

Tertiary Education and Research (Wales) Bill

Written submission from the Higher Education Funding Council for Wales to the Children, Young People and Education Committee
(Oral evidence session: Thursday 18 November 2021 - submitted: Monday 8 November 2021)



Introduction

1. Purpose and limitations

- 1.1 The purpose of this document is to provide a briefing for members of the Children, Young People and Education (CYPE) Committee of the Senedd in advance of the session on 18th November 2021 at which HEFCW is to give evidence on the Tertiary Education and Research (Wales) Bill introduced on 1 November, 2021.
- 1.2 Whilst the Bill was being developed by the Welsh Government, we were afforded the status of external stakeholder. We have therefore not been directly involved in developing the draft legislation and have not seen the Bill in draft before it was published on 1 November 2021 other than the version issued for consultation in 2020. This briefing has been prepared within a week of the Bill being laid and, as a consequence, can only be an initial response prepared with very little time in which to engage with a substantial volume of material. What follows, therefore, is an initial response to the Bill, supported by illustrative comments. There has also been insufficient time to engage our Council in this response, consequently it represents the views of officers only. We currently expect to make a further submission in response to the general call made on 6th November by the CYPE Committee in which we expect to engage the views of our Council.
- 1.3 As will be detailed below, we have been supportive, in principle, of the broad thrust of these proposals since the development commenced some six years ago. In our response to the draft legislation consultation in 2020, we expressed disappointment that the legislation, as then drafted, represented a missed opportunity. As we indicated in our 2020 response, the thrust of the Hazelkorn report, accepted by the Welsh Government, was to establish a clear vision for the PCET sector in Wales, with a clear intention that the sector should be cohesive and integrated, with administrative arrangements which facilitated better the meeting of employer and student needs, and removed the tensions around interfaces between the current sectors. In our view, the Bill as introduced fails to meet those recommendations and would require amendment to do so.
- 1.4 We remain persuaded by, and committed to, reform of the current arrangements to establish a single, cohesive tertiary sector in Wales. Our observations below seek to provide constructive comment and we will continue to work with colleagues to seek to optimise this legislation to maximise the resultant benefits for Wales.

Background

2 Role of HEFCW

2.1 We are a Welsh Government sponsored body established and empowered by the Further and Higher Education Act 1992 with additional powers conferred by the Higher Education (Wales) Act 2015.

2.2 We are required to take account of, or adhere to, other legislative requirements such as the Equalities Act 2010, the Well-being of Future Generations Act 2015 and Welsh language standards.

2.3 We regulate, fund and influence higher education providers as well as deliver on Welsh Government priorities including those set out in the Minister for Education's annual remit letter to our Council.

2.4 Our Vision is set out in our Corporate Strategy approved by Welsh Government:

“Our long-term ambition is for Wales to have a world class, globally responsible and sustainable higher education, research, innovation and training system that promotes the interests of students and ensures that Wales flourishes socially, economically, environmentally and culturally.”

2.5 We are an organisation of 58 staff. We have a Council of 12 members (with one vacancy at present) that is, in turn, advised by 8 committees. We are audited by Audit Wales and are subject to the Freedom of Information Act. Our decisions can be challenged legally by judicial review. It is important to note that whilst our Council members have a range of experience and skills, including managing and leading universities, the membership does not include current staff or governing body members at Welsh providers. This has reduced the potential for conflicts of interests, real or perceived, which the Board of the Commission will also need to manage.

2.6 Whilst funded by, and in receipt of a remit from, Welsh Government, as a sponsored body we are independent of government. This enables our organisation of specialist staff to work in partnership with those higher education (HE) providers (including a number of further education (FE) colleges) we fund and regulate to deliver long term outcomes for the benefit of Wales. It enables us to work away from the political environment, beyond the shorter-term periods of programmes of government, whilst still being accountable to the public through Welsh Ministers and the Senedd.

2.7 We operate by providing both challenge and support to the HE providers we fund and regulate. We are not a market regulator like other organisations with similar remits in the UK. We work in partnership with many HE sector bodies and work closely with other UK funders and regulators of HE to maintain the HE activities that operate UK wide and ensure that developments take accounts of Welsh requirements.

- 2.8 HEFCW provided evidence to the [Review of the oversight of post-compulsory education in Wales, with special reference to the future role and function of the Higher Education Funding Council for Wales \(HEFCW\)](#) conducted by Professor Ellen Hazelkorn in 2015. As part of that submission HEFCW set out its position as follows:

“We consider that there is scope to improve cross-sectoral arrangements between the FE and HE systems. The current arrangements, in which a degree of competition between these two sectors exists in the space which, arguably, matters most for progression and up-skilling, are sub-optimal... we consider that a single body with oversight of both sectors could secure significant benefits in this regard”

For the past six years, therefore, we have seen the proposed developments as an opportunity to improve the contribution which the post-compulsory education system makes to Wales. This remains our clear position.

