



Constitutional and Legislative
Affairs Committee

**Report on the Additional
Learning Needs and Education
Tribunal (Wales) Bill**

May 2017



National Assembly for Wales
Constitutional and Legislative Affairs Committee

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The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Current Committee membership:



Huw Irranca-Davies AM (Chair)
Welsh Labour
Ogmore



Nathan Gill AM
Independent
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West



David Melding AM
Welsh Conservative
South Wales Central



Dafydd Elis-Thomas AM
Independent
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01. Introduction

The Committee's remit

1. The remit of the **Constitutional and Legislative Affairs Committee** (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
2. In our scrutiny of Bills introduced in the National Assembly our approach is to consider:
 - matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
 - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
 - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
 - any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 12 December 2016, Alun Davies AM, the Minister for Lifelong Learning and Welsh Language (the Minister), introduced the **Additional Learning Needs and Education Tribunal (Wales) Bill** (the Bill) and accompanying **Explanatory Memorandum**.³
4. The National Assembly's Business Committee referred the Bill to the **Children, Young People and Education Committee** on 22 November 2016, and on 29 November 2016, set a deadline of 12 May 2017 for reporting on its general principles.⁴ The deadline was subsequently extended to 24 May 2017 by the Business Committee.
5. On 14 February 2017, we received a copy of a **letter** from the Minister to the Chair of the Children, Young People and Education Committee enclosing the **Policy intent for subordinate legislation to be made under the Bill** and the **Draft Additional Learning Needs Code** (the code).
6. We considered the Bill at our meeting on **27 February 2017**, taking evidence from the Minister and three Welsh Government officials.
7. Following that meeting, on 11 April 2017 the Minister **wrote** to provide further information.

¹ National Assembly for Wales, **Standing Orders of the National Assembly for Wales**, September 2016

² Functions under Standing Order 21.8 are the responsibility of the **External Affairs and Additional Legislation Committee**

³ Welsh Government, **Additional Learning Needs and Education Tribunal (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes**, December 2016

⁴ Business Committee, **Report on the timetable for consideration of the Additional Learning Needs and Education Tribunal (Wales) Bill**, December 2016

Background

8. The Explanatory Memorandum accompanying the Bill states that the Bill:

“... makes provision for a new statutory framework for supporting children and young people with additional learning needs (ALN). This replaces existing legislation surrounding special educational needs (SEN) and the assessment of children and young people with learning difficulties and/or disabilities (LDD) in post-16 education and training. The Bill also continues the existence of the Special Educational Needs Tribunal for Wales, which provides for children, their parents and young people to appeal against decisions made by the local authority in relation to their or their child’s ALN, but renames it the Education Tribunal for Wales.”⁵

9. The Welsh Government states that the Bill aims to create:

- a unified legislative framework to support all children of compulsory school age or below with additional learning needs (ALN), and young people with ALN in school or further education (FE);
- an integrated, collaborative process of assessment, planning and monitoring which facilitates early, timely and effective interventions; and
- a fair and transparent system for providing information and advice, and for resolving concerns and appeals.⁶

10. In order to achieve these three overarching objectives, the Explanatory Memorandum sets out ten core aims within which the Bill’s provisions have been developed.⁷

⁵ Explanatory Memorandum, paragraph 1.1

⁶ Explanatory Memorandum, paragraph 3.3

⁷ Explanatory Memorandum, paragraph 3.4

02. Legislative competence

11. The Explanatory Memorandum states that the National Assembly has the legislative competence to make the provisions in the Bill by virtue of Part 1 of Schedule 7 to the *Government of Wales Act 2006*, specifically:

- Paragraph 5: Education and training;
- Paragraph 9: Health and health services; and
- Paragraph 15: Social welfare.⁸

12. The Explanatory Memorandum indicates that the Bill supports Human Rights, in particular the *United Nations Convention on the Rights of the Child* (UNCRC).⁹

13. When questioned, the Minister stated his belief that the Bill is within the competence of the National Assembly and confirmed he had discussed these issues with the UK Government. He said:

“...I am confident that the Bill is entirely within competence. We’ve had conversations, clearly, with our counterparts in the United Kingdom Government about cross-border issues. We have absolute confidence that the whole of this Bill is entirely within competence.”¹⁰

14. When asked whether any of the provisions in the Bill would be outside competence if the relevant parts of the *Wales Act 2017* were already in force, the Minister told us:

“...it is fair to say as well that the 2017 Act will change the competence of the National Assembly, and that could have an impact on any future piece of legislation. We are currently reviewing any implications of the 2017 legislation on this Bill.”¹¹

15. He added that there were concerns relating to the “area dealing with the tribunal, where the Wales Act does cover areas around the exercise of Welsh tribunals”.¹² The Minister subsequently *wrote* to us on 11 April 2017 regarding the Welsh Government’s analysis of the *Wales Act 2017* and its implications on the Bill. He told us:

“As I indicated during the Committee session in February, the 2017 Act’s competence provisions are not relevant to the Bill. The competence provisions of the Government of Wales Act 2006, as currently in force, continue to apply in respect of Bills that complete stage 1 of scrutiny by the principal appointed day. That day has not yet been appointed. It can only be appointed in regulations made under section 71(3) of the 2017 Act following consultation with the Llywydd and the Welsh Ministers, and then must be at least four months after the regulations are made.”

⁸ Explanatory Memorandum, paragraphs 2.1-2.2

⁹ Explanatory Memorandum, paragraph 8.585

¹⁰ Constitutional and Legislative Affairs (CLA Committee), 27 February 2017, RoP [9]

¹¹ CLA Committee, 27 February 2017, RoP [12]

¹² CLA Committee, 27 February 2017, RoP [14]

16. The Minister stated that analysis of the Part 3 provisions in the *Wales Act 2017* does not suggest that its impact on the Bill (in terms of requiring amendments) is significant and he indicated that he would consider one potential amendment to the Bill in relation to the cross-deployment of Tribunal members as a result of the *Wales Act 2017*. We consider this further in Chapter 4.

