

Report on the Curriculum and Assessment (Wales) Bill

December 2020



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About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.senedd.wales/SeneddLJC

Committee Chair:



Mick Antoniw MS
Welsh Labour

Current Committee membership:



Carwyn Jones MS
Welsh Labour



Dai Lloyd MS
Plaid Cymru



David Melding MS
Welsh Conservatives

The following Member attended as a substitute during this inquiry.



Suzy Davies MS
Welsh Conservatives

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1. Introduction

On 6 July 2020, Kirsty Williams MS, the Minister for Education (the Minister), introduced the Curriculum and Assessment (Wales) Bill (the Bill).¹

Introduction of the Bill

1. The Bill was accompanied by an Explanatory Memorandum² (EM), which was later revised and re-laid on 1 September 2020.³ References in this report to the EM are the to the revised version.
2. On 30 July 2020, the Minister issued a Statement of Policy Intent (SOPi) to accompany the Bill.⁴
3. The Senedd's Business Committee referred the Bill to the Children, Young People and Education Committee on 9 July 2020, and set a deadline of 4 December 2020 for reporting on its general principles.⁵

Background

4. The Bill makes provision for “the establishment of a new and reformed legislative framework to support the implementation of the new curriculum and assessment arrangements as part of a wider programme of education reform in Wales”.⁶

¹ Curriculum and Assessment (Wales) Bill, as introduced

² Curriculum and Assessment (Wales) Bill, Explanatory Memorandum (EM), incorporating the Regulatory Impact Assessment and Explanatory Notes, July 2020

³ Curriculum and Assessment (Wales) Bill, Explanatory Memorandum (EM), incorporating the Regulatory Impact Assessment and Explanatory Notes, September 2020

⁴ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent for Subordinate Legislation, direction making powers and guidance

⁵ Business Committee, Timetable for consideration of the Curriculum and Assessment (Wales) Bill, July 2020

⁶ EM, paragraph 1.1

5. On introduction of the Bill the Minister said:

“The new Curriculum for Wales framework will provide every school in Wales the opportunity to design and implement their own curriculum within a national approach that secures a consistency of approach for learners across the country.”⁷

6. The EM states that the Bill proposes to facilitate the following:

1. The design, adoption and implementation of a curriculum for 3 – 16 year olds in maintained schools, maintained nursery schools and in funded non-maintained nursery settings and curriculum provision in Pupil Referral Units and in other settings secured by a local authority in Wales providing education otherwise than at school.
2. Limited provision for post-compulsory education in maintained schools.
3. General requirements a curriculum must satisfy, including cross curricular skills (literacy, numeracy and digital competence), areas of learning and experience and the mandatory elements (Welsh, English, Religion, Values and Ethics, and relationships and sexuality education).
4. The publication by the Welsh Ministers of a What Matters code setting out the key concepts in each area of learning and experience describing the breadth of learning which must be covered.
5. The publication by the Welsh Ministers of a statutory code providing a framework for progression in the new curriculum.
6. The publication by the Welsh Ministers of a code setting out core learning in relationships and sexuality education.
7. The implementation of assessment arrangements to support every learner to make progress.

⁷ Welsh Government Written statement, Introduction of the Curriculum and Assessment (Wales) Bill, 6 July 2020, Kirsty Williams MS, Minister for Education

8. Will have the effect of establishing a 3 – 16 continuum of learning and through the removal of the terms key stages 2, 3 and 4, and foundation phase in legislation.
9. The disapplication of English up to age 7 to help support and maintain Welsh language fluency.
10. Exceptions for certain pupils (in specified circumstances).
11. Powers for the Welsh Ministers to issue guidance to head teachers, governing bodies and local authorities in respect of their functions.⁸

The Committee's remit

7. The remit of the Legislation, Justice and Constitution Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other matter relating to legislation, justice and the constitution within or relating to the competence of the Senedd or the Welsh Ministers, including the quality of legislation.
8. In our scrutiny of Bills introduced in the Senedd, our approach is to consider:
 - matters relating to the competence of the Senedd, including compatibility with the European Convention on Human Rights (ECHR);
 - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
 - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
 - any other matter we consider relevant to the quality of legislation.

⁸ EM, paragraph 1.2

9. We wrote to the Minister setting out a series of specific questions in relation to the Bill on 4 August 2020.⁹ The Minister replied on 18 September 2020.¹⁰ We also took evidence from the Minister at our meeting on 5 October 2020.¹¹

⁹ Letter to the Minister for Education, 4 August 2020

¹⁰ Letter from the Minister for Education, 18 September 2020

¹¹ Legislation, Justice and Constitution Committee, 5 October 2020

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.¹²

10. In her statement on legislative competence the Llywydd, Elin Jones MS, stated that in her view the provisions of the Bill would be within the competence of the Senedd.¹³

Human rights

11. To be within the legislative competence of the Senedd, section 108A(2)(e) of the *Government of Wales Act 2006* (the 2006 Act) requires all provisions of a Bill to comply with the ECHR.

12. The Minister told us that she is satisfied that, as a whole, the Bill is “compatible with the rights protected by the *Human Rights Act 1998* (“the Convention Rights”)”.¹⁴

13. The integrated impact assessment Curriculum for Wales-ensuring access to the full curriculum considers how the Bill’s provisions concerning Religion, Values and Ethics (“RVE”) and Relationships and Sexuality Education (“RSE”) are compatible with the Convention Rights.

14. In her letter dated 18 September 2020, the Minister set out her detailed analysis of how the Bill’s provisions for RVE and RSE comply with Article 2 Protocol 1 (right to education) Article 9 (freedom of thought, conscience and religion) and Article 14 (protection of discrimination) of the ECHR.

¹² EM, Member’s Declaration, page 1. See also EM, paragraph 2.1 and LJC Committee, 5 October 2020, Record of Proceedings (RoP) [6] and [7]

¹³ Presiding Officer’s Statement on Legislative Competence, 6 July 2020

¹⁴ Letter from the Minister, 18 September 2020

15. RVE is one of the four mandatory elements of the new curriculum for 3 to 16 year olds specified under section 3 of the Bill, and will replace ‘religious education’ as it stands in the current curriculum.

16. With regards to RVE, the EM states:

“RVE is a field of study in which a range of disciplinary approaches are used by learners to critically engage with a broad range of religious and non-religious concepts. The intention is to ensure all children and young people are provided with the scope to explore Wales’ historical and contemporary relationship to philosophy and religious views, including non-religious beliefs.”¹⁵

17. RSE is also one of the four mandatory elements of the new curriculum for 3 to 16 year olds specified under section 3 of the Bill, and will replace ‘sex education’ as it stands in the current curriculum.

18. On RSE, the EM states:

“It is intended that RSE will be taught across the curriculum. Teaching and learning explores the interconnected ways in which a wide and diverse range of social, cultural, technological and biological influences affect the ability to form and maintain positive relationships. It is an important element in creating a whole school approach to supporting overall physical, mental and emotional health and well-being.”¹⁶

19. The Bill makes no provision for parents to be able to withdraw their children from the RVE or RSE aspects of the curriculum. We asked the Minister if she was satisfied that this is compatible with parents’ rights to respect for their religious and philosophical convictions under Article 2 Protocol 1 (right to education) and their right to freedom of thought, conscience and religion under Article 9 of the ECHR. The Minister told us:

“... the Bill does not provide a right to withdraw. This will ensure that every child has education in RVE and RSE. I believe that issues around

¹⁵ EM, paragraph 3.46

¹⁶ EM, paragraph 3.52

RVE and RSE permeate throughout society and often raise complex issues which can be difficult for all of us and particularly children to navigate. I believe schools have a part to play in equipping pupils to understand and navigate their way through those issues. This will be achieved by providing a better understanding of both these areas from the perspective of different faiths, non-faiths and philosophical ideas within the context of a modern multicultural and multi faith society.”¹⁷

20. The Minister acknowledged that the RVE provisions in the Bill “are a particularly complex area of the Bill”¹⁸ and provided us with a summary of what each category of school is obliged to do in the new Bill in respect of RVE:

“Community schools, and foundation and voluntary schools without a religious character:

- There is no right to withdraw from RVE;
- The provision in the curriculum for RVE must be designed having regard to the agreed syllabus;
- It must also be designed having regard to any guidance issued by the Welsh Ministers under the Bill.

Foundation and voluntary controlled schools that have a religious character:

- There is no right to withdraw from RVE;
- The curriculum must include provision for RVE which has been designed having regard to the agreed syllabus;
- If that provision does not accord with the school’s trust deed or the tenets of its faith, the curriculum must also make provision for RVE that does accord with the trust deed or the tenets of the faith of the school (“Denominational RVE”);

¹⁷ Letter from the Minister, 18 September 2020

¹⁸ Letter from the Minister, 18 September 2020

- The provision in the curriculum for RVE must also be designed having regard to any guidance issued by the Welsh Ministers under the Bill;
- In this type of school, the default position is for RVE which has been designed having regard to the agreed syllabus to be provided to pupils;
- But if a pupil's parent requests it, a school must provide Denominational RVE to the pupil instead of the RVE designed in accordance with the agreed syllabus. This is not a right to withdraw from RVE, but a right to request a different type of RVE.

Voluntary aided schools that have a religious character:

- There is no right to withdraw from RVE;
- The curriculum must include provision for RVE which accords with the school's trust deed or, if the trust deed doesn't make provision about RVE, with the tenets of the school's faith. ("Denominational RVE");
- If the Denominational RVE provision does not accord with the agreed syllabus, the curriculum must also make provision for RVE that does accord with the agreed syllabus;
- The provision in the curriculum for RVE must also be designed having regard to any guidance issued by the Welsh Ministers under the Bill;
- In this type of school, the default position is for Denominational RVE to be provided to pupils;
- But if a pupil's parent requests it, a school must provide RVE to the pupil that accords with the agreed syllabus, instead of the Denominational RVE. Again this is not a right to withdraw from RVE, but a right to request a different type of RVE."¹⁹

¹⁹ Letter from the Minister, 18 September 2020

21. The Minister told us:

“It is important to note that, aside from the Bill, the law requires that if a state mandates RVE it should ensure access to pluralistic RVE or if not there should be a right to withdraw. (...)”

The Bill allows Denominational RVE to continue to be provided by faith schools but in the case of voluntary aided faith schools, a child’s parent may opt out of that in favour of pluralistic RVE. By pluralistic I mean it teaches a number of different views both religious and non-religious. In doing that the Bill recognises the role of schools with a religious character in the provision of state education. The Welsh Government recognises that historically, the state has embraced various faiths in the provision of education. In drafting the Bill, Welsh Government have endeavoured to respect this. Those faiths have a valuable role in the provision of education in Wales.

