

## Legal Implications

### Education Act 1996: General Duties

1. Part 1 of the Education Act 1996 (“the 1996 Act”) imposes a number of general duties on all local authorities in Wales. The general duty in section 13 of the 1996 Act is to contribute (so far as the Council’s powers enable them to do so) towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and secondary education are available to meet the needs of the population of their area.
2. Section 13A(3) of the 1996 Act states that a local authority in Wales must ensure that their relevant education functions and their relevant training functions are exercised by the authority with a view to promoting high standards, and promoting the fulfilment of learning potential by every person to whom the subsection applies, including those who are of compulsory school age or are below school age and are registered as pupils at schools maintained by the authority.
3. Section 14 of the 1996 Act then provides that the Council shall secure that sufficient schools for providing primary education and secondary education are available in the Council’s area. Schools available for an area shall not be regarded as sufficient unless they are sufficient in number, character and equipment to provide for all pupils the opportunity for appropriate education. Appropriate education means education which offers such variety of instruction and training as may be desirable in view of (a) the pupils’ different ages, abilities and aptitudes; and (b) the different periods for which they may be expected to remain at school, including practical instruction and training appropriate to their different needs.

## **School Standards and Organisation (Wales) Act 2013**

4. Part 3 of the School Standards and Organisation (Wales) Act 2013 (“the 2013 Act”) is concerned with school organisation. The Welsh Ministers have issued the School Organisation Code (“the Code”)<sup>1</sup>. Local authorities must, when exercising functions under Part 3 of the 2013 Act, act in accordance with any relevant requirements contained in the Code, and must have regard to any relevant guidelines contained in it. The key provisions are summarised in the section on the Code below.
5. Chapter 2 of Part 3 of the 2013 Act deals with school organisation proposals. A maintained school in Wales can only be discontinued in accordance with Part 3 of the 2013 Act.
6. A local authority has the power to make proposals to discontinue various types of schools, including a community school. Section 48(2) of the 2013 Act provides that before publishing such proposals, a proposer (in this case, the Council) must consult on its proposals in accordance with the Code. The consultation document must be issued during the term time of the schools affected and consultees must be given at least 42 days to respond to the document, with at least 20 of these being school days.
7. The proposer must publish a report on the consultation it has carried out in accordance with the Code. The consultation report must summarise each of the issues raised by consultees, responding to these by means of clarification, amendment to the

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<sup>1</sup> Welsh Government - School Organisation Code: November 2018

<https://gov.wales/sites/default/files/publications/2018-10/school-organisation-code-second-edition.pdf>

proposal or rejection of the concerns, with supporting reasons; and setting out Estyn's view (as provided in its consultation response) of the overall merits of the proposal.

8. If a local authority decides to proceed with a proposal to discontinue a maintained school, it must publish proposals to that effect in accordance with the Code (section 48). The proposal must be published by way of statutory notice. Chapter 4 of the Code sets out specific requirements as to how statutory proposals must be published. Proposals must be published on a school day and the objection period must include 15 school days (in addition to the day on which it is published).
9. Section 49 of the 2013 Act makes provision for any person to object to proposals published under section 48 within the objection period of 28 days. The Council must then publish a summary of all objections made to the proposal and its response to those objections before the end of 7 days beginning with the day of the Council's determination.
10. The local authority proposer must then determine whether the proposals should be implemented. Where a local authority's proposals have received objections, and require determination, those objections will be carefully considered before a final determination is made. A further report to Cabinet will be prepared before any such determination is made. This determination must take place before the end of 16 weeks beginning with the end of the objection period.

## **The Code**

11. The Code contains the following elements:

- It imposes requirements in accordance with which relevant bodies (including all local authorities in Wales) must act. Where mandatory requirements are imposed by the Code or by the 2013 Act or another statute or statutory instrument, it is stated that the relevant bodies must comply with the particular provision. Where practices are prohibited, it is stated that the relevant bodies must not use this practice.
  - It includes statutory guidance to which the Council must have due regard and sets out the policy context, general principles and factors that should be taken into account by those bringing forward proposals to reconfigure school provision and by those responsible for determining proposals. Where guidance is given by the Code, it is stated that relevant bodies should follow this guidance unless they can demonstrate that they are justified in not doing so.
12. Paragraph 1.1 of the Code sets out the key background principles and policies, which should be taken into account by the Council in developing school organisation proposals. These include:
- United Nations Convention on the Rights of the Child;
  - A living language: a language for living – Welsh Language Strategy 2012-2017
  - Welsh- medium Education Strategy;
  - One Wales: One planet, a new sustainable development scheme for Wales May 2009 or any successor strategy;
  - Child Poverty Strategy for Wales (issued February 2011 Information document number 95/2011), or any successor strategy;
  - Faith in Education.

