



## **Tribunal (Additional Support Needs) Forum**

**20 June 2018**

**Abode Hotel, Glasgow**

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

The first Tribunal Forum as the Additional Support Needs jurisdiction within the Health and Education Chamber of the First-tier Tribunal for Scotland (we will use the term 'the Tribunal' to describe the jurisdiction) was held on Wednesday 20 June 2018 in Glasgow. The next Forum will be held in the Glasgow Tribunals Centre, 20 York Street, Glasgow and the date will be advertised on our Website in due course.

The President delivered a presentation including an update on Tribunal reform, the First-tier Tribunal for Scotland Health and Education Chamber, which houses the previous Additional Support Needs Tribunals for Scotland, and will eventually house the NHS Appeal Panel, the NHS Tribunal for Scotland and the current 32 Education Appeal Committees.

The President also discussed the changing legislative landscape, including the extended rights granted to children aged between 12 and 15 years from 11 January 2018, and how children within this age range have been assisting her to improve access to the Tribunal. She shared information about the new Glasgow Tribunals Centre.

The Forum heard from the In-House Convener, Derek Auchie, on the new appeal and review procedures, which came into force on 12 January 2018. He provided an analysis of a recent Inner House appeal from the decision of a tribunal and explained

a new procedure to be piloted with selected education authorities, which will lead to a new process for documentary evidence lodging and collation.

The Forum heard from the Senior Operations Manager, Hazel McKay, who provided an insight into the development and creation of the new *needs to learn* website, which has been designed specifically for children aged between 12-15 years. This was launched on 12 February 2018.

The Forum heard from Operations Manager, Paul Stewart, on how the Tribunal has adapted its forms and guidance, to make it accessible for children aged between 12 and 15 years.

Below is a flavour of some of the questions and topics discussed at the event.

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## **The First-tier Tribunal for Scotland Health and Education Chamber**

The Additional Support Needs Tribunals for Scotland transferred into the Health and Education Chamber of the First-tier Tribunal for Scotland on 12 January 2018 by virtue of the provisions of the Tribunals (Scotland) Act 2014, and became the Additional Support Needs jurisdiction within the Chamber. The new logo for the Tribunal looks like this:



## **Scottish Tribunal reform**

The intention of Scottish Tribunal reform is to improve access and delivery; and to achieve consistency for those who use tribunals. The Tribunal administration will maintain its expert staff and each individual jurisdiction will maintain its specialism.

The First-tier Tribunal for Scotland is the “first instance” tribunal, with a right of appeal to the Upper Tribunal. The first Chamber (Housing and Property) was commenced in December 2016, with others following, including the Health and

Education Chamber in January 2018. Other Chambers will commence with the various transfers of jurisdictions being completed by around 2022.

## Education Appeal Committees and NHS Appeals Tribunals

It is intended that the *NHS Tribunal for Scotland*, the *National Appeal Panel for Entry to the Pharmaceutical Lists* and the 32 *Education Appeals Committees* (currently delivered by the local authorities in Scotland) will transfer into the Health and Education Chamber by April 2021.

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## Legislative landscape

From 11 January 2018, rights under the 2004 Act were extended to children aged between 12 and 15 years who have capacity (and where their wellbeing will not be adversely affected). This includes the right to make two types of reference:

- A reference in relation to a co-ordinated support plan (CSP)
  - A reference appealing against the education authority's assessment of the child's capacity or wellbeing
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## My Voice!

Children will now be given an opportunity to write their views in a new form which has been designed to help them do this – the 'My Views' form was introduced in January 2018.

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## Needs to Learn



A children's section has been developed on the Chamber's main website, called '*needs to learn*', which has been designed for children aged 12 to 15 years.

This uses unique imagery, which is designed to emphasise the independence of the tribunal from their school and any other organisation or agency which the child may receive services from.

With this comes new child friendly forms and guidance which can be accessed on the site.

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## **Glasgow Tribunals Centre**

Our administration and President's office transferred into the Glasgow Tribunals Centre (GTC) in York Street, Glasgow, at the end of March 2018.

The GTC will house the Health and Education Chamber, the Housing and Property Chamber and a number of other reserved UK tribunals.

There will be a number of hearing rooms, which include some uniquely tailored for children and vulnerable adults. These are being designed *by* children, *for* children. Children have shared their experiences of what works and what doesn't in terms of feeling included in their hearings process. They wanted choices about how they can participate in the hearing.

