



Ein cyf/Our ref LF/LA/051/10

22 December 2010

Dear Ian,

Proposed Education (Wales) Measure

Constitutional Affairs Committee – 13 January 2011

I am writing in response to your letter dated 6 December 2010, inviting me to give evidence to the Committee on 13 January 2011.

I am pleased to accept your invitation and look forward to the opportunity to discuss the subordinate legislation making powers contained within the proposed Education (Wales) Measure. I would like to provide the following information to assist the committee prior to our meeting.

1. What impact will the proposed Measure have?

Details of the intended impact of the proposed Measure are set out at section 3 of Part 1 of the Explanatory Memorandum.

The proposed Measure will put in place powers and duties to make collaboration commonplace in the education system, to improve school governance and to avoid importing further complexity into school admissions and the planning of school places in Wales.

The proposals will improve school performance and are in the spirit of the School Effectiveness Framework. They address recommendations made by the Enterprise and Learning Committee's 2009 report on the role of school governors.

The proposed Measure makes provision to:

- drive collaboration between local authorities, governing bodies of maintained schools and Further Education Institutions ("FEIs");
- give local authorities a power to establish a federation of schools;
- improve governor training;

- improve clerking of governing bodies;
- prevent schools in the future from changing category so as to become foundation schools and to prevent new foundation schools being established.

Collaboration

The impact will be to make collaborative working in the education system common place, rather than the exception. The proposed Measure builds on the current law for school and FEI and governing body collaboration. It makes it possible for local authorities to be equal partners in collaboration arrangements. It places a new duty on local authorities, school and FEI governing bodies to periodically consider collaboration if working in that way would make the use of public resources to deliver education and training provision more effective and efficient .

Federation of maintained schools

Federation of maintained schools means the creation of a single governing body that governs several schools.

The proposed Measure's impact will be to make federation more common place by providing local authorities with a power to propose and implement federation. Presently only governing bodies may do this. The provision for an order to define small schools, the direction power of the Welsh Ministers and regulations to be made under section 11 will in combination result in federation becoming much more usual for small schools.

Federation provides unified governance which in turn may have advantages such as: better operational links between schools which may help spread good practice and improve resource efficiency; and putting in place one leadership team for several schools. Federation may also ease any difficulties recruiting and retaining governors because a federation will need fewer governors than the governing bodies which it replaces. Having fewer governors will allow local authorities to concentrate training and support.

School Governance – Governor Training and Clerking

The proposed Measure's impact will be to raise the standards of governor training and clerking and to ensure that there is a minimum standard and offer throughout Wales.

The Welsh Ministers will have a power to prescribe topics on which governors must be trained and the standards and content of that training. The initial impact will be to address the recommendations made by the Enterprise and Learning Committee about induction training and training for chairs. Over time, regulations will be extended to other topics where training needs to take place.

The proposed Measure also requires local authorities to secure training for clerks and to offer their schools a professional, trained clerk. Presently, the clerk to a governing body may be a school employee, a member of the public appointed by the governing body or a person employed by the local authority, where the local authority offers such a service. The proposed Measure will ensure that all schools will have the opportunity to a local authority clerk if they choose.

Foundation Schools

At present a promoter may propose the establishment of a new foundation school, or that an existing school should change category so as to become a foundation school. All proposals for a change of category require determination by Welsh Ministers. The Measure will prevent schools in the future from changing category so as to become foundation schools, and will also prevent new foundation schools being established. The Measure will not affect those proposals which have been published, but not yet implemented before the Measure comes into force. The Measure does not remove the category of foundation school, it will simply prevent any further schools joining that category.

2. What powers are contained in the proposed Measure allowing Welsh Ministers to make subordinate legislation?

3. Why are those matters being dealt with by enabling powers rather than on the face of the proposed Measure?

4. Why have the particular affirmative/negative powers been chosen in each case?

Section 5 of the Explanatory Memorandum contains a table giving a summary of details of subordinate legislation that may be made by Welsh Ministers and the reasons for it. Paragraphs 5 to 5.1 of Part 1 of the Explanatory Memorandum explain:

- those powers which are contained in the proposed Measure allowing Welsh Ministers to make subordinate legislation;
- why the matters covered by those enabling powers are dealt with in that way, rather than by being dealt with on the face of the proposed Measure; and
- which Assembly procedure applies to the exercise of the power in each case and the reasons why that has been chosen.

