

**Response to the National Assembly for Wales consultation on the proposed additional learning needs draft legislative competence order 2007****Background**

The purpose of the amendment sought is to empower the National Assembly for Wales to make changes to existing legislation by 'Assembly Measures'. This will be in relation to any aspect of the organisation and delivery of provision to support persons with additional learning needs (currently special educational needs) in Wales.

Empowerment will be by a Legislative Competence Order made under Part 3 of the Government of Wales Act 2006 which will enable the National Assembly for Wales to give effect to policies relevant to additional learning (currently special educational) needs which it may decide to take forward in due course.

Issues identified by the Children's Commissioner for Wales through contact with children and young people and those acting on their behalf :

The main issues which have been identified include:

- a. That there is no power to alter the statutory threshold which activates the LEA formal duties.
- b. That there is no power to enforce or require implementation of provisions in Special Educational Needs Code of Practice for Wales.
All agencies must have "regard" to the Code of Practice. This means that a responsible body must consider what the Code says (they must not ignore it) but there are no statutory provisions for enforcing any guidance contained in the current Code of Practice.) This is particularly evident in the continuing practice of excluding and unofficially excluding from school children with ALN.

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- c There is no power to make fundamental changes to the Education Act 1996 regarding the statutory assessment procedure or the issue of a statement of special educational needs.
(The Assembly currently has power to issue Regulations about how the process may operate, but does not have the power to change or replace the process.)
Children's Commissioner for Wales staff have given evidence to ELLC in respect of possible changes to the use of statements of SEN.

- d There is no power to alter the range of individuals who have rights of appeal to the SEN Tribunal for Wales (for example to grant a child the right of appeal).
This has been a matter of some considerable discussion following a proposal to this effect directly from the office of the Children's Commissioner for Wales.

- e There is no statutory requirement for local dispute resolution mechanisms to be concluded before proceeding to appeal to the Tribunal.

- f There is no statutory requirement for LEA's to provide advocacy services for children with Special Educational Needs.

- g At present there is little scope for the National Assembly to confer, by Regulation, additional specific duties upon LEA's or anyone else in relation to Special Educational Needs.

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The primary legislative source for pupils with Special Educational Needs in England, Wales and Northern Ireland is Part IV of the Education Act 1996.

Special Educational Needs are defined in Section 312 of the Education Act 1996 as arising when a child has a learning difficulty which calls for special educational provision to be made.

A learning difficulty is subsequently defined in Section 312(2) as arising if:

- a the child has a significantly greater difficulty in learning than the majority of children of the same age.
 - b the child has a disability which either prevents or hinders him/her from making use of the educational facilities of a kind generally provided for children of the same age in schools within the area of the LEA, or
 - c the Child is under the age of 5 years old and is, or would be, if special educational provision were not made for him, likely to fall within paragraph (a) or paragraph (b) when of or over that age.
- It should be noted that, under this law, a child is not taken as having a learning difficulty solely because the language in which s/he will be taught is not the language of the home.

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Special Educational provision is defined in Section 312(4) as follows:-

For a child aged 2 years and over, educational provision additional to, or otherwise different from, the educational provision made generally for children of the same age in schools maintained by the LEA (other than special schools) in the area, and;

For a child aged under 2, educational provision of any kind.

Section 313-314 of the Education Act 1996 provides for the issue of a Code of Practice which requires LEA's and others to "have regard to the provisions of the Code".

Sections 323-324 of the Education Act 1996 contains provisions for the making of a statutory assessment and issue of a Statement of Special Educational Needs.

Sections 325-326 (and Schedules) of the Education Act give parents a right of appeal to an independent Special Educational Needs Tribunal against a decision of an authority not to carry out a statutory assessment, not to issue a Statement of Special Educational Needs, against the contents of Parts 2, 3 and/or 4 of the Statement, and against the cessation of a statement. However, the right of appeal is not extended to pupils themselves.

The Education Act 1996 was amended by the SEN Disability Act 2001 (extending Part 4 of the Disability Discrimination Act 1995) to impose a primary duty on responsible bodies (ie schools and colleges) not to discriminate against a pupil or student for a reason related to disability; and a duty to take reasonable steps to avoid putting disabled pupils at a substantial disadvantage. Again, the main redress

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for such discrimination is appeal to the Special Educational Needs Tribunal which is not open to children and young people.

