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Constitutional and Legislative Affairs Committee

The School Standards and Organisation (Wales) Bill

Legal Briefing – Powers to make Subordinate legislation

1. Introduction and overview of the Bill

This paper sets out what powers are contained in the School Standards and Organisation (Wales) Bill (“the Bill”) for Welsh Ministers to make subordinate legislation.

The Bill sets out to do the following:

- reform the powers of local authorities and the Welsh Ministers to intervene in the conduct of schools maintained by local authorities that are causing concern;
- to reform the powers of the Welsh Ministers to intervene in the exercise of education functions by local authorities;
- to provide for school improvement guidance;
- to reform the statutory arrangements for the organisation of maintained schools;
- to provide for Welsh in education strategic plans;
- to make miscellaneous provisions in relation to maintained schools including provisions on free school breakfasts, flexible charging for school meals, school-based counselling, parents’ meeting and a code of practice on relations between local authorities and maintained schools.

2. Powers to make subordinate legislation

The Bill contains several powers for subordinate legislation to be made by Welsh Ministers. These are explained in Part 1.5 of the Explanatory Memorandum laid with the Proposed Bill and in the Explanatory Notes that appear at the end of that Memorandum.

Standing Order 26.6 (vii) states that when any Bill is introduced, the responsible Member must lay an explanatory Memorandum which must among other matters contain the following:

(vii) where the Bill contains any provision conferring power to make subordinate legislation, set out, in relation to each such provision:

- (a) The person upon whom, or the body upon which, the power is conferred and the form in which the power is to be exercised;*
- (b) Why it is considered appropriate to delegate the power; and*
- (c) The Assembly procedure (if any) to which the subordinate legislation made or to be made in the exercise of the power is to be subject, and why it was considered appropriate to make it subject to that procedure (and not to make it subject to any other procedure).*

Section 98 of the Bill sets out the regulations and orders under the Bill to be made by statutory instrument and sets out the National Assembly for Wales (“the Assembly”) procedure in respect of those instruments. It also lists some powers that allow Orders to be made that are not to be exercised by statutory instrument.

The Bill gives the following powers to make subordinate legislation:-

(i) School Organisation – The Code on School Organisation (“the Code”) (Section 39)

Section 38 provides that the Welsh Ministers must issue, and revise from time to time, a code on school organisation. The Code will contain provisions about the exercise of functions of the Welsh Ministers, local authorities, governing bodies of maintained schools, local determination panels and other persons in connection with proposals made. The Code may impose requirements, and may include guidelines setting out aims and objectives and other matters. It is intended that setting out requirements in a Code rather than on the face of the Bill or in regulations will enable the use of language more easily understood by interested parties. The fact that the proposed Code may impose requirements makes it clear that it is proposed to be legislative in nature, rather than purely administrative.

Section 39 sets out the procedure for Welsh Ministers to issue a Statutory Code on school organisation. Provisions inserted in the code will be based on best practice and a code will allow those principles and best practice to be incorporated over time.

Procedure: The Code will be subject to the procedure laid out in the Bill. The Welsh Ministers must consult such persons as they think fit on the draft of the Code (or revised Code). A draft copy of the code must be laid at the Assembly. If, before the end of the 40 day period, the National Assembly resolves not to approve the draft of the code, the Welsh Ministers must not issue the proposed code in the form of the draft. If no such resolution is made before the end of the 40 day period then the Welsh Ministers must issue the code. The code or revised code will come into force on a date appointed by order of the Welsh Ministers. The procedure mirrors that in laying the codes on School Admissions and School Admission Appeals. In effect, the

procedure also mirrors that of the “negative procedure”, though the assembly veto is exercisable before the Code is made rather than afterwards as is usually the case with Statutory Instruments.

(ii) School Organisation Proposals – Establishment, alteration and discontinuance of maintained schools (Section 57(3))

Chapter 2 of Part 2 of the Bill makes detailed provisions for the establishment, alteration and discontinuance of schools and in doing so gives various powers to local authorities, the Welsh Ministers and governing bodies of schools.

Section 57 is an interpretation section and subsection (1) lists a number of definitions contained in Chapter 2. “Small school” is defined as a school with fewer than 10 registered pupils on the third Tuesday in the January immediately preceding the date on which the proposals are made. This date is currently the annual school census date. Section 57(3) allows Welsh Ministers by Order to change the date in the Bill should this be necessary.

Procedure: Section 98(4) states that an order made under section 57(3) will be subject to the negative resolution procedure.