These should be read in conjunction with the information below.

The enabling powers in the proposed Measure for Welsh Ministers to make subordinate legislation are:

Section 6 – Regulations about the power to collaborate

The Welsh Ministers may make further provision, by way of regulations, about the power to collaborate. Regulations under this subsection could set out the functions that an education body cannot delegate to another body or to a joint committee. Regulations may make particular provision about the constitution and procedure of joint committees of the collaborating education bodies, and other connected matters.

Subsections (3) and (4) provides that regulations may modify any legislation relating to the functions of the collaborating education bodies, where those functions are delegated, or relating to the bodies by whom those functions are to be discharged, in its application to those functions or bodies.

These areas are suitable for regulations as these will set out the administrative detail which follows the intent of the Measure and will allow future amendments in the light of experience. 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). The very detailed technical modifications required here are best accompanied by way of regulations.

The reliance on the negative resolution procedure reflects our view that these are technical and provide for administrative detail. By way of example, current regulations for collaboration set out the detail of the scheme by which schools and / or FEIs can collaborate. The regulations provide detail on how bodies might establish joint committees; the clerking arrangements of joint committees; functions that may not be delegated to a joint committee; provision for non governor members attending a joint committee; who is entitled to attend joint committees, proceedings of the joint committees (including restrictions on who may attend); the provision of Minutes. It is intended that regulations made under this Measure will reflect the current regulations.

Sections 10, 11, 12, 13, 14 and 18 – Regulations about the federation of maintained schools

These sections re-enact existing governing body powers under sections 24 and 25 of the Education Act 2002 and broaden the federation concept by giving local authorities a power to propose federations of maintained schools.

The reliance on the negative resolution procedure in these sections, reflects our view that these powers allow the Welsh Ministers to determine the administrative or operational proposals of a policy proposal that has been set out on the face of the Measure. By way of example, the Federation of maintained Schools and Miscellaneous Amendments (Wales) Regulations 2010 (“the 2010 Regulations”) set out the detail of the scheme by which schools can currently federate. The regulations provide detail of the process schools that choose to federate should follow which include consideration a report of federation; consultation with stakeholders and assessment of responses, constitution and membership of a single federated governing body and the way that governing body conducts its business. It is intended that regulations made under this Measure will reflect the current regulations in respect of federations proposed by governing bodies

Section 10 – Federation by governing bodies

This section provides that a governing body may make proposals to federate schools in accordance with regulations.

It is considered that these are suitable for regulations as they will provide for the details of the scheme which follows on from the intent of the Measure. A number of detailed provisions will be required as to procedure and this level of detail is best set out in secondary legislations which will also allow technical adjustments to be made.

Section 11 – Proposals to federate schools

This section provides that a local authority may make proposals to federate schools. This section requires a local authority to publish proposals and to determine proposals. 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.

It is considered that these are suitable for regulations as they will provide for the details of the scheme which follows on from the intent of the Measure. The subject matter will be technical and will provide for administrative detail. A number of detailed provisions will be

required as to procedure and this level of detail is best set out in secondary legislation which will also allow technical adjustments to be made. The regulations will set out how the local authority will determine the proposal to federate schools and will provide detail about the information to be included, how the proposals are published, the consultation that may be required, how proposals may be withdrawn and how they might be modified or confirmed. It is the intention that the regulations will, in the main, reflect the existing 2010 Regulations.

Section 12 – *Implementation of proposals under section 11*

This section makes provision in connection with the implementation of proposals to federate.

Where a local authority has confirmed proposals they must be implemented as confirmed (subsection (4)). However confirmed proposals may be modified at the request of such persons as may be specified in regulations (subsection (5)).

