Response to the Department of Education's Consultation on "Every School a Good School – The Way Forward for Special Educational Needs and Inclusion".

Children's Law Centre

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Introduction

The Children's Law Centre is an independent charitable organisation established in September 1997 which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and every child can achieve their full potential.

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run an advice/ information/ representation service. We employ a full-time mental health solicitor and child and adolescent mental health services are one of the organisations' main priorities for action. We have a dedicated free phone advice line for children and young people called CHALKY. Education issues comprise 25.5% (3259) of the total number of issues raised through the CHALKY helpline since June 2000. We also have a youth advisory group called Youth@clc.

Some 60 appeals per year are brought by parents to the Special Educational Needs and Disability Tribunal (SENDIST) in Northern Ireland and the number of appeals continues to grow each year. Due to the ever increasing level of queries on this subject we have employed a Barrister who is dedicated solely to this area of work within CLC. As a result we are able to undertake SENDIST cases and provide representation at appeals. We also institute judicial reviews on issues relating to SEN and disability within schools to ensure that the international and domestic legal rights of school-children are respected and upheld.

Our organisation is founded on the principles enshrined in The United Nations Convention on the Rights of the Child, in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

From its perspective as an organisation, which works with and on behalf of children, both directly and indirectly, the Children's Law Centre is grateful for the opportunity to make this submission to the Department of Education (DE) and to offer assistance in developing its proposals for "Every School a Good School – The Way Forward for Special Educational Needs and Inclusion".

Consultation

While we appreciate the complexities associated with, *"Every School a Good School- The Way Forward for Special Educational Needs and Inclusion"* we are pleased to note the inclusion of a young person's version of the consultation document for use with children and young people. We support the Department of Education in developing this document to encourage consultation with children and young people as one of the groups who will be most impacted upon by the introduction of many of the proposed changes to the education system. **We do have a number of concerns that most of the Department's proposals which are detailed in the consultation document have not been mentioned within the very short young person's version of the consultation document. While we understand that there is a need to make the complex information contained in the consultation document accessible to children and young people, we do not believe that the young person's version provides an accurate description of the proposals contained within the full consultation document.** For this reason, it will not facilitate consultation with children and young people, or indeed any members of the community who may require an easy read version of the proposals contained in the, *"Every School a Good School The Way Forward for Special Educational Needs and Inclusion"* consultation document.

The Children's Law Centre is deeply committed to the effective operation of section 75 of the Northern Ireland Act 1998 and we are keenly aware of the statutory obligation inherent in section 75 to consult directly with those who are likely to be affected by a policy, whether or not they have a personal interest. While we note reference to a number of consultation meetings which were carried out with parents and children and young people and the fact that the Department has been working with schools on the development of the policy proposals contained in the consultation document, no information as to the numbers of young people who have been consulted with as part of this process has been provided.

Direct consultation with children and young people is essential not only in ensuring compliance with section 75 of the Northern Ireland Act 1998, but also in ensuring compliance with the Department of Education's obligations under Article 12 of the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC Committee, in its Concluding Observations following its examination of the UK Government's compliance with the Convention in 2002 expressed concern about the inconsistent application of Article 12, stating that,

"...the Committee is concerned that the obligations of article 12 have not been consistently incorporated in legislation" [1]

[1] Para 29, CRC/C/15/Add.188

This concern was reiterated in the Committee's Concluding Observations in 2008 where they recommended that,

"…the State party, in accordance with article 12 of the Convention, and taking into account the recommendations adopted by the Committee after the Day of General Discussion on the right of the child to be heard in 2006… promote, facilitate and implement, in legislation as well as in practice, within the family, schools, and the community as well as in institutions and in administrative and judicial proceedings, the principle of respect for the views of the child"[2]

The Equality Commission's, *"Guidance for Implementing Section 75 of the Northern Ireland Act 1998"* states that consultation should take place in accordance with its stated Guiding Principles on Consultation,

"...specific consideration should be given on how best to communicate information to young people..."[3]

The Guidance also states that,

"Consultation should also include those directly affected by the policy to be assessed, whether or not they have a personal interest."[4]

In addition, the Department of Education's approved equality scheme makes a commitment to consider,

"…consideration will be given on how best to communicate information to young people and those with learning disabilities"[5]

The Department of Education's approved equality scheme also states,

"The Department recognises the importance of proper consultation and in carrying out its equality duties will endeavour to conduct consultations with groups and individuals in a timely, open and inclusive manner, and in accordance with the Guiding Principles on consultation as laid down by the Equality Commission's Guidelines (see Annex I). The Department recognises the need to begin the consultation in relation to Section 75 duties as early as possible."[6]

[2] Para 33, CRC/C/GBR/CO/4

[3] Section 4 2(c)

[4] Annex 1, 5.1

[5] Para 4.7, Page18 Department of Education's Approved Equality Scheme February 2001

[6] Para 4.1, Page 16 Department of Education's Approved Equality Scheme February 2001

The UNCRC Committee in its most recent Concluding Observations in October 2008 noted its regret that some of their earlier recommendations have not been implemented, making particular reference to education[7]. It also stated that,

"The Committee is concerned that there has been little progress to enshrine article 12 in education law and policy"[8]

The Committee went onto recommend that the State Party,

"promote, facilitate and implement, in legislation as well as in practice, within the family, schools, and the community as well as in institutions and in administrative and judicial proceedings, the principle of respect for the views of the child;"[9]

We therefore wish to request information and details of any direct consultation on, *"Every School a Good School The Way Forward for Special Educational Needs and Inclusion"* which the Department of Education has undertaken with children and young people as part of this consultation exercise, including information on the numbers and section 75 identities of children and young people consulted and the extent of such consultation. We would also welcome copies of the child accessible consultation documents used to undertake this consultation.

We would also be grateful if you would respond with details of the system which you intend to use to analyse responses to this consultation process including the degree of weight which will be attributed to both individual and organisational responses. This is a vital element to drawing conclusions from responses and progressing with identified areas for immediate action. For this reason, we would appreciate information both on the system itself and on its operation for the purposes of analysis.

Caveat

The format of the response booklet provided has not been used as it is seeking agreement/disagreement with ideas which are extremely generalised. For example, Point 2 seeks agreement with 13 key principles along with a section of the consultation document which covers all of the proposed key changes to the system. It would not be possible to simply agree or disagree with such a widely framed proposition.

A statistical analysis of the standard response booklet will not provide an accurate reflection of the views of those responding. A responder might well agree with an ideology such as inclusion but may not agree that the proposed system will deliver inclusion. For this reason, Children's Law Centre is using the format below and having discussed this with the Department has been assured that all written responses will be taken into account and given due weight.

[7] Para 6a), CRC/C/GBR/CO/4
[8] Para 32, CRC/C/GBR/CO/4
[9] Para 33, CRC/C/GBR/CO/4

Response to Specific Consultation Points

Consultation Point 1 - Inclusion

(Reference: paragraphs 3.1 to 3.8)

1 Do you agree with the introduction of an inclusive framework based on the wider concept of additional educational need (AEN)?

While Children's Law Centre agrees with the concept of inclusion, in practice under the current framework, children with SEN and children with a disability have statutory protection and the main concern in creation of an overarching concept of AEN (or alternatively the addition of a separate concept of AEN) is that both statutory protection and available resources will be diluted for children in the current SEN and disability categories. Given the financial constraints evident across the Education and Library Boards, coupled with increasing demand on SEN services and resources, it is clear that significant additional funding would be required to run a system based on a greater range of need.

A further concern is that budgeting for these proposals will not be quantified until after this consultation; funding is subject to a bid under the Comprehensive Spending Review and it is clear that there is no current plan to protect or ring-fence funding for the implementation and running of SEN and inclusion policies. Paired with the proposal to delegate more funding to schools, this creates increased probability that funds intended for SEN will be diverted to cover shortfalls in other areas of schools' spending. This already happens in practice today.

This situation could be rectified by ring-fencing funding and putting structures in place for strict auditing regarding actual annual funding allocations within schools. Accountability is the key to the efficient and equitable distribution of resources to combat barriers to learning for all children.

The proposals in their current form define AEN as including SEN, learning environment, family circumstances and social/emotional difficulties. However, at the road-shows given by the Department it was suggested that there were two separate concepts of SEN and AEN, which highlights the fact that much more clarity is needed regarding definition of the educational needs of children. Further, there has been no mention of a disability category. Disability is tied together with SEN via the SENDO legislation, which strengthens the rights of children with SEN to be educated in ordinary schools and creates legal rights and duties in relation to disability discrimination. Disability should be part of any framework for inclusion as many children with a disability also access resources via the SEN framework. Indeed, we would hold the view that all relevant s75 groupings should have legally accessible rights within a properly resourced framework for inclusion based on strict accountability.

