

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

# Report on the Qualifications Wales Bill

March 2015

Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



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## Report on the Qualifications Wales Bill

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# Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

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## Current Committee membership:



**David Melding (Chair)**  
Welsh Conservatives  
South Wales Central



**Alun Davies**  
Welsh Labour  
Blaenau Gwent



**Suzy Davies**  
Welsh Conservatives  
South Wales West



**William Powell**  
Welsh Liberal Democrats  
Mid and West Wales



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

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# 1. Introduction

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## *The Committee's remit*

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or the 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 December 2014, the Minister for Education and Skills, Huw Lewis AM (“the Minister”) introduced the Qualifications Wales Bill and accompanying Explanatory Memorandum.<sup>1</sup>
5. On 11 November 2014, the Business Committee agreed, in accordance with Standing Order 26.9, to refer the Bill to the Children, Young People and Education Committee, to consider and report on the general principles. The deadline for reporting is 13 March 2015.
6. We took evidence from the Minister on 26 January 2015.

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<sup>1</sup> Welsh Government, *Qualifications Wales Bill – Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes*, December 2014

## 2. Background

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### *Purpose of the Bill*

7. The Explanatory Memorandum states that the Bill:

“... provides for the establishment of Qualifications Wales as the independent regulatory body responsible for the recognition of awarding bodies and the review and approval of non-degree qualifications in Wales. Qualification Wales will also, along with the Welsh Ministers, be responsible for preparing a list of priority qualifications, designated as such by reason of the significance of the qualification, having regard to the needs of learners and employers in Wales. The intention is through the establishment of Qualifications Wales, to strengthen the oversight of qualifications and of the qualification system in Wales.”<sup>2</sup>

8. An independent Welsh qualifications body is regarded as a Welsh Government priority.<sup>3</sup>

9. The Explanatory Memorandum also notes that the Bill “does not aim to establish Qualifications Wales with awarding functions at this time”,<sup>4</sup> adding that “further legislation will be required to enable Qualifications Wales to become an awarding body in the future.”<sup>5</sup>

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<sup>2</sup> Explanatory Memorandum, paragraph 1

<sup>3</sup> Explanatory Memorandum, paragraph 5

<sup>4</sup> Explanatory Memorandum, paragraph 8

<sup>5</sup> Explanatory Memorandum, paragraph 9

### 3. Legislative Competence

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#### *Explanatory Memorandum*

10. The Explanatory Memorandum indicates that the National Assembly for Wales has the legislative competence to make the Bill by virtue of paragraph 5 (Education and training) of Part 1 of Schedule 7 to the Government of Wales Act 2006.

#### *Evidence from the Minister*

11. The Minister told us:

“I’m very confident, yes, that this is within competence. We’ve received no comment or correspondence of any kind, and that includes the UK Department for Education at Whitehall, that has questioned competence in any way.”<sup>6</sup>

#### *Our view*

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

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<sup>6</sup> Constitutional and Legislative Affairs (“CLA”) Committee, RoP paragraph [8], 26 January 2015

## 4. Observations

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### *Introduction*

13. The Bill has 56 sections, in eight parts, and four schedules.

14. The Bill contains four order and regulation-making powers. These are explained in Part 5 of the Explanatory Memorandum. Section 50 of the Bill sets out how regulations under the Bill are to be made by statutory instrument and the Assembly procedure to be followed in respect of those instruments.

15. The main issues we considered are set out below.

### *Purpose of the legislation*

16. The Minister told us that:

“Essentially, the Bill is about ... the Ministers divesting themselves of powers and ... the transition to an independent body with oversight of qualifications in Wales ... The legislation also opens up ... the opportunity to simplify and streamline the system, and get rid of ambiguities, for instance in terms of cross-border issues, to pursue opportunities around quality, and to combat proliferation, of course, which has been accepted, I think, as a problem, by most people for really quite a long time, now.”<sup>7</sup>

17. The Minister explained that existing legislation could not be used to divest powers from Welsh Ministers to a new organisation and that primary legislation was needed.<sup>8</sup> He also confirmed that another piece of legislation would be needed for Qualification Wales to become an examining body as well.<sup>9</sup>

### *Section 21 – Power to specify minimum requirements*

18. Section 21 gives the Welsh Ministers the power to publish regulations that set out requirements for a form of qualification in relation to the knowledge, skills and understanding (essentially the ‘subject content’) that are required to be addressed by that

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<sup>7</sup> CLA Committee, RoP paragraph [10], 26 January 2015

<sup>8</sup> CLA Committee, RoP paragraphs [11-12], 26 January 2015

<sup>9</sup> CLA Committee, RoP paragraphs [54-55], 26 January 2015

qualification. The Bill sets out a number of conditions which must be met before the Welsh Ministers may make regulations. These conditions ensure that the regulations are only introduced with the purpose of ensuring that learners follow an appropriate curriculum.

