



Additional Support Needs Tribunals for Scotland

Tribunal User Group Meeting – Monday 10 November 2008

Perth Concert Hall

ASNTS hold regular Tribunal User Group (TUG) events to provide a forum to put questions in relation to any aspect of the Additional Support Needs Tribunals to the President and Secretary.

The latest TUG event took place in Perth Concert Hall on Monday 10 November 2008 and was attended by 31 delegates.

The President commenced the event with an overview of the legal issues currently facing the Tribunal.

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Legal Issues and the Tribunal

Jessica Burns
10 November 2008

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Court of Session Opinions

[2008] CSOH 60 Lord Wheatley SC v City of Edinburgh

[2008] CSOH 61 Lord Matthews DG v Argyll and Bute Council

[2008] CSIH 51 Lord Carlaway WA v The Highland Council

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[2008] CSOH 60 Lord Wheatley SC v City of Edinburgh

'The whole burden of the test of what constitutes additional support needs clearly refers to educational support, and further to education support offered in a teaching environment. This in turn must refer to the educational needs of the child, and not to anything else.'

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[2008] CSOH 61 Lord Matthews DG v Argyll and Bute Council


- 'A structure which proceeds on the basis that only two witnesses will be the norm strikes me as one in which hearsay is almost inevitable.'
- 'Whether a tribunal requires to go through every piece of evidence and say why it was accepted or rejected will depend, in my opinion, on the nature of the decision that they have to make and the nature of the evidence which is led before it.'



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[2008] CSIH 51 Lord Carloway WA v The Highland Council

- Appeal on basis of 'failing to ensure that they or the respondents had the information necessary to ascertain WA's additional support needs.'
- Held '...[the decision] ought not to be subjected to an unduly critical analysis'
- 'The Tribunal are entitled to re-assess the merits of a particular issue and to reach their own conclusion on a child's needs.'



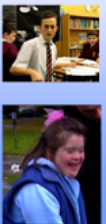
Emerging Issues

- Effectiveness of pre-hearing settlement
- Different views from Education Authority and Health Board
- Continuing differences in the way in which authorities interpret the legislation and deliver additional support



Publication of Decisions


- Rule 45 publication revisited
- Counsel's opinion
- Opportunity for parties to see the anonymised decision
- Clarity on dates
- All parties and witnesses' identities not disclosed
- Reference to onward appeal
- Revised search tool on website



Hearing from Children

Since 2007 TUG advocacy workers have been engaged to represent the child's views on three occasions:

- twice an advocacy worker has taken the views of the child prior to the hearing and submitted these as written evidence.
- on the third occasion the advocacy worker sought the child's views and presented these as oral evidence to the Tribunal.



Proposals for Legislative Review

- All placing request appeals for special schools
- Commencement date for placing request
- Referral where failure to implement decision
- Assessment for accommodated and looked after children
- Jurisdiction to extend to all children undergoing school education
- Exclusion appeals related to additional support needs



Issues for 2009

- Legislative Review
- Equality Bill
- Future Organisation of Tribunals in Scotland
- Representation for Parents

The Secretary then followed this with a presentation regarding Tribunal activity since the Tribunal User Group 2007.

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Tribunal Activity Since 2007 Tribunal User Group

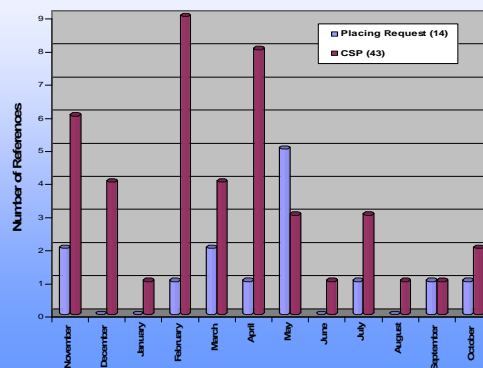
Lesley Maguire
10 November 2008



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References Received per Month

