

**National Assembly for Wales**  
Constitutional Affairs Committee

Report on the Proposed Local Government  
(Wales) Measure

December 2010



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Legislation Office  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

Tel: 029 2089 8154  
Fax: 029 2089 8021  
Email: [Legislationoffice@wales.gov.uk](mailto:Legislationoffice@wales.gov.uk)

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## **Constitutional Affairs Committee**

The Constitutional Affairs Committee must consider and report on any of the matters set out in Standing Order 15.2 and may consider and report on any of the matters set out in Standing Orders 15.3, and 15.6.

### **Powers**

The Constitutional Affairs Committee was established in June 2007 (as the Subordinate Legislation Committee). Its powers are set out in the National Assembly for Wales' Standing Orders, particularly SO 15. These are available at [www.assemblywales.org](http://www.assemblywales.org)

### **Committee membership**

<i>Committee Member</i>	<i>Party</i>	<i>Constituency or Region</i>
Janet Ryder (Chair)	Plaid Cymru	North Wales
Alun Davies	Labour	Mid and West Wales
William Graham	Welsh Conservatives	South Wales East
Rhodri Morgan	Labour	Cardiff West
Kirsty Williams	Welsh Liberal Democrats	Brecon and Radnorshire

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## **The Committee's Recommendations**

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**Recommendation 1.** We recommend that Section 10(1) should be amended to clarify that the power in Section 10(1)(b) relates only to modifications of standing orders in relation to staff provided under Section 8(1)(b). **(page 24)**

**Recommendation 2.** We recommend that the regulation making powers in Section 143, which are related to the accreditation of quality in community government, should be exercised using the affirmative resolution procedure. **(page 26)**

## **The Committee's Role**

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### **Standing Orders**

1. The Constitutional Affairs Committee may consider and report on the following matters under the National Assembly's Standing Orders:

- Standing Order 15.6 (ii) states that the Constitutional Affairs Committee may consider and report on 'the appropriateness of provisions in proposed Assembly Measures .....that grant powers to make subordinate legislation to the Welsh Ministers'.
- Whilst it is not part of the Committee's remit to comment in the merits of the proposal which the proposed Measure is intended to implement, Standing Order 15.6(v) states that the Committee may consider and report on 'any legislative matter of a general nature within or relating to the competence of the Assembly or Welsh Ministers'.

2. The purpose of this report is to inform the Assembly's Stage 1 debate on the general principles of the proposed Measure and subsequent legislative stages.

### **The Proposed Measure**

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3. The Proposed Local Government (Wales) Measure<sup>1</sup> was introduced on 12 July 2010 by Carl Sargeant AM, Minister for Social Justice and Local Government. This was followed by a legislative statement by the Minister in the National Assembly on 13 July 2010<sup>2</sup>. The proposed Measure was referred to Legislation Committee No. 3 for stage 1 (general principles) consideration. The stage 1 reporting deadline is 17 December 2010.

### **Policy Background**

4. The policy background to the proposed Measure is summarised in the Explanatory Memorandum at paragraph 1 as follows

"1.1 The purpose of this Measure is to make changes intended to strengthen the structures and working of local government

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<sup>1</sup> <http://www.assemblywales.org/bus-home/bus-guide-docs-pub/bus-business-documents/bus-business-documents-doc-laid.htm?act=dis&id=191170&ds=7/2010>

<sup>2</sup> Record of Proceedings – 13 July pages 87-104

in Wales at all levels and to ensure that local councils reach out to and engage with all sectors of the communities they serve.

1.2. The proposed Measure makes provision to:-

1.2.1 broaden and increase participation in local government by permitting steps which help remove barriers and disincentives to standing for election to local councils (Parts 1-2 of the proposed Measure);

1.2.2 enable the review and improvement of the governance structures introduced through the Local Government Act 2000 so that they better suit the circumstances of local government in Wales (Parts 3-4);

1.2.3 enhance the role of non-executive (“backbench”) local authority councillors in the scrutiny of local services (Parts 5-6);

1.2.4 develop and strengthen the role of community councils in Wales, including enabling them to deliver a wider range of services and actions locally as well as to increase the effectiveness of their representational role and their ability to work in partnership with other bodies (Part 7);

1.2.5 reform the system for setting allowances for councillors (Part 8);

1.2.6 allow the Welsh Ministers to issue statutory guidance on collaboration between local authorities, and between them and other bodies (Part 9).

