

**The National Assembly's Children, Young People and Education Committee
Post-legislative scrutiny of the Higher Education (Wales) Act 2015
Consultation response by Universities Wales**

1. Introduction

1.1. Universities Wales represents the interests of universities in Wales and is a National Council of Universities UK. Universities Wales' Governing Council consists of the Vice-Chancellors of all the universities in Wales and the Director of the Open University in Wales.

2. Q1. Has, or is the Act, achieving its policy objectives, and if not why not?

- 2.1. The Act achieved its essential and key **immediate** objectives though not necessarily the overarching policy objectives. Overall a robust regulatory system for universities in Wales has been maintained despite the major reduction in grant funding for universities in Wales and major change in the funding and regulatory systems in other parts of the UK. The Act has so far provided robust arrangements for fee limits and the use of fees, measures to promote student access, quality assurance arrangements, and financial management. At the same time the FHEA 1992 has continued to cover the use of all public funding.
- 2.2. Nevertheless, the legislation was not fully successful in meeting its objectives and there remain significant regulatory challenges particularly in the longer term, which in part have led to the further PCET reform proposals.
- 2.3. A key objective was to enable the regulatory system in Wales to function in the absence of significant grant funding for higher education. The new powers do not rely on funding. By comparison, however, current arrangements are inflexible and cumbersome and not well suited for strategic and policy engagement. The funding powers under the 1992 Act continue to provide a far more flexible and effective instrument in this respect, but only apply to some activities and providers.
- 2.4. The CYPEC Committee expressed its concern that the Welsh Government had not given sufficient consideration to the potential outcomes of the Diamond Review and the Bill may prove to be a temporary 'stop-gap' piece of legislation. (Stage 1 Report, Para 23). In the event, the Diamond Review recommended the continuation of significant HEFCW funding. The result is that HEFCW now has a wide set of additional powers for which the rationale for maintaining may be largely redundant once the recommendations of the Diamond Review are fully implemented.
- 2.5. The Act's stated objectives included ensuring that the new powers were proportionate and that the arrangements preserved and protected the institutional autonomy and academic freedom of universities. The Act, however, went much further than enabling existing arrangements to work without funding, and provided HEFCW with an array of new intervention powers and sanctions for example, where providers are deemed to be at risk of not complying with the regulatory requirements. Unis Wales had very significant concerns with the Bill as introduced which raised issues in respect of competition law, charity law requirements, and the national accounting status of universities. The CYPEC Report at Stage 1 in October 2014 similarly expressed

concerns that the new powers were disproportionate in relation to a mature sector (para 83) and there was 'a danger of over-regulation' (para 84).

- 2.6. The areas of greatest concern in the Bill were addressed through amendment before it was enacted, but there remain potential issues in some areas e.g. potential for the powers to give directions enforceable by injunction to be used for minor matters, the lack of procedural requirements for the Welsh Government of HEFCW in issuing statutory guidance and potential for lack of clarity about what is statutory, and the unrestricted potential coverage of the financial management code.
- 2.7. The Bill only partly implements the Welsh Government's original proposals as set out in the Technical consultation in June 2013 to provide a holistic HE system. In particular, the Act only applies to 'regulated' providers, and only providers with full-time undergraduate provision can become regulated under the Act. Other types of HE provider (or potential HE provider) cannot be regulated under the Act, including part-time and postgraduate only providers, research institutes etc. FE colleges who only offer part-time HE education, for instance, cannot become regulated institutions under the Act unlike their counterparts who provide full-time HE education. The Act would allow changes to the regulations to allow part-time provision to be regulated – but at the expense of imposing fee limits which may not accord with optimal funding and finance arrangements. More generally, there is question about how far the system will be able to cope with new providers.
- 2.8. Contrary to CYPEC's recommendation in its Stage 1 Report, the Act only implemented a part of the arrangements for HE and did not deal with specific course designation for non-regulated institutions. In fact, it did not deal with either automatic course designation for regulated institutions either. These were both left to be dealt with through subsequent student support regulations. Specific course designation arrangements are still developing and a source of confusion for new providers, particularly given the differences in approach adopted in England. The funding powers under the FHEA 1992 also continue to operate in parallel rather than as an integrated system, resulting in a complex interaction between the two. The opportunity to develop a fully integrated system was missed.
- 2.9. Moreover, it left challenging overlaps in responsibilities. HEFCW, for instance, is responsible for the quality of all provision of the regulated institution not just HE provision – this includes e.g. FE and lower level provision with clear statutory overlap in responsibilities with other existing bodies.
- 2.10. Despite its intention, the new regulatory framework still remains sensitive to cross-border changes in the fee and funding systems. To work in practice, the Act relies on providers applying voluntarily to become regulated institutions and accepting the higher levels of regulation and fee limits in return for higher levels of student support. So far all universities have opted to become regulated providers (and special provisions were made for the OU in Wales in the Act). However, non-regulated providers are not subject to restrictions on the fees they can charge or subject to the greater regulatory controls of the Act. If fees are substantially lowered in response to changes in England, however, this may remove the financial advantages for regulated institutions (ironically, the main incentive could be the recognition of regulated institutions for purposes of enabling English students to receive student support).

