**Tribunals (Scotland) Act 2014 - Consultation on Draft Regulations regarding:**

1. **the Transfer of Functions and Members of the Additional Support Needs Tribunals for Scotland to the Scottish Tribunals;**
2. **the rules of procedure for the First-tier Tribunal for Scotland Health and Education Chamber**
3. **the Composition of the First-tier and Upper Tribunals for Scotland and**

**(4) Eligibility criteria for ordinary members**

**Analysis of Responses**

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November 2017

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**ANALYSIS OF RESPONSES TO THE CONSULTATION ON DRAFT REGULATIONS FOR:**

1. **THE TRANSFER OF FUNCTIONS AND MEMBERS OF THE ADDITIONAL SUPPORT NEEDS TRIBUNALS FOR SCOTLAND TO THE SCOTTISH TRIBUNALS,**
2. **THE RULES OF PROCEDURE FOR THE FIRST-TIER TRIBUNAL FOR SCOTLAND HEALTH AND EDUCATION CHAMBER**
3. **THE COMPOSITION OF THE SCOTTISH TRIBUNALS WHEN HEARING APPEALS AND REFERRALS IN AND FROM THE FIRST-TIER TRIBUNAL FOR SCOTLAND HEALTH AND EDUCATION CHAMBER**
4. **ELIGIBILITY CRITERIA FOR ORDINARY MEMBERS OF THE FIRST-TIER TRIBUNAL WITH HEALTH AND EDUCATION EXPERIENCE**

**Background**

1. The Scottish Government is in the process of implementing the Tribunals (Scotland) Act 2014 (the 2014 Act) which creates a new, simplified statutory framework for tribunals in Scotland, bringing existing tribunal jurisdictions together and providing an organised structure for new jurisdictions.
2. The 2014 Act creates two tribunals, the First-tier Tribunal for Scotland (First-tier Tribunal) and the Upper Tribunal for Scotland (Upper Tribunal), known collectively as the Scottish Tribunals. In due course all of the devolved tribunal jurisdictions will transfer-in to the Scottish Tribunals. The first tribunals (the private rented housing panel, the homeowner housing panel and their respective committees) transferred into the Scottish Tribunals in December 2016. The Scottish Tax Tribunals transferred into the Scottish Tribunals in April 2017.
3. The Additional Support Needs Tribunals for Scotland (ASNTS) were established by the Education (Additional Support for Learning) (Scotland) Act 2004 in order to hear appeals against certain decisions of Education Authorities in relation to educational support. The Equality Act 2010 conferred additional functions upon the ASNTS, in order that the tribunals can hear appeals against decisions/actions of an educational body where it is alleged they have discriminated on the basis of disability.
4. The Scottish Government ran a consultation between 22 May and 1 August 2017 on the suite of draft regulations required to transfer the ASNTS into the Scottish Tribunals.[[1]](#footnote-1).

**Consultation responses**

1. There were 15 responses to the consultation from individuals and organisations. There were nine responses from Local Authorities, three from organisations, two from individuals and one from the Law Society of Scotland.
2. Due to the small number of responses this analysis relies on consideration of the key points raised in the responses relating to each set of regulations rather than an in-depth statistical analysis of the responses.

**Analysis of responses**

1. All the responses received were in relation to the Health and Education Chamber Rules. All the typographical amendments that were suggested have been taken on board.
2. The majority of the comments received suggested amendments to the existing rules of procedure. We discussed these amendments with the Support and Wellbeing Policy team and as summary of our responses to the main comments is in Annex A.

**Next Steps**

1. The draft regulations have been amended as considered appropriate, in light of respondents’ comments. The regulations setting out the eligibility criteria for ordinary members of the First-tier Tribunal with health and education experience were laid in the Scottish Parliament on 4 September 2017 and came into force on 2 October 2017. This was to allow the Judicial Appointments Board for Scotland to undertake a recruitment exercise for ordinary and legal members of the First-tier Tribunal assigned to the Health and Education Chamber.
2. The remaining regulations were laid in the Scottish Parliament on 30 October 2017 and are due to come into force on 12 January 2018.

