

# **EDUCATION (WALES) MEASURE**

## **Explanatory Memorandum**

This Explanatory Memorandum has been prepared by the Department for Children, Education, Lifelong Learning and Skills (DCELLS) of the Welsh Assembly Government and is laid before the National Assembly for Wales.

## **Member's Declaration**

In my view the provisions of the Proposed Education (Wales) Measure, introduced by me on the 27 April 2009, would be within the legislative competence of the National Assembly for Wales.

### ***Jane Hutt AM***

Minister for Children, Education, Lifelong Learning and Skills  
Assembly Member in charge of the Proposed Measure

***27 April 2009***

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### **ANNEX 1 – Explanatory Notes**

# 1. Description

1.1 The purpose of this Measure is to extend children's<sup>1</sup> 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<sup>2</sup> 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<sup>3</sup>.

1.2 In essence, the Measure will:

- provide for an initial legislative pilot phase during which children in specified local authority areas will be able to make appeals and claims to the Tribunal and also enable the Tribunal to register and hear appeals/claims;
- subsequently give children across Wales the right to appeal and claim to the Tribunal;
- require that Local Education Authorities (LEAs) inform children of their appeal rights;
- place a duty on LEAs to make arrangements for, and inform children about access rights to, Partnership and Disagreement Resolution Services;
- place a new duty on LEAs to provide access to independent advocacy services that can listen to and give voice to children's views and concerns. Advocates will be expected to be able to assist children in resolution processes, appeal/claim case preparation and support or represent them at hearings;
- remove Minister of the Crown functions and consent requirements in relation to regulations governing the Tribunal's disability discrimination jurisdiction;
- empower Welsh Ministers to make regulations governing the Tribunal's Disability Discrimination jurisdiction; and

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<sup>1</sup> Section 579 of the Education Act 1996 defines a child as a person who is not over compulsory school age. However, section 312(5) extends the definition of a 'child' for the purposes of Part 4 of the 1996 Act, to include any person who has not attained the age of 19 and is registered at a school.

<sup>2</sup> In this context a parent includes any person who is not a parent of a child but who has parental responsibility for, or care of him on a long-term and settled basis.

<sup>3</sup> the Education Act 1996 and the Disability Discrimination Act 1995 were both amended by the Special Educational Needs and Disability Act 2001

- place on Welsh Ministers the responsibility for considering complaints about non-implementation of Tribunal Disability Discrimination orders.

### **Curriculum in Wales**

1.3 The Measure is also used as a vehicle to amend current legislation relating to the Curriculum in Wales following introduction of the foundation stage on 1 August 2008 for those pupils aged 3-4 years old. The foundation stage is being commenced in phases and will not be fully rolled out until 1 August 2011. Accordingly, the foundation stage applies to those pupils aged:

- 3-4 years old from 1 August 2008;
- 3-5 years old from 1 August 2009;
- 3-6 years old from 1 August 2010; and
- 3-7 years old from 1 August 2011.

1.4 The foundation stage, once fully rolled out on 1 August 2011, will wholly replace the first key stage of the National Curriculum which currently includes those pupils aged 5 to 7. Consequently the following legislative changes are to be made:

- the removal from the statute book of all references to the first key stage from 1 August 2011; and;
- the re-naming of the “foundation stage” to the “foundation phase”. This is purely a change of name and does not affect the type of educational provision provided by the foundation stage. “Foundation Phase” is the term used by practitioners and in Assembly Government publications, and it is considered desirable to amend legislation so that it fits with the term currently in use.

## 2. Legislative background

2.1 The powers giving parents rights to make appeals about SEN assessment and provision, and placing associated duties on local authorities are found in Part 4 of the Education Act 1996 as amended by Part 1 of the Special Educational Needs and Disability Act 2001. The Education Act 2002 provided for the establishment of the Tribunal and for regulations governing its SEN jurisdiction to be made by the Welsh Ministers.

2.2 The right of parents to make claims of unlawful discrimination against “responsible bodies”<sup>4</sup> for reasons related to their children’s disability is set out in Part 4 of the Disability Discrimination Act 1995 as amended by Part 2 of the Special Educational Needs and Disability Act 2001.

### Secretary of State functions

2.3 The majority of the Secretary of State’s administrative functions in relation to Wales regarding the Tribunal transferred to the National Assembly for Wales under the National Assembly for Wales (Transfer of Functions) Order 1999 and then to the Welsh Ministers by virtue of paragraph 30 of Schedule 11 to the Government of Wales Act 2006. The Secretary of State retained, however, the power to make regulations governing Tribunal proceedings on a claim of unlawful discrimination (albeit with the agreement of the Welsh Ministers). The Secretary of State also retained the power to direct compliance with an Order of the Tribunal.

### Power and Competence

2.4 Section 93 of the Government of Wales Act 2006 (the 2006 Act) 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 to that Act.

2.5 The National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007, inserted “Matter 5.8” into schedule 5 to the 2006 Act, detailed as follows:

#### ***Matter 5.8***

*Provision about the provision of services that are intended to encourage, enable or assist people—*

- (a) to participate effectively in education or training,*
- (b) to take advantage of opportunities for employment, or*
- (c) to participate effectively in the life of their communities.*

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<sup>4</sup> The responsible body of a maintained school or maintained nursery is the LEA or the governing body according to which has the function in question. The responsible body of a Pupil Referral Unit is the LEA; and for an independent school or non-maintained special school is the proprietor.

2.6 The National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008, inserted “Matter 5.17” into Schedule 5 of the 2006 Act, detailed as follows:

**Matter 5.17**

*Education and training for –*

*persons who have greater difficulty in learning than the majority of persons of the same age as those persons;*

*persons who have, or have had –*

*(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.*

2.7 Part 3 of Schedule 5 to the 2006 Act allows for an Assembly Measure to remove a Secretary of State’s function, providing that the Secretary of State consents to it. The required consent has been obtained from the Ministry of Justice.

Curriculum in Wales

2.8 Part 7 of the Education Act 2002 contains the legal framework for the Curriculum in Wales. Section 99 of the Education Act 2002 imposes certain duties on the Welsh Ministers, local education authorities, governing bodies of maintained schools and head teachers to ensure that the Curriculum in Wales meets certain standards. In addition, the Curriculum in Wales must consist of a Basic Curriculum. There are several different elements to that Basic Curriculum which are set out in section 101 of the Education Act 2002. One such element is the requirement for there to be a National Curriculum for Wales. The National Curriculum for Wales applies to all those pupils who have attained the age of 3 but are not yet over compulsory school age. The National Curriculum for Wales itself consists of the foundation stage and the key stages (comprising the first, second, third and fourth key stage). As noted above, by 1 August 2011 the first key stage will have been fully phased out and will have been wholly replaced by the foundation stage.

2.9 The powers to legislate in relation to these provisions are contained in Matter 5.4 and Matter 5.7 of Schedule 5 to the Government of Wales Act 2006 which provide as follows.

**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.*

### **3. Purpose & intended effect of the legislation**

3.1 The Welsh Assembly Government has adopted the United Nations Convention on the Rights of the Child as the basis for all its work for children and young people. This is expressed in 7 Core Aims, particularly the fifth aim: to ensure that children are listened to and treated with respect. The Welsh Assembly Government is committed wherever possible to increasing children's entitlement and their participation in the processes and decisions that affect their education, so that their views can be heard.

3.2 The purpose of this Measure is to extend to children and young people appeal rights to the Special Educational Needs Tribunal for Wales. The Measure will also extend to children and young people the right to make claims of disability discrimination.

3.3 Principally, this Measure aims 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<sup>5</sup>.

#### **CHILDREN'S APPEAL AND CLAIM RIGHTS**

##### Current Position

3.4 Where parents (the individual or agency having responsibility for a child) disagree with certain decisions<sup>6</sup> taken by local authorities in Wales, about

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<sup>5</sup> In July 2008, the Equality and Human Rights Commission issued its report in relation to the UNCRC and recommended in its executive summary that the UK Government should act promptly to ensure that looked after children with SEN have an independent right to appeal decisions made about their support needs.

<sup>6</sup> The grounds of appeal are that a LEA:

- 1) Will not carry out a formal assessment of a child's special educational needs;
- 2) Refuses to issue a statement of a child's special education needs.

