Contents

Legislation Committee No 3

Committee Membership

Peter Black	Welsh Liberal Democrats	South Wales West
Christine Chapman	Labour	Cynon Valley
William Graham	Welsh conservative Party	South Wales East
Janice Gregory	Labour	Ogmore
Helen Mary Jones	Plaid Cymru	Llanelli
Dai Lloyd (Chair)	Plaid Cymru	South Wales West

Summary

General principles and the need for legislation

1. We note that the majority of witnesses are in favour of the principle and need for the proposed Measure. We note the views of witnesses that the proposed Measure will ensure compliance with the United Nations Convention on the Rights of the Child. We also note the Minister's evidence that legislation is required to provide children with the right to appeal in respect of special educational needs or make a disability discrimination claim. Therefore we agree with the principle of the proposed Measure and the need for legislation.

2. Our views on some of the specific sections of the proposed Measure are set out in section 4.

Specific Comments on Sections
Sections 1 & 9: Right of the child to appeal in respect of Special Educational Needs and to make Claims in respect of Disability Discrimination

3. We note the evidence from witnesses with regard to the potential implementation issues that could arise from the creation of a universal right of appeal and claim for children. However, given the evidence received in favour of the principle of and need for this right we are of the view that these issues can be addressed in future guidance and regulation. We therefore support the creation of a universal right for a child to appeal in respect of special educational needs or make a disability discrimination claim.

4. We have considered the removal of section 1(4) from the proposed Measure, and the suggestion that if the pilot identified circumstances where having the right would not be in the child's best interest, section 18 (which refers to the power to make provision about appeals and claims by a child) could be used to address that instead. We have also considered circumstances where if the pilot phase did present a circumstance where it was regarded appropriate to preclude a child from making an appeal or claim, this could be included at a later date, also through section 18 of the proposed Measure.

5. With regard to section 1(4) of the proposed Measure we acknowledge the evidence in support of the inclusion of section 1(4) and the need for flexibility in responding to circumstances that could arise during the pilot phase.

6. However, we do not feel that we have received sufficient evidence to demonstrate the need for this provision. We particularly note the evidence received from the Minister confirming that section 1(4) does not have to be used and that she "cannot envisage in what circumstances a child would not

be allowed to appeal"[1]. We also note that in respect of the right of the child to make an appeal or claim the Minister "did not want to fetter that right or to nullify the universality[2]".

7. Therefore we have concerns that where section 1(1) of the proposed Measure provides the 'Right of a child to appeal in respect of special educational needs", another sub-section of the same section, that is section 1(4), gives the Welsh Ministers the power to remove this right. We feel that this represents a contradiction of a fundamental principle of the proposed Measure.

8. We are in agreement with evidence received from the Children's Commissioner for Wales, SNAP and the WLGA/ADEW that the rights of a child to appeal or make a claim should be unrestricted. We also feel that there are sufficient powers and flexibility under section 18 of the proposed Measure to respond to any issues that could arise during the pilot phase.

9. Furthermore, given that the purpose of the proposed Measure is to provide a parity of rights between children and adults, and adults have an unrestricted right to appeal or make a claim, we consider that it is logical that children also have that unrestricted right to appeal or make a claim.

10. We further note that these issues also apply to section 9 of the proposed Measure, which provides the 'Right of a child to make a disability discrimination claim", and where another sub-section of the same section, that is section 9(6), gives the Welsh Ministers the power to remove this right.

11. We recommend that sections 1(4) and 9(6) be removed from the proposed Measure. However, if the Minister is minded not to take note of this recommendation we recommend that the use of powers provided to Welsh Ministers under sections 1(4) and 9(6) be subject to scrutiny by the Assembly through the affirmative procedure.

Section 2: Notice and service of documents

12. We note the concerns raised by witnesses regarding the need to ensure that the duties on LEAs to give notice to or serve a document on the child as well as the parent are deliverable through means appropriate to the communication needs of the child. We also consider that the pilot and evaluation phase will be crucial in identifying effective means of communicating with and engaging children with the new rights available to them.

13. We therefore recommend that requirements to ensure that the notice and service of documents are delivered in an appropriate format are included in guidance.

Sections 3 & 10: Case Friends

[1] Record of Plenary Proceedings (RoP), paragraph 37, 11 June 2009
[2] ibid, paragraph 19, 14 May 2009

14. We have considered the evidence submitted in relation to those eligible to be appointed as case friends and agree with the Minister that this needs to remain broad to avoid the exclusion of certain individuals.

15. However, we also note the views of witnesses who have made suggestions in terms of those suitable to be case friends. Therefore we recommend that details of suitable case friends be included in guidance which will be informed by the pilot and evaluation phase.

16. In terms of parental consent being required by a child or young person to appoint a case friend we note the concerns of witnesses that this would undermine the principle of the proposed Measure. We also have concerns that circumstances when a looked after child or fostered child is making the appeal or claim, may require the consent of the LEA who they are appealing or claiming against, which could represent a conflict of interest. Therefore we recommend that parental consent to appoint a case friend should not be made a requirement either through the Measure, in guidance or regulations.

17. We note the concerns of witnesses with regard to the need for criminal record bureau (CRB) checks on case friends in order to safeguard children and young people wishing to appoint case friends. We agree with these concerns and recommend that, a requirement for enhanced CRB checks to be undertaken on all case friends, with the exception of those who have current and satisfactory CRB checks, should be included in regulations.

Sections 4 & 11: Advice and Information

18. We note the concerns of witnesses regarding the practical issues arising from the requirement on LEAs to arrange for children, with special educational needs or disabled children, as well as their parents to receive advice and information about matters relating to their needs. We share these concerns and recognise the importance of ensuring the receipt and understanding of such advice and information.

19. We therefore recommend that consideration be given, during the pilot and evaluation phase, to determining upon whom this responsibility should be best placed. Upon determining this we recommend that the Minister incorporate this into future guidance under section 4(3) of the proposed Measure.

Sections 5 & 12: Resolution of disputes

20. We acknowledge the views of the Minister, but given the evidence provided by witnesses in support of the need for transparency, we agree and recommend that there is a need to split the provision of resolution support services for parents and those provided for children. We are of the view that this would ensure that services provided to children are entirely independent particularly in instances where there is disagreement between the child and parent. We therefore recommend that the Minister gives consideration to

bringing forward amendments to sections 5 and 12 of the proposed Measure that separate the provision of resolution support services for parents and those provided for children.

Sections 6 & 13: Independent Advocacy Services

21. In discussing the provision of independent advocacy services we considered a recommendation made by the Children and Young People Committee in respect of its report on 'Advocacy Services for Children and Young People in Wales'. The recommendation stated that:

> "Following appropriate consultation, the Welsh Assembly Government should establish a centrally funded national advocacy unit, with responsibility for commissioning independent advocacy services in local areas".

22. A further report of the Children and Young People Committee on the development of advocacy services for children and young people commented that:

> "We expressed disappointment that the first recommendation of the report - the establishment of a centrally funded national advocacy unit with responsibility for commissioning independent advocacy services in local areas - was only agreed to in part".

23. We also note that in response, although disappointed with the outcome, the Children and Young People Committee did not suggest an alternative structure for commissioning independent advocacy services, and recommended that:

> "Members of the National Independent Advocacy Board should have the opportunity to report to the National Assembly for Wales, on an independent basis of the Welsh Assembly Government".

24. We note the views of the Children and Young People Committee and witnesses in relation to the importance of children and young people being able to access independent advocacy that will provide them with independent information about their options. However, in terms of addressing this we support and welcome the Minister's commitment to monitoring and ensuring that standards of independence will be met at all times.

Sections 7 & 14: Tribunal Procedure

25. We note the evidence received from witnesses highlighting the potential challenges in terms of ensuring the meaningful participation of children, given the breadth of ages and those with complex needs, in tribunal procedures. Therefore we recommend that the pilot and evaluation phase be used to gather evidence and develop guidance relating to the meaningful participation of children in tribunal procedures.

26. We note the evidence received from witnesses in support of the child or young person, as the appellant, being present at a tribunal hearing. We are of the view that children and young people should be present at such hearings. However, we do note concerns from witnesses that there may be circumstances in which the child or young person's presence may be inappropriate.

27. Therefore we recommend that the Minister give consideration to amending Tribunal procedural regulations to enable children and young people to attend tribunal hearings unless there are exceptional circumstances whereby such attendance is deemed inappropriate. We further recommend that the pilot and evaluation phase be used to identify such circumstances.

Section 17: Piloting the rights of a child to appeal or make a claim

28. In light of the evidence received outlining the potential timetable for the piloting, evaluation and possible amending of the proposed Measure, we considered that there is no reason to explain why it would take from September 2012 to May 2013 to prepare regulations under section 18 to amend the proposed Measure. We considered that whilst there clearly has to be an evaluation of the pilot and a report prepared under section 17(5), it could be expected that any regulations under section 18 would be developed as the pilot proceeds. The regulations under section 17 should have covered all the issues, and regulations under section 18 should only cover issues arising from the pilot, as powers under preceding sections could be used to do everything else.

29. Furthermore we considered that local authorities not affected directly by the pilot would still have had plenty of time to consider what they would need to do to implement the Measure from September 2013. For any changes of consequence arising from the pilot, there should be consultation with stake holders in relation to the regulations, and there is no reason why that cannot take place simultaneously with any consideration by the Assembly under the super-affirmative procedure.

30. We have carefully considered the evidence received from witnesses that the issues being explored through the pilot and evaluation phase are particularly complicated, could have significant implications and potentially present serious and complex situations.

31. In light of this we have discussed the appropriateness of addressing such situations through future regulations. As such we have given serious consideration to the option of amending the proposed Measure in order to implement a pilot and evaluation phase and then drafting a further proposed Measure to put in place the full and broader powers, once the pilot phase has been evaluated.

32. However, having considered the evidence we accept the framework approach outlined in the proposed Measure and that a pilot and evaluation

phase be undertaken to inform future amendments made under the powers outlined in section 18. However, we strongly recommend that any future orders to amend the proposed Measure, after the pilot and evaluation phase, are subject to the super affirmative procedure. For that reason, we ask that the Minister give consideration to bringing forward an amendment to this effect.

Section 18: Power to make provision about appeals and claims by a child

33. In terms of the pilot and evaluation phase we are of the view that direct links should be made with ongoing pilots on statementing.

34. Furthermore, given the evidence received from witnesses we recommend that the proposed Measure should include a requirement for a further consultation process with key stakeholder on conclusion of the pilot and evaluation phase. We therefore ask that the Minister consider bringing forward an amendment to this effect.

35. Having considered the Ministers explanation we discussed the advantages of the super affirmative procedure in that it allows for wider scrutiny and consultation. We note that although the affirmative procedure involves a plenary debate it does not include wider scrutiny and therefore limits possible challenge.

36. We feel that the need for wider scrutiny is particularly significant given that the breadth of the powers under section 18. Therefore we have concerns regarding how these powers could be used by future Ministers to amend the principles of the proposed Measure.

37. Furthermore, given the breadth of these powers and the potential to significantly amend the proposed Measure, we recommend that there should be a requirement for public consultation on any changes to the proposed Measure made using section 18.

38. We also consider that the framework powers being sought under this proposed Measure relate to issues of fundamental principle, such as whether a child can or cannot appeal. Whilst we recognise the unusual circumstances in which the proposed Measure has been drafted, we are of the view that the exercise of these framework powers should be subject to rigorous scrutiny. We therefore recommend that the use of section 18 of the proposed Measure be subject to the super affirmative procedure

39. We also recommend that a maximum timescale for the pilot stage should be set out in the proposed Measure.

Report of the Subordinate Legislation Committee

40. We have considered the report of the Subordinate Legislation Committee and have taken note of it in making our recommendations.

Financial Implications – Finance Committee consideration

41. The Committee laid its report before the Assembly on 25 June, unfortunately, we have not been able to consider the report in detail.

1. Introduction

1. On 27 April 2009, the Minister for Children, Education, Lifelong Learning and Skills, Jane Hutt AM ("the Minister"), introduced the Proposed Education (Wales) Measure and made a statement in plenary[1] the following day.[2]

2. At its meeting on 27 April 2009, the National Assembly's Business Committee agreed to refer the proposed Measure to Legislation Committee No.3 for consideration of the general principles (Stage 1), in accordance with Standing Order 23.21. It also agreed that the Committee must report on the proposed Measure no later than 7 July 2009.

Terms of scrutiny

3. At our first meeting on 7 May 2009, we agreed the following framework within which to scrutinise the general principles of the proposed Measure:

To consider:

(i) the need for a proposed Measure to deliver its purposes of:

- providing rights for children and young people to make special educational needs (SEN) appeals and claims of disability discrimination to the SEN Tribunal for Wales (the Tribunal); and

- amending the law providing for parents in Wales to make appeals and claims to the tribunal, as set out in the Education Act 1996 (as amended) and the Special Educational Needs and Disability Act 2001;

(ii) whether the proposed Measure achieves its purposes;

(iii) the key provisions set out in the proposed Measure and whether they are appropriate to deliver its purposes;

(iv) potential barriers to the implementation of the key provisions and whether the proposed Measure takes account of them; and

(v) the views of stakeholders who will have to work with the new arrangements.

[1] A full meeting of the National Assembly for Wales
[2] RoP, 28 April 2009, available at: http://www.assemblywales.org/bus-home/bus-chamber/bus-chamber-third-assembly-rop.htm?act=dis&id=126592&ds=4/2009. (NB: unless otherwise stated, subsequent references in this report to RoP refer to the proceedings of the Legislation Committee No.3.)

The Committee's approach

4. We issued a general call for evidence and invited key stakeholders, primarily from within the field of education and special educational needs, to submit written evidence to inform our work. A list of consultation responses is attached at Annex 1.

5. We took oral evidence from a number of witnesses, details of which are attached at Annex 2.

6. The following report represents the conclusions and recommendations we have reached based on the evidence received during the course of our work. We would like to thank all those who have contributed.

