

Proposed Local Government (Wales) Measure

Constitutional Affairs Committee – supplementary information

This paper addresses the points raised in the letter of 20 October from the Chair of the Constitutional Affairs Committee to the Minister for Social Justice and Local Government.

The Chair's letter posed questions concerning:

1. The intended use of certain subordinate legislation powers;
2. The choice of procedure in sections 10, 116 and 143 in the proposed Measure;
3. The exercise of functions by councillors (section 55);
4. Similar powers.

1. The intended use of certain subordinate legislation powers

The Committee commented that 16 of the subordinate legislation powers identified in the proposed Measure concerned powers which the Assembly Government “had no intention of using at present” or were to be “held as reserve powers”.

The phrases referred to were used in the context of providing a written response to the Committee's specific question – *How does the Government intend to implement these powers?* The Government's responses to this question were intended to do no more than give an indication of when each subordinate power in the Measure might be implemented – and it was not suggested that “reserve” powers are distinguishable from those that the Government does not intend to use at present. In the case of the 16 powers, it simply is not possible to predict the time and circumstance when these powers might be used.

It is misleading to generalise about the 16 powers; they need to be considered in the context of the wider information provided, in the Explanatory Memorandum and the supplementary paper to the Committee, which sets out the purpose of each power and the contribution it will make to the policy objectives embodied in the related provision.

The Assembly Government considers that the 16 powers are needed; they provide a positive power which will allow the Welsh Ministers to respond to circumstances and take action to secure the policy objectives set out on the face of the Measure. The Welsh Ministers consider that it is neither practical nor possible, in the case of the 16 powers, to predict all the circumstances where the policy objectives in question may require such action and place them on the face of the Measure. The flexibility sought by way of the 16 powers will allow the Welsh Ministers to respond in a timely and effective way to new circumstances and take action which is within the principles set out in the Measure itself.

Taking each power in turn:

Section 9(1)(i) – Regulation-making power to add to the list of prescribed democratic services functions

The proposed Measure lists the functions of the head of Democratic Services at section 9 (1) (a)-(h). The list is quite comprehensive but cannot be considered to be exhaustive. Experience may show that it would be appropriate for other functions to be assigned to Democratic Services, whether they be functions currently vested in local government or new ones; this power will permit such assignment. The power would be subject to the affirmative resolution procedure.

Section 34 – gives effect to paragraph 13(2) of part 3 of Schedule 1 to the proposed Measure – Order-making power if failure on part of local authority to cease operating alternative arrangements

The policy intention is set out in section 34 in the proposed Measure and provides that local authorities operating alternative arrangements must cease to do so and start operating executive arrangements. The Order-making power in paragraph 13(2) of Part 3 of Schedule 1 is needed to enable the Welsh Ministers to take action to achieve the intention if a local authority does not make the changes required by the proposed Measure. The steps which a local authority will be required to take in making the change (whether or not the Order-making power is invoked) are already set out in Schedule 1 (Parts 1 and 2) to the proposed Measure.

Section 55 – Order-making power – exercise of functions by councillors

Section 55 provides that a local authority may make arrangements for individual members to exercise functions of the executive or other functions of the authority in relation to the electoral division for which the member is elected or in relation to the member's membership of a body other than the local authority. It is considered prudent to include the order-making power at section 55(4), which would allow the Welsh Ministers to exclude functions from such arrangements by local authorities or place conditions on how such a function is exercised.

The Welsh Ministers want to allow local authorities a degree of flexibility in the exercise of their new power to take advantage of local circumstances; it is conceivable that what might be appropriate for one part of a local authority would not be so for another part – such could depend on the strength or otherwise of local structures/partnership working. The Welsh Ministers consider that the power at section 55(4) will enable them to take decisions in the light of experience and with regard to specific circumstances within local authorities.

