

National Assembly for Wales
Constitutional Affairs Committee

Report on the Proposed Education
(Wales) Measure

January 2011



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(Wales) Measure

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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

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

Recommendation 1. We recommend that the Welsh Government amends section 15 to ensure that the definition of small schools takes into account the nature of schools and the character of the areas in which they are based in an objective and broadly consistent way across Wales. **page 17**

Recommendation 2. We recommend that any Orders made under section 15 should be subject to the affirmative resolution procedure. **page 17**

Recommendation 3. We recommend that the words “in exceptional circumstances” should be inserted after “Welsh Ministers may...” in section 16(1). **page 18**

Recommendation 4. We recommend that Section 16 should include a requirement to consult stakeholders before any direction takes effect. **page 18**

The Committee's Role

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 Measuresthat 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

3. The proposed Education (Wales) Measure was introduced on 6 December 2010 by Leighton Andrews AM, the Minister for Children, Education and Lifelong Learning. The Minister made a legislative statement on the proposed Measure to the Assembly on 8 December 2010. The proposed Measure was referred to Legislation Committee No. 5 for stage 1 (general principles) consideration with a reporting deadline of 21 January 2011.

Policy Background

4. The proposed Education (Wales) Measure contains provisions to achieve four broad aims:-
 - To increase collaboration amongst education bodies;
 - To encourage the federation of School governing bodies;
 - To address weaknesses in the current school governance system; and

- To simplify the planning of school places by prohibiting the creation of further Foundation schools.
5. The proposed Measure provides powers and duties aimed at:
- making collaboration commonplace in the education system;
 - encouraging federation of school governing bodies;
 - improving school governance through training of clerks and governors; and
 - simplifying the planning of school places in Wales.

Powers to make Subordinate legislation

6. 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.

Part 1 - Collaboration by Education Bodies

7. 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.

8. **Section 3** places duties on the education bodies to consider working collaboratively. Education bodies which conclude that the exercise of powers of collaboration would improve the effective and efficient use of public resources in relation to education and training must collaborate.

9. **Section 6** subsection (1) provides a power for the Welsh Ministers to make further provision through regulations about the power to collaborate. Regulations under this subsection can deal with a range of matters including 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. Subsection (4) provides 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).

10. **Procedure:** Regulations made under section 6 will be subject to the **negative** procedure. The Government's view is that the regulations made under this section will be of a technical nature and that, therefore, the negative procedure should be the appropriate applicable procedure.

11. **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. **Procedure: No Procedure.**

Part 2 - School Governance

Chapter 1- Federation of maintained schools

12. 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.

13. **Section 10** gives governing bodies of maintained schools a power for two or more schools to federate, or for an existing federation to federate with other schools, or for two or more existing federations to federate under a single governing body. It also provides for the decision to federate under this section resting with the governing body concerned, once they have complied with certain conditions and procedures set out in regulations.

14. **Section 11** subsection (1) provides local authorities in Wales with the power to propose that two or more maintained schools federate,

that an existing federation federates with other schools, or that two or more existing federations may federate under a single governing body.

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

16. Subsection (3) says that a local authority must determine any proposals to federate schools that it has published. Regulations under subsection (6) 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.

17. 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.

18. Subsection (5) requires the consent of certain persons before a local authority may propose a federation that includes 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.

19. 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.

20. **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. When 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)).

21. **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.

22. **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.

23. **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 under section 16 to direct the federation of such schools.

24. **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.

25. **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.

26. **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.

27. **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 (Chapter 1 of Part 2).

28. **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.

29. **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. The Government's view is that regulations made under these sections will be of a technical nature and that there may be a need to update the subject matter of the subordinate legislation on a regular basis and that, therefore, the negative procedure is appropriate.

Chapter 2 - School Governance - training for governors and clerks

30. **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.

31. **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.

32. 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.

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

34. **Procedure:** Regulations made under sections 21, 22 and 23 will be subject to the **negative** procedure. The Government has indicated that regulations made under these sections 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 takes the view that the negative procedure is the appropriate procedure.

Part 3 – Miscellaneous and General

Foundation schools

35. **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.

36. **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.

37. **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.

38. **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.

39. **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.

40. **Procedure:** Section 29 will be subject to the **negative** procedure as the Government takes the view that any order made under this section will be of a technical nature and so this is the appropriate procedure

General

41. **Section 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)).

42. One of the consequences of this provision is that the definition of ‘modification’ in the 1996 Act will apply to this Measure and in particular to section 6(4). The 1996 Act defines modifications as, “additions, alterations and omissions”.

43. **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.

44. **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. As is usual with Commencement Orders, this power is not subject to any scrutiny procedure.

45. **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.

Committee Consideration

46. We considered the proposed Measure on 13 January 2011 and received oral and written evidence from the Minister for Children, Education and Lifelong Learning, Leighton Andrews AM and his officials.

