

Report on the Childcare Funding (Wales) Bill

June 2018



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About the Committee

The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

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Welsh Labour
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Current Committee membership:



Mandy Jones AM

Independent
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Dai Lloyd AM

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- i. the review takes place after an appropriate period and its conclusions are enclosed within a report laid before, and debated by, the National Assembly;
- ii. in the event that the review shows the legislation is (for example) not operating as intended, it should be repealed. This sunset provision should follow the approach included in the Public Health (Minimum Price for Alcohol) (Wales) Bill.

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1. Introduction

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 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.

2. In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 16 April 2018, the Childcare Funding (Wales) Bill³ (the Bill) and accompanying Explanatory Memorandum was introduced by Huw Irranca-Davies AM, Minister for Children, Older People and Social Care (the Minister).

4. The National Assembly's Business Committee referred the Bill to the Children, Young People and Education Committee on 13 March 2018, and set a deadline of 6 July 2018 for reporting on its general principles.⁴ Following a request from the Children, Young People and Education Committee that more time be

¹ National Assembly for Wales, **Standing Orders of the National Assembly for Wales**, March 2018

² Functions under Standing Order 21.8 are the responsibility of the **External Affairs and Additional Legislation Committee**

³ Available on the National Assembly's **website**.

⁴ Business Committee, **Report on the timetable for consideration of the Childcare Funding (Wales) Bill**, April 2018

allowed to complete the work, the Business Committee subsequently agreed that the deadline be extended to 18 July 2018.⁵

5. We took evidence from the Minister at our meeting on 14 May 2018.⁶

Background

6. The Explanatory Memorandum accompanying the Bill states that the Bill is intended to:

“... facilitate the delivery of a key commitment in the Welsh Labour manifesto Together for Wales (2016), which is to provide 30 hours per week of government funded early education and childcare to the working parents of three and four year olds in Wales for up to 48 weeks per year.”⁷

7. Currently all 3 and 4 year old children (from the term after their third birthday) are entitled to a minimum of 10 hours early education per week during term time over 39 weeks of the year, as part of the Foundation Phase.⁸ The Childcare Offer (the offer), as set out in the 2016 manifesto, is designed to build on this universal entitlement.

8. The Welsh Government began **piloting the offer in September 2017** in seven local authorities:

- Blaenau Gwent County Borough Council;
- Caerphilly County Borough Council;
- City and County of Swansea;
- Flintshire County Council;
- Gwynedd Council;
- Isle of Anglesey County Council; and
- Rhondda Cynon Taf County Borough Council.

⁵ Business Committee, **Revised timetable for consideration of the Childcare Funding (Wales) Bill**, June 2018

⁶ CLA Committee, 14 May 2018, RoP

⁷ Explanatory Memorandum, paragraph 3.1

⁸ **Foundation Phase**

9. The Explanatory Memorandum states:

“The primary purpose of this Bill is to support the Welsh economy, by helping parents, particularly mothers, to return to work or increase the hours they work. This will both increase the size of the workforce, and improve the employability of parents, especially mothers.

The Bill will also support a number of additional purposes, including increasing parents’ employment choices, particularly those of mothers and improving the social wellbeing of children and parents, with improvements to the quality of family life and childhood experiences that come with an increased disposable income.”⁹

10. The Bill provides the Welsh Ministers with the power to provide funding for childcare for qualifying children of working parents and to make regulations about the arrangements for administering and operating such funding.

11. The Bill also provides the Welsh Ministers with regulation-making powers to:

- prescribe the conditions which will have to be met for a child to be considered eligible for funding (i.e. to be considered a “qualifying child”), including any declarations that will have to be made and any conditions which will have to be met by the parent of a child;
- make provision to require parents to provide information that is relevant to their application for childcare funding and make arrangements for financial penalties to be imposed where false or misleading information is provided;
- make provision that will permit HMRC and permit or require UK Government departments, Ministers of the Crown and local authorities to provide qualifying information to the Welsh Ministers or to a person providing services to the Welsh Ministers for the purposes of administering the scheme;
- prescribe the detail of arrangements for onward disclosure of qualifying information and to create criminal offences in connection with the onward disclosure of information that relates to a particular person.

⁹ Explanatory Memorandum, paragraphs 3.5 and 3.6

12. On 17 April 2018 the Minister issued a statement of policy intent to accompany the Bill.¹⁰

¹⁰ **Childcare Funding (Wales) Bill Statement of Policy Intent for Subordinate Legislation to be made under this Bill**

2. Legislative Competence

General

13. The Bill is the first Bill considered by this Committee under the new reserved-powers model of legislative competence (as set out in section 108A of the *Government of Wales Act 2006 (GOWA)*).

14. The Welsh Government is satisfied that the Bill is within the legislative competence of the National Assembly. Paragraphs 2.1 to 2.11 of the Explanatory Memorandum set out the Welsh Government’s position.

