

CYPE(5)-23-19 – Paper 2

Ymateb gan: Cyngor Cyllido Addysg Uwch Cymru Response from: Higher Education Funding Council for Wales

HEFCW's response to the post-legislative scrutiny of the Higher Education (Wales) Act 2015

Introduction

The Higher Education (Wales) Act 2015 strengthened the Higher Education Funding Council for Wales' regulatory powers in relation to quality of education, financial affairs, full-time undergraduate fees and improving equality of opportunity and the promotion of higher education. We acknowledge that the Welsh Government introduced the legislation in response to the fact that the funding available for higher education in Wales was diminishing such that the pre-existing regulatory machinery, and policy levers, all of which depended on funding, were becoming ineffectual. The intent behind the legislation, therefore, was positive, but there have been a number of regulatory and operational challenges with the new arrangements.

We wish to note, up front, that the legislation only became fully enacted on 1 August 2017, and as a result, it is possibly too early in some respects to understand the full impact of the legislation. However, we wish to share some of our experiences of the legislation from the development and initial implementation of the Act.

General points we wish to make are that:

- The prescription and complexities of the legislation have prevented some of the objectives of the Higher Education (Wales) Act 2015 from being achieved. The lesson from this is not to over-specify the legislation. That doesn't mean advocating the use of framework legislation, with the detail to be added later by secondary legislation. It means accepting that the logic of having an arm's length body is that you trust that body to develop the operational machinery, albeit with an expectation that they will consult as appropriate, and that they will act reasonably (or be challenged). Whilst the Welsh Government engaged with us as a stakeholder when the legislation was being developed, and whilst we were asked a number of individual questions to aid their thinking, we were not in a position greatly to influence the shape of the legislation, or the final form in which it was presented. This resulted in a degree of complexity which we would have counselled against.
- Regulating only full-time undergraduate higher education has left some gaps in the oversight of higher education in Wales. This could result in a poorer experience for students studying on those courses, despite being allowed to receive student support to study on those courses, and
- The range of regulatory sanctions available to HEFCW are limited. This impedes HEFCW's ability to take decisive action and be proportionate when a regulated institution is non-compliant or not delivering policy objectives as effectively as they could.

In order to inform the scrutiny, we have also provided links to our original responses to consultations to inform the development of the Bill.¹

1. Has, or is the Act, achieving its policy objectives, and if not why not?

1.1 We have answered this question by responding to each of the objectives set out in the explanatory memorandum accompanying the Higher Education Bill.

(a) ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government backed higher education grants and loans;

1.2 HEFCW has established robust arrangements, through consultation and appropriate scrutiny, for the areas that the Act empowers HEFCW to regulate: fee levels, equality of opportunity, promotion of higher education, quality of education and financial affairs. As we will set out in this response, however, there are areas that are outside of the scope of HEFCW's powers that HEFCW cannot regulate.

1.3 The Higher Education (Wales) Act 2015 has only established a regulatory system for full-time undergraduate higher education provision. This has allowed for some publically funded institutions in Wales to receive student support for their part-time higher education courses without having to be regulated. As a result, providers receiving student support do not have to have undergone an external review of their higher education provision by a body on the European Quality Assurance Register, such as the Quality Assurance Agency for Higher Education. As a result, Welsh Government cannot be assured that part-time provision being supported by Welsh Government student support meets the reasonable needs of the students. This is a risk to both the public purse, the reputation of higher education in Wales and most importantly of all the students studying on those courses.

1.4 In addition to this, postgraduate study is also not regulated. Providers that receive student support for this provision are likely to be regulated by HEFCW. This provides quality oversight of those courses but does not provide the same level of scrutiny over the fee levels charged and the investment of fee income to improve equality of opportunity and promote higher education.

1.5 As we have noted in our response to question 5 of the consultation on proposals for the reform of the post-compulsory education and training system in Wales, Public Good and a Prosperous Wales², the sanctions available to HEFCW via the Higher Education (Wales) Act 2015 operate slowly and are largely existentially threatening to providers. This makes the sanctions difficult to use and does not allow for swift formal intervention to address problems proportionately through our legal powers.

