

Constitutional Affairs Committee

Report (CA (3) 07-10)

Date: 4 March 2010
Time: 9.00am
Venue: Committee Room 2, Senedd

CONTENTS

The Committee met on 4 March 2010. At the meeting the following Committee Members were present: Janet Ryder AM, Mike German AM, William Graham AM and Rhodri Morgan AM. Apologies were received from Alun Davies AM. There were no substitutions.

The Committee reports to the Assembly as follows:

Instruments and draft instruments in respect of which the Assembly is not invited to pay special attention under Standing Order 15.2 and 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

CA400 - The Local Authorities (Alteration of Requisite Calculations) (Wales) Regulations 2010

Negative Procedure. Date made 11 February 2010. Date laid 15 February 2010. Coming into force date 28 February 2010

CA401 - The Food for Particular Nutritional Uses (Miscellaneous Amendments) (Wales) Regulations 2010

Negative Procedure. Date made 17 February 2010. Date laid 19 February 2010. Coming into force date 15 March 2010

Draft instruments subject to approval pursuant to a resolution of the Assembly (Affirmative Procedure)

CA403 - The Local Education Authorities and Children's Services Authorities

Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date in accordance with article 1

Instruments and Draft Instruments in respect of which the Assembly is invited to pay special attention under Standing Orders 15.2 and/or 15.3

Instruments subject to annulment pursuant to a resolution of the Assembly (Negative Procedure)

CA395 - The Community Health Councils (Constitution, Membership and Procedures) (Wales) Regulations 2010

Negative Procedure. Date made 9 February 2010. Date laid 10 February 2010. Coming into force date 1 April 2010

The Committee noted that although the Welsh Government accepted the reporting point, it intended to “review the operation of the Community Health Councils (Constitution, Membership and Procedures) (Wales) Regulations 2010 by 31 March 2012” and to correct it “as part of that review.”, which means that the error will remain uncorrected for a further two years. The Committee agreed to write to the Minister to ask her to explain why the relevant correction could not be done sooner.

CA399 - Housing Renewal Grants (Amendment) (Wales) Regulations 2010

Negative Procedure. Date made 10 February 2010. Date laid 11 February 2010. Coming into force date 4 March 2010

Draft Instruments subject to approval pursuant to a resolution of the Assembly (Affirmative Procedure)

CA397- The School Funding (Wales) Regulations 2010

Affirmative Procedure. Date made not stated. Date laid not stated. Coming into force date 1 September 2010.

In addition to highlighting the reporting point under SO15.2, the Committee decided to report these Regulations under Standing Order 15.3 (ii) as giving rise to issues of public policy likely to be of interest to the Assembly, because they implement provisions relating to 3 year funding for schools.

The Committee noted that while the Regulations stated that the local authorities would be able to direct schools to spend balances when school surpluses are £50,000 or more (primary school) or £100,000 (secondary or special school), the Explanatory Memorandum indicated that it was holding balances of more than 5% (rather than any cash amount) that represented poor financial management. The Committee agreed to report on this issue but also to write to the Minister highlighting the concern, asking him to confirm the policy intent and why a phrase such as “whichever is the lower” had not been used.

CA398 - The School Standards and Framework Act 1998 (Repeal) (Wales) Order 2010

Affirmative Procedure. Date made not stated. Date laid not stated.
Coming into force date 1 September 2010

The Committee considered this Order alongside CA397: although this Order had no reporting points it was consequential on “The School Funding (Wales) Regulations 2010”.

The Committee’s Reports under S.O.15.2 and S.O.15.3 on these Regulations are attached as Annexes 1- 3.

Other Business

Committee Inquiries : Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters

The Committee took oral evidence from Sir Emyr Jones Parry, Chair of the All Wales Convention, All Wales Convention.

In accordance with Standing Order 10.37(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on Inquiries into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters.

Janet Ryder AM
Chair, Constitutional Affairs Committee

4 March 2010

Annex 1

Constitutional Affairs Committee

(CA(3)-07-10)

CA395

Constitutional Affairs Committee Report

Title: The Community Health Councils (Constitution, Membership and Procedures) (Wales) Regulations 2010

Procedure: Negative

The Regulations make provision for the membership, proceedings and functions of CHCs and the Board of Community Health Councils in Wales. The Regulations revoke the Community Health Councils Regulations 2004 and the Community Health Councils (Amendment) Regulations 2005, save that regulation 32 continues in existence the CHC Board established under regulation 23 of the 2004 Regulations to the extent that regulation 23 of those regulations established the CHC Board.

Technical Scrutiny

Under Standing Order 15.2 the Assembly is invited to pay special attention to the following instrument.

The reference to the establishment of a council provided within the definition of "district of a Council" should be to article 3 and not to article 4 of the Community Health Councils Establishment, Transfer of Functions and Abolition) (Wales) Order 2010 ("The 2010 Order"). This is because article 3 of the 2010 Order provides for the establishment of Community Health Councils, and not article 4. [Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements].

