

Children, Young People and Education Committee

Meeting Venue:
Committee Room 1 – Senedd

Meeting date:
25 June 2014

Meeting time:
09.15

Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales



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Agenda

09.15 – 09.30 – Private Pre-meeting

1 Introductions, apologies and substitutions

2 Higher Education (Wales) Bill – Evidence session 5 (09.30 – 10.30) (Pages 1 - 63)

Higher Education Wales (HEW)
CYPE(4)-18-14 – Paper 1

Professor Colin Riordan, Chair
Amanda Wilkinson, Director
Ben Arnold, Policy Adviser

3 Higher Education (Wales) Bill – Evidence session 6 (10.30 – 11.30) (Pages 64 - 70)

NUS Cymru
CYPE(4)-18-14 – Paper 2

Beth Button, President of NUS Wales
Joni Alexander, Interim Director, NUS Wales
Kieron Rees, Policy and Public Affairs Officer, NUS Wales

4 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

Item 5

5 Consideration of Committee forward work programme (11.30 – 12.00) (Pages 71 - 81)

CYPE(4)-18-14 – Private paper 3

Agenda Item 2

Document is Restricted

Consultation on the Higher Education (Wales) Bill A Response by Higher Education Wales

About HEW

1. Higher Education Wales (HEW) represents the interests of universities in Wales and is a National Council of Universities UK (UUK). HEW's governing council consists of the vice-chancellors of all the universities in Wales and the Director of the Open University in Wales.

Introduction

2. A successful higher education system is critical to the economic and social prosperity of Wales¹:
 - Universities in Wales are more important to their national economy than universities in the rest of the UK.
 - More than half of Wales' investment in research and development comes from universities.
 - As major employers in their own right with a turnover of around £1.3bn, the economic benefits they bring to the rest of the sector through knock-on effects is more than double that.
 - Due to the strong link between higher education and long-term economic prosperity, many countries across the world regard investment in higher education as a priority.
 - In a time of rapidly increasing global competition, universities in Wales have been particularly successful in attracting overseas students, and are responsible for a significant proportion of the nation's inward investment.
 - Universities are also central to a thriving national culture in Wales with its unique creative, historical and linguistic identity.
3. The following paper set out HEW's response to the consultation on the Higher Education (Wales) Bill (the 'Bill') published by the Children and Young People Committee of the National Assembly for Wales (the 'Assembly') on 21 May 2014 following the introduction of the Bill to the Assembly on 19 May 2014. A more detailed commentary on the issues contained in the Bill is provided in Annex A.

¹ See in particular, Kelly, U., "The Economic Impact of Higher Education in Wales", July 2013 (available from HEW's [website](#)) and HEW's response to the National Assembly for Wales HE Funding Inquiry, Nov 2013 (available [here](#)).

Question 1. The Explanatory Memorandum prepared by the Welsh Government describes the Bill's main purposes in the following terms [as cited in the Explanatory Memorandum]. Is there a need for a Bill for these purposes? Please explain your answer.

4. While alternative regulatory approaches may be possible, we support a Bill which meets these purposes in principle. As stated in the Explanatory Memorandum, the need for the Bill is seen as the necessary consequence of the recent changes made to higher education funding and student support in Wales, which were driven by the increase of the levels of tuition fee across the UK (para. 46). The Bill is designed to enable HEFCW to continue to exercise regulatory controls over education delivered in Wales by certain institutions without reliance on the provision of financial support to those institutions (para. 51). Funding and regulatory arrangements across the UK continue to evolve and it is clear that regulatory change is needed to preserve essential features of the current system whatever the funding arrangement.
5. We strongly agree, for instance, that quality assurance arrangements must be consistent across the higher education sector irrespective of funding arrangements. Similarly, public assurance on the financial health and management of universities across the sector is essential for maintaining the confidence of students and investors. We would expect universities to continue to be accountable for the use of any public funding that they receive to ensure that this remains an effective and efficient use of public resources for the public good. We would also expect student interests to continue to be protected appropriately in the wider public interest, recognising that for certain groups of students their private investment is supported by a significant contribution from the taxpayer and the Welsh Government must be able to control their budgets appropriately. We welcome the focus that the Bill places on fair access to higher education including retention in the wider public interest. These are principles which our universities strongly support as responsible institutions seeking to discharge their charitable obligations in providing higher education for the public benefit.
6. Although we welcome a Bill for these purposes, we need to be mindful that it is by no means certain that the current funding arrangements will be retained beyond 2016/17 following the outcomes of the Diamond Review of higher education. Similarly faced with significant reductions in funding in England, we note that the UK Government has endorsed a voluntary agreement between HEFCE and the higher education sector as an interim solution. Above all, we must ensure that we do not rush legislation that has long-term consequences for the sector and Wales at the expense of getting it right. We must ensure that the Welsh Government can achieve its primary aim of putting in place a robust and proportionate regulatory system for the whole of higher education in Wales.

Question 2. Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

7. In our view there are a number of matters to address in the Bill, as currently drafted - some relating to the absence of provisions where they currently exist, and others relating to an increase in provisions which are seen as not appropriate. We have listed some of these below, and others are contained in the Annexes to this submission (particularly Annex A). It should be noted, however, that we do not think that a major absence or increase is intended since this would severely impact on a variety of different stakeholder interests.
8. The replacement of the existing provisions relying on terms of grant means that, in relation to both the fee and access plan provisions and the financial Code, HEFCW and the Welsh Government will no longer be subject to the important restrictions currently in place under the grant-based regulatory system. These, for instance, prevent the Welsh Government from specifying requirements in relation to individual institutions, and ensure that HEFCW must have regard to the denominational character or distinctive characteristics of institutions. The Bill would not prevent HEFCW from determining the criteria for the appointment and selection of academic staff. In our view the Bill currently fails to sufficiently preserve institutional autonomy and academic freedom and would pose serious questions about universities continued ability to manage their affairs and reputation and to compete successfully in an increasingly global market.
9. In particular, the Bill does not prevent the HEFCW from setting terms and conditions which do not relate to HEFCW funding and from discouraging institutions from obtaining income from other sources. This Bill goes beyond the existing principle that regulatory control should only extend as far as public funding. The combined university funding and student fee grant payments amounts to around a quarter of universities' income only.² The Bill seemingly gives free reign to the Welsh Government and HEFCW to determine and control activities which are neither supported by grant nor relate to regulated fee income, and places no financial limits on any spending requirements or financial sanctions. We believe this is disproportionate and could put investment in the sector at risk including banking arrangements which rely on universities ability to provide appropriate surety.
10. A key issue from a student perspective is that in Wales, unlike England, the regulated student fees could be expected to be used for a wide range of activities other than the provision which the students have paid for. There are clear issues about whether this

² Estimated fee grant payments for students at Welsh institutions (£158m) and the funding available for allocation to universities (£174m) together only amount to around a quarter of the £1.3bn of universities total income in 2014/15 (see HEFCW Circular W14/18HE).

adequately serves the interests of students who are expected to pay the regulated fees. We also note that the student complaints legislation would continue to apply to funded institutions not regulated ones.

11. A further difference between the current system and arrangements under the Bill is the potential to determine and enforce policy detail relying on a range of measures rather than having to rely on remedies for extreme cases only (e.g. not approving a fee plan). There are many dangers in this approach which could introduce a system of micro-management which neither the Funding Council nor the Welsh Government are resourced to operate, and could lead to a system open to continuous litigation.
12. In many instances the new powers do not appear to serve any genuine identified need. For instance, access and inspection of documents for quality assurance purposes is ensured through non-legislative means as a condition of receiving a satisfactory assessment. The legal advice we have received describes these powers as 'draconian' and as 'a very strong indicator of control' similar to the powers of entry and inspection of business premises enjoyed by HM Revenue and Customs. The main impact of the new legislative powers in this area would therefore be to undermine confidence in the current system, which appears to be working perfectly well in this respect, and to invite costly litigation instead.
13. The new powers of enforcement allowing all directions to be enforceable by injunction, including requiring positive performance of requirements appears to be extreme. In our view, powers of this nature should only be exercisable in very rare circumstances which should be more clearly prescribed on the face of the Bill.
14. HEFCW gains significant new powers in the Bill to issue advice, guidance and assistance which is mandatory for institutions to take account and power to enforce general duties of cooperation. There are separate powers which relate to quality, the Code and the promotion of equality of opportunity and promotion of higher education more generally. These are the most significant new proposals which were not clearly identified in the Technical consultation, and the sector has not been previously consulted on these. Seemingly, these powers would enable a wide range of potential policy measures to be placed on a statutory footing without the benefit of scrutiny through the legislative process. We welcome the role of HEFCW in providing advice and guidance, but making it mandatory to take into account seems unnecessary.
15. Taken together these issues amount to a very significant shift in the powers of the Welsh Government and HEFCW in relation to universities. As raised in the Technical consultation, these in turn raise serious concerns in relation to the Bill's impact for the charity status of universities and their classification for purposes of national accounting:

- The legal advice we have received at this stage (see Annex A, paras 70-75 for further details) is that the Bill may not lead to a loss of charitable status but, in line with the comments of the Charity Commission in its response to the Technical consultation, the Bill would lead to clear breach of charitable status:

“the consequence of this would be that members of university governing bodies would be placed in an impossible position. As charity trustees, they would face a direct conflict between compliance with the provisions of the Bill and their duty to comply with charity law. Charity trustees who knowingly act in breach of charitable trust are at risk of personal liability for any losses arising to the charity as a result of the breach... clearly governing bodies could not function on the basis of committing an ongoing breach of trust in relation to a university’s charitable status. On the assumption that entry into the new regulatory regime is optional (EM, para. 65) university governing bodies will need to take legal advice, and consult the Charity Commission, as to whether they can lawfully apply to become “regulated institutions” under the Bill, or whether they should apply for specific designation of courses.”

In our view it is essential that the Charity Commission’s assurances are obtained on the Bill in its final form before it is enacted.

- Universities are currently classified by the Office for National Statistics (ONS) as Non Profit Institutions Serving Households (NPISH) and not as central government. This classification is based on twelve indicators of public control. The legal advice we have received at this stage strongly indicates that a review of the Welsh higher education sector would be likely to lead to reclassification of higher education corporations and may potentially lead to the reclassification of universities incorporated by Royal Charter as well. The loss of NPISH status could potentially have a very damaging impact on the international reputation of the sector and could also mean that the charitable status of universities is threatened. There would be significant financial consequences for both the Welsh Government and the sector (see comments relating to Question 8 below) and it would affect all contracts and legal agreements with third parties. See Annex A paragraphs 76-79 for further details.

16. Based on this advice, we see it as imperative that appropriate assurances are sought and obtained from the Charity Commission and the ONS on the Bill in its final form as part of the legislative process, and that the use of powers to make subordinate legislation are reviewed to avoid unintended consequences in this respect (see further below).

Question 3. Are the sections of the Bill as drafted appropriate to bring about the purposes described above? If not, what changes need to be made to the Bill?

17. We provide more detail on the specific sections of the Bill in Annex A. The key additional issues relating to specific parts of the Bill are as follows:

Regulatory system

18. The Bill only covers regulated institutions and leaves important gaps in the overall regulatory framework for higher education in Wales. This means the Bill is heavily reliant on all universities becoming regulated providers. At the same time, the framework is unable to cater for some obvious potential changes in future (e.g. postgraduate and part-time providers or research specialists). The greater regulatory complexity increases the potential for divergence in the sector – for instance, quality assurance would be the duty of HEFCW in respect of the courses provided by regulated institutions, and seemingly the Welsh Government would have the duty in relation to courses designated on a case-by-case basis. There are also uncertainties about how the Bill would operate alongside the grant-based regulation. For a more detailed analysis see the comments in Annex A relating to ss.2-3, and Annex B.
19. The eligibility criteria for providers wishing to apply to become a regulated institution also need to be clarified, as it is not clear that the Bill as drafted is giving effect to the Welsh Government's intentions. From the Explanatory Memorandum it appears that the Welsh Government envisages s.3 covering situations where the institutions in question provide higher education at a level lower than degrees. However, this already appears to be covered by the definition/eligibility requirements in s.2.