**Summary of key responses**

**ANNEX A**

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| **Rule** | **Consultation response** | **Scottish Government response** |
| Rule 1 (Interpretation) | Working day should include days in July. | Decision taken to retain existing provisions as schools are closed during July and there may be difficulties for parties to obtain relevant information to take reference forward during this time. |
| Rule 1 (Interpretation) | Paper hearing should be defined. | Decision taken that this is sufficiently clear. |
| Rule 5 (Supporter) | This rule should not apply where the party is also represented and it should also be clearer whether an authority can attend with a supporter. | Rule retained as a party may wish to have someone there for moral support even if they have a representative. Any party including an authority can attend with a supporter. |
| Rule 7 (Delegation to Staff) | Concerned that staff may make judicial decisions without required training. | This rule only covers issues that are preliminary or incidental in nature and therefore won't cover the making of judicial decisions. |
| Rule 10(3)b First-tier Tribunal's consideration of application for permission to appeal | For clarity add "against that decision" after the word "appeal" | This is a generic provision across the Scottish Tribunals and it is considered clear enough. |
| Rule 11 (Review) | Shortening of timescale for review to two weeks may prove problematic regarding availability of parties to form a view and decide whether to seek a review. . A legal member must be present to hear a review. Time limit for permission to appeal should be extended by review period. | As the 30 day time limit for seeking permission to appeal a decision runs concurrently 14 days for seeking a review was considered justified as it would still allow parties time if review is dismissed to seek permission to appeal. Time limit for permission to appeal can be extended by tribunal. The decision has been taken not to extend 30 days’ time limit for appeal as this would elongate the process. |
| Rule 11 (Review) | One of the reviewing members should be a legal member | It is envisaged that a legal member will deal with a review. |
| Rule 11 (Review) | Ground for review should be based on an error of fact or law not simply an error of law | The grounds for review are set out in section 43 of the Tribunals (Scotland) Act 2014. |
| Rule 11 (Review) | No provision for a paper hearing where both parties agree that should be the case | Rule 11(5) allows the Tribunal to decide a review without a hearing if a hearing is not in the interests of justice. |
| Rule 11 (Review) | Under what circumstances is it anticipated that the Tribunal might review a decision at its own instance? Does the 14 day time limit apply to own instance reviews too? | Allowing the tribunal to review a decision at its own instance gives the tribunal flexibility. Yes 14 day time limit does apply to own instance reviews. |
| Rule 14(6) and (7) Reference | It is unreasonable to expect parents to understand the provisions relating to deemed refusals. | Deemed provisions have been in place since 2005 and this provision works in practice. In addition, Enquire provide information on this. In the event that a parent misses the deadline the Tribunal has provision under rule 29 to make exceptions to timescales (if appropriate). |
| Rule 16(4) (sufficiency of reasons for reference) | add at the end of the rule "and the Tribunal has sent the further and better particulars to the authority" | This amendment would interfere with the potential beginning of the case statement period. Rule 17 provides for the case statement period including its starting and concluding. Amendment to 16(4) as suggested would just confuse this. |
| Rule 17(2)(b) (Case statement period and statement of appellant's case) | Should the words at the end of rule 17(2)(b) immediately after "working days" not apply to the whole of rule 17(2) | Amendment taken on board |
| Rule 19(5) (Response) | Why is the test so high especially as such a high test doesn't apply to an amendment of the appellant's case statement? Time limit is very short for authority to respond - appellant has a period of 2 months to lodge reference and a further 20 working days to lodge written evidence. Exceptional circumstances should arise when information becomes newly available and that this should be tested by the tribunal. | There is parity with the appellant's case via 17(4) and therefore no amendment is required. |
| Rule 23 (Power for legal member to decide references) | This provision allowing a legal member to sit alone needs clarification on the circumstances when this would take place and the procedure to be followed. | This rule simply introduces the power and further clarification will be provided. |
| Rule 23 (Power for legal member to decide references) | Concern that capacity is not purely a legal issue and so may require other members to make a decision. | Other members may be involved in decision if required |
| Rule 26 (Varying or setting aside of directions) | Seeking the variation or setting aside of a direction at any time before hearing creates an uncertainty that is not compliant with the overriding objective. This ought to be timed. | There are already time limits by virtue of other arrangements (for example during case statement period and prior to hearing. Therefore, there is a timeframe in place. |
