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The access to justice barriers for tribunal users: a comparative case study on Special Educational Needs Tribunals

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Introduction

Administrative tribunals provide an essential component of administrative justice, ensuring impartial space where inequitable administrative decisions can be challenged by citizens. By virtue of this independence, the external appeal mechanism is perceived to bring a measure of fairness and objectivity into the decision-making process, thereby increasing the legitimacy of the democratic model.¹ While these forums are often considered informal mechanisms of redress, which are easily accessible and user-friendly, the Access to Justice Reviews in Northern Ireland and recent research have identified difficulties faced by tribunal users in securing access to justice, and have questioned how tribunal users might best be supported.²

This research examines the particular barriers faced by users of Special Educational Needs tribunals in light of Article 12(2) of the UN Convention on the Rights of the Child (UNCRC); comparing the experiences of tribunal users in Northern Ireland with those in Wales, where the UNCRC has been incorporated into domestic law and where tribunal procedures seek to implement UNCRC obligations. Through qualitative research with parents, children with special educational needs, tribunal staff and judiciary, and policy makers, the research identifies specific barriers to justice and develops recommendations for increasing access to justice and for enabling child participation.

Background to the Research and Legislative Differences

Special Educational Needs tribunals, in the event of a disagreement between parents of children with special educational needs and education providers concerning the special educational provision for a child or a claim of disability discrimination, act as an impartial arbitrator to resolve the dispute. Yet research has highlighted that children are often not

¹ N. Harris, 'Dispute Resolution in Education; Role Models' in N. Harris and S. Riddell, *Resolving Disputes About Educational Provision: A Comparative Perspective on Special Educational Needs* (Ashgate Publishing Ltd., 2001) p 29

² G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (ISBN 18772299075, Law Centre NI, 2010)

party to proceedings and rarely attend Special Educational Needs tribunals.³ Children's lack of participation in this process is contrary to international law, in particular Article 12(2) of the UN Convention on the Rights of the Child, which states that the child shall be provided the opportunity to be heard in any judicial and administrative proceeding affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Article 7 of the UNCRPD further advances the obligation by stating that State Parties must ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and they must be provided with disability and age appropriate assistance to realise that right.

The overall aim of this research was to examine, from a child rights perspective, the extent to which SEN tribunals are accessible, enabling and participatory for users, concentrating on barriers to accessibility and participation, and exploring issues which might continue to dissuade users from seeking redress through the tribunal system. In addition, the research examined the creation of formal opportunities for children to voice their opinions and to have these opinions given weight and influence the decisions that affect children's lives. The research used a comparative approach to compare and contrast SEN tribunals in Northern Ireland and Wales with the aim of identifying similarities, differences and areas of efficient and progressive practice. The decision to examine these two distinct regions comparatively stems from their differing approaches to child participation in the SEN tribunal process. While Northern Ireland retains the traditional parental right to appeal only, Wales has piloted an innovative right of appeal for children through the Education (Wales) Measure 2009. This Measure bestowed children with the right to make an appeal and placed a duty on Local Authorities to inform children of these new rights and to make advocacy services available to assist children in resolution processes.⁴ This innovative approach was linked to a much wider political project within Welsh Government which sought, from the point of devolution, to incorporate the United Nations Convention on the Rights of the Child (UNCRC) into domestic legislation and assent to international guidance influencing broader Welsh policy aims.⁵

Key Findings -Experience of Adult Users in both Northern Ireland and Wales

While the overall aim of the research was to examine the participatory nature of Special Educational Needs tribunals for children in light of the international obligations bestowed by Article 12(2) of the UNCRC and Article 7 of the UNCRPD, responses by interviewees highlighted significant, general barriers to participation faced by adults in their engagement with tribunal processes. Given this fundamental issue of general accessibility, it raised the basic question: If indeed parents are struggling to access the system, how then are we to expect children to fit seamlessly into the existing process?

One key finding was that socio-economic factors and legal capacity impacted on accessibility to the tribunal. Tribunal Panel Members in both Northern Ireland and Wales highlighted that all too often SEN tribunals are the mechanism of the middle class and that those from poorer backgrounds do not understand the system, lack the confidence to engage, and do not have the means to retain expert help. Findings also uncovered substantial difficulties for parents seeking advice and support following the onset of educational disputes. This raised considerable concerns regarding access to justice as the enablement of meaningful participation requires that those participating must have an adequate understanding of the issue at stake and the possible outcomes of differing decisions.⁶ As one parent from Northern Ireland stated, '*We kept hitting a brick wall every time we asked for help. Nobody would help us.*' The findings were similar in Wales with parents stating that they could not access support mechanisms and felt the limitation of advice services was worsened by the budgetary constraints of support organisations.

