

The Welsh Government's Legislative Consent Memoranda on the Skills and Post-16 Education Bill

November 2021



1. Background

The UK Government's Skills and Post-16 Education Bill

1. The Skills and Post-16 Education Bill¹ (the Bill) was introduced in the House of Lords on 18 May 2021. It is sponsored by the Department for Education.

2. The long title of the Bill notes that it is:

"A Bill to make provision about local skills improvement plans; to make provision relating to further education; to make provision about functions of the Institute for Apprenticeships and Technical Education and relating to technical education qualifications; to make provision about student finance and fees; to make provision about assessments by the Office for Students; to make provision about the funding of certain post-16 education or training providers; and for connected purposes."

3. The Bill completed its passage through the House of Lords on 25 October 2021 and was introduced to the House of Commons on 26 October 2021, where it has had its first and second reading. Committee stage in the House of Commons is yet to be announced.

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. Standing Order 29.2 stipulates that a legislative consent memorandum should be laid "normally no later than 2 weeks after introduction".

5. On 9 July 2021 Jeremy Miles MS, the Minister for Education and Welsh Language (the Minister), laid before the Senedd a Legislative Consent Memorandum² (the Memorandum) in respect of the Bill.

6. Paragraphs 4 to 19 address the Memorandum and the Bill as it was before amendments were made to the Bill by the House of Lords.

¹ Skills and Post-16 Education Bill, as introduced (HL Bill 5)

² Welsh Government, Legislative Consent Memorandum, Skills and Post-16 Education Bill, July 2021

7. The Business Committee agreed that the Legislation, Justice and Constitution Committee, the Economy, Trade and Rural Affairs (ETRA) Committee and the Children, Young People and Education (CYPE) Committee, should report on the Memorandum by 21 October 2021.³ This date was subsequently extended to 16 December 2021.⁴

Provision for which the Senedd's consent is required

8. Paragraphs 6 to 12 of the Memorandum set out the Welsh Government's assessment of the provisions in the Bill which require Senedd consent, namely clauses 1, 4 and 14.

9. Clause 1 provides for local skills improvement plans, introducing duties on certain training or education providers to co-operate with designated employer representative bodies to develop local skills improvement plans and have regard to the plans once they have been developed.

10. Clause 4 provides for the meaning of certain phrases used in clause 1, of which the relevant phrases for the purposes of this Memorandum are:

- "relevant provider" means a provider of post-16 technical education or training which is—
 - a. an institution within the further education sector (within the meaning given by section 91(3) of the *Further and Higher Education Act 1992* (the 1992 Act)),
 - b. a higher education provider (within the meaning given by section 83(1) of the *Higher Education and Research Act 2017*),
 - c. an independent training provider, or
 - d. a local authority in England, a 16 to 19 Academy or a school that is specified or described in regulations made by statutory instrument by the Secretary of State.

- "specified area" which means an area in England.

³ Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the Skills and Post-16 Education Bill](#), July 2021

⁴ Business Committee, [Revised timetable for consideration of the Legislative Consent Memorandum on the Skills and Post-16 Education Bill](#), November 2021

11. The definition of "relevant provider" would encompass a Welsh provider, such as a sixth form college.

12. The UK Government is not seeking the legislative consent of the Senedd to clauses 1 and 4. However, paragraph 9 of the Memorandum states that:

"As Welsh providers may deliver post-16 technical education or training that is considered to be material to a specified area in England certain Welsh providers may fall within scope of the above duties in relation to such provision."

13. Clause 14 modifies section 22 of the *Teaching and Higher Education Act 1998* (the 1998 Act) which provides the Secretary of State and the Welsh Ministers with a wide concurrent regulation-making power that could be used to authorise or require the making of grants or loans for any prescribed purposes to eligible students in connection with their undertaking higher or further education courses designated by or under regulations.

14. Paragraph 11 of the Memorandum states:

"Certain of the Welsh Ministers functions under section 22 of the 1998 Act are exercisable in relation to Wales concurrently with the Secretary of State. None of the modifications relate specifically to functions exercisable by Welsh Ministers under this provision. However, the UK Government intends in future to make regulations implementing the Lifelong Loan Entitlement and will rely on the Secretary of State's amended functions under section 22 of the 1998 Act for this purpose. The approach adopted by the UK Government in respect of its proposed amendments to section 22 of the 1998 Act means that the modifications applied in relation to course modules will carry forward into provisions that are exercisable by the Secretary of State (concurrently with the Welsh Ministers) in relation to Wales and therefore are amendments with regard to devolved matters in Wales."

