NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Response of the Northern Ireland Human Rights Commission to the Consultation on the Special Educational Needs and Disability (SEND) Bill

Summary

The Northern Ireland Human Rights Commission (the Commission):

(para 12) welcomes the introduction of the duty to seek and have regards to the views of the child but advises that the qualification defence of 'reasonably practicable' and the requirement to 'have regard to the importance' of participation, are not consistent with the DENI's duty under article 12 UNCRC and article 7 UNCRPD to assure to the child the right to express their views.

(para 13) recommends that the phrase 'so far as reasonably practicable' is removed from the bill at clause 1 and the provision is amended to strengthen the duty to seek and have regard to the views of the child so as to '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'.

(para 23) welcomes the intention in clauses 2 – 5 to improve the level of individualised support available to children with SEN and disabilities. The Commission advises that the Assembly Committee support these clauses which will;

- place a duty on the Education Authority to publish a plan of arrangements for special educational needs provision including details of resources and advisory support available and arrangements for staff training in grant-aided schools; (clause 2)

- place a duty on Boards of Governors to prepare and review personal learning plans for every SEN pupil, to designate a teacher as the learning support coordinator and to inform parents or pupils over compulsory school age of the arrangements relating to disagreements with the Board of Governors; (clause 3)
- place a duty on Boards of Governors to 'take reasonable steps to identify and provide' the necessary support for SEN pupils and share information with all those involved in supporting pupils; (clause 3)
- reduce statutory time limits for completing assessments of need. (clause 5)

(para 25) recommends that the Assembly Committee seek assurance from DENI that they will expedite the revised statutory Code of Practice along with details of other subordinate legislation to be introduced to the Northern Ireland Assembly in relation to SEN provision.

(para 27) advises the Assembly Committee to seek assurance from DENI that there will be no retrogression in the level of SEN provision as a result of this bill and subordinate legislation. The Commission also recommends that the Committee considers further the need for the Bill to require that the Code of Practice and other subordinate legislation should be enacted by way of the affirmative resolution procedure. This process of requiring that statutory rules must be approved by the Assembly before becoming law would allow the Assembly Committee to provide full scrutiny of the human rights and any other implications of the revised SEN and inclusion framework as a whole before the Code of Practice can come into effect.

(para 31) advises that the Assembly Committee support the provisions in clauses 6 and 7 introducing new appeal rights for parents as they represent progressive measures towards fulfilling the human rights obligation to provide robust and effective access to redress regarding violations of the right to education.

(para 34) recommends that an additional clause should be included in the bill to establish a procedural duty upon the tribunal to fulfil the right of the child to be heard in the appeals process in accordance with UNCRC article 12(2).

(para 41) recommends that, given the impact of clauses 9 and 10 on determining the capacity of children to exercise their rights, the Assembly Committee should consider the need for subsequent regulations to be enacted by the affirmative resolution procedure.

(para 45) acknowledges the progressive intention of clause 11 and nevertheless recommends that the Assembly Committee consider if the power conferred upon DENI at clause 11 (1) would be more effective as a duty. The Commission further advises that clause 12 should be amended to establish a duty rather than an enabling power due to the risk of retrogression should appeal rights that were available to children under the pilot scheme subsequently be removed. Such provisions should also include a duty to promote the scheme and ensure meaningful and effective access for children to exercise their right of appeal.

(para 46) advises that, it is now 7 years since the UN Committee on the Rights of the Child made a Concluding Observation on children's appeal rights in special educational needs tribunals (see paragraph 43 of this response). As a result, an additional period of up to 10 years is not an appropriate length of time to allow for the establishment of the pilot scheme. In the event that the initiation of the pilot scheme could take 10 years from the date of the bill receiving Royal Assent, this could result in a total delay of 17 years in the implementation of the UN Committee's 2008 recommendation.

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Introduction

1. The Northern Ireland Human Rights Commission (the Commission) pursuant to Section 69 (1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of Human Rights.[1] In accordance with this function the following statutory advice is submitted to the Northern Ireland Assembly Committee for Education (the Assembly Committee) in response to its consultation on the SEND bill.

