

**Children and Young People Committee
School Standards and Organisation (Wales) Bill
SSO5 – Response from Michael Imperato, Solicitor**

Submission by
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Intervention in Schools Causing Concern

Where schools are falling behind, action must be taken and, importantly, needs to be seen to be taken. The evidence is that only a few local education authorities (LEA) in Wales have issued warning notices to schools. Also, it is stated that the legislation in practice is confusing. Unfortunately, it is common in education law for procedures to be spread over several different areas of legislation. This can give rise to procedural failings, resulting in delay, legal challenges, etc.

I welcome the idea of school improvement guidance for LEAs, though any such guidance on when to intervene in schools is going to have to be kept up-to-date. The educational landscape changes regularly. Such guidance will have to be updated and therefore consulted upon almost as a continuous process, particularly if it is going to include technical guidance on teaching and management techniques. It may be akin to “painting the Forth Bridge”.

It is proposed that the Welsh Minister (WM) would be able to direct LEAs to take action. The WG would be able to direct the LEA to take any action it considers appropriate and WM can issue guidance targeted at a specific school. In theory, this seems an admirable principle. If an LEA is not dealing with a failing school adequately and promptly, there should indeed be the opportunity for government intervention. However,

- How easy would it be for WM to take an informed and detailed view of what is happening on the ground in a particular school?
- How is WM going to be able to rapidly put together a detailed plan or even an informed outline plan for one individual school?
- Who is going to do this? Are educational specialists going to be brought in?
- How quickly can this be done – speed is of the essence?

The statutory guidance is going to have to be very carefully framed as to when WM intervene (where WM considers the LEAs’ policy is not likely to improve education).

What if the LEA or other interested parties oppose the WM intervention? What is the mechanism for such disagreement?

Overall, is this principle not at odds with school organization (see later), where the virtues of local knowledge, rather than WG involvement, is placed at the forefront? This is a huge contradiction running through the proposed bill.

School Organization

In summary, it is clear that the preferred option of WM is to remove the current system, whereby appeals relating to school organization are determined by WM and instead, most will be determined by a local determination panel (LDP). This is a hugely flawed proposal.

Starting the Process – The Trigger

Part of the proposal deals with the trigger for an appeal by way of objections. I agree that it does, on the face of it, seem absurd that one person, potentially with no link to the school, can be able to trigger a conflict process. On this point, I am inclined to agree with the WG proposal as to the need for 10 or more persons to object. I am not entirely sure what is meant when it is said that such person must have a “direct interest”. I would submit that this needs to be given the widest possible definition. I would not want to exclude, for example, parents of pupils who will be attending a school within the next couple of years but who are not presently there. If anything, they are probably the people with most at stake in any school reorganization. What of people with no children, living next door to a school, either one that is proposed to being closed

or one that is proposed to being built? What of governors, staff, parents of pupils of neighboring schools? It may be better to avoid trying to legislate for a “link”. Also, there seems to be something inherently wrong where a school with no pupils is also subject to the same complex procedures relating to school organization.

However, it is not quite so black and white where the school a very low number of pupils. Should such schools be treated differently? Is this not imposing an arbitrary distinction on such schools? As a matter of law, it could be seen as fettering discretion. Although very small, such schools can be disproportionately important in their communities, being a real hub for a village or area, particularly in rural Wales.

Statutory Guidance on Consultation

In my personal experience, consultation by LEAs during the school organization process is variable and patchy. Guidance on good practice is overdue. It is stated in the regulatory impact assessment (RIA) at 7.27, that guidance may not be effective as proposers (LEAs) only need to have regard to it. In my experience in judicial review (JR) cases, any LEA ignoring WM guidance would be given short shrift by a court. Guidance should be adhered to. However, the relevance and importance of any such guidance could be undermined by the LDP system. As is pointed out at RIA 7.33, if LDPs are established, the result may be that LEAs are less inclined to follow guidance closely as there will be a lack of independent scrutiny of the whole process, no accountability.

