



Ms Shirley-Anne Sommerville
Cabinet Secretary for Education and Skills
Via email: scottish.ministers@gov.scot

8 December 2021

Dear Cabinet Secretary,

I am writing to you following the publication of SQA's appeal data for 2021 and in order to express my ongoing concerns about the human rights compliance of both the 2020 and 2021 ACM and appeals models.

For more than a year, in correspondence with your predecessor, Mr Swinney MSP, and Scottish Government officials, my office has been raising concerns about the experiences of young people from the SQA 2020 cohort of students. These children and young people have been denied access to a route of appeal/review for grades determined under the 2020 Alternative Certification Model (ACM), and the terms of the Deputy First Minister's direction on 11th of August 2020.

I am therefore writing to ask you to make a Section 9 direction under the Education (Scotland) Act 1996, requiring the SQA to allow this small number of children and young people from the 2020 cohort who remain disadvantaged by decisions made by the SQA the Scottish Government, to appeal directly and on the basis of limited additional grounds.

As you will recall, teachers were required under the 2020 ACM to undertake a process of estimating grades. Students were entirely excluded from these processes, on the instructions of the SQA, and were therefore denied their rights under the UNCRC to participate in decision-making that affected their lives.

Notwithstanding this, the Deputy First Minister's direction of 11th August to rely on those teacher estimated grades was a positive step for most students, and resolved much of the unfairness and discrimination caused by SQA's approach to moderation under the original ACM. However, it also resulted in a small number of students being left with no right of appeal, challenge, or remedy.

You will be aware that the appeal process put in place in 2020 provided that appeals could only be undertaken by a centre, and only in the following situations:

- Where an administrative error was made when the estimate was submitted
- Where the centre is of the view that a candidate's estimate was affected by discrimination or other conduct by the centre that is unacceptable under the Equality Act 2010
- Where the Head of Centre believes that there has been an error within SQA's internal processes for confirming results to centres following the 11th August announcement

These grounds excluded those students:

- who disagreed with, or disputed their teacher's estimated grade; or
- who had a protected characteristic(s) that was not fully accounted for in the estimation process; or
- who had experienced exceptional personal circumstances that impacted on their ability to evidence attainment.

Before the end of the last session of the Parliament, my office was informed by Education officials that the Deputy First Minister was still considering whether he would ensure that these children and young people were afforded a remedy, via an amended right of appeal or review.

My office has now received correspondence from your officials that the outcome of that year long process of consideration is that there is, *“no way to reopen, or widen out grounds for appeal for, the 2020 appeals process in a fair and equitable manner to all learners....”* And instead, that SQA has been asked, *“...to consider any request to review an appeal which was brought forward previously and refused by SQA, or an appeal that the centre refused to take forward to SQA, because it was not satisfied that the criteria for 2020 appeals were met, but only if the head of centre confirms that new information has come to light which may have an impact on the original decision using the criteria set for 2020 appeals.”*

The young people most adversely affected are obviously extremely disappointed that the only form of redress the Scottish Government has offered is an appeal (and only if their schools and teachers agree), on grounds the young people, and my office, have been saying for over a year are inadequate in terms of compliance with human rights.

In light of this, I would strongly suggest that the young people concerned are entitled to a more detailed explanation of the decision. It will be important to explain to them for what reason(s) it is considered there is “no way” to reopen the process. The explanation should set out what options and factors have been considered, and on what basis they were rejected. It should make clear what assessment was done of the legal and human rights obligations, and set out how best interests and principles of natural justice have been taken account of in that decision-making process.

As you know, it remains my view that these young people have had their rights breached. Initially, as a result of SQA's failure to put in place a fit for purpose, fair and equitable ACM and appeals system prior to, and subsequent to, the DFM's direction to

revert to teacher estimated grades. Those failures have been compounded by the Scottish Government's disappointing unwillingness to address this matter in a timely way once the issues were raised with Ministers in September 2020, and even when Professor Mark Priestly drew attention to it in his Review.

There would obviously have been more flexibility to fix the failings in the system while the bulk of 2020 appeals were still live, but these opportunities were passed up by SQA and the Scottish Government for reasons that remain unclear. For example, my office has still had no response to the proposal (first made in a letter to the Deputy First Minister on 2nd September 2020 and reiterated in meetings with officials), of the creation of limited revised appeal grounds. This would have at least provided an immediate and rational solution which respects the small group of young people's human rights.