Fee and access plans

20. In addition to the serious concerns we have raised above, we are concerned about the lack of procedural restrictions on enforcing fee plan requirements in this section. The restrictions on the use of sanctions or defences against sanctions on the basis of reasonable compliance need to go further in this section – though we welcome signs that the Welsh Government has in part incorporated the defence on grounds of reasonableness that applied to English institutions. We believe that the use of the negative resolution process in the further development of regulations relating to the approval, withdrawal and enforcement of the fee and access plan requirements are in many instances inappropriate.

Quality assurance

21. A major issue that needs to be resolved is that the duty to assess the quality of education under the new Bill does not cover courses provided by Welsh universities outside Wales as it does under the current legislation. There may also be an issue about the fact that existing courses delivered via franchise would not be covered, only new ones. We note that in absence of further regulation, that neither HEFCW nor the Welsh Government would have a duty to assess the quality of provision of unregulated

providers including those whose courses are designated on a case by case basis, even if they are funded.

Financial Code

22. As identified above, the provisions relating to the Code fail to incorporate the protections of institutional and academic autonomy that are currently in place under the FHEA 1992, as expressly acknowledged in the Financial Memorandum. In particular, there are serious concerns that enforcement powers are not limited to the extent of grant or regulated fee income received and do not have to relate to activities which are supported by that income.
23. In the light of this, too much discretion is left to determine the content of the Code through a non-legislative process. We believe that it should be for HEFCW and not the Welsh Government to determine the code – but given the powers of enforcement and potential for wide interpretation, the limits need to be much more tightly prescribed than in the past through due legislative process overseen by the National Assembly.
24. The Code and conditions of grant (i.e. Financial Memorandum) would both apply to regulated institutions in receipt of HEFCW funding. This could rise to potential conflict in the exercise of the separate statutory functions and we are unclear how this will operate at this stage, as different regulations could apply to the same matters.

Question 4. How will the Bill change what organisations do currently and what impact will such changes have, if any?

25. There are a significant number of major potential impacts for universities. This includes in particular the impact on universities ability to determine its own affairs and the consequences that follow from this (see next section), a comparative lack of protections relating to academic autonomy with potentially major consequences for reputation, and business-critical impact in terms of potential breach of charity duties and loss of NPISH status for purposes of national accounting.
26. We realise that in some instances the new powers such as the powers of access and inspection, for instance, would not be exercised frequently (if at all) in practice. The Bill, however, potentially allows both the Welsh Government and HEFCW to exercise much greater control of university activities, particularly through the fee and access plan provisions, the financial Code and the powers to issue mandatory guidance. This could potentially lead to major changes. This will, of course, depend on the further regulations and HEFCW's exercise of its discretion. In our view, there need to be clearer limits in place to ensure that the new powers are not simply a path to legislating for universities without resorting to the Assembly.

Question 5. What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

27. Key barriers to implementation are the timescales and volume of further regulation required, including the development of the financial Code (see further comments on the use of subordinate legislation below). We are very concerned that the current timescales allow insufficient time for issues to be identified and addressed and for adequate legislation and arrangements to be put in place for 2016/17.
28. The potential impact for national accounting status and charity status are also clearly barriers to implementation of this Bill as it stands. As we have argued, these must be addressed through the legislative process satisfactorily to avoid damage to the sector which is business critical.
29. Further clarity is needed on exactly how the transitional arrangements would apply – which we note will depend on the commencement of other sections. The key issue under the transition arrangements is the (in effect) retrospective application of the new regulatory requirements to existing fee plans. There is a question of how far the current plans are suitable for the new purposes and powers for which they will be used under the transitional arrangements.

Question 6. Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales?

30. We have not identified any issues relating to legislative competence at this stage. However, the Bill has potential ramifications for the whole of the UK higher education sector, for instance in terms of the impact for the reputation of the UK sector as a whole and consequences arising from the close links and business between universities across the UK, which we would expect the Secretary of State for Wales to monitor closely. It is also clear, that certain aspects of the Welsh Government's regulatory framework will require cooperation from other UK nations to implement. For instance, we currently understand that the Bill's gap in providing a duty to assess quality of education for courses delivered by Welsh regulated institutions outside Wales is attributable to the limits in the Welsh Government's legislative competence.

Question 7. What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (ie statutory instruments, including regulations, orders and directions)? In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

31. A key issue is that the Bill is largely a 'framework' Bill which leaves many of the proposals of the Technical Consultation to be dealt with through subsequent subordinate legislation. This makes it difficult to fully assess the impact of the Bill and consequent changes particularly in terms of their impact for key issues such as universities' charity status and classification for purposes of national accounting.
32. In the light of the above, a key concern is that in the large majority of cases, the negative resolution procedure is proposed. This means that the legislation can be passed automatically without consultation or requiring a majority vote. It also means that the legislation cannot be amended, and must be accepted or rejected as a whole. In our view in particular, the powers to prescribe mandatory provisions in the fee and access plans (s.6(1)) and regulations detailing the matters to be taken into account in approving a plan (s.7(3)) for instance are important matters where we believe that an affirmative procedure, super-affirmative procedure (requiring consultation) or inclusion on the face of the Bill would be more appropriate. There are, however, a significant number of other instances we would question the use of the negative resolution procedure. These are matters which the Children and Young People Committee may wish to pick up with the Constitutional and Legislative Affairs Committee in producing a Stage 1 Report on the appropriateness of the powers and designated procedures.
33. The extensive use of regulations also raises issues about the commencement and feasibility of implementation of the Bill, intended to apply for 2016/17. It is clear that the Bill cannot be implemented without the prior exercise of many of these powers. We also note that the transitional arrangements appear to depend in part on what regulations are brought into force in the transitional period. We question whether these regulations can be adequately drafted and consulted on prior to the intended date of implementation. Serious consequences would follow from getting this wrong for both universities and Wales more generally.
34. In three instances, the Bill incorporates powers to amend either the Act itself or other primary legislation through the means of subordinate legislation (i.e. Henry VIII powers). In the past such powers have been controversial and used with great caution, since changes to primary legislation may be made without the normal oversight of the Assembly. We question whether this is appropriate. On the face of it, these powers should not be used as an excuse for not identifying required changes on the face of the Bill.
35. Although not strictly speaking a power to make subordinate legislation, we note that the Bill also confers significant new powers on HEFCW which are legislative and judicial in character. This includes, for instance, new statutory powers to issue guidance which is mandatory for institutions to take account of, wide powers to determine and enforce fee plan requirements, and the ability determine and enforce a financial code. We would

welcome the committee on taking a view on the appropriate use of these arrangements given the constitutional role of the National Assembly.

Question 8. What are your views on the financial implications of the Bill? In answering this question you may wish to consider Part 2 of the Explanatory Memorandum (the Regulatory Impact Assessment), which estimates the costs and benefits of implementation of the Bill.

36. The costs for the sector may largely depend on the further regulations and exercise of the HEFCW's powers. There will undoubtedly be an additional administrative cost for both HEFCW and universities anticipated as result of this Bill. Since the new regulatory framework would rely on enforcement through legal action we would also expect there to be significant costs for the Council and sector arising from increased litigation.

37. The Bill includes several new powers to allow the Welsh Government and/or HEFCW to determine and enforce spending requirements. These are not limited to income derived from the Funding Council, or additional income received from regulated fees. Where powers are used to direct university spending which does not relate to the use of grant or regulated fee income, this would represent additional cost to the sector which must be met from other sources. There is a clear danger that the Bill could be used to enforce policy on universities, at the expense of other activities, without proper financial support.

38. The new powers to direct income could also seriously damage the business and financial interests of universities. Investors, contractors and bankers need to be confident in universities ability to determine their own financial and corporate affairs. There is evidence in Wales to suggest that any questions regarding this could significantly damage universities ability to compete for business and research contracts and research council income, to enter partnerships and agreements, to obtain banking covenants or to attract investment more generally.

39. As it stands our advice is that the Bill and its subsequent regulations could lead to the breach of the charity duties of university governors, leading to their personal financial liability should their institution apply to become a regulated institution. The wider financial and reputational impact on universities would be critical to their continuation.

40. In the case of reclassification of universities to central government for purpose of national accounting we would expect there to be significant consequences for the DfES budget, which in turn would have serious implications for the sector – in particular surpluses and losses would become Welsh Government funds and would have to be managed within their overall budget. If universities lost NPISH status and became part of the public sector then it would also be necessary for the universities affected to conduct a comprehensive review of all their contracts and legal agreements with third parties. Particular areas of concern include: employment arrangements and collective

employment agreements; banking covenants to ensure there is no breach of covenant; and representations and warranties as to a university's legal status in commercial agreements, and joint ventures.

41. It is not clear whether these have been identified or included in the costs set out in the Explanatory Memorandum. In general, we note that we do not understand the costs presented in the Explanatory Memorandum. We are not aware of any engagement with universities in their preparation. We are uncertain whether HEFCW has been appropriately involved but would regard HEFCW as the most appropriate body to comment on the costs as shown. We would welcome the Finance Committee scrutinizing these further to clarify what these costs refer to and how they were calculated in producing a Stage 1 report.

Question 9. Are there any other comments you wish to make about specific sections of the Bill?

42. We should emphasise that at this stage new issues are continuing to emerge from our consideration of the Bill. We have previously expressed our concern that there was no consultation on a Draft Bill prior to introduction, and we note that the resulting Bill largely fails to address the issues which we raised in response to the Technical Consultation (see Annex C). It is, therefore, essential that in we work closely with the National Assembly to identify and address these issues through the legislative process in order to ensure – as all parties would welcome – that the Bill is effective in achieving its aims and contributes to ensuring that Wales has a reputation for high quality legislation.
43. We confirm that the HEW consultation response is a public document and that the Welsh Government may make a copy available on the internet or in a report. We look forward to engaging with the National Assembly, the Welsh Government and HEFCW in the further development of the proposals.

**Higher Education Wales
June 2014**

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Appendix A: HE (Wales) Bill - Detailed Summary and Commentary

Text in black = a paraphrase/summary of provisions. *Blue italics = commentary.*

Contents

The Bill sets out provisions in three key areas: fee and access plans, quality assurance, and the financial Code. (s.1)

I. FEE & ACCESS PLANS

- **Eligibility to apply for a fee and access plan conferring ‘regulated provider’ status**

Institutions in Wales who provide higher education and are charities can apply to HEFCW to have ‘fee and access plans’ approved as ‘regulated institutions’. Further provisions about making applications can be made through regulations. (s.2). Providers of HE in Wales who are charities but do not otherwise meet the requirements of an eligible institution would have to apply to the Welsh Government to be designated as such to apply for regulated institution status. Further provisions relating to application, approval and withdrawal of designation can be made through further regulations (s.3). The definition of ‘in Wales’ expressly includes the Open University for purposes of the act (s.54(3)), with the exception of the provisions relating to the Code on financial management (s.27(8): see below).

Key issues:

- *The Bill does not deal with the whole HE system, and there are questions about its ability to cater for future new entrants (e.g. part-time and postgraduate providers, research institutes etc).*
- *The eligibility requirements determining whether a provider is eligible to apply for a fee plan or needs to first apply for designation by Welsh Government are unclear.*
- *The Bill itself does not confer automatic designation of courses for purposes of student support – this would be subject to separate legislative change.*

Further issues:

- *The proposed HE system will be highly complex, with potential for overlap and gaps in the duty and powers in relation to higher education.*

[1] *All higher education institutions in Wales are currently universities with charitable status, which means that the eligibility issues relate primarily to other potential regulated providers. Specific provision is made for the Open University in the Bill. Formerly, the fee plan legislation applied to institutions whose activities were funded by HEFCW under the Further and Higher Education Act 1992. Eligibility for funding*

in turn depended on being a university or university college, being a higher education corporation, or being an HE provider who was otherwise designated.

