



Mick Antoniw MS
Chair Legislation, Justice and Constitution Committee

18/09/2020

Dear Mick,

Thank you for your letter dated 4 August 2020 with questions in advance of my attendance at the Legislation, Justice and Constitution Committee evidence session on 5 October.

My response to the questions raised are as follows:

Human Rights

Q1. Are you content that the Bill as a whole is compatible with the European Convention on Human Rights?

I am satisfied the Bill as a whole is compatible with the rights protected by the Human Rights Act 1998 (“the Convention Rights”).

Q2 . The Bill makes no provision for parents to be able to withdraw their children from Religion, Values and Ethics (“RVE”) or Relationships and Sexuality Education (“RSE”). Are you satisfied that this is compatible with parents’ rights to respect for their religious and philosophical convictions under Article 2 Protocol 1 (right to education) and their right to freedom of thought, conscience and religion under Article 9 of the European Convention on Human Rights?

As the question states the Bill does not provide a right to withdraw. This will ensure that every child has education in RVE and RSE. I believe that issues around RVE and RSE permeate throughout society and often raise complex issues which can be difficult for all of us and particularly children to navigate. I believe schools have a part to play in equipping pupils to understand and navigate their way through those issues. This will be achieved by providing a better understanding of both these areas from the perspective of different

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

faiths, non-faiths and philosophical ideas within the context of a modern multicultural and multi faith society.

The RVE provisions are a particularly complex area of the Bill and so I have set out below a summary of what each category of school is obliged to do in the new Bill in respect of RVE. I have gone on to discuss why this approach is compliant with Article 2 Protocol 1 (A2P1), and Article 9 and Article 14 as mentioned above.

Community schools, and foundation and voluntary schools without a religious character:

- There is no right to withdraw from RVE;
- The provision in the curriculum for RVE must be designed having regard to the agreed syllabus¹;
- It must also be designed having regard to any guidance issued by the Welsh Ministers under the Bill.

Foundation and voluntary controlled schools that have a religious character:

- There is no right to withdraw from RVE;
 - The curriculum must include provision for RVE which has been designed having regard to the agreed syllabus.
 - If that provision does not accord with the school's trust deed or the tenets of its faith, the curriculum must also make provision for RVE that does accord with the trust deed or the tenets of the faith of the school ("Denominational RVE");
- The provision in the curriculum for RVE must also be designed having regard to any guidance issued by the Welsh Ministers under the Bill;
- In this type of school, the default position is for RVE which has been designed having regard to the agreed syllabus to be provided to pupils;
- But if a pupil's parent requests it, a school must provide Denominational RVE to the pupil instead of the RVE designed in accordance with the agreed syllabus. This is not a right to withdraw from RVE, but a right to request a different type of RVE.

Voluntary aided schools that have a religious character:

¹ The agreed syllabus is the syllabus for religious education recommended by the Agreed Syllabus Conference established by a local authority for its area and adopted by it. The agreed syllabus is determined in accordance with section 375 and Schedule 31 to the Education Act 1996.

- There is no right to withdraw from RVE;
 - The curriculum must include provision for RVE which accords with the school's trust deed or, if the trust deed doesn't make provision about RVE, with the tenets of the school's faith. ("Denominational RVE")
 - If the Denominational RVE provision does not accord with the agreed syllabus, the curriculum must *also* make provision for RVE that does accord with the agreed syllabus.
 - The provision in the curriculum for RVE must also be designed having regard to any guidance issued by the Welsh Ministers under the Bill;
- In this type of school, the default position is for Denominational RVE to be provided to pupils.
- But if a pupil's parent requests it, a school must provide RVE to the pupil that accords with the agreed syllabus, instead of the Denominational RVE. Again this is not a right to withdraw from RVE, but a right to request a different type of RVE.

Pluralistic RVE

I am satisfied that not providing a right to withdraw in respect of RVE is compatible with the rights protected by the Human Rights Act 1998, including A2P1 and Article 9 and Article 14 when read together. It is important to note that, aside from the Bill, the law requires that if a state mandates RVE it should ensure access to pluralistic RVE or if not there should be a right to withdraw. In response to the following question I have set out the provisions in the Bill that ensure that pluralism in RVE² is achieved.