³ N. Harris, S. Riddell, and E. Smith, 'Special Educational Needs (England) and Additional Support Needs (Scotland) Dispute Resolution Project: Working Paper 1: Literature Review' (University of Manchester, 2008) p 46

⁴ Education (Wales) Measure 2009

⁵ National Assembly for Wales, Children and Young People: A Framework for Partnership (November 2000) Section 4, p 3

⁶ T. Webler and S. Tuler, 'Fairness and Competence in Citizen Participation: Theoretical Reflections from a Case Study' (2000) 32(5) Administration and Society 566-595 p 568

Parents in both Northern Ireland and Wales expressed that there was a lack of alternatives in relation to dispute resolution. Alternative dispute resolution services were viewed sceptically by parents who had availed of their services, with concerns expressed regarding their effectiveness and the resoluteness of outcomes reached during the process. These findings echo other such research which highlighted parental concerns that ADR outcomes are not legally binding and there is therefore a greater risk that rights will not be safeguarded through this mechanism.⁷

While tribunals are often heralded as informal, welcoming, inquisitorial environments which do not require a wide breadth of legal knowledge, findings from this research indicated that SEN tribunals are diametrically different to the professed norm and are instead formal, legalistic, adversarial and intimidating for users. Respondents from this study found the process to be complicated, time-consuming, legalistic, and 'horrendous' and struggled to access support to deal with the problems they encountered.

One outstanding barrier to participation highlighted by the findings was an inequality of legal arms between parents and Education Boards/Local Authorities, exacerbating the power imbalance between the citizen and the state and raising explicit concerns regarding the fairness of the process in both Northern Ireland and Wales. As a parent from Northern Ireland stated, *'I didn't think the tribunal itself was a level playing field really.'* Another noted, *'Well I think it's totally stacked against you. If they can bring a barrister and a solicitor and you're on your own.'* Parents in Wales expressed similar sentiments, *'So obviously we don't have the resources to finance a barrister ... essentially it's not a level playing field.'*

In terms of procedural fairness, the quality of interpersonal treatment is essential to a procedure being viewed as fair. Tyler in particular found that people value the quality of their interpersonal treatment, particularly when they feel they are being treated with dignity and respect by authorities.⁸ Respondents in this study maintained that they had encountered personal insults and questions regarding their parenting abilities. This was found to intensify the adversarial environment, with parents expressing sentiments of feeling pitted against the strength of Education Boards/Education Authorities and/or legal representatives. A further significant issue expressed in the findings was the impact on family life experienced by parents in both Northern Ireland and Wales when taking a case to tribunal, from the detrimental effect on mental health, to the impact on marital relations and the financial implications of taking a case.

These findings helped to identify some of the issues and barriers experienced on a general level by those currently using SEN tribunals and served as an essential knowledge base upon which to examine children's participation in the process.

Key Findings – Barriers to Child Participation at SEN Tribunals in Northern Ireland and Wales

The findings from this research identified a number of significant barriers to child participation at SEN tribunals. During the interview process a number of key conceptual hurdles featured prominently in responses. In particular notions of the child's ability to participate based upon common theoretical concerns regarding age, capacity, and protectionist approaches constituted recurrent, pervasive, attitudinal barriers to involving children in decisions that affect them.

Often the power relationship between adults and children, and in particular parents and children, was identified as a reason to deny children their right to participate in legal process. One of the main concerns among interviewees for granting children wider participative rights within the process was the contention that differing opinions between the child and the parent would be difficult to reconcile. There was a worry that wider participative rights for children could ultimately corrode adult authority.⁹

While international guidance states that that the capacity of the child to participate should not be seen as a limitation of the right, but rather as an obligation for State parties to assess the capability of the child to form an autonomous opinion to the

⁷ S. Riddell, J. Stead, E. Weedon and K. Wright, 'Dispute Resolution and Avoidance in Special and Additional Support Needs in England and Scotland' (University of Edinburgh, 2010) p 5

⁸ T. R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime & Justice 283-357

⁹ J. Cashmore, 'Children's Participation in Family Law Decision-Making: Theoretical Approaches to Understanding Children's Views' (2011) 33 Children and Youth Services Review 515-520

greatest extent possible,¹⁰ the capacity of children to participate at SEN tribunals was continually raised by respondents as a reason for not permitting access to the process. Findings indicated that many adults felt that younger children should not be involved in tribunal hearings because they lacked skills, maturity and aptitude by nature of their age. While this reflects similar research which indicated that when deciding upon the capacity to participate a distinction is often drawn between the younger child and the younger person, in the case of SEN tribunals, this is further exacerbated by wider conceptions of disability.¹¹

