

CYPE(5)-25-19 - Paper 1

Minister for Education Evidence Paper

Children, Young People & Education Committee

Title: Post-Legislative Scrutiny of the Higher Education (Wales) Act 2015

Date: 26 September 2019

Time: 09:30 – 11:00

Introduction and context

The previous Welsh Government's primary policy objectives in relation to the Act were to:

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

Since the passage of the Act under the previous administration, I and my officials have maintained an effective working relationship with the Higher Education Funding Council for Wales (HEFCW), the body primarily discharged with implementation of the Act. We are fortunate in Wales to enjoy a strong working relationship with our higher education institutions. Our communication with HEFCW and the sector is generally positive and productive.

The 2015 Act was introduced by the previous administration in order to enable HEFCW to continue to regulate the Welsh higher education sector following the large reductions in HEFCW recurrent funding after the 2012 student funding reforms. Since its passage, the sector in Wales and in the rest of the UK has seen further substantial changes to the funding and policy environment. Our implementation of the recommendations of the Diamond Review has further altered the balance between direct-recurrent funding and student support. The passage of the Higher Education and Research Act 2017 has moved the regulatory framework for higher education in England towards a clearly more marketised sector. Brexit and the decline in the school-leaver population have caused some uncertainty for our universities in an increasingly competitive environment for recruiting domestic and international students.

Looking ahead, our post-compulsory education and training reforms will establish a new funding and regulatory body that will oversee higher education, further education, apprenticeships, adult learning, and school sixth forms. The new Commission for Tertiary Education and Research will replace HEFCW's functions related to the oversight of public funds awarded to universities, higher education providers and other publically funded post-compulsory education and training providers. Our reforms will be informed by the wider trends affecting post-compulsory education policy, as well as the extensive consultation we have conducted with the affected sectors.

Aims of the 2015 Act

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

The Act was passed to ensure that HEFCW had the powers to continue to ensure robust and proportionate regulation of higher education in Wales. The Act has been essential in ensuring that HEFCW can continue to regulate the sector following significant changes to the funding of higher education since 2012. Despite the legislative change, the Act in many ways emphasised continuity in regulation, and built upon existing forms of oversight and regulation in quality assurance, financial management, fee limits, and widening access.

Since commencement of the Act HEFCW has discharged its regulatory functions in respect of quality assurance through the Quality Assessment Framework for Wales, published in March 2018.¹ The framework provides for 'gateway' quality assurance for providers wishing to become regulated, arrangements for assurance of established providers, a process for dealing with student complaints, development work on degree standards, external examining, UK-wide comparability, and agreeing arrangements for transnational quality assurance. I am encouraged that Welsh universities continue to receive excellent student feedback on the quality of education they provide and outperformed the rest of the UK in the most recent National Student Survey.

HEFCW's recently published annual regulatory report, which was laid before the Assembly in July, outlines in detail how the Council has been closely monitoring the financial health of the sector. HEFCW's Institutional Risk Review (IRR) process draws on a range of information from the latest data returns, Council and officer engagements with institutions are also used to assess risk in six key areas: governance and management; finances; strategic direction; research and knowledge transfer; students and quality; and estates. HEFCW uses this information to assign a level of risk (low, medium or high) to an institution. These risk assessments are confidential and are not shared publicly. I expect the Council to take the necessary

¹ HEFCW, *Quality Assessment Framework for Wales* (July 2019).

steps to assist institutions to mitigate risk, particularly for those institutions that are rated as high risk.

In view of the challenges facing the sector in Wales and across the UK, my officials have been discussing with HEFCW how their risk review processes and the guidance provided to Governing Bodies might be strengthened.

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

Since the passage of the Act the Welsh Government has sought to set clear expectations for HEFCW and the higher education sector through annual remit letters. At my request, HEFCW has been able to take forward programmes of work in areas of interest to the public good including openness and transparency on senior pay, pay equality and gender pay, measures to encourage fair working practices, good governance, student mental wellbeing, and collaboration with regional skills partnerships.

Through my annual remit letter to HEFCW, I have been able to encourage and promote activity to tackle inequality and promote a fairer more equitable sector for students and staff. I have asked HEFCW to work with the sector to promote a more open approach to senior pay, to take action on pay inequality and gender pay, to promote a living wage sector and a more ethical approach to procurement. We have seen progress in these areas in the following areas:

- HEFCW has been remitted to produce an annual report to Welsh Government on senior pay levels and awards in higher education institutions in Wales.
- Welsh higher education institutions are meeting their commitment to pay the Living Wage Foundation's living wage to all directly-employed higher education staff by 2018/19, and to start implementing the living wage across their outsourced activity.
- As of the end of July 2017, Welsh universities become signatories to the Welsh Government's Code of Practice Ethical Employment in Supply Chains.

