

## Form and Accessibility of the Law Applicable in Wales A consultation response by Universities Wales

### 1. About Universities Wales

- 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.<sup>1</sup>

### 2. Introduction

- 2.1. Universities Wales welcomes the opportunity to comment on the issues raised by the Law Commission in its consultation paper on 'Form and Accessibility of the Law Applicable in Wales'. We have chosen to comment on a selection of the questions contained in the Law Commission's consultation paper (grouped by chapter heading below). These comments are based on our experience of the legislative process in Wales, working with the Welsh Government and the National Assembly for Wales on legislation relating to higher education.
- 2.2. Since the devolution of primary legislation making power, an increasing amount of our work has concerned legislative developments relating to (or potentially relating to) higher education. Recently, this has included for instance legislative proposals relating to diverse matters such as public service workforce planning, gender-based violence, additional learning needs, and the new qualifications framework for Wales. There has also been significant new legislation in Wales relating primarily to higher education. Universities Wales was called upon to give evidence in relation to the Further and Higher Education (Governance and Information) (Wales) Act. In particular, we represented the interests of universities in the development of the Higher Education (Wales) Bill which introduced major regulatory change to the sector and the first major divergence in policy from England. Many of our comments in this response are based on an in-depth involvement with the passage of this Bill through the National Assembly for Wales, and the related development of regulations following its enactment in 2015. Universities Wales has also worked regularly with its parent body, Universities UK, to respond to UK legislation relating to Wales, which has for instance has recently included consumer protection and counter-terrorism legislation.
- 2.3. Some of the comments in this response we had an opportunity of making to the Constitutional and Legislative Affairs Committee to help inform their inquiry into law making

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<sup>1</sup> For further information about Universities Wales see: <http://www.uniswales.ac.uk/>.

in the Fourth Assembly. However, these were submitted prior to the introduction of the HE (Wales) Bill in May 2015, and the following paragraphs benefit from our subsequent experiences.

- 2.4. From the outset we should state that the issue of the accessibility of the law is an important one for our policy work on higher education in Wales. As identified in the consultation paper, education has been a key area for devolved legislation-making in Wales. There are in our view substantial benefits to be potentially gained from review of the legislative process and accessibility of the law in Wales (**Question 1-1**). We highlight a number of potential areas where there could be significant cost and labour savings for stakeholders through pursuing proposals which help identify the existing law applicable for Wales more clearly and the impact of proposed amendments (e.g. Keeling schedules), and help to reduce the costs of dealing with unclear or poor legislation through changes to legislative and pre-legislative processes. However, the real benefit from our perspective is improving the capacity of the National Assembly for Wales and Welsh Government to make good law.

### **3. The current legislative process (Chapter 3)**

- 3.1. We recognise that the National Assembly for Wales, and Welsh Government, face increasing challenges in terms of the volume and complexity of future legislation. Given the resources available in Wales, the current process in general appears to strike a balance between efficient enactment of policy and effective scrutiny. Our experience of the work of the Committees in scrutinising legislation, in particular, has been very positive. However, we would agree with the consultation paper in that there appear to be opportunities for strengthening the process further.

#### Pre-legislative process

- 3.2. In particular, we think that there is an opportunity to strengthen the pre-legislative stage of development of a Bill. In our response to the Constitutional and Legislative Affairs Committee's inquiry on Making Laws in the Fourth Assembly in May 2014, we raised a number of concerns in the context of the imminent introduction of the HE (Wales) Bill. These included the late publication of consultation responses which adversely affected the ability of the university sector and other stakeholders to share their views publicly and prepare for the introduction of the Bill, the lack of sufficient clarity on detail in the consultation that did take place to comment meaningfully, and regarding the lack of continuing dialogue between the Welsh Government and the sector in developing the proposals further before the Bill was introduced. Our subsequent experience confirms the importance of the pre-legislative stage: it is very difficult for the Welsh Government to contemplate desirable changes once a Bill has been introduced.

3.3. By contrast our experience of working with the Welsh Government on the HE (Wales) Act 2015 Regulations shows the value that a constructive and meaningful dialogue on draft legislation prior to its introduction can have. In our consultation response, we identified a number of issues with the draft regulations. This included some significant technical issues such as the definition adopted for qualifying courses which inadvertently required that they must be provided by a publicly-funded institution – contrary to a principal purpose of the new legislation to ensure that the regulatory framework could work irrespective of whether an institution was publicly funded or not.<sup>2</sup> The regulations incorporated a number of changes explicitly in response to our comments which successfully addressed many of the issues we raised.<sup>3</sup>

3.4. We welcome the Constitutional and Legislative Affairs Committee's recent recommendation that there should be a presumption in favour of publishing draft Bills:<sup>4</sup> we previously expressed our view that Bills of the importance and complexity of the HE (Wales) Bill should not be introduced without prior consultation on a draft Bill. We also view an appropriate consultation and engagement with stakeholders prior to introduction of legislation as essential to good law-making. In our view strengthening the pre-legislative requirements, would serve to avoid unnecessary consideration of issues by the National Assembly for Wales which could be addressed more effectively prior to introduction. Ideally, we would like to see the Committee's recommendation taken further. Where the pre-legislative stage preparation falls short, for instance, this could involve ensuring that longer timescales are assigned to the initial stages to compensate or even requiring a Bill to be re-introduced after appropriate pre-legislative consultation. This would also be consistent with the view that the National Assembly should be the final arbiter on matters of due process.