The Bill allows Denominational RVE to continue to be provided by faith schools but in the case of voluntary aided faith schools, a child's parent may opt out of that in favour of pluralistic RVE. By pluralistic I mean it teaches a number of different views both religious and non-religious. In doing that the Bill recognises the role of schools with a religious character in the provision of state education.

The Welsh Government recognises that historically, the state has embraced various faiths in the provision of education. In drafting the Bill, Welsh Government have endeavoured to respect this. Those faiths have a valuable role in the provision of education in Wales.

² As to examples of the relevant case law please (Folgerø v Norway (Application no 15472/02) [2007] ECHR 15472/02; Lautsi v Italy (2008) 46 EHRR 47, paragraph 54); (Lautsi v Italy (2012) 54 EHRR 3, paragraph 59) and R (on the application of Fox) & Others v Secretary Of State For Education [2015] EWHC 3404 (Admin).

In respect of voluntary aided schools with a religious character, although the right to withdraw is removed, that does not mean that pupils at those schools will necessarily have to receive Denominational RVE. Instead, their parents can request that they be taught RVE in accordance with the agreed syllabus, and a school must then provide this type of RVE. So, although the right to withdraw is removed, what will be provided must be pluralistic if the parent so requests. This approach has the effect of imposing a new requirement upon a school of this type (to provide RVE in accordance with the agreed syllabus if requested by a parent) and this is, in our view, proportionate.

It is important to note that I do not assume that any Denominational RVE will not be pluralistic. In conversations with my officials the Catholic Education Services have been very clear that they consider the RVE provided in Catholic schools is pluralistic. It is simply that in most cases that Denominational RVE will be provided in accordance with the trust deed, and whilst it is not feasible for the Welsh Government to consider every trust deed, the approach set out in the Bill is in our view compatible with Convention Rights.

Pluralistic RSE

I am also satisfied that removal of the right to withdraw in respect of RSE is compatible with the rights protected by the Human Rights Act 1998, including A2P1 and Article 9. It is important to note that aside from the Bill, the law requires that where the state mandates RSE, it must ensure access to pluralistic RSE or there should be a right to withdraw.

The RSE provisions are designed to ensure that it is provided pluralistically. That is what is required by the current law. I have in my response to the following question set out how the provisions in the Bill seek to ensure plurality in RSE.

Q3. What safeguards exist within the Bill (or more widely) to seek to ensure that both the RVE and RSE curricula are –

- a) designed in a way that is objective, critical and pluralistic, and**
- b) delivered in a way that is objective, critical and pluralistic,**

thereby complying with Convention rights?

RVE

The Bill makes provision in a number of respects which are designed to secure the pluralistic content and teaching of RVE. These are as follows:

Re-naming of religious education to Religion, Values and Ethics (RVE)

The name change reflects the broad focus and pluralistic nature of RVE. That was done by linking the Bill provision to the term “philosophical convictions” in A2P1 (see section 62 of the Bill). In other words, the RVE provided pursuant to the Bill must be compatible with A2P1 in that it must include teaching on non-religious philosophical convictions.

Agreed syllabus

The agreed syllabus must comply with certain requirements specified in section 375A(3) of the Education Act 1996 (as revised by paragraph 7 of Schedule 1 to the Bill). This requires that the agreed syllabus must reflect religious traditions in Great Britain while taking account of the teaching and practices of other principal religions. To ensure plurality the Bill also requires that it must reflect that a range of non-religious philosophical convictions that are held in Great Britain. Section 375A of the 1996 Act states that the reference to “philosophical convictions” in section 375A(3)(b) is to philosophical convictions within the meaning of A2P1 of the Human Rights Act 1998. The purpose of these provisions is to ensure that a range of religious and non-religious views are taught as part of RVE thus ensuring the approach to this subject is both critical and objective.

A school’s curriculum must include provision for RVE that is designed having regard to the agreed syllabus, or (in the case of voluntary aided schools with a religious character) in accordance with the agreed syllabus. Thus the pluralistic requirements of the agreed syllabus will feed through into the curriculum provision for RVE.