15. In her statement on legislative competence,¹¹ the Llywydd, Elin Jones AM, stated that in her view sections 4(2), 4(5)(b) to (d), and 5(3) would not be within the legislative competence of the National Assembly. This is because these provisions require the consent of the Secretary of State for Wales to bring them within the National Assembly’s competence and the necessary consent had not been obtained at the time of introduction.

16. When asked if he was satisfied that the Bill is within the National Assembly’s competence, the Minister said:

“I’m satisfied that the Bill is within the reserved-powers model of legislative competence for Wales under the Government of Wales Act. (...) sections 4 and 5 of the Bill do require the consent of appropriate Ministers to be given through the Secretary of State for Wales, and we’ve had ongoing discussions—very productive discussions—regarding those consents, and they continue as we speak. We anticipate... consent being received during the Stage 1 process.

I’m very pleased... that we’ve had the consent of the Chief Secretary to the Treasury on behalf of Her Majesty’s Revenue and Customs...”¹²

Human rights

17. To be within the legislative competence of the National Assembly, section 108A(2)(e) of GOWA requires all provisions of a Bill to comply with the ECHR.

¹¹ **Presiding Officer’s Statement on Legislative Competence: Childcare Funding (Wales) Bill**, 16 April 2018

¹² CLA Committee, 14 May 2018, RoP [135], [137], and [181]

18. The Minister said the Welsh Government has considered human rights implications as part of the equality and human rights impact assessment. He went on to say:

“We believe the Bill is compatible with articles 6 and 14 of the Human Rights Act 1998. We do have safeguards within the Bill as well, of course, to protect the system from abuse, but also to ensure that we do have a clear, impartial, true system for applicants to follow if they don’t agree with decisions about, for example, eligibility, which is a key part of this Bill, or if they want to appeal against, for example, a penalty, which is within this Bill, or the amount of penalty imposed on them, and this is consistent, we believe, with article 6 of the Human Rights Act.”¹³

19. The Minister added:

“There’s one other aspect, of course, which the committee would want to be aware of, and that’s in regard to article 14. We have considered that insofar as the Bill is intended to facilitate a system that is not discriminatory in any way, such as on sex, race, colour, language, religion, politics and so on, and we’re content that it satisfies that.”¹⁴

Our view

20. We note the evidence from the Minister and the information provided in the Explanatory Memorandum.

21. We also note that the Llywydd has stated that in her view sections 4(2), 4(5)(b) to (d), and 5(3) would not be within the legislative competence of the National Assembly because these provisions require the consent of the Secretary of State for Wales. We acknowledge that the Welsh Government is continuing discussions with the UK Government regarding consent matters and that the Minister anticipates consent being received during the Stage 1 process.

22. The Welsh Government’s assessment of how the National Assembly has the legislative competence to proceed with this Bill spans 11 paragraphs in the Explanatory Memorandum. The means of establishing whether it is possible to legislate in a particular area appears more difficult than before. This is not a criticism of the Welsh Government. Rather, this serves to highlight the complex nature of the reserved powers model introduced by the *Wales Act 2017*.

¹³ CLA Committee, 14 May, RoP [141]

¹⁴ CLA Committee, 14 May, RoP [142]

23. All necessary consents from the UK Government should have been sought and granted before the Bill was introduced into the National Assembly. As a manifesto commitment from 2016, the Welsh Government's legislative proposal has been developed over a considerable period and, for that reason, there should have been sufficient time to negotiate consent matters with the UK Government.

Recommendation 1. The Minister should update the National Assembly on the progress of the consent discussions with the UK Government during the Stage 1 debate.

24. We have considered the Minister's responses to the questions we posed in relation to the Bill's compatibility with human rights and consider the approach adopted to be reasonable. However, we arrived at this view because much of the policy detail will appear in the regulations emanating from the Bill; human rights considerations will arise when those regulations are laid. In this regard, we believe particular attention will need to be given to regulations which will give effect to sections 4, 5 and 6 of the Bill.

3. General observations

The need for legislation

25. In the written statement which accompanied the introduction of the Bill, the Minister said:

“This Bill will enable a technical solution to the management and processing of applications for the Childcare Offer. (...)

I am keen to establish a national system for managing applications and for making the necessary eligibility checks... This Bill will enable us to achieve this.”¹⁵

26. In his evidence to us on 14 May, the Minister said:

“In order to pursue the mechanism that we want to deliver the childcare offer in its entirety, we have opted for a system that... uses the HMRC model... That’s to avoid a couple of things... One is the complexity for local authorities. (...) But also, there are families out there with quite complex issues that don’t easily provide all the paperwork, and that is providing complexity as well.... So, a single system in Wales is preferred, both by parents from our pilots but also from local authorities.”¹⁶

27. We asked the Minister whether the Bill is a premature undertaking given that the pilot programmes are still in their early stages. The Minister said:

“We have shortly coming forward an evaluation of the first year of the pilots. (...) we’re piloting in areas where we are learning specific lessons and then tweaking and adjusting. (...) But in order to get to this full-blown system, we actually need to legislate now to enable the opening of the data gateways with HMRC, to have those negotiations with the UK Government. We need to do that now to move away from the system we currently have, to be ready for the 2019-2020 roll-out.”¹⁷