#### Legislative process

3.5. Our experience of the role of the National Assembly for Wales in the process of scrutiny of primary legislation has been positive, and in particular we found that the Constitutional and Legislative Affairs Committee (CLAC) and the Children Young People and Education Committee (CYPEC) both played a vital role in ensuring that HE (Wales) Bill was properly considered and improved. However there are number of aspects of the process that call for comment based on our experience.

3.6. In relation to the HE (Wales) Bill, the Stage 1 Reports of both the CPE and CLA committees appeared to share many of our concerns with the Bill as introduced, and set out a series of recommendations which we felt able to support in full. The Welsh

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<sup>2</sup> See Universities Wales' response to the HE(Wales) Act 2015 Regulations, 12 May 2015, pp.5-6, available from: <http://www.uniswales.ac.uk/publications/consultation-responses/>

<sup>3</sup> See the Explanatory Memorandum to the Higher Education (Qualifying Courses, Qualifying Persons, and Supplementary Provision) (Wales) Regulations 2015, paragraph 44, ([here](#)).

<sup>4</sup> Report on Making Law in Wales, 8 October 2015, (see [here](#)).

Government, in the end, responded to sufficient number of these to address our most critical concerns, including bringing forward important amendments to address issues regarding the impact of the Bill as introduced for charity status and national accounts classifications of universities in Wales. A parting view expressed in Plenary, with which we strongly agree, however, was that the HE (Wales) Bill could have been improved further.<sup>5</sup>

- 3.7. A key issue is that in practice, despite much careful scrutiny of the Bills, amendments only have a realistic chance of being agreed if the Welsh Government chooses to support them. As was also commented in Plenary in the Stage 4 proceedings, a significant number of proposed amendments to the HE (Wales) Bill, for instance, had the full support of all opposition parties in Stages 2, but with votes equally divided on party lines the motion to agree the amendment fell on the Chair's casting vote as required by standing orders. We would question whether the current process enables the National Assembly to apply similar levels of pressure on government to make or concede amendments as the longer bicameral process in Westminster which requires agreement to be reached between the two Houses.
- 3.8. While it could be argued that matters of policy are rightfully for the elected executive to determine subject to due scrutiny, we would question whether the current process gets the balance right when it comes to determining constitutional or legislative matters. The selective acceptance of the Stage 1 report recommendations of the Constitutional and Legislative Affairs Committee bears further consideration in this context. It is difficult to see why for instance the Welsh Government should be the final arbiter about what level of scrutiny the Assembly should apply to regulations when the Welsh Ministers seek to exercise powers they have conferred on themselves in a Bill. Decisions about whether provisions should be included allowing the Welsh Government to amend primary legislation by means of statutory instrument (i.e. Henry VIII clauses) also raises constitutional issues – and we expressed our concerns about the inclusion of three such clauses originally included in the HE (Wales) Bill which seemed to provide unnecessary latitude for future amendment with limited scrutiny. If a Bill seeks to reserve too much policy detail to be determined by regulations, rather than placing it on the face of the Bill - as we felt was the case with the HE (Wales) Bill and we gather has been a criticism of a number of other Bills - not only does this deprive stakeholders of the opportunity to comment on the Bill meaningfully it lessens the scrutiny of the National Assembly. On the face of it these should be matters for the legislature, not the executive, to determine.
- 3.9. Given this, we would strongly support further attempts to strengthen the oversight and ownership of constitutional and legislative issues in the National Assembly, and increasing the opportunity for scrutiny through an additional amendment stage which is not subject to government discretion.

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<sup>5</sup> See the Record of Proceedings of the Stage 4 discussion in Plenary, 27 January 2015.

