



Tribunal (Additional Support Needs) Forum

23 May 2023, Glasgow

Forum Note

Each year the Tribunal hosts a Forum, which provides an opportunity to meet the Chamber President and her staff and to discuss topical matters in relation to the Tribunal. The Forum is a valuable information sharing event.

The sixth Health and Education Chamber (**HEC**) Tribunal Forum was held on Tuesday 23 May 2023 at the Glasgow Tribunals Centre, our first in-person Forum since 2019. Covid did not prevent us from conducting our annual Forums, but it did mean that the last three of these were conducted online. Like many of the advances we made during the pandemic, we learned that an event such as this could easily be accommodated in an online environment, where many more could attend than in-person. But we have also recognised the value of in-person contact. To reflect our advances and our values, we will conduct every alternate Forum online. **The 2024 Forum will take place online on Thursday 18 April 2024 10:00 – 13:00.**

Attendance at this year's Forum was high and varied, as always, with representatives from child and parent groups, legal and education, the Scottish Government, the Children and Young Person's Commissioner for Scotland (**CYP**CS), the Scottish Courts and Tribunal Service (**SCTS**), social work and health.

Summary of Topics

1. Chamber President's Update

Attendees heard how the HEC has entered the final phase of transition from Covid. The President explained the three hearing types and the current venues that will be used for in-person hearings. With any type of hearing the HEC sensory principles will be maintained. A visual of these principles are in the PowerPoint presentation. The

President also discussed the rise in case volume in this reporting year (2023/2024). Finally, the President issued the revised [Information Note 01 2023: Parties, Representatives, Witnesses and Supporters](#).

2. Scottish Government (Update on Education Appeal Committees)

Mr Jerry O’Connell provided a brief update on the conclusion of the [consultation](#) of the proposed transfer of the Education Appeal Committees (**EAC**) to the Scottish Tribunals (which ran from October 2022 – February 2023).

3. Casework Update

Mrs Arlene Shearer, the Senior Operations Manager, SCTS, provided an overview on performance and statistics over the last reporting year.

Miss Sarah Tracey, the Casework Team Leader, SCTS, provided information on the recent expansion of sensory resources, including a visual guide, an accessible guide to the website decision database and the launch of animation videos.

4. Judicial Update

The HEC In-House Legal Member provided a judicial update topical matters which have arisen in the HEC since the last Forum.

5. The Views of the Child in Tribunal Proceedings

Ms Marie Harrison (Senior Policy Officer – My Rights, My Say (**MRMS**) & Children’s Views) explained how independent advocates ensure that the views of children are passed onto the Tribunal and other formal processes that they become involved in as part of the MRMS project.

1. Chamber President’s Update

Hearings

New [President Guidance 01 2023 Hearings in the HEC](#) was issued in February 2023 which introduces three hearing types: in-person, remote (online or telephone or a mixture) and hybrid (a mixture of both in-person and remote). There has been a

gradual increase in the number of in-person and hybrid hearings, with remote hearings (online) continuing to be the majority hearing type. The following venues may be used for in-person hearings – these are: George House (Edinburgh), Glasgow Tribunals Centre (**GTC**) and in early course the Inverness Justice Centre. The principal venue being used is the GTC, which has the fullest range of sensory hearing facilities. The President will increase venue availability over the course of the year.

Sensory Principles

The President provided a presentation of the sensory principles used in HEC hearings.

Case Volume, Extensions and Case Statements

A record 202 cases were received in the reporting year 22/23, which is the highest recorded since the ASNTS first began. This had a knock on effect across the whole of Tribunal activity and has led to –

- Increase in hearings
- Availability – hearings being booked further in advance
- Increase in late motions (withdraw or suspend) close to the hearing date

Late motions within 5 working days of the hearing

The number of cases which settle/withdraw in the week leading up the hearing has risen considerably. Scrutiny of the reasons for withdrawal demonstrate that in a number of cases it ought to have been possible for agreement to have been reached earlier than the week before the hearing.

The President has revised the former Information Note and produced [Information Note 01 2023 Parties, Representatives, Witnesses and Supporters](#) to include provision for late requests to withdraw, suspend or postpone a hearing, where the request arrives 5 working days (or less) of the hearing date. Parties may now be required to attend before a legal member at a case management call or at the hearing to explain the reasons for the proposed withdrawal, suspension or postponement of the reference or claim.

