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Llywodraeth Cymru
Welsh Government

Mick Antoniw, MS
Chair
Legislation, Justice and Constitution Committee
Welsh Parliament
Ty Hywel
Cardiff Bay
CF99 1SN

11 January 2021

Dear Mick,

Curriculum and Assessment (Wales) Bill

I would like to thank the Legislation, Justice and Constitution Committee for their scrutiny of the Curriculum and Assessment (Wales) Bill during Stage 1 and for the report which was published on 4 December 2020.

I have set out responses to the Committee's recommendations at Annex A. In summary I have accepted (or accepted in part) six of the recommendations.

I hope this letter is helpful in setting out responses to the Committee's Report. I will also be writing to the Chairs of the Children, Young People and Education Committee and the Finance Committee with respect to their Stage 1 Reports, and will copy the letters to all three Committee Chairs.

I look forward to continuing to work with Members as the Bill progresses through the Senedd process. I can provide further information if that would be helpful.

Yours sincerely,

Kirsty Williams AS/MS
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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.

Annex A: Response to the Legislation, Justice and Constitution Committee Stage 1 Report Conclusions and Recommendations

Recommendation 1. Section 72 of the Bill should be amended so that the Codes to be made under sections 6, 7 and 8 of the Bill may not be made unless a draft of the proposed Code (or, in the case of the revisions, of the proposed revised Code) has been laid before, and approved by a resolution of, the Senedd. The requirement in section 72(2)(a) of the Bill should be retained.

I recognise the intention behind the Committee's recommendation, and accept this recommendation in part. I have put forward Government amendments that will require the RSE Code and any subsequent revisions to be subject to the affirmative procedure. This is because this is an area of wider public interest, and sharing the ownership with the Committee may be a positive way of providing some collective support for the Code and practitioners across the executive and legislature.

However, the What Matters and Progression Codes are technical professional documents developed in close collaboration with practitioners. Both now and in the future, these codes will be the product of co-construction. Opening that to the affirmative procedure calls into question that process. It also raises significant concerns about the validity and trust of that process if practitioners' considered views are then overridden.

The What Matters Code and the Progression Code are likely to have to be updated in order to respond to changing circumstances in schools in the longer term and we consider that the negative procedure provides the appropriate level of flexibility to allow this to happen in a reasonable timeframe. The key principles are still set out on the face of the Bill – such as the AOLEs themselves and what a curriculum must provide in relation to them.

The codes do not allow us to do certain things which would be considered of special importance such as 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.

Recommendation 2. The Minister should use the Stage 1 debate to provide further clarity regarding the powers in section 17 of the Bill and how they may be used by the Welsh Ministers.

I accept the Committee's recommendation, however, time did not allow for clarification during the Stage 1 debate. At present I do not anticipate the need to make use of the regulation making powers under section 17 other than to specify a date by which a curriculum must be adopted.

If necessary we may make provision that would, for example, impose a consultation requirement.

The key duties such as who must adopt and what must be adopted are on the face of the Bill.

However, should circumstances change or issues come to light these regulation making powers will enable the Welsh Government to make provision as appropriate, for example, we may need to use these powers in relation to the revision of curricula to reflect any significant changes to curriculum requirements in the future.

Recommendation 3. Section 25 of the Bill should be amended to include a non-exhaustive (but comprehensive) list of the circumstances in which the regulation-making power in section 25(1) may be used by Welsh Ministers.

I recognise the intention behind the Committee's recommendation, however, I do not accept this recommendation. The section confers power on the Welsh Ministers to specify further requirements for a curriculum for 14-16 years olds.

We do not intend to use this power at the outset as we expect that the requirement in the Bill for a curriculum to be broad and balanced will be sufficient. However, should there be evidence that schools are offering a narrow curriculum to this age group, or are not providing courses of study that lead to certain qualifications then this power can be used to address the position.

The very nature of this provision is to capture unforeseen eventualities, therefore it is not practical to include a list of circumstances in which the power to make regulations would be used.

The regulations will be the subject to consultation at the appropriate time. Whilst we have set out in our statement of policy intent the sort of provision that we anticipate may be made under these regulation making power we do not see adding a list of non-exhaustive circumstances is necessary.

Recommendation 4. The Bill should be amended so that regulations made under section 25(1) are subject to the affirmative procedure.

I recognise the intention behind the Committee's recommendation, however, I do not accept this recommendation. We do not believe the draft affirmative procedure is the appropriate procedure. As we set out in the Statement of Policy Intent (SOPI), it is likely that we would use this power if there was evidence that schools were narrowing their curricula. We would want to act swiftly in such cases and as such the negative procedure is appropriate for this.

There is an equivalent provision for the local curriculum in section 116A of the Education Act 2002. The application of the negative procedure is therefore consistent with past practice. Regulations under section 116A of the 2002 Act have been made and the application of the negative procedure in that case has not given rise to any policy issues or stakeholder concerns.

Recommendation 5. The Minister should use the Stage 1 debate to provide further clarity regarding the power in section 34(5) of the Bill and how it may be used by the Welsh Ministers.

