

Subordinate Legislation Committee

Appropriateness of the subordinate legislation provisions in Proposed Children and Families (Wales) Measure

1. Standing Orders

1.1 The Committee has the following powers under Standing Orders:

- Standing Order 15.6 (ii) stated that the Subordinate Legislation Committee may consider and report on ‘the appropriateness of provisions in proposed Assembly Measuresthat grant powers to make subordinate legislation to the Welsh Ministers’.
- Whilst it is not part of the Committee’s remit to comment in the merits of the proposal which the proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on ‘any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers’.

1.2 The purpose of this report is to inform the Assembly’s Stage 1 debate on the general principles of the proposed Measure and subsequent legislative stages.

2. Consideration

2.1 On the 27 April 2009 the Committee considered the ‘Proposed Children and Families (Wales) Measure’ and decided to give further consideration to the subordinate legislation provisions in the proposed Measure. To gather further information on the proposed Measure the Committee invited Dr Brian Gibbons AM, Minister for Social Justice and Local Government, to give evidence to the Committee on 11 May 2009.

3. Background

3.1 The Welsh Assembly Government introduced the Proposed Children and Families (Wales) Measure to the Assembly on 2 March 2009. A Stage 1 Committee has been established to consider the general principles of the proposed Measure.

3.2 The Explanatory Memorandum that accompanies the proposed Measure states:

“The Children and Families (Wales) Measure makes statutory provision to take forward the Welsh Assembly Government’s commitment in terms of child poverty and to take forward early development of its strategy for vulnerable children by

bringing forward legislation to provide greater support to families where children may be at risk, and strengthened regulatory enforcement in children settings.”

4. Subordinate Legislation Making Powers and Procedures

4.1 The Children and Families (Wales) Measure makes statutory provision, through a legislative framework, to take forward the Welsh Assembly Government’s commitment in terms of child poverty. It also intends to take forward early development of the Government’s strategy for vulnerable children by bringing forward legislation to provide greater support to families where children may be at risk together with strengthened regulatory enforcement in children settings.

4.2 The Proposed Measure is in four Parts:-

- Part 1: Eradicating Child Poverty – sections 1 to 12
- Part 2: Child Minding and Day Care for Children – section 13 to 48
- Part 3: Integrated Family Support Teams – sections 49 to 58
- Part 4: Miscellaneous and General – sections 59 to 68

Additionally the Proposed Measure contains two Schedules: Schedule 1 deals with Minor and consequential Amendments and Schedule 2 with Repeals.

4.3 Part 1 – Eradicating Child Poverty

The purpose of Part 1 of the Proposed Measure is to introduce a legislative framework requiring Welsh authorities (as defined in section 12) to make and demonstrate their contribution towards eradicating child poverty by requiring the production and publishing of strategies reflecting the broad aims contained in section 1 of the Proposed Measure for contributing to the eradication of child poverty in Wales. These strategies will provide a reference point for objective setting and other actions.

4.4 Part 2 – Child Minding and Day Care for Children

The current legislation relating to childminding and regulation of day care is found in Part 10A of and Schedule 9A to the Children Act 1989. The purpose of the Proposed Measure is to repeal and re-enact the current provisions (which are mainly technical in nature) to ensure that the range of regulatory enforcement options is available to all establishments and agencies that the Welsh Ministers regulate and to introduce a new regulatory option, namely a penalty notice, which will allow the Welsh Ministers to take a quick and proportionate response to a regulatory breach. The Proposed Measure seeks to restate and modify the law in a more cohesive way and does not provide for any significant burdens to be placed upon child minders or day care providers.

Part 3 – Integrated Family Support Teams

The purpose of Part 3 of the Proposed Measure is to introduce new integrated family support teams to strengthen support to vulnerable children and families through reconfiguring services towards more targeted support delivered by

multidisciplinary professional teams to improve outcomes for children and adults so that they can live safely together as a family unit.

Part 4 –Miscellaneous and General

The purpose of the Proposed Measure is to reflect the Welsh Assembly Government's commitment to the United Nation Convention on the Rights of the Child and in particular to Article 31.1 and 2 relating to play. The Proposed Measure imposes a duty on local authorities to carry out assessments of the sufficiency of play opportunities in their areas in accordance with regulations made and guidance issued by Welsh Ministers.

The Proposed Measure also reflects the Welsh Assembly Government's commitment to Article 12.1 of the united Nation Convention on the Rights of the Child relating to the formation and expression of views. The Proposed Measure places a general duty on local authorities to make arrangements to promote and facilitate participation by children in decisions of the local authority which affect them.

