

Evidence to the Legislation Committee No.3 on the proposed Education (Wales) Measure

Written submission on behalf of the Children's Commissioner for Wales



The Children's Commissioner for Wales is an independent children's rights institution established in line with the Paris Principles. In exercising his functions, the Children's Commissioner for Wales must have regard to the United Nations Convention on the Rights of the Child (UNCRC).

The Commissioner's remit covers all areas of the devolved powers of the National Assembly for Wales insofar as they affect children's rights and welfare.

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The Children's Commissioner for Wales is very pleased to give evidence to support this important children's rights development. The office has been closely involved throughout the, discussion and consultation stages that have lead up to the proposed Measure being laid.

The first Children's Commissioner for Wales, Peter Clarke was concerned that children with special needs did not have a right of appeal to the Special Educational Need tribunal for Wales (SENTW) . This was considered to be an example of domestic legislation not being fully in line with the UNCRC, specifically article 12. As a result of Peter's analysis he submitted a proposal to the Welsh Assembly Government (WAG) to address this gap. The original proposal is attached at Appendix 1.

The original proposal suggested that the children's right of appeal should be contingent on the parent not exercising their right to make an appeal. Secondary school pupils' right of appeal against exclusion from school in Wales has a similar limitation. At that time we felt that the tension between parents' rights and children's rights would mean that a universal right of appeal for children would not be easily accepted. However, in the ensuing discussions with Special Educational Needs (SEN) professionals across Wales it became clear that this was not the case and that there was a considerable appetite for a universal right of appeal.

The SENTW and Welsh Assembly Government is to be congratulated for facilitating the debate on this topic which has also raised a more general awareness of children's rights and may have resulted in a more participative approach within the wider SEN process. Although the SEN Code of Practice refers to and encourages children's participation, it is up for discussion as to whether this is always seen as a priority.

The questions from the Committee:

1. 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?

Yes. We believe that this is a child's right under article 12 of the United Nations Convention on the Rights of the Child to have their voices heard in decisions that affect them.

The current situation in which only the child's parents may make an appeal to the tribunal is often unsatisfactory and does not comply with article 12 of the UNCRC which states:

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The current situation may be deemed insufficient when viewed from a rights based framework for other reasons too.

Parents do not always act in the best interests of their children. When the child is disabled the parents may often be overprotective - which can seriously infringe the child's right to privacy, freedom of association, access to play and leisure facilities and to equality of opportunity amongst other rights.

We are aware, through individual cases brought to this office and through discussion with SEN managers across Wales, that specialist educational placement may often be sought by parents as a form of respite for the parents rather than essential educational provision for the child.

Other parents may simply be disinterested or unwilling to make an appeal and have to go through a process that, despite the best efforts of SENTW, can appear intimidating and stressful. The cost of legal representation is also a deterrent for some families.

Perhaps though, the main reason for the need for this legislation is for the child with special needs to be given the opportunity to demonstrate their potential to the Tribunal. Often a bare description of the illness or disability can give the impression that they would be unable to participate in the hearing. Often the children can be their own best evidence in demonstrating their potential

Presence at the hearing would also ensure that they would be able to understand the arguments and may well be better able to accept the decisions that are made. To be provided with information about such decisions is their right under article 13 of the United Nations Convention on the Rights of the Child, which states:

"The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice"

2. 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?

In considering this question, consultees *may* wish to consider, in particular, the nature of the provisions in the proposed Measure that:

(a) local authorities must inform children of their right to appeal (Section 4);

There will need to be some consideration as to how this is best done taking into account the child's age, maturity and the nature of the child's special needs. Simply writing to the parents and to the child may not have the desired effect as there will be no opportunity to check that the child has received the letter and, more importantly, understood the content.

It may well be that the measure should place a specific duty on the school Special Educational Needs Coordinator (SENCO) to check both receipt and understanding.

