

**Consultation on the School Standards and Organisation (Wales) Bill
Initial response from the Charity Commission for England and Wales**

The Charity Commission is the independent regulator and registrar for charities in England and Wales. We are the regulator for 162,000 registered charities. We also regulate a similar number of 'excepted' charities that do not have to register, but are subject to our jurisdiction.

Some charities have been exempt from registration and regulation by the Commission. The Charities Act 2011 ('the Charities Act') reforms the regulatory framework for exempt charities. It provides for the appointment of principal regulators, responsible for overseeing exempt charities' compliance with charity law. We can use our powers in consultation with the appropriate principal regulator. We therefore have some degree of regulatory oversight for these charities too.

We are grateful for the opportunity to comment on the School Standards and Organisation (Wales) Bill and hope to positively inform its development.

We note that the Children and Young People's Committee is considering a number of aspects of the Bill, including whether it gives rise to any unintended consequences. We believe that the Bill does not take sufficient account of the charitable status of the governing bodies of foundation and voluntary schools, and the trusts that hold the land on which they operate. It therefore has unintended consequences for them.

Unfortunately the Bill only came to our attention this week and we have not had the opportunity to fully scrutinise it. We therefore wish to highlight a number of key issues that we have so far identified, and hope that it will be possible to discuss these with you in more detail.

Charitable status of bodies connected with foundation and voluntary schools

The governing bodies of foundation, voluntary and foundation special schools, and other specified foundation bodies ('governing bodies of foundation and voluntary schools') were created under the School Standards and Framework Act 1998 (SSFA). Section 23 of that Act states that they shall be charities.

This was, of course, one step in a long history of charitable and statutory provision working side by side, which gives rise to a varied and complex picture.

Voluntary (aided or controlled) schools, and foundation schools that were originally provided by charities, usually comprise two charities:

1. the governing body, a corporate body created under SSFA, which runs the school
2. the charity usually called the foundation, which holds the land and buildings on trust for the provision of a school (or for specified religious and educational purposes).

The 'school' itself is the charitable activity of the governing body, not a legal entity in its own right.

Charity regulation and the role of the Welsh Government

Charities in England and Wales must register with the Commission unless they are:

- small (total income below £5,000 a year);
- excepted from the requirement to register (and total income below £100k a year);
- exempt from registration or regulation by us.

We regulate excepted charities and charities below the £5,000 registration threshold even though they are not registered.

The SSFA (as amended) provided that:

- the governing bodies of foundation and voluntary schools are exempt charities;
- their associated foundation charities are excepted from registration, but subject to regulation by the Commission.

The Charities Act now contains the provisions exempting the governing bodies of foundation and voluntary schools. It also contains provision for every exempt charity to have a principal regulator responsible for overseeing compliance with charity law. Charities with no principal regulator will lose their exempt status.

On 1 August 2011, the Welsh Ministers were appointed principal regulator for the governing bodies of foundation and voluntary schools in Wales. (At the same time the Secretary of State for Education was appointed principal regulator for these charities in England.)

As principal regulator, the Welsh Ministers have a duty to do all they reasonably can to promote compliance with charity law by these charities. We can advise and assist principal regulators. We can use our powers in consultation with the principal regulator.

Issues arising from provisions of the School Standards and Organisation (Wales) Bill

1. Powers to intervene in or direct schools

Independence from the control of other bodies is a fundamental principal of charitable status. Independence is not an absolute, but it does mean that:

- charities must exist for exclusively charitable purposes, not for the purpose of carrying out another body's policies or directions
- within the law and their responsibilities as charity trustees, governors should be free to determine their own policies

The Bill contains a number of powers that would allow local authorities and the Welsh Ministers to intervene in schools' governance or direct them to take certain actions.

These include:

- Clause 6 – power of the local authority to appoint additional governors

- Clause 7 – power of the local authority to constitute a governing body of interim governors
- Clause 12 – power of the Welsh Ministers to require a governing body to collaborate
- Clause 13 – power of the Welsh Ministers to appoint additional governors
- Clause 14 – power of the Welsh Ministers to constitute a governing body of interim governors
- Clause 15 – power of the Welsh Ministers to direct schools to federate
- Clause 17 – general power to give direction
- Clause 58(2)(b) – directions to make proposals to remedy excessive or insufficient provision
- Clause 67(3)(b) – power to make direction for SEN provision

There may be occasions where government must intervene in or direct a school, for example if a school is failing or if pupils are at risk. But some of these proposed provisions would allow Ministers or the local authority to intervene simply to further government policies, or to meet their responsibilities in relation to school places or SEN provision. This would not seem within the spirit of respecting charities' independence.

These provisions do not always seem to take account of the requirements that apply to many voluntary schools to follow the tenets of a particular religion.

Charity trustees have an overriding duty to act in the interests of their charity (and its present and future beneficiaries). Powers to direct charities could in some circumstances inhibit trustees from complying with their duty.

School governors appointed by the local authority or the Welsh Government would be subject to the same duties under charity law.

2. Powers potentially affecting charitable status

Clause 45 would allow school governors to make proposals to change a school's status between community, voluntary aided, voluntary controlled and foundation. Under clause 46, voluntary aided schools could be compelled to make such proposals.

Under charity law a charity cannot simply stop being a charity. A charity's assets can only be applied for its charitable purposes. If a charity closes, its assets must be transferred to another similar charity. Any transfer of charity assets to a local authority or other non-charity would have to be at full market value. Community schools are not charities. We cannot see how changing from a voluntary or foundation school to a community school could meet the requirements of charity law.

Similarly, if a charity school was merged or closed in accordance with the powers in clauses 15 or 16, its property would have to be dealt with in accordance with its charitable trusts. A governing body charity could only merge with a non-charitable governing body if the non-charity was absorbed into the charity.

3. Provisions affecting school sites

The provisions for school land in Part 3 of Schedule 5 do not seem to take full account of the charitable trusts of school sites. Nor do they appear to recognise foundations as independent charities.

Many complications may arise within school site trusts, including:

- trusts that are wider than the provision of education, for example religious trusts with an educational element
- restrictions on changing the use of the site (or the type of school) which, if breached, could result in the trust reverting to the heirs of the original donor.
- community school sites held on charitable trusts under the Elementary Education Act 1870.

We encountered similar issues in the drafting of the Education Act 2011 in England. We worked with DfE and representatives of religious bodies affected, and a satisfactory conclusion was reached in that case.

We would welcome the opportunity to discuss these issues with you in more detail. We have only had the opportunity to make an initial assessment of the Bill and its impact on charities. Other matters may come to our attention on further scrutiny.

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