Their model of an inclusive hearing room has three distinct areas –

- An area with a round table with equal height chairs which look the same, where the tribunal members, parties and their representatives, the child and the witness will sit whilst evidence is being heard.
- An area with two small sofas, where the child and the tribunal members and any appropriate others can sit, if the child would prefer to give their views or evidence there.

- A break out area, with a screen, a beanbag and small fridge, where the child can take a break from the hearing, whilst still remaining in the room, with access to fresh water and snacks.

In addition to the hearing room, children would like a separate sensory room, where they could go to rest or de-stress, and they welcomed the idea of a 1:1 evidence room where a child could give their evidence to one questioner, who would have an agreed list of questions.

During this experience the questioner and the convener of the hearing (the legal member) would have a live hearing link. The tribunal members and the parties would be able to see the child and the questioner. The child would be aware that others are observing but would not see or hear them. The 1:1 evidence room would be softly furnished with two armchairs and tactile features.

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## **President's Guidance (PGN 1+2)**

The President issued two new guidance notes in January 2018 to coincide with the commencement of the provisions of the 2016 Act and to align with earlier guidance on independent advocacy.

### *No. 01/2018 THE VIEWS OF THE CHILD*

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

A tribunal has a new duty to seek the views of the child. 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.

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, 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.

## No. 02/2018 CAPACITY AND WELLBEING

The purpose of this guidance is to clarify the approach to be taken by a tribunal when considering the two new tests of ‘capacity’ and ‘wellbeing’, which are set out in section 3 of the 2004 Act. The guidance explores the ‘wellbeing test’ and provides a framework for deciding capacity.

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### Enquires to the Tribunal

1. *It would be interesting to understand more about when a reference might become a disability discrimination case – for example the recent case where a local authority was found to have discriminated against a pupil having failed to prepare an adequate CSP. Enquires are received where parents don’t know if they should make a reference or a claim.*

Where it is alleged that an education authority has not done something it should have or has done something wrong, in relation to the education of a child, this could give rise to a disability discrimination claim, whether or not it is also something which can give rise to a reference. It is competent for a claim and a reference to be made for the same child, arising from the same or similar circumstances.

2. *Educational Assessment in relation to Curriculum for Excellence (CfE) levels and its examination and questioning within the tribunal*

CfE criteria may be relevant to the question of whether a child has reached the milestones expected of a child of his/her age. It could be relevant to: suitability of the current school; suitability of the school named in the placing request; provision to be included in a CSP to assist a child to attain expected milestones; whether any lack of/inadequacy of provision represents disability discrimination.

Any such questioning would always be related to the legal tests the tribunal is considering and not inspired by a general review of the decisions of the education authority. The tests are widely worded, which could justify detailed enquiry in this area.

*The Role of Care Inspection and Education Scotland reports in evidencing ability to meet learners needs of additional support needs profile*

The tribunal's task is not to decide on the general performance of either of the schools in question (in a placing request case). On the other hand, an inspection report might contain material which demonstrates a strength/weakness in a particular area relevant to the case.

Usually, such evidence is general in nature, and so of limited impact and the tribunal will be looking for evidence of specific provision for the child in question. Much will depend on the facts and circumstances of the case, and of the specificity of the comments in the inspection report.

What the tribunal will be less interested in (and even frown upon) will be a general attempt to blacken (or boost) the impression of a school by referring to a poor/excellent inspection report since the general reputation of the school is not in issue.

*Robust Progress and tracking of a learners Journey both experiences and achievements suitable and sensitive to capture the additional support needs of*

*individuals. The attendee elaborated on this point – when cross-examined as a witness the questions asked are much wider in nature rather than focusing on the subtleties of progress or tracking of a learner’s journey.*

If this is intended to refer to the importance of robust tracking of progress of a learner, it is important, as an evidence trail is needed showing what the child has achieved and areas where there are achievement issues. Isolating the causes of changes in achievement levels can be important to gauging when and why a child’s progress has changed, and this in turn influences the assessment of the suitability of provision for a child.

The role of a witness in tribunal proceedings is to assist the tribunal on the matters before them. Witnesses will be invited to speak to matters of fact, and where the witness is qualified to do so, to provide an informed professional opinion. Attendees are referred to the Tribunal Forum 2016 note, which explains the role of witnesses in tribunal proceedings.

