

Transfer of the Functions of Education Appeal Committees to the Scottish Tribunals: Consultation Analysis

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Transfer of the Functions of Education Appeal Committees to the Scottish Tribunals: Consultation Analysis

1. Executive Summary

1.1 Background

This report provides a summary of the analysis of responses submitted during the consultation on whether the functions of Education Appeal Committees (“appeal committees”) should transfer from the auspices of local authorities to the Scottish Tribunals. The consultation opened on 14 November 2022 and closed on 6 February 2023. Following the collection of consultees’ responses, a mixed method approach was adopted to analyse the consultation findings. This ensured a comprehensive review of the qualitative and quantitative data. Please visit [LINK] to view responses to the consultation where consent has been given to publish the response.

1.2 Responses Received

In total 75 responses were received as part of the consultation. Respondents were asked to self-identify either as individuals or as organisations.

- 30 respondents self-identified as an individual
- 45 respondents self-identified as an organisation.

Responses from organisations were assigned appropriate categories to allow for further analysis.

- Local authority and local authority representative bodies (30 responses)
- Legal profession or judiciary (four responses)
- Representative/advocacy bodies for children with additional support needs (eight responses)
- Representative/advocacy body for parents (one response)
- Representative body – education (one response)
- Ombudsman/Regulator (one response)

1.3 Summary of Responses

The following provides a summary of the key outcomes of the questions:

68% of respondents (51 responses) did not agree that appeal committees should transfer to the Scottish Tribunals. A minority of 17% (13 responses) did agree that appeal committees should transfer to Scottish Tribunals. 7% (5 responses) were not sure and 8% (6 consultees) did not provide an answer to this question.

57% of respondents (43 responses) agreed that appeal committees should remain under the auspices of local authorities but with improvements to how they operate. A minority of 27% (20 responses) did not agree, 8% (6 responses) were not sure and 8% (6 consultees) did not provide an answer to this question.

32% of respondents (24 responses) answered that no changes should be made to how appeal committees operate. A majority, 45% (34 responses), answered that changes should be made, 11% (8 responses) were not sure and 12% (9 consultees) did not provide an answer to this question.

Next steps

This report provides the analysis of the views expressed in the consultation. As a result of the responses received and the issues raised the Scottish Ministers will consider whether appeal committees should transfer to the Scottish Tribunals, and if not, what improvements could be made to the current system.

2. Introduction

2.1 Background to the consultation

Local authorities are required to set up and maintain appeal committees. The great majority of the appeals considered by these appeal committees relate to school admission placing requests and a smaller number to exclusions from school.

The Tribunals (Scotland) Act 2014 (“the 2014 Act”) created a new two-tier structure for devolved tribunals, organised into the First-tier Tribunal which is a tribunal of first instance and the Upper Tribunal which hears appeals from the First-tier Tribunal and, in some specific circumstances, first instance appeals. These are known collectively as the Scottish Tribunals. In schedule 1 of the 2014 Act, appeal committees are listed as one of the tribunals, which will transfer to the Scottish Tribunals at such time and in so far as Scottish Ministers consider appropriate.

The 2014 Act contains powers to make the secondary legislation required to amend the Education (Scotland) Act 1980 (“the 1980 Act”) and transfer the functions of appeal committees to the First-tier Tribunal. Those functions would be transferred to the Health and Education Chamber, which also houses the functions of the former Additional Support Needs Tribunals for Scotland (generally referred to as the Additional Support Needs jurisdiction).

2.2 Format of the consultation

The consultation ran from 14 November 2022 to 6 February 2023. Views were invited on three questions in relation to whether Education Appeal Committees should transfer to the Scottish Tribunals and seeking views on any improvements that could be made to the current system. The questions are summarised as follows:

- **Do you agree that appeal committees should transfer to the Scottish Tribunals?**
- **Do you consider that appeal committees should remain with local authorities but with improvements to how they operate?**
- **Do you consider that no changes should be made to how appeal committees operate?**

2.3 Format of this consultation report

This consultation analysis report is in two parts: a quantitative analysis of the consultation responses in section 3.5, and a qualitative analysis in section 4.1 which sets out the main themes that were gathered from the consultation responses. Where necessary, comments are provided by the Scottish Government to give further clarity or explanation.

Please note that the discussion in section 4.1 does not include consideration of each individual comment made, rather the most relevant themes mentioned by multiple respondents.

