

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Professional Qualifications Bill

January 2022



1. Background

The UK Government's Professional Qualifications Bill

1. The UK Government's Professional Qualifications Bill¹ (the Bill) was introduced into the House of Lords and had its first reading on 12 May 2021. The Bill is sponsored by the UK Government Department for Business, Energy and Industrial Strategy.
2. The Bill completed its stages in the House of Lords on 17 November 2021 and had its first reading in the House of Commons on 18 November 2021. Committee Stage in the House of Commons was completed on 20 January 2022. A date for Report Stage in the House of Commons is yet to be announced.

The Welsh Government's Legislative Consent Memorandum

3. Standing Orders 29.1 and 29.2 provide that a Legislative Consent Memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.
4. On 17 June 2021 Jeremy Miles MS, the Minister for Education and Welsh Language (the Minister), laid before the Senedd a Legislative Consent Memorandum² (the Memorandum) in respect of the Bill.
5. We reported on the Memorandum on 30 September 2021.³ The Minister formally responded to our report on the Memorandum on 6 October 2021.⁴
6. On 5 October 2021, the Senedd voted against a motion to give consent to the relevant provisions in the Bill.⁵ During the debate, and as outlined in the Memorandum, the Minister indicated that he had urged the UK Government to make amendments to the Bill and informed the Senedd that until such changes were made and assurances were received he would not recommend to the Senedd that it gives its consent to the Bill.⁶

¹ [Professional Qualifications Bill, as introduced](#) (HL Bill 2)

² Welsh Government, [Legislative Consent Memorandum, Professional Qualifications Bill](#), June 2021

³ Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill](#), September 2021

⁴ [Letter from the Minister for Education and Welsh Language](#), 6 October 2021

⁵ [Plenary](#), 5 October 2021

⁶ [Plenary](#), 5 October 2021

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2)

7. On 6 December 2021, the Minister laid before the Senedd a Supplementary Legislative Consent Memorandum⁷ (Memorandum No. 2) in respect of amendments made to the Bill on 9 November 2021 during Report Stage in the House of Lords.

8. The Business Committee agreed that the Economy, Trade and Rural Affairs Committee and the Legislation, Justice and Constitution Committee should report on Memorandum No. 2 by 10 February 2022.⁸

Update on the Welsh Government's position and amendments made to the Bill for which consent is sought since the publication of the Memorandum

9. Paragraphs 8 to 11 of Memorandum No. 2 provide an update on the position since the publication of the Memorandum, and state how Memorandum No. 2 differs from the Memorandum laid before the Senedd in June 2021.

10. Paragraphs 12 to 20 set out the amendments made to the Bill at Report Stage in the House of Lords for which consent is now being sought.

11. Memorandum No. 2 states:

"The UK Government has made amendments to Clause 1 of the Bill as introduced and inserted additional clauses 14 and 15, as agreed at the House of Lords Report Stage on 9 November."⁹

12. At paragraph 9 of Memorandum No. 2 the Minister confirms that he remains concerned about the continued inclusion of concurrent regulation-making powers in the Bill. This concern is reflected in the Minister's comments as regards clause 1, new clause 14 and new clause 15.

13. As regards clause 1 of the Bill and the amendment made to it, Memorandum No. 2 notes the Minister's continued opposition to this clause as "the UK Government has refused to remove the concurrent powers given to the Secretary of State and Lord Chancellor".¹⁰

⁷ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 2), Professional Qualifications Bill, December 2021

⁸ Business Committee, Timetable for consideration: Supplementary Legislative Consent Memorandum (Memorandum No. 2) on the Professional Qualifications Bill, December 2021

⁹ Welsh Government, Memorandum No. 2, paragraph 11

¹⁰ Welsh Government, Memorandum No. 2, paragraph 14

14. At paragraph 14 of Memorandum No. 2 the Minister states:

"In an effort to be constructive, officials have indicated to the UK Government on several occasions that I may be prepared to recommend consent for this Bill, including clause 1, if an amendment is made to require the Secretary of State and Lord Chancellor to obtain the consent of the Welsh Ministers before making any legislation in areas which have been devolved to Wales. However, the UK Government has not been prepared to make any such amendment."