17. In terms of the Bill's impact on human rights issues, the Minister told us he was "confident that this Bill takes account of all the obligations that we have according to the competence of the National Assembly".¹³

Our view

18. We note that no issues have been raised with the Minister by the UK Government regarding the National Assembly's ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

19. We also note the assessment of the Bill's compatibility with the UNCRC included in the Explanatory Memorandum. We note that human rights are engaged.

20. We do have some concerns regarding human rights in relation to how the power in section 45(2)(d) of the Bill could be used in the future to exclude further groups of learners with ALN from mainstream education. We highlight these concerns in Chapter 4.

¹³ CLA Committee, 27 February 2017, RoP [16]

03. General observations

Balance between what is on the face of the Bill and what is left to subordinate legislation

21. We asked the Minister how he decided what to put on the face of the Bill and what to leave to regulations. He told us:

“There will always be tension between what is in active primary legislation and what is achieved through regulation. I’ve been a Member of this committee for long enough to know that tension is exercised on a regular basis. Now, in terms of looking at what we’re seeking to do here, it’s quite a complex piece of policy area, and what we’re seeking to do is to ‘decomplexify’, if you like, whilst at the same time enable us to have a clear and logical approach to both the structure of the Bill, the structure to the overall legislation, and then come to a conclusion on where we have the areas that need to be covered in primary legislation on the face of the Bill, and those areas which are best dealt with by secondary legislation.”¹⁴

22. The Minister explained that he published the code to inform the process of scrutiny, adding that it is:

“...the statutory guidance that will deliver and implement the Bill we have in front of us.”¹⁵

23. He went on to say:

“I did that in order to aid exactly this sort of scrutiny. Are the 200 pages of draft guidance—they’re statutory guidance—in the code, is it there to provide the best possible illustration of the sort of regulations we will seek to make under this Bill, and is it right and proper that all of that is kept as secondary legislation, or should some of that be on the face of the Bill? That is part of the reason why we’ve sought to inform the process of scrutiny by publication of the code and to test that as a part of the parliamentary processes we’re going through at the moment. I hope that we’ve got the balance right. I’m very aware, as a Minister, that we should put into regulation those matters that should properly be dealt with in regulation, and all other matters should be on the face of the Bill.”¹⁶

Policy intent for subordinate legislation

24. The policy intent for subordinate legislation document indicates that the Welsh Government has no intention of using in the near future eight of the regulation-making powers it is taking.¹⁷

¹⁴ CLA Committee, 27 February 2017, RoP [22]

¹⁵ CLA Committee, 27 February 2017, RoP [22]

¹⁶ CLA Committee, 27 February 2017, RoP [22-23]

¹⁷ Welsh Government, **Additional Learning Needs and Education Tribunal (Wales) Bill: Policy intent for subordinate legislation to be made under the Bill**, February 2017

25. The relevant provisions are:

- Section 12(7)(c) – enables regulations to set out other forms of provision (aside from Additional Learning Provision, a place at a particular school or institution or other institution or board or lodging) which must be described in an Individual Development Plan (IDP);
- Section 36(2) – enables regulations to provide for paragraph (a) of the definition of “home authority” in section 562J (1) of the *Education Act 1996* to apply (with modifications) for the purposes of Part 2 of the Act;
- Section 45(2)(d) – regulations may provide for additional circumstances where a local authority is not required to secure education for a child in a mainstream maintained school;
- Section 50(3) – enables regulations to be made providing exemptions to the requirement for a local authority to secure education or training at an independent special post 16-institution in Wales or England only if the institution is included on a list made by the Welsh Ministers under section 50;
- Section 60(1) – enables regulations to be made allowing a local authority to supply goods and services in relation to Additional Learning Provision;
- Section 68(4) - regulations may make provision corresponding to any provision of Part 1 of the *Arbitration Act 1996*;
- Section 82(c) - inserts a regulation-making power into section 579 of the *Education Act 1996* to enable further provision to be made about the meaning of references to a person being “in the area” of a local authority in Wales; and
- Section 86(8) – enables regulations to be made amending the definition of NHS body so that it includes a Special Health Authority.

26. When asked why this approach was being taken and if this was an indication that the powers were not needed for the implementation of the policy of this Bill, the Minister said:

“Now, I understand that the committee may well argue that that should properly be done via additional primary legislation, and that a further Bill should be brought forward to achieve that objective, but it would be my argument that there isn’t going to be a further Bill on this matter, either in this Assembly or in the early years of the next one, in all probability. Therefore, we do need a piece of legislation that is not only futureproof, but enables us to have the flexibility to deliver on our policy objectives over the coming years.”¹⁸

27. When asked if the intention of these Regulations is to provide further policy-making flexibilities, the Minister responded:

“I think it gives us the flexibility to implement policy in changing circumstances. I think that’s the way I would prefer to characterise it. But, clearly, these are, again, reasonably narrowly defined areas, not wide and broad-ranging powers to make regulation in a number of ill-defined areas. They are areas—I think access to information is one you might quote—where the

¹⁸ CLA Committee, 27 February 2017, RoP [37]

actual power to make regulation is reasonably narrow. It isn't a broad power that we're seeking to take."¹⁹

28. The Minister proceeded to outline that the regulation-making powers would not “alter the policy structure or the architecture of the legislation” and that they would enable the Welsh Government to “deliver the objectives of the legislation in a more coherent way”.²⁰

29. When asked, the Minister indicated that the Regulations would be subject to the negative procedure.²¹

30. In response to the suggestion that the affirmative procedure would provide more reassurance that the regulation-making powers are not a way of changing policy without the need to use primary legislation, the Minister said, “I’m happy to give that due consideration”.²²

Our view

31. Our general view is that any regulation-making power should have a purpose.

32. We note the Minister’s comments regarding the eight regulation-making powers that he has indicated he does not intend to use in the future and that these powers are relatively narrow.

