

# Children's Hearings Redesign: Public Consultation on Policy Proposals

*David Mackie, Chair of the Hearings System Working Group, has been considering the Scottish Government's consultation on proposals for the redesign of the Children's Hearings System. In this blog, he raises concerns about the inclusion in the consultation of a 'Legal Member'.*

One of the most significant and important recommendations emerging from the [Hearings for Children Report \(HFC\)](#) is that the establishment of grounds should be addressed in advance of a hearing taking place, thereby removing potentially the most adversarial component of Children's Hearings and keeping a Hearing specifically for an inquisitorial approach to discussion and making decisions. The Hearings System Working Group (HSWG) heard from children, young people and families of the process of grounds being read out at Grounds Hearings feeling demeaning, especially when they did not have a clear understanding of what was being spoken about. This was particularly the case when families were facing allegations about the inadequate care and protection of children or were being accused of criminal behaviour. The issue could become adversarial when they did not accept or disagreed with the Statement of Facts accompanying the Grounds for Referral.

The idea that grounds hearings can be a disproportionate use of volunteer panel time was not one that featured in the Working Group's engagement with stakeholders including Panel members. And yet that is the premise upon which the notion of a Legal Member is introduced in the section of the Scottish Government Consultation Document headed 'Establishing Grounds'.

The Consultation Document goes on to suggest that Scottish Government and the HFC Report agree in the abstract that there must be a process whereby 'a recognised decision maker considers whether the grounds of referral have been established'. The Hearings System Working Group and the HFC Report never departed from the premise that the decision maker already exists very successfully in the current system in the form of the Sheriff and that the only question was the stage at which the Sheriff would become engaged. At no point did the HSWG or any stakeholder question the appropriateness of the Sheriff for this role, a fundamental element of [Kilbrandon](#). The reference in the HFC Report to the development of specialisation among Sheriffs and the involvement of the same Sheriff whenever possible was an aspirational recommendation in support of a belief that emerged from engagement with stakeholders that this would enhance the role of the Sheriff and the experience of children, young people and families engaging with them. It reflects a similar call in the Final Report of the Lord Justice Clerk's Review Group for Improving the Management of Sexual Offence Cases in relation to children, young people and the Children's

Hearings system for the trauma-informed training of Sheriffs, the involvement of the same Sheriff where possible and the utilisation of strong case management practices.<sup>1</sup> The experience would be further enhanced if the physical environment in which hearings were held by the Sheriff were more conducive to the needs of children and young people such as Hearings Centres or the adaptation of Court facilities. The HFC Report did not use the language of providing a specialist decision-maker, nor did it question the appropriateness of the Sheriff for this role.

## A brand new idea

The idea of a Legal Member is brand new in the sense that it has emerged for the first time in the Scottish Government Consultation Document and is the product of a civil service policy unit. The evidence supporting the development of the concept has not been shared; and so significant inferences have to be drawn and a degree of conjecture employed to understand precisely what is proposed.

We are told immediately what the Legal Member is not and that is a Panel member; so a member of what? We are told that:

- The Legal Member will operate in the existing Children's Hearings centres (as is proposed for Sheriffs);
- Will take over the role currently performed by Sheriffs in relation to the establishment of grounds where these are disputed or not understood and interim decisions – so a judicial role;
- The Legal Member's decisions will be appealable 'to court adopting similar procedures to existing arrangements' (by Stated Case to the Sheriff Appeal Court) so no change there;
- The Legal Member will be 'legally qualified, competency-based and fee-paid, *consistent with legal members of other Scottish tribunals*' (see discussion below);
- They will be provided with induction and ongoing education in their functions and subject to rigorous performance monitoring.

Where then, will this new judicial post sit? We have to work this out for ourselves, because the Consultation Document is surprisingly vague about it. The Legal Member is not a Sheriff or a new type of Sheriff and has no connection with the Sheriff Court

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<sup>1</sup> Improving the Management of Sexual Offence Cases, Final Report of the Lord Justice Clerk's Review Group, Chapter 6 'The Children's Hearings System' #6.10-6.13; Recommendation 6(iv), (ix) and (x). Trauma informed training of the Judiciary is already established.

except that it is proposed that their decisions be appealable there. The Legal Member is not a Panel member; so not supported by Children's Hearings Scotland and rightly so as this would be a huge departure from one of the most fundamental tenets of Kilbrandon.<sup>2</sup> So, what is the Legal Member and where will they be established? The only logical answer is the one that is but hinted at in the Consultation Document. **The Legal Member will be a fee paid First Tier Tribunal Member sitting within and supported by the Scottish Tribunals.** If not within the First Tier Tribunal Chamber system then where? It seems, respectfully, that there is no other possible home for this proposed new judicial office.

