



Representatives' Forum

05 March 2025, Online

The first Health and Education Chamber (Additional Support Needs) (HEC) Representatives' Forum was held on Wednesday 05 March 2025 online. This Forum will be run annually.

The next Representatives' Forum will take place on 5 March 2026. Feedback is sought on whether this Forum should be in-person or online.

A small number of invitations (maximum of 12) will be extended for the Representatives' Forum, in order to maximise engagement and meaningful discussion. Lay and legal representatives are welcome to attend the Representatives' Forum. Invitations are extended to education authorities (on a first come first served basis), independent schools, child and parent representative agencies and other interested agencies, like the CYPSC.

The purpose of the Forum is to discuss relevant and topical matters of Tribunal process and procedure.

Individual cases cannot be discussed.

1. HEC Updates

a) HEC Decision Timescales

Decisions will ordinarily be issued within 10 working days of the date of conclusion of the tribunal's deliberations. Parties can expect to be kept fully informed if a decision will be delayed by the caseworker.

b) Incorporation of the United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC (Incorporation)(Scotland) Act 2024 (**2024 Act**) came into force in July 2024. The Act has the intent of delivering a proactive culture of everyday accountability for children's rights across public services in Scotland. As part of this, public authorities must take proactive steps to ensure compliance with children's rights in their decision-making and service delivery. Education authorities, grant-aided,

independent schools and the Tribunal are all public authorities with responsibilities under the 2024 Act.

The President is developing detailed Guidance on the UNCRC that will be published on the HEC website later in 2025.

The following sections/Articles of the 2024 were highlighted.

Section 34 of the 2024 Act gives certain organisations a right to intervene in our proceedings where a UNCRC compatibility question arises. These organisations may give notice to the Tribunal of their intention to intervene and will become parties for the purpose of the compatibility question. When the Tribunal receives an application that raises a UNCRC matter that could give rise to a compatibility question, intimation is automatically provided to the three organisations who are listed in section 34.

Section 7 provides two ways to rely on a UNCRC right in the HEC:

1. A party may bring proceedings against a public authority, (which, in this Chamber would be an appellant or claimant in relation to an education authority, independent school or grant-aided school) as a standalone proceeding.
2. A party may rely on the UNCRC requirements (the Articles in the 2024 Act) concerned in any legal proceedings – for our purposes, legal proceedings would be any reference and/or claim.

Article 12, paragraph 2 provides the child with a right to be heard in any judicial proceedings affecting the child either directly, through a representative or an appropriate body.

Section 9 of the 2024 Act introduces a new right for a child to be given an opportunity to express their views about the effectiveness of the relief, remedy or order being sought.

A *Child Engagement Plan* process was introduced in spring of 2024 in preparation for the commencement of the 2024 Act, to look at a beginning-to-end process in relation to contact with children during the Tribunal process and to make sure that staff and Judiciary are UNCRC informed. This plan will be completed at the case management call (**CMC**) stage and will highlight anything of relevance that will help hearing clerks to know how to engage as well as possible with the child.

c) Overriding Objective

This objective is about process decisions of the Tribunal as rule 2 (1) states –

‘These Rules are a procedural code with the overriding objective of enabling the First-tier Tribunal with the assistance of the parties to deal with references or claims fairly and justly.’

The overriding objective includes important points from Rule 3 (1) which states

‘The First-tier Tribunal must seek to give effect to the overriding objective when it—

- (a) exercises any power under these Rules; or
- (b) interprets any rule.’

This means that in making any process decision of any kind (and whether contested or not), the Tribunal has a duty to give effect to the overriding objective when it exercises any power or interprets any rule. Fairly and justly includes the following factors —

- a) dealing with the reference or claim in ways which are proportionate to the complexity of the issues and to the resources of the parties;
- b) seeking informality and flexibility in the proceedings under these Rules;
- c) ensuring, *so far as practicable*, that the parties are on an *equal footing procedurally* and are able to *participate fully in the proceedings, including assisting* any party in the presentation of his or her case *without advocating the course* he or she should take;
- d) using the First-tier Tribunal's special expertise effectively; and
- e) avoiding delay, so far as compatible with the proper consideration of the issues.

It is important that representatives expressly refer to the overriding objective when asking the tribunal to take a process decision.

d) Suspensions and their purpose

The Tribunal is seeing a rise in requests for suspension under rule 24. That rule provides two reasons for suspensions. One is for mediation, the other is under rule 24(1)(b), allowing suspension of proceedings if it would be fair and just to do so. Suspensions should not ordinarily be sought to monitor the outcome of a trial placement as the Tribunal is a judicial decision making body and not a monitoring body.

e) Cancellations of Hearings

Information Note 01 2023 for Parties, Representatives, Witnesses and Supporters provides that where a request to withdraw a reference/claim is made within 5 working days of the date of the hearing, parties may be required to attend before a legal

member at a case management call hearing or at the full hearing to explain the reasons for the proposed late withdrawal.

f) The Role of a Witness

Information Note 01 2023 for Parties, Representatives, Witnesses and Supporters contains very detailed information on the process that applies and the practical points that need to be addressed for those attending a Tribunal hearing. The note should put witnesses at ease as it explains what is expected of them and what will happen during the course of a hearing. The note is sent out when the hearing is fixed and it is sent again to any witness that we hold contact details for prior to a hearing. Representatives should encourage witnesses (including parties), whether skilled or non-skilled, to read the information note.

g) Skilled Witnesses

The difference between a skilled and non-skilled (ordinary) witness lies in the difference between facts and opinion. A fact is something that has happened or that is the case so if a witness is giving evidence about that, then they are giving factual evidence and if they are giving evidence about anything else that is opinion evidence. Skilled witnesses may give both fact and opinion evidence, for example a fact about something that happened in a class room then give their opinion on it.

