

**IN THE MATTER OF
THE FURTHER AND HIGHER EDUCATION
(GOVERNANCE AND INFORMATION) (WALES) BILL**

FURTHER OPINION

introduction

1. I have already advised 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. I am now asked to advise on three questions which arise from the terms of the Further and Higher Education (Governance and Information) Bill 2013 (“the Bill”). The Bill has now reached its first stage of consideration, by the Children and Young People Committee of the Welsh Assembly (“the Committee”). In a letter dated 2 May 2013, Ann Jones AM, the chair of the Committee, asked for “evidence on the general principles of the Bill”. Consultees were asked, in particular, to give their views on the questions set out in the Annex to the letter.

2. The questions on which I am asked to advise are:
 - a. whether the process for enacting the Bill is appropriate;
 - b. what is the basis for a statement made to the UCU by the Minister’s spokesperson that if the Welsh Government generates a surplus of more than 2 per cent in its budget in a year, any excess has to be returned to the Government in Westminster¹; and

¹I am told that this statement has been recently clarified, as follows; “Under current arrangements, as the Public Sector ONS classification has yet to be implemented by the Treasury, colleges are free to retain surpluses (or of course suffer deficits).

If the Public Sector classification was implemented (which the Bill is there to avoid), my understanding is that college surpluses or deficits would be treated by the Treasury as part of the Welsh Government’s budget (there is also the capital impact). Should that happen, the Welsh Government would need to set a limit on the amount that a college could retain. I do not know if the Treasury sets an upper limit for this (I could probably find out if you need to know), but in the sponsored bodies I have worked for in the past, the limit has been set at 2% of grant in aid,

- c. whether the objectives for the Bill as set out in the Explanatory Memorandum to the Bill (“the EM”) are achieved by the Bill, and, if not, what amendments to it might be necessary.

(a) the process for enacting the Bill

3. I am asked about section 5 of the EM (page 15). My instructions state that the Bill “will be processed by the “negative resolution procedure”. I am told that UCU considers that such a procedure would be unsatisfactory, as it would prevent the important principle which the Bill seeks to establish from being debated in the Assembly. I think that this may be a misunderstanding.
4. Section 5 of the EM deals with powers which will be conferred by clause 3 of the Bill (if it is enacted). Clause 3 substitutes new sections 27-27B for sections 27-27C of the Further and Higher Education Act 1992 (“the 1992 Act”). The new sections 27(3), and (4), and 27B(1) and (3) confer powers on the Welsh Ministers to make regulations about the procedure for abolishing FEIs and to prescribe the types of body to which the assets of a FEI may be transferred on dissolution. The Table in Section 5 of the EM explains why it is considered appropriate that regulations made under the new sections 27 and 27B should be made by the negative resolution procedure: essentially, because they concern matters of detail, not substance.
5. The Welsh Government has published Guidelines on Subordinate Legislation (dated 25 January 2012) which set out the factors to be taken into account when a choice is being made between the negative and affirmative resolution procedure. It seems to me, certainly at first glance, that the use of the negative procedure for regulations made under these powers would not contravene these Guidelines.

but it could be less.

It is also worth noting that any such retention is not normally cumulative. In other words, one cannot save up for something over a period of time. If the Bill becomes law, the colleges would remain free to retain surpluses.”

It seems from this clarification that there may be no legal basis for the two per cent figure, and that the statement relates, not primarily to the obligations of the Welsh Government vis à vis Westminster, but to a stipulation which it is anticipated the Welsh Government will place on FEIs.

6. Section 5 of the EM is not concerned with the procedure for enacting the Bill. The Bill is primary, not delegated legislation, and so will be subject to all the stages to which Bills in the Assembly are subject: see the National Assembly for Wales Guidance on Bills in the Assembly (2011), available on the Assembly website.

