

Y Pwyllgor Is-ddeddfwriaeth

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Cymdeithas y Cyfreithwyr



Ms J Ryder AM
Chair
Subordinate Legislation
Legislation Office
National Assembly for Wales
Cardiff Bay
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Dear Chair,

Subordinate Legislation Committee - Proposed Education (Wales) Measure

I write in response your letter of 20 May requesting opinions on the Proposed Education (Wales) Measure.

In the time available we have not been able to review the subject matter of the proposed Measure in sufficient detail to comment upon the operation of the proposed Measure. However, we are able to offer our views, as requested, on the delegated powers provisions particularly those outlined in Section 18.

Overview

As a matter of first principles primary legislation is made to enable a particular policy to be pursued. In this instance consultation has been undertaken and the subject of the legislation is clear. However, 17 out of the 19 clauses in Part 1 grant or provide for the operation of delegated powers.

The details of the procedures and qualifications leading to implementation of this policy are a fair subject for delegation to the Welsh Ministers: Sections 3 - 6 and 10 - 13 are examples. However, the extent of the delegation of subordinate law-making powers in the proposed Measure goes much further than detailed implementation.

Interruption of Rights through Regulations

The Committee must be satisfied that where delegated powers can be used to restrict rights of appeal (section 1) or claims (section 9) the way this is done is appropriate. The government does not explain why these powers are needed or how they might be used so there is no information available to assess the provisions as drafted. In the circumstances the powers must be viewed in isolation so the Committee should consider how the government could in future use sections 1(4) or 9(6) to avoid rights or claims and whether to restrict this power.

Section 18

Section 18 only applies once a pilot under section 17 has been undertaken and a report placed before the National Assembly. Then the provisions of section 18 are subject to a rigid timescale (see further below). Although these surrounding circumstances purport to limit the application of the section in time the breadth of the powers which it is proposed should be delegated should only be available to the executive in narrow circumstances.

Section 18(2) provides that the Welsh Ministers will have power:

- (a) to add, remove or modify rights;
- (b) to amend or repeal provisions of Part 4 of the Education Act 1996;
- (c) to amend or repeal provisions of Part 4 of the Disability Discrimination Act 1995...

The wording has been extracted here to highlight the far-reaching consequences of the delegation of power under this section. The power is exercisable in relation to specific matters within the subject of the proposed Measure but such wide powers to change primary

legislation by the executive through subordinate law-making is of concern.

What additional powers would the Welsh Ministers need to react to the outcome of the pilot? The powers delegated in the sections preceding section 17 provide a framework which is already very wide. We believe that it is questionable to simply add a blanket clause in section 18(2) without clear explanation why the powers granted under the other sections within the proposed Measure are in themselves insufficient to deal with the implementation of the policy.

Our concern is that the government draftsmen are applying 'just in case' reasoning; thus, the executive acquires powers across the whole subject area of any proposed Measure rather than those discrete powers which allow the executive to implement a policy which has been scrutinised by the legislature. In future the government could have full legislative control over a particular subject to implement policy as they develop it rather than to lead with firm and developed policies.

The delegation of powers is subject to a timeframe for the exercise of the powers but reading across section 17 there is no certainty as to when this will occur. The time limits refer to the regulations under made under section 17(2) but under section 17(4) the regulations governing the pilot can be extended so there is in fact no certain time limit.

Section 18 adds a qualification to the delegated powers under subsection (3) but it only requires that "The Welsh Ministers must have regard (among other things) to their report..." which is of limited effect. Whether or not the pilot results in changes to the policy or additional proposals the government can make further changes to existing primary legislation at that stage.

Also, what are the "other things" as referred to in section 18(3)? Is it acceptable to include such a description in primary legislation?

One response to the delegation of wide powers is to apply the affirmative procedure to subordinate legislation made under a measure. Simply applying the affirmative procedure to the making of future subordinate legislation is not an answer to concerns regarding the limits of powers delegated to the executive in a particular piece of primary legislation.

The affirmative procedure does mean that the legislature has some control over new subordinate legislation but it should be used sparingly. The affirmative procedure is not an alternative to the legislature exercising its own law-making function, and particularly so given that the Assembly has evolved an effective scrutiny system by establishing Legislative Committees to consider the provisions of draft Measures, including the calling of evidence from outside bodies and persons and their appearance before such Committees to give oral evidence.

Explanatory Memorandum

We submit that the onus is on the government to show why the delegation of powers is necessary and that the particular delegation, both as to nature and extent, is appropriate to implement the policy and to vary it in the future where this is proposed.

In our view 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.

Inquiry

Following its recent inquiry into scrutiny of subordinate legislation and delegated powers the Committee has set out the information the Committee views as necessary for its consideration of delegated powers in UK Bills (Recommendation 8). The assessment of the delegation of law-making powers to the Welsh Ministers through proposed Measures is exactly the same as that which should be applied in relation to UK Bills. The recommended information is a useful checklist and should be a requirement for explanatory memoranda for delegation of powers in new Measures (it is only the penultimate paragraph which would not apply to proposed Measures).

We trust our comments will inform the Committee. Should you consider that further explanation of any of the views expressed here is required please contact us.

Yours faithfully,

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