- 3.10. We found the legislative timescales scheduled for consideration of the HE (Wales) Bill extremely challenging at times. As we outline elsewhere in this response, getting to grips with legislation of this complexity – particularly when reliant on publicly available resources - can be a considerable task. We continued to identify issues throughout the passage of the HE (Wales) Bill, but could only focus on a shortlist of the most important issues to tackle. More time for consideration and or additional stages could potentially afford a better opportunity to ensure that a fuller range of issues could be deliberated in detail (both in the Assembly and outside of it) – leaving further amendment/reporting stages to the Welsh Government’s discretion is perhaps not sufficient and we welcome full consideration of the CLAC’s recent recommendation that an additional compulsory stage should be considered. The timescales for passing a Bill in Wales appear to be rather shorter than for Westminster. Fewer stages are involved and fewer opportunities to amend.
- 3.11. Access to legislative counsel has at times appeared to be a significant issue. In particular, Welsh Government officials referred to lack of legislative counsel time on a number of occasions in our discussions with them as the key reason for not being able to draft further amendments, or to support/consider opposition amendments or alternatives, despite having reached some agreement on the value of such amendments and support for them in principle. We commissioned lawyers whose help enabled us to present a range of options which complied with the appropriate form, yet this remained an issue. More recently, we have been told that it is currently unlikely that there will be a consultation or publication of a draft of the next set of regulations to be made under the HE (Wales) Act 2015 prior to regulations being laid due to constraints on legislative counsel time. While these matters are hard to judge from an external perspective, it appears to be adversely affecting the capacity to make good legislation in Wales.
- 3.12. We would also welcome further review of the **negative resolution procedure** in Wales and/or the guidelines on its use. The negative resolution procedure is governed by a combination of UK legislation (the Statutory Instruments Act 1946) and the National Assembly’s Standing Orders, which as we comment elsewhere may not be immediately obvious to general stakeholders.
- 3.13. Firstly, we would welcome guidelines that ensure that this not being used routinely for regulation-making powers: one of the key criticisms of the HE (Wales) Bill as introduced was that it delegated too much policy detail to regulations with the lowest level of scrutiny, although a number of the procedures were amended to affirmative resolution procedure in the Bill as finally enacted.
- 3.14. A second issue is that the current arrangements enable regulations to come into force before there is an opportunity to consider and table a motion to annul them if appropriate. For instance, three sets of regulations were made under the HE (Wales) Act 2015 following this procedure, and laid with their accompanying documentation between 9 and 13 July 2015, the final week that the Assembly was in session. They came into force on 31

July 2015 during the summer recess, but currently still fall within the period for potential annulment which will not expire until the end of October 2015. As they apply to Wales the provisions require that notification/explanation must be given if the instrument is not laid at least 21 days before coming into operation but we question whether this safeguard goes far enough (no such notice was presumably required in this example, despite the Assembly being in recess). We would welcome guidelines that ensure that in normal circumstances regulations do not come into force until the expiry of the period for annulment, providing an opportunity to prevent issues in advance of coming into force and for stakeholders to prepare for the implementation timetables that these effectively set.

- 3.15. On the face of it, there is potential to reform the legislation as it applies to Wales in this area. We are also aware that in Scotland statutory instruments following the negative resolution procedure have to be laid before Parliament not less than 28 days before the legislation is due to come into force. Provisions of this kind may help to obviate difficulties for stakeholders.
- 3.16. An issue noted in Committee during the passage of the HE (Wales) Bill was the lack of a process for scrutinising **commencement orders**. In practice, commencement of legislation can be complex and have a significant impact on stakeholders. In the case of the HE (Wales) Act 2015, for instance, decisions on the commencement of provisions and their sequencing effectively determined which provisions of the new and existing regulatory frameworks would or would not apply during the transitional period and any consequent issues that could arise i.e. matters of considerable importance to stakeholders. The arrangements for the transitional period were not clear from the face of the Bill, and have only become clear as the commencement orders have been laid. We welcome the suggestion that there may be merit in providing the National Assembly for Wales an opportunity for scrutinising commencement orders where it sees fit in the interests of promoting good policy implementation and to ensure that any significant policy decisions of this nature contained in the commencement orders can be appropriately scrutinised.
- 3.17. The consultation asks for views on whether a special procedure should exist for **non-controversial Law Commission Bills** in the National Assembly (**Question 3-2**). We would agree that special procedures could potentially promote a more efficient and effective scrutiny of consolidation Bills which simply attempted to re-frame the existing law. However, there are also clear dangers in providing a process that could be used more widely. We highlight in particular the discussions in committee on the HE (Wales) Bill reflected in the CLA Committee's Stage 1 Report which highlighted the very different understanding between the Welsh Government and others of what was meant by 'technical' and the level of scrutiny merited for such provisions. Similarly, there may be issues over agreeing what is non-controversial. For a Law Commission Bill we would not expect there to be issues of general principles that require Stage 1 debate, but conceivably issues which require a consideration of general principles to resolve may arise in practice from the process of consolidation and a means of escalating any such issues for consideration

should be available. A by-pass process is already available for Stage 1 which could perhaps be used or adapted for these purposes. For Bills with an element of reform, i.e. seeking to introduce new policy, there are clearly risks that this procedure is used for Bills which would deserve the normal scrutiny procedure, and we agree that these should be limited to Law Commission Bills on issues which Plenary can agree are non-controversial.

