



## GUIDANCE TO TRIBUNAL MEMBERS No 01/2018

### THE VIEWS OF THE CHILD

#### *Purpose of this Guidance*

1. The purpose of this guidance is to clarify the various ways in which a tribunal can hear the views of a child.

#### *Meanings*

2. In this guidance these words have the following meanings:

the Tribunal	the Additional Support Needs jurisdiction of the Health and Education Chamber of the First-tier Tribunal for Scotland
a tribunal	the three people who will consider a claim or reference and make a decision – one will be a legal member who is an experienced lawyer and the other two are specialist members, with expertise in education, social work or health. Occasionally a tribunal will be made up of one legal member, sitting alone
2004 Act	Education (Additional Support for Learning) (Scotland) Act 2004, as amended
The 2018 Rules	The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)
Code of Practice	Supporting Children's Learning, Statutory Guidance on the Education (Additional Support for Learning) (Scotland) Act (as amended) Code of Practice (Third Edition) 2017
UN CRC	United Nations Convention on the Rights of the Child
UN CRPD	United Nations Convention on the Rights of Persons with Disabilities

child for the purpose of this guidance, this includes a child aged up to 15 years<sup>1</sup> and a young person aged 16 years and over who remains in school education

*Direction to Tribunal Members No 05/2010: the views of the child*

3. President's Direction No 05/2010 is now revoked.

*Statutory duty*

4. A tribunal has a duty to seek the views of the child<sup>2</sup>. This is distinct from a duty to obtain the views of the child. There may be limited circumstances where it is not possible to obtain the views of the child, or where the child does not wish to express a view. The threshold for obtaining the views of a child engaged in Tribunal proceedings is low, and every effort should be made to overcome any barriers to this.
5. In order to discharge this duty a tribunal must consider which steps may need to be taken to hear the views of the child, consistent with the spirit of the 2004 Act, other relevant legislation, the Code of Practice<sup>3</sup>, Tribunal Guidance and international obligations. A tribunal shall take all necessary steps to ensure that the views of the child are obtained in a way appropriate to the age, maturity understanding, welfare, choice and needs of the child. A child should be given every opportunity to express his or her views. Rarely will a child be unable to express any view.
6. The Code of Practice provides examples of good practice in communicating with a child<sup>4</sup>, which include giving the child enough time to prepare and go over the material to be discussed, a supportive communication facilitator to tease out full meanings and specialised or new vocabulary (perhaps in sign or symbol form).
7. Tribunal members have been provided with a copy of the *7 Golden Rules for Participation*<sup>5</sup>, which provides child-centred guidance. This document can be consulted when a Tribunal member is deciding on how the views of a child should be taken.

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<sup>1</sup> s. 29(1) 2004 Act and s.135(1) Education (Scotland) Act 1980

<sup>2</sup> The 2018 Rules, rule 44

<sup>3</sup> See chapter 7 – Working with Children and Families

<sup>4</sup> chapter 7, paragraph 27

<sup>5</sup> Produced by the Children and Young People's Commissioner for Scotland

*Guidance to Tribunal Members No 03/2018: independent advocacy*

8. This guidance is to be read alongside Guidance to Tribunal Members No 03/2018: independent advocacy, which explains the role of independent advocacy in Tribunal proceedings.

*Guidance to Tribunal Members No 02/2018: capacity and wellbeing*

9. This guidance is to be read alongside Guidance to Tribunal Members No 02/2018: capacity and wellbeing, which explains the approach to be taken by a tribunal when assessing the child's capacity and/or wellbeing.

*UN CRC*

10. The CRC is the most complete statement of children's rights ever produced and is the most widely-ratified international human rights treaty. Wherever possible, this guidance is to read in a way which is compatible with the terms of the CRC.
11. Article 12 of the CRC is of particular importance. Article 12 requires that every child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, their views being given due weight in accordance with their age and maturity.
12. Article 12.2 requires that children are entitled to be heard in any judicial proceedings affecting them, which include our Tribunal proceedings, either directly, or through a representative or an appropriate body.

*UN CRPD*

13. The CRPD places a greater emphasis on supported decision making and in maximising autonomy for disabled persons. Wherever possible, this Guidance is to be read in a way which is compatible with the terms of the CRPD.
14. Article 7 is of particular importance. Article 7 requires provision of age-appropriate assistance to children with disabilities. Article 7.3 requires that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children. In order to realise that right, children with disabilities should be provided with disability and age-appropriate assistance.

*Section 12 of the 2004 Act*

15. Section 12(2)(b)(i) of the 2004 Act places a duty on the education authority to seek and take account of the views of the child or young person (unless the

authority are satisfied that the child or young person lacks capacity to express a view).

16. Except where there are good reasons for not doing so, where the education authority, in execution of its section 12(2)(b)(i) duty, expresses the opinion that the child or young person lacks capacity to state his/her views to the tribunal, the legal member should, at the case conference call, seek from the education authority full reasons for this opinion. In doing so, the legal member should make enquiries with the education authority (and the appellant/claimant, where appropriate) as to the range and appropriateness of communication methods potentially available for the taking of views, bearing in mind the abilities and needs of the child or young person.

