

National Assembly for Wales

Children, Young People and Education Committee

Higher Education (Wales) Bill

CYPE(4)–16–14 – Paper 1

Response from : Higher Education Funding Council for Wales (HEFCW)

Response to Welsh Government Higher Education (Wales) Bill Technical Consultation

This document provides the response from the Higher Education Funding Council for Wales (HEFCW) to the consultation questions raised by the Children, Young People and Education Committee in respect of the Welsh Government's Higher Education (Wales) Bill. It should be noted that there has been insufficient time since the request for this response to secure the views of Council members: this response represents the views of officers.

HEFCW is a Welsh Government Sponsored Body which was established by the Further and Higher Education Act 1992. Our responsibilities for initial teacher training are covered under the Education (School Teachers' Qualifications) (Wales) Regulations 2004 and the Education Act 2005. HEFCW is responsible for funding higher education in Wales and distributes funds for education, research and related activities at nine higher education institutions, including the teaching activities of the Open University in Wales. We also fund higher education courses at further education colleges. In allocating funding from the Welsh Government to higher education providers, we seek to ensure that the higher education policy priorities of the Welsh Government, including those which are set out in our corporate strategy and associated measures, are met.

This response addresses directly the questions asked by the Committee. We will be pleased to address these responses in more detail when we attend.

1. Is there a need for a Bill for these [as specified] purposes? Please explain your answer.

We agree with the Welsh Government's assessment that the current regime for higher education fees and funding requires the establishment of a new regulatory framework for higher education in Wales.

At present, most aspects of HEFCW's role, and powers of intervention, relate to provision which it funds, as provided for by the 1992 Further and Higher Education Act. The relationship between HEFCW and providers of higher education in Wales (higher and further education institutions) has been dependent on our ability to set

conditions in respect of the funding we have provided. The introduction of the new fees regime in Wales, from 2012, has resulted in a large proportion of our available resources being spent on provision of tuition fee grant for full-time undergraduate Welsh domiciles (wherever in the UK they study) and EU students studying in Wales.

In academic year (AY) 2014/15, we expect some 60% of our total resources to be spent in this way. We are not able, under current legislation, to attach conditions to the provision of tuition fee grant in a way similar to the conditions of funding we have been able to impose historically. The term 'funding' here has a particular meaning. It relates to the transfer of money from our Welsh Government grant in aid direct to institutions and is distinct from tuition fee grant which, although it also comes from the same grant in aid, forms part of the payments made by, or on behalf of, students to institutions. Depending on the particular composition of an institution's portfolio, we expect some institutions in Wales to depend on our funding (as opposed to fee income) to the extent of only 5% of their total income from AY 14/15.

This diminution of the extent to which institutions depend on our funding has a number of consequences:

1. We are not able to rely on the current statutory framework to ensure that we can secure higher education provision of appropriate quality, since our current powers relate only to that which we fund and the extent to which we will be funding institutions has diminished substantially. In addition to protecting the interests of students, it is also in the interests of providers and of Wales, for reputational reasons, that no Welsh provision should be of poor quality.
2. We are not able to exercise appropriate controls in respect of the financial management of institutions since, again, our current powers of intervention are cast in terms of our funding. Again, this oversight is exercised in support of the interests of students, but also the sector, and Wales, as a whole.
3. We are not able to exercise effective leverage in pursuit of Welsh Government policy priorities: the use of policy-driven funding allocation formulae has historically been an effective and efficient means of securing policy leverage.
4. Our current statutory powers would afford us no purchase in respect of any providers other than the existing funded institutions.

For these reasons, given the operation of the new fees and funding regime from 2012/13 onwards, we agree with the need to revise the statutory regulatory regime for higher education in Wales. We would wish to be clear, however, that we are not here seeking to imply that higher education institutions would not be guided by Welsh Government policy priorities and submit to regulatory activity. They are socially responsible organisations which are aware of, and responsive to, the policy context within which they operate. They are also charities with a focus on public benefit. Nonetheless, institutions have to balance a genuine desire to deliver public policy priorities with the need to remain economically sustainable. These can sometimes be in conflict. Our interventions typically concern the point at which that balance is struck and our concern is to retain the capacity to influence with maximum effectiveness and efficiency.