- [2] *The eligibility requirements determining whether a provider is eligible to apply for a fee plan or needs to first apply for designation by Welsh Government are unclear. According to the definition section (s.54) 'higher education' means a course of any description mentioned in the ERA 1988 (Schedule 6) – this includes any course of study, whether for an examination or otherwise, that is higher in standard than GCE A-level and includes HNCs/HNDs and degrees. S.3 enables providers of higher education in Wales that are charities but would not be regarded as an institution for the purposes of the act (i.e. are not automatically eligible to apply for a fee plan) to apply to the Welsh Government for special designation to apply. From the Explanatory Memorandum it is clear that the Welsh Government envisages this covering situations where the providers in question provides higher education at a level lower than degrees – however, this already appears to be covered by the definition/eligibility requirements in s.2.*
- [3] *Notably, the Bill does not deal with the whole regulatory system for higher education. In particular, the WG's intention to establish a case-by-case process for designating courses for purposes of statutory student support for unregulated providers is not addressed. The Explanatory Memorandum reiterates the Welsh Government's intention to introduce a choice of two different designation pathways (see EM paras 65-72), as previously proposed in the Technical Consultation. This would enable automatic designation for regulated providers and case-by-case designation for other eligible providers on application to the Welsh Government. The intention is to confer greater access to student support for regulated providers than unregulated providers in return for greater regulation (e.g. grant and loan support of up to £9k for regulated providers, and loan support of up to £6k for courses designated on a case by case basis). The Bill itself, however, does not specify the fee packages available to regulated/unregulated providers. The Explanatory Memorandum (para. 66) states that "the revised arrangements for the specific designation process can be made without the need for amendments to primary legislation and will be taken forward by administrative means separately to this Bill. It is not clear what is meant by administrative means, however. The Bill itself also does not confer automatic course designation for regulated providers - we assume that this would be introduced by separate regulations under existing student support legislation and, in absence of further legislative change, universities would continue to be automatically designated by virtue of being funded.*
- [4] *The Bill also does not address other potential key components of the different support/control packages such as, for instance, student number limits which in the absence of further legislative change would continue to be implemented through the terms and conditions of grant (i.e. apply to funded institutions). Fee limits, if any, for providers who do not have a fee and access plan are not detailed (see below). Similarly, many important provisions relating to HE, such as the student complaints provisions established by the HEA 2004, would continue to apply to institutions on*

account of university title or other criteria and, without further legislative change, would not depend on regulated status.

[5] *At this stage, it is assumed that there will be sufficient incentives to ensure that all current universities become regulated providers. It is not clear, however, that the overall proposed higher education regulatory framework for HE will provide the future flexibility to deal with new entrants as intended. There could be potential issues, in particular, for part-time or postgraduate specialist institutions in future: part-time specialist institutions could potentially become regulated providers but part-time courses would then be subject to fee regulation (see EM para. 75); postgraduate provision¹ is expressly excluded from the scope of the new fee and access plan legislation. Notably, HEFCW's current duty to assess the quality of education of the institutions that it funds has been removed and replaced by a new duty in respect of regulated providers only, so in absence of further legislation, there would be no public body with a duty to provide quality assurance for unregulated providers.*

[6] *The potential for different regulatory positions is greatly increased under the Bill (adding to the existing complexity involving university/university college title and different forms of incorporation). In theory, an eligible provider may choose to become a regulated provider, an 'unregulated' provider or decide not to access the student support package at all (there is no current term for this – here called 'non-regulated'). The same provider may or may not be funded. The legislative provisions relating to the award of university title and degree awarding powers remain unchanged in this Bill – the BIS criteria will continue to apply for both England and Wales.*

- **Content of the fee and access plans**

The prescribed content of the fee and access plans relates to (a) the period to which the plan relates, (b) fee limits, and (c) 'general provisions':

(a) Plan period

The plan must specify the period to which it relates up to a prescribed maximum (s.4)

(b) Fee limits

The fee and access plan provisions allow fee limits to be set in respect of persons and courses as prescribed by the Welsh government. Fee limits would not apply to international students. Similarly, the fee limits may only apply to undergraduate courses and postgraduate ITT. Different fees can be set for different courses, and can vary for different years of the plan, subject to the maximum (s.5). Institutions would be under a duty to ensure that regulated course fees do not exceed the limits set under their most recent fee plan for the years to which it relates, whether or not it is still in force (s.10).

¹ Other than courses of initial teacher training.

Further issues:

- *The fee limits for regulated and unregulated/non-regulated providers are unclear. In the absence of further legislation, there would only be statutory fee limits in respect of regulated providers in Wales.*

[7] *The precise coverage of the fee limits would depend on subsequent regulations. A key change, however, is that the fee and access plans now allow the inclusion of part-time courses – this was formerly excluded by the HEA 2004. The Explanatory Memorandum makes it clear that arrangements for part-time study need to be given further consideration and until such time as part-time tuition fees are regulated they would not be included (EM para 43).*

[8] *The fee and access plan legislation also removes the ‘basic amount’ for Wales which currently sets a limit for providers who do not have an approved fee plan. This change means that, in absence of further legislation, there would only be fee limits in respect of regulated providers in Wales and the Welsh Government’s policy intent in respect of other institutions is still unclear at this stage.*

(c) General fee plan provisions

The fee plans must contain provisions relating to the promotion of equality of opportunity and the promotion of higher education as prescribed by the Welsh Government through regulations using the negative resolution procedure. This may include setting objectives, setting out expenditure information, and monitoring compliance and progress. They may also include requirements to providing financial assistance to students and taking measures to attract or retain under-represented students. The provisions may not, however, refer to particular courses or the manner in which they are taught/supervised/assessed, or to the criteria for the admission of students (s.6(5)). The rules for approving, publishing, and varying fee plans are all still to be determined through further regulations. (s.6)

Key Issues:

- *The fee and access plans provide fewer restrictions on how HEFCW (and the Welsh Government) can exercise their powers than under the FHEA 1992, effectively removing many of the important current safeguards designed to respect the need for institutional autonomy.*
- *The regulated student fees will be expected to be used for a wide range of activities other than the provision which the students have paid for. There are clear issues about whether this adequately serves the interests of students who are expected to pay the higher fees.*
- *The potential scope of the fee plans application appears to be excessively wide, given the new powers of enforcement and comparative lack of restrictions on the requirements that can be made. At the same time this leaves important gaps in activities (and potentially providers) that can be regulated under the new Bill.*
- *Further regulations relating to the fee plan requirements (s.6(1)) should follow an affirmative resolution process, given the increased scope and powers of*

enforcement.

Further issues:

- *The fee limits for regulated and unregulated/non-regulated providers are unclear. In absence of further legislation, there would only be fee limits in respect of regulated providers in Wales.*

- [9] *Although the existing provisions of the HEA 2004 have been transferred to the Bill quite closely with many provisions unchanged, this remains a key area of concern.*
- [10] *The scope of the general provisions for Wales as they are set out in the Bill are the same as under the HEA 2004 in that they must relate either to equality of opportunity or to promotion of higher education. As with the previous legislation, it is clear that the list of provisions which may be prescribed are not exclusive and in particular can potentially include any financial or other requirement which can be interpreted as promoting equality of opportunity or promoting higher education. A key change from the HEA 2004 is that the fee and access plans no longer rely on the conditions of grant.*
- [11] *A key difference between England and Wales is that the application of the fee planning legislation in England is much narrower: in England 'access plans' relate equality of opportunity only. Furthermore, the Office for Fair Access (OFFA), the regulatory body in England, is clear that its remit only extends to students and courses that are fee-regulated and that only measures targeted at undergraduate students (or postgraduate ITT students) from under-represented and disadvantaged groups should be included in plans in England.²*
- [12] *In Wales, the intention is that in future HEFCW would interpret and apply the provisions as widely as possible to enable the new regulatory approach. The fee and access plans will be interpreted to apply to all areas covered by the HEFCW corporate strategy targets (see HEFCW Circular W14/02HE) with the exception of those related to ITT (which we assume may later be brought in depending on future regulations), research council income, reconfiguration and collaboration and governance. Accordingly, the promotion of higher education would be deemed to cover HEFCW's existing targets relating to student satisfaction survey performance, overseas student recruitment, quality assessment outcomes, employment outcomes and employability, delivery of continuing professional development, and achievement of collaborative research income targets.*
- [13] *The Bill adds new provisions for Wales which explicitly enables the plans to cover student retention (s.6(3)(b)) and provision of expenditure information (s.6(4)(b)), although these were effectively already covered in Wales through the Minister's fee plan guidance. A key change, however, is that any financial requirements made*

² <http://www.offa.org.uk/guidance-notes/how-to-produce-an-access-agreement-for-2015-16/> para. 18.

under the Bill are no longer limited by the extent of HEFCW funding (or their equivalent).

- [14] *The Bill transfers across the clauses in the HEA 2004 which provide protection for academic autonomy (s.6(5)). These prevent requirements being set in relation to particular courses or the admission of students. A key issue identified in HEW's response to the Technical Consultation, however, was that the fee planning legislation provides less protection than the current regulatory system based on the FHEA 1992 which is a particular concern given the intended use of the Bill as the primary regulatory instrument for HE in future, with its extended scope of application and increased powers of enforcement. The key provisions in the FHEA 1992 (ss.65 and 66) not included in the new fee-based regulatory framework include:*
- Welsh Government provisions must relate to all institutions or classes of institution and not to particular institutions.*
 - HEFCW must have regard to the desirability of not discouraging institutions from developing other sources of funding.*
 - HEFCW must not set terms and conditions relating to programmes of research.*
 - HEFCW must not determine the criteria for the selection and appointment of academic staff .*
 - HEFCW must have appropriate regard to the denominational character or distinctive characteristics of institutions.*
 - HEFCW must not set terms and conditions that relate to income which does not come from the Council (for instance, the terms and conditions could not relate to fee grant payments). The Bill provisions are not limited to the students paying the additional fees or the provision they are paying for.*
- [15] *It is further noted that, in England, the Director of Fair Access is under a general statutory duty to protect academic freedom (s.32 HEA 2004), in addition to the specific duty in respect of the content of courses, the manner in which they are taught and the criteria by which students are selected for admission. There is no such general duty imposed on HEFCW or the Assembly by the Bill.*
- [16] *A key issue from a student perspective, is that in Wales, unlike England, the regulated student fees will be expected to be used for a wide range of activities other than the provision which the students have paid for. There are clear issues about whether this adequately serves the interests or expectations of students who pay regulated fees.*
- [17] *The scope and potential application of controls across all these areas appears to be disproportionate and could, in conjunction with other parts of the Bill or other subsequent regulatory changes, threaten charity and NPISH status as a result (see above). In light of the potential impact of further regulation in this area, we would question whether the use of negative resolution procedure (as previously used under*

the HEA 2004) is appropriate for regulations under 6(1), and should be replaced with an affirmative procedure.

- **Approval of plans**

HEFCW must approve or reject plans submitted to it. Only plans from eligible or specifically designated institutions can be approved. The matters to be taken into account by HEFCW would be determined by further regulations using the negative resolution procedure. (s.7) Further regulations would also determine how institutions should publish their plans (s.8) and may allow plans to be varied subject to HEFCW's approval (s.9). Before giving notice that it has rejected a plan, HEFCW would be required to issue a warning notice and take into account representations from the institution in question (s.40-43).

Key Issues:

- *Further regulations relating to the approval of plans should follow an affirmative resolution process.*

[18] The criteria for approval and withdrawal of approval for plans are closely related to powers to make provisions about its content. This may be a key area where an affirmative resolution process may be regarded as essential for pursuant regulations.

Enforcement of fee and access plans

- **Duty to monitor compliance and effectiveness**

HEFCW has a duty to monitor compliance with the fee limits and general provisions of the fee plan. It must also evaluate the effectiveness of the fee plans both individually and generally for the sector. (s.15).

[19] The duty to monitor the effectiveness of plans is new – a potential issue is the extent to which it focuses on individual institutions.

- **Excess fees cannot be enforced through contract**

If . fees exceeding the applicable fee limit are charged in a contract with a student, the fee charged will be deemed to be the maximum fee but the contract remains otherwise valid (s.14)

[20] This means that students can't be made to pay the excess under contract law.

