 8 & page 9

¹⁰ <https://www.healthandeducationchamber.scot/index.php/chamber/decisions/274>, paragraph 3 (page 22)

¹¹ <https://www.healthandeducationchamber.scot/index.php/additional-support-needs/decisions/381>, paragraph 14



The Promise Scotland

Hazel McKellar

**Speech and Language Therapist, NHS Forth Valley and
Health and Education Chamber, Specialist (Health) Member**

Specialist member Hazel McKellar shares some of the work taking place to support keeping The Promise

I am a Speech and Language Therapist, currently seconded from NHS Forth Valley to Falkirk Council Social Work Department. I am working in the Family Placement Team which incorporates adoption, fostering and kinship care. My pilot project aims to support Falkirk Council in keeping **The Promise** to Falkirk's children who are in care. Many of you will have heard of **The Promise** and here, I share just a taster of the activity going on to support keeping **The Promise**.

In her introduction to The Promise, Chair of the Independent Care Review, Fiona Duncan states:

"Scotland cannot legislate for love, and nor should it try...Scotland must create an environment and culture where finding and maintaining safe, loving respectful relationships is the norm".¹

The Independent Care Review (Care Review) was commissioned by the Scottish Government in 2016. Between February 2017 and February 2020, the review was undertaken to figure out how Scotland could love its most vulnerable children and give them the childhood they deserve. The Care Review listened to 5,500 experiences, over half of whom were children, young people and adults who had lived in care. The rest were families and the paid and unpaid workforce. The Care Review also considered existing research on the care system and commissioned further research. It reviewed all of the legislation and rules, collected data and made connections across the roots and branches of the care system. The Care Review published seven reports, one of which was **The Promise**. On 05 February 2020, in the Scottish Parliament, the First Minister pledged to #KeepThePromise. This commitment got the support of all political parties. The children and adults who engaged with the Care Review and organisations, institutions, bodies, communities and groups all across Scotland also pledged to #KeepThePromise. It is a promise we all must keep.

The Promise is based on the premise that the United Nations Convention of the Rights of the Child (UNCRC) will underpin a whole approach to care grounded on

¹ [Independent Care Review Report: The promise](#), page 8

active and sustained application of those rights. It applies to all parts of public life including communities, health, education, social work and the justice system.

The Promise is built on four foundations:

1. **Voice** – children must be listened to and meaningfully involved in decisions about their care
2. **Family** – where children are safe and feel loved in their families they must stay and families must be supported to nurture that love and overcome difficulties which get in the way
3. **Care** – where living with their family is not possible, children must stay with their brothers and sisters where safe to do so and belong to a loving home
4. **People** – children who Scotland cares for must be supported to develop relationships with people in the workforce and wider community, who in turn must be supported to listen and be compassionate

The four foundations are surrounded by scaffolding; help, support and accountability must be ready and responsive when it is required.

The role I am currently seconded to aims to build the capacity of carers to identify and support children and young people who experience challenges with speech, language and/or communication skills. If a child experiences neglect, abuse or trauma, their development can be affected. They may not complete stages of development or consolidate fully what they are learning. We know that often language, thinking, emotions and physical skills are different to other children of the same age. Some children may present as age appropriate but when they experience stress may quickly behave as if they were much younger. I have produced a series of trainings to build the knowledge, skills and confidence levels of carers. We work through the development of speech, language and communication skill from birth to adolescence and the possible impacts of adversity and trauma on these skills. I coach the adults on ways they can change the communication environment around the child or young person to give them the best opportunities to connect and communicate. I am able to support teams around children who are transitioning from fostering to adoption to gather the child's views and to adapt child-centred plans to minimise stress to the child. I can work alongside birth parents who are on a rehabilitation plan to have their child return home. The Promise requires that Scotland must support all families caring for disabled children and those with additional support needs. If families require intensive support they must get it and not be required to fight for it.

Practice example: H is 5 years old; he suffered significant neglect and abuse in the first 16 months of his life, he requires consistent loving care and he often becomes dysregulated. H is non-verbal, which means that he does not yet communicate using words. He understands language supported by visual clues, environmental clues, routines and when the adults use Makaton signs alongside

talking. The multidisciplinary team around H requested my support to gather his views on what he wants as they seek to match him with his forever family, i.e. his adoptive family. I collaborated with H's social worker, his class teacher and his foster carer. I made a basic outline representing a home, and a circle representing family, and I used Makaton signs to introduce the concepts. H selected from sets of pictures 'who' he wants in his forever family; 'what' they will like doing; and 'what' will be in his home and garden. H was highly engaged in this activity and firm in his choices. We photographed his choices, and the photos were attached to his existing paperwork for the adoption and fostering panel.

