

The Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill

September 2021



1. Background

The UK Government's Professional Qualifications Bill

1. The UK Government's Professional Qualifications Bill¹ (the Bill) was introduced to the House of Lords and had its first reading on 12 May 2021. The Bill is sponsored by the UK Government Department for Business, Energy and Industrial Strategy.

2. The explanatory notes to the Bill state that it:

"...creates a new framework for the recognition of professional qualifications and experience gained overseas and takes steps to reform regulators' practices. It will revoke and replace the interim system for professional qualifications that derives from the UK's membership of the EU."²

3. At the time of writing this report, the date for Report stage in the House of 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 modifies or falls within the Senedd's legislative competence.

5. On 17 June 2021 Jeremy Miles MS, the Minister for Education and the Welsh Language (the Minister), laid before the Senedd a Legislative Consent Memorandum³ (the Memorandum) in respect of the Bill.

6. The Business Committee agreed that the Legislation, Justice and Constitution Committee, and the Economy, Trade and Rural Affairs Committee, should report on the LCM by 30 September 2021.⁴

Provision for which the Senedd's consent is required

7. Paragraphs 11 to 26 of the Memorandum set out the Welsh Government's assessment of the provisions in the Bill which require Senedd consent, namely clauses 1 to 10 and 12 to 19.

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

² Professional Qualifications Bill, [Explanatory Notes](#), paragraph 1

³ Welsh Government, [Legislative Consent Memorandum, Professional Qualifications Bill](#), June 2021

⁴ Business Committee, [Timetable for consideration of the Professional Qualifications Bill](#), July 2021

- 8.** Annex A to the Bill's explanatory notes lists only clauses 1 to 10 as those for which the UK Government is seeking the consent of the Senedd.
- 9.** Paragraph 30 of the Memorandum sets out the reasons for making provision for Wales in the Bill.
- 10.** The Memorandum states:

"The Welsh Government is unconvinced that the majority of the measures contained in this Bill are necessary. The Welsh Government is not opposed to the principle of recognising international qualifications and experience gained overseas, but considers the concurrent powers contained in the Bill undermine the long-established powers of the Senedd and the Welsh Ministers to regulate in relation to matters within devolved competence."⁵

- 11.** At paragraphs 31 to 38 of the Memorandum, the Welsh Government gives further background to its position on the Bill (as introduced).

- 12.** The Memorandum concludes:

"As set out above, the Senedd's consent is required for clauses 1 to 10 and 12 to 19 of the Professional Qualifications Bill. But the Welsh Government will not be in a position to recommend that consent be given unless the Bill is substantially amended to address our significant concerns."⁶

⁵ Welsh Government, Memorandum, paragraph 30

⁶ Welsh Government, Memorandum, paragraph 41

2. Committee consideration

13. We considered the Memorandum at our meeting on 13 September.⁷ We were not in a position to take oral evidence from the Minister given the timetable for scrutiny. However, given the timetable, we wrote to the Minister on 12 August to raise a number of questions in relation to the Memorandum. The Minister responded on 10 September.⁸

Our view

14. As noted at the start of this report, the Bill was introduced into the House of Lords on 12 May 2021. However, the Memorandum was not laid before the Senedd until 17 June, approximately five weeks later. Standing Order 29.2(i) requires a Legislative Consent Memorandum to be laid normally no later than two weeks after the introduction of the Bill to the UK Parliament. The Minister told us:

*"In the Welsh Government's view, the Standing Order deadline is potentially achievable for Bills on which the two governments have worked closely together and are in agreement; the "normally" qualification recognises the realities of what is a highly variable process. In this case, the Bill is not one on which the UK Government had been working with us throughout in a meaningful way...; and production of the Legislative Consent Memorandum was hampered both by the complexity of the issues at play in the Bill as well as by machinery of government delays following the Senedd election on 6 May 2021."*⁹

15. Notwithstanding the particular circumstance of the Senedd election, we believe the Minister's explanation as to how and when the Welsh Government generally considers the Standing Order deadline achievable is important, and should be more widely discussed.

Recommendation 1. In the interests of transparency, the Welsh Government should inform the Senedd's Business Committee of its reasoned position on how and when it considers it would be able to lay a Memorandum within two weeks of a Bill's introduction to the UK Parliament and the circumstances in which it would not be able to meet this timeframe.