- **New 'compliance' and 'reimbursement' powers.**

Where HEFCW is satisfied an institution has failed to comply with fee limits it can direct institutions to reimburse the excess fees, or require it to take steps to comply. If they do so, they HEFCW must publish the direction and give a copy to the Ministers – the detail of this process would be determined by further regulations. (s.12).

[21] *These are new ‘regulatory’ powers. The compliance and reimbursement powers appear to be proportionate in that they are limited to excess fees and effectively replicate previous powers under the grant-based system.*

- **New powers to enforce general fee plan provisions**

Further regulations, using the affirmative resolution procedure, would determine what steps HEFCW should take if it is satisfied that an institution has failed to comply with the general provisions of an approved plan. This could include provisions about what does and what does not constitute a failure to comply and matters to be (or not to be) taken into account by HEFCW in reaching its decision. It could make provision for HEFCW to direct institutions to take steps to comply, including expenditure directions and further sanctions. The detail of the procedure for giving and reviewing notices would also be determined by further regulations following an affirmative resolution procedure. (s.13). Any directions would be enforceable by injunction (s.44).

Key issues:

- *The powers to enforce general fee plan requirements appear to be disproportionate in that*
 - *they may impose financial directions not restricted to the use of the regulated fees (or grant income)*
 - *they may include both mandatory and prohibitory requirements*
 - *there are no procedural restrictions on the application of the proposed powers on the face of the Bill*
 - *There are insufficient restrictions on the use of sanctions or defences against sanctions on the basis of reasonable compliance.*

Further issues:

- *Too much is left to determine through subordinate legislation, and the provisions should not include the power to amend primary legislation through regulations.*

[22] *This is a key new power. Under current legislation, if HEFCW is satisfied that an institution has failed to comply with general fee plan provisions, it may only refuse to approve a new fee plan. It may not enforce specific steps or make specific financial directions to remedy non-compliance (although the provisions already in the fee plan may include specific steps or financial requirements – see s.6).*

[23] *The new powers of enforcement of the general provisions appear to go well beyond the existing fee plan legislation (or grant-based provisions under the FHEA 1992) and allow specific interventions ranging from minor to major. There is no equivalent in the fee planning legislation for England. It is also noted that the powers allow both prohibitory and mandatory injunctions – courts traditionally tend where possible to avoid the use of mandatory injunctions requiring the positive performance of a particular step due to the higher degree of coercion typically associated with them. There are no procedural or substantive constraints on the application of the proposed powers on the face of the Bill.*

[24] *According to the legal advice we have received at this stage “the power to give directions backed by injunction is a very strong indicator of external control of HEIs by HEFCW. The existence of such a power would be a significant factor in assessing the implications of the Bill for charitable and NPISH status.”*

[25] *In the Technical consultation, it was proposed that any spending direction should not exceed the amount of expenditure agreed by HEFCW in the approved plan (5.32). This restriction does not appear to have been adopted, and there are no limits on spending directions in the Bill itself.*

[26] *A key further difference between England and Wales in the existing fee plan legislation is that, in England, governing bodies are not to be sanctioned for failure to meet general conditions if they can show they have made all reasonable attempts to do so. The Bill partially reintroduces this safeguard for Wales in respect of approving/refusing to approve a fee plan: a governing body is not to be treated as having failed ‘if HEFCW are satisfied that the governing body has taken all reasonable steps to comply’ (s.36(4)). This does not appear to extend to enforcement of general fee plan provisions or more generally, however.*

[27] *The Bill also allows the further regulations to amend both primary and secondary legislation, i.e. it contains a controversial ‘Henry VIII clause’ (see further below). Given the potential scope and impact of these provisions, we would query whether this should have been set out in more detail on the face of the Bill, and question whether it is sufficient to delegate these matters to subordinate legislation which does not have to be rejected or accepted without amendment.*

- **Powers to enforce cooperation with monitoring and evaluating**

Institutions must provide such information, assistance and access to the institution’s facilities as HEFCW reasonably require for purposes of monitoring and evaluating the effectiveness of plans. If satisfied that an institution has failed to comply, HEFCW may issue directions to secure compliance (s.16). Any directions would be enforceable by injunction (s.44).

[28] *This new power was not explicitly identified in the Technical Consultation although arguably it was implied (paras 5.23-24). The provisions relating to fee and access plans give HEFCW the power to force institutions to allow access to their institutions but stop short of the full powers of entry and inspection established for quality and financial assurance purposes. We note that the equivalent power bestowed upon OFFA by HEA 20014 does not include the duty to grant access power to enter to inspect documents.*

- **Power to refuse to approve a fee and access plan**

HEFCW may refuse to approve a fee and access plan for failure to comply with the fee limits, the general plan provisions, directions relating to inadequate quality, or the financial Code. Before giving notice that it has refused to approve a plan, HEFCW would be required to issue a warning notice and take into account representations from the institution in question (s.40-43). HEFCW can withdraw a notice, and further

regulations would detail the procedure and matters to be taken into account. An institution must not be regarded as having failed to meet the general provisions of the plan for purposes of this section, if HEFCW is satisfied that it has taken all reasonable steps to do so. (s.36).

Further issues:

- *Approval can be refused on grounds which do not relate directly to the fee plans – i.e. issues relating to the financial Code or quality. The power is arguably too wide/disproportionate.*

[29] *The new powers mean that HEFCW can refuse to approve a fee and access plan not just for non-compliance with the fee and access plan itself but for non-compliance with quality directions or the financial Code.*

[30] *The Bill partially reintroduces an existing provision for England (s.37(2) HEA 2004) which provides that a governing body is not to be treated as having failed ‘if the governing body has shown that it has taken all reasonable steps to comply’. This safeguard does not appear to extend to enforcement provisions more generally, however, as it continues to do in England.*

- **Power/duty to withdraw approval of a fee plan**

HEFCW may withdraw a fee and access plan for persistent failure to comply with either the fee limits or the general plan provisions, where quality is seriously inadequate or for serious failure to comply with the financial Code. Further regulations (following the negative resolution procedure) would set out the matters to be taken into account in deciding whether to give a notice of withdrawal. (s.38)

HEFCW must withdraw approval of a plan if the institution in question becomes no longer eligible (e.g. loss of charity status) – the matters to be taken into account and procedure to be followed would be determined by further regulations. These regulations may also subsequently amend the sections in the HE (Wales) Act itself relating to giving notices and directions more generally (subject to the affirmative resolution procedure). (s.37)

Before giving notice of withdrawal of approval of a fee plan, HEFCW would be required to issue a warning notice and take into account representations from the institution in question (s.40-43).

Key issues:

- *The criteria for enabling HEFCW to withdraw approval need to be carefully considered and specified in more detail.*
- *In light of this, the affirmative resolution procedure should be followed for regulations determining the matters to be taken into account. The Bill should also not enable primary legislation to be amended through regulations determining when HEFCW must withdraw approval (on status/eligibility grounds).*

Further issues:

- *Approval can be withdrawn on grounds which do not relate directly to the fee plans – i.e. issues relating to the financial Code or quality. The power is arguably too wide/disproportionate.*

[31] Currently HEFCW only has the power to refuse to approve fee plans i.e. plans have to run their course. The power to withdraw approval mid-term may be supported in principle on grounds of allowing effective and timely intervention. However, the precise criteria and guidance for triggering withdrawal, merit careful scrutiny. For instance, when should a single serious failure to comply with the Code enable withdrawal? Could persistent failure to comply with non-serious general provisions of the plan enable withdrawal? It is unclear whether these are in fact the most helpful criteria, and it is questionable whether it is sufficient to leave so much detail to subordinate legislation using the negative resolution process.

[32] It is noted that the affirmative resolution procedure is only used for s.37 for regulations relating to HEFCW's duty to withdraw approval because of eligibility issues, and does not apply to regulations relating to its power to withdraw approval more generally. s.37(2)&(3) also includes a controversial 'Henry VIII clause'. It is not immediately clear why this is needed.

II. QUALITY ASSURANCE

[33] *The provisions for quality are, in general, in line with those proposed by the Technical consultation. The new regulatory powers outlined in the Technical consultation have been included with the exception of the power to attend board of governors' meetings. In addition, HEFCW's power to issue advice and guidance imposes a new statutory obligation on regulated institutions to take their advice/guidance into account. HEFCW's duty to assess quality in respect of funded providers is removed altogether, which is arguably a surprise.*

- **Duty to assess the quality of education**

HEFCW would have a statutory duty to assess the quality of education provided in Wales by regulated institutions or to make arrangements for quality assessment on its behalf. Provision of education outside of Wales by regulated providers would not be covered by HEFCW's duty. The duty would extend to new courses provided through external providers on a regulated institution's behalf – but not to existing courses provided by external providers (s.17). The duty persists where a regulated provider ceases to have a fee plan in force provided a course is designated for purposes of statutory student support. (s.26). The quality of education is inadequate if it does not meet the reasonable needs of those receiving it (s.18).

Key issues:

- *The duty to assess the quality of education under existing provisions and the new Bill does not appear to be co-extensive. HEFCW's duty in relation to the provision by Welsh HEIs outside Wales, and for courses delivered under existing franchise arrangements need to be further considered to ensure that there are no unintended gaps.*

Further issues

- *An absence of further regulation, there appears to be no duty in relation to unregulated/non-regulated providers.*

[34] *The Bill replaces and repeals the duty under s.70 FHEA 1992 to assess the quality of education of funded providers. This means that, without further legislation, there would be no public body duty to assess unregulated/non-regulated providers.*

[35] *There is also an issue about how far the HEFCW's duty for quality is coextensive with their current duty – for instance, the courses delivered outside Wales by regulated institutions do not appear to be covered. This is likely to be a key issue for amendment.*

- **Powers to issue quality directions**

If HEFCW believes that quality of education is inadequate – either for a particular course or for the institution as a whole – it can issue directions to improve quality or prevent inadequacy (s.19). Before giving such directions, HEFCW would be required

to issue a warning notice and take into account representations from the institution in question (s.40-43). The directions would be enforceable by injunction (s.44).

[36] *This is a new power.*

- **Power to take other quality measures**

HEFCW may also give advice or assistance to an institution which it must take into account. It can also arrange for reviews to be carried out (s.20).

Further issues:

- *Guidance or assistance on quality should not be mandatory to take into account or directly enforceable.*

[37] *This is a new power. The role of HEFCW in giving advice and assistance may be welcomed, but the fact that it is mandatory to take into account may be regarded as an issue. Even though this could presumably include considering the advice but not actually following it, there would be increased potential for litigation.*

- **Powers to enforce cooperation for quality assessment**

Regulated institutions and their external providers would be under a duty to cooperate with HEFCW by providing such information, assistance, and access to the institution's facilities as are reasonably required for purposes of assessing quality. If HEFCW is satisfied the institution has failed to comply, it may issue directions to comply (s.21), which would be enforceable by injunction.

Further issues:

- *There is limited procedural protection against HEFCW's powers to enforce cooperation.*

[38] *This is a new power. It is identical to s.34 except that it applies to quality, not the financial Code. Note that there is no procedural requirement to issue a warning notice when exercising power under this section (s.40-43 does not apply), unlike for the s.22 powers of entry and inspection.*

- **Powers of entry and inspection relating to quality**

HEFCW may enter the premises of a regulated institution (or its external provider) and inspect documents for purposes of assessing the quality of education, including carrying out reviews. HEFCW would be required to give 'reasonable notice' to the institution, except in cases of urgency or where this would defeat the object of its powers, and must exercise its powers at reasonable times. This would not include a power to enter a dwelling without the agreement of its occupier. (s.22)

Further issues:

- *It is questionable whether this power is necessary (and therefore proportionate)*

[39] *These powers are new. They are identical to the new powers of access and inspection in s.35 of the Bill (in respect of the financial Code), except that they apply in relation to the quality. It is questionable whether these 'regulatory powers' are necessary given the general power to require access (under s.21) and the fact that access conditions can be made a condition of a satisfactory quality assessment itself. The legal advice we have received on this section is as follows:*

"These are draconian and extensive powers to give to a regulatory body and constitute a very strong indicator of control. They are very similar to the powers of entry and inspection of business premises enjoyed by HM Revenue and Customs under the Finance Act 2008, Schedule 36, paras. 10-12. However none of the restrictions are applied to HMRC in Schedule 36 (e.g. documents to legal professional privilege) appear to be applied to the powers under section 22. These powers are of course replicated in section 35 in respect of monitoring compliance with the Code. We note that an "authorised person" under sections 22 and 35 is simply a person authorised in writing by HEFCW to exercise the relevant functions. For example it could be a civil servant employed by the Welsh Government."

