

National Assembly for Wales
Bill Summary

The Higher Education (Wales) Bill

August 2014

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This paper summarises the Higher Education (Wales) Bill currently before the National Assembly for Wales.

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Higher Education (Wales) Bill

1. Introduction

Introduction date: 19 May 2014

Member in charge: Huw Lewis AM, Minister for Education and Skills

Committee undertaking Stage 1 scrutiny of the Bill: Children, Young People and Education Committee

Committee Stage 1 reporting deadline: 3 October 2014

The *Higher Education (Wales) Bill* seeks to legislate to:

- ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government backed higher education grants and loans;
- safeguard the contribution made to the public good arising from the Welsh Government's financial subsidy of higher education;
- maintain a strong focus on fair access to higher education; and
- preserve and protect the institutional autonomy and academic freedom of universities.

The Bill seeks to achieve these objectives through:

- establishing a new regulatory framework applicable to all providers of higher education in Wales which seek automatic designation of their higher education courses for the purpose of student support;
- ensuring the new regulatory controls do not rely on the Higher Education Funding Council for Wales (HEFCW) providing funding to those institutions and providers;
- requiring all higher education providers that benefit from the Welsh Government's financial subsidy in the form of statutory student fee loans or grants to have charitable status;
- requiring all higher education providers whose courses are automatically designated for statutory student support to commit to activity in support of equality of access to higher education; and
- building, as far as possible, on the existing system of controls established by HEFCW under its terms and conditions of funding.

2. Background

The *Higher Education (Wales) Bill* will make provision for a revised regulatory framework for higher education in Wales. It will achieve this by providing the HEFCW with the necessary functions to:

- assure the quality of higher education provision;
- enforce tuition fee controls and fee plan requirements; and
- establish a framework for the organisation and management of the financial affairs of providers of higher education in Wales whose courses are automatically designated for student support purposes.

The regulation of publicly funded higher education in Wales is currently achieved through the application and enforcement of terms and conditions attached to teaching and other grants allocated by HEFCW to institutions¹. Sanctions for non-compliance with terms and conditions largely rest on HEFCW withholding (or threatening to withhold) grant funding.

2.1. Existing legislative provisions

The National Assembly for Wales has the legislative competence to make provision in the *Higher Education (Wales) Bill* under Part 4 of the *Government of Wales Act 2006 (GoWA 2006)*. The relevant provisions of GoWA 2006 are set out in section 108 and Schedule 7. Paragraph 5 of Part 1 of Schedule 7 sets out the subjects on which the Assembly may legislate including: “Education and Training”.

The Bill will amend, repeal and replace some of HEFCW’s existing functions. HEFCW, a Welsh Government Sponsored Body, was established under the provisions of *the Further and Higher Education Act 1992 (FHEA 1992)*. Their primary role to date has been to administer funds made available by the Welsh Ministers and others for the purpose of providing financial support for activities eligible for funding under section 65 of the FHEA 1992 and section 86 of the *Education Act 2005*. These activities predominantly relate to the provision of higher education, teacher training and other activities of higher education institutions in Wales but also include the provision of certain HE courses by FE institutions in Wales.

¹ W08/36HE Revised Financial Memorandum and Audit Code of Practice, HEFCW, 2008.
www.hefcw.ac.uk/working_with_he_providers/institutional_assurance/institutional_assurance.aspx [accessed 27 June 2014]

HEFCW's existing functions are principally set out in Part 2 and Schedule 1 of the FHEA 1992 and Part 3 of the *Education Act 2005*.

- Additionally HEFCW has functions under Part 2 of the *Higher Education Act 2004* concerning the enforcement and approval of fee plans;
- HEFCW has a statutory duty under section 70 of FHEA 1992 to secure that provision is made for assessing the quality of education provided in institutions for whose activities they provide, or are considering providing, financial support. HEFCW discharges this duty via a service level agreement with the Quality Assurance Agency for higher education ('QAA');
- *The Higher Education Act 2004* sets out the mechanism for controlling tuition fees in Wales.

Part-time courses

The fees for part-time HE courses are not regulated at present in Wales and such courses are therefore not currently subject to fee plan requirements. However, the revised regulatory framework has been designed to accommodate part-time courses *in future*, subject to fee regulation being introduced. For the time being, any institutions or providers in Wales which only offer part-time HE courses will not need to have a fee and access plan in force in order for their courses to be automatically designated for the purposes of student support.

Territorial extent

The Bill applies in relation to Wales. The Welsh Government proposes to seek an Order under Section 150 of the *Government of Wales Act 2006* in respect of the regulation of courses provided in England by institutions in Wales.