[The Tribunals \(Scotland\) Act 2014](#) brought tribunals in Scotland under one umbrella – the [Scottish Tribunals](#). The Scottish Tribunals system has two tiers:

- a First-tier Tribunal,
- an [Upper Tribunal](#) that hears appeals against decisions of the First-tier Tribunal

The First-tier Tribunal is divided into Chambers, each of which hears cases relating to particular devolved issues including Housing and Property, Taxation, Health and Education, and Social Security. A General Regulatory Chamber deals with charity and transport appeals. Administrative support for the Scottish Tribunals is provided by [the Scottish Courts and Tribunals Service \(SCTS\)](#).

Three Tribunals address reserved issues which have specific Scottish jurisdiction and structures, and these are the Mental Health Tribunals for Scotland, the Pensions Appeals Tribunal and the Lands Tribunal for Scotland, all supported by SCTS.

There are three tribunals that deal with reserved issues that have GB-wide jurisdiction and structures and are not supported by SCTS and these are the Immigration and Asylum Tribunal, the Social Entitlement Tribunal (Social Security and Child Support Appeals) and the Employment Tribunal in Scotland.

There is no existing Chamber within the Scottish First Tier Tribunal system that addresses family law, child law, child protection or matters arising from the Children's Hearings. It is to be inferred, therefore, that a completely new Chamber will require to be established sitting within the Scottish First Tier Tribunal system and supported by SCTS. Its members, the Legal Members, are likely to be mainly Solicitors and

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<sup>2</sup> #72 "... the desirability of separating clearly the two issues of (a) adjudication of the allegation issue and (b) consideration of the measures to be applied." # 73 "Such an agency (Children's Hearings) would clearly not be a criminal court of law or indeed a court in any accepted sense. It would be the duly constituted public agency authorised to deal with juvenile offenders where necessary by the application of compulsory measures." # 74 " ... we shall refer to this agency as the 'panel' as distinct from the courts of law ..."

Advocates in private practice sitting as fee paid Tribunal Members. (It may be that Sheriffs or Summary Sheriffs could be deemed eligible to sit as First Tier Members of this new Chamber but that would be bizarre given the existing role of Sheriffs that it is sought to eliminate and replace.) It seems likely that their recruitment will be through the Judicial Appointments Board for Scotland as it is difficult to see how else the specialised Scottish judicial competences required for the role could be properly assessed. Any other competency-based recruitment short of JABS would seem inadequate and deficient. Appeals against the decisions of Sheriffs on the establishment of grounds for referral are rare; one cannot help wondering whether decisions by less judicially experienced Legal Members will generate more appeals to the Sheriff Appeal Court.

This proposal will come with a cost; the cost of establishing the new Chamber, the appointment of a President, the support staff (salaries and pensions), IT infrastructure and other bureaucratic infrastructure and, of course, the Legal Members' fees. It is noteworthy that, unlike other part-time fee paid members of the Judiciary whose earnings are pensionable, First Tier fee paid Members are not and, moreover, their daily fees are the lowest.

The Chamber will be independent of and separate from the Children's Hearings, which are supported by CHS, and the Sheriff Court but will engage with both. Arrangements will be required, therefore, for the transfer of documentation and exchange of information in respect of individual cases with concomitant challenges in relation to confidentiality and data protection. With the decision-making process in respect of disputed grounds for referral being spread across two institutions, the new First Tier Tribunal Chamber and, for appeals, the Sheriff Court, the likelihood of duplication or at least the loss, rather than creation of efficiencies, seems likely. Above all the risk of confusion and misunderstanding among the children, young people and families being served by these processes will be heightened. It is counter-intuitive, when an opportunity arises from the redesign of the Children's Hearings to simplify and bring clarity to the decision-making process, to further fragment it by the introduction of another separate and independent but related body, the new Chamber addressing matters of child protection and the Children's Hearings system.

To my knowledge the proposal has not been raised with the President of the Tribunals in Scotland, Lady Wise, or her team of officials.

There is one important matter affecting the feasibility of this proposal and that is when the Scottish Tribunals will be in a position to take on the establishment and administration of a new Children's Hearings or Child Protection Chamber when it is still to complete the absorption of the MHTS with, waiting in the wings, the substantial challenges of the Employment Tribunals and Immigration and Asylum Tribunal. It seems unlikely that the proposal for the establishment of Legal Members within the SCTS structure could be achieved within any timescale that would be realistic for implementation of The Promise and the transformational change that is desired now

unless the process were somehow accelerated. Would primary legislation be required with the appointment of a Tribunal President, support staff and the provision of a budget by Scottish Ministers?<sup>3</sup>

