



Additional Support Needs
Tribunals for Scotland

Tribunal User Group Meeting – Friday 30 March 2012

Europa Building, Glasgow

ASNTS hold regular Tribunal User Group (TUG) events to provide an opportunity to address any aspect of the Additional Support Needs Tribunals to the President and Secretary.

The latest TUG event took place in Europa Building, Glasgow on Friday 30 March 2012 and was attended by 35 users.

The President commenced the event with an introduction to his background and a view on the ethos of the Tribunals.

Dr Morrow comes from a legal background, working in family and mental health law. He is also the President of the Mental Health Tribunal for Scotland. From an education perspective, Dr Morrow was previously an elected member of an Education Appeal Committee and has been involved in advocacy projects.

Dr Morrow highlighted that should there be any concerns or issues that users would like to raise, he operates an open door policy and queries can be addressed to ASNTSPresidentsOffice@scotland.gsi.gov.uk or arrangements made for a meeting in person.

Dr Morrow stressed that the focus of Tribunal proceedings should be on creating a better situation for the child rather than focussing on very legal arguments.

Dr Morrow has met with lead education officers from authorities and had encouraged settlement of CSP references. There should be a quick resolution on CSP references whether this be before the hearing or a decision made by the Tribunal.

Over the coming months, Dr Morrow will be looking at how best to manage multiple references and claims. Also, finding a balance between the legal soundness of decisions and making these understandable for parents, will be on the agenda.



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Dr Morrow indicated that he is discouraging an overly adversarial approach to hearings whilst maintaining the right for parties to be heard properly. Scottish Government is already looking at the voice of the child in legal proceedings.

Users were encouraged to look at the [Consultation on the Scottish Government's Proposals for a New Tribunal System for Scotland](#) and to respond to this.

Following the President's introduction, Adam O'Brien, City of Edinburgh Council, asked whether the President thought that the cases that had gone to the Court of Session have been helpful in clarifying the law.

Dr Morrow responded that the law has been clarified regarding specific facts in particular cases. The President's intention is to look at bigger principles rather than case specific issues in an attempt to make a cohesive interpretation of the law.

ASNTS could petition to become a party in Court of Session appeals if it was thought necessary.

The Tribunal Reform proposals look at appeals going to an Upper Tribunal rather than to the Court of Session.

Moira Hallett, Glasgow City Council, made the point that a lot of Tribunal references could be avoided if parents took up mediation provided by the authority. Morag Steven, Common Ground Mediation, responded that perhaps parents are less likely to take up mediation offered by the authority when it is the authority they are in dispute with.

Dr Morrow indicated that he had met with mediation and arbitration colleagues to look at the system and whether an alignment of the whole dispute resolution process could be possible. Currently, mediation, adjudication and a Tribunal reference can all be happening at the same time. This will be a topic for the next training event for conveners and members. There may be potential for judicial mediation facilitated by a convener to become part of the Tribunal process.

This was followed by a presentation from the Secretary on Tribunal activity which can be found at www.asntscotland.gov.uk.

In addition to the statistical information, the change to the Secretariat's email addresses was highlighted.



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The user's guides have also been amended with the most important change being that after 1 April 2012, lunch will no longer be provided at hearings.

Anita Caven, Children in Scotland asked how the change in legislation and the addition of disability discrimination claims have impacted on the Tribunals.

Dr Morrow responded that only two claims have gone to a hearing. These hearings have been lengthy and ways of dealing with these cases so that the hearing is shorter will be looked at. It is very difficult to draw out trends due to the limited number of hearings. Disability discrimination claims are also often tied up with ASN references.

EHRC have an interest in this area and want to keep track of how the legislation is developing. The arguments in this area have been very legal so far.

Cathy Flynn, previously ISEA, noted that there had been a dramatic drop in the number of contents references. This could be a good sign that CSPs are improving but in ISEA's experience this area was very difficult to get right.

Dr Morrow replied that there is a lot of pressure on education authorities to get CSPs right as the Tribunal consequences can be great. This area should be about improvement.



Feedback on the quality of CSPs can be brought to the attention of Laura Meikle, Support and Wellbeing Unit.