### The legislative process and Parliament

3.18. Legislation relating to HE in Wales continues to be made by Parliament as well as the National Assembly for Wales – most recently for instance in the Consumer Rights Act 2015 which included provisions about providers subject to the student complaints scheme of the Higher Education Act 2004. For us this raises some issues of due process that should be considered further. While a memorandum ensures a level of cooperation between Wales and England on such legislation, this deprives the National Assembly for Wales an opportunity for scrutiny of the legislation applying to Wales. In our experience, this results in a lack of consultation as well as scrutiny. There is even an issue with basic awareness and monitoring of such developments: legislation will appear on the legislation.gov.uk database, but not in databases of Welsh legislation. It is not clear how relevant amendments to Westminster Bills which apply to Wales could be easily monitored.

3.19. This is a particular concern for the cross-border operation of policy, where there may be a continuing need to rely on Westminster legislation. An order brought under s.150 of the Government of Wales Act 2006,<sup>6</sup> for instance, was necessary to provide reciprocal arrangements with England enabling courses delivered by regulated institutions in England to be covered by HEFCW's new quality assurance duty (it did not unfortunately, remove potential issues with other provision outside of Wales). The HE (Wales) Act 2015 was passed, enacted and partially implemented before this was published, and the outcome of the discussion between governments confirmed. We would welcome further suggestions on how this type of situation can be better coordinated by the governments, and overseen by the National Assembly.

## **4. Drafting and interpreting legislation (Chapter 4)**

4.1. In general, there are many aspects of the legislative drafting in Wales that have not presented us with difficulty, and the Welsh legislation we have dealt with has largely been successful in balancing simplicity and precision, including implementing good practice in terms of modern language. **(Q4-1)**. However, there were a number of occasions where we felt that the drafting could have been significantly improved in certain aspects.

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<sup>6</sup> The Higher Education (Wales) Act 2015 (Consequential provisions) Order 2015, 2015 No. 1353 – made 4 June 2015.

- 4.2. An instance of where we believe drafting could have been significantly improved – preferably before the Bill was laid – is provided by section 3 of the HE (Wales) Act 2015. This aims to provide a potential process for designation of ‘other providers of higher education’ where they do not meet the criteria set out in section 2 of the Act. During the passage of the Bill through the National Assembly for Wales, we had lengthy dialogue on this section to clarify how it was intended to operate. We had received two separate legal interpretations from highly respected firms which were at variance with each other. The Explanatory Notes did not appear to illuminate the interpretation very far. Moreover, the Welsh Government’s further explanations did not appear to match the guidance in the Explanatory Notes very well. We pressed for amendment of the section and/or the explanatory notes, which could be taken into account in judicial interpretation. As a result, the Welsh Government added a further example of the type of situation that was meant to be covered by the provision in to the Explanatory Notes accompanying the Bill.
- 4.3. However, this did not fully resolve matters. As we commented in response to the Welsh Government’s consultation on the first set of regulations made under this section, a continuing lack of clarity over what provider of these provisions in the Act made it difficult to respond to the consultation meaningfully.<sup>7</sup>
- 4.4. The definition of an ‘institution’ for purpose of the Act continues to cause problems and consume scarce resources in seeking to reach a workable clarity. With the transitional arrangements of the HE (Wales) Act 2015 having already come into force, there is still a need to clarify when a provider which is part of a larger corporate structure should be regarded as an institution in its own right or an external provider. While this may be something that the Welsh Government issues further guidance about, it will remain for HEFCW to ensure that it has taken its own legal advice on this issue before adopting a policy. Our view is that many of these issues could have been avoided in drafting, and that further consideration of the section prior to the Bill’s introduction could potentially have obviated the need for the significant time and resource spent in clarifying and compensating for this.
- 4.5. We agree that there is potential merit in publishing the Office of Legislative Counsel’s Legislative Drafting Guidelines (**Question 4-2**). However, perhaps more importantly, there needs to be consistency between the National Assembly’s approach and the guidance used in drafting. There was much discussion in the Constitutional and Legislative Affairs Committee about the correct procedure to be adopted for powers to make subordinate legislation in the HE (Wales) Bill, for instance. The Welsh Government frequently claimed to have followed Counsel General’s guidelines; the Committee, however, clearly highlighted systematic differences in approach to its own.<sup>8</sup>

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<sup>7</sup> See Universities Wales’ response to the HE(Wales) Act 2015 Regulations, 12 May 2015, available from: <http://www.uniswales.ac.uk/publications/consultation-responses/>

<sup>8</sup> See: CLAC, Report on the Higher Education (Wales) Bill, October 2014, paragraph 25.