I accept the Committee's recommendation, however, time did not allow for clarification during the Stage 1 debate. I anticipate this power may be used to make provision about procedural matters such as time limits by which the head teacher must

make a determination, or as to the procedure to be followed in making such a determination.

The key principles are set out on the face of the Bill and it is only some of the technical detail that will be included in the regulations. For example, the grounds on which a head teacher could determine to disapply a pupil choice are on the face of the Bill.

It is not intended to make regulations in this regard at the outset. The procedures outlined on the face of the Bill are clear about the responsibility of schools here.

However, if it becomes clear over time that pupils and parents or carers are waiting too long in respect of the head teachers' decision or that the procedures adopted by schools are causing difficulties then this power would be used to clarify the process and ensure a consistent approach.

Recommendation 6. The Minister should use the Stage 1 debate to provide clarity as to why the power in section 40 of the Bill is needed in addition to the power in section 50 of the Bill. In doing so, the Minister should provide a further explanation on how the power of direction in section 40 may be used by the Welsh Ministers.

I accept the Committee's recommendation, however, time did not allow for clarification during the Stage 1 debate. The two sections are distinct from each other in their purpose.

Section 40 allows the Welsh Ministers to give a direction to a school or schools to enable development work or experiments to be carried out. The direction can disapply any or all of the implementation requirements, or provide for those implementation requirements to be modified in their application to the schools. It is a direction making power with regard to experiments, but must be agreed to by the LA and governing body.

This direction can be given only for experimental or developmental purposes.

We consider section 40 and section 41 are needed. If section 40 were to be removed, the restrictions in section 41 that apply to the giving of a direction of that kind would no longer apply. My view is that these restrictions are appropriate in the circumstances and I believe that they should be retained – which means retaining section 40.

Recommendation 7. The Welsh Ministers should notify Senedd Members via written statement on each occasion that the power of direction under section 40 of the Bill is used.

I recognise the intention behind the Committee's recommendation, however, I do not accept this recommendation. Section 42(3) already provides that where a direction under section 40 is given it must be published. Section 42(4) also requires the setting to publish a summary of the curriculum that will be implemented as a result.

We do not consider there is a need for a further written statement. This would be unnecessary given the transparent nature of the conditions applied to the giving of direction set out under sections 41 and 42.

Recommendation 8. Section 47 of the Bill should be amended so that:
▪ **the time-limits in respect of appeals about temporary exceptions for individual pupils are included on the face of the Bill;**

▪ **such time-limit provision may be amended by regulations made by the Welsh Ministers which are subject to the affirmative procedure.**

I recognise the intention behind the Committee’s recommendation, however, I do not accept this recommendation. We do not consider it appropriate that sort of detail should be set out on the face of the Bill. It is the sort of detail that may need to be amended over time. Placing that detail on the face of the Bill would not provide the flexibility needed to do that. This type of detail of that is best suited to regulations as it sets out technical details which may change over time.

We had not anticipated using these powers at the outset: schools already have clear procedures. Therefore, any changes to what is on the face of the Bill in this regard would not have been discussed in depth with key stakeholders, including schools and governing bodies. If we decide to add time limits it should only be after appropriate consultation.

This power is intended to be used if issues present themselves over time and as practice develops.

Recommendation 9. Should the Minister reject recommendation 8, section 47(8) of the Bill should be amended so that Welsh Ministers are placed under a duty to make regulations that make further provision regarding the time-limits for appeals under the section.

I recognise the intention behind the Committee’s recommendation, however, I do not accept this recommendation. As with recommendation 8, we believe it would be appropriate to consult on whether time limits would be appropriate at a national level, and the level of flexibility they should have to fit in with schools’ existing procedures. Agreeing to make regulation mandatory would have the effect of making a policy decision on time limits without having the evidence to support it. We do not wish to predetermine the matter and to allow stakeholders the fullest opportunity to inform the policy.

Recommendation 10. The Bill should be amended so that regulations made under section 50 are subject to the affirmative procedure.

I accept this recommendation. As this power has a relatively general role I am content to agree to making regulations subject to the draft affirmative procedure.

Recommendation 11. The Minister should use the Stage 1 debate to clarify the power in section 67 of the Bill and how it may be used by Welsh Ministers.

I accept the Committee’s recommendation, however, time did not allow for clarification during the Stage 1 debate. This section enables the Welsh Ministers to make regulations about teaching and learning for learners who, for example may be a registered pupil at a maintained school, maintained nursery school or a pupil referral unit, but also receive education at another such setting.

In these situations it is expected that providers would work together to decide how provision in multiple settings will interact so that the learner receives a full curriculum. Regulations may impose duties and will describe the mechanism of this process in more detail. However, more work is needed due to the potential number of different cases here. It is intended to work with various settings to develop these regulations to ensure that these learners receive a full curriculum where possible.

The purposes of the regulations is to provide a way of different institutions to work together to discharge the functions that are already set out in the Bill or in regulations made under it.