Under subsection (6) a local authority can determine not to implement a confirmed proposal if it would be unreasonably difficult to do so or if circumstances have changed so much that it is no longer appropriate to do so. Regulations may require the local authority to consult prescribed persons before making that determination (subsection (7)).

It is considered that these are suitable for regulations as they will provide for the details of the scheme which follows on from the intent of the Measure. The subject matter will be technical and will provide for administrative detail.

Section 13 – *Single governing body for federations*

A federation is a group of schools with one governing body. Regulations may allow, subject to the exclusions in this section that a governing body is to be treated as a single body for prescribed enactments. It is considered to be appropriate that these issues are suitable for regulations as the subject matter will be technical, will provide for administrative detail following on from the intent of the Measure,...

Section 14 – *Regulations in relation to federation of schools federated under Chapter 1 of Part 2*

This section 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.

It is considered that these are suitable for regulations as they will provide for the details of the scheme which follows on from the intent of the Measure. The subject matter will be very technical and will provide for administrative detail there may also need to be technical amendment over time.

Section 15 – *Identification of small maintained schools in Wales for the purposes of Chapter 1 of Part 2*

This section provides a power for the Welsh Ministers to make an order defining a “small maintained school” by the numbers of pupils in a school.

It is considered that these are suitable for regulations as they will provide for the details of the scheme which follows on from the intent of the Measure. The subject matter will be technical and will provide for administrative detail on how to effect the federation of schools.

Section 18 – *Federations: supplementary provisions*

This section 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.

These are considered suitable for regulations as these will set out the administrative detail which follows the intent of the Measure and will allow future amendments in the light of experience. Although the modification of primary legislation may be required, the changes will be of such technical nature as not to warrant debate and the affirmative procedure.

Section 21 – Information and training for governors of maintained schools

This section requires a local authority to provide training and information as it thinks necessary. Regulations made under this section may require a local authority to secure (free of charge) the provision of prescribed training to school governors.

It is considered that these are suitable for regulations as they will provide for the details of the training which follows on from the intent of the Measure.

The reliance on the negative resolution procedure in this section, reflects our view that these powers should allow the Welsh Ministers to determine the administrative or operational proposals of a policy proposal that has been set out on the face of the Measure. Section 21 follows the precedent of the current law by establishing the principle that local authorities are required to provide governors with information and training, free of charge. Section 21 extends the concept to provide for prescribing what the training offer should be in regulations or a document published and specified by the regulations. The detail of the training offer will be technical and such administrative detail is most appropriately the subject of regulations not the proposed Measure itself.

Section 22 – Provision of clerks by local authorities

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.

The reliance on the negative resolution procedure in this section, reflects our view that these powers would allow the Welsh Ministers to set out the details as to how this provision would operate and to determine the administrative or operational proposals of a policy proposal that has been set out on the face of the Measure.

Section 23 – Training for clerks to the governing bodies of maintained schools

Regulations under this section 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.

The reliance on the negative resolution procedure in this section, reflects our view that these powers allow the Welsh Ministers to determine the administrative or operational proposals of a policy proposal that has been set out on the face of the Measure. The detail of the training offer will be technical and such administrative detail is most appropriately the subject of regulations not the proposed Measure itself.

Section 29 - Supplementary powers in relation to foundation schools

This section allows the Welsh Ministers to make provision by order which they consider necessary or expedient for the purposes of giving 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.

There are a number of statutory instruments on the statute book which are drafted on the premise that schools may change category to a foundation school, or that there may be proposals for such schools in the future. Once the provisions sought in the proposed Measure come into force, such proposals will no longer be possible unless they have been published before the proposed Measure comes into force. It is considered desirable, in the interests of clarity, for the subordinate legislation with such provisions to be amended to reflect the provisions sought in this Measure for foundation schools. Because such subordinate legislation is made under a number of different enabling powers in different Acts of Parliament this will mean any amending statutory instrument will need to cite a very long list of powers, including lengthy footnotes to those powers. Therefore, in the interests of drafting efficiency and clarity for the reader, we are seeking this power so that those amendments may be made citing the power in the proposed Measure only. This will avoid the lengthy list of enabling powers from different pieces of primary legislation in the amending statutory instrument. Therefore it is considered suitable to include a power to make such technical amendments to subordinate legislation in future.