2.4 Data protection and the consultation

To ensure compliance with data protection requirements, respondents were asked by the Scottish Government if their responses could be published online. The appropriate data redactions have been implemented dependent upon respondents' answers to this question. Where respondents have given permission to publish their response without name, quotations have been provided with the appropriate identifying data redacted. To provide context to the response, we have provided the details of the general category to which the respondent has been identified as belonging.

To help illustrate further the key themes explored in the consultation responses some quotations have been included within the discussion below.

No quotations have been provided from respondents who provided an answer "do not publish response". However, these responses formed part of our overall consideration and analysis of the consultation responses.

3. Analysis of Consultation Responses

3.1 Discussion on approach for quantitative data

The consultation included quantitative questions where the respondent was asked to select an answer from “Yes”, “No”, or “Not Sure”. The number of respondents in each category were counted and are presented in section 3.5. Where respondents did not provide an answer to a question a “no answer” category is also analysed.

3.2 Discussion on approach for qualitative data

A free text box was included alongside the quantitative questions to allow respondents to elaborate on their answer and provide qualitative information about their views on the proposals. Responses which included text as part of the respondents’ answer were analysed as follows.

Responses were initially reviewed to identify themes that presented across the body of responses. Responses were categorised for each question into groups according to the main themes that were present in each response. To ensure consistency across the body of responses, the themes identified were recorded in a coding framework. This document was updated as the analysis progressed. The coding framework recorded themes that arose from the body of responses, and these were further reviewed to identify key themes which encompassed groups of themes. Where a theme is referenced as a key theme, it was identified as a theme raised by over 10 responses to the consultation.

3.3 Limitations of this methodological approach

It is also important to acknowledge that this approach has limitations. Firstly, the coding framework was developed from the themes identified within responses received and was formulated prior to the analysis of responses. Secondly, the questions posed in the consultation document can be argued to have placed boundaries on the responses provided and to have potentially limited their breadth and focus. Finally, it is not possible to guarantee that the analysis will be free of bias. The information provided by respondents will reflect their interests and perspectives. Similarly, the views of those analysing the data will also be present and be reflected in the interpretation of the data and use of the coding framework. However, this approach allows us to identify areas of consensus, disagreement and debate within consultation responses and for them to be explored in greater

depth than would be possible with data gathered solely from quantitative questions.

As noted by Cresswell (2013), care should be taken when using a coding framework that attributes numerical values to qualitative data¹. As a result, we do not set out the number of responses that highlighted the identified theme. We also acknowledge that the analysis is based on information provided by those who responded to the consultation which will not be representative of the wider population and, as noted above, will reflect the views and interests of those individuals and organisations that chose to respond to the consultation.

3.4 Consultation Responses

In total, 75 respondents provided responses for the consultation, 67 through the Citizen Space platform and 8 by email.

| Category of Respondent | Number | Percentage |
|---|---------------|-------------------|
| Individual | 31 | 41% |
| Organisations representing Local Authority Interests | 29 | 39% |
| Other organisations (representing various stakeholder bodies including those from for example the judiciary and legal profession, advocacy groups for children with additional support needs) | 15 | 20% |

¹ Cresswell, J. (2013). Qualitative inquiry and research design: Choosing among five approaches. Los Angeles, CA, page 185