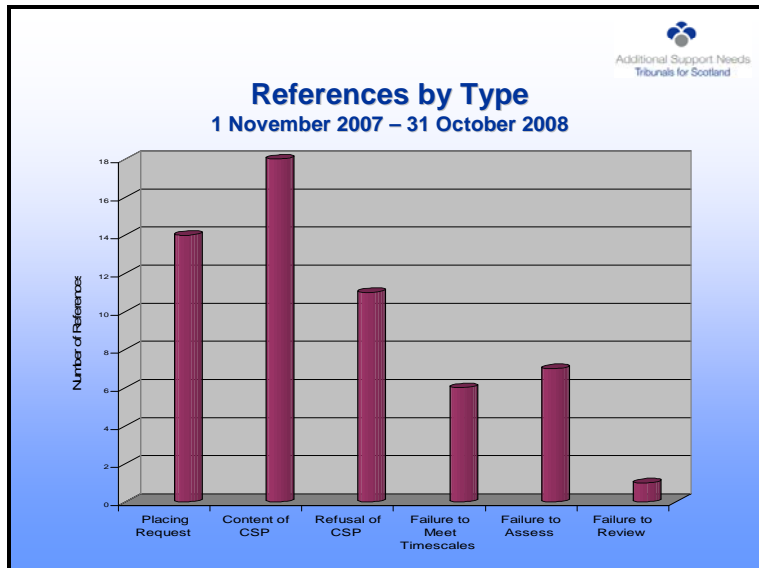
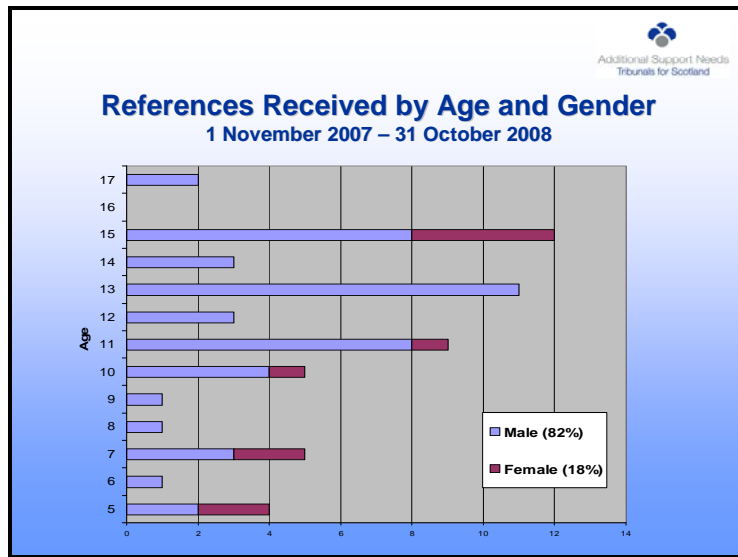
1 November 2007 – 31 October 2008