Failure to properly include disability within the framework may lead to incompatibility with the **United Nations Convention on the Rights of Persons with Disabilities** (UNCRPD), ratified by the UK on 8th June 2009. The Optional Protocol, which has also been ratified enables the bringing of petitions to the UN Committee (which is responsible for monitoring implementation) and enables the institution of enquiries into systematic violations. In particular the following articles of the UNCRPD are relevant: **Article 5** provides that persons with disabilities shall have equal access to all the protections afforded by the law. **Article 7** provides that all children with disabilities shall have full enjoyment of all human rights and fundamental freedoms; that their best interests shall be a primary consideration and that their voices shall be heard in all matters concerning them. **Article 24** provides the right for persons with disabilities to access **an inclusive education system at all levels**. Therefore, a model for inclusion that makes little or no reference to and/or gives no consideration to the rights of disabled children, is unacceptable to the Children's Law Centre.

It is important that the Department sets out clearly the statutory rights of children within the education system and does not muddy the waters by confusing definitions in relation to SEN, AEN and disability which arguably fall into three separate categories in terms of the types of assessment and provision needed. Further, it is important to recognize that these three concepts, even when separately defined are often interlinked. A child who has a disability may also have a learning difficulty or face social barriers to learning. Some learning difficulties (SEN) are capable of meeting the definition of "disability" whereas others are not. A child with a disability does not necessarily have a learning difficulty. A disability will have a long-term adverse effect whereas other barriers to learning can be either long or short-term in nature.

The degree of complexity/multiplicity of barriers will vary widely from child to child. **A "one size fits all" approach with the label "AEN" will very likely be unworkable in practice and will potentially damage children's educational rights unless there is absolute clarity around enforceable rights at distinct stages of the process with clear pathways for access to resources for each of the relevant groupings.**

The current proposal to limit the grant of statutorily enforceable CSPs to children using the significantly raised thresholds of the criteria suggested in Annex A (akin to the definition of disability) does not meet the needs of all children to access resources within a fully inclusive model. In Scotland, a similar system reduced the number of statements from around 16,000 to around 3,000. This directly impacts upon the ability of parents to seek redress when the system does not deliver as it should.

Any special education system will require adequate checks and balances and it could indeed be argued that our special education system requires a broadening in the range of legally enforceable rights in order that it operates more effectively. A reduction in rights will prove disastrous, destroying parental confidence in the system.

It is a matter of serious concern that the department is aiming to diversify the categories of need in the absence of dedicated funding. The Children's Law Centre holds the view that in the initial implementation of these proposed changes, more funding would be required so that the groups of children currently protected could continue to enjoy their statutory rights and the additional groups of children could overcome barriers to learning.

In deciding upon the appropriate framework to use for SEN, it may assist the Department to have regard to the approach taken and solutions suggested by the Lamb Enquiry into SEN in England and Wales (please see enquiry website: http://www.dcsf.gov.uk/lambinquiry/). **Having considered the two options of improvement of the current system** (which is similar to the current system in Northern Ireland) **or changing the system to a system similar to that used in Scotland** (which is similar to the current DE proposals for NI), **the enquiry team decided that the better option was to make improvements to the current system.**

This enquiry has gathered evidence on the best practical solutions through 8 pilot projects which are available on the enquiry website. Funding of £31 million has been secured for a 2 year pilot project on measuring outcomes. The evidence gathered in England and Wales could provide valuable insight into the way forward for SEN and Inclusion in Northern Ireland.

Consultation Point 2 **- Key Principles of the Proposed Policy Framework**

(Reference: paragraphs 4.1 to 4.6)

2 Do you agree with the key principles on which the policy proposals are based?

There are 13 key principles within the policy framework alongside a summary of the key changes envisaged within the system. It is not possible to give a blanket response to Point 2 due to the fact that the question covers the entirety of the consultation. Our response to the changes that may be effected by the key principles and proposals within the consultation document is detailed in the remaining consultation points.

Consultation Point 3 **- Early Identification and Intervention**

(Reference: paragraphs 5.1 to 5.5)

3 Do you agree with the proposals relating to early identification and intervention?

The proposals promote the concept of early intervention as a mechanism for improving outcomes for children and for optimizing the use of funds by decreasing long-term cost. Early intervention is a part of the current system listed as an "essential practice" under paragraph 1.7 of the Code of Practice. This concept, in our experience, has not been sufficiently put into practice, not due to lack of will but because of shortage of resources e.g. a child with dyslexia may have to wait several years on a waiting list to access specialist literacy support and may not get onto that waiting list until he/she has standard scores which have declined considerably. In our experience, one of the Boards has described the level of decline required as reaching the point of a "non-functioning" reading age.

There are insufficient resources to make provision available at an early stage for children who fall within the current framework so that they may access the curriculum on an equal basis with their peers and this raises questions around rights connected to **Article 2, Protocol 1** of the **Human Rights Acts 1998** which guarantees that "**no person shall be denied the right to education**" and **Article 28** of the **UNCRC** which enshrines the **right to primary education**. The Children's Law Centre favours effective early identification and intervention and would call for extra resources to be made available to balance the deficit in early provision within the current system.

The Children's Law Centre holds the view that an immediate significant injection of funding is required to increase the availability of professional assessments and support services, in order to maximize the longer-term financial savings which early intervention could produce. This would be needed in addition to the funding which has already been made available for capacity building (i.e. teacher training) within schools and in addition to funding required to maintain provision for children who currently have statements or are in the process of seeking support, while the longer-term benefits of increased early intervention are awaited.

Before extra responsibilities for early intervention can be further delegated to schools, extra funding will be required at school level. The capacity-building programme should be completed prior to this delegation so that schools will be in a position to deal with the new requirements and responsibilities that are to be placed upon them. The current system is marred by excessive delays in intervention in terms of accessing professional assessments and services due to lack of resources.

The capacity-building programme will improve the potential for early intervention to take place but will not solve the problem that schools will continue to face in terms of delays in accessing specialist services required to properly diagnose and provide for a child who is identified at an early stage as having SEN (e.g. educational psychology assessments, LTSS). Such delays have thwarted many attempts at early intervention.

Identifying the child is only one side of the equation. Providing for the child's needs via intervention is the other side and even with the current underutilization of early intervention, there are insufficient resources to cater for the level of need identified.

In terms of the rights of parents and children to access early identification and intervention, it is the view of the Children's Law Centre that there should be an independent appeals process accessible directly by parents and children (who should hold their own independent right to appeal) where they are not in agreement with decisions by the school e.g. where there is a refusal to intervene on the ground of resources or there is disagreement about the level of help the child would need. Such a system should carry with it free advocacy services to enable effective presentation of complex issues and early (and ultimately less costly) resolution of disputes.

Failure to grant children independent rights at all stages of the process, as is currently the case in Northern Ireland, goes against **Article 12** of the **United Nations Convention on the Rights of the Child** (UNCRC), by virtue of which the **voice of the child** should be heard and his/her views should be taken into account.

Children and parents must be given clear and transparent information about the schools' duties and responsibilities and must have clear mechanisms for challenging decisions made. Consistency must be assured in relation to decision-making at the school-based stages of the process so that it is clear when a child is entitled to the benefits of early intervention.

The Children's Law Centre does not agree that teachers or **Learning Support Coordinators** should carry responsibility for "lower-level diagnostic testing". Diagnosis is clearly the remit of qualified health professionals.

Personal Learning Plans (PLPs) are proposed to replace IEPs and to form part of the system of early intervention. There is a lack of detailed information about the status of PLPs. Planning in a vacuum to set targets for a child is insufficient. There must be an effective mechanism for review throughout the school year incorporating proper maintenance of the PLP (or IEP) so that the targets are either met, or redesigned. We would recommend that there should be a statutory duty to maintain and review the PLP. External review would be favourable so that effective maintenance of outcomes is assured for children.

In relation to **electronic record-keeping**, we would in principle agree with this (subject to restrictions on access and respect for data protection) as it could assist in avoiding duplication of work and could increase overall efficiency in information-sharing.

***Consultation Point 4* - <u>Pre-School Settings</u>**
(Reference: paragraphs 6.1 to 6.3)

4 Do you agree with the proposals relating to pre-school settings?

The plan to bring pre-school providers with places allocated under the PEAG scheme within the Code of Practice is very welcome as it should allow more children to access support at an early stage and will reduce inconsistency of access to intervention within the pre-school setting.

Further clarification is required on the role, qualifications and expertise of the proposed "Early Identification Officers" proposed to be "established and maintained" by ESA to assist the pre-school sector where there may be skills shortages in relation to identification of SEN. Again, diagnosis is the remit of qualified health professionals, to whom children should be referred if intervention is or may be needed.

It is also unclear from where the budget for the added pre-school services would flow, given that the volume of statements or CSPs under the proposed system would be substantially reduced and these are the current mechanism for provision.