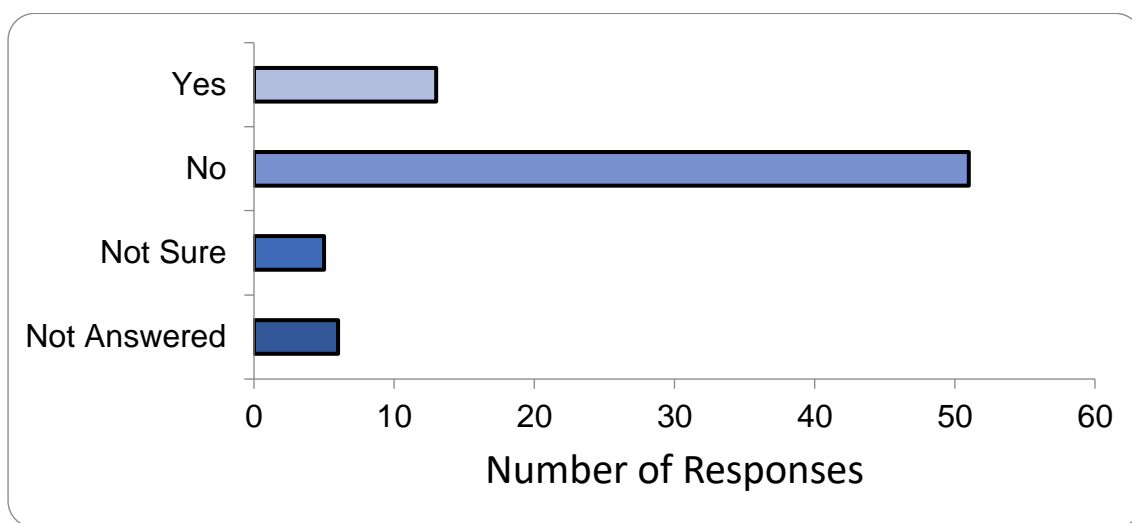
3.5 Quantitative Analysis

This section provides quantitative analysis of the questions in the consultation.

Question 1: do you agree that appeal committees should transfer to the Scottish Tribunals?

69 consultees responded to this question and the majority (68%) were opposed to the proposal:

Figure 1. Responses to question 1 by response type.

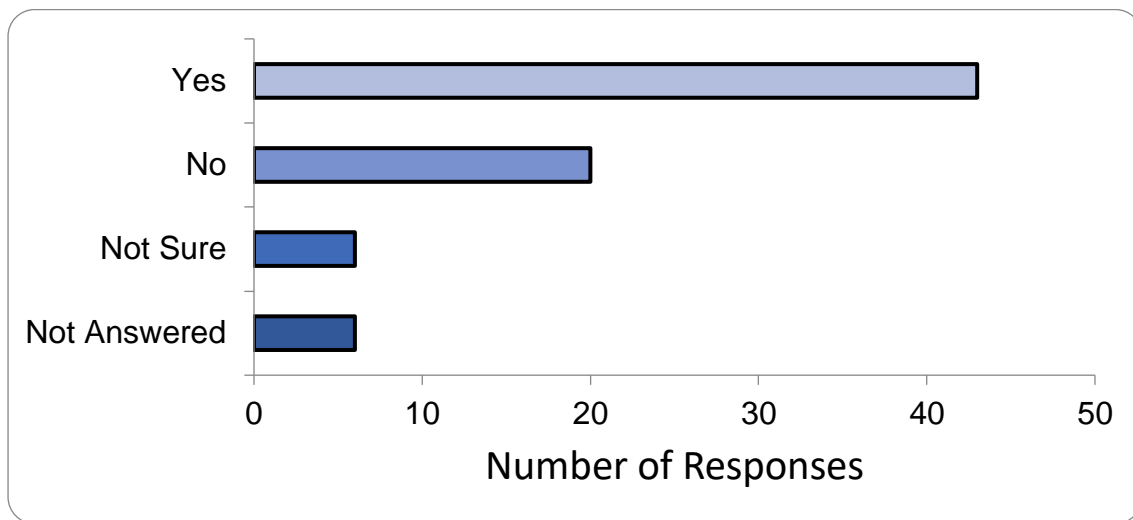


| Option | Total | Percent |
|--------------|-------|---------|
| Yes | 13 | 17% |
| No | 51 | 68% |
| Not Sure | 5 | 7% |
| Not Answered | 6 | 8% |

Question 2: do you consider that appeal committees should remain with local authorities but with improvements to how they operate?

69 responses were given with the majority, 43 (57%) in favour of appeal committees remaining with local authorities. 20 consultees were in favour of appeal committees remaining with local authorities, the remainder were not sure or did not answer:

Figure 2. Responses to question 2 by response type.

