



Llywodraeth Cymru
Welsh Government

Justice System Impact Identification

Form

Overview

Welsh Government officials are submitting this form

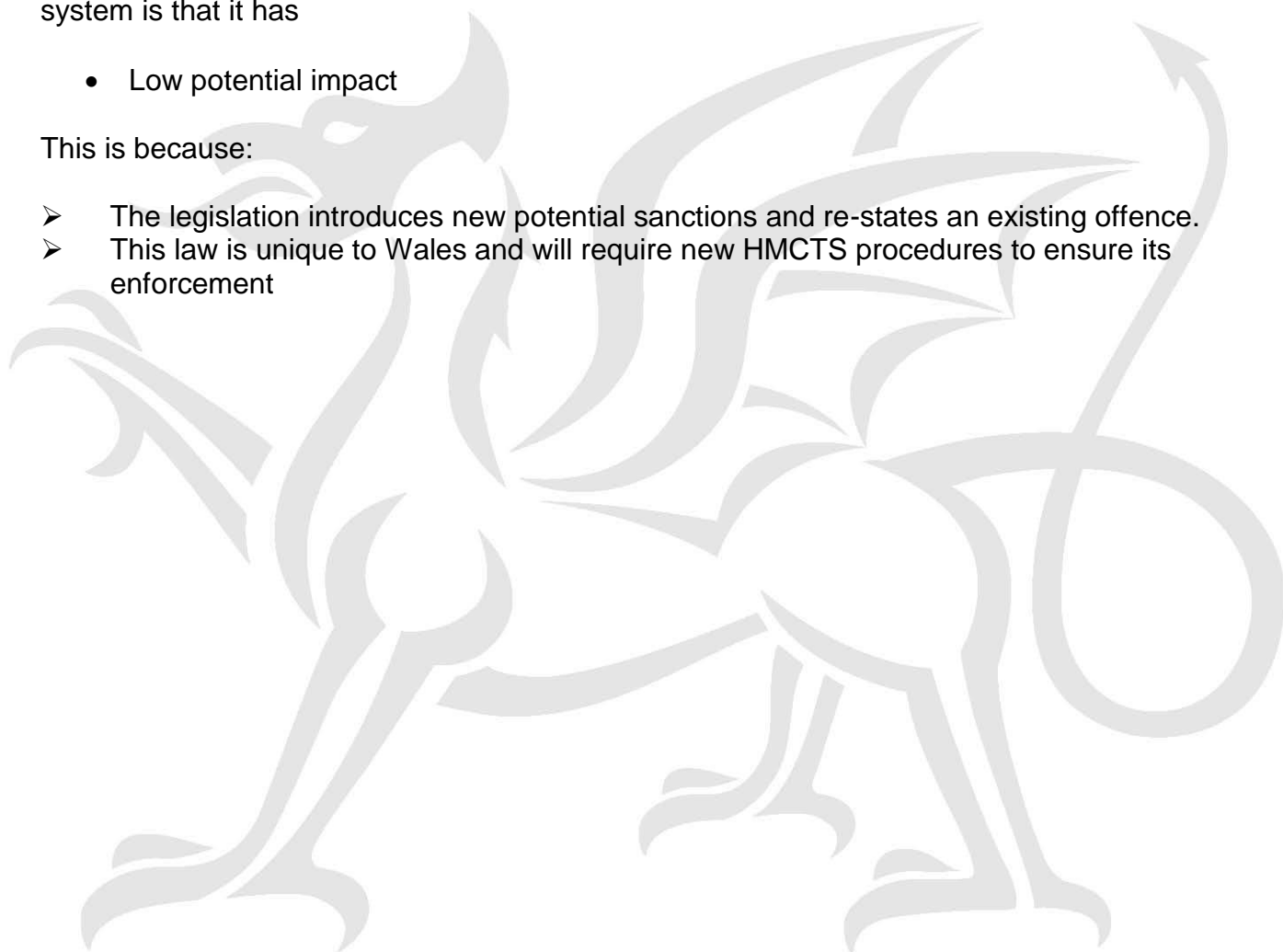
- For assessment by the Ministry of Justice

The Welsh Government's assessment of the impacts of this legislation on the justice system is that it has

- Low potential impact

This is because:

- The legislation introduces new potential sanctions and re-states an existing offence.
- This law is unique to Wales and will require new HMCTS procedures to ensure its enforcement



1. Bill Title

1.1. Working title of Bill

Tertiary Education and Research (Wales) Bill

2. Policy lead contact details

2.1. Name / Job Title

2.2. Department / office /
business area

Higher Education Division, Economy Skills natural Resources.