4.6. Reading amended legislation causes significant difficulty (**Question 4-3**). The key issue is the time and resource required to ensure that an accurate version of the text to be amended, and that the change can be seen and understood in context. We strongly agree with the Law Commission's observation that 'time is an essential commodity' (para 4.17) when it comes to providing effective input to the legislative process.

4.7. In the case of the HE (Wales) Bill, a number of highly important changes were contained in the section on 'minor and consequential amendments'. Paragraph 2 of the Schedule, for instance, amended the Further and Higher Education Act 1992:

2(1)Section 70 (assessment of quality of education provided by institutions) is amended as follows.

(2)In subsection (1), for "Each council" substitute "The Higher Education Funding Council for England".

4.8. A common issue with such schedules, as the Law Commission highlights, is that the impact is not obvious on the face of the Bill, and can only be found from investigation. The new Act contained a new duty in respect of regulated institutions – which the Explanatory Memorandum highlighted clearly. From the Technical consultation prior to the introduction of the Bill, it was not clear whether HEFCW's current duty to assess of the quality of education of the institutions it funds would continue under the new arrangements. The effect of the consequential amendment, however, was to remove HEFCW's existing statutory duty in relation to funded institutions altogether. This meant, and still means, that certain types of providers who were formerly potentially covered by HEFCW's quality assurance duty were no longer covered. It raises the possibility that HEFCW could fund an institution but not have a statutory duty to assess the quality of the provision it funded. A second consequence was that, as a result of the different formulation of the duty, provision outside of Wales was no longer covered by the quality assurance arrangements (although provision in England is now covered by a reciprocal arrangement with England).

4.9. The key point in this context is that the consequences of this were not widely recognized in State 1 scrutiny of the Bill before Universities Wales gave evidence to the Children Young People and Education Committee and were invited to submitted additional evidence on this topic. It became one of the key areas of concern in Stage 2 proceedings, with several amendments introduced by opposition parties attempting to rectify the apparent deficiencies in the legislation.

4.10. We strongly agree with the Law Commission's view (4.54) that there is potential value in introducing **Keeling-type Schedules (Question 4-4)** to help identify exactly how a Bill amends another piece of legislation. One of the key reasons for the Keeling-type schedule being useful at the present time is that publicly accessible versions of the up-to-date text are currently not available and it may be that developments in legislation.gov.uk may address this in future (although this is less clear for secondary legislation). Even so, it can be difficult or impossible to understand the precise effect of the amendments from a

reading of the amended legislation alone. Considerable work can be required just to identify the detail of the changes. In some instances, as illustrated above, this can be absolutely critical.

4.11. In practice, the first thing that an organisation such as ours must do in reviewing legislation is to prepare a Keeling-type schedule. Our members will also need to have performed or benefited from a similar analysis before an informed discussion can be held within the sector on the merits of the provisions. When commissioning legal advice, the first thing that our legal advisers must do is to prepare a Keeling-type schedule (although commercial services may of course aid this). There is clearly much duplication of effort and resource among users that could be potentially saved by making a Keeling-type schedule available (and this may apply to policy makers too). Even more importantly, however, this would help to remove a barrier to giving the proposals timely consideration and scrutiny. Our experience as exemplified above in relation to the removal of HEFCW's previous quality assurance duty by the HE (Wales) Act 2015, is that the Explanatory Memorandum is not always successful in highlighting the issues that stakeholders view as important, and that important details contained in the consequential amendments can be easily missed, or not appreciated until late in the process of legislative scrutiny.

4.12. Instead of making them formal schedules to an amending Bill (**Question 4-5**), we think that it would be preferable to adopt the recent recommendation of the Constitutional & Legislative Affairs Committee that Keeling-type schedules should be separate formal documents accompanying the legislation, or annexed to the Explanatory Memorandum. Wherever possible these would need to provide as much of the original legislation as is required for a reader to understand the precise effect from the amended extract alone (**Question 4-6**), but some form of introduction to contextualise an extract could be used where more pragmatic and helpful to do so. While the detail provided by a Keeling-type schedule would be of significant value for many key users, in our view, there is a danger that this would make the Explanatory Memorandum/Notes less approachable for a more general readership. If the Keeling-schedules are formal schedules that become law when a Bill is enacted, it is also not clear to us how the risk of this being at variance with the Printer's copy would be removed or managed.

4.13. **Overview sections** contained in the legislation are not helpful in our experience (**Question 4-7**), and we agree that there is a risk that these complicate the interpretation of the legislation (**Question 4-8**). The Law Commission cites the example of the HE (Wales) Bill in its consultation paper which serves as an example of the need for continued effort required to avoid any issues. Two amendments (Amendments 1 and 4) to the overview section were agreed in Stage 2 consideration of this Bill: both sought to improve the descriptions of the provisions in the Bill which had not changed. Where there are substantive changes to sections of the Bill, this could also be expected to necessitate amendment to the overview section.

