



The Further and Higher Education (Governance and Information) Bill

Submission to Children & Young People Committee

May 2013

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Introduction

1. This paper has been drawn up by ColegauCymru in response to the Further and Higher Education (Governance and Information) Bill (henceforth entitled FHE Bill).
2. This response focuses on the further education (FE) section of the Bill. The section on the supply of information in connection with student loans and grants is non-contentious and ColegauCymru has no comment to make.

The Legal Status of FE colleges and FE institutions in Wales

3. ColegauCymru represents the 19¹ further education (FE) colleges and FE institutions in Wales.² In 2011/12, there were 214,850 individual students attending college and 229,615 enrolments.³ Colleges in 2011/12 had a turnover of £462m with Welsh Government investment, including work-based learning, of £365m (79% of total income).
4. FE colleges have a crucial role to play in delivering the skills that Wales needs to make a significant contribution to the economy of Wales. ColegauCymru believes that the changes set out in the FHE Bill will be of considerable benefit to colleges in continuing to provide a high quality service to learners, businesses and local communities.
5. Colleges are educational charities and their key purpose is to provide education and training. Since incorporation, they have been motivated by the interests of their learners and communities. They are not driven by profit. Indeed, their charitable status would be lost if they chose to do so.
6. The Welsh Government's regulatory role over colleges is expected to be strengthened shortly. The Welsh Government Minister for Education recently submitted a case to the UK Cabinet Office for Welsh Ministers to be appointed as the Principal Regulator for FE colleges and designated FE institutions in Wales. This is in keeping with changes made by the Charities Act 2006 (which are not contained in the Charities Act 2011). The FE colleges have welcomed the Welsh Government's proposed new regulatory role.
7. The Humphreys Review⁴ considered FE colleges as social enterprises existing to provide social benefits to their local communities. In this sense, they are not-for-profit organisations delivering public services but not directly part of government.

1 The 19 include Coleg Harlech/WEAN; WEA South; YMCA Community College; and Merthyr Tydfil College, University of Glamorgan
2 In this paper the terms 'FE college' and 'college' are used to cover FE colleges and FE institutions.
3 *Further Education, Work-Based Learning and Community Learning in Wales 2011/12 SDR 48/2013*, Welsh Government, March 2013.
4 *Independent Review of the Governance Arrangements of Further Education Institutions in Wales* (the Humphreys Report), Welsh Government, March 2011.

The FHE Bill: General comments

8. ColegauCymru welcomes the provisions in the Bill that would remove certain unnecessary restrictions and controls on colleges in such a way as to enable the Office for National Statistics (ONS) to restore to colleges their status as 'not for profit institutions serving households' (NPISH). This was the status that existed prior to the ONS announcement in October 2010 that FE colleges in the UK should be classified as part of central government.
9. In the White Paper on the proposed FHE Bill, the Welsh Government recognised the maturity of the FE sector in Wales and that colleges are best placed to determine the needs of their learners and communities. This echoes the statement in the Education Minister's Priorities Letter that colleges "*make a significant contribution towards our economy and society and have responded well to the needs of individuals and employers in Wales*".⁵
10. Colleges strongly support the Welsh Government's emphasis on collaboration and cooperation in Wales. Colleges already work closely together. Indeed, the very existence of ColegauCymru and its extensive networks and tradition of sharing good practice over many years provide solid evidence of how colleges have embraced partnership. This is a key part of the college ethos in Wales. Relationships with HE institutions have improved considerably and colleges already have in place, or are working hard to develop, fruitful partnerships with local schools.
11. FE colleges have striven to raise standards and improve their services to learners. They have engaged positively in the Transformation agenda. This has been achieved in partnership with, and with strong guidance and support from, the Welsh Government.
12. Colleges recognise that they are recipients of taxpayers' money, operating within the policy context of an elected, devolved administration. They are keen to deliver the skills agenda set out by the Welsh Government. This will require continued constructive working relationships between the Welsh Government and colleges, working through ColegauCymru, to ensure that colleges continue to implement government initiatives and share good practice.
13. The FHE Bill does not affect other statutory checks on colleges. FE colleges will still be subject to Estyn inspection, as well as various financial and accountancy standards and audits, and charity and company law, as well as the Welsh Government's Quality and Effectiveness Framework.
14. The Education Minister's Priorities Letter for FE colleges, sent in May 2012,⁶ outlined four key areas for the sector over the two years 2012/13 and 2013/14:

5 *Priorities for the Further Education Sector: 2012/13-2013/14*. Letter from Leighton Andrews AM, Minister for Education and Skills, sent to college principals 29 May 2012.

