

# National Assembly for Wales

## Children, Young People and Education Committee

HEB 07

### Higher Education (Wales) Bill – Stage 1

Evidence from : Cardiff Metropolitan University

#### Preliminary comment

The University has chosen to highlight a limited number of specific issues in its response to the consultation. A summary approach has been adopted to facilitate the Committee's appreciation of the University's position. The points identified should not be interpreted as the limit of the University's interests. More detailed and additional points are made by Higher Education Wales in its response to the consultation. The University supports that response.

#### **1. Is there a need for a Bill for the purposes described by the Welsh Government?**

The University recognises the Welsh Government's need to address the policy objectives that the Bill seeks to address. Those objectives could be addressed by one of two approaches, which are not mutually exclusive. The Welsh Government's purposes could be achieved through the immediate introduction of new legislation (as the Government intends), or they could initially be addressed through the development and application of a voluntary agreement on institutional designation between higher education providers and HEFCW (i.e. to augment the terms and conditions that HEFCW currently imposes through its Financial Memorandum). A voluntary agreement would represent a means by which the Welsh Government could manage risk whilst 'buying the time' to develop comprehensive and far-reaching new legislation with a full appreciation of its consequences and implications. A decision to proceed with the Bill as planned (i.e. to the Welsh Government's planned timescale and without using a temporary 'fix' in the form of a voluntary agreement) means that the timescale for developing new legislation has been necessarily compressed, increasing the risk that the Bill either may not fully achieve its objectives and/or result in unforeseen outcomes.

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

The Bill may deliver some but not all of the Welsh Government's stated objectives.

Objective 1 – [to] ensure robust and proportionate regulation of institutions in Wales whose courses are supported by the Welsh Government backed by Welsh Government backed higher education grants and loans

The Bill will enable robust (i.e. forceful) regulation, but it this is likely to be disproportionate as it provides a framework for the Welsh Government and

HEFCW controlling activities that are neither supported by HEFCW grant nor related to regulated fee income - Welsh Government funding (through HEFCW grants and fee grants) equates to circa 25% of HEIs' total income. Moreover, the Bill includes no financial limits to spending requirements (that can be stipulated by HEFCW) or financial penalties.

Many of the new powers granted to HEFCW do not seem to address explicit needs and so appear unnecessary. HEFCW's powers of access and inspection of documents for quality assurance is a case in point. The intention to give HEFCW powers whereby all of its directions would be enforceable by injunction appears excessive. Powers such as this should be defined within the Bill.

Welsh higher education institutions have a long track record as stable, well-governed and successful organisations. The intention to give HEFCW significant new powers to issue mandatory advice, guidance (which is legally enforceable) and assistance appears unnecessary and excessive.

Objective 2 – [to] safeguard the contribution made to the public good arising from the Welsh Government's financial subsidy of higher education

The Bill will enable the Welsh Government to achieve this objective in respect of institutions in Wales that are charities. The Bill provides no safeguards in respect of provision delivered within Wales by 'private' or 'alternative' providers that is subsidised by the Welsh Government financial. Equally it provides no safeguards in relation to the Welsh Government's subsidy of higher education delivered by 'public', 'private' or 'alternative' providers elsewhere in the UK. It is understood that the Welsh Government has little scope to directly regulate providers based outside of Wales and therefore (as explained in the Explanatory Memorandum) needs to rely on the regulatory mechanisms existing in other parts of the UK. However, there is a particular concern about this approach. In England although 'public' institutions have agreed to abide by a voluntary agreement, there is an absence of regulation for 'private' and 'alternative' providers. The Welsh Government has designated 309 courses delivered by 'private' or 'alternative' providers as suitable to receive student fees backed by public loans and grant. The vast majority of those 'private' or 'alternative' providers are based in England. The Bill cannot sensibly be viewed in isolation from policy, and it appears that the Welsh Government's policy to provide a full range of financial support to students wherever they study in the UK is assisting the growth of 'private' and 'alternative' providers in England, which are subject to very little regulatory oversight or control.

Objective 3 – [to] maintain a strong focus on fair access to higher education

The University views the Bill as achieving this objective.

Objective 4 – [to] preserve and protect the institutional autonomy and academic freedom of universities

It is not possible to reach a firm conclusion that this objective will be met. The Bill includes important assurances that institutions' freedom in respect of admissions criteria and academic delivery/assessment, but also provides

HEFCW with additional powers in relation to quality assurance, financial management and the setting of fee and access plan objectives. The way in which those powers will be applied – either individually or in combination – is difficult to discern because the detail of regulation will only become apparent through the application of subordinate legislation. Additionally, it appears that the Bill will enable the Welsh Government to specify requirements in relation to individual institutions (something that it is prevented from doing in respect of HEFCW grant administered under the 1992 Act). Finally, there is a real concern that competition between institutions in Wales could be significantly impacted by the exercise of the additional powers being provided to HEFCW.

**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?**

The University regards the Bill as running the risk of not achieving all of the Welsh Government's purposes. There are two major areas of concerns and several other aspects that merit significant attention. The two most important areas of concern are the potential impact of the Bill on the charity status and NPISH status of institutions – both of which are potentially jeopardised as a consequence of the significant shift in the powers of the Welsh Government and HEFCW to control the strategic direction and operation of institutions

The loss of charity status would be devastating for universities and defeat the object of the Bill which requires institutions to have charity status for the purposes of automatic designation. Although the Bill in itself may not result directly to a loss of charitable status, it is envisaged that a reclassification of institutions as public sector (discussed in the following paragraph) would precipitate the Charities Commission reviewing whether they could retain that status. Moreover, it appears possible that Bill would lead to a breach of charitable status. Institutional governors would be placed in conflicted position as they would have to decide whether to comply with the Bill or discharge their duty as charity trustees.