⁷ [Legislation, Justice and Constitution Committee, 13 September 2021](#)

⁸ [Letter from the Minister for Education and Welsh Language, 10 September 2021](#)

⁹ [Letter from the Minister for Education and Welsh Language, 10 September 2021](#)

16. We note that, on introduction, the Welsh Government was “unconvinced that the majority of the measures contained in this Bill are necessary.” For that reason, we asked the Minister about the Welsh Government’s role and intergovernmental relations during the development of this Bill. The Minister said:

“The Welsh Government’s role has been to ensure that the Welsh Government’s and key stakeholder’s concerns with the Bill are raised formally with the UK Government at official and Ministerial levels. The Welsh Government has also worked to ensure there is recognition and agreement on the professions for which regulations are devolved, as well as devolved regulators, that are impacted by the Bill.

The UK Government started engagement on this Bill during late January and early February 2021, and progressed with detailed development of the Bill during the Senedd pre-election period.”¹⁰

17. We further note that the Minister has said that he is committed to working constructively and positively with UK Government Ministers and officials to develop mutually acceptable amendments to the Bill, but that this is now in the context of “inadequate engagement ahead of introduction”.¹¹

18. We also asked why the Welsh Government is unconvinced that the majority of the measures contained in the Bill are necessary, and which provisions it considered are necessary. We note the Minister’s explanation that:

“The Welsh Ministers and devolved regulators already have the powers needed to deliver current and future policy and regulations within areas of devolved competence, including powers to recognise all overseas qualifications on a case by case basis.

We do acknowledge that some of the provisions of the Bill may be necessary. Clause 5 of the Bill contains a power for the “appropriate national authority” to modify legislation as a consequence of the revocation of the European Union (Recognition of Professional Qualifications) Regulations 2015. This power will enable the Welsh Ministers to make amendments to Welsh

¹⁰ Letter from the Minister for Education and Welsh Language, 10 September 2021

¹¹ Letter from the Minister for Education and Welsh Language, 10 September 2021

*legislation where these are considered to be appropriate as a consequence of the revocation of the 2015 regulations."*¹²

19. It is not clear from the Minister's letter whether it is only clause 5 of the Bill that the Welsh Government considers may be necessary, or whether clause 5 has been given as one example.

Recommendation 2. The Minister should, in advance of the Senedd's debate on the relevant consent motion, confirm which provisions in the Bill the Welsh Government considers are necessary.

20. Given the Welsh Government's position that the majority of the Bill's provisions (on introduction) are unnecessary, we acknowledge the Welsh Government's stated intention not to recommend that consent be given unless the Bill is amended to address significant concerns.

21. We asked the Minister what specific amendments to the Bill he has requested, and what is the current status of those discussions with the UK Government. The Minister told us that both he and the Counsel General had been in correspondence with UK Government Ministers, particularly as regards the inclusion of concurrent powers¹³ in the Bill. The Minister told us:

*"I am pressing for an amendment to the Bill which would ensure that the powers of the Secretary of State and Lord Chancellor could not be exercised in areas devolved to Wales without obtaining the consent of the Welsh Ministers. I am also pressing for an amendment which would provide for a specific carve out from the requirements of Schedule 7B. I made Lord Grimstone aware of this in a meeting I had with him on 19 July."*¹⁴

22. We are aware that Welsh Government guidance¹⁵ says that new concurrent functions should only be created in very exceptional circumstances and should be removed at the first opportunity.

Conclusion 1. We share the Minister's concerns regarding the inclusion of concurrent powers in the Bill. However, we are also concerned that the mechanism for resolving this problem is seen to be by providing the Welsh Ministers with a power to consent to regulations made in

¹² Letter from the Minister for Education and Welsh Language, 10 September 2021

¹³ Concurrent powers are those exercised by the Welsh Ministers or UK Ministers in relation to Wales, where the exercise of the power by UK Ministers requires the consent of the Welsh Ministers.

¹⁴ Letter from the Minister for Education and Welsh Language, 10 September 2021

¹⁵ [Letter from the Minister for Climate Change in relation to the Welsh Government Legislative Consent Memorandum on the Environment Bill](#), 6 August 2021

devolved areas, with no role for the Senedd. Furthermore, Welsh Government guidance says that new concurrent functions should only be created in very exceptional circumstances and should be removed at the first opportunity.

Recommendation 3. The Minister should, in advance of the Senedd's debate on the relevant consent motion, further explain why he is seeking an amendment to the Bill to add a consent provision to the concurrent powers, when Welsh Government guidance says that new concurrent functions should only be created in very exceptional circumstances.