In addition to concerns regarding the age and capacity of children, one outstanding apprehension was the protective need to shield children from the process and/or sensitive personal information in order to safeguard them from knowledge of the dispute and/or their additional support needs or disability. As one parent from Northern Ireland stated, *'My child has never been aware that there is anything wrong with him.'* Another noted, *'No personally I don't believe the child should be there because there are things that can be said that could make your child feel inferior.'*

Protectionist opinions were raised following the discussion on parental experiences of the tribunal process which suggested that the tribunals, as they currently exist, are too formal, lengthy, paper-based, legalistic and adversarial and are therefore not a suitable environment in which to include children.¹² There was a concern, due to the inequality of legal arms, that children would be cross examined by barristers. A point that was raised by one Northern Irish Tribunal Panel Member, who stated, *'What I want is what's best for the child and being best for the child is not being aggressively questioned by an over ambitious young barrister.'* Essentially parents agreed that children should be able to voice their opinion during SEN proceedings, but they were extremely hesitant in relation to their child encountering a tense and adversarial hearing.

A further barrier to the introduction of child rights initiatives in legal process could be attributed to the attitude of judicial staff to the implementation of such approaches.¹³ The findings from this research highlight a significant geographical disparity in the opinions of judicial staff to the introduction of a child's right to appeal. Panel members' responses in Northern Ireland when asked if children should have a more active role in the process were tentative and reflected traditional views on exposure to sensitive information and parental protectionism. In comparison, Welsh Panel Members when asked if they felt children should have the opportunity to voice their opinions within the process were immediately positive with strong opinions reinforced by notions of child citizenship, the rejection of the age/capacity debate, the central positioning of the child in the process and the relaying of how beneficial child participation can be. In addition, Panel Members in both Northern Ireland and Wales raised concerns regarding their, or others, capacity to engage with children within the tribunal setting. Northern Irish Panel Members were dubious about expanding child rights of appeal or expanding children's participation in the process; again effectively creating an attitudinal barrier to the granting of an audience for children's opinions.

Another impeding factor to the incorporation of the international right has been the lack of political will in Northern Ireland to domestically implement child rights legislation. In addition to the Education (Wales) Measure of 2009, the Welsh have domestically incorporated the UNCRC in the Rights of Children's and Young Persons (Wales) Measure 2012, becoming the first legislature to pass an explicit child rights law. This piece of legislation imposes a legal duty on Welsh Ministers to have due regard to the rights and obligations in the UNCRC and its Optional Protocols. The development of expanded participative forums for children in Wales may well be attributed to their developed notion of citizenship. An examination of the political environment from the outset of devolution, would suggest that there has been a concerted effort to engage with the citizenry, producing more democratic institutions and nurturing a system rife for the development of social policy.¹⁴

¹⁰ United Nations Committee on the Rights of the Child, General Comment 12 (20 July 2009) CRC/C/GC/12

¹¹ H. McConachie, A.F. Colver, R.J Forsyth, S.N. Jarvis and K.N. Parkinson, 'Participation of Disabled Children: How Should it be Characterised and Measured?' (2006) 28(18) Disability and Rehabilitation 1157-1164

¹² N. Harris, 'Education Law: Excluding the Child' (2000) 12(1) Education and the Law 31-46 p 35

¹³ E. Tisdall et al, 'Children's Participation in Family Law Proceedings: A Step Too Far or a Step Too Small' (2004) 26(1) Journal of Social Welfare and Family Law 17-33

¹⁴ M. Drakeford, 'Wales and a Third Term of New Labour: Devolution and the Development of Difference' (2005) 25(4) Critical Social Policy 497-506

Realising Participation for all SEN Tribunal Users

While challenging the above barriers to participation at SEN tribunals, for both adults and children, seems an arduous task, a number of reforms have been identified by the key stakeholders in this research, and these in combination with reforms emerging from existing literature, lay a robust foundation upon which to build participative initiatives for all SEN tribunal users to ensure the realisation of the internationally assured rights.

Expanding knowledge of children's rights and SEN tribunals: A key area of concern has been the general lack of knowledge of rights. In order to address attitudinal concerns of parents and other key stakeholders, there needs to be an increased awareness among adults, including the judiciary, and children, that children are rights holders, entitled to claim their rights, and, in particular, to exercise their right to participate. In addition, all parents and children need to be informed that the tribunal exists and that this mechanism of redress is available should they encounter a dispute regarding special educational provision at any stage of the child's education.

