

**National Assembly for Wales**  
Constitutional and Legislative  
Affairs Committee

## Report on the Education (Wales) Bill

November 2013



Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales

The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.

An electronic copy of this report can be found on the National Assembly's website:  
**[www.assemblywales.org](http://www.assemblywales.org)**

Copies of this report can also be obtained in accessible formats including Braille, large print; audio or hard copy from:

Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

Tel: 029 2089 8008  
Fax: 029 2089 8021  
Email: [CLA.Committee@wales.gov.uk](mailto:CLA.Committee@wales.gov.uk)

© National Assembly for Wales Commission Copyright 2013

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the National Assembly for Wales Commission and the title of the document specified.

**National Assembly for Wales**  
Constitutional and Legislative  
Affairs Committee

## Report on the Education (Wales) Bill

November 2013



Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales

## Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders 21. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

## Current Committee membership



**David Melding (Chair)**  
Deputy Presiding Officer  
Welsh Conservatives  
South Wales Central



**Suzy Davies**  
Welsh Conservatives  
South Wales West



**Julie James**  
Welsh Labour  
Swansea West



**Eluned Parrott**  
Welsh Liberal Democrats  
South Wales Central



**Simon Thomas**  
Plaid Cymru  
Mid and West Wales

In accordance with Standing Order 17.48, Joyce Watson substituted for Julie James AM.



**Joyce Watson**  
Welsh Labour  
Mid and West Wales

# Contents

---

<b>Recommendation .....</b>	<b>5</b>
<b>1. Introduction.....</b>	<b>9</b>
The Committee's remit .....	9
Introduction and consideration of the Bill.....	9
<b>2. Background.....</b>	<b>10</b>
Purpose of the Bill .....	10
Summary of provisions in the Bill.....	10
<b>3. Legislative Competence .....</b>	<b>11</b>
Evidence.....	11
Our view .....	11
<b>4. General observations.....</b>	<b>12</b>
Evidence from the Minister .....	12
Our view .....	15
<b>5. Powers to make subordinate legislation – observations on specific powers.....</b>	<b>19</b>
Section 2 (Education Workforce Council) and Schedule 1 (Education Workforce Council) .....	19
Our view .....	20
Section 5 (Power to add functions) .....	21
Our view .....	22
Section 9 (Register) and Schedule 2 (Categories of registration)..	22
Our view .....	23
Section 10 (Eligibility for registration) .....	23
Our view .....	25
Sections 12 (Registration Fees) and 13 (Registration: further provision).....	25
Our view .....	26
Sections 14 (School teachers and school learning support workers), 15 (Further education teachers) and 16 (Further education learning support workers).....	27

Our view .....	29
Sections 17 (Requirement to undertake period of induction) and 19 (Appeals against induction decisions) .....	29
Our view .....	30
Section 23 (Appraisal of registered persons) .....	30
Our view .....	32
Sections 24 (Code of conduct and practice) and 25 (Code of conduct and practice: further provision).....	32
Our view .....	33
Sections 26 (Disciplinary functions) and 28 (Disciplinary functions: further provision) .....	34
Our view .....	36
Sections 33 (Council to maintain records about certain persons), 35 (Supply of information: the Council), 36 (Supply of information: employers) and 37 (Supply of information: agents and contractors) .....	37
Our view .....	38
Sections 44 (Persons with learning difficulties: assessment of post-16 educational and training needs), 45 (Assessments of post-16 educational and training needs: appeals), 46 (Persons with learning difficulties: case friends and advocacy services) and 47 (Responsibility for providing post-16 education and training for persons with learning difficulties).....	38
Our view .....	39
Section 49 (Dates of terms and holidays and times of school sessions).....	40
Our view .....	41
Section 52 (Ancillary provision).....	41
Our view .....	42
Section 56 (Commencement) .....	43
Our view .....	43
General comments on Part 5.....	44
Explanatory Memorandum .....	44

## Recommendation

---

**Conclusion 1:** We do not consider it good practice to introduce a framework Bill unless there are good reasons for doing so. Ultimately, it is better to delay the introduction of a Bill rather than introduce one which requires further detailed policy development and for the outcome of that development to be added by means of subordinate legislation. (Page 17)

**Conclusion 2:** The framework nature of Part 2 of this Bill suggests to us that the Welsh Government does not yet have a clear idea of the policy objectives it is seeking to achieve. An alternative and more worrying view is that, given the extensive use of the negative procedure, the Welsh Government is seeking to avoid detailed and proper scrutiny of its policy intentions in this area. Either way, we consider the approach adopted by the Bill to be very poor practice. (Page 17)

**Recommendation 1:** We believe that this Bill should have more detail on its face. We recommend that the Minister undertakes a fundamental review of the balance of the Bill with a view to tabling amendments to ensure that the Bill's policy intent is much clearer. (Page 17)

**Recommendation 2:** We recommend that the Minister issues a statement, to coincide with the Stage 1 debate on the Bill's general principles:

- (i) explaining the balance adopted between what is on the face of the Education (Wales) Bill and what is left to subordinate legislation, and
- (ii) responding to the concerns we raise in this report on this issue. (Page 18)

**Conclusion 3:** Using an argument of flexibility as a basis for deciding whether to use the negative procedure instead of the affirmative procedure (or vice versa) is not relevant and should not be used. (Page 18)

**Conclusion 4:** In case there is any doubt, and as a general principle, the Welsh Government should not rely on consultations with stakeholders on a negative instrument as a substitute for placing

detail on the face of the Bill or applying the affirmative procedure where it is appropriate to do so. (Page 18)

**Recommendation 3:** We recommend that during the Stage 1 debate, the Minister explains the procedures he intends to use for the regulation-making powers in Schedule 1 and clarifies the reasons for his approach. As part of this, however, we also recommend that the Minister should give serious consideration to applying the affirmative procedure in each case. (Page 21)

**Recommendation 4:** Given the nature of the power and in the absence of a strong explanation for using the negative procedure, we recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 5. (Page 22)

**Recommendation 5:** We recommend that during the Stage 1 debate, the Minister clarifies the use of procedure in relation to the regulation-making powers in section 10. As part of this, however, we also recommend that the Minister should give serious consideration to applying the affirmative procedure in each case. (Page 25)

**Recommendation 6:** In the absence of detail on the face of the Bill and given that financial issues are involved, we recommend that the Minister should table an amendment to section 12 applying the affirmative procedure to the making of regulations under this section. (Page 27)

**Recommendation 7:** In the absence of detail on the face of the Bill and the weak justification for the use of the negative procedure, we recommend that the Minister should table an amendment to section 13, applying the affirmative procedure to the making of regulations in the first instance. (Page 27)

**Recommendation 8:** In the absence of any detail on the face of the Bill and given the discretionary power to make regulations, we recommend that the Minister should table amendments to place a duty on Welsh Ministers to make regulations under sections 14, 15 and 16, and to apply the affirmative procedure to the regulation-making powers in those sections in the first instance. (Page 29)

**Recommendation 9:** In the absence of any detail on the face of the Bill and given the discretionary power to make regulations, we recommend



that the Minister should table amendments to place a duty on Welsh Ministers to make regulations under section 17, and to apply the affirmative procedure to the regulation-making power in this section in the first instance. (Page 30)

**Recommendation 10:** We recommend that the Minister should consider tabling table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 19. (Page 30)

**Recommendation 11:** We recommend that the Minister should table amendments to ensure that:

- (i) in the absence of any detail on the face of the Bill, a duty is provided to make the regulations under section 23;
- (ii) the affirmative procedure is applied to regulations made under section 23. (Page 32)

**Recommendation 12:** We recommend that the Minister should table an amendment to make it a duty to make regulations under section 25(1) and to apply the affirmative procedure to this regulation-making power. (Page 34)

**Recommendation 13:** We recommend that the Minister should table amendments to apply the affirmative procedure to the making of regulations under section 26(6) and section 28(1). (Page 37)

**Recommendation 14:** We recommend that the Minister should table an amendment to apply the affirmative procedure to regulations made under sections 40K(2), 41A(5) and 41A(6) of the *Learning and Skills Act 2000*; these sections are to be inserted by virtue of sections 45 and 47 of the Bill. (Page 40)

**Recommendation 15:** We recommend that as part of the Stage 1 debate, the Minister sets out clearly how he intends to use the powers provided for by section 52. In addition, we recommend that he justifies the use of the affirmative procedure as opposed to a super-affirmative procedure for regulations made under this section. (Page 43)

**Recommendation 16:** We recommend that the Minister tables amendments to the Bill to provide that commencement orders are subject to the negative procedure where they are made:

- (i) in accordance with section 56(5)(b); or
- (ii) after the Fourth Assembly. (Page 44)

