



**WALES  
CYMRU**

**RESPONSE TO:**

**The Further and Higher Education  
(Governance and Information)  
(Wales) Bill**

**CONSULTATION**

**Contact Details:**

**Margaret Phelan/Lisa Edwards  
Wales Official  
UCU  
Unit 33, The Enterprise Centre  
Tondu  
BRIDGEND  
CF32 9BS**

**Tel: 01656 721951  
E-mail: [mphelan@ucu.org.uk](mailto:mphelan@ucu.org.uk)  
[ledwards@ucu.org.uk](mailto:ledwards@ucu.org.uk)**

## **UCU Wales response to the consultation on Higher and Further Education (Governance and Information) (Wales) Bill**

1. The University and College Union (UCU Wales) represents more than 7,000 academics, lecturers, trainers, instructors, researchers, managers, administrators, computer staff, librarians, and postgraduates in universities, colleges, adult education and training organisations across Wales.

2. UCU Wales is a politically autonomous but integral part of UCU, the largest post-school union in the world: a force for educators and education that employers and government cannot ignore.

3. UCU was formed on the 1<sup>st</sup> June 2006 by the amalgamation of two strong partners – the Association of University Teachers (AUT) and the National Association of Teachers in Further and Higher Education (NATFHE) – who shared a long history of defending and advancing educators’ employment and professional interests.

4. We welcome the opportunity to respond to the consultation on the Further and Higher Education (Governance and Information) (Wales) Bill.

5. The content of our evidence is based on the explanatory memorandum, the information we have received through formal briefings with civil servants and advice sought from counsel in regard to the impact that the legislation will have on nationally agreed pay scales and an All Wales contract. We are currently seeking further advice from counsel, regarding the legal process chosen by the civil servants.

5. During discussions on the white paper and from the advice UNISON and UCU sought in regard to the white paper (attached at appendix one) it became clear to us that the rationale for the bill as laid out in the Explanatory Memorandum, left key questions unanswered.

6. The memorandum at page 6 states

“any surpluses generated by colleges would be accounted for as Welsh Government funds; FEIs would be unable to retain a surplus in order to build reserves for future projects; and additional financial information and accounting requirements.”

7. The first question we find difficult to answer is why, when schools can have total reserves amounting to £67,269,000<sup>1</sup> for the financial year 2011/12 and remain in the public sector; do colleges need to return to NPISH classification to do the same thing? If schools, which are classified as public sector, are able to run surpluses, there does not appear to be an insurmountable problem. College

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<sup>1</sup> <https://statswales.wales.gov.uk/Catalogue/Local-Government/Finance/Revenue/Delegated-School-Outturn>

reserves for 2012 totalled £123,736,626. (appendix 3). UCU are concerned that the proposals set out in the Bill, allow for reserves to be diverted into the private sector. Money, which in our opinion, would be better utilised if it remained within the public sector and the control of the Welsh Government.

8. Secondly, why are the additional financial and accounting requirements so onerous as to require such a significant change to the FE sector as this bill will create?

9. And lastly, why do we not have sight of the draft regulations which will protect the significant assets which are currently, public sector assets?

10. We are concerned that the drive behind the Bill is more to do with pressures from the Treasury than problems regarding surpluses or the ability to borrow money. Discussions around the reclassification of colleges in England revealed that the ONS, in responding to a letter from Martin Doel of the AoC, stated that;

“the classification decision [to place colleges in the public sector] is for statistical purposes only. It introduces no new controls over borrowing by the FE sector, but merely reflects the powers that already exist.”

(appendix two para.6)

11. Therefore UCU question the need to implement a bill that seeks to reclassify FE, as it would appear that the “negative impacts for the FE sector” that have been attributed to reclassification of the sector to central government, will not be realised?

12. UCU Wales are fundamentally opposed to the proposal to enhance the autonomy and decision making abilities of Further Education Institutions (FEIs) in Wales and believe that the consequences of this bill have not been fully considered by the Welsh Government, nor will it be if the procedure chosen to introduce the legislation remains the same. In our opinion, should the proposal become legislation, we will see the slow privatisation of post 16 educational provision in Wales. It will not produce wholesale change overnight, but it will allow Principals to ‘privatise’ any part of the service. The consequences of which are likely to lead to a profit driven/target lead culture, focussed on “value for money”, which is not conducive to fostering quality education that puts the needs of students and the community at its heart, which from our perspective, is the key mission of Further Education.

13. We also believe that the continued marketisation of the sector will further erode the educational contribution and professionalism of teachers and lecturers; decisions will increasingly be based on managerial models rather than educational models. Already we have seen a shift in this culture since incorporation in 1992; students are no longer referred to as students, but as learners, customers or consumers, qualifications are now outcomes or output and the focus has been on how much output can be achieved in the shortest possible time at the least cost. This in our opinion may represent value for money, but it does not represent quality education. For the Welsh Government to truly be able to realise its vision of a world class education system that not only provides job opportunities, but also lifelong chances, improved health and

wellbeing and helps to tackle child poverty, we need to re-examine the proposals as set out in the Bill.

14. We agree with the First Minister in that,

"We want to ensure better life chances for our young people by helping them to achieve their potential. Education is fundamental to building a just, inclusive and fair society."

Education is the key to a just, inclusive and fair society. Already education is being rationed and funded based on age; the reality is that free education ends at 18. Affordable education and training after 18 and throughout life will be affected by privatisation of post 16 education in Wales, and is not the path Wales should follow.

15. UCU is undertaking research into the culture of managerialism and the erosion of educational professionalism and has found that increasingly, the views and commitment of teaching staff are not taken into account in institutional arrangements. The experience, knowledge and judgement of professional practitioners has been pushed aside by a target driven culture of audit and inspection, causing much damage to education, in its true sense. UCU wish to redress this balance.

16. UCU Wales' concerns regarding the privatisation of the FE sector are based on what we see happening in England., where we see examples of for-profit subsidiaries being set up with staff being transferred to private providers on inferior terms. There have also been problems associated with outsourcing, offshoring and sub-contracting. (See appendix two paras. 15 - 22). We do not wish to see this mirrored in Wales. The loss of public money to the private sector is not, in our opinion a good use of scarce resources. We would prefer to see such scarce resources remain in the public sector, for the purpose of funding FE provision. UCU already has evidence that the use of public-private partnerships has meant that the pressure to keep the cost of bids down, is leading colleges to cut staff costs, increase casualisation or transfer staff to cheaper contracts in order to be competitive.

17. The previous government placed additional funding within the sector to establish an all Wales pay scale for lecturers in Wales to provide pay parity with school teachers. The advice to schools from the education minister in England is to dismantle, for the good of the school, the current terms and conditions of school teachers. A fact that we believe will be replicated in colleges in Wales if the current bill is passed into legislation. We would also hope that the Welsh Government would not seek to support the culture of job insecurity associated with fixed term and hourly paid contracts.

18. With regard to the purpose of the Bill UCU Wales are concerned that the legislation that Welsh Government seeks, will not achieve the aim of reclassifying the FE Sector to NPISH. It states clearly in the memorandum that one of the risks of introducing the Bill is that,

"The legislation does not give the ONS Classification Committee the assurances needed that key steps have taken place to increase autonomy of FE colleges and

the reversal of the public sector categorisation for national account purposes fails.”

19. UCU question the efficacy of the Bill, if it’s “key powers” for ONS re-classification, have not yet been established as fit for purpose? We are currently awaiting advice from counsel on this matter.

20. UCU Wales believes that FE sector in Wales should remain in the public sector and that many of the successes of the past decade have resulted from the level of control the Welsh Government has used to persuade the sector to do its bidding.

21. UCU are concerned that , based on our experience of what is happening in England, the Bill is being driven by the policies of Westminster and the pressures of the Treasury to reduce the National debt. As this is not an issue for Wales, we question why it is necessary to follow this course of action.

Responses to the specific questions set by the committee are addressed below.

## **Consultation Questions**

### **General**

#### **1. The Explanatory Memorandum prepared by the Welsh Government describes the Bills main purposes in the following terms:**

“The ...Bill seeks to enhance the autonomy and decision making abilities of Further Education Institutions by removing and modifying existing legislative controls on them

The Bill also gives effect to the Welsh Government policy to allow data relevant to student grants and loans to be shared by Her Majesty’s Revenue & Customs (HMRC) with the Welsh Ministers and anyone to whom the Welsh Ministers delegate or transfer functions. The data sharing gateway is an integral part of a project to modernise the Student Finance Wales delivery service to simplify and create efficiencies in that service.”

