

Education Act 2011

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Overview

The Act is wide-ranging and far-reaching, amending or repealing 47 separate issues to do with education and children law.

The Education Act 2011 received Royal Assent on 15 November 2011, the day after it finished its last Parliamentary stage reflecting the Government's need to implement several provisions without delay. The DfE has not, and may not, issue a timetable containing information of the Act's implementation. Information was given in debate, although for reasons of brevity it is not included in this briefing.

Prior announcements and consultation

Many of the Act's provisions were announced in the Department for Education's Schools White Paper *The Importance of Teaching* in November 2010 covering teaching, schools and the school system. In addition, proposals from the Department for Business, Innovation and Skills, found in *Skills for Sustainable Growth* and *Further Education – New Horizon*, cover vocational learning and management of further education and sixth form colleges. The Act also contains provisions on early years and student fees and loans.

Nature of Bill

Compared to recent Acts from the education department, this Act is comparatively short with 83 sections and 18 schedules over 10 Parts over 159 pages. However, the brevity is achieved by amending previous legislation and not by writing new legislation for the 47 issues it covers. This makes the legislation very difficult to understand. The 18 education and children Acts which are being amended, or parts repealed, are:

- Children Act 1989
- Further and Higher Education Act 1992
- Education Act 1994
- Education Act 1996
- Education Act 1997
- Teaching and Higher Education Act 1998
- School Standards and Framework Act 1998
- Learning and Skills Act 2000
- Education Act 2002
- Children Act 2004
- Higher Education Act 2004
- Education Act 2005
- Childcare Act 2006
- Education and Inspections Act 2006

- Education and Skills Act 2008
- Apprenticeships, Skills, Children and Learning Act 2009
- Children, Schools and Families Act 2010
- Academies Act 2010

The ‘standalone’ provisions in the Act are to do with the residual affairs of four bodies which are being abolished: General Teaching Councils England (GTCE), Training and Development Agency for Schools (TDA), Qualifications and Curriculum Development Agency (QCDA) and Young People’s Learning Agency (YPLA). See Sections 12, 17, 27 and 68 with their schedules 3, 6, 9 and 17 respectively. The “sunset clause” (which removes the provision from the statute book) in section 75 on direct payments is also standalone. The rest of the Education Act 2011 amends the Acts listed above and other legislation.

Progress

The legislation was introduced into the Commons on 26 January 2011, and reached the Lords on 12 May, returning to the Commons on 14 November where 100 Lords amendments were added to the Bill, amending 14 of the original issues in the Bill and adding a further five. A three-page note on these amendments, their purpose and where they are placed in the final Act can be obtained from John Fowler at the LGiU. Email John on john.fowler@lgiu.org.uk to request a Word or PDF copy.

Wales

There remains a single legal jurisdiction for England and Wales and a single legal basis – 1996 Education Act. The Act in many places inserts “in Wales” in legislation which currently applies to England and Wales with the effect that in future it will apply only to Wales, e.g. Section 5 on the requirement to give 24 hours notice prior to a detention outside school hours (although the Section title misleadingly refers to a repeal), and Section 34 provision on Admission Forums. Section 24 is specifically about Wales, giving Welsh Ministers additional enforcement powers over examination boards. As there is a common GCSE and GCE examination system in England and Wales it would have been difficult to have legislated in one jurisdiction and not the other. The legislation on FE college governance in Wales found in section 49 and schedule 12 has also been updated and separated from that of England.

Briefing in full

This short analysis follows the order of the Act. Related issues are not always together. For example, amendments to admissions legislation can be found in sections 34, 36 and 64 (and schedule 10).

Part 1: Early years provision

Early years provision (the ‘free entitlement’, notionally 15 hours a week for 38 weeks a year) will be offered to 2-year-olds from disadvantaged families (**Section 1**).

Part 2: Discipline

School staff receive greater powers to search pupils for, and seize, more items. In addition to knives, offensive weapons, stolen articles, and alcohol, staff will be able to search for and seize items those thought likely to be used to commit an offence or cause personal injury to either the pupil or another

pupil. Schools will be able to seize items banned by school rules. If school rules prohibit electronic devices (mobile phones etc), these can have files removed before they are returned. In urgent circumstances, a member of staff can dispense with the need for the presence of another member of staff of the same sex as the pupil before carrying out a search of a pupil's clothing or possessions (**Section 2**). Similar powers are given to staff at further education institutions (**Section 3**).

