Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

Pwyllgor Deddfwriaeth Rhif 3
Legislation Committee No. 3

Dydd Iau, 11 Mehefin 2009
Thursday, 11 June 2009

Cynnwys
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Procedural Motion

Cofnodir y trafodion hyn yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir cyfieithiad Saesneg o gyfraniadau yn y Gymraeg.

These proceedings are reported in the language in which they were spoken in the committee. In addition, an English translation of Welsh speeches is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Peter Black	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Christine Chapman	Llafur Labour
William Graham	Ceidwadwyr Cymreig (yn dirprwyo ar ran Alun Cairns) Welsh Conservatives (substitute for Alun Cairns)
Janice Gregory	Llafur Labour
Helen Mary Jones	Plaid Cymru The Party of Wales
David Lloyd	Plaid Cymru (Cadeirydd y Pwyllgor) The Party of Wales (Committee Chair)

Eraill yn bresennol
Others in attendance

Jane Hutt	Aelod Cynulliad, Llafur, y Gweinidog dros Blant, Addysg a Dysgu Gydol Oes Assembly Member, Labour, the Minister for Children, Education, Lifelong Learning and Skills
Huw Maguire	Rheolwr Polisi Mesur AAA, Llywodraeth Cynulliad Cymru SEN Measure Policy Manager, Welsh Assembly Government
Amina Rix	Gwasanaethau Cyfreithiol, Llywodraeth Cynulliad Cymru Legal Services, Welsh Assembly Government

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Fay Bowen	Clerc Clerk
Carolyn Eason	Gwasanaeth Ymchwil yr Aelodau Members' Research Service
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Joanest Jackson	Cynghorydd Cyfreithiol Legal Adviser
Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 10.30 a.m.
The meeting began at 10.30 a.m.

Cyflwyniad ac Ymddiheuriadau
Introduction and Apologies

[1] **David Lloyd:** Croeso i gyfarfod diweddaraf Pwyllgor Deddfwriaeth Rhif 3. Fel y mae pawb yn ymwybodol, yr ydym,

David Lloyd: Welcome to the latest meeting of Legislation Committee No.3. As you will all be aware, we have, over the past few

dros yr wythnosau diwethaf, wedi bod yn trin ac yn trafod y Mesur Arfaethedig ynghylch Addysg (Cymru), sydd yng Nghyfnod 1. Heddiw yw'r bedwaredd sesiwn dystiolaeth.

weeks, been discussing the Proposed Education (Wales) Measure, which is at Stage 1. Today is our fourth evidence-gathering session.

[2] Yn anffodus, bydd yn rhaid i William Graham adael i fynd i gyfarfod arall am 11 a.m.

Unfortunately, William Graham will have to leave to attend another meeting at 11 a.m.

[3] Os bydd larwm tân, dylai pawb adael yr ystafell drwy'r allanfeydd tân penodol gan ddilyn cyfarwyddiadau'r tywysyddion. Dylai pawb ddiffodd eu ffonau symudol, gan gynnwys y Cadeirydd. Mae pawb yn ymwybodol bod y Cynulliad yn gweithredu yn ddwyieithog. Mae clustffonau ar gael i chwyddleisio'r sain a hefyd i glywed cyfieithiad ar y pryd. Nid oes angen i neb gyffwrdd y botymau ar y meicroffonau, oherwydd bydd hynny'n amharu ar y system ddarlledu.

Should there be a fire alarm, everyone should exit the room through the designated fire exits, and take instructions from the ushers. Everyone should switch off their mobile phones, including the Chair. Everyone will be aware that the Assembly operates bilingually. Headsets are available for amplification and interpretation. You do not need to press the buttons on the microphones; doing so can interfere with the broadcasting system.

10.31 a.m.

Mesur Arfaethedig ynghylch Addysg (Cymru)—Cyfnod 1: Sesiwn Dystiolaeth 4
Proposed Education (Wales) Measure—Stage 1: Evidence Session 4

[4] **David Lloyd:** Croesawaf Jane Hutt, y Gweinidog dros Blant, Addysg, Dysgu Gydol Oes a Sgiliau. Croeso hefyd i Huw Maguire, rheolwr polisi'r Mesur anghenion addysgol arbennig, a hefyd i Amina Rix o'r adran gwasanaethau cyfreithiol.

David Lloyd: I welcome Jane Hutt, the Minister for Children, Education, Lifelong Learning and Skills. I also welcome Huw Maguire, the special education needs Measure policy manager, and Amina Rix from the legal services department.

[5] Symudwn yn awr at y cwestiynau. Fel y gwyddoch, y patrwm arferol yw fy mod i'n gofyn y cwestiwn cyntaf.

We will now move on to questions. As you know, the usual pattern is for me to ask the first question.

[6] Minister, we have heard evidence from a number of witnesses about a number of potential implementation issues arising from the decision to create a universal right of appeal and claim for children, which does not take into account their age and capacity. Have you considered setting a lower age limit for appeals or phasing in the introduction?

