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Y Gweinidog Plant, Pobl Hŷn a Gofal Cymdeithasol
Minister for Children, Older People and Social Care



Llywodraeth Cymru
Welsh Government

Our Ref: MA - L/HID/0441/18

Mick Antoniw
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Ty Hywel
Cardiff
CF99 1NA

17 September 2018

Dear Mick,

Childcare Funding (Wales) Bill

Thank you for the committee's consideration of the Childcare Funding (Wales) Bill during Stage 1 and for the report which was published on 28 June 2018.

I have noted the committee's concerns about the way the Bill has been constructed and the committee's view the government has not succeeded in striking the right balance between what is on the face of the Bill and what is left to subordinate legislation.

I have asked my officials to review the balance between what is on the face of the Bill and what is left to regulations. Consequently, I shall be bringing forward government amendments, which will help to respond to the committee's recommendations and which will help to clarify the Bill's intended purpose.

By including more information about who is a "qualifying child" on the face of the Bill, I hope the committee's concerns about the potential for the Bill, as drafted, to be "used to pursue an entirely different policy to that which is contained in the Explanatory Memorandum, for example after-school care for 8 to 13-year-olds, will be alleviated.

I have balanced the committee's views in this respect with recommendation 10 from the Children, Young People and Education Committee which makes the case for maintaining flexibility for the future around the age of qualifying children.

In responding to the recommendations of the three committees which have scrutinised the Bill, I have tried to strike a careful balance, but there have inevitably been occasions when I have had to fall on one side rather than the other.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

I also note the committee's concerns about the administrative scheme not being subject to the scrutiny of the National Assembly. In my response to the Children, Young People and Education Committee, I have offered to share an initial framework administrative scheme with the committee ahead of Stage 3. I have also said I would welcome the opportunity to return to the committee in the Spring with a draft scheme.

I would like to take this opportunity to make you aware of a change in the delivery arrangements for the second year of early implementation of the childcare offer which will have an impact on the options in the Bill's Regulatory Impact Assessment.

In the first year, each local authority undertook the full process themselves, including the assessment of applications and processing of payments to childcare providers. For the remaining period of early implementation until the national roll out in 2020, we will be asking local authorities to work in partnership with one authority accepting and processing applications on behalf of others and making relevant payments. This is intended to minimise the sunk costs (costs already incurred and non recoverable) in an approach we are not taking forward in perpetuity and to maximise efficiencies for taxpayers.

This approach will be added to the Bill's Regulatory Impact Assessment as a fifth option during Stage 2. The data will be shared as soon as it becomes available, although it is not expected to make a significant difference to the balance of costs between our preferred option of using HMRC and the other options.

Annex A provides a more detailed response to the recommendations made by the Constitutional and Legislative Affairs Committee during Stage 1 scrutiny.

I am copying this letter to the chairs of the Children, Young People and Education and Finance committees for information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Huw', with a horizontal line underneath it.

Huw Irranca-Davies AC/AM

Y Gweinidog Plant, Pobl Hŷn a Gofal Cymdeithasol
Minister for Children, Older People and Social Care

Recommendation 1

The Minister should update the National Assembly on the progress of the consent discussions with the UK Government during the Stage 1 debate.

I **accept** this recommendation.

I am pleased to report that all necessary consents for the information sharing provisions in sections 4 and 5 of the Bill have been secured. The consent of the Chief Secretary to the Treasury had been secured in advance of the Bill's introduction and the consent of the Home Secretary and the Secretary of State for Work and Pensions were secured, via the Secretary of State for Wales, on 28 June. My letter of 9 July to the Presiding Officer, copied to the chairs of committees, confirmed this. I shall provide an update, as requested, during the Stage 1 debate.

Recommendation 2

We are not satisfied with the balance between what is on the face of the Bill and what is left to subordinate legislation. The Minister should undertake a fundamental review of the balance ahead of Stage 2 proceedings, with the objective of tabling amendments at Stage 2 to ensure that the Bill's policy intent is much clearer.