2.2. Policy context

Some of the key documents relevant to the development of higher education policy in Wales are:

2.2.1. For Our Future

Jane Hutt AM, then Minister for Children, Education Lifelong Learning and Skills, published [***For Our Future - The 21st Century Higher Education Strategy and Plan for Wales***](#) in November 2009. This replaced the [***Reaching Higher***](#) strategy. *For our Future* set out a pattern of new relationships between universities, HEFCW and the Welsh Government and a regional strategy which provided the basis, to some extent, for the reconfiguration of the sector.

2.2.2. The McCormick Task and Finish group

In March 2011, an Independent Task and Finish group, chaired by John McCormick, published their report on the governance of higher education in Wales: [***Achievement and Accountability: Report of the Independent Review of***](#)

[Higher Education in Wales, March 2011](#). Amongst other things, their report recommended a new ‘arm’s length’ regulatory and funding body with new powers: *Universities Wales*.

2.2.3. A Policy Statement on Higher Education, June 2013

The Welsh Government published its [Policy Statement on Higher Education](#) saying that it sought to set a new vision for higher education in Wales until 2020 with recommendations about how to plan now for a more unpredictable future including: potential new models for delivery of provision; the potential for online digital learning; a potential move to more specialised universities; new ways of delivering part time higher education; finding new ways to support postgraduate study, for instance through trialing a small number of two-year condensed undergraduate degree programmes with a third-year paid Master’s degree funded through the statutory student support system; and identifying new sources of long-term funding.

2.3. Consultation

2.3.1. The Further and Higher Education (Wales) Bill White Paper, July 2012

The Welsh Government’s Department for Education and Skills issued a White Paper on 2 July 2012 on the proposals for the *Further and Higher Education (Wales) Bill*. The White Paper invited comments on the proposals for the Bill and was published on the Welsh Government website: [The Further and Higher Education \(Wales\) Bill White Paper, July 2012](#):

The White Paper consulted on proposals comprising:

- new funding and student support arrangements;
- supporting partnership and collaborative activities;
- quality assurance and enhancement of higher education provision;
- strengthening the learner voice;
- access arrangements; and
- dispute resolution procedures.

A summary of the White Paper responses was published on 6 March 2013.

Leighton Andrews AM, then Minister for Education and Skills, indicated in the accompanying Written Ministerial Statement that further analysis and development on the higher education proposals would take place and noted his intention to seek the necessary legislative provisions later within this Assembly term: [Welsh Government Summary of Responses to the White Paper – Further and Higher Education \(Wales\) Bill 2013](#).

2.3.2. Higher Education (Wales) Bill: Technical consultation

The [Higher Education \(Wales\) Bill: Technical consultation](#) was issued on 20 May 2013 and closed to responses on 29 July 2013. This set out the Welsh Government's response to the White Paper consultation and the provisions being sought in the Bill. It also invited views on how the revised regulatory system should operate including:

- The introduction of a revised approach to the designation of HE courses for the purpose of statutory student support;
- Arrangements for the enforcement of the tuition fee cap and fee plans;
- Arrangements for quality assessment of higher education provision; and
- Financial and governance assurance.

2.3.3. Additional engagement

The Explanatory Memorandum says that:

- there has been sustained engagement with HEFCW on the matters contained within the White Paper and technical consultation in the last two years;
- Officials have also engaged directly with key stakeholders including Higher Education Wales (HEW), Colegau Cymru, the Open University in Wales and the National Union of Students (NUS) Wales in a series of discussion meetings held prior to the conclusion of the technical consultation;
- Engagement with the UK Government's Department for Business, Innovation and Skills (DBIS) and the Wales Office to address certain cross-border issues arising from the proposed changes has been undertaken. Policy officials initiated contact on these matters and engagement ran in parallel with the technical consultation exercise.

3. The Higher Education (Wales) Bill

3.1. *Overview of the Bill*

The Bill has eight Parts comprising 57 sections and one Schedule.

It will allow an institution in Wales which provides higher education and which is a charity to apply to HEFCW for approval of a **fee and access plan**. The Bill deals with the contents of a fee and access plan including a fee limit for courses which are to be prescribed in regulations.

It will require HEFCW to **monitor institutions' compliance** with their fee and access plans and to monitor the effectiveness of plans. The Bill will also confer functions upon HEFCW which they may exercise where they are satisfied that a regulated institution has failed to comply with a fee limit in its fee and access plan.

It will confer functions upon HEFCW relating to the **assessment of the quality of education** provided in Wales by or on behalf of a regulated institution and in relation to the steps that HEFCW may take if they are satisfied that the quality of education is inadequate or likely to become inadequate.

