

National Assembly for Wales

Children, Young People and Education Committee

HEB 14

Higher Education (Wales) Bill – Stage 1

Evidence from : Glyndŵr University Wrexham

Background and Introduction

Glyndŵr University has played a unique role in the development of higher education in Wales since the advent of devolution. It was established with a different role and philosophy from other universities and in particular in its championing of the widening participation agenda.

It has worked very closely with HEFCW over the years and has consequently developed its own views as to the range and exercise of HEFCW's powers. Since the University was established in 2008, and over the period of the previous Strategic Plan: 2009-2014, Glyndŵr University has established itself as a distinctive, innovative and progressive regionally-based university with an international profile. Its strengths include:

- Applied research and world-leading research excellence in Optics, Informatics and Composites
- Industry-led courses based on well-developed links with major local and regional employers, such as Airbus, Kellogg's, JCB and the BBC
- A commitment to working in partnership with business, employers and HE and FE providers to meet the needs of the region
- An extensive curriculum covering a breadth of subject areas, from short courses to PhDs and Professional Doctorates
- Strengths in widening participation and the provision of part-time, flexible and work-based learning opportunities
- A strong commitment to providing high quality student-centred learning and a thriving learning environment experience at each of its campuses
- A strong community ethos and contribution to the regional and local community of North East Wales

The University feels therefore that it is an important position to comment on the proposed new role for the funding council and the implications of the proposals on Welsh universities and the provision of higher education in Wales.

Executive Summary

- 1 The Higher Education (Wales) Bill is a major piece of legislation which significantly tightens central control over both the higher education sector and individual institutions.

- 2 There are considerable gaps in the proposals which it is stated will be filled in at a later stage. Not only does this raise serious constitutional and political issues but it also means that there is considerable uncertainty within the sector which is greatly impairing its effectiveness.
- 3 Some of the provisions within the Bill also appear to be at odds with existing Welsh Government policy. The Bill also relies on judgements by external agencies, although some of the initial advice by those organisations does not seem to have been followed.
- 4 The Bill would impose additional duties on HEFCW which would duplicate those of other organisations.
- 5 Glyndŵr University has concerns over a number of issues surrounding the proposed Bill but this submission concentrates on four main points:
 - the impact on the status and autonomy of universities;
 - the consequent loss of competitiveness compared to universities outside Wales;
 - the practicalities of the proposed changes;
 - the constitutional and political implications of the proposed legislation.

Impact on the Status and Autonomy of Universities

- 6 The University believes that the proposals would have a detrimental impact on the status and autonomy of the University. In particular the strengthening of Government control of individual universities could mean the reclassification of the universities as public sector organisations and the subsequent loss of charitable status.
- 7 The proposals of particular concern are:
 - HEFCW's role in quality assurance and its powers to enter premises and seize property, even without notice (ss 17 - 22)
 - HEFCW's strengthened powers to exercise financial control over universities, including setting separate provision for individual institutions, and, as with the powers over quality control, to enter premises and seize property as it sees appropriate (ss27-35)
 - The power of HEFCW to issue directions to governing bodies which will be enforceable by injunction (s 43)

Reclassification as Public Sector Organisations

- 8 The main purpose behind the White Paper on the proposed FE/HE Bill in 2012 was to reverse the decision of the Office of National Statistics to reclassify further education colleges from being NPISH into public sector organisations. The HE (Wales) Bill would present a real danger that the ONS would decide to move higher education institutions into the public sector.

- 9 The factors that the ONS may rely on to decide whether universities should be part of the public sector include that the Government:
- would have the power to close a university (*s128 Education Reform Act 1988*)
 - would be able to change the constitutions of universities (*s124A(9) ERA 1988*)
 - would be able to decide what sort of financial arrangements universities could undertake (*s27 HE (Wales) Bill*)
 - would be able to exert financial control other than through funding (*ibid*)
 - would have the final say on whether universities can acquire or dispose of assets (*this may be included under s27 HE(W)Bill*)
 - would be able to require universities restructure their operations (*ss20 and 33 HE(W) Bill*)
- 10 Reclassification could have far reaching implications on both the universities and the Welsh Government. For universities it would mean that universities may no longer be eligible for certain projects or grants, or that the terms may be less attractive. It may also have implications on match funding.
- 11 Being in the public sector may also mean that all university staff are public sector workers and therefore subject to any pay constraints the Government may wish to impose. This would result in Welsh universities no longer being able to remain part of the collective pay structure of universities. Pay levels at Welsh universities could fall below those of their English counterparts with subsequent effects on the recruitment of high flying academic talent to Welsh universities.
- 12 Similarly the surpluses or deficits of individual institutions would become those of the Government with all the risks to public sector finances that that entails.

