

SPECIAL EDUCATIONAL NEEDS AND DISABILITY (SEND) BILL

Submission of Evidence to the Northern Ireland Assembly Education Committee

1.0 The Northern Ireland Commissioner for Children and Young People

The Office of the Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003), to safeguard and promote the rights and best interests of children and young people in Northern Ireland (NI). Under Articles 7(2)(3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. The remit of the Office is for children and young people from birth up to 18 years, or 21 years if the young person is disabled or in the care of social services.

In carrying out her functions, the Commissioner's paramount consideration is the rights of the child and NICCY is required to base all its work on the United Nations Convention on the Rights of the Child (UNCRC). A number of articles in the UNCRC are particularly relevant to the provisions contained in the draft Special Educational Needs and Disability Bill. Article 2 enshrines the right of non-discrimination, which means that it is a State's obligation to protect children and young people from all forms of discrimination and to take positive action to promote their rights. This article emphasises the importance of considering the impact of policies and legislation in relation to particularly disadvantaged and marginalised children and young people. Evidently, children with SEN are a vulnerable group and therefore government must ensure that they do not experience any disadvantage through the introduction and implementation of policies and legislation. The draft SEND Bill is seeking to improve provision for children with SEN and disabilities, however it is essential that the Bill and the accompanying regulations and code of practice make appropriate and effective provision for **all** children and young people, irrespective of the nature of their particular needs and circumstances.

Articles 28 and 29 of the UNCRC consider educational rights for children and young people. Article 28 defines children's rights to an education and Article 29 describes the aims of education. Included amongst the aims are the development of the child's

personality, talents and mental and physical abilities to their fullest potential, the development of respect for diversity and the preparation of the child for responsible life in a free society. Providing further interpretation of this Article, the Committee has emphasised that education should be child-focused and child-friendly. As such, children should be provided with educational opportunities which address their particular physical, mental, intellectual and social needs, take account of their evolving capacity, developmental stage and individual needs and which seek to develop a broad range of essential life skills, including literacy, numeracy, conflict resolution, critical thinking and young people and adults.

2.0 Introduction of draft legislation on Special Educational Needs and Disability

2.1 NICCY's engagement with Special Educational Needs and Disability Issues

NICCY welcomes the opportunity to submit evidence to the Northern Ireland Assembly Education Committee to assist the Committee in its consideration of the draft Special Educational Needs (SEN) and Disability Bill. The provision of appropriate, effective and timely educational support and services to children and young people with special educational needs is a critical issue for NICCY and has been a consistent and important focus of our work since the Office was established in 2003.

In its review of children's rights in Northern Ireland, published in 2008¹, NICCY highlighted gaps and inconsistencies in the provision of support and services to children and young people with SEN. The Review highlighted concerns regarding a lack of planning, resourcing and funding. Delays throughout the process, inadequate training for teachers and classroom assistants and an absence in the capacity of mainstream schools to meet the additional needs of children and young people with SEN were also noted. The Review recommended, as has subsequent advice produced by NICCY, the need for early identification and intervention to allow children and young people with SEN to develop their full potential, a need for consistency in the application of procedures and the critical importance of addressing delays in the system. Furthermore, it stated that the child or young person must remain at the centre of the process and ongoing consultation with them and their parents/carers should be undertaken, to ensure their needs are clearly understood and their views genuinely considered and factored into all decision-making regarding the educational support and services they receive.

¹ http://www.niccy.org/uploaded_docs/CRU/NICCY%20Rights%20Review%202008%20.pdf

NICCY's Legal and Investigations' team deals with a wide range of issues relating to children and young people through its Casework Service. In 2014/15, 53% of cases received through the Service, related to educational matters. Of these, 47% related to special educational needs - the most common issue arising in educational enquiries. Indeed the Casework Service has consistently received more enquiries related to this issue than any other.

Over the last twelve years, NICCY has drawn attention to the needs of children and young people with SEN and disabilities through various advice documents provided to NI Executive departments and agencies, NI Assembly Committees and individual MLAs. The Office has also published briefings and reports on SEN. Of particular relevance to this Bill is a report published in 2012, which provided a critical analysis of transitions to adult services for young people with learning disabilities². The research, commissioned by NICCY from researchers at the Queen's University Belfast highlighted variations in the availability and adequacy of transition planning across Education and Library Boards and Health and Social Care Trusts. It also highlighted the lack of appropriate information regarding options and support available to young people with disabilities and their families as young people were leaving school, the inadequacy of interagency working between education and health and social care professionals and between the public and voluntary sectors. There were also concerns that the revised SEN and inclusion proposals would lead to a reduction in provision and statutory protection for children and the lack of statutory obligations surrounding the transitions process for young people without statements was also raised. The Report also identified a failure to take young people's views into account.

