

## Higher Education (Wales) Bill 2013 Technical Consultation A Response by Higher Education Wales

### 1. About Higher Education Wales

- 1.1. Higher Education Wales (HEW) represents the interests of Higher Education Institutions (HEIs) in Wales and is a National Council of Universities UK. HEW's Governing Council consists of the Vice-Chancellors of all the HEIs in Wales and the Director of the Open University in Wales.

### 2. Introduction

- 2.1. The following paragraphs set out HEW's response to the Welsh Government Consultation Document on the Higher Education (Wales) Bill (the 'Consultation Document') which was published on 20 May 2013. The response forms part of a series of responses to related consultations. HEW submitted a joint response with the Chairs of Higher Education Wales (CHEW) to the consultation on the Further and Higher Education (Wales) Bill in September 2012.<sup>1</sup> HEW also submitted evidence to the National Assembly for Wales on the Further and Higher Education (Governance and Information) (Wales) Bill in May and June 2013.<sup>2</sup> HEW's response to proposals put forward by the Higher Education Funding Council for Wales (HEFCW) on future fee planning arrangements was submitted in March 2013. In relation to HEFCW's role more generally, the HEW response to the HEFCW Corporate Strategy consultation submitted in July 2012 is also relevant to the current consultation.
- 2.2. Before addressing the specific questions raised in the Consultation Document, this response focuses on a number of more general issues of significance.

### 3. Executive Summary

- 3.1. The following key issues are identified:
  - The proposed arrangements are highly complex and raise a number of important issues. On many of these we need further clarification and advice before we can reach a final view, including in particular arrangements for unregulated providers.

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<sup>1</sup> A copy is contained in 'Consultation Responses - Part 1' published by the Welsh Government at:

<http://wales.gov.uk/consultations/education/feandhebill/?status=closed&lang=en>

<sup>2</sup> Copies of the HEW submission and additional evidence are published at:

<http://www.senedd.assemblywales.org/mglIssueHistoryHome.aspx?lId=6772>

- The regulatory principles and objectives currently lack sufficient clarity for us to be confident that the proposed measures address them appropriately. Further consideration also needs to be given to HEFCW's role as proposed, with a greater emphasis on HEFCW, the Welsh Government and the sector working in partnership.
- The application of different regulatory arrangements for regulated and unregulated providers raises a number of issues which need to be addressed by the Welsh Government. It is essential that the proposals do not lead to divergence in arrangements for quality assurance or regulation across the UK.
- There appears to be potential for conflict in the proposed use of different legislative provisions (including potentially charity law), which may require significant subsequent amendment if implemented.
- In developing new regulatory controls which are not dependent on grant we welcome the Welsh Government's intention that we do not move towards an inspection regime. However we remain concerned at the introduction of a number of additional powers and controls.
- As currently drafted, the proposals appear to put the autonomous status of universities in Wales at risk with potentially very serious consequences. The potential use of fee planning arrangements, in particular, needs to be reviewed to ensure that there is an appropriate level of restriction on discretion and control and that the classification of universities as Non-Profit Institutions Serving Households (NPISH) is not affected.
- At this stage we question the extent to which the proposed framework could provide an operable and long-term solution for the sector. Further consideration should be given to alternative mechanisms which may offer simpler and more effective solutions to the key issues, and may also be less resource intensive for the Welsh Government to pursue.
- We would expect to see a further period of engagement between the sector and Welsh Government/HEFCW before proceeding with these proposals, followed by further consultation on a revised set of proposals after more thorough exploration of the issues and alternatives.

#### **4. Section 4 – A Revised Regulatory System**

##### **General comments**

- 4.1. We welcome the Welsh Government's consultation and continuing efforts to work in partnership with the sector to find an appropriate solution for Wales which responds to the changes in fee and funding arrangements across the UK. From our discussions with the Welsh Government, we understand that the proposals are not intended to introduce a radical change in practice, but to reflect the need for radical change in the legal framework to support the exercise of current functions. They are needed in particular to address the impact of the shift from grant funding to student

fees, supported in Wales by fee grant payments via HEFCW, and the challenges of wider regulatory change across the UK.

