

LEGISLATIVE CONSENT MEMORANDUM

EDUCATION BILL

Supplementary Legislative Consent Motion

“To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that, in addition to the provisions referred to in motions NNDM4731 and NNDM4660, those provisions which have been brought forward in the Education Bill relating to powers to impose a monetary penalty, recover costs, receive appeals, give directions and withdraw recognition from recognised bodies, insofar as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament.”

Background

1. The above Motion was tabled by Leighton Andrews, Welsh Minister for Education and Skills, under Standing Order 29.6 of the Standing Orders (“SO”) of the National Assembly for Wales (“NAW”). This memorandum is laid under SO29.2. SO29 prescribes that a Legislative Consent Motion must be tabled and a Legislative Consent Memorandum laid before the NAW if a UK Parliamentary Bill makes provision in relation to Wales that falls within the legislative competence of the NAW, or has a negative impact on that competence.
2. The Education Bill (“the Bill”) was introduced on 26 January 2011 and can be found at:

<http://services.parliament.uk/bills/2010-11/education.html>

Summary of the Bill and its Policy Objectives

3. The Bill contains provisions on a range of policy areas and many of its provisions do not apply in Wales. The main purpose of the Bill is to create an education system that delivers for all children. Starting with basic literacy ability and continuing through to the attainment of qualifications, enabling students to continue their education or stand them in good stead for work. The Bill will take forward the commitments set out in the ‘Importance of Teaching’ White Paper and the Department for Business, Innovation and Skills ‘Skills for Sustainable Growth and Further Education’. There will also be two elements of Higher Education Funding included in the Bill.

Provisions in the Bill for which consent is sought

4. The Bill makes provision that applies similarly to England and Wales in relation to the powers of sanction which can be imposed by qualification regulators. The Welsh Ministers are the qualifications regulator in Wales, whereas the Office of Qualifications and Examinations Regulation ("Ofqual") fulfil the same function in England.
5. **Clause 23** will amend sections 32A and 32B of the Education Act 1997 in relation to the regulation of qualifications in Wales and sections 151 and 152 of the Apprenticeships, Skills, Children and Learning Act (ASCLA) 2009, which sets out the equivalent powers for Ofqual in England. These amendments will allow the Welsh Ministers and Ofqual to give directions and withdraw recognition from recognised bodies without needing to satisfy 'the prejudice test'. Currently, Ofqual and Welsh Ministers may only give directions or withdraw recognition if the failure to comply with the condition prejudices, or would be likely to prejudice, the proper award or authentication of any qualification; or prejudices, or would be likely to prejudice, persons who might reasonably be expected to seek to obtain any such qualification – 'the prejudice test'.

Further provision has been drafted enabling both the Welsh Ministers and Ofqual to impose a monetary penalty and recover costs in relation to that monetary penalty where a recognised body has failed to comply with a condition. Before imposing a monetary penalty, there is a requirement on Ofqual and the Welsh Ministers to give notice with reasons to the recognised body of their intention to take this action. This notice will specify how and when the recognised body may make representations. The recognised body must be given at least 28 days to make representations to either the Welsh Ministers or Ofqual.

The amount of a monetary penalty will be limited and will not exceed 10% of the recognised body's turnover. The turnover will be limited to amounts generated as a result of the recognised body's qualification functions. The Welsh Ministers will also be required to publish a statement of how they will determine the turnover of a recognised body.

6. Should the Welsh Ministers exercise their powers, the fines and the costs associated with recovering that fine, will be paid into the Welsh Consolidated Fund
7. The amendments also make provision for recognised bodies to appeal against a decision to impose a monetary penalty, or the amount of monetary penalty imposed. In the case of a decision by Ofqual, the appeal must be made to the first Tribunal and in the case of a decision by the Welsh Ministers, the appeal is to the Upper Tribunal.
8. In practice this will provide the Welsh Ministers and Ofqual with an effective and flexible system of sanctions for the regulation of the

qualifications system. The ability to impose a fine will act as a powerful deterrent. It will also provide a more proportionate response to issues of non-compliance by recognised bodies than their ultimate sanction of withdrawal of a recognised body's recognition and is more meaningful than public criticism alone. In addition, the removal of 'the prejudice test' will enable enforcement powers to be used swiftly in relation to all of the sanctions available to both the Welsh Ministers and Ofqual.

9. It is important that this Bill provides mirror provisions for the regulation of the qualifications system in England and Wales, as recognised bodies offer qualifications across Wales, England and Northern Ireland. The qualifications and examinations system needs to be supported by a regulatory regime which equally holds awarding organisations to account and has full public confidence across Wales, England and Northern Ireland.

10. These provisions are within the legislative competence of the NAW under the following headings:

Heading 5 – Part 1 of Schedule 7 to the Government of Wales Act 2006 - Education and training.

Advantages of utilising this Bill

11. It is the view of the Welsh Government that these provisions should be included in this UK Bill as it represents the most appropriate and proportionate legislative vehicle to enable these provisions to apply in Wales at the earliest opportunity. It will allow the new powers to apply in time for the next examination series enabling the Welsh Ministers to exercise enforcement powers in accordance with Welsh priorities and concerns.
12. If those amendments are to apply only to England, the Welsh Ministers would be placed at a disadvantage. The lack of a consistent approach for the regulation of recognised bodies that operate in both England and Wales would have a detrimental effect in Wales. Ofqual could make a swift decision to use its new enforcement powers in relation to a recognised body's non-compliance, whereas the Welsh Ministers would be unable to impose any monetary penalty and would have to apply 'the prejudice test' for an equivalent failure to comply with conditions. This could add a significant delay in dealing with a recognised body's non-compliance in relation to Wales. The inability to impose a monetary penalty would also create confusion amongst the public, who may note the imposition of a monetary penalty by Ofqual in England and wonder why an equivalent penalty has not been imposed in relation to Wales.
13. This Legislative Consent Memorandum has therefore been laid, and the Legislative Consent Motion tabled, before the NAW for consideration.

Financial Implications

14. There are no financial implications for Welsh Ministers arising from these powers. Any costs will be met from existing resources as the provisions would be part of ongoing regulatory activity.

Leighton Andrews AM.

Welsh Minister for Education and Skills