¹ [HEFCW response to Welsh Government Higher Education \(Wales\) Bill Technical Consultation](#); [HEFCW response to the White Paper consultation on the Further and Higher Education \(Wales\) Bill 2013](#)

² HEFCW response to [Public Good a Prosperous Wales – the next steps](#)

- 1.6 The regulatory system has also been established with a focus on institutions. This limits HEFCW's ability to use the regulatory tools to facilitate collaborative activities to meet Welsh Government priorities such as in relation to improving equality of opportunity.
- 1.7 The legislation is too prescriptive and complex, leaving limited flexibility for HEFCW to shape it operationally. We set out below, in relation to maintaining a strong focus on improving equality of opportunity, that the level of detail makes it harder to improve equality of opportunity and promote higher education. It has also resulted in terms being used such as *quality likely to become inadequate* that have to be worked through with quality experts and the sector to define, as it is a unique concept to quality arrangements in higher education. In addition the legislative requirement for the Financial Management Code to be approved by the Minister and laid before the National Assembly prior to implementation has reduced the Council's ability to respond swiftly to changing circumstances.
- 1.8 There are some areas, though, where it is appropriate that the legislation, and implementation of the legislation, is not moderated to reflect differing types and scale of provider. The result of entering the regulatory system in Wales is that all full-time higher education courses delivered by a regulated institution are automatically designated for student support. All institutions, regardless of size or mission, must be able to demonstrate that they meet the same requirements of financial viability and quality of education as any other regulated institution in order to protect students and provide assurances to Welsh Government.

(b) safeguard the contribution made to the public good arising from the Welsh Government's financial subsidy of higher education;

- 1.9 All institutions that are currently regulated for their full-time undergraduate courses are charities. Additionally, they are all required to invest a proportion of their student fee income to meet objectives to improve equality of opportunity and promote higher education in Wales. This safeguards the contribution to the public good to an extent, but our response to the question regarding fair access below suggests that the legislation might secure only limited improvement to the contribution being made by institutions to the public good.
- 1.10 As noted above, part-time and postgraduate study is not regulated therefore there are no regulatory controls linked to that tuition fee income in order to improve the contribution to the public good.

(c) maintain a strong focus on fair access to higher education;

- 1.11 The legislation provides a strong focus on fair access in higher education through the requirement for an institution, wishing to be regulated, to submit a fee and access plan demonstrating their commitment to not just fair access but a wider range of important measures to improve equality of opportunity and promote higher education. However, maintaining a focus is not the same

as effectively improving equality of opportunity and promoting higher education. Whilst it is still a little early to definitively comment on the effectiveness of fee and access plans given that the first fee and access plans have still not been fully evaluated, we do have concerns about how effective fee and access plans, in the way they are set out in the 2015 Act, can be in achieving the policy objectives.

- 1.12 The protection of the autonomy of institutions has been set out to such an extent in the 2015 Act where we have been advised that, legally, we cannot require regulated institutions to focus on national outcomes to improve equality of opportunity and promote higher education in Wales. Institutions can choose the objectives and targets they include in fee and access plans. Institutions that focus on national outcomes do so voluntarily.
- 1.13 The detail set out in the legislation, supporting legislation and guidance regarding the process for fee and access plans is too prescriptive. Institutions in Wales are all different types of institutions yet the mechanism used to achieve Welsh Government's policy aim to improve equality of opportunity and promote higher education is detailed and does not allow for a strong focus on outcomes. In the future we would recommend that any new legislation should be less prescriptive and allow a regulatory body to determine, via advice from committees and through relevant consultation, the best methods and processes to improve equality of opportunity and promote higher education in Wales. The regulatory body should be trusted to do this and be judged on the outcomes that the sector achieves.
- 1.14 The timings for approving and then monitoring the compliance with and evaluating effectiveness of fee and access plans are disjointed as to take forward effectively the objectives that the fee and access plans were designed to achieve. For example the 2017/18 fee and access plans were written and approved in early to mid-2016. They can only be monitored and evaluated effectively in late 2018-mid 2019, the time at which the 2020/21 fee and access plans are being written and approved. In the event of any issues with effective plans then it would have been too late to inform effectively the approval of 2, if not 3, subsequent plans.
- 1.15 Given that part-time and postgraduate provision is not regulated then the levers to improve equality of opportunity in this area of higher education are limited.

(d) preserve and protect the institutional autonomy and academic freedom of universities.

- 1.16 The preservation and protection of institutional autonomy and academic freedom are writ large throughout the legislation. The intention to protect institutional autonomy does seem to have, in some areas, prevented HEFCW from achieving the objectives of the legislation.
- 1.17 We have noted the barriers to improving equality of opportunity above such as challenging target setting to improve outcomes for Wales.

2. How well are the Act's overall arrangements working in practice, including any actions your organisation has had to take under the Act?

2.1 We have set out some of the limitations of the overall arrangements of the Act in response to the question above, such as the range of sanctions available to HEFCW and the effectiveness of fee and access plans.