2.3. Telephone number

2.4. Email address

2.5. a) Date of submission of
this form

Date of Submission: February 2020

2.6. b) When is a response
required?

3. Additional contact details

3.1. Legal Contact

3.2. Telephone number

3.3. Email address

4. General information

4.1. Please provide

- a) contact details of your lead official for the appraisal of costs or savings and;
- b) the Justice Policy lead if known.

4.2. Have you notified the judicial office of your proposals by completing Desk Instruction 7? (please seek advice from your legal advisors)

- Yes
 No (please explain why)

Legal Services are in the process of completing a Desk Instruction 7.

4.3. In brief, what is your proposal?

Professor Ellen Hazelkorn's Report, "*Towards 2030 - A Framework for Building a World-class Post-Compulsory Education System for Wales*", published in March 2016, found that the post compulsory education and training (PCET) system was not sufficiently learner focussed and did not achieve best value for money. She emphasised the need for the PCET sector to avoid operating as several discreet sectors in competition with each other. Her key recommendation was to establish a single regulatory, oversight and co-ordinating authority for the post-compulsory sector, to fund provision, monitor governance practice, ensure quality and to be the lead funder of research.

The Tertiary Education Research (Wales) Bill provides for the establishment of a new strategic authority – the Commission for Tertiary Education and Research ("the Commission") – to provide oversight, strategic direction and leadership for the post-compulsory education and training sector. The Commission would replace the current Higher Education Funding Council for Wales (HEFCW) and would also assume responsibility for the funding and performance of further education, apprenticeships, mainstream sixth form provision and research and innovation in Wales.

The following areas have been identified as areas which may affect the number of applications:

The duty of a governing body to comply with a direction section 80

If the Commission gives a governing body of an institution a direction under Part 2 of the Bill, the governing body must comply with the direction. Any such direction is enforceable by injunction so this is an area which could lead to an increase in applications to the courts, but this is considered unlikely because the Commission will have "softer" intervention powers in the first instance which should prevent a direction being resorted to. Additionally, officials are not aware of HEFCW having exercised its direction giving powers.

Requirement for certain persons to provide information to the Commission section 127

This provision allows the Commission the power to request information from certain persons specified in section 127(2). If a person fails to comply with this request, then the request can be enforced by injunction, so this is an area which could lead to an increase in applications to the courts.

“Application-to-acceptance” information section 129

Section 129(1) confers a power on the Welsh Ministers to seek by notice “application-to-acceptance” information from certain persons. Compliance with those notices is enforceable by injunction, made on application of the Welsh Ministers (section 129(6)).

Both of the provisions above regarding “application-to-acceptance” information are provisions. If persons from whom information is requested fail to provide it, an injunction can be used to compel them to do so. These are therefore provisions that could lead to an increase in the number of applications to the courts. However, because there will be mechanisms in place for ensuring the information is collated as a matter of routine, this is considered unlikely in practice.

The Bill also restates an offence for wilfully obstructing the Chief Inspector (of Estyn) in the exercise of functions in relation to an inspection by them under the Bill. To the best of our knowledge, no-one has been prosecuted using the existing equivalent powers, and we have no reason to assume the likelihood will increase under the new legislation.

Reviews of Commission decisions will be by an appointed person or panel, as occurs under the Higher Education (Wales) Act 2015. Recommendations by that person or panel will then be made to the Commission, who will make a fresh decision (or stand by its original decision). If at this point an institution remains unhappy with the decision of Commission, they would need to bring judicial review proceedings of the Commission’s decision.

The Bill includes equivalent injunction and review provisions to those relating to HEFCW in the 2015 Act. These enforcement measures have not been used to date. In addition, the Bill includes an injunction powers to enforce notices and an additional review mechanism for registration decisions. The Commission’s functions are in general more numerous and varied than those of HEFCW, and are not limited to higher education. The Welsh Ministers can also have powers to make an application to enforce by injunction a notice sent by them. Although unlikely, it cannot be ruled out that there may be a potential increase in the number of applications to the courts as a result.