Charitable status

- 13 The loss of NPISH status may also affect the charitable status of Welsh universities. This is particularly the case with Higher Education Corporations, more so than with universities with a Royal Charter.
- 14 Other factors that may influence this decision include the government's control over the beneficiaries of the universities' actions (through the Fee and Access Plan) (*ss2 – 16 HE(W) Bill*)
- 15 A further factor that could influence the charitable status of universities is the ability of the government to direct the universities' policies and business plans. The Bill prohibits the Government from interfering in individual courses but there is no restriction on the Government stating which in areas the universities should target their academic provision. HEFCW will also be deciding on the student profile through requiring universities to target specific under-represented groups. It will through the Code have power to determine and direct the universities own

financial and management arrangements and approve or reject individual transactions. The cumulative effect of this could be that the government's control over universities is so strong that they cannot retain their charitable status.

- 16 The final decision on whether universities were still charitable organisations would lie in the hands of the Charity Commissioners. It appears that the Charity Commissioners themselves raised their concerns about this in their submission to the original White Paper. Some of their recommendations in particular that the sector should rely on best practice rather than a mandatory code enforceable by a regulatory body, have not been reflected in the Bill.
- 17 The loss of charitable status would also mean that the universities were no longer subject to this particular piece of legislation.

Loss of Competitiveness by Welsh Universities

- 18 The increase in centralised powers over universities presents a number of problems to the sector as Welsh universities could become increasingly uncompetitive compared to English universities.
- 19 The proposed changes would highlight the different approaches to the regulation of universities. Wales would follow a very strict regime with unprecedented government interference. English universities, including those with significant numbers of Welsh students, paid for by the Welsh Government, will continue to have a very light touch oversight by Government.
- 20 In practical terms this difference in the approach of the two Governments may result in Welsh universities lacking the freedom of action their English competitors have in responding to market demands. The need to seek HEFCW's approval will also considerably increase the response time of Welsh universities, in many cases excluding them from some initiatives which require a quick response.
- 21 The Bill would allow further tightening of the funding Council's control over Welsh universities without any opportunity to raise concerns about potential implications. Such changes could further restrict the ability of Welsh universities to compete.
- 22 The details of the proposal to provide the Funding Council with a role in quality assurance are of particular concern. It is unclear whether this new quality regime would be instead of or in addition to the quality role undertaken by the QAA. If it is in place of the QAA, the University would have grave doubts as to the wisdom of such a proposal. The QAA is highly regarded internationally and has set clear guidelines for quality issues in higher education across the UK. Were Wales to depart from those guideline it would have a detrimental effect on the reputation of Welsh higher education generally.

- 23 If HEFCW's new role is in addition to the QAA's scrutiny it would place an additional burden on Welsh institutions that their English equivalents do not have. Not only would this divert resources away from frontline provision into backroom bureaucracy, but it would also send out an unwelcome message as to the quality of Welsh higher education. It would be perfectly reasonable to ask why Welsh institutions need this additional layer of quality control unless the current system under the QAA has failed.

Practicalities of Proposed Changes

Fee and Access Plan

- 24 Sections 2 to 16 impose the duty on HEFCW to examine and approve fee plans for all the universities in Wales. As such it is a continuation of existing practices.
- 25 The draft legislation also envisages a massive extension of HEFCW's powers beyond the limits of the direct grant funding made available by HEFCW. This is an unjustifiable imposition on the autonomy of universities
- 26 The position of universities from outside Wales operating within Wales or Welsh universities operating in England is not clear. Universities based outside Wales would not on the face of it be subject to the new system even if they offered courses in Wales. The legislation states that non Welsh universities could apply to the Welsh Government to be regulated, although it is difficult to see why any would want to do that, as the proposed regulation would be a considerable additional burden, without any clear benefit. Such a position could lead to English universities operating in Wales under a considerably lighter touch regime and therefore be at a distinct advantage.
- 27 The Bill would allow part time fees to be included within the fee and access plans at a later stage. Glyndŵr University does not think that this is reasonable. While it is reasonable to treat full-time provision as homogeneous activity, the same assumption cannot be made for part-time provision, which covers a range of provision from 'bitesize' short courses to higher volume activity such as students completing a 3-year full-time degree in 5-years on a part-time basis. The language used in the Bill and any successive legislation needs to reflect this adequately - it would not be appropriate to apply 'blanket' controls across all part-time provision, such as the current fee plan.
- 28 The University is also concerned that part-time fees could be regulated without any scrutiny by the Assembly.
- 29 The Explanatory Notes state that "the regulated student fees will be expected to be used for a wide range of activities other than the provision which the students have paid for". This is particularly worrying