1.3 Bodies subject to the proposed Measure are:-

- Principal Councils
- Community Councils
- National Park Authorities
- Fire and Rescue Authorities
- The Independent Remuneration Panel for Wales”

### **Powers to make Subordinate Legislation**

5. When compared with other proposed Measures that the Committee has considered, the proposed Measure contains a large

number of regulation and order making powers, although, the number of regulation and order making powers reflect the voluminous length of the Measure, being 108 pages in total. Details of these follow.

***Parts 1 and 2 Strengthening Local Democracy and Family Absence for members of Local Authorities, which make provision for promoting and supporting membership of local authorities:-***

6. **Section 1** provides for Welsh Ministers to prescribe the survey questions a local authority must ask when discharging the duty to conduct a survey of unsuccessful candidates and councillors.
7. **Procedure:** Regulations made under section 1 will be subject to the **negative** procedure. Regulation making powers in section 1 will enable Welsh Ministers to specify the format of the questions that must be asked by a local authority and how the collated data is sent to Welsh Ministers. A non-exhaustive list of the type of information that the prescribed questions may capture regarding unsuccessful candidates and councillors is on the face of the Measure. Had the regulations been required to contain the type of information as aforesaid, then there is an argument for the regulations being subject to the affirmative procedure. However, as this type of information is already contained on the face of the Measure, and the regulations will only contain questions based on this information, then the negative procedure is probably suitable. Furthermore as technical and administrative details of the proposed regulations may require a number of updates in the future, and as amendments by such regulations may be required at relatively short notice, it is therefore appropriate that such regulations be subject to the negative procedure.
8. **Section 2** provides for the Welsh Ministers to specify the format in which the local authorities must provide the information they have collated to the Welsh Ministers.
9. **Procedure:** Section 2 is subject to the **negative** procedure, and as any amendments made would be of a technical and/or administrative nature, the negative procedure is appropriate.
10. **Section 9.** The regulation making powers in section 9 (1) (i) will enable the Welsh Ministers to add to the list of prescribed democratic services functions

11. **Procedure:** Regulations made under section 9 (1) (i) are subject to the **affirmative** resolution procedure. This is suitable as it can add to the functions of the Head of Democratic Services which are specified in the Measure itself and any additional functions should be subject to scrutiny.

12. **Section 10.** The regulation making powers in section 10 will enable Welsh Ministers to require a local authority to incorporate provision on the management of staff assigned to the Head of Democratic Services into its standing orders and to make other modifications to their standing orders.

13. **Procedure:** Regulation making powers under section 10 are subject to the **negative** resolution procedure. The Explanatory Memorandum states that the negative resolution procedure is considered appropriate as the technical and administrative details of the proposed regulations may require a number of updates in the future.

14. Section 10 does not specify any limitation to the modifications of the standing orders that may be made by the local authority. Given the nature of standing orders, namely that they govern the operation and procedures of a local authority, and that no limitation is mentioned in section 10, we have given consideration at paragraph 98 to limiting the power to modify standing orders in relation to the management of staff.

15. **Section 24** provides delegated power to Welsh Ministers to set out the determining detail of a period of family absence for a member of a local authority.

16. **Procedure:** - Regulations made under section 24 are subject to the **affirmative** procedure. This is considered the suitable procedure for regulations made under section 24 as the regulations will introduce a new scheme of leave of absence for members of local authorities.

17. **Section 25** provides Welsh Ministers with regulation making powers to set out the determining detail to calculate a period of maternity absence. The regulations must not provide for a period of maternity absence to exceed 26 weeks.

18. **Procedure:**-Regulations made under section 25 are subject to the **affirmative** procedure. For the reasons given for the suitability of the

affirmative procedure for regulations under section 24, the same would apply for the appropriateness of the affirmative procedure for regulations made under section 25. In this case the new scheme of leave of absence relates to maternity leave absence.

19. **Section 26** provides regulation making powers for Welsh Ministers to prescribe the nature and periods of new-born absence. Regulations must not provide for a period of new-born absence in respect of a child to exceed two weeks.

20. **Procedure**:-Regulations made under section 26 are subject to the **affirmative** procedure. Again, for the reasons given in relation to section 24 and section 25, this appears appropriate.