- **Power to issue statutory guidance on quality**

HEFCW may issue guidance on matters relevant to quality which regulated institutions would be under a statutory obligation to take into account. Before issuing new or revised guidance, HEFCW would have to consult with each regulated institution and any other persons they think appropriate. (s.23). HEFCW may also issue guidance on the criteria to be used for assessing the quality of education, which institutions will be required to take into account. Before issuing new or revised guidance, HEFCW would have to consult with each regulated institution and any other persons they think appropriate. (s.24)

Further issues:

- *It is questionable whether guidance which is mandatory to take into account is necessary (and therefore proportionate).*

[40] *This power is new, and potentially an issue. In practice, universities have to take into account quality guidance from the QAA in particular as part of the quality assessment process – the result of not doing so could mean an adverse assessment. Arguably HEFCW should have a power to issue guidance and require that it is taken into account as part of any quality assessment arrangements, but this should not be a separately enforceable.*

- **Power to withdraw fee plan approval relating to quality**

The Bill allows HEFCW to withdraw the fee and access plan approval where quality is seriously inadequate (see comments on s.37 (under fee and access plans above) for further details).

[41] This is a new power. The key change from the Technical consultation is that it was formerly proposed that the decision would be considered provisional in the first instance and then subject to an independent review process.

- **The role of the HEFCW Quality Committee**

A committee should be established to advise HEFCW on the exercise of its functions in relation to quality of education. The majority of members must be external to HEFCW and should have experience of providing higher education. (s.25)

[42] This largely replicates the functions of the existing statutory committee. The role of the committee, however, could have increased importance given the extension of HEFCW's functions.

III. FINANCIAL CODE

[43] *The key change in this area since the Technical consultation is that the Code now relates to financial affairs only, not governance as well. It is not clear how governance would be dealt with under this legislation if at all – which would seem to imply that FHEA 1992 would still have to be relied on. We understand that there will be a consultation with the sector on the Code, possibly as early as July 2014.*

- **Financial management code**

HEFCW must prepare and publish a financial management ‘Code’ containing a mixture of mandatory provisions including ‘requirements’ which institutions must comply with or ‘guidance’ which institutions must take into account. The content of the Code may, among others, include provisions relating to obtaining HEFCW’s consent for certain transactions, accounting and audit arrangements, and the provision of information. The OU would not be subject to the Code. (s.27)

Before publishing the first or a revised Code, HEFCW must consult with each regulated institution and other persons as it thinks appropriate, and submit a draft (with accompanying explanations and a summary of the consultation) to the Welsh Government for approval. If the Welsh Government does not approve the Code, HEFCW must either submit a revised version following further consultation, or give notice that it is not proceeding with the revision. Once approved by the Welsh Government it would be laid before the Assembly and published. (s.28 & s.29). HEFCW would be under a duty to monitor compliance with the Code (s.30).

Key issues:

- *There is a lack of statutory restrictions on HEFCW/the Welsh Government relating to powers exercised in relation to the Code, which formerly applied under the FHEA 1992 (particularly s.66). In particular, the restrictions on HEFCW provide by the FHEA 1992 in relation to institutional autonomy (see comments on s.6 above) which are expressly acknowledged in the Financial Memorandum and the requirements only extend as far as and relate to the use of public (i.e. grant) funding.*
- *Too much discretion is left to HEFCW to determine the content of the Code through a non-legislative process.*

Further issues:

- *The Code and conditions of grant (i.e. Financial Memorandum) would both apply to regulated institutions in receipt of HEFCW funding – giving rise to potential conflict.*

[44] *The consultation and approval procedure now applies to a revised Code not just the first Code (picking up a point HEW made in the Technical consultation).*

[45] *In Wales, the Financial Memorandum (HEFCW W08/36HE) is currently used. It outlines institutional responsibilities for stewardship of financial support received*

under the FHEA 1992, financial management (interpreted quite widely to include internal management more generally), value for money, provision of information and risk management. It covers the allocation and payment of funds, and estate management. It sets certain conditions on the disposal of property including land and buildings, and financial commitments. It deals with costing and pricing of activities. It also sets out requirements relating to financial statements and internal and external audit. These are effectively enforced as terms and conditions of grant. As a result, the restrictions on HEFCW provided by the FHEA 1992 in relation to institutional autonomy (see comments on s.6 above) are expressly acknowledged in the Financial Memorandum and the requirements only extend as far as and relate to the use of public (i.e. grant) funding.

- [46] *There are also other important regulatory requirements for universities in this area. Universities in Wales are also regulated as to their charitable status by the Charity Commission. The FHEA contains specific provisions relating to higher education corporations. The Companies Act and related legislation may also apply.*
- [47] *The lack of statutory protections limiting HEFCW or the Welsh Government in the Bill (or provision to make them by subsequent legislation) are key areas of concern given the new enforcement powers and extended scope of a financial code beyond direct public funding.*
- [48] *We note that the consent issue for financial transactions was an important factor in the decision of the ONS to reassign Further Education colleges from NPISH to the public sector.*
- [49] *The Bill leaves HEFCW considerable unrestricted discretion in determining the content and scope of the Code, albeit subject to consultation requirements and Welsh Government approval. Arguably, the powers are insufficiently defined on the face of the Bill and leave too much to be determined through a non-legislative process.*

- **Powers to make directions in respect of failure to comply with the Code**
HEFCW may direct institutions to take/not take specified steps for purposes of dealing with or preventing failure to comply with the Code (s.31 & 32). Before issuing a direction, HEFCW would be required to issue a warning notice and take into account representations from the institution in question (s.40-43). The directions would be enforceable by injunction.

Key issues:

- *The enforcement powers are not limited to the extent of public funding received and do not have to relate to activities which are publicly funded.*

- [50] *The power is new. The extent to which matters fall within the scope of enforcement will depend on the content of the Code. The steps/sanctions, including spending*

directions, are not limited to the extent of public funding received (however defined) and do not have to relate to activities which are publicly funded.

- **Powers to make other measures relating to the Code**

HEFCW may also give advice or assistance to institutions with a view to improving the organisation of management of financial affairs. This could include carrying reviews relating to compliance with the Code. Institutions would be under statutory obligation to take account of HEFCW's advice. (s.33)

Key issues:

- *Financial advice and guidance should not be mandatory to take into account.*

[51] A key new provision contained in the Bill is a new power for HEFCW to issue mandatory guidance, which institutions will be obliged to take account of. Although this would require institutions to consider, not necessarily follow the guidance, this would presumably increase the potential for legal action. The role of HEFCW in providing guidance may be welcomed, but it is less certain that guidance with statutory obligations is necessary or helpful, and this may be a key issue. This provision is similar to the new proposed power in relation to quality (s.23).

- **Powers to enforce cooperation relating to the Code**

Regulated institutions would be under a duty to cooperate with HEFCW by providing such information, assistance, and access to the institution's facilities as are reasonably required (a) for purposes of monitoring compliance with the Code or (b) giving guidance/advice on improving the organisation/management of financial affairs, including conducting reviews, or (c) exercising its powers of access and inspection relating to the Code. If HEFCW is satisfied the institution has failed to comply, it may issue directions to comply which would be enforceable by injunction. (s.34)

[52] This power is new. It is identical to the power in s.21 except that it applies to the Code, not quality. Note that there is no procedural requirement to issue a warning notice in this section (s.40-43 does not apply).

- **Powers of access and inspection relating to the Code**

HEFCW may enter the premises of a regulated institution (or its external provider) and inspect documents for purposes of monitoring compliance with the Code, including carrying out reviews. HEFCW would be required to give reasonable notice to the institution, except in cases of urgency or where this would defeat the object of its powers, and must exercise its powers at reasonable times. This would not include a power to enter a dwelling without the agreement of its occupier. (s.35)

[53] *The powers in this section are new. They are identical to the new powers of access and inspection in s.22 of the Bill, except that here they apply in relation to the financial Code not quality. See the comments on s.22 above for the legal advice we have received on the ‘draconian’ nature of these powers.*

- **Power to withdraw fee plan approval relating to the Code**

The Bill allows HEFCW to withdraw fee plan approval for serious failure to comply with the financial Code (see comments on s.37 (under fee and access plans above) for further details.

[54] *It is noted, that the test proposed in the Technical consultation was that HEFCW could withdraw the fee plans where there had been serious financial mismanagement or persistent failure to comply with the Code. A key question is whether this test is the correct one, and whether the requirements are sufficiently detailed in the Bill itself.*

IV. OTHER PROVISIONS

Supplementary functions

Key issue:

- *HEFCW should not have a general power to issue advice and guidance which is mandatory to take into account particularly given the broad application of this power relating to any matter promoting higher education.*

Further issue:

- *It is questionable if the power to enforce directions by injunction is necessary (and hence proportionate).*

- HEFCW must take into account any guidance issued by the Welsh Ministers. (s.46)
- HEFCW must produce annual reports to the Welsh Ministers who may direct their form and content (s.47).
- If directed to do so, HEFCW must also provide special reports on compliance with the fee and access plans (including their effectiveness), compliance with quality requirements or compliance with the financial Code. More generally, HEFCW may be required to produce a special report on any matter relating to the promotion of equality or promotion of higher education. (s.48)
- HEFCW must prepare and publish a statement on how it proposes to exercise its main intervention functions after consultation with regulated institutions or any other

persons it thinks appropriate. Regulations would provide further provisions relating to the form, content, publication and consultation requirements. (s.49).

- HEFCW may (and must if directed) give information and advice to the Welsh Ministers relating to the promotion of equality or higher education (s.50).b
- HEFCW may identify good practice relating to the promotion of equality of opportunity/the promotion of higher education, and give institutions information and advice which they are legally obliged to take account of. (s.51).

[55] See comments on s.33. This is likely to be a key issue. The provision of best practice, advice and guidance may be welcomed, but not the statutory obligation to take it into account. Given the wide interpretation of the application of promotion of HE, this gives HEFCW very wide license to make provisions which bear a legal requirement. Although institutions would be required to consider, but not necessarily follow the advice this would appear to increase the potential for legal action.

- All directions given by HEFCW must be in writing and would be enforceable by injunction. (s.44).

[56] It is questionable whether the powers under this Bill need to be enforced by injunction. This appears to be excessive. The legal advice we have received is that “It should be noted that the power to give directions backed by injunction is a very strong indicator of external control of HEIs by HEFCW. The existence of such a power would be a significant factor in assessing the implications of the Bill for charitable and NPISH status.”

Provisions to make subordinate legislation

- All powers to make subordinate legislation should follow the negative resolution procedure, except in three instances. An affirmative resolution procedure should be used for s.13 powers to make provision about failure to comply with general provisions of the plan, whether or not the regulations amend primary legislation. An affirmative procedure should also be used for s.37 (duty to withdraw plan approval) and s.55 (consequential and transitional provision) but only where they amend primary legislation.(s.52).

Key issues:

- *The Bill amounts to a ‘framework Bill’ the use of which has previously been criticised by the Constitutional & Legislative Affairs Committee, and leaves many important matters to be determined through subsequent legislation.*
- *This makes the Bill’s impact on charity and NPISH status difficult to assess, and means that there continues to be risk to both in implementing the framework through further regulations.*
- *The extent of further legislation required calls into question the ability of the Welsh Government and sector to implement these proposals properly for*

2016/17.