The proposals relate to the fact that ESA "Children Support Services" are to be available to pre-school settings. This terminology is entirely unclear and it is unknown to which services this refers.

***Consultation point 5* - <u>Primary and Post Primary</u>**
(Reference: paragraphs 7.1 to 7.5)

5 Do you agree with the proposals relating to primary and post primary?

The proposals relating to primary and post-primary are welcome and if properly resourced have potential to improve outcomes for children who require a more personalised style of education or a modified learning environment to meet their individual needs.

While schools must meet their obligations towards children who face barriers to learning it is important that there is sufficient financial support for this purpose and a clear pathway of accountability from schools to ESA for the purpose of enforcing a culture of integration of all children. A lack of resourcing and practical support is likely to perpetuate a culture of rejection by schools of children with special educational needs, such as emotional and behavioural difficulties. This raises a raft of legal issues connected to equality of access, including **disability discrimination** and **breaches of human rights** under domestic legislation

as well as **breaches of international obligations** under the **UNCRC** (Articles 2, 3, 23, 28 and 29); and the **UNCRPD** (Articles 5, 7 and 24).

Nurture groups are a welcome and positive idea but again issues around funding will require to be properly worked out as these are currently funded by the Department of Social Development rather than the Department of Education.

The proposals relating to EOTAS provision are welcome in that schools should exhaust all available options within school to give children the best opportunity of remaining within a supportive mainstream setting. However, it should be noted that for some children who have become disaffected within mainstream education, EOTAS is an extremely valuable tool and an undue restriction upon EOTAS places could cause greater levels of isolation and disaffection to occur amongst these pupils. EOTAS placement is costly and greater clarity is needed around financial responsibility for placement as between schools and ESA, as it is proposed that schools will take responsibility for the pupil and be accountable for future outcomes.

Consultation Point 6 **- <u>Training and Development</u>**

(Reference: paragraphs 8.1 to 8.5)

6 Do you agree with the proposals relating to training and development?

£24 million has been made available for capacity building within the SEN system and it is understood that this money will be used as a "training budget" with a view to building skills relating to identification of, assessment of and provision for SEN at all levels within the teaching profession and the wider school workforce.

The Children's Law Centre welcomes training that will enable teachers and others to ensure equality of access to education for all children and it is hoped that all school staff would be enabled to access appropriate training. **<u>It is imperative that the training and capacity building programme to build expertise within schools is put into place before any further delegation of responsibility to schools.</u>**

In order to maximize this spend of £24 million it is crucial that external support services within health and education, which have traditionally been underfunded, are also built up to cope with improvements in the levels of identification of children with SEN.

***Consultation Point 7* - <u>Learning Support Coordinators</u>**

(Reference: paragraphs 9.1 to 9.4)

7 Do you agree with the proposals relating to Learning Support Coordinators?

The potential impact of these proposals on the role of the SENCO or LSC is that the role of the SENCO will carry much greater responsibility than is currently the case. This is because a large proportion of children would be taken outside of the statementing process and provided for at the school-based stages. The outcomes for the majority of children would therefore be directly related to the effectiveness of the LSC within a particular school. This may create inconsistency in the quality of provision for children.

The role of the SENCO or LSC is vital both in terms of providing a co-ordinated approach to SEN within school and providing the link between parents and schools. The Children's Law Centre is aware that in some schools, the SENCO is not given sufficient status to carry out the role effectively and in others SENCOs do not have access to appropriate training or do not have sufficient time available to meet the responsibilities of the role.

It is agreed that LSCs should receive appropriate professional development and should have an accredited professional qualification. Given the extension of responsibility under these proposals, it may be appropriate in some cases that the LSC is part of the SMT or that the role is a full-time role. If not part of the SMT, the LSC should be given a mechanism to communicate with the SMT on a regular basis to ensure accountability at senior level within the school.

However, it would be manifestly inappropriate to delegate responsibility for any kind of "diagnostic testing" to a member of teaching staff. This is the clear responsibility of qualified health professionals. Such delegation could open the way for educational negligence claims against teachers and schools which would cause significant cost and damage to our education system.

***Consultation Point 8* – <u>Co-ordinated Support Plans</u>**

(Reference: paragraphs 10.1 to 10.6)

8 Do you agree with the proposals relating to Coordinated Support Plans (CSP)?

<u>The Children's Law Centre strongly disagrees with the proposals relating to coordinated support plans which are set out at point 10.6 as being relevant to "the **small minority of**</u>

children who need SEN provision that is **additional to or different from** that which an **enhanced** mainstream school will be able to provide".

This proposal seems to be based upon an unfounded, untested assumption that the provision of teacher training within the mainstream sector will effect a major reduction in the need for special educational provision as defined in Article 3(4)(a) of the Education (NI) Order 1996. An attempt to correlate teacher training and capacity-building within mainstream schools with the level of special educational need in the school population is completely illogical. Arguably, increased skill levels within the mainstream teaching profession could help ameliorate the unnecessary escalation of special educational need in some children through earlier intervention. However it is highly unrealistic to translate this type of improvement into a significant reduction in the need for special educational provision.

The evidence is in fact that the level of special educational need is continually increasing within the mainstream sector. The current Code of Practice posits that around 2% of children will need a statement when in fact 4.1% of the school population has a statement. Further it is recognized by the Department that there has been a 50% increase in SEN since 2000; that 18.3% of children are on the SEN register and that 66% of children with SEN attend mainstream schools.

The effect of these proposals regarding CSPs would be a significant reduction in parents' and children's legally enforceable rights to special educational provision. This is a highly undesirable outcome given that access to legal redress is the mechanism by which the integrity and operational standards of any SEN system (in whatever form) can be maintained in accordance with children's rights. Under similar recent changes in Scotland, the number of statements fell from approximately 16,000 to approximately 3,000.

Under the current proposals, the planned reduction in statements, coupled with the planned reduction in grounds of appeal (e.g. removal of Stage 4 of the Code of Practice) and the proposed reduction in appeals flowing from reviews of statements, represents an unconscionable dilution of the legal rights of children and parents.

This removal of access to legally enforceable rights has very serious implications in terms of paving the way for discrimination against and exclusion of children with special educational needs, additional educational needs and disabilities.

The Children's Law Centre is completely opposed to any move away from the current statutory annual review process. In our experience this process is an invaluable tool for properly informed parents to use to ensure the legal rights of children are respected. The flaw in the annual review system is in fact that there is no right of appeal on a refusal to amend a statement (a problem that will be rectified in England and Wales as a result of the recommendations of the Lamb Enquiry).

The current proposals include a plan to leave requests for review in the hands of parents. Without doubt this will discriminate, inter alia, against children from poorer socio-economic backgrounds, whose parents in many cases would not have the means to instigate a review and who in many cases have not been properly informed of the value of the review as a tool to help their child. We find that once parents are properly informed, they do value the annual review very highly.

There are insufficient statutory rights built into the current system. Further, children themselves have absolutely no right of appeal; cannot access the SENDIST independently and therefore have no inbuilt mechanism within our system to guarantee that their voices will be heard in accordance with the right enshrined in **Article 12** of the **UNCRC**.

A dilution of the existing rights of parents, such as that proposed, will destroy parental confidence in the SEN system and will cause significant damage to the relationships between parents and schools. These relationships, which rely on open communication, are crucial in terms of ensuring that the special educational needs and rights of children are met by schools in partnership with parents (as emphasized under the current Code of Practice).

One of the flaws within the current system, which causes so much focus to fall upon statementing, is that there is no earlier point in the process at which a parent can ensure compliance with a child's rights (at the school-based stages). The statement is a legally enforceable document setting out the child's educational needs and his/her entitlement to provision to meet those needs. **It is recommended that the Department considers a review of legal rights within the SEN system with a view to the introduction of enforceable legal rights at the school-based stages, whilst retaining current statutory rights attached to statements.** One constructive suggestion is that these rights should be enforceable against the ELBs/ESA rather than schools to prevent relationship breakdown between parents and teachers i.e. schools should not have ultimate responsibility for decisions on provision and parents/children should be enabled to make requests for provision directly to the ELB/ESA.

The proposed dilution of rights will also have a significant negative impact on accountability for resource usage. Further delegation of budgets away to schools without a significant increase in funding for both education and related health services will have the effect that special educational provision will not be distributed on the basis of a child's individual assessed needs and the system will instead become resource driven under school budgets which are not ring-fenced. This is not in keeping with the current legal position whereby special educational provision should be governed by the needs of the child.

The Children's Law Centre strongly disagrees with the new threshold criteria for obtaining a CSP set out in Annex A and Section 10 of the proposals. These criteria closely resemble the legal definition of "disability". This is a very high threshold which the majority of children with SEN who currently have a statement, will not be able

to meet. While it is recognised that much more can be done to improve outcomes for children through properly resourced early intervention, the CSP is the gateway to specialist resources for vulnerable children and as such should not be so highly restricted.

