

DATA LABEL: PUBLIC

**EDUCATION EXECUTIVE****PLACING IN SCHOOLS APPEAL COMMITTEE – TRANSFER OF FUNCTIONS TO SCOTTISH TRIBUNALS – CONSULTATION PAPER****REPORT BY HEAD OF EDUCATION (PRIMARY, EARLY YEARS AND RESOURCES)****A. PURPOSE OF REPORT**

To invite the Education Executive to consider and approve a response to the Scottish Government Consultation on the transfer of the functions of the West Lothian (Placing in Schools) Appeal Committee to Scottish Tribunals.

B. RECOMMENDATION

To approve the response to the Scottish Government Consultation on the transfer of the functions of the West Lothian (Placing in Schools) Appeal Committee to Scottish Tribunals.

C. SUMMARY OF IMPLICATIONS

I	Council Values	Focusing on our customers' needs; being honest, open and accountable; making best use of our resources; working in partnership
II	Policy and Legal (including Strategic Environmental Assessment, Equality Issues, Health or Risk Assessment)	Education (Scotland) Act 1980; Tribunals (Scotland) Act 2014
III	Implications for Scheme of Delegations to Officers	None
IV	Impact on performance and performance Indicators	None
V	Relevance to Single Outcome Agreement	Our children have the best start in life and are ready to succeed
VI	Resources - (Financial, Staffing and Property)	Potential for significant increases in cost arising from the requirement for legal representation, increased travel costs and utilisation of staff time.
VII	Consideration at PDSP	Circulated to PDSP members due to Scottish Government Consultation timescales.

VIII Other consultations

Governance Manager, Legal Services

D. TERMS OF REPORT

The Tribunals (Scotland) Act 2014 envisages that the work of placing in schools appeal committees will transfer to the Scottish Tribunals.

The Scottish Government is undertaking further consultation on this proposal.

Current arrangements within West Lothian are that Placing in Schools Appeals are heard by a panel of three comprising an elected member of the council or appointed member of the Education Executive, a parent, and a person experienced in education and acquainted with the educational conditions in the area. All members of the panel receive training provided by the Council's Legal Services. Appeals are usually heard in the Civic Centre.

Current arrangements are accessible, quick and low cost, and take account of local circumstances, harnessing the knowledge and experience of relevant local stakeholders. They are consistent with the principle of community empowerment, as they involve local people making decisions within their own communities. They are consistent with the principle of subsidiarity. They contribute to local democracy as they involve local elected members both in a decision making and a representative role.

The draft response appended to this report does not support the transfer of the functions of the placing in schools appeal committee to the Scottish Tribunals. This is consistent with previous responses by West Lothian Council on this issue, and the emerging views of COSLA and ADES.

The main points within the response are:-

- Centralisation represents a diminution of both local democratic accountability and community empowerment.
- The loss of the specific knowledge and experience required by current members of Appeal Committees would be a retrograde step.
- Centralisation will lead to a less responsive service to appellants, and place increased burdens on local authority staff and headteachers.
- Centralisation will lead to increased costs arising from travel and the necessity of legal representation.
- Increased legalisation is unlikely to make the process less stressful for appellants.
- Any delay in determining appeals is likely to lead to negative educational consequences.
- There is no recent evidence to support such significant change, with limited evidence produced 9 to 22 years ago being referenced.

- Rather than spend unquantified sums of money introducing a new system to respond to what appear to be relatively minor concerns, the Scottish Government could spend a relatively modest sum on supporting the implementation of previous recommendations, for example on addressing the two substantive recommendations made by the Scottish Council of the Committee of Tribunals, namely the provision of national training, and on use of 'neutral' venues.

E. CONCLUSION

Current arrangements empower decision making within local communities, taking account of the knowledge and experience of members of local communities. Outcomes for all those affected are considered. Minor changes to support the rigour of the process are likely to have greater positive impact than an unnecessary nationalisation, breaking community links and increasing legalisation of the process.