15. The Memorandum does not provide details of the source of the Welsh Government's information regarding the UK Government's intention to make regulations in the future.

16. Annex A of the Bill's explanatory notes confirms that the UK Government is seeking the consent of the Senedd in relation to clause 14 of the Bill only.⁵

⁵ Skills and Post-16 Education Bill (HL Bill 5), [Explanatory Notes](#), Annex A

Reasons for making provision for Wales in the Bill

17. Paragraphs 13 and 14 of the Memorandum set out the reasons for making the provisions for Wales in the Bill.

18. The Memorandum notes that the Welsh Government does not recommend that legislative consent should be granted by the Senedd in relation to clauses 1 and 4 of the Bill. The Minister states:

*"I consider that the imposition of duties on Welsh institutions is a devolved matter. Furthermore, these provisions could place unnecessary burdens on Welsh institutions. This could have the effect of diverting the resources of an institution in Wales contrary to the devolved requirement to direct resources in response to the priorities of the Welsh Government and those identified by the Regional Skills Partnerships in Wales. I have written to the Secretary of State for Education to request that the Bill be amended to address my concerns."*⁶

19. The Memorandum also notes that the Welsh Government does recommend that legislative consent should be granted by the Senedd in relation to clause 14 of the Bill. The Minister states:

*"It is my view that it is appropriate to deal with the amendments in respect of section 22 of the Teaching and Higher Education Act 1992 in this UK Government Bill as the provisions amend the Secretary of State's functions in relation to student support and do not directly impact the Welsh Ministers' student support functions."*⁷

The Welsh Government's Supplementary Legislative Consent Memorandum

20. On 29 October 2021 the Minister laid before the Senedd a Supplementary Legislative Consent Memorandum⁸ (Memorandum No. 2) in respect of the Bill⁹ submitted to the House of Commons following amendment in the House of Lords.

⁶ Welsh Government, Memorandum, paragraph 18

⁷ Welsh Government, Memorandum, paragraph 17

⁸ Welsh Government, [Supplementary Legislative Consent Memorandum \(Memorandum No. 2\), Skills and Post-16 Education Bill](#), October 2021

⁹ [Skills and Post-16 Education Bill](#) (Bill 176)

21. The Business Committee agreed that the Legislation, Justice and Constitution Committee, the ETRA Committee and the CYPE Committee should report on the Memorandum by 16 December 2021.¹⁰

Update on the position since the publication of the Memorandum and amendments for which consent is required

22. In paragraphs 6 to 8 of Memorandum No. 2 the Minister provides an update on the position since the Memorandum was laid in July 2021, as follows:

"This Supplementary Legislative Consent Memorandum (Memorandum No. 2) updates the Senedd on the UK Government's amendments made to clauses 1 and 4 of the Bill at the House of Lords Report Stage on 12 October 2021.

My view on these clauses has not changed."

23. Paragraphs 9 to 13 of Memorandum No. 2 note the amendments agreed since the laying of the Memorandum for which the Welsh Government considers the Senedd's consent is required.

24. Memorandum No. 2 notes:

"Amendments to [clauses 1 and 4] have been agreed at House of Lords Report stage. Clause numbers relate to the latest version of the Bill. It is not yet known which, if any, of these amendments will remain in the Bill. (...)

Where amendments have been made to clauses which were in the Bill on Introduction and were identified in the first Legislative Consent Memorandum as engaging standing order 29.1(i), there is no change to our position that these clauses require the consent of the Senedd by virtue of standing order 29.1(i)."¹¹

25. In paragraph 14 of Memorandum No. 2 the Minister states:

"Although I am encouraged that the UK Government has brought forward amendments to limit the scope of post-16 education and training falling within the scope of the local skills improvement plans duties the amendments

¹⁰ Business Committee, [Timetable for consideration of the Supplementary Legislative Consent Memorandum \(No. 2\) on the Skills and Post-16 Education Bill](#), November 2021

¹¹ Welsh Government, Memorandum No. 2, paragraphs 9 and 13

agreed at Report Stage in the House of Lords on 12 October do not adequately address my concerns."