The Scottish Government Consultation Document advances the dubious proposition that the Legal Member will be “...*better* able to explore ways of identifying and eliminating sources of delay in establishing grounds ...”. The basis, let alone evidence, for this is not offered. Sheriffs are experienced in dealing with factors that lead to drift and delay in cases referred for the establishment of grounds for referral and have been provided with wide powers to ensure the expeditious disposal of cases.<sup>4</sup> The need to observe ECHR Article 6 compliance will remain and with it the right to representation of anyone affected by a decision of the Legal Member. The Legal Member will still be faced with the same challenges that are experienced in the Sheriff Court of parents, living possibly chaotic lives, seeking to enter the process late, seeking adjournments for the instruction of solicitors, investigation, preparation of reports and legal aid applications. It seems more likely that Legal Members who will be part time, fee paid and less experienced than Sheriffs, will be less able to resolutely manage and direct the proceedings to eliminate or minimise drift and delay. The powers that the Consultation Document proposes be given to Legal Members to combat drift and delay do no more than mirror those that already exist in the hands of Sheriffs.

The Scottish Government Consultation Document suggests that the proposals regarding the Legal Member could bring continuity, but the evidence base for this assertion is not provided. In fact, the opposite will be the case and if the reliance is upon part time, fee paid legal practitioners the possibility of ensuring the same Legal Member for all hearings is more remote than if a resident Sheriff were engaged. This will be particularly the case for those First Tier Members who hold a portfolio of judicial and tribunal appointments since, to put it crudely, this one will attract the least remuneration and no pension entitlement. While financial reward is rarely the motivation of Judicial and Tribunal officers it nonetheless represents a disincentive to undertake the role on a continuous and consistent basis.

The Consultation Document makes a further assertion for which there seems little foundation that ‘... Court will always be an anxious and difficult experience for many children and families ...’, however this does not align with evidence provided to

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3 Cf. Mental Health Tribunals for Scotland (MHTS) see **Mental Health (Care and Treatment) (Scotland) Act 2003, s. 21** and **Schedule 2**

4 **Act of Sederunt (Child Care and Maintenance) Rules 1997, Rule 3.46A** addressing the instruction of a single expert, use of Affidavits, restriction of issues for proof, restriction of witnesses, use of live link for the taking of evidence alongside common law powers to prevent prolixity, repetition and delay and a general duty to ensure the expeditious conduct of business

the Hearings System Working Group that children, young people, families and, for that matter, social workers preferred court for the clarity of process and decision-making and, for social workers, less abuse. It ignores recommendations in the HFC Report regarding the alignment of the court experience with the experience of Children's Hearings, the possible holding of grounds proofs in hearings centres and the adaptation of Court premises to improve the experience of children and families generally.

## Fact finding hearings

The Consultation Document describes the fact-finding hearings that it is envisaged will be overseen by the Legal Member and in doing so provides nothing less than a description of grounds hearings as they are presently arranged. It is difficult to discern any difference which is disappointing as it fails to give recognition to the desire among children, young people and parents to move away from the demeaning and adversarial nature of the current grounds hearings. The fact-finding hearings will take place at hearings centres when the grounds will be considered. If grounds are not understood or disputed the Legal Member can defer to consider evidence 'similar to a Sheriff's current approach'. The HFC Report, by contrast, raised the possibility of avoiding any attendance at all by children, young people and families where grounds were not disputed and for such cases to be dealt with in chambers by the Sheriff or possibly by the Chair. This would occur in the context of a more relational, enhanced level of engagement between children, young people and their families with the Reporter in advance of grounds being framed and, crucially, with the support of independent advocacy throughout the process ensuring fairness, equality of arms and informed decision-making. It seems that an opportunity has been missed in the Consultation Document to obtain views on these innovative and transformative ideas.

If a policy objective is at play to delegate important, life-changing judicial decision-making in respect of vulnerable children to the lowest possible level of the judiciary in order to achieve cost savings, it and its pros and cons should be called and considered for what they are. It would be a shame, though, if such financial, managerial and administrative considerations were pursued at the expense of further fragmenting and eroding the decision-making process for children and young people and worsening their experience of the Children's Hearings system. It is a proposal that would still demand the net utilisation of scarce funding. The proposal betrays a system led approach and not one that addresses the needs of the children and young people the Hearings system exists to serve. It flies in the face of the collaborative principles underlying The Promise, and the Hearings for Children Report, ignores the voices of children and young people who have experienced care and undermines the assertion that Scotland can be the best country for children to grow up in. Historically, decisions in respect of the status of individuals and children were the preserve of the Supreme Court owing to their importance. This proposal would have the stigmatising effect of moving such decisions to the lowest judicial level.

My conclusion, therefore, is that the notion of a Legal Member is flawed and ill-conceived on its merits. It becomes a distraction from a missed opportunity to obtain views on and to explore more fully the innovative and transformative recommendations in the HFC Report around the establishment of grounds in advance of a hearing in the context of a more relational approach by Reporters and the provision of independent advocacy from the earliest stages.

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