Any such guidance will have to be produced from consultation. My concern is that WM consultation is often somewhat incestuous. It will be important that parent groups and solicitors who have been involved in school organizational challenges over the last few years are tracked down and actively encouraged to partake in consultation, rather than it being dominated by LEAs and other bodies linked to the Welsh Government.

Local Determination Panel

It is suggested in the Legislative Background paper (LB) at 3.55, that this will be five persons, either local authority members or lay people. Presumably, the lay people are “worthys” from the area where the organization is taking place. How this option is described in RIA 7.31 is very instructive. It is intended to “remove requirement for an independent decision maker”. This lack of independence is the main issue. Any kind of administrative or legal process which seeks to resolve challenges between persons or organizations has to be seen to be fair and independent. This can never be the case with an LDP. A number of issues arise.

- Who will be these people?
- If it's going to include actual councilors from the LEA itself, how can that be independent?
- Who are the lay members going to be? They are probably going to be former teachers and head teachers, former councilors or local authority employees. How independent can they be?
- Who chooses them? Presumably, it's the LEA.
- Who trains them? Presumably it's the LEA.
- Who provides back office service to them, presumably the LEA?

A major concern is who is going to clerk the meetings? There are likely to be some very contentious issues arising, including complex legal arguments. The clerk from the local LEA must inherently lack independence. In these matters emotions often high, the clerk is going to have a key role and will have to be experienced and robust.

Such cases will have to have a significant back office level of support. Who's going to collate and summarise the objections and prepare papers for the LDP – presumably the LEA? These cases produce mountains of paperwork.

There is an inherent contradiction in seeking to have an independent decision-making panel whilst at the same time; such a panel is close to the local decision. Even if a member of the panel has no link with the LEA, they may have direct or indirect links with the school in question or neighboring schools which will be impacted by any decision. It's going to be virtually impossible to find an able person, with knowledge of the education system, in the immediate locality to sit on the LDP without some sort of link to the school in question or LEA. I can envisage individual LDP members facing considerable scrutiny in this context, the threat of Article 6 HRA challenges will be routinely raised.

Cost of LDP

With respect I wholly disagree with the cost benefit analysis, suggesting that the LDP will produce savings in money. It's reckoned that it cost £4,000-£5,000 per annum for WM to consider a school organization challenge. I find it astonishing to read in "Costs and Benefits" (CB) at 8.56 that the cost of a clerk, room hire, refreshments, allowances and expenses is expected to be £250 per meeting. This is so far off beam, it's embarrassing. If this process is to be properly prepared, considered, clerked and staffed by able people, the cost would be far higher. Virtually every proposal would probably need a number of meetings, such meetings will likely last all day if not for several days (this will depend on the format of the panel meetings, see below). A significant cost, which conveniently seems to have been forgotten, is the back office cost of the preparation of papers for such meetings. Many of these challenges generate huge amounts of documentation, a number of lever arch files, complex pupil number projections for both the LEA and – in opposition – from parental groups. There are complicated arguments over costings, often involving independent surveyor reports. There are complex legal arguments around issues of guidance and issues arising from the consultation. See below comments on the form of the panel hearings, costs could be greatly increased. Where a decision is made, it will have to be very carefully worded and phrased. Decisions are normally quite lengthy. They have to be legally watertight to try to avoid the subsequent JR challenge. All in all, it is a lengthy complex process, often involving vast amounts of documentation and complex analysis. If, as the evidence suggests, the average cost of WM considering such an issue is £4,000-£5,000, in my respectful view, this represents excellent value for money. Para 8.56 envisages "little administrative support, or legal advice", what kind of process is envisaged? It seems to be no more than a "rubber stamp", that indeed would be cheap but it is not, with respect, a proper process.

How many Judicial Review (JR) challenges have there been to the WM? I would expect there to be potential for far more under the LDP scheme (especially as envisaged), thus increasing costs significantly.