21. **Section 27** provides for Welsh Ministers to make regulations which set out the determining detail to calculate a period of adoption absence. Regulations must not provide for a period of adopter's absence in respect of a child to exceed two weeks.

22. **Procedure**:-Regulations made under section 27 are subject to the **affirmative** procedure, and again the affirmative procedure is deemed to be the appropriate procedure as it requires the approval of a scheme as in sections 24, 25 and 26.

23. **Section 28** provides delegated power to Welsh Ministers to prescribe the nature and periods of new adopters' absence. Regulations must not provide for a period of new adoption absence in respect of a child to exceed two weeks.

24. **Procedure**:-Regulations under section 28 are subject to the **affirmative** procedure. The affirmative procedure is appropriate as it concerns the approval of a new scheme.

25. **Section 29**:-The regulation making powers pursuant to section 29 enable Welsh Ministers to prescribe the nature and periods of parental absence. Regulations must not provide for parental absence in respect of a child to exceed a period, or a total period, of three months.

26. **Procedure**:-Regulations under section 29 are subject to the **affirmative** procedure. Again, the affirmative procedure is considered to be appropriate as it concerns the approval of a new scheme.

27. **Section 30** provides for the Welsh Ministers to prescribe the administrative procedures to be followed by local authorities and the scope of the absence including continuation of benefits arising from membership of the council or the executive available to members entitled to absence under this part of the Measure, and are supplemental to those made under section 24 to 29 of the Measure.

28. **Procedure**:-Regulations under section 30 are subject to the **affirmative** procedure. Regulations pursuant to section 30, include the provision for the consequences for the failure to give notices, to produce evidence, to keep records or to comply with other procedural requirements, and can make provision for the consequences for the failure to act in accordance with the aforementioned notices, as well as making provision entitling a member of a local authority (or of the executive) to present a complaint about a decision by a local authority to bring a period of absence to an end or to postpone or cancel a period of absence, and to apply, or make modifications of, an enactment. "Modification" is defined within the Measure as including an "amendment", and regulations made under section 30 in effect equate to a Henry VIII clause, and so can amend primary legislation.

### ***Part 3, 4 and 5-Governance***

29. **Section 34** gives effect to Schedule 1, paragraph 13 (2) in Part 3 of which provides a delegated power for the Welsh Ministers to ensure that local authorities cease to operate alternative arrangements and start to operate executive arrangements of a form specified by the Welsh Ministers. There is no reason to believe that local authorities will not make the necessary changes to replace alternative arrangements with executive arrangements, however section 34 is a default power in case the changeover from one arrangement to another is not made.

30. **Procedure**:-The order making power contained within section 34 is subject to the **negative** resolution procedure. This is appropriate given the procedural nature of the power.

31. **Section 55** provides delegated powers for the Welsh Ministers to exclude any functions or to place limitations on the extent to which a function may be exercised by a non-executive member of the council.

32. **Procedure**:-The order making power within section 55 is subject to the **negative** resolution procedure. This is appropriate given the procedural nature of the power and given that the equivalent power in

relation to the functions not to be discharged by the executive (section 13 of the Local Government Act 2000) is also subject to a negative resolution procedure.

***Part 6 Overview and Scrutiny: -Provisions within this part relate to Overview and Scrutiny Committees of local authorities***

33. **Section 57** provides for Welsh Ministers to make regulations to specify how two or more local authorities may appoint a joint overview and scrutiny committee and the arrangements under which the committee may exercise its functions.-

34. **Procedure**:-The regulation making power in section 57 is subject to the **negative** resolution procedure. This is appropriate as the provisions relate to the administrative details of the scheme which follows on from the intent of the Measure.

35. **Section 60** provides for the Welsh Ministers may by order to designate a person for the purposes of section 21 of the Local Government Act 2000. This allows the Welsh Ministers to designate a person relating to any matter which affects a county area. This will have the effect of those designated persons or bodies being under an obligation to respond to requests to attend or to supply information to scrutiny committees.

36. **Procedure**:-The order making power in section 60 is subject to the **affirmative** procedure. This procedure is appropriate as it allows the opportunity of debate and approval of those person and bodies which will be subject to scrutiny in a local government area.

37. **Section 62** amends section 21A of the Local Government Act 2000 which provides a delegated power for Welsh Ministers to specify matters that can be excluded from consideration by overview and scrutiny committees.