The Government has responded as follows:

"The reporting point is accepted. The Minister intends to review the operation of the Community Health Councils (Constitution, Membership and Procedures) (Wales) Regulations 2010 by 31 March 2012. The reporting point identified will be corrected as part of that review. In the meantime, Community Health Councils and those who are responsible for appointing CHC members i.e. local authorities and selected voluntary organisations, will be written to advise them of the drafting error and the fact that it will be corrected when the Regulations are amended".

The Committee noted the Government response but was concerned that any correction would not be made until March 2012 at the earliest. The Committee agreed to write to the Minister indicating its concerns.

Merits Scrutiny

No points are identified for reporting under Standing Order 15.3 in respect of this instrument at this stage.

Janet Ryder AM

Chair, Constitutional Affairs Committee

4 March 2010

Annex 2

Constitutional Affairs Committee

(CA(3)-07-10)

CA397

Constitutional Affairs Committee Report

Title: The School Funding (Wales) Regulations 2010

Procedure: Affirmative

These Regulations revoke and replace the LEA Budget, Schools Budget and Individual Schools Budget (Wales) Regulations 2003, the Schools Budget Shares (Wales) Regulations 2004 and the Education (LEA Financial Schemes) (Wales) Regulations 2004 in relation to financial years that commence on or after 1 April 2011. They make provision for the funding of maintained schools in Wales for those financial years.

Technical Scrutiny

Under Standing Order 15.2 the Assembly is invited to pay special attention to the following instrument.

(i) Regulation 4 states that classes of local authority expenditure are specified in Schedule 1 of the Regulations. Paragraph 8 (Health and child protection) of Schedule 1 refers to section 31 of the Health Act 1999 which has been repealed by the NHS (Consequential Provisions) Act, section 6, Sch. 4. [Standing Order 15.2 (vi) defective drafting or it fails to fulfil statutory requirements].

(ii) Sub paragraph (2) of paragraph 1 (Expenditure to support grants) of Schedule 2 of the Regulations refers to section 484 of the 1998 Act. The Regulations define the 1998 Act as being the School Standards and Framework Act 1998. Section 484 of the 1998 Act is not in existence. [Standing Order 15.2 (vi) that its drafting appears to be defective or it fails to fulfil statutory requirements].

Government Response to the issues raised in the Technical Scrutiny:

(i) The reference to the Health Act 1999 is to ensure that any arrangements made under that Act which continue in existence are included, but as the provision is re-enacted in the National Health Service (Wales) Act 2006 it is accepted that the reference to the 1999 Act is not strictly required. It will be removed when the regulations are

next amended. As the regulations do not apply until the financial year commencing 1 April 2011, it is proposed that this will be done at the same time as other planned amendments to change the way that children educated other than at school are treated in budgeting terms (which are currently planned to be made before 1 April 2011).

(ii) The reference should be to the "1996 Act" not the "1998 Act". This will be corrected when the regulations are next amended.

Merits Scrutiny

The following issues have been identified for reporting under Standing Order 15.3 (ii) as giving rise to issues of public policy likely to be of interest to the Assembly:

The regulations implement a number of changes to the way in which Local Authorities allocate budgets for the schools they maintain and to the way they monitor and hold schools to account for their spending. The changes are:

- **3 Year Funding for Schools** – Authorities will provide schools with a three year forecast for each allocation they receive rather than the single year they currently do.

Constitutional Affairs Committee View

This implements a recommendation made in June 2006 by the 2nd Assembly's Committee on School Funding¹, which recommended the introduction of three year budgets for schools. The Welsh Government accepted the recommendation in full in their response to the Committee's report².

The issue was considered again in the 3rd Assembly in 2008 when the Enterprise and Learning Committee undertook an inquiry, *Arrangements in School Funding*³, which considered progress in implementing the Committee on School Funding's recommendations. The Committee concluded that progress had been made

While noting that this change has taken some time to introduce, the Committee commends the Welsh Government for now following through on its commitment to introduce 3 year funding for schools.

¹ [Report on School Funding Arrangements in Wales](#)

² [Assembly Government Response to Assembly School Funding Committee Report: 'School Funding Arrangements in Wales' Cabinet Statement, 26/09/2006 Jane Davidson, Minister for Education, Lifelong Learning and Skills.](#)

³ [Enterprise and Learning Committee Inquiry, Arrangements for school funding](#)

- **School Budget Surpluses** - Local authorities will be able to direct schools to spend balances when school surpluses are £50,000 or more (primary school) or £100,000 (secondary or special school). If the school fails to comply with the direction to spend, then the authority may also be able to claw back surpluses with the proceeds going to the authority's Schools Budget.