#### **Is there a need for a Bill for these purposes? Please explain your answer.**

UCU question the need for the Bill, if the main objectives of the Bill are to remove and modify existing legislative controls in order to reverse the ONS classification from Central Government to NPISH.

UCU have concerns that removing and modifying existing legislative controls, will not be in the best interest of the learners or the wider community.

The legislation *could* result in the reversal, but there is a risk that it will not give the ONS Classification Committee the assurances needed to do so. Therefore it is questionable that there is a need for the Bill, if it is not guaranteed that it will achieve what it proposes to do.

**2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.**

As already stated, it is acknowledged in the Memorandum that the Bill will not necessarily result in reclassification by the ONS, which therefore would not deliver one of the stated objectives of the Bill. Thus the need to remove and modify existing legislative controls on FECs in order to achieve this aim, without the certainty of obtaining that objective, seems to be an unnecessary exercise, other than it having the potential to allow privatisation of the post 16 education sector.

**3. Are the sections of the Bill as drafted appropriate to bring about the purposes described above? If not, what changes need to be made to the Bill?**

We are awaiting advice from counsel on this matter

**4. How will the Bill change what organisations do currently and what impact will such changes have, if any?**

UCU are concerned that greater autonomy for FECs to make changes to their Instruments and Articles of Government, will enable colleges to determine the shape and size of their own governing bodies, with no guarantees that staff or student members will be included. It is important that *elected* members of the different staff groups and students retain places on governing bodies, to ensure that their interests are represented accurately. We would want to see the schedule amended to reflect representation from the academic staff and support staff, which is elected by the constituent bodies.

The ability of FECs to dissolve themselves, borrow funds and establish subsidiary arrangements without the consent of Welsh Ministers, provides the potential for FECs to dissolve themselves and set up as profit making enterprises.

There is an implicit assumption that the needs of the learners and of the community will be better met if there is less control from Welsh Ministers. UCU do not believe this to be the case. Further Education should remain in the Public Sector. The proposal to repeal restrictions and controls on FECs, raises concerns that this will open up post-16 education to privatisation. We believe that the best interest of our members, our students and the wider community are best met by a system that is funded and controlled by the public and is accountable to the citizens of Wales.

It is clear that through franchising and sub-contracting arrangements in the post 16 education and training sector in England, public money is being diverted into the for-profit private sector.

UCU would like to know what safeguards will be put in place to ensure that public money remains in the public sector? Why do we not have the draft

regulations tabled at the same time? The memorandum at section 24 on page seven states that the Bill makes provision for Regulations to prescribe the publication of the information, consultation requirements and the bodies to which property and rights can be transferred.

We are also very concerned that the introduction of the Bill as it stands will herald the disintegration of the National Pay Scales for Lecturers in FE and will impact adversely on the National Contract Negotiations. It is our understanding that Welsh Ministers would have no powers to prevent this from happening, should the Bill progress. Without the intervention of the Ministers the National Pay Scales would not have been agreed and the Contract Negotiations would not have progressed as far as they have done.

Disparity of pay and conditions amongst lecturers in Wales is likely to lead to the demoralisation of the workforce, increase difficulties in recruiting appropriately qualified staff and lead to a decline in the quality of educational provision, which we do not believe will serve the aim of the Welsh Government to "help everyone reach their potential, reduce inequality, and improve economic and social well-being".

We would also like to know what safeguards will be put in place to ensure that the National Pay Scale for FE Lecturers in Wales and a national contract for all staff in FE will be maintained and implemented in FECs?

**5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?**

Trade Union dissent and possible industrial action.

**6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales?**

We are awaiting advice from counsel on this matter.

**Powers to make subordinate legislation**

**7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (i.e. statutory instruments, including regulations, orders and directions)?**

**In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.**

We are awaiting advice from counsel on this matter.

**Financial Implications**

**8. What are your views on the financial implications of the Bill?**

**In answering this question you may wish to consider Part 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.**

As previously stated, UCU has concerns that the removal and modification of existing legislation on FECs, runs the risk of the privatisation of the post 16 education sector and the loss of public money to private enterprise. The cost of which could potentially be greater than the £77,348 per annum, estimated to maintain the current system.

UCU also seek to question why reclassification to central government, is considered a negative impact? Why is it not possible for college reserves to be returned to Welsh Government funds and redistributed to colleges where there is a need? We believe that with proper mechanisms in place, the Welsh Government would be able to retain any surpluses and re-invest them in Further Education. UCU Wales urge the Welsh Government to consider this option as a way of retaining control over the sector, which we believe is essential to the continued success of FE in Wales.

With regard to the HMRC-SLC verification of household income, it is agreed that an automated verification system would be preferable to a manual system, in terms of data sharing. It will hopefully simplify the process for students. However, there are concerns that information held by HMRC may not always accurately reflect the actual household income at the time of application, if HMRC the information used is relevant to the previous financial year.

UCU would like to know what safeguards will be put in place to ensure that students do not suffer detriment, if current household income differs from the information held by HMRC?

This would be particularly important for students from lower income households, where inadequate finance could cause unnecessary hardship and possibly deter some from entering Higher Education.

## **Other comments**

### **9. Are there any other comments you wish to make about specific sections of the Bill?**

UCU welcome the proposal that there will be an enhanced intervention power for the Welsh Minister, where a governing body is mismanaging its affairs; however if Estyn are proposing to possibly increase their inspection cycle up to nine years, the Minister may not be informed of such mismanagement early enough for intervention to be effective?

Section 25 of the memorandum makes reference to the "repeal of the requirement for Welsh Ministers to have an intervention policy", which seems to contradict the proposal that they will have enhanced intervention powers

UCU would like to know what mechanisms will be put in place to monitor appropriate management of college affairs.



UCU are concerned that enhancing the autonomy and decision making abilities of FEIs, will not necessarily benefit the needs of the learners and the local community, as there is the potential for the needs of shareholders to outweigh the needs of education.

It is the view of UCU that since incorporation there has been an increase in the marketisation of the education system, alongside this the scope of professional educationalists to make their own judgements has become more and more limited. Focus on productivity and quality assurance policies has eroded the focus on the holistic education of the individual.

UCU would welcome the opportunity to explore this issue further with Welsh Government Ministers so that we can work towards a truly first class education system in Wales that not only prepares its citizens for employment, but also for life, regardless of their age or financial circumstances.

**IN THE MATTER OF THE WELSH GOVERNMENT'S WHITE PAPER  
ON THE FURTHER AND HIGHER EDUCATION (WALES) BILL**

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**OPINION**  
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*introduction*

1. I am asked to advise the University and College Union (“UCU”) on the Welsh Government’s proposal, set out in its White Paper, ‘Further and Higher Education Wales Bill’, to de-regulate further education institutions (“FEIs”) in Wales<sup>1</sup>. In October 2010, the Office for National Statistics (“ONS”) decided to change the classification of FEIs (for public accounts purposes) from “not for profit institutions serving households” to “central government”. In May 2012, ONS re-classified FEIs in England after the Education Act 2011 (“the 2011 Act”) came into force, but ONS did not re-classify FEIs in Wales.
2. One explicit aim of the Welsh Government’s proposal is to counter the effect the decision which ONS made in October 2010, as it affects FEIs in Wales<sup>2</sup>. The aim is to decrease the control exercised by the Welsh Government over FEIs, in the hope that this will ensure that they are classified once more as NPISHs. At the same, time, however, I am told that the Minister for Education and Skills has been advised that the de-regulation of FEIs will not prevent the Welsh Government from meeting its manifesto commitments in this field. There are two: to “ensure parity of esteem between college lecturers and school teaching staff by maintaining the current link between their pay and conditions” and to “introduce an all-Wales contract for FE lecturers”<sup>3</sup>.
3. I am asked to advise whether I agree that these three aims (de-regulation, re-classification, and continuing control of employment terms of staff) are compatible. There are really 3 issues: whether
  - a. the changes proposed in the White Paper are likely to result in the re-classification

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<sup>1</sup>As far as I can tell, the White Paper is not accompanied by a draft Bill.

<sup>2</sup>See, for example, the “Overview” at the start of the White Paper, and the third paragraph of the Ministerial foreword.

<sup>3</sup>Welsh Labour Manifesto 2011, page 37, second and third bullets.

- of FEIs in Wales; and
  - b. the proposed legislation is inconsistent with continuing controls over pay and conditions of staff; and
  - c. if controls over pay and conditions of staff are kept, those might or would affect re-classification.
4. In this Opinion I will consider:
- a. the instruments which deal with classification,
  - b. ONS's general approach to classification,
  - c. ONS's classification of FEIs,
  - d. the relevant legislative provisions,
  - e. the White Paper,
  - f. UCU's response, and
  - g. the issue on which I am asked to advise.

