

The Welsh Government's Legislative Consent Memorandum on the Schools Bill

November 2022



1. Background

The UK Government's Schools Bill

1. The Schools Bill¹ (the Bill) was introduced into the House of Lords on 11 May 2022. It is sponsored by the Department for Education.

2. The long title to the Bill states that it is a Bill to:

"make provision for the regulation of Academies; about school and local education funding; about the attendance of children at school; about the regulation of independent educational institutions; about teacher misconduct; and for connected purposes."

3. The Bill completed report stage in the House of Lords on 18 July 2022. At the time of writing this report, the date for third reading in the Lords was yet to be confirmed.

The Welsh Government's Legislative Consent Memorandum

4. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

5. On 7 July 2022, Jeremy Miles MS, Minister for Education and Welsh Language (the Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.²

6. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Children, Young People and Education Committee should report on the Memorandum by 17 November 2022.³ This reporting deadline was later extended to 1 December 2022.⁴

¹ Schools Bill, as introduced (HL Bill 1)

² Welsh Government, [Legislative Consent Memorandum, Schools Bill](#), July 2022

³ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Schools Bill](#), July 2022

⁴ Business Committee, [Revised timetable for consideration: Legislative Consent Memorandum on the Schools Bill](#), September 2022

Provision for which the Senedd's consent is required

7. Within the Memorandum, the Minister states that an amendment to the Bill which makes provision within the legislative competence of the Senedd, amendment 96,⁵ was agreed during Lords Committee Stage.⁶

8. The Minister provides detail on the effect of the amendment to paragraph 1 of Schedule 2⁷ to the Bill (consequential amendments relating to Part 2). Paragraph 1 of Schedule 2, as amended, inserts amendments to section 494 of the *Education Act 1996* (the 1996 Act), which applies (as will the amendments) in England and Wales. The Memorandum states that section 494 of the 1996 Act:

*"... provides for recoupment of amounts by local authorities in cases where a pupil is excluded from a school in one local authority area and subsequently provided with education in another local authority area (including cross border recoupment of funding between English and Welsh local authorities)."*⁸

9. The Minister states that the Bill's proposed amendment to section 494 of the 1996 Act will serve to expand its scope to encompass academies.⁹

10. The Minister confirms the Welsh Government's view that the Senedd's consent is required for the provision included by the amendment, as it has a purpose within the legislative competence of the Senedd (namely the funding of Welsh schools).¹⁰

11. The Minister states that the UK Government agrees that the Senedd's consent is required for this provision.¹¹

12. The Minister also states that the Bill as introduced proposed consequential amendments in the Bill to the Education Act 1996 that serve to re-state the law as it applies in Wales. As those

⁵ UK Parliament, Schools Bill [HL], [Committee Stage amendment 96](#)

⁶ Memorandum, paragraph 3

⁷ At Lords Committee Stage, the amendment made changes to Schedule 3 of the Bill, as the Memorandum states. However, the effects of amendments at Lords Report Stage mean that Schedule 3 is now Schedule 2. For clarity, this report will therefore refer to Schedule 2.

⁸ Memorandum, paragraph 9

⁹ Ibid.

¹⁰ Memorandum, paragraph 10

¹¹ Memorandum, paragraph 11

provisions therefore make no changes to the law in Wales, the Minister states that they do not require the Senedd's consent.¹²

The Welsh Government's position

13. The Minister believes it is appropriate for the Bill to contain devolved provision for the following reasons:

"Amendment 96 ... is consequential to clause 42 (in Part 2) of the Bill. Clause 42 (Clause 41 in the Bill as introduced) deals with budget adjustments for excluded pupils and is intended to put the budget adjustments on a consistent statutory footing across the sector in England (for local authority maintained schools and academies). It provides the Secretary of State with a regulation making power to make provision for a budget deduction to be made in respect of a pupil who is permanently excluded from an academy or a maintained school, and replaces the power in section 47(2)(c) of the School Standards and Framework Act 1998 in England.

The amendment will extend the arrangements in section 494 of the Education Act 1996 to encompass academies, which exist only in England. The application of the amendment in Wales will be limited to cross border recoupment for exclusions, where a pupil moves from an English academy to a Welsh maintained school or vice versa, and will mean that the funding will follow the pupil. This replicates existing cross border practice in relation to academies and therefore this amendment merely formalises such arrangements.

Were the Senedd minded to enact these reciprocal obligation provisions itself, it would be restricted from making the amendments without the consent of the Secretary of State by paragraph 8 of Schedule 7B to the Government of Wales Act 2006, on the basis that they will serve to confer/impose a function on an English public authority – to the extent that they will require an English local authority to pay money to a Welsh local authority in circumstances where a pupil is permanently excluded from an academy school and is subsequently provided with education in a maintained school in Wales.

