

# NATIONAL ASSEMBLY FOR WALES

## REPORT OF THE SUBORDINATE LEGISLATION COMMITTEE

### The appropriateness of the subordinate legislation provisions in the Proposed Education (Wales) Measure

#### 1. Standing Orders

1.1 The Committee has the following powers under Standing Orders:

- Standing Order 15.6 (ii) states that the Subordinate Legislation Committee may consider and report on 'the appropriateness of provisions in proposed Assembly Measures .....that 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 18 May 2009 the Committee considered the Proposed Education (Wales) Measure and decided to give further consideration to the subordinate legislation provisions in the proposed Measure. Jane Hutt AM, Minister for Children, Education, Lifelong Learning and Skills gave evidence to the Committee on 1 June 2009. The Committee received written evidence from the Law Society and Cymru Yfory and Cymru Yfory gave oral evidence at the meeting on 8 June 2009.

#### 3. Background

3.1 The Welsh Government introduced the Proposed Education (Wales) Measure to the Assembly on 27 April 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 purpose of this Measure is to extend children's entitlement by providing them with rights to make special educational needs (SEN) appeals and claims of disability discrimination to the Special Educational Needs Tribunal for Wales (the

Tribunal). It will amend the law that gives parents the right to make appeals and claims to the Tribunal, as set out in Part 4 of the Education Act 1996 and part 4 of the Disability Discrimination Act 1995.”

#### **4. Subordinate Legislation Making Powers and Procedures**

4.1 The proposed Measure has extensive powers for subordinate legislation to be made by Welsh Ministers. These are explained in Part 5 of the Explanatory Memorandum laid with the Proposed Measure, and in the Commentary on Sections that appears at the end of that Memorandum.

4.2 Sections 1-8 of the Proposed Measure amend the Education Act 1996 to give children the right to appeal to the Special Educational Needs Tribunal for Wales (“the Tribunal”) that corresponds to the existing rights of parents.

**Section 1** grants that right to children, and subsection (4) permits Welsh Ministers to make regulations that provide for circumstances in which a child may not appeal. No explanation or example is given of how the power might be exercised.

**Section 3** permits Welsh Ministers to make regulations that provide for a “case friend” to make representations and exercise rights on a child’s behalf. Subsection (3) gives examples of the matters that might be included in those regulations.

**Section 4** requires local education authorities to make arrangements for the provision of advice and information about matters relating to the special educational needs of a child. Subsection (2) permits Welsh Ministers to issue guidance, and subsection (3) to make regulations.

**Section 5** requires local education authorities to make arrangements for the resolution of disputes relating to the special educational needs of a child. Subsection (4) permits Welsh Ministers to issue guidance, and subsection (5) to make regulations.

**Section 6** requires local education authorities to make arrangements for the provision of independent advocacy services relating to special educational needs appeals by a child. Subsection (7) permits Welsh Ministers to issue guidance, and subsection (4) to make regulations.

4.3 Sections 9-16 amend the Disability Discrimination Act 1995 to enable disabled children to make a claim to the Tribunal in relation to discrimination that corresponds to the existing rights of parents.

**Section 9** grants that right to children, and subsection (6) permits Welsh Ministers to make regulations that provide for circumstances in which a

child may not make a claim. No explanation or example is given of how the power might be exercised.

**Section 10** permits Welsh Ministers to make regulations that provide for a “case friend” to make representations and exercise rights on a child’s behalf. Subsection (4) gives examples of the matters that might be included in those regulations.

**Section 11** requires local education authorities to make arrangements for the provision of advice and information about matters relating to disability discrimination. Subsection (2) permits Welsh Ministers to issue guidance, and subsection (3) to make regulations.

**Section 12** requires local education authorities to make arrangements for the avoidance or resolution of disputes relating to relevant disability discrimination. Subsection (3) permits Welsh Ministers to issue guidance, and subsection (4) to make regulations.

**Section 13** requires local education authorities to make arrangements for the provision of independent advocacy services relating to disability discrimination. Subsection (7) permits Welsh Ministers to issue guidance, and subsection (4) to make regulations.

**Section 14** has the effect of transferring the existing power to make regulations relating to the procedure to be adopted by the Tribunal in relation to Disability Discrimination Claims from the Secretary of State to Welsh Ministers. It can then be exercised in parallel to their existing power in relation to SEN appeals procedures.