15. As such, Memorandum No. 2 confirms that the Minister will not recommend that the Senedd grants consent for clause 1 of the Bill.¹¹

16. New clause 14 of the Bill relates to the protection of regulator autonomy when regulations are being made under clauses 1, 3 or 4 of the Bill (which all provide for concurrent powers). Paragraph 16 of Memorandum No. 2 provides the Minister's view that the new clause makes provision of a kind that the Senedd could legislate for in respect of devolved areas and therefore the clause falls within the legislative competence of the Senedd.

17. Memorandum No. 2 outlines that new clause 14 has been added to the Bill to "provide assurance to regulators that the appropriate national authority may legislate only where doing so would not adversely affect regulatory autonomy".¹²

18. Paragraph 16 of Memorandum No. 2 outlines the Minister's concerns with this new clause, specifically that the Secretary of State or Lord Chancellor may act as the appropriate national authority and regulate in devolved Welsh areas, which may be contrary to the aims of Welsh regulators or the Welsh Ministers.

19. Again, the Minister's ongoing opposition to concurrent powers in the Bill (at clauses 1, 3 and 4 of the Bill) means he will recommend that consent for new clause 14 is withheld.¹³

20. New clause 15 of the Bill relates to consultation with regulators. Paragraph 19 of Memorandum No. 2 confirms the Minister's view that this new clause is within the legislative competence of the Senedd.

¹¹ Welsh Government, Memorandum No. 2, paragraph 14

¹² Welsh Government, Memorandum No. 2, paragraph 16

¹³ Welsh Government, Memorandum No. 2, paragraph 17

21. While this new clause requires the appropriate national authority to consult a regulator before making regulations under clause 1, 3 or 4 of the Bill (which all provide for concurrent powers), Memorandum No. 2 notes that "it does not go so far as to prevent the appropriate national authority from making regulations which the regulators have opposed during such consultation".¹⁴ Further, and as with new clause 14, the Secretary of State or Lord Chancellor may act as the appropriate national authority and make such regulations in devolved areas.

22. For the same reasons as outlined above in respect of new clause 14, Memorandum No. 2 confirms that the Minister will recommend that the Senedd withholds its consent for new clause 15, specifically because of opposition to the concurrent powers in the Bill.

23. The Minister concludes:

"I consider that further amendments are needed to address my concerns in respect of the concurrent powers in the Bill.

I cannot recommend the Senedd gives its consent to these provisions being included in the Bill on the basis of the amendments brought forward to date.

We will continue to monitor the Bill's developments and update the Senedd as appropriate."¹⁵

24. As regards the Minister's previously stated concerns with what is now clause 16(5) of the Bill (previously numbered clause 14(5)), at paragraph 10 of Memorandum No. 2 the Minister states that his concerns about the inclusion of this clause have been addressed by the UK Government, which "has made it clear that the effect of clause 16(5) is to extend the Welsh Ministers' executive competence as far as the Senedd's legislative competence, including the ability to make regulations which modify the functions of reserved authorities with UK Government consent, but no further". The Minister further states that he accepts this position and accepts that clauses 16(2) and 16(5) together "have the effect of aligning legislative and executive competence in this way".

¹⁴ Welsh Government, Memorandum No. 2, paragraph 19

¹⁵ Welsh Government, Memorandum No. 2, paragraph 24-25

2. Committee consideration

25. We considered Memorandum No. 2 at our meeting on 17 January 2022, and we agreed our report on 24 January.¹⁶

Our view

26. We note the Welsh Government's view regarding the amendments made to clause 1 of the Bill and to new clauses 14 and 15 and agree with the Welsh Government that the consent of the Senedd should be sought for these provisions in the Bill.

27. We continue to share the concerns of the Minister regarding the existence of the concurrent powers¹⁷ in the Bill. Notwithstanding these shared concerns, our earlier report on the Memorandum highlighted to the Minister that we were not content with his preferred mechanism for resolving this problem, which was to provide the Welsh Ministers with a power to consent to regulations made in devolved areas, with no role for the Senedd.