There is no guidance as to the meaning of "complex" or "multiple" need by way of a comparison of the current and proposed systems. Currently children with "complex or significant" needs which are not responding to relevant and purposeful measures taken by the school and others at Stage 3 would qualify for statutory assessment. By introducing the concept of a multiplicity of needs, the department would again seem to be raising the threshold significantly.

Annex A makes it clear that only "long-term" difficulties with "significant" "adverse" effect on educational development, for which the child requires "frequent" access to "a diversity of multi-agency services", will qualify for a CSP. This suggests a change in the definition of SEN which is wholly unnecessary and will unduly restrict access to specialist help. Further the concentration on "long-term" difficulties does not sit comfortably with the concept of early intervention.

Should the Department proceed to change the 5 stage procedure under the Code of Practice it is recommended that full consultation is undertaken regarding the form of any standard criteria which are to govern a child's entry to a particular stage of the process including the grant of formal, legally enforceable SEN provision, whether by means of a CSP or otherwise.

It is not clear what the mechanism would be for obtaining a CSP or what legal redress is available if parents or others are not satisfied with the process. It seems that MGs are to have some role in deciding upon which children should go forward for a CSP but it is completely unclear where legal responsibility is positioned between the MGs and ESA (or the ELBs). It is recommended that clear pathways of legal responsibility are maintained and that parents and other agencies, as well as schools should retain the ability to refer a child for consideration for formal provision, whether via a statement or a CSP.

A further issue is that numerous obstacles in addition to onerous criteria are to be put in the way of a child accessing a CSP. For example, under the current 5 stage process a child can go straight to stage 4 or 5 if that is what the child needs i.e. the child does not have to progress through each of the stages in a particular order to get to the next stage.

Under the current proposals at point 13.8 it is clear that not only are there sequential hurdles, but that schools have to demonstrate that they have exhausted their own resources and have used planned support programmes which have not been successful before a child can move to statutory assessment. Further, current provisional guidelines for schools state that a child should undergo at least 2 review periods at stage 3 of the Code of Practice before a school should consider referring to

Stage 4 assessment. This is clearly the wrong approach and is completely inconsistent with the current Code of Practice. Children should be placed at the stage of the Code of Practice which meets their needs.

As the proposed system is not easily comparable with the current system, it is insufficient simply to say that the same legal appeal mechanisms can apply as we are not comparing like with like.

***Consultation Point 9* - <u>Transition Points</u>**

(Reference: paragraphs 11.1 to 11.7)

9 Do you agree with the proposals relating to transition points?

The Children's Law Centre welcomes the expansion of the transition service to all children with SEN.

***Consultation Point 10* - <u>Developing Effective Partnerships</u>**

(Reference: paragraphs 12.1 to 12.30)

10 Do you agree with the proposals relating to the development of effective partnerships:

(a) Within school and pre-school settings? (paragraphs 12.3 to 12.5)

The Children's Law Centre broadly agrees with the "whole school approach" involving all school staff and welcomes the focus on clear, target-based, time-bound support strategies which are focused on the needs of the child.

(b) Across educational settings & learning communities? (paragraphs 12.6 to 12.7)

The Children's Law Centre broadly agrees with the proposals regarding the sharing of good practice and collaborative working within local learning communities, provided this is properly resourced.

(c) Between mainstream and special schools? (paragraph 12.8)

The Children's Law Centre broadly agrees with the concept of partnership between mainstream and special schools. However, the level of partnership

suggested would require a significant injection of funding into the special schools sector, which is already stretched to capacity in terms of the level of provision available for pupils within the current system. Increased reliance on special schools may diminish the staff-hours available to children in those schools.

It is understood that consideration is being given to dual placements for some children so that they might benefit from services within both the mainstream and special education sectors. The mode of financial incentive mentioned in the consultation document is not clear at this stage of the proposal, however very careful thought would have to be given to the manner in which such collaboration could be resourced if it is to have the desired effect. For example, in our experience, reports have been made of special schools struggling to provide sufficient supports and expertise to children enrolled. We have undertaken legal action on behalf of parents to enforce entitlements for some children whose rights have been neglected due to lack of funding. If special schools were to share their skills and resources with a wider range of pupils, they would be likely to require significant additional resources as well as greater numbers of professionally trained staff to enable them to do this effectively. The same argument would be valid across all educational settings and learning communities.

(d) Between Education and Health and Social Care (e.g. Education and Skills Authority and proposed Regional Health Boards)? (paragraphs 12.9 to 12.17)

The development of **legally enforceable** obligations is the key to creating the **effective** partnership which is critical to the success of this part of the proposal. The current relationship between ELBs and HSCTs is not effective in practice due to the fact that the ELBs have the legal responsibility for arranging special educational provision, which may include therapies provided by the HSCTs. The HSCT is only legally obliged to comply with requests from the ELBs to the extent of available resources. One example of a result, which the Children's Law Centre has had to deal with on behalf of parents, is that even with a SENDIST Order prescribing specific, quantified therapies within a statement, parents are left in the middle of a lengthy, resource-consuming dispute between the ELB and the HSCT about provision of therapies. Meanwhile, the child's legal rights to therapy are sidelined. It is highly undesirable that this type of "partnership", which fails due to a lack of properly resourced specialist therapists and the lack of clear legal enforceability, should be allowed to continue.

There is a significant danger that the current proposal could in fact exacerbate this situation in the absence of clear pathways of legal accountability. ESA and the RHSCB and HSSTs are to be "bound by agreements to plan jointly". It is unclear what form these agreements will take, how flexible they will be, whether they will be enforceable or what the procedure would be to complain if they do not in fact produce cooperation.

It is the view of the Children's Law Centre that neither "memoranda of understanding" nor "service level agreements" will be sufficient to deliver an effective wrap-around service based on the "team around the child approach".

It is crucial that the partnership is not in any way resource-based as this dilutes the statutory protection of children's rights as currently framed under Articles 12 and 14 of the Education (NI) Order 1996. The obligation placed upon the ELBs under Article 12 is **needs-based**, whereas the obligation placed upon HSCTs under Article 14 is **resource-based**. This conflict requires resolution via a change in the obligation upon the HSCTs (or RHBs) so that there is a **statutory duty** upon the relevant organizations to comply with requests by ELBs (or ESA) which is not dependent upon resources. In turn, this change requires to be properly costed and budgeted as the true issue is restriction and wastage of resources, in terms of both funding and the availability of qualified health professionals.

(e) Between the Department of Education (DE) and the Department of Employment and Learning (DEL)? (paragraph 12.18)

The Children's Law Centre agrees that there is a need for the development of effective partnerships between DE and DEL to facilitate smooth transition for children from school to adult life and that this should be used to support all students with learning difficulties and disabilities.

(f) Through the establishment of Multi-disciplinary Groups? (paragraphs 12.19 to 12.25)

It is the view of the Children's Law Centre that there is insufficient clarity around the proposal for the establishment of multi-disciplinary groups, in terms of the legal responsibilities of the MGs in relation to other bodies (such as ESA); the powers available to MGs and the modes of referral for parents, schools, health professionals and others to enable children to access this service. Referral is of particular importance given that it is the MGs who will make decisions about which children should progress to formal assessment.

Currently, there are examples of good practice in terms of effective multi-disciplinary working and aspects of these proposals could, with sufficient legal boundaries in place, produce better planned and more coordinated support services for children and schools.

However, clients have reported lengthy waiting lists of up to one year for assessments of children by current multi-disciplinary teams as well as logistical difficulties in accessing the multi-disciplinary teams. Further, we have seen examples where such teams are viewed as being somewhat removed from the process of specifying and quantifying appropriate therapy levels with the result that future provision for children is not set out clearly and is not sufficiently legally enforceable. These problems cause unacceptable delay and undermine children's rights through failure to provide appropriate service levels. This in turn denies children their right to a practical end effective education.

A further problematic area is the dependency within the MG structure, on close cooperation between DE, ELB/ESA, DHSSPS, RHSCB and HSCTs. This represents a significant blurring of responsibilities and creates barriers to accountability. For example, as the system currently stands, a parent can bring an ELB to the SENDIST for its refusal to conduct a statutory assessment. If a multiplicity of bodies is to be jointly responsible for the decision whether to assess a child, with governance of that responsibility dependent solely upon service level agreements or memoranda of understanding, there will be no clear pathway to legal redress on occasions when the system fails to deliver.

It is strongly recommended that clear legal duties are set out and maintained so that the decisions of MGs can be challenged by parents directly. It may be appropriate that the ultimate legal responsibility for decision making is left with the ELBs/ESA so that children and parents have absolute clarity about who should be brought to the SENDIST. Otherwise, it will be necessary to considerably extend the remit of SENDIST and the bodies who can be brought before it which will increase the complexity of legal challenges and will ultimately drain resources unnecessarily from the SEN system.