**Recommendation 17:** We recommend that during the stage 1 debate the Minister explains and clarifies why:

- (i) it is necessary to make reference to ancillary provisions in three separate places in the Bill; and
- (ii) why different procedures are used in each case. (Page 44)

**Recommendation 18:** We recommend that a revised Explanatory Memorandum should be issued following Stage 2 and that it should include a table of derivations. (Page 45)

**Conclusion 5:** The lack of adequate reasons to explain the adoption of a particular procedure for the scrutiny of individual pieces of delegated legislation, coupled with the framework structure of Part 2 of the Bill, has led us to recommend the application of an affirmative procedure in more instances than we would normally expect. (Page 45)

# 1. Introduction

---

## *The Committee's remit*

1. The remit of the Constitutional and Legislative Affairs Committee's ('the Committee') is to carry out the functions of the responsible committee set out in Standing Order 21<sup>1</sup> and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

## *Introduction and consideration of the Bill*

4. On 1 July 2013, the Minister for Education and Skills, Huw Lewis AM ('the Minister') introduced the Education (Wales) Bill ('the Bill') and accompanying Explanatory Memorandum.<sup>2</sup>
5. The National Assembly's Business Committee referred the Bill to the Children and Young People Committee for consideration on 18 June 2013, setting the deadline of 22 November 2013 for reporting on its general principles.
6. The Constitutional and Legislative Affairs Committee took evidence on the Bill from the Minister at its meeting on 30 September 2013.

---

<sup>1</sup> National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, October 2013

<sup>2</sup> Welsh Government, *Education (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, July 2013

## 2. Background

---

### *Purpose of the Bill*

7. The Explanatory Memorandum accompanying the Bill explains that:

“The Bill sets out a number of proposals that will enhance workforce planning, training and development. The Bill will introduce a new, more robust registration system that will bring greater coherence and recognise the contribution of the whole education workforce to the education of all learners in Wales.

The Bill will bring greater coherence by changing the way that school term dates are set so that they may be harmonised across all maintained schools in Wales.

The Bill will also support provision for learners with special educational needs by reforming the way independent schools are registered and approval to provide education for learners with SEN. It will also provide for better transition for SEN learners from school into further education by placing responsibility for assessing the needs of, and securing specialist post-16 education for learners with learning difficulties and/or disabilities with the local authority.”<sup>3</sup>

8. In particular, the Bill sets up a new body called the Education Workforce Council, which replaces the General Teaching Council for Wales (‘the GTCW’). The Bill seeks to expand the former role of the GTCW. At present, only teachers are required to be registered and regulated by the GTCW. As a result of the Bill, the Council’s regulatory regime will also cover school learning support workers, further education teachers and further education learning support workers.

### *Summary of provisions in the Bill*

9. The Bill contains 57 sections and is split into five Parts. Part 1 provides an overview to the Bill. Part 2 concerns the education workforce and Part 3, persons with learning difficulties. Parts 4 and 5 deal with general and miscellaneous provision respectively. There are four schedules.

---

<sup>3</sup> Explanatory Memorandum, page 6, paragraphs 6 - 8

### 3. Legislative Competence

---

#### *Evidence*

10. The Explanatory Memorandum explains that the National Assembly for Wales has the competence to make provision for and in connection with Education and Training by virtue of subject 5 of Part 1 of Schedule 7 to the *Government of Wales Act 2006*.

11. In his evidence, the Minister, when asked whether there were any issues of dispute with the UK Government about competence, said:

“There is certainly no dispute and, as far as I am aware, no grey areas either. Contact with UK Government officials has been quite extensive already, as Members would no doubt expect. We have had outright acknowledgment in some areas by the Ministry of Justice and the Wales Office in terms of areas of competence relating to those parts of the Bill that impact upon them. All areas of the Bill have been discussed with relevant officials in the UK Government. No concerns around competence have been reported to me.”<sup>4</sup>

#### *Our view*

12. We note that no issues have been raised with the Minister regarding the ability of the National Assembly to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

---

<sup>4</sup> Constitutional and Legislative Affairs (“CLA”) Committee, *RoP [paragraph 117]*, 30 September 2013

## 4. General observations

---

### *Evidence from the Minister*

13. We were interested in establishing to what extent the Bill re-enacts or consolidates existing legislation. The Minister told us:

“... the Teaching and Higher Education Act 1998 has been used as a template, particularly for the education workforce council provisions of the Bill. The 1998 Act has also been used as a template for the induction provisions. So, we are building on precedent in terms of the form of the Bill, in some aspects. The Education Act 2002 has also provided a template for the appraisal and requirements to be qualified provisions as part of this Bill ... there are some interesting aspects of the Bill that are ... novel, such as the duty to co-operate around school term dates for instance, which is an example of Wales really going in the diametrically opposite direction to that which is happening now in England, with the deregulation of school term dates. Essentially, the template provides for us to head off in completely the opposite policy direction.

... if I was to summarise, particularly around the education workforce council element of the Bill, which is the bulky part of the Bill, we are taking an existing principle and making a policy decision to expand that principle of registration, regulation and support around teachers, as it exists at the moment, and expanding that across the range of professions that now support our young people in education.”<sup>5</sup>

14. In subsequent discussions about detailed provisions of the Bill, an official accompanying the Minister expanded on the role of legislative templates in shaping the Bill:

“That goes to where we were at the beginning in terms of considering the 1998 Act as a template, and then working through that and looking at whether we have the right balance, or whether the 1998 Act has the right balance between having

---

<sup>5</sup> CLA Committee, *RoP [paragraphs 119-120]*, 30 September 2013

principles on the face of the Bill and, as the Minister was saying, giving sufficient flexibility to deal with the future.”<sup>6</sup>

15. The Minister emphasised that the use of templates and citing precedents from pre-devolution Bills was “very far from a cut-and-paste job”<sup>7</sup> and that the legislation had “been through a critical filter here, for sure.”<sup>8</sup>

16. The issue of flexibility (in the context of law-making) proved to be a recurring theme throughout the evidence session. When questioned on why a significant number of sections in the Bill started with the phrase “Welsh Ministers may by regulations” and why little detail appeared on the face of the Bill, the Minister told us:

“You may wish to get into greater detail as regards the instances there. You are quite right; the Bill, in some ways, is perhaps a little anomalous in the breadth of the allowance that is there for Ministers to make regulations. However, that is, in almost every instance, connected to the need for flexibility—surrounding the education workforce council, for instance—and the perceived future need to expand the list of recognised professions. So, although we might now be talking about learning assistants in FE or in schools, there could conceivably be, in the very near future, an expansion to include other professions that are not currently listed on the face of the Bill. So, there would be a need for Welsh Ministers to add to the nominated workforce, if you like. That also means that we have to be flexible in terms of how the Bill treats each of those nominated professions.”<sup>9</sup>

17. When asked whether it was fair to describe the Bill as a framework Bill, the Minister said that it was not a fair description, saying:

“...I would not describe this as a framework Bill, as such. The principles are very clearly drawn. The face of the Bill does contain an appropriate level of detail. Clearly, there are quite a number of regulatory powers, but that is because of the very variable landscape that we will be talking about and having to deal with in the future as regards different professions,

---

<sup>6</sup> CLA Committee, *RoP [paragraph 167]*, 30 September 2013

<sup>7</sup> CLA Committee, *RoP [paragraph 170]*, 30 September 2013

<sup>8</sup> CLA Committee, *RoP [paragraph 170]*, 30 September 2013

<sup>9</sup> CLA Committee, *RoP [paragraph 124]*, 30 September 2013

different levels of expectation and different fee regimes. It would be impossible to move forward with a one-size-fits-all approach by attempting to get all of this stuff described on the face of the Bill.”<sup>10</sup>

18. We also explored the reasons for the choice of negative or affirmative procedure for the making of subordinate legislation. An official accompanying the Minister explained the approach, using provisional registration (section 10(2)(b)) as an example:

“... when considering the Bill, you would be voting in terms of whether you think that the principle of provisional registration is right or wrong. Therefore, in terms of the actual details and mechanics of how that would work, we would say that we would need flexibility and that therefore the negative procedure would be appropriate. Where we are changing something, adding something or removing something in the Bill, we recognise that that is going somewhat further than what we are doing with the provisional regime and, therefore, an affirmative procedure would be more appropriate—for example, the provisions in Schedule 2 about adding or removing categories. We recognise that that, to an extent, will change what is in the Bill and that is why we think that it is appropriate that the affirmative procedure is attached to that.”<sup>11</sup>

19. In respect of regulations made under section 28(4), he also explained the circumstances in which the negative or affirmative procedure would be used, citing the amending of the face of the Bill as a trigger for the latter.<sup>12</sup> The Minister added:

“By its very nature, this Bill is very particular. What the Bill is attempting to do is to respond to a changing landscape. If you look, for instance—just by way of illustration—at how technical support in schools for information technology might evolve, we could be fast approaching a situation where our current ideas about IT teaching and IT technical support would be—and I think that they may already be—very outdated in terms of what children actually need. We could be talking about the growth of a new sort of hybrid profession here that does not actually

---

<sup>10</sup> CLA Committee, *RoP [paragraph 126]*, 30 September 2013

<sup>11</sup> CLA Committee, *RoP [paragraph 149]*, 30 September 2013

<sup>12</sup> CLA Committee, *RoP [paragraph 211]*, 30 September 2013



exist. There is no-one with that kind of professional background—well, there might be fortunate individuals with that kind of professional background who do exist, but, essentially, we are not making provision for that kind of thing in schools. Now, we have to have a piece of legislation that enables us to recognise that kind of evolution ...”<sup>13</sup>

20. On a number of occasions the need for flexibility was cited as a reason for use of the negative procedure (although it was also cited as a reason for use of the affirmative procedure<sup>14</sup>), with an emphasis also placed on Welsh government consultation. For example, in relation to section 5, when the Minister told us:

“... we always have to remember that the negative procedure does allow scrutiny. It certainly maximises flexibility. Any changes made by regulation, as I said, would have to go through a period of consultation.”<sup>15</sup>

and, in relation to section 23:

“Again, I am going to use the ‘flexibility’ word. We must have that there because of the changing workforce landscape that we are trying to deal with, both now and in the future—always in response to evidence, and always in response to consultation.”<sup>16</sup>

21. As indicated in the previous paragraphs, the concept of the Bill needing sufficient flexibility to take account of future developments was raised on numerous occasions. A further example is provided in comments made in relation to section 5, when we were told in respect of the Education Workforce Council that:

“... what we are looking for is, to an extent, to futureproof this body so that we can deal with what might eventually happen ...”<sup>17</sup>

### ***Our view***

22. In our view, Part 2 of the Education (Wales) Bill clearly has a framework structure, with a lack of detail on its face and an over-

---

<sup>13</sup> CLA Committee, *RoP [paragraph 213]*, 30 September 2013

<sup>14</sup> Explanatory Memorandum, Chapter 5, page 46

<sup>15</sup> CLA Committee, *RoP [paragraph 138]*, 30 September 2013

<sup>16</sup> CLA Committee, *RoP [paragraph 173]*, 30 September 2013

<sup>17</sup> CLA Committee, *RoP [paragraph 153]*, 30 September 2013

reliance on regulation-making powers to deliver the Welsh Government's policy objectives.

23. We have expressed concerns about the use of framework Bills before (see our *Report on the Social Service and Well-being (Wales) Bill*, July 2013 and in particular Conclusion 3); it is therefore unwelcome and disappointing to have to report again on such a Bill.

24. The number of regulation-making powers contained in the Bill is significant. While some of the detail explaining what the regulations are to contain is welcome, that appears, in many areas, to be at the expense of any policy principle set out on the face of the Bill. In addition, most of the regulation-powers are discretionary. The combined effect of this is that in places, if regulations are not brought in by Welsh Ministers, the legislation is effectively rendered ineffectual.

25. For example, in Part 2 of the Bill, entitled Education Workforce, sections 14, 15 and 16 appear under the subject cross-heading *Requirements to be satisfied to provide services* and, according to the Explanatory Memorandum accompanying the Bill, are intended to "impose limitations on who may provide certain services in maintained (and special) schools and further education institutions in Wales".<sup>18</sup> However, subsection (1) of each section starts with the phrase "The Welsh Ministers may by regulations", which in effect provides discretion for Welsh Ministers to bring such provisions into force. There is no policy detail on the face of the Bill about the requirements to be satisfied to provide services and should no regulations be brought into force in this area, there will be nothing in law at all in relation to the subject cross-heading as a consequence of this Bill.

26. Furthermore, references were made throughout the evidence of the need to take account of future developments and to the concept of futureproofing. As we indicated in our report on the Social Services and Well-being (Wales) Bill, to some extent, the concepts of flexibility and future-proofing would be more valid if they were used to develop an existing policy framework, rather than being used to develop the key policy once a Bill becomes an Act. This argument is equally valid in relation to the Education (Wales) Bill.

27. On a more general issue, we found the Explanatory Notes to the Bill contained at Annex 1 of the Explanatory Memorandum to be poor

---

<sup>18</sup> Explanatory Memorandum, Explanatory Notes - Annex 1, paragraph 34

and they would benefit from greater detail when they come to be published, should the Bill receive Royal Assent.

28. In light of our comments above, we are left wondering whether this legislation has been rushed through. Rushed legislation is rarely good legislation. With this in mind and given the framework nature of Part 2 of this Bill, we repeat Conclusion 3 of our *Report on the Social Services and Well-being (Wales) Bill*.

**Conclusion 1: We do not consider it good practice to introduce a framework Bill unless there are good reasons for doing so. Ultimately, it is better to delay the introduction of a Bill rather than introduce one which requires further detailed policy development and for the outcome of that development to be added by means of subordinate legislation.**

29. In terms of this particular Bill we draw the following conclusion.

**Conclusion 2: The framework nature of Part 2 of this Bill suggests to us that the Welsh Government does not yet have a clear idea of the policy objectives it is seeking to achieve. An alternative and more worrying view is that, given the extensive use of the negative procedure, the Welsh Government is seeking to avoid detailed and proper scrutiny of its policy intentions in this area. Either way, we consider the approach adopted by the Bill to be very poor practice.**

30. In terms of the balance between what is on the face of the Bill and what is left to subordinate legislation, we are not at all satisfied with the balance that has been achieved.

**Recommendation 1: We believe that this Bill should have more detail on its face. We recommend that that the Minister undertakes a fundamental review of the balance of the Bill with a view to tabling amendments to ensure that the Bill's policy intent is much clearer.**

31. We note that in relation to our report on the Social Services and Well-being (Wales) Bill, the Deputy Minister for Social Services, on 31 October 2013, made a written statement on the balance between what is on the face of the Bill and what is left to subordinate legislation.

**Recommendation 2: We recommend that the Minister issues a statement, to coincide with the Stage 1 debate on the Bill's general principles:**

- (i) explaining the balance adopted between what is on the face of the Education (Wales) Bill and what is left to subordinate legislation, and**
- (ii) responding to the concerns we raise in this report on this issue.**

32. During the course of our consideration of detailed provisions, flexibility was often cited as a reason for the use of the negative procedure, although on one occasion it was also cited as a reason for using the affirmative procedure. That said, it may be that the argument for flexibility as a reason for a particular procedure was being confused with the reason for the need to use a delegated power. However, the use of one procedure over the other, does not, in our view, offer any significant degree of flexibility or time-saving for the Welsh Government; it merely provides for varying degrees of scrutiny by the National Assembly.

**Conclusion 3: Using an argument of flexibility as a basis for deciding whether to use the negative procedure instead of the affirmative procedure (or vice versa) is not relevant and should not be used.**

33. When arguing in favour of the negative procedure for some regulation-making powers, sometimes the Minister referred to the fact that consultation would be undertaken. We would of course always expect consultation to be undertaken by the Welsh Government on draft regulations, whatever procedure they would be subject to.

**Conclusion 4: In case there is any doubt, and as a general principle, the Welsh Government should not rely on consultations with stakeholders on a negative instrument as a substitute for placing detail on the face of the Bill or applying the affirmative procedure where it is appropriate to do so.**

## 5. Powers to make subordinate legislation – observations on specific powers

---

34. The Bill contains a total of 36 delegated powers to make subordinate legislation, which are explained in Chapter 5 and Annex 1 (the explanatory notes) of the Explanatory Memorandum.

35. Section 53 sets out the procedure to be used when making orders and regulations under the Bill.

36. Given the relatively substantial nature of the Bill we focused our attention on certain aspects of the Bill and these are considered below.

### ***Section 2 (Education Workforce Council) and Schedule 1 (Education Workforce Council)***

37. Section 2 changes the name of the GTCW (General Teaching Council for Wales) to the Education Workforce Council and introduces Schedule 1, which sets out the updated constitution of the Council.