It will require HEFCW to **prepare and publish a financial management code** which will apply to regulated institutions. The Bill will require HEFCW to monitor, or make arrangements for the monitoring of, institutions' compliance with the requirements of the Code. The Bill will also confer functions upon HEFCW which they may exercise where they are satisfied that a regulated institution has failed, or is likely to fail, to comply with a requirement of the Code.

It will make provision for the circumstances in which HEFCW **may refuse to approve** a new fee and access plan for an institution and the circumstances in which HEFCW must, or may, withdraw their approval of a fee and access plan.

It will make **provision for the procedures** to be followed by HEFCW in relation to the steps that they may take in respect of regulated institutions, including the giving of warning notices and the ability of institutions to apply for reviews.

It will confer functions on HEFCW in relation to the **provision of reports to the Welsh Ministers** and the **provision of information and advice** by HEFCW.

It will make consequential amendments to other Acts, including *the Further and Higher Education Act 1992* and the *Higher Education Act 2004*.

Each Part and Section is described in greater detail:

3.1.1. Part 1 – Introduction

This Part contains an overview of the Bill and describes its content (Section 1).

3.1.2. Part 2 – Fee and Access Plans

Part 2 deals with:

- (a) The content of a fee and access plan, including:
 - Applications by institutions for HEFCW's approval of fee and access plan (Section 2);
 - The Period to which plan relates (Section 4);
 - The Fee limit (Section 5);
 - Promotion of equality of opportunity and higher education (Section 6);
 - Approval of fee and access plan (Section 7);
 - Publication and variation of an approved plan (Sections 8 and 9);
 - Limits on student fees (Section 10);
 - Compliance and reimbursement directions (Sections 11 and 12);
- (b) Failure to comply with a fee limit in a fee and access plan (Section 13);
- (c) The validity of certain contracts (Section 14); and
- (d) The monitoring of fee and access plans (Section 15) and a duty to co-operate (Section 16).

3.1.3. Part 3 Quality of Education

Part 3 makes provision about the assessment of the quality of education provided by or on behalf of institutions that have a fee and access plan, including provision about:

- (a) powers available for the purposes of assessment (Section 17);
 - (b) steps that may be taken by HEFCW in respect of education of inadequate quality (Sections 18 to 20);
- Section 21 provides a duty to co-operate with quality assessment;
- Sections 22 to 24 deal with the details of quality assessment including the powers of entry and inspection, guidance and criteria;
- Section 25 requires HEFCW to set up a Committee to advise them about exercise of quality assessment functions.

3.1.4. Part 4 – Financial Affairs of Regulated Institutions

Part 4 makes provision about the preparation and publication of a code relating to the organisation and management of the financial affairs of institutions that have a fee and access plan, including provision about:

- (a) HEFCW's duty to prepare and publish a Code (Section 27);
- (b) Procedure for approval of Code (Sections 28 – 29);

- (c) Powers available for the purposes of monitoring compliance with the code (Section 30), and in the case of failure to comply with the code (Sections 31 to 33);
- (d) Section 34 includes a duty to co-operate;
- (e) Section 35 deals with financial management: powers of entry and inspection.

3.1.5. Part 5 – Fee and Access Plans: Withdrawal of Approval etc.

Part 5 makes provision for circumstances in which:

- (a) HEFCW may refuse to approve a new fee and access plan for an institution; Including Notice of refusal to approve new fee and access plan (Section 36);
- (b) HEFCW must, or may, withdraw their approval of an institution's fee and access plan including:

- Section 37: Duty to withdraw approval;
- Section 38: Power to withdraw approval;
- Section 39: Publication etc of notice under Part 5.

3.1.6. Part 6 – Notices and directions given by HEFCW

Part 6 makes procedural provision about notices and directions given by HEFCW (including provision about the review of certain notices and directions):

- Sections 40 to 43 set out the warning notice and review procedures that apply to giving notice;
- Sections 44 and 45 deal with Directions: compliance and enforcement.

3.1.7. Part 7 – Supplementary functions of HEFCW

Part 7 makes provision about certain supplementary functions of HEFCW, relating to guidance, reports, information and advice including:

- Section 46: Duty to take Welsh Ministers' guidance into account;
- Section 47: Annual reports;
- Section 48: Special reports;
- Section 49: Statement in respect of intervention functions;
- Section 50: Information and advice to be given by HEFCW to Welsh Ministers;
- Section 51: Other information and advice.