I am aware that Welsh institutions are committed to working to improve the mental health and well-being of students. There are also already some good UK frameworks, such as 'stepchange' and 'Suicide Safer Universities' by Universities UK, and the Welsh Government's 'Healthy and Sustainable Higher Education and Further Education Framework' taken forward by Public Health Wales, which provides a whole-setting approach to health and wellbeing and builds on the successful work done in our schools. There is, of course, more that can be done but it is important to recognise the work already taking place. These actions by higher education

institutions support our Wellbeing Objectives to tackle regional inequality and promote fair work.

This year's remit letter to HEFCW recognised the need for strong collaboration both between higher education institutions, further education institutions and other learning providers to meet local skills requirements. My letter asked the Council to encourage institutions to build on existing activity to further develop an entrepreneurial culture within the sector, and to contribute to this agenda within the school sector.

The 2015 Act requires that institutions who wish to apply to HEFCW for approval of a fee and access plan in order to become a regulated institution must be charities. A key benefit of regulated institution status is that any qualifying courses offered by the institution will automatically be designated for Welsh Government student support, which means any student is in principle eligible for tuition and maintenance loans and grants. The Act also includes recognition for higher education institutions' charitable status, and demonstrates our commitment to higher education operating as a public good in Wales. During development of the Bill, officials worked closely with the Charity Commission to ensure that the law did not affect institutions' ability to comply with charity law.

The Welsh sector's commitment to viewing higher education as a common good and the support from university leaders to working together for national priorities has been particularly welcome. HEFCW's publication, *Innovation Nation: On Common Ground*, demonstrates how higher education providers pursue their civic mission and act as corporate citizens both locally and globally. Projects have provided opportunities to promote local access to the arts, sport, culture and heritage, engage the interest and raise the aspirations of learners of all ages, and contribute to the sustainability of local communities.

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

The 2015 Act strengthened HEFCW's monitoring and enforcement role in respect of fee and access plans by requiring HEFCW to evaluate the effectiveness of approved plans both individually and generally. Through their fee and access plans institutions have a range of measures in place aimed at promoting and safeguarding fair access to higher education. The fee and access plan process ensures institutions in Wales commit to activity which supports the promotion of higher education and equality of opportunity in access to higher education. In the 2017/18 academic year HEFCW reported total fee and access plan investment in equality of opportunity and the promotion of higher education of £105,727,000, a sector total investment of 17% of fulltime undergraduate and PGCE total fee income. I note that HEFCW has recently

reported that “no regulated institution has failed to comply with the regulatory requirements associated with a fee and access plan”.²

We are beginning to see this additional investment deliver results. 13.2% of first degree undergraduates at Welsh universities are from low-participation neighbourhoods, ahead of the UK average of 11.6%.³ However, due to the nature of fee and access plans it will take more time before the full effects of this increased investment in equality of opportunity in Welsh higher education will be able to be fully assessed. HEFCW, and subsequently the new Commission for Tertiary Education and Research, will, in due course, be able to conduct research and analysis to evaluate the effectiveness and impact of fee and access plans. The intention is that HEFCW will utilise the findings of such evaluations to develop good practice information and advice on the most effective fee plan activities and investments, with the aim of improving fee plan outcomes.

Nonetheless, I have noted the evidence provided to the Committee by HEFCW and higher education institutions in regards to the operation of fee and access plans. Our preparation for the TETR Bill has included consideration of ways in which we can maximise the effectiveness of higher education providers’ obligations in widening access and opportunity, whilst minimising unnecessary administrative burden. I will be bringing forward proposals in the Bill to allow fee and access plans to be more strategically focused, for plans to incorporate consideration of access to part-time and postgraduate courses, and to emphasise positive outcomes for students from underrepresented groups as well as institutions’ upfront investment.

(d) Preserving and protecting the institutional autonomy and academic freedom of universities

Higher education institutions continue to enjoy substantial rights of autonomy. I am confident that the implementation of the Act has not infringed on that autonomy, despite the concerns raised by some stakeholders prior to passage of the Act.

I am further confident that the Act has not, nor could have, infringed on academic freedom, and have no evidence to suggest that it has. I note the evidence from Cardiff University which states that “the autonomy and academic freedom of the institution has not been in question since the enactment of the bill, with no adverse effects arising”.⁴

² HEFCW, *Annual Regulatory Report, 2017/18* (July 2019), p.12.

https://www.hefcw.ac.uk/working_with_he_providers/he_wales_act_2015/Annual_Regulatory_Report.aspx

³ HESA, *Participation of under-represented groups in higher education (Table series T1 and T2)* (February 2019),

<https://www.hesa.ac.uk/news/07-02-2019/widening-participation-tables>

⁴ Cardiff University, *Response to call for evidence – CYPE Committee Post-Legislative Scrutiny of the Higher Education (Wales) Act 2015* (2019).

<http://senedd.assembly.wales/mgConsultationDisplay.aspx?id=348&RPID=1015905352&cp=yes>

The challenge ahead for the coming TETR Bill will be to ensure the appropriate balance between maintaining autonomy for the higher education sector as well as ensuring that the sector is subject to appropriate accountability and operates in a manner that aligns with the social, economic and civic needs of Wales. I am confident that our proposals will achieve the right balance, and are steadfast in our commitment to academic freedom and institutional autonomy within our higher education sector.

