

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

Justice Delivered

A report into the impact of the COVID-19 pandemic on the delivery of
justice in the Health and Education Chamber

Word Meanings

In this report the following words or abbreviations are used

HEC	Health and Education Chamber of the First-tier Tribunal for Scotland.
the Tribunal	Additional Support Needs jurisdiction, which sits in the HEC.
SCTS	Scottish Courts and Tribunals Service (who provide administrative support to the HEC).
2004 Act	Education (Additional Support for Learning) (Scotland) Act 2004.
2010 Act	Equality Act 2010.
SQA	Scottish Qualifications Authority.
Appropriate Agency	Means any other local authority or any Health Board; and includes The Scottish Agricultural College, Skills Development Scotland and others specified in article 2 of the Additional Support for Learning (Appropriate Agencies)(Scotland) Order 2005; SSI 2005/325.
ECHR	European Convention on Human Rights.
UNCRC	United Nations Convention on the Rights of the Child.
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities.
Looked after child	Means a child or young person who has been in the care, or provided with accommodation, of their local authority for more than 24 hours.

Chamber President Introduction

1. On 16 March 2020, the Prime Minister addressed the four nations of the UK and shared the decisions taken in COBR. The week before, people were asked to stay at home if they had one of two key symptoms: a high temperature or a new and continuous cough. Now, people were urged to stop non-essential contact, unnecessary travel and to work from home if possible. On 23 March 2020, the first national lockdown was imposed. People were instructed to stay at home, except for very limited purposes - and so began the vigorous battle against COVID-19. At times, the devolved governments of the UK took separate approaches and in each nation there were periods when different levels of restriction were imposed, depending on local data. People had to check the level of local restriction and understand what this meant for their daily lives. No individual or agency was left untouched. This includes children and young people, their parents and siblings - especially the most vulnerable, those with additional support needs.
2. Initially, there was a significant impact on the justice sector in Scotland and on this Chamber, specifically the Additional Support Needs jurisdiction. New processes, which ordinarily would have been mapped out, consulted upon, trialled, tested and monitored before becoming embedded, were introduced within days and weeks. We found success in many of these and they are now part of the Chamber's ordinary practice. This report illustrates these. It is a reflective report. It examines our journey, from 16 March 2020 to end September 2022. It is multi-faceted. It explores approaches and innovations from a range of perspectives, judiciary, staff, parties and representatives. The voice of the child can be heard across a number of these reflections. As in all things, this has remained at our core.
3. We are beginning to understand the detrimental impact the pandemic has had on the mental health of our children and young people. For lengthy periods, they lost the regular and consistent supports normally available through extended family, education, health and social care. Many struggled with mask wearing, physical and social distancing. We see this reflected in our cases, which highlight what we already know, that relationships, consistency, routine, healthy boundaries, clear communication and above all, love, are essential for the wellbeing of children and young people. School plays a critical part in this, particularly for those with additional support needs. Research suggests that school closures and the disruption to school education during the pandemic has had a lasting detrimental impact on their wellbeing.
4. Despite such unprecedented times, our staff and judiciary rose to the many challenges, with skill, expertise and a "can do" attitude. Just eight days into the first national lockdown, we had in place a judicial case triage system, which allowed us to manage our cases and hearings during the period when the Lord President and President of Scottish Tribunals instructed the national suspension of courts

and tribunal work which was not time critical. My In-house Legal Member, Derek Auchie, who joined me in triaging all new cases and reviewing existing ones, supported me in this work. We both did this while working entirely from home. None of this would have been possible without the support of the SCTS IT team, which allowed us full access to the HEC electronic case management system, at all times of the day.

5. Our staff embraced swift change without complaint and my Executive Assistant, Lynsey Brown, provided me with considerable support as I mapped our way through. Our judiciary rose to the challenges with considerable flair and professionalism. With their expertise, we were able to identify, create and develop supportive processes around the child or young person.
6. I am enormously grateful to those who have diligently stood with us as we pressed on through challenging times – and I am inspired by their commitment to the important work of this Chamber. We use a coat of arms to depict the Chamber but the individuals who are often unseen - judiciary and staff - are the real face of the Chamber.

May Dunsmuir
Chamber President

September 2022

A. Background: Additional Support Needs jurisdiction

7. The Additional Support Needs jurisdiction (**the Tribunal**) sits within the Health and Education Chamber. This report focuses on this jurisdiction, which decides different types of cases in relation to school education.
8. Applications are made to the Tribunal under the 2004 and the 2010 Acts. These types of application are summarised below.

References: 2004 Act

9. The Tribunal has always been able to hear references from parents and young people ¹ against decisions of education authorities regarding the provision of educational support. Since 11 January 2018, children aged between 12 and 15 years who have capacity to make a reference and where their wellbeing will not be adversely affected by doing so, have been able to make two types of references. These are: (1) A reference in relation to a CSP; and (2) A reference appealing the education authority's assessment of the child's capacity or wellbeing (which is undertaken when the child seeks to exercise one of the rights available under the 2004 Act). Children ² have no right to make a placing request reference, whereas young people do.

Child Parties: Capacity and Wellbeing

10. There is no presumption of capacity in the 2004 Act. There are two statutory tests relating to the child's capacity and wellbeing, which the child must overcome before they can exercise a right (including a right to make a reference to the Tribunal) under the 2004 Act. President's Guidance sets out how a tribunal will approach these tests. ³ There is provision within the Tribunal's Rules of Procedure ⁴ for a legal member to hear an appeal against the decision of the education authority on its assessment of the child's capacity or wellbeing, which reduces the potential for delay and provides for the efficient hearing of the reference. There is also provision for the reference to be decided on the written evidence without the need for an oral hearing, where both parties agree.
11. When assessing capacity, a tribunal or a legal member will assess the child's level of maturity and current understanding in relation to the specific right the child seeks to exercise. Sufficient maturity and understanding is not age specific and capacity

¹ Young people are those aged 16 years and above, who remain within school education - the upper age limit (previously 17 years), was removed by the Education (Scotland) Act 2016.

² Children are those aged up to and including the age of 15 years.

³ President's Guidance 01/2021: The Child, Young Person and the Tribunal.

⁴ The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366).

is not a static concept. A child may lack capacity to exercise certain rights, but have capacity to exercise others. Capacity is measured in relation to the particular child and the exercise of the particular right at the particular time. There is no single formulation to assess a child's capacity against the range of rights available within the 2004 Act.

Disability Discrimination Claims: The Equality Act 2010

12. Since 2010, the jurisdiction has been able to hear claims from parents, children and young people ⁵ against responsible bodies ⁶ in relation to alleged disability discrimination in school education. Examples of types of claim include exclusion, expulsion, the use of restraint or seclusion and the SQA process used for the assessment of exam results during COVID-19.
13. The Tribunal has issued two recent decisions in which restraint has been the core issue. The interpretation of key concepts in restraint practice, such as training, de-escalation, triggers and reporting, are all influenced by judicial decisions on these subjects.

UNCRC and UNCRPD

14. The UNCRC is the most complete statement of children's rights ⁷ ever produced and is the most widely ratified international human rights treaty. Wherever possible, President's Guidance is read in a way which is compatible with the terms of both the UNCRC and the UNCRPD. At the time of writing, the UNCRC has not yet been incorporated into Scots law. ⁸ The Scottish Government has committed to the future incorporation of the UNCRPD into Scots law.
15. The UNCRC and UNCRPD are already being used in HEC decisions (including restraint decisions), since even before they are brought into full force in Scotland, they carry weight in assessing the current domestic law.

ECHR

16. The Human Rights Act 1998 incorporated the ECHR into domestic UK law. The ECHR comes from the Council of Europe, and was signed by the UK government when it was launched in 1950. The Council of Europe is not a European Union

⁵ Where the child or young person has the capacity to make the claim - there are no comparable 'capacity and wellbeing' tests in the 2010 Act.

⁶ This includes a school managed by an education authority, an independent school and a grant-aided school.

⁷ For the purposes of the UNCRC, a child means up to the age of 18 years, Article 1.

⁸ On 24 May 2022, the Deputy First Minister said the Scottish Government is looking at the changes that need to be made to the Bill to address the Supreme Court judgment on it. These changes will be need to be brought as "amendments" to the Bill so it can then go through a "reconsideration stage" in the Scottish Parliament. This means that MSPs will vote on the small changes to the Bill and not the entirety of the Bill.

body, and so the ECHR is not an EU treaty. This means that the UK's exit from the EU has no effect on the ECHR. The ECHR most commonly arises in disability discrimination claims.

B. School Education

17. School education is central to the Tribunal's jurisdiction. It is therefore important to understand the impact of the pandemic on its delivery and design. This chapter explores the principal aspects of school education and examines how this has affected children and young people with additional support needs.
18. During the pandemic, the legal, policy and education landscape were ever evolving and the Scottish Ministers issued a number of *Education Continuity Directions*⁹ in 2020 and 2021 to allow education to be provided to the children of key workers and vulnerable children during periods of school closure. There were a number of school closures during this period.

School education – school closures

19. Scotland's Commissioner for Children and Young People (**CYPCS**) and others persistently raised concerns about the impact of school closures on children and young people. During national lockdowns, our schools closed to all but the children of key workers and 'vulnerable children',¹⁰ leaving the majority of Scotland's school pupils learning from home. Where education hubs were set up in schools, early evidence suggested that uptake of places was low.¹¹
20. During this time, statutory duties on local authorities to children and young people with additional support needs or disabilities continued, subject to any Scottish Government direction regarding the planning and preparation for the safe return to schools. Despite this, evidence suggested that many children and young people with additional support needs were unable to access adequate additional support for learning or teaching, either in school or remotely.¹²
21. There is widespread consensus that school and early learning and childcare closures have significant impacts on child health and development.¹³ The

⁹ Educational Continuity Directions were made under paragraph 11(1) of schedule 17 (Temporary Continuity Directions etc.: Education, Training and Childcare: Scotland) of the Coronavirus Act 2020. Ten such directions were made, the first commencing on 21 May 2020 and the last ending on 02 April 2021.

¹⁰ There were concerns that the Scottish Government had not adequately defined 'vulnerability'. Observatory of Children's Human Rights Scotland and CYPCS (2020), [Independent Children's Rights Impact Assessment on the Response to Covid-19 in Scotland](#), page 23.

¹¹ Ibid. Appendix 3, page 31.

¹² Inclusion Scotland (2020), *Rights at Risk – Covid-19, disabled people and emergency planning in Scotland – a baseline report from Inclusion Scotland*, page 9.

¹³ Scottish Government, Advisory Sub-Group on Education and Children's Issues, [Coronavirus \(COVID-19\) – Childcare, Schools, Early Learning and Childcare Settings: Evidence Summary](#), April 2022, page 3.

statement from the UK Chief Medical Officers in August 2020 highlighted the criticality of schooling:

“We are confident that multiple sources of evidence show that a lack of schooling increases inequalities, reduces the life chances of children and can exacerbate physical and mental health issues. School improves health, learning, socialisation and opportunities throughout the life course including employment. It has not been possible to reduce societal inequalities through the provision of home-based education alone. School attendance is very important for children and young people.”

