



Additional Support Needs
Tribunals for Scotland

Additional Support Needs Tribunals for Scotland (ASNTS)

**Tribunal User Group – Friday 9 February 2007
Perth Concert Hall**

ASNTS Tribunal User Group (TUG) provides a forum for stakeholders to be updated on both judicial and administrative matters and to raise issues in relation to any aspects of the Additional Support Needs Tribunals with a panel comprising the President, Secretary and Deputy Secretary of the Additional Support Needs Tribunals. This is part of our commitment to accountability and transparency.

The latest TUG event took place in Perth Concert Hall on Friday 9 February and was attended by 45 delegates including 6 members of the ASNTS secretariat and 5 members/conveners of ASNTS.

Introduction by the President, Ms Jessica Burns

The President opened the Tribunal User Group meeting with a short presentation.

During the presentation, the President set out the themes for 2006:

- induction training;
- putting training into practice;
- dealing with pre-hearing issues;
- working together – conveners and members;
- initiating Tribunal networks; and
- learning the limitations of theory and assumptions.

And then went onto discuss what themes are likely to emerge in 2007:

- increased volume of references;
- more opportunities to gain experience; and
- more consistency of approach due to:
 - volume of decisions;
 - publication of decisions;
 - rotation of members;
 - Presidential guidance; and
 - consolidated learning.

The President then went on to discuss her own role and what this involved. This included:

- the importance of outreach work being undertaken (the President and a number of members and conveners have already attended several related training days and seminars in an official capacity);



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- the awareness that low volumes of references does not equate to a low volume of work;
- the dependence on the Secretariat as key drivers in the process – at this time the President thanked all members of the Secretariat for their hard work to date;
- an awareness that the Tribunal does not exist in a vacuum; and
- an acknowledgement that all involved in the Additional Support Needs Tribunals are still at the beginning of a learning curve.

The President then addressed the importance of listening to users, which included:

- acknowledging the mismatch between expectation and experience;
- the production of witness guidance based on helpful feedback (the President spoke about the importance of guidance and that further relevant guidance documents will be issued in due course);
- using feedback from users as a basis for future training events;
- actively responding to user feedback rather than waiting until a formal complaint is received; and
- the importance of understanding the user perspective.

The final part of the President's opening presentation discussed how the ASL Act is assessed now and in the future through:

- HMle reports into the implementation of the Act by Local Authorities;
- the evaluation of Enquire;
- the future delivery of advice and information;
- ongoing research in relation to representation at Tribunals;
- the evolving role of The Scottish Committee for the Council on Tribunals; and
- the review the Scottish Executive will undertake of the Additional Support Needs Tribunals jurisdiction and the effectiveness of the legislation.

Presentation by ASNTS Secretary, Gareth Allen and Deputy Secretary, Lesley Thomson

The Secretary of the Additional Support Needs Tribunals, Gareth Allen, opened the Secretariat presentation by discussing reference statistics. It was indicated that these were a first set of statistics, and were not at this stage necessarily indicative of trends. It was intended that these statistics would be put on the website and updated quarterly.

37 references have been received since commencement in November 2005. Of these references, the grounds are as follows:

Grounds of reference	Section of Act	Number received
Failure to assess	s.18 (5)	5
Placing request refused	s.18(3)(e)	11



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EA state CSP not required	s.18(3)(b)(i)	12
EA not prepared CSP in allotted time	s.18(3)(c)	6
Parent disputing contents of CSP	s.18(3)(d)(i)	3

The gender balance of the references received is 73% male and 27% female.

The age profile of the references received can be seen below:

Age	Number of references
5 years	1
6 years	2
7 years	0
8 years	4
9 years	4
10 years	2
11 years	5
12 years	4
13 years	5
14 years	3
15 years	6
16 years	0
17 years	1

The respondent Education Authorities are as follows:

Education Authority	No. of references as respondent
Aberdeen	1
Aberdeenshire	1
Argyll and Bute	6
Borders	1
Dumfries & Galloway	1
East Ayrshire	2
East Dunbartonshire	4
East Lothian	1
Edinburgh	7
Eilean Siar	1
Falkirk	1
Fife	1
Glasgow	1
Highland	2
South Lanarkshire	3
Stirling	3
West Dunbartonshire	1



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The Secretary then discussed the statistics of the decisions reached by Tribunals, as follows:

- 8 references have been allowed, without an oral hearing (i.e. generally where the education authority withdrew their opposition to the reference);
- 3 references were allowed following an oral hearing;
- in 8 references the Tribunal confirmed the Education Authority's decision following an oral hearing;
- in 3 references, the Tribunal confirmed the Education Authority's decision on the CSP (oral hearing) and the decision to refuse the placing request was referred to an Education Appeal Committee; and
- in 4 references, the parent withdrew their reference.