13. In addition, when developing school organisation proposals, the local plans to which Council should have regard include the following:
- Local plans for economic or housing development;
  - Welsh in Education Strategic Plans (made under part 4 of the 2013 Act);
  - Children and Young People’s Plans (or successor plans)
  - 21st Century Schools – Capital Investment Programme and the relevant wave of investment.
14. Finally, the Council should have regard to the following Welsh Government Guidance on related matters:
- Learner Travel Operational Guidance<sup>2</sup>
  - Measuring the capacity of schools in Wales, Circular<sup>3</sup>.
15. Chapter 1 then lists a number of factors which should be taken into account by relevant bodies, including the Council, when exercising their functions of preparing and publishing school organisation proposals or approving/determining them. These factors include:
- Quality and standards in education (looking at outcomes, provision, leadership and management) at the school which is the subject of the proposals, and at any other school or educational institution which is likely to be affected. The Code states that local authorities should place the interests of learners above all others. Where proposals involve the transfer of learners to alternative provision, there should normally be evidence that the alternative would deliver outcomes and offer

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<sup>2</sup> Learner Travel Statutory Provision and Operational Guidance: 2014 - <http://gov.wales/docs/det/publications/140616-ltogg-en.pdf>

<sup>3</sup> Measuring the capacity of schools in Wales, Circular - <https://gov.wales/docs/dcells/publications/111104measuringcapacityen.pdf>

provision at least equivalent to that which is currently available to those learners.

- The need for places and the impact on accessibility of Schools (whether alternative school based provision will have suitable capacity and provide accommodation of at least equivalent quality and is sufficient to meet existing demand and projected demand and the nature of journeys to alternative provision and resulting journey times for pupils, including SEN pupils. In particular, whether primary school pupils will have one way journeys in excess of 45 minutes or secondary school pupils one way journeys of over an hour.
- Resources of education and other financial implications. This involves a consideration of a number of factors set out in the Code, including whether proposals ensure a fairer and more equitable distribution of funding between mainstream schools, what effect proposals will have on surplus provision, the costs of proposals (including additional transport costs), any projected net savings, any budget deficits of schools affected and whether the proceeds of sales of redundant sites remain in the education budget.

16. The Code also lists other general factors which should be taken into account, namely educational attainment, equality issues, charitable interests (paragraph 1.6). A list of specific factors in the consideration of school closures is at paragraph 1.7. This states that there is no presumption in favour or against the closure of any type of school. The case for closure should be robust and in the best interests of educational provision in the area. A Community Impact Assessment should be obtained. When considering whether closure is appropriate, special attention should be given to the matters set out on pg 12 of the Code, including :

- considerations of alternatives to closure, including multi-site schools, clustering/collaboration/federation with other schools
  - the overall effect of closure on the local community
  - how parent's and pupil's encouragement with the alternative school and any facilities it may offer could be supported
17. In addition to the usual considerations in relation to standards of provision, the Council should also consider
- whether proposals will improve standards of accommodation for pupils with SEN, including building accessibility;
  - how proposals will address any health, safety and welfare issues;
  - how proposals, where appropriate, will support increased inclusion; and
  - the impact of proposals on other SEN provision within the immediate and wider local authority area including out of county where appropriate
  - whether there is a need for a particular type of SEN provision within the area;
  - whether there is surplus SEN provision within the area;
  - whether SEN provision would be more effective or efficient if regional provision were made; and
  - the impact of proposals on the transportation of learners with SEN
18. The list of factors to be taken into account in approving/determining school organisation proposals is listed at paragraph 1.14.

### **Public Sector Equality Duty**

19. The public sector equality duty (see section 149 of the Equality Act 2010) came in to force in April 2011. Public authorities like the

Council are required, in carrying out their functions, to have due regard to the need to three equality needs set out under s149 of the Equality Act 2010 to:

- eliminate discrimination (both direct and indirect discrimination), harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it

20. Direct discrimination occurs if, because of a protected characteristic, a local authority treats a person less favourably than it treats or would treat others.

21. Indirect discrimination occurs if a local authority applies to a person a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of that person (“B”). A provision, criterion or practice is discriminatory if –

- The local authority applies, or would apply, it to persons with whom B does not share the characteristic,
- It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
- It puts, or would put, B at that disadvantage, and
- The local authority cannot show it to be a proportionate means of achieving a legitimate aim.

