Children, Young People and Education Committee: Report on the Legislative Consent Memorandum for the Higher Education and Research Bill

Background

1. On 1 December, Kirsty Williams AM, Cabinet Secretary for Education laid a Legislative Consent Memorandum[1] for the Higher Education and Research Bill[2] currently before the UK Parliament. The Memorandum relates to clauses in the Bill which include provisions within the legislative competence of the Assembly.

2. Standing Order 29 includes details about the process for consent in relation to UK Parliament Bills. When the UK Parliament wishes to legislate on a subject matter which has already been devolved to the National Assembly for Wales, convention requires it to receive the consent of the Assembly before it may pass the legislation in question. Such consent is given by the Assembly through Legislative Consent Motions (LCMs).

3. Before a LCM can be tabled, a Legislative Consent Memorandum relating to the legislation in question must be laid and may be considered by an Assembly committee or committees. In this case, the Memorandum has been referred by the Business Committee to the Children, Young People and Education Committee to consider and report on it.

Policy Objective(s) and Summary of the Bill

4. The UK Government's stated policy objectives are to increase competition and choice in the English higher education sector, raise standards and strengthen the United Kingdom's capabilities in research and innovation. It makes provision for:

- establishing a new regulatory and teaching funding body for the English HE sector – the Office for Students (OfS);
- operation by the OfS of a register of HE providers in England and a quality and standards ratings scheme (the Teaching Excellence Framework ("TEF"));

[1] Legislative Consent Memorandum: Higher Education and Research Bill
[2] Higher Education and Research Bill

- the OfS to grant degree awarding powers and university title for HE providers in England (where providers apply for degree awarding powers or university title);
- the Secretary of State to require application-to-acceptance data from organisations who offer a shared and centralised admissions service for HE providers in England for the purpose of research;
- arrangements for alternative student finance payments in England and Wales;
- deregulation of higher education corporations in England; and
- a new research and innovation body: United Kingdom Research and Innovation (UKRI).

5. At introduction the majority of the Bill applied to England only, but included a relevant provision for alternative student finance. The UK Government tabled amendments, accepted during Committee Stage, which extended provision to Wales. The Memorandum was laid by Welsh Government following the tabling of the relevant amendments.

The provisions which are the subject of the Legislative Consent Memorandum

6. The Bill makes provision within the competence of the Assembly in the following three broad areas:

(A) Rating the quality of, and the standards applied to, higher education;
(B) Financial Support for Students; and
(C) Amendments to powers to support research.

7. Detail on the specific provisions for which consent is required is included in the Welsh Government's Memorandum.[3] In summary, these provisions will:

- enable the Welsh Ministers to make provision, by regulations, for an alternative student finance scheme in Wales;
- enable Welsh Ministers to consent to Welsh higher education institutions participating in the Teaching Excellence Framework (TEF) ratings scheme if they so wish;

[3] Legislative Consent Memorandum: Higher Education and Research Bill - paragraphs 5 to 17

- enable Welsh Ministers, by regulations, to set maximum amounts of student support payable to Welsh students undertaking HE courses at English institutions by way of reference to fee limit lists published by the Office for Students;
- enable Welsh Ministers, by regulations, to make provision for the designation of HE courses for student support by way of reference to matters determined or published by the Office for Students or other persons;
- enable Welsh Ministers, by regulations, to make provision for student support payments which are suspended under the regulations to be subsequently cancelled;
- clarify and extend the Welsh Ministers' powers to award funding for research.

Reasons for making these provisions for Wales in the Higher Education and Research Bill

8. The Welsh Government sets out detailed reasons for making these provisions within the Higher Education and Research Bill within the Memorandum.[4]

Legislative Competence

9. The Memorandum correctly identifies that the relevant provisions of the Bill fall within the legislative competence of the National Assembly for Wales, insofar as it relates to education and training under paragraph 5 of Part 1, Schedule 7 to the Government of Wales Act 2006. As such, the consent of the National Assembly for Wales is required. There are no legal issues which the Committee has identified.

Appropriateness of the legislative approach

10. As set out in the Memorandum, the Welsh Government believes it is appropriate to deal with these provisions in this UK Bill as it represents the most timely, efficient and coherent means of achieving the powers necessary for the purposes set out. The Welsh Government further believes that a delay in seeking provision at the same time as provisions are taken forward for the rest of the UK could result in Welsh providers and students studying at Welsh providers being disadvantaged.