38. Schedule 1 paragraph 3(1) provides the Welsh Ministers with an order-making power to specify the number of people that will sit as members of the Council. The order is subject to the affirmative procedure because according to the Explanatory Memorandum this provides “flexibility to allow for any changes to the wider education workforce required to register”<sup>19</sup>; it is also noted that a similar provision appears in relation to GTCW in the *Teaching and Higher Education Act 1998*.<sup>20</sup>

39. Paragraph 4(1) of Schedule allows the Welsh Ministers to make regulations relating to members of the Council and how they are to be appointed. The regulations are subject to the negative procedure as “this provides flexibility to meet the changing needs of the education workforce”<sup>21</sup>; again the Explanatory Memorandum notes that a similar provision appears in relation to GTCW in the *Teaching and Higher Education Act 1998*.<sup>22</sup>

40. Paragraph 9(2) of Schedule 1 allows Welsh Ministers to make regulations about the appointment of the chief officer of the Council

---

<sup>19</sup> Explanatory Memorandum, Chapter 5, page 46

<sup>20</sup> Explanatory Memorandum, Chapter 5, page 46

<sup>21</sup> Explanatory Memorandum, Chapter 5, page 46

<sup>22</sup> Explanatory Memorandum, Chapter 5, pages 46 - 47

and the appointment process. The use of delegated legislation is considered appropriate to allow Welsh Ministers:

“... to have oversight of over such appointments/terms and conditions (particularly at time of financial constraints) but also to have the agility to be able to adapt and implement any changes that might be necessary”.<sup>23</sup>

41. The negative procedure is considered appropriate given that “regulations provide detail about the appointment process and how the terms and conditions of appointment are to be determined.”<sup>24</sup>

42. We questioned the Minister on why the affirmative procedure was being used for the order-making power contained in Schedule 1 paragraph 3(1). He told us that it was because it “is intimately tied up with public expenditure” and the Assembly as a whole needs to scrutinise the costs involved.<sup>25</sup>

### ***Our view***

43. We note the views of the Minister.

44. We consider the Minister’s arguments in relation to the procedures to be used for the regulation-making powers in Schedule 1 to be weak and inconsistent.

45. The Explanatory Memorandum highlights flexibility as a reason for the use of both the negative and affirmative procedures in relation to regulation-making powers in Schedule 1. As we have said in conclusion 3, the use of an argument of flexibility to justify a particular procedure is not a relevant consideration and this is a prime example of our concern here.

46. We also note that in relation to the power to make regulations under paragraph 3(1) of Schedule 1, the Minister justifies the use of the affirmative procedure by reference to public expenditure. However, such an argument could equally apply to regulations made under paragraph 9(2) of Schedule 1, which allows Welsh Ministers to make provision about the “remuneration, allowances, expenses and

---

<sup>23</sup> Explanatory Memorandum, Chapter 5, page 47

<sup>24</sup> Explanatory Memorandum, Chapter 5, page 47

<sup>25</sup> CLA Committee, *RoP [paragraph 221]*, 30 September 2013

pensions” of the chief officer of the Education Workforce Council. Yet these regulations are subject to the negative procedure.

47. Both paragraphs 4(1) and 9(2) of Schedule 1 provide for an appointments process. We believe that in order to fully implement best practice in public appointments, such regulation-making powers should be subject to the affirmative procedure.

**Recommendation 3: We recommend that during the Stage 1 debate, the Minister explains the procedures he intends to use for the regulation-making powers in Schedule 1 and clarifies the reasons for his approach. As part of this, however, we also recommend that the Minister should give serious consideration to applying the affirmative procedure in each case.**

### *Section 5 (Power to add functions)*

48. Section 4 sets out the main functions of the Education Workforce Council. Section 5(1) gives powers to Welsh Ministers to confer or impose additional functions on the Council, by way of an order. Before making such an order the Welsh Ministers must consult appropriate persons or bodies (e.g. the Council).

49. According to the Explanatory Memorandum, the order is subject to the negative procedure because:

“The main duties are set out on the face of the Bill and use of the negative procedure will allow flexibility. Any changes made by regulation will take into account the views of appropriate bodies following the consultation.”<sup>26</sup>

50. When asked about the need for flexibility in section 5 and what kinds of functions he might anticipate adding, the Minister indicated that it would be difficult to predict<sup>27</sup>, adding:

“... we have an institution that, through no fault of its own, is not fit for purpose, because things have evolved around it. So, I think that we do need that flexibility set out in section 5. The power might not be used, of course, and it would only be used after proper consultation and so on, but we absolutely need that

---

<sup>26</sup> Explanatory Memorandum, Chapter 5, page 38.

<sup>27</sup> CLA Committee, *RoP [paragraph 133]*, 30 September 2013

flexibility in there in order to deal with what is a constantly evolving arena. In fact, this would be one of the strengths in terms of where Wales could get to through this piece of legislation, in that we would have an instrument to address workforce needs—apart from anything else—that would be unprecedented in the United Kingdom.”<sup>28</sup>

51. Asked whether the affirmative procedure might be more appropriate for the order-making power, the Minister said:

“... we always have to remember that the negative procedure does allow scrutiny. It certainly maximises flexibility. Any changes made by regulation, as I said, would have to go through a period of consultation. I would say, however, Chair, that, if section 5 is of real concern to Members, that is something that I would need to consider very seriously.”<sup>29</sup>

### ***Our view***

52. We note the Minister’s comments but are not convinced by the arguments he puts forward for using the negative procedure. While we agree that it affords a degree of scrutiny, it is not as robust as that provided for by the affirmative procedure. In this case, the addition of functions to the Education Workforce Council, which is being established through this Bill and is therefore a core part of it, should in our view be subject to this more robust scrutiny.

**Recommendation 4: Given the nature of the power and in the absence of a strong explanation for using the negative procedure, we recommend that the Minister should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 5.**

### ***Section 9 (Register) and Schedule 2 (Categories of registration)***

53. Section 9 provides that the Education Workforce Council must keep a register of every person eligible for registration under section 10 and in accordance with the categories of registration set out in Schedule 2, namely: every teacher in a school or further education institution and every learning support worker in school or further

---

<sup>28</sup> CLA Committee, *RoP [paragraph 134]*, 30 September 2013

<sup>29</sup> CLA Committee, *RoP [paragraph 138]*, 30 September 2013



education institution. Paragraph 2 of Schedule 2 allows Welsh Ministers to amend, remove or add to the categories of workers that need to be registered as part of the Education Workforce Council, by order. The order is subject to the affirmative procedure because it modifies an enactment.<sup>30</sup>

54. The Minister explained the rationale for using the affirmative procedure here, saying that paragraph 2 of Schedule 2:

“... deals with the education workforce and the addition of new categories of workers to the registration regime. So, that is much more technical, but is a necessary thing that we have to do. If we are going to add youth workers, we would not have to introduce another Bill to do it. Essentially, that is why that is there.”<sup>31</sup>

### ***Our view***

55. We note the Minister’s view and are content with the use of the affirmative procedure.

### ***Section 10 (Eligibility for registration)***

56. Section 10 sets out the conditions a person must meet in order to be eligible to be registered as part of the education workforce. Specifically, section 10(2)(b) gives the power to Welsh Ministers to make regulations setting out what criteria a person must comply with before they become eligible for provisional registration. The regulations are subject to the negative procedure because:

“There will need to be flexibility to allow a system of provisional registration to meet future policy aspirations and the changing needs of the education workforce both now and in the future. The detail is technical.”<sup>32</sup>

57. Section 10(3) states that for a person to be eligible for registration they must not have been be barred from regulated activity relating to children, subject to a disciplinary order under this act or disqualified from working in a post equivalent to the category of registration for which registration is sought in another part of the

---

<sup>30</sup> Explanatory Memorandum, Chapter 5, page 47

<sup>31</sup> CLA Committee, *RoP [paragraph 241]*, 30 September 2013

<sup>32</sup> Explanatory Memorandum, Chapter 5, page 38

United Kingdom. Section 10(6) states that Welsh Ministers may by order amend subsection (3) to specify such additional grounds of ineligibility as they consider necessary or expedient. The order is subject to the affirmative procedure because it is “appropriate that changes made to primary legislation are approved in plenary.”<sup>33</sup>

58. In explaining the difference between the procedures for the two sets of regulations, the Minister re-affirmed that this was as a consequence of regulations under section 10(6) amending the Bill and therefore being subject to the affirmative procedure.<sup>34</sup> He also said that section 10(6) affects the person,<sup>35</sup> expanding on this point to say:

“You are using a piece of legislation to, effectively, alter the course of someone’s life. Section 10(2)(b) is really about opening up options for the workforce and making workforce development more structured ... section 10(6) is about a much more serious issue.”<sup>36</sup>

59. An official accompanying the Minister added that:

“Our view is that, with regard to section 10(2)(b), the principle of provisional registration is on the face of the Bill, and therefore that is why, for any regulations relating to that, a negative procedure would be appropriate, whereas section 10(6) enables subordinate legislation to actually change the Bill itself, which is why we recognise that an affirmative procedure would be more appropriate in that case.”<sup>37</sup>

