I welcome this opportunity to make a brief submission to the Justice Committee on the Tribunals (Scotland) Bill. In doing so, I will focus on the future of the Additional Support Needs Tribunal for Scotland (ASNTS) and the children’s hearings system.

The Additional Support Needs Tribunal for Scotland

Firstly, I note the provisions in the Bill that would implement the Scottish Government’s proposal to integrate the ASNTS into the new, unified two-tier tribunals system. In relation to those provisions, I would urge the Committee to press Ministers to show that the submissions made by users of the ASNTS and those who support them were taken into account, and their informed views taken seriously in the decision to pursue full integration in the new structure.

Any loss of expertise and understanding of the often complex circumstances of children and young people with additional support needs (ASN) and their families from the existing tribunal would be highly undesirable and must be avoided. Its capacity to elicit and take due account of the voices of the children and young people who use it must be protected and improved. Along with others in the sector, I have argued for an end to the anomaly in the Education (Additional Support for Learning) (Scotland) Act 2004, due to which children under 16 have no access to the tribunal in their own right — a contrast to the general rule in civil proceedings which presumes capacity to instruct a solicitor to sue and defend in civil proceedings from age 12. If full integration of the ASNTS into the new tribunal structure proceeds, the new body should be set up so as to be accessible and sensitive to the rights and needs of users and potential users with ASN.

Children’s Hearings

The Scottish Government’s Consultation on the Scottish Government’s Proposals for a New Tribunal System for Scotland (2012) proposed that Ministers take a power to transfer the functions of other tribunals into the new unified tribunals system in the future. Notably, children’s hearings were included in the list of tribunals to which this may apply. No policy rationale was provided for the inclusion of children’s hearings in the document at that stage, and notably the children’s hearings system is not mentioned in the Policy Memorandum that accompanies the Bill. However, s. 26 (2) confers upon Ministers a broad power to transfer further tribunals into the unified tribunals structure by affirmative instrument, and in my reading the children’s

---

1 Education (Additional Support for Learning) (Scotland) Act 2004, s. 18 (2)(a): Where the child is ‘not over school age’ (cf. s. 29 (2)), only the child’s parent(s) have the right to make a reference to the Tribunal.

2 Age of Legal Capacity (Scotland) Act 1991, s. 2 (4A) and (4B): Children under 12 may have capacity to instruct if in the assessment of the solicitor the child has a general understanding of what it means to do so.

3 At para 4.63.

4 Section 73 (2)(b).
hearings system would meet the conditions in subsections (3) and (4), and is not excluded by subsection (5).

I do not consider the inclusion of children’s hearings under this category to be appropriate for a number of reasons, briefly discussed below.

The Children’s Hearings (Scotland) Act 2011 marks the most substantial programme of reform to this uniquely Scottish system for child protection and youth justice since at least the mid-1990s. The bulk of the Act’s key provisions came into force on 24 June 2013, and the system is transitioning to full operation under the 2011 Act. A new national body, Children’s Hearings Scotland, has been set up to improve consistency of standards and administration of the system. I am confident the Act’s operational provisions and the support provided to hearings and panel members will deliver real improvements for children and young people. It is important to allow those latest reforms to be implemented in full and the reformed system to settle in.

More fundamentally, I would submit that the children’s hearings system is different in nature from other tribunals, and its functions may not sit easily alongside those of others. It does not deal with ‘disputes’ in anything like the sense of those that come before employment tribunals or even the ASNTS, for example. The system’s founding principles, its remit and the nature of its proceedings occupy a special place in the Scottish legal system and the child welfare system. Those principles’ enduring relevance was powerfully illustrated by the unanimous passage of the 2011 Act through Parliament and the continuing cross-party support for its model.

These will be amongst the reasons for the notable fact that none of the various reviews of the tribunals system cited in the consultation document recommended bringing the children’s hearings system under the auspices of a unified tribunals infrastructure. Indeed, the Administrative Justice and Tribunals Council’s 2011 report *Tribunal Reform in Scotland: A Vision for the Future* noted that the children’s hearings system is the ‘one major exception’ to its proposal for a unified governance model for tribunals in Scotland, citing the system’s nature, its ‘size and sophistication’ and the recent substantial reforms among its reasons.

Finally, neither the consultation document nor the Policy Memorandum to the Bill give any reasons why future additions to the new tribunals system should not be effected by means of primary legislation, with the full parliamentary scrutiny that that would entail.

It is my view, therefore, that Scotland’s unique care and justice system for children and young people should be explicitly excluded from the scope of the power in s. 26.

I trust the above comments are of assistance to the Committee.

Scotland’s Commissioner for Children and Young People
1 August 2013

---

5 At para 4.4, p. 10.