'Scotland must understand that 'language creates realities'. Those with care experience must hold and own the narrative of their stories and lives; simple, caring language must be used in the writing of case files' ²

Scotland needs to change the language of care. There must be meaningful involvement and collaboration to ensure all professionals share a language of care and support to uphold the rights and relationships so important to children. Language must be easily understood, be positive and must not create or compound stigma. There are many pieces of work underway around changing the language of care. Our HEC legal member, Collette Gallagher, is currently the Keeping the Promise Operational Lead at the Scottish Children's Reporters Administration (SCRA). Collette is leading and collaborating on many exciting improvement projects including one looking at how we can change the language used in the Children's Hearing system. Details about the SCRA language and communications toolkit can be found on the SCRA website, www.scra.gov.uk.

All around Scotland, groups of young people who have experience of living in care are working together to tell **US** what matters to them. A group I am connected to, the Falkirk Champions Board are one such group and I commend their short video on The Promise to you all: [Falkirk Champs and the Promise - YouTube](#)

As the amazing young people in the video remind us, The Promise has been made to all of them and it is up to all of us to #KeepThePromise.

As I wrote at the start, I have only given a taster here of what is going on to #KeepThePromise. There are regular reports and updates available on www.thepromise.scot and many opportunities for us to contribute to consultations and be involved in improvement projects.

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.

² [Independent Care Review Report: The promise](#), page 69



Chamber President's Office Update

Tribunal Forum 2022

Our third consecutive online Tribunal Forum took place on 28 September 2022. Attendance was high and varied, as always, with representatives from child and parent groups, legal and education, social work and health. Our staff also attend the Forum as do a number of our judiciary.

A detailed note on the day with the presentation slides, is available on the [HEC website](#).

Letters to the child or young person

The President continues to encourage tribunal members to discuss, in each case in which a decision is issued, whether or not to prepare a letter to the child or young person affected by the outcome of the case. Five such letters have been issued since this subject was first discussed at the All Members' Conference in March 2018.

Parties can request such a letter in a particular case.

A letter to a child or young person can be prepared in any case, whether or not the recipient has provided views or evidence to the tribunal. Such a letter will always be considered in cases where the child or young person has directly participated in the hearing, or has provided views via advocacy.

The impact of letters to children and young persons affected by our decisions can be significant, and is a way to acknowledge and respect the importance of the person at the centre of all of our work.

This subject was discussed at a recent Legal Member training event, where the letters that have been issued were considered. We heard then from Marie Harrison (Senior Policy Officer for the Children's Views service, with Children in Scotland) that children and young people have valued such letters, feeling these demonstrate that they have been heard and that they are important.

Suspensions of references and claims

The President's office, as part of its regular judicial monitoring of progress of references and claims, continues to observe suspensions (pausing) of cases and

the reasons for doing so. This is with a keen eye on the duty of tribunals to avoid delay (rule 2(2)(d) of the Tribunal rules), as part of the overriding objective to decide cases fairly and justly.

The tribunal will only suspend a reference or claim where there is a genuine and short-term reason for a case not being progressed.

‘Holistic’ approach to assessing support – what does this mean?

An appeal court decision often used to justify a general ‘holistic’ approach to the comparative suitability of two schools is not authority for this approach, and is therefore sometimes incorrectly used for this purpose. The Inner House in *City of Edinburgh Council v MDN*¹ referred to the tribunal’s mention of a ‘holistic’ approach in that case. The Inner House did not endorse this approach except in relation to provision delivered in a school. This decision therefore justifies a ‘holistic’ approach only for educational and non-educational support provided in a school.

Equality Act 2010 claim versatility

The range of subject matter included in claims under the Equality Act 2010 (the 2010 Act), alleging discrimination demonstrates the breadth of educational issues that come under the remit of this jurisdiction. As noted at the Tribunal Forum in September, the subject matters dealt with in claims since June 2021 include both the detail of educational provision in the school (such as tuition, assessment, participation in project work, restraint of a pupil, curriculum content and exclusion) as well as wider policy issues (such as on repeat year requests, staff training and exclusions). This flexibility is carried into the broad remedy power in the 2010 Act² and reflects the statutory breadth of subject matter for a claim.³

Transition references

The Tribunal has not yet decided a reference of this kind at an HEC hearing. We note, however, that of the eight transition references lodged since the move into the Chamber in 2018, five were received since April 2021. This suggests an upturn in interest in transition duties.