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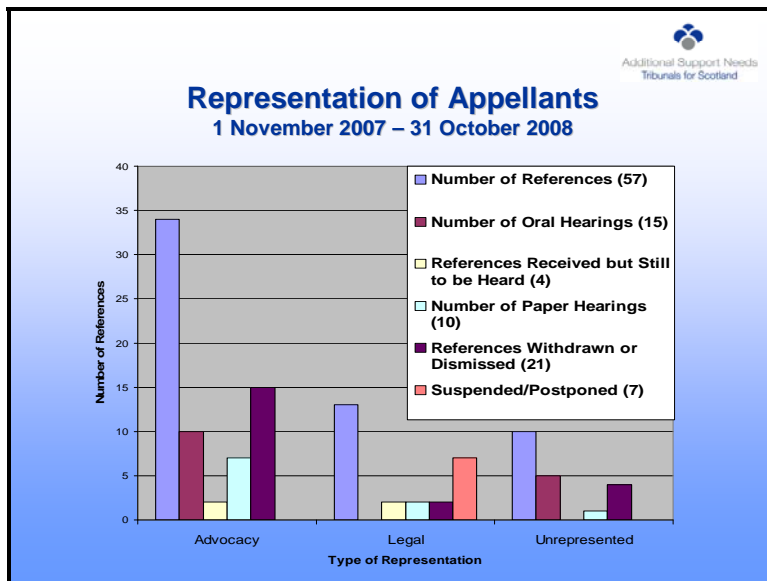
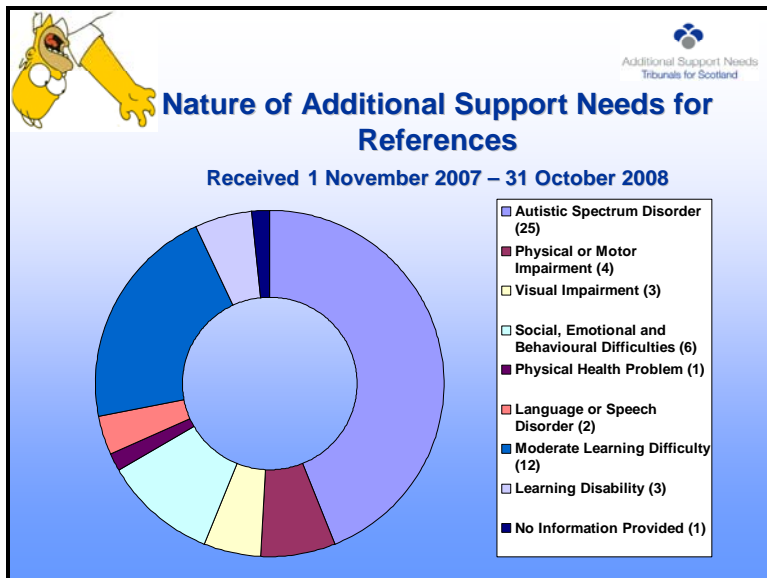
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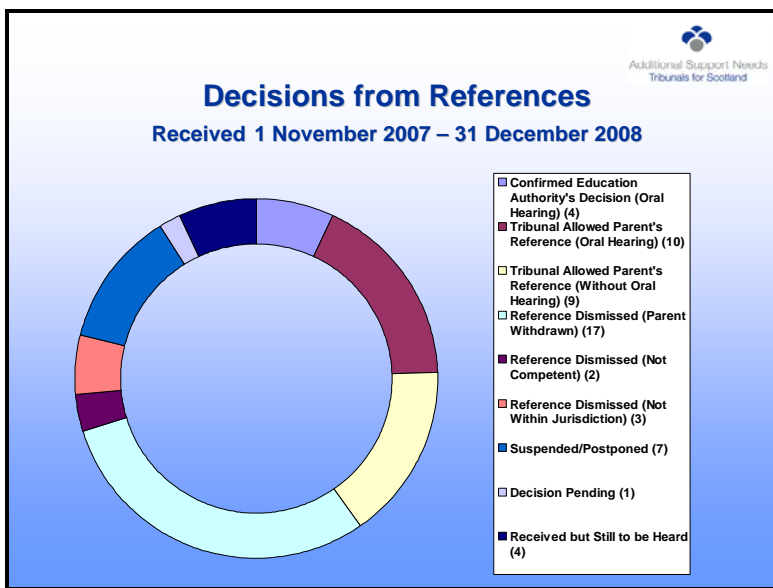