Or, where a statement has been issued or changed appeals may be made against:

- 3) The needs identified within a statement, and the special help designed to meet those needs (parts 2 and 3 of the statement).
- 4) The name of the school where the child will be placed (part 4 of the statement).
- 5) The LEA not naming a school.
- 6) An LEA refusal to change the school named within a statement, where that statement is at least one year old.
- 7) A refusal by an LEA to reassess needs where a new assessment has not taken place within the preceding six months.
- 8) An LEA decision to cancel a statement and,
- 9) An LEA decision not to amend a statement following reassessment.

either the assessment of, or provision to meet their child's SEN, they have statutory rights of appeal to the Tribunal. Unless there are exceptional circumstances, appeals must be made within two months of the disputed decision. Similarly, where parents consider that their children have been discriminated against on the basis of a disability by those responsible for their education, they may make claims of disability discrimination to the Tribunal<sup>7</sup>. Ordinarily, disability claims must be made within six months of the last alleged discrimination. However, if parents have used the Equality and Human Rights Commission conciliation service, claims must be made within 9 months, of the alleged discrimination.

3.5 Appeals and claims may be heard by the Tribunal or withdrawn by parents or conceded by LEAs or responsible bodies.

3.6 Where an appeal or claim is determined by the Tribunal and the parent or respondent believes that the Tribunal's decision is wrong in law, they may make an appeal to the Upper Tribunal<sup>8</sup>.

3.7 There are currently 80,618 pupils in Wales with a special need but no statement<sup>9</sup>, an additional 14,994 have a statement of special needs<sup>10</sup>. During the last Tribunal year, 1 September 2007 – 31 August 2008, there were 94 appeals registered by the Tribunal. Appeal numbers have fallen in each of the last two years, having peaked at 150 registrations in 2005/06. The Tribunal reported that in excess of 62% of all appeals were withdrawn by parents or conceded by LEAs prior to a hearing. Historically, two-thirds of all appeals have concerned children at primary school age.

3.8 Nine claims of disability discrimination were made to the Tribunal last year (no claims have been made in the current year from September 2008).

3.9 The Tribunal's annual reports have highlighted the uneven distribution of appeals, on an LEA basis, over the last five years with one or two LEAs accounting for disproportionately large percentages of the total appeal numbers. Annual reports are accessible at <http://www.sentw.gov.uk>;

### Objectives

3.10 The fundamental objective of this Measure is to give a parity of appeal rights for parents and their children. The Measure does not restrict children's rights on the bases of age or competence, but an appeal or claim may be brought on a child's behalf by a "case friend" if the child does not feel

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<sup>7</sup> Claims may be made on one or more of the following bases: education and "associated services" (this can be the teaching provided at the school but also includes what happens during break-times and activities such as school clubs, orchestras, plays and trips or visits), fixed-term exclusions from maintained schools and admissions to, and fixed-term and permanent exclusions from, independent schools.

<sup>8</sup> The Upper Tribunal is an executive agency of the Ministry of Justice, a court of record, with jurisdiction throughout the United Kingdom. It was established by Parliament under the Tribunals, Courts and Enforcement Act 2007 and came into existence on 3 November 2008

<sup>9</sup> <http://wales.gov.uk/topics/statistics/headlines/schools2008/hdw200808071/?lang=en>

<sup>10</sup> <http://wales.gov.uk/topics/statistics/headlines/schools2008/hdw200806182/?lang=en>



sufficiently confident to initiate or participate in the process. (Examples of who may act as a case friend are set out at page 12.) The same deadlines for making appeals/claims will be applied to children and their parents. They both may make appeals/claims on the same or different grounds, with the Tribunal having a power to determine whether appeals/claims from multiple parties should be consolidated.

3.11 The Measure aims to ensure that children's entitlement is realised and that their needs can still be met in circumstances where their parents do not make such appeals or claims, either through choice or other factors.

3.12 The Measure will form part of a suite of initiatives aimed at increasing child participation in decision-making processes relating to Tribunal appeals and claims. Other actions will include a review of the current Tribunal Regulations<sup>11</sup>, and a partial revision of the Special Educational Needs Code of Practice for Wales.

#### Implementation plan

3.13 The Measure will fulfil its objective 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.

3.14 The pilot phase will give the Welsh Ministers the power to make regulations that specify the number and identity of those LEAs who will partake in the phase and its duration. The pilot, which will be subject to rigorous scrutiny by means of an action research project, will provide quantitative and qualitative assessments that will be based on the experiences of all stakeholders such as appellants/claimants, the Tribunal, LEAs, Advocacy Providers, and representatives. The pilot phase will provide an opportunity for careful evaluation of the practical application of the rights, the configuration and resourcing of necessary services.

3.15 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.

#### Impact

3.16 The new appeal rights will have varying impacts on a range of stakeholders including children and parents, LEAs, the Tribunal, and the voluntary, advocacy and legal sectors.

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<sup>11</sup> Special Educational Needs Tribunal Regulations 2001 (2001/600), as amended and the Special Educational Needs and Disability Tribunal (General Provisions and Disability Claims Procedure) Regulations 2002 (2002/1985).

3.17 Those affected by the disability claim right will include the stakeholders listed above plus governing bodies of schools and owners of independent schools.

## **INFORMING CHILDREN OF THEIR APPEAL RIGHTS**

### *Current Position*

3.18 LEAs must write to parents when they make appealable decisions in respect of SEN, advising parents of:

- their right to appeal to the Tribunal;
- the time limits for making an appeal: (two months from sending the decision); and
- the arrangements that have been made to offer disagreement resolution services and, that using such services does not affect their right of appeal.

### *Objectives*

3.19 This Measure will require LEAs to write to parents and children detailing their statutory rights and informing them of services they can access. This will include access for children or their case friend to an independent advocate. Guidance will set out how children can be provided with this information in alternative, comprehensible ways.

3.20 The principle is well-established of involving children and young people in assessment and decision-making processes prior to an appeal. Even though it is not anticipated to lead to a large number of children making appeals, informing them of their rights from the outset is a commitment to enabling them to access their entitlement and further demonstrate respect and a willingness to listen to their views.

3.21 Although the duty will fall on LEAs, others including schools and SEN Co-ordinators should have a practical involvement in making sure children are aware of their entitlements.

## **ACCESS FOR CHILDREN TO PARTNERSHIP AND DISAGREEMENT RESOLUTION SERVICES**

### *The Current Position*

3.22 The Education Act 1996 requires LEAs to make arrangements for parents of children with SEN to access Parent Partnership Services<sup>12</sup>. The services must provide advice and information about SEN. LEAs must take

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<sup>12</sup> Section 322A of the Education Act 1996 was inserted by section 2 of the Special Educational Needs and Disability Act 2001 (SENDA 2001)

appropriate steps to make parent partnership services known to parents, head teachers, schools and others they consider appropriate.

3.23 In meeting their duties, LEAs currently make contractual arrangements with providers from the voluntary sector.

3.24 LEAs are also required to make disagreement resolution arrangements to encourage the early and informal avoidance or resolution of disagreements between

- parents of children with SEN and the LEA; and .
- parents of children with SEN and schools about the SEN provision made for the child<sup>13</sup>.

#### Objectives

3.25 The Measure will place a duty on LEAs to reconfigure their existing services or arrangements to take account of children's appeal and claim rights. It is intended that children will be able to access neutral information and disagreement resolution services. Tribunal procedural regulations will be amended to require parties to an appeal, to state what actions they had taken to resolve their differences. The expectation will be clear, particularly where children are involved, that parties will have taken opportunities to resolve their differences in an informal way where possible. Minimum standards for partnership and disagreement resolution services will be established within the SEN Code of Practice for Wales. This will have an impact for LEAs and the voluntary sector.

### **A NEW DUTY ON LEAS TO PROVIDE ACCESS TO INDEPENDENT ADVOCACY SERVICES TO ASSIST CHILDREN IN RESOLUTION PROCESSES, APPEAL/CLAIM CASE PREPARATION AND SUPPORT OR REPRESENTATION AT HEARINGS.**

#### Current Position

3.26 At present, parents making appeals or claims may avail themselves of access to an "Independent Parental Supporter", who may assist in case preparation and, if required, support or representation at a hearing of the Tribunal. The majority of parents are not legally represented before the Tribunal; there is no entitlement to public funding for legal representation. There is no current statutory requirement to provide advocacy support for children themselves. Some LEAs already have arrangements in place for universal advocacy services for children in their areas, but these services may possibly lack the expertise necessary in such circumstances.

#### Objectives

3.27 In providing universal rights for children and young people to make appeals and claims to the Tribunal, there is a necessity to provide them with an appropriate supporting framework to discuss and, if necessary, facilitate

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<sup>13</sup> Section 322B of the Education Act 1996 was inserted by section 3 of SENDA 2001.

the practical expression of those rights. The Measure will ensure that children are able to access neutral information about their options. Children considering initiating the process will have access to an independent advocacy service for which LEAs will be required to make arrangements. There will be a statutory duty on LEAs to inform children how they can access these services.