The proposal to transfer responsibility to the Tribunals System risks service failure resulting from inability to recruit and retain sufficient members, inability to schedule the required number of hearings within a short period of time, and inability to schedule hearings flexibly to meet the needs of parents and local authority representatives to ensure a fair hearing which has access to all necessary information.

F. BACKGROUND REFERENCES

None

Appendices/Attachments:

- 1) Draft Consultation Response

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Date of meeting: 17 January 2023

Appendix 1

Transfer of the functions of education appeal committees to the Scottish Tribunals - Consultation Paper**West Lothian Council Education Executive Response****1. Do you agree that appeal committees should transfer to the Scottish Tribunals?**

No, for the following reasons.

1) Community Connection, Knowledge and Experience of Members

The current Placing in Schools Appeal Committees are recruited from local communities, and it is appropriate that communities remain empowered to make decisions of this sort. Centralisation represents a diminution of both local democratic accountability and community empowerment.

The current Placing in Schools Appeal Committee members are required to have specific knowledge and experience.

- Parents of pupils attending schools in the area can be expected to understand the concerns and motivations of parents seeking entry to a particular school for academic reasons, to allow continuity of friendship group, or reasons of convenience connected with childcare. This representative will also balance the concerns of parents who may not wish to see a school overcrowded if capacity is exceeded, or class size limits disregarded, or subject choice reduced if resources are moved from the senior phase to create an extra class in the broad general education.
- Persons with experience of education or acquainted with educational conditions in the area will also understand the concerns of parents, but also the implications for schools of having to form additional classes or rearrange timetables to allow the admission of an additional pupil. They will be well placed to judge the strength of an education authority ground of refusal.
- Local democratically elected councillors perform a representative role, and are experienced in advocating for individual constituents. They also have a wider responsibility for ensuring the efficient allocation of resources to benefit all members of the community. They bring both experiences to bear in Appeal Committees.

Current Appeal Committees are therefore well balanced, rooted in local communities, and benefit from the local community connection and knowledge of their members. It is unclear from the consultation how substituting this local community connection and knowledge for a more remote, centralised, legalistic approach will lead to better outcomes, or contribute to the Scottish Government's stated goal of empowering communities.

The consultation document asserts that tribunal members can be recruited from local communities. Recruitment of members to the current system is not easy, and there is no indication in the consultation document that sufficient thought has been given to the logistics of recruiting sufficient members from across all communities in Scotland to enable a large number of appeals to be heard within a very short window of opportunity.

The consultation document makes no comment on whether the proposed new members will be required to have the knowledge of education, the life of schools and local authority service provision and financial responsibility that characterises current membership. A diminution of this knowledge and experience can only be a retrograde step. This point was recognised during scrutiny of the Tribunals (Scotland) Bill during its passage through Parliament in 2013. [Official Report – Parliamentary Business : Scottish Parliament](#)

The removal of local elected members from Appeal Committees will dilute local democratic accountability.

The proposed centralisation is contrary to the principles of community empowerment and subsidiarity.

2) Responsiveness of System to the Needs of Appellants, Local Authority Officers and Headteachers

The centralisation of Appeal Committees, and the break with local communities, is likely to lead to a less responsive system. It is unclear from the consultation that sufficient regard has been taken for the logistics involved in running a centralised system, with the likely consequence that appellants and local authority officers will have to travel out of their local communities, and that less account will be taken of their availability. Costs to all parties will increase, as set out in section (3).

At present Appeal Committees are held taking account of the availability of both parties to the appeal, in order to ensure fairness, and that the Appeal Committee has access to all of the information it needs to make its decision. If insufficient account is taken of the other responsibilities of Headteachers in scheduling hearings, this will impact on the education of other pupils within their schools. If Headteachers can no longer attend appeals due to increased travel time, or hearings scheduled at times which conflict with their other duties, Appeal Committees will lose access to an important source of information.

Local elected members have a representative role in supporting constituent appeals. Under current arrangements, it is relatively easy for local elected members to attend appeal hearings, and the scheduling of hearings can take account of their availability. If local elected members can no longer attend appeals due to increased travel time, this represents a further dilution of the local democratic process.