5. Provisions conferring power to make subordinate legislation

5.1 The measure contains a number of provisions which confer on the Welsh Ministers, a power to make regulations and orders in relation to certain functions under the Proposed Measure. The power in each case is to be exercised by the Welsh Ministers by statutory instrument.

5.2. The following provisions contain powers to make **regulations**:-

Part 1

Section 1(5): power to make regulations for the determination of material deprivation and median income;

Section 4(3): under strategies prepared by Welsh children's services authorities, amends section 26 of the Children Act 2004, giving the Welsh Ministers power under that act to make regulations in relation to children's plans;

Section 5(3): power to make regulations in relation to strategies prepared by other Welsh authorities, including the period of the strategy; its publication; review and consultation before publication;

Section 6(1)(a): power to make regulations in relation to a local authority duty to secure availability of free childcare; prescribe the type of childcare; prescribe the description of children entitled to it and their age;

Section 9(1): power to make regulations to impose duties on local authorities in relation to the provision of particular sorts of parental support services and health support services for particular sorts of children or parents; power to require that the duty triggered by the making of regulations under section 6(1) or a duty in relation to parental support services or health support services, is to apply in one or more parts of a local authority area;

Section 9(2): power to make regulations about the areas in which services specified by the regulations are to be provided either in the regulations or by requiring that the authorities themselves specify the areas.

Part 2

Section 18(2)(a) and (c): power to make regulations to prescribe the information to be provided by applicants for registration as a childminder and the relevant fee;

Section 19: power to make regulations to prescribe further information to be provided by applicants for registration as a childminder;

Section 20(2)(a) and (c): power to make regulations to prescribe the information to be provided by applicants for registration as a day-care provider and the relevant fee;

Section 21: power to make regulations to prescribe further information to be provided by applicants for registration as a day-care provider;

Section 22: power to make regulations to prescribe information about prescribed matters, to be included on a certificate of registration: power to prescribe fee for replacement of lost certificate of registration;

Section 24(1),(2),(3) and (4): power to make regulations governing activities of persons registered as childminders or day-care providers, including welfare and development of children; suitability; qualifications and training; maximum numbers of children cared for; staffing levels; premises; complaints procedure; staff supervision; records; provision of information; obligations of third parties (under section 23(3)) and (under section 24(4)), offences and penalties;

Section 25(5): power to make regulations to prescribe the circumstances under which a person's registration may be cancelled;

Section 26(1): power to make regulations to prescribe the circumstances under which a person's registration may be suspended;

Section 32(2),(3),(4) and (5): power to make regulations in relation to the disqualification of a person from registration (section 32(2)); to prescribe particular circumstances in which a person may be disqualified from registration (section 32(3)); further provision in relation to a person living in a household where a person has been disqualified (section 32(4)) and power of Welsh ministers to consent to a person not being disqualified (section 32(5));

Section 34(1),(2) and (3): power to make regulations in relation to inspection of childminding and day-care; publication of reports (section 34(1)); inspection by Welsh Ministers or Chief Inspector of Education and Training or another (section 34(2)) and application of section 29(2) to (4) of the Education Act 2005 to reports published under the regulations (section 34(3));

Section 37(1),(2) and (3): power to make regulations in relation to supply of information to local authorities; Welsh Ministers to supply prescribed information to local authorities on taking certain steps;

Section 39(2) and (5): power to prescribe offences which are fixed penalty offences; period in which proceedings for an offence may not be instituted;

Section 40(1) and (2): power to make regulations making supplementary provision with respect to penalty notices; amounts payable under fixed penalties;

Section 44(1)(a) and (b): power to make regulations to require a local authority to secure information and advice as to childminding and day-care; training in to childminding and day-care;

Section 45(1) and (2): power to make regulations as to payment of fees by registered persons: amount and waiver of fees;

Section 48(1) and (2): power to make regulations to provide for death of registered person;

Part 3

Section 50 (2) and (9): power to make regulations to say which health and social services functions can be assigned to an IFS team by a local authority and power to assign functions to the team and to allow referrals to IFS teams in different circumstances.

Section 51(2): power to make regulations in relation to the way the Integrated Family Support Teams are funded.

Part 4

Section 60: power to make regulations about the assessments which local authorities must make on the sufficiency of play opportunities in their area.

