



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

### **23 April 2025, Glasgow Tribunals Centre**

### **Forum Note**

The eighth Health and Education Chamber (HEC) Tribunal Forum was held on Wednesday 23 April 2025 at the Glasgow Tribunals Centre.

**The 2026 Forum will take place online, on Wednesday 22 April 2026.**

Some have asked for online access to our in-person events, which we have explored but are unable to facilitate. Considering budget constraints (and this includes the cost of travel) we ask for your feedback on whether we should maintain the current cycle of:

- a. 1 year in-person, 1 year online; or move to
- b. 2 consecutive years online followed by one in-person.

As always, attendees have come from across the country and we have a variety of agencies and individuals, which include child and parent representatives and agencies, advocacy, mediation, education authorities, independent schools, health agencies, university students, the Scottish Government and the Scottish Courts and Tribunal Service (SCTS).

#### **1. Chamber President's Update (presentation, slides 3 and 4)**

This past reporting year has been a very busy one in the Additional Support Needs jurisdiction. We have once again exceeded all previous years' volumes. The 2025 PowerPoint presentation will provide you with more information on our statistics.

#### **Sensory Hearings**

Around 36% of all our hearings in the past reporting year were conducted on a hybrid basis. While online hearings still have their place, there remains an appetite for in-

person hearings, and for that reason, a considerable investment has been made to develop our sensory hearing concept across a greater geographical spread in Scotland.

We are currently relocating our sensory hearing floor in the Glasgow Tribunals Centre to the ground floor, improving street to hearing access. We will have two hearings rooms and a greater number of waiting rooms, with one waiting room adapted to include more sensory regulation features. All other sensory features remain – including our autism friendly colour palate, ‘less is more’ architecture and all of our accessible furnishings.

A tailored sensory hearing suite in Edinburgh is also in development, which will be available later this year.

And finally, we have invested in two mobile sensory hearing kits, to travel and be set up in other parts of Scotland. Later this year these will be available in Stirling and Dundee. We are exploring other areas to expand the mobile sensory hearing venues across Scotland.

### **President's Guidance**

The President has introduced new guidance and will be revising existing guidance. [PGN 02 2024 Drafting a Letter to the Child or Young Person](#) was introduced in 2024. Tribunals have been drafting letters to children for some years now, but we have recently introduced the visual letter to the child, using a range of *needs to learn* imagery.

[Information Note 01 2023 Parties, Representatives, Witnesses and Supporters](#) has been updated. Given the rising number of unrepresented parties in our proceedings, this Information Note is particularly valuable. A copy is sent by the Tribunal to all parties and witnesses.

In addition to this, the President plans to revise [PGN 06 2018 Case Management Calls](#) to include some further information requested at the Tribunal's first Representatives' Forum, which was held earlier this year, and to update it with UNCRC information; likewise for [PGN 01 2021 The Child, Young Person and the Tribunal](#).

## **The UNCRC (Incorporation) (Scotland) Act 2024**

The President had prepared Guidance on the UNCRC for members in 2024. This will be published around May/June 2025. If there are to be statutory amendments to primary or secondary legislation, the Guidance will be updated to reflect this.

Since July 2024 (when the 2024 Act commenced), we have received 17 cases where it is alleged there is incompatibility with the UNCRC.

### **Child-centred**

In preparation for the UNCRC Guidance, the President started a new round of direct child consultations. This time, instead of the title, 'Child Architectural Consultants' (which was given to those who designed the sensory hearing suites) we used the title, 'Child Expert Consultants'. These children were asked to share what it feels like to be listened to and what it feels like not to be listened to. You will find a sample of their responses in the new Guidance.

What we have learned so far is that answers are often found in the small things that adults miss for example, a drinking straw, fresh water and using the same naming convention for everyone, including the child. Children this past year also spoke about the importance of friendships at school and they ask that adults take notice of this.