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

We consider that the Bill, as drafted, goes a considerable way to meeting the stated objectives. If the Bill receives Royal Assent, it will be our intention to operate the new regime in a way which recognises strongly the need for a partnership approach between the sector and the Council, thereby effecting as seamless a transition from funder to regulator as possible.

In terms of the objective to 'safeguard the contribution made to the public good arising from the Welsh Government's financial subsidy of higher education', we consider that the current proposals achieve this to only a limited extent. Policy leverage will now depend almost entirely on fee plans which are constrained in their scope, with a strong focus on widening access and on activities rather than outcomes. They are also less efficient and effective as a policy lever than funding. There is inevitably a long timeline between construction and approval of a fee plan and the point at which there is sufficient data about performance to be in a position to judge the extent to which the plan has been delivered. As a minimum, that is close to three years. The proposals in the Bill also introduce a range of processes for representations and reviews which will extend that timeline still further. In practice, therefore, sanctions are likely to be sustainable only in instances of extremely poor performance. This means that a number of current Welsh Government policies will not be subject to effective policy leverage via fee plans with the concomitant risk of poorer performance in these areas.

We would also note that there is no provision in the Bill to enable us to control the annual cost of tuition fee grants. There is also no provision for safeguarding the public good arising from the financial subsidy of higher education outside Wales, as the fee plan requirements can only be applied to higher education providers in Wales. Finally, there is no provision in the Bill for securing the public good from the government loans which would be made available to students of 'other providers' or to secure oversight of the financial situation of such providers such that we could safeguard student interests.

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?

As indicated above, we would welcome greater flexibility in respect of the scope of fee plans in order to secure prioritisation of a broader range of policy interests. We would also welcome scope to control the annual cost of tuition fee grants and means to safeguard the public good arising from the subsidy of higher education delivered outside Wales.

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

We are clear about the correlation between institutional autonomy and good performance of higher education systems. We are also clear that higher education

policy is delivered, ultimately, by higher (and further) education institutions. Our role is to ensure that Welsh Government higher education policy is well informed, as far as possible, and to provide the conditions in which delivery of policy priorities by the HE sector, and other providers, in Wales is maximised. This requires us to adopt a partnership approach, and that requirement will not change as a consequence of this Bill.

We are also assuming that, whilst this Bill proposes to change some of the tools we have available, the fundamental role of the Funding Council, acting as intermediary between the providers and government, will remain. We consider the 'arm's length' principle enshrined in the 1992 Further and Higher Education Act to be an essential aspect of current arrangements which should be retained. We have not had sufficient time to test fully the relationship between this Bill and the provisions of the 1992 Act but there might be need for greater clarity in that regard.

We currently have the power to cease funding an institution. We also have the power currently not to approve a fee plan. Exercising either of these options would be existentially threatening to any Welsh HE institution. Whilst those powers exist, it has always been the position of the Funding Council that a mutually respectful, responsible and mature working relationship with the sector should avoid the need to exercise those powers: that will continue to be our expectation.

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

We have mentioned above the difficulties caused by the extended timelines for the operation of fee planning processes, coupled with the time required for the various representation and review processes which could be required. We understand that it is intended that the provisions of this Bill are intended to be in place in time for the 2016/17 academic year. In practice, that will mean that we will have to issue guidance to institutions in March 2015, based on the new regime. That guidance is itself dependent on the production and approval of the relevant regulations which will support this Bill. This constrained timescale represents a significant challenge.

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 have no reason to doubt that the Bill falls within the legislative competence of the National Assembly for Wales.