*a. the instruments which deal with classification*

*(1) the European System of National and Regional Accounts 1995*

5. The European System of National and Regional Accounts 1995 ("ESA 95") is "an internationally compatible accounting framework for a systematic and detailed description of a total economy"<sup>4</sup>. It was adopted in a Council Regulation dated 25 June 2006 (Council Regulation 2223/96), and has been amended since. ESA 95 is a long document, with many classifications and sub-classifications.
6. The system recognises five types of unit: non-financial corporations, financial corporations, general government, households, and non-profit institutions serving households ("NPISHs") (ESA 95, paragraph 1.28). The sector "non-financial corporations" includes public non-financial corporations (S1101). These are "all non-financial corporations that are subject to control (see paragraph 2.26) by government units" (ESA 95, paragraph 2.28).
7. Paragraph 2.26 of ESA 95 provides that "Control over a corporation is defined as the ability to determine general corporate policy by choosing appropriate directors, if

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<sup>4</sup>ESA 95, paragraph 1.01.

necessary. A single institutional unit (...a government unit) secures control by owning more than half the voting shares, or otherwise controlling more than half the shareholders' voting power. In addition, government secures control over a corporation as a result of special legislation decree or regulation which empowers the government to determine corporate policy or to appoint the directors.”

8. The key distinction for current purposes is between the general government sector (S.13) and NPISHs ( S.15). “Central government” is defined as including “all institutional units which are other non-market producers (see paragraph 3.26<sup>5</sup>) whose output is intended for individual and collective consumption, and mainly financed by compulsory payments made by units belonging to other sectors, and/or all institutional units principally engaged in the redistribution of national income and wealth”<sup>6</sup>. The “institutional units” included in sector 13 include “non-profit institutions recognised as independent legal entities which are other non-market producers and which are controlled and mainly financed by general government”<sup>7</sup>.
9. A further category is the private non-profit institution (“NPI”). A NPI is “a legal or social entity created for the purpose of producing goods and services whose status does not permit them to be a source of income, profit or other financial gains for the units that establish, control, or finance them....any surpluses they make cannot be appropriated by other institutional units” (ESA 95, paragraph 3.31). “If less than 50% of production costs are covered by sales, an institutional unit is an other non-market producer and classified to the sector NPISH. But other non-market NPIs that are controlled and mainly financed by general government are classified to the general government sector” (ibid, paragraph 3.32).
10. Paragraph 2.87 of ESA 95 defines NPISHs (S.15). They are NPIs which are separate legal

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<sup>5</sup>ESA 95 distinguishes between market output (P11), output produced for own final use (P12) and other non-market output (P13) (ESA 95, paragraph 3.16. “Other non-market output” covers output that is provided free, or at prices which are not significantly different, to other units” (ibid, paragraph 3.23). An “other non-market producers” are “local KAU or institutional or institutional units whose major part of output is provided free or at economically insignificant prices” (ibid, paragraph 3.26). A ‘KAU’ is a “kind-of-activity-unit” (ibid, list of abbreviations and acronyms).

<sup>6</sup>Ibid, paragraph 2.68.

<sup>7</sup>Ibid, paragraph 2.69.b).

entities, which serve households and which are private other non-market producers. “Their principle resources, apart from those derived from occasional sales, come mainly from voluntary contributions, in cash or kind from households in their capacity as consumers, from payments made by general governments, and from property income”. S.15 includes a list of the main NPISHs; trade unions, professional or learned societies, consumers’ associations, political parties, churches or religious societies, including those financed, but not controlled by, governments) social, recreational and sports clubs, charities, relief and aid organisations financed by voluntary transfers in cash or in kind from other institutional units. Charities which serve non-resident units are included, and entities “where membership gives right to a predetermined set of goods and services” are excluded.

11. Schools are dealt with specifically in paragraph 3.36 of ESA 95. A school mainly financed by payments from government which are linked to the number of pupils, is, by implication, an other non-market producer. If it is a public producer, that is, “when it is mainly financed and controlled by the government, it should be classified in the sector general government”.

(2) *Eurostat’s Manual on Government Deficit and Debt (“MGDD”)*

12. Eurostat’s Manual on Government Deficit and Debt (“MGDD”) provides further guidance on classification. At paragraph I.2.3, it deals with the “Concept of public institutional unit”. It says,

**“A public producer is a producer that is controlled by general government. All other producers are private producers.**

**• Public producers are found either in the corporations’ sectors (if they are market) or in the general government sector (if they are non-market or if they are not institutional units).**

**• Control is defined as the ability to determine the general (corporate) policy or programme of an institutional unit by appointing appropriate directors or managers, if necessary. Control may be exercised by government directly or indirectly (through a public holding corporation for example).**

**• Owning more than half the shares of a corporation is a sufficient, but not a necessary, condition for control. Government can also exercise control over a corporation through special legislation, decree or regulation that empowers the government to determine corporate policy or to appoint the directors.**

**• This definition of control is also applicable to NPIs. But in cases where the criteria set out above are not formally satisfied, or where special legislation is lacking, a more**

**operational definition of control is necessary. The government secures the control of a unit when it influences the management of this specific unit, independently of general supervision exercised on all similar units. Public intervention in the form of general regulations applicable to all units working in the same activity should not be considered as relevant when deciding whether the government holds control over an individual unit.**

**Control in the example of schools**

**· General government controls a school if its approval is needed to create new classes, make significant investments in gross fixed capital formation, borrow or if it can prevent the school from ending its relationship with government.**

**· However, general government does not control the unit if it just finances the school or supervises the quality of education the school has to provide (fixing general programmes, or the maximum number of pupils per class)."**

*b. ONS's general approach to classification*

*(1) ONS's classification process*

13. In January 2012, ONS issued a paper<sup>8</sup> on its classification process. Paragraphs 21-24 are as follows:

**"21. The guidance is extensive but two main stages can be identified when classifying an entity to an institutional sector. The first involves a decision on whether the entity is within the public or private sectors, and the second a decision on whether it is a market or non-market producer.**

**22. In summary, the difference between the public and private sectors is determined by where control lies, rather than by ownership or whether or not the entity is publicly financed. International guidance defines control as the ability to determine general corporate policy. For example, this control can be exercised through the appointment of directors, control of over half of the shareholders' voting power, through special legislation or decree, or through regulation.**

**23. As a result NACC will examine an entity to see whether there are any factors that enable any part of the public sector, either individually or collectively, to determine the general corporate policy of the entity. This includes recognition that government, or other sectors, may also control a unit through contractual arrangements. If this control is established, the entity is classified to the public sector.**

**24. Having decided whether an entity is part of the public or private sectors, the second important aspect for sector classification is to determine whether it is a market or non-market entity. Public sector market entities are classified as public corporations (for example, Royal Mail and Manchester Airport Group); public sector non-market entities are classified in the general government sector (for example, government departments**

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<sup>8</sup>UK National Accounts sector and transaction classification: A summary of the classification process (ONS, January 2012), page 6.

**and the BBC). General government is then subdivided into sub-sectors, including central government, state government and local government. Private sector market entities are classified as private corporations, and private sector non-market entities are generally classified to a sector known as Non-profit Institutions Providing Services to Households.”**

*(2) public control*

14. In September 2012, ONS sent an email to UCU. This referred to ESA 95 and to MGDD (both in general terms, to paragraphs 2.26 and 1.2.3 specifically). It went on to say that ‘general corporate policy’ is not defined anywhere in MGDD, but that ONS uses 14 indicators of public control. These are whether the public sector can
- a. determine aspects of how the body delivers its outputs;
  - b. have a final say in the sale/acquisition of fixed assets;
  - c. take a share of proceeds of asset disposals;
  - d. close the body;
  - e. prevent the body from ending its relationship with the public sector;
  - f. veto any takeover (except in the case of an conventional special share);
  - g. change the constitution of the body, or veto changes to it;
  - h. decide what sort of financial transactions the body can undertake, or limit them;
  - i. prevent the body from receiving certain types of income from other sources;
  - j. exert numerous minor controls over how the body is run;
  - k. exert financial control as part of a general system of controlling public expenditure;
  - l. control dividend policy;
  - m. set pay rates;
  - n. (for non-regulatory reasons) approve acquisitions.
15. The email went on to say that the presence of any of these can be enough to make a body part of the public sector, unless the power is considered to be a reserve power only. ONS’s view was that the powers of the Welsh Ministers over borrowing satisfied conditions h. and k., and their powers to interfere with governance arrangements, and to merge and close bodies met conditions d. and g.. In any case, MGDD also provides specific guidance on schools (which, as FE Corporations are similar to schools, applies by analogy). Paragraph 1.2.3 of MGDD is then quoted.