33. We are concerned by the approach taken by the Welsh Government in taking power to make regulations where it is not currently anticipated that the powers will be exercised in the near future. In addition, it is not a convincing argument to say that there will be no further Bill on this area and that as a result, regulation-making powers should be added to provide the Welsh Government with flexibility. If an Act of the Assembly becomes out of date quickly for whatever reason (including unexpected circumstances) and it requires significant change as a result, it should be achieved using further primary legislation.

34. It is our view that some of the intended regulation-making powers could be used to change policy. We are particularly concerned with sections 45(2)(d), 82(c) and 86(8). We discuss these different provisions in Chapter 4.

Recommendation 1. We recommend that the Minister justifies why the regulation-making powers under sections 12(7)(c), 50(3), 60(1) and 68(4) are needed in the Bill.

¹⁹ CLA Committee, 27 February 2017, RoP [39]

²⁰ CLA Committee, 27 February 2017, RoP [41]

²¹ CLA Committee, 27 February 2017, RoP [43]

²² CLA Committee, 27 February 2017, RoP [45]

04. Observations on specific powers to make subordinate legislation

Background

35. The Bill includes 32 powers permitting the Welsh Ministers to make subordinate legislation (mainly in the form of regulations). The rationale for the use of these powers and for the Assembly procedure attached to them is contained in Chapter 5 of the Explanatory Memorandum.

36. Of the 32 powers to make subordinate legislation:

- 12 are subject to the affirmative procedure;
- 16 are subject to the negative procedure;
- 1 is subject to the negative draft procedure;
- Section 84(1) is subject to the affirmative procedure if amending primary legislation, otherwise it is negative; and
- 2 have no procedure as they are applicable to commencement orders.

37. Our scrutiny session focused on those powers of most interest to us and our consideration below considers the specific matters that we wish to draw to the attention of the National Assembly.

Section 4 – Additional learning needs code

Section 5 – Procedure for making the code

38. Section 4 places a duty on the Welsh Ministers to issue and publish a code on ALN. Section 4(2) of the Bill highlights the areas in which the code may provide guidance in the exercise of the functions under Part 2.

39. According to the Explanatory Notes, the code:

“... will provide guidance to which key stakeholders listed in this section must have regard when exercising their functions under this Bill in relation to ALN. This means that the guidance in the code should be adhered to unless there is a good reason to depart from this”²³

40. Section 4(4) of the Bill sets out those sections and areas of the Bill for which the code may impose requirements on local authorities and governing bodies of maintained schools or institutions in the further education sector.

41. Section 5 of the Bill sets out a draft negative procedure for making the code. The procedure requires the Welsh Ministers to consult before the code can be issued or revised. If, following consultation, the Welsh Ministers wish to proceed with the draft code either in its original form or as amended, they must lay a draft before the Assembly for a period of 40 days. The code cannot be issued if before the end of the 40 day period, the Assembly resolves not to approve it. If there is no such resolution the Welsh Ministers must issue the code which will be commenced via Order.

²³ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 22

42. The Minister explained the purpose of the code and why it was not published at the same time as the Bill was introduced:

“We published a code in order to aid the parliamentary scrutiny of the Bill and to enable the National Assembly and others to consider the meaning of the Bill and the way that the Bill would be implemented in real terms. So, clearly, the priority was to publish the Bill and to ensure that the Bill was available to the National Assembly according to the timetable we’d given an undertaking to do so. So, the Bill had to be published first.”²⁴

43. He added:

“It’s very much a draft code. Clearly, the actual code will be drafted when the legislation is complete and when this Bill reaches the statute book. We’ll then be able to publish a new draft based on the final version of this legislation and that code will itself then be subject to scrutiny.”²⁵

44. The Minister sought to clarify the purpose of the draft negative procedure in section 5 for approving the draft code, describing trying to strike a balance between two elements: public consultation and parliamentary scrutiny.²⁶

45. The Minister confirmed that he had given an undertaking to the Children, Young People and Education Committee that he will provide the opportunity to consider the code in due course, ensuring:

“the widest possible and most vigorous scrutiny available to us, and we’re happy to continue to work with the National Assembly to ensure that happens.”²⁷

46. When asked why the code is subject to a different procedure to the affirmative procedure attached to the guidance it replaces (the Special Educational Needs Code), the Minister said:

“The old special educational needs code was delivered using different legislation at a different time, and was done in a different way, but I recognise that that’s no argument for doing things differently today. I would be content for the National Assembly, were it to be so minded, to determine a different process of scrutiny if that is what the National Assembly wishes to do. What we’re doing in section 5 is outlining what we believe is at the moment the most appropriate means of enacting this secondary legislation.”²⁸

47. We asked why some of the content of the code could not be subject to regulations or put on the face of the Bill. The Minister told us:

“I don’t think it would have been appropriate or practical to include much of what is in the code on the face of the Bill, and I hope that we’ve created a Bill

²⁴ CLA Committee, 27 February 2017, RoP [56]

²⁵ CLA Committee, 27 February 2017, RoP [57]

²⁶ CLA Committee, 27 February 2017, RoP [59]

²⁷ CLA Committee, 27 February 2017, RoP [59]

²⁸ CLA Committee, 27 February 2017, RoP [61]

that has the architecture, the framework, the structure, in place, and a code that then delivers that in practice but delivers it in a way that maintains a level of flexibility and enables us to make adjustments to that code as needed without needing to go back to primary legislation. Now, there will always be tension there, as I've said, and I'm happy to consider elements of that tension.”²⁹

48. In further questioning the Minister said:

“Clearly, if the National Assembly believes that this should go through the positive or the affirmative procedure, then I would not be objecting to that in any way at all. But I would also say...that I actually think we need to go further than that sometimes, and not simply go through the process, but actually enable Members to contribute as we're developing and as we're drafting that piece of secondary legislation.”³⁰

Our view

49. Whilst the Committee has not scrutinised the code itself, we are concerned as to the balance that has been struck between what is on the face of the Bill, what is in regulations and what is contained in the code.