¹⁵ **Written Statement - Introduction of the Childcare Funding (Wales) Bill**, 16 April 2018

¹⁶ CLA Committee, 14 May 2018, RoP [145]

¹⁷ CLA Committee, 14 May 2018, RoP [147]

Balance between what is on the face of the Bill and what is left to subordinate legislation

28. The Bill contains 13 sections and seven powers for the Welsh Ministers to make subordinate legislation. The delegated powers are summarised in Chapter 5 of the Explanatory Memorandum. As mentioned earlier in this report, the Welsh Government has also provided a Statement of Policy Intent. The Statement outlines the Government’s **current** policy intention.

29. With the exception of the order making power in section 12 of the Bill, the delegated powers provided by the Bill will take the form of regulations, which will be subject to the affirmative procedure.

30. The Welsh Government envisages two sets of regulations arising from powers in the Bill. One set of regulations dealing with eligibility criteria and how to apply for the funding, and another set of regulations dealing with information sharing between the Welsh Government and third parties which will require the consent of an “appropriate Minister” on behalf of a UK Government department or Minister of the Crown.¹⁸

31. We asked the Minister why he had chosen to legislate in this way. The Minister began by saying that this Bill is “slightly different from normal framework Bills” because of the pilot programmes in place in seven local authorities.¹⁹ He added:

“We don’t think it would be appropriate to come back to primary legislation to make adjustments of a technical nature—things like eligibility criteria et cetera, et cetera. We think it’s far more appropriate to deal with those through regulations.”²⁰

32. The Minister said that the question of balance is always important to what you put on the face of the Bill but that, in this case, “we’ve got the balance right because there’s sufficient detail on the face of the Bill, supplemented by the statement, the explanatory memorandum, the pilots (...) there’s nothing hidden on what this Bill is trying to do”.²¹

¹⁸ **Childcare Funding (Wales) Bill Statement of Policy Intent for Subordinate Legislation to be made under this Bill**

¹⁹ CLA Committee, 14 May 2018, RoP [150]

²⁰ CLA Committee, 14 May 2018, RoP [150]

²¹ CLA Committee, 14 May 2018, RoP [153]

33. The Minister also placed great importance on the need for flexibility for the future. He said:

“This Bill is this Bill. This Bill is very much on the 30 hours, including the foundation phase of 10 hours—30 hours, 48 weeks of the year, with those parameters. It’s a manifesto commitment. It’s very much constrained within those criteria, but it might well be, in future, that a future Minister of any political party says, ‘Well, do you know, we actually want to revisit this...’”²²

34. We pursued this line of questioning with the Minister and asked why he was legislating when he was not yet in a position to clearly express what the policy is, and when legislating in this way would not attract the full scrutiny process in the National Assembly. The Minister said:

“... the difference here is that we have the statement of policy intent, which makes quite clear the information that will come forward within subordinate legislation. And, of course, we have the pilots already under way, so we know what this offer is intending to do and the sort of shape it will be, although there might be tweaks as we go along...

But there is flexibility here for future Ministers, and I think it’s a deliberate flexibility...”²³

35. The issue of flexibility proved to be a recurring theme throughout the evidence session with the Minister. On many occasions the need for flexibility to take account of future developments was cited as a reason to use subordinate legislation to give effect to the overall policy.²⁴

36. As the current intention is to give effect to the Childcare Offer through subordinate legislation we asked the Minister whether and when the regulations would be available in draft format to enable thorough examination. The Minister told us that he anticipates the regulations being laid in the first half of 2019 but they would not be available in draft.²⁵

²² CLA Committee, 14 May 2018, RoP [150]

²³ CLA Committee, 14 May 2018, RoP [152] and [162]

²⁴ CLA Committee, 14 May 2018, RoP [150], [155], [162], [163], [192], and [216]

²⁵ CLA Committee, 14 May 2018, RoP [165]

37. The Minister has committed to consult on subordinate legislation where it is considered appropriate.²⁶ We asked for clarification on this point. The Welsh Government policy lead for the Bill said:

“There are the regulations that will be dealing with the data sharing and the gateways, which will be very technical and very detailed in nature, and there’s a question as to whether we would consult on that. I think it’s a different question for the Minister, then, in terms of the wider eligibility regulations, and if there were an opportunity to have maybe a light-touch consultation on that during 2019. But it’s not something that we’ve come to a firm view on at this point in time.”²⁷

38. The Minister went on to say:

“If it was something that substantively changed... the eligibility, something that materially affected the overall policy thrust, I think that’s something we would want to consult on, but if it was technical issues around the gateway, it seems not appropriate then.”²⁸

39. As the Minister told us he did not plan to routinely consult on the draft regulations, and as those regulations will contain important details including the eligibility criteria, we raised with him the option of using a superaffirmative procedure in order for the regulations to have enhanced scrutiny when they are ready to come before the National Assembly. The Minister told us it was “something that we’ve knocked about” and while he believes the affirmative procedure approach is the correct approach “for anything that is of a technical nature” he said he would be interested in hearing the Committee’s thoughts on this matter.²⁹

Our view

40. It is not generally our role to comment specifically or give a view on the general principles of a Bill as other factors, which will not have received thorough attention during our scrutiny, will affect that judgement. However, the need for legislation is a relevant consideration for this committee.