Legal Framework (Scotland)

In Scotland the primary legislation for pupils with additional support needs is the Education (Additional Support for Learning)(Scotland) Act 2004.

Section 1 of the above Act defines additional support needs as follows:

- (1) A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person.
- (2) In subsection (1) the reference to school education includes, in particular, such education directed to the development of personality, talents and mental and physical abilities of the child or young person to their fullest potential.

In this Act [Section 1 (3)(a)] additional support means:

- a. in relation to a prescribed preschool child, a child of school age or a young person receiving school education, provision which is additional to or otherwise different from educational provision made generally for children or, as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority for the area to which the child or young person belongs;
- b. in relation to a child under school age, other than a prescribed pre-school child, such educational provision as is appropriate in the circumstances.

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The committee seeks a response to the following questions:

- 1. Would the terms of the proposed Order allow for the implementation of the policy agenda on additional learning needs by means of measures? If not, how would the proposed Order need to be re-drafted and why?**

We assume that 'policy agenda' here refers to the agenda of the National Assembly for Wales as set out in various documents including, for example: "The Learning Country – Vision into Action"; "Values for Inclusive Education"; "Rights to Action" and the recent ELLC reviews of special educational needs to which we have contributed. We further assume that this includes the commitment of Welsh Assembly Government to consider extending the right of appeal to SENTW to children and young people.

At first sight wording in the competence order sought appears to be broad, for example: "Education and Training"; and "persons" rather than 'child' or 'adult'. However, the proposed wording for the Order might prove to be inadequate or even restrictive as will be explored in the responses to the remaining questions.

- 2. Is it appropriate for the proposed Order to cover all persons? If not, how should the proposed Order be re-drafted and why?**

The reference to 'persons' will enable the National Assembly for Wales to introduce measures bringing about changes for children, young people and presumably adults who fall within the terms of the proposed Order. This would enable the Assembly to make changes to provision for children before and beyond the current statutory school age (5-16), and young people in further and higher education and training.

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The proposed wording would provide scope for the National Assembly for Wales to introduce measures in relation to the duties of LEA's, the Further Education Funding Council for Wales (DELLS) and Higher Education.

The terms used throughout documentation, produced before and associated with the draft competence order, refer to "additional learning needs", implying a change from the previous 'special educational needs'. However, the persons identified in the proposed Order are only those:

- a. who have a greater difficulty in learning than the majority of persons of the same age as those persons;
- b. who have a disability.

Notwithstanding the change to 'persons', this description of those who might be included in Measures to be introduced in Wales may not be substantively different from those included in the 1996 Act. Essentially, it continues to cover only those persons who have an identified difficulty in learning or diagnosed disability.

If the National Assembly for Wales may wish to include in its Measures persons who have additional needs as a consequence of other causes (eg: looked after children; bullying; young carers), or if it should wish to make any guidance for these 'groups' statutory, it would not have the power to do so under the proposed competence order.

Additionally, are the 'additional needs' to be confined to 'learning' (as in England currently) or to be extended to 'support' (as in Scotland currently)?



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The statutory provisions in Scotland are far more inclusive than those currently in place in England, Wales and Northern Ireland. For example: the 2004 Scotland Act:

a. refers to any child or young person, who, for whatever reason, requires additional support for learning;

It may well be that under this definition it would be possible to provide additional support for the children of asylum seekers or traveller children.

b. states that ' a child or young person has additional support needs if the child or young person is, or is likely to be, unable without provision of additional support to benefit from school education provided or to be provided for the child or young person'.

Children whose parents abuse substances or young carers are amongst those who may well require additional support but would not normally be so identified under the current definitions of additional learning needs.

Chapter 2 of the "Supporting Children's Learning - Code of Practice (Scotland)" includes a framework based on the idea of "additional support needs".