3. *Whilst fully appreciating the rights and entitlement of children and young people under additional support for learning, could the Tribunal confirm from their perspective the requirement for a child/young person to attend an independent special school where a parent exercises their right to make a placing request.*

*There is a concern from a local authority perspective that such visits raise both anxiety/unsettledness for the child/young person which can have a significant adverse impact on their wellbeing. Furthermore, such offers of visit raise expectation of attendance prior to any consideration of funding from the Local Authority.*

*Independent school may have an impression that The ASNTS require visits (which may be over a number of days) and that in the absence of these, it would jeopardise the likelihood of a successful outcome at Tribunal.*



The question of visits by a child to a prospective independent school is a matter entirely for the child, his/her parents, the independent school and those advising the child/parents. The tribunal (whether generally or in an individual case) cannot encourage/discourage a party to/from gathering evidence of a certain kind. The tribunal is neutral and can only deal with evidence as it is presented. Independent schools should not have the impression that the tribunal does or does not expect evidence that a visit has taken place, since the President has not issued any policy statement to that effect. Each tribunal, when sitting, sits independent of the President and of any other tribunal, and will determine the individual case before it with reference to the evidence presented, which may, or may not, include a visit by the child to the independent school.

4. *How the Tribunal will monitor how well local authorities are implementing additional support for learning legislation and if they will make their thinking public on lessons to be learned?*

The Tribunal does not have a broad monitoring role in connection with the 2004 and 2010 Acts and education authorities. Such a role would conflict with the Tribunal's independence and impartiality.

The President does have the power to monitor (rule 12) implementation of a FtT decision. She can review the authority's compliance with the decision and may refer the matter to the Scottish Ministers, where she is not satisfied that the authority is complying.

*Are there any plans to simplify the tribunal process and make it more accessible (and affordable) for parents/carers/young people?*

The tribunal process has recently been simplified for all users in preparation for our transfer into the Health and Education Chamber. The reference and claim forms have been revised and simplified; there are child friendly claim and reference forms for 12 to 15 year old appellants/claimants; the template correspondence used for children has been reviewed and simplified; there is a

review on documentary evidence which will lead to the process in this area being streamlined; guidance notes have been issued to Tribunal members to assist in effective case management; appeal process is now to the Upper Tribunal.

*In the Tribunal's experience, do those families who can afford legal representation have more success than those without legal representation?*

There are no fees to make a reference or a claim to the Tribunal. Let's Talk ASN Scotland provides free representation and advocacy to young people and parents for references. My Rights My Say provides free representation and advocacy for children aged 12 to 15 years for references. Legal aid is available for Equality Act claims.

There is a 21 month ESRC funded research project underway at the moment - *Autonomy, Rights and Children with Special Educational Needs: A New Paradigm?* The research team consists of Professor Sheila Riddell, Dr James MacAllister, Dr Kevin Wright, Dr Duncan Carmichael and Dr Grace Kong (University of Edinburgh) and Professor Neville Harris and Dr Lucy Dix (University of Manchester), which may be of interest to attendees.

There is no data available comparing success rates between represented and unrepresented parties, and such data would be of very limited value given the small number of unrepresented parties there are.

5. *Difficulties of parents/young people identifying suitable witnesses for hearings. Parents regularly struggle to bring professional witnesses themselves to a hearing to give evidence. There is also a cost implication with independent reports.*

*There is nothing to prevent a parent from listing an education authority employee as a witness. Attendees are referred to the Tribunal Forum Note 2016, for further information on witnesses.*

*A further question was raised regarding the potential for witnesses refusing to attend.*

If necessary the Tribunal can cite a witness to attend. The party would have to make a written request to the Tribunal, with full details of the witness and their address.

6. *Time 'delays' in the referral process – the length of the tribunal process e.g. waiting for a hearing and subsequent decision.*

Attendees were reminded that there are statutory timescales for the case statement period. These can be shortened on request, where there is good cause and where the other party does not object. Where a party objects to a request to have the case statement shortened, the convener will determine the request after considering both views.

The case conference call period is a judicial case management tool, intended to ensure that all necessary matters are identified and focused in advance of the hearing. The President has issued guidance on this [PGN 06/2018](#).

Hearings last on average 2 and half days, which do not always run consecutively, due to the limited availability of parties and witnesses. Where possible, hearing days will be scheduled to take place as close together as possible, to prevent undue delay. Evidence and submissions can be lengthy. There has to be a balance between speed and thoroughness and the issues, documentation and evidence to be led, which are complex. The President will commence a pilot in August on the use and lodging of documentary evidence, which is intended to streamline this process and to remove unnecessary duplication.