Full consultation will be required to properly formulate agreed standard criteria and protocols to be used in decision-making by MGs as regards children, parents and schools, as well as mechanisms for challenging the application of those criteria.

In terms of budgeting for MGs, it is not clear whether MGs will have their own budgets or how funds would be allocated. With the collaboration of a number of government departments will come the issue of conflict of interest regarding which department should be responsible for funding specific special educational provision. Health care professionals, education professionals etc are influenced and governed by their own departments and this creates issues around the impartiality of decision-making i.e. a professional may feel under pressure to avoid making a recommendation which is beneficial to a child but which incurs significant cost to his/her departmental budget. There is much anecdotal evidence that professionals working for ELBs have similar difficulties in recommending provision for children under the statementing process at present.

(g) With parents and carers? (paragraphs 12.26 to 12.28)

The Children's Law Centre agrees that the current guidance in the Code of Practice on working in partnership with parents and carers should be more consistently and effectively delivered and this proposal is welcomed. In particular, we would recommend that a framework should be established to guide professionals in best practice for sharing core information and to aid in establishing positive relationships with parents. Too often in practice, it is clear that parents do not have basic information about what provision is available for children and may not have been given proper awareness of the 5 stages of the Code of Practice or about the function or importance of annual review of statements.

(h) With children and young people? (paragraph 12.29)

The Children's Law Centre fully supports the proposal relating to **effective partnership with the child**, as is the child's right, in line with **Articles 12 and 13 of the UNCRC**. This is not a new proposal but is again an existing legal right which has not been given proper effect due to deficiencies in current practice.

(i) With voluntary organisations? (paragraph 12.30)

The voluntary sector plays a valuable role in supporting parents, children, young people and organizations who are involved with the SEN system. However, it is important for the Department to recognize that the voluntary sector is currently stretched to full capacity and indeed in certain areas funding has been lost due to the current economic climate. **If further reliance is to be placed upon the voluntary sector, sufficient government funding will be required to enable services to be restored, maintained and expanded.**

The proposal relating to regular involvement by ELBs/ESA, the RHSCB and schools in training courses and the exchange of information with the voluntary sector is welcome and would be greatly enhanced through the support of adequate funding to build capacity in the voluntary sector.

***Consultation Point 11* - <u>Outworking of the Proposed Model</u>**

(Reference: paragraphs 13.1 to 13.9)

11 Do you agree with the replacement of the sequential stages of 1-5 of the current CoP by the proposed 3 strand model (Within School, Within School plus External Support, Co-ordinated Support Plans)?

The Children's Law Centre does not agree with the proposal, as it is currently formed, to replace stages 1-5. It is acknowledged that there are inefficiencies with the 5 stage system and that there is ample room for improvement. The delays and bureaucracy

within the current system are mainly caused by lack of resources. The current proposal seeks to change to a new system along the Scottish model, rather than an improved system along the lines of the existing model. Interestingly, the Lamb review when considering the best route to take in England and Wales chose to recommend improvement to the current system.

No costings have been made available in relation to these two potential options for Northern Ireland and it is submitted that changing to a new system is likely to be considerably more expensive and time consuming than improving the current system.

The main objection that we would have to the current proposals to replace the 5 stages with a 3 stage approach is that this will result in significant diminution in legally enforceable rights and ultimately this shall be to the detriment of children who rely on special educational provision in order to access an effective education.

In reality, provision which is unenforceable is of little benefit to children with SEN, AEN and disabilities as it can be removed at any time based on resource considerations. The child's needs then become secondary to the process and the child's rights are significantly diluted. This is already happening where statements are not clear and unambiguous or where children are reliant on the resources available at the school based stages.

The difficulties in this part of the proposal are compounded by the fact that budgets are not to be protected by ring-fencing; schools are to take the major responsibility for the vast majority of children with SEN without adequate support structures in place to provide the professional services those children will need and parents will lose the appeal rights available at Stage 4 (which is to be removed), will lose appeal rights on abolition of the annual review and will lose appeal rights as a direct result of a substantial reduction in the number of statements/CSPs (due to the fact that the threshold for obtaining a CSP is to be raised so high that it will exclude the majority of children who are currently entitled to a statement).

It is the view of the Children's Law Centre, having consulted with a variety of professionals, organisations and parents that some aspects of these proposals are already being implemented in practice with a view to reducing the number of statutory assessments, reducing the number of statements and reducing the number of classroom assistant hours available.

This is further confirmed by the increasingly restrictive and bureaucratic approach to referral for statutory assessment advocated within the documents "***Provisional Criteria for Initiating Statutory Assessments of Special Educational Needs and for Making Statements of Special Educational Need***" and "***Good Practice Guidelines For Schools to Meet the Special Educational Needs of Pupils at the School-Based Stages of the Code of Practice***", whereby the DE in tandem with the five Boards has attempted to formulate SEN into 7 groupings governed by a comprehensive set of

highly prescriptive criteria and thresholds which bear no relation to the available statistics on the level of need in Northern Ireland in general and have the effect of emasculating the concept of the "need of the individual child".

These criteria also detract significantly from the straightforward criteria and procedures for making statutory assessments set out at Part III of the Code of Practice where it is stated that "*decisions must be made in light of all the circumstances of each individual case*" and that the *central question for Boards is whether there is convincing evidence that, despite relevant and purposeful measures taken by the school, with the help of external specialists, the child's learning difficulties remain or have not been remedied sufficiently...beyond that, the evidence Boards should seek and the questions they should ask* ***will vary according to the child's age and the nature of the learning difficulty"*** and will include non-academic factors.

One example of an inappropriate threshold, which has no legal force but is being commonly used, is that in many cases only children scoring in the bottom 2% of the population can access statutory assessment. Boards over the years have tried to formalise this criteria which is now contained throughout the Provisional Criteria. **This takes no account whatsoever of what an individual child needs and removes the focus away from individual circumstances in an effort to avoid financial cost.** In addition DE's own statistics show that for 2008/9 4.1% of the school population required a statement. It is not known what research or evidence, if any, has been to validate these provisional criteria.

The publication, use and effect of these documents is evidence of the insidious implementation of a transition towards a 3 stage process (which has the potential to be more bureaucratic and less flexible to meet the needs of individual children than the 5 stage system), whereby children are moved out of the statementing process and into the school-based process. It is of great concern that this is already evident before completion of this consultation.

The fact that the Department appears to be proceeding to implement some of the proposals contained in its consultation document prior to the completion of the EQIA is a matter of grave concern. Central to the carrying out of an EQIA are the obligations on the Department as a designated public body for the purposes of section 75 the statutory duty to take into account the views expressed through consultation. In addition, the Department is under a statutory obligation, where adverse impact has been identified through consultation, to mitigate the adverse impacts and where mitigation of adverse impact is not possible, to further the policy aims through the implementation of an alternative policy. Prior to the completion of an EQIA, these vital steps in the policy development process will not have been undertaken.

If the Department of Education were to progress with the implementation of its policy proposals, as we believe they are doing, the adverse impacts identified through consultation and those which have yet to be identified through the analysis of responses to this EQIA, will be allowed to operate unchecked, having

a dangerously detrimental impact on the enjoyment of equality of opportunity by some of the most vulnerable members of society, children and young people with disabilities, those with AEN and/or SEN.

The introduction of policy proposals prior to the completion of an EQIA will never be acceptable under section 75 of the Northern Ireland Act 1998 and it fundamentally undermines the carrying out of an EQIA in its entirety. This is particularly concerning where the policy in question relates to the provision of education for some of our most vulnerable children and young people.

We wish to stress that it is not only our opinion that the introduction and progression of policy proposals prior to the completion of an EQIA would be in breach of section 75 of the Northern Ireland Act 1998, but it is also the view of the Equality Commission for Northern Ireland. The issue of piloting a policy prior to the completion of an EQIA arose with regard to the PSNI's proposal to introduce tasers to the PSNI in July 2007. At that time, Assistant Chief Constable Roy Toner approached the Equality Commission for advice on the appropriateness of piloting teaser weapons prior to the completion of an EQIA of the policy proposal. The PSNI received a letter from the Equality Commission[10] detailing its advices on this issue which are very clear and state,

"The Commission remains firmly of the view that the primary means of assessing the impact of policies is through Equality Impact Assessment. This process takes place in parallel with the development of the policy and requires public authorities to clarify the aim of the policy, to gather data and on that basis to assess impact, to consider mitigating measures, and to engage in consultation in advance of a decision being made and future monitoring of the impact of the policy over time... In response to your query regarding proceeding with the pilot stage of the introduction, ***the Commission is of the clear view that the issue of TASER weapons to any officer would be inappropriate until the EQIA has been completed and its conclusions taken into account.****"* (Our emphasis)

The above advice from the Commission is unequivocal that the progression of policy proposals, even as a pilot, prior to the completion of an EQIA would be wholly inappropriate. We firmly recommend that the Department fully complies with the advice of the Commission with regard to its policy proposals contained in, *"Every School a Good School The Way Forward for Special Educational Needs and Inclusion"* and reverses all implementation of any of the policy proposals contained in the consultation document and desists from progressing these proposals any further in compliance with section 75 of the Northern Ireland Act 1998 and the Department's approved equality scheme.