5.3 The procedure for these regulations is the **negative procedure**. Use of the negative procedure is justified in the Explanatory Memorandum on the following grounds:-

5.4 Regulations under these powers relate to matters which are technical or procedural in nature or will set out detail. The nature and content of the provisions made by any such regulations would not appropriate to be included on the face of the Measure. It is also desirable that the Welsh Ministers have the flexibility to amend provisions about matters such as those relating to the regulation of childminding and daycare quickly. The negative resolution procedure affords the Assembly a degree of scrutiny appropriate to the limited type of provision that can be made in these regulations.

5.5 In each of the cases detailed above, the rationale for the application of subordinate legislation rests upon the need to avoid excessive detail or to allow for flexibility, within the confines of the principles presented within the

Measure itself. As these regulations will contain considerable detail, and will be subject to periodic review and amendment if required, it is held to be more appropriate that they be contained within subordinate legislation than appear on the face of the Measure.

5.6 The following sections contain powers for the Welsh Ministers to make **orders**:-

Part 1

Section 1(7): provides power to amend those things identified as “broad aims” contributing to the eradication of child poverty in section 1(2).

Section 2(5): provides power to make regulations to specify objectives for a Welsh authority which relate to the broad aims in section 1 and the Welsh authority’s functions. Section 2(6) provides that the regulations may also disapply the authority’s choice of objectives to the extent specified.

Section 12(2): provides power to amend the list of bodies named as “Welsh authorities” and who are subject to the duty to prepare and publish a child poverty strategy.

Part 2

Section 13(4): provides power to amend the definition of what constitutes “childminding” and “day care” and so makes the person providing those services liable to register with the registration authority.

The procedure which applies to these regulation making powers is the **affirmative procedure**. In each case they provide power to amend a particular aspect of the Measure itself. The potential effect of amendments made under these powers is more far-reaching whether in relation to the child poverty duty or the regulation of the childminding and day care sector.

Section 67 contains a power for the Welsh Ministers to make an order to commence provisions of the Measure. As is normal practice for commencement orders, **no procedure** will apply to such orders.

5.7 The Proposed Measure also provides for the Welsh Ministers to issues guidance and directions.

6. Issues raised in evidence and recommendations of the Committee

6.1 In taking evidence from the Minister the Committee sought clarification and further details on:

6.2 Scope of the proposed measure

- Appropriateness of specifying objectives in regulations
- The possibility of having different objectives across different authorities
- Appropriateness of affirmative procedure
- If the Measure will lead to significant policy or legislation divergence from England, and the consequences for tackling child poverty
- Discussions with relevant UK Ministers regarding the Child Poverty Bill

6.3 In response to these issues the Minister stated that he did not envisage setting objectives for local authorities, as this would be a reserve power used when authorities were failing to comply. The Minister said that it was inevitable that there would be a variation across Wales in terms of objectives; this is due to the different urban and rural authorities and the different challenges faced by these authorities. The Minister stated that as yet there was no final form on the Child Poverty Bill, but the main focus would be on non-devolved areas and this provides justification for a different Welsh Measure. The Committee notes the procedures intended to be applied to the making of subordinate legislation and the reasons given in the Explanatory Memorandum for the application of a particular procedure to a particular power.

Committee's view

The Committee noted the evidence received, On the basis of the evidence received, the Committee are content with the procedures proposed for the making of subordinate legislation subject to the exception detailed in Recommendation 4.

6.4 Regulation Making Powers

- Balance between powers on the face of the proposed Measure and powers to make regulations
- Consultation process when making regulations
- Timescales for publishing guidance and bringing regulations into force

6.5 The Minister felt that the balance between powers on the face of the proposed Measure and the power to make regulations was balanced and the detail would be seen in regulations, the Minister stated that this was always a challenge and there was a requirement for a balance between the legislative framework and regulation. In response to specific questions the Minister stated it was standard practise not to have a duty to consult.

6.6 The Committee notes there is no statutory duty to consult. However, a duty may be conferred in specific instances. *Craies on Legislation*¹ states:

“It is common for the Minister in whom a power to make delegated legislation is vested to be under a statutory duty to consult before he exercises it. Failure to consult will generally render voidable any purported exercise of the delegated power. While a duty to consult falls short of a duty to comply with the wishes of the consultee, it is more than a pure formality, requiring the person consulting to give his mind in a genuine way to matters raised by those consulted”

6.7 Section 65(3) of the Government of Wales Act 1998 included the following provision:

¹ A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation

“(3) The subordinate legislation procedures must also include provision for securing that, if a regulatory appraisal indicates that the costs of complying with any proposed Assembly general subordinate legislation are likely to be significant—

(a) appropriate consultation (including consultation with representatives of business) is carried out, and

(b) the regulatory appraisal is published,

before a draft of the statutory instrument containing the subordinate legislation is laid before the Assembly.”