22. In 2021, the World Health Organisation (**WHO**) identified schools as an essential service and advised that the closure of schools should only be considered when there are no other alternatives.¹⁴ They state that if restrictions are imposed to decrease or control transmission, schools should be the last places to shut their doors and the first to reopen with appropriate infection prevention measures. They recognise that interrupting children’s education should be a last resort:

“Last year’s [2020] widespread school closures, disrupting the education of millions of children and adolescents, did more harm than good, especially to children’s mental and social well-being. We can’t repeat the same mistakes,” (Dr Hans Henri P. Kluge, WHO Regional Director for Europe)

23. A joint publication from UNESCO, UNICEF and the World Bank¹⁵ in 2021 stated that:

Reopening school doors should be a priority in all countries, but doing so alone is not enough. As schools reopen and begin a shift into the “new normal”, education cannot go back to “business as usual.” Following large periods of closure, students will return with uneven levels of knowledge and skills. Some may not return at all. This holds particularly true for children from more disadvantaged backgrounds. Mental health issues, gender-based violence and other setbacks may have also arisen or escalated closures due to the disruption in school-based services. Students will need tailored and sustained support as they readjust and catch up.

24. Education is a critical part of the lives of children and young people with additional support needs. Education helps children and young people become successful learners, confident individuals, responsible citizens and effective contributors.¹⁶

¹⁴ [WHO/Europe | Media centre - WHO/Europe: Keep schools open this winter – but with precautions in place.](#)

¹⁵ UNESCO, UNICEF, World Bank (2021), *What’s Next? Lessons on Education Recovery: Findings from a Survey of Ministries of Education and the COVID-19 Pandemic*, page 8. [National-Education-Responses-to-COVID-19-Report2_v3.pdf \(unesco.org\)](#)

¹⁶ *Curriculum for Excellence*, Scotland.

Education must develop every child's personality, talents and abilities to the full.¹⁷ It is a 'multiplier right, with the potential to achieve transformative change within society'.¹⁸ It works best when it is delivered in harmony with home and with as few interruptions to routine and consistency as possible.

25. Year on year, the majority of Tribunal cases involve children and young people with autism. For children and young people with autism, education meets many needs; they gain skills to transition to adulthood, to build relationships and to cope with future challenges. Maintaining established routines is one way that they make sense of the world around them and avoid anxiety.¹⁹ School closures and remote learning naturally defeated this. In June and July 2020, seven in ten parents said their autistic child had difficulty understanding or completing schoolwork and around half said their child's academic progress suffered.²⁰
26. During school closures, children and young people lose familiar structures and teaching methods. For those who could not cope with on screen learning, there was an increased burden on parents. Not every home had an IT system. Not every child or young person, parent or carer had pre-existing digital literacy. Many low-income families did not have access to devices or technology. Not every school age child in Scotland had access to a laptop,²¹ although the Scottish Government distributed more than 50,000 devices (including laptops) to help with remote learning.²² Education Scotland also produced guidance for teachers and families on remote learning for schools²³ to promote a shared understanding of the key principles of remote learning and the support and resources available for teachers and families for children and young people.

School education – exam assessments

27. SQA exams did not take place in 2020 or in 2021 and a process of assessment was used to grade pupils. In some cases, this left pupils and their parents bewildered, hurt and disappointed – leading to Tribunal claims under the 2010

¹⁷ UNCRC, Article 29.

¹⁸ Observatory of Children's Human Rights Scotland and CYPSCS (2020), *Independent Children's Rights Impact Assessment on the Response to Covid-19 in Scotland*, page 9.

¹⁹ National Autistic Society, (2020), *Left Stranded: The impact of coronavirus on autistic people and their families in the UK*. During the pandemic, the Tribunal saw a rise in cases where the number of children and young people experienced anxiety.

²⁰ Ibid, Executive Summary.

²¹ Observatory of Children's Human Rights Scotland and CYPSCS (2020), *Independent Children's Rights Impact Assessment on the Response to Covid-19 in Scotland*, page 6. There is a lack of clear data on the total number of children and young people in Scotland who have been digitally excluded.

²² Deputy First Minister, John Swinney, 08 January 2021, Remote Learning for Schools.

²³ [COVID-19 Education Recovery Group \(CERG\)](#).

Act.²⁴ Young people consistently raised concerns about the cancellation of national exams by the SQA.²⁵

28. In March 2022, the SQA published revision support to help learners undertaking National 5, Higher, and Advanced Higher courses as they prepared for this year's exams, with the clear intention that SQA exams would take place from April to June. The materials are part of a wide-ranging package of support to ease pressure on learners following disruption to learning caused by the pandemic.

29. In August 2022, we saw, once again in Scotland, the conventional issue of exam results.

School education: vulnerable children and young people

30. Some of the most vulnerable children and young people who are looked after lost regular contact with their parents during lockdowns, which impacted on their sense of certainty and security and gave rise to increased distressed behaviour.²⁶ Those with neurodevelopmental and sensory conditions such as autism struggled with physical distancing and the wearing of masks, including those who lip-read. Others struggled to make sense of the changes and rules in school, at home and across society.

31. All of this filtered through to our case types. Claims were made regarding residential school responses to pupils' distressed behaviour.²⁷ The number of placing requests reduced in line with school closures in 2020 and 2021 and the extension of time for education authority decisions. Children asked for co-ordinated support plans (**CSP**) to help them to make sense of what supports they should be receiving to help them to thrive in school.²⁸ The strain on schools and appropriate agencies became evident.

32. It is difficult to estimate the impact on teachers, pupil support assistants, carers and supporters but the Head of Care in an independent special school summed it up when the lifting of a national lockdown was announced by the First Minister in March 2021, when saying:

"There was a palpable sigh of relief amongst staff. They had become more than weary."

²⁴ For example, Additional Support Needs Tribunal decision, [ASN D 25 06 2021](#).

²⁵ Observatory of Children's Human Rights Scotland and CYPSCS, (2020), *Independent Children's Rights Impact Assessment on the Response to Covid-19 in Scotland*, page 23.

²⁶ See *C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party)* (SEN) [2018] UKUT 269 (AAC) at para 81 for a discussion of 'distressed behaviour'.

²⁷ See Additional Support Needs Tribunal decision, [ASN D 14 01 2021](#)

²⁸ See Additional Support Needs Tribunal case, [ASN D 10 12 2020](#)

School education: suspension of tribunal cases

33. The date by which a local authority had to give their response to a placing request (received by 15 March) was extended by one month in 2020. This extension was reduced to two weeks in 2021. The period of time a local authority had to consider and make a decision on a placing request (received by 15 March) was extended by a month (to three months) in 2020, which then reverted to the usual timescale of two months in 2021. This meant that in 2020 a number of placing request references were lodged with the Tribunal later than usual and few of these could be decided before the start of the next academic year in August.
34. With this concern at the forefront, all existing Tribunal placing request references were released from suspension on 1 June 2020 and their progress was accelerated by reducing the dates for the case statement periods. From these, cases involving a child beginning primary 1 or secondary 1 were prioritised. All suspended cases were then decided by the end of October 2020, later than we would have liked but as efficiently as possible. New placing requests (received after 1 June 2020) were then progressed without unnecessary suspension.
35. Since 1 July 2020, when all other case types were released from suspension (claims under the 2010 Act and co-ordinated support plan references under the 2004 Act), there have been no further periods of multiple suspension and, due to the strides made in remote judging and casework, this is unlikely to again prove necessary in the HEC.

C. Tribunal case volume

36. In common with a number of other Scottish Tribunal jurisdictions, we saw a reduction in the volume of applications in the first year of the pandemic (01 April 2020 – 31 March 2021). Volume then increased in the second year (01 April 2021 – 31 March 2022) to expected levels. In year three (01 April 2022 to date) volume has risen significantly, particularly in the area of placing requests.

37. When reviewing research and our case types, the following factors may play a part in this rise:

- a) The immediate and ongoing impact on children and young people's education of school closures during lockdowns and heightened periods of restriction.
- b) Reduced access to health and social care during times of heightened anxiety and confusion and limited access to child and adolescent mental health services (**CAMHS**) during the transition from the pandemic.
- c) The fragmentation of education delivery, using digital and remote teaching in 2020 and 2021.
- d) Increased time at home, particularly for families already having trouble at home.
- e) The disruption of routine for children with neuro-diverse conditions, such as autism, ADHD and sensory conditions.
- f) The impact on the mental health of children and young people in Scotland. The CYPSCS and the Children's Parliament ²⁹ acknowledge that children are having more mental health worries and problems than before the pandemic.
- g) The impact of COVID-19 on children and families already living with challenging circumstances. Public Health Scotland developed a survey to find out how children in Scotland aged 2–7 years have been affected by COVID-19. They found ³⁰ that overall COVID-19 and the associated restrictions have had a negative impact on children and their families. This effect has been more severe for some families that were already experiencing challenging circumstances.
- h) The impact of COVID-19 in the delivery of in-person education – wearing of masks, physical distancing etc.
- i) The continuing impact of COVID-19 and sickness absence in the delivery of in-person education as we transition from the pandemic.

²⁹ Observatory of Children's Human Rights Scotland and CYPSCS, (2020), *Independent Children's Rights Impact Assessment for Children*, Annex 2; See also the Scottish Mental Health Law Review, and the workstream on children and young persons: <https://mentalhealthlawreview.scot/workstreams>.

³⁰ Public Health Scotland, (2021), *COVID-19 Early Years Impact and Resilience Study (CEYRIS)*.

D. Access to Justice

Access to justice: child parties

38. We are able to observe some of the impact of the pandemic on education through our case types. Some of our decisions will have relevance across the education sector and the publication of decisions remains one of the President's priorities. These are anonymised and published on the HEC website.
39. Recent decisions have included the definition of a school;³¹ the use of physical restraint in a residential school;³² and whether the provision of third sector support purchased by social work can be classed as social work support, amounting to support being provided by an 'appropriate agency'.³³ Children have raised some of these cases in their own right. They are eager in their endeavours, persistent and diligent. They have adapted very well to the remote hearing environment, introduced in June 2020. Their concentration, focus and attention is impressive. One child used their talent for drawing throughout a two-day remote video hearing and shared some of these with hearing participants. A tool used very effectively to relax the child and reduce nerves and anxiety.
40. Children and young people have demonstrated remarkable resilience in the face of great adversity but we must not let that lead to a relaxation of standards and expectations. We have a responsibility to ensure that they can continue to access justice despite challenges. Remote hearings provided a solution during the pandemic and provides a future choice as we now transition.
41. Our Chamber was the first Scottish Tribunal to use Cisco WebEx for video hearings (from July 2020). Since then, they have become well-embedded practice. We have identified that for these to be effective and to remain a viable alternative to in-person hearings in the future, we need:
- a) Well supported judiciary, with access to a robust and secure home or workplace network, good IT support and tools, including a minimum of two screens and a headset.³⁴
 - b) E-bundles, consistent with documentary evidence guidance.
 - c) Clear guidance to members, parties, witnesses and other participants.
 - d) Well trained judiciary.
 - e) Well trained clerks and caseworkers.

³¹ The Upper Tribunal upheld the HEC's preliminary decision on this point on appeal: *Aberdeen City Council v LS* [2021] UT 1.

³² [ASN D 14 01 2021](#).

³³ [ASN D 10 12 2020](#).