22. In short, indirect discrimination would arise if a local authority applies the same provision, criterion or practice to everyone, but it puts those in a certain protected group at a “particular



disadvantage” when compared with persons who are not in that protected group. Even if a “particular disadvantage” arises, indirect discrimination does not arise if the provision, criterion or practice can be justified – i.e. if it is a proportionate means of achieving a legitimate aim. Members must pay due regard to any obvious risk of such discrimination arising in respect of the decision before them. These matters are examined in Appendix E and summarised in the Equality Impact Assessment section of the Cabinet report.

23. Having due regard to the need to advance equality of opportunity includes having due regard to the need to remove or minimise disadvantages suffered by them. Due regard must also be had to the need to take steps to meet the needs of such persons where those needs are different from persons who do not have that characteristic, and to encourage those who have a protected characteristic to participate in public life.
24. The steps involved in meeting the needs of disabled persons include steps to take account of the persons’ disabilities.
25. Having due regard to ‘fostering good relations’ involves having due regard to the need to tackle prejudice and promote understanding.
26. Complying with the duty may involve treating some people better than others, as far as that is allowed by the discrimination law.
27. The equality duty arises where the Council is deciding how to exercise its statutory powers and duties under the 1996 Act and the 2013 Act. The Council’s duty under Section 149 of the Act is to have ‘due regard’ to the matters set out in relation to equalities when considering and making decisions in relation to its statutory duties under those Acts. Accordingly due regard to the need to

eliminate discrimination, advance equality, and foster good relations must form an integral part of the decision making process. Members must consider the effect that implementing a particular decision will have in relation to equality before making a decision. The council must have an adequate evidence base for its decision making. This can be achieved by means including engagement with the public and interest groups, and by gathering details and statistics on those who use the schools currently school currently, and how the schools are used. A careful consideration of this assessment is one of the key ways in which members can show “due regard” to the relevant matters.

28. Where it is apparent from the analysis of the information that the proposals would have an adverse effect on equality then adjustments should be made to avoid that effect (mitigation).
29. Members should be aware that the duty is not to achieve the objectives or take the steps set out in s.149. Rather, the duty on public authorities is to bring these important objectives relating to discrimination into consideration when carrying out its public functions (which includes the functions relating to school reorganisations). “Due regard” means the regard that is appropriate in all the particular circumstances in which the authority is carrying out its functions. There must be a proper regard for the goals set out in s.149. At the same time, Members must also pay regard to any countervailing factors, which it is proper and reasonable for them to consider. Improving the quality of education in the Council’s area, making schools more efficient, budgetary pressures and practical factors will often be important. The weight of these countervailing factors in the decision making process is a matter for members in the first instance.

30. The duty covers the nine protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. However, section 149, so far as relating to age, does not apply to the exercise of a function relating to the provision of education to pupils in schools (see paragraph 1 of Schedule 18 to the 2010 Act).
31. The Council must also comply with the specific equality duties imposed by the Equality Act 2010 (Statutory Duties)(Wales) Regulations 2011, SI 2011/1064 (“the Regulations”), particularly regulation 8 (imposing specific duties to make arrangements for assessing the impact of its policies/practices and monitoring of the same).

### **Wellbeing of Future Generations (Wales) Act 2015**

32. The Well-being of Future Generations Act 2015 (“the 2015 Act”) requires the Council to think about the long-term impact of their decisions, to work better with people, communities and each other and to prevent persistent problems such as poverty, health inequalities and climate change.
33. To make sure we are all working towards the same purpose, the 2015 Act puts in place seven well-being goals on the Council . The 2015 Act makes it clear the listed public bodies must work to achieve all of the goals, not just one or two, these being:
  - A prosperous Wales
  - A resilient Wales
  - A healthier Wales
  - A more equal Wales
  - A Wales of cohesive communities
  - A Wales of vibrant culture and Welsh Language
  - A globally responsible Wales

34. The 2015 Act imposes a duty on all public bodies in Wales to carry out “sustainable development”, defined as being, "The process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the well-being goals." The action that a public body takes in carrying out sustainable development includes setting and publishing well-being objectives, and taking all reasonable steps in exercising its functions to meet those objectives.
35. The 2015 Act sets out five ways of working needed for the Council to achieve the seven well-being goals, these being:
- The importance of balancing short –term needs with the needs to safeguard the ability to also meet long-term needs
  - Considering how the Council’s objectives impact upon each of the wellbeing goals listed above
  - The importance of involving people with an interest in achieving the well-being goals and ensuring that those people reflect the diversity of the area which the Council services
  - Acting in collaboration with other persons and organisations that could help the Council meet its wellbeing objectives
  - Acting to prevent problems occurring or getting worse.