(b) the financial implications for the Welsh Government

7. Paragraph 12 of the EM notes that “any surpluses generated by colleges would be accounted for as Welsh Government funds”. This point is also made at paragraph 29. Paragraph 96 summarises the financial advantages for the Welsh Government. They are:
 - a. additional FEI income would not count as the Welsh Government’s income. This is about 20 per cent of FEIs’ total income on average (paragraph 69 of the EM).
 - b. surpluses generated by FEIs would not form part of the Welsh Government’s funds. Paragraph 70 of the EM gives the figures for the last few years. The picture is a mixed one, but generally, the sector has produced a surplus, of varying amounts.
 - c. FEIs could retain their surpluses to build up reserves to pay for capital projects.
 - d. FEIs’ total capital spend would not count against the capital budget of the Department for Education and Skills (“the DfES”). The figures are given in paragraphs 73-75. One effect is that the Welsh Government’s 50% capital grants to FEIs are scored as the total amount of the spending (ie, the amount of the grant x 2).
 - e. Depreciation of FEIs’ assets (some £22m per annum: EM, paragraph 77) would not count against the Welsh Government’s budget.
 - f. “Any movement” (presumably, increased deficit) in the local government pension scheme would not count against the Welsh Government’s annually managed expenditure budgets.
 - g. The Welsh Government and FEIs will not have to spend more money on producing and auditing annual returns. This cost is estimated as about £4700 per annum for the Welsh Government and a little over £4000 per year for each FEI (paragraphs 61-65 of the EM).
8. There are provisions governing the financial relationship between the Westminster Government and the Welsh Government in the Government of Wales Act 2006 (“GOWA”). Part 5 of GOWA is entitled “Finance”. Section 117 of GOWA establishes

a Welsh Consolidated Fund. By section 118 funds may be paid into it by the Secretary of State. In addition, any Minister of the Crown, and any government department may make payments to the Welsh Ministers, to the First Minister, or to the Counsel General.

9. The only provision which I have been able to find in Part 5 of GOWA which deals with the payment of money from the Welsh Consolidated Fund to the Secretary of State is section 120(4). Section 120(3) enables the Treasury, after consultation with the Welsh Ministers, to designate by order any sums received by or on behalf of various Government bodies in Wales. Section 120(4) obliges the Welsh Ministers to make payments to the Secretary of State of any description of sum designated in an order made under section 120(3). The Government of Wales Act 2006 (Designation of Receipts) Order 2007 (2007 SI No 848) was made under section 120(3). Article 2 of that Order designates certain receipts (mostly interest payments). It does not refer more generally to surpluses generated by the Welsh Government.
10. I have also considered the terms of four other documents:
 - a. HM Treasury's October 2010 document 'Funding the Scottish Parliament, the National Assembly for Wales and the Northern Irish Assembly; Statement of Funding Policy' ("the policy"),
 - b. Devolution: memorandum of understanding and supplementary agreements (Cabinet Office, 1 March 2010), and
 - c. the Concordat between HM Treasury and the Welsh Assembly Government dated February 2005 (that is, before GOWA was enacted); and
 - d. 'Empowerment and Responsibility: Financial Powers to Strengthen Wales, the report of the Commission on Devolution in Wales, published in November 2012².
11. The policy explains the financial relationship between the devolved Governments and the UK Government in relatively general terms.
12. Paragraph 1.2 states of the policy states that, "The United Kingdom Parliament votes the necessary provision to the Secretaries of State; they make payments to the devolved

²Sometimes referred to as the "Silk Commission Report". Chapter 2 deals with existing funding arrangements. It makes clear that few of these are set out in legislation.

administrations”. Some spending is funded locally (see paragraph 1.3). Paragraph 2.7 says, “Responsibility for United Kingdom fiscal policy, macroeconomic policy and public expenditure allocation across the United Kingdom remains with the Treasury. As a result, the devolved administrations’ budgets continue to be determined within the framework of public expenditure control and budgeting guidance in the United Kingdom. However, once overall public expenditure budgets have been determined, the devolved administrations have freedom to make their own spending decisions on devolved programmes within the overall totals and they ensure their plans meet the fiscal rules.”