(iii) Assessing demand for Welsh medium education (Section 87)

Section 87(1) provides a power exercisable by regulations for the Welsh Ministers to “require a local authority, in accordance with regulations, to carry out an assessment of the demand among parents in its area for Welsh medium education for their children. Section 87(2) may (among other things) make provision about when and how to make an assessment.

Procedure: Any such regulations will be subject to the negative resolution procedure (section 98(4)).

(iv) Assessing demand for Welsh education – Regulations and Guidance (Section 88)

Section 88(1) gives power to Welsh Ministers to make regulations about Welsh in education strategic plans. Section 88(2) allows the regulations to specify the form and content of a plan (88(2)(a)); the timing and duration of a plan (88(2)(b)); keeping a plan under review and its revision (88(2)(c)); consultation during the preparation and revision of a plan (88(2)(d)); the submission of a plan for approval

(88(2)(e)); and when and how to publish a plan (88(2)(f)). Section 88(3) provides that Welsh Ministers may also make regulations enabling local authorities to prepare and submit a joint plan to allow for collaborative working between local authorities.

Procedure: Any such regulations will be subject to the negative resolution procedure (section 98(4)).

(v) Independent counselling services for school pupils and other children (Section 93)

Section 93 provides that a local authority must secure reasonable provision for a service providing counselling in respect of health, emotional and social needs for school pupils and other specific groups. The explanatory memorandum states that school-based counselling is currently being piloted in primary schools and that these regulation making powers will allow Welsh Ministers to respond to any future evidence based need. Subsection (5) also will allow Welsh Ministers to make regulations requiring “the provision of an independent counselling service at other locations other than in the schools”.

Procedure: Any such regulations will be subject to the negative procedure (section 98(4)).

(vi) Schedule 1 – Establishment of normally constituted governing body (Schedule 1 Paragraph 17(2))

Schedule 1 Paragraph 17(2) provides Welsh Ministers with regulation making powers to make provision with respect to the transition from an interim executive board to a normally constituted governing body. The explanatory memorandum states that the purpose of such regulations will be to set out the technical arrangements for when the interim executive board has concluded its business, and a normally constituted governing body is to take over the governance and conduct of the school.

Procedure: Any such regulations will be subject to the negative procedure (section 98(4)).

(vii) Schedule 2 – Regulated alterations (Schedule 2 Paragraph 26)

Paragraph 26 of Schedule 2 will allow Welsh Ministers by order to add, delete or amend specified alterations of schools. This is a fairly significant power as it will allow Welsh Ministers to amend the Bill itself in this context, therefore avoiding the need for new primary legislation.

Procedure: Any such orders will be subject to an affirmative resolution procedure.

(viii) Schedule 5 – Implementation of proposals to change category of school (Schedule 5 paragraph 40)

Schedule 5 provides procedures for when a school changes category in accordance with proposals. Paragraph 40 gives regulation making powers to the Welsh Ministers in connection with the implementation of proposals to change a school's category in respect of the government of a school.

Procedure: Any such regulations will be subject to the negative procedure (section 98(4)).

(ix) Commencement Provisions

This section provides for sections 1 (overview), 101 (commencement) and 102 (short title and inclusion as one of the Education Acts) to come into force the day after Royal Assent is received. Chapter 3 (school improvement guidance) of Part 2, section 92 (amendment to power to charge for school meals etc.) and paragraphs 26, 29(1), 30 and 31 of Part 3 of Schedule 6 (amendments consequential on section 92) (and section 100 in relation to those paragraphs) come into force two months after Royal Assent is received.

Section 101(3) gives the power to Welsh Ministers to make commencement orders to bring the remaining parts of the Bill into force when needed.

Procedure: There is no scrutiny procedure provided for the commencement orders and this is normal legislative practice.

3. Delegated Powers not to be exercised by statutory instrument

In this Bill some provisions give Welsh Ministers the power to make orders that are not to be exercised by statutory instrument and therefore not subject to any Assembly scrutiny procedure.

(i) Rationalisation of School Places – Directions to make proposals for rationalisation of school places

Section 58 makes provisions for instances where the Welsh Ministers believe that there is excessive or insufficient provision for primary or secondary education in maintained schools in the area of a local authority or in a part of such an area. Section 58(2) provides that the Welsh Ministers may, by order “(a) direct the local authority to exercise its powers to make proposals to establish, alter or discontinue schools, and (b) direct the governing body of a foundation, voluntary or foundation special school maintained by the authority to exercise its powers to make proposals to alter its school.” Such an order must then require the proposals to be published no later than a specified date in the order, that the proposals apply any principles specified in the order, and that where the Welsh Ministers are of the opinion that there is or there is likely to be insufficient provision, to specify the additional number of pupils to be accommodated.

