

# Report on the Tertiary Education and Research (Wales) Bill

March 2022



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March 2022



# About the Committee

The Committee was established on 26 May 2021. Its remit can be found at [www.senedd.wales/SeneddLJC](http://www.senedd.wales/SeneddLJC).

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Current Committee membership:



**Committee Chair:**  
**Huw Irranca-Davies MS**  
Welsh Labour



**Rhys ab Owen MS**  
Plaid Cymru



**Alun Davies MS**  
Welsh Labour



**Peter Fox MS**  
Welsh Conservatives

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# 1. Introduction

On 1 November 2021 Jeremy Miles MS, the Minister for Education and Welsh Language (the Minister) introduced the Tertiary Education and Research (Wales) Bill (the Bill)<sup>1</sup> and accompanying Explanatory Memorandum (the EM).<sup>2</sup>

1. The Senedd's Business Committee referred the Bill to the Children, Young People and Education Committee on 2 November 2021, and set a deadline of 4 March 2022 for reporting on its general principles.<sup>3</sup>
2. On 2 November 2021, the Minister issued a Statement of Policy Intent for subordinate legislation to accompany the Bill.<sup>4</sup>

## Background to the Bill

3. In July 2020, the Welsh Government published a consultation on the Draft Tertiary Education and Research (Wales) Bill. The EM states that "it was originally not felt appropriate to undertake an open consultation" on a draft Bill. However, the delay to the postponement of the Bill's planned introduction as a result of the COVID-19 pandemic "was seen as an opportunity to further engage with stakeholders, examine the detailed policy proposals and determine their full impact".<sup>5</sup>
4. The EM also states that the public consultation "demonstrated broad support for the new Commission, but also generated some more technical and detailed responses which prompted further exploration of a range of policy and legislative options". The EM confirmed that,

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<sup>1</sup> Tertiary Education and Research (Wales) Bill, as introduced

<sup>2</sup> Tertiary Education and Research (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, November 2021

<sup>3</sup> Business Committee, Timetable for consideration: The Tertiary Education and Research (Wales) Bill, November 2021

<sup>4</sup> Welsh Government, Tertiary Education and Research (Wales) Bill: Statement of policy intent for secondary legislation, direction making powers and guidance, November 2021

<sup>5</sup> EM, paragraph 4.14

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following the consultation, a number of changes were made to the Bill before its introduction to the Senedd, and Table 4.1 in the EM sets out and explains those changes.<sup>6</sup>

## **The purpose of the Bill**

**5.** The Bill provides for the establishment of a new Commission for Tertiary Education and Research (the Commission). The EM notes that the Commission “will be the regulatory body responsible for the funding, oversight and regulation of tertiary education and research in Wales.”<sup>7</sup>

**6.** The Bill comprises seven parts, as follows:

- Part 1 – Strategic framework for tertiary education and research;
- Part 2 – Registration and regulations of tertiary education providers;
- Part 3 – Securing and funding tertiary education and research;
- Part 4 – Apprenticeships;
- Part 5 – Learner protection, complaints procedures and learner engagement;
- Part 6 – Information, advice and guidance;
- Part 7 – Miscellaneous and general.

## **The Committee’s remit**

**7.** The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, 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);

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<sup>6</sup> EM, paragraphs 4.20 and 4.22

<sup>7</sup> EM, paragraph 1.2

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- 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.

**9.** We took evidence from the Minister on 6 December 2021.<sup>8</sup> Following our evidence session, we wrote to the Minister with a series of additional questions in relation to the Bill.<sup>9</sup> The Minister responded on 18 January 2022.<sup>10</sup>

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<sup>8</sup> Legislation, Justice and Constitution Committee, 6 December 2021

<sup>9</sup> Letter to the Minister for Education and Welsh Language, 10 December 2021

<sup>10</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

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## 2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.<sup>11</sup>

### General

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**10.** We considered this Bill under the reserved powers model of legislative competence, as set out in section 108A of the *Government of Wales Act 2006* (the 2006 Act).

**11.** In her statement on legislative competence, the Llywydd, Elin Jones MS, stated that:

- Most of the provisions of the Bill would be within the legislative competence of the Senedd.
- Sections 128(1)(d) and 128(1)(e) would not be within competence because consent is required from the UK Government to bring them within the Senedd's competence and this necessary consent has not been obtained at the time the Statement was made.<sup>12</sup>

**12.** Given the statement made by the Llywydd, we asked the Minister whether he had held necessary discussions with the UK Government regarding the consent that is required in relation to section 128. The Minister told us that there had been constructive discussions and he expected "to receive consent soon".<sup>13</sup>

### Human rights

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**13.** One of the requirements which must be met for a Bill to be within the legislative competence of the Senedd is set out in section 108A(2)(e) of the 2006 Act and requires all provisions of a Bill to comply with the ECHR (the Convention rights).

**14.** We asked the Minister to confirm what assessments have been undertaken in relation to the human rights impact of the Bill, and what the outcome of these assessments has been. In particular, we asked the Minister if he was satisfied that the rights of entry and inspection

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<sup>11</sup> EM, Member's Declaration, page i. See also LJC Committee, 6 December 2021, RoP [4]

<sup>12</sup> Presiding Officer's Statement on Legislative Competence, 1 November 2021

<sup>13</sup> LJC Committee, 6 December 2021, RoP [74]

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provided for in sections 62 and 72 of the Bill are compliant with the *Human Rights Act 1998* (the 1998 Act).

**15.** The Minister responded:

*"The Welsh Government is satisfied that the provisions of the Bill are compatible with Convention rights."*<sup>14</sup>

## **Our view**

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**16.** 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, while the majority of the provisions in the Bill would be within the legislative competence of the Senedd, sections 128(1)(d) and 128(1)(e) would not be within competence because consent is required from the UK Government to bring them within the Senedd's competence, and this necessary consent had not been obtained at the time the Statement was made.

**Recommendation 1.** The Minister should use the Stage 1 debate to confirm to the Senedd whether the required consent from the UK Government in relation to section 128 has been received.

**17.** With regards to any potential 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 1998 Act.

**18.** However, we do not consider the Minister's response to be full and satisfactory. We asked specifically how the rights of entry and inspection provided for in sections 62 and 72 of the Bill are compliant with the 1998 Act but the Minister did not address these points directly.

**19.** We consider that such an uninformative response on an important issue is unhelpful and inhibits effective legislative scrutiny. This is particularly disappointing in the context of the Senedd aiming to ensure that Welsh law upholds human rights protections.

**Recommendation 2.** The Minister should, ahead of the Stage 1 debate on the general principles of the Bill, provide to the Senedd full details about the human rights impact assessments carried out in relation to the Bill, including how section 62 and 72 of the Bill comply with the *Human Rights Act 1998*.

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<sup>14</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

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### 3. General observations

#### **Balance between what is on the face of the Bill and what is left to subordinate legislation, and the general approach to drafting**

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##### **General matters**

**20.** The Bill contains 56 powers for the Welsh Ministers to make regulations, orders, codes, lists and directions, and to issue guidance. The Bill also provides for direction and guidance provisions to be exercised by the Commission. A full list and summary of the powers can be found in tables 5.1 and 5.2 of the EM<sup>15</sup>, and additional detail is provided in the Statement of Policy Intent.

**21.** On 6 December 2021, during our evidence session with the Minister, we asked him whether he believed he had achieved the right balance between the detail on the face of the Bill versus giving regulation-making powers to Welsh Ministers. The Minister told us that there are fine judgments “to make sure that the balance is properly struck”.<sup>16</sup> He added:

*“...the way the question was put to me in other committees was that some stakeholders feel that the Bill is perhaps a little on the prescriptive side and others feel that it's perhaps a little on the other side of the ledger, if I can put it like that. And I suppose that's unsurprising, really. I think what we try and do is make sure that the Bill provides, where appropriate, a level of flexibility, but that that's tethered very clearly in the architecture of the Bill.”<sup>17</sup>*

**22.** The Minister also told us that “[o]ne of the fundamental rationales for the Bill was to support our post-16 sector to be futureproofed... and so that brings with it an element of allowing for flexible development into the future.”<sup>18</sup>

**23.** He went on to say:

*“I hope that the statement of policy intent gives a very clear picture of our direction of travel. And what I've been minded, very strongly throughout, if I can say it like this, is to make sure that where there are regulations—and*

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<sup>15</sup> EM, chapter 5, pages 70–92

<sup>16</sup> LJC Committee, 6 December 2021, RoP [19]

<sup>17</sup> LJC Committee, 6 December 2021, RoP [19]

<sup>18</sup> LJC Committee, 6 December 2021, RoP [20]

*there are obviously a number of areas where we have regulation-making powers—that the Senedd procedure is appropriate for those. So, some of those have been fine judgments. Some of them have retained more or less the current arrangements, if you like, where there are equivalents; some have, I think become more—if I can put it in these terms—protective, really.”<sup>19</sup>*

## **Justification for taking certain regulation-making powers**

**24.** We also asked the Minister whether a justification of ‘appropriate flexibility’, which is mentioned in the Statement of Policy Intent in relation to a number of regulation-making powers<sup>20</sup>, is a sufficient justification for such powers. The Minister said:

*“It isn’t the universal justification—there is a range of justifications for the powers on their own terms, if you like. (...) The very premise of the Bill involves the Government handing over considerable new powers to an arm’s-length body and, obviously, building on the existing—and evolving, if you like, the existing—statutory underpinning of it. And that creates a new dynamic over time, doesn’t it? We then have a commission that will take us forward into the future, and I think that requires an element of flexibility, not least because, in the many years ahead, we will be working on evolving this together with stakeholders, and so there needs to be an opportunity to do that without requiring primary legislation in order to facilitate that. So, that’s why I think the balance is appropriately struck.*

*But I understand, obviously, the committee’s constitutional interest in this area, obviously, and so, if you take a different view, I’d be very interested to hear that, and to listen to your reflections and recommendations, obviously.”<sup>21</sup>*

**25.** The Statement of Policy Intent states that there is no current intention to make regulations under sections 55 and 59 of the Bill, and that such powers are there for future-proofing. Similarly, it states that there is no intention to make regulations under section 61 and that this power is included to provide flexibility.<sup>22</sup>

<sup>19</sup> LJC Committee, 6 December 2021, RoP [20]

<sup>20</sup> Statement of Policy Intent, pages 7 and 17

<sup>21</sup> LJC Committee, 6 December 2021, RoP [22-23]

<sup>22</sup> Statement of Policy Intent, page 19. (To note - the Statement of Policy Intent incorrectly refers to section 69(9)(a) rather than section 61(9)(a).)

**26.** We asked the Minister whether it would be better to leave these powers out of the Bill and revisit these matters if and when required in the future. We also asked him to clarify for whom the legislation was being futureproofed. The Minister stated:

*"Just to be clear, when we talk about taking these out of the Bill, but accepting that they may be needed in future, what we're really saying is that it would be acceptable for us to require primary legislation to make these changes in future. That's the alternative, if you like, to having provisions in the Bill.*

*So, taking each of those in turn, if you look at section 55, the list of the different kinds of education and training that must be inspected by Estyn reflects the current position, if you like. As we sit here today, it is comprehensive, but there would need to be further primary legislation to amend that list into the future, just for the pretty simple purpose of specifying different kinds of education and training for Estyn to inspect. So, if we're to, say, include initial teacher education for post-16 in that mix, that would require a new Act of the Senedd if we didn't provide the mechanisms in this Bill, which I think is disproportionate, really.*

*The same rationale applies to section 59, which, essentially, is parasitic, if you like, on section 55.*

*And on section 61, again, these are around provisions in relation to timescales and the provision of information, so it doesn't feel to me like it would be proportionate for that sort of technical, practical regulation to require primary legislation in the future. It probably simply wouldn't happen."*<sup>23</sup>

**27.** Section 86(6) of the Bill contains regulation-making powers which the Statement of Policy Intent says are also not currently intended to be used. We similarly asked would these powers not be better addressed in the future if and when the need arises. The Minister responded that the power in section 86 is intended to ensure that gaps in higher education provision could be addressed should it not be possible or practicable for such courses to be provided by a registered provider in the 'core' category.<sup>24</sup> He added:

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<sup>23</sup> LJC Committee, 6 December 2021, RoP [49-51]

<sup>24</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

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*"The Commission's main higher education function power (section 85) is intended to apply to higher education providers registered in the proposed 'core' category and regulations would provide for that. However, there could be providers in Wales, who for example, elect to register in the 'alternative' category or are not registered at all who would not be eligible for higher education funding by the Commission under its main higher education funding power, but may be able to provide 'specialist' courses identified by the Welsh Ministers as being needed for Wales. There may also, in very rare instances, be courses at providers outside of Wales which the Welsh Ministers or Commission identify as requiring funding so as to provide benefits to Wales and people ordinarily resident in Wales."*<sup>25</sup>

**28.** The Minister also said:

*"Whilst no such instances have been identified as yet, we believe it would be prudent to retain this power in order to provide sufficient flexibility to the Commission in the future and ensure that funded higher education can meet the needs of Wales."*<sup>26</sup>

**29.** In relation to section 91, the Statement of Policy Intent says that "The use of secondary legislation to determine the scope of relevant education and eligibility for the purpose of the funding duty is intended to enable a progressive expansion of the funded adult further education and training offer over time to address evolving patterns of need." Similarly, the Statement of Policy Intent uses wording such as "not current government policy" and "should the need arise" in the context of regulation-making powers under sections 95 and 101. We asked the Minister to expand on this and explain why he considers it to be appropriate to put these powers in place now, rather than when the need arises. The Minister told us:

*"We presently intend to introduce regulations under [section 91(3)] upon, or shortly following, commencement of these provisions, in line with this duty. It is my intention that these regulations will set out the first iteration of requirements for the provision of further education and training made available for adults.*

*Full details of the policy that will underpin these regulations is being developed following publication in December of a report for the Welsh*

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<sup>25</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>26</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

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*Government by the Wales Centre for Publication Policy entitled 'Supporting the Welsh Lifelong Learning System', which set out recommendations in this area. (...)*

*Regulations under sections 95 and 101 concern the powers to require providers to be registered to access further education and apprenticeships funding. (...) these powers are intended to ensure the regulatory system can evolve in response to future changes in the size, shape and funding of tertiary education in Wales."*<sup>27</sup>

## **Henry VIII powers**

**30.** Section 141 of the Bill contains wide Henry VIII powers. We asked the Minister to confirm that he was content that he wasn't setting too wide-ranging a power in this regard. The Minister responded:

*"I don't think that we are. There are two elements here, namely what is the range of things that could be done being one question; and then the second question is for what purpose should those things be done. The first question deals with a range of other legislation, as you suggest in your question. So, on one level, that is wide-ranging. But the purpose for which that could be done is quite limited, I would say—namely, to ensure full use of the Bill or of things that follow on inevitably from the Bill. So, the justification for using those powers is relatively narrow, I would say. This kind of power is quite common in this kind of Bill, and perhaps the most important thing in the context of the discussion that we have had during this meeting so far is that if those powers were to be used in the context of primary legislation already on the statute book, that would have to go through the affirmative process in the Senedd. So, the Senedd would have the right to decide whether that's appropriate or not."*<sup>28</sup>

## **Approach to drafting**

**31.** We also raised an issue with the Minister regarding a particular drafting style within the Bill. There are several sections in the Bill where examples are provided for matters that regulations may cover, for example in sections 25(4) and section 59(2). We asked the Minister whether he

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<sup>27</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>28</sup> LJC Committee, 6 December 2021, RoP [76]



was concerned that this may lead some readers to think that the regulations in question can only cover the matters listed. The Minister told us:

*"Section 25(4) sets out examples of what regulations that are made under section 25(3) may do. This includes conferring functions on the Commission in connection with the operation of further initial conditions provided for in the regulations, and examples of what further initial conditions of registration may relate to.*

*In accordance with the current practice for drafting laws for Wales<sup>29</sup>, it is made clear that the list is not exhaustive by the use of the words 'may (among other things)'. This is a recommended approach to clearly conveying in primary legislation the relationship between the regulation-making power and the non-exhaustive list of examples of what it may be used for. The specific wording used makes clear that section 25(4) doesn't qualify or limit the scope of section 25(3).*

*The second example cited in the question, section 59(2), operates in a similar way; the words 'may include' serve to clarify that the examples listed in the section do not limit the scope of the regulation-making power in section 59(1). Again, the wording is used in accordance with the drafting recommendations and practice set out in 'Writing Laws for Wales: a Guide to Legislative Drafting'. "<sup>30</sup>*

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## Interaction with UK legislation

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**32.** The Counsel General and Minister for the Constitution has previously, and very clearly, set out to us that the Welsh Government does not have regard to the *United Kingdom Internal Market Act 2020* (the 2020 Act) when preparing Welsh legislation.<sup>31</sup>

**33.** We asked the Minister to confirm that, in line with what the Counsel General has told us previously, consideration was not given to the non-discrimination and the mutual recognition principles in the 2020 Act when drafting the Bill. The Minister said:

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<sup>29</sup> The letter from the Minister for Education and Welsh Language (18 January 2022) draws specific attention to paragraphs 5.6(8) and (9) of "Writing Laws for Wales: a Guide to Legislative Drafting" published in 2019

<sup>30</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>31</sup> Letter from the Counsel General and Minister for the Constitution, 22 October 2021

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*"...I think the position is as the Counsel General set out, that we work on the basis that the devolved powers that we have, as determined by the various Government of Wales Acts, is the underpinning for our development of legislation. So, it is our view as a Government that the internal market Act cannot lawfully limit those devolved responsibilities, and so, in that sense, that is the basis on which we've constructed this legislation as well. But I can give the committee the assurance that I am content that nothing needs to be changed in this Bill as a result of the internal market Act."*<sup>32</sup>

**34.** We probed a little further and asked the Minister to clarify whether, in preparing the Bill for introduction to the Senedd, he had disregarded the 2020 Act. The Minister told us:

*"I wouldn't say 'disregarded', Chair. We've had regard to the provisions of the Act in looking at whether any of the provisions of the Bill need to be changed, but the Government's position is that the devolution boundaries are set by the Government of Wales Acts, and so the internal market Act can't lawfully limit those. But I'm seeking to go further and tell you that we've looked at the Bill from the perspective of the Act as well, if you like, and there are no changes needed to it."*<sup>33</sup>

**35.** We also asked the Minister whether he anticipated that there may need to be changes to the Bill if the current judicial review case<sup>34</sup> regarding the 2020 Act does not fall in favour of Welsh Government. The Minister told us that that was not his understanding.<sup>35</sup>

**36.** We also asked the Minister about broader matters related to the Welsh Government's legislative programme. The Counsel General noted, when announcing the Welsh Government's legislative programme<sup>36</sup>, that there is UK legislation, such as the Skills and Post-16 Education Bill<sup>37</sup>, that overlaps with Welsh Government proposals in the legislative programme.