*c. ONS’s classification of FEIs*

*(1) October 2010*

16. On 13 October 2010, ONS issued a paper called “Classification of Sixth Form and Further Education Institutions” (“the 2010 paper”). This exercise was prompted by the creation of sixth form college corporations by the Apprenticeships, Skills, Children and Learning Act 2009. It led to a review of the classification of FEIs in England and Wales. The executive summary reports that ONS used MGDD, which provides guidance on classification. ONS decided that FEIs should be re-classified from NPISH to central government. The key factor in this decision was “public sector powers over the various institutions. Most importantly [FEIs] require public sector approval for borrowing....” ONS relied on the passage in the MGDD, quoted in paragraph 12, above.
  
17. In section 2 of the 2010 paper, ONS explained that it had, from 1993, classified FEIs as NPISHs. This decision pre-dated the issue of MGDD. Before that, it had classified them in the local authority sector. In section 3 of the 2010 paper, ONS says that it has considered the legislative basis of FEIs, and that a key factor has been the MGDD, which is said to imply that an institution should be classified to the sector which controls its borrowing. Section 19 of the Further and Higher Education Act 1993 made borrowing by FEIs subject to the consent of “the appropriate council”: and those bodies were classified by ONS as Central Government.

*(2) May 2012*

18. On 31 May 2012, ONS issued a further paper (“the 2012 paper”), announcing its decision to re-classify FEIs in England from the General Government to the NPISH sector. This was prompted by the passage of the Education Act 2011 (“the 2011 Act”). The executive summary describes the 2010 decision as being based on “the discovery of public sector controls” over [FEIs], sufficient to result in ONS concluding that the public sector had control over these bodies’ general corporate policy”. ONS’s assessment of the changes made by the 2011 Act was that they were “sufficient to remove public sector control”. On page 4 of the 2012 paper, ONS explains that the reclassification in 2010 reflected “public sector controls held by the public sector over [FEIs’] general corporate policy.....A number of different controls were identified, but one of the most important related to borrowing.....Other public sector controls included controls over things like the governance arrangements and the public sector also had the ability to close or to merge [FEIs]”.



19. The 2012 paper then describes the provisions of the 2011 Act. It removed the requirement for consent to borrow (“One of the main changes”). It also removed the Secretary of State’s power to modify, revoke or replace instruments and articles of FEIs in England, and transferred it to the FEIs. The Secretary of State no longer has a right to dissolve FEIs, or to appoint up to two additional members of a governing body. Some controls remain, but they are limited to situations where an institution is being mismanaged, or performing badly. In such circumstances the Secretary of State can replace the governing body, or give directions to the governors. ONS sees these powers as reserve, or ‘step-in’ powers. They do not provide the public sector with control over the general corporate policy of FEIs in England. If the powers were exercised, then that would result in the public sector taking control of an FEI.

*d. the relevant legislative provisions*

20. The 2011 Act amended the Further and Higher Education Act 1992 (“the 1992 Act”), which is the enactment which applies to FEIs in England and in Wales. Several of the provisions differ as between England and Wales, and it can be deduced from ONS’s current classification of FEIs in England and Wales that those differences account for the different classifications.
21. Section 19 is entitled ‘Supplementary powers of further education corporations’<sup>9</sup>. Section 19(4) confers powers on FEIs to
- a. form, participate in forming or invest in a company,
  - b. to form, participate in forming or otherwise become a member of a charitable incorporated organisation,
  - c. to borrow money, to grant a mortgage, charge or security,
  - d. to invest surpluses,
  - e. to accept gifts and
  - f. to do things which are incidental to the carrying on of an educational institution.
22. The powers listed in paragraphs 21 a. and b. are limited as respects FEIs in Wales. They cannot be exercised for the purposes of conducting an educational institution, or investing in a company which conducts an educational institution, or becoming a member of a

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<sup>9</sup>In this part of this Opinion, when I use the acronym ‘FEI’, it refers to further a education corporation.

charitable incorporated organisation, unless the Welsh Ministers decide otherwise, nor can they be exercised for the purpose of providing education if the provision is secured wholly or partly by funds provided by the National Assembly for Wales, unless it decides otherwise. The power listed at paragraph 21.c may not be exercised by a FEI in Wales unless the Welsh Ministers consent.

23. The statutory provisions about instruments and articles of government are different in England and Wales. Instruments of government in England must comply with Part 2 of Schedule 4 to the 1992 Act, and apart from that, may make “such other provision as may be necessary or desirable”. In Wales, they must comply with Part 3 of Schedule 4, and subject to that, may make any provision which is authorised by Part 3, and such other provision as may be necessary or desirable.
24. In England, an instrument must specify basic things, such as how many members a corporation has, eligibility for membership, that the staff and students must be included (though it is not specified how), and how members are to be appointed. It must make provisions about procedures, and, in particular, must specify how the FEI may resolve for its dissolution and the transfer of its property, rights and liabilities. An instrument must also provide for there to be a chief executive, and a clerk, and for their responsibilities. It must require the FEI to publish its arrangements for consulting staff and students. It must also permit the FEI to change its name, with the consent of the Secretary of State, and must specify how the FEI may change or replace the instrument and articles of government. The instrument must prevent the FEI from making changes which would result in its ceasing to be a charity.
25. The provisions which apply in Wales are more detailed and prescriptive. By paragraph 14, an instrument must take into account the power of the Welsh Ministers, in section 39 of the Learning and Skills Act 2000 (“the 2000 Act”), to appoint up to two people to be a governor of a FEI. An instrument may provide for a person to be nominated as governor by some other body, including a body nominated by the Welsh Ministers. There is no provision for an instrument to provide for the dissolution of the FEI.
26. By section 21, on the date when it is established, the instrument and articles of government of an FEI must be such as is prescribed in regulations. Section 22 of the 1992 Act applies

in England. Section 22 gives an FEI in England a power to modify or replace its instrument of government. But in Wales, by section 22ZA, any draft replacement or modification of an instrument of government produced by an FEI has to be approved by the Welsh Ministers. The Welsh Ministers also have power, of their own motion, to modify, revoke or replace an instrument of government. The Welsh Ministers may also direct FEIs in Wales to modify, replace or revoke their articles of government, or to secure that any bye-laws made under the instrument of government are modified, replaced or revoked.

27. By section 22A, a further education corporation must be a charity.
28. In England, if a FEI proposes to dissolve itself, it must publish details of its proposal, and consult on it (section 27). If having consulted and taken account of consultees' views, a FEI in England decides to dissolve itself, it must notify the Secretary of State, and it is dissolved on the dissolution date (section 27A). The FEI may transfer its property, rights and liabilities to such body as may be prescribed. If the transferee is not a charity established for exclusively educational purposes, any property transferred must be transferred for use for exclusively educational charitable purposes (section 27B).
29. In Wales, the Welsh Ministers may by order provide for the dissolution of a FEI, and for the transfer of its property, rights and liabilities to any person appearing to the Welsh Ministers to be wholly or mainly engaged in the provision of educational facilities or services, or any body corporate established for purposes which include the provision of such facilities or services. The Welsh Ministers may transfer such property rights and liabilities to the higher education funding council. If the recipient is not a charity, the transfer must be on trust (as in section 27B).
30. Sections 51 and 52 enable a local authority in England, and the Welsh Ministers in Wales, to require the governing body of a FEI to provide education to a named person or persons. The accounts of a FEI are open to inspection by the Comptroller and Auditor General (section 53). Governing bodies must provide information as specified in section 54.
31. In England, the Secretary of State may intervene if the governing body of a FEI is mismanaging its affairs, has failed to discharge any legislative duty, have acted or are

proposing to act unreasonably in the exercise of any legislative power or duty, or if the FEI is performing significantly less well than it might be expected to, or is failing, or likely to fail, to give an acceptable standard of education or training (section 56A)(1). The Secretary of State may remove some or all of the members of the governing body, or appoint new members, or give directions (section 56A(6)). Those include a direction to the governing body make a resolution to dissolve itself. The Secretary of State may not direct a governing body to dismiss a member of staff.