The parents of an excluded pupil lose the right to appeal to a local independent panel to ask that their child is reinstated. Instead, parents can ask a review panel to ask the school to think again (although the school does not have to). If the review panel finds that there were procedural irregularities, or that information about the exclusion was not properly considered by the school before confirming the exclusion, the exclusion can be quashed and the school must then consider properly the exclusion. In such circumstances, the school can be fined. Pupils who have a disability will be able to appeal to the first-tier tribunal (**Section 4**).

The requirement to give 24 hours notice before a pupil is detained outside school hours as part of a punishment is repealed (**Section 5**). The requirement that each secondary school must participate in a behaviour and attendance partnership is repealed (**Section 6**).

Part 3: School workforce

The General Teaching Council England (GTCE) is abolished (**Section 7**). Teacher discipline functions are given to the Secretary of State who gets the power to investigate allegations of professional misconduct etc against qualified teachers and the power to prohibit qualified teachers from teaching (**Section 8**). The Secretary of State will take over from the GTCE the management of teacher induction (**Section 9**). Transitional, consequential and transfer arrangements are made consequent upon the abolition of the GTCE (**Sections 10 to 12**).

Restrictions are placed on reporting by the media etc of alleged criminal offences by teachers in schools prior to a formal charge being made (**Section 13**).

The Training and Development Agency for Schools (TDA) is abolished and the Secretary of State becomes directly responsible for funding initial training, including the setting of entry standards for funded training to teaching and other school related professions (**Sections 14 to 17**).

The School Support Staff Negotiating Body (SSSNB) is also abolished; the Body has not yet issued, and will not now issue, its first report on pay and conditions of support staff (**Section 18**).

A drafting error in earlier legislation to do with the management of staffing where a local authority suspends delegation is corrected (**Section 19**).

Part 4: Qualifications and curriculum

Maintained schools may be required to take part in international surveys of school and pupil performance (**Section 20**).

The examination regulator Ofqual is reorganised with the appointment of a chair to the Ofqual board as a separate person from that of the Chief

Regulator who becomes the chief executive of Ofqual (**Section 21**). Ofqual is directed to consider examination standards in other countries when considering standards in England (**Section 22**). Following the problems with errors in the Summer 2011 GCSE and GCE examinations, Ofqual is given powers to investigate and fine examination boards for errors (**Section 23**). A similar power is given to Welsh ministers (**Section 24**).

The Qualifications and Curriculum Development Agency (QCDA) is abolished with functions being extinguished or transferred to the Secretary of State. The development of the National Curriculum is transferred to the Secretary of State without the need to involve an arm's-length body (**Sections 25 to 27**).

The Secretary of State gives up power to direct how the Connexions service works in a particular local authority, but schools can refuse entry to Connexions advisers (**Section 28**). Schools become responsible for impartial careers guidance for 14 to 16-year olds which cannot be provided by a member of the school's staff (**Section 29**). Local authorities will no longer be responsible for securing the additional (non-core) diploma entitlement for 16 to 18 year olds (**Section 30**), and the full range of diploma courses for 14 to 16 year olds (**Section 31**).

Part 5: Education institutions: other provision

The provisions (which were at the start of Part 5) repealing the duties on schools to co-operate with the local authority and other partners to promote the well-being of children and have regard to the children and young people's plan were removed from the Bill by a Government amendment in the Lords.

Schools will no longer have to publish a school profile (**Section 32**), and local authorities will no longer appoint School Improvement Partners to each school (**Section 33**).

The admission forum, the body which supports local co-ordination of school admission arrangements, is abolished. On an appeal against a school's admission arrangements, the adjudicator will lose the power to rewrite admission arrangements. Instead, the adjudicator will state what needs to be done in respect of the appeal to bring the admission arrangements into line with the School Admissions Code. This judgement will remain binding on the admission authority. Local authorities will continue to send annual reports to the Schools Adjudicator but the content of the report will be set out in the Admissions Code rather than regulations (**Section 34**).