3.1.8. Part 8 – General

Part 8 contains general provisions, including provision about the exercise of powers to make regulations and the interpretation of terms used in the Bill including:

Regulations and Directions (Sections 52 and 53);

Consequential and transitional provision etc (Section 55);

Commencement (Section 56);

Short title etc. (Section 57).

Schedule

Part 1 of the Schedule (paragraphs 1 to 26) lists those enactments to which consequential amendments are made. One effect of Part 1 of the Schedule will be to repeal the provisions of the *Higher Education Act 2004* concerned with fee plans in so far as they relate to Wales.

Part 2 of the Schedule (paragraphs 27 to 31) makes provision for transitional arrangements.

4. Financial implications of the Bill

A detailed Regulatory Impact Assessment (RIA) is contained in the EM which presents the costs of the two options considered:

- Option 1: Do nothing – maintain the current arrangements;
- Option 2: Reform the functions of HEFCW to enable effective regulation and implement additional, strategically important policy proposals; and
- **Option 3: Reform the functions of HEFCW to enable effective regulation**

Option 3 is the Welsh Government’s preferred option, as they believe this provides an effective regulatory framework for the Higher Education sector and has a lower additional cost compared to Option 2.

Annex A in the Explanatory Memorandum to the Bill (EM) explains the methodology used to calculate the costs of Option 2 and Option 3. The Welsh Government and HEFCW identified a list of existing and additional tasks associated with the Bill and then allocated the number of days required to complete each task and the grade of the staff member completing the task.

The RIA breaks the costs down into **regular costs**, **additional costs** and **exceptional costs** and also conducts a sensitivity analysis to produce a range of estimated costs between 2015/16 and 2019/20.

The total cost of the Bill (Option 3) over the first five years of operation is estimated to be around £9m.

Table 1: Summary table of the total costs of Option1, 2 and 3

	2015/16	2016/17	2017/18	2018/19	2019/20	Total
Option 1	1,109,000	1,303,000	1,303,000	1,321,000	1,303,000	6,339,000
Option 2	3,055,000	3,280,000	3,061,000	3,135,000	3,200,000	15,731,000
Option 3 (the Bill)	1,666,000	1,853,000	1,800,000	1,814,000	1,841,000	8,974,000

Source: National Assembly for Wales, [Explanatory Memorandum - Higher Education \(Wales\) Bill](#), 19 May 2014, Table 1, Table 2 and Table 5

5. Response to the Bill

The Minister in charge of the Bill, Huw Lewis AM, made a [statement in Plenary](#) on 20 May 2012. He stated:

From September 2014, there will be three cohorts of students studying at Welsh institutions who may be charged tuition fees at a higher level than those permitted under the previous regime. The shift in funding away from HEFCW's institutional grants to income derived from student tuition fees means that the current legislation relating to higher education funding and regulation is no longer fit for purpose. This Bill provides for a revised regulatory system applicable to all institutions in Wales that have a fee and access plan in force, as approved by HEFCW. The Bill will ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government-backed higher education grants and loans; safeguard the contribution made to the public good arising from the Welsh Government's significant financial subsidy of higher education; maintain a strong focus on fair access to higher education; and preserve and protect the institutional autonomy and academic freedom of our universities.

The Bill has been designed to enable HEFCW to exercise appropriate and proportionate regulatory controls without reliance on the provision of financial support. In conjunction with the Bill, it is intended that higher education courses that are offered by institutions with fee and access plans in force will be automatically designated for Welsh Government student support. Such institutions will be subject to the regulatory requirements established by the Bill. The improved regulatory controls will better protect the interests of students, taxpayers and Welsh society and help to safeguard the reputation of Welsh higher education institutions on the UK and international stage.

Suzy Davies AM, speaking for the Welsh Conservatives, stated:

I do not think that there is any need to rehearse the differing opinions on Welsh Government fee subsidies for Welsh students, wherever they choose to study in the UK. However, the statement today effectively accepts that there have been implications for HEFCW—the money available to it and the level of influence that it can exercise via its diminished ability to make the funding allocations to higher education institutions that they previously enjoyed.

She also asked the Minister about how the Bill related to the ongoing [Diamond Review of Higher Education Funding and Student Finance Arrangements in Wales](#).

The Minister replied:

She is quite right to point out that there are important issues of potential cross-over between this legislation and the Diamond review. However, I do not anticipate that the fundamentals of this legislation need to wait in any way for the Diamond review to report. However, it is important that we allow one process to inform the other, as she quite rightly says, and that would inform that kind of dialogue between Professor Ian Diamond, the institutions, the Welsh Government and others, which will be important as we progress through the next stages of this legislation.