## **2. Casework Update (presentation, slides 5-11)**

Mrs Hazel McKay, Head of Tribunal Operations, SCTS, provided an overview on patterns and statistics over the last reporting year. See 2025 PowerPoint Forum Presentation for statistics, which highlights a record number of applications received since the Tribunal's inception; and that placing requests remain the highest application type to the HEC (Additional Support Needs).

### **Animations (presentation, slides 12 and 13)**

Mr Craig Barr, HEC Casework Team Leader, SCTS, provided an overview and demonstration of our animation videos, including the new versions using Makaton signing. You can find all of our animation videos on our [website](#).

### 3. HEC Judicial Update (presentation, slides 14-23)

#### A. Case Law Update (slides 15-20)

##### 1. [TE v City of Edinburgh Council 2024 UT 25](#)

This decision is by Lady Poole. Permission to appeal was initially refused by the HEC and a permission to appeal application was made to the Upper Tribunal for Scotland, which was also refused.

There must be an arguable error in law which is material to the outcome of the case before permission to appeal is granted. The alleged error in this case was not material as it only pertained to a small part of the reasoning and it only related to one of the two grounds of refusal.

Lady Poole makes further comments:

- Reasoning on only the main issues needs to be adequate.
- Reliance on the factual observations in the non-instructed advocacy report was proper. In fact, if the tribunal had not taken account of this material that would have resulted in a ground for an appeal.
- Examination and assessment of evidence are primarily matters for the tribunal. A disagreement with the outcome or the factual findings made by the tribunal on the basis of the evidence before it do not of themselves raise points of law.
- An argument made in the public interest, which is not material to the outcome, might, exceptionally, be considered by the Upper Tribunal. Lady Poole provided an example of a point of statutory interpretation.

##### 2. [JC v South Lanarkshire Council 2024 UT 27](#)

This decision is by Lady Carmichael. It is based on a technical point about the drafting of section 18(1) of the 2004 Act. Statutory wording is defective because the change to section 18(3)(da) was not also made to section 18(1) at the time of amendments to the 2004 Act in 2009. Essentially a drafting error had occurred and therefore Lady Carmichael was able to resolve that point.

The practical consequence of this decision is that challenges to placing request refusals for (a) children/young persons with additional support needs and (b) where the refusing education authority is not responsible for the school education of the child or young person, should come in the form of a reference to the HEC. Previously, such challenges were taken to the Education Appeal Committee (**EAC**), but as a result of Lady Carmichael's decision in this case, the EAC no longer has jurisdiction over these cases. Lady Carmichael also used some decisions from the First-tier Tribunal to help in her understanding around the issue to be decided.

### 3. [JH v Scottish Borders Council 2024 UT 50](#)

This is a decision by Lord Young. This involved a placing request refusal which was overturned by the Tribunal on the basis that the education normally provided in the specified school is not suited to the age, ability or aptitude of the child (2004 Act, Schedule 2, paragraph 3(1)(b)). There was no evidence led from anyone with direct experience of provision at the specified school. Where there is a lack of evidence from the specified school on this particular ground, Lord Young held that the reasons for accepting indirect evidence should be fully explained in the tribunal's reasons.

Another point in this case was the reliance on a comparison between the profiles of pupils at child's current school and those at the specified school. This factor is legitimate to have regard to when concerning the suitability of the specified school, but a follow up question must be asked – 'What does that comparison mean for the suitability of the educational experience of the child in the specified school?' Simply referring to a comparison of pupil profiles is not enough. Lord Young goes back to the wording of the ground of refusal in the 2004 Act and what this wording says.

### **B. Language (slides 21-22)**

The use of language is crucial. Tribunal members take care in their use of language. Tribunals often have to describe occurrences of a distressed physical reaction by a child or young person in a school, and if that is what we are describing in our decision then we have to do so accurately. The comments by Judge Rowley in [C & C](#), [2018] UKUT 269 (AAC), paragraph 3, (in slide 21) have been very influential. The language of intention should be not be used if it is not accurate.

The General Teaching Council for Scotland have issued a document called [Meeting the Needs of Autistic Learners: A professional guide for teachers](#) which contains seven key messages. Key message five is 'Seek to understand distressed behaviour', so this is the terminology being used by the professional regulator of teachers.