³⁴ See, *Remote Access to the Court of Protection Guidance* (2020), for a description of the different types of remote hearing, equipment, e-bundles, transparency and security. See also HEC [President's Guidance 02:2020 Remote Hearings and the Covid-19 Outbreak](#).

42. We are almost there. We have met and exceeded points b) to e). We have well-trained judiciary and staff, guidance is available to all and the IT support infrastructure is in place. We need to improve on point a) and the Judicial Office, together with the SCTS are exploring how to meet the IT needs of our judiciary. Until then the majority of our judiciary continue to rely on their own devices and networks. Despite this, they have worked very hard to ensure that the hearing itself is not too adversely affected by the limits of their own systems and equipment.

Access to justice: effective participation

43. Effective participation remains central to our hearings, whether remote or in person. For this to work well in remote hearings, participants need:

- a) Access to a robust home/office network.
- b) A room where they will not be interrupted or overheard.
- c) Regular reassurance and explanations during the course of the hearing.
- d) Regular comfort breaks.
- e) Clear (and age/accessible appropriate) guidance.
- f) Test sessions before the hearing to allow any IT issues to be ironed out and provide confidence to participants.

44. Remote hearings have allowed us to deliver justice during a crisis period but they are more than a crisis tool. They have advantages that allow children to participate when an in-person hearing would be a barrier. There are advantages to parents from being able to attend from their home. Participants do not have the stress of travel and there are obvious environmental benefits and cost savings. For these reasons the remote hearing is here to stay, not as a replacement for in-person hearings, but to sit alongside them, providing a choice of hearing style.

Access to justice: choice, choice, choice

45. Participation is at its most effective with choice. Choice means looking at things through the eyes of the person accessing justice. In the HEC, we take a child or young person centred approach, which means looking through the eyes of the child or young person, not through the eyes of an adult. We remain on a continuum of learning, applying these principles:

- a) Listening and learning: from those with lived experience.
- b) Authenticity: learning directly from children and young people who have the most authentic experience, expertise and understanding.
- c) Credibility: testing our learning and development to ensure that it provides a well-tested and credible route to access justice.
- d) Encouraging choice: as early as possible in the process and as often as is needed.

46. We see the principles of participation and choice illustrated in *Hart's Ladder of Participation*. *Hart's Ladder of Participation* is a model for use when developing and working on youth participation projects. It aims to enable children and young people to take an active part in decision making, and give them the opportunity to have a 'voice' in society.
47. The President has used *Hart's Ladder* when consulting and working with children and young people on the sensory hearing design, when developing the *needs to learn* website (for 12 to 15 year olds) and when developing guidance to the judiciary, the administration and parties.³⁵

Roger Hart's Ladder of Young Peoples Participation

Rung 8	Children and adults share decision-making and actions <i>Projects are initiated by children empowering them while at the same time enabling them to access and learn from the life experience and expertise of adults.</i>
Rung 7	Children lead decision-making and actions <i>Projects are initiated by children with adults in a supportive role.</i>
Rung 6	Adult initiated, shared decisions with children <i>Projects are initiated by adults but children are involved in decision making.</i>
Rung 5	Children are consulted and informed <i>Children are given advice on projects designed and run by adults. Children are informed of how their input will be used but outcomes and decisions made by adults.</i>
Rung 4	Children assigned and informed <i>Children are assigned a specific role and informed of how and why they are informed.</i>
Rung 3	Children tokenised <i>Children appear to be given a voice but in fact have little or no choice about what they do or how they participate.</i>
Rung 2	Children as decoration <i>Children are used to help or bolster a project.</i>
Rung 1	Children are manipulated <i>Adults use children to support courses and pretend courses are inspired by children.</i>

Image taken from the website of [Oaklands School, Walterslade, Kent](#)

³⁵ For an explanation of this model and its constituent parts, see the Organizing Engagement web page [Ladder of Children's Participation](#).

E. Tribunal Administration

Senior Operations Manager, Natasha Russell

48. The President instructed that all hearings be conducted remotely from June 2020 onwards. Although in-person hearings are now being phased in, remote hearings continue to account for the majority of hearings. In response to this, our staff quickly became experts in setting up and hosting remote hearings, conducting test sessions with parties and members, and resolving any issues that arise.
49. The digital platform used for hearings (Cisco Webex) also allows our staff team to meet remotely to conduct team meetings. This really boosted morale and motivation during periods of lockdown. The Chamber welcomed a new caseworker into the team, Amy Richardson, who joined in February 2021 and two temporary caseworkers, in 2022, to support the rising volume of cases.
50. The staff team continue to consider improvements in their work and the future of a digital operational delivery model is well supported by all involved.

Operations Managers, Paul Stewart and Elaine Forbes

51. In 2020, any time-critical hearings were initially conducted by telephone but this presented its own challenges. Our hearings can be lengthy and we have set a high standard for how hearings are conducted, which is demonstrated by the President's comprehensive guidance to Tribunal Members and our commitment to developing our sensory hearing facilities in the GTC and the Inverness Justice Centre. While the telephone provided a valuable platform for early time-critical hearings, this could be difficult for multiple days – and so we were keen to explore other methods.
52. In June 2020, the Chamber became the first in Scotland to be given permission by the President of Scottish Tribunals to conduct a remote video hearings pilot. To support this, the SCTS IT project team were given an overview of the Chamber and our hearing requirements. Cisco WebEx was then identified as a potential platform. A pilot hearing was identified for July 2020 and our casework team worked closely with the project team to develop new processes and procedures for facilitating remote video hearings in accordance with the President's guidance. Amongst other things, this included:
- a) An assessment of WebEx on a variety of devices.
 - b) How to set up and host remote video hearings.
 - c) A process for testing WebEx with all participants in a hearing.
 - d) The role of the hearings clerk in a remote video hearing.
 - e) How adjournments could be facilitated.
 - f) How witnesses would take part in these types of hearings.

53. The pilot hearing was a success and the President was granted permission for this to be rolled out. Remote video hearings have been used successfully ever since with very few technical issues due to the advance testing carried out by staff with parties, representatives, witnesses and other participants. So far, we have not encountered any technical issues that could not be overcome, and the majority of hearings have concluded within the number of days allocated by the tribunal.

The HEC conducted 52 hearings via Cisco WebEx over 121 days between August 2020 and September 2022.

54. The casework and clerking teams have now become experts in the use of Cisco WebEx and have used their knowledge to facilitate other events via Cisco WebEx including the Annual Tribunal Forum (3 times), Members' evening training (3 times), specialist training (3 events over 4 days) and our All Member's Conference (3 times). This means that we have conducted 12 training events using Cisco WebEx since 2020.

55. The team have also shared their knowledge with other Chambers and Tribunal jurisdictions, supporting the rollout of remote video hearings more widely across Scotland.

F. Our judiciary

56. A well-supported judiciary needs good quality up to date relevant training and a positive member review process and experience. The delivery of these two important judicial supports had to be restructured during the pandemic, to make sure they were not lost, diluted or compromised. As a result, both were able to continue, although initially delayed and in a different form – remotely. This chapter explores both.
57. Training during 2020, 2021 and 2022 was delivered entirely online, consistent with the Judicial Institute for Scotland. The loss of an opportunity to meet in person and to benefit from full social interaction means that maintaining online training for all training events may be difficult to justify, especially for a low sitting jurisdiction. However, the cost and time savings which online training can secure could justify maintaining the online environment for all training in the Chamber except the All Members' Annual Conference and any other training deemed to merit in-person attendance. The All Members' Annual Conference in 2023 will take place in-person, as will a specialist two day training event for legal members.
58. Evening training will continue to be delivered online even after we start to hold in-person training events again. There are several benefits to this: disproportionate travel time compared to training event time (for some) will be avoided; avoids late night travel; more family friendly. In essence, online evening training is proportionate, bearing in mind the nature and length of the event.
59. It is a feature of HEC judicial training that administration, casework and clerking staff attend for their own knowledge and development. There is an advantage to staff attending these online as they do not have to travel and can return to their desks with ease.

Our judiciary: Specialist training, Derek Auchie, Lead Trainer

60. For any judicial post-holder, regular, ongoing judicial training is an internationally recognised requirement. The UN [*Bangalore Principles of Judicial Conduct 2002*](#) reflects this where, at Value 6: Competence and Diligence, at Application 6.3, the following is stated:

“A judge shall take reasonable steps to maintain and enhance the judge’s knowledge, skills, and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.”³⁶

³⁶ See also the [*Declaration of Judicial Training Principles 2017*](#) produced by the International Organisation for Judicial Training representing 70 countries which states that ‘Ongoing training must be considered an integral component of judicial duties.’, page 8.

61. Those of us who have the privilege to serve in this Chamber, making significant decisions about the education and future of vulnerable children and young people, know the value of regular training in what is (in normal times) a fast moving landscape. Not only does the substantive law (including guidance on aspects of the law) move and change rapidly; so does practice in the areas of specialism relevant to Chamber cases. On top of that, judicial process law and practice is ever changing, meaning that we need to keep abreast of how to continue to deliver a fair and full process.

The HEC and the online training environment

62. As if all of this were not enough, for the moment, we have moved to delivering all training in an online format. That brings challenges, both on the technical front, but also for engagement: a big part of our training dynamic over the years has been to meet socially and exchange ideas and experiences in-person. However, the Chamber staff and judiciary have risen to this challenge and a number of online training events (nine in total, with a tenth to come in October 2022) have been designed and delivered.

63. The art and science of broadcasting live events has come a long way since the world's first livestream in 1993, which involved footage of a dripping coffee maker. Our Chamber training events are, we hope, quite a bit more interesting than that. As we were planning for our 2020 All Members' Annual Conference, to take place on 19 March 2020, the first COVID-19 restrictions were announced three days earlier. This led to the President cancelling that conference.

64. As the Chamber worked to manage its caseload following the pandemic, plans quickly started to move training online. The first live event for the Chamber was not a training event: it was the Annual Tribunal Forum on 29 September 2020. This event gave us our first opportunity to try out the Cisco WebEx platform. The event went very well, following the format of its usual (live) delivery.

The approach to online training

65. The phrase 'new wine in old bottles' has influenced our thinking here. The 'new wine' is the delivery of training online; the 'old bottles' refers to the vessel in which we maintain our previous training priorities, such as: practicality, engagement, creativity of approach and professional development. We were determined to retain as much of the essence of excellence in judicial training as we could, but adapt to present it in a new (online) format.

Our first online training event

66. We delivered evening training to our Legal Members on 1 October 2020, our first online training event. The administrative support team quickly developed a very clear and accessible two-page step-by-step guide for members on how to access the training event area, and everyone managed to join with little fuss.
67. We discussed recent developments on important practical issues around relevance of certain evidence in placing request references, 2010 Act remedies, time bar in claims and references and expenses. We then moved on to consider remote hearing issues; by this time, these hearings had started and we considered a range of challenges including noise interruption and the presence of parties during the taking of the views of the child.
68. For the remote hearings discussion, legal members were split into small groups since, although there were 14 legal members, we wanted to retain the small group work which we know members enjoy and which is, if anything, more important in an online event than in a live one.
69. The post-event Survey Monkey questionnaire was designed to capture our usual feedback on the material delivered, but was adapted to capture views on accessibility and navigability of the learning platform. The feedback was very positive on both fronts. It was clear that delegates were pleased to be chatting with colleagues about Chamber business, after no live interaction for over 6 months.