The Bill re-states existing legislation (section 23(3) of the Education Act 2005) containing an offence for wilfully obstructing the Chief Inspector (of Estyn) in the exercise of functions in relation to an inspection by them under the Bill.

Reviews of Commission Decisions (section 43 and section 76)

Reviews of Commission decisions will be by an appointed person or panel, as occurs under the Higher Education (Wales) Act 2015. Recommendations by that person or panel will then be made to the Commission, who will make a fresh decision (or stand by its original decision). If at this point an institution remains

unhappy with the decision of Commission, they would need to bring judicial review proceedings of the Commission's decision. No judicial reviews have been brought to date under the Higher Education (Wales) Act 2015 and although a possibility of applications to the courts cannot be ruled out under the Bill, there will be a system of checks and balances in place that will make this no more likely than applications are under the extant legislation.

The Commission would replace the current Higher Education Funding Council for Wales (HEFCW) which was established in Further and Higher Education Act 1992 and therefore requires primary legislation to dissolve it

- 4.4. Is this legislative proposal similar in any way to legislation being brought forward in England? If so, please name that legislation and identify below any ways in which the legislation brought forward in Wales will differ. If the legislation has no substantive difference from that in England, there may be no need to complete all parts of the JSII form.

N/A

- 4.5. Please specify the name of any other related legislation. How do you expect the relevant provisions of this (new) legislation to be enacted?

N/A

- 4.6. Please indicate the anticipated date when a) the legislative changes are expected to come into force and b) the date when the first anticipated impact on the justice system will arise.

a) The Commencement of the legislation is unlikely to be before 2023.

b) It is intended that the Commission will be set during 2023/24, but the registration system will be rolled out gradually after that so appeals against the Commission could be anticipated from 2024 onwards at the earliest.

- 4.7. If altering or introducing an offence, sanction or penalty, which of the following groups will the proposal affect and in what circumstances? (Tick all that apply)

Individuals

Private Institutions (e.g. Businesses)

Public Institutions (e.g. Government Departments)

a) The offence created by the Bill will be enforceable against individuals or an education institution (as a body corporate).

b) The powers to enforce directions and notices by injunction include the possibility of enforcing against individuals, private institutions and public institutions.

- 4.8. Does your legislation only have impact in Wales or are you working jointly with other administrations? Tick all that apply and provide brief details as appropriate, including whether your proposal will create different laws in Wales compared to England, Scotland and / or Northern Ireland.

Please note that, with the exception of the devolved tribunals, the MoJ administers the justice system in England and Wales only. Please talk directly to the MoJ devolution unit if you anticipate your proposal could have an impact on courts or prisons in Scotland or Northern Ireland.

- Wales only
- England
- Scotland
- Northern Ireland
- Other (Please Specify)

- 4.9. If your legislation could directly impact visitors to Wales or other people not normally resident in Wales, or if your legislation is significantly different from elsewhere in England, Scotland or Northern Ireland;-
- a) what arrangements have you made to ensure ongoing awareness raising of the different legislative approach on this issue in Wales?
 - b) what will be the implications on the enforcement agencies of taking forward action against individuals not usually resident in Wales?

The legislation affects higher and further education institutions and organisations working in collaboration with those institutions in Wales, or organisations who predominantly carry out their business in Wales. The Commission will set out their approach and the penalties on commencement and those organisations that are affected will receive the relevant information. If organisations receive funding from the Commission, then they will be notified of the penalties for non-compliance via their terms and conditions of funding and registration.

- 4.10. What are the options under consideration and how does this change the existing situation?

Various options were considered, such as retaining HEFCW or bringing HEFCW under the control of the Welsh Government. All these alternatives were considered not appropriate.

Please see the answers to 4.2.

- 4.11. If you are creating a new civil sanction or penalty which court or tribunal, in your opinion, should deal with it?

Please see answers to 4.2 for details of civil sanctions under the Bill.

Criminal Offences and Civil Penalties and Sanctions

- 4.12. Which of the following are you creating / amending? (Tick all that apply)

- Civil Sanctions
- Fixed Penalties
- Civil Orders
- Criminal Sanctions
- Criminal Offences
- Other (Please Specify)

HEFCW will be dissolved by the Bill and the HE (Wales) Act 2015 repealed. Directions from HEFCW which are enforceable by injunctions and directions, and notices from HEFCW are subject to a review by a panel, will be revoked and extended to the Commission. The existing provisions in section 23(3) of the Education Act 2005 will be revoked and re-stated in this legislation.