4.4 Sections 17 and 18 provide for the piloting of the provisions of the Measure and amending the relevant legislation in the light of the lessons learnt from the pilot(s).

**Section 17** permits Welsh Ministers to make regulations to provide for the piloting of the provisions of the Measure.

**Section 18** permits the amendment by order of legislation (including provisions introduced under this proposed Measure) to take account of lessons learnt during the pilot exercise. The power under section 18 can only be exercised during a limited period. It may not be exercised until a report on the pilot has been laid before the Assembly (under section 17(5)) nor more than 24 months after the end of the pilot period. An order under section 18 is the only delegated legislation under this proposed Measure that would be subject to an affirmative procedure in the Assembly.

**Section 23** contains the usual power for the Welsh Ministers to commence the substantive provisions of the proposed Measure by order. No Assembly procedure would apply to the exercise of this power.

## **5. Issues raised in evidence and recommendations of the Committee**

5.1 In taking evidence, the Committee sought clarification and further details on the matters referred to in the following paragraphs.

5.2 In relation to the scope of the proposed Measure, the issues were:

- whether the proposed Measure achieves its stated aims; and
- whether there is a reasonable balance between the powers on the face of the proposed Measure and the powers conferred by regulations.

5.3 In written evidence to the Committee, the Law Society stated that "the government does not give sufficient information or any arguments in section 5 of the Explanatory Memorandum for the delegation of powers set out in the proposed Measure"<sup>1</sup>. Evidence from Cymru Yfory also considered that such an approach (conferring broad regulation-making powers on the Welsh Ministers) creates serious difficulty and allows for regulations to be made with very limited scrutiny. Cymru Yfory also stated that this approach "very significantly limits the scope for the wider public to be involved in the law making process"<sup>2</sup>. Cymru Yfory also stated that "the Assembly Government has, in this latest case, failed to learn the lessons of the NHS Redress Measure and instead has treated that example of poor practice as a precedent for continued bad practice"<sup>3</sup>.

5.4 Evidence from Cymru Yfory stated that the proposed Measure amounts "to a way of substantially removing the supremacy of the legislative branch and undermining the principle of the National Assembly as the elected body and the principal focus of devolution in Wales"<sup>4</sup>, whilst the Law Society felt that the "government does not give sufficient information or any arguments in section 5 of the Explanatory Memorandum for the delegation of powers set out in the proposed Measure"<sup>5</sup>. The Minister responded that the proposed Measure achieves the aims, which are stated in the accompanying Explanatory Memorandum and that the correct balance is achieved.

5.5 When considering the scope of the proposed Measure, the Committee referred to the evidence presented when scrutinising the appropriateness of the

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<sup>1</sup> Law Society, written evidence

<sup>2</sup> Cymru Yfory, written evidence

<sup>3</sup> Cymru Yfory, written evidence

<sup>4</sup> RoP, Para 10, 08.06.2009, Subordinate Legislation Committee

<sup>5</sup> Law Society, written evidence

subordinate legislation provisions in the NHS Redress (Wales) Measure 2008<sup>6</sup> ("the NHS Redress Measure"). At that time the Minister for Health and Social Services Edwina Hart AM stated:

"I think it is important to recognise that whatever we do on this measure will not set a precedent"<sup>7</sup>

5.6 When making the Committee's recommendations on the NHS Redress Measure, the Committee accepted that there were valid reasons why a 'framework measure' approach was justified for that Measure, but the Committee recommended "that the approach taken by that particular Proposed Measure should not set a precedent"<sup>8</sup>.

5.7 In considering the proposed Education measure and given the evidence it was given the Committee concluded that the proposed Measure would delegate too much power to the Welsh Ministers in its current form, and did not feel that the breadth of powers sought by the Welsh Ministers in this Measure was necessary. However, the Committee was minded not to delay the legislation, and appreciated the importance of the aims of the legislation.

### **Recommendation 1**

**The Committee is concerned that the NHS Redress Measure had been used as a precedent to provide very wide ranging powers of delegation. The Welsh Government must justify this position clearly and state what relevant safeguards are to be put in place.**

5.8 In relation to the right of a child to appeal (or claim), many issues were raised these included:

- whether regulations should be able to prescribe when a child may not appeal;
- whether the circumstances when a child may not appeal should appear on the face of the proposed Measure; and
- whether the Minister envisaged the regulations being used in the future to restrict such rights dependent on a child's age or capacity.