¹ 2011 SC 513.

² Schedule 17, paragraph 9 in the 2010 Act, which states the power of the Tribunal as to ‘make such order as it thinks fit’.

³ See section 85 of the 2010 Act, especially section 85(2).

⁴ Sections 18(3)(g), 12(5)-(6) and 19(3) of the Education (Additional Support for Learning) (Scotland) Act 2004 and The Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005, SSI 2005/265.

The relevant legislation ⁴ was discussed at the Tribunal Forum in September. There are six points in the education of a child/young person with additional support needs when transition duties apply:

- pre-nursery;
- pre-primary 1;
- pre-secondary 1;
- when leaving secondary education;
- where a pupil is moving to another school within an education authority; and
- where a pupil is moving to a school outwith an education authority.

In the period leading up to each of these points (the period being 6 months, 12 months or as soon as reasonably practicable, depending on the circumstances), certain statutory obligations arise around the exchange of information about the pupil between education authorities and other agencies.

Where a parent or young person takes the view that these duties have not been met, and seek that to be rectified, they can make a transition reference to the Tribunal. As with the Equality Act 2010, the tribunal's power to order a remedy is wide: 'may require the [respondent] to take such action to rectify the failure as [the tribunal] considers appropriate'. ⁵

Alternatively (or in addition to a reference), a parent or young person could make a claim about a failure to follow transition duties under the Equality Act 2010. ⁶

Placing request definition

This topic was considered in the November 2021 Bulletin, ⁷ and case law is referred to there.

In a very recent (as yet unpublished) decision, reference *FTS/HEC/AR/22/0145*, the question of whether a placing request reference had been made arose in the context of a request for a deferred (repeated) primary 7 year in an education authority school. The legal member dismissed the reference in a preliminary decision for a different reason, and so the legal member did not answer the question of whether or not a placing request reference had been made. All the legal member would say is that a different answer might apply depending on whether the deferral request relates to a repeated final year at a school (as in the case in hand) or to a different stage of the pupil's education.

⁵ 2004 Act, s.19(3).

⁶ For an example of such a claim (one part of a wider claim) see the HEC decision [ASN D 20 09 2021](#). See also the appeal court case *M v Fife Council* 2017 SCLR 8 (Inner House), relating to a claim under the 2010 Act on a transition point (the appeal was taken not from the HEC, but from the Sheriff Court).

⁷ *Topical Updates*, [The Bulletin, Edition 7, November 2021](#), pages 25-26.

This is a question that may arise in a future case in which it requires to be answered. The answer will depend on the interpretation of the relevant provisions in the 2004 Act, applied in the particular circumstances of the case.

Time bar arguments

Time bar arguments are now reasonably common in HEC cases. The relevant provisions in the Tribunal rules are referred to.⁸ The test for a late reference is different to the test for a late claim. The approach taken in some recent decisions is the one that is likely to be taken in any future cases.⁹

The 'fair and equitable' test for a time bar argument on a 2010 Act claim is similar to the 'fair and just' test to be applied in relation to a reference, making time bar cases on claims relevant to such arguments in references.¹⁰

⁸ The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018, schedule to SSI 2017/366 (**the rules**), rules 14(5)-(7) (2004 Act references) and rule 61(4)-(5) (2010 Act claims).

⁹ See the following recent decisions, all on time bar arguments in relation to 2010 Act claims:
[HEC/AC/22/0002 PRELIMINARY](#); [ASN D 25 06 2021](#); [ASN D 14 01 2021](#);
[FTS/HEC/AC/21/0018/PRELIMINARY](#); [FTS-HEC-AC-21-0072-PRELIMINARY](#).

¹⁰ There is no specific rule setting out a test for a late reference (as there is for a late claim). On a late reference, the time bar point should be considered under rules 56 and 2 of the rules (a fair and just approach).

Children and Young People: News and Developments

Our usual round-up of developments that may be of interest to members includes the cost of living crisis, Enquire briefing paper on Transitions for Children and Young People and the Scottish Mental Health Law Review (Scott Review)

Cost of living crisis

The Scottish Children's Services Coalition (SCSC), an alliance of leading providers of specialist children's services, is warning of a child mental health 'emergency' caused by the cost-of-living crisis, driven by increasing energy costs.

With inflation, energy costs and shopping bills now outstripping wage levels, this has replaced COVID-19 and lockdown restrictions as the primary cause of poor mental health for children and young people

The coalition has called for an urgent co-ordinated response by both the Scottish and UK Governments to address the crisis and avoid a potential 'lost generation' of children and young people with mental health problems, such as anxiety, depression and self-harm. It has also called for greatly increased investment in mental health services.