I **accept** this recommendation.

I have listened to the concerns of this committee and those of the Children, Young People and Education Committee about the balance of what is on the face of the Bill and what is left to subordinate legislation and have undertaken a review.

I consider there to be a strong case, as this is a technical Bill, for placing most of the operational detail in regulations and in an administrative scheme rather than on the face of the Bill. However, I recognise that it is important the Bill is clear about its intended purpose, while maintaining a degree of flexibility to accommodate any slight adjustments that may be required in the light of evidence emerging from the evaluation reports or to accommodate the policy aspirations of future administrations. With this in mind, I am considering bringing forward an amendment to the Bill, with a view to also addressing recommendation 5.

Recommendation 3

The Minister should consider including in the Bill provisions that would require the Welsh Government to review and repeal the legislation (should it be enacted and commenced). Such provisions should ensure that:

- **the review takes place after an appropriate period and its conclusions are enclosed within a report laid before, and debated by, the National Assembly;**

- **in the event that the review shows the legislation is (for example) not operating as intended, it should be repealed. This sunset provision should follow the approach included in the Public Health (Minimum Price for Alcohol) (Wales) Bill.**

The Minister should update the National Assembly of the outcome of his consideration during the Stage 1 debate on the Bill.

I am **continuing to explore the options** available in respect of this recommendation. I do not believe that review provisions such as this are appropriate for all legislation or that this would be apt in the context of a power to provide funding. However I do recognise that, in some cases, there can be a benefit in including them.

I am considering how best to address the points you have made in relation to recommendation four, together with those made by the Children, Young People and Education Committee. I see this recommendation being linked to how those matters are taken forward.

I will write to the committee to update it as proposals are developed.

Recommendation 4

The Bill should, on its face, commit the Welsh Government to providing its Childcare Offer.

There is a strong correlation between this recommendation and recommendation nine made by the Children, Young People and Education Committee, which calls for the Bill to require Welsh Ministers to provide funded childcare within the terms of the offer.

I am **continuing to explore the options** available to me to meet these recommendations, and the principles which support them. I will write to the committee to update them as proposals are developed.

Recommendation 5

The Bill should be amended so that the core eligibility criteria concerning who is a “qualifying child” or a “working parent” appear on the face of the Bill. The Bill should consequentially include provision enabling these criteria to be amended in the future by regulations which are subject to the affirmative procedure.

I **accept** this recommendation.

I’m proposing to bring forward amendments during Stage 2 to provide more clarity in relation to who is a “qualifying child”.

I am mindful of the Children, Young People and Education committee’s recommendation 10 around the need to ensure a degree of flexibility around the age of eligible children and therefore will be seeking to strike a balance between the recommendations of the two committees in this respect.

Recommendation 6

Should the Minister not accept Recommendation 5, the regulations made under section 1 should be subject to a superaffirmative procedure, as opposed to the

affirmative procedure, to provide a counterbalance to the breadth of power being sought.

I **do not accept** this recommendation.

This recommendation is linked to recommendation 5; I intend to provide more clarity in relation to who is a “qualifying child” and that the policy intention of the Bill will be made clearer as a result. I therefore do not intend to make the regulations under section 1 of the Bill subject to the super-affirmative procedure.

Recommendation 7

We do not consider that either the hourly rate payable for the childcare or who can provide such care are matters that should be decided without scrutiny by the National Assembly and amendments should be brought forward at Stage 2 to ensure that such provision will be made in regulations subject to the affirmative procedure.

I **do not accept** this recommendation.

The hourly rate sits outside the scope of this Bill.