47. We also asked for further written evidence on the definition of “modifications”, particularly in the context of sections 6(3) and (4) of the proposed Measure but also in relation to sections 14(2) and 18(1),(2) and (3), which also refer to modifications.

General

48. 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. We are also content that it will not be unnecessarily complex.

49. 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.

50. We make further comment on specific sections and powers below.

Section 6 - Regulations about the power to collaborate

51. We noted that section 6 (4) provides that regulations may make modifications to any legislation relating to the functions of the collaborating education bodies. This does potentially allow for quite wide-ranging amendment of the law in this area depending on how widely the word “modifications” is interpreted. In his oral evidence, the Minister said that this did not allow “wholesale unfettered change”¹ to the law in the area concerned.

52. We asked the Minister for a note giving a firmer definition of what modification means and its legal effect in this context, which he has kindly supplied. The note is attached as an annexe to this report. The thrust of the Minister’s note is in line with the advice we have received from our own legal advisers.

¹ RoP – CA Committee – 13 January – para 65

53. Although we are reassured by the Minister's note and our own advice, we believe that greater clarification of the extent of the modifications the government propose to make would be welcome in order to ensure that any modifications are in line with the overall spirit and intent of the Measure. **We hope that the Minister will provide further clarity on this point during the course of the debate on the general principles of the proposed Measure.**

Sections 15 and 16

Definition of Small School

54. As noted earlier, section 15 allows 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 school is defined as a small school, Ministers will be able to use the powers of direction in section 16 to compel such schools to federate with other schools. It also appears that they will be able to use the powers in section 16 to compel any school to federate with a small school.

55. Although we accept that a small school might be defined in different ways depending on whether it is a primary or secondary school and in a rural or urban area, our assumption was that the power to define small schools was to be used generally so that there was a broadly common definition of the size of a small school across the different parts of Wales and school sectors.

56. However, in evidence, the Minister indicated that a definition could be sought on a case by case basis:

[141] Janet Ryder: May I clarify that point? You will be working out the definition of a 'small school' as it relates to the specific area that is being considered. It is not your intention to come forward with a set definition of a rural small school and an urban small school.

[142] Leighton Andrews: I have not ruled that out, but that is a policy issue that we can pursue during the course of passage of the proposed Measure.²

² Record of Proceedings (RoP) – Constitutional Affairs (CA) Committee – 13 January 2011

57. Whether a school is considered to be a small school (and can, therefore, be compelled to federate) is likely to be a judgement that will often be highly politicised, at least locally. We believe greater certainty is needed in this area so that the definition of a small school is reasonably consistent and objective across the whole of Wales.

Recommendation 1: We recommend that the Welsh Government amends section 15 to ensure that the definition of small schools takes into account the nature of schools and the character of the areas in which they are based in an objective and broadly consistent way across Wales.

Procedure to be Used

58. It is proposed that the power to define small schools under section 15 should be exercised by the negative resolution procedure. As currently drafted, section 15 provides that decisions on what constitutes a small school are entirely at the discretion of Ministers, with no requirement to consult any other body or person. Having made an Order setting out a definition (whether for a specific school or more generally) Ministers are then free to use the powers of direction in section 16, which are not subject to any Assembly procedure.

59. Given our concerns that decisions in relation to deciding what constitutes a small school may be contentious, as well as the powers of compulsion that are thereby given to Ministers under section 16, we believe there is a strong case for specific requirements to consult the bodies that may be affected. We also believe that the lack of any Assembly procedure that would allow scrutiny of a decision to compel federation under section 16, means it is doubly important that there is fuller scrutiny of Orders made under section 15. For this reason we believe that Orders under section 15 should be made by the affirmative resolution procedure.

Recommendation 2: We recommend that any Orders made under section 15 should be subject to the affirmative resolution procedure.

Section 16 Power to be used only in “Exceptional Circumstances”

60. In relation to section 16, we note the Minister’s assurance that he would “...only envisage the section 16 power for Welsh Ministers being used on a very exceptional basis”.³ We also noted that the Minister was prepared to accept that section 16(1) should be amended to add the words “in exceptional circumstances” after “Welsh Ministers may...”⁴.

61. We believe that this would give further reassurance that this power will not be used high-handedly and recommend accordingly.

Recommendation 3: We recommend that the words “in exceptional circumstances” should be inserted after “Welsh Ministers may...” in section 16(1).

Consultation on Power of Direction (Section 16)

62. We also noted that there is no requirement under section 16 to consult those affected by a decision to direct federation. Indeed the Explanatory Memorandum makes clear that schools with small pupil numbers could be federated “without the need to consult the stakeholders of that school”.