13. The “Key principles of allocating public expenditure within the United Kingdom” are stated in Chapter 3. Principle 7 is “if levels of self-financed expenditure generated by a devolved administration grow significantly more rapidly than comparable expenditure in England over a period and in such a way as to threaten targets set for public expenditure as part of the management of the United Kingdom economy, it will be open to the United Kingdom Government to take the excess into account in considering the level of grant to the devolved administrations.” (see also Chapter 6). There is a reference to the surrender of excess provision to the United Kingdom Consolidated Fund in paragraph 5.3.
14. Receipts and charges are dealt with in Chapter 8. The general rule (paragraph 8.1) is that “Responsibility for setting charges for devolved public services will rest with the devolved administrations. They can decide whether they wish to follow United Kingdom Government policy on fees and charges in specific cases. The general principle that applies is if a devolved administration chooses to charge more, the additional negative public expenditure receipts will accrue to its budget and if it chooses to charge less it will need to meet the costs from within its budget.”
15. Paragraph 8.7 deals with trading receipts. It provides, “Where a devolved administration receives significant trading surpluses from the commercial exploitation of publicly funded assets, these may be taken into account by the United Kingdom Government when setting grants to the devolved administration or by the devolved administration surrendering these to the United Kingdom Consolidated Fund. The United Kingdom Government would not expect to take surpluses into account where they are generated by a body which - over a period - is expected to break even or where they are de minimis

in public expenditure terms. The Treasury will consult the devolved administration before trading surpluses are taken into account.”

16. Paragraph 11.5 deals with the management of the consolidated fund. Devolved administrations are required to reflect balances held at the year’s end in the calculation of the following year’s budget requirement, and are required transparently to report the state of consolidated fund and end-of-year balances.
17. On the basis of the policy, it seems to me that it is conceivable that if FEIs did generate significant surpluses those surpluses might affect the amount of grant which the Secretary of State would pay to the Welsh Government in any year. But it also seems to me that, given the size of the sums involved (both the likely size of any surplus and that of the overall budget for the Welsh Government) that any such effect is likely to be small. I have found no reference in the policy (or elsewhere in any public document that I have been able to find) to a requirement that the Welsh Government return any budget surplus greater than 2 per cent to Westminster.

(c) does the Bill achieve the objectives described in the EM?

18. As I indicated in my First Opinion, whether ONS will re-classify FEIs in Wales will depend on an overall judgment about the legal and de facto control exercised by the Welsh Government over FEIs. The Bill addresses the legal position, by removing a number of the current controls over FEIs in legislation.
19. The main proposed changes are:
 - (1) FEIs in Wales will no longer be prevented from forming, participating in forming, or investing in, a company to conduct an educational institution, or from investing in a company conducting an educational institution.
 - (2) FEIs in Wales will no longer be prevented from forming, participating in forming, or otherwise being members of, a charitable incorporated organisation, in order to conduct, or become a member of a charitable incorporated organisation conducting, an educational institution.
 - (3) The Welsh Ministers will no longer have power to permit the

- exercise of the powers referred to in paragraphs (1) and (2).
- (4) FEIs in Wales will no longer be prevented from exercising these powers for the purposes of education if the provision is secured wholly or partly by financial resources provided wholly or partly by the National Assembly for Wales in discharge of its functions under Part 2 of the Learning and Skills Act 2000.
 - (5) The Welsh Ministers will no longer have the power to permit the exercise of those powers when the restriction in paragraph (4) applies.
 - (6) FEIs in Wales will no longer require the consent of the Welsh Ministers for borrowing³.
 - (7) Instruments and articles of government will be required to comply with the requirements of Schedule 4 to the 1992 Act, and subject to that, may make such other provision as may be necessary or desirable.
 - (8) FEIs will have power to modify or replace these documents⁴.
 - (9) Detailed provision about the dissolution of FEIs is made in clause 3, which substitutes new sections 27, 27A and 27B in the 1992 Act. There is limited provision for intervention by the appropriate authority⁵ in this process: regulations may be made about the publication of, and consultation on, proposals for dissolution⁶ FEIs must notify the appropriate authority of any resolution to dissolve itself, and of the date of dissolution⁷.
 - (10) FEIs may, before dissolution, transfer their property, rights and