32. In Wales, by section 57, the Welsh Ministers are given powers to intervene in similar circumstances. They must intervene by order, but their powers of intervention are similar to those of the Secretary of State, except that they cannot direct a governing body to dissolve itself. Although the Welsh Ministers may not direct a governing body to dismiss a member of staff, they may direct a governing body to “secure that the procedures applicable to the consideration of the case for dismissal of a member of staff are given effect to”. The Welsh Ministers must publish their policy about the exercise of their intervention powers (section 57A). They must have regard to it when exercising, or considering whether to exercise, their powers of intervention.
33. Section 35 of the 2000 Act enables the Welsh Ministers to impose conditions on the provision of money which include access to a body’s accounts, documents, “computers and associated apparatus and material”, a requirement to provide information, to charge fees by reference to specified criteria, to make awards by reference to specified criteria, to recover amounts from learners or employers, to make the provision specified in a report of an assessment made under section 140 (assessments relating to learning difficulties).

*e. funding arrangements*

34. It seems that there are two relevant documents, the Financial Memorandum between the Welsh Assembly Government<sup>10</sup>, Further Education Institutions and Higher Education Institutions providing further education in Wales (“the FM”), and “Further Education Institutions’ (FEIs) Conditions of Funding -2012/13” (“the conditions”). The first is quite old, but the second relates to the current year. Paragraph 1 of the conditions refers to the FM. Paragraph 7 of the conditions provides a link to the FM. Paragraph 1 of the

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<sup>10</sup>As it then was.

conditions makes clear that there are other terms and conditions in the FM<sup>11</sup> which apply to FEIs. Paragraph 2 says that the Welsh Government may also publish “guides, circulars, codes of practice, policies, procedures, bulletins, manuals, directions and the like” which will apply to institutions.

*(1) the financial memorandum*

35. The FM was issued by the Welsh Assembly Government (as it then was) in the exercise of its powers under section 35 of the 2000 Act. It is a very detailed document. There are sections on financial accountability, allocation of funds, use of funds, payment of funds, repayment of funds, financial management, estate and equipment management, borrowing and financial commitments, financial statements, contracts and other services, severance payments to senior staff, guarantees and indemnities, compliance with the AM, and revision. The conditions in the FM are a way of exerting influence over FEIs, as any funding which has been provisionally allocated may be adjusted if a FEI does not comply with the conditions of funding (FM, paragraph 6.c).
36. Paragraph 15 imposes a duty on the Principal of a FEI to inform the Welsh Assembly Government in writing of any decision or policy of the governing body which he believes is incompatible with the terms and conditions of the FM. If the Welsh Assembly Government has serious concerns about the FEI’s financial affairs, it can intervene (paragraph 16). The FEI must use earmarked funds for the purposes for which they have been provided (paragraph 21). Misuse must be reported as soon as the FEI becomes aware of it (paragraph 23).
37. The governing body is required to keep the FEI solvent (paragraph 31). There are requirements to report financial matters to the Welsh Assembly Government. The FEI must manage and develop its estate having regard to guidance issued from time to time by the Welsh Assembly Government (paragraph 38). Certain proposed transactions must be reported to the Welsh Assembly Government (paragraph 43). Where money provided by the Welsh Assembly Government has been used in respect of an interest in land, the prior written consent of the Welsh Assembly Government is required for any transaction involving that land, and if land is disposed of, all or part of the proceeds must be paid to

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<sup>11</sup>They are referred to as “general conditions” in paragraph 4 of the FM.

the Welsh Assembly Government (paragraph 45).

38. Paragraphs 47-52 deal with borrowing. Borrowing must meet specific requirements, whether or not consent is needed for it (paragraph 47). Consent is needed for borrowing over a certain limit (paragraph 49). FEIs must have the consent of the Welsh Assembly Government before leasing property or land, and the transaction must satisfy the conditions in paragraph 50 (paragraph 52). All financial statements must comply with the requirements in paragraphs 53-55. The FEI's records and books must be made available to inspection by the Welsh Assembly Government's audit service and the Wales Audit Office (paragraphs 58 and 59). The FEI must provide the Welsh Assembly Government with such information as it may require from time to time (paragraph 60).
39. Paragraph 61 states that the Welsh Assembly Government may from time to time issue guidance about the matters which the FEI is required to report to it, and it is a requirement of the FM that the FEI comply with such guidance. It is also a requirement that the FEI comply with any guidance issued by the Welsh Assembly Government about severance payments to senior staff (paragraph 64). Paragraph 65 prevents the FEI from giving indemnities and similar undertakings otherwise than in the normal course of business. All members of the governing body must be provided with copies of the FM and be trained about it, and the FEI must provide an annual report on the FEI's compliance with the FM (paragraph 66). Annex A to the FM lists the matters for which the consent of the Welsh Assembly Government is required, and Annex B the matters which must be notified to the Welsh Assembly Government. Finally, Annex C sets out the circumstances in which the FEI may retain proceeds, of sale, rent, or other consideration, or part of it.

*(2) the funding conditions*

40. The conditions are detailed. They contain 86 paragraphs. The conditions and the FM are not the only documents to which FEIs are subject. Both the conditions and the FM refer to many other documents produced by the Welsh Government or by the Welsh Ministers, such as guidance and plans, which FEIs are either obliged to follow, or to take into account.
41. They state that recurrent funding is subject to the general conditions in the FM (paragraph 5). Paragraph 5 refers to the targets, set out in Annex A, which are set by the Welsh

Government. The funding provided is provisional and Annex B sets out “the planned deployment” of the funded units (paragraph 6). Funding and targets may be adjusted in the light, among other things, of non-compliance with funding conditions (paragraph 7, third bullet). Capital funding is subject to such separate conditions as the Welsh Ministers may determine (paragraph 4). Funding must be spent mostly on providing education, and the FEI’s provision of education must be consistent with the Minister’s further education planning priorities and with the Welsh Government’s FEI planning guidance (paragraph 10).

42. The FEI must ensure that it does not use money provided by the Welsh Government to undermine provision, current or planned, by other FEIs or schools in its area. Where provision duplicates the provision at another FEI, the Welsh Government may require evidence of collaboration between institutions (paragraph 11). Services funded by the Welsh Government must be provided in a non-discriminatory way, and users’ satisfaction rates must be monitored. The FEI must promote equality of opportunity for all (paragraph 13). The FEI must comply with the Welsh Government’s code of practice about health and safety (paragraph 14). The Welsh Government’s consent is required for any arrangement by which another entity provides services on the FEI’s behalf using money provided by the Welsh Government (paragraph 16).
43. The FEI must assess learners properly before they are recruited (paragraph 19). Paragraphs 20-22 deal with the quality of the education to be provided by the FEI. The FEI must submit an annual self-assessments and a quality development plan complying with guidance produced by the Welsh Government. Progress must be reviewed at least three times a year, and all documents made available to the Welsh Government on request (paragraph 22). Paragraphs 23-35 deal with basic skills. Paragraphs 28-48 deal with specific funding allocations.
44. Paragraphs 49-58 are “Further conditions of funding”. These include a requirement to “honour the National Pay Agreement to ensure that the pay parity achieved is maintained. Non-compliance with the National Pay Agreement will result in the reclaim of 1.5% of the total provisional allocation.” (paragraph 49). The FEI must comply with requirements about the appointment of its clerk (paragraph 50).

45. It must produce an “Individualised Student Learning Agreement” for students (paragraph 51) and must comply with the the Equality Act 2010 (paragraph 52). It must publish, and comply with, its disability statement (paragraph 53). It must not charge a tuition fee to specified students (paragraphs 54 and 55). It must take account of HM Government’s principles on public sector pay, and disclose salaries of senior staff (paragraph 56). It must comply with the Nolan principles, and compile a publicly available register of interests (paragraph 57). Paragraphs 59-62 make detailed provision about European Programmes.
46. By paragraph 65, the FEI must obtain the prior written consent of the Welsh Ministers if it wishes to transfer any of its provision during the funding period. Paragraphs 66 and 67 impose obligations to keep information and to make it available to the Welsh Ministers. Funding can be withheld if information is not provided. Paragraphs 68-72 deal with auditing arrangements, and 73-85 with the monitoring of performance, and funding adjustments. Paragraph 86 is an interesting clause in which the FEI “acknowledges” that nothing in the conditions is to “prejudice, fetter, or affect” the functions of the Welsh Ministers.