[7] **The Minister for Children, Education, Lifelong Learning and Skills (Jane Hutt):** We considered options in relation to competency tests and age restrictions, and we reached the policy decision that rights should be extended on a universal basis. The reason for that is that we consulted widely, and a significant number of the consultation responses backed that universal basis and suggested that rights should not be age or competency-based. We do not think that age is necessarily an effective or appropriate barometer of ability for children with special educational needs. Disabled children might be discriminated against in favour of children of the same age who do not have learning difficulties and who have a greater ability to make a claim in their own names. We are dealing with difficult areas, namely ones of exclusion. If we placed restrictions on children and parents who were unwilling or unable to make appeals, there is a danger that children's interests could not be protected effectively. I believe that you heard evidence from SNAP Cymru that a seven-year-old child had contacted

it and was very clear about what they wanted. That provides the evidence as well as backing the principle of universality. We need to take this through the pilot project; that is critical.

[8] **David Lloyd:** The proposed Measure provides a right for children in schools to appeal to a special educational needs tribunal. Does it provide similar rights for children attending further or higher education institutions?

[9] **Jane Hutt:** It does not apply to children receiving post-16 training or who are in higher or further education. That is because the Learning and Skills Act 2000 makes provision in relation to the special educational needs of such children, so we have to look to that legislation in that respect.

[10] **David Lloyd:** William Graham sy'n gofyn y cwestiynau nesaf.

David Lloyd: The next questions are from William Graham.

[11] **William Graham:** In its written evidence, the Welsh Local Government Association states that there is clearly a need for an ad litem provision or similar, to provide an objective third party view of the individual's views. What is your response to this proposal?

[12] **Jane Hutt:** We do not believe that there is a need to bring in an ad litem service, because the tribunal's commitment is to an informal process, particularly with regard to opening this up for children. They will have their case friends and representatives, who can support and help them and give a voice to their views. We have considered this and discussed it with the tribunal, and we do not believe that this is the right route to follow. The tribunal is committed in its regulations to informality, and this would create a third-party service. In relation to CAFCASS, that is appropriate for children in the family court division, but it is not about the child's voice, so we do not believe that we should be following up the issue of having an ad litem service at all.

[13] **William Graham:** Are you confident that the introduction of the proposed Measure is timely, given the range of the current initiatives, such as the review of statementing that was announced in October 2008, which could potentially have a significant impact on the subject of the proposed Measure?

[14] **Jane Hutt:** We think that it is timely to introduce this proposed Measure, alongside the review of statutory assessment and the statementing framework pilot projects. It is all about embedding children's participation in the statutory assessment process, and we are moving forward with a legislative opportunity here. I think that we must remember that it was four years ago that the Children's Commissioner for Wales first made his proposal regarding children with special educational needs having the right to appeal to a tribunal. During my last appearance before this committee, I said that the Equalities and Human Rights Commission recommended last July that we should be acting promptly on ensuring that looked-after children with special educational needs have an independent right to appeal against decisions. I must pay tribute to Peter Black, because much of this comes from the recommendations of the cross-party committee that he chaired. Let us do what we can in legislation alongside the piloting of the review of the statementing process. I think that it fits well with that.

[15] **David Lloyd:** Janice Gregory sy'n gofyn y cwestiynau nesaf.

David Lloyd: The next questions are from Janic Gregory.

[16] **Janice Gregory:** My first question relates to sections 1 and 9. In their evidence, the children's commissioner and SNAP Cymru suggested that children should have the right to request an assessment of their educational needs in their own right. What is your view on this?

[17] **Jane Hutt:** We have noted that SNAP Cymru is of the view that not extending that right would limit the right of the child to make an appeal. The key point is that this is about giving children parity of rights. There is no appeal right to ask for an assessment and, as you know, through this Measure, parents and children will be able to appeal against a decision by the LEA not to undertake a statutory assessment. The tribunal, when it gave evidence, did not share SNAP's opinion about access to the tribunal. We must take on board the purpose of this proposed Measure, namely that it is specifically about giving children parity of rights to make an appeal to the tribunal; it is not about the assessment process. This goes back to the point that William made in a way. We are looking at the piloting and the assessment process, and something might emerge from that.

[18] **Janice Gregory:** On section 1(4), which provides for regulations for the circumstances in which a child may not appeal, the Special Educational Needs Tribunal for Wales suggested that children and young people should have an unfettered right of appeal. How would you respond to that?

[19] **Jane Hutt:** I would agree. This goes back to the point about universality, does it not? That is how we have framed the proposed Measure. I do not want to fetter that right or to nullify the universality. It is a novel approach and we discussed this when I gave evidence previously. On this issue, I am considering very carefully the views of the committee because, as I said, I do not want to fetter that right. Do we need to pilot this? It would be interesting to hear your views on that.

10.40 a.m.

[20] **Helen Mary Jones:** In a technical sense, Minister, are there a parallel set of circumstances in which parents may not appeal? I am going back to the point that you made about parity, that this is all about giving the children and parents parity. I just want to throw this in for your consideration: if this proposed Measure is there to give children and parents parity and we do not fetter the rights of parents, it would seem logical that we would not want to fetter the rights of the child either. The pilot schemes may show otherwise, but—

[21] **Jane Hutt:** That is a very fair question. I do not know whether you can answer that, Amina or Huw.

[22] **Mr Maguire:** There is nothing in the tribunal legislation at the moment that requires a parent to pass any test or that limits a parent's right to make an appeal, whether they are the parent who is living with the child or otherwise. So, no, there are no manacles.

[23] **Helen Mary Jones:** Thank you; that is helpful.

[24] **Jane Hutt:** Again, it is useful for us to consider this position that is being raised as a matter of concern in the proposed Measure.

[25] **David Lloyd:** On a legal, technical point, section 1(2)(4) is subject to the negative procedure at the moment. Have you considered using the affirmative procedure instead?

