

Assembly Committee on the proposed Consent Order on Additional Learning Needs

Submission by the Disability Rights Commission

1. Introduction

The Disability Rights Commission (DRC) is proud of the fact that the very first area earmarked for a Legislative Competency Order relates to the rights and experiences of disabled people. At the outset, we would like to make it clear the Commission supports the principle that decision-making on Additional Learning Needs be devolved.

We would also commend the Assembly Government's use of the term Additional Learning Needs (ALN) to replace the outdated and patronising terminology of 'Special Educational Needs' (SEN).

The DRC has responded at each stage of the lengthy enquiry conducted by the Education and Lifelong Learning Committee into this policy area. It would be inappropriate for us to reiterate our policy position in detail at this stage – these matters are more appropriately reserved for future debates on the content of any proposed measure.

In this submission therefore we wish to confine ourselves to the questions set out in the letter inviting comments. However, there is one critical question that needs to be raised at this stage. This relates to the impact of the Competency Order on the Disability Discrimination Act which is reserved legislation. Of course, this question is one which is most appropriately addressed to the Secretary of State for Wales and the Commons Welsh Affairs Committee. The DRC is taking steps to do so. It is imperative though that this Assembly Committee is aware of these concerns so that all efforts can be undertaken to avoid a potential conflict with Westminster – a pertinent point given that this is the very first Assembly LCO.

2. Questions

2.1 Impact of Measures flowing from the Competence Order on reserved legislation

In the first instance we will set out the rather complex and cumbersome way in which legislation on SEN/ALN relates to the reserved Disability Discrimination Act as it applies to schools.

When the initial Disability Discrimination Act was introduced in 1995, education services were largely excluded from the remit of the Act. This was done on the basis that most pupils covered by the DDA would also be entitled to a statement of SEN. Providing disability discrimination rights in school based education services would therefore only serve as unnecessary duplication and raise prospects of parents opting for forms of redress through the DDA if they failed to obtain their desired entitlement through the statement and its associated appeals mechanism.

It was rapidly recognised that this exclusion of education from the DDA was much more extensive than was necessary, and allowed both schools and post 16 education institutions to continue discriminatory practices. The introduction of the Special Educational Needs and Disability Act (SENDA) in 2001 extended the DDA to cover education services but still assumed that the vast majority of disabled pupils would be entitled to statements and would get the classroom support they require through the SEN system. Consequently SENDA did not apply the DDA duty on service providers to provide auxiliary aids or services or to change physical features in schools.

In practice, what this means is that unless you have a statement of SEN, you have no statutory entitlement to a range of services which include communication support workers (interpreters), information in an alternative format, or for the location of a class to be changed within the school to overcome a physical access barrier.

The DRC has argued that these provisions are inadequate and that disabled pupils, whether statemented or not, should be entitled to the full range of 'reasonable adjustments' required under the DDA. These calls have hitherto been resisted by Westminster Government. This is despite the fact that according to the latest statistics from DFES, there are 1.3million disabled pupils in school

in England alone without statements. This is not an argument that disabled pupils are provided with every conceivable type of support but rather that their need for a reasonable adjustment is met. A reasonable adjustment is any adjustment that prevents a disabled pupil from being in a position of substantial disadvantage when compared to their non-disabled peers.

The explanatory memorandum accompanying the LCO makes reference to the right of the Assembly to make fundamental changes to the statementing regime. The DRC is aware of proposals by the Education and Lifelong Learning Committee to reduce the number of statemented children and to limit coverage of statements to children with 'severe and complex needs'. The DRC well appreciates the concerns expressed about the bureaucracy involved in the statementing regime and the sheer number of pupils covered. However, we cannot at this stage support a change which will leave a large number of disabled pupils with no legal protection to secure vital access to school and the curriculum.

The DRC's support for this LCO is therefore conditional on the following:-

- That the Assembly Government makes strong representations to the consultation on Discrimination Law Review instigated by the Department for Communities and Local Government in Westminster. These representations should support extending the DDA to cover the rights of non-statemented disabled school pupils to obtain the full range of 'reasonable adjustments'
- That if Westminster fails to heed this request, any Measures that flow from the LCO involving reviewing the entitlement to statements set out a new mechanism to deliver full and consistent support for non-statemented disabled children.

Any failure to take action of this nature will leave significant numbers of disabled pupils in Wales with no legal rights to secure the support they need to get an effective education. Given that disabled pupils are already twice as likely to leave school without any qualifications than non-disabled pupils¹ it would be

¹ DRC – Disability Briefing March 2005

irresponsible to leave more at risk of failing to fulfil their academic potential.