Local authorities and schools must not charge more for school meals than the cost of providing the meals. However, differential charging will be permitted to encourage take up by specific groups (**Section 35**).

Any 'body or person' will be able to refer an objection to a school's admissions arrangements to the adjudicator for determination (**Section 36**)

When a new school is required, the local authority must first try to find a promoter to establish an Academy (or its Free School variant). If none can be found, the local authority can conduct a competition for a foundation or voluntary school as currently happens. If none can be found following a competition, the local authority can then seek the consent of the Secretary of State to establish a community school. A local authority will be able to use the "special cases" route, which does not require the consent of the Secretary of

State, if all else fails. This route can now be used to merge separate infant and junior schools (**Section 37**).

Maintained school governing bodies must consist of parent governors, an elected staff governor and the head teacher and a person appointed by the foundation if there is one. A person can be appointed by the local authority if that person meets the 'eligibility criteria' set by the governing body. The headteacher can resign from the governing body (**Section 38**).

When a school leaves a federation, the federation can continue if there are at least two remaining schools. (**Section 39**)

Outstanding schools will be exempt from OfSTED inspections. Such schools can request an inspection but may have to pay for it (**Section 40**). School inspections will principally have to report on the achievement of pupils, the quality of teaching, the quality of leadership and management, and the behaviour and safety of pupils (**Section 41**). Outstanding further education colleges will be exempt from OfSTED inspections. Such colleges can request an inspection but may have to pay for it (**Section 42**).

The arrangements for inspecting the welfare of pupils in boarding accommodation at maintained and independent schools are revised. Pupils boarded out will be included in inspections. Ofsted will be able to commission, and assure the quality of, a body to inspect arrangements at independent schools (**Section 43**).

The Secretary of State gets additional powers to close directly a school: all schools which are eligible for intervention can be closed directly except those which are eligible for intervention because of a Teachers' Pay and Conditions Warning Notice. The Secretary of State can override a local authority decision not to issue a Performance Standards and Safety Warning Notice and thus make a school eligible for intervention (and consequently eligible for an Academy Order) (**Section 44**).

The legislation allowing complaints to the Local Government Ombudsman about individual schools by parents and pupils is repealed. (**Section 45**)

The Secretary of State can direct changes to local authority schemes for financing schools (**Section 46**). Premature retirement and redundancy costs of school staff employed for community purposes must be met from school budgets provided that meeting these costs does not interfere with the provision of education to the school's pupils (**Section 47**). Schools will be able to charge parents for early years educational provision when the school provides educational provision outside the 'free entitlement' (**Section 48**).

Wide-ranging changes are made to the governance arrangements of FE and sixth form colleges including their powers and duties. Particular changes affecting the local authority role are the repeal of the powers to establish, or discontinue, a sixth form college, or intervene if something goes wrong. Guaranteed places on Sixth Form College Governing Bodies for local authority nominees are also abolished. The college governance constitution arrangements in the Further and Higher Education Act 1992 are rewritten. Colleges in England will approve their own articles and instruments of governance subject to a broad framework which does preserve staff and student representation (**Section 49**).

Pupil referral units will have delegated budgets on the same basis as maintained schools (**Section 50**). The decision to rename Pupil Referral Units (PRUs) as Short Stay Schools is repealed (**Section 51**).

Part 6: Academies

The Academies Act 2010 is largely rewritten.

Secondary academies will no longer need to have a specialism (**Section 52**). Two new types of academies are created: 16 to 19 Academies and Alternative provision Academies. Current Academies become known as Academy schools (**Sections 53 and 54**).

The influence of school trustees, associated foundations and, where one exists, “the appropriate religious body” is strengthened prior to the making of an Academy Order (**Section 55**). Consultation prior to conversion can be done by the potential Academy Trust where the Secretary of State uses the power to force an Academy Order where the maintained school is eligible for intervention (**Section 56**). An individual school in a federation is able to apply to become an academy (**Section 57**). The power of a local authority to continue to fund a school once it becomes an Academy is put beyond doubt thus enabling local authorities to continue to fund Private Finance Initiative (PFI) deals on schools which become Academies (**Section 58**). The law is clarified on the transfer of staff contracts to Academies where an enforced transfer agreement is used (**Section 59**).

