



APPRENTICESHIPS, SKILLS, CHILDREN & LEARNING BILL: HOUSE OF LORDS SECOND READING

A briefing from the National Union of Teachers

2nd June 2009

Introduction

This briefing is intended to highlight the main concerns of the National Union of Teachers – the largest teachers’ organisation in Europe – in relation to the Apprenticeships, Skills, Children & Learning (ASCL) Bill.

Due to the wide scope of the Bill and the large number of Government amendments the NUT is concerned that it has not been as adequately scrutinised in the Commons as it may have been. Some parts of the Bill about which the NUT were most concerned were debated in the early hours of the morning during the marathon last session of the Committee. While every credit must be given to all those on the Committee for functioning under these circumstances arguably the level of proper scrutiny was far from ideal.

Key Concerns

- The new bodies Ofqual and the Qualifications & Curriculum Development Agency (QCDA) should be properly accountable and subject to parliamentary scrutiny. Both bodies should be required to follow proper consultative procedures.
- The extension of the power for schools and colleges to search pupils without consent is on the premise of preventing imminent harm to the pupil or to others and framed within headteachers’ professional judgement. Head teachers, teachers and other school staff should be protected from an unnecessary burden of proof in relation to lawful seizure, retention or disposal.
- Schools and teachers need to be protected from frivolous, unreasonable or vexatious complaints from parents or children.
- The system of regulating academies by means of funding agreements is opaque and unaccountable and that the Young People’s Learning Agency (YPLA) should not be able to enter into a funding agreement with an academy.
- All academies should recognise trade unions for representation and collective bargaining purposes.

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The Bill - a list of main concerns

Part 1: Apprenticeships

Whilst welcoming the right for employees to request time to study and train in chapter 2, the NUT is concerned about some limitations in the provision. The grounds on which an employer could refuse a request are so numerous the provision could effectively be neutered.

It is envisaged in the Bill that a permissible ground for refusal would be 'the burden of additional costs' (page 20, line 10). The NUT believes that additional costs should only be a ground for refusal if they were unreasonable in proportion to the value to be derived from the proposed study or training.

The NUT is also keen to ensure that agency workers and therefore supply teachers qualify for the right to request time to study or train. Clause 39 as it stands does not provide this.

Part 3: Young People's Learning Agency

The YPLA and academies

Clause 75 enables a requirement to be placed on 'the YPLA to enter into Academy arrangements with the Secretary of State'. The NUT believes that academies should be subject to democratic accountability and to the same regulatory framework as other schools and is concerned that the system of regulating academies by means of funding agreements is opaque and unaccountable. It believes that this lack of transparency will be exacerbated if the un-elected YPLA is able to enter into a funding agreement with an academy.

During the Bill Committee, the Minister for Schools the Rt Hon Jim Knight MP stated '*We have no intention of requiring the YPLA to enter into funding agreements with academies.....Even if we did want funding agreements to be negotiated by the YPLA in the future, by law the contracting party would still be the Secretary of State.*' [Official Report, ASCL Public Bill Committee, Twelfth Sitting 19th March 2009; col. 448]

The fact that the Bill as it stands technically appears to allow the YPLA to enter into funding agreements with academies contradicts the logic of the Government's assurances on this issue. It would be helpful to receive clarification on the face of the Bill, therefore, about which 'Academy arrangements' the YPLA could be required to undertake.

Trade union recognition and Academies

The NUT would also welcome an amendment to part 3 of the Bill which would ensure that academies are required to recognise trade unions for teachers and school support staff, in the same way as local authority employers recognise these unions.

Although a majority of academies do recognise trade unions for collective bargaining purposes, a significant minority do not. The TUC Model Agreement for Academies,

published in 2008, provides comprehensive coverage for trade union recognition in Academies.

Part 7: Establishment of the Office of Qualifications and Examinations Regulation (Ofqual)

The Bill provides for the formal set up of Ofqual equipping it with new powers.

The NUT notes the evidence given by Dr. Ken Boston, former Chief Executive of the Qualifications and Curriculum Authority to the Children, Schools and Families Select Committee 22 April¹. Dr Boston questioned the appointment of DCSF observers to the QCA board, and other QCA bodies, which he said ‘has undercut the authority of the QCA and will undercut the authority of Ofqual if we are not careful’.