11. The Welsh Government has also confirmed that there are no financial implications for the Welsh Government if the National Assembly for Wales consents to the provisions applying to Wales.

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[4] Legislative Consent Memorandum: Higher Education and Research Bill - paragraphs 18 to 25

Consultation

12. The Committee wrote to the National Union of Students, Universities Wales, HEFCW and Research Councils UK seeking views on the Memorandum. The responses received are included in the Annex.

13. A number of concerns were raised in the consultation responses relating to the policy behind the relevant provisions of the Bill. In the time available, it has not been possible for the Committee to consult more widely or follow up the stated concerns with the Cabinet Secretary. The Committee will write to the Cabinet Secretary for Education highlighting the concerns raised, should consent of the Assembly be granted.

14. The consultation responses did not, however, raise any matter that impacts on the question of whether the consent of the Assembly is required, or on whether the policies contained in the relevant provisions should be extended to Wales.

Committee Consideration and Conclusion

15. The Committee considered the Memorandum on 14 December 2016. The Committee is content that the Bill will make provision in relation to Wales, for a purpose within the Assembly's legislative competence. On the basis of the Memorandum presented, the Committee has no concerns with the approach being taken.

16. Although consultation has highlighted some concern relating to policy, no issues have been raised relating to the question of whether consent is required, or whether the policies contained in the relevant provisions should be extended to Wales.

17. The Committee recommends that the Assembly supports the Legislative Consent Motion, as it is appropriate to deal with these provisions in this UK Bill as it represents the most practicable and proportionate legislative vehicle to enable these provisions to apply in relation to Wales.

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7 December 2016

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Dear Ms Neagle,

Thank you for your letter of 25 November, 2016 inviting us to comment on the Legislative Consent Memorandum: Higher Education and Research Bill. In the time available, it has not been possible to subject this response to consideration by the Council: it represents the view of officers only.

We consider it appropriate that provision be made to enable higher education providers in Wales to participate in the Teaching Excellence Framework (clause 25 refers). We also consider the proposed amendments to clauses 79 to 81 to broadly appropriate.

We note the proposal to provide the Secretary of State/Welsh Ministers powers to provide support for research, including grants etc. This is an enabling provision and it is not really for us, as a WGSB, to offer a view on it. The proposal does, though, raise the question of what might be intended. The primary means by which Welsh government funding is provided in support of research in Wales is via HEFCW as part of a long-established 'dual support' mechanism, whereby this core funding provides for the infrastructure necessary to enable universities to compete for project based funding made available by UK research councils and other sources. This core research funding, whilst taking account of Welsh government priorities, also provides universities with sufficient flexibility to be able to respond to new research developments and opportunities. If the purpose of this enabling provision were to be an erosion of core research funding via HEFCW in favour of highly targeted project funding directly by Welsh government, there would be a strong risk of undermining the core research infrastructure of Wales, resulting in range of adverse consequences. The importance of the 'dual support' approach for research funding is explored in the recently published report by Professor Sir Ian Diamond on Higher Education Funding and Student Finance in Wales.[1] We would not advocate moving away from this approach to research funding. As indicated above, though, this is

[1] http://gov.wales/docs/dcells/publications/160927-he-review-final-report-en.pdf

more a matter of the potential use of the proposed provisions, rather than the proposed legislation *per se*.

We have no further comments we would wish to offer on the proposed Legislative Competence Order at this stage.

Yours sincerely,

David Blaney

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1. NUS Wales

1.1. National Union of Students in Wales (NUS Wales) is the largest democratic organisation in Wales, representing learners in a wide variety of settings including higher education and further education, adult community learning and apprenticeships.

2. General Comments

2.1. NUS Wales welcomes the opportunity to outline our views regarding the Legislative Consent Memorandum on the Higher Education and Research Bill, to the Children and Young People and Education Committee.

2.2. The Green Paper, *Fulfilling our Potential*, created the foundations for the Teaching Excellence Framework and the associated role of the Office for Students. Students' Unions around the country have been very clear about the detrimental impact of linking quality of teaching with fee increases, particularly for those from disadvantaged backgrounds.