4.13. If you are creating a criminal offence, is it:

- Summary Only (heard before a bench of lay magistrates / judge only)
- Triable Either Way
- Indictable Only (heard before a judge and jury)

In cases where the maximum penalty is to be an unlimited fine, and a triable either way offence is warranted, please explain why a summary only offence is not considered appropriate. This is especially relevant if few, if any, cases are anticipated.

N/A

4.14. Who will be responsible for the enforcement of your legislative proposal and how will they take this role forward? Will there be an increased / reduced need for enforcement action?

Both the Welsh Ministers and the Commission will have the power to apply for injunctions.

The offence in the Bill is a summary offence so would be heard in the Magistrates' Court.

Please see 4.2 for an assessment of whether there will an increase or decrease in enforcement action.

4.15. What is the anticipated number of cases per year? Please provide details of any evidence of assumptions on which estimates are based.

There have been no JRs or injunctions brought against HEFCW or the Welsh Ministers in relation to the Higher Education 2015 Act, so we consider it unlikely that there would be none or very few cases brought against the Welsh Ministers or the Commission under the proposed legislation. However, as set out above, the Commission's functions will be more varied and numerous than HEFCW's, so there may be an increased risk of cases coming before the courts that stem from the Bill.

4.16. Do you expect proceedings to be heard in the Magistrates' Court, the Crown Court, or a Civil Court? What will the proportions be?

Proceedings in relation to the offence created by the Bill would be brought in the Magistrates' Court.

Injunctions would be brought in the County Court or High Court.

In relation to review of the Commission's decision any proceedings in relation to this will be heard in the Administrative Court of the High Court.

Although all proceedings are unlikely for reasons set out above, it is more likely that proceedings would be brought in the civil courts.

4.17. Please state the maximum associated fine and/or custodial penalties. In the case of offences involving penalties of a fine or custody, please indicate and explain the circumstances which would result in a custodial sentence upon conviction and the proportion of custodial penalties which will be at the maximum level.

A fine not exceeding level 4 on the standard scale

4.18. Please provide details of any proxy or current offences and / or penalties on which the proposed penalties are based. If mirroring / comparing existing legislation, ensure that reference is made to the most recent versions of the legislation (via Westlaw, the online legal research service) as this is not always available online.

N/A

4.19. Please provide details of the relevant legislation (where appropriate) and confirm whether the creation or amendment of criminal offences and penalties has been agreed in line with the guidance available at <https://www.gov.uk/government/publications/making-new-criminal-offences>.

N/A

4.20. What will be the short, medium and lifelong implications for an individual found guilty of this offence, and how is this proportionate to the offence created?

A fine not exceeding level 4 on the standard scale

4.21. Does this legislation impose any duty on the public sector? If so, please provide your assessment of the likelihood of individuals or businesses taking action against the public sector for non-compliance with this legislation.

The Bill imposes duties on both the Welsh Ministers and the Commission. It is considered unlikely there will be any actions brought as none have been brought against HEFCW or the Welsh Ministers in relation to the Higher Education (Wales) Act 2015. However, as set out above, the Commission's functions will be more varied and numerous than HEFCW's, so there may be an increased risk of cases coming before the courts that stem from the Bill.

5. HM Courts & Tribunals Service and the Welsh Tribunals Service

Estimating the change to caseload of the Courts and Tribunals Service (including devolved tribunals)

5.1. Do you expect there to be a change in Court or Tribunals process or an increase / decrease in applications / cases to HM Courts and Tribunals Service and / or the Welsh Tribunals through the creation or amendment of this law? Please provide an estimate of the change to volumes of cases going through the court system as a whole, explain any changes in process and outline the evidence and sources that support these estimates.

Please see answers to 4.2.

5.2. Please confirm if the courts / tribunals would be under any duty to inform any regulatory authorities of any convictions made under this offence.

No

Yes (please provide details)

Appeal Rights

5.3. Does your proposal create a new right of appeal or expand an existing jurisdiction in the Unified Tribunals System or route to judicial review? If so, how do you expect these to be handled (i.e. administered by HM Courts & Tribunals Service or Welsh Tribunals)?