The All Members' Annual Conference, November 2020

70. This was our next remote training event, and our first across a whole day. It was run largely as originally planned (but postponed) from March 2020. The catering at HEC training events is legendary, and the President, assisted by the Member Liaison Officer, Lynsey Brown, put together a most welcome confectionary package, mailed to all members, who were instructed not to open it until the event started. A personal message from the President to each member accompanied the package. This helped members to remember the social importance of Chamber gatherings, and was a thoughtful touch for all participants who could enjoy each other's company on screen over a coffee and snack.
71. Following the President's address, we were reminded of the optimism of the vulnerable children and young people we encounter in the work of the Chamber with the uplifting performance of the Pasek and Paul track [You Will Be Found performed by the Southcraig School Choir](#), based in a local authority special school in South Ayrshire.

72. Moving to the main theme of the event, the potential for the influence of international treaties in Chamber cases is significant, and the training was designed to equip members to tackle these issues when they arise.
73. The day began with a detailed and very interesting presentation by the Lord President, the Right Honourable Lord Carloway, entitled *International Law in the Scottish Courts*. The complex question of the status of non-binding treaty provisions was clearly explained by reference to “front door” and “back door” applicability. The Lord President then gave guidance on the important practical question of whether tribunals could, in individual cases, raise treaty provisions which had not been raised by the parties. The latter point led to detailed guidance on this issue being provided by the President to members shortly following the event.

The All Members’ Annual Conference 2021

74. The theme for the 2021 conference, again delivered fully online, was *Judging Through an Autism Lens*. The day was split into two parts: tribunal craft and developments in inclusive practice for autistic learners. Of all of the additional support needs types that feature in Tribunal cases, autism is the most common, making this area of particular importance.
75. We started by learning about remote hearings from a senior judge in the Special Educational Needs and Disability Tribunal in England and Wales (SEND), the broad equivalent of the HEC jurisdiction in Scotland. Given the significantly higher caseload in SEND, Judge McConnell’s discussion of some of the practical issues (and solutions) adopted there gave us insights into how we could improve further our online judging. Recent appeal court case law on participation in remote hearings was drawn to our attention (*AA and BA v A Local Authority (SEN)* [2021] UKUT 54 (AAC)).
76. Group discussion of scenarios is the most favoured learning method among our judicial members, and we turned back to use this method next, but with a difference. In advance of the event, we filmed parts of a mock tribunal hearing: the pre-hearing, the hearing and the deliberations. We used real lawyers, real panel members and a child actor. They were briefed in advance of the recording. Members had some background papers for the mock case, and the clips, and were asked to watch the clips and read the papers in preparation for discussion on the day. The case concerned a child with autism.
77. This took us to the afternoon session, involving scenarios on current inclusive practice for autistic learners. The National Autism Implementation Team (**NAIT**) led this session. NAIT developed two case studies based around scenarios that often arise in Tribunal hearings, namely exclusion from school and a child with a CSP. Delegates considered these in the context of a list of reflective questions

with the theme ‘using an autism lens’ rather than purely through the lens of the legal tests and principles we normally apply.

78. The session delivered by NAIT inspired members to ask for more training in this area. As a result, NAIT has accepted our invitation to deliver the main training for our All Members’ Conference 2023. This will allow us to explore current trends in educating children and young people with autism further, helping us continue to perform our specialist function (and duties) with confidence.

The All Members’ Annual Conference 2022

79. The maturity and novelty of the Chamber’s training agenda are clear from the theme of the latest Annual Conference, *How Judges Judge*, which again was delivered entirely online.

80. The morning session was led by an expert on judicial behavioural science, Dr Brian Barry. He introduced in his opening presentation the key principles, theories and research findings in the area. Delegates then turned (in small groups) to applying these principles to five carefully crafted HEC scenarios designed to bring these out. Concepts that we have not considered before such as prospect theory, heuristics and cognitive biases, emotion and personality and group decision making were all examined and applied, leading to some consideration of how we think (and judge), rather than what we judge.

81. In the afternoon, we discussed preparing to judge and judging online. In these reflective sessions in small groups, we considered techniques, tips and approaches for preparation and online judging, sharing what works well, with a view to continuing to improve our work in these areas.

Training principles

82. Given the variety of training events offered since the movement into the First-tier Tribunal for Scotland in 2018, and the recent layer of complexity of online delivery, we have developed a set of *Member Training General Principles*. These allow all Chamber training events to be quality-checked and carry a consistent approach, so that we can ensure that best practice is repeated. This sets out protocols on, for example: group sessions, training materials, speaker interactions and member feedback.

83. This development demonstrates the maturity of the Chamber training provision. Given the link between training and the ‘proper performance of judicial duties’ in the Bangalore Principles (above), our judiciary deserve nothing less than a professionally designed and delivered training programme. This has not been

compromised by the need to deliver this in an online environment over the past two and a half years.

Our judiciary: Member Review, Lesley Dowdalls, Lead Reviewer

84. The review of judicial members is a key part of ensuring there is continuous professional development. It is an important tool to ensure that judicial standards are maintained and public confidence remains high regarding the decisions of the HEC. A review is a condition of appointment for members. The process is designed to encourage self-analysis, reflection on judicial function and to analyse training development with a view to improving the standards and consistency of service delivered by members of the HEC.
85. The objectives of member review are to provide an opportunity for:
- a) an effective two way discussion about procedure, training and sitting experience between the Member and the reviewer;
 - b) an opportunity to discuss judicial objectives and development;
 - c) providing feedback to individuals on delivery of their judicial function;
 - d) identifying strengths and areas for development; and
 - e) identifying training and development needs.
86. The review process is not the only opportunity that members have to discuss development needs or other related matters and members are always encouraged to raise these with the President.
87. Member reviews continued to be conducted during the pandemic. Observations and interviews took place remotely, using Cisco Webex or teleconference.
88. At the 2022 annual meeting of member reviewers, there was support for the possibility of remote reviews (where the reviewer is online) being the norm going forward, even for in-person hearings. It would reduce time and cost in travelling and overnight stays (in some cases). The disadvantage is not being able to see the reviewee 'in the flesh', but that is outweighed by the advantages of not having to attend in person. It would also be less intrusive and perhaps less off-putting to the reviewee if the reviewer were not there in person. It will be necessary for the reviewer to be able to see the hearing participants, especially the reviewee and this is achievable through on screen observation. This will continue to be explored.
89. The benefit of all reviewers being peers is that they all experience the same issues as reviewees. They can understand concerns/empathise while providing an opportunity for reviewers to remind themselves of the learning achieved from cases in which they have been involved, and discuss any issues.

90. Member review is a supportive process and is even more important when there are limited opportunities for members to share experiences with peers regularly, other than at training. The team of reviewers work hard to ensure a consistent approach is taken to reviews, and that the ethos remains supportive, and the process constructive, to benefit all members equally.
91. Member review also influences the development of member training. The President reads all reviews and the Lead Reviewer and Lead Trainer meet annually to discuss themes and to plan developments.

G. Remote Judging

92. There are advantages and disadvantages to remote judging. We should not think about this as a question of convenience or cost. Instead, the key consideration must always be to make sure the quality of the delivery of justice is not compromised. If that can be achieved in a more convenient and resource effective way in remote hearings, then that is a good thing. If the delivery of justice is compromised, then we must be cautious. This chapter explores the HEC experience of remote judging during the pandemic and our plans as we transition.
93. Ordinarily, before a significant innovation like remote hearings would be introduced, there would have been a pilot and a monitoring and review period. The speed at which we had to introduce this new model prevented that from happening. However, the process was regularly evaluated against feedback from participants. In a low volume jurisdiction like this Tribunal, it has not been difficult to process feedback or to introduce change to accommodate need.
94. We now have the capacity to offer all parties the opportunity to attend hearings in a specific or blended way that accommodates their requirements. Gathering feedback from caseworkers, clerks, Tribunal judiciary, parties, children and young people and witnesses has been critical to identifying improvements and the preferences of tribunal participants. In addition to this, the President conducted observations of multiple remote hearings between 2020 and 2022 and consulted directly with judiciary, staff and stakeholders, which informed progress.
95. The HEC has delivered remote hearings with a range of supporting structures to ensure that the quality of the delivery of justice is as robust as possible. There have been challenges. The lack of an opportunity for the three members to discuss in-person the case and process before, during and after a hearing is relevant. Although there are ways to overcome this (using private rooms on Cisco Webex and teleconferencing), there is no substitute for in-person discussions.
96. Non-verbal communication may be important when assessing the quality of the evidence of a witness. It can be difficult to do this when working with more than one screen. This can be improved by asking one or both of the specialist members to keep a visual eye on the hearing screen and to alert the legal member should any concerns arise. This is a factor in any hearing, whether in-person or online and it highlights the value and collegiate nature of the three member tribunal.
97. IT interruptions, no matter how minor, can cause the hearing to become fragmented. The importance of the legal member is critical here. They set the tone of the hearing and they reinforce the focus of each part of the hearing. Some legal members have been creative in overcoming IT challenges, with one member

adopting a hybrid approach (using telephone for the evidence of a witness whose home network could not support Cisco Webex without difficulties) and continuing the proceedings without unnecessary interruption.

98. Maintaining the focus of a hearing when there are vulnerable parties or witnesses can be challenging whether in-person or remote. The remote model has been a surprising success here. Children and young people have participated well. They have shown a superior command of screens. They have been able to remain within their own home or own surroundings, which has reduced the potential for re-traumatisation.
99. In all other senses, we already judged remotely pre-pandemic. We prepared for hearings on our own, we judicially case managed by telephone and we worked on developing our knowledge of the law and practice on our own, when not attending HEC training events. This continued throughout the pandemic.
100. 'Phase 1' hearings (introducing the three Tribunal members into an in-person hearing room, with all other participants appearing online) were introduced in April 2022. However, the remote hearing model continues to be the most commonly used.
101. 'Phase 2' hearings (three Tribunal members, two representatives, parties and the child or young person, in-person, attending at the Glasgow Tribunals Centre; with all witnesses appearing online) will begin in October 2022.
102. The remote hearing model has provided a range of advantages, which are explored in this chapter. For these reasons, the President has intimated that the option of a remote hearing will remain. Part of the HEC transition includes developing three hearing types, after the phase 2 hearing assessment is completed. These are:
 - a) An in-person hearing.
 - b) A remote hearing.
 - c) A hybrid hearing, using part in-person and part remote (video/teleconference).