An Academy must consult on a proposal to increase its age range (**Section 60**). Local authority support for boarding costs in Academies with boarding is permitted (**Section 61**). The law clarifying the rights of staff not to be required to comply with religious requirements in faith academies which were formerly voluntary controlled schools is clarified along with the rights of staff which were formerly reserved teachers in such schools and new staff appointed to such positions (**Section 62**). The law on Academies land is revised (**Section 63**). The Adjudicator can hear complaints against an Academy’s admission arrangements (**Section 64**). Miscellaneous amendments are made to the law on Academies (**Section 65**).

Part 7: Post-16 Education and Training

The Young Peoples Learning Agency (YPLA) is abolished and functions transferred to the Secretary of State including the funding of 16 to 19 education and Academies. (**Sections 66 to 68**).

The duty on the Skills Funding Agency (SFA) to find an apprenticeship place for all suitably qualified young people is repealed. The SFA must provide “proper facilities for apprenticeship training” for young people who have found an “apprenticeship opportunity” and who are aged 16 to 18 or are above that age but have previously been in care but are under 25 or are of a prescribed description (**Section 69**). The SFA must make reasonable efforts to secure the participation of employers in apprenticeship training (**Section 70**). Apprenticeship certificates will be issued by the Sector Skills Councils (**Section 71**).

The SFA must consult on matters as directed by the Secretary of State (**Section 72**). The scope of training that must be funded by the SFA (and free of charge to the student) is reduced for those over 19 years: entry level

qualifications in literacy and numeracy will remain but it will not be possible to specify level 2 courses except for adults less than 24 years (previously 25 years). The ability to specify level 3 courses for this age range remains. The power to specify area-wide bodies to formulate skills policy is removed (**Section 73**).

The Secretary of State gains flexibility on the enforcement of the 'duty to participate' in education and training for 16 and 17 year olds including the possibility of a criminal offence for failure to participate. (**Section 74**)

Part 8: Direct Payments

The local authority gains a power to make direct payments for children with special educational needs instead of specifying (and meeting the costs) of the special educational provision. A similar power is given for young people with a learning difficulty assessment. The power must only be exercised in accordance with a Pilot Scheme made by the Secretary of State. The provision is repealed four years after the Act is passed (**Section 75**).

Part 9: Student Finance

The Secretary of State gets greater flexibility to set interest rates for student loans; for students starting in or after September 2010, the rate cannot be higher than those which are commercially available. (**Section 76**) A cap can be set on undergraduate part-time course fees. (**Section 77**)

Part 10: General

Sections 78 to 83 contain the standard provision on interpretation and commencement etc.

Comment

It is difficult to sum up a piece of legislation which contains so many issues. Ministers have repeatedly referred to four principles which underlie the legislation. One is specific to education relating to good student behaviour and discipline through improving the quality of teaching. In terms of the Parliamentary debate this means giving additional disciplinary powers to teachers and lecturers. The other three appear across the Coalition Government's approach to public services, namely sharpened accountability; the freeing up of, and giving more flexibility to, professionals to do their jobs; and the fairer use of resources.

Whether these four principles are the best place to start in developing an education strategy is a debate that is beyond the scope of this 'comment' section except to note that the centrality of the Labour administration's 'user focus' is not present. However, with four principles, it is perhaps not surprising that there are so many issues in the Act although the complexity of the legislation is increased by the decision to amend earlier legislation rather than to consolidate much amended legislation. This is seen in, for example, the admissions legislation. The publication on the DfE website of what are called Keeling schedules (which show what the amended legislation will look like) for some provisions is helpful but not an adequate substitute for those who have to implement the new legislation.

Ministers have spoken about what they want the education system to achieve ('a world class system') and how it will be measured, which has usually been

accompanied by a sprinkling of OECD statistics. They have been less forthright in terms of a vision as to how it will be achieved from the four principles. Admittedly, this has been difficult because the two most significant changes to the school system in the last year were not directly related to the contents of the Bill. These are the much higher level of conversion to academy status of local authority maintained schools than the Government had initially planned, and the reductions in local government expenditure and, consequently, of support services for schools.