²⁶ Explanatory Memorandum, paragraph 5.2

²⁷ CLA Committee, 14 May 2018, RoP [170]

²⁸ CLA Committee, 14 May 2018, RoP [171]

²⁹ CLA Committee, 14 May 2018, RoP [173 and 174]

41. This Committee and our predecessor have expressed concerns on many occasions about the use of framework Bills. We are disappointed to find ourselves in the position of reporting again on such an inadequately constructed Bill.

42. The Bill is almost entirely enabling. It contains seven powers for the Welsh Ministers to make subordinate legislation; in a 13 section Bill this is extensive. We are concerned that the Welsh Government is persisting with a practice that has been criticised heavily in the past.

43. The Bill is a skeleton Bill. It lacks clarity and a clear statement of purpose. With so little detail on its face we believe the Bill does not satisfy the key principles of legislating.

44. Primary legislation should not be framed so broadly with the intention of using it as a vehicle for the introduction of subordinate legislation over a long period of time to deal with what may happen in the future. This approach limits the ability of the National Assembly as a legislature to scrutinise, influence, and to debate suggested improvements to significant policy matters in a democratic forum. Similar comments have been made in previous Stage 1 reports.³⁰

45. The Minister told us that the current Bill is constrained to the criteria set out in Welsh Labour's 2016 manifesto but that, in the future, a different Minister of another political party may want to revisit the policy. If a future political party wants to revisit the legislation, the appropriate approach would be to bring forward a new Bill.

46. We have concerns that the National Assembly is being asked to grant wide regulation-making powers to the Welsh Ministers which could be used to make provision not anticipated by the National Assembly during its consideration of the Bill. The Bill as drafted could be used to pursue an entirely different policy to that which is contained in the Explanatory Memorandum, for example after-school care for 8-13 year olds.

47. We are also concerned that the approach adopted in this Bill is not consistent with the Welsh Government's objective of making law in Wales more accessible.

48. Linked to this, the Minister's suggestion that information cannot be placed on the face of the Bill because of the need for flexibility also gives us concern. In its 2013 report on the Social Services and Well-being (Wales) Bill, our predecessor

³⁰ Fourth Assembly's Constitutional and Legislative Affairs Committee's report on the Planning (Wales) Bill

committee said “Flexibility and future proofing are admirable concepts but not at the expense of having a clear understanding of what the Bill will deliver at the time of its introduction”.³¹ These sentiments apply equally to this Bill.

49. An alternative approach would be to include the necessary detail on the face of the Bill and to also include a provision which permits that detail to be amended by subordinate legislation, subject to the affirmative procedure. Including such a Henry VIII power is not an ideal approach to law-making, but it may be a reasonable compromise if the Welsh Government considers such flexibility to be necessary.

50. Adding more detail to the face of the Bill would strengthen it considerably and would provide a clearer foundation for the policy that it seeks to deliver. Otherwise, if regulations are not brought forward, the legislation is arguably rendered redundant.

Recommendation 2. We are not satisfied with the balance between what is on the face of the Bill and what is left to subordinate legislation. The Minister should undertake a fundamental review of the balance ahead of Stage 2 proceedings, with the objective of tabling amendments at Stage 2 to ensure that the Bill’s policy intent is much clearer.

51. The equivalent Bill for England – the Childcare Bill (HL 107) – was criticised for its skeleton nature during Second Reading,³² by the Delegated Powers and Regulatory Reform Committee,³³ and by the Constitution Committee³⁴. While the Welsh Government has already addressed many of the original criticisms that were directed at the Childcare Bill - for example, by enabling the use of the affirmative procedure for regulations rather than the negative procedure as was originally proposed in the Childcare Bill – we agree with the conclusions reached by both aforementioned committees who said “the purpose of an Act is to change the law, not to ‘send a message’”,³⁵ and “Legislation of this type increases the power of the Executive at the expense of Parliament”³⁶.

³¹ Fourth Assembly’s Constitutional and Legislative Affairs Committee’s report on the Social Services and Well-being (Wales) Bill

³² HL Deb 16 June 2015 c1087, c1123, c1124, and c1104

³³ Delegated Powers and Regulatory Reform Committee, Childcare Bill [HL] etc., 2015-16 HL 12, 26 June 2015, and HL 37, 13 October 2015

³⁴ Constitution Committee, Childcare Bill [HL], 2015-16 HL 16, 1 July 2015

³⁵ Delegated Powers and Regulatory Reform Committee, Childcare Bill [HL] etc., 2015-16 HL 12, 26 June 2015

³⁶ Constitution Committee, Childcare Bill [HL], 2015-16 HL 16, 1 July 2015

52. Given the lack of detail on the face of the Bill, and as the Minister has said the regulations will not be available in draft while the National Assembly scrutinises the Bill, we believe the substantive regulations made under the Bill should be subject to enhanced scrutiny, unless further detail is added to the Bill during the amending stages. We comment further on the regulation-making powers and make a number of recommendations in the next chapter of the report.