³These changes will all be achieved by clause 1, which amends section 19 of the 1992 Act.

⁴These changes will be achieved by clause 2 of the Bill. Schedule 1 to the Bill replaces the existing Schedule 4 to the 1992 Act. By paragraph 4(2) of Schedule 1 to the Bill, an instrument must specify how the FEI may resolve to dissolve itself, and transfer its property, rights and liabilities. By paragraph 7, an instrument must permit a FEI to change its name, with, in England, the consent of the Secretary of State, and in Wales, that of the Welsh Ministers. By paragraph 8, it must specify how a body may modify or replace the instrument. An instrument may not permit changes to be made which would mean that the FEI ceases to be a charity (paragraph 9).

⁵The Secretary of State for a FEI in England, and the Welsh Ministers for an FEI in Wales (new section 27(5) of the 1992 Act).

⁶New section 27(3) and (4).

⁷New section 27(3).

liabilities to such persons as may be prescribed in regulations made by the appropriate authority. If the transferee is not a charity established for charitable purposes which are wholly educational, the transfer must be on trust to be used for charitable purposes which are wholly educational.⁸

- (11) Clause 4 makes provision for the instrument and articles of government of institutions designated under section 28 of the 1992 Act which is similar to that made for FEIs which are not designated.
- (12) Clause 5 amends section 57 of the 1992 Act, which deals with intervention by the Welsh Ministers in failing FEIs, so as to align it more closely with section 56, which applies to FEIs in England. It repeals section 57A, which obliged the Welsh Ministers to have an intervention policy.
- (13) Clause 6 removes the requirements (now in sections 33J(3)(b), in 33L(3) of the Learning and Skills Act 2000 (“the 2000 Act”) and in section 116I of the Education Act 2002 (“the 2002 Act”)) that FEIs comply with directions of the Welsh Ministers in carrying out their duties (a) to assist the Welsh Ministers in planning local curricula, (b) to work jointly in delivering local curriculum entitlements; and (c) to assist a local authority in planning local curricula, though they will still be required to have regard to guidance issued by the Welsh Ministers in those respects. The duty to comply with directions in complying with the duty imposed by section 116J of the 2002 Act will also be abolished.
- (14) Clause 7 will abolish the power in section 139 of the Education Act 2002 to make regulations preventing FEIs from providing courses without the approval of the Welsh Ministers, and determining the numbers of people who may attend such courses.
- (15) The power of the Welsh Ministers to appoint governors to FEIs in Wales in section 39 of the 2000 Act will be removed (clause 8, and paragraph 2(a), of Schedule 2 to the Bill). Schedule 2 makes

⁸New section 27B(4) and (5).

a number of other, less significant, amendments to the legislation which applies to FEIs in Wales.