With regard to the local authority role, Ministers repeatedly wanted to “free local authorities, led by directors of children’s services, to focus on championing the interests of parents and children who most need support”. The Labour administration’s 2005 White Paper *Higher Standards, Better Schools for All* was frequently quoted in aid by Ministers. The parliamentary debate provided little space to consider what additional powers local government would need to fulfil this role successfully; the implications for schools which have not converted, especially in areas where large numbers have not done so; and whether local government has the resources, and capacity and competence among its elected members and senior officers, to do the job.

One consequence of the Act is the significant accretion of powers to the Secretary of State. This is seen in the abolition of five public bodies, four of which have a sizeable staffing complement, and the creation of three executive agencies, the Teaching Agency, the Education Funding Agency and the Standards and Testing Agency. And some new functions that the Secretary of State is taking on will be handled within the DfE and not by an executive agency such as curriculum development and parental complaints. The DfE News on the Act states that this is to make the Secretary of State directly accountable to Parliament for important functions. It is said that the current Secretary of State believes that he should be directly accountable to Parliament when a decision is taken in his name to bar a teacher from teaching on disciplinary grounds. The track record of Ministers in other Government departments at managing large executive agencies working in high profile fields is not great; hopefully, the DfE has learnt from these well-recorded problems. It is to be hoped also that both the Secretary of State and Parliament will find the time to allow direct accountability to happen. The Secretary of State did not find the time to vote in the divisions on the final stage of the Education Bill on 14 November.

Vision or no vision, the Act does feel like unfinished business. The Act coupled with Academy conversions and reduced resourcing from local government for school support and out of school educational services increases the likelihood of a radically new school system emerging with new models of delivering school and pupil support. Legislation to support these changes will follow in the wake of these new models, helping to cement the new system together whatever it might look like.

Perhaps, as ever, achieving change and improvement across a local area will depend on the collective vision, and the leadership, management and professional skills, of those working and living in the locality. Collections of independent schools are not as effective at achieving change as an inter-

dependent school system working towards common goals. Legislation must be a handmaiden to the achievement of educational change and not its master. Given the eclectic nature of the Education Act 2011, it is too early to say anything about the medium to long-term effect of the new legislation on these important processes.

Specific issues

All aspects of the Act are of interest to local government including student finance: local government wants all residents to succeed in their education and reach their potential irrespective of parental income or personal wealth. Listed below are specific issues which local authorities may wish to consider. There will be others.

School place planning: does the Act enable the local authority to secure that there are sufficient schools to meet the needs of the local population especially with the much strengthened presumption in favour of academies? Will there be the ability to remove school provision if there are too many school places for the system to run efficiently? How much longer will local authorities have to plan ahead in order to meet the new hurdles to secure school places?

Admissions: with the abolition of the admissions forum, will the local authority have sufficient levers over Academy admission arrangements in order to guarantee fair access to school places for the local population? Will the local authority have to resort to referring admissions arrangements to the adjudicator in order to achieve compliance?

Alternative provision: what is Government policy on alternative provision, especially for pupils over 13 to 14 years of age? Is the intention that such pupils are unlikely to return to mainstream provision and that they remain in alternative provision until they reach school leaving age and/or are relieved of the duty to participate?

Excluded pupils and pupils not in school (particularly those not on a school roll): are there sufficient powers for the local authority to secure educational provision for excluded children whether in maintained schools or academies? Will the amount that maintained schools and academies have to pay be sufficient to meet alternative provision?

Supply of teachers with QTS: what will be the effect of removing the register of teachers, especially when ascertaining that a teacher is eligible to undertake the specified tasks? (The Government has said that it is investigating whether to retain a list of qualified teachers.)

School governance: will the reduction in LA and the potential loss in community representation have an effect on schools' links with their communities?

LA school improvement role and OfSTED inspection: while welcoming proportionality in inspection, how will the LA know that an "exempt" school is getting into difficulties if it no longer has to be inspected by OfSTED and there is no contact through School Improvement Partners?

14-19 co-ordination: will the loss of the LA role lead to inefficiencies in the supply and appropriateness of courses for this age group, particularly for the most vulnerable?

Careers and the Connexions services: the duties to provide a Connexions service will remain although the funding has on the whole gone and schools will have a duty to provide 'impartial' careers guidance for their pupils in years 9 to 11 from September 2012. What are the implications for LA services?