**37.** We asked the Minister whether he had any intention to use this Bill, or the regulation-making powers within it, to address any future concerns that may arise in relation to UK Bills that

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<sup>32</sup> LJC Committee, 6 December 2021, RoP [6]

<sup>33</sup> LJC Committee, 6 December 2021, RoP [8]

<sup>34</sup> Welsh Government. Written Statement: Legal challenge to the UK Internal Market Act 2020 – June 2021

<sup>35</sup> LJC Committee, 6 December 2021, RoP [10]. See also RoP [13]

<sup>36</sup> Statement by the Counsel General and Minister for the Constitution: The Legislative Programme – 6 July 2021

<sup>37</sup> Skills and Post-16 Education Bill. See also Legislative Consent: Skills and Post-16 Education Bill

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overlap with Welsh Government plans. The Minister told us that that was not the intention of the regulation-making powers.<sup>38</sup>

## **Our view**

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**38.** We welcome the fact that the Welsh Government consulted on a draft version of the Bill before introducing the Bill to the Senedd for formal scrutiny. We agree with the views of our predecessor committees that this is good practice and, given the potential benefits to the quality of law produced, there should be a presumption in favour of draft Bills being published and consulted upon.

**39.** With regards to the balance between the detail on the face of the Bill and what is left to subordinate legislation, we note that the Bill contains 46 powers for the Welsh Ministers to make regulations, along with 3 order-making powers, 2 powers to issue guidance, and 5 direction-making powers.

**40.** We acknowledge the Minister's evidence regarding the balance of powers and are broadly content, notwithstanding our views set out below and the particular comments we make in the next Chapter.

**41.** With regards to powers inherited from existing legislation, we note that there are some which have had their scrutiny procedures uplifted. For example, regulations made under section 30(4) of the Bill will be subject to the affirmative procedure, whereas regulations made under a similar existing power in section 5(2)(b) of the *Higher Education (Wales) Act 2015* are currently subject to the negative procedure. We also note that there are some examples of delegated powers in the Bill where opportunities for scrutiny are downgraded, for example in section 19 and section 106. Both of these sections are discussed further in later Chapters.

**42.** We note the Minister's evidence and reasoning for including some regulation-making powers in the Bill for reasons relating to flexibility and future-proofing. However, without specific context as to how these powers will be exercised, we believe that the Senedd is placed at a disadvantage and, moreover, a difficult position when asked to consider whether such powers are appropriate for inclusion in the Bill on grounds of flexibility and future-proofing.

**43.** With specific reference to regulation-making powers which the Minister intends to use "upon, or shortly following, commencement of the relevant provision", we believe that early sight of such proposed regulations would be appropriate and beneficial.

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<sup>38</sup> LJC Committee, 6 December 2021, RoP [17]

**Recommendation 3.** The Minister should provide the Senedd with draft versions of any regulations that are to be made or laid before the Senedd upon, or shortly following, the commencement of the relevant provision as soon as possible and while the Bill is under consideration by the Senedd at Stage 2 of the Bill to enable more full scrutiny of the relevant powers.

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

**Recommendation 4.** The Minister should, in advance of the Stage 1 debate on the general principles of the Bill, provide further clarity regarding the powers in sections 32, 52(8), 55(1)(f), 59(1), 61(9)(a), 86(6), 95(2) and 101(3) of the Bill and how they are intended to be used by the Welsh Ministers.

**Conclusion 1.** We note that section 141 of the Bill contains a broad Henry VIII power and the Minister's evidence in relation to this power. We welcome the fact that any such regulations made under this section will be subject to the affirmative scrutiny procedure in the Senedd.

**45.** We note the Minister's evidence regarding the approach to the drafting of the Bill, specifically as regards the use of examples in the Bill. We also note the Minister's explanation that such examples are not exhaustive and this drafting style is in line with the Welsh Government's drafting guidance. While that may be the case, we are concerned with ensuring that the legislation is clear and capable of being fully understood by those it affects.

**Recommendation 5.** The Minister should ensure that the explanatory notes to the Bill make it clear that, where lists of examples are used in specific sections, such lists are not exhaustive and should not be interpreted as such.

**46.** We questioned the Minister as to whether he has any intention to use this Bill, or the regulation-making powers within it, to address any future concerns that may arise in relation to UK Bills that overlap with Welsh Government plans. While we acknowledge the Minister's statement that that was not the intention of the regulation-making powers, we believe further clarification would be appropriate. This is particularly important given that we believe the Senedd must have an opportunity to scrutinise any steps which the Welsh Ministers consider are necessary or desirable to address either inconsistencies between Welsh legislation and UK Bills; or to address matters when UK Bills may otherwise stray into areas of devolved competence. Such steps should not be taken in regulations.

**Recommendation 6.** The Minister should use the Stage 1 debate on the general principles of the Bill to provide a commitment that the regulation-making powers in the Bill will not be used to address inconsistencies between Welsh legislation and UK Bills; issues with UK Bills that make provision within devolved areas; or any other concerns regarding UK legislation which deals with tertiary education.

**47.** In the next Chapter, we draw attention to specific provisions and regulation-making powers in the Bill, and highlight particular areas of concern regarding the level of detail on the face of the Bill.

## 4. Specific observations on particular Parts and sections and powers to make subordinate legislation

### Part 1 of the Bill

#### The Commission's strategic duties

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**48.** The EM states that the Commission (established by section 1 of the Bill) will be a Welsh Government sponsored body, operating at arms-length from government but within a strategic planning and funding framework established by the Welsh Ministers.<sup>39</sup>

**49.** Part 1 of the Bill sets out the strategic duties of the Commission, requires strategic planning for tertiary education and research by the Commission, and abolishes the Higher Education Funding Council for Wales (HEFCW).

**50.** The EM notes that the Welsh Government's original draft Bill placed general duties on the Commission, and that stakeholder responses to the draft Bill consultation highlighted the need for the Bill to provide a clear statement of the strategic direction of the Commission and its reasons for existing. To deliver this, the EM states that general duties have been expanded into nine strategic duties which are "intended to frame the strategic direction and focus of the Commission and support the delivery of its functions, providing clarity as to its purpose and overarching remit."<sup>40</sup>

**51.** The EM also states:

*"These duties, in conjunction with the Welsh Ministers' statement of priorities, will outline the core matters the Commission must consider and take in account when exercising its functions.*

*By including these duties on the [face of the] Bill, the Welsh Government is providing a consistent set of principles under which the Commission will operate."*<sup>41</sup>

**52.** We asked the Minister whether he was satisfied that these duties include sufficient detail to provide certainty in law and to be workable for the Commission. The Minister told us that when

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<sup>39</sup> EM, paragraph 3.43

<sup>40</sup> EM, paragraph 3.44-3.45

<sup>41</sup> EM, paragraph 3.46-3.47

he became a Minister, it was an opportunity to look again at the Bill “because the context had changed even from the Hazelkorn<sup>42</sup> period—we have more now perhaps challenges, if I can put it like that, in terms of COVID, Brexit, and we’ve got climate change challenges and digital challenges that have come to the fore during this current period”.<sup>43</sup>

**53.** The Minister added:

*“...it struck me that we needed to root the commission’s work on the face of the Bill in a vision for the sector in general, so that that vision was there on the face of the Bill. So, that was my intention. That was the first time for us to do that—for this Government in Wales—that we set out those values on the face of the Bill. (...)*

*They are long-term duties. And that’s important, in terms of the vision that we have. But tied to that is the need for them to be defined in a way that allows them to be implemented by the commission. So, I think it strikes the right balance for an arm’s-length body to be able to have the flexibility to decide how to achieve those duties. It isn’t unusual, of course, when it comes to placing duties on public bodies, to create them in a wider context, and then there’s an opportunity for that body, which is an arm’s-length body, to be able to define those within its own remit and within its own duties.”<sup>44</sup>*

**54.** We pursued this matter with the Minister and asked whether he considered that the Commission’s strategic duties provided for on the face of the Bill provide certainty in law to the level that decisions could be challenged. The Minister responded:

*“...yes, that’s the intention. The duties are defined, of course, in the Bill as well. It will be a matter for the courts, of course, but, from my point of view, I don’t see that this would create individual rights for individuals, but it does ensure target responsibilities and duties, if you like, so it drives the work of the commission.”<sup>45</sup>*

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<sup>42</sup> ‘Towards 2030: A framework for building a world-class post-compulsory education system for Wales’, by Professor Ellen Hazelkorn – March 2016

<sup>43</sup> LJC Committee, 6 December 2021, RoP [26]

<sup>44</sup> LJC Committee, 6 December 2021, RoP [26–27]. See also RoP [29].