38. **Procedure**:-The order making power in section 62 is subject to the **negative** resolution procedure. This is appropriate as the section relates to the administrative detail needed to give effect to the intent of the Measure.

39. **Section 74** provides the Welsh Ministers with regulation making power to specify how local authorities must carry out the appointment of chairs of scrutiny and overview and committees.

40. **Procedure**:-The regulation making power in section 74 is subject to the **negative** resolution procedure. This is suitable as the provision relates to the administrative details needed to give effect to the intent of the Measure.

41. **Section 80** provides for the Welsh Ministers to prescribe in regulations a requirement upon local authorities to publish information about the future intended activities of overview and scrutiny committees.

42. **Procedure**:-The regulation making power in section 80 is subject to the **negative** resolution procedure. This is appropriate as the provision relates to the administrative details needed to give effect to the intent of the Measure.

***Part 7-Communities and Community Councils:-Provisions within this section are concerned with community meetings, community polls and community councils***

43. **Section 97** provides a regulation making power for the Welsh Ministers to, dis-apply the notice provisions contained within the section to community polls where the question is of a type specified in regulations by them. This enables Welsh Ministers to exclude certain questions from the requirement on the returning officer to inform the relevant principal council of the poll and the results of the poll.

44. **Procedure**: Section 97 is subject to the **negative** resolution procedure. This is seen as the appropriate procedure as the provisions relate to notice requirements to polls and these may require amendments of an administrative and technical nature which may require updating in future.

45. **Section 116** allows the Welsh Ministers, by order, to amend various voting thresholds in relation to the existence of a community council or the grouping of a community with other communities by inserting a new section into the Local Government Act 1972. No order can be made before consultation with principal councils or their representative body and community councils or their representative body. This is considered appropriate for an order making power as it is the vehicle for amending the thresholds which appear on the face of the Local Government Act 1972 as amended by the Measure.

46. **Procedure**:-Section 116 is subject to the **affirmative** procedure. The Explanatory Memorandum states that this procedure is the appropriate one as it will allow the Assembly to debate and approve the changes. It should be noted that under this provision it is possible for thresholds to be amended to change the voting thresholds for the procedures to establish or dissolve community councils, making it either easier or more difficult than is proposed by the Measure. However, as no order can be made before consultation with principal councils then, coupled with this consultation requirement, the affirmative procedure is appropriate in this case.

47. **Section 119 (5) (c)** allows the Welsh Ministers to add to the information that must be contained in a public notice giving details of intended co-option by a community council.

48. **Procedure**:-This section is subject to the **negative** resolution procedure and this is appropriate as the provisions therein relate to administrative and technical details which may require updating in future.

49. **Section 122** allows the Welsh Ministers to add to the information that must be contained in a public notice giving details of an intention by a community council to appoint a youth representative.

50. **Procedure**:-Section 122 is subject to the **negative** resolution procedure which is considered to be suitable as the provisions relate to administrative and technical details which may require updating in future.

51. **Section 124** enables Welsh Ministers to provide for youth representatives to be treated as members of the council, which appointed the representative, for certain purposes, specified in the regulations.

52. **Procedure**:-Section 124 is subject to the **negative** resolution procedure which is considered appropriate as the provision relates to administrative and technical details which may require updating in future.

53. **Section 130** provides the Welsh Ministers with an order-making power to amend repeal revoke or dis-apply any enactment which they think prevents or obstructs community councils from exercising their well-being power. This power may be exercised in relation to all or

particular community councils, or particular descriptions of community councils, and for a particular period.

54. **Procedure:**-Section 130 is subject to the **super affirmative** procedure. This is considered appropriate as the analogous power of the Secretary of State can only be exercised by the equivalent procedure in the Houses of Parliament. Section 166 of the Measure specifies that before Welsh Ministers can make an order under section 130, they must carry out the process of consultation as required by section 166.

55. **Section 133** provides for the Welsh Ministers to have an order making power setting out a model charter agreement between a principal council and a community council. The charter agreement contains details as to the way in which the functions of a local authority and community council can be exercised for the purpose of maintaining and improving cooperation between them.

56. **Procedure:**-Section 133 is subject to the **negative** resolution procedure.