Tribunal decisions will be issued in most cases within 10 working days after the last hearing day. Where it is not possible to meet this timescale the parties will be informed and in most cases, a summary decision issued, until the full decision is available.

*The definition of 'education' (i.e. in terms of academic, or broader wellbeing criteria)*

'Education' is not defined but 'school education' is (1980 Act s.135 and s.1(5), as adopted by s.29(2) of the 2004 Act):

"school education" means progressive education appropriate to the requirements of pupils, regard being had to the age, ability and aptitude of such pupils, and includes—

- (i) early learning and childcare;
- (ii) provision for special educational needs; and
- (iii) the teaching of Gaelic in Gaelic-speaking areas."

This is a very broad definition which encapsulates all activities of a child in and out of school, as long as it can be classed as being education provided by the child's school.

*Evaluation and review of decisions by ASNTS – Does the tribunal follow up with a child or education authority after a tribunal decision?*

The Tribunal does not have a broad monitoring role in connection with the 2004 and 2010 Acts and education authorities. Such a role would conflict with the Tribunal's independence and impartiality.

The President does have the power to monitor (rule 12) implementation of a FtT decision. She can review the authority's compliance with the decision and may refer the matter to the Scottish Ministers, where she is not satisfied that the authority is complying.

*7. Inconsistency between legal members re applying the general rules of evidence, in particular:*

- i. Admissibility of oral evidence of parent witnesses that cannot be related to the written case or that should have been put to a previous witness*

The Role of a witness is referred to earlier in this note and in the Tribunal Forum Note 2016.

Each reference or claim is case specific and it is a matter for each individual tribunal to determine the approach to be taken to a witness's evidence. There is an opportunity for a party to seek to re-dress the evidence of their witness, following cross-examination.

Tribunal proceedings are civil in nature, which means that the provisions of the Civil Evidence Act apply:

***Civil Evidence (Scotland) Act 1988***

*9. In this Act, unless the context otherwise requires—*

*"civil proceedings" includes, in addition to such proceedings in any of the ordinary courts of law—*

*.....*

*any proceedings before a tribunal or inquiry, except in so far as, in relation to the conduct of proceedings before the tribunal or inquiry, specific provision has been made as regards the rules of evidence which are to apply; and (d) any other proceedings conducted wholly or mainly in accordance with rules of procedure agreed between the parties themselves (or as respects which it would have been open to them to agree such rules had they wished to do so) except in so far as any such agreement makes specific provision as regards the rules of evidence which are to apply;*

There are a few provisions in the Tribunal's rules of procedure covering aspects of evidence (see rules 25(1)(f), 34, 40, 45). The tribunal can, otherwise, regulate its own procedure (rule 50(1)) and that includes the manner in which oral and written evidence is led.

In other civil cases, where there are rules of evidence, these are sparse.

Where our rules of procedure are silent, the general laws of evidence may apply, which mean that facts may be found on hearsay evidence and without the need for corroboration.

**For example**, a head teacher who is a witness may speak to the classroom activities of the child and their progress within the school. The head teacher would be relying on the evidence and information provided to her by the classroom teacher and others involved with the child. In other words, the evidence of one witness, in this example, the head teacher, would be enough to allow the tribunal to find facts to be established. It would not be necessary to hear the evidence of each individual involved with the child.

On the example of the evidence of a parent being allowed to be led on material not in the statement, or which should have been put to earlier witnesses, on any objection being taken, the tribunal can either disregard the evidence or it can hear the objector on any action required to redress any prejudice caused by taking account of the evidence. That might mean recalling earlier witnesses, for example, and the objecting party can ask for that to happen.

The application of strict rules of evidence to exclude evidence where any prejudice can be alleviated by other means, would fly in the face of the overriding objective in rule 2(1) and more particularly rule 2(2)(b).

On inconsistencies in approach in this area, it may be that these are difficult to detect since usually the approach of a tribunal will be case specific. What is important is that an opportunity is provided to redress any prejudice, and all tribunals should aim to do that if such evidence is to be taken into account. Where the alleviation of prejudice would be too disruptive and the tribunal

does want to take account of the evidence, the prejudice caused may affect the weight to be accorded to the evidence.

*ii. Representative or the authority giving evidence to help meet the over-riding purpose*

The President explained that the representative in a case is distinct from that of a witness. It could be problematic to ask the representative to give evidence in the example cited, since it confuses the role of a representative and a witness. There may be a conflict of interest, but at the very least it is irregular and should probably be avoided.