- 4.2. We also recognise, however, that these proposals will result in significant legislative change that could have a long-term impact for the sector. The proposed changes are closely linked to funding policy and we are aware that solutions to the student support and funding arrangements in Wales have yet to be determined fully, for part-time and post-graduate funding in particular. In other parts of the UK the likelihood of further changes in the regulatory and funding environment has also been signalled. From our perspective the current proposals raise a number of key issues which need to be addressed in this context which we set out below in addition to providing answers to the specific consultation questions. Universities are a major driver of economic growth and social justice, and a key to the future prosperity of Wales. It is important that we get these proposals right, and we look forward to working through the issues raised below with the Welsh Government as part of the next phase of engagement with the sector and revision of the proposals to ensure that Wales has the best possible framework for its future needs.
- 4.3. *The regulatory rationale and principles.* The proposals in this Consultation Document involve high-level consideration of the role of regulation and public intervention. Universities are independent autonomous institutions operating in the public interest. In general we would welcome a clearer statement of the principles of regulation as, for instance, transparently articulated in the proposed changes in England by the Regulatory Reform Group which recognises the success of a system of assurance which relies on a balance of public and self-regulation, and commits itself to a principle of proportionate intervention. As recognised in Part A of the Consultation Document (paragraph 2.30), universities have previously identified three broad issues which changes need to focus on: protecting the interests of the learner, protecting the public purse and establishing a level playing field to all providers of higher education. In our comments below, we identify a number of instances where the objectives would benefit from further clarification and where we regard there to be issues of proportionality.
- 4.4. *Translation and extension of powers.* We welcome from our discussions with the Welsh Government confirmation that the proposals are not intended to introduce a radical change to the role of HEFCW in practice, but to reflect the need for radical change in the legal framework to support the exercise of those functions. The Consultation Document, however, proposes significant new powers for HEFCW in respect of access and inspection to universities in Wales, and potentially at the moment – as we discuss below - in the control of corporate strategy at institutional level. The Welsh Government has argued that a change in the legal basis is required to enable HEFCW to exercise its current powers in the new funding environment, where a greater proportion of university funding is received through

fees supported by fee grant payments. However, the case for extending HEFCW's powers remains unclear. Arguably, given that direct public funding for universities has been significantly reduced and that in legal, accounting and many practical respects fee grant payments are not be regarded as public funding, there is a case for proportionately reducing the powers of public intervention rather than increasing them.

- 4.5. *Providing appropriate restrictions on regulatory intervention.* We are concerned that extension of the fee planning legislation could lead to a dilution of its original and distinct purpose and allow an alternative system of control which obviates the restrictions and safeguards embedded in the Further and Higher Education Act (FHEA) 1992 which currently form the regulatory framework for administering funding for higher education. In short, the provisions of the Act are clearly designed to protect academic, financial and corporate autonomy. The fee planning legislation does not contain equivalent provisions, and the proposed extension of its use would appear to provide a means of circumventing these protections. We discuss this in more detail in the section on fee plans in particular below.
- 4.6. By comparison with existing arrangements, the proposed regulatory framework is highly complex. It extends separate legislative provisions designed for distinct purposes and creates additional distinctions in provider status, increasing the variety of different arrangements within the sector. This is an issue in terms of perception of the sector as a single entity. More importantly, there appear to be a number of areas of potential conflict, confusion or apparent gaps in the framework which raise significant questions about how it would operate in practice or cope with potential changes within the sector in future:
- *Parallel operation of fee plan and grant based powers.* The intention (paragraph 4.23) is that HEFCW's statutory functions would apply to regulated providers rather than those in receipt of funding. We understand, however, that the current statutory provisions in relation to the administration of grant would continue and would be required to fund research and other important areas of activity including, at the moment, part-time and postgraduate provision and strategy funding for full-time undergraduate provision. HEFCW would continue to have a duty/powers in respect of those institutions which it funds (including e.g. quality assurance) irrespective of whether the provider was regulated (i.e. accepted fee plan conditions) or unregulated - yet this appears to conflict with the proposal that HEFCW should have a regulatory role only in respect of those accepting fee plan requirements (i.e. regulated providers). Would this not limit the controls it now has over those institutions to which it administers funds but do not fall under fee planning provisions? Would this mean that HEFCW would have to avoid funding unregulated institutions in order to avoid conflict (including e.g. strategic funding such as the current Public Investment Fund allocations)? The fee plan