Section 56 – amending section 100EA of the Local Government Act 1972 - Regulation-making power – consequential power – making and inspection of records relating to functions exercisable under section 55 by councillors

This Regulation-making power is linked to the power at section 55, which enables local authorities to make arrangements for the exercise of their functions by councillors. Section 100EA of the 1972 Act as amended by section 56 will allow the Welsh Ministers to make regulations to ensure that when a member discharges functions by virtue of arrangements under section 55 a written record will be made of decisions or actions taken by the member in connection with that function and such records will be deposited with the local authority and be made available for inspection.

Sections 55 and 56 will be commenced by Order, on a date to be decided by the Welsh Ministers. In considering when to commence section 55, the Welsh Ministers will wish to consider, at the same time, when they would make the regulations under section 56. There is every intention of making the regulations under section 56 (since they are related to the exercise of the power under section 55), but doing so is dependent on the commencement date for section 55.

Section 62 – Order-making power – reference of matters to overview and scrutiny committee (excluded matters)

Section 62 amends section 21A of the Local Government Act 2000 to give councillors a power to refer a “local government” matter to an overview and scrutiny committee in their council. The Welsh Ministers consider that this is a worthwhile development in the responsibilities of non-executive councillors and overview and scrutiny committees. Since the power conferred on councillors is wide, it is considered appropriate to include an order-making power in section 21A(13) in the 2000 Act, inserted by section 62(5), which would allow the Welsh Ministers to specify certain matters which would be excluded from consideration by overview and scrutiny committees.

The Welsh Ministers want councillors and overview and scrutiny committees to have flexibility in exercising the new responsibilities, but consider 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 and a subordinate legislation power provides the flexibility to make amendments if required.

Section 74 – Regulation-making power – to specify how local authorities must carry out the appointment of chairs of overview and scrutiny committees

The Regulation-making power in section 74 supports the policy intentions set out in sections 65-73 which introduce procedures to govern the appointment of chairs of overview and scrutiny committees in a local authority. The procedures in sections 65-73 are deemed necessary to address circumstances such as where the chairs of all scrutiny committees in a local authority are allocated to a single political group.

It is hoped that local authorities will all comply with the procedures set out in sections 65-73, but the regulation-making power in section 74 is deemed necessary in case a local authority tries to circumvent the new requirements or to deal with unusual cases. Section 74 would enable the Welsh Ministers to take action to ensure that the policy intentions embodied in the proposed Measure are achieved. The power in section 74 is reactive, so it is not possible to specify on the face of the proposed Measure the circumstances in which it might need to be used.

Section 97 – Regulation-making power – notice given by returning officer following taking of a poll consequent on a community meeting

The subordinate legislation power contained in Section 97 would enable the 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.

The effect of this power would be to stop further action being taken on a question which was of a type that had been specified in Regulations made by the Welsh Ministers. There is currently no restriction on the type of question which could be the subject of a community poll. The Welsh Ministers hope that communities will act responsibly and do not wish to introduce any restrictions at present. The Welsh Ministers consider, however, 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.

Section 116 – Order-making power – to alter voting thresholds

This power would enable the Welsh Ministers to alter the thresholds in a community poll concerning the establishment or dissolution of a community council or a group of communities. The order-making power is subject to the pre-condition that the Welsh Ministers have consulted local government about the change. An order under this section would be subject to the affirmative resolution procedure.

The order-making power would enable the Welsh Ministers to amend the thresholds which appear on the face of the 1972 Act (as amended by the proposed Measure) in the light of experience of operating with the new thresholds and procedures - and having consulted with local government.

Section 119 – Regulation-making power - notice requirement for filling vacancy by co-option

Section 119 in the proposed Measure introduces a new requirement that where a community council intends filling a vacancy by co-option, the council must give public notice of the co-option opportunity. The requirements of the public notice are set out in subsection (5) and it is hoped that these will be sufficient to achieve the policy objective of raising awareness of opportunities for participation. It is considered prudent, since this is a new requirement, to include provision to enable the Welsh Ministers to set other requirements for the notice in the light of experience.