The agreed syllabus is adopted by an Agreed Syllabus Conference. The conference will be required to represent non-religious philosophical convictions and they will have voting rights.

There will continue to be Standing Advisory Councils which advise a local authority on the provision of RVE under the Bill – these too will be required to represent non-religious philosophical convictions.

In this way pluralism is built into the agreed syllabus, and the RVE provided in schools.

RSE

In terms of RSE, the Bill also makes provision in a number of respects which are designed to secure the pluralistic content and teaching of RSE. These are as follows.

Change of name:

The Bill provides for a change in the current name in legislation from “sex education” to “Relationships and Sexuality Education” (RSE). This indicates the breadth of the subject and concepts that should be included.

Statutory Code on RSE:

The Bill requires the Welsh Ministers to publish a code setting out the themes and matters in RSE. This will ensure that a range of ideas on any given topic

in RSE are included in it. For example, the code may include sections on different types of marriage and other family relationships.

Statutory Guidance:

The code and Bill provisions will be supplemented by statutory guidance. As noted above, there is a power in section 66 of the Bill to issue statutory guidance to a range of persons who have functions in respect of the curriculum in the Bill (including local authorities, governing bodies, head teachers and providers of funded non-maintained nursery education). That guidance will enable those person/bodies, in designing RSE, to satisfy the pluralistic requirement. That guidance will be the subject of consultation. It is anticipated that it will provide practical guidance to the above bodies on how to discharge their obligations in this regard, for example, on possible matters to include or not include and on what may be good practice in the teaching of those issues in the classroom. For example, the aim would be to make it clear that schools should provide a range of ideas on any given topic and that the information should be conveyed non-doctrinally.

Developmentally appropriate:

The Bill I also includes express provision in sections 24(2) and 52(4) that the RSE provided must be developmentally appropriate.

The purpose of these provisions is to ensure that teaching and learning of RSE is appropriate for the child or young person and that the issues raised are approached in a way that is critical and objective. This is an important feature to ensure that parents and learners know what to expect from their school in the delivery of its RSE curriculum.

Q4. The Bill treats schools with a religious character differently to those without, when designing and implementing the curriculum, so far as it encompasses the mandatory element of RVE.

a) What is the justification for this?

b) Are you content that this does not raise any human rights issues?

Case law and the Convention Rights requires that pluralistic RVE must be available for all learners. If not then there must be a right to withdraw.

As noted above voluntary aided faith schools will continue to be required to teach their Denominational RVE. The Bill also ensures that all pupils will be able to have the agreed syllabus RVE if that is wanted by the parent in such schools. In doing that, the Bill recognises the role of schools with a religious character in the provision of state education. These schools make a valuable contribution to the education system and many parents and learners will want to choose this type of RVE. The Bill respects that and preserves the legal obligation on such schools to teach in accordance with their trust deeds or denomination. We in no way intend to diminish the importance of religion, rather to emphasise wider aspects.

However, in order to secure that each learner has access to pluralistic RVE in voluntary aided faith schools, parents of learners can request agreed syllabus RVE. Likewise, we recognise that parents who send their children to a foundation or voluntary controlled faith school may wish to have their child receive Denominational RVE. In that way every learner has access to the agreed syllabus RVE which will be pluralistic in nature. We consider that is compatible with the Convention Rights. The result of the above is that all children will have access to a pluralistic RVE which will include a range of religious and non-religious views. That is what the law currently requires. In that sense there is equality.

The State is neutral in this space generally. That is why the emphasis is on pluralism. There is no right to have education provided by the State according to one's own religious beliefs. So, whilst the State recognises a place for religious schools, its obligation is to provide pluralistic provision. So where a child is attending a faith school but does not share the faith of that school, there is a right to seek alternative pluralistic provision. But where a child of a particular faith attends a non-faith school, there is no right to require the State to provide education according to that faith. Therefore, so far as there is differential treatment, it is justified on the basis that the State ensures pluralism whilst respecting the ability of people to set up faith schools or to educate outside school in accordance with one's own faith.