[10] Dated 11 July 2005 (incorrectly), Received by the PSNI 16th July 2007

Consultation Point 12 **- <u>Resolution and Appeal Mechanisms</u>**
(Reference: paragraph 14.1)

12 Do you agree that the current informal appeal, dispute avoidance and resolution and formal appeal arrangements (SENDIST) for children with SEN should remain unchanged?

It will not be possible, under these proposals, for the formal appeal arrangements via SENDIST to remain unchanged. This is because the grounds of appeal to SENDIST will require full review and consultation due to substantial removal of appeal rights under the proposed system (e.g. removal of Stage 4 request for statutory Assessment; reduction in the number of reviews of statements and substantial reduction in total number of statements).

Further, the proposals relating to establishment of ESA and MGs along with the transfer of responsibility to schools, result in a potentially undesirable division of responsibility which may require an extension of the parties who can be brought to the SENDIST to have their decisions on allocation of special educational provision reviewed by an independent panel.

The dilution of children's enforceable rights via the reduction in statements should be compensated for elsewhere in the process e.g. at the school-based stages, so that new appeal rights are required.

It is the view of the Children's Law Centre that the under the current system, SENDIST should actually have an additional ground of appeal i.e. appeal on the ground that a statement has not been amended following an annual review. This recommendation has been accepted in England and Wales and is equally valid within Northern Ireland.

<u>Further, in compliance with domestic and international children's rights standards, children should be granted their own right to appeal to SENDIST.</u>

***Consultation point 13* - <u>Funding</u>**
(Reference: paragraphs 15.1 to 15.5)

13 Do you agree with the proposals relating to funding?

It is noted at page 6 of the Executive Summary that *"DE has acquired funding for the* ***commencement*** *of finalized proposals. It should be noted however that* ***full policy proposals can only be implemented as and when the resources become available in BOTH education and social care sectors****. "*

The Children's Law Centre strongly disagrees with the proposals relating to funding on the ground that the Department proposes implementation of a new system without provision of information regarding the cost of implementation and maintenance of such a system and with **NO ALLOCATED BUDGET** as this can only be secured via a bid via the comprehensive spending review. Further it has been confirmed that there is no intention to protect the funding through ring-fencing.

The Children's Law Centre is of the view that the costs of maintaining such a level of discretion within schools regarding the use of the funds far outweigh the benefits of ensuring that the SEN budget is spent directly on pupils' special educational provision (e.g. via ring-fencing). The current system does not appear to have a mechanism whereby the ELBs audit or monitor the spending of schools to ensure funds are spent as intended. There is insufficient accountability in the current system and this would require to be remedied via the institution of formal procedures.

It also appears doubtful whether the proposed allocation of a fixed budget for SEN provision for mainstream schools can meet the individual needs and rights of children in Northern Ireland, as a proposed alternative to pupil-based budgeting. It is strongly recommended that a full public consultation and a full s75 screening is carried out on all aspects of funding, including the LMS and TSN systems. Such a consultation should be "user-friendly" in terms of making clear the workings of the current and proposed systems and how accountability is to be built in. This will help secure parental and professional confidence in the system (rather than simply a consultation with schools as proposed).

It is not at all clear from the proposal what mechanism would be used by the ELBs/ESA for holding the Board of Governors and Principal **fully accountable** for the quality of provision and for the effective use of allocated funding or what **sanctions** would be available. With more resource allocation decisions being placed in the hands of schools, it would be vital that full accountability is built in and that parents of children who have SEN can play a part in pursuing accountability, where resources have not been properly used.

Consultation Point 14 **- Monitoring, Review, Evaluation & Accountability**

(Reference: paragraphs 16.1 to 16.5)

14 Do you agree with the proposals relating to monitoring, review, evaluation & accountability?

The Children's Law Centre favours protection of budgets through ring-fencing as it is our experience that the current level of autonomy enjoyed by schools often results in resources not being applied directly to special educational provision. This is undesirable given that there is a severe shortage of resources available for special educational provision and schools face many other budgetary pressures which result in resources drifting towards general expenses and away from special educational provision.

The Children's Law Centre would strongly recommend that the ELBs/ESA retain responsibility for budgeting so that issues of accountability are clear and spending can be properly audited. In addition, the defects in the current system require to be remedied either by removing budgetary autonomy for SEN from schools altogether or by setting up a system of ring-fencing and rigorous external audit to ensure that funds are used appropriately and efficiently to provide directly for children with SEN. This will also assist schools in meeting their obligations towards children with SEN.

It is arguable that ELBs have struggled for many years to manage with the funds they have had available and have had to resort to adding layer upon layer of bureaucratic criteria to allocate these scarce resources to children, with the result that many families have had to sustain long and stressful battles to access services. It is our view that to move the burden of resource allocation from ELBs to schools will create many more problems than it will solve e.g. increased conflict between parents and schools; inconsistency in provision from school to school (a "postcode lottery") and costly legal challenges against schools re decisions made.

The proposals offer no reassurance other than to say there will be "*robust control mechanisms through the setting of relevant and purposeful measures*". This is insufficient in terms of providing any guarantee of protection of the legal rights of children with SEN or the introduction of sanctions for schools and in these circumstances the Children's Law Centre strongly disagrees with the proposals for monitoring, review, evaluation and accountability.

Consultation Point 15 **– Roles and Responsibilities**

(Reference: paragraphs 17.1 to 17.19)

15 Do you agree with the proposals relating to the roles and responsibilities for:

(a) The Department of Education (DE)? (paragraphs 17.1 to 17.2)

The Children's Law Centre would broadly agree with the roles and responsibilities proposed for DE and in particular welcomes the development of an information and communication strategy to enable parents to have confidence in the system. Formal, structured communication with and involvement of parents at every stage of the process would contribute to an increase in successful outcomes for children. A communication strategy requires development in any case as the current system has failed to deliver parental confidence in terms of information sharing, contrary to the stipulation in the Code of Practice that **partnership with parents is vital**.

(b) ***The proposed Education and Skills Authority (ESA)?*** (paragraph 17.3)

It is insufficiently clear how ESA will operate or indeed when it will become operational. In order to comment in a meaningful way, the Children's Law Centre would require more detail about how the relationship between ESA, MGs and schools would fit into the process of legal redress. E.g. how are schools going to be held legally accountable to ESA? How can parents legally challenge the decisions of MGs? What mechanism is available for challenges to decisions made by ESA? What will be the impact of further dividing responsibility for assessment from responsibility for provision (amongst three groupings – ESA, MGs, schools)?

In other words absolute clarity is needed from the outset about the distribution of legal rights, duties and powers within the proposed system. A spreading of legal responsibilities may prove unacceptable as it will dilute accountability to the point where parents do not know who is legally responsible for a whole range of decisions affecting their children's educations.

(c) The Department of Health, Social Services and Public Safety (DHSSPS)? (paragraphs 17.4 to 17.6)

The Children's Law Centre disagrees with this proposal as it is stated to be subject to "available resources". As stated above in response to Consultation Point 10(d):

"It is crucial that the partnership is not in any way resource-based as this dilutes the statutory protection of children's rights as currently framed under Articles 12 and 14 of the Education (NI) Order 1996. The obligation placed upon the ELBs under Article 12 is **needs-based**, whereas the obligation placed upon HSCTs under Article 14 is **resource-based**. This conflict requires resolution via a change in the obligation upon the HSCTs (or RHBs) so that there is a **statutory duty** upon the relevant organizations to comply with requests by ELBs (or ESA) which is not dependent upon resources. In turn, this change requires to be properly costed and budgeted as the true issue is restriction and wastage of resources, in terms of both funding and the availability of qualified health professionals. "

(d) Multi-disciplinary Groups (MGs)? (paragraphs 17.7 to 17.8)

There is a lack of clarity around the proposals relating to MGs such that Children's Law Centre is unable to take a firm view on the merits of the proposals. We would also have concerns about the length of waiting lists on current multi-disciplinary assessment projects. It is a matter of concern that there does not seem to be any mechanism for parents to refer children to MGs for assessment. Also, the division of legal responsibility between MGs and ESA/ELBs requires to be made clear as currently parents can access redress via SENDIST by pursuing ELBs. If the number of statements is to be dependent upon decisions taken by schools and MGs, children and parents will require access to legal redress in situations where decisions taken are not in the best interests of children. It is also not clear how MGs are to be coordinated e.g. who would be the lead agency?