26. The Minister goes on to add:

"It is my view that the amendments made to clauses 1 and 4 of the Bill at Report Stage have potentially increased the possibility of Welsh institutions being subject to the duties in respect of local skills improvement plans for England. The provisions will also create uncertainty for Welsh institutions as to whether their post-16 education and training provision may be subject to the duties proposed under Clause 1 relating to the preparation of and contribution to local skills improvement plans (LSIPs). Institutions may not know if certain of their courses are considered to be "material" to the skills needs of a local area in England. This position could change year on year depending on the numbers of students from England who elect to study at Welsh institutions. This is of particular concern as the amendments bring student support funds within the definition of what constitutes "English funded" post-16 education and training. Furthermore, the Bill does not define the meaning of "technical" post-16 education and training and opens up the possibility of a wide range of our further and higher institutions' courses potentially being within scope of the LSIPs duties.

The purpose of the proposed LSIPs is to address the skills needs of local areas in England. I am concerned that placing duties on Welsh institutions to have regard to the skills needs of local areas in England could divert the resources away from those institutions responding to the skills needs of Wales. I am not opposed to Welsh further and higher education institutions electing to enter into funding arrangements with the UK Government for specified provision and the UK Government attaching terms and conditions to such funding. However, I do not consider the imposition of statutory duties on Welsh institutions to be either necessary or proportionate."¹²

27. The Minister also confirms that he remains of the view that clauses 1 and 4 could have financial implications for Welsh institutions.¹³

¹² Welsh Government, Memorandum No. 2, paragraphs 15 and 16

¹³ Welsh Government, Memorandum No. 2, paragraph 17

28. While welcoming the engagement of the UK Government to date in respect of the need to make changes to the Bill, the Minister concludes by saying:

"...I consider that further amendments will need to be made to the Bill to address my concerns in respect of the potential impacts arising from the duties proposed to be placed on Welsh institutions providing post-16 education and training. (...)

The UK Government's proposed amendments to clauses 1 and 4 do not address my concerns set out above. I cannot recommend the Senedd gives consent to these provisions in the Bill on the basis of the amendments brought forward to date.

We will continue to monitor the Bill's developments and update the Senedd as appropriate."¹⁴

¹⁴ Welsh Government, Memorandum No. 2, paragraphs 18, 20 and 21

2. Committee consideration

30. We considered the Memorandum at our meeting on 4 October 2021 and Memorandum No. 2 at our meeting on 15 November 2021.¹⁵¹⁶

31. We are aware that the CYPE Committee wrote to the Minister in relation to the Memorandum, and that the Minister responded on 1 October.¹⁷ We draw on this correspondence in our consideration below.

Our view

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

32. We note the Welsh Government's assessment that clauses 1, 4 and 14 require the consent of the Senedd, and that the UK Government is only seeking consent for clause 14. We agree with the Welsh Government's assessment.

33. We also acknowledge that, as matters stand, the Minister will not recommend that consent is given to clauses 1 and 4 of the Bill because of concerns with both the original drafting of those clauses and the subsequent amendments made to them.

34. It is disappointing that neither the Memorandum nor Memorandum No. 2 clearly set out what changes the Welsh Government would need to see made to clauses 1 and 4 of the Bill in order for it to recommend that the Senedd provides its consent.

35. With regard to the amendments made to the Bill at the House of Lords Report Stage, we note that, in correspondence with the CYPE Committee in early October, the Minister confirmed that the UK Government's Department for Education had said that the UK Minister would table amendments in respect of clauses 1 and 4, and that he was awaiting formal correspondence from the Secretary of State. However, the Minister did not confirm what amendments had been sought by the Welsh Government and whether they differed from the proposals by the Department for Education.