Costing and value for money

The Act did not incur significant new costs for Welsh Government. Those costs that were incurred related primarily to the preparation of secondary legislation and ministerial guidance in 2016-17. However, we acknowledge the additional recurring costs to HEFCW in ensuring implementation of the Act since 2016-17, which has been estimated at £250k per annum.

I have given assurances to HEFCW that their income will continue to increase in each year of this Government, as we phase in the reforms to higher education and student support. The final allocations provided to HEFCW in the last three financial years and the 2019-20 Budget demonstrate that we are delivering on that commitment. The final allocations to HEFCW rose from £120m in 2017-18 to £151m in 2019-20.

The 2019-20 remit letter to HEFCW requested further assurance on how Welsh higher education provides quality education, maintains standards and upholds its world-class reputation. It asked the Council to consider whether the current arrangements for monitoring professional accreditation, the classification and awarding of degrees and other measures to assure the quality of provision and academic integrity need strengthening and to provide a report on these issues to ensure that institutions are taking these matters seriously.

In my letter to HEFCW I also asked the Council to work with the HE sector to consider how it can increase openness and transparency around the use of fee income. Students make a significant contribution to institutional income through their tuition fees, and it is fair for students to expect institutions to be accountable for how that fee income is invested. I also expect HEFCW to continue its monitoring of fee levels across the sector for postgraduate and part-time provision in order to protect students from disproportionate and unwarranted fee increases.

Implementation

I would direct Assembly Members to HEFCW's first annual regulatory report for details on the full implementation of the Act.⁵ The report sets out how, during the 2017/18 academic year, the Council has exercised its functions in relation to the Higher Education (Wales) Act 2015 in line with the requirements set out in the legislation and guidance I have issued.

Outcomes from the Welsh Government's formal reviews of the Act

In the explanatory memorandum to the Act published at introduction, I proposed to undertake formal reviews of the Act approximately one, two and three years after implementation. The intention was that such reviews would be timed to follow shortly after the submission of annual reports by HEFCW. Full implementation of the Act did not conclude until the 2017/18 academic year due to a two year transitional period which ended on 31 August 2017. This period was designed to allow a smooth transition from the previous arrangements to the new regulatory system with the aim of minimising disruption for HEFCW and institutions. HEFCW's first annual report was submitted to officials on 30 May 2019. I will take account of this report and subsequent developments in determining the extent, nature and timing of a formal review.

Good practice and lessons learned from both the Act and its preparation (i.e. the process by which the Act was formulated, drafted, consulted on and so forth).

Secondary legislation

I note that a number of concerns were raised during the passage of the Act regarding the use of subordinate legislation. I am confident that the implementation of the Act has demonstrated that the Act is not a 'framework Act', and that the regulatory framework in operation is primarily determined by the primary legislation. Although the Act contains a number of regulation making powers, we consider such powers to be essential to prescribe matters of procedural detail and to provide for future flexibility with regard to matters which may change from time to time.

There were good reasons for the inclusion of each of the regulation making powers and these were set out in the Statement of Policy Intent which accompanied the Act when introduced to the Assembly. In addition, it is worth noting that the 2015 Act did not create a substantially different system (in effect) to that which operated under the Higher Education Act 2004.

Transitional arrangements

⁵ HEFCW, *Annual Regulatory Report, 2017/18* (July 2019).

https://www.hefcw.ac.uk/working_with_he_providers/he_wales_act_2015/Annual_Regulatory_Report.aspx

A phased approach to implementation of the 2015 Act was considered to be necessary to ensure a smooth transition to the new regulatory framework. The legislation was drafted and commenced accordingly, arrangements were made for a two-year transitional period. This approach allowed sufficient time for HEFCW and institutions to successfully adapt to the new regulatory requirements and minimised any risk that might have been incurred by the change to a new legislative basis for regulation.

Consultation

The Welsh Government adopted a two stage approach to consultation on the policy proposals for the 2015 Act comprising a White Paper followed by a Technical Consultation which set out the extensive detail of the proposed regulatory system. Additionally, officials conducted extensive engagement with stakeholders as well as with the UK Government to make arrangements for the continued regulatory oversight of cross-border provision by HEFCW. It is worth noting that the consultation process resulted in several decisions *not to proceed*, including a statutory duty for HEFCW in relation to quality enhancement (as opposed to assurance), and formalising existing processes to strengthen the learner voice.

Future legislation

Looking ahead, I am keen to ensure that HEFCW's successor body, the Commission for Tertiary Education and Research (CTER), is constructed in a way which allows it to be flexible and adaptable as the world changes around it. The new body will have responsibility for funding and regulation across a range of sectors as well as higher education.

I am encouraged by the level of engagement stakeholders have demonstrated with these reforms, which reflects the passion many have for the post-compulsory sector in Wales and its contribution to cultural and civic life. My Officials will continue to engage with and listen to all partners and in particular with learners and their representatives. The detailed feedback provided has helped us refine our thinking as the policy develops within the legislative process.