for an institution with a lower proportion of regulated fees (for example institutions with a large proportion of part-time students or international income) as this is effectively suggesting that regulated fees are used to cross-subsidise other activity.

- 30 It is essential that the Bill doesn't put Welsh institutions at any competitive disadvantage (see paragraphs 18 to 23 above) in what is essentially a single student market. The cross-subsidies that may arise, as noted in the point above, could for example dilute the ability to provide an adequate student experience and reduce the competitiveness of our 'offer' compared to English universities. It is essential that we retain the flexibility to respond in a timely manner to competitive pressures from outside Wales.
- 31 Glyndŵr University welcomes the inclusion of a commitment to widening access as part of the fee and access plan.
- 32 Within the Fee and Access Plan universities would be required to state how they are addressing specific under-represented target audiences. It is not clear from the draft legislation who would identify those target audiences. If it is the Funding Council which identified the target groups this would further strengthen the government control over the sector and would add to the argument that the universities were no longer charities.
- 33 If, alternatively, it is the universities who decide what their target under-represented group is, there is a question as to the value of its inclusion within the fee plan.

Financial Management of Universities by HEFCW

- 34 The University is particularly concerned with the proposal to allow the Funding Council unprecedented authority to intervene in the financial and other management of the University.
- 35 An immediate impact of this proposal is to effectively end the autonomy and independence of the universities in Wales. As stated in paragraphs 14 - 18 this would be achieved by the loss of the NPISH and charitable status of the universities.
- 36 The Bill proposes a number of sanctions on universities which in HEFCW's eyes have failed to comply with the funding council's directions. Glyndŵr University believes there should be a reasonable definition of what constitutes 'failure'; this might include such issues as the proportion of targets not met, the need to recognise near-misses, the need to recognise factors beyond the control of an individual institution, the need to balance short term performance against longer term trends, and the need to ensure adequate dialogue has taken place with institutions prior to any punitive action being taken.

- 37 The Bill partially reintroduces an existing provision for England (s.37(2) HEA 2004) which provides that a governing body is not to be treated as having failed 'if the governing body has shown that it has taken all reasonable steps to comply'. This safeguard does not appear to extend to enforcement provisions more generally, however, as it continues to do in England." The University would strongly support the extension of this safeguard, and particularly the need to have parity with England.

HEFCW's role in Quality Assurance

- 38 Glyndŵr University opposes the granting to HEFCW of powers to intervene in universities over issues of quality.
- 39 The student market is a UK and indeed world-wide one. The sustainability of the Welsh Government's policy on student fees relies on large numbers of students coming to Wales from England. A system which imposes extra bureaucracy on Welsh universities and at the same time underfunds the sector compared to English universities will place Welsh universities at a major disadvantage in a highly competitive market.
- 40 An inevitable result of the requirement of Welsh universities to comply with an additional quality regime will inevitably lead to a redirection of resources away from classroom delivery towards backroom activities.
- 41 It is difficult to see why Welsh universities should need to adhere to two separate quality regimes. The existing regime under the QAA serves Wales and the rest of the UK very well. It is internationally recognised and respected. The proposed legislation makes no mention of Welsh universities being removed from the QAA structure, but if this is the case the University would be strongly opposed to that and it believes the matter should be debated more fully and openly. If it is the intention that Welsh universities remain part of the QAA system there seems to be no reason why an additional layer should be imposed. This would lead to a duplication of responsibilities, further confusion and added unnecessary regulation.

Constitutional and Political Problems

Government of Wales Act 1998

- 42 The basis of the current devolution settlement is the Government of Wales Act 1998 which sets out the legislative and administrative jurisdiction of the National Assembly for Wales. The Act stipulates the powers the Assembly will have over government and non-governmental organisations and, in the case of some of those organisations, sets limits on those powers. Under Schedule 4 of the Act the Assembly's powers over HEFCW are limited to increasing its powers. It does not have the power to remove duties from HEFCW. That power remains with Westminster.