4.14. We agree with the conclusions of the Law Commission (4.87) that the main value of an **Interpretation Act** for Wales at this stage may be to deal with Welsh legal terminology (**Questions 4-11**).

## 5. The condition of legislation in Wales: case studies (Chapter 5)

5.1. As requested (**Question 5-1**), the following paragraphs provide a case study highlighting some of the challenges in terms of accessibility that the present condition of the legislation has posed for us, beginning with an overview of the main legislation applicable to higher education in Wales.

5.2. In common with other areas, the key statute law applicable to higher education in Wales is a mix of enactments made by the UK Parliament and the National Assembly for Wales:

- A number of universities in Wales are higher education corporations governed by the Education Reform Act 1988 and the Further and Higher Education Act 1992 in particular; older universities in Wales, however, were incorporated by Royal Charter. All universities in Wales are charities but, unlike higher education providers in England, Welsh universities are directly regulated by the Charity Commission.
- The Further and Higher Education Act 1992 provided a shared regulatory framework for institutions in both England and Wales and continues to apply to both in relation to its funding provisions and the role of the Funding Councils (although no longer in relation to quality assurance arrangements for Wales). The executive functions of the Secretary of State have been transferred to the Welsh Ministers and references to the HE Funding Council for Wales (HEFCW) substituted for the HE Funding Council for England (HEFCE) in relation to the exercise of devolved powers.
- The Higher Education Act 2004 previously included a complex assortment of joint and separate provisions for England and Wales seeking in particular to provide further regulation in the light of an increase in the maximum fees chargeable to full-time undergraduates, including providing for equality of opportunity (in both England and Wales) and the promotion of higher education (Wales only). The fee plan arrangements have now been replaced by the HE (Wales) Act 2015, but the student complaints arrangements continue to apply to both England and Wales with executive functions transferred to the Welsh Ministers in respect of Wales.
- The first primary legislation relating primarily to higher education was the HE (Wales) Act 2015, which introduced major changes to the regulatory system that applied to the higher education sector in Wales and marked the first major divergence in the regulatory frameworks between the two countries. The Act was introduced to provide a means of regulating providers of higher education in Wales which dispensed with the need for attaching terms and conditions to Funding Council grants under the Further and Higher Education Act 1992.

- In addition, it is noted that the Teaching and Higher Education Act 1998, with executive powers transferred to the Welsh Ministers, provides the basis for student support provisions in Wales.

5.3. From this outline, it can be readily appreciated that many of the challenges identified in the consultation paper also apply to the law applicable to higher education in Wales (**Question 5-2**). For instance:

- A continuing issue for instance is the ease of identifying non-textual amendments to the legislation – in particular, where executive powers have been transferred to the Welsh Ministers and where the comparable body in Wales has been substituted in respect of the devolved powers. These are not always easy to identify even after investigation using publicly accessible resources at present.
- Identifying the applicability of the law, particularly that made by Parliament, can be a challenge. As highlighted in the consultation, the jurisdictional extent of a provision (which is indicated in legislation.gov.uk database) is not a guide to its application for England and Wales. We would welcome further consideration of ways in which this could potentially be addressed. For instance, could a section on extent and applicability be included in future legislation – or even existing legislation? A regular section (perhaps alongside e.g. commencement orders and consequential provisions) could be used and amended/updated as necessary to identify applicability and potentially non-textual amendments. On the face of it this approach would be much less resource intensive than a full consolidation, reform or codification exercise. It is also possible to consider incorporating a table of applicability in the accompanying Explanatory Notes or as a separate document to be published alongside the primary legislation: this would have the advantage of obviating the need for primary legislation but the applicability of the law would still not be clear from the face of the legislation and these may be more problematic to keep up to date.
- A significant issue for Wales is that much of its legislation is enacted through statutory instrument – in part a legacy of the initial devolution of executive functions only to Wales. Amendments to statutory instruments are particularly difficult to spot and difficult to trace. There is no easy means to discover this through publicly available resources. Our initial discussions with the Welsh Government concerning drafts of the HE (Wales) Act 2015 regulations was hampered by not spotting that a set of regulations referred to had been amended. In this instance, it was resolved through constructive pre-legislative dialogue of the kind that we believe should be the norm for any significant legislation.
- Another issue which is perhaps of particular significance for Wales is the prevalent use of Henry VIII clauses. In general, you would expect the Welsh Ministers to have to bring forward primary legislation in order to alter the provisions of an existing Act