Simon Thomas AM, responding for Plaid Cymru said:

Thank you, Deputy Presiding Officer. It is true to say that the nature of the funding of universities has changed significantly since the introduction of fees and additional tuition fees. Therefore, I agree with the Government that we need clarity in this particular area. We, therefore, do not oppose the Bill in principle, or a Bill in principle, but there are fundamental questions that I would like to raise now with the Minister. I am using the word 'universities' as shorthand for the impact that the Bill will have on all institutions that provide education of this kind.

First, I am looking in the Bill for the principle that public control follows public money. It is true that public funding is provided in many different ways. There are direct grant; fees—the Welsh Government money towards tuition fees; and you could argue that student loans are also public money, because it is in a context of public support. In addition, European economic subsidy is also public funding; although some universities would like to argue that it is entirely private, only for them, it does exist in a public context.

Therefore, that is to be considered. However, it is also true to say that there are some grey areas in this context. It seems to me that the Bill goes beyond public money, even in the broadest sense, and starts to deal with control of fully independent activities on behalf of universities. Therefore, it raises the question that has not been answered, I do not think, in the Minister's statement, of this Bill's involvement with charities law, because we are talking about universities that are charities here, and also the ONS distribution in terms of the nature of these institutions. We were in a situation where further education colleges were designated in a certain way, and we had to undo that because it had been designated differently by the ONS. I would like to hear, therefore, an update from the Government on discussions with the Charity Commission and the ONS on that definition.

The Minister replied:

In terms of his comments surrounding concerns around charitable status and, of course, the ONS, I do not believe that there is anything in these proposals that would threaten the charitable status of Wales's higher education institutions, and the Charity Commission agrees. Obviously, we have consulted with the Charity Commission, and it has given feedback on its view of this legislation. It sees no issue or problem surrounding charitable status issues.

In terms of the ONS, that is a complex situation, and I will want to ensure—how shall I put this?—that we do not necessarily wish to attract the concentrated interest of the ONS in terms of these changes. I do not believe, really, that we will, but we need to be careful about those issues as the Bill proceeds through its committee stages. I would caution the sector also to have a care as to what it might wish for in terms of potential changes to this legislation in relation to the attitude of the ONS.

Aled Roberts AM, for the Welsh Liberal Democrats asked the Minister:

The explanatory memorandum admits in the technical consultation that the majority of those who responded to the consultation believed that the Government needed to bring the draft code before the Assembly following HEFCW's consultation on it, but the Government has not accepted that in drafting this Bill. So, why are you not willing to bring the code before the Assembly, given that the Assembly is giving the Minister the power, through HEFCW in this situation, to intervene in universities, and are you willing to admit that the power to intervene goes over and above financial issues in universities? I think that a number of questions have arisen in terms of that.

The Minister responded:

In terms of the code and bringing it before the Assembly, the code is the tool of HEFCW's intervention. It would be a matter for HEFCW, really, to implement the code.

On 20 May 2014, Higher Education Wales (HEW) issued a [written statement on the Higher Education \(Wales\) Bill](#) which raised a number of points including:

- their concern that universities' accountability directly to fee paying students should not be undermined;
- the extent to which important provisions are left out of the Bill to be determined by subsequent regulations, mainly through the negative resolution process, is a major concern for universities and that, in their view, this means that the overall impact of the legislative framework is difficult to assess; and
- many of the issues delegated to regulations raise questions which, in their view, could have a potentially serious impact for universities including their national accounting status as Non Profit Institutions Serving Households (NPISH) and charity status.

Amanda Wilkinson, director of HEW, told the [Times Higher Education Supplement](#) that because of the broad terms of fee plans, proposed spending directives issued by HEFCW under the Bill "may not be limited to access-type work and could potentially be much wider" although their exact scope is currently "unclear".

Stephanie Lloyd, [NUS Wales President](#), welcomed the introduction of the Bill. She said:

We believe higher education to be a public good. With such drastically different policy directions for higher education taking hold across the UK, it is important that Wales rejects the marketisation of education and provides robust regulation to accompany such a dramatic change in funding arrangements. The powers that this Bill will grant the funding council will help ensure that higher education in Wales delivers what students and the Welsh economy need most, and that universities continue to support the most disadvantaged in Wales to access education.

Such changes must of course be handled carefully and sensitively. We feel more detail and scrutiny must be given to the parts of the proposed regulations currently left out of the Bill. We also strongly urge the National Assembly for Wales and the Welsh Government to consult with students and their representatives about what impact this Bill will have on higher education in Wales. But in principle, this is the right step to protect both public investment in higher education and the fundamental role that higher education plays in social justice