6 *ibid.*

- raising standards and attainment
- improving learner progression and support
- building on employer engagement and encouraging enterprise
- developing Welsh-medium provision.

These priorities, frequently reinforced in speeches to conferences and at meetings with ColegauCymru representatives, provide a clear and helpful policy framework within which colleges operate and within which they can respond to the unique needs of their learners and local communities. ColegauCymru supports the continuation of such communication through policy direction.

15. ColegauCymru welcomes the key role envisaged for it in the White Paper in *'leading the sector and ensuring a sense of shared responsibility across all colleges'*. This acknowledgement is an endorsement of the views of the Thomas Review, which stated that ColegauCymru *'has become a collectively energetic and valued organisation showing exemplary commitment to improving education and training in Wales'*.⁷ The ColegauCymru Board embraces this challenge and will wish to work closely with the Welsh Government in drawing up a code of governance and a code of practice covering the relationship between FE colleges and the Welsh Government.
16. ColegauCymru recognises that the final decision on whether to classify FE colleges as NPISH or as central government public sector entities lies with the ONS, not the Welsh Government. There is a risk that, were the proposed Bill to change materially through substantive amendments, it may predispose the ONS to deny the classification sought. ColegauCymru believes the Bill will be able to deliver positive changes whilst simultaneously achieving the objective of satisfying the ONS criteria for NPISH classification and very much hopes that the final version of the Bill, including any amendments accepted during its passage through the Assembly, will not thwart these desired outcomes.

Q1 Whether there is a need for the Bill

17. Yes, there is an urgent need for this Bill.
18. The explanatory memorandum gives a clear account of the importance of the Bill.
19. It sets out three options. To do nothing (option 1) would mean that FE colleges becoming part of central government. Colleges would lose their incentives to generate surpluses which are currently invested in improving services for learners. Assets as well as liabilities would belong to the Government. This

⁷ *The Structure of Education Services in Wales (the Thomas Review)* March 2011, op. cit. Chapter 5 para 16.

could have implications for funds allocated to the Welsh Government through the Barnett formula.

20. The added costs of option 1 show an estimate of £77,348 per year for added administrative and financial management costs. This calculation is based on there being 18 colleges. Assuming the current proposed mergers go through and that there are three colleges likely to be wholly owned by universities in 2013/14, a total of 12 FE colleges would be affected. Even so, ColegauCymru believes that these costs are a considerable underestimate. The Association of Colleges, ColegauCymru's sister organisation in England, pointed out in a personal communication to the chief executive of ColegauCymru that:

'Government accounts are carried out to different international accounting standards so the returns made by Colleges would need to be made on a different basis (e.g. in terms of valuing assets or local government pension scheme (LGPS) pension liabilities). Inter-College transactions and college/government transactions would need to be netted off. This would involve netting off funding from HEFC(W), Construction Skills, MoD contracts and ESF transactions (several hundred in all). UK Treasury requires monthly budgets and management accounts. It isn't clear whether this requirement would be handed down to colleges but there would be an added administrative burden.'

21. The biggest financial loss would be capital spend. As pointed out in the Explanatory Memorandum, the total capital spend by a college in any year would count against any DfES capital budget, not just the capital budget given to colleges by the Welsh Government. Thus the planned £58.5m capital programme, towards which the Welsh Government is paying 50%, would be halved – a dramatic loss of around £29m.
22. Option 2 proposes the setting up of a funding body similar to the Further Education Funding Council for Wales. This proposal would represent a major step change in the policies of the Welsh Government which promoted a 'quango free state in Wales' and has merged with a number of Assembly Sponsored Bodies including ELWa. Setting up a new quango would in any case have no impact on the classification by ONS of colleges. For example, there are two funding councils in England (although both have or soon will have executive agency status) yet colleges there have been classified as NPISH. As pointed out in the Explanatory Memorandum, the cost of running a separate funding council would be £1.84m per year which presumably would be paid for at the expense of learners.
23. Option 3 – the FHE (Governance and Information) Bill is a necessity.
24. The powers that Welsh Ministers currently have derive from the Further Education Act 1992. This 20 year old legislation, which gave FE colleges incorporated status, was a major change for colleges, previously been owned by local education authorities. It included a number of controls that were important for a new sector just finding its feet. Move forward 21 years and matters have