53. The Welsh Government is legislating for its Childcare Offer before the conclusion of the relevant pilot programmes and the consequent appraisal of the effectiveness of the policy. Moreover, figures obtained by BBC Wales in May indicated that local authorities involved in the pilot programmes spent only £3.4m of the £10m allocated to them by the Welsh Government for 2017-18, with councils citing a lack of uptake for the offer as the reason for the significant underspend.³⁷ For these reasons, we believe there is merit in considering whether a review and report requirement should be built into the Bill. In addition, should a review show that the legislation is no longer required or is not operating as intended, there would also be value in considering the inclusion in the Bill of a sunset provision. Such provisions would follow an approach already adopted by the Welsh Government in the Public Health (Minimum Price for Alcohol) (Wales) Bill.

Recommendation 3. The Minister should consider including in the Bill provisions that would require the Welsh Government to review and repeal the legislation (should it be enacted and commenced). Such provisions should ensure that:

- i. the review takes place after an appropriate period and its conclusions are enclosed within a report laid before, and debated by, the National Assembly;
- ii. in the event that the review shows the legislation is (for example) not operating as intended, it should be repealed. This sunset provision should follow the approach included in the Public Health (Minimum Price for Alcohol) (Wales) Bill.

The Minister should update the National Assembly of the outcome of his consideration during the Stage 1 debate on the Bill.

54. For the reasons set out previously, we believe it will be necessary for this Committee to give careful consideration to any regulations made under the Bill, particularly with regards to human rights and to ensure the regulations do not

³⁷ BBC News website "[Parents 'not taking up' free childcare offer, figures show](#)", 30 May 2018

relate to any reservations or are in any other way outside the legislative competence of the Assembly.

55. The remainder of the report makes specific observations on particular sections of the Bill, and the powers within those sections to make subordinate legislation.

4. Specific observations including powers to make subordinate legislation

Background

56. Earlier in this report we commented on the balance of powers between what is on the face of the Bill and what is left to subordinate legislation.

57. During our consideration of the Bill we also focused on the specific sections of the Bill that provide powers to make subordinate legislation, including one section (section 10) which provides a Henry VIII power.³⁸

Section 1 - Funding of childcare for children of working parents

58. Section 1(1) gives the Welsh Ministers the power to provide funding to any person in order to secure childcare for qualifying children of working parents.

59. Section 1(2) gives the Welsh Ministers the power to make regulations which will specify who are “qualifying children” and “working parents” for the purposes of providing such funding.

60. The regulations made under section 1 will be subject to the affirmative procedure. The Explanatory Memorandum states:

“The affirmative procedure is appropriate given that these regulations will set out the detailed eligibility criteria for the Offer and as such will have significant policy implications.”³⁹

61. Paragraphs 3.10 to 3.13 of the Explanatory Memorandum set out the proposed core eligibility criteria. For example, it states that the scheme will be available for the term after the child’s third birthday until the September after their fourth birthday:

- where both parents are working or where the sole parent is working in lone parent families;
- where each parent is earning on average a weekly minimum equivalent to 16 hours at national minimum wage or national living wage;

³⁸ A Henry VIII power is a provision within a Bill that enables primary legislation to be amended or repealed by secondary legislation (e.g. statutory instrument), which may or may not be subject to the approval of the National Assembly.

³⁹ Explanatory Memorandum, page 16

- for self-employed parents and parents on zero hours contracts, providing their average earnings meet the minimum earnings criteria over a 3 month period.⁴⁰

62. Earlier in this report we commented on the lack of detail in the Bill. When asked if he would consider placing the eligibility criteria concerning who is a qualifying child or a working parent on the face of the Bill, with the power to amend that by way of regulations, the Minister said:

“The eligibility, I think, might well be something that people want to come back to in future, and we don’t want a new piece of [primary] law to do that...”⁴¹

63. The Statement of Policy Intent also provides that there will be an administrative scheme, which will be developed alongside the regulations. The scheme will explain what an eligible child will be able to receive and where/by whom the funded childcare will be delivered.⁴²

64. The Minister told us:

“The administrative scheme, of itself, is administrative in nature, but it is made use of in the powers in section 1 of the Bill. So, that’s the statutory underpinning. We will publish the scheme on the Welsh Government’s website.”⁴³

Our view

65. We note the evidence from the Minister on section 1 of the Bill.

66. It is not clear to us why issues of principle relating to the Welsh Government’s Childcare Offer cannot appear on the face of the Bill.