<sup>45</sup> LJC Committee, 6 December 2021, RoP [29]

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## Section 11 – Statement of strategic priorities

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**55.** Section 11 places the Welsh Ministers under a duty to publish a statement setting out their strategic priorities for tertiary education and research and innovation. The statement may be amended or replaced by the Welsh Ministers. Any amendments must be published.

**56.** We asked the Minister to clarify why there is no duty placed on the Welsh Ministers on the face of the Bill to consult any other party when preparing the statement. The Minister responded:

*"The statement of priorities, in conjunction with the Commission's strategic duties, will outline the core matters the Commission must consider and take into account when exercising its functions. The statement will, in effect, be a 'term of government remit letter' and is designed with a longer term planning approach in mind. In practice, it is expected to contain a small number of strategic priorities and high-level success indicators.*

*Whilst there is no statutory requirement to consult on what will be included in the statement, I recognise it would be counter-productive to move away from current practice whereby arms-length bodies in general, and HEFCW in particular, are involved in dialogue with their partnership teams within government when matters are considered for inclusion in their remit."*<sup>46</sup>

## Section 13 – Approval, publication and implementation of strategic plan

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**57.** Section 12 of the Bill requires the Commission to prepare a strategic plan setting out how it intends to discharge its strategic duties and address the Welsh Ministers' statement of priorities. The strategic plan must be sent to the Welsh Ministers for approval within six months of the publication of the Welsh Ministers' statement of priorities under section 11. The Welsh Ministers have the power to approve the plan with or without modifications, but have a duty to consult the Commission in the event of making modifications to the plan. The Commission has a duty to publish the plan and take all reasonable steps to implement it.

**58.** Section 13(4) of the Bill requires the Commission to publish its approved strategic plan but provides no timescale for doing so. We asked the Minister why this was the case, and he told us that, if necessary, the Welsh Ministers could issue guidance under section 18 of the Bill concerning the expectations regarding the strategic plan which aren't included on the face of the Bill. Alternatively, the Minister said that the expectations could be captured in the

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<sup>46</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022



Commission's framework documents "to ensure there is total clarity concerning matters such as these".<sup>47</sup>

**59.** The Minister also provided further background detail and told us that HEFCW's framework documents only specify a timeframe regarding submission of the business plan they draw up in response to the remit letter and that, although they are required to make their other documents available to the public, no timescale is specified.<sup>48</sup>

**60.** The Minister said that this current approach:

*"...has not been problematic, and given stakeholders' views that being over prescriptive on the Bill regarding operational processes is not beneficial, I believe the approach we have adopted is appropriate. This will allow flexible and appropriate mechanisms to be developed."*<sup>49</sup>

## **Section 19 – The Welsh Ministers' power to give general directions**

**61.** Subsection (1) of section 19 enables the Welsh Ministers to issue general directions to the Commission about the exercise of any of its functions. A direction issued by the Welsh Ministers under this section is subject to the limitations that are set out in subsections (2), (3) and (5).

**62.** Although these directions must be published and laid before the Senedd, no Senedd procedure is attached to them. This power is similar to the power in section 81 of the *Further and Higher Education Act 1992* (1992 Act), which is repealed by this Bill, but which provides that any directions to HEFCW have to be made by order which would be subject to the negative procedure.

**63.** We asked the Minister why section 19 of the Bill took a different approach and does not provide for a formal Senedd scrutiny procedure. The Minister responded:

*"In this specific example, you're right, of course, to say that it has changed from the situation that was seen in the 1992 Act. It's the context that's important in this regard. If you look at what's happened during COVID, of course, there's been a need to be able to provide direction under other legislation—for example, for Qualifications Wales. We made directions for them with regard to examinations. That had to be done as a matter of*

<sup>47</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>48</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>49</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

*urgency as a result of COVID. So, that is what is happening here. There is a process in the Bill, of course, to do that, and it's about that ability to ensure that things happen swiftly when that is required. That's the reasoning behind this. (...) if you as a committee don't feel that that balance has been struck in the right way, of course I would be very interested in hearing your stance on that.*"<sup>50</sup>

**64.** We suggested to the Minister that the negative scrutiny procedure is a swift procedure, and asked him to further clarify why there will be a move from directions that were subject to Senedd procedures to a new system that is not subject to Senedd procedures. The Minister said:

*"Well, if you look across the whole Bill, there are other examples to the contrary as well—where the current process uses the negative procedure, and the Bill now has reflected exactly those similar steps with similar powers but within the affirmative procedure. So, there are examples in the Bill that go in both directions. We've looked at every section on its own merits, and we've decided on the best way of dealing with each section and each aspect."*<sup>51</sup>

## **Section 22 and Schedule 2 – Transfer schemes for the transfer of property and staff to the Commission**

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**65.** Section 22 of the Bill introduces Schedule 2 which provides the Welsh Ministers with the power to make schemes for the transfer of staff, property, rights and liabilities as a result of establishing the Commission and dissolving HEFCW. There is no provision in the Bill for the Senedd to scrutinise such schemes.

**66.** We asked the Minister why this was the case. The Minister told us:

*"Procedurally, the schemes do not need to be made by way of order, paragraph 3 of Schedule 2 provides for the Welsh Ministers to lay a copy of a transfer scheme made under Schedule 2 before the Senedd. The transfer of staff and property from WG to the Commission is, in my view, an administrative issue for the Welsh Government, and, although the scheme(s) would also provide for the transfer of staff and property from HEFCW to the Commission, there has to be legal certainty regarding the transfers, hence*

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<sup>50</sup> LJC Committee, 6 December 2021, RoP [31]

<sup>51</sup> LJC Committee, 6 December 2021, RoP [33]

*the obligation on the Welsh Ministers being limited to laying Schedule 2 transfer Schemes before the Senedd.”<sup>52</sup>*

**67.** The Minister also told us that similar provisions in respect of transfer schemes are contained in the *Qualifications (Wales) Act 2015*, the *Higher Education and Research Act 2017*, and the *Energy Act 2016*.<sup>53</sup>

## **Our view**

**68.** We note the Minister’s evidence in relation to Part 1 of the Bill which sets out nine strategic duties of the Commission.

**69.** With regards to section 11 of the Bill, we are unconvinced by the Minister’s reasoning as to why there is no duty placed on the Welsh Ministers on the face of the Bill to consult any other party when preparing the statement setting out their strategic priorities for tertiary education and research and innovation. The Minister himself stated that it would be “counter-productive” to move away from current practice whereby arms-length bodies, including HEFCW, are involved in dialogue with government when matters are considered for inclusion in their remit.

**Recommendation 7.** The Bill should be amended so that the Welsh Ministers are placed under a duty to consult with the Commission and such other persons as they consider appropriate before publishing a statement under section 11.

**70.** We also note the Minister’s evidence in relation to section 13 of the Bill, and are content.

**71.** As highlighted above, section 19(1) provides a direction-making power to the Welsh Ministers to issue general directions to the Commission about the exercise of any of its functions. While these directions must be published and laid before the Senedd, no Senedd scrutiny procedure is attached to them.

**72.** We also noted above that this power is similar to the power in section 81 of the 1992 Act. However, directions to HEFCW under that power must be made by order subject to the negative procedure.

**73.** We are not convinced by the Minister’s explanation that acting swiftly is a reason why directions made under section 19(1) should not be subject to a formal Senedd scrutiny procedure.

<sup>52</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>53</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

**74.** As we said to the Minister during the evidence session, regulations made by the negative procedure can be a swift procedure, and also provides the Senedd with the ability to formally scrutinise such urgent action undertaken by the Welsh Ministers.

**Recommendation 8.** The Bill should be amended to the effect that directions made under section 19 of the Bill are made by an order of the Welsh Ministers that is subject to the negative scrutiny procedure.

**75.** As regards section 22 of the Bill, we note the Minister's evidence and are content.

## **Part 2 of the Bill**

### **General – The operation of the Commission**

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**76.** Part 2 makes provision for the registration and regulation by the Commission of tertiary education providers. Tertiary education encompasses post-16 education including further and higher education, apprenticeships and mainstream sixth forms. Part 2 contains a number of regulation-making powers for the Welsh Ministers in relation to the operation of the Commission.

**77.** We asked the Minister to what extent the power to make such extensive regulations is consistent with the Commission being an arm's-length body. The Minister told us that "this is a process of striking the balance, isn't it, between prescription and permission".<sup>54</sup> He added:

*"...from the point of view of the regulator, a regulator would want the Bill to be as permissive as possible, whereas the regulated would want it to be as restrictive as possible. So, that's the eternal challenge in these questions. I know that the committee has a particular interest, obviously. So, if you take the question of registration as the core mechanism, perhaps, in this part of the Bill, it's obviously important in that context for the regulator to be able to adapt to changes in the sector over time, whether that's around the nature of providers or the size of the sector or funding questions. And so, having everything on the face of the Bill, if I can put it like that, would probably require primary legislative change in the future to be able to respond to those developments. On the other side of the coin, taking all of the provisions off the Bill clearly isn't acceptable either."*<sup>55</sup>

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<sup>54</sup> LJC Committee, 6 December 2021, RoP [39]

<sup>55</sup> LJC Committee, 6 December 2021, RoP [39]

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**78.** The Minister told us that he hoped he had “struck the right balance in terms of making sure the commission has that level of independence that we want it to have, but also the kind of flexibility for legislation to best support it into the future”.<sup>56</sup>

## **Section 23 – The register**

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**79.** Section 23 requires the Commission to set up and maintain a register of tertiary education providers in Wales. The register is to be divided into different categories of registration specified in regulations made by the Welsh Ministers that are subject to the affirmative scrutiny procedure. Regulations that are subject to the negative procedure may prohibit a provider from registering in one category whilst it is registered in one or more other categories.

