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Nick Ramsay AM
National Assembly for Wales
Chair, Public Accounts Committee
Cardiff Bay,
Cardiff
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18 May 2018

Dear Mr Ramsey,

Public Accounts Committee: Inquiry into the 21st Century Schools and Education Programme

The Catholic Education Service is the education agency of the Catholic Bishops' Conference of England and Wales. The Bishops' Conference is the permanent assembly of the Catholic bishops of England and Wales and the CES, as an agency of the Bishops' Conference, is charged with promoting and securing education on behalf of the bishops.

The Catholic Education Service welcomes this inquiry into the 21st Century Schools and Education Programme not least because, despite the fact that capital funding for the voluntary aided sector was included within the funding envelope, no Catholic schools were included in the initial rounds of the Band A phase. We welcome the increased engagement with our sector that has taken place in preparation for the Band B phase.

In terms of the areas specified for this inquiry, the Catholic Education Service has concerns regarding the suggested **Funding Model**, in particular the development of the Mutual Investment Model (MIM).

Catholic schools are provided by their Trustees for the purposes set out in the Trustees' governing documents, known collectively in education law as their "Trust Deed", which will set out the Trustees' charitable objects and other parameters within which they may allow their property to be used. The Trustees will have established the school under charitable trusts in furtherance of their charitable objects, and the governing documents of the school will also contain parameters within which the Church school is to be conducted: these will be compatible with the Trust Deed of the Trustees.

The governing body of the school occupies and conducts the school on behalf of the Trustees as the occupier of the premises, the proprietor of the undertaking and the employer of the staff. The governing body occupies the premises subject to the Trustees' objects, Trust Deed and any other parameters laid down by the Trustees. Whilst the Trustees permit the school to occupy their site for the time being, they do not give the school any right to occupy and ultimate control of the site and any decisions relating to the land and buildings rest with the Trustees.

The Trustees can give notice to terminate the occupation by the governing body of the school at any time. Legislation provides that the period of notice given by the Trustees must be not less than 2 years in circumstances where the termination of occupation would have the result that it is not reasonably practicable for the school to continue to be conducted on its existing site.

The Trustees are entitled to set out parameters governing the use of the land. This can include, but is not limited to, ensuring that the use is compatible with the charitable trusts, for example, restricting the use of the premises to prevent certain activities which they consider to be incompatible with their charitable trust, or where such activities would not be in keeping with the teachings of the church.

In addition, the Trustees control any dealings with the land and buildings. The Trustees' consent is required for any works, including capital works. Most Trustees will not even permit the submission of any capital grant application without the Trustees' consent having been provided.

All Catholic schools are voluntary aided and, therefore, the responsibility for work to the school premises is shared between the school's governing body and the local authority. It is clear from the legislation in relation to voluntary aided schools, that the responsibility for discharging any liability in connection with the provision of the premises for the purposes of the school, lies with the governing body or the local authority.

For Catholic schools, any buildings currently on the land, or that might subsequently be built on it, are part of the land. The land and buildings are assets of the Trustees. They are not public assets, but charitable assets which the Trustees, under charity law, have a duty to protect.

The documents that the Catholic Education Service has seen regarding the MIM are clearly generic and intended for use across all government departments. They appear to have been developed on the assumption that the buildings that will be the subject of these agreements, are in public ownership. They do not in any way envisage dealing with land and buildings where the land and buildings are provided by the voluntary sector such as in this case, where the Catholic Church provides schools as a result of the long standing partnership between Church and State.

Because the only available documentation to us is generic, it is our assumption that the Agreement is drafted on the basis that the "Authority" entering into it is a local authority. If that

is the case, the Agreement provides for the Authority to grant certain rights in relation to the land that, for land and buildings occupied by Catholic schools, are not the Authority's to give. These include rights of access over the site and rights in relation to the ongoing maintenance of the building which is to be constructed.

Since the documentation has been drafted entirely on the basis that the building is a public asset, there is no indication of the intentions of the Welsh Government in relation to how Trustee land could possibly be included in this model of funding. It is not, for example, clear whether in order to participate in the Model, it would be necessary for the Trustees to grant a lease to a third party. Since the expiry date in the Agreement is blank it has not been possible, from a perusal of the Agreement and the User Guide, to determine the period of the Agreement. It is our experience that this type of arrangement would normally include a third party contractor having responsibility for ongoing maintenance of a building for a considerable period, e.g. 25 years.

Even if the Trustees agreed to participate in the Model, the existing documentation would be totally unsuitable. A different set of documentation would be required including an agreement that recognises that the land and buildings that would be the subject of the agreement are not public buildings, that the land on which they are to be constructed is not public land and that would protect the interests of the Trustees, including the ability for them to terminate the occupation of the premises on the same basis as currently exists. Any costs, including legal costs, would have to be met.

The Trustees would, however, be extremely concerned about providing rights to a third party. This is because it is likely to have the effect of impeding the Trustees ability to terminate the school's occupation of the site. As stated previously, the Trustees are able to give notice to terminate occupation at any time, without cause, subject to the statutory provision requiring two years notice in certain circumstances. The Trustees' require the unfettered ability to do so to ensure that the school continues to be conducted in accordance with the Trust Deed, and to meet the estate planning requirements of the Diocesan Bishop. The Diocesan Bishop is responsible for ensuring the provision of Catholic education across his diocese in accordance with canon law.

In addition, certain actions on the part of the Trustees, such as the grant of a lease to a third party, would in law be a disposal. Since the Trust is a charitable trust, the consent of the Charity Commission would be required. The CES is not aware that any discussions have taken place with the Charity Commission to ascertain the view of the Charity Commission about the risks to the charitable land in the event that the Trustees were to agree the use of this funding model.

The Trustees are required to safeguard their assets, and to ensure that they continue to be used for the charitable purposes for which they established their schools. They are able to give notice to terminate the occupation by the governing body at any time, subject to the legislative provision requiring two years' notice. The Trustees must have an unfettered ability to do so.

We assume, similar to the arrangements for other types of schools where the land and buildings are owned by a local authority, that any agreement would involve a long-term arrangement giving rights over the land and buildings to a third party. This would interfere with the Trustees legal obligations in relation to the use of the land and buildings, and their ability to terminate that use. It might also provide rights for a third party to deal with the land, e.g. to carry out works to the land and buildings, without the consent of the Trustees.

In the circumstances, it is unlikely that the Trustees of any Catholic school would be prepared to agree to the use of the MIM model of funding for any capital works to their premises. This is because any such arrangement would cut across the legal obligations of the Trustees in dealing with their land and premises which are essential to ensure that their charitable objects are fulfilled.

As co-providers of maintained schools in Wales, the Catholic sector very much welcomes the implementation of the 21st century schools programme. Our understanding is that our diocesan officers have been working very constructively with the Welsh Government and with Local Authorities on planning for Phase B. However, our advice is that they do so, for the reasons outlined above, without recourse to the Mutual Investment Model of funding.

The Catholic Education Service, alongside representative diocesan officers, if appropriate, would be happy to continue this conversation with the Public Accounts Committee if it is considered helpful.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'pp. R. Hayward', though the context indicates it is Philip Manghan.

Philip Manghan
Education Adviser (Wales)