[26] **Jane Hutt:** Yes. As Members may know, I went to the Subordinate Legislation Committee last week, on 1 June, and I confirmed that this would have to be subject to the affirmative procedure, if we were to proceed with it. I am further considering this issue, so it is helpful to be able to discuss it with the committee today. It would definitely be subject to the affirmative procedure, if we were to proceed with it.

[27] **Janice Gregory:** Moving on to my final question on this section, the Welsh Local

Government Association stated in its evidence that this legislation could have significant implications for relationships between the home and school and home and local authority and could potentially cause tensions within families that are involved in the process. It goes on to state that if the proposed Measure is not based on clear evidence, it has the potential to do immense harm. What are your views on the implications of that evidence?

[28] **Jane Hutt:** We are absolutely clear—this why we are doing pilot schemes—that the proposed Measure will be based on evidence. I have to say that the Welsh Local Government Association was fully supportive of the pilot schemes and it has representatives on the design and implementation group. The tribunal's annual report and the views of the tribunal user group will be fed into the consideration of the impacts and the roll-out. I think that we should go back to the Children's Commissioner for Wales, who said in his evidence that there is potential for harm if we do not give children rights to appeal and their voices are not heard. There is also quite clearly potential for intra-family conflict at present, where there is disagreement between children and their parents. So, we believe that this is in the best interests of all who are involved: the family, the LEA and the school. The partnership and disagreement resolution services operate already and we have informal interventions to try to make sure that people do not become polarised. I believe that it is quite the reverse, and that this proposed Measure will show that we can improve relationships at all of those levels.

[29] **Janice Gregory:** Moving on, Minister, to section 2, in evidence, when referring to the notice and service of documents, both the children's commissioner and SNAP Cymru suggested that the proposed Measure should place a duty on the school's special educational needs co-ordinator to check both receipt and understanding of such documents, and said that that requirement should be included on the face of the proposed Measure. What is your view on that?

[30] **Jane Hutt:** We are not sure that a duty specifying a particular professional is flexible enough to address particular and differing circumstances. It might be putting a duty onto the SENCO without having identified alternative and more appropriate ways of addressing this issue. We can explore this during the pilot phase. Not all the children who will be affected will necessarily be in school—some of them might be home educated and some of them might not be in school for other reasons. I think that it is far too prescriptive to be included on the face of the proposed Measure. We do not want to place the decision as to who has rights in the hands of the body that may be the respondent to appeals, and it goes back to the introduction of a case friend—it starts to bypass that important new role. So we do not agree with that.

[31] **Helen Mary Jones:** I agree with you there, Minister. Through the piloting and then the regulations, can we have your assurance that there will be a mechanism by which the child's understanding of the documents and so on will be checked and that that will be somebody's job? It needs to be done flexibly, but it would be somebody's job to ensure, right at the front end of the process, that the child does understand.

[32] **Jane Hutt:** Yes, and that is where the whole communication and the way in which we engage with children through the new rights that we are going to confer on them through the piloting will be crucial. Hopefully, it will be not be a matter of just sending things through the post; it will involve sitting down with children to work through it. Some of the best practice already involves a one-to-one with parents to discuss what is expected. It is about breaking all the barriers down and being child-friendly to ensure that children do understand their rights. Right from the word go, we are going to promote a new opportunity for children and young people with regard to their rights, and that has to be followed through, not just in any kind of overall publicity, but in actual delivery.

[33] **Christine Chapman:** Moving on to sections 3 and 10, to do with case friends, can

you confirm that the proposed Measure does, in its current form, require a child or young person to have parental consent when making an appeal with the assistance of a case friend or any other representative?

[34] **Jane Hutt:** This, again, is an area in which it was helpful to give evidence to the committee on the last occasion that we discussed this. The proposed Measure does not require a child or young person to have parental consent to appoint a case friend. We have not stipulated that consent is required for children who wish to appoint a case friend; we are saying that this may be desirable.

[35] We do not want to put a consent requirement on the face of this proposed Measure if the matter can be satisfactorily resolved, because it almost starts to put an adversarial note into the parent-child relationship. We want to look at solutions, not just in the design of the pilot phase, but in the pilot phase and its evaluation to ensure that regulations can properly address the detail of case-friend appointments. However, I hope that that clarifies the point that it will not require a young person to have parental consent.

[36] **Helen Mary Jones:** I have a very brief point. I am relieved to hear the Minister say that, because it has occurred to me that with a looked-after child, the parent, technically, is the local authority. If a child has to have the local authority's permission to appoint a case friend to take a case against the local authority, that child might be in a very difficult situation. I am therefore relieved to hear what the Minister has said on this point.

[37] **Christine Chapman:** In its evidence, SNAP Cymru suggested that it may be inappropriate for teachers or teaching assistants to act as case friends. It suggested that this was due to the nature of the case-friend role and its requirement for such a person to have close involvement with the family in respect of personal matters as well as access to in-depth, confidential information about the family. SNAP Cymru suggested that, for teachers, undertaking a case-friend role might conflict with their role as the child's teacher. What is your view on this?

[38] **Jane Hutt:** I just go back to existing guidance on this. Helen Mary just mentioned looked-after children, and the Assembly Government's guidance for the education of children who are looked after by local authorities states that:

[39] 'Looked after children should not be denied access to any channel of complaint or appeal on the grounds that one part of the local authority cannot challenge the decisions of another part of the local authority, or of a school maintained by the authority. This would result in denying looked after children rights which are available to other children through their parents.'