3.28 Advocacy arrangements are intended to be sufficiently broad to embrace responsibility for support, representation and alerting appropriate authorities to concerns about a child's well-being. Minimum standards will be established in regulations or the SEN Code of Practice for Wales.

3.29 Where an appeal is made on a child's behalf by their "case friend", that person will also be entitled to access the independent advocacy arrangements. A "case friend" could be, for example, a parent, sibling, advocate, teacher, or, in the case of Looked After Children, (where the Local Authority has parental responsibility for the child) a foster carer or social worker.

#### Implementation Plan

3.30 In the absence of any direct comparators to ascertain likely uptake of appeal/claim rights and, hence, access to advocacy services, the pilot phase will provide an essential evidence base informing the configuration, refinement and resourcing of advocacy arrangements.

3.31 The commissioning of an advocacy service to support children to make appeals / claims (as detailed in this document) should be considered within the Model for Delivering Advocacy for Children and Young People in Wales. While it will be the LEA's responsibility to provide access to independent advocacy service, under this new Service Model, the commissioning of all advocacy services for children and young people should be integrated and facilitated on a regional basis by the Children and Young People's Partnerships (CYPP). The purpose of this is to:

- Increase independence of the advocacy service
- Improve ease of access for the customer
- Improve ease of referral for the referrers
- Improve consistency and equity across Wales

3.32 LEAs should ensure that they work closely with the CYPPs and regional colleagues to implement this service.

### **WELSH MINISTERS POWER TO MAKE SUBORDINATE LEGISLATION REGULATING THE TRIBUNAL'S DISABILITY DISCRIMINATION JURISDICTION.**

#### Current Position

3.33 The Welsh Ministers have the power to make subordinate legislation in the form of regulations to govern the Tribunal's SEN jurisdiction. Responsibility for making regulations governing the Tribunal's disability

discrimination procedure rest with the Secretary of State for Justice (with the agreement of the Welsh Ministers).

### Objectives

3.34 In order to give full effect to the proposal that children with disabilities can themselves make a discrimination claim to the Tribunal, the Welsh Ministers should have the power to make regulations to govern the Tribunal's disability discrimination jurisdiction.

3.35 These regulations will need to be in force on commencement of the pilot and evaluation phase to enable the Tribunal to deal with discrimination claims made by children in the pilot areas.

3.36 The Measure will remove the Secretary of State's regulation making functions and give those functions to the Welsh Ministers instead. This will allow the Welsh Ministers to use those functions in a way tailored to meet Welsh needs and priorities.

3.37 It is intended that subordinate legislation will have an impact on increasing opportunities for children's views to be taken into account in Tribunal proceedings. To ensure consistency of approach and clarity for Tribunal users, it is intended that existing regulations governing the SEN and disability discrimination procedure of the Tribunal (including time limits for complying with its orders) should be made in a single statutory instrument.

## **PLACE ON WELSH MINISTERS, RESPONSIBILITY FOR CONSIDERING COMPLAINTS ABOUT NON-IMPLEMENTATION OF DISABILITY DISCRIMINATION ORDERS.**

### Current Position

3.38 The Tribunal has the power to order the responsible body to do anything reasonable to put right the discrimination. The Tribunal can also make an order that requires actions to help prevent discrimination against disabled children in future. Examples might include training for school staff; drawing up new guidance for staff; changes to school or LEA policies; relocating facilities (but not changing physical premises); issuing written apologies. The Tribunal has no jurisdiction to order financial compensation.

3.39 The Tribunal has no power to monitor ,or implement its orders. Consideration of complaints against non-compliance with Tribunal SEN orders lie with the Welsh Ministers and/or the Public Services Ombudsman. In the case of non-compliance with disability orders, however, complaints must be made to the Secretary of State.

3.40 For example, a common remedy is that the responsible body is ordered to submit a written apology. The recipient of the apology might find the apology objectionable and may not feel the responsible body has apologised

within the meaning of the order. The current complaint function lies with the Secretary of State, so he would be responsible for investigating any such complaint in relation to compliance with the Tribunal's orders.

### Objectives

3.41 The objective is to remove the Secretary of State's complaint function and give that function to the Welsh Ministers instead. This will allow consistency of approach and ensure that complaints against non-compliance with the devolved tribunal's decisions are addressed in Wales.

3.42 In terms of impact, it has already been established that there are very few claims of disability discrimination made to the Tribunal, with a smaller number again proceeding to a hearing. Of the 9 claims made during the year September 2007 to 2008, only one was ultimately upheld.

3.43 While this new function is intended to clarify the situation for users in Wales and bring a greater degree of consistency, it is highly unlikely to place a significant additional burden on the Welsh Ministers.

3.44 The Welsh Ministers new functions will need to be in force on commencement of the pilot phase to enable users to make a complaint if necessary.

### **CURRICULUM IN WALES**

3.45 The Foundation Phase (3 to 7-year-olds) will replace the National Curriculum first key stage (5 to 7-year-olds) and as a consequence there is a need to remove the concept and all references of the first key stage from the statute book.

3.46 Current legislation in England and Wales refers to 'Foundation Stage'. It is proposed that for clarity and uniqueness for Wales that 'Foundation Stage' is changed to 'Foundation Phase' in the legislation. This will reflect the curriculum that is being delivered and the terminology that is used for 3 to 7-year-olds in Wales.

3.47 Primary and secondary legislation needs to be amended as a consequence of the introduction of the foundation phase in schools in Wales.

#### To remove the first key stage from the statute book

3.48 The first key stage will no longer exist in Wales from 1 August 2010 for all 5 to 6-year-olds and 1 August 2011 for all 6 to 7-year-olds. Recent legislation has disapplied the curriculum requirements of the first key stage for pupils aged 5 - 6 from 1 August 2010 and for pupils aged 6 - 7 from 1 August 2011. The first key stage will need to be permanently removed from the statute book from 2011 and the Assembly Measure will provide the mechanism to make this change.

3.49 The provisions will then be commenced by an Order to be made at a later date and will come into force no later than 1 August 2011.

## 4. Consultation

4.1 During a round of Tribunal User Group meetings held in north, south and west Wales in 2007, Welsh Assembly Government officials canvassed attendees as to their support for the principle of extending appeal rights to children. There was unanimous support for the principle. The user groups comprise representatives of Local Authorities, the Tribunal, the voluntary sector, parents and Parent Partnership representatives.

4.2 A Children's Appeal's Working Group was established in December 2007 to consider the practical implications of the Children's Commissioner's proposal. The group comprised representatives of the Children's Commissioner's office, the SEN Tribunal for Wales, Tros Gynnal, SNAP Cymru and NYAS Cymru, one Local Authority (nominated by Assistant Directors of Education, Wales, Additional Learning Needs), the Administrative Justice and Tribunals Council (a statutory consultee) and officials from the Welsh Assembly Government's Support for Learners Division.

4.3 In May and September 2008, the Welsh Assembly Government issued two "Voices and Choices"<sup>14</sup> consultation documents. These invited views on policy proposals to give children themselves appeal and claim rights to the Tribunal.

4.4 Distinct versions for children and young people were also produced. Additionally, facilitated workshops were held with school councils in three schools across Wales and two facilitated public workshops were also staged.

4.5 A broad range of responses was encouraged, including those from children and young people, Local Education Authorities, Diocesan Authorities, Voluntary Organisations, Educational Psychologists, Children and Young People Partnerships, the Public Services Ombudsman for Wales, Children's Services, the Law Society, the Legal Services Commission, the Ministry of Justice, the Tribunal President, Social Services, Teaching Unions, the Tribunals Service, the WLGA, stakeholders concerned with Special Educational Needs, and a 10% sample of schools.

4.6 In total, 198 responses were received.

4.7 The summary of responses received to the consultation was published on the Welsh Assembly Government website on 26 January 2009, and is available at <http://new.wales.gov.uk/consultations/closedconsultations/education/voicesandchoices/?lang=en>

### **Curriculum in Wales**

4.8 No consultation was deemed necessary or appropriate in respect of making amendments to the Curriculum in Wales. These are technical amendments to legislation in respect of the changes required to replace

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<sup>14</sup> <http://new.wales.gov.uk/consultations/closedconsultations/education/voicesandchoices/?lang=en>

references in the statute book to the first key stage and to substitute references in the statute book to 'Foundation Stage' with 'Foundation Phase'.