NICCY believes it is a significant shortcoming that transitions for young people with learning disabilities is not addressed in detail in the current SEN and Inclusion proposals. Initial proposals issued by the Department in 2009 recommended that access to transition services should be extended to all pupils with SEN and not just those with a statement. However, in the 2012 Policy Memorandum this proposal was withdrawn due to concerns about the creation of 'an increased bureaucratic burden on schools'. The Department has indicated that full reviews will continue to be provided for pupils, post-14, who hold statements however there is no provision proposed for pupils holding Personal Learning Plans. Transition stages for all young people with SEN and disabilities are extremely critical and should be carefully planned, resourced and supported.

² Lundy, L., Byrne, B. and McKeown, P. (2012). 'Review of Transitions to Adult Service for Young People with Learning Disabilities'. Belfast: NICCY.

NICCY believes it is imperative that every young person with SEN or a disability should be offered effective transition guidance and support to ensure they are adequately prepared to progress to the next stage in their education.

2.2 NICCY's engagement with the SEN and Inclusion Proposals

NICCY has significant concerns regarding the very considerable delay in bringing forward this SEND legislation to the NI Assembly and developing the accompanying regulations and code of practice. The Department of Education undertook a major review of Special Educational Needs in 2006. A formal consultation was then launched in 2009, although a summary report of the responses was not issued until January 2012. The Minister's policy proposals, outlined in a Policy Memorandum were agreed by the NI Executive in July 2012 however it is now almost three years later and the draft legislation has just been issued for consultation. **Given the critical importance of early assessment and intervention through the effective deployment of multi-disciplinary approaches in addressing the needs of children and young people with SEN, NICCY considers the delays in bringing forward these proposals to be unacceptable.**

NICCY submitted detailed advice in response to the Department's consultation on SEN and Inclusion proposals in January 2012. In November 2013, the Office provided further advice to the Department regarding a child's right to appeal to SENDIST. Throughout the development of the SEN and Inclusion proposals, NICCY has also had ongoing engagement with bodies in the children's sector for whom SEN and disability is a key issue. The Commissioner and her staff also discuss the needs of children and young people with SEN and disabilities at regular meetings convened with the Minister for Education and departmental officials.

3.0 General Comments

The legislative proposals issued for consultation are intended to make amendments to existing provisions within the Education (Northern Ireland) Order 1996 and the Special Educational Needs and Disability (NI) Order 2005. The draft Special Educational Needs and Disability Bill (SEND) contains relatively few new 'standalone clauses', although it makes provision for the Department to make amendments through the introduction of subordinate legislation. Therefore, as the consultation is limited only to the draft clauses of the SEND Bill and the draft code of practice and regulations are not included; it is not possible to effectively assess the comprehensive proposals for a revised SEN and Inclusion framework. Publishing details of all of the proposals for the revised framework through the legislation, regulations and code of practice would have provided greater clarity and communicated a more coherent and integrated picture of the breadth and detail

of how the changes in SEN and disability provisions will impact on children and young people and their families.

The Comments provided in this submission are therefore largely restricted to the contents of the draft Bill, however reference is made to other issues where possible and appropriate.

3.1 Code of Practice and Regulations

The Department has indicated that the code of practice and regulations have not yet been developed and therefore have not been issued for consultation along with the draft Bill. As noted above, it would have been much more helpful to have had sight of the regulations and code of practice at this stage, as these will contain much of the detail relating to the planned implementation of the revised framework and legislation. The recent communication from the Department of Education to the NIA Education Committee outlines the substantive range of issues which will be addressed in the regulations and code of practice. These will now require consideration by stakeholders through a separate consultation(s). NICCY would be interested to learn whether the Education Committee intends convening further evidence sessions with stakeholders to assist in its scrutiny of the regulations and code of practice once these are published.

3.2 Proposals in the Policy Memorandum not brought forward

A number of key actions proposed by the Department of Education and agreed by the Executive in the Policy Memorandum, 2012 have not been brought forward in the Bill. NICCY understands that some of these proposals, including details of statements, statutory assessment and full reviews of SEN at transition stages, will be detailed further in the code of practice or regulations. However, there was a commitment to undertake further consideration of mechanisms for placing children with SEN in early years settings and to bring forward legislation to place a statutory duty on the Education Authority to ensure that appropriate provision be made available for children with SEN in early years settings. It was also proposed that all funded providers be able, with necessary support, to identify and meet their needs or source external support where required. The Policy Memorandum proposed that the latter provision would be made through an amendment to Article 17 of the Education (NI) Order 1998³.