10.50 a.m.

[40] We have to ensure that the local authority makes the arrangements very clear to ensure that someone who acts as an advocate for the young person, such as a primary carer, a social worker, a designated teacher or an independent person, are clearly set out in policies and protocols in the guidance for looked-after children. If local authorities have complied with the guidance to avoid conflict issues between the local authority and teachers or social workers that are advocating on behalf of the looked-after child, we do not necessarily consider that conflict issues could arise between local authorities and teachers or social workers regarding children that are not looked after by the local authority.

[41] It is a bit of a roundabout answer to your question, but I started with the point about conflicts of interest that already exist in relation to the looked-after child and the teacher or possibly the social worker. We feel that we should explore this in the pilot phase, rather than

restrict it at this stage, because we know that a teacher can be a very powerful advocate.

[42] **Christine Chapman:** In his evidence, the children’s commissioner suggested that more detail was needed on what is required of a case friend and a common understanding of the role required. Could such information be provided on the face of the proposed Measure?

[43] **Jane Hutt:** Again, this relates to not being too restrictive in the proposed Measure, because we want to cast a wide net in terms of who could act as a case friend. So, we do want to be overly specific in the proposed Measure. If we place the detail in regulations, that will allow us to be more flexible in the pilot phase. So, I think that regulations are the route to this in terms of ensuring that we learn from the pilot phase.

[44] On the tribunal proceedings, the role of the case friend will be set out in tribunal regulations. Tribunal regulations are critical for preparation for the appellant—the child in this case. So, we need to have this role clearly explained further down the road in regulations, and not on the face of the proposed Measure.

[45] **Christine Chapman:** Can you outline the practical process involved when a child wishes to appoint a case friend?

[46] **Jane Hutt:** On the practical arrangements, Amina or Huw may want to say something on the issues. On the guidance that we will provide, I have mentioned the tribunal as a key source of information, as are local education authorities and partnership services. The child must have access to that information, which relates to the point that Helen made earlier that this must be child-friendly and independent. The system of appointment would be similar to that where a parent wishes to appoint a representative, but much more child-friendly. We must also remember that there is an opportunity to change the representative at any stage in the process, which will be important for the child. Advocates will probably be helpful in saying what might be the best direction with regard to the appointment.

[47] **Christine Chapman:** In the additional written evidence that you provided, you state that the practical application of appointing case friends needs to be addressed by careful balancing of parental and children’s rights, while also ensuring that child protection is a priority. Will the regulations require child protection checks to be undertaken on all case friends, including extended family or family friends?

[48] **Jane Hutt:** We will explore this further in the pilot design group and the tribunal is considering it. We will explore that before we bring regulations forward, and those regulations will be fully consulted upon. There are situations—we were discussing this yesterday—where we know that close family or other advocates are not necessarily subject to child protection checks. We need to consider this very carefully and robustly.

[49] **David Lloyd:** Mae’r cwestiynau nesaf dan ofal Helen Mary Jones.

David Lloyd: The next questions are from Helen Mary Jones.

[50] **Helen Mary Jones:** The first question is about sections 4 and 11 of the proposed Measure, which are on advice and information. You have already touched on the issue of face-to-face communication to ensure that children understand the process and their options. As you know, SNAP Cymru has suggested in its evidence that face-to-face communication is absolutely key. Do you think that there should be a requirement on the face of the proposed Measure for face-to-face communication with regard to advice and information, or would that be better dealt with in regulation?

[51] **Jane Hutt:** Developing guidance on communication is the most appropriate way, because we have to draw on what is already existing good practice—I mentioned that earlier

in relation to face-to-face meetings with parents—and also what emerges from pilot projects. We think that developing guidance is the right way. As the Children's Commissioner for Wales recognised, we need a certain amount of flexibility, because there might be different learning needs, and there might be other things that the child is experiencing. In the proposed Measure there is a clear requirement for children to be advised of their statutory rights; that is a minimum requirement. We would not be relying solely on letters, because there often has to be an explanation of letters. We think that guidance, as a result of good practice and pilot projects, is key.

[52] **Helen Mary Jones:** With regard to sections 5 and 12 on the resolution of disputes, in its evidence, the Welsh Local Government Association suggested that, in order to ensure confidence regarding independence, a split is needed between the provision of resolution support services for parents and the provision of resolution support services for children. Do you have a view on this?

[53] **Jane Hutt:** We think that that is chiefly a matter for local education authorities. We need to see whether we need to draw a further distinction between children's and parental services. I will go back to the earlier point that was made as to whether we see this as a way of trying to break down particular conflict within families as well. We do not want to create separation unless the pilot projects clearly show that we need to have some opportunities for separation. The key thing is that we need to establish minimum standards. We already have the SEN Code of Practice, which provides us with a framework. There should then be some degree of flexibility and local determination to ensure that those standards are met, and also to make arrangements for the support of the services.

[54] **Helen Mary Jones:** I would not take issue with the need for some level of local flexibility, but when the situation in which a child is making an appeal arises because the child and the parents have a different view, may I ask for your assurance that the child will have independent resolution support services? For example, I am thinking of a case where an older child with a learning difficulty wants to carry on being educated in a mainstream school, but the parents may feel that that is too risky—it very commonly arises that a disabled child wants more independence, and that parents, with the best of motives, want them to be less independent. There may be a difficulty if the same organisation is supporting the parents through the process as is the supporting the child. There may not be a difficulty, but there could be.