Section 122 – Regulation-making power - notice requirement for appointment of community youth representatives

Section 121 in the proposed Measure introduces a new power to enable community councils to appoint up to two community youth representatives and section 122 requires community councils intending to do so to give public notice. The requirements of the public notice are set out in section 122 and it is hoped that these will be sufficient to achieve the policy objective. It is considered prudent, since these are new requirements, to include provision to enable the Welsh Ministers to set other requirements for the notice in the light of experience.

Section 124 - Regulation-making power – effect of appointment of community youth representatives

A community youth representative appointed to a community council in accordance with section 121 of the proposed Measure would not have any of the statutory rights, privileges and obligations of a community council extended to them. The Welsh Ministers consider that this is appropriate but consider it prudent to have the power to provide for a community youth representative to be treated as a member of the council for purposes specified in the regulations, if experience shows that it would be appropriate and in the interests of those concerned.

Section 130 – Order-making power – amendment or repeal of enactments preventing or obstructing a community council from exercising their well-being power

Enables the Welsh Ministers by order to make modifications to any enactment which they think prevents or obstructs community councils from exercising the power of well-being, which is extended to them under section 129 of the proposed Measure. The power in section 130 is needed to enable the Welsh Ministers 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 could be exercised in relation to all or particular community councils, or particular descriptions of community councils, and for a particular period. The power needs to be reactive and for this reason could not be included on the face of the Measure. In view of the broad nature of this power, the super-affirmative procedure is considered appropriate. The pre-requisite consultation process is set out at section 166

Section 133 – Order-making power – power to set out charter agreement

The Welsh Ministers consider that, in the first instance, the development and adoption of collaboration arrangements / charters is best achieved on a voluntary basis at the local level and note that this is the view shared by most stakeholders.

The Welsh Ministers are strongly committed to encouraging charters and consider that this power is needed so that local people are not denied the benefits of such collaborative arrangements simply because councils may be slow or reluctant to come together and address any issues between them. Should the need arise, it is suitable that this power is exercised by order since it will deal with the detailed content of the model charter agreement and apply to an individual county / county borough council and community councils within that area.

Section 137 – Regulation-making power – schemes for the accreditation of quality

Enables the Welsh Ministers to make regulations to provide for an accreditation of quality scheme for community councils.

There is currently no national accreditation of quality scheme to assess the competence of community councils in Wales. The Welsh Ministers consider that there is value in developing such a scheme to help raise standards of local government by community councils.

The intention of the Welsh Ministers is that, in the first instance, a national accreditation of quality scheme in Wales should be developed and operated on a non-statutory basis. However, the Welsh Ministers consider that it would be beneficial to have the power to introduce a statutory accreditation scheme should this be considered appropriate at some future point. This section provides this power. Section 138(2) in the proposed Measure sets out a non-exhaustive list of subject matters under which the statutory accreditation scheme may set criteria.

Section 143 – Regulation-making power – accreditation of quality scheme – consequences

This power is necessary in the event of the introduction of a statutory accreditation scheme. This power would enable the Welsh Ministers to make amendments to legislation in relation to specific community councils arising from such councils being accredited or otherwise under the statutory scheme. This power would allow any future obligation on a community council judged to be unnecessary by virtue of that council having accreditation to be set aside or made easier to comply with.

Section 161 – Order-making power – to amend provision about the Independent Remuneration Panel

This power would enable the Welsh Ministers to make changes to the provisions relating to the appointment, tenure and proceedings of the Independent Remuneration Panel as well as the functions of the Panel under Part 8 of the Measure. The Welsh Ministers consider this power to be prudent because the need for changes could arise due to future developments in local government and any future legislation which may impact on the appointment, tenure and proceedings of the Panel and its functions. The affirmative resolution procedure is proposed, which would allow the Assembly the opportunity to debate and approve any proposed changes to how the panel is appointed and to its functions.