63. As the powers in this proposed Measure are likely to be in use for some considerable time, and are likely to have to cope with a range of changing circumstances, we cannot see any reason not to consult the stakeholders affected by what may be far reaching decisions. We, recommend, therefore that before any direction under section 16 can take effect, stakeholders, which should as a minimum include the LEA and the school governing body, should be consulted and appropriate account taken of their views.

Recommendation 4: We recommend that Section 16 should include a requirement to consult stakeholders before any direction takes effect.

³ RoP – CA Committee – 13 January – para 131

⁴ Ibid – para 163

Witnesses

64. The following witnesses provided oral evidence to the Committee on 13 January 2011. A transcript of the session can be viewed in full at www.assemblywales.org

13 December 2010

Leighton Andrews AM	Minister for Children, Education and Lifelong Learning, Welsh Government
David Lloyd Thomas	Head of School Governance and Revenue Funding Branch, Welsh Government
Simon Morea	Legal Services Department, Welsh Government

List of written evidence

65. The Committee considered the following written evidence. All written evidence can be viewed in full at www.assemblywales.org

<i>Document</i>	<i>Reference</i>
Proposed Education (Wales) Measure	CA(3)-01-11(p1)
Explanatory Memorandum	CA(3)-01-11(p2)
Legal Advisers' Report	CA(3)-01-11(p3)
Letter from the Committee Chair to the Minister for Children, Education and Lifelong Learning, Leighton Andrews AM	CA(3)-01-11(p4)
The Minister's response	CA(3)-01-11(p5)
Response of the Association of School and College Leaders (ASCL) Cymru to Legislation Committee No.5's online consultation	CA(3)-01-11(p6)
Response of the Association of Teachers and Lecturers (ATL) Cymru to Legislation Committee No.5's online consultation	CA(3)-01-11(p7)

Annexe – Minister’s Note of 18 January on Meaning of “Modifications”

Proposed Education (Wales) Measure – Additional Information from Minister for Children, Education and Lifelong Learning

There are powers in the Measure that will allow the Welsh Ministers to make regulations that can modify enactments. In this context, an enactment includes any provision contained in a Measure or Act of the National Assembly for Wales, an Act of Parliament or subordinate legislation.

There is judicial authority as to the ordinary meaning of "modification". In *Legg v Inner London Education Authority* [1972] 1 WLR 1245, Megarry LJ said (at 1256) that:-

"... The process involved in "modification" is thus one of alteration, and it must be considered how radical that alteration is. The alteration may consist of additions or subtractions or other changes in what is already there, or, no doubt, any combination of these. But throughout, there must, I think, be the continued existence of what is in substance the original entity. Once one reaches a stage of wholesale rejection and replacement, the process must cease to be one of modification".

And at 1257:-

"For one proposal to be fairly regarded as a modification of another proposal, one must be able to perceive enough in it of that other to recognise it as still being that other proposal, even though changed. The temptation is into metaphysics, into considering how much of a table can be changed or replaced or modified without it ceasing to be the same table, and so on. The line may well be hard to draw, but there comes a point where the modifications have swamped or eaten away so much of the original that it is impossible to regard what is there as still being the original in a modified form".

The first of the provisions conferring such powers of modification is section 6(4). The Welsh Ministers can make regulations which provide that any such enactment is to apply in relation to the education bodies and functions described in section 6(3) in a modified form. However,

(i) there is no power to make textual amendments to those enactments themselves, only a power to provide that those enactments apply in a modified form in relation to those bodies and functions;

- (ii) there will be a limit as to how far those enactments can be altered, in their application to such bodies and functions, without ceasing to be "modifications" altogether; and
- (iii) the Welsh Ministers may only apply those enactments in a modified form where such modification is "necessary"; that is to say, necessary in order to give effect to the provisions of the Measure which confer power on education bodies to collaborate.

Points (i) and (ii) above can be also be made in relation to section 14(2) (Regulations in relation to federation of schools). In section 14(2) there are further constraints on the provision that the Welsh Ministers can make to apply an enactment with modifications:-

- (i) such provision may only be made where the Welsh Ministers make regulations in relation to federated schools which provide for the transfer of property, rights and liabilities between governing bodies, or between local authorities and governing bodies; and
- (ii) the only enactments that may be applied by the Welsh Ministers in a modified form are those contained in Schedule 10 to the Education Act 1988.

Similar points arise in relation to the modifications that may be made under section 18 (Federations: supplementary provisions) of the Measure in the application of certain enactments to federated schools or their governing bodies -

- (i) those modifications may only be made "for the purposes of this Chapter", i.e. for the purpose of giving effect to the Measure's provisions on the federation of maintained schools;
- (ii) the provisions that may be applied in a modified form are only those which are specified.

Consequently, as any modification in the application of an enactment would be included in the regulations that provide for the detail following on from the intent of the Measure, and that the modification can only alter the application of a provision to give effect to the intent of the Measure as outlined above, it is my view that the negative procedure is the appropriate procedure for the regulations.