[55] **Jane Hutt:** I would envisage that as being established through the minimum standards that we are going to develop.

11.00 a.m.

[56] **Helen Mary Jones:** That is very helpful. Sections 7 and 14 of the proposed Measure are on tribunal procedures. In the children's commissioner's evidence in respect of tribunal hearings, he stated that a child or young person's presence at the hearing would ensure that they would be able to understand all of the arguments and may well be better able to accept the decisions that are made. However, the tribunal suggested that the child may not always be or should not always be permitted to hear all of the evidence, even if they are the appellant. How will the proposed Measure, the guidance and the regulations, give children and young people the right to be present during the whole tribunal hearing? Should it do that, or should there be circumstances in which the child should not be present?

[57] **Jane Hutt:** The proposed Measure establishes children as potential appellants to the tribunal and there will be a presumption that an appellant has an entitlement. Obviously, we will develop regulations based on existing ones, but those regulations will establish the child's right to address the tribunal. There is possibly a degree of discretion at the moment in

terms of involving someone who may be disruptive, for example, at a hearing. However, the presumption must be in favour of entitlement. We need to ensure that a child's wishes are taken into account as far as this is concerned. The tribunal is quite sensitive to this, is it not?

[58] **Mr Maguire:** I think so. Children already appear in tribunal hearings. The tribunal has to take account of how the child feels about whether or not he or she wishes to stay in the hearing. Presumably, if you are confident enough to make an appeal and to go through the process, then due respect should be given to your wishes with regard to whether you wish to partake fully in the process. At the moment, the regulations say that a child may be permitted to address the tribunal. I think that we need to make that a lot stronger so that it says that the child has an absolute entitlement to address the tribunal. That is what we will be looking to do.

[59] **Helen Mary Jones:** That is very helpful; thank you. There may be some exceptional circumstances where, for some reason, a child may wish to be present, but there may be a good reason to exclude them—perhaps if someone giving evidence to the tribunal needs to make reference to another child, for example, in the family. I am very pleased to hear you say, Minister, that the default position is that a child appellant should be present throughout. If there are circumstances where someone giving evidence says to the tribunal that they do not think that it is wise for a certain child to hear something, how and by whom should the decision be made to invoke those exceptional circumstances where a child would be excluded? Do you have a view as to how that decision would be made and who should make it?

[60] **Jane Hutt:** We would have to give the guidance to the chair of the tribunal in relation to the use of any such discretion. That is what we would do.

[61] **Helen Mary Jones:** So, the chair of the tribunal would make any such decision, but in the light of very strict guidance.

[62] **Jane Hutt:** Yes, there would be very clear guidance from us.

[63] **Helen Mary Jones:** That is helpful. Thank you, Minister.

[64] **David Lloyd:** Mae'r cwestiynau nesaf o dan ofal Peter Black.

David Lloyd: Peter Black has the next questions.

[65] **Peter Black:** Moving on to the pilot phase, Minister, in its evidence, the Welsh Local Government Association suggested that it was important for the pilot phase to link directly with the pilot on statementing that was announced in October 2008. Is it your intention to do that?

[66] **Jane Hutt:** Yes. This links with the earlier question about how we fit the pilot schemes together. There is an opportunity for some co-ordination and there is the possibility of interlinking in terms of the areas that are chosen for the SEN pilot schemes. So, there will be a real opportunity for read across.

[67] **Peter Black:** So, you will be looking at that.

[68] In your previous evidence, you outlined the pivotal role that the pilot phase would play in shaping a range of regulations within this proposed Measure. Have you considered having provision in the proposed Measure to require a consultation process with key stakeholders at the conclusion of this pilot phase?

[69] **Jane Hutt:** We have listened to the views of the tribunal concerning post-pilot

consultation and we feel that the scrutiny of the report will reflect the views of stakeholders involved in the project. In framing the tribunal regulations, there is already a statutory duty to consult with the Administrative Justice and Tribunals Council. So, we can explore the potential for a public consultation exercise in the same time frame.

[70] **Peter Black:** The proposed Measure requires that, when the regulations are drawn up, a positive approval process comes to Plenary. Would you be willing to accept a consultation phase built into that, similar to that in the proposed Local Government (Wales) Measure?

[71] **Jane Hutt:** Yes, because the requirements for consultation are already in existing legislation. I mentioned the Administrative Justice and Tribunals Council as one example. So, it would need to take place. The scrutiny of the report will be important.

[72] **Peter Black:** Evidence from the WLGA suggested that, potentially, a small number of cases would be taken to appeal as part of the pilot phase. Do you think that the pilot period will provide enough robust evidence to inform the full implementation of this proposed Measure?

[73] **Jane Hutt:** As you know, Peter, local education authorities generate small numbers of appeals. We are looking at a pilot phase that will include a larger number of appeals. We need evidence on whether that will also be the case with children’s appeals. However, even a small number of appeals can provide crucial evidence for how we support services through funding arrangements to deal with the new appeal right. The pilot phase is not only about the numbers that emerge; it is also about working through the process, including good practice, training and informing the code of practice. The routes to an appeal are as important as the appeal numbers that might emerge in terms of children’s appeals.