2. Background

The National Assembly's legislative competence to make the proposed Measure

7. The principal power enabling the National Assembly to make a Measure in relation the rights to appeal is contained in section 93 of the Government of Wales Act 2006 (the 2006 Act), which gives the National Assembly for Wales the power to make Assembly Measures in relation to "matters" listed in field 5 of Part 1 of Schedule 5 of that Act. Specifically these are matters 5.4, 5.7, 5.8 and 5.17 which are detailed below.

> *Matter 5.4*
> *Provision about curriculum in schools maintained by local education authorities.*
>
> *Matter 5.7*
> *Provision about entitlement to primary, secondary and further education and to training.*
>
> *Matter 5.8*
> *Provision about the provision of services that are intended to encourage, enable or assist people—*
> *(a) to participate effectively in education and training,*
> *(b) to take advantage of opportunities for employment, or*
> *(c) to participate effectively in the life of their communities.*
>
> *Matter 5.17*
> *Education and training for—*
>
> *Persons who have greater difficulty in learning that the majority of persons of the same age as those persons;*
>
> *(i) a physical or mental impairment, or*
> *(ii)a progressive health condition (such as cancer, multiple sclerosis or HIV infection) where it is at a stage involving no physical or mental impairment.*

The Explanatory Memorandum

8. The Explanatory Memorandum[3] accompanying the proposed Measure states that:

> "The purpose of this Measure is to extend children's entitlement by providing them with rights to make special education needs (SEN) appeals and claims of disability discrimination to the Special Education Needs Tribunal for Wales (the Tribunal). It will amend the law that

[3] Welsh Assembly Government, *Explanatory Memorandum to the Proposed Education (Wales) Measure,* April 2009

gives parents the right to make appeals and claims to the Tribunal, as set out in Part 4 of the Education Act 1996 and Part 4 of the Disability Discrimination Act 1995"[4].

9. The Explanatory Memorandum explains that the "the fundamental objective of this Measure is to give a parity of appeal rights for parents and their children"[5].. It also states that the proposed Measure ''will form part of a suite of initiatives aimed at increasing child participation in decision-making processes relating to Tribunal appeals and claims''[6].

10. The proposed Measure's overall intention is to:

- give practical expression to the UN Convention of the Rights of the Child and the associated Welsh Assembly Government's Core Aims;
- provide an additional safeguard to ensure that the needs of disabled children and young people and those with SEN can be met, by reducing the prospect that their needs might not be fully addressed where their parents do not themselves pursue an appeal or claim;
- give children with SEN (including looked after children) an independent right to appeal decisions made about their education support needs[7].

11. The Explanatory Memorandum explains that the proposed Measure will fulfil its objectives in two stages:

- Phase 1 will be undertaken as a pilot and evaluation scheme;
- Phase 2 will involve a roll out of the rights for children on an all-Wales basis[8].

12. The pilot phase will give the Welsh Ministers the power to make regulations that specify the number and identity of those LEAs which will participate in the pilot phase and its duration. The pilot phase will provide an opportunity for careful evaluation of the practical application of the rights, the configuration and resourcing of necessary services[9].

13. The Explanatory Memorandum explains that the full roll out in phase 2 will be informed by the results and recommendations arising from the pilot and evaluation phase. The pilot phase will assist in sharing examples of best practice and overcoming the practical difficulties of applying these rights to children, young people and their "case friends" in the piloted areas.

14. The Explanatory Memorandum also outlines the powers to make subordinate legislation contained within the proposed Measure. In respect of each of these powers the rationale for the application of subordinate legislation rests upon the need to avoid excessive details or to allow for

[4] Explanatory Memorandum, paragraph 1.1
[5] ibid, paragraph 3.10
[6] ibid, paragraph 3.12
[7] ibid, paragraph 3.3
[8] ibid, paragraph 3.13
[9] ibid, paragraph 3.14

flexibility, within the confines of the principles presented within the proposed Measure itself[10].

[10]Explanatory Memorandum, paragraph 5.1

3. General principles and the need for legislation

Background

15. The purpose of the proposed Measure is to extend children's entitlement by providing them with rights to make special educational needs (SEN) appeals and claims of disability discrimination to the Special Educational Needs Tribunal for Wales (the Tribunal)[11].

Evidence from Witnesses

16. Most witnesses agreed with the need for legislation to allow children and young people to appeal or make a claim to the Special Education Needs Tribunal for Wales (SENTW).

17. In oral evidence, SENTW linked the principles of the proposed Measure to Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) as underpinning "this basic right that we should be having". They explained that "there is a need for legislation and I am delighted that the Welsh Assembly Government has been very much in the forefront of doing this"[12].

18. The Children's Commissioner for Wales reiterated these views by stating that:

> "We believe that this is a child's right under article 12 of the United Nations Convention on the Rights of the Child (UNCRC) to have their voices heard in decisions that affect them. The current situation in which only the child's parents may make an appeal to the tribunal is often unsatisfactory and does not comply with Article 12 of the UNCRC"[13].

19. In order to support the call for legislation, evidence was provided by some witnesses to demonstrate that children and young people had expressed an interest in the right to appeal or make a claim to the tribunal. The Children's Commissioner for Wales provided examples of instances where children had contacted his office directly to seek advice on raising their voices independently of their parents[14].

20. SNAP also provided examples of young children who when given a voice had expressed views that were different to their parents[15].

21. However, some witnesses, whilst supporting the principle of the proposed Measure, expressed reservations. The Welsh Local Government

[11] Explanatory Memorandum, paragraph 1.1
[12] RoP, paragraph 7, 27 May 2009
[13] ED4, Written Evidence
[14] RoP, paragraph 113, 4 June 2009
[15] ibid, paragraph 115

Association (WLGA)/Association of Directors of Education in Wales (ADEW) stated that:

> "the principle is correct and well grounded. However - and there is always a 'however' in these things – I would not underestimate how difficult and challenging it is to make this operational, to make it work, make it robust and make it safe. In that, I have significant anxieties as the manager of a system and as a specialist practitioner that to do this properly will be no small challenge"[16].

22. In clarifying this point, the WLGA/ADEW provided some operational examples of the potential difficulties that could arise. They stated that:

> "If my child were to be seen by an educational psychologist, I would be present. I would not entertain the notion of someone seeing my vulnerable child alone, if I had a child with such needs. If that is the person who is assessing the child's view, the parent will be cueing the child's communication. The parent may be the child's key communicator, so what you are actually getting is one view. So, there is a technical difficulty in getting a child's view alone"[17].

23. They went on to explain that:

> "Many of the children whom this will embrace have both communication and cognitive difficulties, and you cannot ascertain their view during a one-off event. The assessor will have to be someone who knows the child well, who understands their moods, their level of communication, and their preferred way of communicating. Again, we need to develop the front end of the system so that that is brought into the identification of need and then spend a window of time learning how to do that well, ironing out any problems, and then framing robust legislation that can take account of the methodology required to do it"[18].

24. Furthermore, in written evidence, the WLGA/ADEW commented that:

> "this legislation could have significant implications for home-school and home-local authority relationships and could have potential for causing tensions within families that are involved in the process. In principle this Measure makes sense but it should be considered that this legislation could be seen as a source of tension between parents and children and young people and with the Local Authority"[19].

25. A common theme emerging from the evidence was that whilst there was wide support for the principle and need for legislation there were a number of concerns regarding its practical implementation. These issues

[16] RoP, paragraph 9, 4 June 2009
[17] ibid, paragraph 10
[18] ibid, paragraph 11
[19] ED3, Written Evidence

were explored in further detail during our detailed consideration of specific sections of the proposed Measure and are referred to later in the report.

26. In contrast, some witnesses did not support the need for legislation and a number of different arguments were put forward. Gwynedd and the Isle of Anglesey County Councils stated that:

> "Children already have the right to make appeals, through their parents. Therefore, it is our opinion that it is not necessary to make additional legislation to this end. In order to satisfy Articles 12 and 13 of the United National Convention on the Rights of the Child more fully, perhaps it would be possible to increase the contribution of children or young people in the appeals process, without extending rights of appeal, by amend the Tribunal's regulations and the guidelines for LEAs"[20].

27. The Association of Educational Psychologists (AEP) stated that:

> "there is no need for legislation to extend children's right to make their own appeals. What is required is a greater participation in the process. It is essential to ensure that children's views are taken into account at all stages of the educational process and, specifically, during the statutory assessment process. However, this can be best achieved by promoting a system of greater participation at all stages of the educational process"[21].

28. AEP also referred to the difficulties for children and young people with complex needs expressing their views on what are difficult issues. They stated that:

> "Even with considerable support many of these children and young people will in all likelihood find it stressful to be put under the pressure of lodging their own appeal. The view of the Association is that what is required is great participation in the decision making process in line with the individual child's wishes and ability to engage in the process"[22].

Evidence from the Minister

29. In relation to the need to introduce legislation the Minister identified three reasons to support of the need for legislation. She stated that:

> "First, it gives practical expression to the United Nations Convention on the Rights of the Child, in particular article 12. Secondly, the legislation will enable us to ensure that the needs of children are considered by the Tribunal"[23].

[20] ED9, Written Evidence
[21] ED12, Written Evidence
[22] ibid
[23] RoP, paragraph 8, 14 May 2009

She added that:

> "Thirdly, there may be parents who, even with support, simply do not feel willing or confident or competent enough to pursue an appeal or claim. So, we need to amend that law, as it currently only gives parents the right to make appeals and claims to the tribunal. Amending the law will give children the right to make an appeal or claim to the tribunal, which will ensure that they are placed on the same statutory footing as parents"[24].

Our View

30. We note that the majority of witnesses are in favour of the principle and need for the proposed Measure. We note the views of witnesses that the proposed Measure will ensure compliance with the United Nations Convention on the Rights of the Child. We also note the Minister's evidence that legislation is required to provide children with the right to appeal in respect of special educational needs or make a disability discrimination claim. Therefore we agree with the principle of the proposed Measure and the need for legislation.

31. Our views on some of the specific sections of the proposed Measure are set out in section 4.

[24] RoP, paragraph 8, 14 May 2009

4. Specific Comments on Sections

32. The Measure would make changes both to the Education Act 1996 and the Disability Discrimination Act 1995, often by the insertion of new sections. Subsections to be inserted are therefore technically subsections of those inserted sections. Thus, for example, the subsection referred to in this report as section 1(4) is technically section 332ZA(4) of the 1996 Act. However, for ease of reference, throughout this report, we have referred to them as subsections of the section making the insertion rather than subsections of the sections to be inserted.

Sections 1 & 9: Right of the child to appeal in respect of Special Educational Needs and to make Claims in respect of Disability Discrimination

Background

33. Section 1 of the proposed Measure extends the rights of parents to appeal to the Tribunal and section 9 extends the rights of parents to make disability discrimination claims to children. More specifically section 1(4) makes provision allowing regulations to be made by the Welsh Ministers that specify circumstances in which a child may not appeal to the Tribunal. Similarly section 9(6) makes provision allowing regulations to be made by the Welsh Ministers that specify circumstances in which a relevant person may not make a claim.

Evidence from Witnesses - Practical Implementation of Sections 1 & 9

34. A number of witnesses referred to the potential implementation issues arising from the decision to create a universal right of appeal and claim for children. SNAP stated that "we are going to be challenged in terms of how best we can support the children, particularly those with communication needs"[25]. They added that:

> "the biggest implementation issue that we will have is about moving forward and saying, 'Children do have rights; we must listen and we must consider their wishes and feelings, in addition to their needs'[26].

35. The WLGA/ADEW also raised similar concerns and informed us that:

> "We are walking into a legal minefield, and it has been interesting to try to get a very tight legal view on this. With other legislation, we hit the issue of the child's competence. Children are deemed competent when they are about 13 years of age if they are of average ability, average awareness, can explain their experience and why they want to decide to do whatever it is that is coming forward. With a special needs child, that judgment of competence is much more difficult to make, because of their cognitive and communication difficulties. So, what is the status

[25] RoP, paragraph 17, 4 June 2009
[26] ibid

of their opinion in their participation in this process, judicially as opposed to inclusively? That is quite difficult to unpack in this regard"[27].

36. They also referred to the difficulties that could arise from tensions between children and parents stating that:

> "I have worked with many parents who have experienced a real challenge in having a child with additional learning needs. They work passionately and with commitment on that child's benefit, but there comes a stage in their life where the child does not want them to be as protective, and a gap will open between the wishes of the family and the wishes of a teenager"[28].

Evidence from Witnesses - Section 1(4)

37. The power given to the Welsh Ministers under section 1(4), to provide by regulations for circumstances in which a child may not appeal, raised concerns for many witnesses particularly with regard to circumstances in which the power may be used.

38. SENTW stated that:

> "As a tribunal we cannot think of any circumstances in which you would be excluding anyone. From a legal point of view, you then touch on human rights. How can you exclude certain people? Quite frankly, if you are going to do that, what is the point of giving the rights to the child?[29]"

39. They did however suggest a possible reason for why the power had been included in the proposed Measure. They stated that:

> "We do not know what we are going to come across in two year's time, when we go through the pilot phase. We don't know what problems there maybe. So, it is a situation in which, if something came up that needed tweaking in some way, that could be done. However, I have to say that I cannot envisage any such circumstance. There would be human rights issues, and, if a situation were to occur, it would be open to challenge"[30].

40. A number of witnesses argued strongly against the inclusion of section 1(4) in the proposed Measure.

41. The WLGA/ADEW stated that "If it is a principles-led Measure, it needs to be inclusive. It is difficult to imagine who you would debar from it"[31]. SNAP supported this,stating that:

---

[27] RoP, paragraph 17, 4 June 2009
[28] ibid, paragraph 18
[29] RoP, paragraph 32, 21May 2009
[30] ibid
[31] RoP, paragraph 35, 4 June 2009

> "I am not quite comfortable with saying that there is a reason to preclude a child from appealing. That might give out the wrong message. Either a child has the right or not. The tribunal is based on legislation. There are only certain issues that you can appeal against as a parent; the same applies to a child"[32].

42. The Children's Commissioner for Wales informed us that "Giving a Minister power to revoke the right of appeal to certain groups of children would be against the spirit of the convention"[33]. He added "We would suggest that section 1 sub-section (4) should be removed from the face of the Measure"[34].