In respect of voluntary aided schools with a religious character, although the right to withdraw is removed, that does not mean that pupils at those schools will necessarily have to receive Denominational RVE. Instead, their parents can request that they be taught RVE in accordance with the agreed syllabus, and a school must then provide this type of RVE. So, although the right to withdraw is removed, what will be provided must be pluralistic if the parent so requests. This approach has the effect of imposing a new requirement upon a school of this type (to provide RVE in accordance with the agreed syllabus if requested by a parent) and this is, in our view, proportionate.

It is important to note that I do not assume that any Denominational RVE will not be pluralistic. In conversations with my officials the Catholic Education Services have been very clear that they consider the RVE provided in Catholic schools is pluralistic. It is simply that in most cases that Denominational RVE will be provided in accordance with the trust deed, and whilst it is not feasible for the Welsh

Government to consider every trust deed, the approach set out in the Bill is in our view compatible with Convention Rights.”²⁰

22. The Minister expanded on these points during our evidence session on 5 October. She said:

“The roots of this lie in the work undertaken by a previous Welsh Government, by Professor Graham Donaldson... In his report, ‘Successful Futures’, he recommended that religious education be a compulsory part of the Welsh curriculum going forward. And I agree that that is an important part of a child’s education, but, obviously, we need to ensure that that part of the curriculum, which is important in delivering the purposes set out for the curriculum, is pluralistic in nature. And whilst, quite correctly... we don’t assume, nor do we have evidence, that religious education that is currently being delivered in many of our faith schools is not pluralistic, we have to take steps in the legislation to ensure that it is. (...)

... the Bill makes provision for denominational education to be delivered, but to ensure that it is compliant with human rights legislation, because there is no right to withdraw, it needs to be pluralistic in nature. And, therefore, whilst it is expressly stated in the Bill that denominational RVE is the default, if a parent requested the agreed syllabus, then that also would need to be delivered.”²¹

23. With regards to RSE, the Minister said:

“It is important to note that aside from the Bill, the law requires that where the state mandates RSE, it must ensure access to pluralistic RSE or there should be a right to withdraw. The RSE provisions are designed to ensure that it is provided pluralistically. That is what is required by the current law.”²²

²⁰ Letter from the Minister, 18 September 2020

²¹ LJC Committee, 5 October 2020, RoP [11] and [12]

²² Letter from the Minister, 18 September 2020

24. We also asked the Minister what safeguards exist within the Bill (or more widely) to seek to ensure that both RVE and RSE comply with the Convention rights by being designed and delivered in a way that is objective, critical and pluralistic.

25. With regards to RVE, the Minister said that the Bill makes provision in a number of respects which are designed to secure the pluralistic content and teaching of RVE, including:

- the re-naming of religious education to RVE;
- requiring that a school's curriculum must have regard to the agreed syllabus, which itself must comply with certain requirements specified in section 375A of the *Education Act 1996*.²³

26. The Minister added:

“The agreed syllabus is adopted by an Agreed Syllabus Conference. The conference will be required to represent non-religious philosophical convictions and they will have voting rights.

There will continue to be Standing Advisory Councils which advise a local authority on the provision of RVE under the Bill – these too will be required to represent non-religious philosophical convictions.

In this way pluralism is built into the agreed syllabus, and the RVE provided in schools.”²⁴

27. The Minister again expanded on the safeguards that exist in respect of the delivery of RVE during our evidence session on 5 October. She said:

“The purpose of the change in the name is to reflect the expanded scope of this aspect of the curriculum and to ensure that it is clear, from the legislation itself, that the new subject should include non-religious views. That was done by linking the Bill provision to the term ‘philosophical convictions’, which is found in article 2, protocol 1, and

²³ Letter from the Minister, 18 September 2020

²⁴ Letter from the Minister, 18 September 2020

that was reflected in section 62 of the Bill. In other words, the RVE provided, pursuant to the Bill, has to be compatible with article 2, protocol 1, in that it must include teaching on philosophical convictions, the definition of which is outlined in article 2, protocol 1. Secondly, we're changing the constitution to the agreed syllabus conferences and to the standing advisory councils on religious education. So, the Government has chosen to retain the agreed syllabus conferences, but the Bill amends the constitution so that it requires a local authority to include, in its list, groups of persons to represent such non-religious philosophical convictions as, in the opinion of the authority, ought to be represented. So, this reflects current guidance that was issued by me to local authorities and agreed syllabus conferences previously to expand their membership."²⁵

28. The Minister also told us:

"The Bill also includes powers for Welsh Ministers to publish statutory guidance to local authorities and to the agreed syllabus conference, which they must have regard to in respect of the adoption of an agreed syllabus. There's also a power in section 66 to issue statutory guidance to a range of persons. (...) So, that's the legislative context in which practitioners will be working, and then, of course, we will have the usual checks and balances in terms of ensuring that schools are delivering a curriculum that is in line with the curriculum. So, that's a job for the governors, that's a job for individual local education authorities, for our regional school improvement services and, actually, ultimately for the inspection regimes, whether that be the religious inspection regime or Estyn."²⁶

29. In relation to RSE, the Minister told us that the Bill also makes provision in a number of respects which are designed to secure the pluralistic content and teaching of RSE, including:

²⁵ LJC Committee, 5 October 2020, RoP [14]

²⁶ LJC Committee, 5 October 2020, RoP [15]

- the re-naming of “sex education” to RSE;
- having a statutory code setting out the themes and matters in RSE, to ensure that a range of ideas on any given topic in RSE are included in it;
- the code and Bill provisions being supplemented by statutory guidance (using the power in section 66 of the Bill);
- the express provision in the Bill²⁷ that the RSE provided must be developmentally appropriate.

30. The Minister said:

“The purpose of these provisions is to ensure that teaching and learning of RSE is appropriate for the child or young person and that the issues raised are approached in a way that is critical and objective. This is an important feature to ensure that parents and learners know what to expect from their school in the delivery of its RSE curriculum.”²⁸

31. The Bill treats schools with a religious character differently to those without, when designing and implementing the curriculum, so far as it encompasses the mandatory element of RVE. We asked the Minister what is the justification for this approach, and whether she is content that this does not raise any human rights issues.

32. The Minister said that case law and the Convention Rights requires that pluralistic RVE must be available for all learners. If not then there must be a right to withdraw. The Minister added:

“... voluntary aided faith schools will continue to be required to teach their Denominational RVE. The Bill also ensures that all pupils will be able to have the agreed syllabus RVE if that is wanted by the parent in such schools. In doing that, the Bill recognises the role of schools with

²⁷ Provision is in sections 24(2), 31(3)(a), 32(6)(a), 38(2), 52(4), 54(3), 55(4) and 57(2) of the Bill.

²⁸ Letter from the Minister, 18 September 2020

a religious character in the provision of state education. These schools make a valuable contribution to the education system and many parents and learners will want to choose this type of RVE. The Bill respects that and preserves the legal obligation on such schools to teach in accordance with their trust deeds or denomination. We in no way intend to diminish the importance of religion, rather to emphasise wider aspects.

However, in order to secure that each learner has access to pluralistic RVE in voluntary aided faith schools, parents of learners can request agreed syllabus RVE. Likewise, we recognise that parents who send their children to a foundation or voluntary controlled faith school may wish to have their child receive Denominational RVE. In that way every learner has access to the agreed syllabus RVE which will be pluralistic in nature. We consider that is compatible with the Convention Rights. The result of the above is that all children will have access to a pluralistic RVE which will include a range of religious and non-religious views. That is what the law currently requires. In that sense there is equality.”²⁹

33. The Minister acknowledged that “The State is neutral in this space generally” and “That is why the emphasis is on pluralism.” She added:

“There is no right to have education provided by the State according to one’s own religious beliefs. So, whilst the State recognises a place for religious schools, its obligation is to provide pluralistic provision. So where a child is attending a faith school but does not share the faith of that school, there is a right to seek alternative pluralistic provision. But where a child of a particular faith attends a non-faith school, there is no right to require the State to provide education according to that faith. Therefore, so far as there is differential treatment, it is justified on the basis that the State ensures pluralism whilst respecting the ability of people to set up faith schools or to educate outside school in accordance with one’s own faith.

²⁹ Letter from the Minister, 18 September 2020

There is already a qualified right at the moment for parents of children in voluntary aided faith schools to opt out of the Denominational RVE and have agreed syllabus RVE instead. Therefore, the new absolute right to opt out from Denominational RVE is not entirely new in that sense but is a development of that existing qualified right of parents. It is something schools will have had to address from time to time.”³⁰

34. The Minister accepted that this absolute right would be a new requirement and that some schools “may find that a difficult task”. However, the Minister said:

“... we believe that task is made easier as the Bill requires them to adopt the agreed syllabus RVE and so that design task is made easier.

In practice, this means that schools with a religious character will have to design two syllabi, if requested by a parent. As there is no right to withdraw a child from RVE (or indeed RSE) the Bill needs to ensure that those children attending a faith school have access to a pluralistic RVE if that is wanted by the parent.

I consider this is compatible with the Convention Rights. As to how they can deliver that in practice, we anticipate that the numbers of pupils not following the Denominational RVE syllabus will be very small. The school would need to consider how they could best deliver on that. For example, they could be provided with additional supplementary or separate classes. My officials are working with the Catholic Education Service and the Church in Wales to consider how to assess and address the impact of implementing this requirement. If the school did not think that was appropriate, then options could include making arrangements for additional learning to be provided at another setting or making arrangements for external providers to provide the learning on the school premises. The school would need to make that clear including what would be provided.”³¹

³⁰ Letter from the Minister, 18 September 2020

³¹ Letter from the Minister, 18 September 2020

35. The Minister told us that she has “listened carefully to the concerns raised by partners and other key stakeholders” but that she does not anticipate that there will be a large number of pupils opting out of Denominational RVE. She added:

“I consider that it is likely that where parents have exercised the right to withdraw from religious education under the current legislation they will also opt out of the Denominational RVE. Our understanding is that current exercise of the right to withdraw in schools with a religious character is extremely low.”³²

Our view

36. We note the evidence in relation to matters of legislative competence from the Minister. We also note the Llywydd’s statement that, in her view, the provisions of the Bill would be within the legislative competence of the Senedd.

37. With regards to human rights implications of the Bill, we note that the Minister is satisfied that, as a whole, the Bill is compatible with the rights protected by the *Human Rights Act 1998*.

38. It is clear that the Minister has given a lot of thought to human rights issues in developing the Bill. However, we wish to highlight an important point. In our report on the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill³³, we said that a full commentary in relation to the Welsh Government’s assessment of human rights considerations ought to be provided in explanatory memoranda laid before the Senedd alongside Bills, rather than in Equality Impact Assessments published on the Welsh Government’s website. We again reiterate that this would have been our preferred approach, not least for reasons of accessibility.