arrangements do not fully replace current powers reliant on grant, and do not provide a means of recovery of grant except in context of meeting fee plan obligations (including compliance with the fee cap). This also creates potential issues in terms of applying different terms and conditions through the Financial Memorandum and proposed Financial and Governance Code. From our further conversations with the Welsh Government, we understand that the fee plan powers and grant-based powers are seen as having distinct areas of application. We would welcome further clarity and confirmation on how these powers could work together and these issues be avoided.

- *Separate arrangements for regulated/unregulated providers.* We do not support further divergence or potential for divergence within the sector. In particular, we are concerned that in theory two universities in Wales could potentially fall under two different regulatory systems and lines of accountability in respect of governance and quality assurance, depending on choices made solely in respect of full-time undergraduate arrangements. Important details about how the system would apply to unregulated providers are lacking in the consultation and are required before a view can be reached on the feasibility of the system as a whole. For instance, clarity and confirmation are needed on whether unregulated providers would be subject to student number restrictions or fee limits. We are concerned about the ability of unregulated institutions to provide higher education without fee limits. Subject to the market, unregulated providers would, in theory, be able to increase fees up to or beyond the £9,000 maximum. This would appear to be counter to the Welsh Government's commitment to protect students from increased fees. This also leaves potential parity issues between regulated and unregulated providers. Potentially it could lead to a position where regulated institutions receive less income and greater regulatory burden than their unregulated counterparts, contrary to the express intention that the 'regulatory requirements will be proportionate to the benefits derived' (paragraph 4.18). A market which supported higher fees despite the lack of the generous student subsidy could also induce voluntary 'deregulation' of providers as an unintended consequence.
- *Charity regulation.* A number of our members have raised concern that there is potential for conflict between regulatory requirements or duplication of regulation. It could be damaging if the different regulators were to reach different verdicts about the satisfaction of requirements that were substantially the same. Unlike England where the Higher Education Funding Council for England (HEFCE) is the regulator for purposes of charity law, we assume that it is not proposed that HEFCW should be regulator for higher education in Wales and that universities (or only regulated providers under these proposals?) would continue to be regulated for purposes of charity law by the Charity Commission. The Welsh Government needs to have very close dialogue with the Charity

Commission about the implications of its proposals to ensure that conflict is avoided and that, with the increased powers of intervention, there will be no risk to the autonomy or charitable status of institutions. Before we can give support to this proposal, we need further assurances on this matter and would expect further discussion with the Welsh Government following this dialogue.

- *Extension of full-time undergraduate fee-based controls to other areas of activity.* We question the suitability of the controls which depend on choices made in respect of full-time undergraduate provision. Universities' activities are much wider. At this stage it is not clear that it would be helpful, for purposes of funding and student support arrangements, to bring part-time provision within existing fee plan arrangements. Research and many other areas of activity would not be related to fee income – and would presumably necessitate the continuation of current grant-based legislation.

4.7. *Impact on institutional autonomy and NPISH status.* We are concerned that, as the proposals stand at present, the current Office for National Statistics (ONS) classification of universities as Non-Profit Institutions Serving Households (NPISH), rather than as central government, could be placed at risk with serious consequences both for the sector and the Welsh Government. As HEW made clear in its response to the National Assembly for Wales' Inquiry on the Further and Higher Education (Governance and Information) (Wales) Bill,<sup>3</sup> in common with our university partners across the UK, our view is that the loss of NPISH status for universities would have a very serious and detrimental impact on the higher education sector:

- The Further and Higher Education Act 1992 is widely regarded as preserving the necessary public safeguards against autonomy of corporate policy and academic independence, which have been a cornerstone of the UK's international reputation for having the best system of higher education in the world. Whilst some divergence between UK administrations is inevitable, an actual or apparent erosion of these safeguards, and/or resulting loss of NPISH status, could give rise to perceptions of a fundamental shift of higher education in Wales in this respect and have a very damaging impact on the international reputation of the Welsh sector.
- Reclassification would have significant consequences for the Department for Education and Skills (DfES) budget, which in turn would have serious implications for the higher education sector.<sup>4</sup> This would include the potentially

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<sup>3</sup> See HEW's Letter to the Children and Young People Committee dated 24 July 2013:

<http://www.senedd.assemblywales.org/mglIssueHistoryHome.aspx?lId=6772>

<sup>4</sup> Further and Higher Education (Governance and Information) Wales Bill, Explanatory Memorandum

negative impact on the Welsh Government capital budget in particular and requirement for additional accounting and annual return arrangements. Any surpluses or deficits would become Welsh Government funds and would need to be managed within the overall Main Expenditure Group, and the ability of institutions to carry forward surpluses and build reserves for future capital projects would be lost. We also understand that, more generally, the reclassification of the sector as central government would impact in particular on the Public Sector Net Debt and to a lesser extent the Public Sector Current Budget and Public Sector Net Investment.

- There would also be significant ramifications arising from the specific provisions which contributed to a change in status. HEW has considered the potential impact of a change in status for higher education in its responses in relation to proposals for direct grant in the Further and Higher Education (Wales) Bill consultation in September 2012 and in relation to the Welsh Government's Public Service Workforce consultation in July 2012. In addition to the above points, the HEW responses identified a potential impact on contractual agreements with partners, collective agreements incorporated into the contracts of employment, or general statutory duties relating to higher education. Implications for tax and charitable status would also be issues which would need to be considered further in any potential reclassification.

4.8. The ONS classification reflects the degree of public sector control over general corporate policy and a reclassification would result from a significant shift in this respect. The key areas which caused reclassification of the FE sector to central government were, according to the ONS: borrowing restrictions, governance arrangements, and the public sector ability to close or merge institutions. When, in England, these powers were limited to situations where the institution is being mismanaged or performing poorly, the ONS took the view that these remaining powers acted as reserve or step in powers. It noted, however, that if such powers were to be exercised this would result in the public sector taking control of the institution in question.<sup>5</sup>

4.9. We understand that the issues relating to NPISH status, including the power to dissolve Higher Education Corporations, are already being looked at in relation to existing provisions in other parts of the UK as well. We would welcome the Welsh Government working with the UK Government to remove, in particular, the power of dissolution or to include appropriate restrictions on its exercise to avoid the potential for this impacting on the NPISH status of higher education in future. In the meantime, we are concerned that the proposals in the Consultation Document pose

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<sup>5</sup> Offices for National Statistics, Reclassification of Further Education Corporations and Sixth Form Colleges in England, May 2012.

an additional risk to NPISH status. We discuss this in more detail in relation to the fee plan section in particular below.

4.10. *Prerequisites for designation for student support.* The need to make provisions which appropriately regulate which providers may access funding or offer courses eligible for student support is recognised, particularly with the potential for new and alternative providers in future. We understand in particular that, under existing arrangements, funding controls are limited in their application to Welsh higher education providers in Wales. However, the Welsh Government is able to designate courses as eligible for student support for providers both within Wales and elsewhere. In HEW's response to the FE & HE Bill consultation last September, the following points were made about alternative providers:

- The private higher education sector is emerging as a growing force in many parts of the world and presents a range of potential opportunities and challenges. From the overall UK perspective, private providers are broadening the UK offer by providing qualifications to a greater number of students.
- Unlike publicly-funded institutions, the granting of degree awarding powers (DAPs) to private providers is currently restricted to a period of six years, after which time it must be reviewed and can be revoked. At present, no private providers that have DAPs have been subject to the six year Quality Assurance Agency (QAA) review. There is also concern that there is no requirement for private providers to supply government or any agency with information on staff and student numbers or financial information such as turnover or financial capacity. When considering transparency of information, it should be noted that the QAA's reports on publicly-funded institutions are published but the reports on private colleges from British Accreditation<sup>6</sup> Council inspectors are not, although the College of Law has done so<sup>7</sup>.
- It is important that appropriate measures are in place to ensure high quality. For example, information concerning students' experiences in private institutions is generally absent in the UK, so it is difficult to judge whether the support provided to students at these institutions by the Welsh Government is being used to the advantage and benefit of the student. The Welsh Government has little control over student numbers in terms of private providers operating in Wales and no control over those operating in England. This could cause potential difficulties for the Welsh budget, which in turn could impact on the amount of funding available for the publically-funded Welsh HE sector to meet Welsh Government priorities. There is no obligation for private providers to engage with the twin pillars of

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<sup>6</sup> [British Accreditation Council](#)

<sup>7</sup> The College of Law is also starting on the six year review process.

Welsh Government policy of social justice and economic development, nor is there a requirement for them to engage in areas such as widening access or Welsh Medium services, for example.

- Both the quality of learning and teaching and the student experience, are important to Wales and we suggest that if all providers of HE, including private providers, were required to adhere to the QAA's Quality Code<sup>8</sup>, the Welsh Government could expect them to take deliberate steps to engage all students, individually and collectively, as partners in the assurance and enhancement of their higher education experience.

4.11. The Consultation Document proposes in particular the use of charitable status as a prerequisite to receive designation for student support. We would question the utility of this mechanism, however, and the extent to which the current proposals fully address these issues. As we understand it, the provision would ensure that any profits made by the charitable organisation would be reinvested for purposes of achieving its charitable objects, and that charitable status is easier to identify than not-for-profit status. Charitable objects/purposes, however, can take a number of forms which may or may not relate to education/higher education. It also does not help to provide parity in important areas of regulation. For instance, universities are subject to freedom of information requirements, the Human Rights Act in exercising their public functions, and an additional range of legislation including EU procurement regulations, application of the Welsh Language Act, and aspects of employment law and equality and diversity legislation. We are unclear at this stage what issues would otherwise be addressed by imposing a charitable status requirement that are not (or could not be) addressed through other means. We believe that the ability to receive statutory student support should depend on holding degree awarding powers and/or university title and the criteria relating to these, and would welcome the Welsh Government further exploring these alternatives.

4.12. *Overall control of the student support budget.* A further key issue is the lack of corresponding controls in place for Welsh-domiciled students studying outside of Wales. Paragraph 2.32 of the Consultation Document states that the scope of regulatory controls covers 'higher education provision supported by Welsh Government backed grants and loans'. The proposals do not provide control of the overall student support budget, or provide a similar level of assurance and protection for the students accessing the support for study in other parts of the UK.

4.13. *The role of HEFCW.* In our previous consultation responses, HEW has expressed its support for an independent Higher Education Funding Council for Wales operating within the bounds of the current statutory framework, and highlighted the

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<sup>8</sup> [QAA Quality Code](#)

considerable value of its expertise, resources, and detailed knowledge of the sector. Our main concern with the current proposals relating to the role of HEFCW is that they do not reflect a partnership approach between HEFCW and the sector or appear to recognise the considerable powers that the Funding Council has under the current statutory framework to achieve objectives through agreement and cooperation. There is more that can be achieved through HEFCW, the Welsh Government and the sector working together particularly in enhancing the profile of universities in Wales on the international scene, and the Welsh Government's recent Policy Statement for HE would appear to provide a good platform for building on this. In 2009 Professor Jones in the second part of his Review concluded that "Wales needs unambiguously to redefine the relationships that govern the direction and management of its higher education system". Increasing its powers of intervention as proposed appears to be moving away from this and we would argue that it is not in any of the parties best interests.

4.14. We would welcome further clarity about HEFCW's capacity and resource levels to deliver these new regulatory obligations. Unlike the Explanatory Memorandum which accompanied the Further and Higher Education (Governance and Information) (Wales) Bill, there is no accompanying study of the value for money/equality impact at this stage. On the face of it, the change in role may require significant additional resource to fulfil the new responsibilities and satisfy expectations adequately. If HEFCW's role significantly changes we assume that this may also have implications for the statutory provisions relating to the composition and governance of HEFCW e.g. Board composition.