2. The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant international treaties in this context include:

- the CoE European Convention on Human Rights, 1950 (ECHR)[2];
- the International Covenant on Economic, Social and Cultural Rights (ICESCR)[3];
- the UN Convention on the Rights of the Child (UNCRC)[4];
- the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[5].

[1] Northern Ireland Act 1998, Section 69(1).
[2] Ratified by the UK in 1951.
[3] Ratified by the UK in 1976.
[4] Ratified by the UK in 1991
[5] Ratified by the UK in 2009

3. The Northern Ireland Executive (NI Executive) is subject to the obligations contained within these international treaties by virtue of the United Kingdom (UK) Government's ratification. In addition, the Northern Ireland Act 1998, section 26 (1) provides that 'if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... [s]he may by order direct that the proposed action shall not be taken.'[6]

4. The Commission further recalls that the Northern Ireland Act 1998, section 24(1) states that 'a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'.[7]

5. In accordance with the Northern Ireland Act 1998, section 6(2) it is outside the legislative competence of the Northern Ireland Assembly to enact laws that are incompatible with any of the ECHR rights.

6. In addition to these treaty standards there exists a body of 'soft law' developed by the human rights bodies of the UN and CoE. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties obligations;
- UN Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities
- UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to Education
- UN Committee on the Rights of the Child, General Comment No. 9: The rights of children with disabilities
- UN Committee on the Rights of the Child, General Comment No. 12: The Right of the Child to be Heard

The views of the child – Clause 1

7. The Commission welcomes the introduction of a duty to seek and have regard to the views of the child in clause 1 in relation to decisions affecting the child.

[6] Northern Ireland Act 1998, Section 26 (1)
[7] Ibid, Section 24 (1)

8. The UNCRC article 12 and the UNCRPD article 7(3) place a responsibility on the DENI to ensure that any child capable of forming his or her own views is accorded the opportunity to express these views and that these views will be given due weight. Article 12 states in full,

> 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.

General Comment 12 of the UN Committee on the Rights of the Child regarding the child's right to be heard makes the following recommendations with regard to education and school:

> Respect for the right of the child to be heard within education is fundamental to the realization of the right to education.[8]
>
> Education authorities have to include children's and their parents' views in the planning of curricula and school programmes.[9]
>
> In decisions about the transition to the next level of schools or choice of track or streams, the right of the child to be heard has to be assured as these decisions deeply affect the child's best interests. Such decisions must be subject to administrative or judicial review.[10]

9. The Commission notes the use of the qualifying statement in clause 1 of the bill 'so far as reasonably practicable'. The Commission is concerned at the potential this statement presents for a broad range of social and economic considerations that could present mitigating factors allowing the child's right to be restricted or dismissed. The removal of this phrase would not remove a defence based on

[8] UN Committee on the Rights of the Child, *General Comment 12 The Right of the Child to be Heard* (1 July 2009) para. 105
[9] Ibid, para. 107
[10] Ibid, para. 113

considerations regarding the capacity of a child to form their own view but would ensure that other administrative factors cannot interfere with the right of the child to be heard.

10. General Comment 12 notes in this regard,

> While difficulties are experienced by many children, the Committee particularly recognizes that certain groups of children, including younger boys and girls, as well as children belonging to marginalized and disadvantaged groups, face particular barriers in the realization of this right.[11]
>
> States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views.[12]

11. The Commission notes that clause 1 would require the Authority to 'have regard to the importance of that child participating in decisions.' This language does not uphold a duty to prioritise the participation of the child over other practical considerations. It therefore is more suggestive of a statutory *power* than a statutory *duty*.