60. In view of the Minister’s comments that section 10(6) could affect the course of someone’s career, we asked whether there was therefore an argument to apply a super-affirmative procedure. In response an official accompanying the Minister said:

“We do not think that this can be characterised as something where the superaffirmative would be appropriate.”<sup>38</sup>

---

<sup>33</sup> Explanatory Memorandum, Chapter 5, page 39

<sup>34</sup> CLA Committee, *RoP [paragraph 140]*, 30 September 2013

<sup>35</sup> CLA Committee, *RoP [paragraph 142]*, 30 September 2013

<sup>36</sup> CLA Committee, *RoP [paragraph 144]*, 30 September 2013

<sup>37</sup> CLA Committee, *RoP [paragraph 145]*, 30 September 2013

<sup>38</sup> CLA Committee, *RoP [paragraph 147]*, 30 September 2013

## *Our view*

61. We note the views of the Minister.

62. In our view, there is an inconsistency within the arguments put forward by the Minister. We note that the affirmative procedure is justified for regulation-making powers under section 10(6) because grounds of ineligibility could affect someone's life. In our view such an argument could equally apply to regulations made in relation to provisional registration, yet they are subject to the negative procedure.

63. Equally, if more detail had been added to the face of the Bill in section 10(2) about grounds for eligibility in relation to provisional registration, then using the arguments referred to in paragraph 59 above, regulations made under section 10(2) would be subject to the affirmative procedure.

**Recommendation 5: We recommend that during the Stage 1 debate, the Minister clarifies the use of procedure in relation to the regulation-making powers in section 10. As part of this, however, we also recommend that the Minister should give serious consideration to applying the affirmative procedure in each case.**

## ***Sections 12 (Registration Fees) and 13 (Registration: further provision)***

64. Section 12 allows the Welsh Ministers to make regulations about the fees that the Council may charge in connection with registration and subsection (2) states that regulations may in particular make provision about certain matters, listed in paragraphs (a) to (g); for example, the amount of fees that may be charged and also the methods that may be used to collect those fees.

65. The negative procedure is considered appropriate for regulations made under section 12 because:

“The detail is technical and administrative and there needs to be flexibility to easily change fees.”<sup>39</sup>

66. Section 13 allows the Welsh Ministers to make regulations about registration generally and subsection (2) states that regulations may in

---

<sup>39</sup> Explanatory Memorandum, Chapter 5, page 39

particular make provision about certain matters, listed in paragraphs (a) to (i).

“The detail is technical and administrative in relation to the composition of the register and the manner in which applicants need to apply.”<sup>40</sup>

67. The Minister explained the rationale for the approach in sections 12 and 13:

“Section 12 deals with the different fees, if you like. This is based, essentially, on the Teaching and Higher Education Act 1998, which currently provides a regulation-making power in relation to fees. It is a negative procedure, but we also have to be careful to provide here, in terms of this Bill, for a regime of fees in which we would have the flexibility to charge different fees for different groups of workers and, indeed, to add further groups of workers over time, which would necessitate that we would, pretty much, regularly have to revisit the fee regime. Of course, there would be consultation each time, leading up to any changes that were made by the regulations, but essentially this takes the precedent of the 1998 Act and rolls it forward, with the negative procedure being the correct way forward for section 12.

Section 13 is about the administration of the registration process and, again, what we are talking about here is allowing flexibility for further changes to be made to the register and the process of registration. Again, the precedent is there in the 1998 Act, in section 4, which provides a similar regulation power relating to teachers’ registration. So, again, the precedent has been taken from the 1998 Act.”<sup>41</sup>

### ***Our view***

68. We note the views of the Minister.

69. We are surprised to see that section 12 of the Bill contains no information about fees on its face. This is an important area of policy and, in our view, information about the principles surrounding the use of fees needs to be more clearly expressed on the face of the Bill. The

---

<sup>40</sup> Explanatory Memorandum, Chapter 5, page 39

<sup>41</sup> CLA Committee, *RoP [paragraphs 161-162]*, 30 September 2013

principle behind recommendation 1 of our report applies in relation to section 12.

70. In addition, given that financial issues are involved, we believe that such regulations should be subject to a more robust scrutiny.

**Recommendation 6: In the absence of detail on the face of the Bill and given that financial issues are involved, we recommend that the Minister should table an amendment to section 12 applying the affirmative procedure to the making of regulations under this section.**

71. The principle behind recommendation 1 also applies in relation to section 13. We also consider that the justification for using the negative procedure in this section is weak.

**Recommendation 7: In the absence of detail on the face of the Bill and the weak justification for the use of the negative procedure, we recommend that the Minister should table an amendment to section 13, applying the affirmative procedure to the making of regulations in the first instance.**

***Sections 14 (School teachers and school learning support workers), 15 (Further education teachers) and 16 (Further education learning support workers)***

72. Sections 14 to 16 provide that Welsh Ministers may, by regulations, impose limitations on who may provide certain services in maintained (and special) schools and further education institutions in Wales. In every case, the person will require to be registered in order to provide the services and may have to have certain qualifications or experience or meet certain conditions.

73. Regulations under section 14 (dealing with teachers and learning support workers) may specify the types of services which a person may not provide in a school without meeting certain requirements. The regulations are subject to the negative procedure and according to the Explanatory Memorandum this is because:

“The detail is technical regarding the qualifications, conditions and training that is required.”<sup>42</sup>

74. Section 15 allows the Welsh Ministers to make regulations stating the criteria and conditions that need to be met by a person providing education in or for a further education institution in Wales. Regulations may specify restrictions on what services they are able to provide. Section 16 allows the Welsh Ministers to make regulations in respect of further education learning support workers. Regulations, which are also subject to the negative procedure, may specify what qualifications are needed, any specified training that needs to be completed or compliance with any other specified condition.

75. According to the Explanatory Memorandum, regulations made under sections 15 and 16 are subject to the negative procedure because:

“The detail is technical and specific to the education worker in question.”<sup>43</sup>

76. The Minister told us that:

“Again, section 14 is about adding new categories, essentially. What we are talking about here is that it is necessary that we have the capacity to update each category of worker as they will have different requirements, so we need the flexibility around the negative procedure there. It is simply a function, if you like, of the kind of job we want the legislation to do. On section 15, again, what I would say is that the detail is technical, as it is specific to the education worker in question, and the regulations will deal with the details of requirements for FE teachers. The subject matter of those regulations would be relatively minor in terms of the overall legislation. In terms of section 16, which is about FE learning support workers, again, the same logic applies—these are regulations dealing with the finer detail for those FE learning support workers. So, all this is relatively minor in terms of the overall legislation that we are considering.”<sup>44</sup>

---

<sup>42</sup> Explanatory Memorandum, Chapter 5, page 40

<sup>43</sup> Explanatory Memorandum, Chapter 5, page 40

<sup>44</sup> CLA Committee, *RoP [paragraph 164]*, 30 September 2013

## *Our view*

77. We note the views of the Minister. As is clear from the *Our View* section of Chapter 4, the principle behind recommendation 1 applies to sections 14 to 16 of the report.

78. It is not clear why issues of principle relating to this policy area cannot appear on the face of the Bill.

**Recommendation 8: In the absence of any detail on the face of the Bill and given the discretionary power to make regulations, we recommend that the Minister should table amendments to place a duty on Welsh Ministers to make regulations under sections 14, 15 and 16, and to apply the affirmative procedure to the regulation-making powers in those sections in the first instance.**

### *Sections 17 (Requirement to undertake period of induction) and 19 (Appeals against induction decisions)*

79. Section 17 enables the Welsh Ministers to require a person to complete a period of induction before that person can be fully registered. The Bill states that regulations made under this section may make provision in respect of matters set out in paragraphs (a) to (f). The regulations are to be subject to the negative procedure because “the detail is of a technical nature.”<sup>45</sup>

80. Section 19 provides a person who has been judged not to have satisfactorily completed a period of induction, with a right of appeal to the Education Workforce Council against the decision. Section 19(3) gives the Welsh Ministers the power to make regulations dealing with matters relating to the appeals procedure. The regulations are subject to the negative procedure owing to their “technical and procedural” nature.<sup>46</sup>

81. The Minister explained that the *Teacher and Higher Education Act 1998* provided a precedent for the use of the negative procedure in relation to the regulation-making power in section 19.<sup>47</sup> An official accompanying the Minister added that:

---

<sup>45</sup> Explanatory Memorandum, Chapter 5, page 41

<sup>46</sup> Explanatory Memorandum, Chapter 5, page 42

<sup>47</sup> CLA Committee, *RoP [paragraph 166]*, 30 September 2013

“In terms of the ... relationship between having things on the face of the Bill and in regulations, you will see from the 1998 Act ... that, in terms of a right of appeal, the actual right would be prescribed in regulations, whereas you will see that, in terms of this Bill, we have actually set out that right on the face of the Bill.”<sup>48</sup>

### ***Our view***

82. We note the Minister’s views.

83. The principle behind recommendation 1 applies to section 17. We also note that section 18 implies that regulations under section 17 are to be brought into force.