Constitutional Affairs Committee View

In response to concerns about the level of reserves held by some schools, and the lack of a uniform arrangement to deal with them, the Welsh Government consulted⁴ in September 2008 on proposals that would allow local authorities to direct schools to spend surpluses of 8% or more. In the Explanatory Memorandum accompanying the regulations, the Government explains that a *“modest level of surplus represents sensible management but excessive balances tie up funds unacceptably. Holding balances of more than 5% of budget for no specific purpose represents poor financial management.”* However, there is no reference in the Explanatory Memorandum to the figure of 8%.

Despite the reference in the Explanatory Memorandum to a percentage threshold, the regulations express the limits for school budget surpluses in cash terms (i.e. £50,000 and £100,000 as set out above), which means that some schools will be able to continue to hold balances of more than 5% while other schools may be directed to spend balances of less than 5%. We understand that the latter position may apply to at least 200 schools in Wales⁵.

It is not our purpose to question the policy behind these changes, although it may be that the implications of this change will prove to be locally controversial in some instances. However, we are concerned that the cash limits may militate against the interests of sensible budget management, particularly in those cases where the cash figures represent less than 5% of a school's budget. We do not understand why it was not possible to draft the regulations so that either a 5% or a cash amount applies depending on which sum is the greater (or the lesser if that was the intent).

We are also concerned that the apparent discrepancy between the Explanatory Memorandum and the regulations makes it difficult for the Assembly to know what the policy intent behind

⁴ [Consultation on the draft School Funding \(Wales\) Regulations 2009](#)

⁵ StatsWales website, [Report 005488](#)

the regulations is and, therefore, whether it has been accurately transposed into the regulations.

- **Notification Date of School Budgets** - The regulations change the date by which local authorities are required to notify the Welsh Ministers of their proposed Schools Budget from 31 January to 14 February.

Constitutional Affairs Committee View

We understand the change is largely because local authorities cannot meet the previous 31 January deadline and are thus in breach of a statutory duty through no fault of their own. The Committee takes no view on this change, although it appears to be a sensible and relatively minor change to allow better co-ordination with the local authority budget setting process. However, please note our concerns below about the Explanatory Memorandum explaining the change.

- **Explanatory Memorandum**

Constitutional Affairs Committee View

In addition to those outlined above, we have a number of other concerns about the Explanatory Memorandum.

The Explanatory Memorandum does not provide any link to the consultation. Consultation issues and responses are not referenced or summarised in the Memorandum. There is also no information given about alternatives considered or whether Ministers changed their original proposals in response to the consultation responses.

While it may be a sensible change, there is no explanation in the Explanatory Memorandum of the reason for the changes to the notification dates for school budgets.

Similarly, while the reasons for the other changes are easier to infer, there is no substantive explanation of them given in the Memorandum.

These regulations replace 3 separate sets of regulations and, we understand, largely replicate the provisions of those they are replacing. Nevertheless, we were somewhat surprised to note from the Explanatory Memorandum that a Regulatory Impact Assessment (RIA) was not considered necessary because the regulations “*replace existing legislative provision with minor modifications*”. Although this may technically be the case, the regulations nevertheless implement significant new policy in

respect of school and local authority budgeting arrangements. In such circumstances we would usually expect an RIA to have been conducted or a more comprehensive explanation provided of why one was not needed.

Overall, we consider the Explanatory Memorandum to be deficient, lacking both sufficient background and detail and inadequately addressing important policy issues.

Janet Ryder AM
Chair, Constitutional Affairs Committee

4 March 2010

Annex 3

Constitutional Affairs Committee

(CA(3)-07-10)

CA399

Constitutional Affairs Committee Report

Title: The Housing Renewal Grants (Amendment) (Wales) Regulations 2010

Procedure: Negative

These Regulations further amend (in relation to Wales) the Housing Renewal Grants Regulations 1996 (S.I. 1996/2890) (“the principal Regulations”), which set out the means test for determining the amount of grant which may be paid by local housing authorities under Chapter 1 of Part 1 of the Housing Grants, Construction and Regeneration Act 1996.

Technical Scrutiny

Under Standing Order 15.2 the Assembly is invited to pay special attention to the following instrument.

The substitution made into the principal Regulations by regulation 3(5)(c) contains gender specific language (“him” in sub-paragraph (i) and “his” in sub-paragraph(ii) without a corresponding “her”).
[Standing Order 15.2(viii)]

Merits Scrutiny

No points are identified for reporting under Standing Order 15.3 in respect of this instrument.

Janet Ryder AM

Chair, Constitutional Affairs Committee

4 March 2010

The Government has responded as follows:

The Housing Renewal Grants (Amendment) (Wales) Regulations 2010

"The use of gender specific language ('his' and 'him') was unavoidable in these amending Regulations because the Regulations amend the Housing Renewal Grants Regulations 1996 ("the principal regulations") which apply in England and Wales. To change the wording in so few places could give rise to inconsistencies and could cause confusion to the reader. Officials are looking into consolidating the Housing Renewal Grants Regulations, which are updated almost yearly to take account of annual changes in benefits and this is something that will be considered when drafting any future consolidating Regulations for Wales to ensure that they would avoid the use of 'gender-specific' language."