4.15. Further comments in relation to the specific questions raised by the Welsh Government are provided below:

***Question 1 - In light of the increased regulatory role proposed for HEFCW should amendments be made to the Council's name?***

4.16. No, we do not think that HEFCW's name should be amended. We understand that the proposals are not intended to introduce a radical change to the role of HEFCW in practice, but reflect the need for radical change in the legal framework to support the exercise of those functions (see above, 4.4). We are also aware that the role of HEFCW may in practice develop significantly through changes in approach and focus rather than through changes in the statutory parameters within which it operates. The high levels of awareness and long-standing reputation associated with HEFCW's current name are also factors to be considered.

***Question 2 - We recognise that a variety of franchising arrangements currently exist in Wales and that these have been developed under the funding system which operated prior to the introduction of new fees and student support arrangements.***

*We are particularly interested in your views as to how franchised provision should be dealt with under the new regulatory framework. In particular:*

*(a) Will the proposal for the institution or provider which franchises the course to be the body which is responsible for either applying for a fee plan or requesting case-by-case designation of its courses work in practice?*

*(b) Could this proposal result in any delivery issues? If so please identify those issues.*

*(c) Are there any alternative approaches which you wish to put forward for consideration?*

4.17. Similar to the current position, our view is that the rules for course designation should apply according to whether the franchisor is regulated or non-regulated, and a regulated institution which franchises the course should be responsible for applying the fee plan. This does, however, highlight an area of further complexity involved with the dual-system approach: a franchisee may be required to deliver to two different sets of HE regulatory systems/controls in respect of franchise provision.

4.18. In implementing these proposals, consideration may need to be given to transitional arrangements to allow existing partnership contracts/agreements to be reviewed, particularly in respect of financial arrangements.

4.19. Further consideration could be given to the exemption of courses delivered through franchise arrangements, to allow regulated providers case-by-case designation of courses as an alternative to automatic designation (see our response to section 5 - question 9 below).

## **5. Section 5 - Fee Controls and Fair Access**

### **General comments**

5.1. The proposal to extend current fee planning legislation raises a number of significant issues, many of which have been already identified in HEW's response to HEFCW's recent consultation on future fee planning arrangements.

5.2. A key issue is to ensure that the powers available under the fee planning arrangements are appropriately restricted. We are concerned that the current proposals to extend fee planning may enable the important safeguards contained in the Further and Higher Education Act 1992 to be obviated unless expressly incorporated in the new proposals. In particular, it is essential to protect universities' independent status for national accounting purposes (i.e. NPISH not central government) and for perceptions of the Welsh higher education sector in general including the autonomy of its institutions and international standing as part of the

UK-wide university sector.<sup>9</sup> The exercise of HEFCW's and the Welsh Government's powers in relation to the allocation of funding grant or other payments to universities is currently subject to a number of significant restrictions/safeguards:

- In making payments to institutions, the terms and conditions which the Funding Council sets are restricted in effect to direct grant, loans or other payments made by the Council. It also has to have regard to the desirability of not discouraging institutions from developing other sources of funding. These measures limit the scope of the powers to the extent of legitimate interest for purposes of controlling public finance, and prevent public control of corporate policy/use of income from other sources. A key issue for HEW is the lack of similar boundaries for the scope of the powers and HEFCW's discretion being built in to the new proposals.
- In turn, the terms and conditions that the Welsh Government may set must relate to all institutions or classes of institution and not to particular institutions – i.e. this limits the level of public control over individual corporate policy as required for NPISH status. We are concerned by the extent to which the current proposals could enable control of the policy of individual institutions.
- Further important restrictions, for which there appear to be no equivalents in the new proposals, include that terms and conditions must not relate to particular courses of study, programmes of research or to the criteria for the selection and appointment of academic staff and for the admission of students – i.e. relating to academic independence. The Funding Council also has a duty to have appropriate regard to the denominational character or distinctive characteristics of institutions.
- Before exercising its discretion with respect to the terms and conditions that it may impose under s.66 FHEA 1992, HEFCW has a statutory duty to consult with any particular institution or representative body which appears to the Council to be concerned. As discussed below (see Question 19), unlike the current proposal this is duty which continues to apply beyond its initial approval.