Given the amendments are of a minor technical nature we consider that the negative procedure is appropriate. The amendments would merely give effect to the policy contained in the provisions set out on the face of the Measure, and would not provide any detail missing from the Measure itself.

Section 32 – Commencement

The Welsh Ministers may make provision to commence certain provisions in the Measure.

It is considered suitable for an Order as the provision relates to the coming into force dates to be decided by the Welsh Ministers., save that the provisions in relation to the foundation schools in sections 25 to 29 which will be commenced 2 months following Royal Approval by her Majesty in Council.

5. How will the powers contained in the proposed Measure affect the powers currently held by Welsh Ministers in this area?

Collaboration

The proposed Measure seeks to strengthen the current arrangements for collaboration and make collaborative working more robust by placing a duty on schools, FEIs and local authorities to consider whether to collaborate.

The Welsh Ministers current powers regarding school governing body collaboration are contained in sections 26 of the Education Act 2002. The Welsh Ministers have made the Collaboration between Maintained Schools (Wales) Regulations 2008 under this power.

The Welsh Ministers powers for school and FEI governing body collaboration are contained in section 166 of the Education and Inspection Act 2006, and the Collaboration Arrangements (Maintained Schools and Further Education Bodies)(Wales) Regulations 2008 are made under this power.

The powers are enabling which means that schools and Further Education Institutions (FEIs) may collaborate if they choose to do so by forming joint committees. These existing powers do not provide for local authorities to be equal partners with schools and FEIs in these joint committees.

The existing powers in the Education Act 2002 and the Education and Inspections Act 2006 will be re-enacted in this Measure. In addition, the powers in relation to collaboration will place a duty on local authorities, and schools and FEIs governing bodies to consider from time to time whether to collaborate, and if the outcome of that consideration is that collaboration would be beneficial, those bodies would be under a further duty to collaborate.

The proposed Measure provides the Welsh Ministers with the power to make regulations so that local authorities can be members of collaboration committees. The process for the establishment of joint committees, the clerking of the committees and the way the joint committee carries out its business would be set out in the regulations which would mirror the processes set out in both sets of existing regulations.

Federation

The Welsh Ministers current powers regarding school federation are contained in sections 24 and 25 of the Education Act 2002, the Federation of Maintained Schools and Miscellaneous Amendments (Wales) Regulations 2010 are made under these powers. The regulations are enabling so schools may choose whether or not they wish to federate under a single governing body and set out the process schools need to follow.

The expectation is that there are many opportunities and benefits to be gained by a single governing body having strategic oversight of a number of schools. Federation would also assist with governor recruitment and retention as fewer governors would be needed. Local authorities have a wider perspective of what could be achieved from federation and in order to develop the federation agenda the powers in sections 10, 11, 12, 13, 14, 15 and 18 will give local authorities a power to propose and establish a federation.

The proposed Measure also gives Welsh Ministers a power to make regulations about the process local authorities should follow to federate schools which would mirror the process that schools have to follow.

To assist local authorities with the process of federating many small schools, the proposed Measure provides the Welsh Ministers with a power to set out, in an Order, the numbers of pupils that would form a small school in each local authority. Schools that attain this number of pupils could then be federated by the local authority using a streamlined procedure to be set out in regulations made under section 11.

Governance

In placing a duty on local authorities to offer maintained schools a clerking service, offer training and prescribe the content of training for clerks, the intention is to ensure that

governors are well trained and that good clerking practices are in place to appropriately advise governors.

The current statutory regime for training and support for governors is set out at section 22 of the Education Act 2002. Local authorities are required to provide governors with training, free of charge, on topics they think is appropriate to enable them to carry out their functions. There is, therefore, no consistent approach across Wales to the content and quality of the training offered. Some local authorities offer their schools a clerking service but they are not obliged to do so.