Further issues

- *The affirmative resolution procedure should have been adopted in a number of the provisions.*

- [57] *Many important provisions have been left for determination through further regulations subject to the negative resolution procedure. There are 27 separate powers conferred on the Welsh Government – which makes it more difficult to assess in terms of impact particularly for NPISH/charity status.*
- [58] *A general issue with the use of regulations is that they cannot be amended – they must be approved or rejected as a whole. The negative resolution procedure allows regulations to be passed automatically unless formal objection is raised requiring it be voted on. Only a super-affirmative resolution procedure requires a process of consultation. It is questionable whether so much of the detail of the regulatory framework should be determined through regulations.*
- [59] *In particular, the Bill includes three provisions which allow primary legislation (including in one instance the Act itself) to be amended through regulations subsequent to the Bill (so-called ‘Henry VIII clauses’). This has often been regarded as controversial practice since primary legislation is amended without going through the full legislative process in Assembly, raising constitutional issues.*
- [60] *It will also mean that there will be many important legislative proposals to be introduced at a later date, which will put pressure on the timing of the implementation of the Bill.*

Transitional arrangements

Further issues

- *There is a question how far the current plans are suitable for the new purposes and powers for which they will be used under the transitional arrangements.*
- *The commencement of transitional arrangements and related consequential amendments of existing legislation will need to take place at the same time.*
- *There is a lack of clarity about how exactly the transitional arrangements would apply – which will depend on the commencement of other sections.*

Commencement orders can bring transitional arrangements into force. Plans approved under the HEA 2004 will be treated as a fee and access plans under the new legislation and will be subject to transitional arrangements for the period to which the plans relate.

[61] *Current plans for 2015/16 relate to one year only. A key question is how far the current plans are suitable for the new purposes and powers for which they will be used under the transitional arrangements.*

In relation to fee planning, any contract which charges excess fees will be deemed to charge the maximum fee only, but will otherwise remain valid (s.16). HEFCW would have powers to:

- set fee limits and monitoring compliance with them (s.10 and s.15(1)(a))
- direct institutions to take steps to cooperate in providing information assistance and access to facilities to enable monitoring of compliance with fee limits (s.16)
- issue compulsory guidance on future compliance and reimbursement directions (s.12)

[62] *Although the Bill enables HEFCW to issue guidance on compliance and reimbursement directions, the power to issue the directions themselves under the transitional arrangements would rely on the Welsh Government bringing s. 11 into force.*

In relation to quality assurance, HEFCW would have a duty to assess the quality of provision of providers with a fee plan (only) and produce reports to the Welsh Government on it.

[63] *The removal of HEFCW's duty to assess the quality of education of the institutions which it funds under the FHEA 1992 would be subject to separate commencement orders for the consequential amendments (see next section). Without removing the existing duty at the same time, HEFCW would be under two separate duties of different scope relating to quality (see comments on the new duty to assess quality above).*

HEFCW would have powers to:

- issue quality directions (s.19)
- take other quality measures, including issuing compulsory advice and guidance (s.20)
- direct institutions to take steps to cooperate in providing information assistance and access to facilities for purposes of assessing quality (s.21)
- exercise its new powers of access and inspection for purposes of assessing quality (s.22)
- issue compulsory guidance on quality (s.23)
- produce reports for the Welsh Government on the quality of education (s.48(1)(d))

[64] *It is not clear whether HEFCW's directions would be enforceable by injunction during the transitional period, which would rely on s.44 also being in force.*

In preparation for the financial Code and intervention statement, HEFCW would be under a duty to consult with regulated providers and other appropriate persons.

HEFCW may also identify good practice relating to any matter relating to the promotion of equality of opportunity/the promotion of higher education. (s.51)

[65] *It is not clear whether the advice issued under s.51 would be mandatory for institutions to take into account in the transitional period (as it would subsequently) - this would seemingly rely on s.51(2) also being in force.*

Consequential amendments

Further issues:

- *In the absence of further legislation, neither the Welsh Government nor HEFCW will have a duty to assess the quality of education provided by institutions who do not have an approved fee plan.*

- *Higher Education Act 2004.* The new fee planning regulations expressly repeal the current provisions of the HEA 2004 relating to fee plans as they apply to Wales, and replaced by the Bill's new fee and access plan framework. Other parts of the HEA 2004, however, are unaffected.

[66] *In particular, it is noted that the provisions relating to student complaints will continue to apply to universities entitled to receive grant funding (s.11 HEA 2004) i.e. they rely on being a university or university college, being a higher education corporation or designation by the Welsh Government (s.65(5) FHEA 1992).*

- *Further and Higher Education Act 1992.* HEFCW's statutory duty to assess the quality of education of funded institutions under the FHEA 1992 is removed and replaced by the Bill provisions.

[67] *In absence of further legislation, neither the Welsh Government nor HEFCW will have with a duty to assess the quality of education provided by institutions who do not have an approved fee plan. Presumably this will be effected via conditions in case-by-case course designations (i.e. regulations under existing student support legislation): see Explanatory Memorandum para. 66.*

- *Teaching and Higher Education Act 1998.* Contrary to expectations arising from the Technical consultation, the existing powers and arrangements for designating courses for purposes of statutory student support (established under s.22 of the Teaching and Higher Education Act 1998, and transferred to Wales by the HEA 2004) are unaffected.

[68] *In absence of further changes in the legislation, this would mean that courses provided by publicly-funded institutions continue to be automatically designated, whereas alternative providers must apply to the Welsh Government on a case-by-*

case basis. The approval of a fee and access plan and 'regulated' status would not confer automatic designation of courses for purposes of student support.

Commencement

- On receiving Royal Assent, the Act only certain provisions would immediately come into force. This includes the introduction and sections on title, interpretation, powers to make consequential and transitional provisions, the applicable procedures for subsequent regulations to follow, and the power to make commencement orders. The power to prescribe the definition of fees through regulations (included in the interpretation section) and the provision that Welsh Government directions must be in writing would also come into force. Otherwise, the commencement of the provisions would be determined by subsequent commencement orders. (s.56)

[69] The commencement orders provide flexibility in implementation, which is welcome. We understand that the Minister has been presented with 3 options in terms of the timing of the introduction of the Bill:

- *Full introduction in 15/16*
- *A 2 stage phased introduction in 15/16 and 16/17 (we understand that this is the Minister's favoured option)*
- *Push everything back to 16/17 as this is seen as no more risky an option*

Additional comments

Key Issues:

- Overall, this provides a framework for the expansion of HEFCW's roles and powers and appears to involve a significant increase in the powers for regulatory intervention which are at odds with previous provisions designed to protect universities as independent autonomous charitable institutions.
- The Bill in itself may not place charity status at risk, but its subsequent regulations could. Assurances should be sought from the Charity Commission that the Act will not remove charity status or place governors in breach of their duties as trustees. The resolution procedure used for subsequent regulation needs to be reviewed to ensure key provisions use an affirmative procedure in light of this.
- The Bill still appears to place the NPISH status of universities, particularly higher education corporations at risk. Assurances should be sought from the ONS that the Act will not jeopardise this status.

Impact on charity status

[70] A key issue raised in the Technical consultation, following legal advice, was that the Welsh Government's proposals did not take sufficient account of charity law requirements. In essence, a charity exists solely to carry out its charitable purposes and not, for example, to implement government policy or carry out directions of a governmental authority.

[71] The role of the Charity Commission as the charity regulator, rather than HEFCW is unchanged. The Charity Commission submitted a response to the Technical consultation. This reflected the early stage of consultation, but raised a number of important issues, for instance:

- The Commission noted that although charity status is technically difficult to lose, charity trustees (governing bodies) could still be in breach of duty to fulfil charitable purposes.
- The Commission clearly advised against any sanctions involving intervention in the governance of a university since this would effectively be taking on the functions and responsibilities of the charity trustees.
- The model for 'sector-led initiatives' which they regarded as 'similar' to the Welsh Government proposals appear to be based primarily on voluntary codes and guidance on best practice and legal requirements – not a mandatory code determined and enforceable by a regulatory body.

[72] The legal advice received by HEW from Mills & Reeve at this stage is that:

“Considering the Bill in the context of the criteria for the independence of charities from government, our preliminary conclusion at this stage is as follows: that the cumulative effect of the provisions of the Bill, taking into

account the fee and access plans, the Code, and measures for quality assurance are so restrictive as to reduce the independence of Welsh HEIs to the extent that they could lead to a breach of charitable status. Although the Bill envisages the possibility of actual loss of charitable status, the Charity Commission, in their response to the Technical Consultation pointed out that in practice there are very few circumstances in which an HEI could lose charitable status. The CC response continues “If a charity ceases to operate for charitable purposes that would not stop it from being a charity; rather it would be a breach of duty on the part of its charity trustees (governing body to fulfil its charitable purposes”. We believe that this reflects the correct position in charity law.

The consequence of this would be that members of university governing bodies would be placed in an impossible position. As charity trustees, they would face a direct conflict between compliance with the provisions of the Bill and their duty to comply with charity law. Charity trustees who knowingly act in breach of charitable trust are at risk of personal liability for any losses arising to the charity as a result of the breach. Although in the present circumstances it is unlikely that a court would hold them to account for breach of trust as the result of compliance with the Bill, clearly governing bodies could not function on the basis of committing an ongoing breach of trust in relation to a university’s charitable status. On the assumption that entry into the new regulatory regime is optional (EM, para. 65) university governing bodies will need to take legal advice, and consult the Charity Commission, as to whether they can lawfully apply to become “regulated institutions” under the Bill, or whether they should apply for specific designation of courses.

However our conclusions in this area must remain provisional because a great deal of detail remains to be set out in regulations via Statutory Instruments, and also via the financial and governance Code which HEFCW must publish and which Welsh ministers must approve.”

- [73] It is currently a key concern that most of the powers to make regulations are intended to follow the negative resolution procedure which does not ensure that they are only passed by a majority vote (it is also a concern that regulations must be approved or rejected as a whole and do not allow a process of amendment).*
- [74] There is no accompanying confirmation from the Charity Commission relating to the Bill itself that there are no issues for universities.*
- [75] Loss or breach of charity status as outlined above is likely to have mission- and business-critical consequences for universities. Loss of charity status would mean that HEFCW must withdraw approval of the fee and access plan/ regulated institutions status. Breach of charity status, as outlined above, would mean that governors must not apply for regulated institution status i.e. the Bill in its current form appears to be self-defeating.*

Impact on classification of universities for purposes of national accounting

- [76] *A key issue raised by HEW in the Technical consultation was the potential impact on the classification of universities for purposes of national accounting and the consequences that would follow from this. Universities are currently classified as Non Profit Institutions Serving Households and not central government.*
- [77] *The ONS classification is based on twelve indicators of public control. The legal advice received by HEW from Mills & Reeve at this stage is that their analysis of these indicators “strongly indicates that on an ONS review of the Welsh HE sector, Welsh HECs would be reclassified from NPISH to public sector” and “given the extent of the financial controls which HEFCW will be able to exercise over Royal Charter universities, it seems likely that on an ONS review of the Welsh HE sector, Welsh HECs would be reclassified from NPISH to public sector”.*
- [78] *Further education corporations were recently reclassified from NPISH to central government by the Office for National Statistics and, in Wales, a primary purpose of the Further & Higher Education (Governance & Information) (Wales) Act was to address this and restore their status. Based on advice issued by the ONS in relation to the FE sector, HEW called for the Welsh Government to remove or restrict the existing powers to dissolve higher education corporations in the new legislative framework – this has not been addressed.*
- [79] *The loss of NPISH status could potentially have a very damaging impact on the international reputation of the sector and could also mean that the charitable status of universities is threatened. There would be significant consequences for the DfES budget, which in turn would have serious implications for the sector – in particular surpluses and losses would become Welsh Government funds and would have to be managed within their overall budget. If universities lost NPISH status and became part of the public sector then it would also be necessary for the universities affected to conduct a comprehensive review of all their contracts and legal agreements with third parties. Particular areas of concern include: employment arrangements and collective employment agreements; banking covenants to ensure there is no breach of covenant; and representations and warranties as to a university’s legal status in commercial agreements, joint ventures etc.*

Impact on university autonomy

- [80] *The principles of university autonomy and the arms-length operation of government have formerly been accepted as cornerstone principles across the UK. The Further & Higher Education Act, for instance, ensured that institutions were not subject to direct control by government in setting terms and conditions of grant and that the Funding Councils, established for this reason, were subject to a number of important restrictions – in particular that the terms and conditions they may impose must not relate to income which was not derived from the Council (i.e. the extent of control should be proportionate to the extent of public investment). Although as a matter of law the Welsh Government is not prevented from amending the legislative system for*

Wales, in its response to the Technical Consultation HEW pointed to the significant dangers of an actual or apparent erosion of these, particularly in terms of international reputation.