The qualification level of the skilled witness is not determinative of the weight to be given to it. For example, in an appeal from a case in this jurisdiction, the Inner House upheld the tribunal's preference of the evidence of a school deputy head teacher over the evidence of a consultant psychiatrist (*JC v Gordonstoun Schools Ltd* 2016 S.C. 758, at paragraph 62).

It is important for witnesses to understand when they are giving factual evidence and when they are stating their opinion because when they state their opinion the tribunal has to be satisfied they have the skills and experience to be allowed to state their opinion.

Action 1: The Chamber President will revise the Case Management Call (CMC) Guidance to include a paragraph that a decision on a skilled witness may be made by a legal member at a CMC. In some cases it may not be possible to consider this at the CMC stage and it may not be known until the hearing of evidence.

h) Duties of skilled witnesses

On this subject, *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 is a key case. It is a Scottish appeal to the Supreme Court and paragraphs 52, 53 and 57 are of importance here.

The main duties are found at paragraph 52 of *Kennedy*:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within its expertise. An expert should never assume the role of an advocate;
3. An expert witness should state the facts or assumption on which his opinion is based and he should not omit to consider material facts which could detract from his concluded opinion;
4. An expert witness should make it clear when a particular question or issue falls outside his expertise
5. An expert witness should, in particular, explain why any material relevant to his conclusions is ignored or regarded as unimportant.

It is a representative's job to ensure an expert witness is aware of the duties imposed on them (confirmed in *Kennedy* at paragraph 57). These duties apply to every witness who is giving skilled evidence.

2. Advance Enquires to the Tribunal

The following questions were raised in advance of the Representatives' Forum:

Q1. Discuss the issue of what information should be provided to witnesses from the bundle in advance of a hearing? There does not seem to be a single approach and it is causing a degree of confusion among representatives.

A. This is a matter that is not straightforward. However, it is addressed in the *Information Note 01/2023 for Parties, Representatives, Witnesses and Supporters*, in paragraphs 26-27:

The bundle

26. A representative should not send the full bundle to any witness. Instead, only the bundle documents relevant to the evidence that witness is expected to give should be sent, to enable the witness to prepare to give evidence. In particular, a witness should not be sent, or otherwise have access to, the written witness statement of another witness.

27. A witness may, however, and where relevant to their evidence, have access to the report of a skilled witness, or to those parts of a written witness statement in which a skilled witness expresses an opinion.

Action 2: The Chamber President will revise this section of the information note to make matters clearer.

Q2. Can the tribunal please consider in person hearings taking place in a venue other than Glasgow? The need to travel from Edinburgh is costly and time consuming for staff, many who are teachers and senior leaders in our schools.

A. HEC Tribunal hearings do not require to take place in person. Hearings may be fixed in one of three modes, as outlined in the PGN 01/2023 Hearings in the HEC, published on the HEC website. These are: in-person, remote and hybrid. The decision on which is to be used is a judicial one, taken usually at a case management call by the legal member after considering the views of party representatives.

Following the conclusion of a sensory venue scoping exercise, work is underway to expand sensory hearing venues across the country, including Edinburgh, Dundee and Stirling, during 2025.

The Glasgow Tribunals Centre sensory hearing suite will shortly move from the sixth floor to the ground floor and should be available in the summer of 2025, which will provide better street-to-hearing room access.

3. Question and Answer Session

The following questions were raised at the Representatives' Forum:

Q3. I find it very tricky to lodge outline submissions before the hearing has started and the evidence tested and I wondered what the theory is behind lodging them before the hearing has started.

A: This is something that was introduced a number of years ago and reference to it is in the CMC guidance. All of the work done before the hearing is designed to try and make the hearing itself more focussed and to make the process more efficient. Outline written submissions have been a central part of these efficiencies. These ordinarily highlight key legal arguments, the principal areas of dispute and a summary of the party's position. They can be added to before the end of the hearing.

Q4. In terms of CMCs, there can be variation in the timetable that is granted by the legal members. Is there any potential to having a more fixed approach, appreciating the need for some flexibility? Legal members don't always ask for written submissions and when they do it is unclear if these are going to be oral or written.

A: The Chamber President will consider if there is scope for a more consistent approach. Representatives are reminded that if they are unsure of what is expected they can ask for clarity during the CMC. A decision on the form submissions should take depends on how the hearing timing goes, so retaining case-specific flexibility is important.

Action 3: The President will include a sample sequencing timetable in the CMC Guidance and include this as part of Tribunal induction training.

Q5. Does the Tribunal have a view in terms of section 8(2) of the UNCRC Act 2024 about the remedy powers that it has under the 2004 Act and whether, in particular, under section 7(5), the remedy power could be extended by regulations to include a power to award damages?

A: The 2024 Act does not grant new remedies, rather it provides another way to access remedies which already exist in the 2004 or 2010 Acts.