5.9 Evidence from the Law Society highlighted the importance of consideration being given as to how the Welsh Ministers could use sections 1(4) or 9(6) in future.<sup>9</sup>

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<sup>6</sup> 2008 nawm 1

<sup>7</sup> RoP, Para 17, 16/10/2007, Subordinate Legislation Committee

<sup>8</sup> Subordinate Legislation Committee Report: Proposed NHS Redress (Wales) Measure 2007, November 2007

<sup>9</sup> Law Society, written evidence

5.10 In response to this The Minister stated there was no intention to restrict a child's right to appeal, but there may be future circumstances where it was necessary to protect the child. The Minister stated there was no intention to restrict a child's right of appeal through age and saw no reason for age restrictions on the right of appeal.

5.11 The Committee was concerned that these powers, once transferred to the Minister would remain with the Minister and may be used by any future Welsh Minister in a way which was contradictory to the present intention. The Committee notes that the Minister has agreed that regulations made under section 1(4) and section 9(6) should be subject to the affirmative procedure.

## **Recommendation 2**

**The Committee recommends that regulations under section 1(4) and 9(6) should be subject to the affirmative procedure and notes that the Minister intends to make this change.**

5.12 In relation to 'case friends', the issues were:

- whether the issue of parental consent when using case friends be dealt with on the face of the proposed Measure; and
- whether provision for persons who can or cannot act as case friends should be on the face of the proposed Measure.

5.13 The Minister stated that these issues, and the question about the way a balance can be achieved between the rights of the child and the rights of the parent, will be clarified after the pilot and a group has been set up to oversee this. The Minister stated that the pilot would also be used to establish who would be appropriate case friends, but there was a need to retain a degree of flexibility.

## **Recommendation 3**

**The Committee accepted that any changes brought about following the pilot will be dealt with in regulations and would recommend that any regulations coming forward as a result of the pilot should be subject to the super affirmative procedure.**

5.14 In relation to independent advocacy services, the issue was:

- the Minister's intention in respect of regulation making powers granted in Section 6(4) and Section 13(4).

5.15 The Minister stated that this links to the national framework for advocacy standards and the pilot will identify if additional standards are required. Also the regulations could reflect the principle that children could choose an alternative advocate if they so wished.

#### **Recommendation 4**

**The Committee accepted that this should be reviewed after the pilot and any regulations coming forward as a result of the pilot should be subject to the super affirmative procedure.**

5.16 In relation to advice and information on disability discrimination claims, the issue here was:

- how the appropriate body might make young people aware of their rights in respect of disability discrimination claims.

5.17 The Minister stated there was no trigger mechanism to make young people aware of their rights, the duty would be on local authorities to ensure that children have advice on disability discrimination rights, whilst the pilot would look to the Equal Opportunities Commission and the Special Education Needs Tribunal for guidance on this matter. The Minister believed the proposed Measure would open up a new avenue to raise awareness of children's rights.

#### **Recommendation 5**

**The Committee accepted that this was an appropriate matter to be reviewed after the pilot. Any regulations coming forward as a result of the pilot should be subject to the super affirmative procedure.**

5.18 In relation to the pilot phase/regulation-making powers, the issues were:

- whether there should be a duty to consult following the initial pilot when making regulations relevant to the proposed Measure;

- whether the broad powers in section 18(2) are appropriate and whether this allows a Welsh Minister to amend the proposed Measure significantly;

- whether the use of the affirmative procedure is appropriate, and whether consideration should be given to using the super-affirmative procedure; and

- the regard that will be paid to the report published under section 17(5).

5.19 The Law Society raised concerns regarding the lack of certainty on the timescale for the exercise of powers under section 17. The time limits refer to the regulations made under section 17(2) but under section 17(4) the regulations

governing the pilot can be extended, meaning there is no certain end date for the pilot.

5.20 The Minister stated that the use of the affirmative procedure for section 18 was appropriate, and that a two year period of consultation during the pilot was sufficient. The Minister went on to say that the pilot is an appropriate opportunity to consult on and to trial the delivery of the proposed Measure.

5.21 The Committee agreed with the evidence from the Law Society regarding the lack of certainty on the timescale and thinks that there is a requirement for a certain end date to the pilot.