50. As a general rule, provisions of a code are not to be treated in the same way as provisions of an Act or statutory instrument, but neither are they to be treated merely as advice. The effect of each code must be construed separately in the light of express provisions about it and its general context.

51. The status of the ALN code is unclear as it includes a mixture of both requirements and guidance, which could lead to confusion for both those professionals and members of the public who will use it. For example, there is no detail on the face of the Bill concerning the preparation, review and content of an individual development plan (IDP). Instead Chapters 10 and 11 of the code set out detailed provision as to timings and the content of plans, with the code stating in respect of Chapter 10 that it sets out mandatory duties, further requirements and guidance.³¹

52. We cannot see any reason why requirements set out in the code could not instead be in the form of regulations. This would ensure that local authorities and governing bodies were clear that such provisions had legislative effect.

53. We note that the suggested procedure for section 5 of the Bill does not follow the same procedure as the existing Special Educational Needs Code which it replaces. The Special Educational Needs Code is approved by way of the affirmative procedure. It is our view that the negative procedure would not provide sufficient scrutiny for this document which will be pivotal to the delivery of the new agenda for Additional Learning Needs.

54. We agree with the Minister's approach to developing the ALN code and in reaching this view we wish to commend the Minister on his comments around encouraging Assembly Members to contribute to the process of developing this guidance. This is an example of good practice and should be followed by the Welsh Ministers at appropriate opportunities.

²⁹ CLA Committee, 27 February 2017, RoP [63]

³⁰ CLA Committee, 27 February 2017, RoP [73]

³¹ Draft Additional Learning Needs Code, paragraph 10.1

Recommendation 2. We recommend that the Minister reconsiders whether the requirements which may be contained in the code pursuant to section 4(4) of the Bill should instead be contained either on the face of the Bill or in regulations.

Recommendation 3. We recommend that the Minister should table an amendment to the Bill, applying a super-affirmative procedure to the making of a code under section 5.

55. In our view applying a super-affirmative procedure to the making of the code would allow for its detailed scrutiny by stakeholders and Assembly committees, before the National Assembly is required to vote on its contents in Plenary.

Section 13 – Key terms in relation to looked after children

Section 14 – Amendments to the Social services and Well-being (Wales) Act

56. Section 13 and 14 of the Bill contain provisions on ALN which are to apply in the case of children looked after by a local authority in Wales. Generally, looked after children have care and support plans which include a personal education plan (PEP) by virtue of the *Social Services and Well-being (Wales) Act 2014*. In the case of such children (subject to exceptions), the authority that looks after the child is to be responsible for any decision on ALN, maintaining an IDP and incorporating it into the child's PEP.³²

57. Section 13(2) includes regulation-making powers to prescribe categories of looked after children who are not to be treated as looked after by a local authority for the purposes of the Act.³³

58. Section 14(2) includes regulation-making powers to amend the *Social Services and Well-being (Wales) Act 2014* so that care and support plans (as outlined in section 83 of that Act) include a PEP, but preserve the flexibility to make exceptions when one might not be necessary or appropriate.³⁴

59. For regulation-making powers under section 13(2), the Explanatory Memorandum notes that the negative procedure is being used as Regulations prescribe:

“...technical and administrative matters, which may be updated from time to time. Children who fell within any new category of exclusion would not be deprived of support for their ALN. Rather, they would be supported via the usual IDP process.”³⁵

60. The negative procedure is also proposed for regulations made under section 14(2) in order to align with the existing procedure set out in the *Social Services and Well-being (Wales) Act 2014*.³⁶ The policy intent document states these regulations are intended “to maintain the status quo i.e. so that the exceptions to the requirement to secure PEPs for looked after children are replicated”.³⁷

61. When asked why the exemptions in section 13(2) could not be put on the face of the Bill, the Minister said:

³² Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 47

³³ Policy intent document, page 6

³⁴ Explanatory Memorandum, Chapter 5, page 68

³⁵ Explanatory Memorandum, Chapter 5, pages 67-68

³⁶ Explanatory Memorandum, Chapter 5, page 67

³⁷ Policy intent document, page 8

“I think most of the areas that deal with the needs of looked-after children are on the face of the Bill...what we’re seeking to do is to integrate the individual development plan into a personal education plan, and to ensure that we integrate this piece of legislation with the existing social services structures. So, I hope that we have achieved that, not just by section 13, but other sections. Now, clearly, what we’re seeking to in 13(2) is to enable us to prescribe those categories of looked-after children who will not be treated as looked-after children by local authorities, in order to be able to be more precise in how this legislation is delivered, and how this legislation is implemented, and how it is integrated with the overall social services regimes.”³⁸

62. We asked a similar question of the regulation-making powers set out in section 14(2). The Minister told us:

“I think the overall approach that we’ve taken in terms of seeking to produce this legislation is to preserve existing flexibility, to ensure that, although most looked-after children have a personal education plan as part of their statutory care and support plan, and that is already determined by, I think, section 83 of the social services Act, then we will be able to fit this into that existing piece of legislation. So, what parts of section 14 do is to insert requirement for a personal education plan from the secondary legislation that’s present into the primary legislation in section 83 of the 2014 Act. That is the purpose of what we’re trying to do here.”³⁹

