CDSA Education Sub-Group

Discussion Paper - Scrutiny of the SEND Bill

21st August 2015

The consideration of the issues set out below has been prepared by the Children's Law Centre as part of the Education Sub-Group of Children with Disabilities Strategic Alliance (CDSA) in response to questions arising during an evidence session held by the Education Committee with members of CDSA on 3rd June 2015. We are not presenting this paper as a legal opinion or legal advice. The paper provides information and comment for consideration by the Education Committee about the function of scrutiny within the legislative process relating to the SEND Bill, with the ultimate aim being to ensure that the revised SEN framework will improve upon the current framework to better meet the needs of children with SEN and disabilities.

1. Article 28 of the Education (NI) Order 1996 provides that Regulations and Orders made by DE which relate to Part 2 of that Order **shall** be subject to negative resolution. In other words the "parent" legislation governs the scrutiny of the revised Regulations relating to the general duty to identify children with SEN; the duties of Boards of Governors; the statutory assessment and statementing processes; the making of a Code of Practice and the review of Education Authority policies and arrangements.

2. Article 28 does not apply to Orders made under Article 5(3) of the 1996 Order, which relates to decisions by the DE about what is in the Code of Practice.

3. Article 28 has the effect of constraining the Committee from scrutinising secondary legislation, with the only the power being the power of the assembly to annul the regulations in their entirety through the negative resolution procedure.

4. On 12th February 2015 the Executive agreed to the introduction of the SEND Bill to the Assembly. The DE states (in its "Delegation of Powers" memorandum) that this indicates the Executive's agreement with the underlying policy. However, it has emerged during evidence sessions to the Committee that a number of key substantive changes are to be brought about outside of the current legislative process. These changes are not apparent upon the face of the SEND Bill i.e. they will be brought forward via revised Regulations and/or new Regulations and a revised Code of Practice. It is arguable that these substantive changes may not sit well with the underlying policy intent or indeed may be indicative of policy intent which is unclear, in the absence of full and proper scrutiny.

5. In addition, concerns have been raised from the outset (by Children's Law Centre) in relation to flaws within the policy development process in terms of s75 requirements and the common law duty to consult. It appears no action

has been taken to address these concerns which include a lack of transparency in terms of the information that has been available to stakeholders (caused by the imbalance between the primary and secondary legislation) and a failure to assess the equality impacts through EQIA. The Committee may wish to consider as part of the legislative scrutiny process whether the DE has discharged their s75 and common law duties and whether the concerns about equality impacts raised by stakeholders have been appropriately addressed. If the substantive policy is introduced via Regulations and Code of Practice which are not subject to Committee Scrutiny; the Committee cannot be assured that equality and human rights compliance processes have been effectively carried out and that the Department has properly considered all potential adverse impacts, undertaken the required mitigation and taken full account of issues raised through consultation with practitioner and parents in the development of the Regulations and Code of Practice.

6. The substantive changes which are of the greatest concern (since they impact directly upon the availability of legally enforceable rights) and which should arguably be placed directly within the Bill to ensure proper scrutiny include:

   (a) The form and content of a statement/coordinated support plan (CSP);
   (b) The change from 5 stages of intervention to 3 levels, with statutory assessment being a “process” rather than a “stage”;
   (c) Arrangements for cooperation between the DHSSPS and the DE.

7. The DE state in their memorandum that the SEND Bill itself, as agreed by the Executive, provides for use of the negative resolution procedure for the Regulations. From our consideration of the Bill this is not clear in relation to Regulations flowing from Article 28 of the 1996 Order (i.e. whereby amendments will be made to existing provisions on identification of SEN, statutory assessment and statementing). The SEND Bill makes no reference to any method of scrutiny in relation to Regulations flowing from Article 28. The Executive did not therefore agree to negative resolution on these crucial matters, as this was pre-determined by the 1996 Order during direct rule.

8. The purpose of regulations generally is to set out administrative procedures and technical areas of operational detail. There is a danger that with the SEND Bill, substantive policy matters, which are not merely administrative or technical, are being delegated to the regulations and to the statutory guidance. The question therefore arises about who should rightly have oversight of the exercise of delegated of powers, whether it be the Executive, the NI Assembly, the DE, the Education Committee or the Education Authority.