Other areas of practice have been addressed within the Information Note which include:

- Preparing witnesses for hearings
- Witnesses and representatives will be addressed by their title and surname and not by their first name in hearings.
- During the hearing, court language and legal jargon should be avoided.

Parties or their representatives will be provided with a copy of this Information Note from the casework team in every reference or claim.

2. The Scottish Government (Education Appeal Committees)

Consultation Questions on the proposed transfer of the EACs to the Scottish Tribunals

1. Do you agree that appeal committees should transfer to the Scottish Tribunals? If so, why?
2. Do you consider that appeal committees should remain with local authorities but with improvements to how they operate? If so, what changes would you like to see?
3. Do you consider that no changes should be made to how appeal committees operate? If so, why?

75 responses (45 from organisations and 30 from individuals) were received and a consultation analysis report is being developed. This is expected to be published before the school summer break. The Scottish Ministers will be considering the issues raised in the consultation and deciding whether the transfer will go ahead.

A range of views were expressed in the consultation:

- The importance of the role of local knowledge and the involvement of local people in the process.
- The need to ensure that there is organisational capacity within Scottish Tribunals to meet the high volume of cases.
- The practicalities – travel to tribunal venues and the potential that this may put off people making appeals.

- Need to improve the skills and knowledge of EACs and build up the knowledge and capacity of Scottish Tribunals as well.

Question from Cairn Legal and MRMS

Q. Consultees were given 3 options – can you give a breakdown of the preference for each?

A. Broadly the majority were in favour of keeping the *status quo* but with some changes to how EACs operate, for example improving training of EAC members.

A. Remarks from the HEC President

I was not aware that the majority of responses were in favour of keeping the *status quo*, which runs contrary to the concerns raised about EACs. The HEC has lodged a response to the consultation (which will be made public within the analysis report). The President is happy to share this on request.

The HEC position on the consultation response themes shared today are:

- EACs would fit well within the HEC. The HEC is a specialist tribunal with considerable experience and expertise in school education. The specialist tribunal model is culturally a good fit for EACs.
- EACs consider placing requests and exclusions. The HEC (Additional Support Needs) considers placing requests and exclusions (as well as other matters). The HEC has an in-depth knowledge of these. Tribunal members are drawn from law, education, health and social work. They are trained and experienced in both types of application.
- On locality, HEC Tribunal members can sit across Scotland (including the Highlands and Islands). We provide a choice of hearing types - remote, in-person or a hybrid version of these, which would remain an option in an EAC hearing. Choice is a central feature of inclusion and access to justice.
- The HEC is able to grow efficiently and effectively to meet demand. Twelve new members (a mix of legal and specialist) have just been assigned from elsewhere in the Scottish Tribunals. This means that the HEC has access to experienced

Tribunal members when it needs them. The assignation exercise took less than 4 weeks. Induction training is being delivered in June and the members can then sit on cases. This same efficient and effective approach can be introduced should the EACs transfer to the HEC.

- Training in the HEC is highly developed, member centred and expert led.
- The child or young person sits at the centre of HEC tribunals. Our work here has been acknowledged as UNCRC and UNCRPD focused, progressive and ground breaking. A child or young person approach would be made central to EACs.

Comment from Policy Officer at CYPCS

I echo everything the President has said. The CYPCS would be in support of the transfer of the EACs to the Scottish Tribunals. The CYPCS was unable to submit a consultation response on time due to a tight deadline for a response to the Covid enquiry.

Response from Mr O'Connell: Although the CYPCS has not been able to submit a consultation response, the Scottish Government would still welcome their views in writing.

Question from Cairn Legal and My Rights, My Say

Q. Would any transfer of jurisdiction necessarily be an all or nothing transfer or, for example, could exclusions transfer to the HEC but placing requests remain with EACs or some categories transfer over? Could there be a partial transfer?

A. A range of different options will be put to Scottish Ministers who will seek views from additional support needs colleagues. No options are off the table. It is not clear if there is any legal barrier to the option of a partial transfer.

The President thanked SOLAR for their help in collating the relevant statistical information to inform the Scottish Tribunals and the HEC response to the consultation.

3. Casework Update

See 2023 PowerPoint Forum Presentation for statistics, which highlights that placing requests remain the highest application type to the HEC (Additional Support Needs).

Decisions Database

Following feedback at last year's Forum, the casework team has developed a new search function for the decisions database. This allows for a search using case type, individual words or phrases, producing a list of the decisions that meet the search parameters. There are two further updates which include a visual demonstration video of how to use the search function and an accessible guide for children and young people on finding and reading a decision.

