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Llywodraeth Cymru
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Ein cyf/Our ref MA(L)ARD/0234/17

Huw Irranca-Davies AM, Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
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Dear Huw,

On 27 February, I attended an evidence session with the Constitutional and Legislative Affairs Committee on the Additional Learning Needs and Education Tribunal (Wales) Bill ('*the Bill*'). At that session, I agreed to provide the Committee with further information on the following two points before the end of this term:

- the Wales Act 2017 ('*the 2017 Act*') and its implications on the Bill, particularly in respect of the late Tribunal amendments; and
- clarification of the basis for the arrangements for the Secretary of State agreement for regulations under sections 79 and 80 the Bill.

Analysis of the Wales Act 2017 and its implications on the Bill

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.

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However, when I gave evidence to the Committee, work was underway to assess what impact, if any, might arise from amendments made at a late stage in the passage of the 2017 Act. These amendments inserted provisions on Welsh Tribunals into Part 3 of the 2017 Act and are relevant to consideration of the Bill because Part 3 lists the Special Educational Needs Tribunal for Wales (SENTW) as one of the Welsh Tribunals. SENTW is the existing Tribunal under the Education Act 1996 (‘*the 1996 Act’*), the name of which will change to the Education Tribunal pursuant to the Bill.

Part 3 provisions

Section 60 of the 2017 Act provides for the Lord Chief Justice of England and Wales to appoint a person to the office of President of Welsh Tribunals. Part 3 sets out various functions for the President, for example:

- Section 60(4) provides that the President of the Welsh Tribunals must, in carrying out functions, have regard to the need for Welsh Tribunals to be accessible; the need for proceedings before those Tribunals to be fair, and to be handled quickly and efficiently; the need for members of the Tribunals to be experts in the subject matter or the law to be applied; and the need to develop innovative methods of resolving disputes;

- Section 60(5) provides that the President of Welsh Tribunals is responsible for the maintenance of appropriate arrangements for the training, guidance and welfare of members of the Welsh Tribunals and for representing the views of members of the Welsh Tribunals to the Welsh Ministers and to other members of the National Assembly for Wales;

- Section 61 provides that the President of Welsh Tribunals (with the approval of Welsh Ministers, and after consulting with the Presidents of the Tribunals) may give directions as to the practice and procedure to be followed by Welsh Tribunals; and

- Section 62 provides for cross-deployment of members of Welsh Tribunals, including members of SENTW. To achieve this, 62(4) amends section 333 of the 1996 Act which deals with the constitution of SENTW.

Furthermore, Schedule 5 to the 2017 Act makes further provision about the two alternative routes to the appointment of the President of Welsh Tribunals.

Potential amendment required to the Bill as a result of the Wales Act 2017

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.

Arrangements for the Secretary of State agreement for regulations under sections 79 and 80

Members of the Committee were interested to understand why the agreement of the Secretary of State is needed to make regulations under sections 79 and 80 of the Bill. 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.

Regulations under section 13(2) and 14(20 of the Bill

There was one area raised with me by the Committee during the course of my evidence session where, given the complexity of the subject, I think it might be helpful if I provide further clarification and information.

It relates to the regulation making powers included in the Bill at sections 13(2) and 14(2) (the later by the insertion of subsection (2B) into section 83 of the Social Services and Well-being (Wales) Act 2014).

The Committee asked two questions in relation to these powers: 1) why are the categories of looked after children that might be prescribed in these regulations not set out on the face of the Bill; and 2) asked that I consider subjecting these powers to affirmative procedure.

These powers, and the categories of looked after children they might prescribe, are inextricably bound up with one another and they should be considered together. They are necessary in order to ensure that the provisions of this Bill, and the system it creates in relation to looked after children, fits with the system for such children created by the Social Services and Well-being (Wales) Act 2014 (“the 2014 Act”).

The underlying purpose of the looked after children provisions in the Bill is to ensure that where looked after children of compulsory school age or below have a personal education plan under the 2014 Act, that plan captures all their educational needs, including any additional learning needs that they have. This holistic approach to the planning of educational provisional for such children is to be achieved by incorporating the looked after child’s individual development plan within their personal education plan and requiring the looking after local authority to be responsible for duties under the Bill.

The requirement for personal educational plans is currently set out in regulations made under the 2014 Act (the Care Planning, Placement and Case Review (Wales) Regulations 2015 (“*the 2015 Regulations*”)). These regulations exclude certain groups of children who are looked after for the purposes of the 2014 Act, from the general requirement for a personal education plan. For example children accommodated for short breaks. These exceptions are an important element in ensuring that the degree of planning for the looked after child is appropriate and proportionate in the context of their particular circumstances.

The Bill moves the general requirement that personal education plans are put in place for looked after children on to the face of the 2014 Act. This then enables the Bill to provide for the incorporation of individual development plans into the personal educational plans. However, it is important the regulations made under the 2014 Act continue to be able to make appropriate exceptions to the general requirement for a personal education plan; hence the need for the regulation making power inserted by section 14(2) of the Bill. I do not think it appropriate for the Bill to remove this power and insert the categories of exception on to the face of the 2014 Act. To do so would constrain future changes in relation to social services policy that could currently be delivered through changes to the 2015 Regulations. This goes well beyond additional learning needs. The ability to further develop social services policy in this area through regulations was the position agreed by the National Assembly when it passed the 2014 Act.

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.

The procedure for making the regulations under sections 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. The essential differences between the general provisions and those for looked after children is that in the latter case:

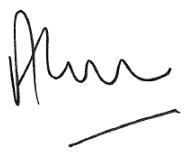
- it is the local authority that looks after the child who is responsible for the duties (rather than a school governing body or possibly another local authority); and
- the IDP must be incorporated into the child's personal education plan.

In other words, the substance of the entitlements in the Bill for those not treated as looked after is equivalent to those treated as looked after.

I hope the Committee finds this information helpful.

I am copying this letter to Lynne Neagle AM, Chair of the Children, Young People and Education Committee, given that Committee's interest in the Bill.

Yours sincerely



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