We had suggested that two additional grounds for appeal be made available to these children and young people as follows:

1. Evidence is available that did not form part of the centre's assessment (for example returned unmarked coursework, or failure to take account of exceptional personal circumstances e.g. bereavement)
2. There is evidence that the centre's estimated grade was a downgrade from previous attainment and/or the teacher's estimate to UCAS in support of the young person's personal statement.

We made clear that these were limited grounds, which would require the provision of supporting evidence, and would therefore not open up the prospect of large numbers of appeals. Rather, they would close a loophole and secure fairness in the system. We suggested that these grounds would only be directly accessible to young people where the centre declined to submit an appeal. I would welcome an explanation of what assessment was made of this proposal and why it was rejected.

The only concrete response we ever received was that there was no money available to expand the scope of appeals. This was during a meeting in January 2021, shortly after SQA was reported to have returned some £14.3m of its budget unspent to the Scottish Government. The Priestly Review's finding, in agreement with my office, that "*[m]any of the negative impacts relating to the cancellation of the 2020 exam diet are the result of a failure to recognise young people as rights holders and as the key stakeholders of the Scottish education system*" still sadly appears to ring true.

To my great disappointment, we are also still awaiting a response on a number of issues my staff raised with your officials on 24 August in relation to the 2021 appeals process and the unjustifiable narrowness of the appeal grounds.

Most significantly, we had noted that for 2021 SQA provides that an appeal can be made on grounds of discrimination where:

- *there has been a breach of the Equality Act 2010 (which must have been either acknowledged by your school, college or training provider or established by a court or the Scottish Public Services Ombudsman), or*
- *your school, college or training provider failed to provide agreed Assessment Arrangements.*

In other words, either the school/college has to acknowledge that it breached the Equality Act 2010, or the young person must have been able to raise a complaint or legal action and take it to a successful conclusion before the appeal deadline. The former is unlikely given the potential consequences for the school, the latter is impossible in the timescale allowed.

I note, in particular, that the SPSO when considering a complaint has no power to establish whether or not the Equality Act 2010 has been breached. I understand that when the Ombudsman became aware that she was cited in the appeal ground her office informed SQA that this is not within the scope of their powers. However, SQA has

declined requests to alter the information on the website or reconsider the terms of the appeal grounds.

I also note that, even if the delays still plaguing the legal system could be overcome, having the matter determined by a court also involves a significant financial barrier which will disproportionately disadvantage children and young people from more deprived backgrounds.

It is clear therefore that unfortunately this appeal ground is not an effective route to remedy for a child who has experienced discrimination or inequality.

I have repeatedly expressed my belief that failure to consider these issues and to provide a fair, robust and human rights compliant appeals system may result in another group of young people being disadvantaged by the failure of SQA and the Scottish Government to make timely and human rights compliant decisions and act compatibly with their legal duties. I have also made clear my view that a failure to ensure that appeals operate on a “no detriment” policy would have the effect of artificially limiting the number of appeals made.

In light of all this, I am therefore concerned to see SQA’s published statistics on appeals released on 7th December which show a very significant drop in appeals, a drop in entrants being upgraded and a rise in entrants being downgraded:

- In 2019 11,528 applicants appealed (2.3% of entries) compared to 3,483 in 2021 (0.67% of entries).
- In 2019, 1683 entrants were marked up (14.6% of appeals) compared to 44 (1.26% of appeals) in 2021.
- And in 2019 only 2 entrants were marked down (0.017%) compared to 13 (0.37%) in 2021.



I would urge you to urgently consider all of these matters. In particular, I remain of the view that, as Cabinet Secretary, you have the statutory power to remedy these rights breaches by making a Section 9 direction requiring the SQA to allow the small number of young people in the 2020 cohort to appeal directly and on the basis of the limited additional grounds my office has suggested, and to amend the 2021 appeal grounds to ensure they provide a remedy for children and young people who may have experienced discrimination.

I look forward to hearing from you.

Your sincerely

Bruce Adamson

Children and Young People's Commissioner Scotland