### **C. Education Authority Decision Letters (slide 23)**

A reminder of the statutory obligations on education authorities to provide information when making certain decisions under section 28(2) of the 2004 Act.

## **4. Advance Enquires to the Tribunal (presentation, slides 24-28)**

### **Q1. What has been the impact of UNCRC incorporation on the Tribunal's work? (Children and Young People's Commissioner Scotland)**

**A1.** The HEC has taken a number of steps since the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (2024 Act) came into force on 16 July 2024. These are as follows:

- The President has consulted with a number of agencies, children and young people, and their parents.
- The President has invested significant time in analysing the 2024 Act and associated material in order to understand the nuances of how it may impact on the work of the HEC.
- All HEC members received intensive training on the 2024 Act, two days for legal members and one day for specialist members, in early October 2024. The Chair of the United Nations Committee on the Rights of the Child, Professor Ann Skelton, delivered a session at that training.
- An online folder of UNCRC reference materials has been provided to all legal members, including all UNCRC General Comments, Concluding Observations and records of Days of General Discussion.
- Draft President's Guidance has been issued to all members which will be published on our website shortly.
- A process for notification of a compatibility question to the relevant intervening parties under section 34 of the 2024 Act has been set up. To date, notifications have been sent in 15 cases and there has been an intervening party in 4 cases.

### **Q2. Keen to learn more about UNCRC implementation and children's rights in relation to ASN tribunal. (East Dunbartonshire Council)**

**A2.** See answer to question 1.

### **Q3. How do independent schools support parents through the tribunal process when seeking local authority funded places? What are the limitations and**

## **barriers and what is expected from the schools by the tribunal? (Harmeny Education Trust Ltd)**

**A3.** As an independent judicial body, we may only provide assistance with navigation around the HEC tribunal process. There is a wealth of resources on our website, which includes explanations of the types of reference and claim that can be made. Some of the sections linked on our home page include:

- 'Making a reference'
- 'Making a claim'
- 'The role of the UNCRC'
- 'What happens next?'
- 'Information and Guidance' (including links to support agencies)
- 'Decisions'

There are Information Notes on 'Making a reference', 'Making a disability discrimination claim' and on 'Parties, Representatives, Witnesses and Supporters', all accessible on the HEC website. Under 'Decisions' on the home page is our decisions database, which carries many of the decisions that have been issued. There is also a 'contact us' page, again linked from the home page, which allows anyone to contact our staff in the event that there are any further questions.

### **Q4. – Deafblind Scotland**

- a) Inclusive Communication**
- b) Recognition and Support**
- c) Accessibility and Inclusion**

#### **A4.**

##### **a) Inclusive Communication**

As a public authority, the HEC is bound by the duties under the Equality Act 2010, including the duty to make reasonable adjustments in our processes and practices for those with a disability. This means that when a reference or claim is case managed by the legal member, one area of discussion will be any steps that are required to allow parties, children, young people and witnesses to participate fully in the process. This can involve the use of interpreters (for language or for sensory interpretation, such as British Sign Language, Makaton and Braille) as well as any communication tool that can allow participants to communicate in any way they find comfortable. Our proceedings are flexible (under our rules, we have a duty to ensure this in every case).

This might include the use, of, for example, Talking Mats (used in particular by independent advocates), Stop/Go cards, social stories, visual guides or anything else that allows for effective communication. There is no limit on the methods of communication that can be used in our processes, subject to our duty to be fair and just to all parties.

## **b) Recognition and support**

All participants in the Tribunal process are recognised and supported, whether they are an unrepresented party, a represented party, a child or adult party, a witness, a supporter or a representative. The support mechanisms include:

1. The rules of procedure, requiring the Tribunal to act procedurally evenly, proportionately, flexibly and informally and avoid delay where possible.
2. Under the HEC Tribunal rules, parties may be accompanied at a hearing by a supporter who can provide moral support, help manage documents, take notes and quietly advise the party. In addition, parties may be assisted by a representative, whether legally qualified or not.
3. Recognition and support for unrepresented parties from the Tribunal is set into the HEC Tribunal rules which call for equal footing procedurally, including providing assistance with case presentation, without advocating the course to be taken.
4. President's Information Notes are available, covering the full process, such as making a claim/reference and what happens after that, coming to the tribunal hearing, how the hearing will be conducted and what happens after the hearing.