(e) Mainstream schools and other educational establishments? (paragraphs 17.9 to 17.16)

The Children's Law Centre broadly agrees with the "whole school" approach to supporting children with SEN and with the idea that schools should take responsibility for educational outcomes which should be monitored/measured and that schools should use all strategies available within the school to support children with SEN.

We agree with the concept of capacity building within schools and providing increased knowledge and skills to the school workforce.

However, we do have a concern that schools are being asked to take on too much of the responsibility that is currently placed with the ELBs and that without a substantial increase in support for schools, a culture of rejection of children with complex needs may develop as schools struggle to cope. This problem is exacerbated by the fact that

schools are not designated as public bodies for the purposes of **s75 of the Northern Ireland Act 1998**. Therefore schools are not obliged to ensure equality of opportunity for all children when carrying out their functions. **We would advocate that schools should be designated as public bodies.**

There appears currently to be an element of spreading of resources in the guise of "sharing expertise" which is a worrying development. Children's Law Centre has already seen evidence of a dilution of resources available in the classroom on the basis that ELBs are now considering the needs of the class rather than the assessed needs of individual children. We firmly believe that the assessed needs of individual children ought to be properly provided for on an individual basis.

It is also a matter of concern for Children's Law Centre that children and parents currently have no statutory mechanism for holding schools to account and that there appears to be no proposal to provide such a mechanism within the consultation document. This is a weakness in the current system which causes entrenchment of disputes between children and/or parents and schools to the detriment of children. We would recommend that the Department gives consideration to an appropriate remedy so that schools may be held accountable to children and parents directly.

(f) The Education and Training Inspectorate (ETI)? (paragraphs 17.17 to 17.18)

The Children's Law Centre agrees in principle with the proposals relating to the role of the ETI. However, it is clear that the ETI would not currently have the staff or resources to effectively carry out their responsibilities as proposed by DE. Any inspections that do take place would be strengthened if ETI were given a power to give schools a rating for SEN and to withhold their reports pending the implementation of any recommended improvements relating to SEN.

(g) Children's Services Directors? (paragraph 17.19)

The Children's Law Centre agrees with the proposals regarding the responsibilities of Children's Services Directors, subject to appropriate statutory provision to enable them to implement effective collaboration between the various disciplines of health, education and social services.

Consultation Point 16 - Proposed Phased Introduction of the Policy

(Reference: paragraphs 18.1 to 18.7)

16 Do you agree with the proposed phased introduction of the policy?

It appears that there could be some considerable difficulty in the plans for phased introduction of the policy in terms of safeguarding the rights of children who currently have statements. Firstly, absolutely no costing has been carried out to our knowledge

and no budget has been secured for full implementation and in the current economic climate there is every possibility that funds will be inadequate.

Secondly, it is possible that the proposed timescale for the phasing out of statements could expire before the policy is fully funded and implemented. **The Children's Law Centre is not in agreement with a phased introduction that does not incorporate flexibility in relation to statements of special educational need which are already in existence. A fixed expiry date is likely to result in discrimination against children with special educational needs as mainstream schools will not be able to support such children in the absence of proper provision. Rather, any time limits on the maintenance of statements should be linked to the actual implementation of any new system.**

Equality Impact Assessment

We note the Department of Education's conclusion with regard to its Equality Impact Assessment (EQIA) on the policy proposals contained in the, *"Every School a Good School-The Way Forward for Special Educational Needs and Inclusion"* consultation paper. The Department states that it believes that the draft policy proposals,

"…will further improve and promote equal opportunities for all children who have additional educational needs (AEN), and in particular those children and young people with SEN. The Department's initial assessment is that these policy proposals will have a positive impact because they aim to bring substantial benefits to children through the early identification of possible difficulties followed by the implementation of timely, appropriate and effective interventions. The proposals aim to ensure that the school workforce (teachers, classroom assistants and other professionals) are equipped with the skills and confidence to take ownership for improved outcomes through the delivery of an effective programme of support for those pupils experiencing barriers to learning. By bringing services together, and ensuring that schools make inclusion an integral part of self-evaluation, the proposals will enable most children experiencing barriers to learning to get effective, well-targeted support without the need to go through a time-consuming statutory assessment process. This policy will also strengthen collaborative working between the education and health and social care sectors, as well as between schools and communities, all of which will bring increased benefits for children and young people with SEN."[11]

While we welcome the above statement by the Department, we do not believe that the impact of the policy proposals will be entirely positive on all children, particularly given our concerns with regard to resourcing and budgets, the lack of legally enforceable rights to provision, the need for effective collaboration and co-ordination between

[11] Para 19.4, Page 60, *"Every School a Good School The Way Forward for Special Educational Needs and Inclusion"*

schools and Government Departments, the inclusion of all children with AEN within a review of special educational needs, the removal of the annual review and the increased responsibility on schools and teachers.

While we are extremely supportive of the concept of inclusion, we have a number of concerns with regard to the enjoyment of equality of opportunity for all children under the proposed system with the creation of an overarching concept of AEN and/or the addition of a separate concept of AEN. Under the current framework, children with SEN and children with a disability have statutory protection and we believe that through the introduction of AEN both statutory protection and available resources will be diluted for children in the current SEN and disability categories. This is even more concerning when one considers the financial constraints evident across the Education and Library Boards and the increasing demand on SEN services and resources. We are therefore of the opinion that substantial additional funding is required to run a system based on a greater range of need.

We are extremely concerned about the Department's proposal to limit the number of statutorily enforceable CSPs granted to children which we believe will have an adverse impact on the enjoyment of equality of opportunity by children who previously would have been statemented and had access to legal redress where this was necessary. In Scotland, the introduction of similar proposals reduced the number of statements from around 16,000 to around 3,000, directly impacting on the ability of parents to seek redress when the system does not deliver as it should. We firmly believe that all special education systems require adequate checks and balances and that it can be argued that our system requires a broadening in the range of legally enforceable rights so that it operates more effectively. A reduction in rights will prove disastrous, destroying parental confidence in the system. There is a very clear need for rights to be enshrined in legislation and enforceable where this is absolutely necessary. This is clearly illustrated below,

"...even the most elaborate and comprehensive system for conferring and protecting the rights of the individual is unlikely to be fully effective unless, as a last resort, the individual has access to practical means of exercising and, if necessary, enforcing those rights"[12]

We believe that if the Department progresses with this proposal which will result in a reduction in legally enforceable rights to provision, there will be very clear potential for adverse impact on grounds of disability and age. We wish to see this proposal amended to mitigate the adverse impact or an alternative introduced which will further the policy aims and remove any adverse impact in line with the Department's obligations under section 75 of the Northern Ireland Act 1998.

We are also extremely concerned that budgeting for these proposals will not be quantified until after this consultation exercise has taken place. The consultation

[12] Page 5, *Advocacy"* Angela O'Rawe, Tara Caul and Paschal McKeown

document states that funding is subject to a bid under CSR and it is clear that there are no proposals to ring-fence funding for the implementation of the proposals contained within the consultation document. When one considers the impact of the Department's failure to allocate funding to these proposals, coupled with the increase in responsibility on schools for the allocation of funding we believe that it is extremely likely that not only will many of the proposals fail to be implemented due to a lack of funding and available resources, but that funds intended for SEN will be diverted to cover shortfalls in other areas of schools' spending. We are aware that this practice already happens in schools today and we do not believe, with expected cuts in public spending of between 8 and 12% over the next few years, that this practice will cease or become less commonplace than at present. There will be obvious issues with regard to the potential for adverse impact on members of the nine section 75 categories if some of the Department's policy proposals do not receive the necessary funding and children with SEN and/or a disability have their rights diluted as a result of changing definitions and less public resources.

We do not believe that it is possible to examine the likely impact that a set of proposed policies will have on any section of the community until it is clear, through comprehensive consideration of available budgets, which elements of the proposals will be implemented and which will not. Any EQIA which is carried out in advance of budgetary allocations and realistic consideration of the impact of less resources and the inclusion of greater numbers of children with additional needs, is in our view fundamentally flawed and non-compliant with the Department's obligations under section 75 of the Northern Ireland Act 1998. Any conclusions which have been reached by the Department in carrying out this EQIA, prior to consideration of the likely level of available resources and budgetary constraints, are hypothetical rather than an actual analysis of how the policy proposals will operate, and therefore impact on members of the nine section 75 groups in practice.

We urge the Department to carry out an EQIA taking into account actual budget allocations for these proposals as a matter of urgency as we believe that this is fundamental in complying with its obligations under section 75 of the Northern Ireland Act 1998. We do not believe that there is any way the Department can be satisfied that there will be no adverse impact on any member of the nine section 75 categories when considering these proposals in isolation from budget allocations. We also believe that there will be clear adverse impact on some of the section 75 categories, depending on the proposals which are taken forward and funded and those which are not. There will therefore be a need, in order for the Department to be in compliance with its obligations under section 75 of the Northern Ireland Act 1998, to mitigate against the adverse impact identified or to introduce alternative policies which will further the policy aims without replicating the adverse impact. We wish to see mitigation and/or alternatives taking the form of ring-fenced funding and the introduction of structures for strict audit regarding actual annual funding allocations within schools. We wish to see the introduction of clear lines of accountability and transparency with the enjoyment of equality of opportunity by all children as a central consideration as we believe that these

are fundamental in ensuring the efficient and equitable distribution of resources to combat barriers to learning for all children.

