

Legislation Committee No.3

LC3(3)-10-09 Paper 1

Special Educational Needs Tribunal for Wales (SENTW)

1. Introduction - about SENTW

1.1 SENTW is pleased to provide a response to the Legislative Committee led consultation.

1.2 SENTW was established by an Act of Parliament in 2003¹. The Tribunal receives its funding from, but is independent of, the Welsh Assembly Government. Its primary function is to manage the statutory discharge of Special Educational Needs (SEN) appeals and claims of Disability Discrimination in Welsh Schools. Appeals are against decisions made by Welsh Local Education Authorities (LEAs) and claims are made against the responsible body for the school.

1.3 Currently regulations only make provision for a parent² or person with parental responsibility³ to make an appeal and claim to the Tribunal.

1.4 The bulk of the Tribunal's work is taken up with SEN appeals. Since it was first established a total of 668 appeals have been registered against Welsh LEAs. Of those approximately; 25% of all appeals have proceeded to a hearing, 25% conceded by the LEA and 46% withdrawn by the parent⁴. Of the appeals that have proceeded to a hearing, 83% have been upheld, that is decided in favour of the parent. Disability Discrimination Claims are a small fraction of the Tribunal's work, 25 claims have been registered since 2003.

1.5 During the first few years of operating the Tribunal saw a steady increase in the number of appeals registered on an annual basis, peaking in 2005/06 with 150 appeals. Since then there has been a year on year downward trend in numbers, with just under 100 appeals registered during the 2007/08 Tribunal year. It is not clear why there have been fewer appeals over the last couple of years, although there has been a marked decrease in the number of appeals made against certain local authorities⁵. In recent years the Tribunal has seen an increase in the more complex types of appeals, against the contents of the SEN statement. There has also been a comparative increase in the number of hearings that take place which suggest that the appeals the Tribunal registers are more complex and more likely to proceed to a hearing and be decided by the Tribunal.

1.6 The Head of SENTW is the President. The Tribunal has 5 legal members, including the president, and 7 specialist lay members. All members have knowledge of special educational needs and disability discrimination legal frameworks and / or knowledge of Special Educational Needs and working with young people. Panels, comprised of 1 legal and 2 lay members hear and decide appeals and claims. Members are appointed in accordance with public appointments procedures and on the basis of a part-time fee-paid contract. Administrative support is provided by a team of 5, including the administrative head, the Secretary of the Tribunal.

1.7 SENTW has an important administrative justice role, testing in accordance with the Tribunal's jurisdiction certain decisions and actions of Welsh Local Authorities and Responsible Bodies of Schools in Wales, to ensure relevant legislation and codes of practice have been applied appropriately and in accordance with the law.

2. Consultation Questions

2.1 Q. Is there a need for legislation to be made to allow children the right to make appeals and claims to the Special Educational Needs Tribunal for Wales and if so why?

2.1.1 SENTW very much welcomes this proposed measure and the principle of increasing the participation of children and young people in Tribunal decisions and processes that affect them.

2.1.2 The Measure underpins the United Nations Convention on the Rights of the Child, to be involved with and to take part in, decisions that concern or directly affect them. It also supports and builds on the proposal made by the late Children's Commissioner for Wales, Peter Clarke, that children should have a right of appeal to the Tribunal. The Children's Commissioner's office has also told us at Tribunal user group meetings of past Tribunal cases where the involvement of the young person may have significantly changed the outcome.

2.1.2 There is a currently a duty on an LEA in responding to an appeal, to obtain and submit the views of the child or to say why the views have not been submitted. It is the view of the Tribunal that this provision is not sufficiently robust as it does not require the LEA to obtain meaningful views or indeed any views at all. The current arrangements are also inequitable as there is no duty on the parent to submit the views of the young person.

2.1.3 There is currently no duty for the parent or responsible body to submit the views of the young person in respect of a claim.

2.1.4 SENTW does not currently have powers by which it can ensure that the views of the child are made known in an appeal / claim.

2.1.5 SENTW has received enquiries from young people who have wanted to make an appeal but whom have been unable to do so under the current provisions.

2.1.6 Given the points raised above, the Measure will most importantly establish a mechanism by which young people will be able to

access the right to have their voice heard in Tribunal decisions which directly affect and concern them.

2.2 Q. Are the sections of the proposed Measure appropriate in terms of reforming legislation relating to Special Educational Needs appeals? If not, how does the proposed Measure need to change?

2.2.1 The Tribunal notes that the provisions made in the proposed Measure will put a duty on local authorities; to inform children of their right of appeal, to make arrangements for partnership and disagreement resolution services and inform children about their right to access them and to provide access to independent advocacy services. The Tribunal considers that this suite of duties and the support that will be made available to young people as a consequence is essential in order for young people to be able to access their rights. Organisations will need to ensure that information is made available to young people in a format which is accessible to the young person. The Tribunal is currently in the process of commissioning guidance for young people to provide information about the Tribunal's work, with the specification that it is in an accessible format.

