

# Constitutional Affairs Committee

CA(3)-01-11

## Paper 3 :

### Legal Advisers' Report

#### Education (Wales) Measure 2011 "the Proposed Measure"

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#### Scope of Powers to make Subordinate Legislation

##### 1 Introduction

This Proposed Measure introduces provisions to achieve four broad aims. The Proposed Measure introduces and puts in place powers and duties to make collaboration commonplace in the education system, to encourage federation of school governing bodies, to improve school governance through training of clerks and governors and to simplify the planning of school places in Wales.

The Proposed Measure contains several powers for Welsh Ministers to make regulations and orders in order to implement and set out the detail required to support the principles contained in the Proposed Measure. This paper sets out what the subordinate legislation powers are in detail and what legislative scrutiny procedures are applicable. Members will find useful a letter from the Minister for Children, Education and Lifelong Learning dated 22 December 2010, which sets out in further detail the subordinate powers contained in this Measure. Section 5 (page 16) of the Explanatory Memorandum also summarises in tabular form the subordinate legislation powers.

##### 2 Powers to make Subordinate legislation

###### Collaboration

Part 1 of the proposed Measure introduces one of the key policy objectives, namely collaboration by education bodies. The Measure defines education bodies to include school governing bodies, Further Education Institutions (FEI's) governing bodies and local authorities. Existing law already provides for some collaboration but this Measure consolidates and builds upon these existing collaboration requirements.

Section 3 places duties on the education bodies to consider working collaboratively. If an education body concludes that the exercise of power of collaboration would improve the effective and efficient use of public resources in relation to education and training then they must collaborate.

Section 6 subsection (1) provides a power for the Welsh Ministers to make further provision by way of regulations about the power to collaborate. Regulations under this subsection could set out the functions that an education body cannot delegate to another body or to a joint committee. Subsection (2) provides that regulations may make particular provision about the constitution and procedure of joint committees of the collaborating education bodies, and other connected matters. Subsections (3) and (4) provide that regulations may modify any legislation relating to the functions of the collaborating education bodies. Legislation may need to be modified in order to reflect the fact that another body or a joint committee may in fact be carrying out a particular function (in the place of, or as well as the education body on whom the function is conferred). Modifying means amending legislation for a limited purpose rather than generally, but Members may wish to inquire why this is not subject to an affirmative procedure if this includes a power to modify primary legislation.

Section 7 allows the Welsh Ministers to issue guidance in relation to collaboration to which education bodies must have regard. Section 7 states that an education body MUST have regard to this guidance when exercising its functions. Members may wish to satisfy themselves that it is appropriate for this to be dealt with by way of guidance rather than regulations that would be subject to an Assembly procedure.

Procedure: Regulations made under section 6 will be subject to the negative procedure. It is intended that regulations made under this section will be of a technical nature and so it is deemed by the Government that the negative procedure is the appropriate applicable procedure.

###### School Governance – Federation of maintained schools

Part 2 of the Measure relates to school governance. Chapter 1 deals with the federation of maintained schools. It replaces for Wales sections 25 and 26 of the Education Act 2002, making new provision for federating maintained schools. Federation allows for two or more schools to group together under a single governing body.

Section 10 gives governing bodies of maintained schools a power to provide that two or more schools federate, or that an existing federation federates with one or more schools, or that two or more existing federations federate under a single governing body. It further provides that the decision to federate under this section rests with the governing body concerned once they have complied with certain conditions and procedures set out in regulations.

Section 11 subsection (1) provides local authorities in Wales with the power to propose that two or more maintained schools may federate, that an existing federation federates with one or more schools, or that two or more existing federations may federate, under a single governing body.

Subsection (2) provides that if a local authority makes proposals to federate schools or federations under this section, it must publish those proposals.

Subsection (3) provides that a local authority must determine any proposals to federate schools that it has published. Regulations will set out the procedure for determining proposals. The local authority may confirm the proposals (with or without modification or subject to the occurrence of an event) or withdraw them.

Subsection (4) allows local authorities to consider federating with schools maintained by another local authority providing they obtain the consent of the other local authority.

Subsection (5) requires the consent of certain persons before a local authority may propose a federation that include a foundation or voluntary school. Those persons are, in the case of a Roman Catholic or Church in Wales school, the diocesan authority, and for other foundation or voluntary schools, the persons who appoint the foundation governors.