It would be futile and immensely disruptive if a Measure is introduced first to radically reduce the number and scope of statements, only for a further Measure to be needed at a later stage simply because local authorities with limited resources were simply not providing the most basic form of support for non-statemented disabled children.

There is no guarantee that when measures relating to this LCO are consulted on that account can be taken of the deficiencies exposed in reserved legislation. So it is at this early stage in considering the LCO that this significant matter should be discussed and resolved.

2.2 Would the term of the Order allow for the implementation of the policy agenda by means of a Measure

Given that the Education and Lifelong Learning committee identified barriers relating to school transport as part of its deliberations, the DRC was disappointed to learn that these issues are not seemingly covered by the LCO. We share the concerns expressed by Peter Black AM as then Chair of the ELLL Committee in the plenary debate on the Order in this regard.

The committee was made aware of concerns expressed about transport provision at points of transition between schools, and when leaving school for attending colleges and training placements.

Research undertaken for the DRC by the University of Birmingham amongst young people and their parents was also critical of school transport provision including;-

- The rigidity of school taxi provision which forces some disabled pupils to leave school early each day
- The failure of school taxi services to adequately cover attendance at extracurricular activities
- Difficulties (including issues associated with bullying) when pupils with a huge variation in ages are carried by the same taxi

ESTYN also report that one of the main barriers to disabled pupils attending extra-curricular activities is the lack of flexibility of specialist transport provided by local education authorities².

When responding to Peter Black, the then Minister Carwyn Jones AM stated that the consultation on the Measure on school transport may provide a more appropriate route for these issues, However, we are concerned that a Measure without the requisite LCO is more limited in its scope and we are unsure whether we can rely on that consultation to make the necessary progress especially in the area of consistency of school and college transport provision. It would be tidier at this stage to make it clear beyond any reasonable doubt that the Assembly has the right to legislate in this area.

2.3 Proposing that the Order covers all persons

We seek clarification on terminology before we can provide an answer to this question,

At present, the SEN framework covers pupils with 'learning difficulties'. The coverage of the Disability Discrimination Act relates to 'people with physical and mental impairments with a severe and long term adverse effect on the ability to undertake day to day activities. Clarification is provided in Hansard that this latter definition includes people with sensory impairments.

The wording of the Consent Order suggests that powers are being devolved for 'persons that have a greater difficulty learning as the majority of persons of the same age as those persons and persons who have a disability'. We assume that this is an attempt to reconcile these two distinct definitions.

The wording of this question suggests that all people associated with education and training are covered not just direct participants (such as the rights of disabled parents of a non disabled child for example)

Whilst a single common definition would seem to be more desirable, there is a key distinction between the category of person

² DDA - The practice of schools and local authorities in implementing their duties. Estyn (Feb 2007)

covered by 'learning difficulties' on the one hand, and people considered as 'disabled' for the purposes of the DDA on the other,

The term 'learning difficulties' will comprise some pupils who should not be regarded as 'disabled'. Also some pupils are likely to be considered as disabled but have no or insignificant 'additional learning needs';

For example, pupils with emotional and behavioural difficulties and pupils who abuse substances or are persistent truants, may well have difficulty learning and be subject to some type of supportive interventions, yet they would not be regarded as disabled. However, there are some disabled pupils who would not describe themselves as having difficulties learning but who may need some form of basic adjustment (such as a partially sighted pupil needing to sit in an area to maximise light).

It is wholly appropriate therefore that the LCO covers both forms of definition. A more detailed statement clarifying what is meant by 'greater difficulty in learning' should accompany the LCO.

2.4 The appropriateness of the disability definition

DRC thinks that the sentence defining disability is too simplistic and therefore open to misinterpretation. Some of the problems we refer to when discussing the relationship between the SEN and DDA legislation arises from different definitions of disability.

A clearer option in the DRC's view is to stick to the definition of a disabled person as enshrined in the Disability Discrimination Act 1995 and updated in the Disability Discrimination Act 2005. This will make it clear that pupils with conditions which have a long term and a severe adverse impact on the ability to undertake daily activities are covered, and that those with progressive conditions are covered from the point of diagnosis without having to demonstrate severity of the condition of necessity. So for example, a child diagnosed with leukaemia or diabetes can be covered and arrangements planned for them at the point of diagnosis.

2.5 Are the terms of the draft order drafted appropriately?

Yes, with the exception of the comments made above on definitions and the lack of coverage of school transport.

Disability Rights Commission
11 September 2007