There is already a qualified right at the moment for parents of children in voluntary aided faith schools to opt out of the Denominational RVE and have agreed syllabus RVE instead. Therefore, the new absolute right to opt out from Denominational RVE is not entirely new in that sense but is a development of that existing qualified right of parents. It is something schools will have had to address from time to time. Nonetheless, we accept this a new requirement. Some schools may find that a difficult task but we believe that task is made easier as the Bill requires them to adopt the agreed syllabus RVE and so that design task is made easier.

In practice, this means that schools with a religious character will have to design two syllabi, if requested by a parent. As there is no right to withdraw a child from RVE (or indeed RSE) the Bill needs to ensure that those children attending a faith school have access to a pluralistic RVE if that is wanted by the parent.

I consider this is compatible with the Convention Rights. As to how they can deliver that in practice, we anticipate that the numbers of pupils not following the Denominational RVE syllabus will be very small. The school would need to consider how they could best deliver on that. For example, they could be provided with additional supplementary or separate classes. My officials are working with the Catholic Education Service and the Church in Wales to consider how to assess and address the impact of implementing this requirement.

If the school did not think that was appropriate, then options could include making arrangements for additional learning to be provided at another setting or making arrangements for external providers to provide the learning on the school premises. The school would need to make that clear including what would be provided.

I have listened carefully to the concerns raised by partners and other key stakeholders but do not anticipate that there will be a large number of pupils opting out of Denominational RVE. I consider that it is likely that where parents have exercised the right to withdraw from religious education under the current legislation they will also opt out of the Denominational RVE. Our understanding is that current exercise of the right to withdraw in schools with a religious character is extremely low.

Bill provisions

Q5. Sections 6 to 8 of the Bill require the Welsh Ministers to prepare codes relating to What Matters, Progression and RSE, which any curriculum implemented for learners must adhere to. Much of the detail of the curriculum will be contained in these codes. Can you explain why the codes are subject to the negative rather than the affirmative procedure?

The key principles are set out on the face of the Bill. The Codes will contain some detail to aid head teachers, governing bodies and teachers in designing and implementing their curriculum. For example, the RSE Code will set out the themes and matters to be included in teaching and learning for RSE.

The subject-matter of the Code will need to be updated from time to time to reflect emerging issues. The Code and any changes to it will be the subject of consultation. I consider that the negative procedure does provide an appropriate opportunity for the Senedd to scrutinise the Code.

I did consider whether notwithstanding that there are aspects of the Code that would indicate that the affirmative procedure is the appropriate procedure e.g. does the it allow us to impose or increase taxation; provision involving substantial Government expenditure; powers to create unusual criminal provisions or unusual civil penalties; or powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion. None of those matters apply in this instance. That though is not the whole picture and I have gone to consider whether the Code gives rise to matters of special importance that would otherwise indicate the affirmative procedure is appropriate.

Whilst the Code will contain themes and matters to be included in RSE it is anticipated that would be of a high level. The provisions on RSE in the Bill were designed not to be prescriptive as its content. Nonetheless a key aspect of the policy on RSE is dealt with on the face of the Bill - the requirement that it must be provided in a developmentally appropriate manner (see sections 24(2) and 52(4) of the Bill). The negative procedure will allow me to respond quickly and amend the Code more quickly in response to new issues in this

area. This area is very sensitive and new complex issues will emerge from time to time

Further support to schools will be provided by way of statutory guidance which will provide more detailed information on recommendations for the teaching of RSE and in particular on the themes and matters set out in the Code. The negative procedure will provide the Senedd with the opportunity to appropriately scrutinise the Code. It will not be the role of the Code to explain how those matters should be taught.

Q6. Section 72(6) of the Bill allows consultation on the codes, required by section 72(2)(a), to be carried out before section 72 comes into force. Do you intend to make use of this provision?

This provision may be required to be used as much of the content for inclusion in the What Matters code and the Progression code was co-constructed and published in January 2020 as part of the Curriculum for Wales guidance documentation. We do not envisage changes to the What Matters code. We would not want to rule out changes to the Progression code if it is clear that practitioners would benefit from additional explanation. We are assessing the need for changes which would require consultation following enactment of the Bill.