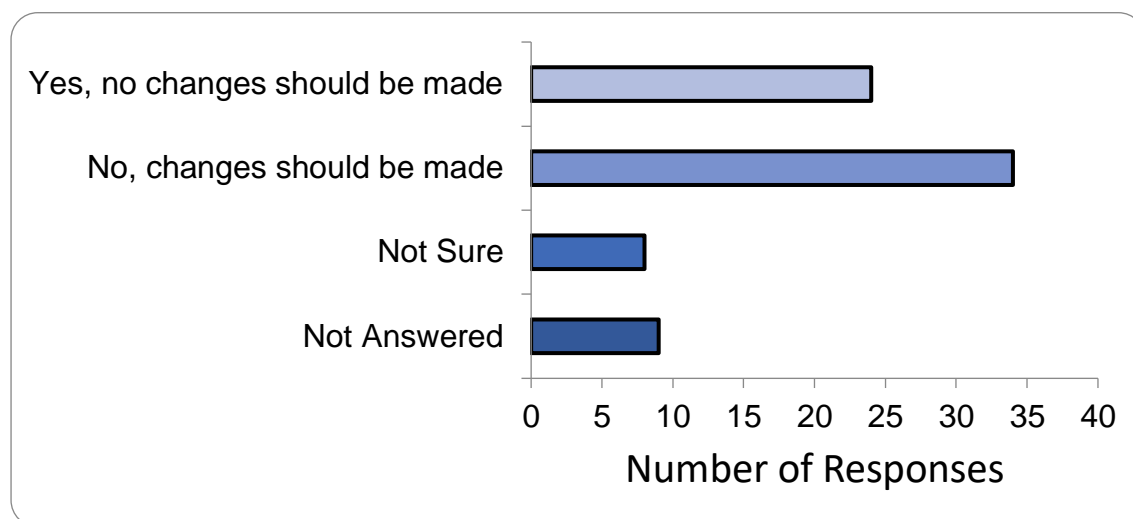


| Option | Total | Percent |
|--------------|-------|---------|
| Yes | 43 | 57% |
| No | 20 | 27% |
| Not Sure | 6 | 8% |
| Not Answered | 6 | 8% |

Question 3: do you consider that no changes should be made to how appeal committees operate?

A total of 66 responses with the largest proportion, 34 (45%), responding that changes should be made to how appeal committees currently operate.

Figure 3. Responses to question 3 by response type.



| Option | Total | Percent |
|--------------------------------|-------|---------|
| Yes, no changes should be made | 24 | 32% |
| No, changes should be made | 34 | 45% |
| Not Sure | 8 | 11% |
| Not Answered | 9 | 12% |

3.6 Key Findings

A total of 75 responses were received. Responses varied greatly in length. Some responses were brief and gave less explanation of the rationale of their response. Responses from organisations focussed on the areas of the consultation most relevant to their organisation’s interests and submitted no answers to some of the questions.

Question 1 asked do you agree that appeal committees should transfer to the Scottish Tribunals? Only 17% of respondents (13 responses) believed that appeal committees should transfer to Scottish Tribunals with the majority in favour of retaining the status quo.

Question 2 asked do you consider that appeal committees should remain with local authorities but with improvements to how they operate? The majority (57%) were in favour with 27% of respondents (20 responses)

against. However, as noted in section 3.3, whilst some may disagree with the question, this may not necessarily mean they would have a preference in proceeding with the transfer as they may believe that appeal committees remain with local authorities but do not require any improvement.

Question 3 asked do you consider that no changes should be made to how appeal committees operate? Around a third (24) of respondents agreed that no changes should be made to how appeal committees operate and just under half (45%) responded that changes should be made to how they operate.

4. Comments on Key Themes

In this section we set out the key themes that were identified in consultees' responses to the consultation. As noted above we do not quantify the number of responses that referred to a particular theme.

4.1 Local Knowledge

Several responses noted the advantages of local decision making, local knowledge and flexibility of approach currently offered through the current system.

One local authority respondent commented:

“Local membership of Committees are best placed to have the necessary knowledge for mainstream placing requests, which will not generally benefit from the health and social work expertise of tribunal members.”

Organisations representing local authorities responded that appeals are better dealt with locally as appeal committees will have a better understanding of the community and that the Health and Education Chamber (HEC) may not be able to replicate that local knowledge and understanding.

A local authority response noted that:

“Experience has shown us that local knowledge is needed to be able to adapt to quickly changing situation regarding decisions at local level between schools”.

Local authority responses placed significant emphasis on knowledge of the local context, including demographic trends and their impact on demand for places. The importance of local knowledge was also echoed by some individual responses. For example, an individual respondent noted the importance of understanding the resource implications of appeal decisions and challenges local authorities may face.

“Local authorities are best placed to understand the context of their schools and there are many resource implications that are faced through placing requests. It is increasingly difficult to recruit to remote, rural and island schools and one additional child may increase staffing requirements which cannot be met. This puts an

additional burden on teaching and support staff and is not in the best interests of all children.”

However, this view was challenged by the response which noted that the rights that are being tested by appeal committees are framed nationally and therefore knowledge of local context is of less relevance.