63. An accompanying Welsh Government official expanded this point, saying:

“...the objective behind the looked-after children provisions is to streamline their general education planning, so that the planning for ALN is integrated within the social services regime for looked-after children. Under that, the requirement to have a personal education plan is currently in secondary legislation under the Social Services and Well-being (Wales) Act 2014. So, what section 14 does is it moves the requirement for looked-after children to have a personal education plan into the Act itself, so up to primary legislation level, but to preserve that existing flexibility for some children not to have one—it gives the regulation power in section 14 to create exceptions for that. An example of one of the current exceptions to the requirement to have a personal education plan is for children who are on short-term breaks, and that’s defined in the regulations. So, section 14 is seeking to preserve that flexibility, in case situations might change. They might want to, for example, change the definition of someone on a short-term break by changing the number of weeks it counts to qualify, or not qualify. So, that’s what section 14 seeks to do.”⁴⁰

³⁸ CLA Committee, 27 February 2017, RoP [80]

³⁹ CLA Committee, 27 February 2017, RoP [86]

⁴⁰ CLA Committee, 27 February 2017, RoP [88]

64. The Minister added:

“What I think we were seeking to achieve here, in terms of the legislation being written and drafted in the way that it is, is to ensure that this legislation dovetails easily into the existing legislative and statutory framework. Now, it would have been possible...to start tinkering with parts of that, and put in various different parts of that instrument onto the face of the Bill. It certainly is possible to do that. But, by doing so, we would be starting then to erode some of the flexibility that we have as part of the overall existing statutory framework. And the purpose of this was to add to, to dovetail into, that statutory framework, rather than to change it. Now, I accept that there can be more than one view on that.”⁴¹

65. We asked the Minister if he would consider using the affirmative procedure for both these regulations in the first instance (given the lack of detail provided on the face of the Bill in relation to exemptions), followed by the negative procedure if dealing with minor details thereafter. The Minister indicated that he was content to do so.⁴²

66. The Minister subsequently **wrote** to us on 11 April 2017. He told us:

“The regulation making power at section 13 (2) of the Bill follows from the regulation making power in section 14 (2). The Bill’s provisions for looked after children are predicated upon the children having personal education plans. The regulations made under section 13 (2) will enable categories of looked after children for whom no personal education plan is required by virtue of regulations made under the 2014 Act, to be excluded for the purposes of the Bill’s looked after children provisions. In other words, it provides the means by which the two regimes can be aligned.”

67. The letter also stated:

“The procedure for making the regulations under section 13 (2) and 14 (2) is negative to align with the procedure applicable to the powers in the 2014 Act relating to planning for looked after children (also negative, under which the 2015 Regulations were made...I would also add that I consider the negative procedure to be appropriate for the section 13 power. If a looked after child is not treated as such for the purposes of the Bill, the child will come within the general provisions of the Bill (as other children do), rather than the specific ones for looked after children”

Our view

68. We are not convinced that, in relation to section 13(2) of the Bill, the Regulations deal with solely technical administrative matters. Therefore, in the absence of information being on the face of the Bill, we believe it appropriate to apply the affirmative procedure to regulations being made under section 13(2) in the first instance, followed by the negative procedure thereafter. We believe a similar approach is appropriate in relation to regulations made under section 14(2).

⁴¹ CLA Committee, 27 February 2017, RoP [90]

⁴² CLA Committee, 27 February 2017, RoP [91-92]

Recommendation 4. We recommend that the Minister should table an amendment to the Bill applying the affirmative procedure in the first instance to regulations made under sections 13(2) and 14(2), followed by the negative procedure on subsequent occasions.

Section 30 – Reconsideration by local authorities of decisions of governing bodies under section 29

69. Section 30 of the Bill enables a child, a child’s parent or a young person to request that a local authority (which is responsible for the person) reconsiders a school governing body’s decision to cease to maintain an IDP.⁴³

70. Section 30(1)(b) contains regulation-making powers to prescribe a period for such a request to be made.⁴⁴ According to the Explanatory Memorandum, the Regulations are subject to the negative procedure because they are “technical and administrative” and “unlikely to be controversial”. It is also noted that the period prescribed is subject to change.⁴⁵

71. We explored why no timescale has been placed on the face of the Bill with varying powers set in regulations. The Minister told us:

“I’m not sure that would achieve very much, quite honestly. But, you know, what we were seeking to do was to ensure that a timescale for reconsideration requests should be a part of the overall determination and description and structure of the IDP, rather than to treat this individual issue in isolation. That was our intention, so that all of this would be covered within the code.”⁴⁶

Our view

72. We do not understand why the power to impose some timescales, such as those for preparing the IDP, is left to the code, whilst others such as the power in section 30(1)(b) will be set out in regulations. As we have already indicated at paragraph 51, we consider that this could lead to confusion.

73. We believe that a timescale is necessary on the face of the Bill for regulations made under section 30(1)(b). The right to review a decision will be exercised by children and/or their parents and young people. It therefore needs to be clear on the face of the legislation the date by which any appeal must be made.

Recommendation 5. We recommend that the Minister should table an amendment to section 30 to place a timescale for making an appeal on the face of the Bill. Any subsequent change to the timescale should be achieved by regulations subject to the affirmative procedure.

Section 36 – Meaning of “detained person” and other key terms

74. Section 36 gives meaning to the term “detained person” and defines other related key terms used in the Bill. Section 36(2) allows for regulations to modify, for the purpose of Part 2 of the Bill, the

⁴³ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 77

⁴⁴ Explanatory Memorandum, Chapter 5, pages 68-69

⁴⁵ Explanatory Memorandum, Chapter 5, pages 68-69

⁴⁶ CLA Committee, 27 February 2017, RoP [96]

definition (in wider education law) of home authority in relation to looked after children and to apply other modifications to the definition which may be made under another power.⁴⁷

75. It is stated in the policy intent document that it is not currently anticipated that this power will be exercised in the near future.⁴⁸ This regulation-making power is one of the eight outlined in paragraph 25.