**Recommendation 9: In the absence of any detail on the face of the Bill and given the discretionary power to make regulations, we recommend that the Minister should table amendments to place a duty on Welsh Ministers to make regulations under section 17, and to apply the affirmative procedure to the regulation-making power in this section in the first instance.**

84. We are pleased to note that the right of appeal has been placed on the face of the Bill in section 19, whereas this was not the case for the equivalent provision under the *Teacher and Higher Education Act 1998*. However, we take the view that matters relating to appeals should be subject to the more robust scrutiny procedure provided for by the affirmative procedure.

**Recommendation 10: We recommend that the Minister should consider tabling table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 19.**

### ***Section 23 (Appraisal of registered persons)***

85. Section 23 provides that the Welsh Minister may make regulations requiring the appraisal of the performance of a registered person. The regulations may impose different requirements in relation to different categories of registration. Before making such regulations, the Welsh

---

<sup>48</sup> CLA Committee, *RoP [paragraph 167]*, 30 September 2013



Ministers must consult such persons or bodies as they think appropriate.

86. The Explanatory Memorandum also explains the rationale for the approach adopted:

“In order to raise standards, well designed systems of induction and appraisal for the education workforce are essential. However, the existing induction and appraisal arrangements for each category are at different stages of development – for example, the teachers’ induction and appraisal arrangements are now well established but the position is different for the other categories. The Bill takes these differing stages of development into account by giving the Welsh Ministers the regulation making power to make provision about induction and appraisal. That will enable different arrangements to be in place for different categories. This ensures that there is flexibility to meet the changing needs of the education workforce both now and in the future and make certain that arrangements meet the different requirements of the wider workforce.”<sup>49</sup>

87. The Explanatory Memorandum also states that the regulations are subject to the negative procedure because:

“The detail is technical, and needs to accommodate potential new groups of workers in the future.”<sup>50</sup>

88. The Minister cited the need for flexibility as the reason for the use of the negative procedure<sup>51</sup> and also drew on the precedent provided by the *Education Act 2002*:

“We must have that there because of the changing workforce landscape that we are trying to deal with, both now and in the future—always in response to evidence, and always in response to consultation ... we can look back now to the Education Act 2002, in which there is a similar regulation-making power in respect of teachers’ appraisal ... I cannot see any reason we cannot take that as a valid precedent in terms of negative appraisal. If it has been good enough for teachers since 2002

---

<sup>49</sup> Explanatory Memorandum, page 13, paragraph 46

<sup>50</sup> Explanatory Memorandum, Chapter 5, page 42

<sup>51</sup> CLA Committee, *RoP [paragraph 173]*, 30 September 2013

and we have had no problems with it, then I cannot see why the wider workforce could not be a part of it as well.”<sup>52</sup>

### ***Our view***

89. We note the Minister comments.

90. The principle behind recommendation 1 applies in relation to section 23; we see no reason why matters of policy and principle relating to the appraisal of registered persons cannot be placed on the face of the Bill.

91. We also note that section 23(5) allows regulations to influence a registered person’s remuneration. In light of the Minister’s previous comments about the use of the affirmative procedure for regulations dealing with matters of public expenditure, we consider that his arguments apply equally in this case.

92. We note that the power and content of section 23 derives from section 131 of the *Education Act 2002*, which is subject to the negative procedure. We also note that this power has been exercised by the Welsh Ministers when making *the School Teacher Appraisal (Wales) Regulations 2011*. Notwithstanding this, we believe that the Minister should reconsider the scrutiny procedure and take this legislative opportunity to improve the level of scrutiny to the affirmative procedure.

### **Recommendation 11: We recommend that the Minister should table amendments to ensure that:**

- (i) in the absence of any detail on the face of the Bill, a duty is provided to make the regulations under section 23;**
- (ii) the affirmative procedure is applied to regulations made under section 23.**

### ***Sections 24 (Code of conduct and practice) and 25 (Code of conduct and practice: further provision)***

93. Section 24 requires the Welsh Ministers to prepare and publish a code of conduct and practice that specifies the standards which are expected of registered persons. The code may specify different

---

<sup>52</sup> CLA Committee, *RoP [paragraph 173]*, 30 September 2013

standards for the different categories of the education workforce. The Education Workforce Council is required to take responsibility for the code and keep it under review.

94. Section 25(1) states that Welsh Ministers may by regulations make provision and in connection with the code. Section 25(2) states that in particular regulations may make provision about the form and content of the code as well as the consequences of any failure by a registered person to comply with the code, which may include disciplinary proceedings under section 26.

95. The power to make regulations is subject to the negative procedure because:

“The detail is technical, and there is a requirement for the code to be reviewed every three years.”<sup>53</sup>

96. An official accompanying the Minister explained how the code will be developed:

“... the code of conduct that we have for teachers is the code against which they are held in terms of their practice and their performance and the basis for any disciplinary procedures against them. So, the code of conduct will be, in the first instance, for Welsh Ministers to establish, because we have to ensure that that code is representative of all of the registered professions. Obviously, the General Teaching Council for Wales would work with us in preparing that code, and we will be building on the code that already exists and is in operation for teachers. The regulations deal with the form and the content—what the code might need to look like, not necessarily the substance of the code, which will be for the council. We have set on the face of the Bill that, as a minimum, that will be revised every three years. However, the code will be something that the education workforce council will be responsible for keeping constantly under review and revising as appropriate.”<sup>54</sup>

### ***Our view***

97. We consider that the publication of a code under sections 24(1) and 24(5) must be based on regulations made in advance under

---

<sup>53</sup> Explanatory Memorandum, Chapter 5, page 43

<sup>54</sup> CLA Committee, *RoP [paragraph 179]*, 30 September 2013

section 25. In addition, given that regulations made in the context of section 25(2)(b) have the ability to affect someone's career, we believe that the arguments made by the Minister in respect of Schedule 1 paragraph 3(1) and section 10(6) apply equally to section 25(2)(b). Accordingly, we believe the affirmative procedure should apply.

**Recommendation 12: We recommend that the Minister should table an amendment to make it a duty to make regulations under section 25(1) and to apply the affirmative procedure to this regulation-making power.**

***Sections 26 (Disciplinary functions) and 28 (Disciplinary functions: further provision)***

98. By virtue of section 26, the Education Workforce Council is required to carry out investigations where it is alleged that a registered person is guilty of unacceptable professional conduct, serious professional incompetence or has been convicted of a relevant offence. Section 26 confers a number of functions on the Council. Section 26(6) allows Welsh Ministers to make regulations that exclude or restrict some of the functions conferred, while Section 26(7) states that this provision may take account of powers exercisable by the Disclosure and Barring Service under the *Safeguarding and Vulnerable Groups Act 2006*.

99. The Explanatory Memorandum states that the negative procedure applies because:

“This will allow the disciplinary functions of the council to quickly take into account/reflect powers exercisable under the 2006 Act.”<sup>55</sup>

100. Section 28(1) allows Welsh Ministers to make regulations about the disciplinary functions of the Education Workforce Council. This includes procedures for investigation, disciplinary orders and action that may be required of an employer when an employee is the recipient of a disciplinary order. Section 28(4) provides a power for Welsh Ministers to make regulations providing that a prohibition order against a teacher in England will have the same effect in Wales. Section 28(5) states that such regulations may modify any provision of an Act.

---

<sup>55</sup> Explanatory Memorandum, Chapter 5, page 43

101. Regulations made under section 28(1) are subject to the negative procedure because the detail is technical,<sup>56</sup> while those under 28(4) are subject to the affirmative procedure, where they add to, amend or omit text of the Act.