2.2 As noted below the financial costs of the developing arrangements for the implementation of the legislation and then the implementation of those arrangements has resulted in us diverting resources from other areas of HEFCW activity.

2.3 As we will explain in response to the following question, the complexities and the prescription of the legislation required us to procure a significant amount of legal advice in order to understand how the legislation could be implemented in the context of a Welsh higher education system that operates at a UK and international level.

2.4 The Act effectively gave HEFCW oversight of all of the provision of regulated institutions, which has had complexities in relation to providers whose principal business is further education, which is inspected by Estyn. This oversight or lack of clarity in legislation has taken us some time to work through, and establish how to address our legal responsibilities without increasing the burden on institutions. It would have been helpful for the Act to focus only on the higher education provision of regulated institutions.

2.5 In the same way, where there are complex post-compulsory education institutions, in the future it will need to be clear where the responsibilities of a new commission end, and how any overlaps are dealt with.

3. Are the costs of the Act, or your organisation's own costs for actions taken under the Act, in-line with what Welsh Government stated they'd be?

3.1 We have previously supplied some estimated costs for our costs under the Act to Welsh Government. Our estimated costs are more than that estimated by the Welsh Government previously. We estimated at the time that in order to implement the Act as effectively as possible we would have needed to employ extra staff. We were not able to achieve this and staff working on developing and implementing the Act were also responsible for continuing HEFCW's ongoing work in addition to this. This has impacted on our ability to deliver our remit effectively.

3.2 As noted above, we have had to take legal advice and this has amounted to approximately £54,500.

- 3.3 The staff costs are more difficult to estimate. Of course, monies were saved because we used existing staff and their knowledge base. If we had employed new staff there would have been a longer period of training and development while those staff settled in. That means that during the period in question, other work, which should have been completed was set delayed and deprioritised. It is impossible to cost the extensive additional hours which were completed within our flexi system by the officers involved, including during the fee and access plan exercise during the act.
- 3.4 Taking into consideration the costs of developing arrangements to account for the new legislation and then developing the new requirements of the legislation we have estimated staffing costs at approximately £250k per annum since 2016-17 as a result of the additional work.
- 3.5 We also know that regulated institutions have encountered significant additional costs as a result of the legislation.

4. Has the Act achieved value for money?

5. Have there been any unintended or negative consequences arising from the Act?

- 5.1 We have highlighted some of our concerns in response to the above questions and have added a few additional points in response to this question. We believe that these consequences could have been avoided if HEFCW had been able to influence the detail of the legislation at an early stage in the light of our extensive operational experience.
- 5.2 The development of HEFCW's powers has not recognised the fact that most regulated institutions are also awarding bodies. It has limited HEFCW's oversight over some of the riskiest elements of higher education provision such as overseas provision.
- 5.3 The specific course designation process in Wales has had to be amended to allow previously publicly funded institutions to apply for their full-time higher education courses to be specifically designated for student support.

6. Are there any lessons to be learned from the Act and how it is working in practice that may be relevant to the proposed Post-compulsory Education, Training and Research (PCETR) Bill?

- 6.1 We have set out above in more detail some of the issues we feel have arisen from the 2015 Act.
- 6.2 The key lessons to be learnt from the Act are:
- The legislation should not be as detailed and prescriptive as the 2015 Act. The new organisation should be trusted to develop the necessary arrangements to achieve the policy objectives associated with the new legislation. Detailed and prescriptive legislation will prevent the new organisation from being flexible to meet the needs of Wales. The new

organisation will be subject to public scrutiny, it will have to be reasonable, it will consult on its arrangements, its members will be publicly appointed and the organisation will be funded by the Welsh Government. They are sufficient controls to keep that new organisation accountable in achieving the objectives of the legislation.

- Provide the new organisation with flexible sanctions that will allow it to respond proportionately and decisively to lever providers to act in ways that meet the legislation's objectives.
- As we have noted above there are limits to fee and access plans to achieve the policy objectives. As we have noted in our response to the PCETR consultations we recommend the separation of regulation and outcome agreements and ensure that all education, research and training providers that receive funding from the new organisation are not treated any differently.

7. Are there any lessons to be learned from how this Act was prepared in 2014/15 (formulated, consulted on, drafted etc)?

- 7.1 We have discussed the limitations of the 2015 Act in detail above. To avoid some of these the development of the legislation and the detail in the legislation should be discussed first with those who have experience of implementing current arrangements, such as HEFCW, before the legislation is laid in the Assembly.

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