The power in section 21 of the Measure enables the Welsh Ministers to prescribe mandatory training for governors. Initially this would be induction training and training for chairs and to set out the content and standard of the training. These provisions would give Welsh Ministers the opportunity to introduce a cohesive and standardised approach to training and provide for quality control over the training which would be appropriate and informed by best practice. As the content of the training would need to be changed from time to time to keep pace with changes to education law, this type of information is necessarily detailed and so more appropriate for regulations.

Clerking

The existing Welsh Minister's powers in respect of the provision of Clerks to maintained schools, are set out at section 23 of the Education Act 2002. The requirement in existing law is that governing bodies must appoint a clerk. Currently clerks can either be a school employee, a member of the public or an employee of the local authority (if the local authority offers such a service).

The power in section 22 of the Measure requires local authorities to inform schools from time to time that they can ask the local authority to provide a clerk to the governing body. This section also gives Welsh Ministers a power to make regulations requiring local authorities to provide a clerk if requested to do so.

The power in section 23 of the Measure enables the Welsh Ministers to prescribe mandatory training for clerks although local authorities do not have to provide this training. These provisions would give the Welsh Ministers the opportunity to introduce a cohesive and standardised approach to training and provide for quality control over the training which would be appropriate and informed by best practice. As the content of the training would need to be changed from time to time to keep pace with changes to education law, this type of information is necessarily detailed and so not appropriate for the face of a measure.

Foundation Schools

Section 25 of the Measure amends current legislation so as to prevent any further foundation schools being established by any promoter, including a local authority, or Welsh Ministers in the case of schools for pupils over the age of 16. In preventing the establishment of new foundation schools, or such schools resulting from a proposal to change category, the intention is to avoid further complications in admissions, planning school places and in capital investment planning for local authorities.

Section 26 amends current legislation so that no proposals can be made to change the category of a school so as to become a foundation school.

Consequently, the Welsh Ministers will no longer be under a duty to determine proposals that involve a change of category to foundation school or proposals for the establishment of foundation schools. However, they will continue to determine those published prior to the

Measure coming into force, where saving provisions have been provided in sections 27 to 28.

Section 32 powers – Commencement

This section deals with the commencement of sections in the Measure and has no direct impact itself. This section provides that sections 25 to 29 (foundation schools), and some other technical provisions (section 30 (general interpretation), 31 (orders and regulations), 32 (commencement) and section 33 (short title and inclusion of the Measure within the Education Acts)) come into force 2 months following Royal Approval by her Majesty in Council. All other sections will come into force on a date to be appointed by the Welsh Ministers in an Order.

6. How does the Government intend to implement these powers?

The intention is that there will be stakeholder engagement in the making of subordinate legislation for collaboration, federation, training for governors and clerks and the provision of a clerking service. The Welsh Ministers expect the regulations to come into force in time for the autumn term starting September 2012.

An Order(s) to set the number of pupils in a local authority that constitutes a small school will be made in consultation with local authorities on the appropriate number. There is no timetable for making these orders – they will be made as and when required.

Foundation Schools - section 29:

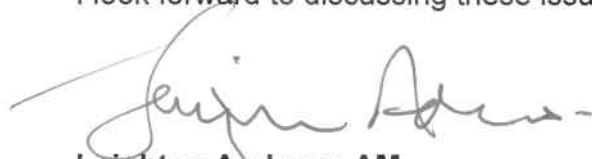
This section provides for an order to be made to amend or revoke subordinate legislation so as to correct or remove any redundant references to the establishment of foundation schools or changes of category to foundation school. Given that the amendments would be of a minor technical nature it would not be necessary to consult on the content of such an order, which would be made as soon as expedient following the Measure's coming into force. The amendments would merely give effect to the policy contained in the provisions set out on the face of the Measure.

Commencement - section 32

This section provides for some sections in the Measure to be commenced by way of an Order of the Welsh Ministers.

I trust that members of the Committee will find the information contained within this letter to be of use in their deliberations. May I once again thank Members for the invitation to attend the committee on 13 January 2011.

I look forward to discussing these issues with you.



Leighton Andrews AM

Minister for Children, Education & Lifelong Learning
Y Gweinidog dros Blant, Addysg a Dysgu Gydol Oes