Speed

Lay people, members of the LDP will need to assimilate complex educational arguments. In contrast, those acting for WM are steeped in the process, guidance and educational issues and yet are also independent with no obvious vested interest. It's suggested the LDP system will be quick, but will it?

The evidence suggests that WM decisions take several months. Is the LDP process going to be any quicker, unless it's wholly arbitrary? I don't honestly think it will be. If anything, given the lack of expertise of some of the LDP members, given the lack of support they will have, given problems obtaining the availability of a suitable clerk, I can see the LDP process actually being a lengthier one than the current process.

Is the LDP going to determine the challenge at a hearing? The phrase panel and reference to a clerk suggest it will be. Are panels going to hear witnesses? Are interested parties going to have legal representation? In such circumstances the LEA is bound to want to have legal representation (probably a QC). Juggling availability of the above will make the process very cumbersome especially if hearings go part heard. The process could take months and months.

As stated above I would expect more JR challenges, thus slowing down the decision process significantly. The suggestion in RAI 7.21 that the LDP will remove "bottlenecks" is risible. It shows a total lack of understanding of the process.

Other Observations

It says at LB 3.49 and RIA 7.21 that the use of WM causes a level of bureaucracy, but one is bound to have some sort of level of bureaucracy to allow any sort of challenge to an LEA plan. The LDP is a level of bureaucracy. Therefore, this is a nothing point. In my view the LDP will prove a more cumbersome, expensive, slow and less credible level of bureaucracy compared to what currently exists.

In RIA 7.20, it says the WM is not able to have detailed knowledge of local needs and this is a drawback of the current system. But how will this tie in with WM being able to take the lead in intervening in schools (see above)? Also, most of the issues in the school organization challenge are based on broad principles, such as the LEA's interpretation of projected demands, the interpretation of guidance, castings of new school buildings. None of the cases I have personally been involved in has there been an issue arising out of any perceived lack of local knowledge of those making decisions for WM. Again, this is a nothing point.

My main concern is actually recognized at RIA 7.33, in that there is a lack of any independent scrutiny and this undermines confidence in the whole system. It is vital that fairness (justice) is

seen to be done. The LDP system will ensure that resentment of those opposing school organization will fester and remain for many years. There is no true “honest broker” in the process envisaged.

I agree with comments in respect of an independent adjudicator. This would be costly and is there enough work to justify? May be viable if linked to other functions, but why change the current process?

Conclusion on LDP

I am bound to say that LDP seems to me to be likely to be perceived as a “kangaroo court” of local worthy’s rubberstamping a decision already made by other local worthys. I do not believe this system has any merit in speeding up the process or saving costs. Indeed, I consider it is inevitable it will be more cumbersome, more costly. I consider it will give rise to far more JR challenges than are already undertaken. The LDP will make mistakes; there will be challenges as to its composition, the role and decisions of the clerk, etc. LDP’s will result in the opposite of what they are supposed to achieve. I have no doubt about this.

Why introduce a quasi legal process to replace a distinct and easily manageable administrative process? It makes little practical sense.

Finally, I consider the whole proposal to remove the role of an obviously independent adjudicator, such as WM, and introduce LDPs may be subject to challenge under the human rights legislation as it is so obviously flawed.

Annual Parents Meeting

As a school governor, I have often attended the annual governors meeting. In my personal experience, it is normally very poorly attended by parents. The school of which I have been a governor for over 15 years has tried all kinds of things to make the meeting more attractive, but none of them have worked. As stated, small governing bodies have to send out an annual report in any event.

I broadly agree with the proposals. There of course must be a mechanism for parents to push for a formal meeting. I wonder if the 10% threshold is a little on the high side, as there of course will always be a lot of apathy amongst parents and part of the problem could be that the wrong impression is being given by school management and only a small handful of parents know that there is, in reality, a problem.

On a practical level, parents will need to clearly know of their rights to trigger a meeting with governors and this right will have to be reminded regularly.

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