Evidence from the Minister

43. The Minister provided evidence to explain the decision to create a universal right of appeal and disability discrimination claim for children, which does not take into account their age and capacity. She informed us that consideration had been given to competency tests and age restrictions but a decision had been reached for rights to be extended on a universal basis. She added that:

> "We do not think that age is necessarily an effective or appropriate barometer of ability for children with special educational needs. Disabled children might be discriminated against in favour of children the same age who do not have learning difficulties and who have a greater ability to make a claim in their own names. We are dealing with difficult areas, namely ones of exclusion"[35].

44. In response to concerns regarding the potential consequences, arising from the proposed Measure, for relationships between the home and school, home and local authority, and tensions within families, the Minister stated that:

> "There is also quite clearly potential for intra-family conflict at present, where there is disagreement between children and their parents"[36].

45. She added that the "proposed Measure will show that we can improve relationships"[37].

46. In relation to concerns regarding circumstances in which section 1(4) of the proposed Measure may be used the Minister stated that:

> "I have been assured by advice from officials that this sub-section does not have to be used. We could make such regulations, but I cannot

[32] RoP, paragraph 139, 4 June 2009
[33] ED4, Annex 1, Written Evidence
[34] ibid
[35] RoP, paragraph 7, 11 June 2009
[36] ibid, paragraph 28
[37] ibid

envisage in what circumstances a child would not be allowed to appeal. I am advised that we may need to have this in law as a safeguard"[38].

47. In responding to concerns regarding the need for section 1(4), given that her evidence suggested that there was no intention of using the sub-section, the Minister stated that:

> "It is only there because of our desire to ensure those universal rights. I think that this is only there, to an extent, to protect a child. If it is the case that there may be circumstances where a child cannot appeal but we have to make arrangements, I think that the pilot project can test that"[39].

48. In response to a request to provide theoretical examples of where the provisions in section 1(4) may be used the Minister provided further written evidence outlining that:

> "the decision to exercise these powers will depend on a number of factors, which may include whether any circumstances are identified during the pilot phase and what justification exists for prohibiting or restricting children from making an appeal/claim in those circumstances"[40].

49. The Minister added that:

> "At present, and prior to the practical implementation of this right within the pilot areas, I cannot envisage circumstances where a child may not appeal or claim, however I feel it is important to retain flexibility should these circumstances arise during the pilot phase. Should circumstances arise where it was felt inappropriate for a child to appeal, for example if it was felt by those involved with the child that the likely outcome of the appeal would be seriously and fundamentally detrimental to the child's well being, by law the Tribunal would not be able to refuse the appeal application. For these reasons, it is important that the Welsh Ministers have the power to legislate, in relation to those circumstances"[41].

50. The Minister explained the potential implications of removing section 1(4) in the proposed Measure:

> "If the regulation making power is removed from the Measure, and circumstances are identified during the pilot phase, the Welsh Ministers would not have the power to legislate in relation to those circumstances. This could have implications not only for the pilot but also, depending on the reasons warranting legislation, on the well being of child appellants/claimants within the pilot areas"[42].

[38] RoP, paragraph 37, 14 May 2009
[39] ibid, paragraph 41
[40] Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 22 May 2009
[41] ibid
[42] ibid

51. The Minister concluded that should no such circumstances be identified and if the Welsh Ministers are satisfied that no reason exists to justify continuation of the regulation making power, the power could be repealed by order, using section 18 of the Measure, which would be subject to debate in Plenary under the affirmative procedure[43].

52. In further evidence again the Minister referred to section 1(4) and the right of the child to make an appeal or claim. She clarified that she did "not want to fetter that right or to nullify the universality[44]" and that she would consider "very carefully the views of the Committee[45]".

53. In further written evidence the Minister confirmed that, although as currently drafted, sections 1 and 9 would be subject to the negative procedure, the affirmative resolution procedure would apply to these particular regulations instead[46].

54. During discussions the Minister also confirmed that the "key point is that this is about giving children parity of rights"[47]. However, when questioned by the Committee as to whether there are any circumstances in which a parent may not appeal, an Official accompanying the Minister stated that:

> "there is nothing in the tribunal legislation at the moment that requires a parent to pass any test or that limits a parent's right to make an appeal, whether they are the parent who is living with the child or otherwise"[48].

Our View – Practical Implementation

55. We note the evidence from witnesses with regard to the potential implementation issues that could arise from the creation of a universal right of appeal and claim for children. However, given the evidence received in favour of the principle of and need for this right we are of the view that these issues can be addressed in future guidance and regulations. We therefore support the creation of a universal right for a child to appeal in respect of special educational needs or make a disability discrimination claim.

Our View - Section1(4)

56. We have considered the removal of section 1(4) from the proposed Measure, and the suggestion that if the pilot identified circumstances where having the right would not be in the child's best interest, section 18 (which refers to the power to make provision about appeals and claims by a child) could be used to address that instead. We have also considered circumstances where if the pilot phase did

[43] Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 22 May 2009
[44] RoP, paragraph 19, 11 June 2009
[45] ibid
[46] Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 24 June 2009
[47] RoP, paragraph 17, 11 June 2009
[48] ibid, paragraph 22

present a circumstance where it was regarded appropriate to preclude a child from making an appeal or claim, this could be included at a later date, also through section 18 of the proposed Measure.

57. With regard to section 1(4) of the proposed Measure we acknowledge the evidence in support of the inclusion of section 1(4) and the need for flexibility in responding to circumstances that could arise during the pilot phase.

58. However, we do not feel that we have received sufficient evidence to demonstrate the need for this provision. We particularly note the evidence received from the Minister confirming that section 1(4) does not have to be used and that she "cannot envisage in what circumstances a child would not be allowed to appeal"[49]. We also note that in respect of the right of the child to make an appeal or claim the Minister "did not want to fetter that right or to nullify the universality"[50].

59. Therefore we have concerns that where section 1(1) of the proposed Measure provides the 'Right of a child to appeal in respect of special educational needs', another sub-section of the same section, that is section 1(4), gives the Welsh Ministers the power to remove this right. We feel that this represents a contradiction of a fundamental principle of the proposed Measure.

60. We are in agreement with evidence received from the Children's Commissioner for Wales, SNAP and the WLGA/ADEW that the rights of a child to appeal or make a claim should be unrestricted. We also feel that there are sufficient powers and flexibility under section 18 of the proposed Measure to respond to any issues that could arise during the pilot phase.

61. Furthermore, given that the purpose of the proposed Measure is to provide a parity of rights between children and adults, and adults have an unrestricted right to appeal or make a claim, we consider that it is logical that children also have that unrestricted right to appeal or make a claim.

62. We further note that these issues also apply to section 9 of the proposed Measure, which provides the 'Right of a child to make a disability discrimination claim', and where another sub-section of the same section, that is section 9(6), gives the Welsh Ministers the power to remove this right.

63. We recommend that sections 1(4) and 9(6) be removed from the proposed Measure. However, if the Minister is minded not to take note of this recommendation, we recommend that the use of powers provided to Welsh Ministers under sections 1(4) and 9(6) be subject to scrutiny by the Assembly through the affirmative procedure.

[49] RoP, paragraph 37, 14 May 2009
[50] ibid, paragraph 19, 11 June 2009

Section 2: Notice and service of documents

Background

64. Currently LEAs (Local Education Authorities) give notice to parents or serve documents on them in relation to statements. Section 2 of the proposed Measure places a duty on LEAs to give notice to the child or serve a document on them as well as the parent. A child is defined in the proposed Measure as including any person who has not attained the age of 19 and is a registered pupil at a school.

Evidence from Witnesses

65. The practical delivery of section 2 of the proposed Measure raised concerns amongst many witnesses. SENTW stated that they:

> "would not look kindly on a child receiving the same letter that the parent gets. We have to think outside the box on this. We could be dealing with very young children. We may have to look at using visual aids or other means of communication"[51].

66. The WLGA/ADEW expressed similar views and suggested "many of those documents would stay on the doormat. They have to be followed up by a visit[52]." They added that:

> "Meeting the statutory requirement is a minimum; it is just not good enough, because it does not give entitlement and opportunity to people. If that is true for the parents, where you may have multigenerational literacy need, and then you have a child with additional learning needs, there will have to be a visit"[53].

67. The Children's Commissioner for Wales shared these views and informed us that "the issue of merely writing to the child – that is just not going to happen"[54]. He explained that:

> "We will have to have a range of communication and, with children, that means face to face communication that clearly informs the child of the opportunities to appeal and have their voice heard"[55].

68. Similar views were shared by Children in Wales who indicated that consideration needs to be given to the best way of informing children about their right to appeal and the services they can access.[56] They stated:

[51] RoP, paragraph 44, 21 May 2009
[52] RoP, paragraph 48, 4 June 2009
[53] ibid
[54] ibid
[55] ibid
[56] ED10, Written Evidence

> "It is accepted that a formal letter will have to be sent from the LEA to the child and their parents informing them of their right to appeal and services they can access. It would be good practice to include in with the letter, a leaflet designed specifically for children that is accessible, child friendly and available in a range of formats, which will explain to the child the process involved in making an appeal and the services that they can access."[57]

69. With regard to ensuring letters are accessible and easy to understand the National Deaf Children's Society (NDCS) recommended that local authorities involve organisations such as themselves to develop materials.[58]

Evidence from the Minister

70. In response to concerns raised regarding the arrangements that LEAs would be expected to put in place to support children and young people to understand documents served on them the Minister outlined that:

> "Local education authorities will be required – and that is the important point – to write to the parent and child separately. There may be a situation in which the child is unable to understand the information, and that is where we must ensure that we engage with the advocacy opportunities."[59]

71. The Minister also informed us that:

> "Hopefully, it will not be a matter of just sending things through the post; it will involve sitting down with children to work through it. Some of the best practice already involved a one-to-one with parents to discuss what is expected. It is about breaking all barriers down and being child-friendly to ensure that children do understand their rights."[60]

Our View

72. We note the concerns raised by witnesses regarding the need to ensure that the duties on LEAs to give notice to or serve a document on the child as well as the parent are deliverable through means appropriate to the communication needs of the child. We also consider that the pilot and evaluation phase will be crucial in identifying effective means of communicating with and engaging children with the new rights available to them.

73. We therefore recommend that requirements to ensure that the notice and service of documents are delivered in an appropriate format are included in guidance.

---

[57] ED10, Written Evidence
[58] ED13, Written Evidence
[59] RoP, paragraph 46, 14 May 2009
[60] RoP, paragraph 32, 11 June 2009

Sections 3 & 10: Case Friends

Background

74. Sections 3 & 10 of the proposed Measure allow for children to have a 'case friend' to make representations on their behalf. They allow regulations to be made in relation to:

- specifying cases in which a child must have a case friend;
- circumstances in which a person may or may not act as a case friend;
- making provision about the appointment or removal of a case friend.

Evidence from Witnesses – General Views

75. A number of views were expressed by witnesses regarding those who should be case friends. In their written evidence SNAP expressed a view that:

> "we are not confident that one off advocates, teachers or social workers will be appropriate in the case friend role although we recognised that the parent and teacher are most often the people that will turn to for help and advice. Our experience is that professionals in health, education, schools and social care often feel bound by hierarchy."[61]

76. In explaining this view further, SNAP informed us that:

> "There needs to be recognition of what is required of the case friend. Understanding the wider picture, gathering the evidence and supporting the young person to put a case file together for a tribunal is quite a significant piece of work. We have parent partnership and we have supported parents who have successfully been to tribunal and have represented themselves, but they have needed that support and the knowledge and understanding of the system and the legislation. So, the 'case friend' will need to have time. We all know that time is limited in the professions."[62]

77. SNAP also recognised the role of such professionals in helping case friends due to their knowledge of the child particularly where there are complex communication problems. However, they also raised concerns that:

> "the case friend role is so intimate that it is not appropriate for someone such as a learning support assistant or a teacher. The involvement with the family and with the young person and the delving into the young person's background is outside of their normal role - it is completely different from the role that they normally perform".[63]

[61] ED5, Written Evidence
[62] RoP, paragraph 192, 4 June 2009
[63] ibid, paragraph 195

78. In contrast the Children's Commissioner for Wales stated that "If a child is to choose someone other than a parent, it is likely that they will choose a teacher"[64]. He added:

> "This however, may place the teacher in the difficult position of supporting a child in an appeal against a decision of the LEA. It will be essential that the teacher's role as a lay advocate is clearly explained in any guidance resulting from this proposed Measure so that the complexities and complications are fully explored. Social workers may also find themselves in a similar position"[65].

79. He also told us that:

> "guidance and regulation need to come out that is similar, in some senses, to the Public Interest Disclosure Act 1998, whereby whistleblowers can be reassured that they will not be victimised if they were to support someone as a case friend. In the past, social workers have told me that they have been highly dissuaded by their employers from supporting young people in this kind of circumstance"[66].

Evidence from Witnesses - Parental Consent

80. The issue of parental consent being required to enable a child to appoint a case friend raised concerns for a number of witnesses.

81. In oral evidence SENTW recognised that:

> "it is an incredibly thorny issue. If you are going to stick with parental consent, you are effectively vetoing the right of the child and, quite frankly, in some respects, we are therefore wasting our time"[67].

82. They added that:

> "No-one wants to drive a wedge between the child and its parents or ruin that relationship in any way, but the child must have an unfettered right to appeal"[68].

83. The WLGA/ADEW also recognised the difficulties of this issue stating that:

> "In a year's time, we will open a brand new disability-adapted mainstream school that will host most special needs, and the one coming after that will host all special needs. However, it is a great step change for a parent to understand that that can be made to happen. You hit a tension there; if a child has been at a mixed playgroup, including some children with special needs, and wants to remain with

[64] ED4, Written Evidence
[65] ED4, Written Evidence
[66] RoP, paragraph 184, 4 June 2009
[67] RoP, paragraph 47, 14 May 2009
[68] ibid

that group, but the parent wants them to go to a closed setting. I think that there is an issue there, and this proposed Measure comes right up against that. Formalising it will not be simple"[69].

84. SNAP also referred to these difficulties and the need to involve parents without taking rights away from the child. They informed us that:

> "It is about involvement and acceptance that the child has this right – it is a case of saying 'Let's work together on this', rather than an issue of whether to act with or without parental consent. Parental consent should not be an issue if a child has a right"[70].