Recommendation 4. The Minister should, in advance of the Senedd's debate on the relevant consent motion, justify why concurrent powers are appropriate for this Bill, when, if exercised by UK Ministers with the consent of the Welsh Ministers, it would not give the Senedd the opportunity to scrutinise the regulation of professional qualifications which are devolved, such as those relating to higher education policy in Wales.

23. In making recommendation 4, we note that the scope of the Bill remains unclear. As a consequence, we further note that the concurrent powers could also extend to capture the regulation of professional qualifications relating to further education policy in Wales.

Recommendation 5. The Minister should, in advance of the Senedd's debate on the relevant consent motion, update the Committee and the Senedd on the latest position regarding the amendments to the Bill that have been sought, and the consequential effect on the Minister's recommendation as to whether consent should be given by the Senedd to the relevant provisions in the Bill.

24. Paragraphs 32 to 35 of the Memorandum set out how, without the consent of the Senedd or the Welsh Ministers, the Secretary of State or Lord Chancellor would be able to exercise regulation-making powers to amend primary legislation, including Senedd Acts.

Conclusion 2. We share the Minister's concerns – as set out in paragraph 34 of the Memorandum – that the combination of concurrent functions and Henry VIII powers in the Bill means that the Secretary of State or the Lord Chancellor could potentially exercise their regulation-making powers to amend Senedd Acts and regulations made by the Welsh Ministers. We do not consider this to be acceptable.

25. We asked the Minister to confirm whether it was his understanding that the powers in the Bill would enable the Secretary of State or Lord Chancellor to amend the *Government of Wales Act 2006* (the 2006 Act). The Minister confirmed:

"The Secretary of State and Lord Chancellor have powers under the Bill to make regulations which can amend primary legislation (see clause 13(1) and the definitions of "legislation" and "modify" in clause 16(1)). There is no restriction on these powers so it is our view that they could indeed be used to amend the Government of Wales Act 2006."¹⁶

Conclusion 3. As our predecessor Committee in the Fifth Senedd said many times and as a matter of basic constitutional principle, the legislative competence of the Senedd should not be modified by regulations made by the UK Ministers.

Recommendation 6. The Minister should seek an amendment to the Bill to the effect that the powers in the Bill cannot be used by UK Ministers to make regulations that amend the *Government of Wales Act 2006*.

26. Paragraph 35 of the Memorandum notes that the UK Government has stated that "it does not intend to use concurrent powers in the areas of devolved competence without the agreement of the relevant [Devolved Administrations]". We asked the Minister where and when the UK Government made this statement, and whether any discussions had taken place as to the inclusion of this commitment on the face of the Bill. The Minister said:

"Lord Grimstone wrote to Ken Skates MS in his capacity as then Minister for Economy, Transport and North Wales on 11 May and stated that the UK Government does not intend to use the concurrent powers in the areas of devolved competence without the agreement of the relevant Devolved Governments.

In my letter to Lord Grimstone on 18 June, I noted that this commitment does not feature in the Bill, and as such is only binding for as long as the current UK Government decides to abide by it."

Conclusion 4. We share the Minister's view and concern that the UK Government's commitment to not use the concurrent powers provided by the Bill in devolved areas without the agreement of the Welsh Ministers is not binding on the UK Government, and we do not consider this to be an acceptable position.

27. Paragraphs 36 and 37 of the Memorandum set out how the Bill includes a "restriction unique to the Welsh Minister's powers", whereby the restrictions imposed by paragraphs 8 to 11 of Schedule 7B to the 2006 Act are effectively imported into the regulation-making process. We

¹⁶ Letter from the Minister for Education and Welsh Language, 10 September 2021

asked the Minister what specific discussions he has had with the UK Government about this restriction. The Minister told us:

"The Counsel General has had correspondence about this restriction with Baroness Bloomfield, UK Government Minister. The explanation received was as follows:

Paragraph 12 of Schedule 7B to the Government of Wales Act 2006 Act (GoWA) provides that where an enactment (in this case the Bill) refers to provisions within the legislative competence of the Senedd, this does not include provision which could only be made by an Act of the Senedd with the consent of a UK Minister (under paragraphs 8, 10 or 11 or otherwise). This means that Welsh Ministers cannot make regulations which impose, confer or otherwise modify the functions of a reserved authority, unless there is specific provision to the contrary. This would therefore have been the default position in relation to powers conferred on Welsh Ministers by the Bill.