2.2.2 The Tribunal supports the proposal to transfer the regulation making powers for the Tribunal's disability discrimination procedures from the Secretary of State for Justice to Welsh Ministers. It is important that young people have a parity of rights in terms of making a claim as well as an appeal. The Tribunal understands that the transfer of powers will allow the National Assembly for Wales to make such provision.

2.2.3 The Tribunal welcomes the proposal to transfer powers to consider complaints about non-implementation of Disability Discrimination Orders from the Secretary of State for Justice to Welsh Ministers. The Tribunal takes the view that Welsh Ministers are best placed to deal with important matters concerning Welsh schools.

2.2.4 The Tribunal's decision and order is legally binding, where appeals are upheld there is a statutory duty for local authority's to implement the order within a specified time scale. In situations where decisions are not however implemented the Tribunal does not have any powers of enforcement. Concerns about non implementation are currently dealt with outside of the Tribunal. Welsh Ministers have a power to direct the local authority to implement an order. There is currently no internal formal mechanism for dealing with such issues and the lack of enforcement powers for the Tribunal means that in instances where the Tribunal's orders are not implemented, resolution is sometimes unlawfully and unduly prolonged. This is very unsatisfactory for all concerned. The Tribunal considers that enforcement powers, which may be made within the Measure or appropriate Regulations, would resolve this problem and improve and strengthen existing provision.

2.2.5 The Tribunal supports the proposal to have an initial pilot and evaluation phase in some local authority areas before the legislation is implemented throughout Wales. The Tribunal notes that the pilot will provide an important opportunity for an evaluation of the practical application of the rights and essential support services and that the full roll out will be informed by the results. This provision is particularly important given that there is no available information on the likely uptake of the new rights and that sufficient support services are essential if the new rights are to be made accessible to young people.

2.3 Q. How will the proposed Measure change what organisations do currently and what impact will such changes have, if any?

2.3.1 The Tribunal notes that the pilot study will introduce rights for young people to make an appeal / claim and that this will be followed by a full roll out. The Tribunal very much welcomes the extension of young peoples rights and has given careful consideration as to the likely impact for the Tribunal.

2.3.2 The Tribunal agrees that a pilot study will helpfully inform the extent to which provision and support should be resourced. Whilst this will be useful for the Tribunal in enabling it to gauge the likely ongoing impact, there will also be an additional start up impact for the Tribunal to take into consideration.

2.3.3 The start up impact will be around developing and establishing new procedures, guidance, information and commissioning and providing training. The Tribunal will be able to build on its existing procedures and experience for when young people attend a hearing under the current arrangements. Also the Tribunal has recently delivered specialist training for its members around involving children in legal proceedings. The Tribunal has seen a drop in appeal numbers over the course of the last few years which means that we anticipate being able to deliver start up within our existing provision and resources. Appeal numbers are however variable and as such this will need to be monitored should numbers increase and the situation change.

2.3.4 The onward impact will vary according to the numbers of appeals and claims, the Tribunal will carefully monitor this and resource allocation may need to be reviewed accordingly. If the up take significantly increases the numbers of appeals this will have a knock on resource impact for the Tribunal when the roll out takes place. If the uptake is low however the Tribunal recognises the importance of putting in place procedures for ensuring that training and expertise of members and staff is kept sufficiently up to date.

2.3.5 Tribunal agrees with the view set out in the explanatory memorandum that the wider impact of the Measure, even if uptake is low, will be to further promote across the various stakeholder organisations the importance of involving children at an early stage in decisions that affect them. The Tribunal also agrees that most importantly the proposals place young people more centrally in processes affecting them, ensuring views of young people are given due respect and weight. In particular these outcomes are likely to be reinforced by the additional duties the Measure will place on local authorities to inform children of their appeal rights and to make arrangements for and to provide access to partnership and disagreement resolution services and independent advocacy services.

2.3.6 The Tribunal considers that the role of the independent advocate will be crucial to securing the full engagement of the young person in the process. The quality and success of advocacy services in this context will very much depend on the appropriate specialism

and training of advocates. If up take for the new rights is high it would need to be ensured that there is a sufficient number of trained advocates available to deliver this service, if up take is low the challenge will be around retention and maintaining up to date training and expertise of advocates.

2.3.7 The Tribunal considers that parity of rights across SEN and disability jurisdictions will establish parallel duties and processes which in practical terms will make it easier for the Tribunal to administer.