39. It is vital that the new curriculum for Wales is both designed and delivered in a way that is objective, critical, pluralistic and altogether compliant with the Convention rights of both children and parents. In this regard, we consider that the Codes that will be made under sections 6 to 8 of the Bill (and any guidance

³² Letter from the Minister, 18 September 2020

³³ Report on the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill, August 2019

issued under section 66 of the Bill) to be of fundamental importance. The Codes are discussed further in Chapter 4 of the Report.

40. The date of the new curriculum taking effect will be prescribed by an Order made under section 79 of the Bill. However, we note that the EM states that the Welsh Government intends to implement the new statutory framework provided for by the Bill in 2021, in advance of the start of the 2022/23 academic year. As such, it will be our successor committee in the Sixth Senedd that will consider the Codes and any regulations that emanate from the Bill. That Committee will, no doubt, take full account of human rights matters when undertaking scrutiny of these important pieces of subordinate legislation.

41. Given that this legislation will deliver fundamental reform to the delivery of education in Wales, we consider that the Bill, if enacted, would be a key candidate for post-legislative scrutiny by a Senedd committee within five years of the new curriculum being implemented in Wales.

3. General observations

The need for legislation

42. The Bill creates the first distinct ‘Curriculum for Wales’, and has been developed following Professor Graham Donaldson’s Successful Futures review in 2015, which advocated a rethink of what young people need from their schooling.

43. The Bill builds upon the White Paper, Our National Mission: A Transformational Curriculum, published by the Minister in January 2019.

44. The Bill repeals Part 7 of the *Education Act 2002*, which sets out the current curriculum and assessment arrangements for Wales.

45. We asked the Minister to clarify the purpose and intention of the Bill. She told us:

“... the purpose of this legislation is to ensure that children in Wales have the opportunity to develop the knowledge, skills and experiences for them to be successful adults, to empower the teaching profession to use their pedagogical skills to develop curricula that are suitable for the children sitting in front of them, and, ultimately, to raise standards within the Welsh education system. (...) It’s a fundamental piece of education reform, as I said, to raise standards, to equip children with what we believe they need to be successful adults, and to empower teachers with the professional autonomy to deliver a curriculum themselves.”³⁴

46. In the written statement that accompanied the introduction of the Bill the Minister said:

³⁴ LJC Committee, 5 October 2020, RoP [18]

“The current provisions [of the Education Act 2002] are narrow, restrictive and do not do enough to support teachers design and develop a curriculum that prioritises learners’ progression.”³⁵

47. We pursued this point with the Minister during our evidence session and asked the Minister to explain why new primary legislation was needed to achieve the stated purpose. She said:

“... the current curriculum that we have in Wales finds its roots in the reform of 1988, and, indeed, the Education Act 2002. That’s before— in 1988, before the fall of the Berlin wall, before we all carried computers around in our pockets. So, basically, the fundamentals of our curriculum are rooted in a time that we’ve moved on from. Successive reports have highlighted, from employers, from children themselves, that the current curriculum isn’t reaching their needs. We’ve also, potentially— inadvertently I’m sure— but we have robbed our teaching profession of their professional autonomy. We have often reduced teaching, in some cases, to a tick-box exercise, and we’re not giving the children and young people what they need to see that step change in outcomes for them and, ultimately, our nation, in terms of our economic development and our well-being in our society.”³⁶

Balance between what is on the face of the Bill and what is left to subordinate legislation

48. The Bill contains 15 powers for the Welsh Ministers to make regulations, along with one order-making power, three powers to issue codes, two powers to issue guidance, and two direction-making powers.

49. We asked the Minister why she believed that she had struck the correct balance between the provisions on the face of the Bill and what has been left to

³⁵ Written statement, 6 July 2020

³⁶ LJC Committee, 5 October 2020, RoP [20]

subordinate legislation. The Minister told us that “there are no right and wrong answers” and that it was a “question of balance”.³⁷ The Minister added:

“I’m of the view that we have achieved the right balance between the level of content on the face of the Bill and what will sit in codes, guidance and subordinate legislation. I think it’s really important as well to understand the philosophical principles behind the curriculum. So... one of the reasons why we have the new curriculum is to empower our teachers to be able to develop curricula that are fit for purpose for their own individual settings. Therefore, having too much detail and diktat on the face of the Bill potentially would undermine the very philosophical principles and pedagogical principles behind the approach to the legislation. So, there’s a balance to be struck, from a legislative point of view but also from a conceptual point of view, of having enough structure and scaffolding and detail on the face of the Bill, so that practitioners, parents, children and young people and those who are interested aren’t left floundering, but at the same time, not having so much detail on the face of the Bill that we dictate to the teaching profession once again everything that is to be taught in precise detail in schools, therefore undermining one of the very principles that underpin the approach to developing a new curriculum in Wales.”³⁸

50. Specific regulation-making powers included within the Bill are discussed in more detail in the next Chapter of the report.

Approach to drafting and matters relating to the consolidation of Welsh law

51. From our scrutiny of the Legislation (Wales) Bill – now *Legislation (Wales) Act 2019* – we are aware that, from the Sixth Senedd, the Welsh Ministers and the Counsel General will be under a duty to prepare a programme of action with the aim of improving the accessibility of Welsh law. Scrutiny of the Bill brought to

³⁷ LJC Committee, 5 October 2020, RoP [29]

³⁸ LJC Committee, 5 October 2020, RoP [29]

the forefront matters relating to how the Welsh Government currently approaches the drafting of legislation.

52. With regards to consolidation, we asked the Minister whether education was still an area where consolidation of legislation is being considered. The Minister said:

“... the Bill does not codify the law... but I think it does make a valuable contribution to improving accessibility in terms of understanding legislation that pertains to Wales and Welsh education, especially with regard to the curriculum. The vast majority of the provisions of the Bill are new, free-standing provisions to be enacted in English and Welsh. So, it doesn’t codify the law, but I think it does make a step in making it easier for Welsh citizens and those that are interested to understand how the law around the curriculum in Welsh schools is underpinned by law.”³⁹

53. The Minister later added:

“I think it’s a really important principle, isn’t it, of the rule of law: that people understand how they can get information, first of all to be able to influence the development of legislation and then have access to it to understand how it applies to them, and how they can protect and pursue their rights? These discussions are held within the department when looking at legislation, but at this stage... it’s felt appropriate that this Bill is drafted in the way it is.

I would absolutely hope in future years that time and resources can be given to consideration about further consolidation within the education department. At the moment, though, I have to say that resources are stretched pretty thin and we’re trying to prioritise what is needed at this time. But that should never preclude, in future, the need to look at further consolidation of Welsh education as we develop the Welsh statute book.”⁴⁰

³⁹ LJC Committee, 5 October 2020, RoP [23]

⁴⁰ LJC Committee, 5 October 2020, RoP [96] and [97]

54. In November 2019, the Counsel General shared with us the Welsh Government’s guidance on drafting legislation, *Writing laws for Wales*. The guidance for Welsh Government legal drafters advises that, if a Bill or statutory instrument uses a term which is intended to have the meaning it has been given in an existing piece of legislation, consideration must always be given to whether it would be better to restate the definition in full rather than applying the existing definition. The guidance states that “if the existing legislation was enacted only in English, restating the definition will ensure that there is also a version in Welsh.”

55. With this in mind, we asked the Minister about the many references in the Bill to the *Education Act 1996* - which predates devolution - and whether any thought had been given to repeating the relevant parts of that Act in this Bill so it becomes part of Welsh legislation, rather than asking pupils, parents and teachers to refer to a separate piece of legislation in order to know, for example, what is meant by “parent”.

56. The Minister’s official confirmed that the *Education Act 1996* is still a key Act, and said:

“For the moment, we consider that, with this Bill, those key terms are best left where they are, because people know where to find them. Taking them out and putting them in this Bill can, sometimes, create more confusion than just leaving them where they are.”⁴¹

57. Following our evidence session with the Minister on 5 October 2020 we wrote⁴² to the Counsel General, Jeremy Miles MS, in his capacity as the Welsh Government Cabinet Member with responsibility for accessibility of Welsh law and oversight of the Office of the Legislative Counsel. Using the Bill as a case study, we asked for the Counsel General’s views on a number of matters, including:

- why, as a general drafting approach, an opportunity has not been taken to restate all relevant definitions from the *Education Act 1996* in

⁴¹ LJC Committee, 5 October 2020, RoP [93]

⁴² [Letter to the Counsel General](#), 9 October 2020

the Bill, particularly as a way of making provision for bilingual definitions of key terms;

- alternative approaches to re-stating definitions in Welsh legislation, for example through the use of explanatory notes.

58. The Counsel General told us that the Welsh Government is “strongly committed to promoting accessibility in legislation, and the use of the Welsh language”, and that:

“This lies behind the position set out in our drafting guidance that, when a definition or expression is used in a Bill, consideration should always be given to whether it should be set out in full in the Bill concerned (as opposed to including in that Bill a pointer to a pre-existing definition set out elsewhere in legislation).”⁴³

59. He added:

“In the context of bilingual legislation, this decision (whether to restate a pre-existing definition) is a particularly significant one. This is because the result of not restating a definition or expression given in an existing Act of Parliament is that the definition or expression is available only in English, not in both Welsh and English.”⁴⁴

60. In the context of the Bill, the Counsel General said:

“... as you have noted, the Bill does not restate definitions used in the Education Act 1996. Instead the Bill provides (in section 77) that expressions in it that are defined in, or given a meaning by, the Education Act 1996 have the same meaning as in that Act. The Bill also includes provision (in section 68) to the effect that it is one of the Education Acts.

The “Education Acts” in this context are certain Acts that are listed in the Education Act 1996. These Acts are defined together with the

⁴³ Letter from the Counsel General, 28 October 2020

⁴⁴ Letter from the Counsel General, 28 October 2020

Education Act 1996 itself as being the “Education Acts”. Definitions and expressions used in the Education Act 1996 feed through into the other “Education Acts” unless there is express provision otherwise.