- 2.11. A particular issue that we raised during the passage of the Bill was that the scope of HEFCW's powers and duties under the Act in respect of quality assurance are limited to regulated institutions' courses within Wales. An additional s.150 order was put in place to ensure coverage of Welsh providers's courses in England, but HEFCW's powers do not extend to courses in other parts of the UK or outside it. In practice, universities and HEFCW have worked around this together to ensure that quality assurance arrangements cover all courses. It is hoped that future legislation may resolve this more satisfactorily, however.
- 2.12. Finally, the Act successfully maintained a focus on fair access under the new system, with the fee and access plans replacing similar arrangements under the HEA 2004 and requiring a significant part of the full-time undergraduate fee income to be used in the support of equality of access or promotion of higher education. The system remains designed around full-time undergraduate students, however. As highlighted in our PCET consultation responses, there are opportunities to improve on regulatory arrangements to focus more clearly on the areas of greatest risk for students, and to rethink the system with their needs and involvement in mind.

3. Q2. How well are the Act's overall arrangements working in practice, including any actions your organisation has had to take under the Act?

- 3.1. Overall, arrangements are working adequately at the moment. However, the arrangements are in general procedurally cumbersome and inflexible and the administrative burden has increased significantly for both HEFCW and providers and the arrangements of the Act, seemingly without a proportionate increase in benefits.
- 3.2. The Fee and Access plan arrangements in particular have become much more complex and lengthy and require significantly more resource to prepare than the arrangements they replaced. The mandatory content is prescribed through a suite of documents whose length, complexity and differences have resulted in difficulties of understanding and interpretation. This includes the Act itself, separate regulations, and Welsh Government statutory guidance as well as HEFCW's own guidance.
- 3.3. As the fee and access plan has become the central tool for implementation of policy, the size and detail of the plans has significantly increased. Universities are now required to fully cost planned expenditure for sixteen different headings, and a further breakdown of student support. The result is that the size of the plans and content have more than doubled in most instances. In addition to the increase in resource required to implement and prepare the plans, one side effect is that the original objective of the fee plans of providing useful information to students has increasingly been a challenge.
- 3.4. Likewise the data and information requirements are significantly increased – particularly relating to institutional eligibility and partnership provision, and forecasting and monitoring information. Implementation has required significant changes to provider processes and systems including approval and sign-off and monitoring processes – including franchise providers as well as the regulated institutions themselves.
- 3.5. As highlighted above, the lack of flexibility and procedural requirements in the Act remain an obstacle, particularly given the need for Welsh universities to respond in a fast moving higher education context. This highlights that there is currently no satisfactory substitute for providing grant funding for more strategic engagement.