but this is not always the case. In addition to any constitutional issues that this may raise, the application of these provisions can be very difficult to identify. By way of example, the role of HEFCW was established by section 62 of FHEA 1992. Section 28(1) of GOWA 1998 as amended by the GOWA 2006, however, enables the Welsh Ministers to transfer additional functions to HEFCW and alter its membership by order. Section 28(7) includes the necessary 'Henry VIII clause' to allow the orders to make consequential amendments to the primary legislation. Unusually, the orders follow the negative resolution procedure (GOWA 1998 s.28(7)(A)), i.e. the legislation takes effect automatically subject to a period enabling a potential veto by the National Assembly, rather than the affirmative procedure which is normally used in such instances to ensure that the amending legislation is subject to the greater level of scrutiny. Notably, this set of GOWA provisions give the Welsh Ministers even greater powers in respect of further education, and these have already been exercised in Wales. FEFCW which was also established by the FHEA 1992 (and replaced with NCETW by the Learning & Skills Act 2000) was abolished and its functions transferred to the Welsh Ministers in 2006.<sup>9</sup>

- Another key issue which has continued to provide challenges is an appreciation of how the devolved powers in Wales interact with UK Law. Most matters in education can also be categorised by another heading, e.g. employment law and education. The consultation paper provides a thorough overview of the key case law in this field. It suffices to note in this context, that there were significant developments in case law in this area very recently, including during and following the passage of the HE (Wales) Bill. The most recent case law poses further questions. Uncertainty about the boundaries of legislative competence continues to be an issue in our work on higher education policy.

## 6. Publishing the law (Chapter 6)

6.1. The key priority for us would be to make sure that **accurate up-to-date copies of the UK legislation are available**. It is in general not feasible for an organisation of our size and remit – or the best use of available resources - to regularly invest in specialist legal services in order to understand and initially assess changes or proposed change in the law relating to higher education. In most cases it is necessary to monitor and make our own initial assessment of legislative developments based on publicly available resources to identify key issues for the sector for which specialist/professional advice may be necessary. We believe that this also widely holds true for our members and other bodies in the sector.

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<sup>9</sup> The National Council for Education and Training for Wales (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, [2005 No. 3238 \(W. 243\)](#).

- 6.2. In our experience, the public accessibility of the law prevents stakeholders from considering the legislation as fully or as early as they may otherwise have done, and hinders issues being identified and discussed between them. From our perspective it can mean that our available resource is not being targeted at issues that genuinely require expert input as efficiently as it could be. Given that time is of essence in the legal process, and the accessibility is a significant factor which affects our ability to respond effectively within the time constraints on behalf of the sector, at the potential detriment of good legislation making.
- 6.3. The most obvious solution is to ensure that this is addressed as part of the **legislation.gov.uk** facility. Legislation.gov.uk is the key publicly accessible resource for finding statutory law and provides access to copies of the legislation with amendments. The texts of legislation, however, are in general not fully up-to-date. Annotations next to each section provide an invaluable record of changes and effects yet to be applied (some of which apply to both England and Wales, some to one nation only). If the legislation is viewed by part rather than section, the annotations do not appear (see for instance the changes to the s.11 and 12 of HEA 2004 made by the Consumer Protection Act 2015 commencing from 1 September 2015). To read the legislation as it currently stands and know whether a provision has commenced or not, it means that the each reference must be investigated and its text incorporated into an updated version.
- 6.4. Our experience of working on legislation such as the HE (Wales) Bill is that time and resource spent on simply **identifying the law** as it stands and the proposed changes, detract significantly from the time and resource available to work with our members to identify potential issues, consider them appropriately within the sector, and to respond to them within the rigid time constraints of the legislative process.
- 6.5. As at time of writing for instance, the significant changes to the HEA 2004 made by the HE (Wales) Act 2015 which mean that much but not all of the Act now applies to England only have not been incorporated in the text displayed and must be discovered by investigating and incorporating the links in the annotations.
- 6.6. Another issue is that amendments to **statutory instruments** are not recorded in the publicly accessible sources. While this issue affects the accessibility of the law applicable to either England or Wales, it is a particular issue for Wales since many of the devolved powers still in use were powers to legislate by statutory instrument. A difficulty we encountered in commenting on proposed regulations pursuant to the HE (Wales) Act, for instance, was that the proposed regulations referred to regulations which it was not initially clear had been amended. Experience of legislation in this area and dialogue with Welsh Government officials helped us to identify and clarify this, rather than publicly available sources.