[81] The Bill provides a framework for the expansion of HEFCW's roles and powers and, on the face of it, involves a significant increase in the powers for regulatory intervention. In particular, this includes the extended scope of the fee and access plan provisions and powers of enforcement relating (in particular) to the fee and access plans and the Code. This includes the ability to give compulsory directions requiring specific performance. These may be either a prohibitory or mandatory nature and would all be enforceable by injunction. The directions including spending directions are not limited in the Bill to the income from regulated fees or funding or the activities funded by them. HEFCW may issue advice, guidance and assistance which is compulsory for institutions to take account (in relation to quality, the Code or even the promotion of equality of opportunity and promotion of higher education more generally). HEFCW also gains extensive and apparently unrestricted statutory powers of access and inspection comparable to HM Revenue and Customs.

Annex B. Overview of the HE regulatory framework (PROVISIONAL DRAFT)

The following tables summarize our current understanding of how the new regulatory system would apply to the whole of HE in Wales. It looks at the new situations for potential providers according to funding status (publicly funded or private) and their status. However, it ignores further complexity relating to university/university college title and incorporation (by Royal Charter or as a higher education corporation), further education institutions and other providers delivering HE and franchise arrangements.

Who would provide quality assurance?

	Publicly funded	Private
Courses automatically designated ('regulated institutions')	HEFCW, under the new provisions of the Bill. However, this will no longer include a duty in respect of courses delivered outside Wales.	HEFCW, under the new provisions of the Bill. The duty will not extend to courses delivered outside Wales.
Courses designated on a case-by-case basis	Welsh Government – subject to further legislation.	Welsh Government – subject to further legislation.
No courses designated	<u>None</u> , in absence of further legislation. The Bill removes HEFCW's duty in respect of funded providers. This category could potentially include e.g. postgraduate, part-time specialist providers, who would be covered under existing arrangements.	<u>None</u> , in absence of further legislation.

Who would provide financial assurance (excluding the requirements e.g. of company law and legislation applying to higher education corporations)?

	Publicly funded	Private
Courses automatically designated ('regulated status')	<p>HEFCW, under the provisions of <u>both the FHEA 1992 and the Bill</u>. It is currently unclear how these separate duties and powers would work together in practice.</p> <p>As charities the providers would also be subject to regulation by the Charity Commission.</p>	<p>HEFCW, under the Bill only.</p> <p>As charities the providers would also be subject to regulation by the Charity Commission.</p>
Courses designated on a case-by-case basis	<p>This is unclear and would depend on further legislation. The current intention is that the Welsh Government would apply less onerous regulatory requirements than for regulated providers.</p>	<p>This is unclear and would depend on further legislation. The current intention is that the Welsh Government would apply less onerous regulatory requirements than for regulated providers.</p>
No courses designated	Not identified.	Not identified.

What fair access or general fee plan provisions would apply?

	Publicly funded	Private
Courses automatically designated ('regulated institutions')	HEFCW would apply new provisions under the Bill.	HEFCW would apply new provisions under the Bill.
Courses designated on a case-by-case basis	<p>Uncertain – subject to further legislation. There would be no fee plan provisions, but the current intention is that the Welsh Government would apply less onerous regulatory requirements than for regulated providers.</p> <p>Funded institutions would no longer be subject to HEFCW's fee plan conditions.</p>	<p>Uncertain – subject to further legislation. There would be no fee plan provisions, but the current intention is that the Welsh Government would apply less onerous regulatory requirements than for regulated providers.</p>
No courses designated	HEFCW could potentially rely on terms and conditions of grant but would not be able to use fee plan legislation.	None.

What fees could providers charge/what fee limits would be set?

	Publicly funded	Private
Courses automatically designated ('regulated institutions')	<p>HEFCW would apply fee limits under the Bill. Subject to further regulations, the intention is to set the fee limit at £9k for full-time undergraduates.</p> <p>There are currently no fee limits for part-time or postgraduate provision or for overseas students, but fee limits for part-time provision could be brought within the fee and access plan provisions and would then be subject to fee limits.</p> <p>If the courses are funded by HEFCW, it may also be possible to set fee limits through the terms of grant.</p>	<p>HEFCW would apply fee limits under the Bill. Subject to further regulations, the intention is to set the fee limit at £9k for full-time undergraduates.</p> <p>There are currently no limits on fees charged by private providers.</p>
Courses designated on a case-by-case basis	<p>The Welsh Government's policy intent is unclear. In absence of further legislation, there would no longer be any statutory fee limits under fee planning legislation.</p> <p>If the courses are funded by HEFCW, it may be possible to set fee limits through the terms of grant.</p>	<p>The Welsh Government's policy intent is unclear. In absence of further legislation, there would no statutory fee limits.</p>
No courses designated	<p>The Welsh Government's policy intent is unclear. In absence of imposing limits through further legislation or conditions of grant (where the courses are supported by</p>	<p>The Welsh Government's policy intent is unclear. In absence of further legislation, there would no statutory fee limits.</p>

	HEFCW funding), there would no longer be any fee limits.	
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What student support would be available for designated courses for full-time undergraduate study?

	HEFCW funded	Not HEFCW funded ('Private')
Courses automatically designated on approval of a fee and access plan by HEFCW ('regulated institutions')	Subject to further legislation, the intention is that eligible students would be able to access a loan and fee grant package up to £9k. Under current arrangements, the funding for the fee grant package would be taken from the HEFCW's budget for HE.	Subject to further legislation, the stated intention is that eligible students would be able to access a loan and fee grant package up to £9k. Under current arrangements, the funding for the fee grant package would be <u>taken from the HEFCW's budget</u> for HE.
Courses designated on a case-by-case basis by the Welsh Government	Subject to further legislation, the intention is that eligible students would be able to access a loan package (only) up to £6k.	Subject to further legislation, the intention is that eligible students would be able to access a loan package (only) up to £6k.
No courses designated	None	None

What student support would be available for designated courses for other modes and levels of study?

	HEFCW funded	Not HEFCW funded ('Private')
Courses automatically designated on approval of a fee and access plan by HEFCW ('regulated institutions')	Unclear.	Unclear.
Courses designated on a case-by-case basis by the Welsh Government	Unclear.	Unclear.
No courses designated	None	None

What are the implications for research activity?

	HEFCW funded	Not HEFCW funded ('Private')
Courses automatically designated on approval of a fee and access plan by HEFCW (' regulated institutions ')	<p>If the research activity is funded from grant, HEFCW may set terms under the FHEA 1992.</p> <p>Research would not be subject to fee and access plan provisions, but programmes of learning including PGR and PGT provision could potentially be subject to fee and access plan requirements.</p>	<p>Research would not be subject to fee and access plan provisions, but programmes of learning including PGR and PGT provision could potentially be subject to fee and access plan requirements.</p>
Courses designated on a case-by-case basis by the Welsh Government	<p>If the research activity is funded from grant, HEFCW may set terms under the FHEA 1992.</p> <p>Subject to further legislation, we assume that research would not be subject to course designation based regulation, but programmes of learning including PGR and PGT provision could potentially be subject.</p>	<p>Subject to further legislation, we assume that research would not be subject to course designation based regulation, but programmes of learning including PGR and PGT provision could potentially be subject.</p>
No courses designated	None	None

NUS Wales Response to 'Higher Education (Wales) Bill' Committee Consultation

Overview

The National Union of Students (NUS) Wales welcomes the opportunity to respond to the '**Higher Education (Wales) Bill**' committee consultation. NUS Wales is a confederation of students' unions representing more than 300,000 students in the nation. As the only representative voice for students in Wales, NUS Wales represents students from all affiliated students' unions in both HE and FE sectors, this includes 9 HE institutions and all Welsh FE Colleges.

NUS Wales exists to promote, defend and extend the rights of students and develop and champion strong students' unions. We fight barriers to education; empower students to shape both a quality learning experience and the world around them; as well as supporting influential, democratic and well-resourced students' unions.

As well as campaigning on behalf of our members, NUS Wales provides a range of training to students' unions including training for full-time offices, part-time officers and staff. We provide support to students' unions to ensure they are able to engage positively with the latest policy developments that affect them.

We provide resources and staff support to students' unions to help strengthen them and enable them to become ever-more effective in their operation. We work with partners across Wales including DfES, HEFCW, HEA and QAA to develop efficient and productive representation structures for students.

In Further Education, NUS Wales has engaged and trained student governors in every single Welsh FE College and trained class representatives from the majority of FE Colleges. Furthermore, we are developing a National Society of Apprentices to provide representation for those who study in this setting; this endeavour has the backing of the Welsh Government.

The core values of NUS Wales are democracy, equality and collectivism. We believe that student organisations should be student-led and that education is a benefit to the individual and to society.

Overview

- NUS Wales believes higher education to be a public good
- We believe there is a need for a new regulatory framework to protect the public investment into higher education in Wales, which remains substantial
- Currently policy levers are ineffective and lack a statutory underpinning given the reduced amount of funding being allocated directly by the Higher Education Funding Council for Wales
- We broadly welcome the Higher Education (Wales) Bill and its objectives in establishing a regulatory framework and policy levers not reliant on terms and conditions attached to funding
- However, we have a number of concerns regarding the Bill as it stands, including specific concerns around detail currently left out of primary legislation around case-by-case designation and the provision the Bill makes for subordinate legislation to amend the primary legislation
- We are also unsure fee and access plans as they currently stand being effective as the principle levers of the regulatory framework for reasons outlined below
- The Welsh Government and the higher education sector in Wales have made separate and public commitments to the idea that students are partners in their education¹ and, as such, that institutions, students and students' union should work in partnership
- Given this, we feel the Bill requires a clearer commitment to involving students and their representatives throughout the regulatory framework. This commitment should include notifying an institutions' students' union of directions from HEFCW that relate to their institution. Similarly this commitment should include safeguarding a place for national student representatives on the committee for quality assurance outlined in the Bill and panels related to reviews of enforcement actions.
- The additional 'fee' income from Welsh full-time undergraduate students is public expenditure, and since the introduction of the new fees regime universities have been required to spend a proportion of this income on equality of opportunity and promotion of higher education
- This expenditure does not always directly relate to full-time undergraduate provision as equality of opportunity is broader than full-time undergraduate provision
- This is appropriate as the purpose of this expenditure is to secure equality of opportunity and is a part of higher education's function as a public good in Wales
- NUS Wales looks forward to working with the National Assembly for Wales, the Welsh Government and the higher education sector in Wales in ensuring the development and delivery of a regulatory framework that safeguards higher education as a public good, promotes social justice and delivers for the people of Wales and the Welsh economy.