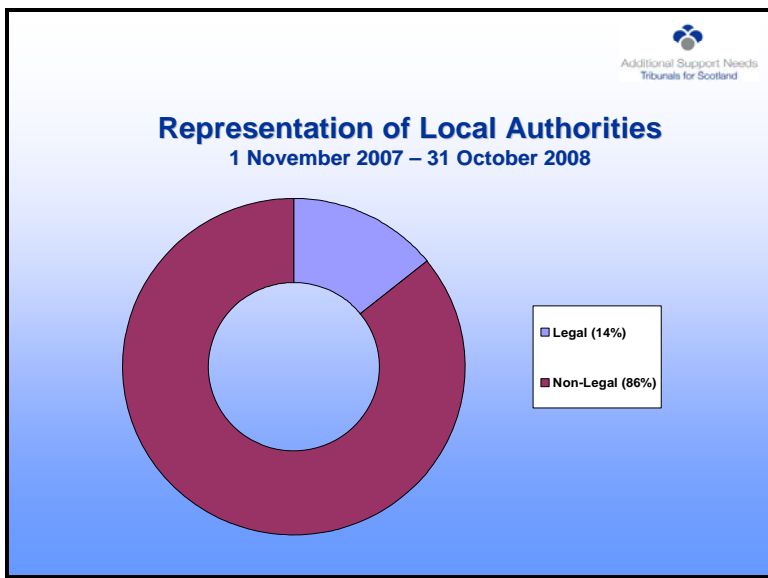
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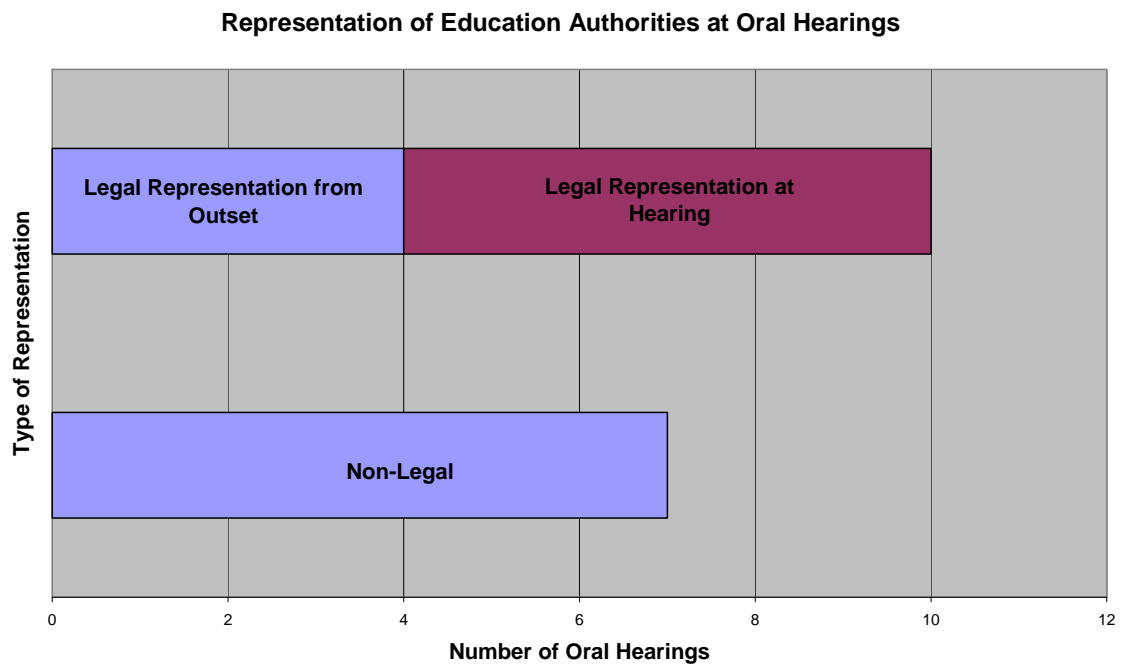
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What Else?