At the Commons Report Stage on 5 May, the Parliamentary Under-Secretary of State Sarah McCarthy-Fry MP stated (Column 114)²: *‘There is no provision in the Bill for Government observers to attend the Ofqual board. If the board itself decided that it wished to have such observers, that would be entirely up to the board, but nothing in the Bill requires that’*. There is concern, however, that DCSF representation at Ofqual meetings has increased of late. The NUT is keen to ensure that Ofqual is a genuine independent authority regulating public exams and maintaining confidence.

Furthermore, Ofqual’s ability to validate examinations should not be constrained by the ability of the Government to refuse to fund any new examinations it approves.

Part 8: Establishment of the Qualifications & Curriculum Development Agency (QCDA)

The Bill provides for the replacement of the Qualification & Curriculum Authority by the QCDA.

The NUT believes the QCDA should remain as a statutory independent authority and not merely an advisory agency to Government.

Part 9: Children’s Services

The Children Act 2004 introduced Children’s Trusts to promote cooperation between local bodies and improve the well-being of children. Clause 186 of the Bill expands the list of ‘relevant partners’ to be involved in Trusts. The NUT is concerned, however that this extended list does not include teacher representatives.

Clause 191 focuses on the staffing of Centres. The NUT would like to see this part of the Bill amended to ensure that those responsible for the management and delivery of education in Children’s Centres are properly qualified early years teachers.

¹ <http://www.parliament.the-stationery-office.com/pa/cm200809/cmselect/cmchilsch/uc205-ii/uc20502.htm>

² <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090505/debtext/90505-0019.htm>

Part 10: Schools

Schools causing concern

Paragraph 4 of Schedule 13 amends the Education and Inspections Act 2006 to introduce teachers' pay and conditions warning notices. Local authorities will be given powers to issue warning notices to schools which do not comply with the School Teachers' Pay and Conditions Document (STPCD). The Secretary of State will also be given powers to direct local authorities to issue pay and conditions warning notices to schools. While, of course, a school not meeting its contractual requirements is a serious cause for concern this provision sits oddly in this section of the Bill.

The key question is whether or not the new provision as drafted might instead act as a restraint on legal recourse to the failure by governing bodies to implement the STPCD by giving the power to LEAs to issue a warning notice. The existence of that power may be preyed in aid by those who would wish to obstruct an early intervention to enforce the STPCD.

The NUT welcomes the intentions behind this initiative which are aimed at ensuring that teachers receive the full benefit of provisions relating to working time to which they are entitled under the STPCD. This, however, is an issue of teachers' rights and entitlements and not one of school standards. Rather than entangling STPCD compliance with the schools intervention arrangements, the NUT believes that it would be more effective and appropriate for complaints to be dealt with by the Local Commissioner.

Parental complaints

Chapter 2 of Part 10 of the Bill is intended to streamline the process by which parents can make complaints about schools. There is concern, however, amongst teachers and head teachers that it may unnecessarily complicate existing complaints structures which work well in the vast majority of schools.

It should not be forgotten that there are very few complaints against schools and OFSTED already has the ability to intervene if a complaint is made.

A key concern for the NUT is to ensure that schools and teachers are protected from frivolous, unreasonable or vexatious complaints from parents or children.

It is also interesting to note that this chapter of the Bill does not appear to apply to Academies. Clause 199(6)(c) describes a "qualifying school" as a community, foundation, or voluntary aided school, community special or foundation special school, maintained nursery school or a short stay school.

Part 11: Learners

Pupil Behaviour - Power to search for prohibited items

The Bill under clauses 235 to 238 extends the existing powers for schools and colleges to search pupils without consent for weapons (introduced as part of the Violent Crime Reduction Act 2006) to include alcohol, illegal drugs and property suspected of being stolen. In the NUT's view any extension of the power to search without consent should

be on the premise of preventing imminent harm to the pupil or to others. The power to search for school staff should be directly linked to their responsibility for the health, safety and welfare of pupils under their supervision and in their care.

During the Committee, the Parliamentary Under-Secretary of State Sarah McCarthy-Fry MP said that *'School & college staff need to be clear about what they can and can not search for, otherwise we risk causing confusion and uncertainty.'* [Official Report, ASCL Public Bill Committee, Sixteenth Sitting Part II 19th March 2009; col. 831] The NUT did not feel that she answered the issues adequately during what was admittedly a long debate in the very early hours of the morning.