¹² Memorandum, paragraph 2

*On this basis and in view of the consequential nature of the amendments, the narrow application of the same in Wales, and the interconnected nature of the relevant Welsh and English administrative systems, it is considered to be appropriate and proportionate for the provision to be made within this UK Bill. This approach will facilitate certainty and continuity in respect of the reciprocal cross border funding obligations.*¹³

- 14.** The Minister recommends that the Senedd gives its consent in respect of the provision.¹⁴

¹³ Memorandum, paragraphs 12–16

¹⁴ Memorandum, paragraph 18

2. Committee consideration

15. We considered the Memorandum and a letter in its respect from the Minister to the Llywydd, dated 19 July 2022,¹⁵ at our meeting on 26 September 2022.¹⁶ Following our consideration, we wrote to the Minister on 4 October 2022 to seek further information.¹⁷ The Minister responded on 10 November 2022.¹⁸

16. We agreed our report on 21 November 2022.¹⁹

Our view

General comments

17. We note the Minister's explanation in his letter of 19 July that the Memorandum was laid three days outside of the normal two-week Standing Order deadline due, in part, "to a failure of the UK Government to notify Welsh Government that the amendment had been tabled."²⁰

18. The Minister also states in his letter of 19 July that the Welsh Government was continuing its consideration of the devolution implications of the Bill as it progresses "to ensure there is nothing further that triggers the LCM process."²¹ In our letter of 4 October 2022, we asked the Minister to confirm if that consideration had concluded. We note that, in response, the Minister confirms that the Welsh Government has assessed the Bill as amended at Lords Report stage and concludes that there are no changes which require a further memorandum.²²

19. We note that the Minister states in his letter of 10 November that the Bill is yet to proceed to Lords Third Reading, and his officials were "seeking clarification as to whether the Bill will be

¹⁵ Welsh Government, [Letter from the Minister for Education and Welsh Language to the Llywydd](#), 19 July 2022, page 2

¹⁶ [Legislation, Justice and Constitution Committee, 26 September 2022](#)

¹⁷ Legislation, Justice and Constitution Committee, [Letter to the Minister for Education and Welsh Language](#), 4 October 2022

¹⁸ Welsh Government, [Letter from the Minister for Education and Welsh Language to the Children, Young People and Education Committee and the Legislation, Justice and Constitution Committee](#), 10 November 2022

¹⁹ [Legislation, Justice and Constitution Committee, 21 November 2022](#)

²⁰ Welsh Government, Letter from the Minister for Education and Welsh Language to the Llywydd, 19 July 2022, page 2

²¹ Ibid.

²² Welsh Government, Letter from the Minister for Education and Welsh Language to the Children, Young People and Education Committee and the Legislation, Justice and Constitution Committee, 10 November 2022, page 1

progressing given the appointment of the new Prime Minister." We acknowledge the Minister's commitment made in his letter to write to us, and the Children, Young People and Education Committee, as soon as more information about the passage of the Bill becomes available.²³

The Welsh Government's view on provision in the Bill which require the Senedd's consent

20. We note the Minister's assessment that paragraph 1 of Schedule 2 to the Bill, as amended at Lords Report Stage, includes provision which requires the consent of the Senedd.

Conclusion 1. We agree with the Welsh Government's assessment that paragraph 1 of Schedule 2 to the Bill includes provision which falls within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.1(i).

21. We note the Minister's view that it is appropriate and proportionate for the Bill to make provision for Wales.

Consequential amendments included in the Bill

22. Numerous clauses, and paragraphs in the Schedules to the Bill, as amended at Lords Report Stage, include consequential amendments that apply in relation to Wales. We note the Minister's view that, as these amendments serve only to re-state the law in Wales, the Senedd's consent is not required.²⁴

23. Standing Order 29.1(i) does not make a distinction between new law or a restatement of the existing law, only that a provision in a UK Bill is relevant provision if it makes provision for any purpose within the Senedd's legislative competence.²⁵ We note that the Minister agrees that these provisions are within the legislative competence of the Senedd. It would therefore appear to us that it cannot be argued that they are consequential provisions relating to matters that are not within the legislative competence of the Senedd, as referenced in Standing Order 29.1(i).

Conclusion 2. We believe the provisions in the Bill that re-state the law in Wales fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.1(i).

²³ Ibid.

²⁴ Memorandum, paragraph 2

²⁵ We expressed this view within our [report on the Welsh Government's Legislative Consent Memorandum on the Skills and Post-16 Education Bill](#) in November 2021.

Recommendation 1. The Senedd's consent should also be sought for all provisions in the Bill that restate the law in Wales.

Clause 52 of the Bill (transitional, saving and consequential provision)

24. We note that clause 52(2) of the Bill provides the Secretary of State with a regulation-making power to make provision that is consequential on the Bill. We raised our concern with the Minister that the power could be used to amend law that applies in Wales, and that there is no requirement in the Bill for the UK Government to consult or obtain the consent of the Welsh Government or the Senedd before making such amendments. We asked the Minister if he had any concerns regarding the clause, and, if so, what steps did he intend to take to resolve those concerns.

25. We note the Minister's view on clause 52(2), as stated in his letter of 10 November:

"I am confident that the provision is narrowly framed (in consequence of the Bill) and will not, in my view, enable UK Government Ministers to make any substantive changes to devolved legislation."²⁶

26. Despite the Minister's response, we remain concerned with the potential effect of the power contained within clause 52(2). We are of the view that if UK Government Ministers are able to make changes to the law to that applies in Wales – whether they be substantive changes or not – the Senedd, or at the very least the Welsh Ministers, should be consulted or be asked to provide consent for any changes which are to be made.

Recommendation 2. The Minister should provide examples of the types of changes which may be made in exercise of the powers conferred by clause 52(2) of the Bill, if enacted.

Recommendation 3. The Minister should confirm and explain why he is content for UK Government Ministers to make non-substantive changes to the law that applies in Wales without prior consultation with the Welsh Ministers, or their consent.

²⁶ Ibid.