The Secretary highlighted that as at 31 December 2006, 54% of reference decisions were issued following an oral hearing.

The Secretary then discussed statistics in relation to appeals made to the Court of Session, as follows:

- four Tribunal decisions have been appealed to the Court of Session;
- two appeals have been allowed and the reference remitted to be considered again by a differently constituted Tribunal; and
- the outcome of the remaining two appeals is still awaited.

The Secretary concluded his part of the Presentation by providing useful sources of information, as follows:

- guides produced by the Additional Support Needs Tribunals (including guides for Parents, Education Authorities and Young People);
- the Additional Support Needs Tribunals website (www.asntscotland.gov.uk); and
- the Additional Support Needs Tribunals helpline (0845 120 2906).

The Deputy Secretary, Lesley Thomson then provided a short presentation on the work undertaken by the Additional Support Needs Tribunals Secretariat. This began by highlighting the two main areas of work undertaken by the Secretariat being the management of resources and the management of references.

The Deputy Secretary discussed the area of Interlocutory work and informed the TUG audience that the level of interlocutory work required was much higher than was originally expected and this has had an impact on both the Secretariat and Convener workloads.

The Additional Support Needs Tribunals website is currently under development in two main areas, 'Attending a Hearing' and 'Decisions Database'. 'Attending a Hearing' is an area of the website which will contain useful information to those



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people who find themselves coming along to a Tribunal (in whatever capacity), as well as having direct links to relevant Presidential Guidance and access to expense claim forms and guidance documents.

The 'Decisions Database' area of the website will be ready to access very shortly (this has been delayed beyond the target date due to a software problem) and will contain anonymised decisions issued following oral hearings.

The Secretariat is exploring the possibility of producing a DVD within the next financial year. This DVD would provide information to those people attending a hearing and explain what to expect.

The final area covered by the Deputy Secretary was that of the Additional Support Needs Tribunals 'User Questionnaire'. The questionnaire seeks feedback on two main areas – 'How the case was handled' and 'The actual hearing'. Completed questionnaires allowed evaluation of the effectiveness of reference management and also the appropriateness of Tribunal arrangements (i.e. venues, waiting areas, refreshments provided, accessibility etc).

Question and Answer session

The following is a selection of issues raised before and during the TUG event:

1. Does the Tribunal have discretion to consider papers following case statement period and make a decision without it going to hearing? (*Barrie Forbes, Highland Council*)

The Tribunal does not have discretion to decide a reference without a hearing unless (1) the respondent withdraws opposition, then the Tribunal have a sitting to consider and issue a formal decision in order to issue a legally binding decision for the appellant or (2) both parties agree in writing to dispense with an oral hearing. *Rule 26 applies.*

2. Is there a limit to how many date changes are made in relation to one hearing? Experience to date meant that constant changes to the provisional hearing date were made which resulted in a huge amount of diary management for the Education Authority (*Barrie Forbes, Highland Council*)

A recent change to working procedures means that when the case statement information is issued, parties are also informed of a provisional hearing date. Once a hearing date is set, if parties request a change to this provisional date then the matter is referred to the convener for consideration and alterations to this date will only be allowed in limited circumstances. This ensures early notification of the date and greater certainty that the hearing will proceed on that date.



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3. Representation at Tribunals – notice of each side’s representation is very late in the process. Can this be brought forward to allow fair and balanced representation? (*Barrie Forbes, Highland Council*)

The Rules do not give timescales for parties to inform of the identity of their representation (Rule 32 applies). It was suggested that this moves away from the user-friendly ethos of the Tribunals and encourages Education Authorities to have legal representation from the outset of the process to safeguard against situations where the appellant is legally represented but the Education Authority is not. The President responded that she hopes that with experience, legal representation will only be instructed where a substantive legal issue is raised but it was not surprising that, in the initial phases, there was a tendency to instruct a legal representative to appear.

4. Education Authorities will bring legal representatives as supporters. Parents do not have the money for such representation and this is unfair. The Scottish Executive should therefore provide funding to parents in relation to this. (*Comment from the floor*)

The Tribunal cannot prevent any party from bringing along a legal representative or any supporter of their choice; however they can try to ensure that a level playing field exists during the actual Tribunal hearing. The President commented that the issue of funding is a matter for the Scottish Executive; however if this emerged as an important issue comment could be made in the President’s Annual Report.

5. Based on hearings, what has representation been like on each side? (*Question from the floor*)

These figures are currently being collated and will appear in the Annual Report to be published in June 2007.