[74] **Peter Black:** The concern about the small number of appeals is not so much that you will have enough examples; it is whether an example will emerge where a child wishes to take forward his or her own appeal, separate from the parents. The more appeals you have, the more examples of such appeals will emerge. If there are just a few appeals, it is possible that such an example might not emerge.

[75] **Jane Hutt:** We will have to see what happens through the pilot phase. We are currently gazing into a crystal ball. However, the children’s commissioner said that, if this is effectively piloted, we might not see many numbers reaching the tribunal stage. We cannot predict that at this stage. The WLGA’s full engagement—and we are close to being able to identify the two pilot areas—will be valuable in terms of local authorities learning, alongside us, what impact each stage of the process will have, leading up to a potential appeal.

[76] **Peter Black:** My next question has a bearing on that, because the proposed Measure enables the length of the pilot phase to be extended by regulation. Do you think that there should be a limit on the length of the pilot phase to ensure that final regulations are brought forward? Conversely, if you do not have enough examples, would you want to extend the pilot period?

[77] **Jane Hutt:** This impinges on what we have just discussed. I want to roll this out as quickly as possible, so we do not intend to extend the pilot phase beyond the two-year period. It is possible that adjustments will be made to the pilot phase if no appeals or claims are brought during that time, but that could be more about communication; for example, we might need to do more awareness-raising. Section 17(4) of the proposed Measure would allow us to extend the duration of the pilot period once, but I hope that we will not have to do that.

[78] **Peter Black:** This is my final question on the pilot phase. As you know, there has been some discussion on the powers that you have, following the pilot phase, to amend this proposed Measure by regulation. Have you considered drafting a proposed Measure to set up a pilot and then drafting a further proposed Measure to put in place the full and broader powers, once the pilot phase has been evaluated?

11.10 a.m.

[79] **Jane Hutt:** We have considered a number of options in relation to this groundbreaking initiative. If we sought limited powers to implement a pilot and evaluation phase, followed by broader rights via a supplementary proposed Measure, that could significantly affect the timescale for implementing the right across Wales. We feel—and I think that the children's commissioner and others have confirmed this in evidence—that there is a need for us to progress with this and activate the right as quickly as possible for children. We do not feel, at this stage, that that is the route that we would want to take because we think that the pilot phase will give us an opportunity to get this right in the proposed Measure.

[80] **David Lloyd:** Janice Gregory sy'n gofyn y cwestiynau nesaf.

David Lloyd: The next questions are from Janice Gregory.

[81] **Janice Gregory:** Minister, I would like to move on to powers to monitor the non-implementation of tribunal decisions. Written evidence from the tribunal states that in instances where decisions are not implemented, the tribunal does not have any powers of enforcement and there are currently no formal mechanisms for dealing with such issues. Do you, Minister, have any evidence on the extent of the non-implementation of tribunal orders?

[82] **Jane Hutt:** There is very little evidence on this. For example, we are aware of one instance in the last two years, but in that case the LEA did not implement the decision and the High Court ordered a stay of the tribunal's decision pending an appeal. The tribunals do not typically have powers of enforcement because those powers are invested in other bodies. However, I have a power of direction, requiring compliance. This could be enforceable through the courts, the public service ombudsman could intervene, and the parents could seek a judicial review, but we would not want to be going there. We need to get it right. It is difficult to see, in practical terms, how this would work as LEAs must comply with tribunal orders within set timescales. They could be recalled to the tribunal but by that time they would usually have complied. We would want to look carefully at any evidence of non-compliance.

[83] **Janice Gregory:** When we were taking evidence on this, the tribunal, the children's commissioner and SNAP Cymru gave evidence that the proposed Measure should be strengthened to ensure that the tribunal has the powers to monitor whether these orders are being implemented within the prescribed timetable, although I hear what you are saying. Would you want the proposed Measure to be strengthened to include such powers? If you do—not that I am putting words into your mouth, Jane—what do you think would be the practical implications of the proposed Measure, if it were amended to strengthen that enforcement provision?

[84] **Jane Hutt:** I think that it goes back to the point that I just made that we feel that the powers of enforcement are already there. They are vested in other bodies and I have mentioned them already. I have a power of direction as well—Ministers have a power to require compliance. Officials advise me that they do not think that that would be necessary because those powers already exist.

[85] **Mr Maguire:** As secretary to the tribunal for the first five years of its existence, I was not aware of many instances of parents saying that authorities had not complied with

decisions. There was sometimes an issue of interpretation about how they had complied with the order, but that is a separate issue, and not really an issue for direction. There is scant evidence that authorities have not complied—sometimes there is an issue about whether they have complied within the time frames. Usually, the interventions of other agencies are sufficient to exercise their minds and get them to move on it really quickly.

[86] **Jane Hutt:** The fact is that we are hoping already that this will be a step change in the delivery of entitlements. I think that, before you, the WLGA and others have already given examples of the changes that they are making to engage children and young people more. There is the children and young people's planning process. I am not saying that we have good practice across Wales, but we have evidence of good practice which shows not just the spirit of delivery, but that recognition and delivery of these new rights is being backed. I hope that political and public service culture will change as a result of these new entitlements. So, it could be very heavy-handed to introduce something else with regard to policy enforcement.

[87] **Helen Mary Jones:** I wish to bring you back to the powers under section 18, Minister. The powers in section 18(2) are very broad, and they have the potential to allow a Welsh Minister to significantly amend the proposed Measure by adding, removing or modifying rights by order of provision. Is it your intention to use those powers in that way to significantly change the proposed Measure? I am not thinking about implementation, but the principle of rights.