The words in parenthesis at the end of clause 14(2) of the Bill ("(ignoring any requirement for the consent of a Minister of the Crown)"), however, set aside the default position established by paragraph 12 of GoWA. The effect is that Welsh Ministers may make regulations using powers in the Bill that are in line with the legislative competence of the Senedd, even if the consent of a Minister of the Crown is required. Together, 14(2) and 14(5) place the regulation-making powers of Welsh Ministers on a footing that mirrors that of the legislative competence of the Senedd – maintaining the position in the Welsh devolution settlement."¹⁷

28. The provision in question, clause 14(5) of the Bill, states that the Welsh Ministers may not make any provision using their regulation-making powers in the Bill without the consent of a Minister of the Crown, where such provision would, if made in an Act of the Senedd, require Minister of the Crown consent. We asked the Minister if there is anything outside of paragraphs 8 to 11 of Schedule 7B to the 2006 Act which would cause an issue in this regard. The Minister told us that the only restriction is on the Welsh Ministers' powers to make regulations which impose, confer or otherwise modify the functions of a reserved authority and, as such, there is

¹⁷ Letter from the Minister for Education and Welsh Language, 10 September 2021

nothing outside of paragraphs 8 to 11 of Schedule 7B to the 2006 Act which would cause an issue.¹⁸

Conclusion 5. In our view the effect of clauses 14(2) and 14(5) together is wider than “maintaining the position in the devolution settlement”. Although it would appear that the wording in parentheses at the end of clause 14(2) is necessary to enable the Welsh Ministers to effectively exercise their regulation-making powers under the Bill, clause 14(5) as drafted means that the Welsh Ministers will require Minister of the Crown consent for any regulations containing provisions which, if contained in an Act of the Senedd, would require Minister of the Crown consent. Under Schedule 7B to the 2006 Act, once a regulation-making power has been given via an Act of the Senedd with Minister of the Crown consent, that power can be exercised by the Welsh Ministers without the limitation of again seeking Minister of the Crown consent to the content of the regulations. Therefore, the power in clause 14(5) is an unusual, and unwelcome, power to be included in a Bill.

Recommendation 7. The Minister should seek an amendment to the effect that clause 14(5) is removed from the Bill.

29. In the Memorandum, the Minister outlines a range of policy concerns arising from the Bill. One concern relates to scope and the Memorandum states that “the definition used in the Bill fails to clearly define scope”. The Welsh Government is therefore unclear whether further education is in the scope of the Bill. We asked the Minister to confirm which definition is being referred to in the Memorandum, and he confirmed:

“This refers to definitions in Clause 16 of the Bill which have to be considered when assessing whether a profession is regulated, and whether a body is a regulator, for the purposes of the Bill. We understand that the UK Government will shortly be issuing guidance on the interpretation of these definitions.”¹⁹

Recommendation 8. The Minister should, in advance of the Senedd's debate on the relevant consent motion, confirm whether the guidance on the interpretation of the definitions in clause 16 of the Bill has been issued by the UK Government and confirm whether he has any continuing concerns with the scope of the Bill or concerns with the guidance.

¹⁸ Letter from the Minister for Education and Welsh Language, 10 September 2021

¹⁹ Letter from the Minister for Education and Welsh Language, 10 September 2021

30. We also asked the Minister what are the implications for the Welsh Government if further education is within the scope of the Bill and, if the issue is not resolved, how will this impact on whether or not he would recommend that consent is given. The Minister said:

*"The Welsh Government is of the opinion that the Further Education sector in Wales is in scope of the Bill. Plainly this would be problematic if the UK Government were to exercise its powers to make changes to regulations in Wales which were not consistent with our policy. The decision on recommending consent will depend on an amendment to the Bill which would ensure that the powers of the Secretary of State and Lord Chancellor could not be exercised in areas devolved to Wales without obtaining the consent of the Welsh Ministers."*²⁰

Conclusion 6. While we note the Minister's interpretation of the definitions in clause 16, we are concerned that the scope of a UK Bill and how it impacts on devolved matters is not clear from the face of the Bill and that it remains unclear to this date.

31. Another concern outlined in the Memorandum relates to how the Bill links professional qualifications and trade policy. The Memorandum states that this "reduces Welsh Minister's powers further since decisions could be badged as 'trade' rather than 'professional qualification' decisions and imposed on Wales in contravention of the Sewel Convention". The Memorandum further states "Whilst assurances from UK Government Ministers and published guidance state this is not the intention, this is a clear risk due to the drafting of this Bill."