Alan Shields, Argyll and Bute Council, added that the Tribunal exists to make itself redundant. Authorities will work hard to avoid cases coming the Tribunal.




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Question and Answer Session

<p> Additional Support Needs Tribunals for Scotland</p> <p><i>I would like a comment on the Tribunal's view of transport provision in the event of an out of authority placing request for a pupil with ASN.</i></p> <p><i>Shona Crawford, West Dunbartonshire Council</i></p>	<p> Additional Support Needs Tribunals for Scotland</p> <ul style="list-style-type: none">• Section 51(1) (2A) of the Education (Scotland) Act 1980• Where a parent makes an out of authority placing request for a pupil with additional support needs under Schedule 2 to the 2004 Act, the home authority's duty to provide transport is replaced by a discretion.• [2011] CSOH Opinion of Lord Tyre in the cause 203 K (AP) for Judicial Review of a decision by North Ayrshire Council to refuse to provide transport for her child M to and from school
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The payment of transport costs is a discretionary payment but in most cases at Tribunal, the authority have taken transport costs into account.

Shona Crawford added to her question by indicating that if the authority were not to pay for transport costs this may disbar parents from out of area placing requests. The authority wouldn't want to set a precedent for providing transport. The President replied that there may be an equality argument in an out of area placing request being allowed but refusing to pay the transport costs.

<p> Additional Support Needs Tribunals for Scotland</p> <p><i>Are the members of the Tribunal confident that they hear the views of the young person along with the views of their parents?</i></p> <p><i>Linda Bailey, Partners in Advocacy</i></p> <ul style="list-style-type: none">• Practice Direction 6 'Instructing Child Advocacy to take the Child's Views'• 11 Tribunals have made directions to hear from the child• Tribunals will seek to facilitate the involvement of the child but will also respect the views of the child where the child has indicated that he/she does not want to be involved in the process.
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Of the 21 placing request hearings held since the first direction instructing child advocacy was issued, 11 Tribunals made directions to hear from the child. Six references had child advocacy instructed, four Tribunals heard directly from the child and one Tribunal directed that a statement from the child be submitted.



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Dorothy McDonald, Tribunal member, added that she had heard from the child at two hearings. Once, the child came into the hearing room with parties present and on another occasion, the child was heard by the Tribunal only. Hearing from the child on both occasions was very significant.

Beverley Gardiner, Take Note, indicated that she had a background in Children's Hearings prior to working with Take Note and felt that the child's views can often get lost behind the parent's views.

Richard Donald, The Moray Council, added that determining the objectivity of the child's views can be difficult. Children may be influenced by their parent's views. Sometimes meeting the child without a parent present can be difficult.