Powers to make subordinate legislation

7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (ie 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 understand that it is generally unhelpful to subject some of the detailed implementation aspects of legislation to the full scrutiny process required for primary legislation. There is scope, however, for changes under the proposed delegated powers to make a material difference to the 'arm's length' relationship we have with the Welsh government. In this context, we note, and welcome, the indication in the Explanatory Memorandum that consultation will be undertaken where appropriate and that affirmative procedures will apply in respect of changes which affect primary legislation. We are less clear, though, on the basis which will determine when consultation, or affirmative procedures, are considered to be appropriate.

Our concern would be to ensure that the overarching intent of this Bill, which is essentially to replace our current funding powers with regulatory powers, but not substantially to increase the extent to which we have historically constrained the sector, or the extent to which the Welsh Government constrains us, is delivered. To that extent, we are keen to see that any arrangements for secondary legislation are cast in that context and appropriately constrained by it.

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.

We have provided information to support the Impact Assessment which estimates the additional costs to HEFCW of implementing the bill. Inevitably, we had to make assumptions in arriving at those estimates, particularly in respect of the extent to which we might find ourselves in contested territory with providers as we implement our part of the Bill.

In our experience, securing policy leverage through formulaic funding approaches has proved to be a relatively efficient process. As the potential funding leverage diminishes, we will increasingly have to turn to fee plans, and other forms of encouragement, to maximise the extent to which the sector is able to deliver to Welsh Government policy priorities. Such approaches are characterised by far greater reliance on extensive engagement with individual institutions. It also entails a more challenging process to ensure that such engagement reflects robust and consistent policies, in order to guard against potential legal challenges. All of this is expensive in terms of staff time. This is a major contributory factor to our assessment that we will need additional resources to deliver the new regime. In arriving at our assessment of those additional costs, we have benchmarked against the experience of our colleagues in Scotland who have been engaged for the past two years in a process of negotiating 'outcome agreements' with Scottish universities. The additional staff time which that process has required in Scotland has equated approximately to one additional member of relatively senior staff per university. This correlated very closely to our assessment of the additional staff costs which we expect to incur (approximately nine additional staff). Having just

emerged a year ago from a substantial reduction (16%) of our staff base, we will not be able to absorb these additional costs within our current resources.

Other comments

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

We made a number of observations in our response to the Welsh Government's Technical Consultation last year which have not been picked up in this Bill.

We remain of the view that it should be sufficient for the Financial Management Code, which might need differentiated specification for different types of provider, to be approved by HEFCW after consultation with the HE providers and wider stakeholders and then laid before the National Assembly for Wales. This would reflect current arrangements which have been operating satisfactorily.

The precise expectations which will be placed on 'other providers' who opt for a case-by-case designation remain unclear. Whilst we appreciate the general desire to ensure that any such regime places demands on providers which are proportional, and we understand that such provision in Wales is currently very limited in scope, we continue to believe the scope for a 'lighter touch' approach in respect of such providers should be extremely limited. Whilst it is proposed that their students should have access to a less generous student support package, such providers will nonetheless be trading on the strengths of the UK higher education brand which is maintained by the quality of provision by universities and other funded providers but also strengthened by the quality and other regulatory arrangements which apply. Those arrangements require significant commitment and expenditure by the sector. Operation of a substantially less onerous regime for those seeking case-by-case designation would place them at a competitive advantage to the established HE sector because they would enjoy the benefits of brand strength without contributing proportionally to maintaining that strength. Furthermore, if subject to a substantially lighter touch in terms of expected contribution to the broader Welsh government policy priorities, such providers would be able to focus on more lucrative elements of HE provision, leaving the burden of less lucrative, but still important, provision to be borne by regulated providers. Finally, we see no justification for establishing a regime which protects the interests of students at such providers less comprehensively than in the established HE sector.

We have no further comments which we would wish to offer at present but will be pleased to answer any questions which the Committee might have.

4 June, 2014