67. We note that the *Childcare Act 2016* does include issues of principle related to the England-only childcare offer and places the Secretary of State under a duty to secure that childcare is available free of charge for qualifying children of working parents for, or for a period equivalent to, 30 hours in each of 38 weeks in any year.

⁴⁰ Explanatory Memorandum, paragraphs 3.10 to 3.13

⁴¹ CLA Committee, 14 May 2018, RoP [192]

⁴² **Childcare Funding (Wales) Bill Statement of Policy Intent for Subordinate Legislation to be made under this Bill**

⁴³ CLA Committee, 14 May 2018, RoP [186]

Recommendation 4. The Bill should, on its face, commit the Welsh Government to providing its Childcare Offer.

Recommendation 5. The Bill should be amended so that the core eligibility criteria concerning who is a “qualifying child” or a “working parent” appear on the face of the Bill. The Bill should consequentially include provision enabling these criteria to be amended in the future by regulations which are subject to the affirmative procedure.

68. We disagree with the Minister that the eligibility criteria will be technical in nature and therefore consultation on draft regulations containing the criteria may not be suitable. We believe that failing to consult on such substantive matters would be contrary to public law principles. Furthermore, we believe that, should the Minister not accept Recommendation 5, substantive regulations made under section 1 should be subject to enhanced scrutiny.

Recommendation 6. Should the Minister not accept Recommendation 5, the regulations made under section 1 should be subject to a superaffirmative procedure, as opposed to the affirmative procedure, to provide a counterbalance to the breadth of power being sought.

69. The administrative scheme, which will have no legal status, will detail such important matters as the hourly rate payable for the childcare and who can deliver it - issues which the Committee is aware are controversial. We are deeply concerned that important issues such as these will be left to a document which is not subject to any requirement of scrutiny by the National Assembly and will not have the same force as if it were issued using powers under the Bill. Section 7(2) of the Bill would allow the Welsh Ministers to issue statutory guidance to local authorities and we do not understand why parts at least of the administrative scheme could not be issued as statutory guidance.

Recommendation 7. We do not consider that either the hourly rate payable for the childcare or who can provide such care are matters that should be decided without scrutiny by the National Assembly and amendments should be brought forward at Stage 2 to ensure that such provision will be made in regulations subject to the affirmative procedure.

Recommendation 8. The Minister should justify during the Stage 1 debate why he has chosen to publish an administrative scheme rather than issue statutory guidance to local authorities.

Section 2 – Power to make provision about administration etc. of funding

- 70.** Section 2 of the Bill contains a power for the Welsh Ministers to make regulations which will prescribe the arrangements for the administration of the Childcare Offer. These regulations may (among other things) include provision which is referred to in sections 3 to 7 of the Bill.
- 71.** Section 3 provides that regulations can require parents who are applying for the funded childcare to provide the necessary information to support their application. It also gives the Welsh Ministers the power to set a penalty of up to £3,000 for any applicant who provides “false or misleading” information as part of their application.
- 72.** Section 4 specifies that the Welsh Ministers may by regulations make provision about the sharing of qualifying information by and with HMRC, a Minister of the Crown, a UK government department, or a local authority. The Welsh Ministers must specify what “qualifying information” is for the purposes of the section but may only use the power to specify information which is required to determine eligibility for funding under section 1. Regulations will in certain circumstances require the consent of the relevant Minister of the Crown.
- 73.** Section 5 enables regulations to make provision for the onward disclosure of information. It also enables provision to be made for criminal offences in connection with the unauthorised onward disclosure of information that has been shared for the purposes of deciding a person’s eligibility.
- 74.** Section 6 enables the Welsh Ministers to make provision about reviews and appeals (currently to the First-tier Tribunal) for parents who disagree with their eligibility determination or if they have been issued with a penalty under section 3.
- 75.** Section 7 gives the Welsh Ministers the power to confer functions on local authorities in regards to the provision of funding, as set out in section 1.
- 76.** The regulations made under section 2 will be subject to the affirmative procedure. The Explanatory Memorandum states:

“The affirmative procedure is appropriate for regulations made under this power. The regulations may, for example, make provision which will deal with the sharing of parental information and will also create a criminal offence for unlawful sharing of such information that relates to a particular person. They may also confer powers and duties on local

authorities. Such considerations are of importance to the governance of the Offer and are therefore suitable for the affirmative procedure.”⁴⁴

77. The Statement of Policy Intent states that the childcare funding arrangements need to be sufficiently flexible to take into account any lessons learned from early implementation of the Childcare Offer in some local authority areas in Wales.⁴⁵

78. The nature of the Bill’s provisions (sections 4 and 5) means there will be a need to collaborate with the UK Government with regards to information-sharing.

79. The Minister told us:

“We’ve had discussions with the Treasury already. We’ve asked them to consent to the general principle of sharing information... set out in section 4 of the Bill, and the proposed arrangements and the sanctions around unlawful disclosure of information in section 5. There’s also going to be continual engagement, further engagement, with the Secretaries of State on the detail of the regulations that have implications for functions of their departments. (...)