Procedure: Section 98(2) states that an order made under section 58(2) will not be made by statutory instrument. Any order will therefore not be subjected to any Assembly scrutiny procedure.

(ii) Regional Provision for Special Educational Needs (Section 67(2))

This chapter makes provision for the possibility of two or more local authorities to provide special education functions on a regional basis if it is considered that that would be more effective or efficient if in relation to the areas of those authorities.

Section 65 provides definitions of what is considered “regional provision” and “special education functions.” Section 66 provides that the “Welsh Ministers may direct local authorities to consider whether they would be able to carry out their special education functions, in respect of children with the special educational needs specified in the direction, more efficiently or effectively if regional provision were made. Subsection (2) states the “authorities to whom a direction is given must report their conclusions to the Welsh Ministers no later than the time specified in the direction.”

Section 67 (2) gives order making powers to the Welsh Ministers for the purpose of securing that regional provision is made in relation to the description of children from the areas specified.

Procedure: Similarly to section 57(2), section 98(2) states that an order made under section 67(2) will not be made by statutory instrument. Any order will therefore not be subject to any Assembly scrutiny procedure.

(iii) Schedule 5, Part 3, Paragraph 34 – Transfer of Land

Paragraph 34 gives the Welsh Ministers power to make an order in relation to the transfer of land in certain circumstances that excludes certain provisions and requirements that would normally apply for other transfers of land under the Bill.

Procedure: Section 98(2) states that an order made under paragraph 34(1) (b) will not be exercised by statutory instrument and therefore will not be subject to any further Assembly scrutiny procedure. This is comparable to a compulsory purchase order that would not be subject to an Assembly procedure.

4. Powers of Direction

For the sake of completeness, the Bill, as highlighted by the Minister's letter dated 16th May 2012, contains several others powers of direction for Welsh Ministers that are laid out on the face of the Bill. These powers will be scrutinised and considered by the Children and Young People Committee when they consider the general principles of the Bill at stage 1 of the legislative process.

In summary, there are powers of direction in sections 12, 15, 16 and 17 relating to intervention in a School Governing Body by the Welsh Ministers. This includes the power to require governing bodies to collaborate and secure advice from specified third parties, to direct the federation of schools, to direct the closure of a school and an over-arching power to give directions generally and to take necessary steps.

Sections 24, 25, 26, 27 and 28 contain powers of direction in relation to intervention in a local authority by the Welsh Ministers. These powers of direction include the power to request local authorities to obtain advisory services; to require performance of functions by other persons on behalf of an authority; to require performance of functions, to which a ground of intervention relate, to be exercised by Welsh Ministers or their nominee; the power to direct exercise of other education functions; and an over-arching power to give directions generally and to take necessary steps.

Section 82 allows Welsh Ministers to direct a local authority to discontinue a community or foundation special school maintained by it on a specified date, if they consider it expedient to do so in the interests of the health, safety or welfare of pupils at the school.

Finally, section 94 provides Welsh Ministers with the power to direct local authorities to provide information regarding their independent counselling services.

5. Powers to issue Statutory Guidance

The Bill also contains several powers for the Welsh Ministers to issue statutory guidance on a range of subjects.

Section 20 gives the Welsh Ministers a power to issue statutory guidance to local authorities in relation to how they exercise their powers of intervention. The power to issue statutory guidance under this section is not made subject to any further Assembly scrutiny.

Section 33 gives the power to Welsh Ministers to issue school improvement guidance. Before issuing such guidance it is subject to an Assembly scrutiny procedure as laid out in section 34 of the Bill. This procedure is similar to the negative procedure. By virtue of section 35, the school authority must follow the guidance unless it sets out a policy statement listing how it intends to exercise duties differently and the reasons why it is seeking to exercise functions differently. This gives it the legislative character that justifies the application of an Assembly procedure. Despite this caveat, the Welsh Ministers retain a power to direct a school authority to take action to comply with the statutory school improvement guidance (section 37).

Section 89(5) of the Bill gives Welsh Ministers a power to issue statutory guidance regarding free breakfasts in primary schools.

Section 93(2)(b) gives the Welsh Ministers the power to issue guidance regarding School Based Counselling.

6. Conclusion

For the majority of delegated powers in the Bill there do not appear to be any unusual provisions. However, the powers listed above in part 3

of this paper lists three order making powers that will in accordance with section 98(2) of the Bill, not be made by statutory instrument.

The Committee may like to consider whether some or all of these Order making powers should be made by statutory instrument and subject to further scrutiny, or whether they are satisfied that these powers are used in the manner already prescribed.

Legal Services
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