## **Recommendation 6**

**The Committee recommends that a maximum timescale for the pilot stage should be set out in the proposed Measure to aid transparency and certainty.**

5.22 In relation to the powers conferred on the Welsh Ministers, the committee have concerns which are:

- the wide ranging powers granted by section 18 and why it was decided to seek such extensive powers rather than introduce an amending Measure, if it was thought that such significant changes might be required after the pilot stage;
- whether the use of the super-affirmative procedure has been considered; and
- whether an amending Measure had been considered.

5.23 In their evidence Cymru Yfory acknowledged that “there is a need to be able to adjust the way the system works in the light of experience and to be able to experiment with pilot schemes”<sup>10</sup>. To achieve a balance between the needs of the Welsh Government and the need for “appropriate democratic control and accountability”, Cymru Yfory suggests three possible approaches to the framing of the legislation, which are not mutually exclusive:

- i. For all regulations made under the proposed Measure to use the affirmative procedure;
- ii. Require all pre-legislative scrutiny of the draft of any regulations the Welsh Government propose to make;
- iii. Impose limits in the proposed Measure on what the Welsh Ministers may and may not do by regulations.

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<sup>10</sup> Cymru Yfory, written evidence

5.24 The Minister stated that there was a responsibility to progress this legislation and a new Measure would be lengthy; the safeguards outlined in the evidence should prevent misuse of the powers provided for in the legislation. The Minister also stated that “the affirmative procedure provides the appropriate level of scrutiny for this particular proposed Measure”<sup>11</sup>. The Minister referred to the report that will be published and laid before the Assembly under section 17(5). The Minister felt this report would address any issues raised during the pilot and allow full engagement, consultation and scrutiny.

5.25 The Minister continued to say that having section 18 removed from the proposed Measure would mean that the Welsh Ministers would not be able to implement any changes identified by the pilot and evaluation phase as quickly as would be possible using the regulation-making powers in section 18 of the proposed Measure. This would result in delaying implementation by extending the pilot period until another proposed Measure could be introduced. There is a risk that an amending Measure after the pilot and evaluation phase may not be able to enact those necessary changes within a reasonable timescale. The Minister stated that:

“The decision to have a pilot phase has been the most important consideration regarding how we will ensure that Welsh Ministers deliver this proposed Measure appropriately in relation to regulation if this proposed Measure proceeds through the Assembly and the scrutiny of the legislation committee, the policy principle is backed and adopted and there is recognition that the pilot phase is an appropriate way forward in trialling this innovative new policy direction, which is, as we have said, uncharted waters. The piloting, in itself, demonstrates this Government’s desire and commitment to getting this right. Having the regulation-making process couched in the affirmative procedures, where most appropriate, will safeguard for the Assembly the opportunity to scrutinise and to ensure that we have learnt the lessons of the pilot phase and delivered on the principal policy intentions”<sup>12</sup>.

5.26 While the Committee accepts the response put forward by the Minister it notes the concerns, raised in written evidence by the Law Society, of the far-reaching consequences that such wide powers to change primary legislation through subordinate legislation could have.

5.27 The Committee noted the reasons why requiring an amending Measure after the pilot and evaluation phase may be undesirable, but considered that a limited delay could be justified by the need for proper legislative scrutiny. The Committee considered carefully whether the proposals in section 18 were so extensive as to require a second measure to make such changes. Having regard to the delay that would entail, the Committee agreed that such a requirement

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<sup>11</sup> RoP, para 92, 01/06/09, Subordinate Legislation Committee

<sup>12</sup> RoP, para 94, 01/06/09, Subordinate Legislation Committee

could be avoided if a super-affirmative procedure were applied to any regulations made under section 18.

### **Recommendation 7**

**The Committee recommends that the proposed Measure is amended to provide enhanced scrutiny provisions.**

- i. For all regulations made under the proposed Measure to be subject to the super affirmative procedure, and for this to include pre-legislative scrutiny (as well as consultation) on any draft regulations to be made by the Welsh Government**
- ii. To impose limits in the proposed Measure on what the Welsh Ministers may and may not do by regulation.**

### **Recommendation 8**

**The Committee believes that sufficient powers are contained in other sections of the Measure to enable amendments to be made following the completion of the pilot , and so considers section 18 as unnecessary. The Committee consequently recommends that section 18 is removed from the Measure. If the changes required are so extensive that they cannot be made using those other regulation making powers, an amending Measure should be introduced.**

### **Recommendation 9**

**The Committee recommends that the scrutiny period allowed for the stage one scrutiny of Measures is increased so that adequate time is made available for proper scrutiny of proposed legislation. This should be a minimum of 12 weeks.**