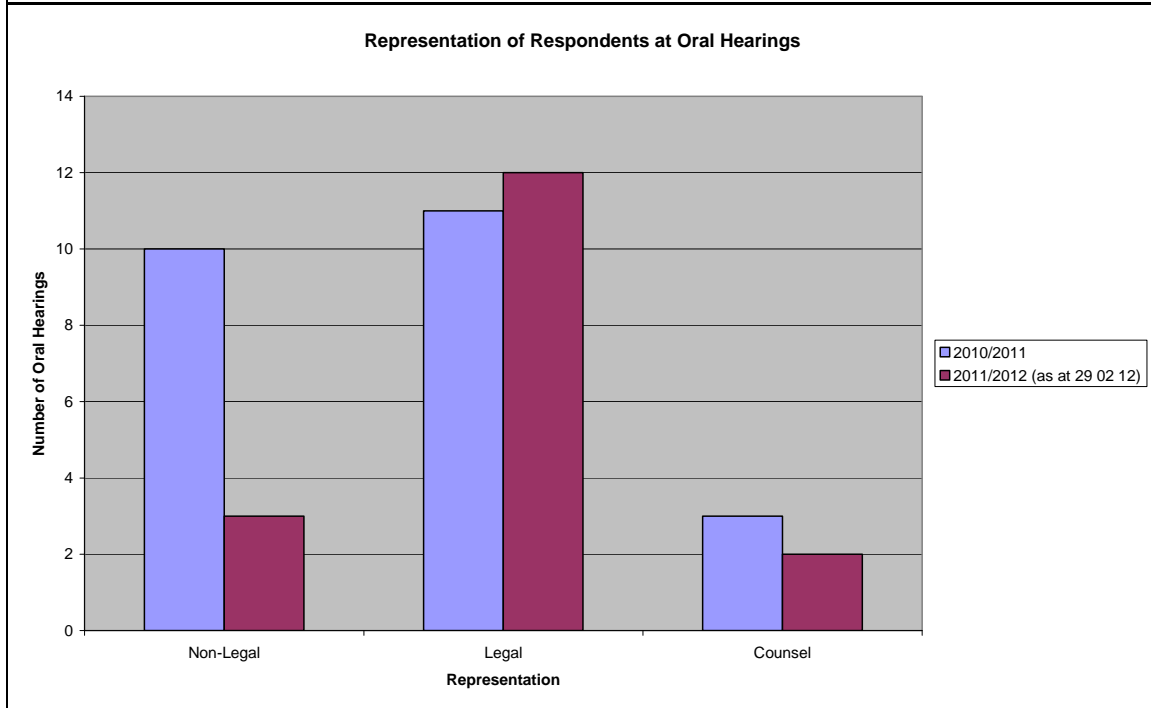
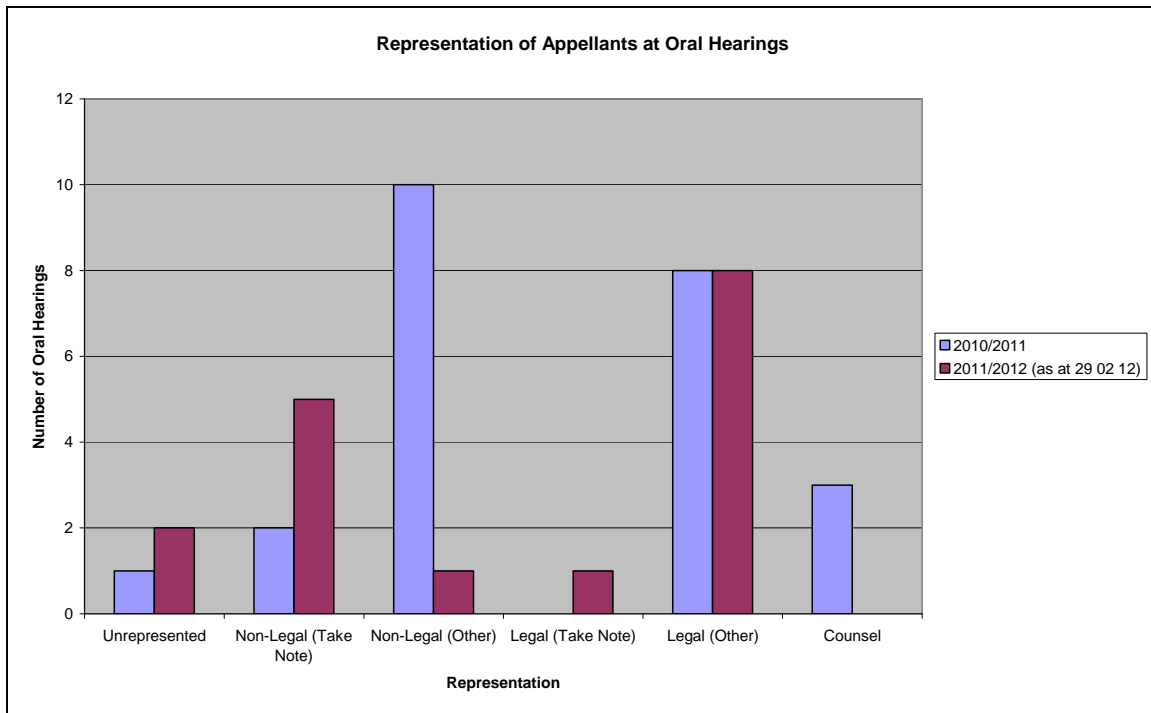
Cathy Flynn, previously ISEA, agreed that it was appropriate to hear from the child, especially in placing request references and in her experience, the Tribunal had always been keen to hear the child's view. Hearing the child's view depends on the capacity of the child and wouldn't expect a child to comment on a CSP reference.