### *Communication*

17. A range of means may be used to support a child to express their views, which include the use of alternative or augmentative communication systems, for example signing, interpreters, video, audio recording and the use of symbols and pictures (such as Makaton and Talking Mats).
18. Where a child needs support in order to communicate it is important to gain an understanding of what the child has expressed, how that has been interpreted and by whom.
19. Appendix A sets out the views of the Inclusion Ambassadors on what works best for children with additional support needs; Tribunal members can take the content of Appendix 1 into account when considering how to obtain a child's views.

### **Before a hearing**

#### *My voice!*

20. The child will be provided with a '*my voice!*' form once the reference or claim is registered, which they can complete in person or with the support of another person (they will be asked to identify who helped them to complete the form), or by using other means, which may include drawings, pictures a video or CD recording. The '*my views*' form can be translated into another language or an accessibility format when necessary.

#### *Needs to learn*

21. The '*my views*' form will include details of the children's section on the Tribunal's website - '*needs to learn*' - which provides child accessible information on the Tribunal process.

### *Independent advocate*

22. An independent advocate may already be supporting the child before a hearing takes place. The independent advocate may be instructed by the child to express the child's views. Alternatively, a tribunal may instruct an independent advocate to take the views of the child in advance of a hearing, in accordance with *Guidance to Tribunal Members No 03/2018: independent advocacy*.

### *Children's Support Service (section 31A)*

23. The children's support service is an independent service, provided by Scottish Ministers to children who have reached the age of 12 years. One of their functions is to seek the views of children. A tribunal can ask that they seek the views of a child aged between 12 and 15 years.

## **During the hearing**

### *In the absence of the parties*

24. Where the child is not a party to the proceedings and a tribunal decides to take the views of the child outwith the presence of the parties, with their consent, the case officer shall remain within the room where the child's views are to be heard for the duration of the view taking session. The proceedings during such a session shall (unless the tribunal considers that good cause exists not to) be audio recorded in the usual way.
25. The tribunal will usually identify one of the members who will ask the child questions. The legal member will share the child's views with the parties on their return to the hearing.

### *With the parties present*

26. Where the child is not a party to the proceedings and the tribunal has decided to hear the child's views in the presence of the parties the legal member shall explain the procedure to be adopted. This will include the types of questions to be asked and who will ask these. In most cases this will be a member of the tribunal, to ensure the child is not exposed to too many different adults asking different questions.

### *The child as a party*

27. Where the child is a party to the proceedings s/he has the same rights as the respondent/responsible body, which includes the right to be present in the hearing room throughout the hearing.

28. In keeping with the overriding objective in the Tribunal Rules, the tribunal will take any necessary steps to ensure the child is appropriately supported to present his/her case. Such presentation includes expressing his/her views and (in appropriate cases) giving evidence. The tribunal shall tailor the proceedings in such a way that the child is given enough information to make an informed choice about how to participate on the day. This will reinforce written information already provided to the child by the Tribunal, and information communicated through the case conference call process.

*Independent advocate*

29. A child of any age can have their independent advocate present during the hearing.

*Supporter*

30. A child aged 12 years and above has a right to have a supporter present at the hearing<sup>6</sup>.

*The hearing venue*

31. Wherever practicably possible, when a child intends to attend a hearing or where the child is a party, hearings will be held in tailored facilities, for example, the Integrated Tribunal Centre in Glasgow.

*Stop and Go Cards*

32. The case officer will have a supply of stop and go cards, which the legal member will provide to the child at the hearing. The child will be advised that they can use the stop card when they need a break and the go card when they are ready to continue.

**May Dunsmuir**  
**President**  
**January 2018**

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<sup>6</sup> The 2018 Rules, rule 5

## Appendix A

### Inclusion Ambassadors

In 2015, Education Scotland established Inclusion Ambassadors in local authorities across Scotland. These young people represent their authority in a range of events and discussions on inclusion. The President met with the Inclusion Ambassadors in October 2017, to ask them about the best way to hear their views in our proceedings. Their responses are set out below.

*What works well/ doesn't work when seeking the views of young people with additional support needs?*

<b>What works?/Good</b>	<b>What doesn't/Bad</b>
Friendly speaking, less formal and comfortable sitting, colourful	Don't like to talk to people unknown
Ask for views/receive information before meetings	People patronising
Options: giving of views before the meeting	Formal speaking, boring colour
Prefer talking to people they know	Timing
Photos, videos or visiting the room beforehand	Too much talk
Good advice-easy to follow	Fair settings
Do not have to attend the whole time-can I attend as much as I want to	Not really being included - adults can take over the meeting
Choice	Do not always understand why we are meeting
It is important we are able to attend	Only attend the last 10 minutes
If our views are written down or captured, if we don't want to be there at the meeting	Feel pressurised to attend
Time out space	Mixed experience of views gathered before the meeting

<b>What works?/Good</b>	<b>What doesn't/Bad</b>
Feel like we are treated like an age appropriate person	The rooms we meet in are not always good - not child centred or friendly
When kids get to get their own point across	When there is a lot of talking
Knowing what is going to happen - preparation for questions	Too many people there
1 to 1 interview	Adults don't always listen
When confidence is built up	Misunderstanding
Understanding views	
Knowing who is going to be there	
Someone who can help explain the questions	
If someone could come with you to meetings	
Tranquillity	
Staff try and support us	