20. Overall, the effect of the amendments proposed by the Bill is to remove a number of the principal current differences between the legislation which applies to FEIs in England and Wales. The amendments deal with the main legislative features which have been referred to by ONS in its classification decisions, as justifying the initial re-classification of FEIs from the NPISH sector to the General Government sector. My view is that, if ONS focusses simply on the picture disclosed by this proposed legislation, it is very likely to take a similar view to the view it has taken about the reclassification of FEIs in England, as there will, if the Bill is enacted, then be little significant difference between the key legislative provisions as they will apply to FEIs in England and Wales. I do not consider that any amendment to the Bill is necessary to achieve this objective.
21. The issue now concerns the practical controls, if any, which the Welsh Ministers may still seek to exercise over FEIs in Wales; controls which do not come from legislation, but which are exerted via the terms on which the Welsh Ministers provides funding to FEIs. It is unlikely, from the terms of the classification decisions which I have seen, that ONS is aware of the current practical controls which are exerciseable as a result of the terms on which funding is provided. It does not follow that if ONS were aware of these, it would necessarily reach a different decision from the decision it has reached about FEIs in England, but these are certainly relevant to any classification decision, and there may be scope for UCU to bring these to the attention of ONS. There may also be scope for UCU to ask, in the process of scrutiny and debate on the Bill, whether the Welsh Ministers have made ONS aware of these controls, and, if not, whether they propose to do so.
22. In this context, it may be of some interest that, in the public documents about the Bill, the Welsh Ministers have expressed varying degrees of confidence about the likelihood that the Bill's provisions will, if enacted, lead to the reclassification of FEIs. Paragraph 21 of the EM says that "The changes made by the Bill focus on those elements of control that fall within the indicators of control that the ONS refer to in determining the classification of bodies for national accounts purposes". Paragraph 27 of the EM assumes that if the Bill is passed, it will mean that FEIs are reclassified by ONS. Paragraph 31 makes the

same assumption. It asserts that if FEIs are not re-classified, this will have a negative impact on the budget of the Welsh Government's Department for Education and Skills (this impact is not explained further). It also makes the point that if FEIs are not re-classified, they will have no incentive to be efficient, and to increase their income. Paragraph 92 of the EM states that passing the Bill would place FEIs "on a similar footing to charities operating within the independent/private sector".

23. Paragraph 96 is slightly less positive: it says, "The legislation could result in the reversal of the public sector classification for public accounts purposes....". The impact assessment attached to the EM identifies as a risk that the legislation does not satisfy the ONS Committee (paragraph 97 of the EM). Opposition from the Unions is also seen as a risk (paragraph 98 of the EM). But paragraph 99 of the impact assessment states that "the Bill captures the key powers that need to be reformed to satisfy the ONS....".
24. The Bill Summary dated May 2013 by the Research Service records, in section 6, statements that indicate that the Welsh Government cannot guarantee that the Bill will achieve re-classification, but that officials from the Welsh Government are having discussions with ONS and that "...it is clear to ONS that we are sending out a signal that shows the direction of travel that we are moving in. We can also provide guidance about governance. My officials have done what they can to ensure that the ONS is clear about our objectives , and we will continue to maintain a dialogue with it".
25. It also emerges from this document that "..... - it is no secret - that this was not my preferred route....However the ONS is making its views clearand I need to safeguard Welsh Government budgets...." The topics of a national agreement and of working conditions in FEIs were raised in the Assembly on 30 April 2013. The Minister's view was that these "are slightly separate issues". They could be debated further during the passage of the Bill. He also acknowledged that "There are issues as to how we set our expectations, which we can explore in the passage of the Bill".

conclusions

26. For these reasons, my view is as follows.
 - a. The Bill will not be enacted by a negative resolution procedure, but after full debate in the National Assembly for Wales, as is the case for all primary

legislation.

- b. I have not, in the time available, been able to find a source for the suggestion that the Welsh Government is, or may be, obliged to return any particular amount of budget surplus to the United Kingdom Government. The overall picture disclosed by the policy is a complex one.
- c. If the Bill is enacted, and if ONS focusses only on the proposed legislation, it is likely to decide to re-classify FEIs in Wales, consistently with its decision about FEIs in England. However, it is far from clear that ONS is aware of the practical control which the Welsh Government can exercise over FEIs in Wales by means of the conditions in practice attached to funding, nor whether, if it were aware of those controls, it would reach the same conclusion. As I note in paragraph 25, above, the Minister does anticipate that there will be some mechanism by which the Welsh Ministers will continue to “set... expectations”.

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