¹⁵ [Legislation, Justice and Constitution Committee, 4 October 2021](#)

¹⁶ [Legislation, Justice and Constitution Committee, 15 November 2021](#)

¹⁷ [Letter to the Minister from the Children, Young People and Education Committee](#), 24 September 2021; [Letter from the Minister to the Children, Young People and Education Committee](#), 1 October 2021

Conclusion 1. It is disappointing that, despite the Welsh Government engaging with the UK Government's Department for Education, the Minister believes that the amendments made to clauses 1 and 4 of the Bill have "potentially increased the possibility of Welsh institutions being subject to the duties in respect of local skills improvement plans for England". We are concerned that this demonstrates a breakdown in intergovernmental working. Furthermore, and while we acknowledge that the UK Government disagrees with the Welsh Government on whether consent should be sought for clauses 1 and 4 of the Bill, this matter again highlights the complexities of the devolution settlement.

Recommendation 1. The Minister should, in advance of the Senedd's debate on the relevant consent motion, confirm what amendments the Welsh Government would need to see made to clauses 1 and 4 of the Bill in order for it to recommend that the Senedd provides its consent to the Bill.

36. We note the Minister's assessment in the Memorandum regarding clause 14 of the Bill.

Conclusion 2. With regards to clause 14 of the Bill, the Memorandum makes reference to the future regulation-making intentions of the UK Government. However the source of this information is not detailed in the Memorandum. While we note that further detail has now been provided to the CYPE Committee, this is information that should have been included in the Memorandum.

37. The Memorandum also fails to explain why the modifications made by clause 14 to section 22 of the 1998 Act do not relate to the functions exercisable by the Welsh Ministers under that section.

38. We note that, in his response to the CYPE Committee, the Minister said on this point:

"The Welsh Ministers' powers are not changed by the proposed modifications to section 22 of the Teaching and Higher Education Act 1998 as provided for by Clause 14 of the Bill. The reasons for this are as follows. Clause 14 amends the 1998 Act to provide a gloss to section 22 of that Act (which is an enabling power for making the student support regulations in both Wales and England) so that modules of higher education courses (and not just such courses as a whole) are able to attract student support. The gloss has effect only in so far as functions are exercisable by the Secretary of State. Some of the Secretary of State's functions are exercisable in relation to Wales concurrently with the Welsh Ministers, though none of those functions are the subject of textual amendments to be made by the Bill. However, only the

Secretary of State's functions are to be amended leaving the Welsh Ministers' functions in respect of student support intact.

The Secretary of State's function in respect of making regulations under section 22(1) authorising the making of grants or loans in connection with the undertaking modules of HE or FE courses is exercisable in relation to England only. The need for legislative consent is a consequence of the incomplete separation of powers as between the Secretary of State and the Welsh Ministers when the student support functions under the 1998 Act were devolved to Wales.

Subject to passage of the Bill the Welsh Ministers' powers under section 22 of the 1998 Act would not be the same as those of the Secretary of State. The Welsh Minister's powers would remain as at present and would refer to whole courses but not to modules of such courses. My letter of the 9 July to the Secretary of State for Education stated that if similar provision is to be sought for Wales, it should be achieved by way of a Senedd Bill."

39. While we acknowledge the further explanation provided to the CYPE Committee, a more detailed analysis of clause 14 should have been included in the Memorandum, particularly given that clause 14 relates to an existing concurrent power.

40. While clause 14 is not discussed in Memorandum No. 2, we acknowledge the Minister's statement in Memorandum No. 2, which states:

"Where amendments have been made to clauses which were in the Bill on Introduction and were identified in the first Legislative Consent Memorandum as engaging standing order 29.1(i), there is no change to our position that these clauses require the consent of the Senedd by virtue of standing order 29.1(i)."¹⁸

Other provisions for which the Senedd's consent should be sought

41. It is not clear to us why the Welsh Government is not seeking the consent of the Senedd for original clause 25 in the Bill as introduced (now numbered clause 35 in the Bill as amended) and for new clause 25 added at the Lords' Report Stage, and we explain our reasoning below.

¹⁸ Welsh Government, Memorandum No. 2, paragraph 13

42. New clause 25 in the Bill as amended provides that any person of any age has the right to free education on an approved course up to Level 3 supplied by an approved provider of further or technical education, if he or she has not already studied at that level. Funding must be provided to the approved provider for that purpose. New clause 25 also imposes requirements on employers in relation to spending funds for people on apprenticeships who are under the age of 25.