Pre-hearing advice and support: The findings of this research reiterate that accessible and relevant pre-hearing advice, information, and support are essential for those wishing to use SEN tribunals. While the current funding climate makes access to publically funded legal support increasingly vulnerable, the value that such support brings is not something that can be quantified only by reference to value for money. The participative potential that these organisations offer to adult, and potential child, SEN tribunal users means that recommendations must necessarily include the need to retain and expand such services. Child-friendly pre-hearing advice and support needs to be developed concurrently with adult services and support organisations should provide specially trained advocates.

Adapting processes to meet the needs of all tribunal users: This research advances that participants should not be excluded from the process because of low literacy skills, lack of confidence about appearing before a panel, or excluded by virtue of their disability or age. Adults and children require a breadth of options to deal with the case as suits them rather than as suits the system. This involves injecting flexibility into the process to enable participation and would require, for example, developing the communicative capability of panel members and tribunal staff; utilising appropriate local settings for hearings; greater discretion to expand time-limits; reviewing the requirement of paperwork; the development of informal, child-friendly procedures and literature; the use of informal, child-friendly settings; and developing accessible tribunal-based information. This requires a creative and intuitive approach, sensitive to the needs of the individual.

Legal Representation: The eradication of the inequality of legal arms is urgently required to rebalance the inherent fairness of the tribunal to ensure administrative justice. There is a need to guarantee that participants do not feel belittled within the process and are shielded from unnecessary censure. It is essential if children are to attend tribunals, that they can express their opinions in a safe environment without fear of rebuke or reprisal.¹⁵ One of the protectionist reasons for refusing children access to their right was the fear that they would encounter cross examination by an overzealous barrister and this is something which needs to be addressed to relay parental concerns, thereby enhancing their receptivity to involving their children in the process.

Enabling the meaningful participation of children at SEN tribunals: Granting children the full right to appeal should be considered only one step in a multifaceted approach to the enablement of meaningful participation. Children have differences. Some have substantial complex needs which may mean it is unrealistic to assume that they can physically attend the tribunal and present their own case. Yet this is not to suggest that those with complex needs cannot influence the decision making process or have their voice heard within the proceeding. Participative approaches need to be measured, not just by their intended effect, but by the outcome they produce. Fundamentally what is being advocated by this research is the development of processes, techniques and procedures to guarantee that children's voices are heard within the process thereby ensuring that they can give their opinion on the nucleus of the disagreement and that their opinion is given

¹⁵ L. Lundy, 'Voice is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) British Educational Research Journal 927-942

weight within the process. The findings highlight that in order to hear the voice of the child there is a requirement to be adaptive to their needs.

Recommendations have included, having Panel Members observing and meeting the child in their home/school environment to gain an understanding of the issue at large; building the capacity and communication skills of tribunal judiciary and staff in order to engage fully with children; reassuring parents that their children will not be exposed to an excessively adversarial environment or unnecessarily exposed to sensitive information.

Political will: The political will to instigate and develop child participation initiatives is essential to the realisation of a rights-based approach.¹⁶ This research identified the rationale for devolution, and the continued development of the democratic project in both Northern Ireland and Wales, as contributing to the burgeoning of child rights initiatives in Wales, and the lack of development on children's rights in Northern Ireland. Yet even with the political will demonstrated by the Welsh, and the enactment of a child's right to appeal to SEN tribunals, an evaluation of the pilot asserted that while systems and processes of informing children and young people of their rights were well established and generally working well, in reality only one claim of disability was made and no appeals had been made by a child. The main general barriers to participation identified in this research may go some way to explain why there has been an initial reluctance to avail of the new Welsh child right to appeal and has substantiated the need for a holistic reform of the system for all users.

Conclusion

At the heart of the reforms suggested by this research lies the key recommendation to progress children's participation at SEN tribunals, but arguably the most important of these involves creating a culture that recognises children as rights holders. Findings highlighted numerous barriers faced by those currently using SEN tribunals and noted that parents, in particular, are reluctant to involve their children in the SEN tribunal process. Given the evidence, which confirms the findings from other empirical research on the difficult experience of many SEN tribunal appellants, there is some sympathy to be had with this perspective: the tribunal is a hostile place for all appellants, and the idea of requiring or encouraging anyone to go into a hostile environment has obvious drawbacks. Yet this does not have to be the case. With commitment, enabling practices, processes and imagination, access to justice for all tribunal users can be realised and, in adjusting the SEN tribunal system to make it more accessible for children, we can seize the opportunity to make the tribunal more accessible for everyone.

¹⁶ C. Melena, 'Building Political Will for Participatory Governance: An Introduction' in C. Melena, *From Political Won't to Political Will: Building Support for Participatory Governance* (Kumarian Press, 2009) 3-30

