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THE EDUCATION BILL 2011 – PART 5

Paper by Edward Capewell to be delivered by Tim Kerr QC

Introduction

1. This paper covers Part 5 of the *Education Bill 2011* ("**the 2011 Bill**"). Part 5 is something of a miscellany, but an important miscellany nonetheless. It contains provisions which remove certain statutory duties from governing bodies and local authorities ("too much bureaucracy" in the Secretary of State's words); provisions on the form that new schools will take (Academies are to become 'the norm') and provisions on inspections and school standards ('accountability for student performance is critical' in the words of the White Paper). It also includes provision to stop a name change taking place.

Repeal of duties

2. Many of the duties which clauses 30-35 of the 2011 Bill will repeal have been in the government's sights since the White Paper. That had stated "…*we will remove statutory duties and requirements which we do not think need to be a legal requirement. Many of these requirements are 'declaratory' – they have little practical force – or else cannot reasonably be policed and enforced. Legislating in these areas is in our view ineffective*…" It is of course too soon to say, but this may be a welcome sign that the present government at least recognises that the way to prove it is changing things is by passing more and more legislation. One thing that rapidly becomes apparent in considering this small group of amendments is just how much education legislation there has been in recent years.

3. Clause 30 then repeals the duty currently placed on the governing bodies of maintained schools and FE institutions, and the proprietors of independent schools to co-operate with their relevant local authority in arrangements to improve the 'well-being' of children. This duty is currently in section 10 *Children Act 2004*, though schools have only been 'relevant partners' of local authorities since January 2010 after they were inserted into the 2004 Act by the *Apprenticeships, Skills, Children and Learning Act 2009* ("**ASCLA 2009**").

4. Clause 31 removes the duties on schools forums and the governing bodies of maintained schools in England (the position in Wales is unaffected) to have regard to 'children and young people's plans'. Children and young people's plans were

also introduced by the *Children Act 2004* (they were part of the 'Every Child Matters' initiative), and the 'have regard' duties were inserted into *Education Act 2002* ("**EA 2002**") by the *Education and Inspections Act 2006* ("**EIA 2006**").

5. Clause 32 repeals section 30A EA 2002 (inserted by *Education Act 2005*) which required maintained schools to publish a 'school profile'. This was intended to be a replacement for the governors' annual report. The content of the profile was to be provided for by the Secretary of State and in regulations. Thankfully no regulations were ever made although the Secretary of State did have template profiles for schools to use. Clause 33 repeals the duty on a local authority to appoint a 'School Improvement Partner' for each of its maintained schools. 'SIPs' were an initiative introduced by section 5 EIA 2006.

6. Clause 34, which amends Part 3 *School Standards and Framework Act 1998* ("**SSFA 1998**"), is of more interest. Clause 34(2)(a) will abolish admissions forums which were introduced by EA 2002 with the intention of ensuring fairness and consistency in admissions across a given LEA area. Clause 34(3) and (4) reduces the role of the Schools Adjudicators[1] in relation to admissions. They will no longer have power to direct modifications to admission arrangements under section 88J SSFA 1998 and they will no longer receive reports from LEAs on admissions arrangements under section 88P.

7. Clause 35 is perhaps Mr Gove's attempt to rid his Office of the 'milk snatcher' taint left by one of his distinguished predecessors. Subsections (2)(a) and (3)(a) restrict charging for milk and meals to cost price only, and subsections 2(b) and (3)(b) permit flexible pricing – the intention of which is to allow schools to, for example, charge less for school meals to families who are not quite eligible for free school meals.

New schools and governing bodies

8. Clause 36, which gives effect to Schedule 10 is perhaps one of the more heavily trailed reforms in the 2011 Bill. It is the 'Academies presumption'. In short, it means that where a local authority considers that a new school is required the power to decide on what sort of school it will be is taken out of their hands and given to the Secretary of State. If there are Academies proposals put forward for a new school then they will go to the Secretary of State for his consideration. Local

[1] For some recent, and somewhat entertaining, decisions of the School Adjudicators, see Clive Sheldon's recent blog post: http://www.education11kbw.com/?p=234

authorities, it seems, cannot be trusted to assist in the development of the Academies programme.

9. The establishment of new schools is currently governed by Part 2 EIA 2006. Section 7 EIA 2006 allows local authorities to publish a notice inviting proposals from bodies other than LEAs to establish new foundation schools or Academies. Paragraph 2 of Schedule 10 inserts a new section 6A into EIA 2006. Section 6A(1) will read:

> (1) If a local authority in England think a new school needs to be established in their area, they must seek proposals for the establishment of an Academy.

10. Section 7 EIA 2006 is amended by paragraph 3 of Schedule 10 to the 2011 Bill to require local authorities to seek the consent of the Secretary of State before inviting proposals for a new school and to remove their ability to publish their own proposals. Paragraph 4 of Schedule 10 inserts a new section 7A into EIA 2006 which will, *inter alia*, allow the Secretary of State to direct the withdrawal of a section 7 notice before the time for submitting proposals is up. That last provision is rather odd given that the Secretary of State will be the one deciding on whether a section 7 notice is made in the first place. I suppose even the Secretary of State changes his mind from time to time.