- 2.9 We have a good track record and reputation in terms of delivering our remit and working in partnership to influence development. We engage regulatory actions as a last resort – our preferred approach is to engage with providers sufficiently frequently that we are able to prevent difficulties arising which require regulatory intervention. HEFCW is not a failing organisation. This was evident from the responses to the [stakeholder and partner survey](#) HEFCW undertook in 2019: “More than four fifths (84%) of respondents said they had a favourable opinion or impression of HEFCW. Only one individual (1%) gave an unfavourable opinion.”
- 2.10 In our response to the draft bill published in 2020, we drew attention to the fact that the associated explanatory memorandum focused largely on the perceived deficits in the arrangements pertaining to the higher education sector, with only cursory treatment of other sectors. There was, for example, detailed assessment of the contextual challenges facing higher education, as well as the financial challenges for each university, but no similar assessment of the challenges facing further education. We are disappointed to see that this bias in approach remains in the revised (but largely unchanged and outdated) explanatory memorandum published in November 2021. This unexplained bias in the underlying case for change undermines the essential premise of the legislation which should, in our view, be focused on the gains which can result from a more cohesive, single tertiary sector in Wales, rather than from a need to correct perceived inadequacies in one part of that sector. This, in turn, has led to a Bill which, in its current form, fails to secure the significant benefits which could be achieved.
- 2.11 Operationally, we are concerned that the arrangements for the transfer of HEFCW’s activities and staff to the Commission are so uncertain that we risk losing the staff and their expertise. That will be a risk both for HEFCW’s continuing activities until its dissolution, and for the new Commission. Despite the fact that it is now six years since the Hazelkorn review was commissioned, the truncated timelines remaining for implementation of the new arrangements from April 2023 also present a significant risk to effective transition.

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3. Issues resolved in the Bill as laid on 1 November 2021

- 3.1. We submitted a comprehensive response¹ to the consultation on the draft bill published in 2020, along with a covering letter². Our initial review of the Bill laid on 1 November indicates that most of the concerns expressed in that response remain unresolved. The following issues, however, are those we identified in our consultation response which we are pleased to see appear to have been addressed in the Bill as laid.
- 3.2. The removal of Access and Opportunity Plans, which we felt introduced unnecessary and significant bureaucracy and duplicated what could be achieved through other powers in place (although we are currently unclear whether outcome agreements will apply across all post 16 providers). We note that that a registration condition for equality of opportunity is in place, alongside a fee limit statement. We support the Commission being able to determine, after consultation, how these conditions should operate.
- 3.3. Some clarification of the Vision for the role of the Commission in the 9 duties included in the Bill. Although we believe there is excessive detail on what the Commission should take into account when delivering on those duties.
- 3.4. The removal of the proposed power for the Minister to appoint the research committee members. We note, however, that the Minister will appoint the Chair of the Committee who will also be the Deputy Chair of the Commission. This could affect the balance of the skills and expertise of the leadership of the Commission's Board.
- 3.5. The Commission, rather than the Welsh Ministers, can now designate the quality body. However, the complexities and detail of Estyn's role still remain. It is also assumed that a quality body must be designated. which provides less flexibility for adapting how the future arrangements should work.
- 3.6. Some changes have been made to address the inconsistency between the need to secure "proper" and "reasonable" facilities for 16-19 and 19 year olds respectively in Further Education. However, we will need to wait for regulations to understand the full extent of the changes and the implications, including the extent to which these provisions could result in a significant shift in funding from HE to FE.

¹ [HEFCW-response-to-the-Draft-Tertiary-Education-and-Research-Wales-Bill-consultation.pdf](#)

² [HEFCW-response-to-the-Draft-Tertiary-Education-and-Research-Wales-Bill-consultation-covering-letter.pdf](#)

4. Remaining issues

- 4.1. Set out below are some illustrative examples of the general principles that we feel have not been addressed by the Bill. We have raised these issues in response to previous consultations and directly with Welsh Government colleagues. It is our view that not addressing them will prevent a single body from addressing the issues that exist in the current system and, more significantly, from improving tertiary education in Wales. We say this from the position set out above, that we are supportive of these amendments in principle, even though this will result in HEFCW being dissolved.
- 4.2. In the explanatory memorandum (paragraph 7.26 refers), there is a strong reflection on the assessment of the current system that Welsh Ministers are limited in the way in which they can direct HEFCW, as an arms-length body, to ensure that it complies with their priorities. This promotes an underlying, but inaccurate, perception that adequate policy control by government lies in tension with an arm's length arrangement. It does not recognise that HEFCW routinely delivers on its remit letter tasks and Welsh Government has not notified us of failure to deliver on the priorities of Welsh Ministers. It does not reflect that Welsh Government funds HEFCW and appoints its members or that we are legally bound to deliver on the duties for public bodies relating to equalities, the Welsh language and the Well-being of Future Generations. In this context, we remain of the view that the existing system provides assurances that the priorities of Welsh Ministers can be delivered without having to undermine the arms-length nature of the Commission. We welcome the fact that the Welsh Government has endorsed the establishment of an arms-length body but take the view that the perceived tension referenced above remains unresolved throughout the Bill with the result that there are a number of clauses which undermine the arms-length principle.
- 4.3. The following examples in the Bill illustrate how the Commission could be circumvented despite the robust checks in place over the Commission's activities such as being audited by Audit Wales, bound by other legislation as a public body and subject to possible judicial review:
- Setting out that the Commission must give Welsh Ministers information related to or obtained in the performance of its functions (section 118) and also determining how that information is given. This could result in registered providers or key partners not sharing information with the Commission, particularly when it is commercially sensitive.
 - Explicitly setting out that Welsh Ministers may approve the Commission's Strategic Plan with modifications (i.e may make unilateral changes to the Commission's plan drawn up after a consultation process).
 - Giving a direction to the Commission which it has to take into account. This could be in "reference to an area of research or innovation but only if that area is specified in the Commission's strategic plan" (a plan Welsh Government could approve after modifying it with areas of research and innovation).
 - Setting out what could be within the terms and conditions of funding by the Welsh Ministers to the Commission including 'areas' of research that