The RSE code is being co-constructed by the RSE Working Group, which includes representation from key stakeholders, and will aim to consult during 2021. Use of the provision in this case is subject to changes to Bill provisions and the timing of the consultation.

The purpose of including this provision in the Bill is to ensure that the codes can be shared with head teachers and governing bodies in good time to enable them to develop their curriculum and prepare for implementation in September 2022.

Q7. Section 17(a) of the Bill enables Welsh Ministers to make regulations about steps that need to be taken by a school or setting before adopting a curriculum. Section 17(c) provides a power to specify additional circumstances in which a curriculum must be revised. The Statement of Policy Intent (“SOPI”) confirms that the Welsh Ministers do not intend to make use of these powers and states that Welsh Government “*believe there is sufficient provision on the face of the Bill in respect of these matters...*”. Given that you believe there is sufficient provision on the face of the Bill, can you confirm why the powers in section 17(a) and (c) are necessary?

At present I do not anticipate the need to make use of the regulation making powers under section 17(a) and (c). However, should issues come to light or circumstances change, they allow the Welsh Government to make any necessary provision. As stated in the SOPI, it is not possible to entirely foresee how practice will develop. Regulation making powers under these subsections have been included to ensure that the system remains workable

in case it becomes apparent that the requirements on the face of the Bill are insufficient. Regulations, if required, would be the subject of public consultation.

Q8. Section 25(1) of the Bill confers power on the Welsh Ministers to make regulations on additional curriculum requirements for learners in school years 10 and 11. The SOPI states that the power could be used to require schools to provide a particular course of study in the event the curriculum is not sufficiently broad and balanced.

a) In the event some schools offer a narrow curriculum for learners in school years 10 and 11, it may be too late for those learners by the time the issue has been brought to the attention of the Minister and any regulations have been made. For that reason, what consideration was given to placing such requirements on the face of the Bill?

Consideration was given to including additional detail on the face of the Bill. However, I feel that a provision on the face of the Bill would not offer the flexibility needed. We anticipate that we will need to see how schools' practices develop, in the context of a very new type of curriculum, and what the shortfalls (if any) there are. For example, the Education (Local Curriculum for Pupils in Key Stage 4) (Wales) Regulations 2009 make this type of provision for the local curriculum at key stage 4. The first iteration of those regulations has been amended to prescribe different requirements as to courses of study for the local curriculum.

b) Regulations under section 5 of the Bill which are concerned with mandatory aspects of the curriculum are subject to the affirmative procedure. Can you confirm why the negative procedure is considered appropriate for regulations made under section 25(1)?

The key principles are again set out on the face of the Bill. The Regulations made under this power will contain some detail. However, we anticipate that we need to see how schools' practices develop, in the context of a very new type of curriculum.

This Regulation making power could not be used to make Regulations that would amend other provisions in primary legislation.

Q9. Section 26 of the Bill enables headteachers and governing bodies of maintained schools and maintained nurseries to disapply English as a mandatory element of the curriculum up to school age 7, where it is in order to develop or maintain pupils' levels of fluency in Welsh. Can you confirm whether any determination needs to be made jointly by headteachers and governing bodies and what happens in the event of a disagreement between them?

The determination would need to be made jointly by the head teacher and governing body in the case of maintained schools and maintained nurseries. They may also revoke the determination.

In the event of a dispute the governing body of the school will play a significant role³. Regulations provide that the head teacher will be a member of the governing body unless they resign. Therefore, I anticipate that any dispute will be resolved at a local level. I consider this is appropriate given a key principle of the Bill is that schools develop their own curriculum. Currently certain decisions fall to be made jointly: in the event of disagreement, compromise is required in order to avoid deadlock. We consider this will be dealt with the same way.