The consultation document asserts that remote hearings may resolve these issues, but does not offer any evidence that parents/carers favour such an approach. Experience in West Lothian in recent years has shown that the large majority of parents favour face to face hearings when the choice is offered.

3) Increased Costs

Both parties to the appeal, and any representatives, are likely to face increased travel expenses. An increase in cost may put in place an otherwise unnecessary barrier to the attendance of appellants or their representatives, including local elected members, at appeals.

If parental expenses are met from the public purse, this represents an otherwise unnecessary increase in public expenditure. Local authorities must be appropriately compensated for any increase in cost, and the Scottish Government must work with COSLA to quantify these costs before an informed decision on the transfer can be taken.

The consultation states that the Scottish Government expects local authorities may choose to have legal representation before Tribunals. This represents a significant increase in the costs associated with appeals, and the Scottish Government must work with COSLA to quantify these costs before an informed decision on the transfer can be taken. Increased legalisation of the process is likely to increase preparation time, which again must be quantified.

4) Impact on Appellants

There is a very short window of opportunity each year in which to hear appeals relating to placement in P1 and S1 at the start of each new school session. It is not made clear how Scottish Tribunals will deal with around 2000 cases simultaneously, and inform parents and education authorities of decisions in time for all parties to plan based on the decision of the Tribunal.

If, as seems likely, the new arrangements introduce a delay in decision making as a more remote and less responsive national service struggles to schedule hearings to meet the needs of participants, there will be negative impact on appellants. Individual children and young people will have to wait longer for decisions, to their detriment, and exacerbating the concerns of parents identified in the study referenced in the consultation.

Any delay will make it more difficult for education authorities to review similar cases and grant a further right of appeal where appropriate before the start of term, impacting negatively on other applicants for a school where an appeal is upheld.

The consultation refers to reports that parents have found the current system stressful. It is unclear how increasing the formality of the process by increasing legalisation and legal representation, and the inevitable change in tone and focus of proceedings, will make the experience less stressful for participants. The potential increased litigious nature of the process could have cost implications for all parties.

5) Impact on Educational Outcomes

If, as seems likely, the new arrangements introduce a delay in decision making this will result in negative educational consequences.

Schools may have to make significant changes to their internal organisation and provision in response to decisions. The later these decisions are taken, the more difficult and impactful such change is likely to be.

The potential negative impact on other pupils attending the school is also likely to be greater if these happen later, after, for example, pupils have received details of their classes for the following year and have participated in valuable transition experiences.

Any delay will also delay the review similar cases where an appeal is upheld, increasing the likelihood of any changes to the school organisation impacting negatively on other pupils.

The consultation focuses on the experience of the rights of the appellant, but gives no consideration to the rights and interests of other children and young people and parents and carers who may be affected by the outcome of an appeal, for example by being in a school which is over capacity, by being in an oversized class, by having subject choice restricted as resources are diverted from the senior phase to form additional classes in the broad general education, or by being unable to gain a place at the catchment school because reserved places have been given away. The

current, well balanced system, allows this consideration, thus focusing on educational outcomes for all.

6) Procedural Issues

The consultation paper does not make clear whether it is proposed that the new arrangements will still include the option of hearing conjoined appeals, where the common authority case for the refusal of all placing requests at a particular school, is held together, and appellants then have an individual hearing to discuss their individual case in turn, later in the day. This practice is not used in West Lothian, as it can result in appellants having to wait for extended periods between the hearing of the common case and their individual hearing. Experience has shown it can also result in sensitive personal information being disclosed by appellants in front of other appellants, despite instruction to save discussion of individual circumstances to individual hearings. If all appeals are heard separately, however, this may increase the time that hearings will take, exacerbating issues of cost, and the impact of delay on appellants and education authorities.

The consultation paper does not make clear how long it is envisaged each hearing will last. There is the potential that hearings will take longer which will exacerbate issues of cost, and the impact of delay on appellants and education authorities.