Dr Morrow added that SCCYP had been involved in looking at the statutory responsibility for taking the views of children into account but that there was no need for the Tribunals to wait for legislation to be in place before seeking the views of the child. Good practice guides for advocacy are currently being looked at by Take Note.

<p style="text-align: right;"><small>Additional Support Needs Tribunals for Scotland</small></p> <p><i>What is the proportion of cases that have been represented by: individuals, lay representatives, lawyers, Take Note lay reps, Take Note lawyers?</i></p> <p><i>Louise Melia, Govan Law Centre</i></p>	<p style="text-align: right;"><small>Additional Support Needs Tribunals for Scotland</small></p> <ul style="list-style-type: none">• Increase in legal representation from 33% in 2010/2011 to 41% in 2011/2012.• Increase in unrepresented parents from 4% in 2010/2011 to 12% in 2011/2012.• Take Note non-legal representatives have appeared in 29% of hearings held during 2011/2012.• A Take Note legal representative has appeared in one oral hearing (6%) during 2011/2012. <p><small>* 2011/2012 as at 29 February 2012</small></p>
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Dr Morrow indicated that he would be disappointed if the outcome was led by the type of representation brought to hearing as the quality of the argument should be foremost no matter the type of representation.

Equality of arms and how to address this at hearings will be the subject of discussions with conveners over the coming year.


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What proportion of placing request appeals are as a result of deemed refusals?

Louise Melia, Govan Law Centre

- **Of 32 placing requests received in 2010/2011, 22% were as a result of deemed refusals.**
- **Of 56 placing requests received in 2011/2012 as at 29 February 2012, 16% of these have been as a result of deemed refusals.**

Adam O'Brien, City of Edinburgh Council, added that decision may not have been issued as there hasn't been sufficient time to work through all the possible permutations which affect each child. City of Edinburgh Council write to all parents who have made a placing request at the beginning of the process and make them aware of the deemed refusal provision and their subsequent appeal rights.

Alan Shields, Argyll and Bute Council, indicated that there could be ambiguity in when the formal placing request was made especially when there had been ongoing dialogue regarding suitable schools.

Laura Meikle, Support and Wellbeing Unit, suggested that the placing request is made when this is put in writing but would confirm this.



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Would the President consider issuing a direction, that in the case of placing request appeals as a result of a deemed refusal – the education authority must issue grounds of refusal forthwith (i.e. As soon as the appeal is lodged?)

Louise Melia, Govan Law Centre

- **Currently, application is made by appellant's representative or direction is issued on the convener's own initiative.**
- **Consideration will be given to whether it would be beneficial for a direction to be issued when the reference has been registered.**



Is it possible to consult with parties prior to fixing a hearing date to ensure availability?

Louise McHugh, Glasgow City Council

- **Current process is to fix hearing dates with regard to conveners' availability. ASNTS issue these dates to parties and then source members. If further days are required, convener would provide availability and this would be forwarded to parties for their own availability.**

Louise McHugh added to her question that in her experience of the Sherriff Court parties had some input into when the hearing would be.

Dr Morrow responded that when the availability of all parties is taken into account then the hearing can be much further away. Currently the system fits around the convener's availability. Availability of parties is provided in other areas and it will be looked into whether this will be feasible at ASNTS.



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What effect (if any) will the establishment of the Scottish Tribunals Service have on ASNTS? Is there a danger that expertise and experience may be diluted?

Morag Steven, Common Ground Mediation

- Greater efficiency and effectiveness with the opportunity to share venues, staff and IT systems
- Core staff have remained the same

As part of the Tribunal Reform proposals a group of Tribunals will be dissolved and become part of a First Tier Tribunal which will be allocated to chambers. Scottish Government is currently looking at whether specialisms, focus and ethos may be lost in this proposal. This consultation ends on 15 June 2012.