“The consultation document, at paragraphs 4.2 and 4.9, refers to a need ‘to ensure that members have a good understanding of the local delivery of education’. While there is value in local knowledge this is not essential. The rights of parents and pupils are framed on a national, not local basis. Consideration of local delivery is therefore usually not relevant and would only encourage differences in how rights are applied across the 32 education authority areas. Where local knowledge of how education operates is relevant (for example, the local structures in place) that can be provided in evidence from the relevant local education official, or by school staff. Where (as is usual) this is not controversial, it can be provided by witness statement, removing the need for oral evidence.”

Furthermore, HEC commented that:

“HEC judicial members are drawn from across Scotland, which provides for flexibility in local delivery. While this enriches the overall knowledge base, it is rarely necessary for a member to need local knowledge in a specific case. Members without direct local knowledge are impartial, they rely on the evidence presented and provide an objective perspective.”

This argues the case that members of the HEC chamber will be fully trained and ready to deal with the appeals that will be heard at an appeal committee if the transfer was to go ahead. Currently, there is no statutory requirement for appeal committee members to receive training.

4.2 Organisational Capacity

Some respondents to the consultation expressed concerns about whether the Scottish Tribunals will have the organisational capacity necessary to ensure that the appeals process is completed in a timely manner. Many respondents representing local authorities noted that the majority of placing request appeals occur in the summer term. They noted that it is crucial that parents receive the outcome of their appeal as soon as possible and certainly before the start of the new school year. Some respondents

thought that the transfer could disrupt the operation of schools and make planning for schools more difficult.

The COSLA response noted:

“There would be a much longer process to prepare and consider cases that are currently administered by appeal committees. We would therefore expect that the timescales for decision making would extend, potentially by a significant period. This stands against the streamlined system that local authorities have established through years of practice.”

A local authority response noted:

“By transferring all aspects of the process away from local decision-making it is likely to remove local accountability; prevent agility and flexibility which is needed between schools, parents and officers in order to make decisions quickly when circumstances change for young people. Moving appeals to Scottish Tribunals is likely to cause further delays in decision-making.”

4.3 Accessing Appeal Hearing Venues

Concerns were expressed about appeal hearing venues and the likelihood they would be mainly in the central belt and/or major towns and cities. This could result in increased costs to parents and time spent travelling for those based outside of the central belt. Some respondents expressed the fear that centralising the work of appeal committees will restrict access to justice as some parents may be put off from appealing, especially those on lower incomes, due to travel costs and time off work to travel to hearing venues.

A local authority noted:

“Both local authorities and parents are likely to face increased travel costs. This may be seen as a barrier to parents who currently only need to travel small distances to the appeal committees hearing.”

4.4 Resourcing the transfer

Respondents opposing the transfer had concerns about the potential costs that could arise following the transfer. Some noted that local authorities may choose to have legal representation at tribunal hearings, in some cases engaging external legal services, significantly increasing the legal

costs associated with this process. Some argued that parents may also wish to engage legal advisers given the quasi-judicial character of the Scottish Tribunals system, and lead to increased costs for them also.

One LA respondent noted:

“The proposal suggests costs of between £500,000 to £700,000 per annum for a central tribunal service, with costs being met by central and local government – given the concerns previously made, these costings seem to be an underestimate. As the proposal has not been fully costed at this time it is difficult to comment further. As noted previously, almost all appeals are heard remotely within East Renfrewshire Council and so there is little cost associated with the process; where meetings have been held in person there is also little expense to all parties. Given the current economic challenges being faced in local government, it is concerning that a process which is efficient, working well and very low cost, will be replaced by one which will cost more and likely be more inefficient and inequitable.”

However, the HEC noted:

“It is worth noting that significant resources are already deployed in the administration of appeal committees; those resources would be saved across all 32 education authority areas.”

The HEC also explained that steps could be taken to ensure that the system is streamlined and efficient:

“The Chamber stands ready to maintain a speedy, judicial and professional decision-making jurisdiction by increasing the flexibility of its processes. This can be achieved by, for example, the use of documents only decisions (something the Chamber already does); legal member only decisions (again, done already); robust pre-hearing case management to reduce the volume of oral evidence (commonly practiced now) and expedited decision making (deciding a number of appeal committees cases in a day).”

4.5 Formality of Tribunals

Some respondents noted the transfer could make the process more formal than at present and potentially put people off from appealing. The procedural aspects may be more complicated and make the process more

stressful for appellants as many parents may find attending an appeal held at a Tribunal centre intimidating.

