



Our ref: MA-L/ARD/0420/17

Huw Irranca-Davies AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

SeneddCLA@assembly.wales

17 July 2017

Dear Huw,

ADDITIONAL LEARNING NEEDS AND EDUCATION TRIBUNAL (WALES) BILL

I wrote to you on 7 June to thank the Constitutional and Legislative Affairs Committee for its Stage 1 report on the Additional Learning Needs and Education Tribunal (Wales) Bill ('the Bill'). In that letter, and during the debate on the General Principles of the Bill on 6 June, I signalled my intention to write to you with a detailed response to each of the Committee's 12 recommendations. This response is provided below; it is based on careful and detailed consideration and reflects my current position on the key issues to be resolved in the Bill. It will, of course, be subject to further discussions to be held throughout the remainder of this term, work to be carried out over the summer recess, and the detailed scrutiny of the Bill at Stage 2.

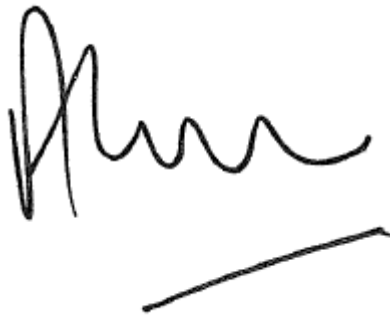
The response to each recommendation sets out whether I accept, or accept in principle (subject to further consideration and discussion) that recommendation. Where I do not accept a recommendation, I have set out my rationale for coming to that decision. I have also indicated, where relevant, that accepting a recommendation will require a further amendment to the Bill.

As you will see, I am accepting (fully or partially) or accepting in principle 8 of the Committee's 12 recommendations. Indeed, a number of the key issues raised in your report align with the Government amendments I have already tabled. My intention is to address other recommendations via amendments tabled in a subsequent tranche or tranches before the tabling window for Stage 2 Government amendments closes on 25 September.

I hope that this information helps to inform your further scrutiny of the Bill and demonstrates my commitment to listen and to work collaboratively to deliver an effective piece of legislation that will genuinely improve the lives of children and young people. I look forward to continuing to work with Members as the Bill progresses through its further stages.

I will also be writing to the Chair of the Finance Committee and the Children, Young People and Education Committee with regards to their Stage 1 reports. I am copying each of the letters to all three Committee Chairs.

Yours ever,

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

Alun Davies AC/AM
Gweinidog y Gymraeg a Dysgu Gydol Oes
Minister for Lifelong Learning and Welsh Language

Welsh Government's response to the Constitutional and Legislative Affairs Committee's Stage 1 report on the Additional Learning Needs and Education Tribunal (Wales) Bill

Recommendation 1

The committee recommends that the Minister justifies why the regulation-making powers under sections 12(7)(c), 50(3), 60(1) and 68(4) are needed in the Bill.

I **accept** this recommendation. I welcome the opportunity it provides to explain why I believe these regulation-making powers are required or otherwise.

Section 12(7)(c) enables regulations to set out other forms of provision that may need to be secured by a local authority to meet the reasonable needs of learners for additional learning provision, should such evidence emerge once the new system is in place. The removal of this power to make regulations risks making the system potentially less responsive to the emergence of such evidence. However, on balance and on reflection, I have decided that the argument for retaining this power is less compelling. The current system for supporting learners has provided no particular evidence that provision other than that already specified in section 12(7) would be necessary in order to meet a child or young person's reasonable needs for additional learning provision. My intention is therefore to table an amendment that removes the power at section 12(7)(c).

Section 50(3) provides a power to add or remove exemptions to the general prohibition on placing a young person at an independent special post-16 institution which is not on the list to be maintained by the Welsh Ministers. This power has been included in the Bill in order to cover unforeseen and exceptional circumstances which might emerge once the new system is rolled out. Although the rationale for retaining this provision is similar to that in relation to section 12(7)(c), I think the risks around removing it may be more likely to be realised and have a more adverse impact on young people. There could be cases where, for example, it becomes clear that the educational interests of young people with very specialist needs are best served through placements which are very short term or perhaps very occasional but where the specialist institutions in question may not consider it worthwhile applying to be added to the list maintained by the Welsh Ministers because of the short term or infrequent nature of such placements.