76. The Explanatory Memorandum states that the Regulations are to be subject to the negative procedure as they:

“Prescribe minor or ancillary matters, which may be updated from time to time. The regulations will provide technical details to support the principles set out in the Bill.”⁴⁹

77. The Minister explained the use of the negative procedure in this instance:

“This is a power that is linked to the Education Act 1996 and there are existing powers within that, which are subject to the negative procedure. We feel that it’s appropriate to be consistent in terms of the procedure that we use for the execution of these powers.”⁵⁰

78. When asked if he had considered if the affirmative procedure may be more appropriate, the Minister told us:

“...we have given consideration to these matters on all of these different powers and regulations. Clearly, on some occasions, we might have come to different conclusions—I accept that, but what we believe is that consistency is also important in terms of understanding and implementing law as well.”⁵¹

Our view

79. We note that this is a power the Minister does not intend to use. However, if that position changes it would be appropriate in our view to provide the National Assembly with the right to consider how the definition is changed, particularly as it is difficult to judge whether the change would be significant.

Recommendation 6. We recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 36(2).

⁴⁷ Explanatory Memorandum, Chapter 5, pages 69-70

⁴⁸ Policy intent document, page 10

⁴⁹ Explanatory Memorandum, Chapter 5, pages 69-70

⁵⁰ CLA Committee, 27 February 2017, RoP [98]

⁵¹ CLA Committee, 27 February 2017, RoP [100]

Section 45 – Duty to favour education for children at mainstream maintained schools

80. Section 45 requires that where a child of compulsory school age with ALN should be educated in a school, the local authority must ensure that the child is educated in a mainstream maintained school, whilst recognising that it might sometimes be appropriate to educate them elsewhere.⁵²

81. Regulations under section 45(2)(d) allow the Welsh Ministers to set out further circumstances in which local authorities would not be under a duty to favour mainstream maintained education for a child with ALN. The Explanatory Memorandum proposes use of the negative procedure for the Regulations as the “subject matter of the subordinate legislation is relatively minor in detail”.⁵³

82. The policy intent document states that it is not currently anticipated that this power will be exercised in the near future.⁵⁴ This regulation-making power is one of the eight outlined in paragraph 25.

83. The policy intent document also states that there may be a need to add in an exception in response to evidence based practice.⁵⁵

84. We asked the Minister why, given that this section had already been re-drafted in light of the consultation on a draft Bill, he feels that a power to provide for other instances where children could be excluded from mainstream education is appropriate. He told us:

“...to ensure that, if a new category of school were to be created in Wales, we could change the legislation to ensure that that could be covered. If free schools, for example, were introduced in Wales, we could amend the legislation to ensure that such schools would be captured under this legislation.”⁵⁶

85. When asked if this would represent a significant policy shift and therefore whether the negative procedure is appropriate, the Minister responded:

“...I don’t think that the affirmative procedure is necessary in this case. We don’t see that this is a change of policy; it means that we continue to implement policy under new and different conditions.”⁵⁷

Our view

86. We are surprised at the Minister’s rationale for including the power. In the event that a new category of school, such as ‘free schools’, were to be introduced in Wales, we would expect to see this change effected by way of primary legislation. Any such primary legislation would need to make amendments to all relevant education legislation including this Bill.

87. Although human rights legislation does not oblige states to make education of a particular type or quality available the European Court of Human Rights has made it clear that the integration of children into mainstream schools should be the norm rather than the exception. We are concerned at

⁵² Explanatory Memorandum, Annexe 1: Explanatory Notes, paragraph 100

⁵³ Explanatory Memorandum, Chapter 5, pages 72-73

⁵⁴ Policy intent document, page 11

⁵⁵ Policy intent document, page 11

⁵⁶ CLA Committee, 27 February 2017, RoP [105]

⁵⁷ CLA Committee, 27 February 2017, RoP [107]

how this power could be used in the future to restrict further learners' access to mainstream education.

88. If a new category of school were introduced in Wales we would expect the Minister to assess at that time the powers needed for this new policy position, and therefore do not believe these regulation-making powers are necessary in this Bill.

89. In the event that the Minister remains of the view that such a power is required, we do not consider that the negative procedure is appropriate; use of the affirmative procedure would go some way to alleviating our concerns.

Recommendation 7. We recommend that the Minister should table an amendment to the Bill, removing the power for the making of regulations under section 45(2)(d). At the very least, the existing power in the Bill should be subject to the affirmative procedure.

Section 58 – Duties to provide information and other help

90. Section 58 provides that when local authorities request information or help from certain public bodies in order to exercise their functions under this Part in relation to children and young people with ALN, those requests are complied with.⁵⁸

91. Section 58(5) contains regulation-making powers to set out a prescribed period in which the person must comply with a request, and for exceptions to apply to this prescribed period. The Explanatory Memorandum further states that the timescales may need to change from time to time in the light of evidence based practice and changing practical considerations, and notes that the negative procedure is being used.⁵⁹

92. The policy intent document outlines the intention of the Regulations:

“The current intention would be to use the power in a similar way to the existing regulations on special education needs (The Education (Special Educational Needs) (Wales) Regulations 2002), which require compliance with a request to a health authority for a contribution to a statutory assessment within six weeks of the date on which the request is received, subject to exceptions. However, it might be appropriate to change this timescale in the future.”⁶⁰

Our view

93. We believe that the prescribed period in which a person must comply with a request for information under section 58 (and the exceptions that may apply) should be set out on the face of the Bill, particularly as that period—six weeks—has already been set out in the policy intent document. This would provide certainty for those under a duty to comply and would represent a more transparent approach.

Recommendation 8. We recommend that the Minister should table an amendment to section 58(5) to place the prescribed period (and any exceptions that apply) in which a person must comply with a request for information on the face of the Bill. Any subsequent

⁵⁸ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 117

⁵⁹ Explanatory Memorandum, Chapter 5, page 72

⁶⁰ Policy intent document, page 14

change to the prescribed period should be achieved by regulations subject to the affirmative procedure.