Even before the pandemic, cases of poor mental health in children and young people were at unprecedented levels, with services struggling to keep up with this growing demand, leaving a growing number of vulnerable individuals unable to access support. The pandemic and the cost-of-living crisis have further exacerbated this situation.

Poverty is a major contributor to mental ill health, and children living in low-income households are three times more likely to suffer mental health problems than their more affluent peers. With more children and young people pushed into poverty as a result of the cost-of-living crisis, an increasing number are set to see their mental health worsen.¹

Figures published by [Public Health Scotland](#) in June indicate that over the quarter covering January to March 2022, 9,672 children and young people were referred to CAMHS for treatment, a staggering 22.4 per cent increase in numbers from the same quarter of the previous year when the equivalent figure was 7,902. At the end of March 2022, a staggering total of 1,322 children and young people had been

¹ Report of the Office of National Statistics - [Survey of the mental health of children and young people in UK \(2004\)](#) at page 57

waiting over a year for treatment.²

A spokesperson for the SCSC commented:

We are facing a mental health emergency and millions of our children and young are at breaking point, with stress and anxiety reaching alarming levels because of the effect of the cost-of-living crisis.

Since the pandemic, referrals have increased and the cost-of-living crisis is only going to make it worse, creating a potential lost generation of vulnerable children and young people.

If we don't give young people the support they need when they need it, the consequences can be catastrophic.

By minimising the drivers of mental health problems - such as poverty - we can reduce the impact on services and we would urge the Scottish Government and UK Government to work together and address this.

The Scottish Children's Services Coalition (SCSC) is an alliance of leading providers of specialist care and education to vulnerable children and young people, as well as support to their families or carers.

Further information about the SCSC can be found at www.thescsc.org.uk.

Enquire Briefing Paper on Transitions for Children and Young People

Enquire has produced a briefing paper on some of the many challenges faced by children, young people and their families at the transition between children's and adult services in Scotland. Enquire have stated in this paper that more could be done to help young people and families during this important period of transition.

Using the evidence from enquiries from their helpline, they have produced a briefing which highlights some of the issues which can cause difficulties including planning, communication, lack of information and stress caused to families and young people. They have also considered how the pandemic has impacted in transitions from school.

The full paper can be accessed at: <https://enquire.org.uk/campaigns/transitions-experiences-of-young-disabled-people-and-their-parents/>

² <https://publichealthscotland.scot/publications/child-and-adolescent-mental-health-services-camhs-waiting-times/child-and-adolescent-mental-health-services-camhs-waiting-times-quarter-ending-march-2022/dashboard/>

The Scottish Mental Health Law Review (Scott Review)

The Scott Review has now concluded its work and the final report has been presented to Scottish Government for consideration. Our President was part of the children and young people working group (chapter 12 of the report). A full copy of the report can be accessed here: <https://mentalhealthlawreview.scot>

The Review makes a range of far-reaching recommendations which apply to all people affected by mental or intellectual disability. Whilst the report applies to all ages, the Review also includes reference to the many additional factors which are specific to children. As we have previously reported in this Bulletin, the Review concludes that there is significant evidence that Scotland's current mental health system for children is under great pressure.

Chapter 12 will be of particular interest to Tribunal members and there are a raft of recommendations for legislative review which all seek to embody a human-rights approach and to significantly improve outcomes for children and young people who have mental health needs, learning disability or neurodevelopmental differences amongst many other things. The Review also emphasises that in order for any core obligations and duties to be effective that meaningful involvement of children and their families is necessary.

HEALTH AND EDUCATION CHAMBER GUIDANCE

[To Members](#)

- PGN 03 2018 Independent Advocacy
- PGN 04 2018 Adjournments
- PGN 05 2018 Postponements, Suspensions and Procedure
- PGN 06 2018 Case Management Calls (Revised October 2021)
- PGN 01 2020 Hearings and the COVID-19 Outbreak
- PGN 02 2020 Remote hearings and COVID-19 (Revised January 2021)
- PGN 01 2021 The Child, Young Person and the Tribunal

[To Administration and Parties](#)

- PGN 01 2022 Documentary Evidence

[Information Notes](#)

- 01 2018 Parties, Representatives, Witnesses and Supporters (Revised October 2021)
- 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@scotcourtsribunals.gov.uk if they wish to contribute. 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 contributions may be subject to editing. Our next publication will be in **May 2023** and any contributions must be submitted no later than **mid-March 2023**.



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