This approach permits a high degree of uniformity and cohesion within the education law system as a whole. It means that definitions and expressions used in any one of the “Education Acts” are likely to build on expressions in the parent Act, i.e. the Education Act 1996, that are also used in other “Education Acts”.⁴⁵

61. The Counsel General provided us with a list of the expressions used in the Bill that are defined in, or given meaning by, the *Education Act 1996*. The Counsel General said that, in the course of drafting the Bill, consideration was given to whether these expressions should be restated in the Bill. He said:

“The issue was considered from a drafting and legal policy perspective, taking into account our commitment to accessibility and bi-lingual drafting: the advantage of restatement would be to achieve bilingual definitions of terms used in the Bill. Though it is worth noting that where expressions are integral to the new curriculum framework, for instance “the four purposes”, “mandatory elements”, “cross-curricular skills”, they are in any event defined in the Bill. Despite this advantage it was decided on both drafting and legal policy grounds to avoid restatement. The object of this decision was to avoid undermining accessibility and the coherence of the body of education law set out in the Education Acts.”⁴⁶

62. The Counsel General told us that a range of factors were taken into account in reaching the decision that restatement, on this occasion, would undermine accessibility and coherence, and his letter to us of 28 October sets out further detail on these points.⁴⁷

⁴⁵ Letter from the Counsel General, 28 October 2020

⁴⁶ Letter from the Counsel General, 28 October 2020

⁴⁷ Letter from the Counsel General, 28 October 2020

63. The Counsel General recognised that “This situation is far from ideal but reflects the current state of the body of education law and in particular the interconnected nature of the various statutes and the expressions used in them, given the general and widely applied concept of “Education Acts”.” He also confirmed that he was:

“... therefore content that definitions used in the Education Acts (including in the Education Act 1996) should not have been restated in the Bill, as adopting such an approach in the context I have set out would have adverse effects in terms of accessibility, consistency and coherence across the body of education law.”⁴⁸

64. With regards to the issue of definitions, the Counsel General agreed with us that there can be a value in using alternative approaches to restating them within legislation. He told us:

“For that reason and the for the reasons I have outlined above, I have asked for the Explanatory Notes for this Bill to be updated, at the first suitable opportunity, to include a copy of the list I have attached to this letter. It may not be an appropriate approach for other Bills, but on this occasion I consider it a sensible alternative.”⁴⁹

Impact Assessments

65. The Welsh Government has carried out a Regulatory Impact Assessment (RIA) for the Bill, details of which are included in Part 2 of the EM.

66. According to paragraph 9.20 of the EM, the Equality Impact Assessment undertaken states that the new curriculum will have a positive impact as regards a number of protected characteristics including disability, race, sexual orientation, and low income households. Paragraph 9.41 of the EM also states that it was not envisaged that a full Rural Proofing Impact Assessment was needed at present.

⁴⁸ Letter from the Counsel General, 28 October 2020

⁴⁹ Letter from the Counsel General, 28 October 2020

67. Paragraph 9.49 of the EM, in relation to the Health Impact Assessment undertaken, says that learners will be provided with a range of learning which supports them to develop and maintain positive health affirming behaviours. However, paragraph 9.50 adds that the flexibility of the new curriculum may result in a variation of provision across different communities which may place some learners at risk because of their background or geography.

68. We asked the Minister to explain how the concerns expressed in paragraph 9.50 of the EM align with the statements in paragraphs 9.20 and 9.41. The Minister told us:

“As it states in the Rural Proofing section of the full Integrated Impact Assessment, “the curriculum is designed to apply to every learner in every classroom in Wales. The practitioners involved in developing the new arrangements, included schools of different sizes in locations across Wales, including rural areas, in collaboration with Welsh Government, regional consortia, local authorities, stakeholders and experts.”

The guidance has been developed to ensure that schools and learners benefit from the new arrangements, regardless of their backgrounds. Schools in rural areas will be supported to develop curricula that reflect their local needs and issues; and the opportunities, services and experiences readily accessible to them in the same way as schools and learners in urban or peri-urban areas.

We recognise there is a risk that flexibility under the new arrangements could lead to excessive variation of provision. These concerns were raised in response to the feedback phase for curriculum development last year, and have resulted in the measures we are proposing in the Bill. The legislation we are proposing places emphasis on elements of the guidance to provide a common framework which includes requirements in respect of the four purposes, areas of learning and experience, the statements of what matters and learning progression. We are of the view that the flexibility being afforded to schools within this robust common national framework, and with wider support for practitioners across

Wales, will lead to learning that is more pertinent to the communities and areas in which children live, whilst also providing a broad and balanced education to support them wherever their future takes them.”⁵⁰

69. Paragraph 9.44 of the EM states that the potential impacts on the justice system of the proposal for a new curriculum have been considered.

70. We asked the Minister whether a full justice impact assessment was undertaken ahead of the introduction of the Bill. The Minister told us that it was undertaken before being submitted to the Ministry of Justice, which subsequently agreed (in January 2019) that a full Justice System Identification process would not be required.⁵¹

Our view

71. We welcome the fact that the Minister produced a white paper in 2019, in advance of introducing the Bill.

72. We note the comments from the Minister regarding the need for the Bill, and acknowledge that the Bill stems from the work of Professor Donaldson in 2015.

73. With regards to the balance between the detail on the face of the Bill and what is left to subordinate legislation, we note the Bill contains 15 powers for the Welsh Ministers to make regulations, along with one order-making power, three powers to issue codes, two powers to issue guidance, and two direction-making powers.

74. We acknowledge the Minister’s evidence regarding the balance of powers and are broadly content, notwithstanding the particular comments we make in the next Chapter.

75. We note the Minister’s view that “having too much detail and diktat on the face of the Bill potentially would undermine the very philosophical principles and

⁵⁰ Letter from the Minister, 18 September 2020

⁵¹ Letter from the Minister, 18 September 2020

pedagogical principles behind the approach to the legislation". As a general observation, we do not agree with this view. As the Minister herself observes, the accessibility of legislation and the ability of stakeholders to understand how that legislation impacts on them is an important aspect to the rule of law. We consider that accessibility is aided by having an appropriate amount of detail on the face of primary legislation.

76. In the next Chapter of the report we draw attention to specific provisions in the Bill, and highlight particular areas of concern regarding the level of detail on the face of the Bill.

77. We note the Minister's evidence regarding the approach to the drafting of the Bill. We also welcome the thorough explanations provided by the Counsel General when he was asked for further detail about the drafting of Welsh Bills and the accessibility of Welsh law more broadly.

78. As we said in our letter to the Counsel General, the consolidation of Welsh law, particularly for reasons of accessibility, is an important and worthwhile task. We hope that the Sixth Senedd does see a concerted effort from the Welsh Government to tackle the proliferation of law that applies in Wales and the inherent complexity that exists.

79. Finally, we note the Minister's evidence regarding the impact assessments carried out ahead of the Bill's introduction to the Senedd.

4. Specific observations on powers to make subordinate legislation

The Bill comprises 80 sections and two Schedules, and is split into seven Parts. It contains 15 powers for the Welsh Ministers to make regulations, along with one order-making power, three powers to issue codes, two powers to issue guidance, and two direction-making powers.

80. The Bill also provides powers for governing bodies to issue directions and make determinations, and for head teachers and providers of funded non-maintained nursery education to make determinations. These powers are summarised in Table 5.1 of the EM.

Sections 6, 7 and 8 - Codes relating to What Matters, Progression and RSE

81. Sections 6 to 8 of the Bill require the Welsh Ministers to prepare Codes relating to:

- What Matters – setting out key concepts for each area of learning and experience;
- Progression – setting out the way progression must be reflected in the curriculum arrangements;
- RSE – setting out the core learning to be undertaken in schools and funded non-maintained settings.⁵²

82. In accordance with sections 6(2), 7(2) and 8(2), a curriculum must encompass the concepts set out in the What Matters Code and accord with the Progression and RSE Codes.

⁵² EM, paragraphs 3.62 to 3.68

83. As highlighted by Chapter 2 of the report, the impact of the Bill on human rights has been a key part of our scrutiny.

84. We suggested to the Minister that the Codes to be made under sections 6, 7 and 8 of the Bill would be important for the protection of Convention Rights, and for achieving the Bill's aims.

85. The Minister told us that each of the Codes is slightly different and, therefore, “a differential approach, depending on the nature of the code, might be appropriate”⁵³. The Minister also considered that “some of the codes will be more controversial than other”, suggesting that the Progression Code (to be made under section 7) is likely to be of interest “probably predominantly to the teaching profession”.⁵⁴

86. With regards to the RSE Code, to be made under section 8 of the Bill, the Minister said:

“Given sensitivities around RSE, I can imagine that code will have a great level of interest. Indeed, that’s one of the reasons why we have decided to proceed with the code for relationships and sexuality education, because of the sensitive nature of the content of that part of the curriculum. It’s really important, from a practitioner point of view, that they have that additional level of support around what should be taught in that area of the curriculum. It’s really important, from a parent’s perspective, so they can see very clearly what the intention is in that part of the curriculum.”⁵⁵

87. The Minister went on to say:

“... it’s also really important from a child and young person’s perspective, so they can see very clearly what their entitlement is, and so that they know what a school should be doing to equip them in this particular regard of their life. And that’s particularly important to me... Report after report has evidenced that young people feel that the

⁵³ LJC Committee, 5 October 2020, RoP [43]

⁵⁴ LJC Committee, 5 October 2020, RoP [41]

⁵⁵ LJC Committee, 5 October 2020, RoP [41]

current provision of this part of the curriculum is not meeting their needs. We're obsessed— absolutely obsessed— with talking about biology and the mechanics of sexual relationships. Children need to know about how to keep themselves safe. They need to know what a good relationship looks like, how they can take action and seek help if they find themselves in a toxic relationship or in a violent relationship. It helps them make good choices.”⁵⁶

88. The Minister later added that it was really important to have the RSE code in order to:

“... provide guidance to practitioners, to provide reassurance for parents about what is being taught, and, crucially, sometimes what is not being taught, and why it's being taught, and also to ensure that children are aware of what their entitlement under this part of the curriculum is.”⁵⁷

89. The Codes to be made under sections 6, 7 and 8 of the Bill will be subject to an enhanced negative procedure in the Senedd. Section 72 of the Bill provides that, before issuing or revising each of the Codes, the Welsh Ministers must:

- consult the persons they think appropriate, and
- lay before the Senedd a draft of the proposed Code (or in the case of revisions, the proposed revised Code).

90. Given that much of the detail of the curriculum will be contained in these Codes, in our letter to the Minister on 4 August 2020, we asked her to explain why the Codes are subject to the negative rather than the affirmative procedure.

91. The Minister said that the key principles are set out on the face of the Bill and that the Codes would contain “some detail to aid headteachers, governing bodies and teachers in designing and implementing their curriculum”⁵⁸.

⁵⁶ LJC Committee, 5 October 2020, RoP [42]

⁵⁷ LJC Committee, 5 October 2020, RoP [43]

⁵⁸ Letter from the Minister, 18 September 2020

92. Using the example of the RSE Code, the Minister told us:

“... the RSE Code will set out the themes and matters to be included in teaching and learning for RSE.