Some organisations who responded who were in favour of the proposed transfer believed that appeal committees are not fit for purpose and that there is a lack of structure in the current set up. One respondent noted that:

“Concern regarding existing arrangements can be traced back to 2000 when the Scottish Committee of the Council on Tribunals prepared a special report on appeal committees. In their annual report of 2010/11, the Scottish Committee of the Administrative Justice & Tribunals Council included a section on education appeal committees. They repeated fundamental concerns that the appeal committees were not fit for purpose and their practices did not satisfy the requirements of impartiality, fairness or transparency.”

4.6 Impartiality of Tribunals

There was also a theme that there would be greater impartiality if the transfer was to go ahead as it was argued that parents would be able to access an impartial forum if appeal committees were to transfer to the Scottish Tribunals, as noted in one response from an advocacy group for children with additional support needs:

“Those who hold the budgets should not be adjudicating on the appeals, as this creates the potential for a conflict of interest.”

It was also argued that a centralised process under one body would mean greater consistency across all appeal hearings in relation to both practice and procedure. Many organisations, especially those from an Additional Support Needs (ASN) perspective also noted that ASN Tribunals are child friendly.

4.7 Improving Skill Levels of Appeal Committee Members

There were many responses to the consultation that indicated that the respondent would like to see improvements made to the current appeal committee system. The most prominent of which was the introduction of national guidance for local authorities to follow for conducting placing request appeal hearings and for panel members to receive annual training to ensure a consistent standard is displayed amongst all 32 local authorities.

Nineteen organisations representing local authority interests expressed interest in this idea. The Society of Local Authority Lawyers (SOLAR) noted that:

“It is difficult to see how the tribunal could replicate the local knowledge of 32 different authorities. If the status quo was maintained, the provision of centralised independent training to the local committee members on decision making processes could instead provide a helpful check and balance, while retaining the very valuable local knowledge.”

It was noted by many respondents that local councillors should not sit on appeal committees and appeal committee members should be drawn from wider society with some expertise in education. It was argued this could help reduce the tendency to prioritise concerns about educational budgets in decision making as this could create the potential for a conflict of interest.

The HEC commented on the ability to ensure that tribunal members have an appropriate understanding of the appeals process:

“A statutory requirement to train all HEC judicial members exists. That training falls under the responsibility of the Lord President. The Lord President monitors member training through the Judicial Institute for Scotland. The Judicial Institute delivers core training on Tribunal Craft and specialist training is delivered by the HEC Chamber President. A Lead Trainer has been appointed from the Tribunal membership who supports the HEC Chamber President in the delivery of these duties.”

5. Conclusion

This report has provided quantitative and qualitative analysis of the 75 responses received to the Education Appeal Committee Transfer consultation. Further work will now commence on whether appeal committees should transfer to the Scottish Tribunals and, if not, what improvements can be made to the current system.

Annex A: Organisations who submitted responses to the consultation.

Aberdeen City Council
Aberdeenshire Council
Aberdeenshire Council - Legal Department
Aberdeenshire Council's School Placings & Exclusions Appeals Committee
Angus Council
Argyll and Bute Council
Comhairle nan Eilean Siar
Connect
Confederation of Scottish Local Authorities (CoSLA)
Association of Directors of Education Scotland (ADES)
Dumfries and Galloway Council
Dundee City Council Children and Families Service
East Dunbartonshire Council
East Lothian Council
East Renfrewshire Council
Enquire – The Scottish Advice Service for Additional Support for Learning
Equality and Human Rights Commission
Faculty of Advocates
Falkirk Council
Fife Council
First-tier Tribunal for Scotland, Health and Education Chamber (HEC)
Glasgow City Council Education Services
Govan Law Centre
Inverclyde Council
Law Society of Scotland
Midlothian Council
Moray Council
My Rights, My Say
National Autistic Society Scotland
North Ayrshire Council
Orkney Islands Council
Partners in Advocacy
Perth and Kinross Council
Scottish Autism
Scottish Borders Council
Scottish Universities Inclusion Group
Shetland Islands Council
Society of Local Authority Lawyers & Administrators in Scotland (SOLAR)
South Ayrshire Council
South Lanarkshire Council

Stirling Council
The Educational Institute of Scotland
West Dunbartonshire Council
West Lothian Council



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