**80.** The Statement of Policy Intent refers to the two categories of registration that are currently proposed to be used for the purpose of registering tertiary education providers. We asked the Minister why these are not set out on the face of the Bill, given that extensive consultation on the Bill provisions has already taken place.<sup>57</sup>

**81.** The Minister told us that the current intention is for there to be two categories, but that the point of a reform is to enable the Commission to lead on change into the future, and the section provides that mechanism for changing circumstances.<sup>58</sup>

**82.** The Statement of Policy Intent also states “It is not current government policy to create any categories for providers which do not provide higher education. These providers will continue to be primarily regulated through the terms and conditions attached to grant funding received from the Commission.”<sup>59</sup>

**83.** For this reason, we asked the Minister why it is necessary to have a law that provides for registration at all, if providers other than higher education providers can be effectively regulated via the terms and conditions of their funding. The Minister told us:

*“Well, I suppose the point is inferred in your question, really, when you said ‘other than higher education providers’. The Bill needs to provide the commission with the tools to regulate the entire sector. As we sit here today, the sector is funded through different mechanisms, and that’s not likely to change very quickly, because we’ve got student support as one of the key*

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<sup>56</sup> LJC Committee, 6 December 2021, RoP [39]

<sup>57</sup> See EM, Chapter 4

<sup>58</sup> LJC Committee, 6 December 2021, RoP [41]

<sup>59</sup> Statement of Policy Intent, page 10

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*elements of funding in higher education, but in further education, it's a grant-based model, and that provides its own mechanism, if you like, for conditions to be attached to the funding. So, as we sit here today, those mechanisms just are different, if you like, and therefore I think you do need the registration mechanism to provide the regulatory gateway, if you like, for higher education provision, but there's a different mechanism that enables FE to be regulated through a different mechanism. What I would say, though, as your question implies, is that the Bill does provide for that to change in future, so that secondary legislation could provide for a requirement for those eligible for further education funding to be registered as well. But that would reflect an evolution in the sector that isn't the case today."*<sup>60</sup>

**84.** Also as regards section 23, the Statement of Policy Intent notes that:

*"...the funding structure (and hence appropriate regulation) of tertiary education (particularly higher education) across the UK has changed frequently in recent years, with changes in other UK administrations often having an effect on funding policy in Wales. These changes have occurred at a rate faster than is appropriate or practicable for the Welsh Government to respond with primary legislation regarding the details of regulation in each and every instance. The Bill enables details of the regulatory framework to be changed in response to any future changes in the structure or funding of the tertiary sector in Wales."*<sup>61</sup>

**85.** We asked the Minister if he could provide further information on this matter, and confirm whether discussions are taking place with other UK governments and administrations to ensure that the law in Wales is able to keep pace with other changes. The Minister responded:

*"A major change to the Welsh Government's tuition fee and student support regime took place in the 2012/13 academic year following the Browne Review of Student Finance in England. The changes made at that time had significant consequences for the funding and regulatory oversight of higher education in Wales and resulted in the need for new primary legislation in the form of the Higher Education (Wales) Act 2015. The 2015 Act provide the statutory framework to ensure that HEFCW could continue to regulate Welsh higher education providers whose relevant HE courses are subject to fee limits*

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<sup>60</sup> LJC Committee, 6 December 2021, RoP [45]

<sup>61</sup> Statement of Policy Intent, pages 9 and 10

*in light of the shift in funding from institutional grants towards an increased reliance on tuition fee income.*

*The Bill seeks to establish a future-proofed regulatory framework, to enable the Commission to maintain regulatory oversight of tertiary education providers, which can be adapted in response to future changes to funding or student support arrangements.*

*The Bill creates a regulatory system fit for the future. It allows for secondary legislation to set out different categories of registration and to link these categories to distinct regulatory requirements and access to funding. This will enable the regulatory system to evolve in response to any future changes in the size, shape and funding of tertiary education in Wales, which may in turn be influenced by changes in such funding elsewhere in the UK.*

*The UK Government has recently proposed the introduction of a 'Lifelong Loan Entitlement' which could radically change the financing of further and higher education provision in future years. Much of the detail of the UK Government's proposals is not currently known but, if implemented, may have implications for future Welsh Government policy in this area. I have recently met with the Minister of State for Higher and Further Education and understand that the UK Government intends to consult on the Lifelong Loan Entitlement.*"<sup>62</sup>

**86.** The Minister added that his officials are continuing to engage with their counterparts in the UK Government on a range of matters arising from the Skills and Post-16 Education Bill, including the development of the proposed Lifelong Loan Entitlement, and that he will work closely with stakeholders in the further education and training sectors to move towards a regulatory settlement which is fit for the long-term and brings greater parity between the FE and HE sectors.<sup>63</sup>

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## **Section 30 – Mandatory ongoing registration condition on fee limits**

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**87.** Section 30 of the Bill requires the Commission to ensure that each provider registered in a category specified by the Welsh Ministers in regulations is subject to a fee limit condition. A fee limit condition requires the provider to have an approved fee limit statement and to ensure that regulated course fees do not exceed the applicable fee limit. A qualifying course is a course

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<sup>62</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>63</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

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described in regulations made by the Welsh Ministers, subject to the conditions set out in subsection (5). Regulated course fees are fees payable by a qualifying person to a provider in order to undertake a qualifying course. Subsection (8) provides that a qualifying person is a person described in regulations made by the Welsh Ministers who is not an international student within the meaning of subsection (9). Subsection (10) also allows the Welsh Ministers to make regulations specifying when fees paid for a course at an external provider are to be treated as regulated course fees and therefore subject to a fee limit.

**88.** Section 30(2)(b) provides for the Welsh Ministers to make regulations to specify what constitutes a “fee limit category”. This power is subject to the affirmative scrutiny procedure, but the three other regulation-making powers in section 30<sup>64</sup> which also deal with fee limits are subject to the negative procedure.

**89.** We asked the Minister to explain why all the powers in section 30 are not subject to the affirmative scrutiny procedure in the Senedd when they deal with the same subject matter. The Minister responded:

*“The regulation making power under section 30(2)(b) enables the Welsh Ministers to specify categories of registration in relation to which the Commission must impose an ongoing registration condition concerning fee limits.*

*Our intention is for this registration condition to apply in respect of the proposed ‘core’ higher education registration category. It is not envisaged that these arrangements would be subject to frequent change. However, if in future arrangements for funding and student support were to change (see answer to question 7), the Bill enables the Welsh Ministers to prescribe other categories of registration to which a fee limit condition must apply. As compliance with fee limits is a significant matter for tertiary education providers and an important feature of the legislative scheme it is appropriate that the affirmative procedure is applied to this regulation making power, and this is consistent with use of the affirmative procedure for other powers regarding registration categories and conditions.*

*In contrast the other regulation making powers under section 30 enable the Welsh Ministers to specify qualifying courses and persons for the purpose of regulating fee limits (sections 30(4) and 30(8)(b)) as well as to set out when*

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<sup>64</sup> In section 30(4), section 30(8)(b) and section 30(10).



*fees payable to a provider in respect of a course it provides on behalf of a registered provider are to be treated as payable to the registered provider for the purpose of fee limits (section 30(10)). These matters may need to change over time to ensure synergy between the courses and persons to whom the fee limit applies and the Welsh Government's student support regulations. The Welsh Government would consult on proposed changes ahead of making regulations under these powers. It is my view that that the negative procedure is appropriate for these regulation making powers, and this is also consistent with the equivalent powers held under section 5 of the Higher Education (Wales) Act 2015.*<sup>65</sup>

## **Section 39 – De-registration, and section 41 – De-registration: procedure**

**90.** Section 39 of the Bill provides the Commission with a power and a duty to remove a provider from the register, or from a category of the register, in circumstances that are provided for in the section. The Welsh Ministers may also make regulations to specify other circumstances in which the Commission must remove providers from either a particular category of the register, or from the register entirely, and make regulations that establish transitional arrangements.

**91.** Under section 41, registered providers may also apply, in a form determined by the Commission, to be removed from the register or a category of the register, or may give consent to a proposal from the Commission to remove the provider from the register or a category of the register. As in section 39, the Welsh Ministers may make regulations establishing transitional arrangements.