- 3.6. Quality assurance arrangements have continued to work well despite the need to adapt to major changes across the UK and challenges to the UK wide-system, but have required significant translation to the new system. There is ongoing work to fully develop and satisfactorily implement HEFCW's new statutory duties – for instance in terms of the practical arrangements for identifying provision that is likely to become unsatisfactory, and alignment with the requirements of the Bologna process and European Standards and Guidelines for Quality Assurance.
- 3.7. The development of the financial management code has highlighted in particular the challenges of operating the new powers alongside the funding powers under the FHEA 1992. The interaction and application of the different provisions is not straightforward. The providers that HEFCW deals with may be regulated or funded – or both. It has been a significant challenge to separate those provisions which belong to regulation under the Code and those – such as value for money provisions – which relate directly to the use of funding.
- 3.8. As we commented at the time, the drafting of the Code provisions have significant potential to be used for matters that were not originally intended. So far this has not been an issue and the oversight of the National Assembly in revisions of the Code provides a helpful procedural check. The process of revision prescribed in the Act remains extremely elaborate, however, and we would have preferred the Act to have found a way of providing greater flexibility for executive decision making and minor change.
- 3.9. Otherwise it is noted that many of the new powers of intervention and sanctions provided by the Act remain unused/untested. The Act is highly detailed and proscriptive in terms of the procedural steps required to exercise the new powers. These can add significantly to the administrative burden in seeking to exercise the powers, without really providing the further protection for stakeholders or providers intended.

4. Q3. Are the costs of the Act, or your organisations own costs for actions taken under the Act, in-line with what Welsh Government stated they'd be?

- 4.1. It has been very difficult to reliably assess the costs of implementation retrospectively, given changes of personnel and limitations of the data available. However, the actual costs for universities (including Universities Wales) appear to have significantly exceeded the Welsh Government's estimates.
- 4.2. The Welsh Government estimated that the additional costs of reforming the functions to enable effective regulation falling on universities to range between £97k and £145k between 2015/16 and 2019/20 (Option 3, Table 10, p.93) – totalling £1.24 million up to 2018/19.
- 4.3. Our best estimate (as set out in our fuller report prepared for the Welsh Government) is that the direct additional costs for Welsh universities and Universities Wales to be in the region of £4.3m up to 2018/19 with ongoing additional costs of around £0.53m. If we include HEFCW's own published estimates of its additional costs (excluding costs prior to 2015/16) the additional cost for higher education in Wales is estimated at around £4.93m up to 2018/19, with ongoing costs of around £0.61m:

Estimated/indicative costs for HE (£000s)

Academic Year	Unis Wales	Universities	HEFCW	Total
2012/13	44	201	-	245
2013/14	126	228	-	354
2014/15	163	382	-	545
2015/16	43	212	49	303
2016/17	15	2,000	264	2,279
2017/18	8	549	244	801
2018/19	4	527	80	610
Grand total	402	3,894	636	4,933

- 4.4. Our analysis identified very considerable costs relating to engagement with the consultation and development of the proposals over several years as necessitated by the Act. This includes the White Paper, Technical Consultation, the Bill, commencement orders, around nine sets of regulations pursuant to the Act, corresponding student support regulations (and consequential changes in other legislation), the different tranches of statutory guidance issued by the Welsh Government, and related consultation on specific course designation.
- 4.5. In terms of implementation, a very significant amount of time and resource was spent on developing interim and transitional arrangements as well as final arrangements including the Fee and Access Plan guidance, partnership guidance, the Full and Transitional Statements of Intervention, and the Financial Management Code (staged through revisions to the Financial Memorandum first). In some areas, as noted above, implementation is still continuing.
- 4.6. The key area for additional recurrent costs, is the fee and access plans which have been a major source of additional cost of the system, with institutions typically employing additional staff to deal with the additional requirements.
- 4.7. Although the direct costs are significant the opportunity costs for universities in Wales, are arguably even more important. If invested in research and innovation, for instance, Welsh universities could have been expected to attract around £11m more income from UK R&I funding on the basis of the correlation between investment and returns in UK R&I funding identified by the Reid Review. On the basis of previous economic analysis of the sector, the loss of wider income generation for other sectors in Wales could be estimated at around £5m:

Opportunity costs - measured in potential loss (£000s):

Academic Year	R&I income loss	Knock-on income generation (Wales)	Knock-on income generation (RUK)
2012/13	564	245	81
2013/14	814	354	117
2014/15	1,254	545	180
2015/16	697	303	100
2016/17	5,243	2,279	752
2017/18	1,842	801	264
2018/19	1,404	610	201
Grand total	11,345	4,933	1,628

4.8. Universities were not engaged with the process of estimating costs or impact of the legislation, and the necessary measures for monitoring costs more accurately were not put in place with the Act. We support the findings of the Finance Committee which recommended improved stakeholder engagement when preparing legislation and associated costings in its Report in 2017.

5. Q4. Has the Act achieved value for money?

5.1. Maintaining a robust regulatory system is essential for universities in Wales and we would expect this to require significant investment. More generally, investment in higher education represents extremely good value for money, given the benefits for students and the wider Welsh economy and society.

5.2. However, as identified above, the Act was only partially successful in its objectives and other options may have achieved the identified objectives better or at lower cost.

6. Q5. Have there been any unintended or negative consequences arising from the Act?

6.1. In addition to the comments above we note the following.

6.2. There has been significant growth in work relating to unregulated providers. While it has made sense for HEFCW to be delegated the administration of specific course designation arrangements, it is not clear that HEFCW have had the additional resource to cover the work. It will remain important to ensure that changes in HEFCW's responsibilities in other areas do not impact on universities and that HEFCW is able to employ additional staff to manage the additional work. Further reforms may provide an opportunity for integrating automatic and specific course designation arrangements more fully.

6.3. Arrangements for franchise provision under the Act have caused significant challenges in implementation for both franchising universities and franchised providers. The Act necessitated a wholesale review of all partnership contracts and arrangements, to ensure compliance with the new statutory definitions and arrangements with a number of providers having to seek legal advice to navigate the complexities of the legislation. Difficulties in this area are to some extent compounded by new/different arrangements being adopted in England.

7. Q6. Are there any lessons to be learned from the Act and how it is working in practice that may be relevant to the proposed Post-compulsory Education, Training and Research (PCETR) Bill?

7.1. There are significant lessons to be learnt from the Act that are relevant to considering future PCET legislation.

7.2. A key issue for us is that a clearer and more coherent set of guiding principles needs to underpin the PCET system reforms from the start. This should obviate disparities in treatment of part-time provision for regulated and non-regulated providers for instance.

7.3. There is further scope for future arrangements to better address the needs and interests of the full range of students. The current regulatory system reflects the fact that it has been built around, and depends on, fee and finance arrangements for full-time undergraduate students.

- 7.4. The level of assurance and regulation needs to be proportionate and better reflect the needs of students. The current system provides strictest regulation of the institutions who pose the lowest risk. Potential for regulatory measures to focus better on areas of greatest need. At the moment the regulation has been increased for institutions that have already strong track records, rather than new and alternative providers.
- 7.5. The risks, costs and value for money of any major legislative proposals need to be assessed very clearly and weighed carefully against alternative options. Experience of the HE(Wales) Act points very clearly to the very substantial costs and time involved in implementing major new legislation, and the long time scales before any potential benefits can be realised. As commented above, in particular the opportunity costs for universities and wider stakeholders are substantial and should not be underestimated.
- 7.6. The Act focusses on regulatory compliance and providing means of intervention for providers deemed to be at risk of failing. It is less successful and less geared towards providing support for strategic oversight of the sector, which was much easier under the previous system. As concluded by Diamond, there is no satisfactory replacement for grant funding in many areas. It is absolutely vital for universities and the economic prosperity of Wales that universities continue to thrive on the global economy and receive the necessary investment and support.
- 7.7. Experience of the HE (Wales) Act also demonstrates the critical importance of maintaining effective relationships and cooperation between stakeholders. Many of the potential difficulties of the Act have been overcome or mitigated in practice due to cooperation within the sector, as highlighted above. The regulatory system needs to provide proportionate assurance and support delivered primarily by developing good relationships and using its powers primarily to incentivise and facilitate.
- 7.8. Experience of dealing with challenges of implementation and shortcomings of the Act further highlights the value of having an effective independent body with responsibility for higher education in Wales operating at arms-length. This means ensuring that the body has sufficient resource and operating flexibility, while setting clear and appropriate parameters for it to work within.