57. **Section 137** enables Welsh Ministers to provide for a quality accreditation scheme for community councils in Wales. Section 137 is a regulation making power which is suitable as the provisions relate to the details of an accreditation scheme which may be liable to regular change.

58. **Procedure:**-Section 137 is subject to the **negative** resolution procedure.

59. **Section 143** provides for Welsh Ministers to have delegated power to make modifications to the operation of any enactment in relation to specific community councils arising from such councils being accredited or otherwise. It allows any future obligation on community councils judged to be unnecessary by virtue of the community council having accreditation to be set aside or to be made easier to comply with.

60. **Procedure:**- Section 143 contains a Henry VIII power as the Welsh Ministers are enabled by regulations to amend primary legislation. However, Section 143 is subject to the **negative** resolution procedure.

### ***Part 8-Members' payments and pensions (Councillors Allowances)***

61. Provisions within this part relate to the Independent Remuneration Panel for Wales and the operation of the system for determining remuneration for councillors in Wales.

62. **Section 161** provides the Welsh Ministers with an order making power to amend the provisions relating to the membership of the Independent Remuneration Panel and the provisions relating to the functions of the Panel.

63. **Procedure**:-The order making power in section 161 is subject to the **affirmative** procedure. Given that the power relates to operational matters of how the Panel is appointed, or its functions, the affirmative resolution procedure is suitable as it would allow the Assembly an opportunity to debate and approve any proposed changes to how the Panel is appointed or to its functions.

### ***Part 9-General***

64. **Section 170**:-Power to make supplementary provision and Section 171 Commencement. Section 171 specifies the coming into force date of any provisions in the Measure.

65. To take account of future developments in local government and any future legislation which may have to be accommodated by local authorities, section 170 allows for supplementary, consequential, incidental, transitional, transitory and saving provision to be made by Welsh Ministers to the respective parts of the Measure. It allows the necessary updating of technical details in the provisions which arise as a result of the passing of other Measures or Acts to be undertaken. This power is needed to enable provision to be made which gives full effect to such an order in secondary legislation rather than on the face of the Measure as it is likely to be very detailed.

66. The order making power in section 170 is subject to the **negative** resolution procedure unless it contains modifications on an enactment, in which case it is subject to the affirmative resolution procedure. This is appropriate as it would have the potential to amend enactments and will give an opportunity for members of the Assembly to debate and approve the amendment, although the committee may wish to consider whether the super affirmative procedure would be better.

67. The order making power under **section 171** is **not subject to any Assembly procedure** which is the usual practice for commencement provisions.

68. Section 171 (1) states that sections 57, 80, 82, 83 and 162; Chapters 2 to 9 of Part 7; Part 9 (except section 169); and Part E of Schedule 4 (and section 169 (2) in so far as it relates to Part E of Schedule 4) come into force on the day after the day on which this Measure is approved by Her Majesty in Council.

69. Section 171 (2) states that Parts 3 and 4; section 54 and sections 75 to 79 come into force at the end of the period of two months beginning with the day on which this Measure is approved by Her Majesty in Council.

70. Section 171 (3) states that apart from sub-section (1) and (2) above, the Measure comes into force in accordance with provision made by the Welsh Ministers by order.

## **Issues arising from evidence and recommendations of the Committee**

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71. We considered the Proposed Local Government (Wales) Measure on 13 October 2010 and received written<sup>3</sup> and oral evidence<sup>4</sup> from the Minister for Social Justice and Local Government, Carl Sargeant AM and his officials.

72. We also asked for and received additional written evidence from the Minister, which we considered on 24 November 2010.

### **General**

73. We are satisfied that the proposed Measure generally achieves the correct balance between powers on its face and the subordinate legislation powers given to Welsh Ministers.

74. We are also content that although there are a considerable number of regulation making powers in the proposed Measure, it will not be unnecessarily complex.

75. From the perspective of the subordinate legislation provisions it contains, we see no reason why the National Assembly should not agree to the general principles of the Proposed Measure.

### **Powers not intended for use or held in reserve**

76. We were initially concerned at the number powers sought by the Government that it appeared either to have no intention of using at present or that are to be held as reserve powers. Of the 23 subordinate legislation powers in the proposed Measure, 16 of them fall into one of these two categories.