The representative is, in a sense, an objective assessor of the merits of a party's case and should be detached from the evidence so as to be able to form a dispassionate view of the evidence and merits; a representative who is also a witness (even to a small corner of the case) is not completely in that position.

*8. The new Glasgow Tribunal Centre will feature specially designed hearing rooms to aid children directly giving evidence or their views to a tribunal. One hearing room will feature a one way mirror room where a child can give speak directly to one person, known to them, while the tribunal members and parties observe.*

*A question was raised on how this design feature would work in practice for a deaf child giving evidence or their views.*

An interpreter would be in the room with the child. This feature will be tested to ensure it captures all eventualities.

*Another question was raised about who the questioner would be in the room with the child.*

This would be someone known to the child, who has had time to work with the child beforehand, to explain the hearings process and how their evidence will be taken. This is likely to be an independent advocate or, in complex communication cases, a registered intermediary.

9. *The removal of the upper age limit – changing the definition of a ‘Young Person’.*  
*A question was raised specifically about a co-ordinated support plan (CSP) and if this would be discontinued at the age of 18 or if this change meant that a CSP should continue past the age of 18.*

The definition of a young person is:

**Education (Additional Support for Learning) (Scotland) Act 2004**

**Section 29**

“young person” means a person who—

- (a) is aged 16 years or over,
- (b) is a pupil at a school, and
- (c) has, since attaining the age of 16 years or over, remained a pupil at that or another school.

*A further question was raised asking if this applied to adult returners.*

See (c) above, which would suggest that it does not apply, as the young person must have remained in school education.

10. The President shared plans of the new hearing facilities at the Glasgow Tribunals Centre and the special design features it will have.

*A query was raised if this meant that hearings would no longer be held locally to the child or education authority.*

The President re-affirmed that hearings would continue to be held in local areas. That will not prevent out of area requests being made for the use of the Glasgow Tribunals Centre, where it would benefit the child. The President hopes that the new hearing facilities in Glasgow will act as a platform, to be



replicated across Scotland in other areas and in other justice centres. If someone wishes to use the GTC facilities the Tribunal will endeavour to accommodate this but the local presence of the Tribunal will not be removed.

11. The In-House Convener introduced a new documents guidance procedure which will be piloted with three Education Authorities from August 2018.

*A practical question was raised in relation to electronic lodging of documents by parties (using secure means) – will the electronic lodging be via an email address or a web portal?*

Secure email addresses only – e.g. pnn, gsx, gcsx etc. Most education authorities have secure email addresses.

12. The Forum heard from the Operations Manager on the steps the Tribunal have taken to create children's forms and guidance.

*A question was raised if the Tribunal have any plan to create forms and guidance for children under age 12.*

The Tribunal have plans to further create a website area, forms and guidance for children under age 12. The current forms and guidance aimed at ages 12-15 years are the first step towards creating child accessibility to the Tribunal.

13. The Forum also heard a statistical case activity update over the period 1 April 2017 – 31 March 2018.

*A question was raised if the Tribunal report only the main additional support need or multi additional support needs of a child or young person.*

Currently only report on the main additional support need with the exception of a 'looked after child' which is reported alongside any other additional support need. The Tribunal will look into this type of reporting for future statistics.

14. The In-House Convener discussed a recent competency issue regarding a reference under section 18(1) of the 2004 Act, which may only be made where the child or young person in question is one for whose school education 'an education authority are (sic) responsible'.

*A question was raised regarding parents who may be looking for flexible education i.e. A child or young person only attending for P.E. and home schooling the rest of the curriculum. Do this count as an education authority being 'responsible'?*

There is a grey area here. The President will shortly issue a Guidance Note on the topic generally: Guidance to Members No 07/2018 *Jurisdiction where Education Authority is Not Responsible for School Education*. Reference is made in particular to paragraphs 7 and 8 of that Guidance Note. In any particular case, the question will be whether there is an element of provision of school education to the child by the education authority in one of its schools. Where there is such an element, even on a very limited scale, it is arguable that the education authority is responsible for the school education of the child. This is a matter which can only be decided on a case by case basis. From a practical perspective, where there is any doubt about the matter, the course of action suggested in paragraph 10 of the Guidance Note should be followed, to preserve both possible recourse routes until a jurisdiction decision is taken by the Tribunal.

*The President thanked the speakers, enquirers and those in attendance today, for their valuable input. She hopes each of you will work with us in making the additional support needs jurisdiction the best it can be.*