

HIGHER EDUCATION (WALES) BILL – As Introduced

Some comments

Part 2 – Fee and access plans

Section 3(4) – The matters to be taken into account when making a designation or withdrawing a designation are not defined, but are left to be determined by regulations, to which it is proposed negative procedure will apply. This is despite the fact that these matters can directly affect the institutions concerned. It is at least arguable that some of these matters should be set out on the face of the bill and that additions to the list should be expressly approved by the legislature through use of the affirmative procedure.

Section 5(9) – allows regulations to determine the ‘circumstances’ in which fees payable are to be treated as payable to the institution. Again, this is a factor which will determine an outcome and should therefore be subject to careful scrutiny. Only negative procedure is envisaged.

Section 6 – Fee and access plans can prescribe conditions, but considerable leeway is given regarding their content. Subsection (3) could conceivably affect both academic standards and finance, and it is questionable whether the provisions of subsection (5) are an adequate safeguard. The concept of an ‘under-represented group’ is introduced in subsection (6), but there is no definition. Whoever can define its meaning has considerable discretionary power.

Section 7 – HEFCW are empowered to approve plans, but once more regulations will provide the matters to be taken into account.

Section 9 – Regulations will also provide for the variation of plans.

Section 12 allows HEFCW to issue guidance.

Section 13 deals with compliance and somewhat unbelievably not only allows regulations to spell out the steps which HEFCW may take for non-compliance, but also what is going to amount to non-compliance and the matters to be taken into account. Subsection (3) finishes the job with a ‘Henry VIII’ provision allowing regulations to amend the Act itself. The regulations contemplated by this section are subject to affirmative procedure, but in truth the content contemplated deserves to be on the face of the primary enactment, enabling the matters concerned to be open to full scrutiny and amendment.

Part 3 – Quality of Education

Section 17(4) leaves to regulations to provide for the circumstances in which a person is to be treated as responsible for providing a course.

HEFCW are given very wide powers under this part of the enactment to deal with situations in which they determine that the quality of education is inadequate. Institutions facing such a judgement are able to request a review, but such reviews are conducted under regulations made by the Welsh Ministers, which regulations allow the Welsh Ministers to decide upon the grounds of review, the procedure to be followed and the steps to be taken by HEFCW following a review. One might have expected much of this, given its seriousness, to be set out on the face of the bill.

The powers of entry and inspection given in section 22 appear somewhat draconian.

Section 23 gives HEFCW considerable power to issue guidance on any matter they think relevant to improving or maintaining the quality of education provided and requires the institution to take such guidance into account. There is no attempt to define what these matters may be. As in other instances, it would surely have been possible for some of these matters to be set out on the face of bill, with a power to add to them by use of affirmative procedure. Instead, HEFCW is left with a power, in section 24, to issue or approve guidance about the criteria for assessing quality, with section 25 providing for a committee to advise HEFCW on the exercise of its quality assessment functions, although how independent the committee will be is not immediately apparent from the provisions of the section.

Part 4 – Finances

Section 27 requires HEFCW to prepare and publish a code relating to the organization and management of institutions' finances. HEFCW decides the content, which the Welsh Ministers may then approve. The code is laid before, but does not require the approval of and may not be annulled by, the National Assembly. Having decided upon the content, HEFCW is then the body entrusted with judging compliance and is empowered to give directions, which attract the same review provisions mentioned earlier in relation to Part 3.

Part 5 – Fee and Access Plans: Withdrawal of Approval

This part deals with HEFCW's duties and powers regarding refusal to approve a fee and access plan, and subsequent withdrawal of that approval. There is a sense in which HEFCW is made judge and jury in relation to these matters. Moreover, the matters to be taken into account by HEFCW in the discharge of these functions are again set in regulations (ss. 36(7), 37(2) and 38(3)). Section 37(3) gives powers to amend what is on the face of the legislation (Henry VIII power), and this extends to the sections dealing with institutions' ability to request a review of decisions in relation to these matters.

Part 6 – Notices and Directions given by HEFCW

Section 43 deals with reviews requested by institutions of decisions affecting them taken by HEFCW. The reviews are to be conducted by persons appointed by the Welsh Ministers acting under regulations made by the Welsh Ministers. These regulations, as already stated above, may deal with the grounds of review, the procedure to be followed and the steps to be taken by HEFCW following a review. As noted above, this section may, in certain circumstances, be amended by secondary legislation made by the Welsh Ministers, albeit subject to affirmative procedure before the Assembly. It is therefore contemplated that the legislature will never have a full opportunity to scrutinize or amend the grounds for review, the procedure nor the consequences.

In addition to all of this, HEFCW are required by section 46 when exercising the functions they are given under this piece of legislation to take into account any guidance issued by the Welsh Ministers.

A further Henry VIII-style power is given to the Welsh Ministers to amend, repeal or revoke any enactment when making regulations effecting incidental, supplementary or consequential provision, or transitional, transitory or saving provision. Affirmative procedure is required where such changes to primary legislation are to be made (section 52 (3) & (4)).