- Venue Review 
- Website Review 
- New Guidance 
- DDA Hearings 

The Secretary added that a further chart would be made available showing the proportion of Education Authorities bringing legal representation to oral hearings. This chart is shown below.



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Question and Answer Session

References in relation to contents of CSP and how Tribunals are coming to their decisions. The main issue is that there is no uniformity. (Lorraine Dilworth, ISEA Scotland)

Mrs. Dilworth expanded on her question by explaining that in her experience there are two main categories of decisions on the content of Co-ordinated Support Plans, either the Tribunal give specific instructions as to what information should be altered or more general guidance is given to the Education Authority as to changes to be made.

The President stated that these differing styles were addressed at a Conveners and Members Training Day in September. The feedback from the training day included the following points:

- the style of decision issued is very much dependent on the amount of detail brought by parties;
- some Tribunals have been greatly assisted by parties stating exactly what they want to see in the CSP or even drafting the CSP they would like to see in place;
- without this specific information the Tribunal are essentially drafting a document where they are not aware if the detail of the professional input sought is appropriate to the needs of the child or whether there are professional services able to deliver what is prescribed;
- it was suggested that the Tribunal should be able to direct that professionals provide information on how they would normally go about delivering such support as is to be included in the CSP.

In relation to these three points, the President highlighted that in some cases appropriate agencies such as Health Boards do not seem to be consulted by the Education Authority about the potential provision and as they are not a party to the Tribunal proceedings they do not have powers to require that this evidence is produced but it may be an issue which could be raised in pre-hearing directions or conference calls.

Pauline Padfield of Scottish Traveller Education Programme commented that Education Authorities should always have the ability to deliver what has been detailed in the CSP as authorities are funded to deliver appropriate services to support the current legislation. It was observed that Tribunals should not make



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decisions based on what the appropriate agencies state that they can and cannot provide.

Mrs. Dilworth noted that reports from Health Boards and other agencies do not always specify what the child requires.

The President highlighted that she had analysed CSPs included with references received by the Tribunal and found the content to be too vague, as she had reported in her Annual Report 2007/2008. There seemed to be a lack of specificity and an absence of planning for the future. These plans may not be typical as many references received by the Tribunal relate to the contents of the CSP and those demonstrating good practice may never be subject to a reference. Examples of good practice often had sections written by the professional who was to be providing the support.

A parent user commented with regard to other agencies and their ability to deliver support that if a Health Board states that it will be unable to provide support then this should be challenged by the Education Authority. He also stated that there should be clarity in the nature and amount of support which will be delivered by various agencies.

The President recognised that there requires to be a high level of engagement between agencies in order for the plan to be sufficiently specific.

Ann Auchterlonie (AFASIC Scotland) commented that often CSPs are not completed by the professionals who will be providing the support. Ms. Auchterlonie continued to state that there is a tendency for CSPs to look at what has happened but not what should be achieved and this may reflect a fear that the Education Authority could be held accountable if objectives were not achieved.

Nigel Over (Enable Scotland) indicated aspects of good practice which he had observed and the relationship between the IEP and the CSP.

There should be an even playing field for appellants in relation to witnesses and representations. (Lorraine Dilworth, ISEA Scotland)

Mrs. Dilworth noted that increasingly Education Authorities are bringing legal representation and professional expertise to Tribunals, which is not always accessible to parents.



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The President stated that she is conscious of this and supports moves towards better support for parents. She queried whether legal representation is the always the right route for either parents or Education Authorities attending Tribunals. Legal representation can polarise parties and is not ideal to support a continuing relationship after the hearing. It should be possible to identify cases of legal complexity where there may be a need for parents to have legal representation. The President also acknowledged that the time and funding required to attend Tribunals is a challenge for advocacy groups and stated that the issue of funding for specialist witnesses and availability of representatives for parents is primarily a matter for Scottish Government although she had made her concerns known.

Christopher Ratcliffe (The National Deaf Children's Society) commented that many organisations have made suggestions to Scottish Government on various topics relating to Additional Support Needs.

The President responded that the Tribunal cannot become a pressure group for parents as it is required to be even-handed with all parties but stated that she has highlighted the issue of representation in Annual Reports and suggested that the current review of the legislation is an opportunity for all to contribute to the debate.

Mrs. Dilworth observed that the equivalent English Tribunal (SENDIST) are looking at a system where they would employ an independent specialist to look at a particular aspect of the child's needs rather than hearing evidence from several witnesses from both sides and asked if ASNTS would be open to this.

The President replied that she was aware of consideration of this practice which is used in the formal courts. The ASN Tribunal can also order a report from an independent assessor in particular circumstances, although there is not a specific budget for this and to date this provision has not been applied. There are some problems relying on one independent specialist. In reality most reports from Education Authorities are written by someone who has a more detailed knowledge of the child over a sustained period whereas often independent assessors only meet the child on one occasion, although a fresh perspective can be helpful in some cases. The President also stated that policy issues should be raised with the Scottish Government by users rather than the Tribunal.

Ms. Auchterlonie suggested that independent reports could be seen alongside those from Education Authorities. She also commented that reports from



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Education Authorities are not necessarily written by someone who has contact with the child.

The impact of the proposed amendments to the Tribunal in particular relating to reviewing decisions and the fast track system for parents and young people. (Lorraine Dilworth, ISEA Scotland)

Mrs. Dilworth asked if there had been any planning for this amendment.