85. Regarding the potential difficulties that could arise from a conflict between the child and the parent SNAP suggested that:

> "It is about working together and using that situation to try again to resolve the issues at the earliest opportunity, and to reduce stress and anxiety for the child and for the family"[71].

86. A number of witnesses raised the issue of whether or not case friends should be subject to Criminal Records Bureau (CRB) checks to ensure children and young people are protected. The WLGA/ADEW supported the requirement of such checks on case friends and stated that:

> "We also need to look at frequency in relation to that, because we are talking about the most vulnerable young people, who may not be able to articulate that something was wrong in the contact they had – that something was not right or was inappropriate. Therefore, the protection levels almost need to be ramped up here"[72].

87. The Children's Commissioner for Wales questioned whether checks would be required of teachers and social workers who have already been subject to such checks and would be acting within their original roles[73].

88. SNAP stated that:

> "There needs to be a strong message in the proposed Measure that you would expect a 'case friend' to be checked unless appointed by the family. I say that with some real concerns because we know that child abuse can occur with family members who are known to the child. It is difficult"[74].

89. SENTW also referred to some of the practical issues arising from undertaking child protection checks and informed us that:

---

[69] RoP, paragraph 51, 4 June 2009
[70] ibid, paragraph 166
[71] ibid, paragraph 168
[72] ibid, paragraph 56
[73] ibid
[74] ibid, paragraph 181

> "If you demand CRB checks, they are very effective, but they are extremely time consuming, which brings us into a time situation, and they are expensive"[75]

Evidence from the Minister

90. With regard to those eligible to be appointed as case friends, the Minister indicated that "We have cast a fairly broad net in relation to those who can act as case friends"[76]. She added that these could include teachers, advocates, social workers, special educational needs co-ordinators, family members or family friends[77].

91. The Minister also informed us that:

> "We did not feel that it was appropriate to list those who were eligible on the face of the proposed Measure, because that could lead to leaving out certain individuals. However, the pilot phase will show us who is likely to emerge as being appropriate case friends, and we may then have to consider whether we need to be more prescriptive"[78].

92. In response to issues raised by witnesses that it may be inappropriate for teachers to act as case friends, due to the potential for conflict with their role as the child's teacher, the Minister stated that:

> "We have to ensure that the Local Authority makes the arrangements very clear to ensure that someone who acts as an advocate for the young person, such as a primary carer, a social worker, a designated teacher or an independent person, are clearly set out in policies and protocols in the guidance for looked after children[79]".

93. The Minister considered that if local authorities were complying with this guidance it was not likely that conflict issues could arise between local authorities and teachers or social workers regarding children that are not looked after by the local authority[80].

94. We asked the Minister to clarify whether children and young people can choose to appeal or make a claim with the assistance of a case friend or any other representative without parental consent.

95. The Minister said that this would be another area that would need to be explored through the pilot scheme. She stated that:

[75] RoP, paragraph 50, 21 May 2009
[76] RoP, paragraph 67, 14 May 2009
[77] ibid
[78] ibid
[79] RoP, paragraph 40, 11 June 2009
[80] ibid

"We recognise that there will need to be a careful balancing of parental responsibility on one hand and children's rights on the other, so we will give guidance on how a case friend can be appointed"[81].

96. The Minister added:

"At the moment, we suggest that parental consent may be required, but when it reaches a point of regulations, we envisage a parental approval element, which may be a 'yes' or 'no'. Parental consent would be helpful, and we want to reduce the potential for conflict, so guidance and clarity on how a case friend can be appointed is critical"[82].

97. In responding to our concerns that if the appointment of a case friend is dependent on parental consent and the parents refuse consent, this could undermine giving children the right to appeal[83], the Minister stated in written evidence that:

"The practical application of appointing Case Friends needs to be addressed by careful balancing of both parental and children's rights whilst also ensuring that child protection is priority. My officials are currently in discussions with stakeholders, including the Tribunal and Advocacy providers, this will be one of the issues that the Pilot Design and Implementation group will be considering. We will continue to take account of these views before framing regulations".[84]

98. The Minister subsequently clarified that "We have not stipulated that consent is required for children who wish to appoint a case friend; we are saying that this may be desirable"[85]

99 In clarifying this point the Minister stated in further evidence that:

"I indicated that in my view it was inappropriate to put a consent requirement on the face of this proposed Measure and provided my reasons for that view. I concluded by stating that I hoped that the explanation clarified the point that it would not require a young person to have parental consent. What I meant by this was that no provision will be placed on the face of the proposed Measure to require a young person to have parental consent."[86]

100. With regard to checks on case friends the Minister said that case friends would need to be checked against the child protection register. She explained that:

[81] RoP, Paragraph 52, 14 May 2009
[82] RoP, Paragraph 52, 14 May 2009
[83] ibid, paragraph 64
[84] Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 22 May 2009
[85] RoP, paragraph 34, 11 June 2009
[86] Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 24 May 2009

"We will prescribe certain requirements in regulations. We will need to know that that person can meet those requirements, not just the basics"[87].

Our View

101. We have considered the evidence submitted in relation to those eligible to be appointed as case friends and agree with the Minister that this needs to remain broad to avoid the exclusion of certain individuals.

102. However, we also note the views of witnesses who have made suggestions in terms of those suitable to be case friends. Therefore we recommend that details of suitable case friends be included in guidance which will be informed by the pilot and evaluation phase.

103. In terms of parental consent being required by a child or young person to appoint a case friend we note the concerns of witnesses that this would undermine the principle of the proposed Measure. We also have concerns that circumstances when a looked after child or fostered child is making the appeal or claim, may require the consent of the LEA who they are appealing or claiming against, which could represent a conflict of interest. Therefore we recommend that parental consent to appoint a case friend should not be made a requirement through the Measure, in guidance or regulations.

104. We note the concerns of witnesses with regard to the need for criminal record bureau (CRB) checks on case friends in order to safeguard children and young people wishing to appoint case friends. We agree with these concerns and recommend that, a requirement for enhanced CRB checks to be undertaken on all case friends, with the exception of those who have current and satisfactory CRB checks, should be included in regulations.

[87] RoP, paragraph 73, 14 May 2009

Sections 4 & 11: Advice and Information

105. Sections 4 & 11 of the proposed Measure require LEAs to arrange for children with special educational needs or disabled children, as well as their parents to receive advice and information about matters relating to their needs. Section 4 relates to special educational needs appeals and section 11 relates to disability discrimination claims.

Evidence from Witnesses

106. With regard to the duties on LEAs to inform children of their right to appeal a number of witnesses raised concerns regarding how this could be done taking into account the differing ages, maturity levels and the nature of the special needs of the children. The WLGA stated that "it is challenging to imagine how this might be done in a consistent way that can be objectively defended under judicial challenge"[88].

107. The Children's Commissioner for Wales stated that:

> "Simply writing to the parents and to the child may not have the desired effect as there will be no opportunity to check that the child has received the letter and, more importantly, understood the content"[89].

108. He went on to suggest that:

> "It may well be that the Measure should place a specific duty on the school Special Educational Needs Co-ordinator (SENCO) to check both receipt and understanding"[90].

109. These views were shared by SNAP who stated that:

> "for this right to be enacted consideration should be given to specific responsibility to ensuring understanding, better still ensuring access to a case friend. This duty of responsibility could be placed with the SENCO"[91].

110. Children in Wales reinforced these views but suggested that the responsibility could be widened by the proposed Measure placing a specific duty of responsibility on other professionals, including teachers or SEN co-ordinators, or an adult who knows the child well and that the child trusts[92].

111. The Association of Educational Psychologists raised concerns that the issue of competency does not seem to have been addressed in relation to the duty on LEAs to inform children of their rights to appeal. They stated that

[88] ED3, Written Evidence
[89] ED4, Written Evidence
[90] ibid
[91] ED5, Written Evidence
[92] ED10, Written Evidence

"there is therefore a supposition that all children will receive information regardless of whether or not they will benefit from being given this"[93].

Evidence from the Minister

112. In giving evidence the Minister provided details of how LEAs will implement and deliver the duties under sections 4 & 11. In doing so she explained that this would relate to the pilot schemes whereby:

> "we are looking, for example, at the role of the SENCO as we move from welfare-based to rights-based arrangements. There is a need for those professionals who are already involved in a disabled child's life to be very engaged in imparting this information and in ensuring those children and young people have access to appropriate information"[94].

113. The Minister in giving evidence suggested that communicating advice and information effectively would be developed through guidance. She stated that:

> "In the proposed Measure there is a clear requirement for children to be advised of their statutory rights; that is a minimum requirement. We would not be relying solely on letters, because there often has to be an explanation of letters. We think that guidance, as a result of good practice and pilot projects, is key"[95].

Our View

114. We note the concerns of witnesses regarding the practical issues arising from the requirement on LEAs to arrange for children, with special educational needs or disabled children, as well as their parents to receive advice and information about matters relating to their needs. We share these concerns and recognise the importance of ensuring the receipt and understanding of such advice and information.

115. We therefore recommend that consideration be given, during the pilot and evaluation phase, to determining upon whom this responsibility should be best placed. Upon determining this we recommend that the Minister incorporate this into future guidance under section 4 of the proposed Measure.

Sections 5 & 12: Resolution of disputes

Background

116. Sections 5 & 12 of the proposed Measure relate to the resolution of disputes with section 5 relating to Special Education Appeals and Claims by Children and section 12 relating to Disability Discrimination Claims.

[93] ED12, Written Evidence
[94] RoP, paragraph 79, 14 May 2009
[95] RoP, paragraph 51, 11 June 2009

117. Both sections place a duty on LEAs to make arrangements for partnership and disagreement resolution services and inform children of their rights to access them. The proposed Measure will also place a duty on LEAs to reconfigure their existing services or arrangements to take into account children's appeal and claim rights.

Evidence from Witnesses

118. Some witnesses raised concerns regarding who should provide disagreement resolution services. The WLGA/ADEW stated that:

> "Given that SNAP is now the parent's service provider then the service for children may need to be commissioned from a new provider in order to secure confidence regarding independence, for all stakeholders"[96].

119. They explained that "There is an issue about separation, in order to make it transparently child-centric"[97] and added that:

> "There is a transparency issue here; we need to ensure that we are not talking to an organisation that we commission. There may be a third player, who is not the person that works for us but who comes from another Authority. It is not clean enough in terms of proper due process"[98].

Evidence from the Minister

120. As regards the separation of resolution support services for parents and children in order to ensure confidence regarding independence, we raised concerns about instances where the child and the parent may have differing views and the child being able to access independent resolution support services[99]. We considered that such situations could present difficulties particularly where the same organisation is supporting both the parents and child through the process[100].

121. The Minister was of the view that this "is chiefly a matter for Local Education Authorities". She added that:

> "We do not want to create a separation unless the pilot projects clearly show that we need to have some opportunities for separation. The key thing is that we need to establish minimum standards. We already have the SEN Code of Practice, which provides us with a framework. There should be some degree of flexibility and local determination to ensure those standards are met and also to make arrangements for the support of the services"[101].

---

[96] ED13, Written Evidence
[97] RoP, paragraph 36, 4 June 2009
[98] ibid
[99] RoP, paragraph 54, 11 June 2009
[100] ibid
[101] ibid, paragraph 53

Our View

122. We acknowledge the views of the Minister, but given the evidence provided by witnesses in support of the need for transparency, we agree and recommend that there is a need to split the provision of resolution support services for parents and those provided for children. We are of the view that this would ensure that services provided to children are entirely independent particularly in instances where there is disagreement between the child and parent. We therefore recommend that the Minister gives consideration to bringing forward amendments to sections 5 and 12 of the proposed Measure that separate the provision of resolution support services for parents and those provided for children.

Sections 6 & 13: Independent Advocacy Services

Background

123. In order to assist children in resolutions processes, appeal/claim case preparation and support or representation at hearings sections 6 & 13 of the proposed Measure place a new duty on LEAs to provide access to independent advocacy services.

Evidence from Witnesses

124. The proposed Measure requires local authorities to provide access to independent advocacy services for children. Advocates will be expected to be able to assist children in resolution processes, appeal/claim case preparation and support or represent them at hearings. There were reservations expressed by a number of witnesses about the appropriateness of this.

125. The Children's Commissioner indicated that:

> "The development of the provision of independent advocacy services in education which is being undertaken at present by Children and Young People's Partnerships may well offer a child a way of avoiding the stress and cost of having legal representation. However the development of such services is ongoing and therefore there will need to be consideration given to how children can be represented by other 'lay' advocates such as teachers and other staff in schools"[102].

126. In further questioning the Children's Commissioner for Wales confirmed a preference for nationally commissioned advocacy services that would be independent of Local Authorities.

127. This view was also shared by National Deaf Children's Society (NDCS) Cymru[103] who also suggested that in order to make a system of independent

[102] ED4, Written Evidence
[103] ED13, Written Evidence

advocacy feasible, advocates would need complete geographic coverage, as well as accessibility via telephone, text phone, SMS and internet portals[104]. They added that:

> "This is particularly important both for children who may have difficulty communicating directly or in writing and due to the geography of Wales where a child may be many miles from the nearest city or town"[105].

128. Witnesses also highlighted the importance of children and young people being able to access independent advocacy that will provide them with independent information about their options. Children in Wales stated that:

> "new services must be rolled out as part of the generic advocacy provision for all children and young people, i.e. within the Model for Delivering Advocacy for Children and Young People in Wales"[106].

129. They also stated that:

> "In order to provide sufficient services for disabled children who wish to appeal, we would recommend the development of a pool of dedicated advocates who are able to work across Wales. This would address the two fold issues of being able to communicate with disabled children and having the additional skills and understanding to ascertain the wishes and feelings of the child, within the appeals structure"[107].

130. Furthermore, Children in Wales identified that the provision of sufficient skilled independent advocates to support children and young people could be a potential barrier to implementing the provision of the proposed Measure. They stated:

> "The advocates will not only be expected to listen to children's views and concerns but to assist the children in the resolution processes, appeals/claim case preparation and support, or represent them at hearings. This is a huge expectation and the provision of appropriate training is essential here. The training must be standardised across Wales otherwise it could result in an inequality of provision[108]".