2.3. The White Paper, *Success as a Knowledge Economy*, went further by outlining a series of controversial "metrics" for how teaching excellence would be measured. NUS Wales supports the principle of better quality teaching, and consistent ways of measuring and comparing such data between institutions to inform student choice, but the principle creates an openly market-driven system.

2.4. A market-driven system will involve failure, in that it will create a scenario where state-sponsored universities will be allowed to falter and ultimately close down. This will obviously have a devastating impact on students at such institutions, not to mention those who are in the midst of applying (and not to mention international and non-home domiciled students).

2.5. The TEF, while not directly considered by this LCM, is directly linked to the creation of the Office for Students. It is important that they are therefore not considered independently of one another.

2.6. We would also like to draw attention to recent media activity regarding the establishment of the Office for Students. Until very recently, the new body was proposed to exist with no representation from students or the wider student bodies. This would have been extremely regressive and has recently changed, following pressure from NUS UK. It should be noted that the funding body in Wales, HEFCW, operates with student engagement as a core value and student representatives sit at all levels of the organisation.

2.7. With the somewhat weighty caveat of TEF in mind, this response will seek to outline the impact that the Office for Students may have on Wales and the broader HE sector.

3. Part 1 – The Office for Students (OfS)

3.1. NUS Wales does not believe that the proposed changes are truly part of an attempt to create a system that works for students; rather, they are part of an attempt to further create a market-driven HE sectors and substantially raise tuition fees.

3.2. The metrics of TEF, as outlined below, do not adequately measure teaching excellence. The UK Government appears to have approached the TEF with the same outlook as they hold for the Research Excellence Framework, and the two are simply not interchangeable. We have highlighted the deficiency of each metric.

3.3. *The Destinations of Leavers from Higher Education survey.* It is a poor measure of teaching quality as Westminster's own research has shown that your career path is most heavily impacted by your ethnicity, age, gender and social class – not by the quality of the teaching you receive.

3.4. *The National Student Survey.* Whilst Students' Unions have developed methods of using the NSS to improve the student experience, it does not work as a measure of teaching quality. Most importantly, the data collected by the survey does not genuinely demonstrate whether teaching is indeed inclusive. Secondly, the sector have become adept at performing well in the NSS by using incentives and producing materials that impress upon students the important link between the NSS and the prestige of the institution. This therefore makes it less likely that students will criticise the university through the NSS for fear of de-valuing their degree. It is also currently unclear whether or not the sections of the NSS that are relating to student engagement will be used in TEF, another sign that TEF does not see students as partners but rather as consumers.

3.5. *Retention.* Students who leave university do so for a number of different reasons; from financial problems to mental health issues, and from the entirely valid decision that HE is not for them. Retention can therefore be a very useful measure in terms of measuring whether or not a University is supporting its students, but it is entirely inadequate for assessing the quality of teaching.

3.6. NUS Wales has significant concerns with the proposed changes in that they will lead not only to fee increases but also to fees being linked to quality. It is predicted that if the HE Bill is passed that, by 2026, English-domiciled students studying at English universities could be paying up to £12,000 a year. This will have severe ramifications for the dynamics and shape of the higher education sector, entrenching inequality between providers and running counter to the Welsh Government's ambition to increase widening access and social mobility.

3.7. This ambition, by the Welsh Government, is something that NUS Wales has been a vocal supporter of and the proposed system could see it extinguished.

3.8. What we do not want to see is a situation in which students are forced to choose a university based on their financial abilities or we risk seeing a segregated

system develop in which it mostly benefits students from advantaged backgrounds attending "Gold" Universities.

3.9. A further concern with TEF is the current plan to introduce subject level TEF by the fourth year. This will mean that one university could have subjects within the same discipline with different TEF ratings. However, the fee level will still be decided at a university level. That is, if a University achieves a Gold TEF score, they will still be able to charge full TEF fees for all their subjects, no matter what the TEF subject level score is. Therefore, you could have students studying on a course that has been rated as Bronze, but paying Gold fees because their University has achieved a Gold TEF rating. This again highlights that TEF is not truly about providing students with the best teaching quality, but about allowing institutions to raise fees and creating a competitive market.