Subsection (6) provides that regulations may specify requirements in relation to proposals to federate, for example, requiring the consent of certain persons to be obtained to the publication or confirmation of proposals. Regulations made under this sub-section may make different provision for a federation involving a small school.

Section 12 makes provision in connection with the implementation of

proposals to federate. Subsections (2) and (3) set out who is required to implement the proposals. These are the local authority or the governing body in so far as the proposals provide for this, and any other person set out in regulations. Where a local authority has confirmed proposals, they must be implemented as confirmed (subsection (4)). However, confirmed proposals may be modified at the request of such persons as may be specified in regulations (subsection (5)). Under subsection (6) a local authority can determine not to implement a confirmed proposal if it would be unreasonably difficult to do so or if circumstances have changed so much that it is no longer appropriate to do so. Regulations may require the local authority to consult prescribed persons before making that determination (subsection (7)).

Section 13 states that a federation (which is a group of schools) will have a single governing body. Schools within a federation will continue to be treated as individual schools (so that in exercising its duties the governing body must do so in relation to each school within a federation individually). However regulations can set out the circumstances when the schools within a federation can be treated as a single school.

Section 14 provides that regulations may make further provision in relation to federations, including in relation to their dissolution and the transfer of property, rights and liabilities.

Section 15 provides a power for the Welsh Ministers to make an order

defining a "small maintained school" by the numbers of pupils in a school. The numbers of pupils would be those specified on a given date in a school year. Once a small maintained school is defined, the Welsh Ministers will be able to use their powers in section 16 to direct the federation of such schools.

Section 16 makes provision in relation to the federation of small maintained schools. Subsection (1) provides a power for the Welsh Ministers to direct local authorities or governing bodies to federate two or more small schools with each other, or to federate a small school or schools with another school that is not itself a small school, or with another federation. Subsections (3) and (4) make provision in connection with the making, variation or revocation of such directions, including that such directions are enforceable by a mandatory order of the High Court.

Section 17 provides a power for the Welsh Ministers to issue guidance to which local authorities, and governing bodies of a maintained school in Wales must have regard to in exercising their functions in relation to federation of maintained schools. Members may wish to satisfy themselves that it is appropriate for this to be dealt with by way of guidance rather than regulations that would be subject to an Assembly procedure.

Section 18 allows regulations to be made which modify Chapter 4 of Part 1 of the School Standards and Framework Act 1998 (intervention in schools causing concern), and sections 49 – 51 and Schedule 15 to that Act (financial delegation) in their application to school federation. Regulations under this section could provide that where certain conditions that trigger powers of intervention exist in relation to one school within a federation, but not to others, those powers of intervention can nevertheless be exercised in relation to the governing body. Section 18 also allows for regulations to modify legislation relating to different categories of schools. Such regulations will make it clear how that legislation applies in relation to schools within a federation which belong to different categories. Again, modifying means amending legislation for a limited purpose rather than generally, but Members may wish to inquire why this is not subject to an affirmative procedure.

Section 19 makes minor and consequential amendments to sections 24 and 25 of the Education Act 2002, limiting their application to England only. In relation to Wales they have been replaced by provisions made by this Chapter.

Section 20 subsection (1) defines terms used in Chapter 1 of Part 2 of the Measure. Subsection (2) provides for the interpretation of terms used in any enactment in relation to a federated school, so that, for example, a reference in legislation to a governing body of a maintained school has effect, in relation to a federation, as though it were a reference to the governing body of a federation.

Procedure: Regulations made under sections 10, 11, 12, 13, 14 and 18 and orders made under section 15 will be subject to the negative procedure. It is intended that regulations made under this section will be of a technical nature and that it may be appropriate to update the subject matter of the subordinate legislation on a regular basis. The Government therefore take the view that the negative procedure is the appropriate applicable procedure.

### **School Governance - training for governors and clerks**

Section 21 subsections (1) and (2) place a duty on local authorities to provide information to governors of maintained schools in Wales to enable the governors to carry out their functions. Subsections (3) and (4) provide that regulations may require a local authority to secure (free of charge) the provision of prescribed training to school governors. Subsection (5) provides that the requirement of regulations under subsection (3) is without prejudice to the duty under subsection (6), which provides that a local authority must provide training to governors to enable them to carry out their functions.