changed radically. ColegauCymru considers that the 1992 Act needs to be amended in the ways proposed by the FHE Bill.

25. It is worth repeating that the FHE White Paper stated that:

'the Welsh Government recognises the maturity of the FE sector in Wales and believes that colleges, rather than government, are best placed to determine how the needs of their learners and local communities should be met; based within the strong and vibrant Welsh culture of collaboration, co-operation and partnership working. This culture is central to the future success of the sector'.

Q2 The key provisions set out in the Bill and whether they are appropriate to deliver its stated purpose

26. The key provisions are appropriate. The proposed Bill strikes an appropriate balance between giving colleges greater responsibility to manage themselves and the recognition of the need for colleges to work within the broad policy areas set out by Government.

27. Colleges will have greater autonomy over their instrument and articles of government. Governing bodies will nonetheless still be required to appoint a principal/chief executive and clerk and to include learners and staff in their membership. There will also be protection ensuring that a governing body must not introduce changes that would lead to the loss of charitable status.

28. The White Paper stated that *'the Welsh Government will work alongside ColegauCymru to develop a Code of Governance for the sector which incorporates the Nolan principles and best practice'*.

29. ColegauCymru will be pleased to undertake this task to ensure high standards of governance are maintained.

30. The Bill provides safeguards against colleges being allowed to transfer its properties, right and liabilities to any other body of their choosing. Regulations will be passed requiring the publication of information, consultation requirements and the bodies to which property and rights can be transferred.

31. Welsh Ministers will have intervention powers including the power to direct the governing body to resolve to dissolve itself in certain circumstances, though the unrestricted ministerial power to dissolve a FE corporation will not be retained if the Bill as it becomes an Act.

32. The Bill gives a college the power to conduct itself through a subsidiary arrangement such as a limited company or charitable incorporated organisation. ColegauCymru is aware that in England, a college made initial explorations of the idea of re-establishing itself as a company limited by guarantee but decided against it when it recognised that FE corporations have better access to higher

education funding, UK Border Agency licences and lengthy LGPS pension deficit recovery periods than companies limited by guarantee. Even in England, then, where a more competitive market in education is encouraged, no college has transferred its assets or liabilities to another body.

Q3 The financial implications arising from the Bill

33. As noted in answer to question 1, there would be added costs if the Bill was not passed or if a funding council was put in place. These added costs at a time of financial stringency would inevitably have a detrimental impact on the services provided for learners.
34. The Bill itself would not lead to increased costs. Colleges may incur some modest legal costs if they choose to change their instrument and articles of government. Banks may apply stricter rules when lending money.

Q4 Potential barriers to the implementation of the key provisions and whether the Bill takes account of them

35. There are no barriers to the implementation of the key provisions. The Bill in effect endorses the NPISH status of colleges that they have enjoyed since 1993 (until the ONS reclassification in 2010) and FE colleges are mature enough to absorb the increased freedoms given in the Bill.

Q5 Whether there are any unintended consequences arising from the Bill

36. Several responses to the White Paper expressed concern that the FE colleges with their newly acquired freedoms would disregard the policies for further education set by the Welsh Government; ignore national agreements on pay; sell off public assets; or even choose to privatise themselves as was apparently the case in England, and focus on profit rather than learners and their communities. ColegauCymru can give clear assurances that none of these will happen.
37. ColegauCymru will further develop its relationship with the Welsh Government. We recognise that an elected government expects its educational policies to be carried out. The Welsh Government will continue to set down conditions attached to its funding of colleges and there will be a revised financial memorandum.
38. However, in order to ensure that the ONS accepts that colleges can be classified as NPISH, the Welsh Government cannot set out regulations directly impacting

on the strategic direction of colleges. The FHE White Paper pointed out that ONS classification is:

'determined by where control lies, rather than by ownership or whether the entity is publicly financed. International guidance defines control as the ability to determine general corporate policy'.