Clause 2 of the draft Bill requires the Education Authority to publish plans relating to its arrangements for special educational provision, however there is no specific reference to

³ http://www.deni.gov.uk/summary_of_key_proposals_july_2012.pdf (No. 6, p.15).

early years' settings and to a requirement for plans to reference the provision of appropriate SEN provision in pre-school education. NICCY would therefore request that further details be provided by the Department, clarifying its intentions regarding to the original proposal (presented in the Policy Memorandum) to provide pupil support services in pre-school settings. Clearly it is vital that all children have equal access to support, irrespective of the pre-school setting in which they are placed. In NICCY's advice to the Department in February 2012, emphasis was placed on the importance of early identification of need and provision in early years settings. We noted that effective intervention at an early stage can have a greater impact in addressing a child's needs, also preventing children from disengaging from mainstream education and potentially coming under alternative education provision. It is clearly vital that children with SEN in both statutory and non-statutory early years' settings can avail of the services and support they require.

3.3 Effective Consultation with Parents/Carers, Children and Young People

Throughout its engagement with the Department of Education around the SEN and Inclusion proposals, NICCY has been concerned that those most directly impacted by any changes have an opportunity to consider and respond to these. In various advice papers provided to the Department, we have urged the Minister to ensure that children and young people are effectively engaged in the consultation process. NICCY's evidence to the Department of Education in 2012 discussed, at some length, the importance of children and young people being supported to contribute their views during any consultation, also highlighting shortcomings in the previous consultation process.

As noted above, the draft Bill has been issued for consultation in advance of and separately from the draft regulations and code of practice. It is therefore difficult to conceptualise the complete SEN and Inclusion framework and how it is intended to operate in practice. An effective consultation with children and young people about the proposed SEN and Inclusion framework already presented various challenges, given the wide ranging proposals for change. However, the 'fragmented' approach adopted by the Department will create further difficulties.

NICCY strongly recommends that the Department provides information in relation to how it intends to consult with children and young people and their parents or carers, on the draft Bill, code of practice and regulations.

4.0 Review of the Special Educational Needs and Disability Bill

Clause 1: Duty of Authority to have regard to views of the child

NICCY welcomes this clause and its prominence at the top of the Bill. Article 12 of the UNCRC, which details the child's right to express their views, is recognised as one of the guiding principles of the Convention, along with Article 2 (non-discrimination), Article 3 (best interests of the child) and Article 6 (survival and development). These rights are regarded as being the means by which the substantive articles are interpreted and achieved. Article 12 enshrines the child's right to express their views on all matters affecting them. It also states that their views must be given due weight while taking account of the age and maturity of the child.

NICCY regards the right to participate in decision-making as a fundamental right of all children and young people and the Office promotes and upholds this right in every aspect of its work. There are many benefits to consulting with children and young people. It can help education service providers gain a deeper understanding of children and young people's needs and desires and quickly identify any possible problems arising from proposed changes. Children and young people feel respected and that their opinions are valued. They are more likely to have a sense of ownership of the decisions made regarding their education and to commit to and engage positively with the support or services provided.

NICCY notes the intention of the Department to provide further details and guidance with regard to how the views of the child will be sought and taken into account, in the code of practice. The guidance should include examples of practical approaches which could be employed in seeking children and young people's views also emphasising the vital role of schools in facilitating pupils' participation in decision-making.⁴ Good practice examples of engagement with children or young people with SEN should be identified and shared. The involvement of intermediaries and informal advocates should also be investigated and their participation considered, particularly where children or young people are reluctant to speak to parents, carers or education professionals. Following on from this, it will be important to clarify which persons are likely to have direct engagement with children and young people to ascertain their views. The duty in the draft Bill refers to the Education Authority however, in practice, it is more likely that parents, class teachers, Learning Support Co-ordinators, educational psychologists, and a range of other educational and

⁴ <http://www.niccy.org/publications/walking-or-talking-participation/>
http://www.deni.gov.uk/pupil_participation_circular.pdf

allied health professionals will provide information to a child or young person and engage most directly with them.

