

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Report on the School Standards and
Organisation (Wales) Bill

October 2012



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Constitutional and Legislative
Affairs Committee

Report on the School Standards and
Organisation (Wales) Bill

October 2012



Constitutional and Legislative Affairs Committee

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

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The Committee's Recommendations

The Committee's recommendations are listed below in the order that they appear in this Report.

Recommendation 1. We recommend that the consultation requirements in Section 39, in relation to the issuing of a Statutory Code on school organisation, should be consistent with those set out in Section 34. **page 16**

Recommendation 2. We recommend that the powers in sections 58(2) and 67(2) should be exercised by statutory instrument and subject to procedural control. **page 16**

Recommendation 3. We recommend that the order making power contained in Section 67(2) should be subject to at least the negative procedure. **page 16**

Recommendation 4. We recommend that the order making power contained in Section 58(2) should be subject to an enhanced negative procedure along the lines of the procedure set out in sections 34 and 39 of the Bill. **page 17**

Recommendation 5. We recommend that a revised Explanatory Memorandum should be issued following stage 2 and should include details of the powers conferred on Welsh Ministers by the Bill, which will not be exercised by statutory instrument. **page 17**

Recommendation 6. We recommend that the Minister looks into the viability of setting out on the face of the Bill a direct link between the date of the school census and the date at which a school is categorised as a small school. **page 18**

Recommendation 7. We recommend that a revised Explanatory Memorandum should be issued following stage 2 and should include a table of derivations along the lines of that provided by the Minister in his letter of 25 June to the Committee Chair. **page 18**

Recommendation 8. We recommend that, where appropriate, a table of derivations should be included in the Explanatory Memorandum of all future Bills. **page 18**

The Committee's Role

1. The Constitutional and Legislative Affairs Committee's remit is to carry out the functions of the responsible committee set out in Standing Order 21¹ and to consider any other constitutional or legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.
3. The Committee also considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in the Standing Orders.

The School Standards and Organisation (Wales) Bill

Background

4. On 23 April 2012 the Minister for Education and Skills, Leighton Andrews AM introduced The School Standards and Organisation (Wales) Bill. The Bill was referred to the Children and Young People Committee for stage 1 scrutiny with a reporting deadline of 12 October 2012.
5. The Constitutional and Legislative Affairs Committee considered the Bill at its meeting on 30 April 2012 and agreed to scrutinise it further as it contained a number of powers to make subordinate legislation.
6. The Minister for Education and Skills, Leighton Andrews AM attended the Committee's meeting on Monday 28 May 2012 accompanied by officials. The Minister's oral evidence was supplemented by additional written information provided on 25 June 2012.

¹ Standing Orders of the Fourth Assembly - National Assembly for Wales

Introduction and overview of the Bill

7. The Bill sets out to:

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

Powers to make subordinate legislation

8. 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 published along with the Bill and in the Explanatory Notes that appear at the end of that Memorandum.

9. 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 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.

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

(i) School Organisation – The Code on School Organisation (“the Code”) (Section 38 and 39)

11. 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.

12. **Procedure:** 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.

13. The Code will be subject to the procedure set 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.

14. 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))

15. 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.

16. 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.

17. **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)

18. Section 87(1) provides a power for the Welsh Ministers to make regulations 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) makes it clear that regulations may (among other things) make provision about when and how to make an assessment.

19. **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)

20. 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)).

21. 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.

22. **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)

23. 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 says 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”.

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

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

25. Paragraph 17(2) of Schedule 1 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.

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

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

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

28. **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)

29. 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.

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

(ix) Commencement Provisions

31. 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 on the day after Royal Assent is received.

32. 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.

33. 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.

34. **Procedure:** There is no scrutiny procedure provided for the commencement orders, which is normal legislative practice.

Delegated Powers not to be exercised by statutory instrument

35. 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

36. 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.

37. 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.”

38. Such an order must then require the proposals:

- to be published no later than a date specified 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.

39. **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))

40. This chapter makes provision for the possibility of two or more local authorities providing special education functions on a regional basis if it is considered that it would be more effective or efficient to do so.

41. 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.”

42. 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.

43. **Procedure:** Similarly to section 58(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

44. Paragraph 34 of Schedule 5 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.

45. **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.

Powers of Direction

46. The Bill, as highlighted by the Minister's letter of 16 May 2012, contains several other powers of direction for Welsh Ministers that are set out on the face of the Bill.

47. 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.

48. 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 relates, 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.

49. 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.

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

Powers to issue Statutory Guidance

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

52. 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 subject to any Assembly procedure.

53. 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.

54. 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).

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

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

Committee consideration

57. Although we believe that the use of the enhanced negative procedure in Section 39, which relates to the issuing of a Statutory Code on school organisation, is appropriate, we felt the consultation arrangements set out in the Bill are insufficient and that further requirements for the Welsh Ministers to consult with certain specified

persons before laying the code should be included. In particular, we believe that the consultation requirements in Section 39 should be consistent with those set out in Section 34, which requires Welsh Ministers to specifically consult with school authorities likely to be affected, in addition to other persons they think fit.

Recommendation 1. We recommend that the consultation requirements in Section 39, in relation to the issuing of a Statutory Code on school organisation, should be consistent with those set out in Section 34.

58. In relation to the order making powers conferred on the Welsh Ministers by sections 58(2) and 67(2) , we are concerned that these powers are not exercisable by statutory instrument and therefore not subject to any procedural control in the Assembly.

59. Although we accept that these provisions largely restate existing provisions set out under the *School Standards and Framework Act 1998* and the *Education Act 2002*, we do not consider it to be best practice. As a result we believe the Minister has missed an opportunity to improve these existing provisions by bringing forward tighter procedural control in this Bill to ensure better scrutiny of future orders made in these areas by Welsh Ministers.