## **c) Accessibility and Inclusion**

These are concepts that are very well understood and implemented in the HEC. We welcome references and claims of all types possible under the relevant legislation, namely:

- Education (Additional Support for Learning)(Scotland) Act 2004 (placing request, CSP and transition references)
- Equality Act 2010 (on any of the six types of discrimination/unlawful conduct)
- United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Act 2024 (as a free-standing case or connected with any of the above case types)
- As noted above, as a public authority, we are obliged to comply with the duties in the 2010 Act in taking all case management, hearing and post-hearing steps.

In all cases where the child/young person affected by our decision is capable of communicating views, they are encouraged to provide them, and they usually do so either directly or through a skilled advocacy service. We have an obligation under the Tribunal rules to seek these views. This obligation is strengthened by the incorporation of the UNCRC into domestic Scots law under the 2024 Act (Article 12 of the UNCRC being relevant here).

Where a child/young person is not able to share their views, the tribunal will often direct the preparation of a non-instructed advocacy report, based on observations of the child in a number of settings. However, non-instructed advocacy is only used where the Tribunal is satisfied that the child is unable to communicate their views by



any means. Parties are expected to address us on why a child (who can often communicate in other aspects of their lives) cannot do so in relation to their education. Creative and flexible techniques and materials are used by advocacy services to communicate with children and young people when collecting their views (such as by Talking Mats) so it is not just a case of expecting children and young people to express their views verbally.

A child seeking a remedy in connection with a co-ordinated support plan may raise a reference as a party, if they are between the ages of 12 and 15 inclusive, have the capacity to do so, and would not be adversely affected in doing so. This gives the child or young person maximum accessibility and inclusion rights to the Tribunal as a party. This means that it is not just their views the Tribunal considers, but instead their evidence, representations and arguments. The child party has equal rights with every other party.

Sensory hearing facilities are available in Glasgow and Inverness and other sensory venues are being made available in Edinburgh and other locations in Scotland. This will widen direct access to the tribunal hearing for children and young people who may wish to attend in person.

The use of hybrid hearings allows participants (including children and young people) who wish to participate in our hearings to do so from the comfort of their own home, if this would make participation more comfortable, whether or not other participants are doing so.

There is the facility for the tribunal to prepare and send a Letter to the Child, where the child is not a party. This allows direct written communication between the tribunal and the child/young person, whether or not the child/young person participated in the proceedings (directly or via advocacy). In such a letter, the Tribunal acknowledges the child/young person's views and explains the main reasons for the decision.

## **5. Question and Answer Session**

**Q5. Will the Tribunal provide UNCRC application forms for freestanding actions? (MY Rights, My Say, Cairn Legal)**

**A5:** The Tribunal is currently looking at creating individual application form types e.g. placing requests, CSPs, claims etc. The Tribunal will also, as part of this exercise, look at creating a freestanding UNCRC application. A UNCRC section is already provided in both of the current application form types.

**Q6. Continuing on from the use of language debate and keeping children and young people at the heart of everything, should a CSP be written in the first person? Other plans are written in first person, but the CSP is currently written in the third person. (Education Scotland)**

**A6:** A child-centred approach will consider the views of the child and attach due weight to those views, consistent with UNCRC Article 12. A child could be asked how they want to be referred to in their CSP.

The Tribunal writes its decisions in the first person, although refers to ‘the child’ (rather than the child’s name) in the decision due to our anonymisation process for the publication of decisions. This is consistent with the use of party status names rather than personal names in the body of the decision e.g. the appellant, the claimant etc. A child could ask that their personal name be used instead of child/appellant/claimant in their decision.

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