NICCY strongly suggests that further explanation is required in relation to the phrase ‘as far as reasonably practicable’ (Art.5(a) of the 1996 Order). Children with SEN can be very vulnerable and decisions regarding their educational needs are often made by educational and health professionals, along with their parents or carers. The phrase, ‘as far as reasonably practicable’ requires adults to exercise judgement and to weigh up various criteria, such as time, risk and available resources when considering *if* they will seek and have regard to the views of a child. NICCY would advocate that the basis for children and young people’s participation in decision-making should be for **every** child to be provided with information and support with the intention that they are **all** enabled to participate. It should be the **exception** that a child or young person is not consulted regarding their views. Sharing good practice will be helpful in supporting professionals to engage with children and young people and to ascertain their views.

NICCY recently published a report which examined evidence of the impact of direct participation with children and young people on the development of departmental policies, strategies, legislation and services⁵. The findings indicated that while some good participative practice exists, overall there is a lack of concrete evidence to demonstrate children and young people’s involvement in these processes. The Report recommends the development of more effective systems for engaging children and young people and evaluating the impact of their contribution.

NICCY therefore strongly recommends that the Department develops a mechanism to assess the level of children and young people’s participation in decision-making in relation to the provisions made for their specific educational needs.

Clause 2: Duty on Education Authority to publish a plan relating to special educational provision

The duty on the Education Authority to publish, review and revise plans in relation to special educational provision is an important commitment and should provide greater transparency and clarity regarding the resources and advisory and support services which will be made available and the arrangements for securing staff training. It is our understanding that the code of practice will outline further details in relation to the content and structure of the plan and the procedures for its preparation, review and revision and

⁵ <http://www.niccy.org/publications/walking-or-talking-participation/>

the individuals who should be consulted during this process. Given that this information is not currently available, it is difficult to provide a detailed assessment, however NICCY would highlight a number of issues which we believe should be considered in relation to this provision in the draft Bill.

It will be essential that the Plan is accessible to all stakeholders, including parents and children and young people. Preparation of a young person's version will therefore be required and should be issued along with the adult version. All individuals who will be consulted in the preparation, review or revision of the Plan must be given adequate time and support to respond, therefore a timetable for this process should be included in the code of practice. It will be important to outline what, if any sanctions may be implemented and by whom, should the Authority fail to provide the information required in the Plan, to consult effectively with consultees or deliver the Plan in a timely manner. NICCY believes it will also be important to determine the nature of the budget which has been allocated towards the completion of the Plan and for this information to be included in the plan, when published.

Clause 3: Enhanced duty on Boards of Governors in relation to pupils with Special Educational Needs

This clause outlines the enhanced duties to be placed on Boards of Governors in mainstream and special schools. These include:

- ensuring that all staff working within a school are made aware of pupil's special educational needs;
- preparing and keeping under review personal learning plans for all pupils with SEN;
- designating a teacher as a Learning Support Co-ordinator, and;
- ensuring that parents and pupils of post-compulsory school age who have SEN are aware of the arrangements regarding dispute avoidance and resolution with regard to SEN provision.

There is also a proposal to give the Department the power to introduce regulations setting out where and how a Board of Governors (BoG) would be required to notify the Education Authority of changes in respect of a child with SEN. NICCY understands that further information regarding BoGs will be included in the regulations and code of practice, specifically the range of duties applicable to BoGs, the circumstances and manner in which a BoG must notify the Education Authority about changes regarding a child for whom the Authority is making special educational provision and the qualifications, experience and any other school functions, as appropriate, of the Learning Support Co-ordinator.

The proposal to place additional duties on Boards of Governors has raised concerns amongst stakeholders. Twenty-three percent of respondents to the 2009 Department of Education consultation on SEN and Inclusion highlighted the increased responsibility and accountability this would place on them. There are questions concerning the capacity of Governors to assume these and other additional responsibilities, such as those outlined in the Department's anti-bullying policy. Governors are appointed in a voluntary, unpaid capacity and they take on significant roles, providing strategic management, accountability and promoting high standards of education and achievement. As well as undertaking the role on a voluntary basis, only a limited number of meetings are convened during the year to address the very broad and substantial range of issues arising in a school. Additional requirements of the role can be particularly onerous for Governors serving in smaller and rural schools.

NICCY would strongly suggest that BoG be provided with extensive training and support to navigate the revised SEN and Inclusion framework, understand their roles and responsibilities as detailed in the legislation, regulations and code of practice and to become confident in discharging their duties in relation to special educational needs provision. This latter requirement will be particularly important in enabling them to question or scrutinise the delivery of SEN provision within a school.

NICCY would suggest that details regarding mandatory training for Governors should be provided in the regulations. Furthermore, the Department should also provide details regarding who would be likely to provide such training and how it will be funded.