[88] **Jane Hutt:** Under the circumstances, we are presenting a pioneering proposed Measure, and it cannot be underpinned, as we know, by any relevant past or present research or experience. As you know, we have taken this decision to pilot the rights, and the pilots could throw up new and, possibly, unforeseen evidence. We therefore need to retain a degree of flexibility, and we do not want to pre-empt the outcomes of the pilots, or any recommendations made by the report, to which we must have regard. There will also be other representations which we will have to regard.

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

[90] These issues were discussed when I appeared before the Subordinate Legislation Committee. It is interesting to look at the written evidence from Cymru Yfory on this matter, as it accepts that the conferral of limited powers at this stage, only to return to the Assembly to seek a further Measure, may not be a practical solution to these issues. We feel that we have the safeguards here in the arrangements. Also, you know that we will be using the affirmative procedure, which will provide opportunities to consult.

[91] **David Lloyd:** On that point, Minister, have you considered using the superaffirmative procedure to approve any order made under section 18?

[92] **Jane Hutt:** Our concern with the superaffirmative resolution procedure is that, although it could give the Assembly an opportunity to rigorously scrutinise a draft order, it could prove to be a very lengthy procedure and that could delay the roll-out of the proposed Measure significantly. I will just go through my understanding of the superaffirmative resolution procedure. It usually provides for a Minister to lay a draft order before the legislature, which then has 60 days to scrutinise it and make any representations with regard to that draft order. On the expiry of the 60 days, the Minister can consider representations made during that period, and then proceed to lay a proposed order, with or without modifications. Under the affirmative procedure, we are talking about 40 days to scrutinise, debate and vote on the proposed order. So, we are concerned about using the superaffirmative

procedure, as that could significantly delay progress. We also have to take recess periods and so on into account. We think that that procedure could take up to seven months in total were we to take that route.

11.20 a.m.

[93] However, we believe that the affirmative procedure can provide the correct balance, by allowing the National Assembly to consider the pilot scheme report—this goes back to the importance of the pilot scheme report—and to scrutinise and debate any draft Order setting out our proposals for changes to the Measure in that time frame of 40 days, which is quite a considerable time frame. To give an example, if we laid the pilot scheme report and draft Order in mid May 2013, the Order could be approved by the Assembly, come into force in early July and be implemented by the tribunal that September, which is the start of the tribunal's year. So, the affirmative procedure would give us that timeline for implementation and extensive opportunity for scrutiny and debate.

[94] **David Lloyd:** The beauty of the superaffirmative procedure is that it allows widespread scrutiny and consultation, albeit sometimes informally. The affirmative procedure has the Plenary debate, but not that wide scrutiny and possible challenge, because we are potentially talking about very broad powers under section 18. We are ostensibly thinking about the difference between 40 days and 60 days.

[95] **Ms Rix:** Our concern is that, to give an example, if a draft Order were laid before the National Assembly, as the Minister said, in mid May—because it is not inconceivable that that would happen: if the pilot period ceases in September, we would then have an evaluation phase, the report would have to be prepared and then the draft Order would have to be prepared—the 60-day period would commence, but would then cease because of the summer recess and recommence in September of that year. We would then have to go away and consider any recommendations made by the Assembly, then draft our proposed Order and lay that, which would be subject to the 40-day affirmative procedure rule. By the time all that has happened, it could have taken six to seven months. There is a balancing act between giving effect to the policy intention of holding the pilot scheme and making the changes with a view to full roll-out as soon as possible in readiness for the new tribunal year in September, and having an extended period of scrutiny that would take until the end of that year with no changes taking place until the following year.

[96] **David Lloyd:** As Chair, I have picked up disquiet in the scrutiny of the proposed Measure because of the potentially wide-ranging powers of section 18, which is why I think that committee members—forgive me if I am speaking out of turn, but I do not think that I am—are seeking that extra reassurance on this point. There is some disquiet about section 18 being there at all in some quarters. Helen, you look as though you want to say something in addition.

[97] **Helen Mary Jones:** I understand the Minister's point about timescales. No-one would want to delay this by another academic year, which is effectively what we are talking about, but we must also give consideration to future Ministers and how they might use the powers to make regulations. As I read it—I am not legally qualified, so I may be wrong—section 18 could be used to make changes to the principles that we are trying to deliver. It could be used to restrict the right of appeal to children with proven capacity, for example. My worry is not so much about what you and your officials would do with that, Minister, but what another Minister might do with it at a future date. Perhaps we will need to give further consideration to that. It is not so much about the extra 20 days for the Assembly, but some kind of requirement for public consultation on any major changes. I do not know how that would be written into the proposed Measure, but I would not want a future Minister to be able to mess about with the principles of this without having to consult publicly at least. That was

what I was trying to say in a roundabout way.

[98] **David Lloyd:** That is also what I was trying to say earlier.

[99] **Jane Hutt:** That is helpful, because, whichever Members comprise the Assembly and whoever the Ministers are, once we have that report, whether it is 60 days, then another 40 days or a year that goes by, I do not think that it is so much a matter of whether the superaffirmative procedure is the route to address your concerns about how this proposed Measure is framed; it is more about the opportunity to consult on the pilot report, effectively, in terms of the lessons from the pilot phase, which is helpful for us to take back.