¹ 'Policy Statement for Higher Education', Welsh Government (2013) and 'Partnership for Higher Education in Wales', Wise Wales (2013)

1. Is there a need for a Bill for these purposes? Please explain your answer.

- 1.1 We agree there is a need for a Bill for the purposes outlined in the Explanatory Memorandum. Particularly – there is a severe need to ensure robust regulation of institutions that are supported by Welsh Government through statutory student support. This is to safeguard the public investment in Welsh higher education and as such the contribution of Welsh higher education to the public good of Wales
- 1.2 Funding in Wales is now 'student-led', the funding follows the student rather than being allocated by the Higher Education Funding Council for Wales (HEFCW).
- 1.3 However, for Welsh-domiciled students in Wales, who make up just over half of all undergraduates in Wales, a significant proportion of that funding remains from the public purse – an estimated £157million in 2014/15². Similarly, there will remain a further approx. £150million invested in Welsh institutions by HEFCW in 2014/15.
- 1.4 We must also remember that a portion of a student's tuition fee loan is not without its own cost to the public purse. The Resource and Accounting Charge – the amount of outlay on student loans in Wales never expected to be repaid – currently stands at £106million in Wales for 2014/15³.
- 1.5 As such, there is a clear and significant amount of public investment into higher education in Wales and it is essential that the investment is protected through a regulatory framework that enables higher education to deliver as a public good in Wales.
- 1.6 The current regulatory arrangements do not enable this. HEFCW's powers are related to terms and conditions attached to funding. Since the bulk of funding now follows the student, rather than being allocated by HEFCW, HEFCW is unable to utilise these terms and conditions to leverage higher education institutions in Wales.
- 1.7 Although the existing use of fee plans helps alleviate this somewhat, the process is widely perceived to be 'toothless' as the powers available to HEFCW to intervene are limited. For example, not approving a fee plan would mean an institution would only be able to charge £4,000 for its causes. This would be catastrophic for almost any higher education provider in Wales in terms of income.
- 1.8 We also feel that there is a need to ensure that those providers who benefit from Government support have charitable status, as outlined in the objectives. NUS Wales feels this is vitally important at a time where there is a concerted effort in England to effectively create a market for higher education including the deregulation that has enabled for-profit providers to proliferate in England. Ensuring higher education providers in Wales are charitable, stakes a clear commitment by the Welsh Government and National Assembly for Wales to the conception of higher education as a public good, a key tool of social justice and the protection of public investment.

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http://www.hefcw.ac.uk/documents/publications/circulars/circulars_2014/W14%2018HE%20HEFCW%20funding%20allocations%202014_15.pdf

³ <http://www.senedd.assemblywales.org/documents/g1121/Public%20reports%20pack%20Wednesday%2010-Oct-2012%2010.00%20Children%20Young%20People%20and%20Education%20Committee.pdf?T=10>

2 Do you think the Bill, as drafted, delivers the stated objectives as set out in the Explanatory Memorandum? Please explain your answer.

- 2.1 We have concerns regarding the current drafting of the Bill, the timeline for implementation and the tools with which the Bill is expected to be delivered.
- 2.2 As outlined in the answer above, we believe the question of higher education regulation requires an answer and that current policy levers are ineffective in ensuring that higher education in Wales delivers for the public good. The Diamond Review of higher education funding is not due to report until 2016, and any reforms of higher education would be unlikely to come into force until 2019/20. There must be regulatory oversight in the intervening period.
- 2.3 The Bill as drafted does provide to an extent for a process of regulation for institutions in Wales and, to a degree, safeguards the contribution made to the public good arising from the financial subsidy of higher education.
- 2.4 The Bill has strong focus on fair access to higher education, which we support. This is demonstrated by the emphasis on access in Fee and Access Plans and their role in the regulatory framework.
- 2.5 However, section 6, subsection (3) outlines the provisions required to be made under the plan which include the need to take measures to attract applications from prospective students from under-represented groups and measures for retaining these students.
- 2.6 We feel that this focus on attracting applications and retention, coupled with the further detail on this area provided in the explanatory memorandum which focuses around such activity as summer schools and study skills support⁴ does not tackle the crux of widening access.
- 2.7 For example, activity to widen access should not simply be focused on increasing applications to the institution specifically but also about engaging schools and other services in the institutions local area to promote higher education more broadly.
- 2.8 We also know that attainment plays a vital role in the progression of young people onto university. As such, we feel that there is a role that universities are uniquely placed to take up. This would involve working with local education providers through targeted support and research to increase attainment of disadvantaged young people locally. This activity would not currently be covered by the description of required activities in the Bill
- 2.9 Similarly, part-time provision plays a key role in widening access as evidenced by the ["It's About Time"](#) report jointly developed by NUS Wales and the Open University in Wales. The provisions that may be prescribed in the fee plan as outlined in Section 6 would not, for example, clearly enable an institution to support part-time provision as a feature of equality of opportunity through their fee plans.
- 2.10 This also highlights an ongoing difficulty with fee plans, which is a focus on activity rather than outcomes. The timeframe of a fee plan cycle – five to six years for a one year fee plan – means that monitoring and enforcing outcomes is challenging. We believe the focus of fee plans should be on outcomes and the activities that underpin those outcomes – not on the activities themselves.
- 2.11 We do not feel that the legislation as it currently stands provides a whole regulatory system for higher education. A great deal is left to subordinate legislation or regulation by other means – particularly provision for case-by-case designation of courses. This concerns us as it is the case by case designation the offers the biggest risk to higher education in Wales, potentially enabling the cherry-picking of profitable courses by new or smaller providers undermining the ability of existing institutions to offer a comprehensive and sustainable suite of courses. We were keen to see case-by-case designation to be outlined through primary legislation in this Bill, as was originally indicated in the technical consultation.

⁴ P. 31, Explanatory Memorandum for the 'Higher Education (Wales) Bill'

- 2.12 What is also concerning in relation to the lack of detail regarding case-by-case designation is that the legislation does not outline what extent those with case-by-case designation would have to adhere to quality assurance processes or other mechanisms that protect public investment in higher education.

3 Are the sections of the Bill as drafted appropriate to bring about the purposes described above? If not, what changes need to be made to the Bill?

- 3.1 The Bill as it stands leaves unanswered questions relating to the overall regulatory framework for higher education in Wales. As outlined in answers above – the lack of detail on case-by-case regulation is troubling, particularly the ambiguity regarding how it relates to the new functions of the Higher Education Funding Council for Wales including quality assurance.
- 3.2 Similarly, point 112 in the explanatory memorandum outlines that although the majority of part-time courses will be covered by the quality assurance duty provided in the Bill, there will be part-time courses that fall outside of this duty. The memorandum rightly points out that HEFCW will still be funders of such courses and so can prescribe terms and conditions through funding. While this is a short term solution, we do not feel this is the lasting settlement you would expect a new regulatory framework for higher education to provide.
- 3.3 We also feel there is ambiguity regarding the eligibility criteria for institutions wishing to apply for automatic designation. Sections 2 and 3 suggest that the only criteria for any provider to be regarded as an institution for purposes as designation are to be a provider of higher education and a registered charity.
- 3.4 There are a number of points throughout the Bill where we feel amendments to include student representatives in terms of notices regarding approval, monitoring and withdrawal of fee plans.
- 3.5 For example, in section 25 we feel it would be appropriate to prescribe that at least one of the members of the committee outlined in subsection (3) is a national student representative. This is line with current arrangements with NUS Wales' membership of HEFCW's Quality Assurance and Enhancement Sub Group.
- 3.6 As discussed our previous answers and below, we are also concerned about various subsections throughout the Bill that make provision for subordinate legislation to amend primary legislation.
- 3.7 We have been unable to determine to what extent the Bill details the link between the purpose and process of being an automatically designated institution and this being for the purposes of statutory student support as outlined in the explanatory memorandum. For clarity, it may be appropriate to make this relationship more explicit on the face of the Bill.

4 How will the Bill change what organisations do currently and what impact will such changes have, if any?

- 4.1 This Bill would have a notable effect on the operations of the Higher Education Funding Council for Wales, higher education providers, students' unions and sector bodies including ourselves. It would fundamentally alter the role of HEFCW and its relationship with providers, presumably requiring a restructure of HEFCW's programme of work.
- 4.2 There would be a far greater emphasis on the fee planning process and as such universities would have to commit more time and resource to meeting the new legislative requirements. The implementation of more effective policy levers would also have implications for university planning processes as it is likely that greater consideration and resource would have to be given to the policy priorities of Government

- 4.3 Students' unions currently have a key role in negotiating fee plans with their institutions. The greater importance placed on fee plans following the implementation of this Bill would mean that greater resource and focus would be placed on this process by students' unions.
- 4.4 These changes would of course have resource implication for students' unions and therefore it may be necessary to amend sector guidance around the funding of students' unions accordingly
- 4.5 The opening up of automatic designation to a range of providers, beyond the current higher education institutions, would potentially lead to other organisations seeking automatic designation and as such adhering to fee planning requirements. It is possible that current further education institutions may pursue this. As such, these changes could have long term implications for the higher education topography of Wales and the number and types of institution providing higher education.

5 What are the potential barriers to implementing the provisions of the Bill (if any) and does the Bill take account of them?

- 5.1 The most significant barrier to implementation will be timescales. Given the long lead-in period to the development and sign-off of fee plans, HEFCW would have to publish fee plan guidance for 2016/17 fee plans in April 2015 and as such likely pre-empt regulatory detail around the approval of fee plans that may be subject to change.
- 5.2 Related to this, the large amount of regulation that is yet to be determined and is not present in this Bill or explanatory memorandum suggests that there would be lengthy and most likely contested process of development of subordinate legislation prior to the provisions of the Bill being able to come into force
- 5.3 Given the recent need to legislate in further education to secure the protection of further education institutions' NPISH status, it would be appropriate to consider whether the provisions that this Bill would make would constitute any threat to higher education institutions' NPISH status.
- 5.4 That said – there are notable differences between higher and further education institutions. Welsh Government, prior to the Further Education Bill, had far greater control over further education institutions' governance arrangements and their financial arrangements including freedom to borrow.
- 5.5 The Government has had in recent memory the same level of control over higher education institutions and the changes to regulation outlined in the Bill would not alter what the Office of National Statistics considered to be the key drivers for reclassification in the further education context.
- 5.6 As touched on in previous answers – fee plans in general are a barrier to implementing the provision of the Bill. Their effectiveness is limited by the disproportionate cycle of a plan to the length of a plan (approximately 6 years to 1 year). Similarly, this timeframe has made it very difficult for students and students' unions to effectively feed into and monitor plans given the yearly turnover of students and elected student representatives
- 5.7 For fee plans to be effective and to support the development of a distinct Welsh student experience, they must be developed in a partnership with students and students' unions. Therefore, for the Bill to be implemented effectively, thought must be given to either how the Bill or the subordinate regulation will shape fee plans into a more effective tool that involves students as true partners in their education and institutions.
- 5.8 To support this, we would recommend an amendment to the Bill that makes the requirement for students' union involvement in the development of fee plans a statutory obligation.

6 Do you have any views on the way in which the Bill falls within the legislative competence of the National Assembly for Wales?

6.1 We understand this Bill to fall within the legislative competence of the National Assembly for Wales

7 What are your views on powers in the Bill for Welsh Ministers to make subordinate legislation (ie statutory instruments, including regulations, orders and directions)?

In answering this question, you may wish to consider Section 5 of the Explanatory Memorandum, which contains a table summarising the powers delegated to Welsh Ministers in the Bill to make orders and regulations, etc.

- 7.1 NUS Wales has substantial concerns regarding the powers in the Bill for Welsh Ministers to make subordinate legislation. The scope of subordinate legislation includes when designation may be withdrawn, the threshold above which an institution must outline how they will spend a proportion of fee income in the furtherance of the plan objectives, the functions of HEFCW in determining whether to approve or reject a plan, the circumstances where HEFCW may give a direction to institutions and the process of appeal/review of a decision by HEFCW.
- 7.2 The original technical consultation for this Bill suggested that the threshold at which point an institution must outline how they will spend the proportion of fee income in the furtherance of the plan objective would be raised from the current £4,000 to £6,000. We strongly oppose this threshold and are concerned by the absence of any figure in either the Bill or explanatory memorandum. Such a threshold should be set in consultation with stakeholders.
- 7.3 We are also concerned that there is provision within the Bill to enable regulations to amend primary legislation; such a provision would enable primary legislation to be amended without the scrutiny normally afforded. Given the sensitive nature of the regulations in question, and the impact that they would have on the higher education sector in Wales, we feel that in some cases affirmative or super-affirmative procedure would be appropriate.
- 7.4 For example, Section 13 outlines that regulations may make provision for HEFCW to direct institutions to take 'steps' that are currently unspecified. Subsection (3) of that section is, similarly, one of the points in the Bill that makes provision for regulations to amend or apply any provision made by the Bill.

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