32. We asked the Minister where and when the UK Government provided the assurances referred to in the Memorandum. The Minister told us that the assurances were set out in the letter sent by Lord Grimstone on 11 May to the then Minister for Economy, Transport and North Wales.²¹

33. We also asked in what published guidance does it state that it is not the UK Government's intention to badge relevant decisions as trade-related rather than relating to professional qualifications. The Minister told us:

"The guidance is the "Arrangements to facilitate the recognition of professional qualification: guidance for regulatory and professional bodies"

²⁰ Letter from the Minister for Education and Welsh Language, 10 September 2021

²¹ Letter from the Minister for Education and Welsh Language, 10 September 2021

published in May 2021 by the Department for Business, Energy and Industrial Strategy.

The guidance states:-

"Where professions are regulated separately in the individual nations of the UK, there are additional factors which may be considered for recognition arrangements for those professions, subject to the right of each devolved government to regulate professions within their devolved competence as they see fit. In some cases, there are differences in the way in which professions are regulated across the UK, and as a result regulatory bodies in different parts of the UK will need to consider how to pursue consistent access for international professionals in all parts of the UK internal market"

There is a risk that the drafting of the concurrent functions in the Bill would enable the UK Government to override "the right of each devolved government to regulate professions within their devolved competence as they see fit".

34. It is not immediately clear to us how the guidance referred to by the Minister does confirm the UK Government's intention that it will not badge relevant decisions as trade-related rather than relating to professional qualifications. Furthermore, and as we highlight in earlier paragraphs, the assurances given by the UK Government Minister in correspondence are not binding on the UK Government.

35. We would also highlight that differences in the regulation of professions introduced after 31 December 2020 between the devolved nations will be subject to the automatic recognition principle of the *UK Internal Market Act 2020* (the Internal Market Act). The Internal Market Act introduces a system for the recognition of professional qualifications across the UK so that professionals qualified in one part of the UK can access the same profession in a different part without needing to requalify, subject to exceptions. The professional qualifications of persons who qualified in other parts of the UK will therefore be automatically recognised in Wales, regardless of the Welsh Government's ability to regulate those qualifications.

36. The previous Welsh Government expressed concerns²² about the Internal Market Act during its passage through the UK Parliament, stating that the regulation of professional qualifications was "an area of divergence which already exists". It also voiced specific concerns

²² [Letter from the Counsel General to the Chair of the Legislation, Justice and Constitution Committee and Chair of the External Affairs and Additional Legislation Committee, 14 August 2020](#)

regarding teachers' qualification and the potential for the Act to undermine teaching standards in Wales.

37. We also asked the Minister what discussions the Welsh Government has had with the UK Government regarding the inclusion of provisions on the face of the Bill to give effect to the assurances referred to in the Memorandum. This question was not addressed in the response we received from the Minister.

38. As regards financial concerns the Memorandum states that there will be an "impact on Welsh Government budget considerations" and that the situation "could ultimately impact on costs for the Welsh Government". We asked the Minister to explain how the Welsh Government could be impacted financially and how the costs relate to those identified for devolved regulators (as identified in paragraph 39 of the Memorandum). We note the Minister's response that:

"If the provisions in the Bill mean that regulators have to commit additional spend to comply, the costs for that spend will ultimately be the responsibility of the Welsh Government through the funding arrangements in place with the devolved regulators."²³

39. As one of our final comments, we note that there is a difference in position between the Welsh and UK Governments as regards the clauses in the Bill where consent should be sought, and we draw this to the attention of the Senedd.

40. Lastly, we wish to highlight that our consideration of the Memorandum has provided an example of the complexities of the post-EU exit era. We acknowledge that this is partly as a result of the way the Bill is drafted. The implementation of the Bill, once enacted, follows the introduction of multiple domestic and international arrangements as a result of the UK's exit from the European Union. The Bill's provisions are intertwined with international treaties – two of which we fortuitously considered alongside the Memorandum²⁴ – and common frameworks²⁵. It will operate alongside the Internal Market Act and the UK's new immigration system which both play key roles in the UK's post-Brexit era.

²³ Letter from the Minister for Education and Welsh Language, 10 September 2021

²⁴ [UK/Peru: Treaty on the Mutual Recognition of Degrees](#); [UNESCO Global Convention on the Recognition of Qualifications Concerning Higher Education](#)

²⁵ [Common Framework - Recognition of Professional Qualifications](#)

Recommendation 9. Where UK Bills that are the subject of Welsh Government legislative consent memoranda interconnect with domestic and/or international arrangements, the Welsh Government should make this clear and provide details in the relevant memorandum.