*f. the White Paper*

47. The Welsh Government is concerned about the consequences of ONS’s decision to re-classify FEIs in October 2010, which still applies in Wales, because there has been no legislation in Wales which addresses that decision. It is keen to reverse that decision<sup>12</sup>. The White Paper identifies “four key areas” as “indicative of public control”. These are the extent to which
  - a. an FEI
    - i. can change its instrument and articles of government,
    - ii. dissolve itself, and
    - iii. borrow independently, and
  - b. the Welsh Government can intervene in its affairs<sup>13</sup>.
48. The “process of making changes to.... Instrument and Articles will cease to be the responsibility of the Welsh Government”. So FEIs will be given greater freedom to decide

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<sup>12</sup>The White Paper, page 2, penultimate paragraph, *ibid*, pages 5-6.

<sup>13</sup>The White Paper, section 3.3, page 6.



what is in their constitutional documents, but the Welsh Government will be able to require “elements of governance that will enable colleges to properly constitute and conduct themselves”<sup>14</sup>. The Welsh Government will continue to insist that there must be places on governing bodies for “learners and staff”. There will be other compulsory provisions. The White Paper observes that “For most colleges this change will make no difference”.

49. But colleges must ensure that their constitutions contain a provision enabling colleges to dissolve themselves. This new power will be subject to ‘safeguards’. The new legislation will give power to the Welsh Ministers to make regulations prescribing how colleges may be dissolved and to which bodies FEIs can transfer their assets. The Welsh Ministers will have a power to direct FEIs to dissolve themselves (but only in the exercise of their default powers: see paragraph 52, below).
50. FEIs will also be required to ensure that they do not make any changes which would lead to their losing their charitable status. The Welsh Government will devise a Code of Governance “to assist colleges”. The contents of the initial instrument and articles of government will still be prescribed in regulations.
51. The current requirement that an FEI obtains the consent of the Welsh Government before borrowing any money will be removed<sup>15</sup>.
52. The Welsh Ministers will retain powers to intervene in the affairs of FEIs to “tackle failure”. These will be exercisable if a governing body is mis-managing the FEI, if a governing body failed to discharge, or has acted, or is proposing to act, unreasonably in the discharge of, any duty imposed by legislation, or the FEI’s performance is significantly poor. In such circumstances, the Welsh Ministers will have power to remove members of the governing body, appoint new members of the governing body if there are vacancies, require a governing body to make ‘collaboration arrangements’ and/or direct a governing body to dissolve itself<sup>16</sup>. The existing power of the Welsh Ministers to appoint two members to a governing body will be removed, as will the prohibition preventing FEIs

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<sup>14</sup>Ibid, first paragraph, page 7.

<sup>15</sup>The White Paper, page 8.

<sup>16</sup>Ibid, pages 8-9.

from using a subsidiary, such as a limited company, to discharge functions.

53. The White Paper says that these proposals “capture key powers that need to be reformed to help enable colleges to be categorised as NPISH releasing them from unnecessary burdens”. It says that the Welsh Government will consider whether there are other restrictions which “are no longer considered necessary, do not add value, and/or act as a barrier to the NPISH classification being re-applied to colleges.” The White Paper goes on to say, “Where appropriate the Welsh Government will develop regulations to assist colleges to navigate their increased freedoms in the most effective way....<sup>17</sup>”.
54. The White Paper is silent about existing funding arrangements, and the extent to which it is proposed either, to modify these in line with the legislative changes which are proposed, or to continue to use these to exert control over FEIs. Nor does the White Paper suggest that the Welsh Government intends to end the control of the Welsh Ministers over FEIs’ use of companies and charitable incorporated organisations (see paragraph 22, above).

*g. the response of the UCU*

55. The UCU considers that the consequences of the proposals by the Welsh Ministers have not been thought through. It believes that the “further education sector belongs in the public sector”. The proposals are contrary to Welsh Labour’s 2011 election manifesto, which said that Welsh Labour sees FEIs as “public assets which belong to their local communities and its community of staff and learners”. The UCU refers to powers in the Government of Wales Act 1998. UCU thinks that if the FE sector becomes NPISH, the Welsh Government might not be able to exert its current level of financial control over the sector, and maintain nationally agreed pay rates, and the national contract (once that has been agreed). The UCU points out that the condition in the funding letter (clause 28) is the means by which the Welsh Ministers currently impose a requirement to comply with national agreement.
56. The UCU questions whether the Welsh Government needs to de-regulate FEIs in a way which could threaten national agreements. The UCU goes on to say that if that control is lost, then Welsh Labour are reneging on manifesto commitment to “ensure parity of esteem

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<sup>17</sup>Ibid, page 9.

between school teachers and college lecturers by maintaining the current link between their pay and conditions”. The UCU also refers to a commitment to introduce an “all-Wales contract for FE lecturers”. The UCU’s view is that if more autonomy is to be granted, then safeguards in the legislation are needed to ensure that national agreements are adhered to.

*h. discussion*

57. In order to answer the question in my instructions, I will consider whether, if ONS were to apply its approach to classification to FEIs in Wales after the legislation which is sketched out in the White Paper is enacted, it would be likely to re-classify FEIs in Wales. It is not possible to give a categoric answer to that question, however, for three reasons.
- a. In the absence of a draft Bill, and drafts of the secondary legislation and any guidance to be made under it, the precise details of the proposed legislation are unclear.
  - b. Nor is it clear to what extent the Welsh Ministers will continue to impose conditions on funding which are similar to those in the FM and in the conditions.
  - c. In any event, it is clear from ONS’s September 2012 email that the classification of an institution is an assessment which involves many factors, so that, in some cases, there may well not be one right, or wrong way, to classify an institution.
58. However, some of the proposals in the White Paper resemble provisions in the legislation which now applies in England. Unless ONS changes its mind about the classification of FEIs in England, these will not prevent, and may well promote, a decision to re-classify FEIs in Wales. I will consider these in turn. I will then consider, to the extent that I am able, how ONS might then approach the overall picture.

*(1) analysis of the proposals*

59. The White Paper proposes that FEIs will have greater freedom to decide the contents of their instrument of government. If that freedom is as great as the freedom given to FEIs in England by the 1992 Act, then that will not prevent, and may contribute to, reclassification. However, much depends on the scope of the requirements which will still be specified in legislation. The requirement that there continue to be places on governing bodies for “learners and staff”, if it is similar to the requirement which applies in England, will not prevent re-classification. It is clear that there will be other compulsory provisions, and how these affect re-classification will depend on what those are. The White Paper

says that the contents of the initial instrument and articles of government will still be prescribed in regulations. Again, much will depend on what is prescribed, and on the extent to which FEIs are able to change what is prescribed. If the proposals in the White Paper are taken at face value, the initial prescription in regulations should not prevent re-classification, so long as FEIs are able, as the White Paper suggests they will be, to change provisions as prescribed .

60. The proposal that FEIs must have a provision in their instrument of government which enables them to dissolve themselves will align FEIs in Wales with FEIs in England, and will promote a decision to re-classify. However, the White Paper says that this power will be subject to ‘safeguards’. It is clear that Welsh Ministers will have power to make regulations prescribing how colleges may be dissolved and to which bodies FEIs can transfer their assets, and a power to direct an FEI to dissolve itself. Whether this change will promote re-classification depends on what those safeguards are, and on the extent to which they prevent FEIs in Wales from ending their relationship with the Welsh Government, for example by dissolving themselves and transferring their assets to a private sector body. With the qualification that a transferee body must be a charity, or, if not, that any assets are transferred on trust, FEIs in England now have that freedom. Moreover, the White Paper does not suggest that the Welsh Ministers intend to relax their give up their existing statutory control over the use by FEIs of companies and charitable incorporated organisations.
61. The proposal that FEIs will be required not to make any changes which would lead to their losing their charitable status will not prevent re-classification. This is similar to the legislation which applies in England. However, the proposal that the Welsh Government will produce a Code of Governance “to assist colleges” may be problematic, depending on the extent to which it seeks to dictate corporate policy and on the sanctions, if any, for non-compliance.
62. The current requirement that an FEI obtains the consent of the Welsh Government before borrowing any money will be removed. This will put FEIs in Wales in a similar position to FEIs in England, and will promote re-classification. The Welsh Ministers’ proposed powers of intervention seem to be similar to those of the Secretary of State in England, so will not prevent re-classification. The proposal to remove the existing power of the Welsh

Ministers to appoint two members to a governing body will promote re-classification, as will the removal of provision which prevents FEIs from using a subsidiary, such as a limited company, to discharge their functions.