If there is such an extreme breakdown in relations between the head teacher and the governing body so that they cannot compromise or exercise this function reasonably that would potentially engage the powers of direction of local authorities and Welsh Ministers in the School Standards and Organisation (Wales) Act 2013. It would be for the local authority to take steps under that Act in the first instance to resolve the problem but if that was not done or did not achieve the necessary result, the Welsh Ministers could exercise their powers of direction under the same Act. I think that is unlikely to happen but, for example, if they are unable to work together or cooperate a direction is a potential option to resolve that problem.

Q10. Section 34 of the Bill specifies the information a head teacher must provide when a determination is made under section 33 not to implement the pupil's choice of a course of study. Section 34(5) enables Welsh Ministers to make further provision by regulations. The SOPI provides that regulations may deal with matters such as time limits or procedures, but that it is not intended to make regulations at the outset as there is sufficient information on the face of the Bill. There is no information on the face of the Bill as to time limits or procedures. Given that this will impact pupils embarking on GCSE examinations where any process will need to be timely, can you confirm what consideration was given to placing more detail on the face of the Bill or requiring rather than permitting regulations to be made?

Consideration was given to including additional detail on the face of the Bill. However, I feel that a provision on the face of the Bill would not offer the flexibility needed. The detail I anticipate that will be needed as set out in the SOPI is of a technical nature that is likely to evolve over a period of time. That is consistent with other education legislation. For example, in relation to pupil exclusions, the detail of the appeal procedures and time limits is set out in secondary legislation (see the Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003 (SI 2003/3227)).

³ It is worth noting that the constitution and procedures of a governing body are regulated primarily by the Government of Maintained Schools (Wales) Regulations 2005.

Whilst I appreciate the point made in your question, it is not possible to entirely foresee how practice will develop and there may still not be a need for these regulations to be made. Therefore, I do not feel it is necessary to require that these regulations be made. If evidence does begin to emerge then regulations will provide the most appropriate legislative vehicle to address this issue. They will allow the Government to amend the detail of any time limits from time to time and in response to changing circumstances.

Q11. Section 40 of the Bill allows the Welsh Ministers to give a direction to a school disapplying or modifying any of the implementation requirements set out in sections 29 to 32 for experimental or developmental purposes. The statement of policy intent provides that it will only be used in rare circumstances.

a) Can you provide some example circumstances?

This might involve an innovative project that is designed to test a new policy idea and raise educational standards. I anticipate that this would be used for smaller scale experiments, perhaps involving 1 or a few schools.

b) Can you confirm how this power differs from the power in section 50(1) of the Bill which would also allow for disapplication or modification of the curriculum?

Section 50 is designed to confer a power broadly equivalent to that in section 112 of the Education Act 2002. The power in section 112 of the 2002 Act was used when the Foundation Phase was piloted in 2008 (see the Education (Disapplication of the National Curriculum for Wales at Key Stage 1) (Wales) Regulations 2008 (SI 2008/1736)). Another example of the use of the section 112 power are the Education (National Curriculum for Wales) (Disapplication of Science at Key Stage 4) Regulations 2006 (SI 2006/1335). In that case the Regulations disapplied the requirements of the National Curriculum for Wales for science in relation to a pupil where the head teacher of the school is satisfied that the pupil is pursuing a course leading to an approved external qualification from the National Qualifications Framework at entry level, level 1 or level 2. I anticipate that this power will be used for matters that are of more general application and therefore are best suited to being dealt with by regulations which must be laid before the Senedd. I anticipate section 40 being used to deal with matters that are not of general application i.e. not all schools and which, for example, just affect one or a relatively small number of schools to address issues that are very specific to those schools.

I anticipate that the power would be used for similar initiatives in the future.

Q12. Section 50(1) gives the Welsh Ministers a power to make Regulations that disapply or modify the curriculum implementation requirements in cases or circumstances specified in the regulations. Section 50(2) allows the Regulations to permit another person to exercise their discretion about disapplying or modifying a curriculum

requirement. What safeguards does you envisage would be in place to ensure there is proper exercise of that discretion?

I recognise that disapplication or modification of the curriculum for any pupil is a serious step. However, any such proposal would be subject to prior consultation and the scrutiny of the Senedd through the laying of Regulations made under section 50 of the Bill.