77. Following the Minister's oral evidence, the Committee Chair wrote on our behalf to the Minister<sup>5</sup> asking for a further explanation of the reasons for the need for the powers and why provision could not have been made on the face of the Measure. The Minister's response<sup>6</sup> indicated that it would be misleading to generalise about these powers, which should be considered individually in the context of the

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<sup>3</sup> CA(3)-23-10(p6)(e)

<sup>4</sup> Record of Proceedings – Constitutional Affairs Committee – 13 October 2010

<sup>5</sup> CA(3)-28-10(p3)(e)

<sup>6</sup> CA(3)-28-10(p4)(e)

particular policy objectives involved. However, the Minister helpfully set out further explanations for each of the powers involved, which has addressed most of our concerns.

### ***Procedural or administrative***

78. For this reason, we are content that the following powers are mainly procedural or administrative, are appropriate for subordinate legislation and that the appropriate procedure is being used in each case:

- **Sections 9 (1):** - Regulation-making power to add to the list of prescribed democratic services functions
- **Section 119:** - Regulation-making power - notice requirement for filling vacancy by co-option.
- **Section 122:** - Regulation-making power- notice requirement for appointment of community youth representative
- **Section 130:** - Order-making power- amendment or repeal of enactments preventing or obstructing a community council from exercising their well-being power.
- **Section 143:** - Regulation-making power - amendment or repeal of legislation in relation to specific community councils arising from being accredited or otherwise.
- **Section 161:** - Order making power - to amend provision about the Independent Remuneration Panel.

### ***Reserve Powers***

79. We are also content that the following powers are appropriate ones to hold in reserve in the event that a local authority or community council fails to act in accordance with a policy objective set out on the face of the proposed Measure:

- **Section 34:** - Order-making power if failure on part of Local Authority ("LA") to cease operating alternative arrangements.
- **Section 74:** - Regulation-making power to specify how local authorities carry out the appointment of chairs of overview and scrutiny committees

- **Section 133:** - Order-making power-power to set out charter agreement
- **Section 137:** - Regulation-making power-schemes for the accreditation of quality

### ***Other Powers***

80. There remain a number of powers where we considered carefully whether the powers were appropriate and the procedure sufficiently robust given the nature of the powers sought.

#### *Sections 56 and 55*

81. Section 55 of the proposed Measure enables local authorities to make arrangements to delegate to non-executive members the authority to exercise functions of the council executive. Welsh Ministers will be enabled to make an order to exclude functions from being delegated or to place limitations on the extent to which a function may be exercised. Section 56 is a consequential power that amends the Local Government Acts of 1972 and 2000.

82. The Minister confirmed in oral evidence that he has no intention to use the power at present. In evidence to the committee on 13th October 2010, he said:

“We expect that councillors and executives will act responsibly in their duty. While we do not feel that we need to list exclusions on the face of the proposed Measure, we may need to list them at some point with regard to the detail. We would not want a council or an executive to delegate functions to an individual councillor, such as budget setting, planning or licensing powers. We do not think that councils would do that, but if they did, we would think that would be inappropriate anyway. That is the fall-back provision – we would not want them to delegate significant powers to individuals around planning, licensing and so on.”<sup>7</sup>

83. This was confirmed in the further information<sup>8</sup> provided by the Minister, where he also cited functions relating to planning or licensing as examples of ones that might be excluded. In addition, the

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<sup>7</sup> RoP – CA Committee – 13 October 2010 – para 79

<sup>8</sup> CA(3)-28-10(p4)(e)

Minister pointed out that the Section 56 power is already available to the Secretary of State in England and has already been exercised.

84. Given the broad power that this section gives to local authorities, we considered recommending that there should be a non-exhaustive list of excluded functions on the face of the Measure. However, we were convinced by the Minister's argument that local authorities should be allowed a degree of flexibility in the exercise of the power and that the power in section 55(4), which will allow Ministers to exclude functions or place conditions on how they are exercised, is appropriate to allow them to take decisions in the light of experience and specific local circumstances.

### *Section 62*

85. Section 62 allows the Welsh Ministers to specify matters that can be excluded from consideration by overview and scrutiny committees. The Minister has confirmed that he has no intention to use the power at present. In his further information<sup>9</sup> to the Committee the Minister said that:

“the order-making power is prudent to provide a safeguard against irresponsible references. By not including a list of excluded matters on the face of the proposed Measure, the Welsh Ministers will be able to respond to developments and take action in the light of experience”.