11. There are further amendments in Schedule 10 which will permit certain proposals for new schools to be published without the consent of the Secretary of State (see paragraph 7 which amends section 11 EIA 2006). These will include proposals for the establishment of (i) new voluntary aided schools (ii) new community or foundation primary schools to replace a maintained infant and maintained junior school and (iii) new foundation or voluntary controlled schools with a religious character to replace an existing religious school on the reorganisation of faith schools in a particular area.

12. The constitution of governing bodies of maintained schools in England is changed by clause 37. Again, the position in Wales will remain unchanged. Clause 37 will introduce amendments to section 19 of EA 2002 so that ordinary maintained schools will only have to have parent governors, the head teacher and (of course) ‘such other persons as may be prescribed’. This removes the requirement in primary legislation to have staff governors and LEA governors. Foundation schools and voluntary schools will still have to have foundation governors and partnership governors as appropriate.

13. Clause 38 again lends assistance to the expansion of Academies. It amends paragraph 5 of Schedule 1 to EA 2002 to allow a federation school (i.e. one where the governing body covers two or more maintained schools) which becomes an Academy to do so without having to go through the statutory procedure for dissolving the governing body of the federation.

School standards

14. Clauses 39 to 44 of the 2011 Bill deal with school standards. The White Paper had expressed the view that a reform to the way Ofsted carried out its inspection role was required. Inspectors, it was said, need to 'spend more time in the classroom and focus on key issues of educational effectiveness rather than the long list of issues they are currently required to consider'.

15. To that end, clause 40 inserts new subsections 5(5) and 5(5A) into EA 2005 (the current 5(5A) was only inserted on September 2010 by the *Children, Schools and Families Act 2010*). Subsection 5(5) sets out the Chief Inspector's general duty to report on certain matters. The list of matters which the report must cover will henceforth be reduced from seven to six. Hardly a momentous change. New subsection 5(5B) requires the report to cover the way in which the school's educational provision meets the needs of all the pupils at the school, including those who are disabled or who have SEN. The explanatory notes state that this will also cover "gender and minority ethnic groups, those eligible for free school meals and the pupil premium, looked-after children and gifted and talented pupils."

16. Clause 39 introduces the notion of an 'exempt school'. Again it does so by amending section 5 of EA 2005 which is of course the Chief Inspector's duty to inspect practically *all* schools at prescribed intervals. Clause 39(2) will insert new subsections 5(4A) and 5(4B) which will state:

> (4A) Regulations may provide that this section does not apply to prescribed categories of school in prescribed circumstances.
> (4B) A school to which this section does not apply by virtue of regulations under subsection (4A) is an "exempt school"

17. It is envisaged that Ofsted will be able to focus their efforts on those schools which really need inspecting. The White Paper envisages that the prescribed categories of school will be those which have previously been judged to be outstanding. Whether that is a sensible move or not is certainly open to question. The last Ofsted annual report recorded that 55% of schools which were outstanding when

last inspected were no longer outstanding when inspected in 2009-2010.[2] Clause 41 envisages a similar regime of exempt FE institutions by making amendments to Chapter 3 of Part 8 EIA 2006.

18. A further reform introduced by clause 39 is the power for Ofsted to charge for an 'inspection on request', i.e. a request from a school to be inspected where the Chief Inspector does not have a duty to inspect. Clause 41 introduces similar provisions for FE institutions. Clause 42 introduces greater powers for the Chief Inspector in relation to inspections of boarding schools, in particular with regard to the question of whether a child's welfare is being adequately provided and safeguarded (amendments are made to *Children Act 1989*).

19. Clause 43 extends the Secretary of State's powers to close 'schools causing concern' as defined in Part 4 EIA 2006. Currently the Secretary of State has power under section 68 EIA 2006 to close a school in special measures (section 62). Clause 43(2) extends the power of closure to those schools which have failed to comply with a performance standards or safety warning notice (section 60) as well as those which have been issued with a notice to improve by the Chief Inspector under section 61. Clause 43(3) also strengthens the Secretary of State's hand with regard to the giving of performance standards and safety warning notices by local authorities. At present, under section 69A EIA 2006, the Secretary of State can make a direction for the local authority to *consider* giving such notices. The insertion of a new section 69A(9A) will give the Secretary of State the power to give a mandatory direction to a local authority. Where such a direction is given the authority "must comply…before the end of the period of 5 working days beginning on the day on which that direction is given." The sanction for non-compliance is not specified.

20. Clause 44 also extends the Secretary of State's powers. It repeals sections 206 to 224 ASCLA 2009 which give the Local Government Ombudsman responsibility for considering complaints against maintained schools received from parents and pupils. Instead the Secretary of State's broad powers under sections 496-497 *Education Act 1996* revert to their pre- ASCLA 2009 status so as to encompass intervening once more with respect to those schools which the Secretary of State is satisfied "have acted or are proposing to act unreasonably" with respect to any power or duty under the Act.

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[2] See our blog post on the report here: http://www.education11kbw.com/?p=148

Pupil referral units

21. The last reform just worthy of brief mention is a very small skirmish in the battle against Newspeak. Section 249(1) ASCLA 2009 had introduced a new name for pupil referral units – 'short stay schools'. Pupil referral units were so called by section 19(2B) *Education Act 1996* but the name had been described by the former Secretary of State for Children, Schools and Families as "outdated and unhelpful". The present Secretary of State evidently doesn't agree. Section 249(1), although it has never been brought into force, is to be repealed by clause 49 of the 2011 Bill.

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