If it was thought necessary in the regulations to confer a discretion on another person it would be possible to place some limitations on the exercise of that restraint, for example, the limits on the circumstances when and how the discretion could be exercised or may place time limits on how long that discretion may be exercised for.

Q13. Section 47(6) of the Bill provides Welsh Ministers with a power to make regulations about the procedure to be followed and time-limits in respect of appeals about temporary exceptions for individual pupils. The SOPI states that the Welsh Government currently have no intention to make regulations dealing with procedure as schools already have processes in place. The SOPI also states that consideration is, however, being given to using the powers to set time-limits. Given the impact that such decisions could have on an individual pupils' education, could you confirm whether any consideration has been given to placing time-limits on the face of the Bill?

Section 47(8) of the Bill provides a power for the Welsh Ministers to make regulations making further provision in connection with appeals under this section. We consider that whilst the power does allow us to make provision in respect of the time limits for appeals, we consider that it is more appropriate to allow schools the flexibility to determine their own procedures at this stage. We will continue to monitor the situation and should evidence emerge that there is a need for such provision in regulations then we can regulate accordingly.

We also consider that, as with the regulation making powers in section 34(5) (see above), setting out this sort of detail on the face of the Bill would not offer adequate flexibility that schools might need. If it does become necessary to legislate in this area then I anticipate that regulations will offer the appropriate amount of flexibility needed and can be amended from time to time more easily than is practical with a Bill. The Bill sets out entirely new arrangements for school curriculums and it is important to assess how school and indeed pupil needs develop.

Q14. Section 67(1) of the Bill provides a wide power for Welsh Ministers to make regulations about teaching and learning for learners who receive education in more than one setting. The SOPI gives one example of how the power may be used, which is to define for the first time in education legislation the number of hours which are deemed to constitute full-time education. Why is the negative procedure

appropriate for such a wide power which would enable fundamental changes (e.g. what is meant by full-time education) to be made?

Section 67 is needed to address the position of children receiving education in more than one setting. Say a child is receiving education at a school, and in a PRU, it would not be possible to apply the usual curriculum requirements to both the PRU and the school, because neither of them can implement a full curriculum for the child. The power in section 67(1) can be used to make provision about how the curriculum should work for a child in this position, and who the various duties should fall on.

In addition, some children will also be receiving education at only one setting, but for such a limited number of hours that it is inappropriate to apply the usual curriculum requirements to that setting. (An example might be a pupil who has been off school entirely due to stress, but who is gradually returning to school, say for 3 hours a week initially.) The power in section 67(1) could be used to make provision for these children. But in doing so it is likely to need to refer to the number of hours of teaching and learning that a child is receiving in a setting – for instance, by making provision about how the curriculum is to apply to children who are receiving only between 3 and 5 hours a week of teaching and learning at a setting.

The fact that there is no definition of full-time education is part of the background to this provision. If there was a statutory definition of full-time education, section 67 could simply state that it applies to children who are not receiving full-time education. But in the absence of this, these children will need to be defined in the regulations, and this may be done by reference to hours of education received. The object of using the power in this way would not be to define full-time education, for the purposes of education legislation generally, but to make flexible provision about how the curriculum is to apply, in the context of the varying and limited number of hours some children may be receiving at a particular setting. We consider that this detail is largely of a technical nature. .

Q15. Section 70(1) of the Bill provides the Welsh Ministers with a power to make regulations to amend primary and secondary legislation where necessary or appropriate to enable the new curriculum framework to operate. Why is this provision subject to the negative procedure when it contains power to modify primary legislation?

In terms of section 70 the circumstances when it could be used are set out in section 70(1) and they are as follows:

- To make supplemental provision, incidental provision or consequential provision.
- To make transitory, transitional or saving provision. This would only include provision that was needed to move from the existing curriculum and assessment arrangements to the new smoothly. For example,

some aspect of the curriculum may be needed to be retained for a cohort of pupils to avoid any unfairness to them.