This clause also references Personal Learning Plans (PLPs), although it is intended that the code of practice will provide more detail about the content, format, management and review arrangements in relation to these, as well as the proposed partnership arrangements between parents, pupils and teachers in the development and review of the Plans. Since the revised code of practice is not currently available for comment, we would reiterate the concerns highlighted in the advice paper we provided to the Department in 2012⁶. NICCY welcomes the intention to place a statutory duty on BoG to 'prepare and keep under review...a personal learning plan' for each pupil with SEN. However our advice paper emphasised that the duty should be strong enough to ensure that schools, not achieving sufficiently high standards in terms of identifying, assessing and meeting the needs of pupils with SEN, are enabled to fulfil their duties regarding the preparation and

⁶ NICCY (2012) 'Advice to the Department of Education regarding proposals for progressing the Review of Special Educational Needs and Inclusion'. Belfast: NICCY.

review of PLPs. There are no references in the draft Bill to the quality of PLPs, external inspections of Governors' fulfilment of this duty, or to any kind of enforcement mechanism which might be employed, if required. The Department had indicated an intention that PLPs would be more closely aligned to outcomes, than is currently the case. It will therefore also be important to learn how the achievement of outcomes will be monitored and where the Education Training Inspectorate (ETI) will have a role, in this respect.

NICCY has previously expressed concerns about the provision which will be made for pupils who participate in the statutory assessment process and who receive a PLP but will not meet the criteria required to obtain a statement through a Co-ordinated Support Plan. Pupils who have provision made for them through a PLP must have full and equal access to all the support and services they require and should not be disadvantaged in any way, compared with pupils holding CSPs. NICCY is also concerned that a significant proportion of pupils currently holding a statement may transfer to a PLP and that this could have a detrimental impact on pupils' development even resulting in developmental regression. Pupils in these circumstances **must** continue to have unfettered access to all the educational and or health-related support and services they require.

In the transition to a revised SEN system, it is imperative this does not result in a dilution of pupils' rights. Each child or young person should have an equal opportunity to access the support or service they require and indeed, their rights should be realised more quickly and effectively.

Clause 4: Duty on Educational Authority to request help from health and social care bodies

The Department's Summary Report, 2012 stated that, 'Health and Social Care Trust input is central to the Review's proposals on multi-disciplinary working and to meeting the non-educational needs set out in a Co-ordinated Support Plan'.⁷ NICCY is aware, through its legal casework and commissioned research, of the detrimental impact of ineffective co-operation between health and education bodies, on children and young people's well-being. Indeed, in its advice paper to the Department in 2012, NICCY proposed that the review of SEN created an opportunity to 'consider the feasibility of introducing a statutory duty to ensure that health provisions set out in a Co-ordinated Support Plan are met'. However the draft legislation does not make any reference to a statutory duty on health and social care bodies to ensure such provision is made nor does it refer to the need for education and social health and social care bodies to actively co-operate. Indeed this

⁷ http://www.deni.gov.uk/summary_of_key_proposals_july_2012.pdf. Page v.

clause states only that there should be an amendment to the Education (Northern Ireland) Order 1996, so that ‘a Board **shall** request the help of the [Health] Authority’ rather than ‘**may**’. This does not significantly strengthen the duty on health and social care bodies to participate in ‘consistent, strong partnerships’ as referenced in the code of practice. Indeed, the code of practice contains few details of the operational nature of inter-departmental working.

These provisions are completely inadequate in terms of ensuring effective, co-operative working between the two key departments and agencies responsible for ensuring appropriate support and services are provided to children and young people with SEN. Furthermore, there do not appear to be any significant sanctions which may be imposed, where there is a failure by the Health Authority to comply with a request from the Education Authority.

NICCY believes that the provisions in this clause fail to strengthen collaborative, multi-disciplinary working to meet the needs of children and young people with SEN. We strongly recommend that this clause is reviewed and a stronger duty is introduced to require co-operation between the relevant health and education authorities.

A significant piece of draft legislation which should be considered alongside the draft Bill is the Children’s Services and Co-operation Bill, which is currently at Committee Stage in the NI Assembly. If passed, this Bill has the potential to effect important changes in inter-departmental working practices and to positively impact on the delivery of support and services to children and young people with SEN and disabilities. NICCY strongly supports the contents of the Bill and recently provided evidence to the OFMDFM Committee on this matter.⁸

Clause 5: Assessment of needs: reduction in time limits

NICCY welcomes all efforts to address the significant time delays in assessing children and young people who may have SEN and putting in place appropriate provisions and support for them. The reduction in time limits during which evidence can be provided to the Education Authority from 29 to 22 days is a positive step and should, theoretically expedite the assessment process. NICCY would suggest however that there should be some flexibility for parents who may encounter particular difficulties in collating the necessary evidence, for example if they are awaiting information from a third party.