6. Parent/carer making a statement at a Tribunal but not appearing as a witness – is this evidence? (*Trevor Baxter, Falkirk Council*)

The parent is entitled to speak at the Tribunal and therefore is giving evidence. If the parent wishes to speak at some stage during a Tribunal, for instance to make a statement but does not wish to answer any questions then they cannot be obliged to do so but the weight that can be attached to that evidence may be less. Tribunals will encourage parents to speak at hearings since it is important that their views are heard.



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7. Closing statements containing issues not referred to in evidence – role of convener, inclusion in or referred to in written decision (*Trevor Baxter, Falkirk Council*)

It is a matter for the individual Tribunal to decide on the day how to deal with any new assertions which arise during closing statements and explore accordingly. The President commented that failure to consider relevant new issues would import a level of formality which the Tribunals should not have and would be inconsistent with their enabling role.

8. Time involved in preparing for a Tribunal – There is a considerable amount of work involved for Education Officers. If a reference is withdrawn it is very frustrating and would welcome views from other Education Authorities on this (*John McVie, Dumfries and Galloway*)

The President commented that good quality preparation prior to the actual Tribunal can result in an withdrawal if it leads to a parent understanding more fully why the decision has been taken and they may no longer wish to challenge it. It should not be regarded as 'wasted effort'. Ted Jeffries from Argyll & Bute commented that there is a large amount of work involved and there are hidden costs, however this may reduce with more experience.

9. Procedures at hearings – continuity. It has proven to be very difficult when trying to prepare parents as to what they may experience at a Tribunal due to Tribunals being handled in very different ways i.e. introductions etc. (*Lorraine Dilworth, ISEA*)

The President responded that there is not necessarily one standard way to conduct a Tribunal hearing however there is still some work to be done to create more consistency. As a result of listening to similar feedback, the forthcoming member and convener training day will incorporate a session on 'Achieving a user friendly hearing'. The President also commented that conveners may adopt different questioning formats dependant on the presence or absence of legal representation. Tribunals have an important role to try and obtain evidence and information in an impartial way.

The President highlighted that under the Rules (Rule 28) it is up to the individual Convener to explain how a Tribunal is to be conducted however a more consistent format could be applied.

10. Should witnesses be sworn under oath? (*Question from the floor*)

The President expressed a personal view that she would not be supportive of witnesses having to take an oath before giving evidence as a matter of course.



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Taking an oath as a matter of course is at odds with the less formal nature of the proceedings. Credibility will be an issue in some hearings but a reminder to the witness that they should tell the truth is normally sufficient.

11. Productions - duplicated productions are a problem. We have also found a lot of parents who do not have open access to records to produce documents, which can then eat into their case statement period (Lorraine Dilworth, ISEA).

The Secretariat is currently reviewing the structure of the bundle to make the documentation as user-friendly as possible. Due to the Rules, there is no power to remove or edit any party's documentation within the bundle.

The President advised that she is mindful to seek an amendment to the Rules so that the parent's case statement is lodged first and the Education Authority only add any additional papers. The cost of the copying is borne by the Tribunal.

Access to document issues must be raised with the Education Authority concerned. A party can ask the Tribunal or convener to make an order for the release of a particular document. If this became a recurring problem then it could be commented on in the President's Annual Report.

12. It would be more cost effective if the Education Authority were the party who advised of their list of submissions and the parents then viewed and added to accordingly (*Comment from the floor*)

The President thought that this would only be feasible where the reference was specific in indicating the aspects to be challenged. There may be scope for this in some cases, particularly where a party is not represented.

13. Who should lead at hearings? There have been cases where the Appellant has been asked to lead and this can be confusing for the parents as they do not fully understand how the Education Authority reached the decision they are appealing against, therefore it would be much better for the Education Authority to lead to allow the parent to understand how they reached a particular decision. (*Lorraine Dilworth, ISEA*)

The President confirmed that her personal view would be that the Education Authority should lead in most cases but she accepted that there may be cases where it is appropriate for the appellant to lead. Holding a pre-hearing case conference could assist in settling this in advance.

14. Is there a need for a CSP at all in grant aided schools, where nursing, SALT, OT or other medical health care are on site? (*Patrick Brown, Sense Scotland*)

The President acknowledged that there appeared to be a divergence between the policy intention and the statutory provisions in this regard. The President expressed a provisional view that that on a strict reading of the Act, it should not



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matter if other agencies are on site or not, it is the nature of the support which is determinative and if the relevant criteria are met then a CSP should be implemented.