**92.** Regulations that may be made under sections 39 and 41 will not be subject to any Senedd scrutiny procedure.

**93.** While we noted that these regulation-making powers are only intended to be used in rare cases, such regulations will aim to protect public funds and student interests<sup>66</sup>, and are therefore important. For these reasons, we asked the Minister to confirm why these regulation-making powers will not be subject to any formal Senedd scrutiny procedure. The Minister said:

*"These are regulations that provide for saving provisions, basically—transition provisions—where the relationship between a provider and the register*

<sup>65</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>66</sup> Statement of Policy Intent, page 13

*changes. So, moving between categories, for example. So, they will be very specific. They'll be very localised and specific to a provider, in all likelihood. There's no scope, really, for those regulations to contain substantive policy. They're technical, really, which is the rationale for them having the arrangements that they have.*"<sup>67</sup>

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## **Sections 67 and 68 – Grounds for intervention and powers to intervene**

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**94.** Sections 67 and 68 of the Bill replace the provisions previously set out in section 57 of the 1992 Act. Section 67 specifies the grounds that must be met in order for the Welsh Ministers to intervene in the conduct of a tertiary education provider in Wales that is an institution within the further education sector. Section 68 makes provision for the way that the Welsh Ministers may intervene if one or more of the grounds for intervention set out in section 67 are met.

**95.** With regard to the intervention powers of the Welsh Ministers under the Bill, section 68 gives the Welsh Ministers the power to give a direction directly to a provider's governing body. The Statement of Policy Intent states that this is intended to be used when the Commission has exhausted its intervention functions or when the matter is so serious that urgent action is required.<sup>68</sup>

**96.** We asked the Minister why these conditions are not reflected on the face of the Bill. The Minister said:

*"Whilst it is intended that these intervention powers will be used in only the most serious cases and will operate alongside the intervention powers available to the Commission under the Bill, express conditions relating to these matters have not been included on the face of the Bill for the following reasons:*

- *the way in which the Welsh Ministers intervention functions will operate alongside the Commission's powers of intervention, and decisions around the urgency of intervention are operational matters that would need to reflect the specific circumstances of each individual case. It would be more appropriate to include operational detail such as this within the Welsh Ministers published statement on how these*

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<sup>67</sup> LJC Committee, 6 December 2021, RoP [47]

<sup>68</sup> Statement of Policy Intent, page 20

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*intervention powers will be exercised (section 70 of the Bill). This would be a continuation of current practice;*

- *section 67 of the Bill already sets out the specific grounds that must be satisfied in order for the Welsh Ministers to intervene under these powers. These broadly restate the existing grounds for intervention that are prescribed under section 57 of the Further and Higher Education Act 1992;*
- *the nature of the grounds for intervention set out under section 67 of the Bill may give rise to circumstances where the issue requiring intervention is not related to the Commission's registration or funding functions, for example breaches of statutory duties by a further education institution. In such cases, the Commission's intervention functions may not be appropriate or able to address the identified issue;*
- *it is likely that many further education institutions will not be registered providers in the first instance, therefore the Commission's regulatory relationship with these providers will be through terms and conditions of funding; and.*
- *it would be difficult to define what constitutes circumstances where more urgent action is needed.*<sup>69</sup>

**97.** The Minister added:

*"In light of the above, there could be potential risks arising from the inclusion of conditions on the face of the Bill that relate to the Commission's intervention functions or the requirement of urgency of use for these powers. Should such conditions be included, the Welsh Ministers would have to demonstrate that all of the Commission's intervention powers had been exhausted (or would not resolve the issue in question) or that there was sufficient urgency before they are able to intervene under these powers. This could have the unintended effect of preventing the Welsh Ministers from taking action under these powers or delay such action in circumstances where it may be necessary to protect further education provision in Wales."*<sup>70</sup>

<sup>69</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>70</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

**98.** The Minister also said that it was important to note that the Bill makes provision for the Commission to play a role in the exercise of these intervention functions which reflect its regulatory role in respect of further education institutions in Wales. He also noted that the Bill requires the Welsh Ministers to have regard to the Commission's view in deciding whether to intervene using these powers.<sup>71</sup>

## **Section 77 – Decision reviewer**

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**99.** Section 77 places a duty on the Welsh Ministers to appoint a person, or a panel of persons, to review decisions under sections 43 (registration decision reviews) and 76 (review of notices and directions) of the Bill. The Welsh Ministers must make regulations (subject to the negative procedure) in relation to decision reviews, and subsection (4) of section 77 sets out what the regulations may, among other things, make provision for.

**100.** In relation to section 77(4) of the Bill, the Statement of Policy Intent indicates that any regulations made under this provision would be "broadly similar" to the current arrangements in the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015.

**101.** We asked the Minister to confirm what is meant by the phrase "broadly similar". The Minister responded:

*"The regulation making power under sections 77(3) and 77(4) of the Bill concerns procedural arrangements to apply in respect of any reviews of the Commission's decisions in relation to the register and its regulatory oversight of registered tertiary education providers. This is similar to a power under sections 44(3) and 44(4) of the Higher Education (Wales) Act 2015. The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015 make provision, amongst other matters, in respect of procedural arrangements for the issue and review of notices and directions under Part 6 of the 2015 Act, including section 44.*

*We have not as yet identified any reason for amending the policy on decision reviews as set out in regulations 7 to 10 of the 2015 regulations. These set out the grounds for review of notices and directions, the procedure to apply for reviews, the procedure for the conduct of reviews, and post-review procedure. However, this will be reviewed in full upon drafting of the regulations and*

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<sup>71</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

*with consideration given to any feedback provided by stakeholders on appropriate provisions for review procedure.*

*In line with standard Welsh Government practice we [sic] the regulations to be made under section 77 would be issued for formal consultation."*<sup>72</sup>

## **Section 78 – Duty to monitor and report on financial sustainability**

**102.** Section 78 places a duty on the Commission to monitor the financial sustainability of certain providers set out in subsections (1)(a) and (b). Section 78(1)(c) gives the Welsh Ministers the power to make regulations specifying other tertiary education providers who will be subject to the duty. Subsection (2) provides the Welsh Ministers with a regulation-making power that will enable them to provide for exceptions to the providers referred to in subsections (1)(a) and (b). Regulations under both section 78(1)(c) and 78(2) would be subject to the negative scrutiny procedure in the Senedd.

**103.** We asked the Minister why the negative procedure had been chosen for these regulation-making powers. Given the breadth of the powers and the impact such regulations may have on many tertiary education providers, we also asked for his views on whether it would be more appropriate for further, specific provision to be included on the face of the Bill. The Minister told us:

*"[The section] provides Ministers with the opportunity of extending the monitoring duty to other kinds of tertiary education providers. I think this might, for example, be used for providers delivering apprenticeships who are not registered and who the commission might be funding under a different power—under section 101, for example. The purpose of the power then is to ensure there are no gaps in the monitoring and reporting duty. But, again, I'm happy to hear from the committee if you feel that that balance is not struck in the right place."*<sup>73</sup>

## **Our view**

**104.** We note that Part 2 of the Bill contains a number of regulation-making powers for the Welsh Ministers in relation to the operation of the Commission.

<sup>72</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>73</sup> LJC Committee, 6 December 2021, RoP [53]

**105.** We note the Minister's view on how the powers given to the Welsh Ministers to make such extensive regulations is consistent with the Commission being an arm's-length body.

**106.** We note that section 23 of the Bill requires the Commission to set up and maintain a register of tertiary education providers in Wales, and that the register is to be divided into different categories of registration specified in regulations made by the Welsh Ministers that are subject to the affirmative scrutiny procedure.

**107.** We are unconvinced by the Minister's explanation as to why it is necessary to have a law that provides for registration, if providers other than higher education providers can be regulated via the terms and conditions of their funding. We believe clarity on this point is important.

**Recommendation 9.** The Minister should use the Stage 1 debate on the general principles to clarify why registration is necessary and why, if it is possible to regulate other tertiary education providers through terms and conditions of funding, it is not possible to regulate higher education providers in the same way.

**108.** We acknowledge the Minister's view that "the point of a reform is to enable the Commission to lead on change into the future, and the section provides that mechanism for changing circumstances". However, given that the Minister told us that the current intention is for there to be two categories of registration, and that it is not current government policy to create any categories for institutions which do not provide higher education, we are unconvinced as to the reasoning why the two categories referred to by the Minister could not be placed on the face of the Bill now. This could be accompanied by a power enabling further categories to be specified in regulations in the future.

**Recommendation 10.** Should section 23 remain in the Bill, the Bill should be amended to the effect that the categories of registration referred to by the Minister for the purpose of section 23 should be set out on the face of the Bill. The Bill should also be amended to provide for a regulation-making power to enable further categories (or changes to categories) to be specified in regulations that are subject to the affirmative procedure.

**109.** We acknowledge, that in making recommendation 10, we are suggesting a Henry VIII power and, for that reason, the affirmative procedure should apply.

**110.** With regards to the structure or funding of the tertiary sector in Wales, and discussions taking place with other UK governments and administrations to ensure that the law is able to keep pace with the changes, we note the Minister's evidence that the Bill seeks to establish a future-proofed regulatory framework, to enable the Commission to maintain regulatory

oversight of tertiary education providers, which can be adapted in response to future changes to funding or student support arrangements.

**111.** We also note the Minister's statement that his officials are engaging with their counterparts in the UK Government on a range of matters arising from the Skills and Post-16 Education Bill, including the development of the proposed Lifelong Loan Entitlement.