Provision of this type might include provision amending primary legislation. For example, the Bill will change the name of “religious education” to Religion, Values and Ethics”. We will need to change those references across the statute book: these are consequential amendments. It is possible that we may not identify and amend all such references in the Bill in which case this power would be used to make those changes and ensure consistency in the statute book in this respect.

This power cannot be used to make provision - whether through the Henry VIII power or otherwise – that contains new substantive provision. Rather it will allow amendments to be made to primary legislation, for example, to ensure all references to religious education are amended to refer to the new subject of RVE where appropriate.

The scope of the power is to give the best effect to the policy intentions of this Bill as approved by the Senedd, enable it to be implemented effectively and ensure that the wider statute book is kept up to date and accessible.

Q16. Section 79(2) of the Bill enables the Welsh Ministers to make orders providing for commencement of certain provisions in the Bill. The Committee’s previous recommendations on this matter on other Bills have been that commencement orders that include ‘transitory, transitional or saving provision’ should be subject to the negative procedure. What assessment was undertaken before deciding that commencement orders would not be subject to any Senedd procedure?

I note the Committee’s views on this matter. However, any commencement Order made under this Bill will not contain new policy. It is there solely to switch on the provisions in the Bill which would at that point have been approved by the Senedd.

Impact Assessments

17. The Equality Impact Assessment undertaken (paragraph 9.20 of the Explanatory Memorandum (EM)) states that the new curriculum will have a positive impact as regards a number of protected characteristics including disability, race, sexual orientation, and low income households. Paragraph 9.41 of the EM also states that it was not envisaged that a full Rural Proofing Impact Assessment was needed at present. Paragraph 9.49 of the EM, in relation to the Health Impact Assessment undertaken, says that learners will be provided with a range of learning which supports them to develop and maintain positive health affirming behaviours. However, paragraph 9.50 adds that the flexibility of the new curriculum may result in a variation of provision across

different communities which may place some learners at risk because of their background or geography. Can you explain how the concerns expressed in paragraph 9.50 of the EM align with the statements in paragraphs 9.20 and 9.41?

As it states in the Rural Proofing section of the full Integrated Impact Assessment, “the curriculum is designed to apply to every learner in every classroom in Wales. The practitioners involved in developing the new arrangements, included schools of different sizes in locations across Wales, including rural areas, in collaboration with Welsh Government, regional consortia, local authorities, stakeholders and experts.”

The guidance has been developed to ensure that schools and learners benefit from the new arrangements, regardless of their backgrounds. Schools in rural areas will be supported to develop curricula that reflect their local needs and issues; and the opportunities, services and experiences readily accessible to them in the same way as schools and learners in urban or peri-urban areas.

We recognise there is a risk that flexibility under the new arrangements could lead to excessive variation of provision. These concerns were raised in response to the feedback phase for curriculum development last year, and have resulted in the measures we are proposing in the Bill. The legislation we are proposing places emphasis on elements of the guidance to provide a common framework which includes requirements in respect of the four purposes, areas of learning and experience, the statements of what matters and learning progression. We are of the view that the flexibility being afforded to schools within this robust common national framework, and with wider support for practitioners across Wales, will lead to learning that is more pertinent to the communities and areas in which children live, whilst also providing a broad and balanced education to support them wherever their future takes them.

18. Paragraph 9.44 of the EM states that the potential impacts on the justice system of the proposal for a new curriculum have been considered.

a) Was a full justice impact assessment undertaken ahead of the introduction of the Bill?

Yes. It was submitted to the Ministry of Justice which subsequently (January 2019) agreed that a full Justice System Identification process would not be required.

b) Paragraph 9.46 of the EM states that a Justice Impact Identification (JSII) form is available and a link to the form will be provided on introduction. It does not appear that the JSII form is published on the Welsh Government website, and we do not believe it has been made available to Senedd Committees. When will the JSII form be made available to Senedd Members?

The document is now available in the impact assessment section of the Welsh Government's Curriculum and Assessment (Wales) Bill web pages at the following link: <https://gov.wales/curriculum-and-assessment-wales-bill-impact-assessment>

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kirsty Williams', is centered on the page. The signature is written in a cursive style with a large initial 'K'.

Kirsty Williams MS
Minister for Education