86. In his evidence to Committee on 13th October 2010,<sup>10</sup> the Minister cited defence facilities as a possible area that could be excluded. The Committee also noted that an equivalent power is already available to the Secretary of State in relation to England, and has been exercised.

87. In the light of this we are content that the power is a reasonable and proportionate one in the circumstances.

### *Section 97*

88. This provision allows for the Welsh Ministers to dis-apply the notice provisions contained within the section to community polls

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<sup>9</sup> *ibid*

<sup>10</sup> RoP – CA Committee – 13 October 2010 – para 100

where the question is of a type specified in regulations made by them. The Minister has confirmed that he has no intention of using the power at present and that there is currently no restriction on the type of question which could be the subject of a community poll.

89. In his evidence to committee on 13th October 2010 the Minister said:

“it is very much a fall-back position, and I do not believe that we will use it often. It will be used rarely if at all...perhaps if there were circumstances that could lead to racial or religious tensions, we would consider it appropriate to use that power.”<sup>11</sup>

90. In his further information<sup>12</sup> to the Committee the Minister confirms that:

“the regulation-making power is prudent to provide a safeguard allowing them to intervene in the event of polls taken on questions which are, for example inflammatory or defamatory”.

91. In the light of the Minister’s assurances about the limited likely use of the power and the nature of the circumstances in which it might be used, we are content that the power is reasonable and proportionate.

### *Section 116*

92. Section 116 allows the Welsh Ministers by Order to alter the thresholds for the various establishment and dissolution procedures in relation to community councils introduced by the Measure. It appears on the face of it to give Ministers a very wide discretion to set thresholds, including the possibility of setting thresholds in such a way that might skew polls toward particular outcomes.

93. The Minister has indicated that he has no intention of using the power at present. In his evidence to the Committee on 13th October 2010 he said:

“The thresholds in the proposed Measure are, I believe, set appropriately to deliver the policy of making it easier to

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<sup>11</sup> Ibid – para 117 & 119

<sup>12</sup> CA(3)-28-10(p4)(e)

establish a community council...we also need to ensure that there is appropriate strength of feeling within a community before a council can be dissolved. So we think that we have measured that appropriately for the thresholds. It is important for us that Ministers can revisit the thresholds should that be necessary, and the affirmative resolution combined with the consultation with local government and communities recognises that".<sup>13</sup>

94. In his letter of 15 November<sup>14</sup> he also made the point that:

The power, limited as it is to the amendment of the thresholds, is not so wide-ranging as to make the super affirmative procedure appropriate in my view. The procedures for the establishment and dissolution of community councils are convoluted and involve several stages. Amending the threshold for a community poll is unlikely to be a particularly effective or efficient mechanism for achieving a particular outcome.

95. As the procedure is affirmative, coupled with the requirement of prior consultation, we consider it to be appropriate in the circumstances and accepted the Minister's response that the power, is limited to the amendment of the thresholds and, therefore, not so wide-ranging as to require a super affirmative procedure.

#### *Section 124*

96. This section enables the Welsh Ministers, by regulations to provide for a community youth representative to be treated as a member of the community council for purposes specified in the regulations. The Minister has confirmed that he has no intention to use the power at present. In his letter to committee<sup>15</sup> the Minister confirms that he considers the power prudent:

"...if experience shows that it would be appropriate and in the interests of those concerned".

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<sup>13</sup> RoP – CA Committee – 13 October 2010 – para 127

<sup>14</sup> CA(3)-28-10(p4)(e)

<sup>15</sup> *ibid*

97. Although it is not entirely clear in what circumstances this power would be used, we are satisfied that the nature of the power and the policy objective that lies behind it is benign.

## **Procedures for other powers**

### ***Section 10***

98. Section 10 (1) of the proposed Measure not only allows the Welsh Ministers to make regulations regarding standing orders relating to staff provided by the head of democratic services, but under Section 10 (1) (b) “to make other modifications of the authority’s standing orders”. This power is wider than the current power provided by Section 8 of the Local Government and Housing Act 1989 Act, and would appear to allow Welsh Ministers to make any modification of the Authority’s standing orders. It is proposed that the negative procedure is used for any such regulations.