## **POLICY CHANGES ADOPTED FOLLOWING CONSULTATION**

4.9 The policy on extending to children themselves appeal and claim rights to the Tribunal, has its roots in a proposal made by the late Peter Clark, first Children's Commissioner for Wales. The Commissioner had proposed that children with SEN should have a right of appeal to the Tribunal in circumstances where their parent/s, for whatever reason did not exercise their own parental right of appeal; it was on this basis that the consultation was framed.

4.10 In light of the responses received and subsequent discussions with stakeholders, however, three key amendments have been made to the method of implementation in the light of the experiences and views of those involved:-

- Introduction of a Pilot and Evaluation Phase prior to full roll-out across Wales;
- Creation of a universal right of appeal and claim for children, not dependent on parents relinquishing or not using their own rights; and
- Creation of a universal right of appeal and claim for children, not dependent on their age or capacity.

### **Pilot and Evaluation Phase**

4.11 A significant number of respondents explicitly supported the principle of children's rights to appeal/claim. There was however some concern about the mechanisms, funding and provision necessary for implementing these proposals. A small number of respondents made persuasive arguments in support of piloting the proposals prior to full roll out.

4.12 It was decided to proceed with implementing a pilot phase, followed by full roll-out of the appeal/claim rights on an all-Wales basis. This approach underlines commitment to the principle and practice of children's appeal/claim rights. It also takes account of concerns arising from the consultation process and will allow for the appropriate development and configuration of key support services.

### **Creating a universal right of appeal and claim for children, not dependent on parents relinquishing or not using their own rights.**

4.13 Post-consultation it was decided to build further on the late Children's Commissioner's proposal that children should have a right of appeal in circumstances where their parent/s did not exercise their own right. The development of such conditional rights did not sufficiently meet the Welsh Assembly Government's developing policy ambitions. Additionally, an unnecessary administrative burden would be placed on the LEAs and/or the



Tribunal to ascertain from parents whether they wished to surrender their rights; this would be vastly disproportionate to the very small number of parents actually making appeals. It would also significantly lengthen the time it may take before a child's appeal or claim may reach the Tribunal. If the child's parent made an appeal within the two-month deadline, or a disability claim within six months of the last alleged discriminatory act, the child would not be able to appeal or claim. If the parent had not taken such action, the right would subsequently pass to the child, who would then, out of fairness, enjoy a further two or six months to make their own appeal or claim. This would make for an unwieldy process.

**Creating a universal right of appeal and claim for children, not dependent on their age or capacity**

4.14 The consultation responses on the issue of competency and its assessment were characterised by their variety. There was no clear consensus of opinion. On further reflection in the light of the responses, it was considered that setting a competence level (be it the child's age and/or capacity) would place unnecessary bureaucratic burdens both on LEAs and the Tribunal, and, consequently, could lengthen the appeals process. It could also increase levels of anxiety for the child should they wish to appeal/claim but it is later decided that they do not pass a competency test.

4.15 Children's interests will still be protected as appeals or claims will be able to be made on behalf of a child by a "case friend", in circumstances where the parent or corporate parent did not wish to appeal or the child could not appeal for want of capacity.

4.16 For example, a parent might decide not to appeal because they have learning difficulties and/or lack confidence to appeal so would prefer a relative to act as their child's case friend. Where the local authority has parental responsibility for a child, it could agree to the child's social worker or the foster carer in whose care they have placed a child on a temporary basis, to act as the child's case friend.

## 5. Power to make subordinate legislation

5.1 In each of the cases detailed below the rationale for the application of subordinate legislation rests upon the need to avoid excessive details or to allow for flexibility, within the confines of the principles presented within the Measure itself.

5.2 The Measure will establish powers to:

**a) enable the Welsh Ministers to make Regulations in relation to the Tribunal's disability discrimination jurisdiction. It will also allow the Welsh Ministers to make, if they consider appropriate, new Regulations for the Tribunal that will consolidate and update provisions in existing SEN Tribunal and Disability Tribunal Regulations and insert new provisions as a consequence of, and to give effect to, the Assembly Measure.**

5.3 This power is in part subject to the removal of the Secretary of State's regulation making functions under Part 4 of the Disability Discrimination Act 1995 and those functions being replicated for the Welsh Ministers under that Act. It is considered appropriate to delegate such powers to the Welsh Ministers in order that all regulations for the devolved Tribunal may be made in Wales in accordance with Welsh interests, policy development and legislative timetabling opportunities. The Welsh Ministers currently have the power to make regulations in respect of the Tribunal's *SEN* jurisdiction; these are made under the negative procedure as they are procedural in detail and allow for flexibility. Disability discrimination regulations currently made by the Secretary of State are also made under the negative procedure for the same reason.

5.4 The Welsh Ministers can only make Tribunal regulations if they have consulted the Administrative Justice and Tribunals Council<sup>15</sup>.

5.5 Regulations in relation to the Tribunal's disability discrimination jurisdiction should be subject to scrutiny by the National Assembly of Wales under the **negative procedure** as the regulations will be procedural in detail and allow for flexibility whenever changes need to be made. The procedure also reflects the position with the similar powers of the Welsh Ministers in section 336 of Education Act 1996 (and those of the Secretary of State in section 28J of the Disability Discrimination Act 1995)

**b) enable the Welsh Ministers to make regulations to establish the pilot scheme prescribing, for example, those Local Authorities that must run the pilot and the date the pilot will commence.**

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<sup>15</sup> Paragraph 24 of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007

5.6 These regulations will allow Welsh ministers to pilot children's rights of appeal and claim for a specified period. Regulations may also make provision for the:

- right conferred on a children by this Measure in relation to special educational needs appeals to apply only to children for whom specified local authorities are responsible;
- duties imposed on a local authorities by this Measure in relation to special educational needs appeals to apply only to specified local authorities;
- right conferred on a child by this Measure in relation to disability discrimination claims to apply only to a body responsible for a school in a specified areas; and
- duties imposed on a local authority by this Measure in relation to disability discrimination claims to apply only to specified local authorities.

5.7 As the regulations will be administrative in nature and set out detailed arrangements on the establishment and operation of the pilot schemes, they should be subject to the **negative procedure**.

**c) enable the Welsh Ministers to make regulations in relation to the provision of advice and information services, dispute resolution services and independent advocacy services.**

5.8 These regulations will prescribe matters that LEAs must satisfy when making arrangements for children to be provided with these services. For example, ensuring that persons who will provide the service are suitably experienced or trained to give assistance to children with SEN or disability. Accordingly, such Regulations should be subject to the **negative procedure**.

**d) enable the Welsh Ministers to make regulations for a child to have a case friend.**

5.9 These regulations will prescribe matters that will allow for a person to exercise a child's right of appeal or claim on behalf of a child or to make representations on behalf of a child to avoid or resolve disputes with a local authority (in relation to an appeal) or a responsible body (in relation to a discrimination claim). As the regulations will be procedural or administrative in nature they should be subject to the **negative procedure**.

**e) enable the Welsh Ministers to make by Order, changes to the Measure identified as a result of the pilot and evaluation schemes or any changes that become apparent and are considered necessary during full roll out of the Measure.**

5.10 Section 18 of the Measure will provide the Welsh Ministers with a power (by order) to add, remove or modify provisions in the Measure. The purpose

of the power is to enable the Welsh Ministers to give effect to any changes identified by the pilot and evaluation phase which are necessary to give full effect to children's rights. The power will also allow the Welsh Ministers to modify the Measure to address any issues that become apparent after the Measure is rolled out generally across Wales.

5.11 The power to make an order under section 18 includes power to:

- add, remove or modify rights;
- amend or repeal provisions of Part 4 of the Education Act 1996;
- amend or repeal provisions of Part 4 of the Disability Discrimination Act 1995; and
- make consequential amendments and repeals to provisions in those Acts.

5.12 The Welsh Ministers must, when exercising their power to modify any provision in the Measure, have regard to the pilot report required by section 17(5).

5.13 Section 17(5) requires the Welsh Ministers to publish a report on how the pilot provisions were implemented and how effective they were in promoting the well-being of children. It also requires the Welsh Ministers to lay a copy of the report before the National Assembly for Wales.

5.14 An order under section 18 should be subject to scrutiny by the National Assembly for Wales under the **affirmative procedure** as confirmed in section 22. This will enable the National Assembly to scrutinise and debate the principles of proposed changes to the Measure.

#### **f) Commencement**

5.15 Section 23 sets out the arrangements for commencement of the Measure in relation to sections 22, 23, and 24. All other remaining provisions of the Measure come into force when commenced by the Welsh Ministers by order. As is normal practice for commencement orders, no procedure will apply to such orders.