9. In Northern Ireland, Committees have a relatively high level of responsibility for scrutiny because of the configuration of our Executive as a coalition. This

does not sit well with the high level constraints upon scrutiny in Article 28 of the 1996 Order, which was enacted before the devolution of education matters and reflects the limitations of the legislative process and scrutiny under direct rule. Powers to effect changes to the SEND Bill and related Regulations through the Committee processes are potentially not commensurate with the responsibilities placed upon the Committee, which has received extensive evidence about operational defects in the SEN system, in terms of enabling the Committee to satisfy itself that the legislation shall have the positive effects intended by the relevant policy.

10. The detail within the revised regulations is not likely to be merely technical (as one might find for example in taxation regulations) but will arguably effect substantive and novel change to the framework e.g. the form and content of statements/CSPs (and therefore the legal enforceability of these); the frequency of the annual review process; the format, content and review arrangements connected to PLPs; and mechanisms for enhanced cooperation between departments.

11. One might take the view that Regulations which implement substantive changes, which in this case are largely invisible upon the face of the SEND Bill, are likely to require a higher level of scrutiny than negative resolution allows, in order to ensure due process. There is potential (without effective scrutiny) for the Executive to approve a policy change upon which it has not been properly informed or consulted. Such a course of action could have legal implications should judicial controls be called upon to remedy any defective processes. CLC would have similar concerns in respect of proposals in other draft Bills to implement substantive changes through Regulations and Codes of Practice e.g. the Mental Capacity Bill. The Education Committee may wish to consider raising the broader matter of this type of legislative process, which potentially negates effective scrutiny by Committees, through appropriate channels in the Executive and the Assembly.

12. Particular issues arise in relation to a revised Code which is not subject to direct scrutiny by the Committee (the only mechanism being the public consultation process). Substantive changes are to be made via the Code. One example of this is the changing from 5 stages to 3 levels, with no indication of how this may impact the triggers for appeal rights to SENDIST when the “request for statutory assessment” ceases to be a “stage” and becomes a “process”. The Code currently guides decision-makers on the thresholds for access to a statutory assessment/statement and will be revised to accommodate the structural change which is to be implemented within the SEN framework. In relation to the introduction of the 3 Levels, the Committee may wish to consider proposing an amendment to the SEND Bill to describe the 3 levels and to ensure that the change from 5 stages to 3 levels does not result in unforeseen adverse consequences for children who need to access those levels of intervention or to access appeal rights, particularly in terms of the the removal of the current “Stage 4”.

13. Further, given the extent of delegation in this matter, the DE may introduce completely new sections of guidance to change the SEN framework via the revised Code. In the absence of appropriate oversight there is a risk of unforeseen adverse impacts for children with SEN and disabilities.

14. One could take the view that sight of the draft revised Code, along with opportunities to interrogate the contents, would be essential to enable legally sound, properly informed decision-making in relation to the progress of the SEND Bill and Regulations.

15. A lack of proper scrutiny may open the potential for legal challenge, calling for the exercise of judicial controls over any procedural failings caused by disproportionate regulation-making powers. A disproportionate delegation of such powers may in effect act as a licence to the DE to effect substantive change in the legal framework governing SEN and disability outside the protections afforded by Assembly legislative procedures. Judicial controls might be called upon on the basis that an imbalance between primary and secondary legislation is resulting in a failure to inform and consult the Assembly so that the Regulations could become vulnerable to being struck down.

16. The employment of flawed processes, hindering proper scrutiny of amendments to the 1996 Order and which could therefore ultimately be open to challenge, would not be in the best interests of children with SEN and disabilities who are awaiting the out-workings of the SEN and Inclusion review. Similarly there is a balance to be struck so that appropriate scrutiny is enabled whilst ensuring that the policy is brought forward in a timely fashion.

17. It may be preferable to consider an agreed course of action which moderates regulation-making powers so that proper scrutiny may take place, thereby enabling proper examination of the impacts of the SEND Bill taken together with the relevant Regulations and Code. Such scrutiny is more likely to result in the emergence of an improved legal framework which meets the policy intent approved by the Executive.

Matters for further Consideration

The Committee may wish to give consideration to the following mechanisms which could be investigated further in an effort to mitigate the potentially adverse effects of the current restrictions upon scrutiny of the revised SEN framework.