⁸ <http://www.niccy.org/publications/niccy-evidence-on-childrens-services-co-operation-bill/>

The reduction in time limits in relation to an assessment of needs is detailed here in the draft Bill, however a reduction in the statutory time limit for the Education Authority to conduct the statutory assessment process from 26 to 20 weeks will be set out in the accompanying regulations. Delays in the SEN assessment process have been a significant problem and NICCY believes it is important that the revised SEN and inclusion framework effectively reduces delays throughout the entire SEN process.

NICCY strongly recommends that a reduction in the statutory time limit for the Education Authority to conduct statutory assessments must also be captured in the draft Bill, to ensure all efforts to reduce delays in the SEN process are enshrined in legislation.

Clause 6: Appeal following decision not to amend statement following review

This clause introduces a new right of appeal to the Tribunal for parents and young people over compulsory school age, where following an annual review of a statement of SEN the Authority does not make any change to the Statement. NICCY welcomes this provision as it provides additional rights of appeal to the Tribunal. We believe that there is an intention for further information regarding the timescales and arrangements for appeals to be outlined in the regulations and code of practice. Evidently it will be important that these are sufficiently clear and accessible to all parents or carers.

Clause 7: Appeals against content of statement or failure to make a statement where child is under 2 years.

Through this provision, parents have the right to appeal the contents of a statement or to appeal the failure to make a statement if a child is under 2 years. Again this provides an additional right of appeal for parents and an opportunity to review the provision that has been made or not made for a young child at pre-school stage. While welcoming this, we would again expect to see further information regarding the procedures and arrangements associated with this right of appeal clearly outlined in the code of practice and regulations.

Clause 8: Mediation in connection with appeals – duty on authority to provide independent mediation.

This Clause places a duty on the Education Authority to provide independent mediation to an individual who intends to make an appeal relating to SEN to the Tribunal. The duty requires the Authority to make arrangements for the provision of mediation and to provide for the appointment of an independent person who can facilitate the resolution of disputes or act as a mediator. This individual cannot be employed by the Education Authority. This proposal represents an important development and, if effectively managed

and implemented, could provide a more positive resolution process than the Tribunal. NICCY understands that the regulations and code of practice will provide more details in respect of the arrangements and procedures for mediation, however it is important to highlight a number of pertinent issues.

It will be essential that that the mediation process is genuinely independent and that individuals perceive it to be independent, otherwise they may be reluctant to participate. The opportunity to take part in mediation should be made available to individuals in a timely manner in order that the process can begin promptly and issues be resolved as quickly as possible. It will also be important that a mediation mechanism demonstrates its effectiveness at an early stage in order to engender confidence in the process and encourage other individuals to participate.

If mediation is to be regarded as a preferred resolution mechanism, it will be essential that an appropriate and effective mediation infrastructure is in place to support the provisions laid out in the draft Bill. NICCY would therefore suggest that the Department provides evidence of the viability of the mediation model, including information regarding the current numbers of suitable mediators in Northern Ireland, its intentions regarding the appointment and training of additional mediators and the levels of funding which are required to establish and maintain a mediation service.

Clause 9: Rights of children over compulsory school age in relation to SEN

This provision gives pupils over compulsory school age who have, or may have SEN, the same rights as those which were previously vested in parents, including the right to request a statutory assessment and the right to appeal to the Tribunal against certain decisions of the Education Authority. The Clause also provides for regulation making powers for young people over compulsory school age who may lack the capacity to exercise these rights, including making provision to determine whether a young person lacks capacity and for a parent to exercise these rights where it is determined a young person lacks the capacity to do so.

NICCY regards this provision as a positive step in facilitating young people's participation in the SEN assessment and appeal process and in decisions regarding their educational needs. Genuine efforts should be made by all those involved in providing or supporting a young person with their education to exercise this right fully. In order to translate this provision into practice, it is essential that all young people who are eligible to exercise this right are effectively informed. NICCY notes that the draft regulations and code of practice

will provide additional information regarding arrangements for assistance and support which will be provided to young people to enable them to participate in the SEN assessment and appeals process. Evidently, it will be important that these are clear, unambiguous and accessible to all young people.