- 6.7. For an organisation such as ourselves, wishing to input to the legislative process, it is not just a knowledge of the substantive law that is important. Information regarding legal process is also critical. The information provided by the National Assembly for Wales guidance is excellent in many respects, and has been of considerable help to us. There are a couple of issues that it may be worth considering, however:
- 6.8. The first concerns the publication of **commencement orders**. Although there is a section for commencement orders on the National Assembly for Wales website, commencement orders do not appear to be routinely published in it: the commencement orders for the HE (Wales) Act 2015 for instance, do not currently appear for instance but appeared directly on legislation.gov.uk under Welsh Statutory instruments. It is not obvious from the otherwise extremely helpful guidance put into the public domain by the National Assembly for Wales, where commencement orders will appear. There is also no easy way of being alerted to their publication, and the publication of Welsh Statutory instruments must be monitored very carefully in order to spot publication. It would presumably be relatively easy to include copies of the orders on the National Assembly for Wales as they are laid, and could make a significant difference to organisations preparing for the introduction of legislation.
- 6.9. Information on the **negative resolution procedure** could also perhaps be helpfully improved. The standing orders set out the legislative process for acts and subordinate legislation, working within the framework of the Government of Wales Act 2006. However, to appreciate the negative resolution procedure a knowledge of (the existence of) the Statutory Instruments Act 1946 is required. Without research it is not clear for instance that the period for annulment does not need to expire before regulations come into force. The Research Service provided a helpful Quick Guide in 2010, but the standing orders have been revised since then – so for instance the former discrepancy between the Standing Orders and the Act in relation to the annulment period under the negative resolution procedure appears to have been resolved.<sup>10</sup> We suspect that that a small addition to the National Assembly’s website information could be very helpful for a wider public on this point.

## 7. Consolidation and codification (Chapters 7 and 8)

- 7.1. We welcome the further discussion of the ideas raised in these sections – Welsh legislation is still in its relative infancy, and we agree that there is an excellent opportunity to consider more radical reforms.
- 7.2. From our perspective, further consolidation or codification could help to tidy the law and improve accessibility (see our analysis above), but we agree that these could only be part

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<sup>10</sup> See the Assembly’s Quick Guide, The Constitution – subordinate legislation, November 2010 ([here](#)). T

of the solution and we agree that its benefits need to be weighed very carefully alongside the available resources and commitment to this agenda.

- 7.3. The most pressing issues for stakeholders such as ourselves, as stated above, is first and foremost need to have access to accurate and update copies of the law which whose application to Wales is clearly identified. Consolidation which separates provisions for England and Wales and reduces reliance on non-textual amendments (such as the transferred powers) may help in achieving this – but we are mindful of the potential costs of this approach. From a pragmatic perspective would favour taking an incremental approach involving a selective programme of consolidation focussing on areas of most immediate priority or areas to be targeted for reform/new legislation.
- 7.4. At this stage it is not clear that benefits of codification outweigh the costs of its implementation and maintenance, although we welcome this being explored and considered further. In the meantime, further developments in legislation.gov.uk such as the Defralex-style indexing of Welsh legislation may help to provide a workable alternative to codification for many purposes.
- 7.5. In addition to issues identified in the consultation, we note that there are potential issues about providing for cross-border arrangements which would need to be considered very carefully in this context. This can be highlighted by a particular issue we encountered with the HE (Wales) Act 2015. The reason given by the Welsh Government for not extending HEFCW's duty to assess the quality of education of regulated institutions to provision outside Wales was that it fell outside the Assembly's legislative competence to do so. To remedy this, an order under s.150 of the Government of Wales Act 2006 had to be brought by the Secretary of State to provide reciprocal arrangements between England and Wales for the coverage of provision in the other's country – notably, however, this did not solve the potential issue for provision in other countries outside Wales. If this is the case for similar issues, a consolidation or codification exercise undertaken in Wales may not be able to replicate or reform legislative provisions with a cross-border application as intended. Ultimately, it may be best for England and Wales to take a coordinated approach to consolidation and reform.

## **8. Control mechanisms in the Government and legislature (Chapter 9)**

- 8.1. We would welcome the scope of the impact assessments being carefully reviewed (**Question 9-1**). For instance, we submitted evidence to the Finance Committee in relation to the HE (Wales) Bill which identified significant issues with the costing of the HE (Wales) Bill proposals and estimates of the impact for the sector.<sup>11</sup> A further impact that in our view

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<sup>11</sup> See Universities Wales' Letter to the Finance Committee, dated 31 July 2014, available from: <http://www.uniswales.ac.uk/publications/consultation-responses/>

should be routinely included is the impact of proposals for the Office for National Statistics (ONS) classifications for purposes of national accounts. This has been a significant issue that has had to be considered in almost all recent legislation we have been involved with (see 2.2 above) from public service/workforce planning legislation to the regulation of higher education.

- 8.2. We welcome the intentions behind the proposal for a Welsh Legislative Design and Advisory Committee (**Question 9-2**). As outlined above, the key issue for us is to ensure that the National Assembly for Wales is the final arbiter on constitutional and legislative matters. The role of the current Constitutional and Legislative Affairs Committee could be perhaps be enhanced as an alternative.

**Universities Wales**  
**October 2015**