102. When questioned about why the negative procedure was being used in sections 26(6) and 28(1), the Minister said:

“This is not Welsh Ministers getting involved with the disciplinary procedures of the council; this is Welsh Ministers being enabled to exclude or restrict any of the council’s disciplinary functions in section 26. That does give Welsh Ministers the power to tailor the disciplinary powers of the council, if you like.”<sup>57</sup>

103. He added that

“Section 28 gives the council disciplinary functions, essentially. That is a technical piece of law making. It is not about Welsh Ministers getting involved with the nuts and bolts of a disciplinary procedure.”<sup>58</sup>

104. By reference to the Disclosure and Barring Service, the Minister indicated that he did not see that the affirmative procedure should be used every time “a technical change needed to be made in terms of a barring from a particular profession, for instance.”<sup>59</sup> He added that:

“... we have to bear in mind that we are dealing with a landscape that we cannot, confidently, in every respect, predict. We are also dealing with professions that have a different degree of professional contact with, for instance, young people in very different contexts. So, I do not see that coming back to a Plenary session of the Assembly every time the form and the content of the procedure for disciplinary proceedings, for instance, needs to be addressed leads us to a very good place in terms of the day-to-day working of the new council.”<sup>60</sup>

105. An official accompanying the Minister, sought to clarify the position by referring the principles being followed generally for

---

<sup>56</sup> Explanatory Memorandum, Chapter 5, page 44

<sup>57</sup> CLA Committee, *RoP [paragraph 202]*, 30 September 2013

<sup>58</sup> CLA Committee, *RoP [paragraph 205]*, 30 September 2013

<sup>59</sup> CLA Committee, *RoP [paragraph 209]*, 30 September 2013

<sup>60</sup> CLA Committee, *RoP [paragraph 209]*, 30 September 2013

determining whether the negative or affirmative procedure is appropriate. He said:

“Section 28(4) illustrates where we recognise that there is potential in that section for us to change the Bill. In those circumstances, we recognise that the affirmative procedure would be appropriate, and hence why there is provision for that in this particular Bill. However, if there are section 28(4) regulations that do not amend the Bill, then, in our view, that would be appropriate for the negative procedure because, in the Bill itself, you are determining principles in terms of the disciplinary functions, and we would say that there is sufficient detail on the face of the Bill, in terms of what the council can and will do in terms of discipline, for you to have an idea as to what it will actually do. The mechanics and the details of how that will be administered are more appropriate for regulations, and the technical nature of those regulations, and the need for them, potentially, to be changed, possibly regularly, to meet evolving needs, leads to our conclusion that it would be negative.”<sup>61</sup>

### ***Our view***

106. We note the Minister’s comments but are not convinced by his justification for the procedures adopted in respect of sections 26(6) and 28(1) of the Bill.

107. Given that section 26(6) allows Welsh Ministers to make regulations that exclude or restrict some of the functions conferred on the Education Workforce Council under section 26(1), we believe that a more robust level scrutiny is appropriate.

108. We also believe that regulations made under section 28(1) also warrant an affirmative procedure given that they cover disciplinary issues. We believe that such an approach is consistent with arguments put forward by the Minister regarding the impact of legislation on the course of someone’s career.

109. We are content with procedures identified for making regulations under section 28(4).

---

<sup>61</sup> CLA Committee, *RoP [paragraph 211]*, 30 September 2013

**Recommendation 13: We recommend that the Minister should table amendments to apply the affirmative procedure to the making of regulations under section 26(6) and section 28(1).**

***Sections 33 (Council to maintain records about certain persons), 35 (Supply of information: the Council), 36 (Supply of information: employers) and 37 (Supply of information: agents and contractors)***

110. Sections 33 to 38 deal with the retention and supply of information which is relevant to the Education Workforce Council's functions or registering and regulating persons who wish to be registered. Section 33 allows the Welsh Ministers to make regulations requiring the Council to maintain records about various persons. For example, this may include holding information about people who have applied and been refused registration or people who have been removed from the register on disciplinary grounds.

111. Section 35 sets out the requirement for the Council to supply information. Section 35(4) also enables Welsh Ministers to make regulations which require the Council to provide information to specific persons or bodies (and subject to specific conditions).

112. Section 36 imposes a duty on a relevant employer to provide information to the Council about a registered person who is no longer employed due to unprofessional conduct, incompetence or conviction of a relevant offence. Regulations under section 36(2) will specify the information required.

113. Section 37 imposes a statutory duty on agents and contractors to supply information to the Council about a registered person. Welsh Ministers may make regulations under section 37(2) specifying what information is required. .

114. The Explanatory Memorandum indicates that in respect of regulation-making functions for sections 33(1), 35(4) and 37(2), the procedure is negative because "the detail is technical/procedural and not likely to be controversial", while for section 36(2) it is negative because the "detail is technical".<sup>62</sup>

---

<sup>62</sup> Explanatory Memorandum, Chapter 5, pages 44 to 46

115. The Minister confirmed this position in questioning saying it was “relatively minor detail ... in relation to the overall legislation”.<sup>63</sup> He also indicated that sections 35, 36 and 37 reflected similar provisions in the *Teaching and Higher Education Act 1998*.<sup>64</sup>

### ***Our view***

116. We note the Minister’s comments and are content with the negative procedure applying to the regulation-making powers under sections 33, 35, 36 and 37.

***Sections 44 (Persons with learning difficulties: assessment of post-16 educational and training needs), 45 (Assessments of post-16 educational and training needs: appeals), 46 (Persons with learning difficulties: case friends and advocacy services) and 47 (Responsibility for providing post-16 education and training for persons with learning difficulties)***

117. Part 3 of the Bill concerns persons with learning difficulties.

118. Section 44 amends the *Learning and Skills Act 2000* by inserting new sections 40A to 40F of that Act, some of which (new sections 40B, 40C and 40D), include regulation-making powers for the Welsh Ministers. These sections relate to assessments of post-16 educational and training needs for person with learning difficulties.

119. Section 45 amends the *Learning and Skills Act 2000* by inserting new sections 40G to 40M of that Act, some of which (new sections 40I, 40J and 40K), include regulation-making powers for the Welsh Ministers. These sections relate to appeals in relation to assessments of post-16 educational and training needs for person with learning difficulties.

120. Section 46 amends the *Learning and Skills Act 2000* by inserting new sections 40N and 40O of that Act, some of which (new sections 40N and 40O), include regulation-making powers for the Welsh Ministers. These sections relate to case friends and advocacy in relation to persons with learning difficulties.

121. Section 47 inserts a new section 41A to the *Learning and Skills Act 2000*. It makes provision about the responsibilities of a local

---

<sup>63</sup> CLA Committee, *RoP [paragraph 219]*, 30 September 2013

<sup>64</sup> CLA Committee, *RoP [paragraph 219]*, 30 September 2013



authority where a post-16 educational and training assessment has been carried out and confers powers on the Welsh Ministers to make in regulations.

122. The Minister explained the purpose of the changes to the *Learning and Skills Act 2000* is to divest Welsh Ministers of powers and, essentially, to shift power to local authorities; he considered that the approach adopted “is a proportionate and appropriate means of doing that”.<sup>65</sup> He acknowledged that this divestment was not complete, given the regulation-making powers being retained.<sup>66</sup> An official accompanying the Minister spoke about the nature of these powers:

“The 11 regulation-making powers within that part of the Bill will probably come down to two broad sets of regulations that will set out the detail to ensure that, when we move the responsibilities to the local authorities, we can ensure consistency of approach, so that learners can expect to receive a single approach to assessment and to establish a level of detail consistently across Wales. That will, in effect, protect learners and ensure that the way that the special educational needs tribunal looks at the cases is consistent and has structure. So, the regulations are about the detail underneath the principles.”<sup>67</sup>

123. She added that:

“At the moment, we have no regulation-making powers in the relevant provisions of the 2000 Act, because the responsibilities and the duties sit with Welsh Ministers. So the regulation-making powers are there to ensure that, when we put responsibilities on local authorities, they deliver consistently and to a minimum standard.”<sup>68</sup>

### ***Our view***

124. We note the comments of the Minister.

---

<sup>65</sup> CLA Committee, *RoP [paragraph 229]*, 30 September 2013

<sup>66</sup> CLA Committee, *RoP [paragraphs 230-31]*, 30 September 2013

<sup>67</sup> CLA Committee, *RoP [paragraph 232]*, 30 September 2013

<sup>68</sup> CLA Committee, *RoP [paragraph 234]*, 30 September 2013

125. We consider that Part 3 of the Bill achieves a reasonable balance between what is on its face and what is left to subordinate legislation. We welcome this.

126. However, we note that Part 3 amends existing legislation and we are concerned that the approach adopted is not consistent with the Welsh Government's objective of making law in Wales more accessible by the process of consolidation.

127. While we are broadly content with the regulation-making powers provided in new sections to be inserted into the *Learning and Skills Act 2000*, we consider that regulations to be made in relation to appeals should be subject to the affirmative procedure.