The Bill’s purpose is to provide the legislative basis necessary to develop a digital application and eligibility checking process for the childcare offer. It does not extend to issues relating to the hourly rate, and it was not our intention that such matters should be included in the remit of secondary legislation flowing from the Bill. Instead they would be within the administrative scheme. Issues such as who can provide the childcare, what rate is payable to them and how and where parents can access the offer are important elements of how the scheme will operate in its entirety and it is important Assembly Members have an opportunity to consider these issues in greater depth.

I would welcome an opportunity to return to the Children, Young People and Education Committee in the Spring to discuss an initial draft administrative scheme, which will cover these issues in more detail.

The hourly rate is subject to ongoing testing as part of the early implementation of the childcare offer. New areas in Cardiff, for example, are being added to the offer to see whether the hourly rate is workable in areas where the cost of childcare is higher than in other parts of Wales.

By placing details of the hourly rate in the administrative scheme, rather than in regulations, we will be in a better and more agile position to keep the hourly rate under regular review.

Recommendation 8

The Minister should justify during the Stage 1 debate why he has chosen to publish an administrative scheme rather than issue statutory guidance to local authorities.

I **accept** this recommendation.

In developing this Bill it was determined that the best approach this was to keep this technical Bill short and focused on giving Welsh Minister’s the power to make arrangements for the administration of the scheme, with regulation-making powers only where legislation is necessary, for example in respect of permitting third parties to provide information and appeals to the First Tier Tribunal.

We are proposing an administrative scheme to be established under the powers in section 1 of the Bill, setting out the operational details of how the offer will work – this will cover such details as the split between childcare and early education, how the offer works during school holidays; which providers can deliver the offer and how providers are to be paid, for example.

It is envisaged that guidance relating to the scheme (whether statutory or otherwise) will be issued to various audiences. However this will supplement the scheme. I do not consider that guidance can be used as an alternative to having an administrative scheme: this would not achieve the certainty and consistency that we need parents across Wales to benefit from.

Guidance will also be required, targeted at different audiences. It will explain to each party their specific role in delivering the childcare scheme and to provide advice on application of the scheme. We will work with local authorities as we develop the guidance.

Recommendation 9

The Minister should, during the Stage 1 debate, provide a further explanation as to why he believes the UK Government will not have, in effect, a veto over the proposed childcare funding arrangements should the UK Government refuse to provide the necessary consent for any regulations which make provision under sections 4 and 5 of the Bill.

I **accept** this recommendation.

The Bill will enable us to set up a system for applications and eligibility checking for the childcare offer. Our preferred approach uses HMRC as the delivery agent and requires access to specific datasets held by HMRC, the Department for Work and Pensions and the Home Office.

Officials have been working with HMRC, the Wales Office and other UK Government departments for many months and I have been confident the necessary UK Government consents would be secured.

These initial consents have been obtained and my officials are now engaging with the relevant UK departments on the next stage, which will involve securing the consents of Ministers of the Crown to subordinate legislation where there is an impact on third parties.

I do not foresee the issue of consents being a barrier to us delivering on the proposed arrangements.

Recommendation 10

The Minister should provide during the Stage 1 debate a further explanation regarding the use in section 11 of the wording “to confer a discretion on any person”.

I **accept** this recommendation.

The wording “to confer a discretion on any person” is a standard form of words frequently used in legislation and is intended to ensure there is sufficient legislative cover and flexibility built into any administrative arrangements to ensure any exceptional circumstances can be dealt with as effectively as possible.

Recommendation 11

The Explanatory Notes which will accompany the legislation should make clear the intention and effect of the wording “to confer a discretion on any person” in section 11.

I **accept** this recommendation and the Explanatory Notes will be amended to address this recommendation during Stage 2.

Recommendation 12

The Bill should be amended so that any Order made under section 12(1) of the Bill is subject to scrutiny and the negative procedure.

I **do not accept** this recommendation.

The making of commencement orders is not normally subject to any procedure, as they bring into force what the National Assembly has approved. The Welsh Government’s position on this issue has already been clarified. I see no reason, therefore, to deviate from the current convention in relation to commencement orders.