12. **The Commission advises that the defence of 'reasonably practicable' and the requirement to 'have regard to the importance' of participation, are not consistent with the DENI's duty under article 12 UNCRC and article 7 UNCRPD to assure to the child the right to express their views.**

13. **The Commission recommends that the phrase 'so far as reasonably practicable' is removed from the bill at clause 1 and the provision is amended to strengthen the duty to seek and have regard to the views of the child so as to '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,**

[11] Ibid, para. 4
[12] Ibid, para. 21

the views of the child being given due weight in accordance with the age and maturity of the child.'[13]

Access to support – Clauses 2-5

14. The Commission notes that the draft bill includes provisions in clauses 2 to 5 that are aimed at improving access to support for children facing barriers to enjoyment of their right to education. The following international standards demonstrate the duty on DENI to take measures to ensure that sufficient individualised support is provided to children with special educational needs (SEN) and disabilities to enable them to exercise their right to an effective education without discrimination.

15. DENI is obligated to respect, protect and fulfil the right to education. The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.[14] The UN Committee on Economic, Social and Cultural Rights notes in General Comment 13 on the right to education that,

> The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education… As a general rule, State parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.[15]

16. General Comment 13 stresses the requirement that educational institutions and programmes must be 'accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds'.[16]

17. This duty requires DENI to ensure that children with SEN and disabilities are able to access their right to an effective education on an equal basis. While the right to education itself is subject to progressive realisation and therefore its fulfilment depends on the availability of

[13] UN Convention on the rights of the child, Article 12 (1)
[14] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to Education* (8 December 1999) para. 46
[15] Ibid, para. 47
[16] Ibid, para. 6(b)(i)

resources, the UN Committee is clear that this does not apply to the obligation to provide access to education without discrimination;

> The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.[17]

18. Furthermore, the UN Committee identifies that violations of Article 13 include 'the failure to take measures which address de facto educational discrimination'[18] highlighting the fact that the duty not to discriminate in the provision of education has both negative and positive dimensions.

19. The UNCRPD article 7 requires that 'children with disabilities have the same rights as other children'[19] and article 24 protects the right to education without discrimination on the grounds of disability. Article 24 also obligates DENI to ensure an 'inclusive education system' that children with disabilities can access 'on an equal basis with others in the communities in which they live.'[20]

20. In realising the right to education for children with disabilities, UNCRPD places a specific duty on DENI to provide 'effective individualised support measures…in environments that maximise academic and social development, consistent with the goal of full inclusion.'[21]

21. The UN Committee on Economic, Social and Cultural Rights and the UN Committee on the Rights of the Child have also highlighted the requirement to provide individualised support to children with disabilities. For example, General Comment 5 of the UN Committee on Economic, Social and Cultural Rights on persons with disabilities recommends;

> States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary

[17] Ibid, para. 31
[18] Ibid, para. 59
[19] *United Nations Convention on the Rights of Persons with Disabilities, 2006* Art 7(1)
[20] Ibid, Art 24(2)(b)
[21] Ibid, art 24(2)(e)

equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers.[22]

22. General Comment 9 of the UN Committee on the Rights of the Child notes the importance of individualised support plans with effective monitoring;

> As children with disabilities are very different from each other, parents, teachers and other specialized professionals have to help each individual child to develop his or her ways and skills of communication, language, interaction, orientation and problem-solving which best fit the potential of this child. Everybody, who furthers the child's skills, abilities and self-development, has to precisely observe the child's progress and carefully listen to the child's verbal and emotional communication in order to support education and development in a well-targeted and most appropriate manner.[23]

23. **The Commission welcomes the intention in clauses 2 – 5 to improve the level of individualised support available to children with SEN and disabilities. The Commission advises that the Assembly Committee support these clauses which will;**

- **place a duty on the Education Authority to publish a plan of arrangements for special educational needs provision including details of resources and advisory support available and arrangements for staff training in grant-aided schools; (clause 2)**

- **place a duty on Boards of Governors to prepare and review personal learning plans for every SEN pupil, to designate a teacher as the learning support coordinator and to inform parents or pupils over compulsory school age of the arrangements relating to disagreements with the Board of Governors; (clause 3)**

[22] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with disabilities* (1 Jan 1995) para. 35

[23] UN Committee on the Rights of the Child, *General Comment No. 9: The rights of children with disabilities* (27 Feb 2007) para. 63

- **place a duty on Boards of Governors to 'take reasonable steps to identify and provide' the necessary support for SEN pupils and share information with all those involved in supporting pupils; (clause 3)**

- **reduce statutory time limits for completing assessments of need. (clause 5)**

24. The Commission notes that all of the proposed measures intended to improve the available support for children with SEN and disabilities will have to be considered within the broader regulatory framework set out in a statutory Code of Practice and other subordinate legislation. The detail of these is not known to the Commission but they will have implications for the realisation of human rights. For example, since the format of Personal Learning Plans and arrangements for their implementation, monitoring and evaluation will be defined in the Code of Practice it is not possible for the Commission to assess the extent to which this provision will improve the support available.