Children and young people who would be able to access support at present and as proposed may:

- have motor or sensory impairments
- have a learning difficulty

Children and young people may also require additional support for a variety of reasons and may include those who:-

- are being bullied
- are particularly able or talented

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have experienced a bereavement
are looked after
are living with Parents who are abusing substances
are living with Parents who have a mental health problem
have English as an additional language
are not attending school regularly
have emotional and social difficulties
are on the child protection register
are young carers

It seems that the terms of the proposed order for Wales, and the previous LCO, may not allow for the implementation of Assembly Measures to cover groups of people other than those who have (under the terms of the proposed Order) greater difficulty in learning than the majority of persons of their age, or who have a disability. In this case, the National Assembly for Wales might not be able to make Measures with regard to any of the groups above. Alternatively, LEA's might be able to avoid duties imposed by Measures by arguing that the person does not have additional learning needs (in the narrower sense) or a personal disability.

The key question for the National Assembly for Wales and its consultees, at this stage, is which groups are to be included in the Legislative Competence Order? This will determine whether the description of those to be included should be, from narrowest to widest, 'additional learning needs', 'additional learning support needs' or 'additional support needs'

Unless the draft LCO is intended to allow Measures for only those persons who have an identified difficulty in learning or a disability, the National Assembly for Wales should consider redrafting the proposed Order to include a much wider



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definition of additional needs by adopting the definitions used in Scotland, or very similar wording.

3. Is the definition of Disability in the proposed Order appropriate? If not how should the definition be re-drafted and why?

The following definitions are contained in the Children's Act 1989 and the Disability Discrimination Act 1995.

A child is disabled if he/she is blind, deaf or dumb or suffers from a mental disorder of any kind is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as maybe prescribed.

Section 17(11), Children's Act 1989

A person has a disability for the purposes of this act if he/she has a physical or mental impairment which has a substantial and long term adverse affect on his ability to carry out normal day to day activities. **Section 1(1), Disability Discrimination Act 1995.**

- Substantial is more than minor or trivial. Long term is defined as having lasted or likely to last for at least a year or for the rest of the life of the person affected).

Therefore, a person coming within the definition of disability under the Disability Discrimination Act may also have Special Educational Needs. However not all children with Special Educational Needs need have a disability which falls within the definition under the 1995 Act.

The proposed wording of the draft Order defines disability in the following terms:

'A person has a disability for the purposes of this matter if that

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person has a physical or mental impairment.'

This definition is different to those contained in the Children Act 1989 and the Disability Discrimination Act 1995, but might not be any more relevant to the purposes of the LCO. This definition might, for example, exclude many persons who the National Assembly for Wales might wish to include, for example:

- those with a motor or sensory impairment;
- those with language, communication or social difficulties;
- those with attention deficit and/or hyperactivity;
- those with emotional difficulties;
- those with poor health, or illness, whether acute or chronic.

The definition also seems to depend on an existing diagnosis ('has a physical or mental impairment') which may exclude those who have not yet been given a diagnosis. Furthermore, it does not define 'impairment' which might render the whole definition liable to dispute.

Our conclusion, therefore, is that the definition of 'disability' in the proposed Order is not appropriate and should be reconsidered. The Welsh Assembly Government has shown great commitment to ensuring that the needs, for example, of looked after children are met. It would further enhance and safeguard the welfare of children if a legislative competence order enabled the National Assembly of Wales to legislate to ensure that groups such as these benefit in addition to those who fit the more traditional definition of special educational needs.

**Response to the National Assembly for Wales consultation on the proposed additional learning needs draft legislative competence order 2007****4. Are the terms of the proposed Order drafted appropriately, to narrowly or too broadly? If necessary, how should the proposed Order be re-drafted and why?**

For the reasons already argued it is our opinion that the proposed Order is drafted too narrowly. It is likely that the proposed wording, if included in an LCO, would prevent the National Assembly for Wales from making Measures to improve support in Education for groups of vulnerable children and young people for whom the Commissioner has responsibility.

On the assumption that the National Assembly for Wales will wish to improve educational provision for widest possible range of persons, including children and young people, we recommend that the wording of the proposed Order should be reconsidered.

The key issue for drafting a Legislative Competence Order seems to be 'which groups of people are intended or likely to be included in future Measures in Wales'.

In our opinion, the National Assembly for Wales could give further consideration to the wording of legislation in Scotland as a model for introducing legislation in Wales.

Maria Battle

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20 September 2007