Remote hearings: the HEC judiciary

103. A Remote Hearings Survey was issued to all HEC judicial members in August 2022. Detailed feedback from 26 HEC judicial members to the Survey (an 86% return rate) tells us that our members see remote hearings as offering a range of advantages. These are (with the bold entries being the most popular):
 - a) **No travel time or delays or overnights stays**, associated costs, associated need for additional care for family members or associated need for the hearing to take place on consecutive days.
 - b) Remote hearings are 'greener'

- c) **Easier for witnesses to attend, for example due to less time spent than for in-person hearings, including travel.**
- d) Easier for tribunal members to attend, allowing them to attend more hearings.
- e) Can assist those with physical disabilities, as no need to travel to and attend a venue.
- f) Less wasted time for witnesses who can do other work while waiting to give evidence where their evidence is delayed.
- g) **Increased rate of child/young person participation**, due to ease of participation, because of, for example, reduced nerves and being in a familiar environment while participating.
- h) Allowed hearings to continue during the pandemic restrictions.
- i) Less stressful to attend than an in-person hearing.
- j) Easy for young people to take part due to higher technology familiarity.
- k) **Flexibility of process is increased**, for example where a child changed their mind about providing views to the tribunal, and this change could easily be accommodated.
- l) Quicker process than witnesses coming and going in an in-person hearing.
- m) Participants' faces can be seen more closely than in in-person hearings.
- n) High quality screen resolution and audio, reducing/closing gap with in-person hearings.
- o) Confidentiality of judicial note taking is stronger.
- p) More convenient bundle navigation – a single screen-shared bundle is used by all.
- q) Electronic bundle can be highlighted and marked with typed comments, which is useful.
- r) Typed note-taking is easier when sitting remotely.
- s) The facility for private rooms with clerks who are adept at moving participants between rooms helps the hearing process.
- t) The facility for participants to take part in audio mode only, where on-screen presence was not possible.
- u) The use of practice sessions to reduce the risk of technical issues.

104. Difficulties around remote hearings were also identified, with the bold entry being the most popular:

- a) **Technical issues, usually around online connectivity**, but also around the use of certain (personal) devices, such as a mobile phone or iPads.
- b) Lack of access to the full (not free) version of Adobe software to allow notes to be made, and lack of training on how to use the software.
- c) Bundle reference numbers and the page numbers for the bundle documents are not aligned, making navigation through the bundle more difficult.
- d) Reduced ability to pick up on non-verbal cues compared to at in-person hearings.

- e) Reduced ability to assess the evidence of witnesses than for in-person hearings.
- f) Less suitable for complex issues or where a party is unrepresented.
- g) Hearings are treated less seriously when they are remote compared to in-person.
- h) Increased risk of external influence of witnesses (due to limited on-screen view angle).
- i) Lack of access for tribunal members to appropriate IT equipment.
- j) Can be more difficult/take longer to observe the need for a break or that someone is distressed.
- k) Communication between tribunal members can be more challenging online.
- l) Professionalism of the Tribunal is easier to convey in person, enhancing reputation.
- m) The 3D, human, physical colour that comes with an in-person hearing can be lost online.
- n) Not being in the room with witnesses leads to something being lost.
- o) Online hearings demand more concentration than for in-person hearings, causing distraction from the proceedings.

105. What is striking about the responses on the difficult aspects of online hearings is that many stated that technical difficulties (by far the most common negative comment) were satisfactorily overcome, in particular by the intervention of tribunal clerks.

106. Judicial members overwhelmingly voted for the continuation of remote hearings as an option alongside in-person hearings: 88.5% in favour, compared with 11.5% against. The reasons for these conclusions are included in the summaries above.

Remote hearings: a legal member's perspective, Collette Gallagher

107. I welcomed the introduction of remote tribunal hearings as a way to ensure cases could be heard during the pandemic. However, conducting a remote hearing brought with it additional considerations and at the outset some concerns.

108. One of my main concerns was about how well supported the appellant or claimant would be and how able they would be to follow proceedings. Some parties can struggle to follow proceedings when hearings take place in-person, and remote hearings when parties are alone at home without their representatives, could increase the chances of this happening. I was also concerned about the presence of children in the family home and in particular the child at the heart of the proceedings.

109. In my hearings, I was able to address these concerns at an early stage during the case management process by enquiring into the needs of those appearing and

working out the necessary accommodations. For example, in one hearing the parent appellant did not have alternative childcare and needed to leave the remote hearing early each day to collect their child from school. In another hearing, the parent was due to give evidence at a stage when their child would have been in the family home and although cared for by another person, was likely to have come in and out of the room. This would have distracted the parent and potentially had an impact on their evidence. In these cases, we were able to facilitate the needs of the parents without any impact on the hearing, with both completed within the allocated days.

110. Another concern related to the risk of IT failings. Whilst Cisco WebEx is a robust platform, it is reliant on other people's connectivity as it is accessed through the internet. I was concerned that people could briefly drop in and out without the clerk or the tribunal members realising. In my hearings, I carefully monitored that everyone was present and able to follow proceedings throughout. This required a high level of concentration but regular breaks reduced fatigue. The experience of the platform was positive with no significant technology issues and high audio and visual quality throughout.
111. Overall, the experience of conducting remote hearings has been a positive one. Although there are challenges, these are not insurmountable. Remote hearings were a response to a crisis but there are clear positives. The most significant of these is that they may provide an accessible way to gain a child's views. The President has commented that children and young people appear entirely comfortable in the remote world and may feel more comfortable participating in this way. In my remote hearings, the child has provided views by way of advocacy or been too young to express a view. However, if remote hearings can lead to children and young people feeling more comfortable participating, I welcome their continuation in some format, even with the return to in-person hearings.

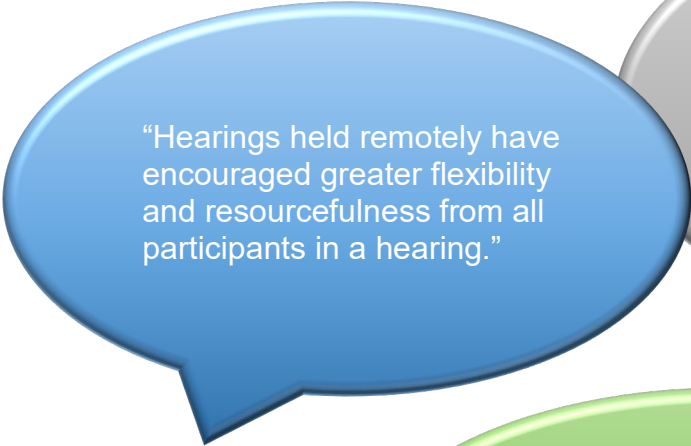
Remote hearings: an education member's perspective, Jane Laverick

112. I was involved in a case that was a first for me in more than one respect: not only was it the first remote hearing on which I had sat, it was also my first hearing in which the claimant was a 'looked after' child.
113. We had all given much thought, at our annual training in 2019, to children bringing cases to the Tribunal. We had discussed how to make the process accessible to a child party and gave careful consideration to making a suitable physical environment for children. We had consulted with children and sought their specific input when designing the sensory hearing suites; we had incorporated autism-friendly strategies into the design of the hearing rooms. Yet, when I had my first case brought by a child claimant, it was heard remotely. The newly designed facilities lay empty and locked.


114. We began our hearing planning by thinking carefully about how we might prepare the claimant for the remote hearing. We decided to create an individualised social story to help explain what it would be like. We knew the claimant was familiar with remote contact but we wanted them to understand that this was likely to be a different experience from the remote interactions with which they were familiar. For one thing, it would be significantly longer. It would also be more formal, and, for the claimant, involve lots of listening without being able to respond directly in the moment, even if they disagreed strongly with what was being said.
115. We tried to anticipate how various aspects of the hearing might seem to them and what parts of the day they might find unusual or unsettling. For example, simple things like people looking serious for sustained periods might cause concern, when their usual experience of remote interactions may well be of participants being visibly cheerful and smiling. We wanted to reassure the claimant this did not signify that we were unfriendly or angry but rather that we were concentrating. Similarly, we anticipated that participants looking away from the camera as they wrote notes might be disconcerting if the claimant's usual experience was of people looking direct to camera in obvious engagement. We wanted to explain that looking away was not a sign of boredom or lack of interest. On the contrary, it was to write notes so that the Tribunal members and other participants could properly remember what had been said. We were keen for the claimant to know that their views would be heard even though they could not interject straightaway if they disagreed with something that was said by a witness in evidence.
116. We suggested the claimant create a stop/go sign to allow us to know if they needed an unscheduled break. We ensured, as we would in an in-person hearing, that we had planned breaks, a prearranged lunchtime and an agreed end for the day. The claimant only used their stop sign once, in anticipation of an agreed break time, indicating that they had understood the overall shape of the day.
117. I think the remote hearing suited the claimant well. It meant the claimant was able to stay for the entire hearing and listen to proceedings whilst having their own space; the only person with the claimant was their mother who was supporting the claimant. The claimant was able to sit and do colouring and other artwork as they listened. We knew the claimant was listening as they respectfully, at the end of one witness's evidence, asked for clarification of a figure of speech and, on other occasions, their facial expression slightly altered in response to what had been said.
118. I look forward to making use of the GTC sensory hearing suites and these excellent facilities but, in the meantime, the remote hearing seems to work well. I had worried that not being able to meet in-person would make it harder for the claimant

in this case. However, as it transpired, I think it may actually have been beneficial to them in terms of being able to engage with a lengthy process.


Member snapshots



"Hearings held remotely have encouraged greater flexibility and resourcefulness from all participants in a hearing."



"Listening and responding to the child's views in a setting which they are very comfortable in has been a positive experience. Remote hearings have led to an even greater focus on the key elements in a case."



"I have been involved in 3 remote hearings now and I have found that the process is as valid as face to face hearings when taking evidence and making decisions."

Remote hearings: casework and clerking

119. The casework and clerking teams have played a key role in implementing and facilitating our remote hearing processes.

Sarah-Anne Tracey, Casework Team Leader

120. I worked closely with project managers, senior management and the President to get the right process in place to facilitate remote video hearings for our Tribunal. I scheduled and hosted a variety of Cisco WebEx sessions for Tribunal members to ensure they were familiar with the platform and to reassure them that remote hearings would not work any differently to our in-person hearings. Ahead of my first hearings, I made sure I got the basics of the system right and had multiple practice sessions with my colleagues to prepare to respond to any issues on the day.

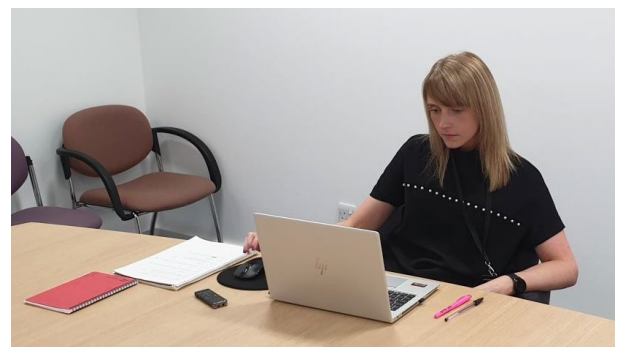
121. In the week leading up to my first hearing, I was feeling very nervous. I was worried my home Wi-Fi would play up on the day. I set up tests with all participants in the

lead up to the hearing so that everyone was able to join the platform successfully and they were familiar with the system before the hearing commenced. Because of these tests, the hearing ran smoothly and there were no interruptions to the proceedings each day. Testing beforehand certainly played a big part in ensuring the hearing did not proceed any differently from an in-person hearing.

122. There are a number of benefits for the HEC and for those taking part in remote video hearings. As the Tribunal covers all local authorities within Scotland, it means we can receive an application from any town or city across the country. We arrange in-person hearings within a suitable local venue, meaning our Tribunal members and clerks need to travel and sometimes stay over in a local hotel. However, remote hearings remove the need for travel. On a number of occasions, we also have witnesses located overseas. The remote system enables them to join the hearing in the same way as other witnesses.