| Rule 28(3) (Power to dismiss) | Refers to 5 days to make representation. Section 25(3) refers to 10 days. The same period should be allowed in each instance to allow for consistency. | This rule is drafted to allow any period above 5 days and therefore should be retained. |
| Rule 29 (Extension of Time) | Definition of "exceptional circumstances" would be helpful and the test of "exceptional circumstances" is too high. | This comment would limit the opportunity to respond to the very wide and varied circumstances which may arise. |
| Rule 36(6) Notice of Hearing | Teachers can't be compelled to work in July so if a hearing can be heard in July this creates an issue. 10 days’ notice of a venue is likely to be difficult in practice. Rewording of ' or such reasonable time' may assist. | The rule states not less than 10 days and in practice this notice is served well beyond 10 days. Therefore, no change is proposed. |
| Rule 37 (Power to decide reference without hearing) | Rule should be qualified to say that the matter may be decided by a legal member sitting alone or with other members as there may be occasions that arise requiring the expertise of members. | Rules already in place and applicable for the use of evidence and witnesses if needed. |
| Rule 44 (Views of the Child) | It appears that the Tribunal is under the obligation always to seek the views of the child irrespective of whether the child has capacity. Wording is too strong. Phrase "for whose school education an education authority are responsible" defined in section 29(3) of 2004 Act. If the definition in the 2004 Act applies then it would mean the duty to seek the views of the child would not apply to all cases. The rule is not explicit about the subject matter of the views of the child - should it be made clear this refers to any reference. Is it intended to restrict application of rule 44 to parental references only or will it include references made by children aged 12-15. Rule could be more explicit on how the views are to be taken. No equivalent to rule 44 in Part 3 of the rules (disability claims). Should there be reference to capacity? Clearer guidance required on obtaining the views of the child. | The rule has been retained as drafted as the requirement is to attempt to gain the views. Given that the requirement is contained within the rules it may reasonably be assumed that it relates to the matters being brought before the Tribunal rather than any other matters. Parental references are specified as it is assumed that the child will have expressed a view if they are making the references themselves by virtue of the reference if not explicitly. There should not be a reference to capacity as capacity is presumed for claims and is therefore not relevant. |
| Rule 47 (Failure of parties to attend) | Expenses should be made if there is a failure to attend. | Expenses provisions allow for expenses to be awarded if a party has put another party to unnecessary expense. Tribunal could use this provision. |
| Rule 48(3) and Rule 93(3) (Decisions on references)/ (Decisions on claims) | Refers to an automatic right of appeal against the FTT's decision which is at odds with Rule 9. No time limit for tribunal to issue decision. | Comment rejected as it is clear enough as it states the FTT shall send notice about the circumstances in which there is a right of appeal to UT. |
| Rule 66 (Response) | Time limit is very short for authority to respond - appellant has a period of 2 months to lodge reference and a further 20 working days to lodge written evidence. | The case statement period is 30 days in total - and applies equally to both parties. Therefore no change is proposed. Nothing can be considered if there is not a case made initially therefore the timings cited in the comments should be disregarded. |
| Rule 84(7)(a) (Attendance at hearings**)** | Clarity sought as to whether it is necessary due to the opening wording to this Rule? | This rule brings clarity to who may or may not attend a hearing. This is likely to be a carefully balanced judgement based on individual circumstances - it is not enough to rely on whether someone is likely to cause disruption or to prevent evidence being heard (for example a media representative may do neither - but a hearing may not wish that type of representative to be present. |
| Rule 85(2) (Conduct of the hearing) | At the end of line for the words "and authority" should be added immediately after the word "claimant" to give parity to parties. | There is already parity as there are 5 witnesses in addition to the claimant (and the lead LA representative). |
| Rule 89 (Children) | Reference to a child giving evidence. At present in reference cases the tribunal speaks with the child and shares those views with parties as opposed to formal giving evidence. A similar flexibility should be used in these cases. Child should be afforded support by an independent advocacy worker to obtain those views and for the cost of that to be met by the authority. | This is a function of the children's service and does not need to be specified in rules. |

1. <https://consult.scotland.gov.uk/tribunals-administrative-justice-policy/tribunals-scotland-act-2014-draft-regulations/> [↑](#footnote-ref-1)