(a) The Committee may wish to consider recommending that the relevant Regulations should be subject to the affirmative resolution process (as, for example, has been employed for clauses 11 and 12 of the SEND Bill for appeals and claims by children) and seeking an agreed way forward. The Committee could consider seeking an undertaking that the revised regulations, insofar as they relate to Part 2 of the 1996 Order, shall be subject to the affirmative resolution process when they are available.

(b) It should be considered whether the Minister, should he be minded to do so, would have power to give effect to such a recommendation from the Committee or, if he did not have such power, whether the SEND Bill might be used as a vehicle to propose an amendment of Article 28 of the 1996 Order to enable affirmative resolution (or any alternative power) in relation to Part 2 in its entirely or in relation to specific regulation-making powers within Part 2.

(c) It may be appropriate to consider whether the affirmative resolution process in itself would be effective in terms of affording substantive protection to the interests of children with SEN and disabilities. It is likely that the affirmative resolution procedure would not be effective in relation to the SEND Bill, given the range and complexity of the issues that fall to be considered.

(d) Consideration could be given to the creation of an exception or exceptions within Article 28, which could possibly be amended through the SEND Bill, to enable greater powers of scrutiny. That is, wording to the effect that - "regulations shall be subject to the negative resolution procedure save insofar as these relate to…[e.g. the form and content of a statement/ the annual review process/ duties relating to PLPs/ mechanisms for enhanced cooperation between departments]…in which case the procedure to be used shall be….."

(e) There are a number of issues of particular significance which could be brought directly into the SEND Bill to enable proper scrutiny. These include the form and content of the statement (CSP); the 3 levels of intervention; and a statutory duty upon health and education to cooperate in providing for children with SEN and disabilities.

(f) Consideration could be given to taking steps to moderate the effects of high level constraints upon scrutiny of the Regulations and to enable direct scrutiny by proposing amendments which restrict the relevant regulatory powers under the 1996 Order. This could be carried out through the insertion of additional provisions into the SEND Bill if the Committee is minded to propose amendments to that effect. In particular we draw attention to the following regulatory powers within the 1996 Order currently:

- Article 14(5): Regulation of cooperation with health
- Article 16(2) & (3): Regulation of form and content of statements
- Article 19: Regulation of annual review procedures

(g) For example, Article 16(2) & (3) currently reads:

16(2) The statement shall be in such form and contain such information ***as may be prescribed***

16(3) In particular the statement shall –
…(a)…
…(b) ***specify*** *the special educational provision to be made….*

A restrictive amendment could be added to Article 16(2) to the effect that "as may be prescribed *save only that the provision called for by the child's learning difficulty shall be both specified and quantified."*

Alternatively, Article 16(3) could be amended via the SEND Bill to provide that Article 16(3)(b) reads "specify **and quantify**".

Alternatively, Article 2 of the 1996 Order (interpretation clause) could be amended to clarify that the word "specify" includes "quantification" of provision to be made.

(h) It may be possible in relation to the SEND Bill, to make a case for referral to the Examiner of Statutory Rules under Standing Order 43(6). However, this process is likely to be lengthy and may be limited in terms of effecting substantive change. In contrast the Committee has gathered extensive information and evidence and is better placed carry out in depth examination of the consequences of the draft legislation and related regulations through Committee procedures, such as evidence sessions and ongoing interrogation of the information gathered.

(i) It is of particular relevance that the issues of SEN and Disability impact our most vulnerable young citizens and that this issue is relatively uncontentious in that all parties express the intention to ensure this legislation will positively improve the lives of children and young people with SEN and disabilities and much work has been undertaken on this issue over the past number of years. In terms of the issue of scrutiny generally, the progress of the SEND Bill with the restricted powers of scrutiny attached, very clearly raises the wider question about whether consideration should be given to allowing additional powers to a Committee in relation to those statutory instruments that it believes require closer scrutiny.

The Committee may wish to liaise with the DE and/or seek legal advice on the issues discussed within this paper with a view to further developing mutually agreeable and effective scrutiny processes in relation to the SEND Bill and related Regulations and Statutory Guidance.

We hope the Committee will find these comments useful and informative and thank the Committee for raising this issue and allowing further time for our consideration.

For further information please contact:

Rachel Hogan BL, SENDIST Representative, Children's Law Centre
rachelhogan@childrenslawcentre.org
Telephone: 028 90 245704