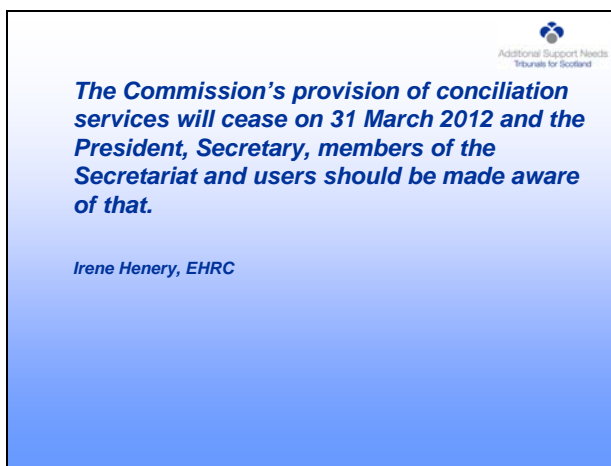
The 2010/2011 Annual Report refers to the amendment to Schedule 1 of the 2004 Act enabling the President to monitor implementation of Tribunal decisions. Can you tell us if that is being requested and how often?

Morag Steven, Common Ground Mediation

- One request received during 2010/2011
- One decision during 2011/2012 gave an implementation date which has been followed up and the decision had been implemented within the timescales.



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Morag Steven, Common Ground Mediation, added that the EHRC through conciliation have done a lot of good work addressing issues and subsequently avoiding legal proceedings.

Adam O'Brien, City of Edinburgh Council, clarified that the mediation that authorities are required to provide under ASL legislation cannot be used for Equality Act cases and asked what was to be provided instead.

Dr Morrow responded that nothing else had been put in the place of conciliation but added that there may be potential for introducing mediation as part of the Tribunal process.

Dorothy McDonald, Tribunal member, asked if the reason for the low number of disability discrimination claims might be because there was not as much publicity about this route of appeal as there was when the 2004 Act was implemented.

Laura Meikle, Support and Wellbeing Unit, replied that the 2004 Act was a new piece of legislation bringing new appeal rights whereas the Equality Act moves the same rights to a different appeal route. Further publicity of the Equality Act can be considered in policy terms amongst work on auxiliary aids and services.



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<p><small>Additional Support Needs Tribunals for Scotland</small></p> <p><i>Asked at the TUG in 2010 about placing requests being heard before the summer holidays. Answer provided was that number of conveners had increased. The Tribunal would aim to hold hearings before the summer holidays for appeals lodged before the end of May – even though this would require much shorter case statement periods. For appeals lodged later than the end of May, the Tribunal would aim for the second week of August on the assumption that teachers were likely to have returned from any travels. The Spring following the TUG, CofE had approximately 10 appeals lodged with the Tribunals arising from placing request refusals made at the end of April – all were settled without need for a hearing but in all cases the hearings were scheduled for after the summer holidays. How does the Tribunal anticipate timing such hearings for this coming year?</i></p> <p><i>Adam O'Brien, City of Edinburgh Council</i></p>	<p><small>Additional Support Needs Tribunals for Scotland</small></p> <ul style="list-style-type: none">• As well as the 12 placing requests submitted during May 2011 involving CofE there were a further eight references received concerning other education authorities during the same period.• As June hearings fell, appellants were contacted in an attempt to backfill these June dates.• This process prompted several hearings to be withdrawn as negotiations between parties were already underway.• The Tribunal will make every effort to schedule placing requests before the new school term starts.
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Additional resources have been put in place to cope with the workload before the summer holidays. Two clerks have been seconded from another Tribunal, conveners' and members' have been encouraged to be as flexible as possible and the President has freed time during this period for additional ASNTS work.

Dr Morrow added that delays are often because of requests for postponement etc. and not simply not being able to schedule hearings as early as possible.

Dr Morrow also asked if it was necessary to avoid the summer holidays for hearings. Adam O'Brien replied that teachers were not obliged to undertake work during the summer holidays as part of their conditions of service.

Sue MacDonald, Comhairle nan Eilean Siar, asked how authorities get other agencies to complete assessments within the timeframe.

Dr Morrow replied that the Tribunal had no authority regarding this generally but when a particular case reached the Tribunal directions would be made.

Irene Stove, Angus Council, added that Angus has a multiagency CSP panel which is able to put pressure on practitioners when timescales have been exceeded.

Alan Shields, Argyll and Bute Council, indicated that a lack of resources in smaller authorities can make this difficult but developing good working relationships with practitioners is helpful.

The President concluded the event by thanking all for attending and adding that he is happy to hear from users at any time.

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