*(2) how will ONS approach the overall picture?*

63. The White Paper identifies the main statutory obstacles to re-classification, and proposes to reverse them. If legislation is enacted in the terms proposed, and ONS adopts the same approach to re-classification as it did in its 2012 paper, it is likely to re-classify FEIs in Wales as NPISHs. However, there are some aspects of the proposed legislation (and, to a greater extent, of its associated secondary legislation and guidance) which are, as yet, unclear. If those go against the grain of the proposed primary legislation, and ONS is aware of them, then ONS may decide not to re-classify FEIs in Wales.
64. As I have already mentioned, the White Paper does not mention funding arrangements. The provisions in the funding arrangements which I have seen are both extensive and intrusive<sup>18</sup>. ONS does not refer to these in either of its papers, and it is possible that it is not aware of them. I consider that if similar controls persist in funding arrangements once the proposed legislation has been enacted, it is at least possible that ONS would see these as tipping the balance against re-classification. It is clear from the email of September 2012 that ONS takes a pragmatic approach to classification, in which it considers a range of factors. The picture disclosed by legislation is an important part of ONS's assessment, but the 14 factors show that ONS also takes into account controls other than legislative controls, including controls exerted by means of contractual provisions. This factual approach to control is supported by MGDD (see fifth bullet, paragraph 12, above, which refers to "a more operational definition of control").
65. It is notable that ONS says in that email that the presence of one of the fourteen factors can be enough to make a body part of the public sector (unless that factor is part of "reserve or step-in power". One of those factors is the ability of the public sector to "set pay rates".
66. It is not clear how, in the light of the proposals in the White Paper, the Welsh Government

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<sup>18</sup>Their extent seems to be growing. The 2008/09 conditions were 57 paragraphs long, and the current conditions are 86 paragraphs long.

intends (if it still does) to meet its manifesto commitment to influence the salaries paid to lecturers in FEIs in Wales, and/or the terms on which FEIs will employ lecturers. There is nothing in the legislative proposals which would permit the Welsh Ministers to do this. This implies, either, that the commitment has been abandoned, or that, if it has not been, the Welsh Ministers intend to continue to influence pay rates and contract terms by means of funding conditions. If that is their intention, then that alone could imperil re-classification of Welsh FEIs as NPISHs. If the funding conditions interfere with corporate policy in other ways, those other controls may make re-classification less likely.

67. It is, of course, right to say that ONS has not, so far, considered factual, as opposed to legislative, controls in its decisions to classify FEIs. The most likely reason for this is that, so far, ONS has concentrated on the legislative position only, and has felt able to reach a clear view on the basis of that alone. It may also be the case that ONS is not aware of the terms of the arrangements by which FEIs are funded. But it cannot be assumed that, if ONS did become aware of those, it would ignore them. The 14 factors listed in the September 2012 email strongly suggest otherwise. It cannot be guaranteed, of course, that if ONS did base its assessment both on the legislative position and on the factual position, it would not re-classify FEIs in Wales, as the controls exercised by way of funding conditions are not the only factor in the assessment. But it cannot be guaranteed, either, that if such controls continue to exist, and ONS took them into account, that it would decide to re-classify FEIs in Wales.

*conclusions*

68. For these reasons, my view is that
- a. If the legislation described in the White Paper is passed, and if its details, and associated secondary legislation and guidance, do not cut across the aims described in the White Paper, then, if ONS bases its assessment solely on that legislation, it is likely to re-classify FEIs in Wales as NPISHs.
  - b. If such legislation is passed, it is not clear how, if at all, the Welsh Ministers would be able to influence the pay, or contract terms, of lecturers in FEIs in Wales.
  - c. If, once such legislation is enacted, the Welsh Ministers intend to continue to apply funding conditions substantially similar to those to which I have referred in this Opinion (and in particular, conditions which oblige FEIs to pay certain rates to staff and to engage them on particular terms), then there is a risk that ONS will not re-

classify FEIs as NPISH. That risk will increase, depending on the scale and intensity of other controls in funding conditions.

**IN THE MATTER OF THE WELSH  
GOVERNMENT'S WHITE PAPER  
ON THE FURTHER AND HIGHER  
EDUCATION (WALES) BILL**

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**OPINION**  
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UCU Legal Services  
University and College Union  
Carlow Street  
London  
NW1 7LH  
Ref: 130122-000004/MKS

Michael Scott



# Appendix 2

## College reclassification and de-regulation in England and Wales

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### Reclassification of FE colleges into the private sector – driving de-regulation to “shrink the debt”:

1. The Further and Higher Education (Governance and Information) (Wales) Bill states that the rationale for reclassification of Further Education colleges as private sector (NPISH) is as follows:
2. “12. The effect of the reclassification of FEIs as central government public sector bodies has negative impacts for the FE sector in Wales that will lead to changes to the way financial information from colleges is collected and monitored and impact on how FEIs manage their internal affairs. The changes have significant implications for FEIs including:
  - any surpluses generated by colleges would be accounted for as Welsh Government funds;
  - FEIs would be unable to retain a surplus in order to build reserves for future projects; and
  - additional financial and accounting requirements.
3. “13. The Bill seeks to enhance the autonomy and decision making abilities of Further Education Institutions by removing and modifying the existing legislative controls on them.”<sup>1</sup>
4. **UCU’s concern is that the Welsh Government’s bill s being driven less by any problem with the ability to run surpluses or borrow money but by pressures from the Treasury.**
5. This is because the discussion around the bill closely mirrors the debate in England in 2012. In 2012, English FE colleges were reclassified into the private sector, having been classified as central government by ONS in 2010. The government was anxious to reverse this decision. However, when Minister John Hayes was asked what the impact would be on college borrowing and finances, he replied:  
“The reclassification will mean that colleges are treated differently for National Accounts purposes. This change is not expected to make any difference to the financial

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<sup>1</sup> Further and Higher Education (Governance and Information) (Wales) Bill, Explanatory Memorandum, April 2013, p. 6.

arrangements of further education colleges for the remainder of this financial year (2010-11). We are in discussion with HM Treasury to agree how the changes will work in future years but it does not automatically follow that further education colleges should adopt the same control systems as central Government. *The reclassification does not in itself limit their ability to borrow money.*<sup>2</sup>

6. This was confirmed by the ONS, responding to a letter from Martin Doel at the AoC, which made it clear that “the classification decision [to place colleges in the public sector] is for statistical purposes only. It introduces no new controls over borrowing by the FE sector, but merely reflects the powers that already exist.”<sup>3</sup>
7. Similarly, schools, which are and remain within the public sector, are able to run surpluses with the agreement of the Local Authority. There would seem to be no insurmountable technical problem with the ability to run surpluses or borrow money.
8. In fact, it seems clear that the real threat actually came from the UK Treasury. When colleges were classified as central government, their borrowing was consolidated into the UK national debt, which given the government’s stated austerity policies, was an extremely sensitive issue. AoC documents seem to indicate that colleges feared, and appear to have been encouraged to fear, that if they remained within central government, they might face action from the Treasury to control their borrowing.
9. The ONS’s decision also sat badly with the government’s stated preference for encouraging de-regulation, the entry of more private providers and greater use of new streams of finance in the college sector.
10. The government’s desire to get colleges reclassified appears to have been one of the main drivers of the Education Act 2011, which included actions to de-regulate colleges. As Minister John Hayes put it in a letter to UCU,

“the powers held by the Secretary of State in relation to colleges are seen as evidence of continuing government control which is incompatible with private sector classification. This required reconsideration of the legislative changes being made and development of solutions that would give colleges more independence in these areas, consistent with our overall approach of reducing regulation in the FE sector.”<sup>4</sup>

The Education Act’s measures were explicitly designed to remove this evidence of public control.

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<sup>2</sup> John Hayes, Parliamentary Answer, 19 October 2010

(<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101019/text/101019w0004.htm> )

<sup>3</sup> Stephen Penneck, Director General, ONS, letter to Martin Doel, dated 7 July 2011.

<sup>4</sup> Letter to UCU, dated 26 October 2011.