99. The Minister confirmed that it is the Government’s intention that the power will be confined to standing orders on the management of staff of the Head of Democratic Services. However, he also confirmed, both in his response to the Committee<sup>16</sup> and in evidence to LC3<sup>17</sup> on 18th November 2010 that he has asked his officials to look at the wording of the section.

100. We are of the view that the power as drafted would be wide enough to allow the Government to make any amendment to a local authority’s standing orders. As this goes beyond the Minister’s policy intention we believe this section should be amended to make it clear that any modification that the Government can make to standing orders is limited to staff provided under Section 8(1)(b).

**Recommendation 1. We recommend that Section 10(1) should be amended to clarify that the power in Section 10(1)(b) relates only to modifications of standing orders in relation to staff provided under Section 8(1)(b).**

### ***Section 143***

101. Section 143 allows Welsh Ministers to make regulations modifying legislation, including Acts of Parliament, to remove or alter statutory

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<sup>16</sup> *ibid*

<sup>17</sup> RoP – Legislation Committee 3 – 18 November 2010 – para 73

impediments from accredited community councils and to place impediments in the way of unaccredited community councils.

102. Our general view is that the affirmative regulation procedure is appropriate for so called Henry VIII powers such as these unless there are good reasons for not doing so. In this case the negative procedure is proposed.

103. The Minister in his response<sup>18</sup> said

“Section 143 does introduce a Henry VIII power with the negative procedure, but we consider the procedure to be appropriate given its limited and specific application.

The Committee's own legal report points out:

*‘these amendments arise in consequence of the accreditation of quality in community government provisions, and so for these reasons the negative resolution procedure maybe the appropriate procedure in the circumstances’.*

The law will not be amended on the face of it pursuant to this power, but rather its application to certain specified community councils (pursuant to the section 143 regulations) depending on whether such councils have accreditation or not.”

104. However, the power may be used to place impediments in the way of unaccredited community councils (those who have not reached a certain standard) and we are concerned that it is not yet clear what criteria community councils need to reach in order to become accredited as regulations under Section 137 and 138 have yet to be made.

105. We acknowledge that the argument is more evenly balanced in this case than on other occasions when it has been proposed that Henry VIII powers should be exercised by negative resolution. Nevertheless, we remain of the view that the affirmative procedure is the appropriate one in this case.

106. In the light of these factors we recommend that the affirmative procedure would be appropriate in this case.

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<sup>18</sup> CA(3)-28-10(p4)(e)

**Recommendation 2. We recommend that the regulation making powers in Section 143, which are related to the accreditation of quality in community government, should be exercised using the affirmative resolution procedure.**

### **Explanatory Memorandum**

107. Alongside our consideration of this proposed Measure, the Committee has also been conducting a separate Inquiry on the drafting of Welsh Government legislation during the 3<sup>rd</sup> Assembly.

108. We will report on the outcome of that Inquiry in due course and it will include our findings on the clarity and helpfulness of Explanatory Memoranda and any recommendations that may be appropriate. Nevertheless, a number of witnesses to the Inquiry have indicated that they found the Explanatory Memorandum for this proposed Measure one of the better ones that they have seen.

109. The rationale it contained for the procedures for exercising each delegated power was particularly welcome and might usefully be extended to future Memoranda.

## Witnesses

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110. The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at [www.assemblywales.org](http://www.assemblywales.org)

*13 October 2010*

Carl Sargeant AM	Minister for Social Justice and Local Government
Frank Cuthbert	Head of Local Government Democracy Team, Welsh Government
Anne Koppel	Legal Services Department, Welsh Government

## List of written evidence

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111. The Committee considered the following written evidence. All written evidence can be viewed in full at [www.assemblywales.org](http://www.assemblywales.org)

<i>Document</i>	<i>Reference</i>
Proposed Local Government (Wales) Measure	CA(3)-23-10(p2)
Explanatory Memorandum	CA(3)-23-10(p3)
Legal Advisers' Report	CA(3)-23-10(p4)
Letter of 22 September from the Chair to the Minister for Social Justice and Local Government Carl Sargeant AM	CA(3)-23-10(p5)
The Minister's response of 4 October	CA(3)-23-10(p6)
The Chair's additional letter of 20 October to the Minister	CA(3)-28-10(p3)
The Minister's response of 15 November	CA(3)-28-10(p4)
Legal Advisers' supplementary report	CA(3)-28-10(p5)