If this is proved to be true, it might be possible, through regulations, and on the basis of the cases that occur, to enable an exemption or exemptions to the general duty to be created. If we do not have that power, very vulnerable young people might be disadvantaged. Section 50 of the Bill contains provisions which are new and have no direct equivalent under existing law. Consequently, we cannot know at this point what anomalous situations might arise. A degree of flexibility to make minor adjustments to the legislative system so that it can respond appropriately to these potential scenarios seems, to me, to be entirely proportionate. Therefore, I think the power at section 50(3) should be retained.

Section 60(1) enables regulations to be made to allow local authorities to supply goods and services to others in relation to additional learning needs matters on terms and conditions which may be provided for in the regulations. There is similar

provision in current law allowing the supply of goods and services to school governing bodies to assist them in making special educational provision (section 318 of the Education Act 1996) and there are regulations dealing with terms as to payment (*Education (Payment for Special Educational Needs Supplies) Regulations 1999* SI 1999/710). These regulations allow the supplying local authority to recover the full cost, but no more, where it supplies goods or services to a school it does not maintain in another local authority area.

In my view, the power in section 60 is necessary. For the new system to work, local authorities are likely to need to supply goods and services to others on occasion, for example so that additional learning provision can be provided to a person from the local authority's area who is detained in relevant youth accommodation. A local authority's general functions may allow it to supply goods and services in connection with additional learning needs matters in some circumstances, but those other powers would not necessarily cover all the circumstances that could be covered by this power. Section 60 would allow the Welsh Ministers to give a clear power to local authorities, as well as giving scope to limit the basis upon which the goods and services may be supplied.

I envisage making regulations to give a specific power to local authorities and include provision to prevent a profit being made.

Section 68(4) provides that Part 1 of the Arbitration Act 1996 does not apply to proceedings of the Education Tribunal but regulations can make corresponding provision. The power is a restatement of an existing provision set out in the Education Act 1996 in relation to the procedures of the Special Educational Needs Tribunal Wales. We are continuing to consider the issue the Committee raises in its report.

Recommendation 2

The committee recommends that the Minister reconsiders whether the requirements which may be contained in the code pursuant to section 4(4) of the Bill should instead be contained either on the face of the Bill or in regulations.

I **do not accept** this recommendation. I have considered the proposition contained in this recommendation carefully, but remain of the view that the current balance between what is included on the face of the Bill, what will be set out in regulations and what will be included in the Code, is appropriate. I would therefore resist an amendment of this sort.

The Code is intended to provide those responsible for delivering the new system with clear guidance and requirements. It will be a practical and accessible 'handbook' for practitioners and professionals and the primary means by which they navigate their way through the new system. Stakeholders have told us that to be properly effective, the Code must have 'teeth'. We are doing this by giving it the power to impose mandatory requirements. Without this power, the Code will be restricted to providing guidance and referencing the mandatory requirements set out elsewhere. Its status and standing will, therefore, be lessened, which would contradict the clear steer we have received from practitioners.

It would not, in my view, be appropriate to set out on the face of the Bill the level of technical detail about operational matters that will be the subject of many of the intended mandatory requirements. Given the operational nature of the requirements, and the refinement they may require over time, placing them anywhere other than in subordinate legislation would be impractical and undesirable. I also think it undesirable to place these requirements in regulations rather than in the Code. Having them in the Code is more practical and accessible for practitioners – they can see the exact wording of the requirement alongside related guidance and examples which can help explain the requirement. The Code will make it clear which of its provisions are mandatory under section 4(4) of the Bill. I would add, in the light of comments below in relation to recommendation 3, that the procedure for making the Code will be every bit as robust as any regulations we might make.

Recommendation 3

The committee recommends that the Minister should table an amendment to the Bill, applying a super-affirmative procedure to the making of a code under section 5.

I **accept** this recommendation in that I have already tabled an amendment to make the Code (and any revised Codes) subject to affirmative resolution procedure.

Separately, I am writing to the Children, Young People and Education Committee outlining a proposal for ensuring that the Committee plays a full role in the consultation phase of the Code's development and consideration.

Recommendation 4

The committee recommends that the Minister should table an amendment to the Bill applying the affirmative procedure in the first instance to regulations made under sections 13(2) and 14(2), followed by the negative procedure on subsequent occasions.