A comment from the floor then indicated that the Scottish Executive have advised that if provisions are managed and directed within the school then a CSP was not required. The President responded that this was clearly a matter for the Scottish Executive to take forward but clarification from the Division on their understanding could not amend the terms of the Act and it may be subject to judicial interpretation.

15. How do Tribunals interpret the word 'significant' and does each Tribunal do this in its own way? (*Question from the floor*)

An appeal currently at the Court of Session is in relation to the interpretation of the word 'significant'. Tribunals will take the wide range of circumstances of a particular reference into consideration when considering the term 'significant'. Tribunals have to consider whether "significant" relates to quantity of support or the difference that the support can make to a child or young person.

16. Some schools make use of an Occupational Therapist to deliver teaching in relation to movement etc. as part of the curriculum. Is this considered part of the child's education or not? (*Question from the floor*)

The constructs of the Act can be extremely difficult to interpret and trying to apply to individual cases can prove to be a very difficult task. It would be necessary to assess whether the nature and frequency of the input could meet the statutory criteria.

17. How can decisions be shared before a 'critical mass' of decisions is reached to allow anonymity to be preserved and approximately how many decisions need to be reached before we are at that point? (*Ken McAra, Dundee City Council*)

It is planned that anonymised Tribunal decisions, where there has been an oral hearing, will start to be loaded onto the ASNTS website by the end of March 2007.

18. If the Code of Practice contains inaccuracies on legal points, where can Education Authorities go from here? (*Question from the floor*)

The President commented that she believes the Scottish Executive regard the Code of Practice as a living document and will therefore review it accordingly as provided for in the legislation. There are some aspects of the application of the legislation on which the Code is silent. Education Authorities have relied on the Code for guidance but it was written before some of the subordinate legislation



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was passed. In the event of any inconsistencies between the Code and the legislation, the Tribunals would apply the primary legislation.

At this point, Sandra Manning from the Support for Learning Department of the Scottish Executive commented that the Code of Practice will be reviewed this year and the Scottish Executive would welcome any comments in relation to this review.

19. Training for staff attending Tribunals (*Lillian Payne, Argyll & Bute Council*)

It is appreciated that for people attending a Tribunal, this is a totally new experience. Guidance for witnesses has been issued and it is hoped that this gives some idea what to expect at a hearing. Additionally, it is planned to produce a DVD in the next financial year that will provide a more user-friendly introduction as to what to expect at an Additional Support Needs Tribunal. The President and members of the Secretariat have spoken at several seminars and events including at workshops in the recent 'Support for Learning' series. It is important that the witnesses who appear at Tribunals are those with the most relevant knowledge of the child not simply those who are most available on the day of the hearing. The President indicated that even if the resources were available, it would be inappropriate for the Tribunals to offer training specifically to the staff of Education Authorities. This was a matter for their internal training.

20. Placing requests – if a reference has been received but later found to be not competent, should ASNTS be bound to return the matter to Appeals Committee (regardless of any other rule prohibiting two placing request referrals within a 12 month period) (*Louise Melia, Govan Law Centre*)

The President responded that this is a complex issue which has been subject to appeal to the Court of Session and has already been highlighted to the Scottish Executive as part of the legislation that could be amended. A comment from the floor indicated that a consultation is currently ongoing in relation to placing requests and the role of Education Appeal Committees (which ends on 16 February 2007).

21. Addressing cross border issues regarding CSP (*Cameron Munro, Glasgow City Council*)

The President responded that it was inappropriate for her to comment on cross-border issues at this time. A decision is soon to be issued on this area with a restricted reporting order lifted and this may be of interest in highlighting some of the difficulties.



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22. One grant aided school has a service level agreement with NHS Lothian. Therapists employed by NHS Lothian have been told not to comment on CSP elements. What difficulties arise? (*Patrick Brown, Sense Scotland*)

This is a matter for NHS Lothian. The Tribunal will always pursue the best interests of the child. If the Tribunal is minded to ask a therapist appearing as a witness about CSP elements, it will do so. The Tribunal has an inquisitorial function. If there is an absence of professional evidence in an area which is crucial to the outcome of a hearing, the Tribunal can seek to bridge that gap by appointing an expert in that area to advise.

23. Why can't children get legal aid for Tribunals? (*Question from the floor*)

This is a matter for the Scottish Executive and Scottish Legal Aid Board

24. A number of references are to do with timescales. Will the President express a view to the Scottish Executive that timescales be reviewed? (*Question from the floor*)

This is a matter for the Scottish Executive but the Secretariat will produce a detailed profile of the issues which give rise to references being made. The President noted that issues about meeting timescales may be an implementation issue which will not persist.

**ASNTS Secretariat
February 2007**