Reviews of Commission decisions would be by an appointed panel, as occurs under the Higher Education (Wales) Act 2015. Recommendations by that panel would then be made to the Commission, who would make a fresh decision (or stand by its original decision). If at this point an institution remains unhappy with the decision of Commission, they would need to bring judicial review proceedings of the Commission decision.

See also 4.2

5.4. Do you expect to establish a new tribunal jurisdiction? If so, has this been discussed with the Welsh Tribunals Unit / Ministry of Justice?

No – a new tribunal jurisdiction is not being established.

Alternative Dispute Resolution

5.5. To what extent could the use of alternative dispute resolution (ADR) procedures (including mediation) be appropriate? How will success in ADR be measured?

N/A

Prosecution and Enforcement

5.6. If the proposal is to add a new offence, will the Crown Prosecution Service act to prosecute defendants? If not, please identify who will prosecute.

N/A

5.7. Will the proposal require enforcement mechanisms for civil debts, civil sanctions or criminal penalties? If yes, who do you expect to enforce these?

No

HMCTS Procedural Rules, Sentencing and Penalty Guidelines

5.8. Do you anticipate that Court and/or Tribunal procedural rules will have to be amended? If so, when is the likely date for the changes?

No

5.9. Will the proposals require sentencing and / or penalty guidelines to be amended?

The standard scale is being used (see s62(6))

6. Legal Aid and Court Fees

- 6.1. What evidence is there that individuals affected by your proposal will be able to secure and afford:
- legal representation and legal advice in order to secure a fair hearing of their case
 - associated court fees

What legal costs for a typical case could each party bear and what provisions exist for a party found innocent to recover all or any of their legal costs?

The legislation will affect organisations such as higher and further education institutions, rather than individuals. Such institutions should have appropriate access to legal representation and the associated court fees.

- 6.2. Once implemented, is your proposal likely to require individuals to seek legal advice and to apply for legal aid in any of the following areas? In each case please provide supporting evidence.

- Criminal
 Civil (including Family)
 Asylum
 Legal aid not available (please provide supporting evidence)

N/A

- 6.3. If legal aid may be affected, would legal aid costs increase or be reduced (and by what margin)?

N/A

7. Prisons and Offender Management Services

Impact on HM Prison Services

- 7.1. Will the proposals result in a change in the number of offenders being committed to custody (including on remand) or probation (including community sentences)? If so, please provide an estimate and reasoning behind it, an estimated timeframe to reach this number of sentences, what evidence this is based on, and the source for your information.

No

7.2. Does the proposal create, remove or change an existing offence with a custodial or probationary sentence, or change the way offenders go through the prison / probation service? If so, please provide details, including the expected impact on probationary services.

N/A



8. Main Justice System Impacts Identified

8.1. Volumes and Costs or Savings (please lengthen if necessary):-

NB in all cases, assume an average annual figure or make clear if a different timespan is being considered. Where there may be significance variance from average in the first years of implementation, please add additional information in the notes below.

Identify the court or tribunal or MoJ service that will be affected by this proposal?	Volumes (please provide both numeric estimates and min-max ranges)	Type (e.g. prison place, tribunal hearing, fixed penalty, etc.)	Estimated recurring annual costs or savings (both numeric estimate and min-max range) (£)	Estimated initial set up costs (£)	Additional Information
Criminal Offences and Sanctions					
Civil Penalties					
HM Courts & Tribunals Services					
Welsh Tribunals					
Legal Aid					
Notes:-					

8.2. Prisons and Offender Management Services (lengthen if necessary, only complete if maximum penalty is something other than a fine)

Offence	Maximum Penalty	No. of prosecutions brought per annum (numeric estimate and min-max range)	Likely proportion sentenced to immediate custody	Likely average custodial sentence length given	Estimated costs or savings p.a. (£)¹ (please provide numeric estimate and min-max range)
Notes:					

Please be aware that any costs or savings identified as a result of any changes to the justice system /additional work must be factored in to the financial assessment of your legislation.

¹ The MoJ publish statistics on "Prison cost per place and cost per prisoner:" - see <https://www.gov.uk/government/statistics/announcements/prison-cost-per-place-and-cost-per-prisoner-2017-to-2018>