(b) local authorities must make arrangements for partnership and disagreement resolution services and inform children about their right to access them (Sections 5 & 12);

(c) local authorities must provide access to independent advocacy services for children. Advocates will be expected to be able to assist children in resolution processes, appeal/claim case preparation and support or represent them at hearings (Section 6 & 13);

It is an unfortunate fact that some legal representatives advise their clients that disagreement resolution is pointless. We feel that it will often be the best way to proceed particularly when the claimant is a child.

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

The entitlement to have a "case friend" may also be important here. If a child is to choose someone other than a parent, it is likely that they will choose a teacher. In 2005, the Children's Commissioner for Wales published "Children don't complain" which was a review of the operation of complaints, representations and whistleblowing procedures as well as the arrangements for the provision of children's advocacy services in local education authorities in Wales. Children told us that after their parents, the person they would be most likely to speak to about problems would be their teacher. It should also be borne in mind that pupils with SEN may spend a considerable amount of time with Teaching Assistants. One section in the Children's Commissioner's review "*Children don't Complain*" refers to accessing support and notes:

- *The young people agreed that going to the teacher would be the first thing they would do, and "that it would be easier if it was somebody they knew and could talk to".*
- *"Know you can complain to the teacher or head."*
- *"Get parents to help."*
- *They would want help to complain and "would feel more confident".*
- *"Having someone to help you in school."*

Children don't Complain, Children's Commissioner for Wales, 2005
<http://www.childcomwales.org.uk/uploads/publications/21.pdf>

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

- (d) the current regulation making powers to in relation to the Tribunal's disability discrimination procedures should be transferred from the Secretary of State for Justice to Welsh Ministers (Section 15); and
- (e) the responsibility for considering complaints about nonimplementation of Disability Discrimination Orders should be transferred from the Secretary of State for Justice to Welsh Ministers (Section 15);

Agreed.

- (f) there should be an initial pilot and evaluation phase in some local authority areas, before the legislation is implemented throughout Wales (Sections 17-19).

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

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

The SEN Code of Practice for Wales has a whole chapter on Pupil Participation which says:

***3:2** Children and young people with special educational needs have a unique knowledge of their own needs and circumstances and their own views about what sort of help they would like to help them make the most of their education. They should, where possible, participate in all the decision-making processes that occur in education including the setting of learning targets and contributing to Individual Education Plans (IEPs), discussions about choice of schools, contributing to the assessment of their needs and to the annual review and transition processes. They should feel confident that they will be listened to and that their views are valued.¹*

Yet few of those who have worked in the area of SEN would agree that this good intention has, until recently at least, become a reality. Throughout our involvement in the discussion and consultation on this proposal we would have argued that there have already been some important changes in how both LEAs and SENTW require the views of the child be ascertained and form part of the SEN decision making processes. If children and young people are enabled to participate in the earlier stages of the SEN process, their needs can be met more quickly and the need for an appeal possibly avoided.

Making a Tribunal accessible to children and young people will inevitably ensure that it is also more accessible to adults acting on behalf of their children.

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

There will be a need for current working practices at all stages of the SEN process to be reviewed to ensure that children are able to participate throughout and not just when making an appeal to the Tribunal. Our experience of discussing this at SENTW User Groups would suggest that this is already happening in many authorities.

As noted in response to question 2, a potential barrier will be the understanding of the role of "case friend" and we feel that there will need to be guidance for schools and teachers issued on this role so that they feel comfortable in taking on the role and that they will not be placed in a difficult situation in any way for doing so.

¹http://wales.gov.uk/topics/educationandskills/policy_strategy_and_planning/schools/sencodeofpractice/?lang=en

6. 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?

It is entirely sensible that they should have the power to react to the evaluation of the pilot and evaluation phases.

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

No.