I **accept** this recommendation. My intention is to bring forward amendments to apply the affirmative procedure to the first exercise of these powers.

Recommendation 5

The committee recommends that the Minister should table an amendment to section 30 to place a timescale for making an appeal on the face of the Bill. Any subsequent change to the timescale should be achieved by regulations subject to the affirmative procedure.

I **do not accept** this recommendation. Whilst I recognise the reasons for putting on the face of the Bill the timescale within which a request to a local authority can be made to reconsider a school governing body decision that a pupil no longer has additional learning needs, there are risks associated with its appropriate alignment with other timescales to be set out subsequently in the Code. I think the best way to approach these different timescales is to develop and finalise them alongside one another so that the integrity of the process as a whole is maintained.

Recommendation 6

The committee recommends that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 36(2).

I **accept in principle** this recommendation subject to further consideration of the link to regulations made under section 562J(4) of the Education Act 1996 and exercising these powers consistently with the objective that the law is accessible.

Recommendation 7

The committee recommends that the Minister should table an amendment to the Bill, removing the power for the making of regulations under section 45(2)(d). At the very least, the existing power in the Bill should be subject to the affirmative procedure.

I **accept** this recommendation. I have already tabled amendments to remove the power for making regulations under section 45(2)(d).

Recommendation 8

The committee recommends that the Minister should table an amendment to section 58(5) to place the prescribed period (and any exceptions that apply) in which a person must comply with a request for information on the face of the Bill. Any subsequent change to the prescribed period should be achieved by regulations subject to the affirmative procedure.

I **do not accept** this recommendation. Regulations made under the power set out in section 58(5) of the Bill will likely set out a range of periods within which different bodies must comply with different sorts of requests for help and information; a single date on the face of the Bill would be inappropriate as a consequence. Also, in setting the period(s), we need to take account of wider timescales for complying with duties in the Bill or the Code, which will be provided for in the Code.

The Code is to be consulted upon widely before it can be made. Therefore, any period set out in the Bill at this stage, may not necessarily be appropriate and may have to be changed at the outset.

I also note that under the current Special Educational Needs system, there is a power to set such periods in regulations (specifically in section 322(4) of the Education Act 1996 and the regulations are the Education (*Special Educational Needs*) (*Wales*) Regulations 2002 SI 2002/152).

Recommendation 9

The committee recommends that the Minister should table an amendment to section 69 to place a timescale for complying with an order of the Education Tribunal for Wales on the face of the Bill. Any subsequent change to the timescale should be achieved by regulations subject to the affirmative procedure.

I **do not accept** this recommendation. Prescribing on the face of the Bill a set period in which an Order of the Education Tribunal for Wales must be complied with would

not be appropriate. Orders will require local authorities or governing bodies of further education institutions to do a range of different things, depending on the nature of the appeal that has been considered. Different categories of Order will require different timescales for compliance and may link to timescales for other matters which will be set out in the Code and will therefore be the subject of separate consultation. Having a single period on the face of the Bill would provide no flexibility to deal with this.

Timescales for compliance with Orders issued by the current SEN Tribunal for Wales under the existing system are set out in regulations. Therefore, there is nothing new or contentious about the approach here.

Recommendation 10

The committee recommends that the Minister should table an amendment to the Bill, removing the power for the making of regulations under section 82. At the very least, the existing power in the Bill should be subject to the affirmative procedure.

I **accept** the second part of this recommendation but not the first. The regulation making power gives flexibility to make further provision about a person being “in the area of” a local authority in Wales, which might be desirable should any difficulties or uncertainty arise as to what it means in particular situations. Although the power might not be used in the near future, I am not persuaded that it is appropriate to remove it. However, I accept the recommendation to move to the affirmative procedure and my intention is to bring forward an amendment to this effect.

Recommendation 11

The committee recommends that the Explanatory Notes to the Bill should be amended to provide an adequate explanation of Schedule 1.

I **accept** this recommendation. The Explanatory Notes will be revised ahead of Stage 3 as per normal practice, and will contain an adequate explanation of the Bill and its Schedules.

Recommendation 12

The committee recommends that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 86(8).

I **accept** this recommendation. My intention is to bring forward such an amendment.