[100] We mentioned statutory duties earlier, and that we would have to consult anyway in terms of tribunal procedures, for example. I do not know whether there is something that we could look at in terms of extending this consultation—that might be helpful in terms of the pilot report. As my advisers would tell me, the point is that this is specific in terms of what we are seeking in this proposed Measure, and we will see what comes out of the evidence that you have taken in your report. I do not see how it could restrict—I do not see how there could be a huge change to the principles as a result of the pilot report. Am I being naive?

[101] **Mr Maguire:** I hope not. It is certainly not our intention, as you recognise, to change fundamental principles.

[102] **Jane Hutt:** You could not change the fundamental principle, could you?

[103] **Mr Maguire:** It would have to be pretty dramatic were we to do that, obviously.

[104] **Peter Black:** The concern of the committee is not so much what comes out of the pilot phase and the changes that take place then, because we accept that the pilot phase will be run by the same Minister as set out the principles of the proposed Measure. However, future Ministers may well want to change those principles and use section 18 to do that. If you are not prepared to go with the superaffirmative procedure, would you consider, for example, a sunset clause in section 18 so that those powers are only available to the Minister in relation to the pilot phase?

[105] **Ms Rix:** The proposed Measure has been drafted in such a way that the exercise of the section 18 power is linked to the pilot phase, so would have to be—

[106] **Peter Black:** So, a future Minister could not use it to change the Measure.

[107] **Ms Rix:** That is correct.

[108] **Peter Black:** I was not clear about that, and that is not—

[109] **Ms Rix:** There is a specific link. We have provided the link in section 18(4) by imposing a requirement that a pilot report is laid. That is how we have tried to address it.

[110] **Peter Black:** From my reading of section 18, it makes no reference to a pilot; it states that if you are going to make an amendment, you lay a report and then you go through the procedure.

[111] **Ms Rix:** Sorry, there is reference to a report on the piloted provisions in section 17(5). So we have specifically linked it to the pilot phase.

[112] **Jane Hutt:** Section 17(5)(a) links it to the pilot phase. It states,

[113] 'publish a report of how the piloted provisions were implemented and how effective they were'.

[114] **Ms Rix:** Does that answer your question?

[115] **Jane Hutt:** Would it be helpful if we were to write to the committee to clarify the point that Peter has made about what is, in effect, a sunset clause, and the effect of the legislation in relation to what a Welsh Minister in future could do with that report?

[116] **Ms Rix:** It is linked to the pilot report in section 17(5), and the sunset clause is, essentially, in section 18(4)(b).

[117] **David Lloyd:** Perhaps we could just have a short note in the next couple of days.

[118] **Jane Hutt:** Absolutely. We will do that, and provide anything else that you feel that you need. I am also giving consideration to the earlier point about exclusion. The evidence of this committee, hopefully, will give more assurance to what will actually go forward in the pilot schemes.

[119] **David Lloyd:** There is one final point from Christine.

11.30 a.m.

[120] **Christine Chapman:** This is about the link to the NHS Redress (Wales) Measure 2008. The framework powers that you are seeking under this proposed Measure relate to issues of fundamental principle, such as whether a child can or cannot appeal, rather than to administrative issues. How does the proposed Measure take into account the recommendation of the committee that considered the NHS Redress (Wales) Measure that future Measures should not be drafted in a framework style, and can you assure us that the exercise of framework powers would be subject to rigorous scrutiny by the Assembly?

[121] **Jane Hutt:** We have partially addressed this in response to the recent questions that have been raised. If I put in writing to you the points that I made about the sunset clause and the opportunities for consultation, that will set this out as another piece of legislation in addition to the NHS Redress (Wales) Measure, but in another context. Would that be helpful?

[122] **Christine Chapman:** That is fine. Thank you.

[123] **David Lloyd:** Diolch yn fawr i'r Gweinidog a'r swyddogion. Yr ydym wedi gorffen ar amser.

David Lloyd: I thank the Minister and officials. We have finished on time.

[124] **Jane Hutt:** Llongyfarchiadau, Gadeirydd.

Jane Hutt: Congratulations, Chair.

[125] **David Lloyd:** Diolch i chi, Weinidog, am fod yn gryno ac yn bwrpasol. Dyna ddiwedd y cyfarfod ffurfiol—ein sesiwn cymryd tystiolaeth lafar olaf oedd hynny.

David Lloyd: Thank you, Minister, for being concise and to the point. That brings us to the end of the formal meeting—that was our final oral-evidence-taking session.

[126] Yn awr, mae angen inni fynd i mewn sesiwn breifat i dynnu pethau at ei gilydd.

We now need to go into private session to draw things together.

11.31 a.m.

Cynnig Trefniadol
Procedural Motion

[127] **David Lloyd:** Cynigiaf fod

y pwyllgor, yn unol â Rheol Sefydlog Rhif 10.37(vi), yn gwahardd y cyhoedd o weddill y cyfarfod hwn ac o gyfarfodydd a gynhelir yn y dyfodol i drafod y prif faterion a'n hadroddiad.

David Lloyd: I move that

the committee, in accordance with Standing Order No. 10.37(vi), excludes the public from the remainder of this meeting and from future meetings to discuss the key issues and our report.

[128] Gwelaf fod y pwyllgor yn gytûn.

I see that the committee is in agreement.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 11.32 a.m.
The public part of the meeting ended at 11.32 a.m.