131. Similar concerns were raised by NDCS Cymru who highlighted the differences between assisting children with resolution processes, appeal/claim case preparation and support at hearings and representing them at hearings. They informed us that:

> "advocates and representatives require specific skills sets. Advocates will need to be able to work well with children and draw out their opinions, where as representatives will need to have the specific skills required in order to articulate a case at Tribunal. Although possible, it

[104] ED13, Written Evidence
[105] ibid
[106] ED10, Written Evidence
[107] ibid
[108] ibid

may be difficult to recruit personnel who possess both of these essential skills sets. Therefore, NDCS Cymru would question whether it will always be appropriate for the same person to perform both advocacy and representative roles"[109].

132. Similarly AEP suggested that there may be difficulties in recruiting suitably qualified people to act as advocates[110].

133. Children in Wales also raised the importance of ensuring that advocacy services are available in the child's chosen language[111]. This view was shared by the Welsh Language Board who also added that consideration should be given to Welsh medium provision of information to children on their appeal rights, arrangements for and informing children of access rights to partnership and disagreement resolutions services and advocacy services[112].

Evidence from the Minister

134. In responding to questions regarding how the proposed Measure would ensure that advocacy provisions provided by LEAs are independent given that LEAs will be defending appeals and claims the Minister stated:

> "The commitment to independence is quite clear in this proposed Measure. It will place a duty on LEAs to provide access to independent advocacy support, including representation"[113].

135. She further explained that:

> "we currently have minimum standards for advocacy providers, and the pilot design group and the pilot projects will work together to ensure that standards of independence are met at all times, and the report will come back to us on how successful that has been"[114].

Our View

136. In discussing the provision of independent advocacy services we considered a recommendation made by the Children and Young People Committee in respect of its report on 'Advocacy Services for Children and Young People in Wales'. The recommendation stated that:

> **"Following appropriate consultation, the Welsh Assembly Government should establish a centrally funded national advocacy unit, with responsibility for commissioning independent advocacy services in local areas"[115].**

[109] ED13, Written Evidence
[110] ED12, Written Evidence
[111] ED10, Written Evidence
[112] ED6, Written Evidence
[113] RoP, paragraph 93, 14 May 2009
[114] ibid
[115] Children and Young People Committee, Report: Advocacy Services for Children and Young People, March 2008

137. A further report of the Children and Young People Committee on the development of advocacy services for children and young people commented that:

> **"We expressed disappointment that the first recommendation of the report - the establishment of a centrally funded national advocacy unit with responsibility for commissioning independent advocacy services in local areas - was only agreed to in part"[116].**

138. We also note that in response, although disappointed with the outcome, the Children and Young People Committee did not suggest an alternative structure for commissioning independent advocacy services, and recommended that:

> **"Members of the National Independent Advocacy Board should have the opportunity to report to the National Assembly for Wales, on an independent basis of the Welsh Assembly Government"[117].**

139. We note the views of the Children and Young People Committee and witnesses in relation to the importance of children and young people being able to access independent advocacy that will provide them with independent information about their options. However, in terms of addressing this we support and welcome the Minister's commitment to monitoring and ensuring that standards of independence will be met at all times.

Sections 7 & 14: Tribunal Procedure

140. Section 7 amends section 336 of the Education Act 1996 which gives the Welsh Ministers the power to make regulations about Tribunal proceedings. Section 14 amends section 28J of the Disability Discrimination Act 1995 by removing the Secretary of State's power to make regulations governing Tribunal proceedings on disability discrimination claims, and conferring those powers on the Welsh Ministers.

Evidence from Witnesses

141. We heard evidence from a number of witnesses regarding the implications of the proposed Measure in ensuring that children and young people can meaningfully participate in Tribunals.

142. In their oral evidence SENTW assured us that they were confident that Tribunal procedures could be amended accordingly to ensure the meaningful participation of children. They stated that:

[116] Report of the Children and Young People Committee, Scrutiny of developments in the provision of advocacy services to children and young people in Wales, May 2009
[117] ibid

> "We have some experience of children at tribunals, and we have discussed that and set an informal precedent on how we deal with them. Tribunals are very informal and not like a court at all"[118].

143. They further explained that:

> "The interesting thing to note is that, as I touched on before, our educational experts are head teachers and child psychologists, and they take over the questioning. The legal chair takes a back seat, because that is not their area of expertise, and the educational experts come to the fore and talk to the children using language they can understand, so that they get the maximum out of it. So I am quite confident that we will formalise that"[119].

144. In contrast, evidence received from other witnesses questioned whether children of primary school age could participate meaningfully in tribunal procedures. The WLGA/ADEW stated that:

> "Many of them cannot actively participate. You are securing their evidence. We are now using technology in many ways to secure children's evidence and their views, filming and so on with consent; many children would find that awful and truly challenging. You can see that from the current position on reviews, where young people have an entitlement to come into reviews and express their view. In my experience, even in the most inclusive school, children come and express their view, but do not want to stay"[120].

145. They also suggested that:

> "even with a group of familiar people, they can be coached, they can be enabled and you can lift them up to come and say what they thought about school this year, or communicate at a fairly core level what they have experienced, but to go to a group of strangers, the step change is huge"[121].

146. Further concerns were raised about whether children with complex types of appeals could participate meaningfully in tribunal procedures. The WLGA/ADEW outlined the challenges that could be faced and stated that:

> "you come up with the question of whether a child can give informed consent to whatever it is that happens to them. Legally, that rests with the parent for most of these children. So, even if they are in their mid-teens, where, in other areas of activity, young people can give consent, these young people cannot. That is what this is walking into: tension between the parents still being the ultimate arbiter"[122].

---

[118] RoP, paragraph 74, 21 May 2009
[119] ibid
[120] RoP, paragraph 78, 4 June 2009
[121] ibid
[122] ibid, paragraph 80

147. The WLGA/ADEW continued by questioning "how a child gets to know what the choices are available to them when they are cognitively challenged"[123]. They added:

> "That is hard, so tailoring that for the child and getting the child to voice it in such a way as to ensure that they are making a proper, informed statement of their opinion is a skilled task"[124].

148. In discussing whether it was possible to achieve this task, the WLGA/ADEW responded by informing us that:

> "it is a long development task, which I would not underestimate In my opinion, if someone said that that system could be up and running within 18 months or two years, they are a better person than me because this is a complex field and it must be given due gravity. We must not do this trivially, but properly"[125].

149. There very differing views regarding the attendance of children at Tribunal Hearings. The Children's Commissioner stated that:

> "A child or young person's presence at the hearing would also ensure that they would be able to understand the arguments and may well be better able to accept the decisions made"[126].

1450. However, SENTW suggested that the child, for certain reasons, may not always be permitted to hear all the evidence even if they are the appellant.

Evidence from the Minister

151. The Minister emphasised the importance of tribunal hearings being 'child friendly' and stated:

> "The pilot project is crucial in showing us what more we need to do to understand how children and young people can be supported in accessing services to help them make decisions"[127].

152. In relation to the presence of children and young people at tribunal hearings the Minister explained that the proposed Measure established children and young people as potential appellants to the tribunal and that there will be a presumption that an appellant has an entitlement to be present[128]. An Official accompanying the Minister confirmed that:

> "At the moment, the regulations say that a child may be permitted to address the tribunal. I think that we need to make that a lot stronger so

[123] RoP, paragraph 81, 4 June 2009,
[124] ibid
[125] ibid, paragraph 83
[126] ED4, Written Evidence
[127] ibid, paragraph 105, 14 May 2009
[128] ibid, paragraph 57, 11 June 2009

that it says that the child has an absolute entitlement to address the tribunal. That is what we will be looking to do"[129].

153. In further evidence, the Minister clarified that:

"as the Tribunal has judicial independence, it would be inappropriate for us to issue formal written guidance to the Tribunal. We will however work closely with the Tribunal with a view to prescribing any exceptional circumstances in Tribunal procedural regulations"[130].

Our View

154. We note the evidence received from witnesses highlighting the potential challenges in terms of ensuring the meaningful participation of children, given the breadth of ages and those with complex needs, in tribunal procedures. Therefore we recommend that the pilot and evaluation phase be used to gather evidence and develop guidance relating to the meaningful participation of children in tribunal procedures.

155. We note the evidence received from witnesses in support of the child or young person, as the appellant, being present at a tribunal hearing. We are of the view that children and young people should be present at such hearings. However, we do note concerns from witnesses that there may be circumstances in which the child or young person's presence may be inappropriate.

156. Therefore we recommend that the Minister give consideration to amending Tribunal procedural regulations to enable children and young people to attend tribunal hearings unless there are exceptional circumstances whereby such attendance is deemed inappropriate. We further recommend that the pilot and evaluation phase be used to identify such circumstances.

Section 17: Piloting the rights of a child to appeal or make a claim

Background

157. Section 17 of the proposed Measure makes provision for Welsh Ministers to make regulations to undertake an initial pilot and evaluation phase in some local authority areas before the legislation is implemented throughout Wales.

Evidence from Witnesses

158. There were mixed views regarding the undertaking of an initial pilot and evaluation phase in some local authority areas, before the legislation is implemented throughout Wales. There was general support in favour of an

[129] RoP, paragraph 58, 4 June 2009
[130] Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 24 May 2009

initial pilot and evaluation phase but many witnesses commented on the practical issues that may need to be addressed.

159. In discussing the extent to which the initial pilot and evaluation phase would impact on the proposed Measure the SENTW stated "That will depend on what we find out during the pilot scheme. It depends how many appeals we get"[131].

160. SENTW informed us that:

> "To bring this in properly and to roll it out without having a pilot scheme would be virtually impossible. I would hate to roll this out across Wales and for it to fail because it had not been tested properly. In doing it this way, we can test it properly and then, hopefully, when it is rolled out, it will be rolled out in a form that we know is going to work and that will bring a lot of benefit to everyone"[132].

161. The WLGA/ADEW stated that:

> "unless it is properly piloted and tested, the unforeseen consequences for children, young people and their parents and carers will not be understood and accommodated within the legislation. If this Measure is not based on clear evidence, then changes within this complex and often emotionally charged area have the potential to do immense harm".[133]

162. In providing clarification of what was meant by "immense harm" the WLGA/ADEW in oral evidence explained that "if we create gaps in this process, we will all be taken to tribunal and, beyond that, we will face wider legal challenge, which is hugely costly."[134]

163. During discussions the WLGA/ADEW provided further explanation of the potential to do 'immense harm' and stated that:

> "For example a child may be left in a waiting room while its anxious parents want something else and the child possibly wants something else. A judicial process takes over and everyone is hanging in limbo for 15 months. That is also on top of the parent having to deal with a child's needs daily. Parents need confidence and assistance and certainty of outcome and they need to be able to make a quick challenge within a framework that they can see and understand. If it has holes in it, the case will go to court, which is where the harm will come in. The term 'immense harm' refers to delay"[135].

164. Further concerns were raised by the Children's Commissioner who stated that:

---

[131] RoP, paragraph 98, 21 May 2009
[132] ibid
[133] ED3, Written Evidence
[134] RoP, paragraph 87, 4 June 2009
[135] ibid, paragraph 93

"It must be recognised that the number of children who choose to make an appeal will be extremely small. If the pilot is to provide sufficient data to inform the full implementation of the Measure, the pilot areas will need to be carefully chosen to ensure that this data can be collected."[136]

165. SNAP also made reference to the pilot areas and suggested that:

"we need to give full consideration to the rural areas of Wales, the language and also across needs. So we must think about this, because if we just picked one area, that might not be the case. So there should be some flexibility in the thinking about how the pilot would work".[137]

166. The WLGA/ADEW informed us that the pilot phase:

"will not provide comprehensive evidence because they are relatively small pilots and we are talking about a relatively small population. However, they will give you casework examples from which you can extrapolate operational disciplines, principles and practice".[138]

167. They added:

"I do not think that we will get a comprehensive result where we understand the whole process, but we will get a fairly robust set of exemplars with which we can say, we can build a code and regulations that are consistent and make sense"[139].

168. The WLGA/ADEW also referred to the importance of the pilot and evaluation phase and stated that:

"We know from other Welsh Assembly Government initiatives over recent years that the better and fuller the evaluation of the pilots, the more successful the roll-out is likely to be. The issues dealt with here are particularly complicated and have quite significant implications and ramifications. Whilst it is important in every instance to evaluate pilots fully in this case, it is absolutely essential".[140]

169. Furthermore, the WLGA/ADEW suggested that consideration should be given to linking the pilots for the proposed Measure with the pilots on statementing as they are closely linked.

170. Similar views were shared by the AEP who indicated that:

[136] ED4, Written Evidence
[137] RoP, paragraph 235, 4 June 2009
[138] ibid, paragraph 85, 4 June 2009
[139] ibid
[140] ibid

> "If this legislation goes ahead there will be a need to pilot it although the piloting process would have been better undertaken before the legislative stage. A properly piloted project would have hopefully have avoided some of the more obvious pitfalls of this proposed legislation".[141]

Evidence from the Minister

171. In her evidence, the Minister informed the committee that:

> "we decided to proceed with implementing the pilot phase followed by a full roll-out. It takes account of the way that we are proposing this based on the consultation process. It allows us to develop and configure key support services. The evidence from the pilots will have an impact. It may have a number of effects that will impact on the proposed Measure"[142].

172. The Minister added that section 18 of the proposed Measure would give the Ministers the power to amend the proposed Measure and any changes would be subject to scrutiny by the Assembly under the affirmative procedure. She added that "it will enable the Assembly to scrutinise and debate the principles of the proposed changes to the proposed Measure"[143].

173. Discussions on section 18 of the proposed Measure identified concerns in relation to the breath of the powers of Welsh Ministers to amend the proposed Measure by regulation following the pilot and evaluation phase. We asked the Minister whether consideration had been given to drafting a proposed Measure in order to set up a pilot and then drafting a further proposed Measure to put in place the full and broader powers, once the pilot phase has been evaluated.

174. In responding to these questions the Minister informed us that seeking limited powers to implement a pilot and evaluation phase, followed by broader powers via a second proposed Measure, could significantly affect the timescale for implementing the right across Wales. The Minister stated that:

> "there is a need for us to progress with this and activate the right as quickly as possible for children. We do not feel, at this stage, that that is the route that we would want to take because we think that the pilot phase will give us an opportunity to get this right in the proposed Measure"[144].