The subject-matter of the Code will need to be updated from time to time to reflect emerging issues. The Code and any changes to it will be the subject of consultation. I consider that the negative procedure does provide an appropriate opportunity for the Senedd to scrutinise the Code.”⁵⁹

93. We received little evidence from the Minister on the What Matters and Progression Codes. With regards to assigning the affirmative procedure to the making of the RSE Code, the Minister said:

“I did consider whether notwithstanding that there are aspects of the Code that would indicate that the affirmative procedure is the appropriate procedure e.g. does the it allow us to impose or increase taxation; provision involving substantial Government expenditure; powers to create unusual criminal provisions or unusual civil penalties; or powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion. None of those matters apply in this instance. That though is not the whole picture and I have gone to consider whether the Code gives rise to matters of special importance that would otherwise indicate the affirmative procedure is appropriate.

Whilst the Code will contain themes and matters to be included in RSE it is anticipated that would be of a high level. The provisions on RSE in the Bill were designed not to be prescriptive as its content. Nonetheless a key aspect of the policy on RSE is dealt with on the face of the Bill - the requirement that it must be provided in a developmentally appropriate manner (see sections 24(2) and 52(4) of the Bill). The negative procedure will allow me to respond quickly and amend the Code more quickly in response to new issues in this area.

⁵⁹ Letter from the Minister, 18 September 2020

This area is very sensitive and new complex issues will emerge from time to time.

Further support to schools will be provided by way of statutory guidance which will provide more detailed information on recommendations for the teaching of RSE and in particular on the themes and matters set out in the Code. The negative procedure will provide the Senedd with the opportunity to appropriately scrutinise the Code. It will not be the role of the Code to explain how those matters should be taught.”⁶⁰

94. We pursued this matter further with the Minister and raised with her the Additional Learning Needs (ALN) Code that is made under the *Additional Learning Needs and Education Tribunal (Wales) Act 2018*. The ALN Code is subject to the affirmative scrutiny procedure in the Senedd.

95. We asked the Minister how the Codes to be made under sections 6, 7 and 8 of the Bill differ from the ALN Code in such a way that it makes it more appropriate for these Codes to be subject to the negative procedure. The Minister said:

“... from my perspective, although the word ‘code’ is common to both the ALN legislation and what we’re talking about here, the nature of those codes and what they contain is substantially different. So, the codes that we’re talking about in the development of the curriculum— so, for instance, the RSE code— are essentially a technical teaching document to support the profession. It’s co-constructed with the profession, so it’s very different, I would argue, from the code that we have talked about in the ALN legislation, which encompasses the rights of the child in their entirety. So, the codes we’re talking about here are important, but they are limited sections of a child’s education, whereas the ALN code covers the entirety of that child’s entitlement. So, they’re different by nature.”⁶¹

96. The Minister went on to say:

⁶⁰ Letter from the Minister, 18 September 2020

⁶¹ LJC Committee, 5 October 2020, RoP [31]

“I think the thing that I would be concerned about with the code is undermining that spirit of co-construction. So, you work with the profession to develop that code— it’s part of our capacity building, actually, within the profession— and then that is undercut or professionals second guess whether that will be supported.”⁶²

97. The Minister’s official agreed with the Minister’s comment regarding co-construction of the Code, and added:

“Another factor is that we can foresee some need, perhaps on the RSE code, for example, to have to make some changes to respond to new and emerging issues that crop up from time to time, and to put something in the code to give a strong direction to schools how they should deal with some complex issues. We think the negative procedure lends itself better to that, just because we can progress that more quickly. It would still be subject to full consultation, of course; it would be still be laid and there would still be an opportunity for a vote if that was what was wanted.”⁶³

98. Another official emphasised the difference between the Codes and the ALN Code:

“The progression code, for example, sets out the relationship between schools in delivering progression and what that needs to look like. So, it’s exactly one of those areas that has been co-constructed with the profession for the profession, and the codes are quite similar in that regard. So, the point about them being quite different from the ALN code I think is really important.”⁶⁴

99. Given the Minister’s comment in relation to the RSE code that “This area is very sensitive and new complex issues will emerge from time to time”,⁶⁵ we asked the Minister if she had given any consideration to the first Codes made under

⁶² LJC Committee, 5 October 2020, RoP [31]

⁶³ LJC Committee, 5 October 2020, RoP [32]

⁶⁴ LJC Committee, 5 October 2020, RoP [36]

⁶⁵ Letter from the Minister, 18 September 2020

sections 6 to 8 of the Bill being subject to the affirmative procedure, with subsequent revised versions being subject to the negative procedure. The Minister responded:

“I can give further consideration to that point. However, my original answer still stands in the sense that the nature of these documents, I believe, means that they are best suited to a negative procedure, due to their content, due to their job, really, within supporting professionals. But obviously, as would any Minister, we’ll always give further consideration to any points that are made by the committee.”⁶⁶

100. Section 72(6) of the Bill allows the consultation on the Codes (as required by section 72(2)(a) of the Bill) to be carried out before section 72 comes into force. We asked the Minister whether she intended to make use of this provision, and she replied:

“This provision may be required to be used as much of the content for inclusion in the What Matters code and the Progression code was co-constructed and published in January 2020 as part of the Curriculum for Wales guidance documentation. We do not envisage changes to the What Matters code. We would not want to rule out changes to the Progression code if it is clear that practitioners would benefit from additional explanation. We are assessing the need for changes which would require consultation following enactment of the Bill.

The RSE code is being co-constructed by the RSE Working Group, which includes representation from key stakeholders, and will aim to consult during 2021. Use of the provision in this case is subject to changes to Bill provisions and the timing of the consultation.”⁶⁷

101. The Minister added:

“The purpose of including this provision in the Bill is to ensure that the codes can be shared with head teachers and governing bodies in

⁶⁶ LJC Committee, 5 October 2020, RoP [39]

⁶⁷ Letter from the Minister, 18 September 2020

good time to enable them to develop their curriculum and prepare for implementation in September 2022.”⁶⁸

Our view

102. We note the Minister’s evidence regarding the powers in sections 6, 7 and 8 of the Bill to make the Codes relating to What Matters, Progression and RSE.

103. We consider that these Codes, and the clarity that they will provide, will be fundamental to the delivery of the new curriculum that meets the educational needs of children in Wales. As stated in paragraph 39, we also believe that the Codes will play a significant role in ensuring that the new curriculum is delivered in way that ensures compliance with the Convention rights.

104. As such, we are unconvinced by the Minister’s reasoning as to why the Codes to be made under sections 6, 7 and 8 of the Bill should be subject to the negative procedure in the Senedd.

105. In justifying the negative procedure, the Minister told us that the Codes will be the product of co-construction with the relevant professions and she was therefore concerned that applying the affirmative procedure to the Codes may undermine the spirit of co-construction.

106. While we welcome the Minister’s commitment to involving the relevant professions in developing the Codes, we cannot see a logical link between such co-construction and a reasoned argument for the determination of which scrutiny procedure should be applied.

107. Furthermore, while we are unclear as to why the Codes may need to be revised at pace (as was suggested in evidence), we do not consider that the revision of a Code following the negative procedure as currently prescribed in section 72 of the Bill can be achieved in any less time than if it was subject to a standard affirmative procedure process.

108. The Codes will play a significant role in the delivery of the new curriculum. While a matter of policy, we acknowledge that some of the changes being

⁶⁸ Letter from the Minister, 18 September 2020

introduced through the new curriculum are considerable and that the Codes (along with statutory guidance) set out much of the detail of the curriculum. As such, the Welsh Ministers will need to continue to give consideration to particular sensitivities and differing views when the Codes (and the curriculum more broadly) are developed.

109. We are, therefore, disappointed with the level of detail regarding the Codes that appears on the face of the Bill. For these reasons, while we welcome the duty in section 72(2)(a) requiring the Welsh Ministers to consult the persons they think appropriate before issuing or revising each Code, we consider that applying the negative procedure to the making of these Codes would be an inappropriate use of that procedure. We believe that an enhanced affirmative procedure should apply to the making of the Codes.

Recommendation 1. Section 72 of the Bill should be amended so that the Codes to be made under sections 6, 7 and 8 of the Bill may not be made unless a draft of the proposed Code (or, in the case of the revisions, of the proposed revised Code) has been laid before, and approved by a resolution of, the Senedd. The requirement in section 72(2)(a) of the Bill should be retained.

Section 17 – Power to make supplementary provision about curriculum adoption and revision

110. Section 17(a) of the Bill enables Welsh Ministers to make regulations about steps that need to be taken by a school or setting before adopting a curriculum. Section 17(b) enables Welsh Ministers to set the date by which a curriculum must be adopted. Section 17(c) provides a power to specify additional circumstances in which a curriculum must be revised.

111. The Statement of Policy Intent notes that the Welsh Ministers do not intend to make use of these powers. It states that Welsh Government believes “there is sufficient provision on the face of the Bill in respect of these matters”.⁶⁹ Given this statement, we asked the Minister to confirm why the powers in section 17(a) and (c) are necessary. The Minister told us:

⁶⁹ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

“At present I do not anticipate the need to make use of the regulation making powers under section 17(a) and (c). However, should issues come to light or circumstances change, they allow the Welsh Government to make any necessary provision. As stated in the SOPI, it is not possible to entirely foresee how practice will develop. Regulation making powers under these subsections have been included to ensure that the system remains workable in case it becomes apparent that the requirements on the face of the Bill are insufficient.

Regulations, if required, would be the subject of public consultation.”⁷⁰

112. We pursued this issue further with the Minister on 5 October and asked again why the Minister was including powers in the Bill with no intent on using them. We also asked what would the powers be used to do, if a decision was taken to make use of them. The Minister said:

“... at present I do not anticipate the need to make use of the regulation-making powers under section 17, other than to specify a date by which the curriculum must be adopted. If necessary, we may make provision that would set out a date by when a curriculum must be adopted or perhaps impose a consultation requirement. The key duties, such as who must adopt and what must be adopted, are actually on the face of the Bill.

However, should circumstances change or issues come to light, these regulation powers would enable the Government to make provisions as appropriate. So, for example, we could need to use these powers in relation to the revision of the curricula to reflect any significant change to curriculum requirements in the future.”⁷¹

113. With regards to the scrutiny procedure attached to the regulation-making power in section 17, the Minister said:

⁷⁰ Letter from the Minister, 18 September 2020

⁷¹ LJC Committee, 5 October 2020, RoP [48] and [49]. See also [50].