Video Animations

The HEC recently launched four new animation videos for children and young people on their website:

Video 1 – Who are we?

This introduces the three members that make up a tribunal and emphasises their independence. It provides more information about how to find help on the HEC website and the other videos.

Video 2 – Talking at a tribunal hearing

This provides an explanation of the different ways the child or young person can talk to the tribunal members and how they can communicate in advance and at the hearing. It also provides information on how they can get help to express their views.

Video 3 – Coming to a video hearing

This provides information on what to expect when attending an online hearing. It also explains each person's role.

Video 4 – Coming to an in-person hearing

This provides an explanation of who the child or young person will see and what to expect when attending a hearing in-person, including the physical hearing room layout.

There is an alternative language version of the animated videos using subtitles and British Sign Language. Another alternative language version (Makaton) will be introduced in the coming months.

The aim of the videos is to help children and young people to understand what to expect when attending and when speaking at a hearing.

4. HEC Judicial Update

See the attached presentation for further details. The following areas were discussed.

HEC Case Law

Presumption of Mainstream (ground of refusal in a placing request)

The burden of proof, need for a causative link, and meanings of ‘incompatible’ and ‘efficient’ in section 15 of the Standards in Scotland’s Schools etc. Act 2000.

SNCT Handbook

Scottish Negotiating Committee for Teachers – Handbook of Conditions of Service (SNCT Handbook) status in Tribunal proceedings.

Terminology in HEC Tribunals

Distressed Behaviour

Language is important, no more so than when considering the ‘behaviour’ of a child or young person, as influenced by the important case [C & C](#), [2018] UKUT 269 (AAC). Parties should avoid terms that suggest intentional actions where this is not meant, for example ‘distressed behaviour’ may be used instead of ‘aggressive’ or ‘violent’ or ‘challenging’.

Witness Communications

Including restricting discussions between witnesses and others, and communication of parts of the bundle to witnesses; and tips for good witness statement preparation including on physical presentation, content and avoiding comment on the ‘ultimate issue’ (any legal test to be applied by the Tribunal).

5. The Views of the Child in Tribunal Proceedings

The MRMS project is entirely independent which means that they don't advocate for the parent or for the local authority. The Children's' Views service (part of MRMS - a network of 4 organisations) work to make sure that children are able to exercise their rights in a meaningful way.

Although the service targets 12 – 15 year olds, they also have a spot purchase agreement with the Tribunal to obtain the views of any child or young person regardless of age.

The Children's' Views service addresses a specific issue or a specific set of questions that have come from an ongoing formal process and a report is produced.

Regardless of a child's communication needs, the service has to be able to respond to them. The onus is not on the child to figure out how to share their views, it is for the service to figure out how to support them to do so. The service spends a lot of time 'setting the scene' and make sure to get it right for the child through conversations with parents and carers but also leaning on participatory framework (the Lundy model). This model involves a way to think about the child as more than just a voice, but also considering the space and environment (where and when are they going to meet and what will they do?). Or would the child prefer to meet online or give their statement via text message?

The service also considers if they have communicated to the child all the information they need to feel empowered and to feel like they understand what is going on. The service has a lot of in-house resources to help them with this including an online magazine and personalised social story letters.

Finally, the service ensures that the child understands with whom their views will be shared. For example, the does the child know that their current school may see what they write? If the child doesn't know this then it loses a lot of meaning.

Setting up shop

The service sends out a personalised social story letter – relying on the things that are important to the child and including things the child is interested in. It also includes

pictures of the staff, information about what is going to happen and when it is going to happen. They have an online magazine and animation detailing how the service works and what they are going to do. They spend a lot of time setting up shop because children feedback that when this happens they feel in a lot more control about what is happening.

Report frameworks

The service has three types of reports:

1. Direct views gathering / participation.
2. Semi-direct views gathering.
3. Indirect views gathering.

The attached presentation details the differences of these reports and the process.

Keeping UNCRC article 12 at the heart, there is a real duty for us to consider the voice of the child when decisions are being made about them, and to ensure that their voice is passed on in the most meaningful way possible for the child.

The President echoed that the views and voice of the child are at the centre of Tribunal proceedings. Independent advocacy reports are incredibly valuable in this regard. Most legal members will instruct an independent advocacy report before the hearing (unless the child or young person is a party).