- 43 Since the establishment of the National Assembly the landscape of higher education has been transformed with a revolution in the way higher education is funded. Universities now have a much lower reliance on government money directed through the funding councils. As a result the role played by HEFCW has changed beyond recognition.
- 44 The Welsh Government could at that point have asked Westminster either to dissolve HEFCW or for the power to amend and if necessary remove some of its duties. Instead the Government has chosen not to go to Westminster but instead to increase the powers of HEFCW.
- 45 This potentially raises major political or constitutional problems for the future. The Assembly still does not have the power to remove duties from HEFCW. It is likely this restriction would apply even to duties that the Assembly has itself granted the Funding Council. At the moment the Welsh Government could ask Westminster to remove an anomaly within the constitutional settlement which the changing face of higher education has necessitated. Were the Bill to be passed the Welsh Government may need at some point to seek Westminster's assistance in reversing or amending the Welsh Government's own policies.

Use of Henry VIII Clauses

- 46 The legislation relies on a code to be developed by the Funding Council without any legislative scrutiny. This means that the Assembly will be asked to delegate considerable powers to HEFCW before those powers have been developed. This introduces considerable uncertainty into the sector which could have a major destabilising effect.
- 47 There is considerable concern over the use of these "Henry VIII clauses" which take the power of scrutiny away from the elected representatives and allow changes to the law including primary legislation to be introduced and implemented by a government body without the need for any scrutiny by the legislature. The Lord Chief Justice, the House of Lords Select Committee on the Constitution and the National Assembly's own Constitutional Committee have all expressed concern over the use of these clauses and have called for them not to be used in the future. Similar calls have been made in other Common Law jurisdictions.
- 48 In this particular case the Bill would remove the power of the National Assembly over the future development of higher education in Wales and leave it all in the hands of unelected officials in HEFCW.

Use of Injunctions

- 49 The proposed sanctions that the Funding Council would have for non-compliance seem draconian and out of all proportion to the issues concerned.

- 50 Such a system would also be expensive and bureaucratic. It is argued that it is a highly ineffective use of the already stretched resources of the court system.

Increasing the Size of the Public Sector

- 51 The proposals are also inconsistent with previous Welsh Government policies. The origins of this Bill lie in the FE and HE White Paper of 2012 which was introduced to reduce the possibility of the further education sector being classified as public sector organisations. The effect of the current proposal, however, is to increase significantly the possibility that the higher education sector will be so classified.

Suggestions

- 52 Glyndŵr University believes that the initial problem should be re-examined and an alternative solution be proposed. The system of funding universities has changed and so as a consequence has the role of the Funding Council. The Welsh Government does not have the power to remove powers from HEFCW or to abolish it. It has therefore sought to find a new role for the Council. Glyndŵr University believes that an approach at this point to Westminster asking for the powers to remove functions from the Funding Council would be better received than a later request where assistance is being sought to resolve a problem of the Government's own making.
- 53 Such an action would also mean that the Government was free to establish a new separate body to oversee higher education in Wales. This would mean the Welsh Government would have a free hand to ensure that the new body had the appropriate responsibilities.

Alternative specific proposals

- 54 Should the Government choose to continue to introduce this legislation the University would propose a number of amendments that would reduce the threat to the NPISH and charitable status of universities.
- 55 The first of such amendments would remove from the Government the right of ministers to dissolve Welsh universities. This is an important factor in determining whether an organisation is public sector or not.
- 56 As suggested earlier the University would also propose that the Welsh Government requests Parliament at this point to remove HEFCW from Schedule 4 of the Government of Wales Act 1998.

Conclusion

- 57 Wales needs legislation to redefine the role of the higher Education Funding Council for Wales. This is necessary as its traditional functions have been superseded by the transformation of the system for funding Higher Education across the UK.

- 58 The proposed Bill outlines the scope of a reformed HEFCW's roles and responsibilities, but leaves significant gaps in the detail. These will be filled in at a later date without any scrutiny by the National Assembly.
- 59 The Bill significantly expands HEFCW's role and sets the scene for unprecedented intervention by the funding council in the running of individual universities, so much so that the continued institutional autonomy of universities is by no means certain.
- 60 Glyndŵr University believes some of the changes proposed by the Bill will so handicap Welsh universities that the whole higher Education sector in Wales will suffer greatly and will not be able to compete with English or international institutions.