175. During our questioning of the Minister we established that the pilot phase is expected to last two years[145] with the possibility of laying the pilot scheme report and draft Order in mid May 2013[146]. Given these timescales

[141] ED12, Written Evidence
[142] RoP, paragraph 111, 14 May 2009
[143] ibid
[144] RoP, paragraph 79, 11 June 2009
[145] ibid, paragraph 77
[146] ibid, paragraph 93

this would involve the pilot phase finishing in September 2012. On that basis, it would be expected that the pilot phase commence in September 2010, to enable sufficient time before then to make regulations under section 17 and the necessary preparations to implement them.

176. In response to concerns raised regarding whether the pilot would produce sufficient evidence the Minister informed us that: "it is possible that we will need to look at piloting in an area where there is a higher number of appeals and an area with a lower number of appeals"[147].

177. The Minister added that "We have a pilot design group to ensure that we learn as much as possible from the pilot and extend it if necessary"[148].

178. In terms of linking the pilot and evaluation phase to other ongoing pilots the Minister confirmed that there would be an opportunity for some co-ordination and the possibility of interlinking in terms of the areas chosen for the ongoing pilot on statementing that was announced in October 2008[149].

Our View

179. In light of the evidence received outlining the potential timetable for the piloting, evaluation and possible amending of the proposed Measure, we consider that there is no reason to explain why it would take from September 2012 to May 2013 to prepare regulations under section 18 to amend the proposed Measure. We consider that whilst there clearly has to be an evaluation of the pilot and a report prepared under section 17(5), it could be expected that any regulations under section 18 would be developed as the pilot proceeds. The regulations under section 17 should have covered all the issues, and regulations under section 18 should only cover issues arising from the pilot, as powers under preceding sections could be used to do everything else.

180. Furthermore we consider that local authorities not affected directly by the pilot would still have had plenty of time to consider what they would need to do to implement the Measure from September 2013. For any changes of consequence arising from the pilot, there should be consultation with stake holders in relation to the regulations, and there is no reason why that cannot take place simultaneously with any consideration by the Assembly under the super-affirmative procedure.

181. We have carefully considered the evidence received from witnesses that the issues being explored through the pilot and evaluation phase are particularly complicated, could have significant implications and potentially present serious and complex situations.

182. In light of this, we have discussed the appropriateness of addressing such situations through future regulations. As such, we

[147] RoP, paragraph 119, 14 May 2009
[148] ibid
[149] RoP, paragraph 66, 11 June 2009

have given serious consideration to the option of amending the proposed Measure in order to implement a pilot and evaluation phase and then drafting a further proposed Measure to put in place the full and broader powers, once the pilot phase has been evaluated.

183. However, having considered the evidence we accept the framework approach outlined in the proposed Measure and that a pilot and evaluation phase be undertaken to inform future amendments made under the powers outlined in section 18. However, we strongly recommend that any future orders to amend the proposed Measure, after the pilot and evaluation phase, are subject to the super affirmative procedure. For that reason, we ask that the Minister give consideration to bringing forward an amendment to this effect.

184. In terms of the pilot and evaluation phase we are of the view that direct links should be made with ongoing pilots on statementing.

185. Furthermore, given the evidence received from witnesses we recommend that the proposed Measure should include a requirement for a further consultation process with key stakeholders on conclusion of the pilot and evaluation phase. We therefore ask that the Minister consider bringing forward an amendment to this effect.

Section 18: Power to make provision about appeals and claims by a child

Background

186. Section 18 provides the Welsh Ministers with a power to make provision by order about the matters being piloted. This includes a power to add, remove, or modify rights, to amend or repeal provisions of Part 4 of the Education Act 1996 and Part 4 of the Disability Discrimination Act 1995, and to make consequential amendments and repeals to provisions of those Acts.

187. The purpose of the power is to enable the Welsh Ministers to make further provision about the rights of children to make appeals and claims in light of information gathered during the pilot phase. The power will also allow Welsh Ministers to modify the rights in order to address any issues that only become apparent after the Measure is rolled out generally across Wales subject to a 24 month time limit for the use of the order making power which starts from the end of the pilot phase.

Evidence from Witnesses

188. A number of witnesses made reference to the powers in section 18 for Welsh Ministers to amend existing, primary legislation by secondary legislation (by order) such as the Education Act 1996 and Disability Discrimination Act 1995.

189. SENTW, in written evidence, supported the "opportunity contained in the Measure to make amendments to existing legislation on conclusion of the pilot study"[150].

190. They stated that:

> "Given the precedential context of the Measure it is important that there is flexibility to adjust legislation and provision in the light of the evaluation study"[151].

191. The Children's Commissioner for Wales also shared this view and stated in written evidence that "It is entirely sensible that they should have the power to react to the evaluation of the pilot and evaluation phase".[152]

192. However, NDCS Cymru expressed a view that although Welsh Ministers are bound to observe the report following the evaluation of the pilots, given the significance of the legislation they strongly urged that Ministers are required to consult on proposed changes prior to implementation[153].

Evidence from the Minister

193. In oral evidence the Minister supported the need for the powers outlined in section 18 of the proposed Measure and explained that:

> "The purpose of that power is to enable Welsh Ministers to make further provision in relation to the rights of children to make appeals and claims in light of the pilot and to modify those rights if certain issues become apparent"[154].

194. We raised concerns with the Minister regarding the breadth of the powers in section 18 and the potential to allow a Welsh Minister to significantly amend the proposed Measure by significantly adding, removing or modifying the rights by order of provision.

195. In response to these concerns the Minister outlined that the proposed Measure is pioneering and cannot be underpinned by any relevant past or present research or experience. She explained that:

> "we have taken this decision to pilot the rights, and the pilots could throw up new, and possibly, unforeseen evidence. We therefore need to retain a degree of flexibility, and we do not want to pre-empt the outcomes of the pilots, or any recommendations made by the report, to which we must have regard"[155].

---

[150] ED1, Written Evidence
[151] ibid
[152] ED4, Written Evidence
[153] ED13, Written Evidence
[154] RoP, paragraph 128, 14 May 2009
[155] ibid, paragraph 88, 11 June 2009

196. With regard to the possibility of a further proposed Measure, to follow the pilot phase and to implement the outcomes of that pilot, the Minister stated that:

> "We are entering uncharted waters, and we need to get things right. It is not always possible to move quickly using an Assembly Measure as an amending vehicle. I have asked that flexibility be achieved through the provisions in the proposed Measure"[156].

197. The Minister also informed us that any orders made under section 18, to amend the proposed Measure, would be subject to the affirmative procedure in order to provide opportunities to consult[157].

198. However, during our discussions we questioned the Minister as to whether consideration had been given to using the super affirmative procedure to approve any order made under section 18.

199. In explaining the reasoning for not using the super affirmative procedure the Minister informed us that:

> "although it could give the Assembly an opportunity to rigorously scrutinise a draft order, it could prove to be a very lengthy procedure and that could delay the roll-out of the proposed Measure significantly"[158].

200. The Minister illustrated this point by explaining the super affirmative procedure and informed us that it could provide for a Minister to lay a draft order before the legislature, which then has 60 days to scrutinise it and make any representations with regard to that draft order. On expiry of the 60 days, the Minister can consider representations made during that period, and then proceed to lay a draft Order, with or without modifications[159].

201. The Minister continued by drawing comparisons with the affirmative procedure and informed us that it allows the Assembly 40 days to scrutinise, debate and vote on a draft Order[160].

202. During our discussions on section 18 we raised concerns regarding the use of powers under section 18 by future Welsh Ministers. We noted that the pilot and evaluation phase would be facilitated under the same Minister that set out the principles of the proposed Measure but raised concerns that different Welsh Ministers could potentially amend those principles using section 18.

203. An official accompanying the Minister assured us that "the proposed Measure has been drafted in such a way that the exercise of the section 18

---

[156] RoP, paragraph 88, 11 June 2009
[157] ibid
[158] ibid, paragraph 92
[159] ibid
[160] ibid

power is linked to the pilot phase"[161]. She added that "we have provided the link in section 18(4) by imposing a requirement that a pilot report is laid"[162]. She continued by stating that "there is a reference to a report on the piloted provisions in section 17(5)(a). So we have specifically linked it to the pilot phase"[163].

204. In further evidence, the Minister clarified the links between the powers in section 18 and the pilot and stated that:

- "there must be regard for the report published under section 17(5) of the measure. Section 17 concerns the pilot scheme and section 17(5)(a) refers to a report on how the piloted provisions were implemented and how effective they were in promoting the well-being of children ("the pilot report")

- the Assembly Government must lay the report before the National Assembly for Wales; and

- the power to amend the Measure must be exercised within 24 months of the pilot regulations ceasing to have effect. This provision which is found in section 18(4)(a) is essentially a 'sunset' provision which means that if the power in section 18 is not exercised within 24 months of the pilot regulations ceasing to have effect, the power in section 18 will cease"[164].

Our View

205. Having considered the Ministers explanation, we discussed the advantages of the super affirmative procedure in that it allows for wider scrutiny and consultation. We note that, although the affirmative procedure involves a plenary debate it does not include wider scrutiny and therefore limits possible challenge.

206. We feel that the need for wider scrutiny is particularly significant given that the breadth of the powers under section 18[165]. Therefore we have concerns regarding how these powers could be used by future Ministers to amend the principles of the proposed Measure.

207. Furthermore, given the breadth of these powers and the potential to significantly amend the proposed Measure, we recommend that there should be a requirement for public consultation on any changes to the proposed Measure made using section 18.

208. We also consider that the framework powers being sought under this proposed Measure relate to issues of fundamental principle, such as whether a child can or cannot appeal. Whilst we recognise the

[161] RoP, paragraph 105, 11 June 2009
[162] ibid, paragraph 109
[163] ibid, paragraph 111
[164] Letter from Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills, 22 May 2009
[165] RoP, paragraph 94, 11 June 2009

unusual circumstances in which the proposed Measure has been drafted, we are of the view that the exercise of these framework powers should be subject to rigorous scrutiny. We therefore recommend that the use of section 18 of the proposed Measure be subject to the super affirmative procedure

209. We also recommend that a maximum timescale for the pilot stage should be set out in the proposed Measure.

5. Report of the Subordinate Legislation Committee

Background

210. The Subordinate Legislation Committee considered the proposed Measure, in accordance with Standing Order 15.6 on 1 and 8 June, taking evidence from the Minister and her officials[166] and Tomorrows Wales at the latter meeting[167]. The Committee laid its report before the Assembly on 24 June 2009 and can be found at Annex 5.

Our view

211. We have considered the report of the Subordinate Legislation Committee and have taken note of it in making our recommendations.

6. Financial Implications – Finance Committee consideration

Background

212. The Finance Committee considered the proposed Measure at its meeting on 11 June 2009, in accordance with Standing Order 14.2. It took evidence from the Minister and her officials.[168]

213. The Committee laid its report before the Assembly on 25 June 2009, unfortunately as a result, we have not been able to consider the report in detail.

[166] RoP, Subordinate Legislation Committee, 1 June 2009
[167] ibid, 8 June 2009
[168] RoP, Finance Committee, 11 June 2009

Legislation Committee No.3
Proposed Education (Wales) Measure

Consultation Responses

Responses	Organisation
ED1	Special Educational Needs Tribunal for Wales
ED2	Association of Teachers and Lecturers
ED3	Welsh Local Government Association and Association of Directors of Education
ED4	Children's Commissioner for Wales, Annex 1
ED5	SNAP Cymru
ED6	Welsh Language Board
ED7	Association of School and College Leaders
ED8	National Union of Teachers
ED9	Gwynedd Council
ED10	Children in Wales
ED11	Mudiad Ysgolion Meithrin
ED12	Association of Educational Psychologists
ED13	National Deaf Children's Society Cymru
ED14	Administrative Justice & Tribunals Council Welsh Committee, Annex 1, Annex 2
ED15	Auditor General for Wales

Responses to the consultation can be found at:
http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-ed.htm

Legislation Committee No.3
Proposed Education (Wales) Measure

Schedule of Oral Evidence

Date	Witnesses
14 May 2009	Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills
21 May 2009	Special Educational Needs Tribunal for Wales
4 June 2009	Welsh Local Government Association/Association of Directors of Education for Wales; Children's Commissioner for Wales; SNAP Cymru
11 June 2009	Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills

Transcripts of oral evidence sessions can be found at:
http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/business-legislation-measures-ed.htm

Jane Hutt AC/AM
Y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgiliau
Minister for Children, Education, Lifelong Learning and Skills

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Eich cyf/Your ref
Ein cyf/Our ref LF/JH/32/09

Dr Dai Lloyd AM,
Chair, Legislation Committee No. 3
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

22nd May 2009

Dear Dai,

Proposed Education (Wales) Measure 2009

Thank you for allowing me the opportunity of giving evidence before the Committee in relation to the above Measure on 14 May. During the evidence session, I agreed to write to the Committee on the 3 points below.

EVIDENCE OF HOW MANY CHILDREN WOULD BE AFFECTED IN RELATION TO INCREASING CHILDREN'S ENTITLEMENT AND PARTICIPATION.

There are currently 14,994 children in Wales with a statement of special needs. Bringing this Measure forward however, was not an evidence-based decision, but one that is built on the strong principle that children should be involved in the decisions that affect their lives. This principle, I hope, is shared by us all. Children have told us that they want to be listened to, and value being more involved in the decisions that affect them.

THEORETICAL EXAMPLES OF WHERE THE SECTION 1 (4) POWER OF WELSH MINISTERS TO PROVIDE BY REGULATIONS FOR CIRCUMSTANCES IN WHICH A CHILD MAY NOT APPEAL, WOULD BE USED.