## **6. Regulatory Impact Assessment (RIA)**

6.1 A Regulatory Impact Assessment for this Measure is at Part 2

## PART 2 – REGULATORY IMPACT ASSESSMENT

### 7. Options

7.1 No regulatory impact assessment is required in respect of the changes proposed to the formal recasting of the Foundation Stage as the Foundation Phase. This assessment has been prepared only in respect of children’s appeal and claim rights and associated provisions.

7.2 Current Tribunal legislation does not provide adequate, practical opportunities or requirement for children’s views to be taken into account in the decisions that affect them, or for their views to be considered if their parents do not make appeals. Children have no right to make appeals or claims to the Tribunal.

7.3 Regulations require LEAs responding to parents’ appeals to set out, in their statements of case, “the views of the child concerning the issues raised by the appeal, or the reasons why the authority has not ascertained those views”. The child who is the subject of an appeal hearing shall be entitled to attend the hearing, and, “the Tribunal may permit the child to give evidence and to address the Tribunal on the subject matter of the appeal”<sup>16</sup>.

7.4 In order to meet more fully Articles 12 and 13 of the United Nations Convention on the Rights of the Child, the Welsh Assembly Government’s related Core Aims, and the Welsh Assembly Government’s policy objectives, set out in Part 1, three options have been considered:

- **Option 1:** do nothing;
- **Option 2:** increase children or young people’s participation in appeals processes, *without extending appeal rights*, by means of amendments to Tribunal regulations and guidance to LEAs; do not extend right to children to make disability claims;
- **Option 3:** Introduce an Assembly Measure

#### Option 1: Do Nothing

7.5 Parties to SEN appeals and disability claims rely upon on existing primary and subordinate legislation and two codes of practice: the Welsh Assembly Government’s Special Educational Needs Code of Practice for Wales and the former Disability Rights Commission’s Code of Practice for Schools. The most recent amendments to the legislation or codes of practice, in relation to the Welsh Tribunal, were made in 2002. While the Tribunal remains a devolved tribunal, its English counterpart, the SENDIST, became part of the Health Education and Social Care (HESC) Chamber of the Tribunals

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<sup>16</sup> Special Educational Needs Tribunal Regulations 2001 (2001/600), as amended

Service's First-Tier on 3<sup>rd</sup> November 2008; SENDIST now operates under the HESC Rules with the former England and Wales regulations being kept alive for Wales only.

7.6 The option of doing nothing is unacceptable as it cannot meet the policy intentions, not least because:

- the relatively weak provision in current regulations for eliciting the child's views does not suffice. LEAs have been urged (at Tribunal User Group meetings and in the Tribunal President's Annual Report 2004/5) to provide information relating to the child's views. Opportunities to hear the child's views are contingent on the will of the parties or the discretion of the Tribunal;
- The child cannot make an appeal or claim and, if the parent is either unwilling or unable to take such action, the child's interests may not best be served or, indeed, able to be served;
- An anomaly exists in that regulations for the Tribunal's SEN function may be made by the Welsh Minister, whereas regulations governing the disability jurisdiction will continue to be made by the Secretary of State (the Minister for Justice); complaints about non-compliance with Tribunal disability orders will continue to lie to the Secretary of State.

**Option 2: Increase children or young people's participation in appeals processes, *without extending appeal rights*, by means of amendments to tribunal regulations and guidance to LEAs; do not extend right to children to make disability claims**

7.7 Under option 2 the Welsh Ministers could amend only the Tribunal's principal SEN regulations and the SEN Code of Practice for Wales. This would serve to place greater emphasis on participation by children in decision-making processes, and strengthen rights and requirements for incorporating children's views in evidence before the Tribunal. Overhaul of the regulations is intended in any case and such action would be complementary to the proposed Assembly Measure. Reform of the regulations and Code of Practice alone is considered unlikely fully to meet the policy objective due to inherent limits:

- There would be no scope for amendment to primary legislation; no appeal and claim rights could be conferred. Appeals would remain contingent solely on parental wishes and ability. Where no parental appeal was forthcoming, for whatever reason, there may be a danger that a child's interests may not best be served.
- Additionally, the power to make regulations in respect of the Tribunal's disability jurisdiction would continue to rest with the Secretary of State (with the agreement of the Welsh Ministers) The Welsh Assembly Government would therefore be reliant on the Secretary of State

making new or amendment regulations for Wales and reliant on those regulations being made within a timescale conducive to the Welsh Assembly Government's delivery programme;

- The extension of disability participation rights requires the agreement of the Secretary of State for it to be effected in regulations, or his agreement, through an Assembly Measure for his regulation-making powers to be removed to allow new regulation-making powers to be created for the Welsh Ministers. This option holds to the status quo in respect of disability claims. Patently, this would not accord with the policy objectives in that there could be no entitlement for children to make claims or for their interests to be served in circumstances where their parents did not make claims. This option also creates difficulties in that children with disabilities would not have claim rights and thus would be treated less favourably than their peers with SEN.

### **Option 3: Introduce an Assembly Measure**

7.8 An Assembly Measure is considered to be the most appropriate of the options to give full effect to the policy objectives. A further attraction is that it provides sufficient flexibility to make any necessary changes to the detail of the policy subsequent to conclusion of the pilot and evaluation phase.

7.9 Option 3 is consistent with meeting the policy objectives as it:

- Provides for careful introduction of children's appeal/claim rights through a pilot phase, permitting children to make appeals and claims and for the Tribunal to register and hear them. Such a pilot can operate only on a legislative basis and requires enabling (primary) legislation; and
- Following evaluation of the pilots, the statutory introduction of appeal/claim rights for children can be rolled out across Wales;
- Provides an opportunity for children's needs to be met, and their views considered, in circumstances where their parents do not make an appeal or claim;
- Ensures the views of children, including those who are looked after, are given due respect and weight;
- Requires provision for access to independent advocacy, Partnership and Disagreement Resolution Services for children making, or considering making an appeal, thus placing them far more centrally in processes affecting them and extending their entitlement. This option more deeply embeds in the culture the right of child of children with SEN and disabilities to participate in the decisions that affect them;
- Allows SEN and disability regulations to be amended on the same bases and for there to be equal rights before the Tribunal for disabled children and those with SEN.



7.10 The amendments to regulations sought in Option 2 can still be pursued to complement the further advancement of rights and access to services in Option 3.

## 8. Costs and Benefits

### Option 1: Do Nothing

#### Benefits:

8.1 Option 1 involves no additional costs to the Welsh Assembly Government, the Tribunal, LEAs or the voluntary sector.

8.2 Currently, appeal levels are running at fewer than 100 per year; in the last year (2007/08) 17 Welsh LEAs had 5 or fewer appeals against their decisions (13 of them had between 0 and 2 appeals). Only 2 LEAs had appeal levels in double figures: Cardiff and Carmarthenshire each had 19 appeals. It is arguable that in the vast majority of cases, LEAs make suitable decisions about provision and schooling for children with SEN. Doing nothing is proportionate to parental appeal activity.

8.3 The relative longevity of the regulations should ensure that LEAs, parental representatives and the Tribunal itself are all familiar with processes and requirements

8.4 Certain provisions already exist to ensure that children's views are taken into account in proceedings before the Tribunal.

8.5 Chapter 3 of the SEN Code of Practice for Wales currently sets out that LEAs, schools and others should seek to involve pupils in decisions that affect them.

#### Costs:

8.6 While there are no additional costs associated with this option, neither does it advance children's entitlement or address any possible reluctance to engage children in decisions affecting them. While appeal numbers are low, there is no empirical research to suggest that this is due to parental satisfaction or that children would not avail themselves of appeal opportunities were these available.

8.7 In this option children's views should be sought but, where they are not, sanctions for non-compliance are unclear and potentially unhelpful (an LEA that fails to lodge a statement of case is precluded from taking a further part in proceedings, leaving a tribunal to determine an appeal on the basis of one party's evidence).

8.8 Where the child's views are absent, the Tribunal cannot of its own volition summons a witness to speak for the child.

8.9 Where a child's parent is unable to appeal, for example in circumstances where their own needs preclude them from so doing, there is no scope for another person to make an appeal on the child's behalf and no challenge may be made to an LEA's final decision about the child's education.

8.10 The Welsh Ministers remain unable to make regulations governing the devolved Tribunal's disability functions.

**Option 2: Increase children or young people's participation in appeals processes, *without extending appeal rights*, by means of amendments to tribunal regulations and guidance to LEAs; do not extend right to children to make disability claims**

#### Benefits

8.11 A strengthening of SEN regulations could reinforce the importance of the child's views in the appeal process. The requirement to provide child's views could be more balanced so that it does not rest solely with the LEA (as respondent to appeals).