25. **The Commission recommends that the Assembly Committee seek assurance from DENI that they will expedite the revised statutory Code of Practice along with details of other subordinate legislation to be introduced to the Northern Ireland Assembly in relation to SEN provision.**

26. The Commission has previously expressed concern about proposals arising from the SEN review regarding changes to the number of stages at which additional statutory assistance can be accessed and the introduction of Coordinated Support Plans as these may result in fewer children being able to access statutory protections, support and resources.[24] Having met with DENI the Commission understands that these changes will be dealt with by the Code of Practice and other subordinate legislation. As this is not yet available, the Commission remains concerned that strengthening the duty to provide support to children who meet the SEN criteria might be undermined by any move to narrow the criteria and remove access to support for a significant number of children. Such a move would contradict a fundamental principle of human rights protection as it would constitute a retrogressive measure.

[24] NIHRC Education Reform in Northern Ireland – A Human Rights Review, pg 17 para. 3.2.6

27. **The Commission advises the Assembly Committee to seek assurance from DENI that there will be no retrogression in the level of SEN provision as a result of this bill and subordinate legislation. The Commission also recommends that the Committee considers further the need for the Bill to require that the Code of Practice and other subordinate legislation should be enacted by way of the affirmative resolution procedure. This process of requiring that statutory rules must be approved by the Assembly before becoming law would allow the Assembly Committee to provide full scrutiny of the human rights and any other implications of the revised SEN and inclusion framework as a whole before the Code of Practice can come into effect.**

Right of Appeal

- **Clauses 6 and 7**

28. The Commission welcomes the proposed introduction of new appeal rights for parents where the decision has been made not to amend a statement following annual review or not to make a statement for a child under 2 following an assessment of needs.

29. The ECHR article 13 outlines the following duty to provide access to an effective remedy where human rights have been violated;

> Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

30. Although the text of ICESCR does not refer to remedies, the UN Committee on Economic, Social and Cultural Rights has stated that the enjoyment of the rights recognised within ICESCR, including the right to education, 'will often be appropriately promoted, in part, through the provision of judicial or other effective remedies'.[25]

[25] UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: the nature of States parties obligations, para. 5

31. **The Commission advises that the Assembly Committee support the provisions in clauses 6 and 7 introducing new appeal rights for parents as they represent progressive measures towards fulfilling the human rights obligation to provide robust and effective access to redress regarding violations of the right to education.**

- **Children participating in appeals**

32. The Commission refers the Assembly Committee to the advice it provided to the Minister of Education in June 2012 on the subject of access to redress (see attached). At that time the Commission stated that;

> To satisfy the procedural requirements of a human rights compliant redress system, **it is advised that where an affected child is capable of forming his or her own views, that he or she has a right, notwithstanding the permission of the Tribunal, to speak at any relevant hearing.** As mentioned, the ability of a child to bring an appeal in his or her own name was highlighted by the UN Committee on the Rights of the Child to be especially important where a child is in alternative care. This is because although the local authority has parental responsibility in this regard, it commonly does not assert these rights. There are also instances of parents who do not assert their parental rights of appeal or operate in the best interests of the child. In order to comply with the recommendation of the Committee, **the Minister may wish to consider instituting appeal rights for children capable of forming their own views.**

33. The Commission welcomes the fact that, since giving this advice in 2012, consideration has been given to instituting appeal rights for children and the bill contains a number of clauses to that effect. However, the Commission notes that the bill does not include any legislative provision to ensure that a child capable of forming his or her own views is facilitated to be able to exercise their right in practice to speak at a relevant tribunal. This is a notable absence in the bill.