**112.** As regards section 30 of the Bill, we note that it requires the Commission to ensure that each provider registered in a category specified by the Welsh Ministers in regulations is subject to a fee limit condition. We further note that section 30(2)(b) provides for the Welsh Ministers to make regulations to specify what constitutes a "fee limit category", and such regulations will be subject to the affirmative scrutiny procedure.

**113.** In relation to the regulation-making powers in section 30 which, if exercised, would be subject to the negative procedure, the Minister told us that he would consult on proposed changes ahead of making such regulations.

**Recommendation 11.** The Minister should, in advance of the Stage 1 debate on the general principles, provide further clarity and reasoning why the regulation-making powers in section 30 are not accompanied by a duty to consult before such powers are used.

**114.** As highlighted above, regulations that may be made under sections 39 and 41 of the Bill will not be subject to any Senedd scrutiny procedure. While we note the Minister's evidence on these matters, we do not consider that such regulations should be made without any scrutiny role for the Senedd. As previously noted, such regulations will aim to protect public funds, and are therefore significant.

**Recommendation 12.** The Bill should be amended to the effect that regulations made under sections 39 and 41 are subject to the negative scrutiny procedure.

**115.** We note the Minister's evidence on sections 67 and 68, and the Minister's view that it would be more appropriate to include "operational detail", such as the conditions as to when the Welsh Ministers will use their intervention powers under section 68, within the Welsh Ministers' published statement made under section 70.

**Recommendation 13.** Given the Minister's explanation regarding the level of detail that may be included in a statement made under section 70 of the Bill, we believe the Bill should be amended so as to require such statements to be laid before the Senedd.

**116.** We note the Minister's evidence in relation to section 77 of the Bill, and acknowledge that this section places a duty on the Welsh Ministers to make regulations in relation to decision reviews.

**117.** The Minister told us that, while he has not identified any reason for amending the policy on decision reviews as set out in The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015, this will be reviewed when the regulations are drafted and consideration would be given to any feedback provided by stakeholders.

**Recommendation 14.** The Minister should, in advance of the Stage 1 debate on the general principles, provide further clarity and reasoning why the regulation-making power in section 77 is not accompanied by a duty to consult before such powers are used

**118.** We note the Minister's evidence regarding section 78 of the Bill and the regulation-making powers therein. However, we do not agree with the Minister that the negative scrutiny procedure should be attached to such regulation-making powers, particularly as having its financial sustainability monitored by the Commission would be a significant matter for a provider.

**Recommendation 15.** The Bill should be amended to the effect that regulations made under section 78(1)(c) and 78(2) are subject to the affirmative scrutiny procedure.

## Part 3 of the Bill

### Section 105 – Consent for payments to collaborating bodies

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**119.** Section 105 provides a framework of controls in respect of the Commission's consent for the passage of funds from directly funded providers, organisations or individuals to collaborating bodies under the specified funding powers. Subsection (1) of section 105 enables the Welsh Ministers to make regulations, that will be subject to the negative scrutiny procedure, which specify the matters that the Commission must take into account when deciding whether or not to give its consent for the passage of funds to a collaborating body.

**120.** Given the potential detail that may be required in these regulations, and the significant amount of funding that may be involved, we asked the Minister why the regulations will only be subject to the negative scrutiny procedure in the Senedd rather than the affirmative procedure. The Minister responded:

*"These bodies that do collaborate with bodies that are subject to the control of the commission already, so that is the scenario we describe here. What the*



*commission does is ensure that there is a right to transfer those funds on. But you're entirely right that it's very important that that happens in a way that safeguards public funds and those important principles associated with that process.*

*The specific answer to your question is, again, that these are technical issues on the whole. Does the body that will receive the funding reflect the principles of the strategic plan of the commission, or do they have appropriate regulatory arrangements in place? So, these are technical issues but, perhaps, ultimately they're very detailed. That's how I would describe those things."*<sup>74</sup>

## **Section 106 – Financial support directions**

**121.** Section 106 of the Bill enables the Welsh Ministers to direct the Commission in respect of the provision of financial support provided to a relevant person under the specified funding powers, where it appears to the Welsh Ministers that the financial affairs of the relevant person have been, or are being mismanaged.

**122.** These directions will not be subject to any scrutiny procedure other than being laid before the Senedd. The power in section 106 is broadly modelled on existing section 57 of the 1992 Act relating to HEFCW.

**123.** We asked the Minister to confirm why, as drafted, section 106 would allow these directions to be subject to no Senedd scrutiny. The Minister told us:

*"The financial support direction power in section 106 of the Bill is similar to existing order-making powers in section 57 of the Further and Higher Education Act 1992. Section 89 of the 1992 Act provides that orders made under section 57 do not need to be made by statutory instrument, and consequently are not subject to any Senedd procedure. The provisions as reflected in section 106 of the Bill have been considered anew with consideration given to how these powers may need to be used.*

*One of the key benefits of a direction making power is to enable the Welsh Ministers to respond to a situation and impose requirements quickly in order to ensure public money is subject to appropriate controls. As such an approach has been developed for the Bill based on three steps:*

<sup>74</sup> LJC Committee, 6 December 2021, RoP [58-59]

- *consulting the Commission before issuing a direction,*
- *being required to publish the direction when given and*
- *providing a report to the Senedd after issuing a direction.*

*Alongside this, the Welsh Ministers are required to keep the direction under review.*"<sup>75</sup>

**124.** The Minister added:

*"I consider this approach enables an appropriate response to matters which may require a timely response. The three step procedural requirements are intended to address possible concerns about scrutiny and transparency of the directions.*

*I attended the Children, Young People and Education Committee earlier this month where the arrangements in respect of issuing general directions to the Commission (section 19 of the Bill) was raised. At that meeting I confirmed I would consider whether there were alternative approaches which could allow for the flexibility whilst addressing the concerns of the Committee. During these considerations I will also reflect on the arrangements for the financial support directions.*"<sup>76</sup>

## **Our view**

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**125.** We note the Minister's evidence in relation to section 105 of the Bill.

**126.** As we highlight above, section 105(1) provides a regulation-making power to the Welsh Ministers to specify the matters that the Commission must take into account when deciding whether or not to give its consent for the passage of funds to a collaborating body.

**127.** The Minister told us that these "are technical issues". We do not agree with this position. These regulations may include significant detail. Furthermore, a significant amount of funding may be involved. We also suggest that the examples of "technical issues" that the Minister provided may be subjective and require extensive due diligence. As such, we are not convinced that the negative scrutiny procedure is sufficient for such regulations.

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<sup>75</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>76</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

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**Recommendation 16.** The Bill should be amended to the effect that regulations made under section 105(1) are subject to the affirmative scrutiny procedure.

**128.** With regards to the direction-making power in section 106(1) of the Bill, while we note the Minister's evidence regarding this section, and the similarities between the power in section 106 and the existing power in section 57 of the 1992 Act, there is one matter which requires clarification.

**129.** In his letter to us on 18 January, the Minister said that section 89 of the 1992 Act provides that orders made under section 57 of the same Act do not need to be made by statutory instrument, and consequently are not subject to any Senedd procedure. While we accept that this is the case, in Annex B to this letter, the Minister told us that the power in section 106(1) of the Bill is derived from section 81(3) of the 1992 Act which is subject to the negative procedure.

**Recommendation 17.** The Minister should, in advance of the Stage 1 debate on the general principles, clarify from which section in the 1992 Act the direction-making power in section 106 of the Bill is derived. If confirmed that the power is derived from section 81(3) of the 1992 Act, the Minister must further explain the down-grading of scrutiny procedure which will therefore be in place.

**Recommendation 18.** The Bill should be amended to the effect that directions made under section 106 of the Bill are made by order of the Welsh Ministers which is subject to the negative scrutiny procedure.

## **Part 4 of the Bill**

### **Powers derived from the Apprenticeship, Skills, Children and Learning Act 2009**

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**130.** The Statement of Policy Intent notes that a number of the powers in Part 4 of the Bill "build upon, or re-enact, existing regulation making powers in the *Apprenticeship, Skills, Children and Learning Act 2009*" (the 2009 Act).<sup>77</sup>

**131.** We asked the Minister to confirm that, where this is the case, the scrutiny procedure which was applicable under the 2009 Act remains applicable under the Bill.

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<sup>77</sup> Statement of Policy Intent, page 36

**132.** The Minister confirmed that “where a power in Part 4 is derived from a regulation making power in the *Apprenticeship, Skills, Children and Learning Act 2009*, the scrutiny procedure in the Bill is at least equivalent to the procedure which was applicable under the 2009 Act”.<sup>78</sup>

### **Sections 111 and 112 – Specification of requirements in relation to approved Welsh apprenticeship, and consultation by Welsh Ministers**

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**133.** Subsection (1) of section 111 provides the Welsh Ministers with a power to specify requirements in relation to approved Welsh apprenticeships and the development of apprenticeship frameworks. The Bill does not set out what form these requirements should take, what status they have, and there is no procedure or opportunity for the Senedd to scrutinise such requirements.