Recommendation 2. We recommend that the powers in sections 58(2) and 67(2) should be exercised by statutory instrument and subject to procedural control.

60. The Committee believes that the order making power contained in Section 67(2), relating to securing regional provision for special educational needs, should be subject to at least the negative procedure.

61. However, the order-making power contained in Section 58(2) of the Bill, which gives Welsh Ministers the power to direct local authorities to establish, alter or discontinue schools, is particularly significant. The Committee believes that the enhanced negative procedure, as laid out on the face of the Bill in sections 34 and 39, would be appropriate for this power.

Recommendation 3. We recommend that the order making power contained in Section 67(2) should be subject to at least the negative procedure.

Recommendation 4. We recommend that the order making power contained in Section 58(2) should be subject to an enhanced negative procedure along the lines of the procedure set out in sections 34 and 39 of the Bill.

62. We were not initially convinced that the Minister provided sufficient reason in his oral evidence for the order making powers contained in Paragraph 34 of Schedule 5, in relation to the transfer of school land. However, we welcome the clarification provided by the Minister in his letter of 25 June 2012 and accept that the power conferred in this instance is appropriate.

63. Although we welcomed the Minister's commitment to inform the Assembly through written statements of any future orders, directions or statutory guidance issued by Welsh Ministers under powers conferred by the Bill, we are disappointed that information relating to the nature and extent of these powers were not contained in the Explanatory Memorandum. In our view details about the powers conferred on Welsh Ministers by the Bill, which will not be exercised by statutory instrument, should be included in a revised version of the Explanatory Memorandum to be issued by the Welsh Government following the completion of stage 2 proceedings.

Recommendation 5. We recommend that a revised Explanatory Memorandum should be issued following stage 2 and should include details of the powers conferred on Welsh Ministers by the Bill, which will not be exercised by statutory instrument.

64. The use of the enhanced negative procedure is an appropriate control on the powers conferred on Welsh Ministers to issue school improvement guidance under Section 33 of the Bill. However the lack of procedural control on other similar powers to issue statutory guidance in Sections 20, 89 and 93 lacks consistency.

65. We were not wholly persuaded by the Minister's argument that making these powers subject to procedural control would lead to unnecessary time delays in issuing such guidance. We have agreed not to make any specific recommendation on this point, but the Minister may wish to review whether any additional procedural controls should be included in the Bill.

66. We accept the Minister's reasons for seeking powers under Section 57, which would allow Welsh Ministers to change the date on

which a school is categorised as a small school, and that the use of such power would have a minimal impact. However a direct link could be made between this provision and details set out in the school census, in order to avoid the need for such powers in the first place.

Recommendation 6. We recommend that the Minister looks into the viability of setting out on the face of the Bill a direct link between the date of the school census and the date at which a school is categorised as a small school.

67. We welcome the clarification provided by the Minister that provisions in Section 95, about holding parents meetings, will come into force 2 months after the Bill receives Royal Assent rather than on dates specified by Welsh Ministers in commencement orders as set out currently in the Bill. We note the Minister's assurances that the Welsh Government will bring forward amendments to deal with this issue ahead of Stage 2 proceedings.

68. We welcome the consolidation of the law on intervention in schools and local authorities and school organisation provided for by the Bill. Bringing together a number of provisions currently found in several existing statutes greatly enhances the clarity of the law relating to education in Wales and we hope that the Welsh Government will apply the same consolidating principles to other Bills introduced in the future. It would have been helpful as an aid to scrutiny if a table of derivations, setting out the sources of the legislation proposed to be consolidated in the Bill had included in the initial Explanatory Memorandum. However, we welcome the table of derivations provided by the Minister in his letter to the Chair of the Committee on 25 June 2012. We believe that this table should also be included in a revised version of the Explanatory Memorandum to be issued by the Welsh Government following the completion of Stage 2 proceedings.

Recommendation 7. We recommend that a revised Explanatory Memorandum should be issued following stage 2 and should include a table of derivations along the lines of that provided by the Minister in his letter of 25 June to the Committee Chair.

Recommendation 8. We recommend that, where appropriate, a table of derivations should be included in the Explanatory Memorandum of all future Bills.

Witnesses

The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of the oral evidence session can be viewed in full at www.assemblywales.org

28 May 2012

Leighton Andrews AM	Minister for Education and Skills, Welsh Government
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*Supported by the
following officials:*

Mr Anthony Jordan	Head of School Governance and Organisation, Welsh Government
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Ms Amina Rix	Lawyer, Welsh Government
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Mr Simon Morea	Lawyer, Welsh Government
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Mr Ceri Planchant	Lawyer, Welsh Government
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List of written evidence

The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at www.assemblywales.org

<i>Paper</i>	<i>Reference</i>
School Standards and Organisation (Wales) Bill (as introduced)	CLA(4)-12-12 (p9)
Explanatory Memorandum to the School Standards and Organisation (Wales) Bill (as introduced)	CLA(4)-12-12 (p10)
Legal Advisers' Report	CLA(4)-12-12(p11)
Letter from the Chair to the Minister for Education and Skills Leighton Andrews AM	CLA(4)-12-12(p12)
The Minister's response	CLA(4)-12-12(p11)
Annexes 1 and 2	CLA(4)-12-12(p13) – Annexes 1 and 2
Letter from the Chair to the Minister for Education and Skills Leighton Andrews AM requesting additional information	CLA(4)-17-12 (p2)
Additional information provided by the Minister	CLA(4)-17-12 (p3)