Megan Wilkinson, Caseworker

123. After a few months of working at home in 2020, we had our first remote hearing on the telephone, which went well but clerking the telephone hearing did not feel the best fit for the Tribunal and I was delighted when we were introduced to Cisco WebEx.
124. Cisco WebEx works extremely well. I clerked the first remote video hearing, which had one legal member, two representatives and an observer. This was a very successful hearing and we have continued to use it from then. I was impressed with the range of things Cisco WebEx could do.
125. We conduct tests of Cisco WebEx for any participants that have not used the platform before. These are normally done a week or two before the hearing and means we can resolve any issues before the hearing.
126. We have faced a few technical difficulties while conducting remote video hearings but have always been able to resolve these so that the hearing can take place as planned and I continue to work with my IT colleagues to resolve any issues we identify in advance of hearings.
127. I personally think there has been more participation in our hearings by using Cisco WebEx, and children may feel more comfortable speaking at a hearing when it is conducted by video.



Eilidh MacMillan, Clerk

128. I have clerked HEC hearings via Cisco WebEx. The preparation for this type of hearing is different to remote telephone hearings because of the visual aspect. I have to ensure my workstation is correctly positioned with the right background and light, for example. Paperwork for these hearings is always provided timeously by the casework team, which means that I am well prepared in advance and know exactly who is attending. On the day of the hearing, regular breaks are important and these are always factored in.



129. The main benefit of remote video hearings is the visual aspect as everyone can put a face to a voice and know who they are speaking to. Being able to see and interpret the body language of those participating is also beneficial and this cannot be done in remote telephone hearings. Amongst other things, this can help to determine when a break might be needed.
130. I am able to keep in contact with any witnesses that need to join the proceedings and can support them if they have difficulties in joining the hearing or are unsure when to join. I have experienced some technical difficulties during remote video hearings but have been able to resolve these on the day.
131. Overall, I found participants to be positive about our use of remote video hearings and Cisco WebEx. Those who have experienced any technical issues have been understanding and patient as any problems are resolved.

Remote hearings: appellant/claimant, Iain Nisbet, Solicitor, Cairn Legal

132. In the week before the first lockdown, I travelled to Edinburgh on a near empty train to appear in an Upper Tribunal hearing on permission to appeal from the HEC. Elbow bumps with the authority's representative and generous provision of hand sanitiser was the order of the day. This was over two years ago, in March 2020, and it was the last time I have undertaken any Tribunal work in-person.
133. The initial discharge of tribunal hearings with no firm dates for rescheduling left many of my clients dismayed by the prospect of not getting a resolution to their case within the timescales they had originally planned. The timing was such that it pushed almost all cases into the next academic year. This was unfortunate but, under the circumstances, unavoidable.

134. As with the rest of society, the Tribunal service went through a steep learning curve to introduce remote hearings by way of video conferencing. Since then, I have undertaken several hearings (procedural, preliminary and full evidential hearings lasting two or three days).
135. In fact, I had already undertaken one tribunal hearing partly by video conference before. This was a case based in the Western Isles, and by agreement between all concerned, it was heard with the tribunal, myself and my client in the Tribunal offices in Argyle Street, Glasgow, and the authority's representative and witnesses in Stornoway. I felt at the time that this worked well, but had insisted that my client and I needed to be in the same room. Obviously, that was not going to be possible in the circumstances of a pandemic.
136. The HEC was up and running online within a couple of months of the first national lockdown in 2020 and quickly worked its way through the initial backlog. It is a relatively low volume jurisdiction, but nevertheless, this was an impressive achievement. We are all well aware of other areas in which a pandemic backlog remains an issue.
137. Representing clients at a tribunal online is clearly a very different experience to an in-person hearing, but by and large it has worked well. I have to record my gratitude here to the clerks and other staff of the HEC whose assistance and support in preparing for and then delivering each online hearing has been vital – and I am sure that I am seeing only a fraction of what is actually undertaken!
138. One of the keys to the success of the online hearing has been a renewed emphasis on written materials prepared in advance of the hearing. Making sure that case statements are fully reflective of the facts and arguments to be advanced is essential, even if this means seeking their amendment as the case evolves. Comprehensive witness statements are more important than ever, and can help to focus the issues and keep the time needed for each individual witness to a minimum. A joint minute of agreed facts (if well drafted and approached with a spirit of co-operation) can be very helpful in narrowing the focus of a tribunal hearing to those matters which are genuinely in dispute.
139. I was initially sceptical about preparing written submission prior to a hearing, but I am now much more comfortable with this idea, when it is requested. I find it helps me to focus on the essentials of the case throughout the hearing. I also quite like being able to set out my stall for the tribunal at the outset.
140. I have also undertaken tribunals where parties have agreed that they can be determined just on the papers. This has always been part of the Tribunal Rules,

and was something that I have sought in appropriate cases even prior to the pandemic. It is worth consideration in appropriate cases, where it can work well. Not every case requires a full oral hearing. My own view would be that it is best suited for cases where there are no substantial factual disputes. Questions of reasonableness etc. can be determined by a legal member or tribunal based on a consideration of the evidence in the bundle and written submissions. Many clients are grateful not to have to go through the stress of a full hearing (even online) if they are satisfied that proceeding in this way will not disadvantage them.

141. Obviously, there are occasional technical issues with the platform for online hearings, Cisco Webex, and the ubiquitous lockdown experience of being repeatedly reminded that “you’re muted” – but no more so than in any of the other meetings and discussions we have all been having online in the past two years or so. Many of those who were not keen on making use of this technology have become adept at using it.
142. Not having clients in the same room does pose some challenges, but I have found that these can largely be addressed by communication using e-mail and/or WhatsApp during the hearing, and telephone calls during breaks and before and after each day. I have noted in some recent hearings that the education authority’s representative and witnesses may all be gathered in the same building for the hearing. Tribunal members may also now be in the same room. It is something that I may now offer my own clients in cases where the tribunal is held online. Also, the role of supporter is much easier if they can be in the same place as the appellant or claimant.
143. Like many on all sides of the Tribunal process, I am actually looking forward to the return of in-person hearings in the near future. However, there are some benefits to remote hearings, which I hope may be retained. The scope for offering an online hearing (in part or in full) may be appropriate in some circumstances. Being able to participate in a hearing without having to travel long distances will, I am sure, be of particular benefit to some witnesses – and minimises the disruption to the working day which otherwise might be incurred. Hearing such evidence by way of a video link, rather than by telephone is preferable for all concerned.
144. As part of the *My Rights, My Say* service for children with additional support needs, we have really valued the additional flexibility that remote hearings provide for child parties to give their evidence and for children giving their views. There is no doubt that being able to speak from a familiar home environment by way of video link is a game changer for many of the children we work with. It has led to children’s voices being heard directly by the tribunal where they would not have been under the old system. My colleagues in *Partners in Advocacy* report that engagement with children via electronic means is often the preferred route for the child, at least initially. Far from being a second best option, online engagement may be the first

choice for a number of children and young people, and this is one feature that I hope we can retain even as in-person hearings resume.

Remote hearings: respondent/responsible body, Scott Connor, Solicitor, Aberdeen City Council







145. I have participated in two remote video hearings since March 2020 (a two day hearing in relation to a placing request and a hearing in regard to a preliminary matter). I have also participated in a remote teleconference hearing where submissions on a preliminary matter (relating to time bar) were delivered.
146. Clearly one of the main advantages of remote hearings is that witnesses do not need to physically attend, and a venue is not required. This undoubtedly allows for a hearing to be fixed quickly if required and can avoid delay.
147. Remote hearings also allow for witnesses to work more flexibly around giving evidence, as opposed to having to set aside an entire day to physically attend a hearing and wait in a witness room. In the proceedings I was involved in, parties and the legal member agreed an approximate timetable for witnesses which greatly assisted. This flexibility also makes it easier to facilitate witnesses from outwith the education authority (e.g. NHS) to give evidence. One witness for the appellant participated from England, which I assume was far easier to arrange compared to the witness having to physically attend.
148. Education Authority witnesses were appreciative of the opportunity to test the remote hearing platform before the hearing and this reduced any concerns around potential technical issues on the day.
149. During my first remote hearing, I experienced intermittent technical issues. However, I was able to resolve these issues with the Tribunal clerk and IT Support. The legal member was understanding of the difficulties. No substantial technical difficulties were experienced during the two-day hearing I participated in.
150. The legal member facilitated regular comfort breaks during the hearing, which were appreciated. Even with regular breaks, remote hearings can be tiring (due to concentrating on a screen whilst switching windows between productions, preparation and trying to observe witnesses and tribunal members at the same time). In this regard, evidence in chief by way of witness statement, a joint minute of agreed facts and written submissions undoubtedly benefitted in terms of reducing the overall length of the hearing, in addition to breaks.
151. My personal view is that remote hearings should continue to be offered as an alternative to an in-person hearing, post pandemic and it should be for the legal member to determine the appropriateness of conducting a hearing in-person or

remotely in terms of the overriding objective, and the facts and circumstances of the case, having considered representations from parties.

Remote hearings: advocacy, the child and young person

152. Partners in Advocacy provide advocacy services to children and young people. It is one of the agencies that make up *My Rights, My Say* (**MRMS**), the national children's service. MRMS supports children aged 12 to 15 years to use their rights under the 2004 Act. Advocacy helps children speak up about what is important to them at school and in our Tribunal proceedings.

153. Partners in Advocacy explored the thoughts of children and young people on our remote (or virtual) hearings and Sarah-Jane Crews ³⁷ shares their thoughts here:

-  Remote hearings were easily accessible and for some young people preferred.
-  Some young people commented it felt less scary and intense to have support at the tribunal itself virtually (this was a comment from a mental health tribunal but it echoes our MRMS young people's experience).
-  On one case during the pandemic, one child preferred to have the decision taken on the papers by the tribunal and this for them worked as even the thought of a virtual tribunal was overwhelming.
-  The tribunal was excellent at keeping us informed throughout the pandemic about what was happening, what was likely to happen and always open to questions and queries.
-  I think with young people the more choice they can have about what works for them, the more involved they feel they can be – going forward if virtual or in-person hearings were offered for young people, I think there would still be an uptake for virtual hearings with attendance from young people themselves.
-  Advocacy reports didn't differ massively, we still went through the process of submitting them as we always would and employed creativity to ensure comprehensive views from young people were sought when face to face meetings weren't permitted or possible.

Remote hearings: independent advocacy reports - different ways to talk

154. An associate at My Rights, My Say recently developed a communication tool on Miro (a design website) and used screen share to hand over control of his screen to a young person who was then able to move symbols and illustrations around

³⁷ Interim Service Manager, Partners in Advocacy.

and share their views via this platform. This case study shows how this process worked.

Children's Views Case Study



Background

Josh is 12 years old and is autistic with learning difficulties. Sometimes Josh's speech can be difficult to interpret, and he can become frustrated when people don't understand him. Josh has had a tough time recently and lost his dad about a year ago. Josh is just about to move from primary school to secondary school. He has been offered a place at a mainstream school by the local authority, but Josh's mum has applied for a place for him at a special school. Josh's mum made a reference to the tribunal as the placing request was refused.