**Recommendation 14: We recommend that the Minister should table an amendment to apply the affirmative procedure to regulations made under sections 40K(2), 41A(5) and 41A(6) of the *Learning and Skills Act 2000*; these sections are to be inserted by virtue of sections 45 and 47 of the Bill.**

***Section 49 (Dates of terms and holidays and times of school sessions)***

128. Section 49 amends the *Education Act 2002* in respect of Wales by inserting new sections 32A, 32B and 32C. New section 32A sets out the responsibilities of a local authority or governing body in setting school term and holiday dates. Once dates have been determined, Welsh Ministers are to be notified of the dates by following a procedure set out in regulations, subject to the negative procedure because they are technical.<sup>69</sup> New section 32B of the 2002 Act allows the Welsh Ministers to direct a local authority or governing body to determine different school term dates from those set under section 32A. Before making a direction under this section, the Welsh Ministers must carry out appropriate consultation. Section 32B(4) allows the Welsh Ministers to make regulations about such consultation. They are subject to the negative procedure because "the detail is technical and is unlikely to be controversial."<sup>70</sup>

129. New section 32C(5) of the 2002 Act is a restatement of the existing provision regarding school session times which relate to

---

<sup>69</sup> Explanatory Memorandum, Chapter 5, page 49

<sup>70</sup> Explanatory Memorandum, Chapter 5, page 50

Wales in the current section 32 of the Education Act 2002.<sup>71</sup> The regulation-making powers consolidate existing regulation-making powers in section 32 of the 2002 Act<sup>72</sup> and are subject to the negative procedure.

130. An official accompanying the Minister told us that:

“The provisions around setting of term dates are new powers, to an extent. The new element is where Welsh Ministers may issue directions. That said, the principle about local authorities and governing bodies of voluntary-aided and foundation schools in the first instance setting dates is the same. The second part of it is that we have taken the opportunity to re-enact the provisions on school session times, so that it is in the same place, but that is just a straight re-enactment and there is no change to the law.”<sup>73</sup>

### ***Our view***

131. We note the Minister’s comments and are content for the negative procedure to apply in relation to regulations made under new sections 32A, 32B and 32C of the *Education Act 2002*.

### ***Section 52 (Ancillary provision)***

132. The Explanatory Memorandum explains section 52 in the following terms:

“The powers conferred on the Welsh Ministers by this section allow them to make such orders as they consider appropriate for the Bill to achieve its purposes and have its full effect.

Examples of how this power might be used include:

- making changes to other legislation in consequence of the changes made by this Bill (particularly where the UK parliament is also amending the same legislation at the same time);
- to provide additional clarity around any of the new procedures;

---

<sup>71</sup> Explanatory Memorandum, Annex 1 – Explanatory Notes, paragraph 130

<sup>72</sup> Explanatory Memorandum, Chapter 5, page 50

<sup>73</sup> CLA Committee, *RoP [paragraph 237]*, 30 September 2013

- to deal with unforeseen details arising out of the implementation of the new system.

Where this power is used to amend the text of primary legislation it must be laid before and approved by the Assembly before it comes into force.”<sup>74</sup>

133. It also says that:

“Whilst the principles are set out on the face of the Act, and it will be necessary to amend several other Acts it is not practical to identify every consequential amendment at this stage.”<sup>75</sup>

134. When we asked the Minister to give some indication of why such sweeping and widely-phrased powers would be used, he said:

“In section 52, we are dealing with Henry VIII powers, essentially. As Members will be aware, this is about primary legislation being amended without having to present another Bill. There are two aspects to this in the Bill. One is section 52 and there is another paragraph in Schedule 2. They are both subject to the affirmative procedure. Section 52 is in relation to school term dates. We might not require that power at all, but ... the UK Government ... is bringing forward primary legislation to amend section 32 of the Education Act 2002, and it is amending the Act. This is all happening at around the same time, so we may need to use the power to amend section 32 to ensure that our changes still work ... So, section 52 is specifically there to ensure that we can carry on making legislation in Wales, regardless of what happens in Westminster.”<sup>76</sup>

### ***Our view***

135. Based on the Minister’s comments, we have some concerns about the breadth of powers provided for in section 52. We are not entirely clear about how the Welsh Government intends to use them or how they could be used by future governments. As a consequence we consider that the use of a super-affirmative procedure in respect of

---

<sup>74</sup> Explanatory Memorandum, Annex 1 – Explanatory Notes, paragraphs 136 to 138

<sup>75</sup> Explanatory Memorandum, Chapter 5, page 50

<sup>76</sup> CLA Committee, *RoP [paragraph 240]*, 30 September 2013

section 52 may be worth exploring to provide a counterbalance to the breadth of power being sought.

**Recommendation 15: We recommend that as part of the Stage 1 debate, the Minister sets out clearly how he intends to use the powers provided for by section 52. In addition, we recommend that he justifies the use of the affirmative procedure as opposed to a super-affirmative procedure for regulations made under this section.**

### ***Section 56 (Commencement)***

136. Section 56 provides commencement provisions for the Bill. Section 56(5)(b) explains that an order made under section 56(4) may include transitional transitory or saving provision as the Welsh Ministers consider necessary or expedient.

137. An official accompanying the Minister explained that it is usual for commencement provisions to contain the wording set out in section 56(5)(b):

“That is common wording that you would get in every piece of primary legislation. It is designed to cater for the situation of moving from an existing regime to a new regime, where there is a transitional period. You need to make provision to make that seamless. So, it is not about making new principles; it is just about the mechanics of moving in one instance from one regime to a new regime.”<sup>77</sup>

### ***Our view***

138. It is standard practice that no procedure is prescribed for commencement orders and we are content with this approach.

139. However, a common theme of our scrutiny of Assembly Bills has been to consider how the commencement provisions they contain could be used given that they are subject to no procedure. We have written to the First Minister to clarify the inclusion of such provisions and have noted his response.<sup>78</sup>

---

<sup>77</sup> CLA Committee, *RoP [paragraph 246]*, 30 September 2013

<sup>78</sup> Letter from the Chair of the Constitutional and Legislative Affairs Committee to the First Minister, *Commencement Orders*, 2 July 2013; Letter from the First Minister to

140. We believe that one way to overcome our concerns is for commencement orders to be subject to a negative procedure where they:

- (i) do more than simply commence provisions and have ancillary provisions within them, however necessary that may be to ensure effective transition to a new regime;
- (ii) commence provisions in a different Assembly from the one in which the parent Act is made.

**Recommendation 16: We recommend that the Minister tables amendments to the Bill to provide that commencement orders are subject to the negative procedure where they are made:**

- (i) in accordance with section 56(5)(b); or**
- (ii) after the Fourth Assembly.**

#### ***General comments on Part 5***

141. We note that sections 52(1) and 53(1)(a) allow for such subordinate legislation to be made that is incidental, consequential, supplemental, transitional, transitory or saving provision. Section 56(5)(b) allows for an order to be made that may include “transitional, transitory or saving provision”. All these sections contain ancillary provisions yet are subject to different procedures.

**Recommendation 17: We recommend that during the stage 1 debate the Minister explains and clarifies why:**

- (i) it is necessary to make reference to ancillary provisions in three separate places in the Bill; and**
- (ii) why different procedures are used in each case.**

#### ***Explanatory Memorandum***

142. We have already expressed concern about the lack of detail contained in the Explanatory Notes within the Explanatory Memorandum (see paragraph 27).

143. In our view, the Explanatory Memorandum as a whole would have benefitted from being more thorough and detailed in explaining the

---

the Chair of the Constitutional and Legislative Affairs Committee, 18 October 2013; CLA Committee, *RoP [paragraphs 14 - 36]*, 4 November 2013

purpose of the legislation. In particular, the Bill draws on sections in other legislation and it would have been helpful as an aid to scrutiny if a table of derivations, setting out the sources of the legislation proposed to be consolidated (or adapted) in this Bill had been included in the initial Explanatory Memorandum.

**Recommendation 18: We recommend that a revised Explanatory Memorandum should be issued following Stage 2 and that it should include a table of derivations.**

144. Throughout Chapter 5 of this report we have drawn attention to the way in which the Minister has justified the use of either the negative or affirmative procedure. Conclusions 3 and 4 make clear our views on some of the arguments used.

145. Overall, we believe the arguments used to justify a specific procedure have been weak, particularly given the explanations set out in Chapter 5 of the Explanatory Memorandum. We consider that the reasons given for the adoption of a particular procedure lack the necessary level of detail and clarity. They are also repetitive and give an impression that little time or thought has been given to preparing this important document.

**Conclusion 5: The lack of adequate reasons to explain the adoption of a particular procedure for the scrutiny of individual pieces of delegated legislation, coupled with the framework structure of Part 2 of the Bill, has led us to recommend the application of an affirmative procedure in more instances than we would normally expect.**