43. The drafting of the new clause does not make its meaning or practical effect clear. For example, there is no definition of "approved course", "approved provider" or "Level 3". There is also no clear indication as to where the funding which is required by the clause is to come from.

44. There is nothing in the new clause as drafted which appears to limit its effect to England. The explanatory notes to the Bill as amended state that new clause 25 aims to give all people in England the legal right to free education on an approved course for their first qualification up to and including level 3, regardless of the learner's age.¹⁹ However, the reference to England is not reflected on the face of the Bill.

45. Under Standing Order 29, a relevant provision is any clause of a Bill which makes provision in relation to Wales for any purpose within the legislative competence of the Senedd. New clause 25 of the Bill appears to be a relevant provision as it deals with education, which is within the legislative competence of the Senedd, and there is nothing in the provision which states that it does not apply in relation to Wales.

Recommendation 2. The Minister should, in advance of the Senedd's debate on the relevant consent motion, confirm why the Senedd's consent should not be sought for new clause 25 in the Bill as submitted to the House Commons.

46. Clause 35 in the version of the Bill as amended by the House of Lords amends the 1992 Act. The amendments change the mechanism by which the Secretary of State can designate educational institutions in England as falling within the statutory further education sector. It would allow the Secretary of State to designate an institution by means of an administrative order that must be published, rather than by statutory instrument as is currently required.

47. Clause 35(2) makes provision to clarify the appropriate authority to make designation orders in relation to educational institutions in each of Wales and England. Paragraph 184 of the amended explanatory notes to the Bill states that this is a devolved matter. Annex A to the

¹⁹ Skills and Post-16 Education Bill (Bill 176), **Explanatory Notes**, paragraph 136

explanatory notes also states that clause 35 applies to Wales and that corresponding provision would be within the legislative competence of the Senedd.

48. We are aware that this matter was raised in the exchange of correspondence between the CYPE Committee and the Minister, and we note that the Minister said:

"Clause 25 [now clause 35] makes amendments to the Further and Higher Education Act 1992 and it applies in relation to Wales. However, it makes no changes to the law - it is simply clarifying and restating the law in respect of Wales and it is my view that the consent of the Senedd is not required."

49. While we acknowledge the Minister's explanation, we do not agree with the Minister's position. We again refer to Standing Order 29.1(i) which defines a relevant Bill as a Bill under consideration in the UK Parliament which makes provision in relation to Wales "for any purpose within the legislative competence of the Senedd (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Senedd)".

50. The Standing Order does not make a distinction between new law or a restatement of the existing law, only that a provision in a UK Bill is a relevant provision for the purpose of the Senedd's legislative consent process if it makes provision for any purpose within the Senedd's legislative competence.

Conclusion 3. In our view, the consent of the Senedd should be sought for clause 35 in the Bill (clause 25 in the Bill as originally introduced).

General comments

51. Finally, we note that the Memorandum was laid in the Senedd over seven weeks after the Bill was introduced in the House of Lords. However, the Memorandum does not include an explanation for this delay. We highlighted a similar issue in our recent report on the Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill (the Professional Qualifications Bill Memorandum).²⁰ In that report, we recommended that the Minister should inform the Senedd's Business Committee of the Welsh Government's reasoned position on when it considered it would be able to lay a legislative consent memorandum within

²⁰ Legislation, Justice and Constitution Committee, [Report on The Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill](#), September 2021

two weeks of a Bill's introduction to the UK Parliament in accordance with Standing Order 29.2(i).²¹

52. While we note that the Minister provided an explanation in correspondence with the CYPE Committee, we again highlight that how and when the Welsh Government generally considers the Standing Order deadline achievable is important, particularly for Committees with responsibility for scrutinising memoranda. As such, while we acknowledge that the Minister has responded²² positively to the recommendation in our report on the Professional Qualifications Bill Memorandum, we remind the Minister of the importance of transparency on this issue.

²¹ Report on The Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill, recommendation 1

²² [Letter from the Minister for Education and Welsh Language in relation to the Report on the Welsh Government's Legislative Consent Memorandum on the Professional Qualifications Bill](#), 6 October 2021