34. **The Commission recommends that an additional clause should be included in the bill to establish a procedural duty**

upon the tribunal to fulfil the right of the child to be heard in the appeals process in accordance with UNCRC article 12(2).

- **Clauses 9 and 10**

35. The Commission notes and welcomes the proposal in the draft bill to provide appeal rights to all children over compulsory school age in relation to special educational needs provision and disability discrimination claims.

36. The Commission notes the regulation-making powers contained within clauses 9 and 10 and the fact that the impact of these legislative measures on the child's rights to be heard in formal proceedings will rely heavily on the amendments to the tribunal regulations and other regulations made by DENI.

37. Clauses 9 and 10 include reference to the introduction of regulations that will set out how determinations will be made regarding a child's capacity to exercise their right to appeal. Such regulations will engage human rights and would have to be compliant with the international human rights standards on the issue of the evolving capacities of children.

38. For example, the UNCRPD article 3(h) stipulates that one of the general principles guiding its implementation must be 'respect for the evolving capacities of children with disabilities.'

39. The UNCRC article 12 is also underpinned by respect for the evolving capacities of children and in General Comment 12 the UN Committee on the Rights of the Child notes that the phrase 'capable of forming his or her own views',

> '…should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to

express them; it is not up to the child to first prove her or his capacity.'[26]

40. The UN Committee emphasises that age alone should not be used to determine the capacity of the child to have their views heard and sets out a number of recommendations that should be considered in such determinations, including:

'it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.'[27]

41. **The Commission recommends that, given the impact of clauses 9 and 10 on determining the capacity of children to exercise their rights, the Assembly Committee should consider the need for subsequent regulations to be enacted by the affirmative resolution procedure.**

- **Clauses 11 and 12**

42. The Commission welcomes the proposed introduction of a pilot scheme to enable children below the upper limit of compulsory school age to bring an appeal in relation to special educational needs provision and disability discrimination claims and the proposed arrangements for follow-up provision. This is a progressive measure that could improve the ability of children to exercise their rights.

43. In the 2008 concluding observations on the UK, the UN Committee on the Rights of the Child expressed concern that the participation of children in all aspects of schooling was inadequate, since children have few consultation rights and in particular, no right to appeal their exclusion from educational facilities or the decisions of a special educational needs tribunal. In this regard, the Committee recommended that the UK Government,

[26] UN Committee on the Rights of the Child, *General Comment 12 The Right of the Child to be Heard* (1 July 2009) para. 20
[27] Ibid, para. 21

> Ensure that children who are able to express their views have …the right, in particular for those in alternative care, to appeal to special educational needs tribunals.[28]

44. The Commission notes that clause 11 establishes a power whereby DENI 'may by regulations' introduce a pilot scheme. It further notes that this power will have effect following Royal Assent and would be repealed after 10 years. In addition the Commission notes that clause 12 also establishes an enabling power whereby DENI 'may by regulations' make provisions for children to exercise their right of appeal following the completion of the pilot scheme.

45. **The Commission, acknowledging the progressive intention of clause 11, nevertheless recommends that the Assembly Committee consider if the power conferred upon DENI at clause 11 (1) would be more effective as a duty. The Commission further advises that clause 12 should be amended to establish a duty rather than an enabling power due to the risk of retrogression should appeal rights that were available to children under the pilot scheme subsequently be removed. Such provisions should also include a duty to promote the scheme and ensure meaningful and effective access for children to exercise their right of appeal.**

46. **The Commission advises that, it is now 7 years since the UN Committee on the Rights of the Child made a Concluding Observation on children's appeal rights in special educational needs tribunals (see paragraph 43 of this response). As a result, an additional period of up to 10 years is not an appropriate length of time to allow for the establishment of the pilot scheme. In the event that the initiation of the pilot scheme could take 10 years from the date of the bill receiving Royal Assent, this could result in a total delay of 17 years in the implementation of the UN Committee's 2008 recommendation.**

[28] UN Committee on the Rights of the Child, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (20 October 2008), para. 67