Section 69 – Compliance with orders

94. Section 69 of the Bill enables the Welsh Ministers to prescribe in regulations a period within which the governing body or local authority concerned must comply with an order of the Education Tribunal for Wales, beginning with the date on which it is made.⁶¹

95. The Explanatory Notes add that if the Education Tribunal for Wales makes an Order (e.g. requiring a local authority to revise an IDP), the governing body or the local authority concerned must comply with the Order before the end of the period (if any) prescribed in regulations, beginning with the date on which it is made.⁶²

96. The Explanatory Memorandum notes that the negative procedure is being used as the Regulations prescribe technical and administrative matters, which may be updated from time to time.⁶³

97. The policy intent document indicates that “regulations made under this power are likely to be similar to those currently set out in the SENTW Regulations 2012”.⁶⁴

Our view

98. In our view, if the Minister is clear about what are the timescales for complying with an order of the Education Tribunal for Wales, then it is useful and practical to prescribe these on the face of the Bill.

Recommendation 9. We recommend that the Minister should table an amendment to section 69 to place a timescale for complying with an order of the Education Tribunal for Wales on the face of the Bill. Any subsequent change to the timescale should be achieved by regulations subject to the affirmative procedure.

Section 79 – Constitution of the Education Tribunal for Wales

Section 80 – The President and members of the panel

99. Section 79 of the Bill sets out how the Education Tribunal for Wales is constituted. According to the Explanatory Memorandum, regulations made under this section will provide administrative detail that may need to be updated from time to time in response to changing policies in relation to how the tribunals more generally operate.⁶⁵

100. Section 80 sets out the conditions and requirements under which a person may be appointed as President, and appointing a person as member of the legal chair panel or lay panel. The delegated powers in section 80(2) enable the Welsh Ministers, with the agreement of the Secretary of State, to prescribe requirements that a person must satisfy to be appointed as a member of the lay panel.⁶⁶

⁶¹ Explanatory Memorandum, Chapter 5, page 76

⁶² Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 135

⁶³ Explanatory Memorandum, Chapter 5, page 76

⁶⁴ Policy intent document, page 17

⁶⁵ Explanatory Memorandum, Chapter 5, pages 78-79

⁶⁶ Policy intent document, page 20

101. We asked the Minister why the agreement of the Secretary of State is needed to make regulations under both sections. He told us:

“At the moment, we need the agreement of the Secretary of State to make these appointments and, I believe, under the new legislation, we would need the consent of a Minister of the Crown. We are still considering this issue at the moment, so there is a slight health warning there that this issue is still being considered. But, at the moment, we would need the agreement of the Secretary of State, and as we have no policy to change that, we are working to the same policy in this legislation.”⁶⁷

102. Still referring to the *Wales Act 2017*, the Minister added:

“...we are working within the boundaries of this legislation. At the moment—that’s the situation as it was and the situation as it currently is. To change that, you would have to have consent to do that, because we would be changing the powers of the Secretary of State.”⁶⁸

103. The Minister wrote to us on 11 April 2017 indicating a potential amendment required to the Bill as a result of the *Wales Act 2017*. He told us:

“Analysis of the Part 3 provisions in the 2017 Act does not suggest that its impact on the Bill (in terms of requiring amendments) is significant. However, I am considering the need for an amendment to the Bill in order to take into account the amendment made to section 333 of the 1996 Act by section 62(4) of the 2017 Act.

Our Bill currently repeals section 333 and in doing so, would remove the new provision for the cross-deployment of Tribunal members. It well may be that we will wish to retain the ability of members of other Welsh Tribunals to move around to avoid any gaps when Education Tribunal members are not available, thus allowing proceedings to continue.”

104. He also confirmed the arrangements for the Secretary of State to agree regulations under sections 79 and 80:

“The Secretary of State functions in those sections exist in the current arrangements in the 1996 Act; so the provisions in the Bill are a restatement of existing law.

As I noted during my appearance before Committee in February, if we wanted to remove these existing functions we would have to seek and obtain Minister of the Crown consent to do so.”

Our view

105. We note the Welsh Government’s view regarding the impact of the *Wales Act 2017* on the Bill. We welcome the Minister’s intention to potentially table an amendment to the Bill in relation to cross-

⁶⁷ CLA Committee, 27 February 2017, RoP [115-116]

⁶⁸ CLA Committee, 27 February 2017, RoP [120]

deployment of Tribunal members and trust he will be in a position to confirm his intention during the Stage 1 debate.

106. We also note the Minister's explanation as to why the agreement of the Secretary of State is needed in order to make regulations under sections 79 and 80.

Section 82 – Meaning of “in the area” of a local authority

107. Section 82 of the Bill inserts a regulation-making power into section 579 of the *Education Act 1996* which will allow further provisions to be made about the meaning of “in the area” of a local authority in Wales.⁶⁹ This will not just apply to additional learning needs but will apply to the Education Acts generally. This regulation-making power is one of the eight outlined in paragraph 25.

108. The power would for example allow the Welsh Ministers to make changes to who is considered to be “in the area” of a local authority for the purpose of school attendance orders (*section 437 of the Education Act 1996*) or a local authority's duty to identify children not receiving education (*section 463A of the Education Act 1996*).