2. The choice of procedure in Sections 10, 116 and 143

i. Section 10

We have proposed that the regulation-making power in section 10 of the proposed Measure should be subject to the negative resolution procedure. We consider this is appropriate because our intention is that the power will be confined to Standing Orders on the management of staff provided under section 8(1)(b) – ie staff working to the new Head of Democratic Services. I have noted the comments of the Committee's Legal Advisers about the apparent breadth of section 10(1)(b) and have asked my officials to consider whether we need to take action to dispel the mis-conception.

ii. Section 116

The proposed Measure introduces new thresholds which, I believe, are set appropriately to deliver our policy of making it easier to establish community councils and to ensure that there is an appropriate strength of feeling within a community before a council can be dissolved.

It is important that Ministers are able to revisit these thresholds should experience show it to be necessary. The affirmative resolution procedure,

coupled with the requirement of prior consultation with local government, recognises that there is likely to be interest in the way in which Ministers exercise these powers. 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.

iii. Section 143

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.

3. Section 55 – exercise of functions by councillors

The Committee asked whether we could give examples of the sorts of functions that we envisage might be excluded by an order under section 55. Although we do not know at present which functions will need to be excluded under this power, examples might be those functions relating to planning or licensing.

The Committee has also asked whether we would consider including a non-exhaustive list of excluded functions on the face of the proposed Measure. An order making power is considered to be appropriate not only as an order will relate to the procedural nature and the detail of arrangements enabled by the Measure but also given the large number of local authority functions which are subject to change. The proposed power is not as broad as might be supposed: the functions which could be discharged by a councillor, should an authority choose to make arrangements under section 55, are limited to the extent that they may only be discharged in relation to the electoral division for which the councillor was elected or in relation to the councillor's official membership of a body other than the authority.

Should local authorities choose to make arrangements for non-executive members to exercise functions there may be need for the Welsh Ministers to make an order excluding certain functions, but it is not possible to foresee at

this stage what sorts of functions Welsh Ministers might wish to exclude or restrict. We consider that it would be appropriate to take such decisions in the light of experience and with regard to specific circumstances within local authorities.

4. Similar Powers

(i) Powers available to Welsh Ministers which have not been used:

Local Government Act 2000:

Section 36 - power to order local authorities to hold referendums for elected mayor

Section 86 - power by order to specify schemes of elections to county councils

Local Government & Housing Act 1989:

Section 18(3) - regulations limiting the total amount of allowances an authority may pay

(ii) Some analogous powers available to the Welsh Ministers and the Secretary of State

Section 9(1) of the Measure (functions of Democratic Services). Section 68 of the Local Government Act 2000 confers functions on the Public Services Ombudsman Wales and Section 68(1) contains an order-making power for Welsh Ministers for such functions to be added to.

Section 13(12) of the Local Government Act 2000 permits the Secretary of State/Welsh Ministers by regulations to make provision with respect to the discharge of any function which, under executive arrangements, is not the responsibility of an executive of a local authority (including provision disapplying section 101 of the Local Government Act 1972 or any provision of that section).

A regulation-making power which is in some ways analogous to the power in section 74 of the proposed Measure is that in section 54 of the Local Government Act 2000. Section 54(1) to (3) sets out the general functions of a standards committee and subsection (5) also permits the Welsh Ministers to make regulations with respect to the exercise of the functions of standards committees of authorities in Wales (section 54(4) gives similar power to the Secretary of State in relation to authorities in England).

(iii) In the following two cases we have also considered it would be prudent for Welsh Ministers to have at their disposal the same powers as were

considered necessary for the Secretary of State in precisely the same contexts with regard to England.

Section 56 amends section 100EA of the Local Government Act 1972 for Wales; this power is already available under section 100EA to the Secretary of State in relation to England: it has been exercised – see SI 2009/352.

Section 62 (amending section 21A of the Local Government Act 2000) contains an order-making power to enable the Welsh Ministers to exclude matters to be referred in accordance with the section by councillors; the power under section 21A is already available to the Secretary of State in relation to England, and has been exercised (SI 2008/3261).