“I would argue that these provisions are relatively minor in the overall Bill and therefore we felt that the negative procedure was appropriate in this particular instance.”⁷²

114. Given that the need for the regulation-making power is unclear, we asked whether the power should be subject to a sunset-provision. The Minister’s official said he did not think so, and added:

“It’s not so much how it pans out, say, in the first year of the curriculum, for example. These issues could crop up at any point across a range of settings, so we would need to keep them in long term.”⁷³

Our view

115. We note the Minister’s evidence regarding the regulation-making powers in section 17 of the Bill, and specifically the Minister’s comments that, at present, she has no intention of using these powers.

116. As a matter of good law-making, we remind the Welsh Ministers that we do not consider it appropriate for a government to take executive powers via a Bill when that government has no intention of using those powers.

117. The Minister herself acknowledged that “once it’s on the statute book, it’s on the statute book and a different Minister could use [the powers] to different effect”.⁷⁴ As such, and in line with the Minister’s statement, we take the opportunity to re-iterate that consideration must always be given to what a Bill permits a Welsh Minister to do via subordinate legislation and not just to what a current Welsh Minister says they will do with that power.

Recommendation 2. The Minister should use the Stage 1 debate to provide further clarity regarding the powers in section 17 of the Bill and how they may be used by the Welsh Ministers.

⁷² LJC Committee, 5 October 2020, RoP [49]. See also [50].

⁷³ LJC Committee, 5 October 2020, RoP [52]

⁷⁴ LJC Committee, 5 October 2020, RoP [28]

118. We also note that regulations made under section 17 of the Bill are subject to the negative procedure.

Section 25 – Power to impose further curriculum requirements

119. Section 25(1) of the Bill confers a regulations-making power on the Welsh Ministers to make regulations specifying additional curriculum requirements for learners in school years 10 and 11.

120. The Statement of Policy Intent indicates that the power could be used to require schools to provide a particular course of study in the event the curriculum is not sufficiently broad and balanced.⁷⁵

121. In the event that some schools offer a narrow curriculum for learners in school years 10 and 11, it may be too late for those learners by the time the issue has been brought to the attention of the Minister and any regulations have been made. For that reason, we asked the Minister what consideration was given to placing such requirements on the face of the Bill. The Minister told us:

“Consideration was given to including additional detail on the face of the Bill. However, I feel that a provision on the face of the Bill would not offer the flexibility needed. We anticipate that we will need to see how schools’ practices develop, in the context of a very new type of curriculum, and what the shortfalls (if any) there are. For example, the Education (Local Curriculum for Pupils in Key Stage 4) (Wales) Regulations 2009 make this type of provision for the local curriculum at key stage 4. The first iteration of those regulations has been amended to prescribe different requirements as to courses of study for the local curriculum.”⁷⁶

122. We asked the Minister what she intended to do with the regulation-making power in section 25, and why the power was different to the power in section 17. The Minister said:

⁷⁵ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

⁷⁶ Letter from the Minister, 18 September 2020

“Well, section 25, as you said, looks to give the power to impose further curriculum requirements, especially for 14 to 16. This is to ensure that there is a broad and balanced curriculum delivered right the way through to the end of statutory education. Suzy, you and I are aware that sometimes one of the unintended consequences of an accountability regime that we’ve had in the past has led to a narrowing of the curriculum, where the core is focused on, sometimes to the exclusion of other subjects and other experiences. So, we’re looking to make sure that there are safeguards to ensure that there is a broad and balanced curriculum delivered right the way through to 16. The powers to make regulations, then— as I say, we could act if we felt, as I said, probably, the curriculum was too narrow, but it would potentially give us powers to effect change if we felt the curriculum was too broad.”⁷⁷

123. We also asked the Minister to explain, in more detail, the power in section 25(3)(b) of the Bill. The Minister told us:

“Well, again, it’s to make sure that the curriculum is appropriate. My main fear is a narrowing of the curriculum, especially if a child isn’t necessarily taking a formal qualification. So, the intention of the Bill is that each child would study an element of each of the areas of learning and experience right the way through to the age of 16, even if they weren’t going to sit a formal qualification at the end of it, to ensure that that experience was broad.

I guess, in the question of too much, inadvertently perhaps we could have schools expecting children to take a huge range of subjects, which might be detrimental, perhaps, to a child’s well-being. We seem to have children these days that sit many, many more GCSEs than perhaps any of us certainly did, and that can put an immense pressure. So, again, it’s about having that balance there.”⁷⁸

⁷⁷ LJC Committee, 5 October 2020, RoP [56]

⁷⁸ LJC Committee, 5 October 2020, RoP [58] and [59]

124. The Minister's official added:

"The only thing that I might add is that, at the moment, we have the local curriculum for the same cohort of pupils. We're not keeping that in exactly the same way in this Bill. But for the ages 14 to 16, we do allow those pupils to delve down into more detail in a range of subjects, and so we're retaining these regulation-making powers that originate from the local curriculum provisions at the moment. And so the kind of things we have in mind would be, for example, specifying a minimum number of courses or perhaps a maximum number of courses you could take. It's one of the things that we've done with the local curriculum regulations. Another example would be specifying you have to include a range of vocational and non-vocational courses to cater for a spread of talents."⁷⁹

125. Given that regulations under section 5 of the Bill (which are concerned with mandatory aspects of the curriculum) are subject to the affirmative procedure, we asked the Minister to confirm why the negative procedure is considered appropriate for regulations made under section 25(1). The Minister said:

"The key principles are again set out on the face of the Bill. The Regulations made under this power will contain some detail. However, we anticipate that we need to see how schools' practices develop, in the context of a very new type of curriculum.

This Regulation making power could not be used to make Regulations that would amend other provisions in primary legislation."⁸⁰

126. The Minister's official also said:

"Section 5, as you say, is subject to the affirmative procedure. It's the Henry VIII power that allows us to amend the face of the Bill— primary legislation— and so we consider affirmative is important for that and appropriate. Here, we wouldn't be amending primary legislation, it would just be including provision by way of regulations. As I say, it's the

⁷⁹ LJC Committee, 5 October 2020, RoP [60]

⁸⁰ Letter from the Minister, 18 September 2020

continuation of the powers that we have to make regulations in this area for the local curriculum. Negative procedure attaches to that. And, again, the key principles are set out on the face of the Bill, in terms of allowing pupils in the 14-to-16 cohort to narrow down a little bit and focus in more detail on particular things. The detail that would be in here is just about minimum and maximum number of courses. It's the sort of thing that would evolve from time to time."⁸¹

127. The Minister concluded by saying:

"... these are not major changes. They aren't massively different from what's already included in the education and local curricula for pupils in the key stage 4 regulations of 2009. So, it's not massively revolutionary, it's just to provide those safeguards."⁸²

Our view

128. We note the Minister's evidence regarding the power in section 25 of the Bill which enables Welsh Ministers to make regulations that may impose further curriculum requirements in relation to pupils aged 14-16 at a maintained school. We further note that this power could be used to require schools to provide a particular course of study in the event the curriculum is not sufficiently broad and balanced.

129. While we acknowledge the Minister's view that flexibility is needed to see how schools' practices develop, as we set out when questioning the Minister, we have concerns that this is a broad power that can impose further curriculum requirements, which are a key aspect of this Bill.

130. For this reason, we consider that the Minister should include more detail on the face of the Bill that specifies when and why the power may be used. We do not consider that section 25(3) of the Bill provides an appropriate level of detail.

⁸¹ LJC Committee, 5 October 2020, RoP [62]

⁸² LJC Committee, 5 October 2020, RoP [63]

Recommendation 3. Section 25 of the Bill should be amended to include a non-exhaustive (but comprehensive) list of the circumstances in which the regulation-making power in section 25(1) may be used by Welsh Ministers.

131. Furthermore, for the same reasons set out above, we do not consider it appropriate for the negative procedure to be used to make such regulations.

Recommendation 4. The Bill should be amended so that regulations made under section 25(1) are subject to the affirmative procedure.

Sections 33 and 34 – Power to disapply duty to implement pupil choice

132. Pupils embarking on GCSE courses can choose some of their teaching and learning but, under section 33 of the Bill, a head teacher may determine that the duty to secure the teaching and learning does not apply if a ‘relevant ground’ applies. Sections 33(3) and (4) of the Bill sets out the relevant grounds.

133. Section 33(6) of the Bill contains a Henry VIII power that enables regulations to amend subsections (3) and (4). Such regulations will be subject to the affirmative procedure. The Statement of Policy Intent notes:

“It is anticipated that the grounds for refusal set out above may need to evolve over time. It is possible that future grounds may relate to whether an individual choice will offer sufficient breadth and balance. We consider it appropriate that Regulations should be able to amend that detail as the need arises.”⁸³

134. In accordance with section 34 of the Bill, a head teacher must give specific information when informing the pupil and their parents of a determination made under section 33. Section 34(5) of the Bill enables the Welsh Ministers to make further provision (in connection with determinations under section 33) by regulations subject to the negative procedure.

135. According to the Statement of Policy Intent, it is anticipated that regulations made under section 34(5) may deal with matters such as time limits

⁸³ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

by which the head teacher must make a determination or the procedure to be followed in making such a determination.⁸⁴ The Statement notes that it is not the intention to make regulations in this regard at the outset as “the procedures outlined on the face of the Bill are clear about the responsibility of schools”.⁸⁵

136. As there is no information on the face of the Bill regarding time limits or procedures and given that this may impact pupils embarking on GCSE examinations where any process will need to be timely, we asked the Minister to confirm what consideration was given to placing more detail on the face of the Bill or requiring rather than permitting regulations to be made. The Minister told us:

“Consideration was given to including additional detail on the face of the Bill. However, I feel that a provision on the face of the Bill would not offer the flexibility needed. The detail I anticipate that will be needed as set out in the SOPI is of a technical nature that is likely to evolve over a period of time. That is consistent with other education legislation. For example, in relation to pupil exclusions, the detail of the appeal procedures and time limits is set out in secondary legislation (see the Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003 (SI 2003/3227)).