Increased legalisation of the process is likely to increase preparation time for education authorities. This will either exacerbate delay, or increase cost, or result in education authorities being unable to present their case effectively. The current funding shortfall affecting all education authorities will restrict the resources that they are able to devote to this process.

Currently an appellant who loses an appeal has the right to appeal to the Sheriff Principal, which is a legal process which the appellant would need to pay for. It is understood that under the proposed Tribunal arrangements that there would be a further right to appeal to the Upper tribunal at no cost to the appellant. The consultation paper stresses the accessibility of the tribunal system. If a higher proportion of appellants who are unsuccessful in their initial appeal lodge a further appeal, there may be further cost to local authorities, and the Scottish Government must work with COSLA to quantify these costs before an informed decision on the transfer can be taken.

There may also be further delay as it is not clear that the proposed arrangements will allow an increased number of appeals against the initial decision to be heard within the very short window of opportunity. As previously stated, any delay will impact negatively on the appellants, and also have a significant negative impact on other children and families if schools are required to make changes to class structures and timetables at a late stage to accommodate children admitted as a result of an appeal.

2. Do you consider that appeal committees should remain with local authorities but with improvements to how they operate? And if so, what changes would you like to see?

The consultation document refers to a perceived imbalance in power between education authorities and appellants. A significant imbalance exists in that appellants currently have a further right of appeal against the decisions of the Appeal Committee, whilst education authorities do not. This imbalance must be addressed with education authorities also given the right of appeal against decisions of the Appeal Committee (if it remains in existence) or Scottish Tribunals.

Amongst the advantages of the current arrangements are local decision-making, speedy decision-making, early certainty for those in similar circumstances who might be affected by reviews after successful appeals, ability to react quickly to changes in circumstances, informality, and low cost.

Whilst the consultation document identifies some concerns regarding independence and transparency, these could be addressed without a wholesale replacement of current arrangements.

The consultation document identifies two specific concerns identified in a report produced 22 years ago, in 2000, in which the Scottish Council of the Committee of Tribunals recommended that all involved with the appeal committees should be properly trained, and neutral venues should be used for hearings.

In West Lothian, all members of the Appeal Committee receive training from the Council's Legal Services, and hearings are held in the Council headquarters.

Rather than spend unquantified sums of money introducing a new system to respond to what appear to be relatively minor concerns, the Scottish Government could spend a relatively modest sum on supporting the implementation of previous recommendations, for example on addressing the two substantive recommendations made by the Scottish Council of the Committee of Tribunals, namely the provision of national training, and on use of 'neutral' venues.

A public consultation in 2006 found that appellants thought the appeal process could be stressful and upsetting, and had concerns about the impact on their child and family. It is not surprising that those who were not successful in their appeal should have reservations about the process. It is unclear if this consultation was sufficiently balanced by seeking the views of parents/carers, children and young people and educational professionals who had experienced the negative impact of school capacities and class sizes being breached, or an inability to enter the local catchment school as reserved places had been given away.

The consultation document references 'similar points' being made during parliamentary scrutiny in 2013, but these appear anecdotal in nature and to be based on the observations of one speaker only.

It is not appropriate that such significant change is based on limited evidence produced 9, 16 and 22 years ago and not updated since, when current arrangements are accessible, quick, low cost and effective.

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

Current arrangements are accessible, quick and low cost, and take account of local circumstances, harnessing the knowledge and experience of relevant local stakeholders. They are consistent with the principle of community empowerment, as they involve local people making decisions within their own communities, taking account of the knowledge and experience of members of local communities. They are consistent with the principle of subsidiarity. They contribute to local democracy as they involve local elected members both in a decision making and a representative role. Outcomes for all those affected are considered, not only outcomes for appellants.

Minor changes to support the rigour of the process are likely to have greater positive impact than an unnecessary nationalisation, breaking community links and increasing legalisation of the process.

The proposal to transfer responsibility to the Tribunals system risks service failure resulting from inability to recruit and retain sufficient members, inability to schedule the required number of hearings within a short period of time, and inability to schedule hearings flexibly to meet the needs of parents and local authority representatives to ensure a fair hearing which has access to all necessary information.