2.4 Q. What are the potential barriers to implementing the provisions of the proposed Measure (if any) and does the proposed Measure take account of them?

2.4.1 The Tribunal recognises the importance of making information on rights and guidance about the process available in a format that is accessible to the young person. Such good practice could be established through various mechanisms such as making provision within the appropriate regulations or promoting such practice through issuing guidance.

2.4.2 The Measure is silent on how the appropriate body might make young people aware of their rights in respect of disability discrimination claims given there is no statutory trigger mechanism. Young people may benefit from a greater awareness of rights which could for instance form part of planned SEN provision for young people. There is similarly no trigger mechanism for parents wishing to make a claim. The Tribunal has recently launched its website which provides information about the process for making a claim of disability discrimination within the context of its jurisdiction.

2.4.3 The Tribunal considers that access to specialist advocacy services is essential to achieve the engagement of young people as proposed by the Measure. In particular the quality and expertise of advocates could impact on the efficient discharge of appeals and claims. The Tribunal will make available guidance, information and training about appeals and claims processes to improve knowledge and understanding of those involved in its processes.

2.4.4 The Tribunal is conscious of the need to ensure that the knowledge and expertise of its members is kept up to date should the up take in appeals be relatively low.

2.5 Q. What are the financial implications of the proposed Measure for organisations, if any? In answering this question you may wish to consider Section 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the proposed Measure.

2.5.1 The Tribunal's work is very much demand led according to the number of appeals and claims made and its budget allocation is set and monitored accordingly. Over the course of the last few years there has been a decline in appeal numbers, if this continues there is likely to be spare capacity within the existing budget allocation for the Tribunal to deliver and implement the proposed Measure. The Tribunal has in the past been proactive about fully utilising its resources by taking forward business improvement projects such as the development of its website.

2.5.2 Appeal numbers are however variable and as such the situation would need to be monitored, last year the Tribunal registered 94 appeals. This year we anticipate a further 10% decline in numbers. It is not an exact science however, in the 2005/06 Tribunal year for instance appeal numbers peaked at 150. Should numbers of appeals rise over 120 the resource allocation would need to be reviewed to ensure that the Tribunal has capacity to fulfill its statutory duties.

2.5.3 The pilot study will provide an important opportunity for the Tribunal to gauge the likely uptake and affect on appeal numbers. It will also give the Tribunal an opportunity to plan delivery and implementation so that it fully utilises its existing budget allocation across the term of the study.

2.6 Q. What are your views on 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?

2.6.1 The Tribunal welcomes the opportunity contained in the Measure to make amendments to legislation on conclusion of the pilot study. 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. The Welsh Assembly Government has been very proactive in consulting widely on the development of the proposals set out in the Measure and the Tribunal would welcome a further consultation opportunity once the pilot study has been completed and the evaluation report published and before legislation and provision is finalised.

2.7 Q. Are there any other comments you wish to make about specific sections of the proposed Measure?

2.7.1 The Tribunal has welcomed the opportunity to work closely with the Welsh Assembly Government on the development of proposals to give young people the right to make an appeal and claim to the Tribunal. Like the Welsh Assembly Government the Tribunal wants to ensure that views of young people are heard in the Tribunal's processes. The greater involvement and participation of young people in the Tribunal's decisions and processes which affect them is overdue. This has been widely recognised by Tribunal members and staff and those attending the Tribunal's User Group meetings. It is hoped that the Measure will in particular help young people who are in a 'looked after' situation and who may not otherwise be able to access the right to make an appeal or claim.

2.7.2 The Tribunal also particularly welcomes the opportunity for a pilot study to gauge up take and test provision before legislation is finalised. The study will also give the Tribunal an opportunity to develop and implement provision so that it fully meets the needs of its customers.

3. Conclusion

The Measure establishes an important precedent for Wales in terms of rights for young people and their involvement in Tribunal decisions which affect them. The Tribunal is very enthusiastic about the greater involvement of young people in its processes and decisions and is looking forward to working closely with the Welsh Assembly Government to move this agenda forward. The Tribunal is particularly excited about the prospect of working with young people to achieve the principles established in the Measure and to deliver the policy.

Special Educational Needs Tribunal for Wales

May 2009

1 Education Act 2002 Chapter 32 Section 195

2 The parental right to make an appeal and claim to the Tribunal is set out in Part 4 of the Education Act 1996 and Part 4 of the Disability Discrimination Act 1995.

3 A person with parental responsibility in this context is any person who is not a parent of the child but who has parental responsibility for or care of the child on a long-term settled basis.

4 Figures for appeals conceded and withdrawn do not include those registered in 2003/04

5 More detailed information about the numbers of appeals can be found in the Tribunals Annual Reports which are published on its website <http://wales.gov.uk/sentwsub/home>