Whilst I appreciate the point made in your question, it is not possible to entirely foresee how practice will develop and there may still not be a need for these regulations to be made. Therefore, I do not feel it is necessary to require that these regulations be made. If evidence does begin to emerge then regulations will provide the most appropriate legislative vehicle to address this issue. They will allow the Government to amend the detail of any time limits from time to time and in response to changing circumstances.”⁸⁶

⁸⁴ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

⁸⁵ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

⁸⁶ Letter from the Minister, 18 September 2020

137. We pursued this matter further with the Minister, and asked her to clarify her reasoning as to why a regulation-making power was more appropriate than more detail on the face of the Bill. The Minister said:

“... section 33 specifies the grounds on which a headteacher is able to refuse a pupil’s decision to pursue teaching and learning chosen by the pupil under section 24. Subsection (2) of this section enables the headteacher to make a determination to refuse that choice. Subsection (4) means it’s possible to reverse a decision to allow a pupil to take a course. It may be disproportionate cost or unacceptable— . It’s limited: disproportionate cost and unacceptable health and safety risks to other pupils. They’re not subject to a legislative procedure because it really is a matter for headteachers in the day-to-day running of their schools, and alongside their staff, they’re in the best position to make such determinations. However, section 34(5) would enable the Welsh Ministers to make further provision to regulate these powers if that need arises. Again, we have to have a balance here in terms of the day-to-day running of schools. We could find ourselves in a situation where it was simply impossible for a school to make reasonable endeavours to provide that if that was the only child in the school that wanted to study that particular subject. So, we have to qualify that right in some way because of the practicalities of running an education system. (...)”

I think we could use greater regulation powers... to maybe put in some details about how that process would work. So, you might want to have some details and regulations about timescales and procedures around that, but the principles of when a headteacher can use those powers are on the face”.⁸⁷

138. The Minister’s official added:

“... this set of provisions in the main replicates what’s there for the local curriculum portion of the curriculum at the moment, and the sorts of information and details that would go in the regulations are of that

⁸⁷ LJC Committee, 5 October 2020, RoP [68] and [70]

sort of technical nature, with the key principles already being set out on the face of the Bill— so, for example, who makes a determination, under what grounds they make that determination.”⁸⁸

Our view

139. We note the Minister’s evidence regarding the regulation-making powers in section 33 of the Bill. We further note that the power in section 33(6) is a Henry VIII power, in that it enables regulations to amend the face of the primary legislation. We acknowledge that such regulations will be subject to the affirmative procedure, and are content.

140. With regards to the regulation-making power in section 34(5) of the Bill, we note the Minister’s evidence on this power. While we are content that the negative procedure applies to such regulations, we would welcome more clarity about whether this power may be used by the Welsh Ministers in ways other than applying time limits by which the head teacher must make a determination or the procedure to be followed in making such a determination.

Recommendation 5. The Minister should use the Stage 1 debate to provide further clarity regarding the power in section 34(5) of the Bill and how it may be used by the Welsh Ministers.

Section 40 – Development work and experiments

141. Section 40 of the Bill allows the Welsh Ministers to give a direction to a school disapplying or modifying any of the implementation requirements set out in sections 29 to 32 for experimental or developmental purposes. Such a direction will be subject to no procedure in the Senedd.

142. The Statement of Policy Intent notes:

“Section 41 specifies two conditions that must be satisfied before a direction can be given under section 40.

⁸⁸ LJC Committee, 5 October 2020, RoP [69]

The first condition is that the curriculum that will be put in place, as a result of the direction, will enable pupils and children to develop as outlined in the four purposes; offer appropriate progression; be appropriate to the pupils' or children's age, ability or aptitude; take into account their additional learning needs (if any); and secure broad and balanced teaching and learning.

The second condition, in the case of a school, is that the local authority has applied for the direction with the agreement of the governing body, or vice versa; or that, where no application has been made, both the governing body and the local authority agree to the direction being given. For a foundation or voluntary aided school there is no role for the local authority in this regard.

For funded non-maintained settings it is the local authority and the setting that must agree to a proposal for a direction brought by a local authority or the Welsh Ministers.”⁸⁹

143. Section 42 of the Bill provides supplementary detail about the power of direction in section 40.

144. The Statement of Policy Intent also states that “the nature of this power is such that it will only be used in rare circumstances”.⁹⁰

145. We asked the Minister to provide some example circumstances. In her letter, the Minister told us that this might involve an innovative project that is designed to test a new policy idea and raise educational standards. The Minister also said that she anticipated that this power would be used for smaller scale experiments, perhaps involving 1 or a few schools.⁹¹

146. We followed-up on this matter when the Minister provided evidence to us on 5 October 2020, and asked her to provide particular examples of what sort of project would lead the Minister to consider disapplying or modifying any of the curriculum implementation requirements. The Minister suggested that the

⁸⁹ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

⁹⁰ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

⁹¹ Letter from the Minister, 18 September 2020

implementation of the foundation phase could be considered a past example. She said:

“So, these are quite substantial powers, to be able to disapply the rest of the Bill, but in sections 41 and 42, we give some more detail about how that power can be used. But, for instance, let me think of a past example— the implementation of the foundation phase. So, you might have a new approach to teaching a particular cohort of the school and you might want to have pioneer schools that are engaging in the discussion, implementation and the trialling of that. So, in the new curriculum, you might use these powers to trial a new ‘what matters’ statement— so, if you were having a review of the ‘what matters’ statements. Or you could, for instance, perhaps be introducing a review of a part of an entire AoLE. You might be delivering a new AoLE. So, it’s about giving the flexibility to allow for innovation within the curriculum. So, as I said, previously, you might think about the introduction of a play-based early years agenda, to create the space to do something like that, or as I said, to amend the ‘what matters’ statements, or perhaps create a new AoLE, or a different type of organisation within the curriculum. So, it’s a space to allow innovation.”⁹²

147. The Statement of Policy Intent indicates that section 50 of the Bill is designed to reflect the existing provision in section 112 of the *Education Act 2002*, and that that power was used to disapply aspects of the national curriculum when trialling the foundation phases in certain schools. The Statement notes that it is anticipated that the power in section 50 of the Bill would be used for similar purposes.⁹³

148. We therefore asked the Minister to confirm how the power in section 40 of the Bill differs from the power in section 50(1) of the Bill which would also allow for disapplication or modification of the curriculum. The Minister told us:

⁹² LJC Committee, 5 October 2020, RoP [76]

⁹³ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

“Section 50 is designed to confer a power broadly equivalent to that in section 112 of the Education Act 2002. The power in section 112 of the 2002 Act was used when the Foundation Phase was piloted in 2008 (see the Education (Disapplication of the National Curriculum for Wales at Key Stage 1) (Wales) Regulations 2008 (SI 2008/1736)). Another example of the use of the section 112 power are the Education (National Curriculum for Wales) (Disapplication of Science at Key Stage 4) Regulations 2006 (SI 2006/1335). In that case the Regulations disapplied the requirements of the National Curriculum for Wales for science in relation to a pupil where the head teacher of the school is satisfied that the pupil is pursuing a course leading to an approved external qualification from the National Qualifications Framework at entry level, level 1 or level 2. I anticipate that this power will be used for matters that are of more general application and therefore are best suited to being dealt with by regulations which must be laid before the Senedd. I anticipate section 40 being used to deal with matters that are not of general application i.e. not all schools and which, for example, just affect one or a relatively small number of schools to address issues that are very specific to those schools.

I anticipate that the power would be used for similar initiatives in the future.”⁹⁴

Our view

149. We note the Minister’s evidence regarding the power in section 40 of the Bill that will permit the Welsh Ministers to give a direction to a school disapplying or modifying any of the implementation requirements set out in sections 29 to 32 for experimental or developmental purposes, provided that certain conditions set out in section 41 are met.

150. As the Minister herself has said, despite the prerequisite conditions listed in section 41, this power of direction is a substantial power to be given to the Welsh Ministers.

⁹⁴ Letter from the Minister, 18 September 2020

151. The Minister cited the past implementation of the foundation phase in schools as an example of how the powers both in section 40 and 50 may be used. For this reason, and given the extent of the power in section 40 of the Bill, we believe the Minister needs to provide more clarity on why this power is needed over and above the power in section 50 of the Bill.

Recommendation 6. The Minister should use the Stage 1 debate to provide clarity as to why the power in section 40 of the Bill is needed in addition to the power in section 50 of the Bill. In doing so, the Minister should provide a further explanation on how the power of direction in section 40 may be used by the Welsh Ministers.

152. We note that the power of direction in section 40 of the Bill is subject to no procedure. Given the nature of this power, we consider that transparency of its use will be important.

Recommendation 7. The Welsh Ministers should notify Senedd Members via written statement on each occasion that the power of direction under section 40 of the Bill is used.

Section 47 – Appeals about temporary exceptions for individual pupils

153. Section 47(8) of the Bill provides Welsh Ministers with a power to make regulations in connection with appeals about temporary exceptions for individual pupils. Regulations made under section 47(8) are subject to the negative procedure.

154. The Statement of Policy Intent states that the Welsh Government does not anticipate using these powers at the outset to make further provisions about the appeals process. However, the Statement also notes that consideration is being given to using the powers at the outset to set time-limits for appeals.⁹⁵

⁹⁵ Curriculum and Assessment (Wales) Bill: Statement of Policy Intent

155. Given the impact that such decisions could have on an individual pupils' education, we asked the Minister to confirm whether any consideration has been given to placing time-limits on the face of the Bill. The Minister told us:

“Section 47(8) of the Bill provides a power for the Welsh Ministers to make regulations making further provision in connection with appeals under this section. We consider that whilst the power does allow us to make provision in respect of the time limits for appeals, we consider that it is more appropriate to allow schools the flexibility to determine their own procedures at this stage. We will continue to monitor the situation and should evidence emerge that there is a need for such provision in regulations then we can regulate accordingly.

We also consider that, as with the regulation making powers in section 34(5)..., setting out this sort of detail on the face of the Bill would not offer adequate flexibility that schools might need. If it does become necessary to legislate in this area then I anticipate that regulations will offer the appropriate amount of flexibility needed and can be amended from time to time more easily than is practical with a Bill. The Bill sets out entirely new arrangements for school curriculums and it is important to assess how school and indeed pupil needs develop.”⁹⁶

156. We pursued this matter further with the Minister on 5 October. The Minister reiterated her view that putting detail on the face of the Bill would not offer the adequate flexibility that schools may need in this aspect of the work.⁹⁷ The Minister also said:

“I have to say we are considering whether it would be helpful to use these powers at the outset to make regulations specifying time limits for appeal. So, we're doing some more thinking in this area. But it's about flexibility, primarily.”⁹⁸

⁹⁶ Letter from the Minister, 18 September 2020

⁹⁷ LJC Committee, 5 October 2020, RoP [78]

⁹⁸ LJC Committee, 5 October 2020, RoP [78]

Our view

157. We note the Minister's evidence regarding section 47 of the Bill which provides Welsh Ministers with a power to make regulations in connection with appeals about temporary exceptions for individual pupils.

158. We acknowledge that the Minister does not intend on using the regulation-making power straight away to make further provision about the appeals process.