Sections 1 and 9 of the Measure concern a child's right of appeal and claim. Section 1 refers to SEN Appeals (inserts new section 332ZA (4) within the Education Act 1996) whilst section 9 refers to claims of disability discrimination (inserts new section 281A (6) into the Disability Discrimination Act 1995). Both sections give Welsh Ministers enabling powers to make regulations that specify the circumstances in which a child may not appeal/claim.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

English Enquiry Line 0845 010 3300
Llinell Ymholiadau Cymraeg 0845 010 4400
Ffacs * Fax 029 2089 8475
Correspondence.Jane.Hutt@Wales.gsi.gov.uk

The policy intention of this proposed Measure is that the right is universal to ALL children irrespective of age or competence. I strongly believe that no children should have to seek the Tribunal's permission to appeal/claim and that specific groups of children will not be prevented from making an appeal/claim. Therefore, the decision to exercise these powers will depend on a number of factors, which may include whether any circumstances are identified during the pilot phase and what justification exists for prohibiting or restricting children from making an appeal/claim in those circumstances.

At present, and prior to the practical implementation of this right within the pilot areas, I cannot envisage circumstances where a child may not appeal or claim, however I feel it is important to retain flexibility should these circumstances arise during the pilot phase. Should circumstances arise where it was felt inappropriate for a child to appeal, for example if it was felt by those involved with the child that the likely outcome of the appeal would be seriously and fundamentally detrimental to the child's well being, by law the Tribunal would not be able to refuse the appeal application. For these reasons, it is important that the Welsh Ministers have the power to legislate, in relation to those circumstances.

If the regulation making power is removed from the Measure, and circumstances are identified during the pilot phase, the Welsh Ministers would not have the power to legislate in relation to those circumstances. This could have implications not only for the pilot but also, depending on the reasons warranting legislation, on the wellbeing of child appellants/claimants within the pilot areas.

If on conclusion of the pilot phase, no such circumstances are identified and the Welsh Ministers are satisfied that no reason exists to justify continuation of the regulation making power, the power could be repealed by order (section 18 of the Measure), which will be subject to debate in Plenary under the affirmative resolution.

FURTHER CLARIFICATION ON PARENTAL CONSENT IN RELATION TO THE PROVISION WITHIN SECTION 3, CASE FRIENDS.

I recognise the complexities associated with the issue of Case Friends. Sections 3 and 9 allow for Welsh Ministers to make Regulations pertaining to Case Friends.

The practical application of appointing Case Friends needs to be addressed by careful balancing of both parental and childrens' rights whilst also ensuring that child protection is a priority. My officials are currently in discussions with stakeholders, including the Tribunal and Advocacy providers, this will be one of the issues that the Pilot Design and Implementation group will be considering. We will continue to take account of these views before framing regulations. Application of the group's recommendations will be trialled out in the pilot and evaluation areas, allowing us to develop and configure the key support services needed to support children in making appeals and claims to the Tribunal.

Yours,

Jane

Jane Hutt AC/AM
Y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgiliau
Minister for Children, Education, Lifelong Learning and Skills

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Ein cyf/Our ref
LF/JH/044/09

Dr Dai Lloyd AM,
Chair, Legislation Committee
No. 3
National Assembly for Wales
Cardiff Bay
Cardiff
CF99 1NA

24 June 2009

Dear Dai,

PROPOSED EDUCATION (WALES) MEASURE 2009

Thank you for giving me the further opportunity to give evidence before the Committee on 11 June in relation to the above Measure. During the evidence session, I agreed to write to the Committee on the points below.

SECTIONS 1 AND 9 - ENABLING POWER TO MAKE REGULATIONS THAT SPECIFY THE CIRCUMSTANCES IN WHICH A CHILD MAY NOT APPEAL/CLAIM

The Measure currently provides that regulations made under the new sections 332ZA(4) of the Education Act 1996 and 28IA(6) of the Disability Discrimination Act 1995 are subject to the negative resolution procedure. Having reflected on that procedure, I advised Subordinate Legislation Committee on 1 June that the affirmative resolution procedure would apply to these particular regulations instead.

I have however noted the views expressed by Committee members and will, as indicated in evidence on 11 June, continue to consider the need for these powers in the Measure.

OPPORTUNITIES FOR CONSULTATION

We consulted extensively with interested persons before formulating our policy. I would therefore like to reassure Committee members that we will continue to engage with those people who are likely to be affected by this Measure by seeking their opinions in relation to any draft regulations prepared under Part 1 of the Measure.

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

English Enquiry Line 0845 010 3300
Llinell Ymholiadau Cymraeg 0845 010 4400
Ffacs * Fax 029 2089 8475
Correspondence.Jane.Hutt@Wales.gsi.gov.uk

You will be aware from my evidence that we are already subject to a statutory duty to consult the Administrative Justice and Tribunals Council in relation to any proposed Tribunal procedural regulations. This obligation is found in paragraph 24 of Schedule 7 to the Tribunals Courts and Enforcement Act 2007.

SECTION 18

The purpose of the power set out in section 18 is to enable further provision about the rights of children to make appeals and claims to the Tribunal to be made in the light of information gathered during the pilot phase.

The power will also allow modification of the provisions in the Measure to address any issues that become apparent (or become significant) after the Measure is rolled out generally across Wales.

Whilst I recognise the concerns raised by Alan Trent of Tomorrow's Wales and the Law Society, each case must be considered on its own merits. The power in section 18 is broad enough to allow for provision to be made about the matters being piloted. It is not however, a free standing power to amend any provision of the Measure itself. It would not for example, allow amendment of Part 2 of the Measure.

The power in section 18 is specifically linked to the pilot. It is linked because the ability to exercise the power in section 18 is subject to the requirements in subsection (3) and (4) being met. Those requirements relate to the pilot because:

- there must be regard for the report published under section 17(5) of the Measure. Section 17 concerns the pilot scheme and section 17(5)(a) refers to a report on how the piloted provisions were implemented and how effective they were in promoting the well-being of children ("the pilot report").

- the Assembly Government must lay the pilot report before the National Assembly for Wales; and

- the power to amend the Measure must be exercised within 24 months of the pilot regulations ceasing to have effect. This provision, which is found in section 18(4)(a), is essentially a 'sunset' provision which means that if the power in section 18 is not exercised within 24 months of the pilot regulations ceasing to have effect, the power in section 18 will cease.

All of these requirements would have to be satisfied by the government (or any future government) in order to exercise the power in section 18. Although I am prepared to keep this provision under review.

In terms of procedure, you will be aware from my evidence that my concern with the super-affirmative resolution procedure is that it could be a very lengthy process which could significantly delay roll out of the Measure across Wales. Whilst the procedure may take different forms it can, as the Local Government (Wales) Measure does, allow the legislature 60 days to scrutinise and make representations in relation to a draft order and a further 40 days to scrutinise, debate and vote on a revised draft order that sets out changes to proposals in the original draft order. In practical terms this procedure could delay roll-out of the Measure for what could be up to 6/7 months. This is because, when calculating the 60 and 40 day period, no account is taken of any time during which the National Assembly is dissolved or in recess for more than 4 days.

The affirmative procedure on the other hand, achieves what I believe to be the correct balance for this particular Measure, by allowing the National Assembly to consider the pilot report and scrutinise and debate any draft order within 40 days.

Following the valuable contribution made by Committee members, I am considering section 18 and exploring potential options available in relation to consultation.

As a side point, you may be interested to know that the Climate Change Act 2008 recently conferred a similar power on the Secretary of State. That power is subject to the affirmative resolution procedure. The power allows the Secretary of State to approve a pilot scheme and to amend provisions in the Act by way of subordinate legislation as appear to him to be "*necessary or expedient having regard to the operation of the provision in the pilot areas*".

DRAFTING OF THE MEASURE

The Measure specifically sets out the policy intention of giving children with SEN and disability the right to appeal/claim to the Tribunal on the face of the Measure and allows for necessary systems to be created to support those rights, by subordinate legislation. Drafting the Measure in this way replicates the legal frameworks that currently exist in primary legislation for Tribunals.

For example, the Tribunal Courts and Enforcement Act 2007, which created a new simplified statutory framework for tribunals in England and Wales, sets out the policy intention on the face of the Act and delegates wide regulation making powers to the Lord Chancellor, the Secretary of State for Justice and a non-departmental public body sponsored by the Ministry of Justice. Together these delegated powers, which allow for flexibility, support and give effect to, the implementation and operation of the tribunal system.

The Employment Tribunal Act 1996 and Part 5 of the Nationality, Immigration and Asylum Act 2002, which relates to the Asylum and Immigration Tribunal, are drafted in a similar fashion.

These frameworks appear to work well for Tribunals as they allow for considerable flexibility. It therefore makes good sense in my view, for the Measure to adhere to the drafting style that has been tried, tested and adopted in primary legislation for Tribunals for several years.

LEGISLATIVE PROCEDURE FOR SUBORDINATE LEGISLATION

Regulations made under section 14 of the Measure in relation to the Tribunal's Disability Discrimination jurisdiction will be subject to scrutiny by the National Assembly for Wales under the negative procedure. This is because the regulations will be procedural in detail and allow for flexibility whenever changes need to made. For example, to change the number of witnesses that a party can rely on or the circumstances when a party can withdraw an appeal.

The procedure reflects our existing powers in relation to SEN appeals under section 336 of the Education Act 1996 and those of the Secretary of State in relation to Disability Discrimination claims under section 28J of the Disability Discrimination Act 1995.

I have already commented on the procedure that will be used for the powers in the new sections 332ZA(4) of the Education Act 1996, 28IA(6) of the Disability Discrimination Act 1995 and section 18 of the Measure.

All other regulation making powers in the Measure will be subject to scrutiny under the negative resolution procedure. This is again because the regulations will be administrative in nature, set out detailed arrangements and there is a need for flexibility to amend the regulations swiftly if necessary. As indicated earlier, we will continue to engage with those people who are likely to be affected by this Measure by seeking their opinions in relation to any draft regulations prepared under Part 1 of the Measure.

ADDITIONAL POINTS

It may also be helpful if I clarify the following additional points that were discussed during Committee on 11 June.

CASE FRIENDS

In response to the question posed by Christine Chapman, I indicated that in my view it was inappropriate to put a consent requirement on the face of this proposed Measure and provided my reasons for that view. I concluded by stating that I hoped that the explanation clarified the point that it would not require a young person to have parental consent. What I meant by this was that no provision will be placed on the face of the Measure to require a young person to have parental consent.

TRIBUNAL GUIDANCE

In response to the question posed by Helen Mary Jones, I said that we would provide the Tribunal with very clear guidance in relation to the circumstances when it may be appropriate for the Tribunal to exercise its discretion to exclude a child or young person from all or part of the proceedings. As the Tribunal has judicial independence, it would be inappropriate for us to issue formal written guidance to the Tribunal. We will however work closely with the Tribunal with a view to prescribing any exceptional circumstances in Tribunal procedural regulations.

ORDERS OF THE TRIBUNAL

In response to the question posed by Janice Gregory, I confirmed that tribunals do not have powers of enforcement because those powers are vested in other bodies. I also indicated that I have a power of direction, requiring compliance. This is indeed the case in relation to orders made under Part 4 of the Education Act 1996. The Secretary of State currently has the power to enforce compliance of an order made under the Disability Discrimination Act 1995 ("the 1995 Act") and that is why we have made provision in section 15 of the proposed Measure to remove the Secretary of States complaint function under the 1995 Act and create that function for the Welsh Ministers instead. This will then allow us to consider any complaints made in relation to the non- implementation of SEN and disability discrimination Tribunal orders.

Jane Hutt

NATIONAL ASSEMBLY FOR WALES

REPORT OF THE SUBORDINATE LEGISLATION COMMITTEE

The appropriateness of the subordinate legislation provisions in the Proposed Education (Wales) Measure

1. Standing Orders

1.1 The Committee has the following powers under Standing Orders:

- Standing Order 15.6 (ii) states that the Subordinate Legislation Committee may consider and report on 'the appropriateness of provisions in proposed Assembly Measures …..that grant powers to make subordinate legislation to the Welsh Ministers'.

- Whilst it is not part of the Committee's remit to comment in the merits of the proposal which the proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on 'any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers'.

1.2 The purpose of this report is to inform the Assembly's Stage 1 debate on the general principles of the proposed Measure and subsequent legislative stages.

2. Consideration

2.1 On 18 May 2009 the Committee considered the Proposed Education (Wales) Measure and decided to give further consideration to the subordinate legislation provisions in the proposed Measure. Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills gave evidence to the Committee on 1 June 2009. The Committee received written evidence from the Law Society and Cymru Yfory and Cymru Yfory gave oral evidence at the meeting on 8 June 2009.

3. Background

3.1 The Welsh Government introduced the Proposed Education (Wales) Measure to the Assembly on 27 April 2009. A Stage 1 Committee has been established to consider the general principles of the proposed Measure.

3.2 The Explanatory Memorandum that accompanies the proposed Measure states:

"The purpose of this Measure is to extend children's entitlement by providing them with rights to make special educational needs (SEN) appeals and claims of disability discrimination to the Special Educational Needs Tribunal for Wales (the

Tribunal). It will amend the law that gives parents the right to make appeals and claims to the Tribunal, as set out in Part 4 of the Education Act 1996 and part 4 of the Disability Discrimination Act 1995."

4. Subordinate Legislation Making Powers and Procedures

4.1 The proposed Measure has extensive powers for subordinate legislation to be made by Welsh Ministers. These are explained in Part 5 of the Explanatory Memorandum laid with the Proposed Measure, and in the Commentary on Sections that appears at the end of that Memorandum.

4.2 Sections 1-8 of the Proposed Measure amend the Education Act 1996 to give children the right to appeal to the Special Educational Needs Tribunal for Wales ("the Tribunal") that corresponds to the existing rights of parents.

> **Section 1** grants that right to children, and subsection (4) permits Welsh Ministers to make regulations that provide for circumstances in which a child may not appeal. No explanation or example is given of how the power might be exercised.
>
> **Section 3** permits Welsh Ministers to make regulations that provide for a "case friend" to make representations and exercise rights on a child's behalf. Subsection (3) gives examples of the matters that might be included in those regulations.
>
> **Section 4** requires local education authorities to make arrangements for the provision of advice and information about matters relating to the special educational needs of a child. Subsection (2) permits Welsh Ministers to issue guidance, and subsection (3) to make regulations.
>
> **Section 5** requires local education authorities to make arrangements for the resolution of disputes relating to the special educational needs of a child. Subsection (4) permits Welsh Ministers to issue guidance, and subsection (5) to make regulations.
>
> **Section 6** requires local education authorities to make arrangements for the provision of independent advocacy services relating to special educational needs appeals by a child. Subsection (7) permits Welsh Ministers to issue guidance, and subsection (4) to make regulations.