28. Recommendations 3 and 4 in our report on the Memorandum dealt with this matter. Recommendation 4 in our earlier report said that the Minister should justify why concurrent powers are appropriate for this Bill when, if exercised by UK Ministers with the consent of the Welsh Ministers, it would not give the Senedd the opportunity to scrutinise those regulations.

29. The Minister's formal response, that the Welsh Government's starting point is that concurrent functions are not appropriate for the Bill, does not address our concern.

30. We wrote¹⁸ to the Minister on 15 October 2021 requesting further and fuller clarification on this matter. The Minister responded on 22 November 2021 and told us:

"It is not my intention to deny the Senedd the opportunity to scrutinise secondary legislation made in relation to devolved areas, and I acknowledge conclusion 1 in the Committee's report which sets out your concerns on the role of the Senedd in this matter. I would again reiterate my position that there should be no concurrent powers in this Bill. However, if the UK

¹⁶ [Legislation, Justice and Constitution Committee, 17 January 2022](#), and [Legislation, Justice and Constitution Committee, 24 January 2022](#)

¹⁷ Concurrent powers are those that may be exercised by the Welsh Ministers or UK Ministers in relation to Wales. Where the exercise of the power by UK Ministers requires the consent of the Welsh Ministers, it is described as a concurrent plus power.

¹⁸ [Letter to the Minister for Education and Welsh Language](#), 15 October 2021

*Government persist in including these powers, then I shall continue to seek an amendment that requires the Secretary of State or Lord Chancellor to obtain consent from Welsh Ministers before making regulations in devolved areas. If this is successful, then as per the Welsh Government's concurrent powers guidance, which has been shared with the Committee, I will write to the relevant Senedd committees to inform them of any intention to consent to the UK Government exercising the concurrent plus power in relation to Wales, and where time allows I will provide an opportunity for the Senedd to express a view before I give consent."*¹⁹

Conclusion 1. While we note the Minister's commitment to inform Senedd committees of any Welsh Government intention to consent to the UK Government exercising concurrent plus powers in relation to Wales, should the UK Government first agree to amend the Bill to provide the Welsh Ministers with a consenting role, we repeat our concern that the Senedd would be circumvented in an area within competence. It is not only being denied a role in directly affecting the detail of primary legislation on a devolved matter that will take effect in Wales, but also in carrying out its role in scrutinising secondary legislation that will become law in Wales.

31. Further to conclusion 1 and the matters raised above, we again highlight matters raised in our earlier report on the Memorandum (at conclusions 2 and 3, and recommendation 6) regarding the combination of both concurrent functions and Henry VIII powers in the Bill that, without the consent of the Senedd (or the Welsh Ministers) would permit the Secretary of State or Lord Chancellor to exercise regulation-making powers to amend primary legislation, including both Senedd Acts and the *Government of Wales Act 2006* (the 2006 Act).

32. Specifically as regards the provisions in the Bill that would enable the amendment of the 2006 Act via regulations made by UK Ministers without the consent of the Senedd (or the Welsh Ministers), recommendation 6 in our report on the Memorandum asked that the Minister seek an amendment to the Bill to remove this power. In his formal response to our report, the Minister told us that he would seek such an amendment. While not referred to in Memorandum No. 2, we note that in his letter to us on 22 November 2021, the Minister said:

"...on 28 October I wrote to Lord Grimstone to ask that the UK Government table an amendment to ensure that the powers in the Bill cannot be used by UK Ministers to make regulations that amend the Government of Wales Act 2006. I also asked for an amendment which would provide for a specific carve

¹⁹ [Letter from the Minister for Education and Welsh Language](#), 22 November 2021

*out from the Minister of the Crown consent requirements in paragraph 11 of Schedule 7B to the Government of Wales Act.*²⁰

Recommendation 1. While we welcome the Minister's action to seek an amendment to the Bill to the effect that the powers in the Bill cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*, the Minister should, at the earliest opportunity and in advance of the Senedd's debate on a relevant consent motion, provide an update on any relevant action by, or discussions with, the UK Government on this specific matter.