The My Rights, My Say Children's Views service was asked to gather Josh's views about school to help the panel members at the tribunal decide which school Josh should go to. They wanted to find out Josh's general views about the provision offered by the local authority and what he thought about the request to attend the special school.

Gathering Views process

The Children's Views worker arranged an introductory online video chat with Josh and his mum. The Children's Views worker introduced them self and explained the gathering views process. Josh and the Children's Views worker also spent some time getting to know each other and talking about their interests.

Given the information provided by the tribunal and Josh's mum, the Children's Views worker designed a 'talking mats' style activity to gather Josh's views. For the purposes of an online meeting the Children's Views worker created this using the web application Miro.³⁸ This consisted of a canvas with a top-scale of *like / don't like / not sure*. A variety of symbols represented different aspects of school life, such as the physical environment, relationships, Josh's experiences and anything else that Josh wanted to talk about. The Children's Views worker would invite Josh to place these symbols under the headings of *like / don't like / not sure* and give the opportunity to expand on why he placed them there. The Children's Views worker handed

³⁸ www.miro.com.

over remote control of their screen to Josh, so he could populate the board himself. The Children's Views worker met with Josh twice and carried out the activity with regards to both schools.

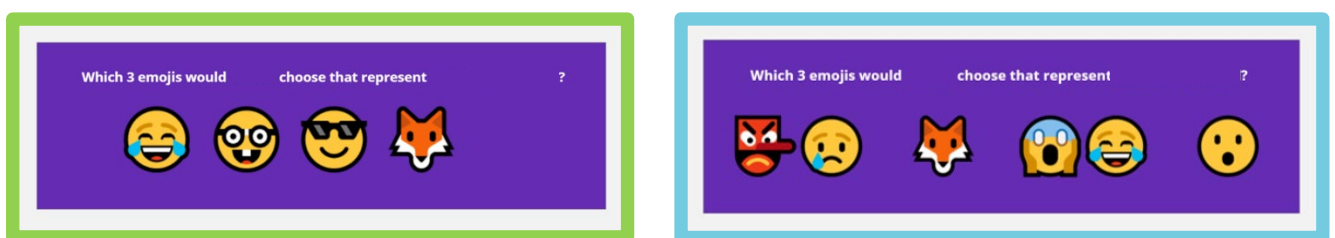
Result

Sharing remote control of the Miro board was used to brilliant effect and Josh was able to navigate Miro very well, with the help of the Children's Views worker. Taking each symbol individually, Josh placed them onto the board exactly where he wanted and talked about why he did so.



The Children's Views worker also provided blank cards for Josh to create and place his own symbols. Josh loves foxes and created a fox symbol that he wanted to add. He also drew a symbol to represent a negative experience that he had when he encountered a locked door on a school visit. Josh expanded on this, explaining that he was frustrated because the button to open the door was too far away.

The Children's Views worker also carried out a short activity asking Josh to choose emojis that he thinks represent each school.



Using emojis to explain how he felt, Josh demonstrated a great level of interpretation. For example, Josh chose a fox to represent both schools and explained that **“foxes scream a lot”**, adding that pupils at both schools tend to scream and make noises like foxes.

Feedback

The Children's Views worker received positive feedback from Josh's mum about his experience.

The Children's Views worker also received feedback from Josh that he enjoyed both gathering views sessions. He said that he enjoyed using Miro and taking control of the cursor.

"Oh thank you so much, he asked yesterday when your next call would be so you have made an impression on him..."

Using this method of gathering views greatly benefitted Josh and allowed him to feel in control and communicate his views in a way that was meaningful to him. It is a method that could be tailored to each individual on a case-by-case basis, in order to maximise impact and outcomes.

Remote hearings: child and parent perspectives

From the parents' perspective, "It was vastly better than going to a strange place and speaking face to face, as C struggles with new things, so C would have been less comfortable away from our familiar home. C is very used to FaceTime etc. so comfortable with talking on screen, and having the dog with him and familiar surroundings helped keep C's anxiety down, giving C the confidence to talk openly."

C says he:

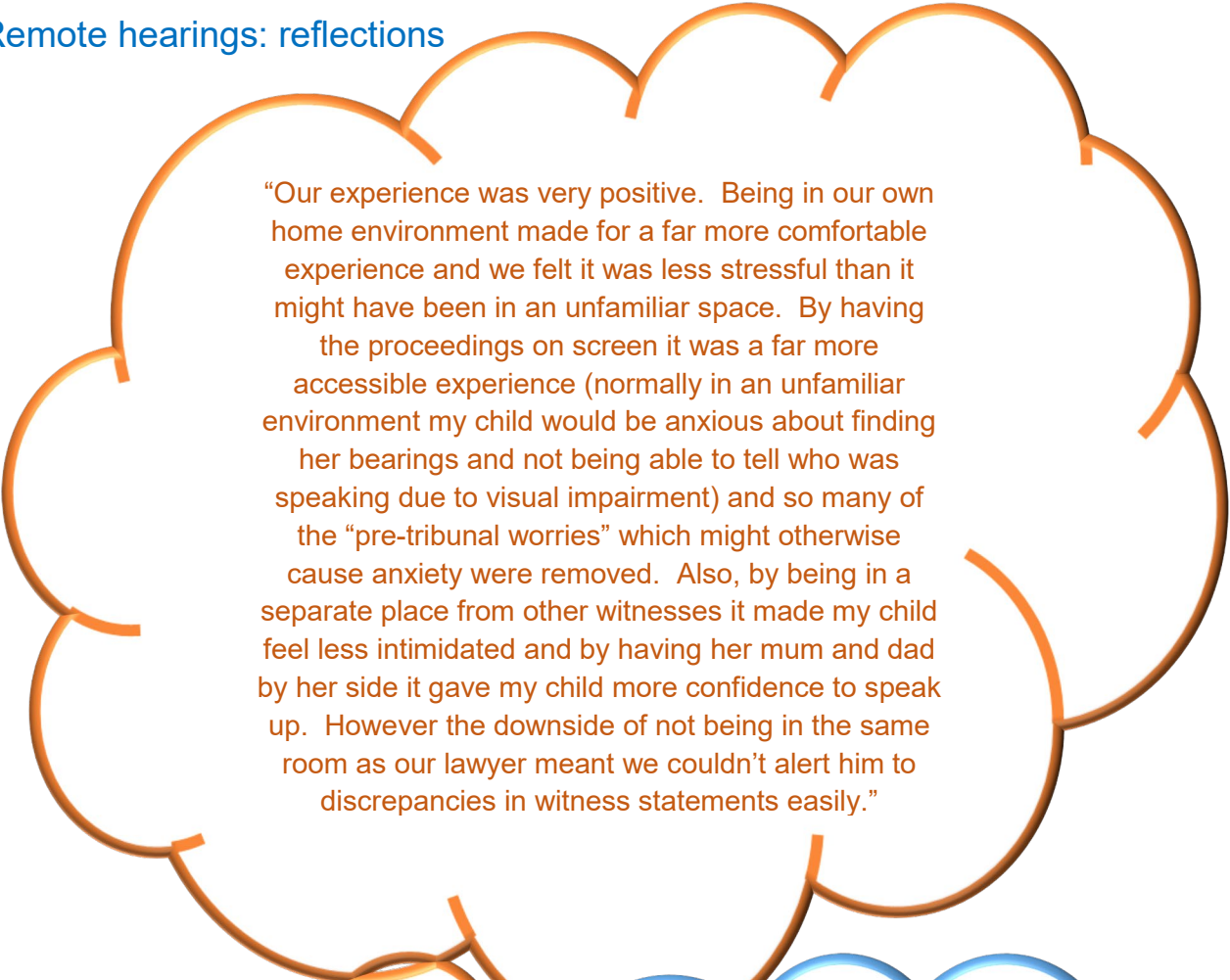
"Thought it was a bit strange but I am glad I got to talk to them and tell them. "

I asked if it was better than going into a big room somewhere else. He says

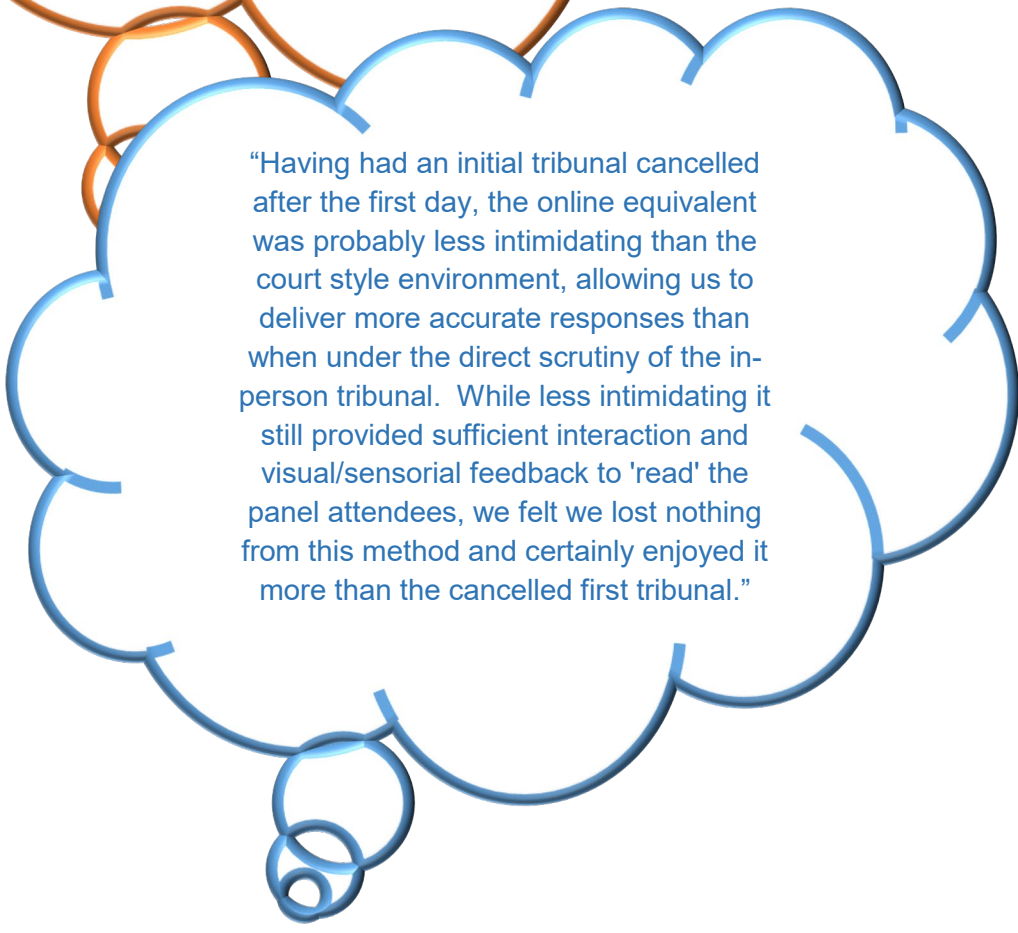
"Yes it was better to be at home. "

"The online tribunal worked quite well for us as a family, as it felt less intimidating than appearing in person. Importantly, it enabled our son to contribute to the tribunal more freely in a less intimidating environment, allowing him to communicate how he felt in the setting of his own home. Although by its nature the tribunal process is stressful and emotionally demanding, the tribunal members made every effort to put us at ease to support the process."