4.3 Sections 9-16 amend the Disability Discrimination Act 1995 to enable disabled children to make a claim to the Tribunal in relation to discrimination that corresponds to the existing rights of parents.

> **Section 9** grants that right to children, and subsection (6) permits Welsh Ministers to make regulations that provide for circumstances in which a

child may not make a claim. No explanation or example is given of how the power might be exercised.

Section 10 permits Welsh Ministers to make regulations that provide for a "case friend" to make representations and exercise rights on a child's behalf. Subsection (4) gives examples of the matters that might be included in those regulations.

Section 11 requires local education authorities to make arrangements for the provision of advice and information about matters relating to disability discrimination. Subsection (2) permits Welsh Ministers to issue guidance, and subsection (3) to make regulations.

Section 12 requires local education authorities to make arrangements for the avoidance or resolution of disputes relating to relevant disability discrimination. Subsection (3) permits Welsh Ministers to issue guidance, and subsection (4) to make regulations.

Section 13 requires local education authorities to make arrangements for the provision of independent advocacy services relating to disability discrimination. Subsection (7) permits Welsh Ministers to issue guidance, and subsection (4) to make regulations.

Section 14 has the effect of transferring the existing power to make regulations relating to the procedure to be adopted by the Tribunal in relation to Disability Discrimination Claims from the Secretary of State to Welsh Ministers. It can then be exercised in parallel to their existing power in relation to SEN appeals procedures.

4.4 Sections 17 and 18 provide for the piloting of the provisions of the Measure and amending the relevant legislation in the light of the lessons learnt from the pilot(s).

Section 17 permits Welsh Ministers to make regulations to provide for the piloting of the provisions of the Measure.

Section 18 permits the amendment by order of legislation (including provisions introduced under this proposed Measure) to take account of lessons learnt during the pilot exercise. The power under section 18 can only be exercised during a limited period. It may not be exercised until a report on the pilot has been laid before the Assembly (under section 17(5)) nor more than 24 months after the end of the pilot period. An order under section 18 is the only delegated legislation under this proposed Measure that would be subject to an affirmative procedure in the Assembly.

Section 23 contains the usual power for the Welsh Ministers to commence the substantive provisions of the proposed Measure by order. No Assembly procedure would apply to the exercise of this power.

5. Issues raised in evidence and recommendations of the Committee

5.1 In taking evidence, the Committee sought clarification and further details on the matters referred to in the following paragraphs.

5.2 In relation to the scope of the proposed Measure, the issues were:

- whether the proposed Measure achieves its stated aims; and

- whether there is a reasonable balance between the powers on the face of the proposed Measure and the powers conferred by regulations.

5.3 In written evidence to the Committee, the Law Society stated that "the government does not give sufficient information or any arguments in section 5 of the Explanatory Memorandum for the delegation of powers set out in the proposed Measure"[1]. Evidence from Cymru Yfory also considered that such an approach (conferring broad regulation-making powers on the Welsh Ministers) creates serious difficulty and allows for regulations to be made with very limited scrutiny. Cymru Yfory also stated that this approach "very significantly limits the scope for the wider public to be involved in the law making process"[2]. Cymru Yfory also stated that "the Assembly Government has, in this latest case, failed to learn the lessons of the NHS Redress Measure and instead has treated that example of poor practice as a precedent for continued bad practice"[3].

5.4 Evidence from Cymru Yfory stated that the proposed Measure amounts "to a way of substantially removing the supremacy of the legislative branch and undermining the principle of the National Assembly as the elected body and the principal focus of devolution in Wales"[4], whilst the Law Society felt that the "government does not give sufficient information or any arguments in section 5 of the Explanatory Memorandum for the delegation of powers set out in the proposed Measure"[5]. The Minister responded that the proposed Measure achieves the aims, which are stated in the accompanying Explanatory Memorandum and that the correct balance is achieved.

5.5 When considering the scope of the proposed Measure, the Committee referred to the evidence presented when scrutinising the appropriateness of the

[1] Law Society, written evidence
[2] Cymru Yfory, written evidence
[3] Cymru Yfory, written evidence
[4] RoP, Para 10, 08.06.2009, Subordinate Legislation Committee
[5] Law Society, written evidence

subordinate legislation provisions in the NHS Redress (Wales) Measure 2008[6] ("the NHS Redress Measure"). At that time the Minister for Health and Social Services Edwina Hart AM stated:

"I think it is important to recognise that whatever we do on this measure will not set a precedent"[7]

5.6 When making the Committee's recommendations on the NHS Redress Measure, the Committee accepted that there were valid reasons why a 'framework measure' approach was justified for that Measure, but the Committee recommended "that the approach taken by that particular Proposed Measure should not set a precedent"[8].

5.7 In considering the proposed Education measure and given the evidence it was given the Committee concluded that the proposed Measure would delegate too much power to the Welsh Ministers in its current form, and did not feel that the breadth of powers sought by the Welsh Ministers in this Measure was necessary. However, the Committee was minded not to delay the legislation, and appreciated the importance of the aims of the legislation.

Recommendation 1

The Committee is concerned that the NHS Redress Measure had been used as a precedent to provide very wide ranging powers of delegation. The Welsh Government must justify this position clearly and state what relevant safeguards are to be put in place.

5.8 In relation to the right of a child to appeal (or claim), many issues were raised these included:

- whether regulations should be able to prescribe when a child may not appeal;

- whether the circumstances when a child may not appeal should appear on the face of the proposed Measure; and

- whether the Minister envisaged the regulations being used in the future to restrict such rights dependent on a child's age or capacity.

5.9 Evidence from the Law Society highlighted the importance of consideration being given as to how the Welsh Ministers could use sections 1(4) or 9(6) in future.[9]

[6] 2008 nawm 1
[7] RoP, Para 17, 16/10/2007, Subordinate Legislation Committee
[8] Subordinate Legislation Committee Report: Proposed NHS Redress (Wales) Measure 2007, November 2007
[9] Law Society, written evidence

5.10 In response to this The Minister stated there was no intention to restrict a child's right to appeal, but there may be future circumstances where it was necessary to protect the child. The Minister stated there was no intention to restrict a child's right of appeal through age and saw no reason for age restrictions on the right of appeal.

5.11 The Committee was concerned that these powers, once transferred to the Minister would remain with the Minister and may be used by any future Welsh Minister in a way which was contradictory to the present intention. The Committee notes that the Minister has agreed that regulations made under section 1(4) and section 9(6) should be subject to the affirmative procedure.

Recommendation 2

The Committee recommends that regulations under section 1(4) and 9(6) should be subject to the affirmative procedure and notes that the Minister intends to make this change.

5.12 In relation to 'case friends', the issues were:

- whether the issue of parental consent when using case friends be dealt with on the face of the proposed Measure; and

- whether provision for persons who can or cannot act as case friends should be on the face of the proposed Measure.

5.13 The Minister stated that these issues, and the question about the way a balance can be achieved between the rights of the child and the rights of the parent, will be clarified after the pilot and a group has been set up to oversee this. The Minister stated that the pilot would also be used to establish who would be appropriate case friends, but there was a need to retain a degree of flexibility.

Recommendation 3

The Committee accepted that any changes brought about following the pilot will be dealt with in regulations and would recommend that any regulations coming forward as a result of the pilot should be subject to the super affirmative procedure.

5.14 In relation to independent advocacy services, the issue was:

- the Minister's intention in respect of regulation making powers granted in Section 6(4) and Section 13(4).

5.15 The Minister stated that this links to the national framework for advocacy standards and the pilot will identify if additional standards are required. Also the regulations could reflect the principle that children could choose an alternative advocate if they so wished.

Recommendation 4

The Committee accepted that this should be reviewed after the pilot and any regulations coming forward as a result of the pilot should be subject to the super affirmative procedure.

5.16 In relation to advice and information on disability discrimination claims, the issue here was:

- how the appropriate body might make young people aware of their rights in respect of disability discrimination claims.

5.17 The Minister stated there was no trigger mechanism to make young people aware of their rights, the duty would be on local authorities to ensure that children have advice on disability discrimination rights, whilst the pilot would look to the Equal Opportunities Commission and the Special Education Needs Tribunal for guidance on this matter. The Minister believed the proposed Measure would open up a new avenue to raise awareness of children's rights.

Recommendation 5

The Committee accepted that this was an appropriate matter to be reviewed after the pilot. Any regulations coming forward as a result of the pilot should be subject to the super affirmative procedure.

5.18 In relation to the pilot phase/regulation-making powers, the issues were:

- whether there should be a duty to consult following the initial pilot when making regulations relevant to the proposed Measure;

- whether the broad powers in section 18(2) are appropriate and whether this allows a Welsh Minister to amend the proposed Measure significantly;

- whether the use of the affirmative procedure is appropriate, and whether consideration should given to using the super-affirmative procedure; and

- the regard that will be paid to the report published under section 17(5).

5.19 The Law Society raised concerns regarding the lack of certainty on the timescale for the exercise of powers under section 17. The time limits refer to the regulations made under section 17(2) but under section 17(4) the regulations

governing the pilot can be extended, meaning there is no certain end date for the pilot.

5.20 The Minister stated that the use of the affirmative procedure for section 18 was appropriate, and that a two year period of consultation during the pilot was sufficient. The Minister went on to say that the pilot is an appropriate opportunity to consult on and to trial the delivery of the proposed Measure.

5.21 The Committee agreed with the evidence from the Law Society regarding the lack of certainty on the timescale and thinks that there is a requirement for a certain end date to the pilot.

Recommendation 6

The Committee recommends that a maximum timescale for the pilot stage should be set out in the proposed Measure to aid transparency and certainty.

5.22 In relation to the powers conferred on the Welsh Ministers, the committee have concerns which are:

- the wide ranging powers granted by section 18 and why it was decided to seek such extensive powers rather than introduce an amending Measure, if it was thought that such significant changes might be required after the pilot stage;

- whether the use of the super-affirmative procedure has been considered; and

- whether an amending Measure had been considered.

5.23 In their evidence Cymru Yfory acknowledged that “there is a need to be able to adjust the way the system works in the light of experience and to be able to experiment with pilot schemes”[10]. To achieve a balance between the needs of the Welsh Government and the need for ”appropriate democratic control and accountability”, Cymru Yfory suggests three possible approaches to the framing of the legislation, which are not mutually exclusive:

> i. For all regulations made under the proposed Measure to use the affirmative procedure;
>
> ii. Require all pre-legislative scrutiny of the draft of any regulations the Welsh Government propose to make;
>
> iii. Impose limits in the proposed Measure on what the Welsh Ministers may and may not do by regulations.

[10] Cymru Yfory, written evidence

5.24 The Minister stated that there was a responsibility to progress this legislation and a new Measure would be lengthy; the safeguards outlined in the evidence should prevent misuse of the powers provided for in the legislation. The Minister also stated that "the affirmative procedure provides the appropriate level of scrutiny for this particular proposed Measure"[11]. The Minister referred to the report that will be published and laid before the Assembly under section 17(5). The Minister felt this report would address any issues raised during the pilot and allow full engagement, consultation and scrutiny.

5.25 The Minister continued to say that having section 18 removed from the proposed Measure would mean that the Welsh Ministers would not be able to implement any changes identified by the pilot and evaluation phase as quickly as would be possible using the regulation-making powers in section 18 of the proposed Measure. This would result in delaying implementation by extending the pilot period until another proposed Measure could be introduced. There is a risk that an amending Measure after the pilot and evaluation phase may not be able to enact those necessary changes within a reasonable timescale. The Minister stated that:

> "The decision to have a pilot phase has been the most important consideration regarding how we will ensure that Welsh Ministers deliver this proposed Measure appropriately in relation to regulation if this proposed Measure proceeds through the Assembly and the scrutiny of the legislation committee, the policy principle is backed and adopted and there is recognition that the pilot phase is an appropriate way forward in trialling this innovative new policy direction, which is, as we have said, uncharted waters. The piloting, in itself, demonstrates this Government's desire and commitment to getting this right. Having the regulation-making process couched in the affirmative procedures, where most appropriate, will safeguard for the Assembly the opportunity to scrutinise and to ensure that we have learnt the lessons of the pilot phase and delivered on the principal policy intentions"[12].

5.26 While the Committee accepts the response put forward by the Minister it notes the concerns, raised in written evidence by the Law Society, of the far-reaching consequences that such wide powers to change primary legislation through subordinate legislation could have.

5.27 The Committee noted the reasons why requiring an amending Measure after the pilot and evaluation phase may be undesirable, but considered that a limited delay could be justified by the need for proper legislative scrutiny. The Committee considered carefully whether the proposals in section 18 were so extensive as to require a second measure to make such changes. Having regard to the delay that would entail, the Committee agreed that such a requirement

[11] RoP, para 92, 01/06/09, Subordinate Legislation Committee
[12] RoP, para 94, 01/06/09, Subordinate Legislation Committee

could be avoided if a super-affirmative procedure were applied to any regulations made under section 18.

Recommendation 7

The Committee recommends that the proposed Measure is amended to provide enhanced scrutiny provisions.

i. For all regulations made under the proposed Measure to be subject to the super affirmative procedure, and for this to include pre-legislative scrutiny (as well as consultation) on any draft regulations to be made by the Welsh Government

ii. To impose limits in the proposed Measure on what the Welsh Ministers may and may not do by regulation.

Recommendation 8

The Committee believes that sufficient powers are contained in other sections of the Measure to enable amendments to be made following the completion of the pilot , and so considers section 18 as unnecessary. The Committee consequently recommends that section 18 is removed from the Measure. If the changes required are so extensive that they cannot be made using those other regulation making powers, an amending Measure should be introduced.

Recommendation 9

The Committee recommends that the scrutiny period allowed for the stage one scrutiny of Measures is increased so that adequate time is made available for proper scrutiny of proposed legislation. This should be a minimum of 12 weeks.