33. With regards to what is now numbered clause 16(5) in the Bill, originally numbered clause 14(5) (and referred to as such in the Memorandum and our report on the Memorandum), we previously highlighted that the drafting of this clause meant that the Welsh Ministers will require Minister of the Crown consent for any regulations containing provisions which, if contained in an Act of the Senedd, would require Minister of the Crown consent. Under Schedule 7B to the 2006 Act, once a regulation-making power has been given via an Act of the Senedd with Minister of the Crown consent, that power can be exercised by the Welsh Ministers without the limitation of again seeking Minister of the Crown consent to the content of the regulations. Therefore, the power in clause 16(5) is an unusual, and unwelcome, power to be included in a Bill. As such, recommendation 7 in our report on the Memorandum said that the Minister should seek an amendment to remove this provision from the Bill.

34. In his formal response on 6 October 2021 to our report on the Memorandum, the Minister said that the Counsel General and Minister for the Constitution has exchanged correspondence with Baroness Bloomfield on this issue, and continues to outline his concerns with the approach taken in respect of this specific clause.

35. In our letter to the Minister on 15 October 2021 we noted that, while we accept that the Counsel General and Minister for the Constitution has exchanged correspondence with the UK Government Minister on this issue, we would welcome clarification as to whether the Minister will formally seek the amendment to the Bill as set out in the recommendation. In requesting this clarification, we were mindful of the Minister's definitive response to recommendation 6 in our report on the Memorandum in which he clearly stated that an amendment will be sought.

36. In response, in his letter to us on 22 November 2021, the Minister said:

"The UK Government has made it clear that it will extend the Welsh Ministers' executive competence in clause 14 as far as the Senedd's legislative

²⁰ Letter from the Minister for Education and Welsh Language, 22 November 2021

*competence, including the ability to make regulations which modify the functions of reserved authorities with UK Government consent, but no further. We accept this position, and also accept that clause 14(2) and clause 14(5) together have the effect of aligning legislative and executive competence in this way. Therefore I will not be seeking an amendment to remove clause 14(5)."*²¹

37. We note that Memorandum No. 2 provides an update on the Minister's original concerns with clause 16(5) (previously clause 14(5)) of the Bill and that those concerns "have now been addressed by the UK Government".

38. However, no information is provided in Memorandum No. 2 as to the nature of the assurances given to the Minister by the UK Government. Further, as far as we are aware, any such intergovernmental discussions and assurances in this regards are not reflected in any amendments made to the face of the Bill. In the absence of such information or changes to the face of the Bill itself, we remain of the view that the clause as drafted contains an additional limitation to the Welsh Ministers' power.

Recommendation 2. The Minister should, at the earliest opportunity and in advance of the Senedd's debate on a relevant consent motion, provide further information as to how and when the UK Government made its position clear in relation to clause 16(5) (previously clause 14(5)) and provide fuller detail on what the assurances are and how such assurances have assuaged the Minister's previous concerns.

39. Finally, our report on the Memorandum highlighted our concern at the delays in laying the Memorandum.²² We again note that there was also a delay in Memorandum No. 2 being laid before the Senedd, with it arriving almost five weeks after relevant amendments had been tabled in the House of Lords.

40. While we note that, in his letter to us on 6 December 2021, the Minister stated that the amendments raised "a number of complete constitutional issues" and that the analysis of which resulted in this delay²³, we remind the Minister of the comments and conclusions we made in our report on the Memorandum and continue to emphasise the importance of the Welsh

²¹ Letter from the Minister for Education and Welsh Language, 22 November 2021

²² See report on The Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill, September 2021, paragraphs 14-15 and recommendation 1

²³ ~~Letter from the Minister for Education and Welsh Language~~, 6 December 2021

Government providing timely information to the Senedd so that it may conduct full and proper scrutiny of legislative consent memoranda for UK Bills.