Remote hearings: reflections



"Our experience was very positive. Being in our own home environment made for a far more comfortable experience and we felt it was less stressful than it might have been in an unfamiliar space. By having the proceedings on screen it was a far more accessible experience (normally in an unfamiliar environment my child would be anxious about finding her bearings and not being able to tell who was speaking due to visual impairment) and so many of the "pre-tribunal worries" which might otherwise cause anxiety were removed. Also, by being in a separate place from other witnesses it made my child feel less intimidated and by having her mum and dad by her side it gave my child more confidence to speak up. However the downside of not being in the same room as our lawyer meant we couldn't alert him to discrepancies in witness statements easily."



"Having had an initial tribunal cancelled after the first day, the online equivalent was probably less intimidating than the court style environment, allowing us to deliver more accurate responses than when under the direct scrutiny of the in-person tribunal. While less intimidating it still provided sufficient interaction and visual/sensorial feedback to 'read' the panel attendees, we felt we lost nothing from this method and certainly enjoyed it more than the cancelled first tribunal."

Remote hearings: reserved courts and tribunals experience

155. When considering research on remote hearings, we must be careful not to rely too heavily on findings from the public courts. Tribunals are different from the courts. Our rules of procedure are different, and usually enable more informality and tailoring of the judicial experience around the particular case, and the participants, particularly the child or young person. Our tribunals usually sit in hearings as tribunals of three. The dynamic of interaction between three judicial members is missing from the majority of the public courts. This is important, as effective interaction pre-hearing, during the hearing and after the hearing (in deliberations) is entirely different to where there is a single judicial member. That caveat having been noted, there is value to be found in a major research study Clark, J., *Evaluation of remote hearings during the COVID-19 pandemic Research report, HMCTS* (referred to as ‘the 2021 study’ below), which looks at reserved remote hearings in the courts as well as in tribunals.
156. ‘Reserved’ means the courts and tribunals which have not been devolved to Scotland. His Majesty’s Courts and Tribunals Service administer these. These include the Special Educational Needs and Disability Tribunal (SEND) and the Employment Tribunals.
157. Interviews with public users in the 2021 study identified that less formality was welcomed by some and not being at the court put them more at ease whilst the judge played an important role in setting the tone of the court.³⁹ Two thirds of all public users felt remote hearings were an acceptable alternative during the pandemic and over half (56%) felt they would be acceptable afterwards.⁴⁰ One support professional participant commented that they felt that remote hearings do not reduce anxiety amongst clients but rather create a shift in anxiety. Clients are no longer anxious about travelling to the court but are now anxious about making the technology work so that they can join the remote hearing.
158. Some hearing participants felt more comfortable giving evidence from home especially children and young people⁴¹, which may apply to some adults too. On the other hand, for some adults, this could become a question of convenience. There is a risk that giving evidence remotely leads to a more relaxed approach to the value of evidence and the status and import of a judicial process.⁴² Then there is the security issue – others in the home of the witness/participant. We cannot control that as we can in an in-person hearing room.

³⁹ Page 70.

⁴⁰ Page 75.

⁴¹ Although in a wider group of ‘vulnerable individuals’ who attended remote hearings, a smaller proportion than for non-vulnerable individuals found them acceptable during the pandemic and beyond, see page 76 of the 2021 study and page 12 for the definition of ‘vulnerable individuals’.

⁴² See pages 71-72 of the 2021 study.

159. Co-location of representative/supporter and a party is an issue with online hearings – this could stifle opportunities for ongoing communication, and noticing when a client is upset or in intervening to influence a client’s conduct.⁴³
160. There is evidence that unrepresented parties communicate less effectively online than in-person (Table 5.9, page 58 of the 2021 study). See also the remarks of Mr Iain Nisbet earlier in this report.
161. The research suggests that wellbeing impacts on all participants are more significant for online than in-person hearings (Table 5.13, pages 63-64 of the 2021 study).
162. Overall, judges and court/tribunal staff were less positive than legal representatives about the acceptability of remote hearings post-pandemic (pages 77-78 of the 2021 study) although this difference was less pronounced for tribunal judges than for other judges, see the box on page 78. Nevertheless only 33% of tribunal judges strongly agreed that post-pandemic remote hearings should be acceptable as a substitute for in-person hearings.
163. The following is a summary of the general views from tribunal judges:

Judges sitting in tribunals were generally more positive about the use of remote hearings compared to other jurisdictions. They were more likely to report satisfaction with training and guidance on remote hearings, more likely to be satisfied that requests for reasonable adjustments and special measures can be met for remote hearings and more likely to consider that remote hearings can create a comparable environment and deliver procedural justice. They were also more likely to consider that remote hearings could be an acceptable alternative for certain types of cases post pandemic. (2021 study, page 81).

⁴³ Page 14, 2nd bullet and pp 28-29 of the 2021 study, and a more detailed discussion in Annex C: *Communication during remote hearings*, pages 90-92.

H. Remote judging: Conclusions

Digital justice

164. There is a place for digital justice, provided it is well resourced. The HEC has a digital casework system, which is of considerable value. As a result, we were able to introduce a case triage system immediately during the first lockdown in March 2020. We were able to develop new ways of managing documentary evidence and introduced the e-bundle very early into our remote hearing journey. This was no mean feat, given the general size of our written productions, which can total hundreds of pages. We also amended our documentary evidence guidance and trained caseworkers to reiterate the importance of reducing duplication and including only necessary documents or parts of documents. The value of the hidden work that goes on quietly before the members are given their bundles cannot be overstated. The casework team work hard to ensure the bundle is compliant with guidance and to do this they have developed strong communication skills with parties.
165. A remote or blended working model is as effective as an in-person model and in many respects, more efficient. Digital working removes the time and cost of travel for judiciary, clerks, parties and witnesses.
166. We can utilise digital technology to ensure that a crisis like the pandemic can avoid a detrimental impact on tribunal participants. There ought to be no further need to suspend cases. Justice can continue unimpeded.
167. Remote hearings do not last longer than in-person hearings. No extra time is needed for the online hearing, even when factoring in IT glitches.

Judicial proceedings

168. It is important to respect the proceedings and reinforce their judicial nature, while promoting flexibility, in a remote hearing. The usual physical ‘props’ are missing as is the atmosphere of an in-person hearing. Proceedings will be accessible and as informal as appropriate or required, but the hearing, which will lead to a judicial decision, remains a significant and formal event. In this regard, simple things like maintaining dress code are important.

Sensory Architecture

169. The HEC developed sensory hearing suites in the Glasgow Tribunals Centre, which were formally launched in February 2020. These recognise the importance of sensory architecture and the value of minimisation. There is a 1:2:1 room where a child or young person can give evidence to one person, while being heard and observed by the tribunal and parties. To support children and young people’s

understanding of the independence of the Tribunal, a suite of images, unique to the HEC, was created and used together with a tailored website, called *needs to learn*, for 12 to 15 year old children.

170. It is important that the sensory nature of a hearing is maintained when online. To do this, we use an HEC visual backdrop (in autism friendly colours and using the *needs to learn* 'tribunal members' image) and encourage representatives to have a 'no-clutter' background in their own environment. The 1:2:1 evidence room can be created online by asking all participants to switch their cameras and microphones off, apart from the child or young person and the questioner.

Effective participation

171. Irrespective of hearing type, it is critical that parties can participate effectively; otherwise, we fail to provide access to justice. The child or young person with a neuro diverse condition has greater challenges and may need adjustments or support to be able to effectively participate in a hearing. ⁴⁴

172. We need to check that the processes and language we use are accessible, by checking understanding and through regular testing and review. This has been a critical part of the introduction and development of HEC remote hearings. It is important not to shroud new processes in legal-speak and to communicate openly. Sir Ernest Ryder, former Senior President of Tribunals, captures this here:

“What to judges and lawyers are the rituals, traditions and language of a formal legal process, embodying procedural protections and principles of fairness of many centuries standing, are to some and perhaps many members of the public, who we expect to trust and respect the rule of law, incomprehensible, unfamiliar and defensive barriers. Effective access to justice is impaired by barriers of this and other kinds. Without communication and engagement between those of us who administer the justice system and the people we serve, there will not be adequate trust and understanding and, as a consequence, there will not be respect.” (*Diversity and Judgecraft*, (2018), para 4).

173. The social story (a personalised visual guide) is an important tool to support the child or young person in their journey to and during any hearing, but perhaps more so during the remote hearing. Consistency in language and imagery is important to make sure the child or young person identifies the remote hearing as an independent tribunal process. We added to our existing *needs to learn* images to support this and the 'online' image here was developed.



⁴⁴ See Equality and Human Rights Commission (2020), *Inclusive Justice: a system designed for all*: page 7, *Effective Participation*.

174. It is important that the child or young person have access to a range of supporting tools when attending any type of hearing. This should not be lost in a remote hearing. For example, bringing a pet to the hearing. In one remote hearing, a child witness brought their dog into the room while they gave evidence. To support this the *needs to learn* ‘pet therapy’ image here was developed.



175. Given the number of people who can appear in hearings, it is important that the three members of the tribunal are easy to identify on screen, if they are not together in one room, during a remote or hybrid hearing. To do this, an HEC screen backdrop is used (below). This provides a clear indication of who the members are throughout the hearing. Our hearings last on average two days, so this is an important factor and improves the accessibility of the process. Parties and witnesses must be able to keep the tribunal members in their sight at all times.



Guidance and communication

176. Remote hearings were a novel process in the HEC. To this end, clear guidance for participants (members, parties and witnesses) has been critical. Guidance to members was issued before the hearings were launched in July 2020 and published on the HEC website and circulated to stakeholders. Additional Guidance on the new ‘e-bundle’, an electronic version of the former paper bundle was piloted in 2020 and issued in 2021.⁴⁵ New guidance will be issued in 2023 to explain the choice of three hearing types.

177. The e-bundle has been a success, despite (or perhaps because of) the size of the bundle, which can run into hundreds of pages.

⁴⁵ [President’s Guidance to Administration and Parties 01 2022: Documentary Evidence.](#)

IT support and resources

178. A robust local network, with IT support is critical to the success of a remote hearing. As is the delivery of sufficient IT resources to members (see pages 14 -15). With these supports in place, we can adapt and change quickly to ensure access to justice can continue. We will use this example when thinking of future innovations. There should be no barriers.

Building a system moulded by the child or young person

179. Children and young people may have a stronger preference than other participants may for giving evidence in a comfortable setting (usually at home). We have learned to think more flexibly and case (and participant) specific, in a way we may not have done had it not been for the pandemic - consider the experience of 'C' (page 42) who brought his dog to his hearing. Children and young people can bring pets to any sensory hearing suite, but there is an ease to having your pet with you in your own environment. In this way, we wrap the system around the child and not the child around the system. If a child or young person prefers to give their evidence from their own home, they should and will be able to do so.

In all respects, research and learning teaches us that the system should be moulded by the child or young person - not the converse - the child or young person moulded by the system. In the HEC, we use the language of flexibility, which is inherent in our rules of procedure and our overriding objective. Our hearing style and processes are being changed and improved as children and young people teach us more. This is the very nature of a specialist tribunal – we, the judiciary, bring our expertise – but we always listen to the authentic voice of experience – that of the child or young person.

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