are within the strategic plan of the Commission (which may have been amended to include those 'areas' by Ministers).

- Providing financial support to a provider for Further Education and certain Higher Education courses.
- Prescribing what the Commission must do when delivering the nine strategic duties
- Being able to intervene directly at a Further Education Institution, with the power to amend its governing body membership.
- The legislation enables Government to fund research around the Commission through retaining powers under the Science and Technology Act 1965 and the Higher Education Act 2004. The logic for this is unclear when the aim is for the Commission to be the strategic body for Tertiary Education and Research.

4.4. The Bill hardwires much of the current system into new legislation. Given that the Hazelkorn Review was published in 2016, it is not clear why the foundation of the Bill is essentially the current system, albeit with some modifications. The existing tensions are still unresolved and will prohibit the commission from achieving the goals of a unified PCET sector. Indeed, once established in legislation, the Commission will not be able to operate outside that legislation and cannot morph to new arrangements, better suited to a unified approach to funding and regulating the system, whilst still operating lawfully. The following examples illustrate this:

- The legislation places a duty on the Commission to assess, monitor and promote improvement in the quality of education and training across providers registered with and funded by the Commission. However, it also specifies what Estyn must inspect and requires the Commission to fund Estyn to deliver on that. Effectively the Bill is replicating the Estyn duties that are included in existing legislation.
- The Bill does not address the issue of oversight of some areas of provision that potentially pose a quality risk such as Trans-National Education delivered under validation arrangements by a provider registered with the Commission that is also an awarding body.

4.5. There is no clear rationale in the explanatory memorandum for the decision to develop the Bill as introduced. Particularly, there is a limited assessment of the costs with little consideration of the length of time that it will take to develop the system. It took three years for HEFCW to put in place the processes and systems to implement fully the Higher Education (Wales) Act 2015 and that was without any significant changes being made to HEFCW itself. The question still remains regarding the rationale for merely tweaking the current regulatory and funding arrangements and, in so doing, justifying the costs.

4.6. The explanatory memorandum does not provide a rationale for the research section of the Bill including, in particular, an explanation as to why the Government will continue to be able to fund research independently of the Commission. If the Commission is to be responsible for strategic funding the Senedd and its Committees should have assurance that the Commission will

be the sole conduit of Welsh Government funding for higher education research. If there are circumstances where funding should be provided directly by Ministers, then we would expect the Commission to be required to be part of any such funding decisions made by Ministers.

- 4.7. The Bill introduces Outcome agreements but there is no evidence provided for how Outcome agreements will deliver the beneficial changes sought.
- 4.8. Overall, we consider that the legislation is too prescriptive and detailed, with the sections related to Estyn and Apprenticeship being examples of this. The Further and Higher Education Act 1992 is an example of concise and legislation that has enabled HEFCW to fund, influence and regulate (up until 2015), effectively and also to respond swiftly and flexibly to changing situations and challenges as necessary. The more detailed the legislation, the more likely that there will be complexities of implementation which are difficult to resolve and the less likely that the legislation will stand the test of time.

5. Conclusion

- 5.1. In our response to the draft Bill consultation in 2020, we concluded:

‘... the current provisions in the draft Bill have missed the opportunity to establish a harmonised regulatory and funding regime for the tertiary education sector. It hard-wires in the pre-existing arrangements, making the delivery of key anticipated benefits of greater cohesion and consistency unattainable. In this respect, the draft Bill, with the associated very significant transitional costs, offers little beyond the current arrangements. It is not sufficient just to establish a new body: the legislation needs to enable that body to address the cultural challenges without the impediment of retaining current discrete regulatory, funding and quality assurance arrangements with all their complexities.’

Whilst welcome adjustments have been made to the Bill, as illustrated in section 3 above, our initial reading suggests that further amendment to the draft legislation would be required to deliver the potential benefits provided by this opportunity and to justify the significant investment in the transition and on-going operational costs. We will be pleased to engage constructively as the Bill passes through the various Senedd processes with a view to supporting further refinement prior to finalisation.