8.12 Regulations could provide for the child to have an unequivocal right to address the Tribunal, which would not be contingent on the Tribunal's discretion or permission

8.13 As there would be no new statutory duties imposed by a Measure, costs to the Welsh Assembly Government would be minimal and, also, there would be no new financial burdens for the Legal Services Commission (LSC) and other non-devolved functions. Consequential Tribunal training costs and user training could be accommodated within existing budget allocations and incorporated into regular Tribunal conferencing and User Group events.

8.14 There would be no scope for proxy appeals or testing of LSC eligibility and other rules in respect of child appellants

8.15 Regulatory amendment could provide for witnesses to be called, either by the parties or by the Tribunal, to advocate for the child's views.

8.16 This option is consistent with the UN Convention on the Rights of the Child and the Welsh Assembly Government's Seven Core Aims.

8.17 Regulations could be consulted on and made within a one-year period.

#### Costs

8.18 Appeals about children would still, ultimately, be dependent upon parental will or capacity. While it is anticipated that in almost all cases parents will act in the best interests of their children, in situations where they do not the needs of children, perhaps particularly looked after children, may not be met.

8.19 There could be no new duties to extend advice and disagreement resolution facilities to children. Similarly, there would be no statutory duty to provide advocacy support to children.

8.20 There would be the possibility of European Human Rights Act implications if children with disabilities had fewer or lesser appeal rights than children with SEN

8.21 Any complaints of non-compliance with disability orders would continue to lie to the Secretary of State.

8.22 Amendments to the Tribunal guidance (although a matter for the Tribunal itself) and the SEN Code of Practice for Wales and voluntary sector literature would be necessary. Additionally, consultation costs associated with new regulations are estimated to be in the region of £10,000, including the production and presentation of child-friendly consultation media. This figure is based on the “Voices and Choices” consultations.

8.23 Costs can be met from within the Welsh Assembly Government’s Additional Learning Needs budgets.

### **Option 3: Introduce an Assembly Measure**

#### Benefits

8.24 Option 3 allows the policy intention to be met.

8.25 This option signals the Welsh Assembly Government’s ongoing commitment to meeting children’s needs and extending their entitlements. It represents a proper and positive response to the late Children Commissioner’s proposals and furthers underlines the Welsh Assembly Government’s commitment to the United Nations Convention on the Rights of the Child.

8.26 A pilot and evaluation phase will provide a critical opportunity to gather evidence in an area where there are no direct comparators. It will establish the likely level of use of the procedures and services and therefore help ensure that the likelihood of over- or under-resourcing provision is diminished. Pilot studies can be accommodated from within existing Welsh Assembly Government budget allocations and represent a relatively low-cost option at a time of financial uncertainty.

8.27 In terms of costs and service provision, an evidenced assessment can be made on the likely take-up of child appeals and claims. Accordingly, a proper basis can be developed for resource allocation.

8.28 Pilots will also provide an opportunity to assess the likely implications on applications for Legal Help and onward appeals to the Upper Tribunal.

8.29 Whatever the eventual take-up of appeal and claim rights, the Measure provides a significant opportunity further to embed in the culture the importance of involving children in the decisions that affect them.

8.30 There is a major benefit in the development and sharing of best practice, across the Tribunal, LEAs, and advocacy providers. Similarly, there is a period to develop training in a relatively novel area of administrative justice.

8.31 Access for children to Partnership and Disagreement Resolution Services will increase children's opportunities to examine their options and resolve disagreements informally at an early stage.

8.32 This option provides opportunities to align with other Welsh Assembly Government pilot projects that will examine options for the statutory assessment of children's SEN. Additionally, the further development of Integrated Specialist Advocacy Services for children will provide major opportunities once the rights are rolled out on an all-Wales basis.

8.33 The option provides for regulations governing all aspects of the devolved Tribunal's functions to be made by the Welsh Ministers. Disability claims and SEN appeals can be treated on an equal footing.

#### Costs

8.34 While a benefit of the pilot phase is the opportunity to develop an evidence-base, there is uncertainty about likely take-up. Appeal numbers have dropped from a high of 150 in 2005/06 to 118 the following year before falling to a historic low of 94 registered appeals in 2007/08. Should appeals run to trend at the half-year point, it is likely that numbers this year will remain at a similarly low level. The highest number of disability claims made during a year was 9 (2007/08). No claims have been registered in the first five months of the current Tribunal year. We cannot forecast with any real accuracy what, or if, there will be an impact from extending appeal rights to children, either as part of a pilot phase or across Wales.

8.35 A pilot stage over two years, followed by an evaluation period, on the basis of an additional 0-10 appeals by children per year, may be realised at an additional programme cost of £130,000 but is not anticipated to cost more than £150,000. This one-off cost assumes a pilot co-ordinator, with input into the pilot design, working for two days per week (plus associated on-costs and travel and subsistence) at a level similar to an existing project secondee currently working within the Support for Learners Division. LEAs would be funded for making contractual arrangements with advocacy and associated service providers. Costs incurred would include training for advocacy providers, Partnership and LEA officers, and call-off costs for advocacy provision. Further costs would include development, testing and production of guidance and information for children and young people in suitably child-friendly formats. Discretion as to service contracts and media will rest with LEAs and the project manager, in line with minimum standards and terms and conditions of grant set by the Welsh Assembly Government. Action research and evaluation costs will be met centrally through the Assembly Government's Research Team. Costs will be carefully monitored throughout and provision built in to cater for increased marginal costs allied to greater than 10 child appeals/claims per year.

8.36 An outline of possible costs for the pilot and evaluation period is set out below:

Project Manager (2 days/week + T&S)	45,000
Action Research & Evaluation	15,000
Literature/Alternative Media Development, testing and production	50,000
Training for LEA staff and support services	20,000
<b>Total</b>	<b>130,000</b>

8.37 These identified costs can be met from within current Welsh Assembly Government's Additional Learning Needs budgets.

8.38 Costs to the Tribunal could be accommodated from within Tribunal budgets. It is unclear at this stage whether appeals brought by children would be *instead* of those brought by parents, or additional appeals that the Tribunal would not otherwise have had to consider. Even in the latter case, hearing fees for the Tribunal chairs and lay members may be easily contained if child appeals follow the same pattern as those brought by parents, 63% of which were withdrawn by parents or conceded by LEAs.

8.39 If final child appeal and claim numbers are as low as anticipated, costs to LEAs, most of whom generate single figure appeals, would be marginal and there would be no reflection in the settlement. Naturally, subsequent to the pilot phase and the full roll-out of children's rights, trends would be carefully monitored and any adjustments made as necessary.

8.40 LEAs are already required to make arrangements to provide parents with Parent Partnership Services and make provision for access to Disagreement Resolution Services. Recasting these services in order that they are accessible to children is but an extension of an existing duty and, as such, may involve only marginal increases in LEA expenditure. Priority 4B of the Better Schools Fund.

8.41 Onward appeals from the Tribunal now lie to the Upper Tribunal. Prior to November 2008 appeals were made to the High Court. 7 appeals from decisions of the Tribunal have been made to the High Court since the Tribunal's inception in 2003. It is not anticipated that extending appeal and claim rights to children will have any additional impact on the Ministry of Justice.

8.42 Appellants or claimants to the Tribunal will be eligible to receive Legal Help if they satisfy the criteria of the Legal Service Commission's rules. Legal Help will provide legal assistance with the preparation of a case and evidence

and reports. Legal Help does not extend to representation before the Tribunal. Entitlement to funding is usually based on an assessment of household means, not those of the child unless a conflict of interest is established. Additional costs to the LSC as a consequence of the pilot phase are likely to be negligible. The LSC and Ministry of Justice wish to consider the evaluation of the pilots in order to develop a rational basis for financial implications.

### **Summary**

8.43 Only Option 3 can fully address the policy objectives by introducing first a pilot phase followed by a rollout of children's appeal and claim rights across Wales. This option provides a sound opportunity for careful evaluation of the practical application of the rights and the configuration of necessary services.

## **9. Competition Assessment**

9.1 The Measure will not have a negative effect on competition.



## **10. Post-Implementation Review**

10.1 The pilot phase will be subject to rigorous scrutiny by means of an action research project. Quantitative and qualitative assessments will be based on the experiences of appellants, the Tribunal, LEAs, advocates, representatives and other Government departments.

10.2 Provision has been made in the Measure to give the Welsh Ministers the power to modify the Measure to give effect to any changes identified by the pilot and evaluation phase which are necessary to give full effect to children's rights. The Measure will also allow Welsh Ministers to modify the Measure to address any issues that become apparent after the Measure is rolled out generally across Wales.