**134.** We asked the Minister how these powers would help the Welsh Ministers to set out the kind of requirements providers will need to adhere to and asked how Members of the Senedd will be enabled to scrutinise such requirements. The Minister told us:

*“...we need to ensure that the process that we have of designing and providing apprenticeships is appropriate. And the powers in the Bill replace those in the 2009 Act. And the arrangements at the moment are... quite clunky. So, these are far more flexible, and that's very important in this specific context, because it's responding to economic changes that we're trying to do so that the provision is appropriate and provides the skills that we need. So, that's the principle, of course. And the role of Welsh Government Ministers in this is to ensure, at the end of the day, that we can respond to, for example, changes in terms of investment into Wales or common policies across several aspects of Government. (...)*

*In terms of how that transfers into action, the requirements will need to be published. We'll need to publish the date that they come into force. There'll have to be consultation as well with the commission themselves and any other body affected before that coming into force can happen. And the specification or the requirements create a responsibility on the commission to respond to that. So, in order for them to be apprenticeships that are authorised by the Bill, it has to respond to those requirements...*

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<sup>78</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

*If we, as a Government, wanted to keep hold of all these powers, we wouldn't create a commission and transfer almost all of the powers with regard to further education to the commission. So, that's the fundamental principle here. We have a great deal of flexibility within the current system that we have in this area in general. One example where there is insufficient flexibility is this area.*"<sup>79</sup>

**135.** We put it to the Minister that the fact that there are weaknesses in the current system does not mean that the same weaknesses should be transferred into a new system. We also asked him to identify the accountability to the Senedd in this process. The Minister said:

*"...I as a Minister am yielding powers to the commission so that the commission can deal in a different way, an alternative way, with these issues. But on the other hand, we have a process within the legislation. The line of sight is there between the decisions that we make strategically as a Government—the declaration of strategic priorities, and so on—and that turns into a strategic plan for the commission and then there is action through the regulatory system. Some have said, in other contexts, that that gives too many powers to the Welsh Government to decide what the commission can do. There were questions at the beginning of this discussion today on that point, but the question that you ask now is an example of why we need that line of sight, which is so that you can hold me as Minister to account in committee and ask me those difficult questions. I think that the Bill enables that to happen and ensures that we as Ministers continue to be accountable. But that does mean, on operational matters, that there are examples where the power is in somebody else's hands, namely the commission."*<sup>80</sup>

## Our view

**136.** We note the Minister's evidence as regards the powers in the Bill derived from the 2009 Act, and are content.

**137.** As set out above, section 111 provides the Welsh Ministers with a power to specify requirements in relation to approved Welsh apprenticeships and the development of

<sup>79</sup> LJC Committee, 6 December 2021, RoP [63-64] and [66]

<sup>80</sup> LJC Committee, 6 December 2021, RoP [68]

apprenticeship frameworks. The Bill does not set out what form these requirements should take, and there is no specified procedure for the Senedd to scrutinise such requirements.

**138.** The Minister told us that flexibility would be needed so that the Welsh Government could respond to economic changes. While we acknowledge the Minister's reasoning on this matter, we are unconvinced that such executive action needs to be put in place via a mechanism that is not subject to Senedd scrutiny.

**Recommendation 19.** The Bill should be amended so that requirements in relation to approved Welsh apprenticeships, for the purpose of Part 4 of the Bill, are prescribed in regulations that are subject to the negative scrutiny procedure.

**139.** As regards the consultation that the Welsh Ministers will undertake before specifying or withdrawing a requirement under section 111 of the Bill, the Minister told us that there will "have to be consultation as well with the commission themselves and any other body affected". However, it is our understanding that section 112 of the Bill requires the Welsh Ministers to consult with the Commission and "such other persons as they consider appropriate". Whom the Welsh Ministers consider to be appropriate does not guarantee that affected bodies will be consulted.

**Recommendation 20.** The Minister should, in advance on the Stage 1 debate on the general principles, confirm that bodies affected by section 111 of the Bill will be consulted before requirements are prescribed in relation to that section, and commit to bringing forward an amendment to the effect that this duty to consult is set out on the face of the Bill.

**140.** The Minister also told us that the "specification or the requirements" create a responsibility on the Commission to respond to the consultation undertaken by the Welsh Ministers. It is not clear to us that this is a duty placed on the Commission.

**Recommendation 21.** The Minister should, in advance of the Stage 1 debate on the general principles, clarify and confirm whether any duty is placed on the Commission in the Bill to respond to a consultation under section 112 of the Bill.

## **Part 5 of the Bill**

### **Section 124 – Qualifying institutions for student complaints scheme**

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**141.** Section 124 of the Bill makes amendments to Part 2 of the *Higher Education Act 2004* (the 2004 Act) in relation to the student complaints scheme. Section 11 of the 2004 Act sets out the qualifying institutions that are subject to the scheme.

**142.** Section 124 of the Bill amends section 11 of the 2004 Act to enable the Welsh Ministers, by regulations, to specify additional qualifying institutions. Such regulations would be subject to the negative scrutiny procedure in the Senedd.

**143.** We asked the Minister whether this kind of wide-ranging power demanded the use of a different procedure. The Minister told us that the Bill “sets out a list of the bodies that could be subject to the work of this office”. As such, the Minister said that, with that detail being on the face of the Bill, “it strikes me as being appropriate that it is the negative procedure that is used”.<sup>81</sup>

## **Our view**

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**144.** We note that section 11 of the 2004 Act sets out qualifying institutions that are to be subject to the student complaints scheme, and that section 124 of the Bill amends section 11 of the 2004 Act to enable the Welsh Ministers to make regulations which specify additional institutions. We further note that such regulations would be subject to the negative scrutiny procedure.

**145.** We note the Minister’s evidence in relation to section 124 of the Bill, in particular that there is a certain level of detail on the face of the Bill regarding to which institutions may in future be brought within the ambit of the student complaints scheme, and are content.

## **Part 6 of the Bill**

### **Section 130 – Use of application-to-acceptance information for research purposes**

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**146.** Section 130 of the Bill makes provision for how the Welsh Ministers may use the information obtained under section 129 (power to require application-to-acceptance information) and with whom the information may be shared. Section 130 also makes provision for the circumstances in which a product of research using information obtained under section 129 may be published.

**147.** Subsection (5) places a duty on the Welsh Ministers to publish guidance setting out the factors that will be taken into account when approving a body or individual with whom the information may be shared. There is no requirement for this guidance to be laid before the Senedd.

**148.** We asked the Minister to explain why this is the case. The Minister told us:

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<sup>81</sup> LJC Committee, 6 December 2021, RoP [72]

*"This guidance is intended to cover procedural and technical matters to support the implementation of these provisions and as such I do not consider the application of a Senedd procedure or a requirement to lay the guidance before the Senedd to be necessary."*<sup>82</sup>

## **Our view**

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**149.** We note that subsection (5) of section 130 places a duty on the Welsh Ministers to publish guidance setting out the factors that will be taken into account when approving a body or individual with whom the information obtained under section 129 may be shared. We further note that there is no requirement for this guidance to be laid before the Senedd.

**150.** We note the Minister's evidence in relation to section 130 of the Bill and are content.

## **Part 7 of the Bill**

### **Section 135 – Dissolution of higher education corporations in Wales**

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**151.** Section 135 makes amendments to section 128 of the *Education Reform Act 1988* (the 1988 Act). Section 128(2) of the 1988 Act contains a power for the Welsh Ministers by order (subject to the negative procedure) to provide for the dissolution of a higher education corporation in Wales and the transfer of its property rights and liabilities to other listed institutions.

**152.** Section 135 preserves this wide-ranging power for the Welsh Ministers. In exercising the power, the Welsh Ministers must consult the higher education corporations it intends to dissolve. There are no further specific conditions attached to the power. The Explanatory Memorandum provides no rationale of the preservation of this power other than that it would be a desirable position.<sup>83</sup>

**153.** We asked the Minister why he considered the desirability of this wide-ranging power to be sufficient justification, and asked that he expand on the reasons for retaining the power.

**154.** The Minister told us that these powers were "in essence, backstop powers and their use would be subject to the principles of public law". He added:

*"I recognise the strength of stakeholder feeling in respect of these powers and as such am actively exploring an amendment to these provisions and have asked my officials to consider the feedback and comments made by*

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<sup>82</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

<sup>83</sup> EM, paragraph 3.406



*stakeholders in respect of these provisions as part of developing that amendment. I would also welcome the views and recommendations of the Committee.*

*As we continue to consider this matter I am happy write to Committee with any further updates.”<sup>84</sup>*

## **Our view**

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**155.** We note the Minister’s evidence in relation to section 135 of the Bill, and the wide regulation-making power therein. Earlier in the report in Chapter 3, we noted our concern with the Minister’s offering of flexibility and future-proofing as justifications for taking regulation-making powers in the Bill. We also have strong concerns with the Minister’s view that preserving the wide-ranging power that currently exists in section 128 of the 1988 Act through section 135 of the Bill is desirable. This is not an acceptable justification for the preservation or extension of a power to the executive in a Bill.

**Recommendation 22.** If preserving the existing power in section 128(2) of the *Education Reform Act 1988* through section 135 of the Bill is merely desirable and not essential to the implementation of the Bill, the Bill should be amended to the effect that the power in section 128(2) of the 1998 Act is repealed, rather than expanded upon.

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<sup>84</sup> Letter from the Minister for Education and Welsh Language, 18 January 2022

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