39. The White Paper also quoted from the European Manual on Government Deficit and Debt which states that in the case of schools:

'the general government controls a school if its approval is needed for creating new classes, making significant investments in gross fixed capital formation or borrowing; or if it can prevent the school from ending its relationship with government.'

40. ColegauCymru has in membership all the FE colleges and FE institutions in Wales. As such, it works closely on behalf of the whole FE sector with the Welsh Government, as a critical friend, discussing and commenting on key policies and translating these into recommended actions.

41. A good example is the move towards Transformation. This development was a key Welsh Government policy. FE principals, supported by their governing bodies, took proactive decisions to merge with other colleges and in two instances with their local university. This Transformation was not imposed by the Welsh Government. Rather, the Welsh Government set out its policy direction and colleges responded positively. Other education sectors did not respond in a similar way.

42. There are other examples.

- Pay parity, negotiated between ColegauCymru and the joint trade unions and introduced in 2005/2006, has been honoured by FE colleges.
- ColegauCymru and the joint trade unions have been negotiating a common contract for the past three years and are close to an agreement.
- Several colleges have introduced or are in the process of introducing membership style governing bodies on the lines of that recommended by Humphreys.

43. ColegauCymru will ensure that it recommends to colleges that they retain pay parity between lecturers and school teachers; honour any common contract if agreed with the joint trade unions; and support the introduction of membership bodies on the lines set out in the Humphreys report on governance arrangements.

44. Some commentators have raised the issue of colleges being motivated by profit as a result of increased freedoms. Colleges will retain the 'not for profit institutions serving households' status. This clearly states that colleges are not in existence in order to make profit. Colleges will remain charities and the Principal Regulator will likely be the Welsh Government. A focus on profits rather than the

learner would endanger an institution's charitable status. However, colleges will continue to be entrepreneurial and seek to generate income (in 2011/12 almost £100m) outside of their Welsh Government funding. This helps colleges' overall financial position and brings in valuable additional revenue that is reinvested for the benefit of learners.

45. Finally, attention has been drawn by some to the competitive education philosophy across the border in England and whether the FHE Bill will encourage similar activity by FE colleges in Wales. There is of course a very different political and educational agenda in England. In England, academies, free schools, studio schools and university technical colleges are being established, often in direct competition with high performing colleges. The emphasis is on choice and competition. In Wales, there is a partnership and cooperation agenda in which colleges have played their full part and will continue to do so. In terms of quality standards, however, colleges are not complacent. They remain competitive with each other in their drive to raise standards and improve their services to learners, communities and business.

Q6 The views of stakeholders

46. Principals and governing bodies have indicated clearly their strong views in support of the Bill. Governing bodies comprise governors drawn from a wide range of stakeholders including local authorities, the local community, business, staff and students.
47. The Welsh Government report on the responses to the consultation on the White Paper states 'the responses we received from learning providers generally agreed with the proposals in the White Paper. In contrast, the majority of trades unions disagreed with the proposals'.
48. Governing bodies recognise that the new freedoms will place greater responsibility on them. However the increased freedoms will bring long term benefits to learners, local business and local communities.

Q7 The level of detail on the face of the Bill compared to any powers contained in subordinate legislation

49. ColegauCymru is not able to comment at present. The Bill strikes an appropriate balance between giving colleges greater responsibility to manage themselves and the recognition of the need for colleges to work within the broad policy areas set out by Government.

The FHE Bill: Conclusion

50. On behalf of FE colleges in Wales, ColegauCymru welcomes the decision of the Welsh Government to publish the FHE Bill. The Bill recognises the maturity of the FE sector and the fact that FE colleges will act responsibly with the increased freedoms set out in the Bill.

51. ColegauCymru and colleges will continue to work closely with the Welsh Government and seek to implement its policies aimed at improving education and training opportunities for learners, communities and business.