**Keith Towler
Children's Commissioner for Wales.
May 2009**

Appendix 1

Original proposal November 2005



**Comisiynydd Plant Cymru
Children's Commissioner for Wales**

**Proposal from the office of the
Children's Commissioner for Wales**

**Children's Right of Appeal to the Special Educational Needs Tribunal
for Wales**

21 November 2005

The current position

Parents in Wales whose children have special educational needs can appeal to the Special Educational Needs Tribunal for Wales (SENTW) against decisions made by Local Education Authorities (LEAs) in Wales about their children's education. SENTW also considers claims from parents of disability discrimination about schools in Wales.

The Proposal

We propose that the right of appeal should be extended to children and young people themselves providing that their parents do not wish to appeal in respect of the matter.

The right for children to participate in matters affecting them is enshrined in the United Nations Convention on the Rights of the Child – in particular articles 12 and 13.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

or (b) For the protection of national security or of public order or of public health or morals.

No further negotiation is required for them to have these rights. However, for children and young people to exercise their rights, adults and organisations have to allow, enable and facilitate the process by which they can do so.

The Implications

It will be necessary for change to primary legislation (possibly by the addition of a Wales only amendment) and regulatory change to enable children and young people to exercise a similar right.

SENTW will need to consider how to provide access to a specialist advocacy service to facilitate the children and young people's participation in the process.

Slightly different arrangements for hearings where a child is the applicant may be needed although we recognise that, at present, a great effort is made by SENTW to put the adults concerned at their ease.

Child friendly information about the process of appeal will need to be produced.

Current Legislation

The legislation gives the right of appeal to parents and does not specify that the child should have the right to attend and give evidence at the hearing. Indeed it is left to the Tribunal to decide whether to permit the child to address them:

Statutory Instrument 2002 No. 1985

The Special Educational Needs and Disability Tribunal (General Provisions and Disability Claims Procedure) Regulations 2002

Part IV section 30

(7) The tribunal may permit the child to give evidence and to address the tribunal on the subject matter of the claim.

We understand that the Tribunal requires the local authority to seek and present the child's views at the hearing but there is no similar requirement on the parents to state their understanding of the child's views.

It is assumed that parents will always act in their child's best interest and yet the experience gained through supporting and advising children who have contacted this office suggests that there are instances where this is not the case. Several local education authority officers have also reported instances of parents not acting in what they consider to be the child's best interests.

It is also necessary to consider those families in which parents are either disinclined or unable to make an appeal. This may be due to many factors such as the parents being intimidated by the process or simply being disinterested in their child's education. Some parents may have special educational needs themselves.

We believe that these current arrangements infringe children and young people's rights which they have under the United Nations Convention on the Rights of the Child.

We believe that by allowing children and young people to appeal and take part in the hearings they will feel that they have been heard and, after receiving an explanation of the reasons for any decision, better able to accept even decisions with which they do not agree.

There will inevitably be arguments against these proposals.

A common argument is that children with SEN will not be capable of making an appeal. Whilst this may be true in a number of cases, many children have special needs due to a disability which may not affect their ability to present their case. If children and young people are truly unable to lodge an appeal, either alone or with assistance from an advocate, then there will be no appeal for the Tribunal to hear. This is not a good argument for denying all children the right of appeal.

The exercise of these proposals will require changes to primary legislation but there is no reason why the Welsh Assembly Government should not request these changes if they are thought to be in the best interest of the children of Wales. Indeed, in a press release on 15th June 2005, Mr Peter Hain suggested that such moves could be more speedily addressed.

“Since the General Election, we have already set in motion an innovative approach with Westminster bills drafted in a way which gives the Assembly wider and more permissive powers to determine how policies should be implemented in Wales.”

The suggestion has also been made that the Welsh Assembly Government should be cautious about enacting legislation which will enhance the rights of children in Wales when their peers in England do not have equal rights. The Welsh Assembly Government has already made significant enhancements to the rights of children and young people in Wales, such as:

- The appointment of a Children's Commissioner for Wales long before such a post existed in other parts of the United Kingdom.
- Since January 2004 secondary school pupils in Wales have the right of appeal against exclusion from school.
- Disabled children in Wales will also benefit from the abolition of the test of parental means in applications for a Disabled Facilities Grant.