The Amendment Bill looks at giving the convener the power to amend the decisions more broadly in specific circumstances. Details will be covered in subordinate legislation and it is understood there will be a consultation process. Mrs. Maguire went on to state that in the proposed fast track system a convener would be able to act alone to deal with references where a paper hearing would normally be held, for example in cases where the Education Authority do not challenge the reference. This would shorten the time taken from submitting a reference to receiving a decision but the timescales for this will again be fixed within subordinate legislation.

The President added that it is understood that the draft of the subordinate legislation will not be published until 24 April 2009. With regard to ASNTS reviewing its own decisions, the President stated that this power to review would be used sparingly but would be a more proportionate route than the Court of Session in some cases.

Is the Tribunal aware of benefits arising from the ASN processes for children with interrupted learning due to mobility e.g. children who travel with families for work. Have the Tribunals picked up any evidence of the effectiveness of the legislation for travelling children with other kinds of ASN? (Pauline Padfield, Scottish Traveller Education Programme)

Ms. Padfield commented that interrupted learning is an additional support need but teachers working with children whose learning is not continuous do not find the legislation to be helping these children. The Secretary stated that ASNTS has not yet had a reference regarding a child with interrupted learning.

The President went on to say that the limited range of the Tribunal jurisdiction means that many needs which may or may not be met would not be capable of challenge through the Tribunal. There is not enough information available through research in order to comment on those whose needs are not currently



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being met by the legislation but early statistical indications are that certain groups are not well represented.

Ms. Padfield remarked that there is a hesitation to commit to additional support for children with interrupted learning as they will then move on, leaving ambiguity over who will continue to be responsible.

Have there been any references from a young person to the Tribunal re: placing requests. (Joyce Buchanan, Enquire)

The Secretary responded that ASNTS has received seven references regarding young people (aged 16 or 17), two of which related to placing requests, but none of these have been brought by the young person. In each case the parent brought the reference as the young person 'lacked capacity'

Could you provide an update on the draft Amendment Bill from the Tribunals perspective – this would be appreciated. (Pam Grandison, Midlothian Council)

The President replied that when she had responded to the consultation, which was limited, she also took the opportunity to draw attention to some other issues. She went on to say that the original intention was to review the legislation after three years. This has not yet happened but it may have been appropriate to do so alongside this legislative review. The President stated that one of the issues which she had commented on was the apparent lack of engagement with the needs of looked after or accommodated children in the ASN system.

The President also remarked upon the poor statistical information available on exclusions over at least the previous two years. As there is a high correlation between additional support needs and exclusions the Welsh government are actively considering giving jurisdiction for all exclusions to SENTW.

The President also suggested that it would simplify the confusing appeal routes for all placing requests relating to special schools to be referred to ASNTS rather than only those relating to children with a Co-ordinated Support Plan in view of the widely different numbers of these plans across education authorities.

Ms. Masterton raised the issue of whether the home or host authority is responsible for the CSP with regard to accommodated children. The President replied by stating that this is partly dealt with in the legislation but she had also suggested to the Minister that all children who are looked after or accommodated

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could be assessed at a specified point to see if their needs met the criteria for a CSP.

The President also re-iterated that whilst the Tribunals cannot become a pressure group for specific interests they are able to highlight issues of concern.

Difficulties with parents being “ping-ponged” between Sheriff Court and Tribunal depending on CSP/No CSP criteria. (Nigel Over, Enable Scotland)

The current amendments to the legislation are dealing with this issue, giving the Tribunal the discretion to deal with placing requests if it is decided that no CSP is required. The President queried whether the discretionary nature of this provision would provide the certainty of process which was in the interests of users.

How is arbitration going? Could referrals to Tribunals be reduced by meaningful arbitration and could this be reported on? (Nigel Over, Enable)

The President responded that many ASNTS hearings do not proceed since the pre-hearing case conference facilitates a settlement of the matter in dispute. The Tribunals do not have jurisdiction over how the CSP is delivered prior to a reference being made or after the decision is issued but would like to see some tracking on whether the decision of the Tribunal is implemented.

The President concluded the event by thanking all for attending and voicing her appreciation to all those who had raised issues.