3.10. There is a concern that Welsh universities being a part of TEF will affect the oversight that the Welsh Government will have over the delivery of HE in Wales. This is of a particular concern in light of the Hazelkorn Review as it raises questions over who will have greater oversight over Welsh HE; the new Tertiary Education Authority or the English-based Office for Students. The Bill gives the Office for Students a far greater power for intervention than HEFCE currently has, meaning they will potentially be able to exert these powers without having to go through the Welsh Government.

3.11. We therefore view the Office for Students, and any associated powers that they may have over Welsh institutions, as a potential challenge to devolution. It is essential that the policy levers and powers that Welsh Government has over the HE sector remain in whatever new body is created.

4. Part Two: – Other Education Measures

4.1 It is imperative that Muslim students are given the opportunity to take out loans in order to afford the cost of education. Currently Muslim students are not able to access Sharia compliant loans, which has a detrimental effect on their ability to access Higher Education, particularly for those who cannot access financial support from their family. Therefore, we believe it is imperative that Clauses 79 and 80 are changed in a way that enables students to access Sharia compliant laws.

4.2 In relation to Clause 81, whilst we do not wish to see tuition fees rising above £9000m we acknowledge that it is likely to happen in England. Therefore, we believe that Welsh students who wish to study in England should have access to loans that will cover the higher cost of tuition. Students should be able to access Higher Education wherever they wish to study therefore it is important that the loan provision given to Welsh undergraduates is one that can cover the cost of study anywhere in the UK.

5 Part 3 – Research

5.1 Research, for the most, is not fully devolved to Wales. One of the greatest threats to research, and the associated sector, that the Welsh Government can truly aid in is the vote to leave the European Union. Erasmus+, European Structural Funding and, in this instance, the Horizon2020 scheme will all potentially be withdrawn from the UK.

5.2 We would urge the Committee to consider how the impact of the Higher Education and Research Bill can be mitigated to ensure that areas like Horizon2020 are protected.

5.3 NUS Wales welcomes the opportunity to provide further oral or written evidence to the committee if requested.

Fflur Elin, NUS Wales President

The National Assembly for Wales Children Young People and Education Committee
Consultation on the Higher Education and Research Bill 2016:
A 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.

2. Introduction

2.1. We offer the following comments in response to the consultation of the Children Young People and Education Committee (CYPEC) on the Legislative Consent Memorandum (LCM) relating the Higher Education and Research Bill 2016 (HERB), which was laid before the National Assembly for Wales on 17 November 2016.[2]

2.2. Since this consultation was launched we note that a revised version of the LCM was published on 1 December 2016.[1] Further amendments to HERB were agreed at the Report Stage of the House of Commons, and we expect further amendments to be laid for the House of Lords to consider in Committee.[2] Our response makes some additional comments in relation to these, in anticipation that these will also be the subject of a subsequent LCM.

2.3. For fuller comments on the Bill, see in particular our response to the Public Bill Committee of the House of Commons.[3] This response set out key issues for Wales, supplementing the responses of Universities UK and Universities Scotland.

2.4. We offer comments on the provisions in the Bill for which Assembly consent is required by convention as follows.

3. Provisions for which consent is required

(A) Rating the quality of, and the standards applied to, higher education

3.1. We welcome that the amendment to Clause 25 of the Bill enables universities in Wales to participate in the Teaching Excellence Framework (TEF) and that the Office for Students (OfS) will be able to assess TEF applications. It is essential that universities are able to participate in TEF on grounds of international reputation and recognition, as we set out in our response to the Welsh Government's consultation.

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[1] See here.

[2] See here for the Bill, here for the accompanying Explanatory Notes, and here for its legislative progress.

[3] See here.

(B) Financial Support for Students

3.2. Universities Wales supports the principle behind these amendments to clauses 79 to 81, namely that the Welsh Ministers should have the same powers in relation to Wales.

3.3. As originally drafted, the Bill gave the Secretary of State the power (in relation to England) to determine the maximum amount of student loan by reference to matters determined or published by the Secretary of State or other persons. Amendment 109 gave the Welsh Ministers the same powers in relation to Wales. Amendment 243 added similar power to designate HE courses for the purpose of student support by reference to matters determined or published by the OfS or other persons. Additional amendments also allowed suspended student support payments/alternative payments to be cancelled (Amendments 242, 244 and 245).

3.4. However, we are concerned about the drafting of Clause 81 as amended. In particular, the power to specify the maximum amount of student loan and the power to designate HE courses for the purpose of student support are both exercisable 'by reference to matters determined or published the Secretary of State or other persons'.