We are also concerned about the potential for adverse impact on members of the nine section 75 categories by the very firm emphasis on individual schools and in particular their increased responsibilities. There is no commitment of the necessary additional resources to schools to help them to carry out all of the proposed changes and there is a very real risk of further over-burdening schools without the necessary support to the point that the inequalities which currently exist may exacerbated in reality. Again, we believe that there is clear potential for adverse impact as regards the allocation of funding and the onus on individual schools which must be addressed through an EQIA which considers the allocation of resources as a central component. We urge the Department to carry out a thorough and comprehensive EQIA which will address these issues as a matter of urgency. **Given the proposed increase in the responsibility on schools, particularly with regard to the allocation of resources, we are of the opinion that it is now more necessary than ever to designate schools as public bodies for the purposes of section 75 of the Northern Ireland Act 1998.** While we appreciate the additional onus that this will place on some already stretched schools we do not believe that schools can assume this pivotal role as regards access to provision without being bound by section 75 in the same way as all other providers of public services. There is a great deal of expertise from the education sector to draw upon in order to ensure that the transition for schools is a smooth one. Section 75 already applies to the Department of Education, the Council for Catholic Maintained Schools, the Council for Curriculum, Examinations and Assessment, Education and Library Boards, Further Education Colleges and Universities. Most of these bodies have been designated for nine years and there is much to be gained from looking to them to see what works and what doesn't and to develop the necessary skills required. Because of the knowledge and expertise which exists in relation to section 75 and the obligations it places on public bodies, schools are in a much better position than most of the public bodies were when they were designated nine years previously.

We wish to see section 75 being implemented in schools in exactly the same way as it operates with regard to all other designated public bodies. **Section 75 of the Northern Ireland Act 1998 is of constitutional importance in the context of the new settlement in Northern Ireland and children need to have their rights to the same basic human rights as adults under section 75 upheld. The intention of the legislation is to promote equality of opportunity and this must be done in exactly the same way in schools as in any other designated public body so as not to undermine the stated commitment to the need to have due regard to the promotion of equality of opportunity among children and young people and to all those in the age category in general.**

We have a number of concerns about the Department's emphasis on the co-ordination and collaboration of Government Departments with regard to these proposals, particularly with regard to the Departments of Education and Health. We agree that it will be fundamental that these Departments work together to deliver better outcomes for

all children in Northern Ireland. **We would be very supportive of the introduction of a statutory duty to co-operate so that collaboration and joint working between these Departments is as effective and efficient as possible.** This will also ensure that the necessary cross-departmental working takes place without relying on good-will. This will be particularly important given current and future Departmental resource constraints. We remain to be convinced that the necessary level of partnership working will take place on a consistent basis without the introduction of a statutory duty to co-operate on both Departments. Any failure by either or both Departments to co-operate as is necessary will have an obvious adverse impact on the enjoyment of equality of opportunity by members of the section 75 categories.

We are extremely disappointed to note the Department's emphasis in the EQIA on, "equal access" to the same opportunities and high quality education[13]. This emphasis is reiterated in the Department's stated aim that,

"...every learner is given a fair and equal chance and that all children reach their potential"[14]

While it is vital that all children reach their potential in education and we welcome this commitment by the Department, there appears to be a misunderstanding in relation to what is required by section 75 of the Northern Ireland Act 1998 when the Department places its emphasis on equal access fair and equal chances. All children and young people do not have a shared life experience and positive discrimination and pro-active government policies are required to enable these groups of children and young people to experience equality of opportunity. Positive action is required by section 75 where equal access will not deliver equality of opportunity for those groups in society who are disadvantaged and require additional help and support to enjoy equality of opportunity.

Examples of where positive action will be necessary with regard to these policy proposals include with regard to Traveller children and looked after children who have much higher rates of SEN than children from other sections of the community. We are very disappointed that the Department has highlighted the dramatically higher rates of children with SEN in these groups but has failed to develop any targeted action to ensure that these groups of children can access equality of opportunity through positive action as required by section 75 of the Northern Ireland Act 1998. We have a number of concerns with regard to data collection (below). However, we believe that there is a need for disaggregated data collection, for example, in relation to disability, gender and race, in order to facilitate the measurement of progress towards ensuring equality of opportunity and enjoyment of rights.

One very important element of carrying out an EQIA is the consideration of available data and research. We are very concerned to note a number of statements in the EQIA

[13] Para 6.2, Page 33 Equality Impact Assessment
[14] Para 6.2, Page 33 Equality Impact Assessment

that data is either not collected or is not available for a number of the nine section 75 categories. These include political opinion, marital status, dependents and sexual orientation. This is despite the existence of data which has not been relied upon by the Department, such as the young Life and Times Survey which gives an invaluable insight into the caring responsibilities of young people and may well have been useful to the Department in considering the category of young people with dependents.

In addition, we note that the Department has concluded that as most school children are below the age at which they may participate in the electoral process that political opinion is not an issue of relevance. This is despite the Equality Commission's Monitoring Guidance which details methods for ascertaining political opinion where designated public bodies do not have this information, e.g. by proxy. The fact that young people cannot take part in the electoral process does not mean that they do not have a political opinion which must be considered when carrying out an EQIA.

We are very concerned by the failure of the Department to collect data on the sexual orientation of young people, particularly given the worrying findings from its research carried out by Youthnet in 2003 into the experiences of the education system by LGBT young people. We do not believe that the Department's obligation to collect data on the nine section 75 categories has been adequately met in this instance. The Equality Commission's *"Guidance for Implementing Section 75 of the Northern Ireland Act 1998"* outlines the obligation on public authorities to collect information to enable them to make judgments of the extent of the impact of proposed policies on the nine equality categories[15]. The Guidance also details the types of data which public authorities need to be collecting in order to comply with section 75 of the Northern Ireland act 1998 in carrying out an EQIA. Given that the Department of Education has been a designated public body for the purposes of section 75 since 1st January 2000, we are extremely disappointed and concerned to note the apparent lack of data and research which exists in order to make judgments of the impact of the introduction of its policy proposals on the nine equality categories.

In addition to the Department's obligations to collect data under section 75 of the Northern Ireland Act 1998, the UNCRC also places obligations on public bodies to collect data on children's rights. It is widely accepted that the statistics produced in relation to the state of children's rights in NI are limited and that those produced cross different parameters, timescales and ages. The UNCRC Committee's General Comment No 5 stresses that,

"...*sufficient and reliable data collection on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights"* is an essential part of implementation.[16]

[15] Page 11, Practical Guidance on Equality Impact Assessment
[16] CRC/GC/2003/5 para. 48

In its 2002 concluding observations the UNCRC Committee recommended that the UK establish a nationwide system whereby disaggregated data are collected on all persons under 18 years of age for all areas covered by the UNCRC and that these data be used to assess policies and progress to implement the UNCRC.[17] The Committee also recommended that the Government monitor the situation of a number of groups of children who are exposed to discrimination and the comparative enjoyment by children of their rights across Northern Ireland, England, Wales and Scotland with data collection as central to this monitoring.[18] The Department needs to prioritise the setting up of systems for disaggregated data collection in line with its international and section 75 obligations to ensure that monitoring and remedial action can take place on all of its policies.

Conclusion

The Children's Law Centre would strongly urge the Department to reconsider the option of building upon the established system and making improvements to it (as is the case in England via the Lamb Enquiry) rather than taking the more onerous, untested route of implementing a new system. Simply shifting responsibility for resource management from ELBs to schools, changing the terminology, adding further bureaucracy and cutting out critical stages of the process is potentially a short-sighted high-risk strategy. This is an unacceptable level of risk which such vulnerable children can ill afford to carry.

It is our view that the current Code of Practice already provides the basis for fulfillment of the Department's ideology and vision for children with SEN as outlined in the extracts below:

5 Fundamental Principles
Code of Practice, paragraph 1.6

- Needs of pupils with SEN must be met
- Access to a broad & balanced education
- Mainstream education where possible
- Children under school age may have SEN which require intervention
- Partnership with parents is vital

[17] CRC/C/Add.188. para 49
[18] CRC/C/Add.188. para 22a and b

6 Essential Practices
Code of Practice, paragraph 1.7

- Early identification & assessment
- Mainstream school can usually provide for SEN with parental partnership
- Timely assessments and statements
- Complete, clear, thorough statements
- Ascertainable wishes of the child
- Multi-disciplinary approach