

Jeremy Miles AS/MS
Gweinidog y Gymraeg ac Addysg
Minister for Education and Welsh Language



Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
Ty Hywel
Cardiff Bay
Cardiff
CF99 1NA

14 March 2022

Dear Huw

Tertiary Education and Research (Wales) Bill

I would like to thank the Legislation, Justice and Constitution Committee for their scrutiny of the Tertiary Education and Research (Wales) Bill during Stage 1 and for the report which was published on 2 March 2022.

In the report there were some recommendations which sought further information ahead of the general principles debate, for the ease of the Committee I have set out my response to these recommendations below.

In **recommendation 2** the committee queried our consideration of the Bill's provisions, including the rights of entry and inspection provided for in sections 62 and 72, in relation to the Human Rights Act 1988 (the 1988 Act). I can confirm that the human implications of the Bill's provisions have been considered during the development of the Bill and I am content the Bill, including those provisions specifically mentioned by the Committee are compatible with the Convention rights.

Recommendation 11 and **recommendation 14** relate to subjecting certain Welsh Minister's regulation making powers, specifically section 30 and 77 of the Bill, to a statutory consultation duty.

As I explained when I attended the Committee in December, there is a general expectation that Welsh Government subordinate legislation be subject to consultation. Certain

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

Gohebiaeth.Jeremy.Miles@llyw.cymru
Correspondence.Jeremy.Miles@gov.wales

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.

regulation making powers in the Bill are subject to a statutory consultation duty in light of their nature or due to consultation with certain persons being of specific relevance. I will consider further whether these powers specifically would benefit from a statutory consultation duty.

My response to **recommendation 4**, regarding a range of regulation making powers in Part 2 and 3 of the Bill is set out in the Annex to this letter.

In relation to **recommendation 17**, which queries whether the direction making power in section 106 of the Bill is derived from section 81(3) of the Further and Higher Education Act 1992 (the 1992 Act) and if so, the rationale for the procedure specified in section 106 in relation to the issuing of a financial support direction to the Commission.

I can confirm that section 106 of the Bill is derived from section 81(3) of the 1992 Act. Currently, section 81(3) of the 1992 Act enables the Welsh Ministers to direct HEFCW about the provision of financial support to an institution in the higher education sector if they consider that the institution's financial affairs have been, or are being, mismanaged.

Section 106 of the Bill, makes similar provision which enables the Welsh Ministers to issue financial support directions to the Commission about the provision or securing of financial resources under specified powers to a relevant person, where it appears to the Welsh Ministers that the financial affairs of that person have been, or are being, mismanaged.

All powers within the Bill have been subject to thorough consideration in respect of the manner in which the power is to be exercised and the appropriate Senedd procedure. In doing so the nature of any existing provision, from which the power has been derived, has been considered, however the historic approach to the original power has not automatically been carried forward if doing so was not necessarily considered appropriate.

The power in section 106 enables the giving of directions to the Commission by the Welsh Ministers in relation to specific matters, as set out in section 106. As such, these directions relate to a single body and specific matters and do not provide for general law-making of a wider nature.

I consider that the requirements set out in the Bill in respect of the requirement on the Welsh Ministers to publish the direction, report to the Senedd that a direction has been given and lay of copy before the Senedd is sufficient to ensure the accessibility and transparency of directions given to the Commission under section 106.

Turning to **recommendation 20** which sought confirmation that bodies affected by section 111 of the Bill, which provides for the specification of requirements in relation to approved Welsh apprenticeship, will be consulted before requirements are prescribed in relation to that section.

I can confirm that section 112 of the Bill requires the Welsh Ministers to first consult the Commission and such other persons as they consider appropriate before specifying, revising or withdrawing any requirements under section 111. I consider that 'such other persons' would capture those bodies affected by any provision made under section 111 however I am content to consider the drafting of section 112 and consider whether an amendment may be necessary to strengthen the requirement.

I can also confirm, in response to **recommendation 21**, that no duty is placed on the Commission in the Bill to respond to a consultation under section 112 of the Bill.

I will respond to the remaining recommendations at the general principles debate and through a further letter which I intend to send to the Committee following that debate.

I hope this letter is helpful in providing further information to the Committee. This letter has been copied to the Children and Young People Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jeremy Miles', with a stylized, cursive flourish at the end.