This provision was repealed by the Government of Wales Act 2006.

Recommendation 1: Notwithstanding the evidence and other information before it, the Committee recommends that a duty to consult should be added to the Measure. To ensure that minor technical amendments can be made without consultation the Committee further recommends that appropriate exceptions are identified.

6.6 Eradicating Child Poverty

- The broad aims set out for eradication of child poverty, if these are capable of amendments and use of affirmative procedure
- The use of regulations to specify levels of material deprivation and median income, whether it would be more appropriate for this determination to appear on the face of the Measure.
- Final impact for local authorities as a result of changes to the current policy framework

6.7 The Minister responded that the broad aims were evidence based and felt they would only be amended in certain circumstances, such as if there is a clash with the Child Poverty Bill. The Committee felt this was a contradiction to the evidence previously given (6.3), but the Minister felt that there would be significant differences in Wales which would complement Westminster. The Minister stated that the specified median income was well established and had been used for a number of years. The Minister also stated that the changes to the policy framework would not have any financial implications for local authorities.

Recommendation 2: The Committee notes that the Child Poverty Bill has not yet been introduced. Nevertheless, the Committee recommends that clarification is provided in respect of the impact the Child Poverty Bill will have on this Measure either by way of an addendum to the Explanatory Memorandum or other readily available publication.

6.8 Child Minding and Day Care for Children

- Whether Part 2 is considered to be ‘skeletal’ when setting out the proposed new regime for the regulation of childminding and day care

- Reasons for re-enactment of current law relating to childminding and day care.
- Consultation which has taken place with childcare and day care providers.
- The broad discretion conferred on Welsh Minister in respect of the circumstances for when a person is disqualified from registration as a childminder and day care provider
- Timescales and resources allocated to bring into force the regulations relating to the inspection of childminding and day care.
- Delegated power to prescribe fixed penalty offences and issue fixed penalty notices, and whether relevant offences should be ordered according to the official Magistrates Court Sentencing Guidelines and not be determined by regulations
- The type of offences considered suitable to be dealt with by fixed penalty notices and whether these should be prescribed on the face of the Measure

6.9 The Minister stated that Part 2 of the Measure is a consolidation of existing legislation, with some added improvements. The Minister said the broad discretion conferred on Welsh Ministers regarding the disqualification of childminders and day care providers mirrors the current situation; similarly the inspection regime also consolidates the current situation. The Committee is given to understand that that a system of fixed penalty notices is to be introduced in respect of establishments regulated under the Care Standards Act 2000. The Minister stated that minor breaches should not be subject to Court proceedings and not every breach would be subject to a fixed penalty, although serious breaches would not be acceptable and would be dealt with by way of court proceedings.

Recommendation 3:

The Committee recommends that Part 2 of the proposed Measure is not commenced until it is clarified how the proposals would work in the field of care standards.

6.10 Integrated Family Support Teams (IFST)

- Difficulties for stakeholder commenting on provisions in relation to IFSTs because so much of the work around IFSTs will be found in secondary legislation
- Whether the structure and functions of IFSTs should be prescribed in order to provide a consistent approach to service delivery
- Whether a list of prescribed persons should be included on the face of the Measure
- Requirement to consult with relevant stakeholders on proposals to change the composition of an IFST

6.11 The Minister stated that there was an understanding on IFSTs and they would be run on a pioneer basis and the regulation would be prescriptive. The Minister did not feel there was a need for a list of prescribed persons on the face of the Measure, as there was a need to be flexible, and the Measure

already identifies the types of people who would be considered as prescribed persons. The Minister stated that there has been two years of extensive consultation with relevant stakeholders.

Committee's view

The Committee is content with the provisions outlined within Part 3 relating to Integrated Family Support Teams.

6.12 Miscellaneous and general

- use of negative procedures under section 60 and whether Welsh Ministers will not consult fully on any amendments to provisions in relation to sufficiency of play opportunities

6.13 The Minister stated that there was on going consultations and discussion which will be used when bringing forward statutory duties for play opportunities and the use of the negative procedure was appropriate as it does not affect the operational delivery of the Measure.

Recommendation 4: The Committee considers that as regulations made under section 60 (power to make regulations about the assessments which local authorities must make on the sufficiency of play opportunities in their area), would effectively set out the substantive detail of the duty, regulations made under Section 60, should be subject to the affirmative procedure.