109. The regulation-making power under this section is subject to the negative procedure. The Explanatory Memorandum states this is because:

“The main provision is set out in the Act and this power allows for further detail to be made which is likely to be administrative, dealing with which local authority is responsible for a person.”⁷⁰

110. The policy intent document adds that “it is not currently anticipated that this power will be used in the near future”.⁷¹

111. We asked the Minister why he felt it appropriate for a Bill concerned with ALN to include such a power which will apply to education law generally. He told us:

“Because in terms of ensuring a child's education, what we want to ensure is coherence and consistency and that the young person or the child's home local authority is responsible for both the ANL matters and any other relevant educational needs or functions. So, what we want to do is to ensure that we have consistency and coherence. We want to ensure that we have a holistic approach to the delivery of the individual's additional learning needs, but that those additional learning needs are delivered within the context of their wider educational needs, so the power is taken to ensure that you do have that holistic approach to the child or the young person's education.”⁷²

112. The Minister was asked why the negative procedure was being used given both the policy and legal implications of any change to the definition. He responded:

“What we're doing here is extending the responsibility for the delivery of that education experience to the home local authority. We're not extending these powers any further than that. We're simply saying that the home education

⁶⁹ Explanatory Memorandum, Chapter 5, page 80

⁷⁰ Explanatory Memorandum, Chapter 5, page 80

⁷¹ Policy intent document, page 20

⁷² CLA Committee, 27 February 2017, RoP [123]

authority should have responsibility for the delivery of that holistic, rich education experience for those people with additional learning needs. So, that's what we're doing. I think that's a fair and reasonable use of this power. The exercise of that power through the negative or affirmative procedure is, I think, a fair point of debate and a fair point of consideration. If the committee feels strongly on that—that that is, again, an area we would be happy to give further consideration to.”⁷³

Our view

113. We are concerned with the breadth of this power. It would allow the Welsh Ministers to change the definition of who is “in the area” of a local authority in Wales in wider education legislation that is not concerned with additional learning needs. We can see no reason why such a broad power should be included in a Bill concerned with additional learning needs.

114. In the event that the Minister remains of the view that such a power is suitable we do not consider that the negative procedure is appropriate; use of the affirmative procedure would go some way to alleviating our concerns.

Recommendation 10. We recommend that the Minister should table an amendment to the Bill, removing the power for the making of regulations under section 82. At the very least, the existing power in the Bill should be subject to the affirmative procedure.

Section 83 – Minor and consequential amendments and repeals

115. Section 83 is described in the Explanatory Memorandum as introducing Schedule 1, which makes minor and consequential amendments and repeals.⁷⁴

116. The Explanatory Notes to the Bill contain no information about the provisions in Schedule 1. Some information is included about two regulation-making powers in Chapter 5 of the Explanatory Memorandum about subordinate legislation. However, there is no explanation for the inclusion, for example, of new section 441A in the *Education Act 1996* (paragraph 3(17)). In addition there is no explanation of the meaning of paragraph 11, which makes amendments to the *Equality Act 2010*.

117. When questioned on the lack of detail provided in the Explanatory Notes in relation to Schedule 1, the Minister replied:

“I hope that the explanatory notes provide sufficient detail, but I recognise that these are, by their nature, minor and consequential amendments and my consideration is that we’ve dealt with this in an appropriate way.”⁷⁵

118. In response to a question on the level of detail provided around the purpose of paragraph 3(17) in Schedule 1, which we considered to be a substantial new section, the Minister said:

“I think it was a decision that I took in terms of the level of detail needed in order to appreciate and to understand what these amendments were seeking to deliver. What we’re seeking to do is to ensure consistency in what has been quite a complex body of legislation. It comes back to our initial conversation on

⁷³ CLA Committee, 27 February 2017, RoP [125]

⁷⁴ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 154

⁷⁵ CLA Committee, 27 February 2017, RoP [131]

this matter. We are seeking to replace two systems, if you like—pre-16 and post-16—with a single holistic system of additional learning needs. What that means is that we do need to make a number of minor consequential amendments to a number of Acts of Parliament, which currently populate this policy area. So, in order to simplify the regime, we have to ensure the legal integrity of it, which means making a number of these minor consequential amendments. It was my view, and it remains my view, that the policy intent of legislation is sufficiently clear as to enable an understanding of Schedule 1.”⁷⁶

Our view

119. We recognise that Schedule 1 of the Bill sets out minor and consequential amendments and repeals. However, as paragraph 116 above indicates, Schedule 1 also contains more substantive issues.

120. It is our view that the Explanatory Notes would have benefited from providing a commentary on some of these issues to help with an understanding of the implications of the Bill for other legislation. Moreover, in our view it is important to explain all provisions in a Bill adequately, even if they are considered to be minor and / or consequential.

Recommendation 11. We recommend that the Explanatory Notes to the Bill should be amended to provide an adequate explanation of Schedule 1.

Section 86 – General interpretation

121. Section 86(8) of the Bill would allow the Welsh Ministers to amend the definition of “NHS body” in the Bill so that it includes a Special Health Authority in accordance with the Act. This would result in the Additional Learning Provision duties in sections 18 and 19 of the Bill applying to any Special Health Authority. The Welsh Ministers have confirmed that it is not currently anticipated that the power which is subject to the negative procedure will be used in the near future.⁷⁷ This regulation-making power is one of the eight outlined in paragraph 25. The Explanatory Memorandum states that it is subject to the negative procedure because it allows “only a very restricted administrative change”.⁷⁸

122. When questioned, the Minister stated that he believed the objective of the policy to be correct but was content to consider the mechanism for scrutiny further.⁷⁹

Our view

123. There are in our view two reasons why these regulations should be subject to the affirmative procedure. Both are matters of principle.

124. Firstly, these regulations would apply all the duties in the Bill that apply to NHS bodies which come within the current definition to a Special Health Authority established under the *NHS (Wales) Act 2006*. In our view that represents a significant policy change that requires approval by the National Assembly.

⁷⁶ CLA Committee, 27 February 2017, RoP [133]

⁷⁷ Policy intent document, page 21

⁷⁸ Explanatory Memorandum, Chapter 5, page 81

⁷⁹ CLA Committee, 27 February 2017, RoP [129]

125. Secondly, the regulations would amend primary legislation and it remains our clear view that in such circumstances regulations must be subject to approval by the National Assembly.

Recommendation 12. We recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 86(8).