3.5. This appears to provides too much latitude. Seemingly, the Welsh Ministers/UK Government could exercise these powers by reference to any person, not just the OfS. They can also refer to matters in any form, whether published or not, not just the OfS register of providers and TEF classifications. The provision as drafted has considerable potential for being used in ways that are not currently intended in future, or may be more appropriate to set out in regulations with the oversight of the National Assembly for Wales. We would prefer the wording of this clause to be tightened to ensure that it corresponds more closely with the specific instances in which the UK and Welsh governments would exercise powers.

(C) Amendments to powers to support research

3.6. The amendment purports to clarify that the Secretary of State/Welsh Ministers powers to provide support for research includes providing financial support for research (i.e. grants, loans and other payments) subject to such terms and conditions as they see fit – including those which may require the recipient of support to repay sums, pay interest and provide information.

3.7. We query whether this clarifies or extends the powers in relation to universities in England and Wales.

3.8. At the moment, core funding for research in Wales is currently provided via HEFCW under the Further and Higher Education Act 1992, which enables the Welsh Ministers to give HEFCW grant on such terms as it sees fit, and for HEFCW in turn to allocate that grant to institutions on such terms as it sees fit. However, the powers of the Welsh Ministers and HEFCW are both subject to a number of important limitations which are designed to protect the academic and institutional autonomy of institutions, and allow institutions to operate at arms-length from government as is required by charitable status and to avoid reclassification as central government for purposes of national accounting classifications.

3.9. Competitive funding for specific projects is also provided by the UK Research councils. The current legislation for UK research council funding allows the Secretary of State to set terms and conditions of grant to UKRI but relies on UKRI's powers to enter and negotiate contracts with individual institutions in respect to UK competitive research funding projects.

3.10. Otherwise, the Welsh Government and HEFCW have powers to enter agreements directly. We question whether this amendment is required and are concerned that, without further qualification, the amendment may be opening up a route to direct funding without being subject to the important provisions of the 1992 Act which appropriately safeguard institutions.

4. Report stage amendments

(D) UKRI representation

4.1. A number of amendments which also relate to Wales were laid by the UK Government on 15 November 2016 and agreed in the Report Stage.[4]

4.2. In particular, Amendment 35 places a duty on the Secretary of State to 'have regard to the desirability' of UKRI membership including "at least one person with relevant experience in relation to at least one of Wales, Scotland and Northern Ireland" i.e. a representative from one of the devolved nations.

4.3. We recognise and appreciate that this appears to be designed to address concerns expressed by the responses of Universities Wales and Universities Scotland. However, this amendment is wholly insufficient in our view. As a minimum each nation should be represented, and it should be mandatory.

4.4. Amendment 21, by contrast, provides that there must be at least one person with experience of representing or promoting the interests of students (i.e. a student representative).

4.5. As expressed in our response to the Public Bill Committee, the legislation needs to be strengthened to ensure devolved interests are better catered for when exercising UK wide functions. The legislation must ensure there is appropriate representation and build in appropriate duties not only to consult with devolved administrations but to also have regard to devolved policy. UK research funding should also be appropriately ring-fenced.

4.6. We strongly endorsed the views expressed by Universities Scotland in their submission to the Public Bill Committee, and the nine amendments proposed by the Scottish National Party (amendments 180 to 188). These were not agreed in the Commons. However, we understand that further amendments addressing these areas will be tabled on the behalf of Universities Scotland for consideration by the Lords. We ask that the Welsh Government and National Assembly support these.

[4] See here.

5. Further issues

5.1. A key further issue we raised in our submission to the Public Bill Committee was the need for a further amendment to only allow the dissolution of a higher education corporation (HEC) in Wales at its request, in line with the changes in England.

5.2. We understand that the Welsh Government does not intend to bring forward legislation of its own to address this at this stage. In our view this leaves HECs in Wales unnecessarily exposed to the risk of reclassification by the Office for National Statistics (ONS) for purposes of national accounting. A review of the classification is currently overdue (expected in June 2016) and the power to dissolve a corporation was cited as a factor which previously led to reclassification of the FE sector.

5.3. We would like to draw this issue to the attention of the Committee, in the hope that we can encourage the issue to be addressed.

Universities Wales
7 December 2016