The loss of institutions' NPISH status and their reclassification as public sector could have a very damaging impact on the international reputation of Welsh higher education. The surpluses and losses of institutions would become Welsh Government funds and would have to be managed within its overall budget. Loss of NPISH status would precipitate a need for institutions to conduct a comprehensive review of all their contracts and legal agreements with third parties. Particular areas of concern include: employment arrangements and collective employment agreements; banking covenants to ensure there is no breach of covenant; and representations and warranties as to an institution's legal status in commercial agreements, joint ventures etc. The Bill is silent about the locus of the power to dissolve Higher Education Corporations (HECs). It is surely inappropriate that the Bill does not give HECs the power to dissolve themselves given their long history of autonomy and working for public benefit, particularly as the Welsh Government intends to extend the powers afforded to Further Education Colleges in this regard.

A further issue of significant concern relates to the student perspective of the impact of the Bill. In Wales, unlike England, 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 raises issues about whether this adequately serves the interests of students who are expected to pay the higher fees.

Another important issue relates to the enforcement powers that the Bill will give to HEFCW. The powers are neither limited to the extent of public funding received by an institution or have to relate to the activities which are publicly funded.

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

As the Bill gives significant latitude to the Welsh Ministers in the form of powers to apply subordinate legislation, it is difficult if not impossible to determine its impact in any detail. However, in general terms it seems certain that the Bill is likely to have significant ramifications for the role of HEFCW which will have to take on some new regulatory functions, and extra reporting functions. It is imagined that it would not be possible for HEFCW to readily meet these demands from within existing resources and capabilities. HEFCW will need to consider the implications of its dual function as a funding council (i.e. 1992 Act) and a regulator (i.e. as a consequence of the Bill) for its communications and interactions with institutions. The Bill should specify how conflicts between HEFCW's two functions would be managed.

Again in general terms, it also seems certain that institutions will need to expend additional resources and effort on servicing the new regulatory requirements. Depending on the way in which statutory instruments are constructed and HEFCW's approach to their implementation, it is conceivable that institutions may have a greater propensity for risk aversion. This would be likely to be case if HEFCW adopted a draconian approach when evaluating the impact of fee and access plans.

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

The primary barrier to implementing the provisions of the Bill concerns its potential impact on institutions' NPISH and charity status. The University understands that the Welsh Government has liaised with the Charities Commission but has not sought specialist external advice in relation to NPISH status.

Another significant barrier to implementing the Bill stems from its reliance on subordinate legislation that would be approved via the negative resolution procedure. A lack of public scrutiny and consultation increases the risk of subordinate legislation not being appropriately framed to achieve the objectives of the Bill.

The inclusion of transitional arrangements within the Bill is intended to take account of some of the timing issues associated with the agreement of 2015/16 fee plans (which HEFCW will approve in July 2014) and the enactment of the Bill (in early 2015). Whilst this provides the Welsh Government with a practical solution, it does so to the detriment of institutions which are making commitments without the benefit of knowing how regulation will work in practice.

The timescale for enacting the Bill may represent a significant challenge for the Welsh Government if the Bill meets opposition in the Assembly. Possibly of greater importance is the impact on institutions assuming that enactment occurs in-line with the Welsh Government's schedule. It is not unrealistic to conceive of a situation in which institutions were given very little or possibly no time to introduce mechanisms and changes to their operations in order to comply with the requirements of the financial code. This scenario could easily materialise if the code was agreed in April, with a requirement that it be implemented in full from the start of institutions' financial year (i.e. in August).

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

The University sees the Bill as being within the legislative competence of the National Assembly for Wales.

**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)?**

The Bill gives too much latitude to Welsh Ministers being able to shape regulation through subordinate legislation. The use of the negative resolution procedure in 23 areas is considered to be unwise. Whilst accepting that some areas are technical or administrative in nature, many are not and would benefit from public scrutiny and consultation with institutions (and other interested parties).

The areas of the Bill that cause the greatest concern are:

- Section 6 (1) Promotion of equality of opportunity and higher education
- Section 7 (3) Approval of fee and access plans
- Section 13 (1) Power to make provision about failure to comply with general provisions of a fee and access plan.

The University's concerns are not limited to these sections – a comprehensive assessment can be found in the response submitted by Higher Education Wales.

The Bill's reliance on subordinate legislation should be reduced. This could be achieved through a combination of mechanisms: through the inclusion of more detail in the Bill itself; by removing some of the provisions within the Bill that enable the Welsh Ministers to introduce subordinate legislation; and by using the positive resolution procedure used in respect of some subordinate legislation.

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

The evaluation of the financial implications of the Bill provided in the Explanatory Memorandum provides an incomplete view because the Bill's reliance on subordinate legislation means that it is not possible to ascertain the full form and extent of the additional regulatory burden. In so far as the information provided in the Memorandum is valid, it is likely to under estimate the cost to HEFCW and to institutions.

The potential financial implications do not appear to have considered the potential for the Welsh Government to become responsible for HEIs' surpluses and losses as a consequence of their loss of NPISH status. In particular the risk associated with institutional borrowing and pension deficit would transfer to the Welsh Government.