159. We also acknowledge that the Minister is giving consideration to using the powers in section 47 at the outset to set time-limits for appeals. However, while a matter of policy, given the impact that decisions regarding temporary exceptions could have on an individual pupils' education, and as the Minister has already assessed the need for such time-limits to be specified, we are unclear why the Minister has not set-out that information on the face of the Bill or placed a requirement on the Welsh Ministers to make regulations that will set the time-limits for appeals (as opposed to providing the Minister's with a general power).

160. We acknowledge that placing the time-limits for appeals on the face of the Bill may not appear to offer the flexibility which the Minister considers is necessary. As such, if the Minister was to take this approach, we believe it reasonable that there should also be an accompanying provision that would permit the time-limits to be amended via regulations. Such a Henry VIII power must be subject to the affirmative procedure.

Recommendation 8. Section 47 of the Bill should be amended so that:

- the time-limits in respect of appeals about temporary exceptions for individual pupils are included on the face of the Bill;
- such time-limit provision may be amended by regulations made by the Welsh Ministers which are subject to the affirmative procedure.

161. Should the Minister not be persuaded by our conclusions set out above and therefore reject recommendation 8, the Welsh Ministers must bring forward regulations which set-out the time-limits for appeals.

Recommendation 9. Should the Minister reject recommendation 8, section 47(8) of the Bill should be amended so that Welsh Ministers are placed under a duty to make regulations that make further provision regarding the time-limits for appeals under the section.

162. We agree that regulations under section 47(8) should be subject to the negative procedure.

Section 50 – Power to make provision for further exceptions

163. Section 50(1) gives the Welsh Ministers a power to make Regulations, subject to the negative procedure, that disapply or modify the curriculum implementation requirements in cases or circumstances specified in the regulations.

164. Section 50(2) allows the Regulations to permit another person to exercise their discretion about disapplying or modifying a curriculum requirement. We asked the Minister what safeguards she envisaged would be in place to ensure there is proper exercise of that discretion. The Minister told us:

“I recognise that disapplication or modification of the curriculum for any pupil is a serious step. However, any such proposal would be subject to prior consultation and the scrutiny of the Senedd through the laying of Regulations made under section 50 of the Bill.

If it was thought necessary in the regulations to confer a discretion on another person it would be possible to place some limitations on the exercise of that restraint, for example, the limits on the circumstances when and how the discretion could be exercised or may place time limits on how long that discretion may be exercised for.”⁹⁹

⁹⁹ Letter from the Minister, 18 September 2020

Our view

165. We note the Minister’s evidence regarding the power in section 50 of the Bill to make provision for further exceptions to the curriculum implementation requirements.

166. The Minister herself recognised that the disapplication or modification of the curriculum for any pupil is a serious step. While we acknowledge the Minister’s comments that any such proposal would be subject to prior consultation, we note that there are no conditions attached to the exercise of these powers.

167. Furthermore, we note that section 50(2) permits another person to exercise their discretion about disapplying or modifying a curriculum requirement and appropriate safeguards are likely to be needed for a person exercising such a discretion.

168. For these reasons, we do not consider that the negative procedure is an appropriate procedure to be applied to the power in section 50.

Recommendation 10. The Bill should be amended so that regulations made under section 50 are subject to the affirmative procedure.

Section 67 – Power to make provision for children receiving education in more than one setting

169. Section 67(1) of the Bill provides a wide power for Welsh Ministers to make regulations about teaching and learning for learners who receive education in more than one setting. The power could be used to define what is meant by full-time education.

170. We asked the Minister why is the negative procedure appropriate for such a wide power. In her letter to us dated 18 September, the Minister told us:

“Section 67 is needed to address the position of children receiving education in more than one setting. Say a child is receiving education at a school, and in a PRU, it would not be possible to apply the usual curriculum requirements to both the PRU and the school, because neither of them can implement a full curriculum for the child. The

power in section 67(1) can be used to make provision about how the curriculum should work for a child in this position, and who the various duties should fall on.

In addition, some children will also be receiving education at only one setting, but for such a limited number of hours that it is inappropriate to apply the usual curriculum requirements to that setting. (An example might be a pupil who has been off school entirely due to stress, but who is gradually returning to school, say for 3 hours a week initially.) The power in section 67(1) could be used to make provision for these children. But in doing so it is likely to need to refer to the number of hours of teaching and learning that a child is receiving in a setting – for instance, by making provision about how the curriculum is to apply to children who are receiving only between 3 and 5 hours a week of teaching and learning at a setting.

The fact that there is no definition of full-time education is part of the background to this provision. If there was a statutory definition of full-time education, section 67 could simply state that it applies to children who are not receiving full-time education. But in the absence of this, these children will need to be defined in the regulations, and this may be done by reference to hours of education received. The object of using the power in this way would not be to define full-time education, for the purposes of education legislation generally, but to make flexible provision about how the curriculum is to apply, in the context of the varying and limited number of hours some children may be receiving at a particular setting. We consider that this detail is largely of a technical nature.”¹⁰⁰

171. When the Minister attended our meeting on 5 October, we asked her to expand on when this power might be used, and again asked why the negative procedure is considered appropriate for such a wide-ranging power. The Minister said:

¹⁰⁰ Letter from the Minister, 18 September 2020

“... the section enables the Welsh Ministers to make regulations about teaching and learning for learners who, for example, may be a registered pupil at a maintained school or nursery school, or a pupil referral unit, but also are receiving education at another such setting. This section also permits regulations of this type to be made about other children of compulsory school age who are described in the regulations themselves. This provision is needed to ensure that the regulations make provision about teaching and learning to be provided to children who are receiving part-time education, but not education in more than one setting. So, an example of that might be a child who is perhaps seriously, seriously unwell, or perhaps recovering from serious illness who may be receiving two hours of education a week at home. The curriculum requirements in the Bill would not be appropriate for a child in this position, I would suggest, and so provision will need to be made in the regulations about what criteria the education should meet. So, as you can imagine, there could be large numbers of permutations possible in that context, and the level of detail that would need to be entered into, so I consider it necessary to deal with the position of this small class of children by way of regulations, rather than the face of the Bill itself. So, I think, again, it's about flexibility and recognising that there could be some very specific needs of individual children who find themselves in this way, and having a curriculum that is appropriate for them.”¹⁰¹

172. In relation to the negative scrutiny procedure being attached to the regulation-making power in section 67, the official accompanying the Minister said:

“... we do understand the point being made that it's a regulation-making power that applies to a disparate group of pupils, and the reason we couldn't deal with it on the face of the Bill is just there'd be so many permutations it would just be impossible. Going to the particular question about the negative procedure, we would argue that the key principles are there on the face of the Bill, it's just making

¹⁰¹ LJC Committee, 5 October 2020, RoP [81]

those work for this fairly narrow group of pupils. So, it wouldn't be setting out any new or substantive policy ideas or principles; that's all there on the face of the Bill. It's really about just making these different institutions work together to work for this fairly small cohort of pupils."¹⁰²

Our view

173. We note the Minister's evidence regarding the power in section 67 of the Bill for Welsh Ministers to make regulations about teaching and learning for learners who receive education in more than one setting.

174. While we are content that the negative procedure applies to regulations made under section 67 of the Bill, we believe that more clarity is needed on how this power may be used, particularly as regards its potential use to define what is meant by full-time education.

Recommendation 11. The Minister should use the Stage 1 debate to clarify the power in section 67 of the Bill and how it may be used by Welsh Ministers.

General provisions

175. Section 70(1) of the Bill provides the Welsh Ministers with a power to make regulations to amend primary and secondary legislation where necessary or appropriate to enable the new curriculum framework to operate.

176. Such regulations will be subject to the negative procedure and may make:

- supplemental provision, incidental provision or consequential provision;
- transitory, transitional or saving provision.

177. With regards to regulations that make transitory, transitional or saving provision, the Minister said that this would only include provision that was needed to move from the existing curriculum and assessment arrangements to the new smoothly. The Minister provided an example of some aspect of the

¹⁰² LJC Committee, 5 October 2020, RoP [84]

curriculum may be needed to be retained for a cohort of pupils to avoid any unfairness to them.¹⁰³

178. The Minister also said that provision of this type might include provision amending primary legislation. For example, the Bill will change the name of “religious education” to “Religion, Values and Ethics”. The Minister said that those references will need to be changed across the statute book, and identified them as consequential amendments.¹⁰⁴ The Minister also said:

“It is possible that we may not identify and amend all such references in the Bill in which case this power would be used to make those changes and ensure consistency in the statute book in this respect.

This power cannot be used to make provision - whether through the Henry VIII power or otherwise - that contains new substantive provision. Rather it will allow amendments to be made to primary legislation, for example, to ensure all references to religious education are amended to refer to the new subject of RVE where appropriate.

The scope of the power is to give the best effect to the policy intentions of this Bill as approved by the Senedd, enable it to be implemented effectively and ensure that the wider statute book is kept up to date and accessible.”¹⁰⁵

179. We asked the Minister why regulations made under section 70(1) will be subject to the negative procedure when they may be used to modify primary legislation. The Minister told us:

“... I think that’s a fair cop, and it’s my intention to bring forward a Government amendment in relation to section 70, which will have the effect of ensuring that any regulations made under this provision that amend primary legislation would be subject to draft affirmative procedure. On reflection, the point that the committee makes today, and I know the committee has made previously, is that it’s not

¹⁰³ Letter from the Minister, 18 September 2020

¹⁰⁴ Letter from the Minister, 18 September 2020

¹⁰⁵ Letter from the Minister, 18 September 2020

appropriate to amend primary legislation in a negative way. So, we will bring forward amendments to address that at Stage 2.”¹⁰⁶

180. Section 79(2) of the Bill enables the Welsh Ministers to make orders providing for commencement of certain provisions in the Bill.

181. The Committee’s previous recommendations on this matter on other Bills have been that commencement orders that include ‘transitory, transitional or saving provision’ should be subject to the negative procedure.

182. We asked the Minister what assessment was undertaken before deciding that commencement orders made under section 79(2) would not be subject to any Senedd procedure. The Minister said:

“I note the Committee’s views on this matter. However, any commencement Order made under this Bill will not contain new policy. It is there solely to switch on the provisions in the Bill which would at that point have been approved by the Senedd.”¹⁰⁷

Our view

183. We note the Minister’s evidence regarding the regulation-making power in section 70 of the Bill. We welcome the Minister’s commitment to amend the Bill so that regulations made under section 70 which amend primary legislation will be subject to the affirmative procedure.

184. We note the Minister’s evidence regarding the power in section 79 that enables the Welsh Ministers to make orders providing for commencement of certain provisions in the Bill. We note that such commencement orders made under section 79(2) of the Bill will not be subject to any Senedd scrutiny procedure.

¹⁰⁶ LJC Committee, 5 October 2020, RoP [86]

¹⁰⁷ Letter from the Minister, 18 September 2020