10.3 The Welsh Ministers must, when exercising their power to modify any provision in the Measure, have regard to the report on how the pilot provisions were implemented and how effective they were in promoting the well-being of children.

10.4 Any changes to the Measure will be made through subordinate legislation, (by order) and subject to scrutiny by the National Assembly under the affirmative resolution procedure.

## **Annex 1**

# **Explanatory Notes**

## **Education (Wales) Measure**

### **Introduction**

These Explanatory Notes relate to the proposed Education (Wales) Measure as introduced in the National Assembly for Wales on 27 April 2009.

The Welsh Assembly Government's Department for Children, Education, Lifelong Learning and Skills has prepared them in order to assist the reader of the proposed Measure and to help inform debate on it. They do not form part of the proposed Measure and have not been endorsed by the National Assembly for Wales.

The Explanatory Notes should be read in conjunction with the proposed Measure. They are not, and are not meant to be, a comprehensive description of the Measure. So where a section or part of a section does not seem to require any explanation or comment, none is given.

The Measure gives children and young people the right to make an appeal in respect of special educational needs to the Special Educational Needs Tribunal for Wales ("the Tribunal") and gives them a right to make a claim in respect of disability discrimination in schools to the Tribunal.

The Measure also makes changes to current legislation relating to the school curriculum which flow from the implementation of the foundation phase (3 to 7 year-olds) of the National Curriculum for Wales. The first key stage is removed from the National Curriculum for Wales and the "foundation stage" is re-named the "foundation phase".

The powers to make such a Measure are contained in Matters 5.4, 5.7, 5.8 and 5.17 of Schedule 5 to the Government of Wales Act 2006. Matters 5.4, 5.7 and 5.8 were inserted by The National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007. Matter 5.17 was inserted by The National Assembly for Wales (Legislative Competence) (Education and Training) Order 2008.

# Commentary on Sections

## Part 1 – Education Appeals and Claims by Children

### Special educational needs appeals

#### Sections 1- 8 insert new provisions into the Education Act 1996

#### **Section 1 – Right of a child to appeal to the Tribunal in respect of special educational needs (inserting a new section 332ZA into the Education Act 1996)**

Subsection (1) of the new section 332ZA specifies existing grounds on which a parent of a child with SEN may appeal to the Tribunal.

Subsection (2) provides that a child may appeal to the Tribunal in relation to the existing grounds on which the child’s parent may appeal.

Subsection (3) permits a parent and child to appeal at the same time whether on the same or on different grounds.

Subsection (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.

Subsection (5) provides that the exercise of rights granted under this section is subject to any provisions made by regulations under sections 332ZC and 336(1) of the Education Act 1996.

#### **Section 2 – Notice and service of documents on a child (inserting a new section 332ZB into the Education Act 1996)**

Subsection (1) of the new section 332ZB specifies various circumstances when a Local Authority must give notice to, or serve a document on, a parent of a child.

Subsection (2) places a duty on a Local Authority to give notice to, or serve a document on, the child as well as the parent.

Subsection (3) requires that any provision which applies to notices given to or documents served on a parent will apply equally to notices or documents served on a child.

#### **Section 3 – Case Friends (inserting a new section 332ZC into the Education Act 1996)**

Subsection (1) of the new section 332ZC allows regulations to be made by the Welsh Ministers that provide for a child to have a person (known as a “case friend”) to make representations on behalf of the child to avoid or resolve

disputes with the Local Authority, or to exercise a child's right of appeal on behalf of the child.

Subsection (2) sets out the duties of a case friend when making representations or making an appeal on behalf of a child.

Subsection (3) provides that regulations made by the Welsh Ministers under this section may (among other things) confer functions on the Tribunal and set up procedures in relation to case friends. Regulations may also make provision about the appointment or removal of a case friend, specify circumstances in which a person may or may not act as a case friend, specify circumstances in which a child must have a case friend, and specify requirements in respect of a case friend's conduct.

**Section 4 - Advice and information  
(amending section 332A and inserting a new section 332AA into the Education Act 1996)**

Section 332A of the Education Act 1996 is amended so that it applies to England only.

A new section 332AA is inserted into the Education Act 1996.

Subsection (1) of the new section places a duty on Local Authorities to arrange for any child in their area with SEN, and any parent or case friend of such child, to be provided with appropriate advice and information about matters relating to the child's SEN.

Subsection (2) requires Local Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide advice and information to children, their parents or case friends.

Subsection (3) requires Local Authorities to comply with any regulations made by the Welsh Ministers that relate to advice and information arrangements.

Subsection (4) places a duty on Local Authorities to make children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that advice and information services are available.

**Section 5 - Resolution of disputes  
(amending section 332B and inserting a new section 332BA into the Education Act 1996)**

Section 332B of the Education Act 1996 is amended so that it applies to England only.

A new section 332BA is inserted into the Education Act 1996.

Subsection (1) of the new section places a duty on Local Authorities to make arrangements to provide independent dispute resolution services to avoid or resolve disagreements between the Local Authority and a child and the Local Authority and a parent of a child.

Subsection (2) obliges Local Authorities to make arrangements to provide independent dispute resolution services with a view to avoiding or resolving disputes between a child and the proprietor of a school and a parent and the proprietor of a school.

Subsection (3) requires Local Authorities to make arrangements that provide for the appointment of an independent person to help avoid or resolve disputes.

Subsection (4) requires Local Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide dispute resolution services.

Subsection (5) requires Local Authorities to comply with any provision made in regulations by the Welsh Ministers that relate to dispute resolution services.

Subsection (6) places a duty on Local Authorities to make children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that dispute resolution services are available.

Subsection (7) requires Local Authorities to notify children, parents and case friends for children in their area that participation in dispute resolution arrangements will not affect a parent or a child's entitlement to appeal to the Tribunal.

## **Section 6 - Independent advocacy services (inserting a new section 332BB into the Education Act 1996)**

Subsection (1) of the new section 332BB places a duty on Local Authorities to arrange for an independent advocacy service to be available in their area, and for a child or a case friend for a child to be referred to the service should they request it.

Subsection (2) defines "independent advocacy services" as services intended to provide advice and assistance to a child who is considering whether to appeal to the Tribunal, who has made or intends to make an appeal, or who is taking part in or intending to take part in dispute resolution arrangements.

Subsection (3) requires Local Authorities when making advocacy services arrangements, to have regard to the principle that the advocacy service must be independent of any person who is the subject of an appeal or involved in investigating or adjudicating on the appeal.

Subsection (4) requires Local Authorities to comply with any regulations made by the Welsh Ministers that relate to advocacy services arrangements.

Subsection (5) places a duty on Local Authorities to make children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that independent advocacy services are available.

Subsection (6) allows a Local Authority to make arrangements that provide for payment to be made to, or in relation to, a person who provides independent advocacy services to a child or case friend.

Subsection (7) requires Local Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide independent advocacy services to children or case friends.

### **Section 7 - Tribunal procedure**

This section amends section 336 of the Education Act 1996 which gives the Welsh Ministers the power to make regulations about Tribunal proceedings.

Subsection (2) adds additional paragraphs into section 336(2) to enable the Welsh Ministers to postpone proceedings in certain circumstances and to add or substitute parties in appeal proceedings.

### **Section 8 - Procedure for making regulations (amending section 569 of the Education Act 1996 and inserting a new section 569(2A) and (2B) into that Act)**

This section amends section 569 of the Education Act 1996 which makes provision in relation to regulations.

Subsection (2) amends section 569(1) of the Education Act 1996 to specify that any power of the Welsh Ministers to make regulations must be exercised by statutory instrument.

Subsection (4) inserts new subsections (2A) and (2B). Subsection (2A) prescribes that regulations made under sections 332ZA, 332ZC, 332AA, 332BA, 332BB and 336 will be subject to the negative resolution procedure. Subsection (2B) is a signpost to the effect of paragraphs 33 to 35 of Schedule 11 to the Government of Wales Act 2006, which deal with the Assembly procedures that apply to subordinate legislation made under powers in the Education Act 1996 and other Acts that were transferred to the Welsh Ministers by the 2006 Act.

### **Disability Discrimination Claims**

### **Sections 9- 16 insert new provisions into the Disability Discrimination Act 1995**

**Section 9 - Right of a child to make a disability discrimination claim  
(inserting a new section 28IA into the Disability Discrimination Act 1995  
– Jurisdiction and Powers of the Tribunal)**

The new section 28IA gives disabled children the right to make a claim to the Tribunal themselves, and allows the Tribunal to consider and adjudicate on a claim made by a child.