8. Q7. Are there any lessons to be learned from how this Act was prepared in 2014/15 (formulated, consulted on, drafted etc)?

- 8.1. Yes, there are significant lessons to be learnt from the preparation of the HE(W) 2015, as we identified and were recognised in the reports of the National Assembly Committees at the time.
- 8.2. We submitted evidence to your Committee's Inquiry on law-making in the 4th Assembly, prior to the introduction of the Bill on the 19th June 2014 which raised concerns about the lack of consultation and engagement with the sector on detailed proposals or a Draft Bill following the close of the Technical consultation in June 2013. In our view many of the problems with the Bill that had to be ironed-out during the legislative passage or have remained, could have been avoided and dealt with more efficiently prior to its introduction, .
- 8.3. Despite intentions, the Bill did not initially achieve its objectives and required extensive amendment to become workable. In the case of legislation, experience strongly suggests that the legislative detail is critical. It is absolutely essential that there is sufficient time and resource

available to all stakeholders for developing, drafting and amending the provisions together, and legislative time in the calendar to deal with any future changes.

- 8.4. In terms of the current PCET proposals, the Welsh Government's engagement with stakeholders in its PCET reform proposals has been better so far, but we note that it was precisely at this stage that the problems occurred last time. It will remain essential that the detailed proposals and or a draft Bill are discussed with the sector prior to laying any Bill, to avoid similar issues again.
- 8.5. As discussed above, it appears that the costs of the proposals for the sector were underestimated, as we suspected at the time. The recommendations of the National Assembly Finance Committee in 2017 on financial estimates accompanying legislation appear to be highly pertinent in this context. In particular, it is important that relevant stakeholders are engaged with the process of costing to achieve a better shared understanding and agreement of the likely costs, risks and impacts. For any new proposals, the Welsh Government should also consider setting up appropriate monitoring arrangements for assessing costs and policy impacts from the outset.
- 8.6. There were also a significant lessons to be learnt in terms of the approach to drafting the Bill, as recognised in particular by the Stage 1 report of the National Assembly's Committee for Constitutional and Legislative Affairs, published in October 2014:
- The Bill as introduced left a substantial amount of important detail to be determined or clarified through subsequent subordinate legislation. As commented by CLAC, the Bill lacked clarity and did not ensure that those affected by the legislation have a clearer and fuller picture of how it will impact on them. There was a tendency to omit matters deemed as technical from the face of the Bill, despite their importance. It will be important in future legislation to ensure that the all matters of significance are dealt with on the face of the Bill and not developed piece-meal.
 - In particular it was a concern that, initially in the large majority of cases, the negative resolution procedure was proposed. The use of the negative resolution process does not formally require consultation, or allow amendment of the detail of the provisions. These were amended following the National Assembly Constitutional & Legislative Affairs's Stage 1 Report, published in October 2014.
 - In three instances, the Bill incorporated powers to amend either the Act itself or other primary legislation through the means of subsequent regulations (i.e. Henry VIII powers). The inclusion of these powers has traditionally been infrequent and controversial, since it enables primary legislation to be amended without the proper oversight of the Assembly.
- 8.7. Based on experience of the HE(W)A 2015, we would not support any form of 'framework bill' which sought to stagger the process by leaving important details to be determined at a later date through regulations without the full requisite scrutiny process of primary legislation. This would only increase risks, and be likely to create more issues for students and providers than it seeks to address.