6. Enquires to the Tribunal

The following advance enquiries were received for the Forum (HEC response in blue):

Question 1 – Angus Council

Q. Following the Scottish Government consultation, what will the implications be if there is a transfer of the functions of Education Appeal Committees to the Scottish Tribunals?

A. If there is a transfer of these functions, the HEC will work closely with the Scottish Government to agree a timescale for the transfer.

Secondary legislation containing rules of procedure will require to be prepared, and member recruitment or assignation will take place where necessary. Expert training

will be delivered to members. President's guidance will be prepared along with Information Notes to assist in understanding the processes.

Stakeholders would be kept closely advised of developments by the Scottish Government and the HEC as any such process unfolds.

Question 2 – Children in Scotland

Q. Would it be possible to get an update on the potential move of the Education Appeals Committee to the tribunal – and whether children will be given the same opportunities to share their views as in ASN tribunals?

A. See the earlier responses.

The views of children would be a critical part of the development of rules, guidance and practice, as is the case within the HEC at the moment. By the time any transfer may take place, it is possible that the UNCRC may have been enacted into domestic Scots law, and this would influence the approach to the taking of the views of children across all cases within the HEC.

Question 3 – Argyll and Bute Council

Q. Use of mediation and other supports to resolve issues at a local level.

A. As a judicial body, the HEC cannot comment on how these mechanisms operate at local level. However, it is not uncommon for parties to seek the suspension of references and claims to allow mediation to take place. Unless special circumstances exist, tribunals will usually be amenable to such requests.

Question 4 – Children and Young Peoples Commissioner Scotland

Q. Extension of rights – how to ensure compatibility with UNCRC?

A. Although the UNCRC is not currently part of domestic Scots law, it can be used as an aid to the interpretation of other international obligations that have been incorporated into Scots law, such as those in the European Convention on Human Rights (via the Human Rights Act 1998).

This means that the UNCRC may have relevance in HEC cases, but only in this sense and in relation to a specific point under the UNCRC.

Should the UNCRC become part of domestic Scots law, it will apply directly, with no need to use it as an interpretation aid to other international obligations.

The UNCRC (along with children and young people) has influenced a number of developments in the HEC including:

- *needs to learn* - the 12 to 15 year old section of the HEC website
- *needs to learn* – the catalogue of HEC unique visual images

- Accessible forms and guidance
- New video animations for children and young people
- Sensory hearings
- President's Guidance on The Child, Young Person and the Tribunal
- The use of independent advocacy

Question 5 – East Dunbartonshire Council

Q. I have not attended any formal training on tribunals or had involvement in many years of cases going to tribunal so feel I could do with a general refresh and update.

A. There are a number of sources of information on the HEC's work available on our website. These include President's Guidance and Information Notes, notes of discussions at previous Tribunal Forum events and our decisions database. A general review of the material on our website would assist here.

Question 6 – East Ayrshire Council

Q. Patterns and trends relating to ASN as outlined in briefing paragraph will be interesting.

A. See the 2023 Forum Presentation for statistics, patterns and trends.

Question 7 – Let's Talk ASN

Q. Social story decisions.

A. The President has started work to explore whether a social story could be used where a letter to the child (explaining the decision) is issued. This work will be led by one of the HEC specialist members (in speech and language therapy) and supported by a legal member and children and young people will be consulted.

Question 8 – Let's Talk ASN

Q. Ensuring that Authorities refer to the statutory service to assist parents in any refusal letters. We are noticing an increase in parents commencing tribunal proceedings themselves and only hearing about our service at case management call.

A. Education authorities are obliged, under section 28(2) of the 2004 Act, to provide certain information to a person who makes a request under the Act (including a placing request) where that request is refused. That information does not include a reference to the statutory advice service (currently Let's Talk: ASN). This does not prevent education authorities from doing so, but there is no legal obligation to do so.

However, the President encourages all education authorities to provide this information in a clear and accessible way to reduce the potential for delays in the Tribunal process.

Question 9 – Let’s Talk ASN

Q. It would be useful if Tribunal rules were clearly linked on ASNT website.

A. There are links to the main legislative sources on our website. The rules have now been added as a block on the main homepage to assist in navigation.

Question 10 – Let’s Talk ASN

Q. On the ASNT [adult] reference form, on page 1, it requests information about the child and states male/female. It would be useful if more inclusive language were adopted. Along a similar vein, albeit child’s legal name requires to be stated it would be helpful if a ‘known as’ could be inserted on the form. This would acknowledge children and young people who identify as a gender that is not their biological one. This is particularly relevant for advocacy stage in order to ensure a positive relationship commences between advocate and child with the correct usage of name.