The NUT readily acknowledges that there are situations in which teachers may need a power of search and would wish to have that power clearly defined and be without fear of contravening the Human Rights Act or prosecution for an offence against the person. However, teachers are not law enforcement officers, and they have no reason to risk assault upon them by insisting on searching a pupil who is capable of a violent reaction.

As it stands, the Bill fails to protect teachers from an unnecessary burden of proof in relation to lawful seizure, retention or disposal. The burden of proving that a confiscation was lawful should not be up to the person (the teacher) who confiscates. The confiscation should be assumed to be lawful unless the contrary is proved. Otherwise this will be a real deterrent to teachers and other school staff. There is a concern that if the provisions remain as they currently stand in the Bill school staff might be unwilling to exercise their powers because if they were challenged, they might have to bear the burden of proving that they had acted correctly rather than the other way round.

In responding to a proposed amendment in Committee, the Parliamentary Under-Secretary of State Sarah McCarthy-Fry MP said: *'Seizing, retaining and disposing of a pupil's property is an infringement of their rights under article 8 and article 1 of protocol 1 of the European convention on human rights. Therefore, any legislation permitting that and providing a defence in the case of damage or loss must be clear, justifiable and proportionate. I am sure that hon. Members would agree that there must remain an overriding obligation on school staff to act lawfully and reasonably.'* [Official Report, ASCL Public Bill Committee, Sixteenth Sitting Part III 19th March 2009; col. 847]

This is not a satisfactory answer. Of course everybody agrees that confiscations etc. must be lawful. The question is where the burden of proof lies to demonstrate that it is lawful. The European Convention, enacted here within the Human Rights Act, does not require that the burden of proof should fall on the person who seizes retains or disposes. The law should not assume that teachers who confiscate have done wrong until they prove that they have not.

Recording and reporting use of force

Clauses 239 and 240 place a requirement on schools and colleges to have procedures in place for the *recording* of significant incidents involving use of force by staff on pupils, and for the *reporting* of such incidents to parents.

The current NUT guidance to its members includes advice that procedures should be in place for the recording of significant incidents involving use of physical restraint by staff on pupils and that parents should generally be informed.

The NUT believes that decisions to report pupil restraint to parents should remain within headteachers' professional judgement in the context of the school's behaviour policy. The NUT is not convinced that the introduction of a statutory duty upon governing bodies to record and report is necessary at this time.

This new duty would not offer teachers any higher level of protection from allegations from students or parents which are malicious or unfounded. Furthermore, it is difficult to see how it would generate any improvement in behaviour policies as it does not address training for de-escalation techniques or behaviour management.

School behaviour partnerships

The Bill makes it a statutory requirement that schools enter into a behaviour and attendance partnerships with other schools in their local authority area. Given that the explanatory notes make clear that 98% of maintained secondary schools have already voluntarily entered into partnerships, the NUT is concerned that this new duty is for the most part unnecessary and is akin to using a sledgehammer to crack a nut.

Clause 241 also introduces a requirement for school behaviour partnerships to prepare and submit a report to the Children's Trust at least once every 12 months. Teachers are worried about yet another bureaucratic burden. It would be helpful if Ministers could reveal details of their impact assessment of this new requirement, particularly with regard to the amount of time spent annually by schools producing these reports.

Short stay schools

The NUT supports the change of name for alternative provision from Pupil Referral Units (PRUs) to Short Stay Schools under clause 242.

It does not, however, support the proposed introduction of a power for the Secretary of State to direct local authorities to replace PRUs with a specified alternative if they are deemed to be in need of special measures or have been given a notice to improve. Factors such as high staff turnover, leadership discontinuity and inadequate local authority support would not be successfully tackled by closure or by replacement by privatised provision. Closure and replacement by private providers would undermine the outreach and behaviour support advice capacity of units.

Any decision to close a PRU and to hold a competition needs to consider the impact of the closure on school links on a case-by-case basis, taking account of the community and category of pupil that the school serves and the views of the teachers and head teacher within the PRU.

The NUT would like reassurance that any closure of a PRU would not reduce the extent of existing provision, especially provision catering for pupils with behavioural, emotional, or social difficulties.