NICCY's concern is that every young person, as far as possible, is given the right to participate in decision-making about the provisions made for their particular educational needs. We will therefore be particularly interested to review the regulations which will be applied in cases where a young person lacks or may lack the capacity to exercise these rights.

Clause 10: Rights of Child over Compulsory School Age in relation to disability discrimination claims

This clause gives young people over compulsory school age the right to make a claim to the SEN and Disability Tribunal (SENDIST), where they believe that a school or the Education Authority has unlawfully discriminated against them on grounds of disability. It amends Articles 22 and 23 of the 2005 Order. The clause also provides a power to make regulations regarding the proceedings of the Tribunal in relation to assistance and support for children and young people over school compulsory age, to pursue a claim. Where a Tribunal believes a child or young person lacks the capacity to do this, the clause sets out arrangements for the parent of a child or young person to pursue a claim.

NICCY welcomes the extension of this right to young people over compulsory school age. The issues we have raised in relation to clause 9 are equally applicable to clause 10 and should be read across.

Clause 11: Appeals and Claims by Children – pilot scheme

This clause states that through regulations, the Department may make a scheme to allow children and young people under 16 years to appeal or make a disability discrimination claim to the Tribunal. Contained in this clause are a range of provisions detailing the issues about which a child or young person may appeal.

In its concluding observations in 2008, the UN Committee on the Rights of the Child expressed concerns about the inadequacy of participation opportunities for children and young people in schools in the UK. The Committee drew attention to the lack of opportunities for those with SEN, commenting in paragraph 66 of the Concluding Observations, that children and young people did not have the right to appeal the decision

of SENDIST. The Committee therefore recommended that the UK government ‘ensure that children and young people, able to express their views have the right, particularly those in alternative care, to appeal to special educational needs tribunals.’⁹

NICCY provided detailed advice about extending the right of appeal for children and young people to SENDIST in October 2013. In this, we outlined our position which is consistent with the recognition of children’s status as rights bearers, under Article 12 of the UNCRC and informed by the Concluding Observations and General Comments submitted by the UN Committee on the Rights of the Child. The advice paper proposed that children and young people from the age of 11 years should be presumed competent to exercise their independent right to appeal. Research indicates that from this age, children are generally competent to understand different options put to them, to express their views and opinions and to communicate these to others when information is provided and adapted appropriately.¹⁰

NICCY believes that an underpinning principle in the SENDIST appeals process should be a presumption of capacity on the part of the child. Therefore any child aged 11 years or over should be deemed capacitous unless there is compelling evidence to suggest otherwise. Similar to civil and criminal proceedings for children, the Tribunal should determine the competency of the child which would ensure impartiality and address any potential conflict which may arise between the parent and child. The paper also proposed that consideration be given to extending the right of appeal to children under the age of 11 years, where they are capable of formulating and communicating their views and can demonstrate an understanding of the Tribunal process and the implications it will have for the educational provision which will be made for them.

With regard to the introduction of a right of appeal for children and young people, NICCY suggested in its advice paper, that the Department might wish to investigate the appropriateness of age thresholds for itself and to establish the extent of support for such provision amongst relevant stakeholders. We proposed that a pilot scheme be conducted, similar to those introduced in England and Wales. In implementing a pilot scheme, it was also suggested that the Department could review the accessibility of the Tribunal and consider whether the processes and procedures could be regarded as ‘child friendly.’ The advice paper also recommended the provision of independent, well-resourced advocacy services for children and young people, tailored to their individual needs, to ensure they are empowered to use the right of appeal.

⁹ <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

¹⁰ Disability Rights Commission (2007). *My School, My Family, My Life: Telling it like it is*. March 2007.

Reflecting on the advice provided to the Department, NICCY is therefore extremely disappointed with the pilot scheme proposals detailed in the draft Bill. Clause 11 states that the Department '*may*' make a scheme. There is apparently therefore no requirement for it to do so, and so it remains questionable whether this provision will be taken forward. **We would strongly recommend that this wording is altered to clearly reflect the Department's commitment to implement a pilot scheme.**

Of equal concern is the provision within the clause that a pilot scheme, would be brought forward within **10 years** of the date on which the Bill receives Royal assent. Whilst recognising that the establishment of a pilot scheme will require carefully planning and consideration and that the draft Bill states **within 10 years**, NICCY believes that such a delay is completely unacceptable. Furthermore, the draft Bill states that a pilot scheme must be in place for at least two years. This means that even if the Bill receives Royal Assent in 2016, and the Department decides to introduce a pilot scheme, it may be 2028 before the majority of children and young people with SEN in Northern Ireland have the opportunity to avail of this provision.