A. The adult application forms have been updated and are now live on the website. A ‘non-binary’ option has been added and ‘known as’ has been added to child and adult forms.

7. Question and Answer

The following questions were raised at the Forum:

Question 11 – City of Edinburgh Council

Q. If the EAC jurisdiction transfers to the Tribunal is this not likely to give rise to an expectation that a central Government funded free of charge legal service will be available to appellants that is not currently available and is such an expectation financially feasible given the huge size of the jurisdiction?

A: (Mr O’Connell) – These are the sort of issues that Scottish Ministers will be considering and will be reflecting advice from them. Expectations and financial implications will part of those considerations.

Comment from President – Access to representation is an important part of access to justice and the future incorporation of the UNCRC will reinforce this.

Question 12 – Enquire

Q. What can the Tribunal realistically do when transition planning fails but the young person doesn't want to stay on at school?

A. Where a transition reference is made and the Tribunal finds a failure in that respect, then the Tribunal would make a decision on what should happen as a result.

Comment from CYPCS – I have come across similar issues at the point when transition references are being made. Often the relationship has become so difficult that children no longer want to attend school. This means that the child is out of education. Children and families have sadly given up by the time they get to transition.

Comment from Cairn Legal and MRMS - The Tribunal has very broad powers to order transition planning but if the reference has only been raised in May or June before the child is due to leave school, then the options are necessarily limited by that. The duties are planning duties. It is not for the local authority to find a post school placement, so the Tribunal's powers are always going to reflect that. It is about getting that planning process right. If you get the planning right at the appropriate stage and the right people around the table to have that child-focussed discussion about what next then that vastly increases the chances of a post school placement being found. The earlier the better.

Comment from the President – It is worth remembering that the Tribunal has a broad range of procedural powers. This means that it can expedite proceedings, for example, by shortening the case statement period, or by fixing a hearing promptly. These may have relevance in transition references which are received fairly late in the child or young person's school journey.

Question 13 – Stirling Council

Q. There is weariness in the system. We are working in an incredibly stressed system. Tribunal data shows a trend of growth in the number of references, especially placing requests, so we can anticipate that trend will continue. However, public finances are not in a great place so the stress and challenge placed on local authorities and education services to get it right for a growing number of children and young people with complex additional support needs is a huge challenge. Are there potential mitigations that we could put in place, for example, compulsory mediation? Could something be built in to have a required review process to review if a tribunal decision remains in the child or young person's best interest?

The Tribunal is tasked with making decisions and sometimes those decisions have huge cost implications for education services which then perpetuates the cycle of fewer resources to meet the needs of a growing number of children and young people.

A. The Tribunal is a judicial body and is independent of schools, education authorities and health agencies. Our powers come from relevant primary legislation – principally

the Education (Additional Support for Learning) (Scotland) Act 2004 Act (for placing requests, co-ordinated support plan and transition references) and the Equality Act 2010 (for disability discrimination claims).

In placing request references we consider the ground(s) of refusal relied upon by the education authority and the evidence and legal arguments of the parties before deciding whether to confirm or overturn the decision to refuse the placing request. Our decisions are legal decisions and binding on both parties. If a party believes that there is an area of carelessness in the decision that can be remedied by a review or that there is an error of law, they have a right to ask for permission to have a decision reviewed or appealed. There are time limits to this.

The only other review power available rests with the President, who has a power to monitor a decision for non-implementation at any time after the decision has been made. A party will usually raise a request that the President use this power and if the President is not satisfied the decision is being implemented the President may make a referral to the Scottish Ministers. The Scottish Ministers then need to make a decision on what is to happen.

With regard to the rise in placing request applications, this occurs when the dispute cannot be resolved locally. We are still seeing the presence and impact of Covid in our applications.

It is important to note that we are not a review or monitoring body – once a child is placed, it remains the responsibility of the education authority to monitor how they are settling into a placement. It should make no difference whether the Tribunal or the education authority places the child in a school. If a placement is not working and a child is not settling then the school/education authority should communicate with the child, the parents and relevant others to resolve this.

The President is happy to visit education authorities or to do online work to explain the limits or extent of Tribunal powers.

The President concluded the event and thanked speakers, enquirers and those in attendance today, for their helpful and valuable engagement and input.