We also have, similarly, continuing engagement on the amendment to section 18 of the Commissioners for Revenue and Customs Act 2005 [section 8], as it constitutes a modification to the functions of HMRC...”⁴⁶

80. The Minister added:

“So, as appropriate, Ministers and the Treasury will have power of consent over regulations made under sections 4(5), 5(2) and 5(3) of the Bill.”⁴⁷

81. As UK Government Ministers will have a significant role under the provisions of sections 4 and 5 we asked the Minister whether the UK Government will effectively have a veto over the childcare funding arrangements if they refuse to provide consent. The Minister told us:

“... do they have a veto over this childcare scheme? No, because we looked at different options of providing them, and one of those options

⁴⁴ Explanatory Memorandum, page 18

⁴⁵ **Childcare Funding (Wales) Bill Statement of Policy Intent for Subordinate Legislation to be made under this Bill**

⁴⁶ CLA Committee, 14 May 2018, RoP [179 and 180]

⁴⁷ CLA Committee, 14 May 2018, RoP [179]

is the fallback option, which is to continue providing it through the local authorities. If push came to shove, we could do that. It would be more bureaucratic, it would be more costly. It's not the ideal thing either for local authorities or for parents and families, frankly, but we could do that. So, they don't have a veto over this scheme, but, certainly, we need to work with the UK Government and to have their consents in order to operate it through the HMRC model..."⁴⁸

82. Section 4(4) of the Bill states that "information or a description of information may be so specified only if the Welsh Ministers consider it appropriate to do so for the purposes of determinations as to eligibility for funding under section 1". We have noticed a growing trend towards the more frequent use of "appropriate" in legislation as opposed to "necessary". For that reason we asked the Minister to clarify why "appropriate" has been used rather than the less subjective word of "necessary". The Minister said:

"Our drafting experts have come down firmly on the view that 'appropriate' is the appropriate wording rather than 'necessary'. (...)

The regulations that we're looking at will need to specify the type of information concerned... and Welsh Ministers are going to have to identify a range of information that's relevant in this context. (...) because it's judging what the type of information should be, then it's 'appropriate' that's the correct terminology to use rather than 'necessary'."⁴⁹

83. With regards to the power in section 7 to confer functions on local authorities we asked the Minister why that power has been taken, given that the pilots are operating without legislation. We also asked the Minister how he anticipated that power may be used. The Minister told us that there will still be a need to confer functions on local authorities but those functions may be different to what they are now. He said:

"So, for example, it could well be—it probably will be—continuing to advise parents (...) Supporting childcare providers will be a key role for local authorities, both in terms of identifying where there are gaps, where there is duplication, where we need Welsh language provision, et cetera, et cetera."⁵⁰

⁴⁸ CLA Committee, 14 May 2018, RoP [183]

⁴⁹ CLA Committee, 14 May 2018, RoP [196 and 198]

⁵⁰ CLA Committee, 14 May 2018, RoP [202 and 203]

Our view

84. We note the evidence from the Minister regarding the power to make regulations under section 2 which may include provision which is referred to in sections 3 to 7.

85. We note that regulations made under section 2 are subject to the affirmative procedure and are satisfied with this.

86. We acknowledge that discussions have already taken place with the UK Government regarding the sharing of information that will be required under sections 4 and 5 of the Bill, and we welcome the progress that has been made. However, we challenge the Minister's assertion that the UK Government will not have a veto over the childcare funding arrangements should they decide not to provide the necessary consent. The Minister stated that, should UK Government consent be refused, the Welsh Government's fall-back option would be to continue to deliver the childcare funding scheme through local authorities. While we do not contest that this would be a way of administering the policy (as it is delivered now in the seven pilot areas), a refusal of consent from the UK Government in respect of the information-sharing regulations will mean that the Welsh Government's preferred HMRC-run model will be unworkable.

Recommendation 9. The Minister should, during the Stage 1 debate, provide a further explanation as to why he believes the UK Government will not have, in effect, a veto over the proposed childcare funding arrangements should the UK Government refuse to provide the necessary consent for any regulations which make provision under sections 4 and 5 of the Bill.

87. We note that the provisions of sections 4 and 5 may engage Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to private and family life). It will be necessary for this Committee to carefully consider whether these future regulations comply with Article 8 when they are laid before the National Assembly.

88. With regards to section 4(4) and the use of "appropriate" as opposed to "necessary", we are satisfied with the Minister's justification and are content with the use of "appropriate" on this occasion.

Section 10 – Power to change amount of financial penalty for provision of false or misleading information

89. Section 10 provides the Welsh Ministers with the power to change the amount of financial penalty for provision of false or misleading information as set out in section 3(6).