Subsection (1) of the new section specifies the grounds on which a disabled child may make a claim to the Tribunal.

Subsection (2) provides that the child's right to make a claim does not extend to a claim that relates to admission or permanent exclusion decisions against a school maintained by the Local Authority.

Subsection (3) permits a child to make a claim at the same time as the child's parent whether on the same or on different grounds.

Subsection (4) allows the Tribunal to make an order in relation to a claim made by a child.

Subsection (5) allows the Tribunal to make an order to prevent or alleviate discrimination, but this does not include a power for the Tribunal to order payment by way of compensation.

Subsection (6) makes provision allowing regulations to be made by the Welsh Ministers that specify circumstances in which a disabled child may not make a claim to the Tribunal.

Subsection (7) provides that the exercise of rights granted under this section is subject to any provisions made by regulations under sections 28IB and 28J of the Disability Discrimination Act 1995.

**Section 10 – Case friends  
(inserting a new section 28IB into the Disability Discrimination Act 1995)**

Subsection (1) of the new section 28IB allows regulations to be made by the Welsh Ministers that provide for a disabled child to have a person to make representations on behalf of the child to avoid or resolve disputes with the Local Authority, or to exercise the child's right to make a claim to the Tribunal.

Subsection (2) specifies that a person who makes representations or makes a claim on behalf of a child is to be known as a "case friend"

Subsection (3) sets out the criteria that a case friend must satisfy when making representations or making a claim on behalf of a child.

Subsection (4) provides that regulations made by the Welsh Ministers under this section may confer functions on the Tribunal and set up procedures in relation to case friends. Regulations may also make provision about the appointment or removal of a case friend, specify the circumstances in which a person may or may not act as a case friend, specify circumstances in which a child must have a case friend, and specify requirements in respect of a case friend's conduct.

Subsection (5) defines a "disabled child" for the purposes of the new provisions in this Measure

### **Section 11 - Advice and information (inserting a new section 28IC – Disability Discrimination Act 1995)**

Subsection (1) of the new section 28IC places a duty on Local Authorities to arrange for any disabled child in their area and for any case friend for such child, to be given advice on matters relating to disability discrimination in schools.

Subsection (2) requires Local Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide advice and information to disabled children (or case friends).

Subsection (3) requires Local Authorities to comply with any provision made in regulations by the Welsh Ministers that relate to advice and information arrangements.

Subsection (4) places a duty on Local Authorities to make disabled children, parents of disabled children, head teachers and proprietors of schools in their area and such other persons as they consider appropriate, aware that advice and information services are available.

### **Section 12 - Resolution of disputes (inserting a new section 28ID – Disability Discrimination Act 1995)**

Subsection (1) of the new section 28ID places a duty on Local Authorities to make arrangements to provide independent dispute resolution services to avoid or resolve disagreements between a disabled child and the body responsible for a school.

Subsection (2) requires Local Authorities to make arrangements that provide for the appointment of an independent person to help avoid or resolve disputes.

Subsection (3) requires Local Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide dispute resolution services.



Subsection (4) requires Local Authorities to comply with any provision made in regulations by the Welsh Ministers that relate to dispute resolution services.

Subsection (5) places a duty on Local Authorities to make disabled children, parents of disabled children, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that dispute resolution services are available.

Subsection (6) requires Local Authorities to notify disabled children, parents of disabled children and case friends for disabled children in their area that participation in dispute resolution arrangements will not affect the entitlement of any person to make a claim to the Tribunal.

### **Section 13 - Independent advocacy services (inserting a new section 28IE – Disability Discrimination Act 1995)**

Subsection (1) of the new section 28IE places a duty on Local Authorities to arrange for an independent advocacy service to be available in their area, and for a disabled child or a case friend for a disabled child to be referred to the service should they request it.

Subsection (2) defines “independent advocacy services” as services intended to provide advice and assistance to a disabled child who is considering whether to make a claim to the Tribunal, who has made or intends to make a claim, or who is taking part in or intending to take part in dispute resolution arrangements.

Subsection (3) requires Local Authorities when making advocacy services arrangements, to have regard to the principle that the advocacy service must be independent of any person who is the subject of a claim or involved in investigating or adjudicating on the claim.

Subsection (4) requires Local Authorities to comply with any regulations made by the Welsh Ministers that relate to advocacy service arrangements.

Subsection (5) places a duty on Local Authorities to make disabled children, parents, head teachers and proprietors of schools in their area, and such other persons as they consider appropriate, aware that independent advocacy services are available.

Subsection (6) allows a Local Authority to make arrangements that provide for payment to be made to, or in relation to, a person who provides independent advocacy services to a disabled child or case friend.

Subsection (7) requires Local Authorities to have regard to any guidance given by the Welsh Ministers when making arrangements to provide independent advocacy services to children or case friends.

## **Section 14 - Tribunal procedure**

This section 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.

Subsection (2) adds an additional paragraph into section 28J(2) to enable the Welsh Ministers to add or substitute parties in Tribunal proceedings.

## **Section 15 - Role of the Welsh Ministers**

This section amends section 28M of the Disability Discrimination Act 1995 by removing the Secretary of State's complaint function with regard to non compliance with the Tribunal's order and conferring that function on the Welsh Ministers.

## **Section 16 - Procedures for making regulations**

This section amends section 67 of the Disability Discrimination Act 1995 by inserting a new subsection (5A) which provides that regulations made under sections 28IA, 28IB, 28IC, 28ID, 28IE and 28J are to be subject to the negative resolution procedure.

## **Section 17 - Piloting the rights of a child to appeal or make a claim**

Subsection (1) makes provision allowing regulations to be made by the Welsh Ministers to pilot the rights given to a child under this Measure for a specified period.

Subsection (2) specifies that regulations made under subsection (1) may make provision for the:

- rights conferred on a child by this Measure in relation to special educational needs to apply only to children for whom specified local authorities are responsible;
- duties imposed on a local authority by this Measure in relation to special educational needs to apply only to specified local authorities;
- rights conferred on a person by this Measure in relation to disability discrimination to apply only to a body responsible for a school in specified areas; and
- duties imposed on a local authority by this Measure in relation to disability discrimination to apply only to specified local authorities.

Subsection (2) also allows for regulations to make provision for reports, or other information on the operation of the pilot, to be provided to the Welsh Ministers.

Subsection (3) confines the Welsh Ministers' power to make regulations in relation to the pilot to specified circumstances.

Subsection (4) makes provision for the duration of the pilot to be extended.

Subsection (5) requires the Welsh Ministers to publish a report on how the pilot was implemented and on how effective the pilot was in promoting the well-being of children. Together with subsection (6), it also requires the Welsh Ministers to lay a copy of the report before the National Assembly for Wales no later than 12 months after the regulations cease to have effect.

### **Section 18 - Power to make provision about appeals and claims by a child**

This section 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.

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 the light of information gathered during the pilot phase. The power will also allow the 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.

Subsection (3) specifies that the Welsh Ministers must have regard to the pilot report required by section 17(5) when making an order under this section.

Subsection (4) states that the power to make an order under this section cannot be exercised before the pilot report required by section 17(5) is laid before the National Assembly for Wales, or after 24 months of the pilot regulations made under section 17(1) having ceased to have effect.

### **Section 19 - Interpretation of sections 17 and 18**

This section defines the terms used in sections 17 and 18.

## **Part 2 – Miscellaneous and General**

### **Section 20 - Foundation phase**

This section substitutes “foundation phase” for “foundation stage” in all occurrences within the Education Act 2002. It also removes all references to the “first key stage” within that Act.

### **Section 21 – Minor and consequential amendments**

This section states that minor and consequential amendments are set out in the Schedule to the Measure.

### **Section 22 – Orders and regulations**

Subsection (1) provides that any power of the Welsh Ministers to make regulations under the Measure is exercisable by statutory instrument.

Subsection (2) specifies that any power of the Welsh Ministers to make an order or regulations under the Measure includes a power to make different requirements for different areas, to make provision generally or for specific cases, and to make incidental, supplementary, transitory, transitional or savings provisions

Subsection (3) specifies that pilot regulations (made under section 17) will be subject to the negative resolution procedure.

Subsection (4) requires that any order exercising the powers given to the Welsh Ministers by section 18 to amend the Measure must be laid before and approved by resolution of the National Assembly for Wales.

### **Section 23 - Commencement**

This section sets out the arrangements for commencement of the Measure in relation to sections 22, 23, and 24. All other remaining provisions of the Measure come into force when commenced by the Welsh Ministers by order.

### **Section 24 – Short title**

This section establishes the Measure's title as the 'Education (Wales) Measure 2010.