Jeremy Miles AS/MS

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Minister for Education and Welsh Language

Recommendation 4. The Minister should, in advance of the Stage 1 debate on the general principles of the Bill, provide further clarity regarding the powers in sections 32, 52(8), 55(1)(f), 59(1), 61(9)(a), 86(1), 95(2) and 101(3) of the Bill and how they are intended to be used by the Welsh Ministers

Section	Description	Intended purpose
32	Power for the Welsh Ministers to provide for further mandatory ongoing registration conditions	<p>It is intended that this power be used by the Welsh Minister to specify mandatory ongoing registration conditions additional to those specified on the face of the Bill.</p> <p>Whilst there is no immediate intention to exercise this power, as all currently relevant ongoing registration conditions are set out on the face of the Bill, it is anticipated that as the tertiary education sector evolves there may be additional regulatory matters in respect of which it may be appropriate or necessary to make provision.</p> <p>This power enables such regulatory expectations to be clearly specified and subject to Senedd scrutiny.</p> <p>The Bill provides for an equivalent power in relation to providing for additional initial conditions of registration (section 25(3)) and the statement of policy intent published with the Bill sets out the intended use of that power.</p>
52(8)	Power to make provision about the circumstances in which a person is to be treated as responsible for providing a course.	<p>Section 52(8) allows the Welsh Ministers to specify circumstances where an external provider should, or should not, be treated as providing all or part of a course on behalf of a registered provider. The Welsh Ministers currently have an equivalent power under section 17(4)(a) of the Higher Education (Wales) Act 2015.</p> <p>Partnership arrangements between providers, such as franchise arrangements, often take novel forms and are regularly evolving. These can include, for example, arrangements between higher education providers or between universities and colleges where, as stated in section 52(7)(b), a person other than a registered provider</p>

Section	Description	Intended purpose
		<p>may be responsible for providing all or part of a higher education course.</p> <p>In such cases it is critically important for the purposes of quality assurance that, where there may be a risk of confusion over which provider is to be treated as responsible for providing a course, that the law is able to provide clarity on such matters. Providing for all possible current forms of arrangement on such matters in primary legislation risks unwieldy and unduly lengthy legislation which may also become out-dated, and so it is appropriate that such a power to provide clarity exists through secondary legislation.</p>
55(1)(f)	<p>Power to specify education and training which the Chief Inspector of Education and Training (the “Chief Inspector”) must inspect, in addition to education and training set out on the face of the Bill.</p>	<p>The functions of the Chief Inspector adapt over time in line with changes in the post-16 sector.</p> <p>For example, apprenticeship provision, both at lower and higher levels of qualification, is much more widespread today than it was in 2000, when the Chief Inspector’s post-16 functions were last laid in legislation. Higher level apprenticeships in particular are an area where the functions of the Chief Inspector may be less clear under the primary legislative framework, and this has been a subject of discussion and partnership working in recent years between Welsh Government, Estyn and HEFCW.</p>
59(1)	<p>Power to confer further functions on the Chief Inspector in connection with the education and training described in section 55(1).</p>	<p>It is vital that, whatever is agreed on the role of the Chief Inspector in respect of higher apprenticeships or any other emerging forms of post-16 education and training, that such functions are within <i>vires</i>. The rationale for maintaining these powers to further specify in secondary legislation the description of education which Estyn must inspect and its functions in that respect is therefore to ensure that Estyn’s work can continue to reflect future changes in the pattern and delivery of post-16 education and training.</p>

Section	Description	Intended purpose
61(9)(a)	Power to make further provision in relation to the obligations to provide the Chief Inspector with information in connection with an area inspection; and to require area inspection reports to be published before the end of a certain period.	<p>The matters and persons relevant to the conduct of an area inspection may vary depending on the current policy of Estyn, the Commission, or Welsh Ministers. Section 61 provides that in conducting an area inspection Estyn may consider the quality of and financial management of resources for education and training within an area, including value for money. In making such a judgement on the quality of or value for money of education and training, the Chief Inspector may require relevant information from a range of stakeholders wider than those set out in section 61(7), such as Regional Skills Partnerships, Corporate Joint Committees, employer groups and representatives, trade unions, student and learner representatives, or other relevant bodies. This power ensures that provision can be made for, where required, such relevant information to be acquired by the Chief Inspector.</p>
86(1)	Power to specify a particular course of higher education or description of course of higher education in respect of which the Commission can provide financial resources.	<p>It is intended that this power could be used to address gaps in the provision of higher education should the need arise. Gaps in provision may arise due to a lack of specified providers (i.e providers registered in a category specified in regulations made under section 85(3)) being able to fulfil an identified need. For example, a need for a specialist course to be delivered in Wales or to be undertaken by small numbers of students ordinarily resident in Wales, which may not be cost effective for specified providers to deliver.</p> <p>In addition, certain courses below degree level which lead to professional qualifications at levels 4 and 5 on the qualifications framework are currently funded by the Welsh Government and delivered by FE institutions. Such courses may be relevant to improving employment prospects, re-skilling or to meet industry or sector specific standards.</p>

Section	Description	Intended purpose
95(2)	Power to provide that financial support for specified purposes for further education and training can only be secured under section 94(1)(a) or (b) to providers registered in specified categories. Regulations may provide for exceptions for specified courses or specified descriptions of courses to the requirement to be registered.	Whilst it is not government policy to create any registration categories for providers of apprenticeships, further education or training in the short term, the Bill has been drafted in such a way to enable the regulatory arrangements as set out in the Bill to be expanded over time to include other categories without the need for further primary legislation.
101(3)	Power to provide that the Commission can only provide financial resources in respect of expenditure incurred in connection with the provision of an approved Welsh apprenticeship to providers registered in categories specified in the regulations.	