19. According to the Explanatory Memorandum, the regulations are subject to the affirmative procedure because:

“... the regulations affect Qualifications Wales’ ability to determine the required content of a qualification ... This procedure offers the Assembly an opportunity to scrutinise and to review what the Welsh Ministers believe should be the minimum requirements in terms of the knowledge, skills and understanding that a learner should demonstrate in order to be awarded the qualification in question.”<sup>10</sup>

20. The Minister explained why it was necessary to retain this power, saying:

“Although Ministers would divest themselves of responsibility for the regulation of qualifications, we would still retain responsibility for the curriculum. So, in terms of that, we would need this power to specify minimum requirements in order to have that fallback position ... we could not have awarding bodies running around, essentially completely ignoring the Welsh curriculum.”<sup>11</sup>

21. He added that this power has not been divested to an independent regulator “because there has to be a democratic input into this”.<sup>12</sup>

### ***Section 33 – Power to impose monetary penalties***

22. Section 33 enables Qualifications Wales to impose a monetary penalty on an awarding body and set out the requirements in relation to giving notice of such a penalty. Qualifications Wales may decide that a monetary penalty is necessary if an awarding body has failed to comply with a condition in relation to its recognition or approval status. Section 33(3) states that the monetary penalty amount will be determined by reference to regulations made by Welsh Ministers. The

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<sup>10</sup> Explanatory Memorandum, Chapter 5, pages 36-37

<sup>11</sup> CLA Committee, RoP paragraph [18], 26 January 2015

<sup>12</sup> CLA Committee, RoP paragraphs [21-22], 26 January 2015

regulations are subject to the affirmative procedure because they affect:

“... the amount an awarding body may be required to pay as a monetary penalty and affords the Assembly the opportunity to debate and scrutinise the amount of the penalty.”<sup>13</sup>

23. The Minister noted that the powers are “pretty much transferred in terms of their essence and their scope from the English situation”.<sup>14</sup> When asked whether there were issues of competence because some awarding bodies operate cross-border, the Minister indicated that the precise scope would need to be established and added that he “wouldn’t like to pre-empt any consultation that we need to undertake”.<sup>15</sup>

#### ***Section 54 – Power to make consequential and transitional provision etc.***

24. Section 54 empowers the Welsh Ministers to make regulations to provide for any additional consequential, or incidental provision, or any transitional, transitory or saving provisions to give full effect to a provision of the Bill, or for the purposes of, or in consequence of, a provision of the Bill. The affirmative procedure is specified for amending or repealing primary legislation, otherwise the negative procedure would apply.<sup>16</sup>

25. When asked whether these powers to amend primary legislation might be used more frequently given the lack of secondary powers in the Bill and during scrutiny to add more powers by amendment, the Minister told us:

“It’s conceivable, although the safeguard is there that the affirmative procedure would be necessary...”<sup>17</sup>

#### ***Section 55 – Coming into force***

26. Section 55 provides for certain Bill provisions to come into force on Royal Assent. The remaining provisions of the Bill come into force

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<sup>13</sup> Explanatory Memorandum, Chapter 5, page 37

<sup>14</sup> CLA Committee, RoP paragraph [28], 26 January 2015

<sup>15</sup> CLA Committee, RoP paragraph [36], 26 January 2015

<sup>16</sup> See Explanatory Memorandum, Chapter 5, page 38

<sup>17</sup> CLA Committee, RoP paragraph [51], 26 January 2015

on the date specified by the Welsh Ministers in commencement orders made under this section.

27. An order under this section also allows Welsh Ministers to make transitional, transitory or saving provisions in connection with the coming into force of this Bill's provisions. There is no scrutiny procedure. The Explanatory Memorandum states that there is no procedure because "Commencement Orders do not change policy, they simply allow the policy in the Bill to be given effect."<sup>18</sup>

28. The Minister explained the approach adopted by saying:

"I suppose it's just a question of the administrative, practical consequences of shifting from one regime to another. Section 55 talks about Ministers having the power to commence sections of the Bill, and that is not necessarily a question of simply signing a simple, single piece of paper. It's quite a complex matter and would require some flexibility in terms of how we carry that through."<sup>19</sup>

### ***Our view***

29. We commend the Minister for the way in which the Bill is drafted. It is clear to follow and understandable. The level of detail placed on its face is appropriate, with a small number of regulation-making powers that are clear and justifiable. Most of these are then subject to the more robust scrutiny afforded by the affirmative procedure and we welcome the recognition that such a procedure should be used for statutory instruments that amend or repeal primary legislation.

30. We also note and welcome the drafting of section 54 and its use of the "in consequence of" construction in subsection (1), which is in line with previous recommendations contained in our Bill reports.<sup>20</sup>

31. Our only concern relates to commencement orders that also make transitional, transitory or saving provisions. Such orders should in our view be subject to the negative procedure.

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<sup>18</sup> Explanatory Memorandum, Chapter 5 page 38

<sup>19</sup> CLA Committee, RoP paragraph [44], 26 January 2015

<sup>20</sup> For example: *Report on the Well-being of Future Generations (Wales) Bill*, recommendation 11 (November 2014) and *Report on the Planning (Wales) Bill*, recommendation 7 (January 2015)

**Recommendation 1: we recommend that the Minister should table an amendment to apply the negative procedure to orders made under section 55(3)(b).**