As we highlighted in our advice paper to the Department, similar pilot schemes have been implemented in England and Wales. The Children and Families Act (2014) in England provided for the establishment of pilot schemes in local authority areas to enable children and young people to appeal to make appeals in relation to their SEN to the Tribunal¹¹. In Wales, the Education (Wales) Measure 2009 extended the existing right of parents and carers to make a Special Education Needs (SEN) appeal or disability discrimination claim to the Special Educational Needs Tribunal for Wales, to children and young people. A pilot scheme was introduced in two authorities in September 2012, just **3 years** after the Education (Wales) Measure was introduced. An evaluation of the two-year pilot scheme in Wales was published in June 2014. This revealed that only one claim of disability discrimination was made across the two participating authorities during the Scheme. Independent evaluators of the scheme suggested that this could demonstrate that the education and support systems were working effectively. The scheme was rolled out across Wales from January 2015 (6 years after the introduction of the Education (Wales) Measure, 2009).

Pilot schemes in other jurisdictions provide helpful models from which learning and evidence can be gleaned to inform the development of a similar scheme in Northern

¹¹ <http://www.legislation.gov.uk/ukpga/2014/6/notes/division/4/3>

Ireland. The learning and experience of those involved in the planning and delivery of similar provisions elsewhere should therefore be harnessed to inform the development of a similar scheme in Northern Ireland.

NICCY strongly advises the Department to take account of these schemes and their timescales and to significantly reduce the proposed timescale for introducing a pilot scheme within 10 years, to a period of ‘not more than 3 years.’

Clause 12: Appeals and Claims by Children – follow up provision

Clause 12 provides a power for the Department to make regulations to provide for children and young people within the compulsory school age to bring an appeal or disability discrimination claim to the Tribunal. This provision can be made after the pilot scheme has been in place for two years, which essentially means it is likely to be in excess of 12 years from the date the Bill receives Royal Assent, before the vast majority of children and young people within school compulsory age are able to make an appeal or disability discrimination claim to the Tribunal. NICCY has indicated in its comments above that a similar pilot scheme was introduced in Wales, **three years** after the introduction of the Education (Wales) Measure, 2009 and the scheme rolled out across Wales **six years** following its commencement.

The Department should provide details of the rationale behind the considerable delay in introducing these important provisions for children and young people with SEN, along with an assurance that a pilot scheme will indeed be introduced.

Clause 13: Definition of Child for the purposes of special education

This clause alters the definition of a child for the purposes of special education. It proposes that the Education Authority may maintain a statement of SEN to the end of the school year following a young person’s 19th birthday. A young person may remain in school until the end of the school year.

NICCY welcomes the provision in this clause, as it extends a young person’s access to educational support and provision as they approach the end of their school education. However the draft Bill does not contain any additional provisions for young people transitioning from school to further education, training or employment. As highlighted earlier, this is an issue of significant concern to NICCY and one where there continues to be shortcomings and gaps in the provision and support provided to young people with SEN and disabilities.

Clause 15: Commencement and Transitional Provisions

This clause sets out the arrangements for the commencement of the legislation. It states that sections 13 to 16 will come into effect the day after the Act receives Royal Assent and other provisions, that is sections 1 to 12 will come into operation on such day or days as the Department decides. Further clarification should be provided by the Department to explain when Clauses 1-12 are likely to come into effect.

Clause 15 also makes provision for the Department to make savings and transitional, transitory or consequential provisions as it appears appropriate to it. The Department should also provide further information regarding the transitional arrangements it intends implementing, as these may affect other aspects of the draft Bill as well as its general acceptability.

5.0 Conclusion

We would reiterate our previous comments concerning the challenges of reviewing the proposals contained in the Bill separately from the detail provisions which will be contained in the draft regulations and code of practice. These will give effect to many of the provisions in the Bill and to the changes proposed to existing legislation, namely the Education (Northern Ireland) Order 1996 and the Special Educational Needs and Disability (NI) Order 2005. It will therefore be essential that all stakeholders have the opportunity to review and comment on the draft contents of the code of practice and regulations and NICCY would respectfully suggest that the Education Committee may wish to take further evidence from stakeholders to support their consideration of these.

NICCY would reiterate it thanks to the Committee for the opportunity to provide written evidence and would request an opportunity to provide oral evidence to the Education Committee to support their ongoing scrutiny of the draft SEN and Disability Bill.

END