## The Education Act 2011:

11. The Education Act 2011 removed the power of the Chief Executive of the Skills Funding Agency to appoint governors and gave colleges the power to amend their instruments and articles and dissolve themselves without having to seek the approval either of the Secretary of State or the Skills Funding Agency. It also removed certain constraints on colleges borrowing and setting up new companies.
12. In summary, in England it appears to be the case that the decision to pursue reclassification was motivated not by any technical problem with colleges borrowing or retaining their surpluses but by the government's political desire to move colleges' borrowing out of the national debt. Consequently, colleges appear to have been given the message that unless reclassification was successful, they might see their borrowing restrained. The Education Act 2011 and the consequent reclassification of FE into the private sector, were driven by this, coupled with the conviction that de-regulation would bring 'greater efficiency'.
13. The political character of this decision was enhanced by the allegation made by leading economists that the Prime Minister David Cameron was using the transfer of Further Education employees into the private sector to boost the figures for employment in the private sector.
14. **UCU's concern is that the Welsh Government's bill is being driven less by any problem with the ability to run surpluses or borrow money but by similar pressures from the Treasury.**

## De-regulation in England – dangerous experiments and weakened governance

15. UCU is also concerned that the de-regulatory agenda that is being driven as a consequence of this pressure will drive colleges to a greater dependence on private sector solutions and private finance, while at the same time eroding the checks and balances that have historically existed within college governance. The combination of these tendencies creates a dangerous dynamic in which colleges are encouraged to take risks with publicly accumulated assets and public funding streams in order to diversify their income streams and reduce their dependence on central government, while at the same time, the mechanisms of public control and the influence of other stakeholders which could hold them to account, are seriously weakened.
16. In our new report, *Lost in Translation*, UCU has documented a series of recent examples in the English context which illustrate the dangers of this dynamic.<sup>5</sup>

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<sup>5</sup> *Lost in Translation: the internal privatisation of our colleges and universities and the threat to the public interest* (UCU, May 2013).

### **For-profit subsidiaries:**

17. Newcastle College 'Group', under the well-remunerated leadership of Dame Jackie Fisher, moved from being a regionally based FE college to positioning itself as a national provider. When private equity funded training provider Carter & Carter collapsed in 2007, Newcastle took over a large part of the former company, using funding from the Learning and Skills Council and renamed it InTraining. InTraining was constituted as a for-profit subsidiary of the college until 2011 when the college was restructured as a 'Group'. Intraining's 2012 accounts show that the company has short-term liabilities of £14 million and owed £7 million to Newcastle College Group. As the accounts put it, Intraining is 'dependent on continuing financial support being available from its immediate and ultimate parent undertaking (ultimately both are Newcastle College Group)'. Newcastle College Group has also begun to transfer some staff from the college to Intraining.

### **Subsidiary companies and attacks on staff:**

18. Lincoln College recently set up new subsidiary companies to provide support services back to the college and employ all new support staff. Future employees would have been employed on inferior terms and would have had an inferior pension scheme. The aim, according to the college leadership, was to 'reduce over time the college salary overhead and in particular eliminate Final Salary Pension Contributions of 20% on new starters' (under the Local Government Pension Scheme). Following campaigning by UCU and UNISON, terms for future employees have been significantly improved.

### **Outsourcing and Offshoring:**

19. City College Norwich, which recently reconstituted itself within a federated 'group', ran into problems when it outsourced processing of student application forms to a private company named QuScient on the back of a Skills Funding Agency grant through the Efficiency and Innovation Fund. A college source told the Times Educational Supplement: 'We understand that the project hasn't gone well at all...The college has actually had to send out a member of staff to Chennai (in Tamil Nadu, India) in recent days to try and sort it out.'

### **The return of subcontracting:**

20. The Department of Business, Innovation and Skills is encouraging FE colleges to subcontract training and placing no limits on the amount of their budgets that they can use for this. The government has also told the Skills Funding Agency that it must cut its own administrative costs, leading it to concentrate its funding into fewer, bigger contracts and forcing many smaller training providers to become subcontractors to continue with their businesses. This is in spite of the recent historical experience of the 1990s franchising scandals. As Nick Linford, editor of FE Week, has written: 'Colleges subcontracted out the teaching, training and assessment of students, claimed the public funding and passed on a portion to the subcontractors. The arrangement filled colleges'

offers with much-needed funds and was justified as a means of widening participation. It all ended in tears when the Serious Fraud Office was called in to investigate a number of colleges when allegations of misuse of millions of pounds of public money surfaced. The misuse consisted of phantom students, phantom training providers, courses that never ran or were never fundable, and more...in some cases, colleges were subcontracting more than half of their entire budget and as a result, they were sued for millions. Some colleges rebranded, others merged and some collapsed.'

21. In spite of this, experience Sparsholt College ran into problems in 2011 after it subcontracted its delivery of sports apprenticeships to a private training company Luis Michael Training. LMT was accused by angry parents and the college of failing to deliver quality training and other irregularities, triggering a Serious Fraud Office investigation. The company is now defunct.

### **Dissolution:**

22. Barnfield College announced earlier this year that it was considering dissolving itself and becoming a company limited by guarantee. This would enable it to create a for-profit subsidiary company, which would assume control of its assets and hopefully attract a private equity fund as an investor. The aim appears to have been to fund the expansion of Barnfield's portfolio into HE. The plans appear to have been put on hold in recent months following a difficult Ofsted inspection. UCU has made clear its opposition to these proposals. Other colleges are known to be considering this option.

### **Summary:**

23. These examples predate the Education Act 2011. In UCU's view the Act's de-regulatory measures only serve to increase the risks that examples like this will become far more common. By enabling college corporations to amend their instruments and articles or dissolve themselves without reference to the Secretary of State or the Skills Funding Agency, the government has actively encouraged and given the legal powers to enable senior managers to arrogate huge powers to themselves. College managements are being encouraged to cut their costs, aggressively build up surpluses and diversify their income streams. This is leading to numerous examples in England of attacks on the pay and terms and conditions of college staff. The examples of Newcastle College and Barnfield also raise serious questions about the use of public funds and assets and their exploitation by for-profit enterprises.

### **What should be done:**

24. UCU opposes the option of legislation. We consider that the costs associated with setting up the Welsh Funding Council for FE are more than offset by the savings that will be made to the public purse by avoiding the kind of de-regulation that has been pursued

in England. The dangers to publicly accumulated assets and public funding streams are acute.

25. If the option of legislation is pursued, it would be imperative to provide some robust safeguards of the public interest and of the quality of provision.

- **UCU would recommend that an asset lock is built into any legislation, to ensure that assets accumulated over time through public investment and subsidy are retained for the purposes of advancing the public benefit in education and cannot be disposed of, including disposal of them in part or granting an interest in them, without the approval of the Welsh government.**
- **UCU recommends that the Bill sets out firm guidance on the requirements of any revisions to instruments and articles. This guidance must ensure that governance arrangements provide robust protection of the interests of the many stakeholders with an interest in further education colleges in Wales.**
- **UCU would also recommend that the bill includes a requirement on all recipients of public funding to adhere to nationally agreed contracts, to the Wales National Pay Scales and to protect pension provision to avoid a damaging race to the bottom in the quality of provision.**

<b>APPENDIX 3</b>					
		<b>Reserves</b>			
<b>FE Institution</b>		<b>2012</b>	<b>2011</b>	<b>2010</b>	<b>2009</b>
Bridgend College			22,818,000	20,217,000	17,078,000
Cardiff & Vale College*					
Coleg Sir Gar		13,212,000	14,883,000^	11,216,000	9,971,000
Coleg Ceredigion		1,990,000	2,604,000	2,176,000	1,984,000
Deeside College		28,249,000	28,588,000	13,728,000	6,065,000
Gower College Swansea*		10,214,000	16,036,000	20,473,000	
	Swansea College			11,842,000	8,417,000
	Gorseinon College			3,624,000	3,000,000
Coleg Gwent		1,442,000	8,504,000^	5,214,000	3,608,000
Coleg Harlech/WEA (North Wales)					
Gwrp Llandrillo-Menai*		25,598,000			
	Coleg Llandrillo		19,995,000*	13,753,000*	7,492,000
	Coleg Menai				
	Coleg Meirion Dwyfor		Llandrillo fig now includes Meirion reserves	Llandrillo fig now includes Meirion reserves	
Merthyr Tydfil College			1,007,000	1,947,000	943,000
Coleg Morgannwg		8,877,000	11,872,000	12,102,000	9,926,000
Neath Port Talbot College		2,694,000	5,502,000	3,985,000	2,397,000
Pembrokeshire College		10,368,000	11,038,000	10,198,000	9,498,000
Coleg Powys		5,655,000	7,369,000	7,602,000	7,118,000
St David's Catholic College		240,000	497,000^	1,791,000	1,705,000
WEA South			435,133	226,549	-115,846
Yale College		3,171,000	2,664,000^	970,000	-2,214,000
YMCA Community College		1,695,626	1,552,065	1,268,236	1,295,856
Ystrad Mynach College		10,331,000	11,413,000	10,850,000	8,131,000
<b>Totals</b>		<b>123,736,626</b>	<b>120,234,198</b>	<b>137,638,785</b>	<b>96,299,010</b>

key

(figure) means in deficit

\* means merger

^ amended figure from previous report