Section 22 deals with the provision of clerks to school governing bodies. Current regulations under section 23 of the Education Act 2002 provide for the appointment of a clerk to a governing body. Under this section a local authority must inform the body which appoints the clerk that it may ask the local authority to provide a person to act as the clerk. If the body makes such a request, regulations may require the local authority to provide a clerk and for

a payment to be made for the provision of the service.

Regulations made under section 23 can impose a duty on the body that appoints a clerk to a governing body (in accordance with regulations under section 23 of the Education Act 2002). The duty that can be imposed is to ensure that the person appointed as a clerk has completed training to a standard set out in the regulations. Subsection (3) provides that regulations may make further provision in relation to the training of clerks.

Section 24 imposes a duty on a local authority to secure the training it sees necessary for clerks to governing bodies.

Procedure: Regulations made under sections 21, 22 and 23 will be subject to the negative procedure. It is intended that regulations made under this section will be of a technical nature and that it may be appropriate to update the subject matter of the subordinate legislation on a regular basis. The Government therefore take the view that the negative procedure is the appropriate applicable procedure.

### **Foundation schools**

Section 25 removes the ability of local authorities or other promoters to propose the establishment of a new foundation school in Wales. This section also amends section 113A of the Learning and Skills Act 2000 to remove the ability of the Welsh Ministers to propose the establishment of a foundation school for pupils over the age of 16.

Section 26 prohibits a school from making a change to its category and opting to become a foundation school. Schedule 8 to the School Standards and Frameworks Act 1998 makes provision enabling schools in Wales to change categories. This section amends Schedule 8 to the 1998 Act so as to remove the ability of a local authority or a governing body to propose that a school change its category so as to become a foundation school. This will not prevent a school which is currently a foundation school changing category so as to become a different category.

Section 27 contains a savings provision in relation to proposals to establish new foundation schools. The amendments made by section 25 above do not affect any proposal for the establishment of a new foundation school published prior to section 25 coming into force, and which has not been implemented. The proposal will therefore continue to be dealt with under section 28 of, and Schedule 6 to, the 1998 Act as though the amendments made by section 25 had not come into force.

Section 28 also contains a savings provision. The amendments made by section 26 do not affect any proposal for a school to change from one category to another published prior to section 26 coming into force, and which has not been implemented. Such a proposal will be dealt with under Schedule 8 to the 1998 Act as though the amendments made by section 25 had not come into force.

Section 29 allows the Welsh Ministers to make provision by order which they consider necessary or expedient to give full effect to sections 25 to 28. An order made by the Welsh Ministers under this power may, among other things, amend or revoke subordinate legislation.

Sections 30 subsection (1) defines terms used in the Measure. Subsection (2) provides that the Measure is to be read as one with the Education Act 1996. This means that the definitions in that Act are to be read across into this Measure, and the general provisions in that Act apply to the Measure. For example the "education functions" of a local authority are set out in Schedule 36A to the Education Act 1996, and that definition therefore applies to the term when used in this Measure. The definitions set out in the Measure take precedence over any used in the Education Act 1996 if there is a difference in meaning (subsection (3)).

Section 31 provides for orders and regulations under the Measure to be made by statutory instrument and sets out the Assembly procedures in respect of these instruments.

Section 32 makes provision about commencement. Sections 25 to 33 come into force two months after the Measure is approved by Her Majesty in Council. The other provisions of the Measure will be brought into force by order made by the Welsh Ministers. The explanatory memorandum estimates that these orders will be made by September 2012.

Section 33 subsection (1) provides that the title of this Measure is the Education (Wales) Measure 2011. This Measure is to be included in the list of Education Acts set out in section 578 of the Education Act 1996 (subsection (2)). Any reference in legislation to "the Education Acts" will include a reference to this Measure.

Procedure: Section 29 will be subject to the negative procedure as the Government take the view that any order made under this section will be of a technical nature and so this is the appropriate procedure. Section 32 gives the power to make a commencement order and this is not subject to any procedure. Commencement Orders are not normally subject to any scrutiny procedures therefore this is not unusual.

### 3 Conclusion

There do not appear to be any unusual provisions for delegated powers in the Proposed Measure apart from the power to modify any enactment in sections 6 and 18. Where powers are provided, these are subject to the negative procedure unless they are powers of commencement, in which case no procedure applies. No powers are subject to the affirmative procedure. As is normally the case, no procedure would apply to guidance issued under sections 7 and 17.

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