90. The power is a Henry VIII power as it will enable section 3(6) to be amended by subordinate legislation.

91. The Explanatory Memorandum states:

“The affirmative procedure is appropriate for regulations made under this power as it would involve the amendment of primary legislation and result in an increase in a financial penalty.”⁵¹

Our view

92. Our established practice has been to seek the use of the affirmative procedure for any subordinate legislation that would change primary legislation. For that reason we welcome that the affirmative procedure will be used for the regulations made under section 10.

Section 11 – Supplementary provision about regulations under this Act

93. Section 11 specifies that any regulations made under the Bill are to be made using the affirmative procedure.

94. Section 11(1)(a) includes provision for regulations to confer a discretion “on any person”. We asked the Minister what this meant in practice. The Minister said:

“One of the things we’re already discovering with the pilots is that there are some families who are much more complex than others, and they don’t fit within a clear mould—they don’t have access to paperwork, they don’t have the normal trail of things that you might demand of somebody. So, there will need to be some discretionary ability, for example, for an informed operator of this scheme to say, ‘Well, you haven’t quite ticked all of these boxes, but you’re clearly entitled and you need it and you’re working and you fall within the eligibility but you just can’t prove it.’ (...)

⁵¹ Explanatory Memorandum, page 19

We are aware that [these generalised discretions] do exist in other areas. We're not the first to bring this forward."⁵²

Our view

95. We note the evidence from the Minister on the provisions within section 11 of the Bill.

96. We have only been able to find four examples of UK primary legislation (and no examples in Welsh Measures or Acts) where the phrase “to confer a discretion on any person” is used. While we acknowledge the explanation for the use of the wording in section 11, we believe greater clarity of intent would be achieved if this type of generalised discretion was explained more clearly.

Recommendation 10. The Minister should provide during the Stage 1 debate a further explanation regarding the use in section 11 of the wording “to confer a discretion on any person”.

Recommendation 11. The Explanatory Notes which will accompany the legislation should make clear the intention and effect of the wording “to confer a discretion on any person” in section 11.

Section 12 – Coming into force

97. Section 12 of the Bill provides that sections 12 and 13 come into force on the day following Royal Assent. All other provisions in the Bill come into force by way of Order. An Order under section 12(2) may make transitory, transitional or saving provision. The commencement Order(s) will not be subject to a scrutiny procedure.

98. In his evidence the Minister told us that the commencement date will not form part of regulations that are subject to a scrutiny procedure because the Welsh Government has always been clear that the policy will be rolled out by 2020.⁵³

99. Given the lack of detail on the face of the Bill and as the commencement Order(s) may include transitory, transitional or saving provision we asked the Minister if the lack of scrutiny procedure for these orders was a weakness of the Bill. The Minister said:

⁵² CLA Committee, 14 May 2018, RoP [216] and [223]

⁵³ CLA Committee, 14 May 2018, RoP [153]

“... we’re aware that this particular area has been discussed on a number of occasions previously with other Ministers in other policy areas. And I know that the committee, I’m sure, will be familiar with the Welsh Government position on this generally. Our belief is that commencement Orders give effect to the provisions that are already considered and debated and agreed by the Assembly. And in this situation, for example, this is a very clear commitment, and the roll-out dates are very clear, and restated and restated endlessly. So, Welsh Government position is that a commencement Order shouldn’t be subject to any procedure unless there’s a specific case where there’s a good reason for this, and we don’t see it here within this particular example.”⁵⁴

100. The Minister added:

“My understanding is that a technical discussion of this was set out in a letter,⁵⁵ dated 16 October 2014, from the then Minister for Communities and Tackling Poverty, and it was in relation to the Financial Education and Inclusion (Wales) Bill, and I think the Government’s position was set out very clearly at that point, and it remains the Government’s position.”⁵⁶

Our view

101. It is standard practice that no procedure is prescribed for commencement Orders. Our predecessor committee, in its Legacy Report of the Fourth Assembly, recommended that the successor committee scrutinises commencement Orders which contain incidental, supplementary, consequential, transitory or transitional provisions and writes to the relevant Welsh Minister where it identifies issues of concern. For that reason, and unlike our predecessor Committee, we have not tended to comment on commencement provisions in Bills.

102. However, the conclusions and recommendations that precede this chapter of the report highlight that this Bill is out of the ordinary. For commencement Orders which will derive from a Bill that contains such little detail on its face, it is important that the primary legislation empowers the National Assembly with a right to scrutinise those Orders. We consider that a skeleton Bill should not make

⁵⁴ CLA Committee, 14 May 2018, RoP [228]

⁵⁵ See Annexe 3 of the Fourth Assembly’s Constitutional and Legislative Affairs Committee’s **report on the Financial Education and Inclusion (Wales) Bill** (November 2014)

⁵⁶ CLA Committee, 14 May 2018, RoP [229]

use of a procedure which inhibits future scrutiny by the legislature given the uncertainty that arises from its lack of substantive content.

103. We consider the Minister's justification for applying no procedure to commencement Orders under section 12(1) of the Bill to be weak.

Recommendation 12. The Bill should be amended so that any Order made under section 12(1) of the Bill is subject to scrutiny and the negative procedure.