5.3. As things currently stand, it is unclear how the existing fee plan provisions could be extended to incorporate more general policy control.<sup>10</sup> The Higher Education Act 2004 states that the general requirements of the fee plan must relate to (i) the

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<sup>9</sup> See further the joint response of Higher Education Wales and the Chairs of Higher Education Wales to White Paper on FE/HE (Wales) Bill, September 2012, pp.5-8.

<sup>10</sup> The content and duration of fee plans are prescribed in particular by the Higher Education Act 2004 (ss.22-41) and the Student Fees (Approved Plans) (Wales) Regulations 2011. The Welsh Government also issued guidance to HEFCW which sets their expectations of the Council's role.

promotion of equality of opportunity, or (ii) the promotion of higher education. This would include e.g. to take measures to attract applicants from under-represented groups, provide financial assistance to students, and make information available to students on financial assistance etc. The objectives set under the fee plan arrangements must also seemingly relate to the two specific headings identified by the Act. These limits to the fee plan scope are also currently reflected in the Welsh Government's statutory fee plan guidance (as published in HEFCW W12/15HE for 2013/14) which stipulates that 'HEFCW should assess whether an institution's fee plan is appropriate in terms of improvements in promoting HE and equality of opportunity in accessing HE'. It is difficult to see how the extension of fee planning legislation could provide a basis for the wider Financial and Governance Code or be used for enforcing performance against targets unrelated to full-time undergraduate students, as proposed by HEFCW in its recent consultation, without primary legislation and radical change in the purpose of the legislation. In the meantime, care will be needed to ensure that any extension in the use of the fee plans does not exceed the statutory limits.

- 5.4. In extending the use of the fee plan, there is a danger that the original student-oriented purpose of the fee plan is no longer served adequately. One of the key purposes of the current fee plan provisions was to provide fee paying students and the public with confidence that the increased fee income resulting from the funding changes was being put to appropriate use and that issues of social justice continued to be addressed. Under HEFCW W12/15HE, for instance, institutions are required to 'continue to demonstrate the depth of engagement with the student body, and the steps in place to ensure that students are aware of new fee charges prior to enrolment, and how fee income will be invested in support of the student experience'. The selection of information in the fee plan and the way it is presented should reflect this purpose (the lessons drawn from the development of the Key Information Sets can also be applied in this context<sup>11</sup>). In particular, institutions are currently required to demonstrate that they are investing a 'reasonable proportion' (in the region of 30%) of new fee income (i.e. income above the basic rate of £4k), in equality of opportunity and promotion of higher education (see HEFCW W12/15HE). From HEFCW's recent consultation,<sup>12</sup> it is clear that the fee planning arrangements would be intended to cover a wide range of indicators that are not related to full-time undergraduates or any additional fees gained from them under the new fee and funding arrangements, and we expressed our view that this would detract from their important role in providing students and the wider public with a clear understanding of the relation between the additional fee income and its consequent investment.

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<sup>11</sup> See for instance: Understanding the information needs of users of public information about higher education, Enhancing and Developing the National Student Survey, (2010), Report to HEFCE by Oakleigh Consulting and Staffordshire University. [http://www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12\\_10b.pdf](http://www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12_10b.pdf)

<sup>12</sup> HEFCW Circular W13/01HE Consultation for high-level proposals for fee planning 2014/15.

- 5.5. Further comments in relation to the specific questions raised by the Welsh Government are provided below:

**Question 3** - *Do you agree with the proposal that in cases of persistent failure to comply with fee limits that HEFCW should be able to withdraw its approval in respect of an approved plan?*

- 5.6. No. Although we would support the continuing ability to refuse to approve a new fee plan in extreme cases, we do not see the need for the current levels of control to be extended to enable a plan to be withdrawn mid-period. There is no evidence to suggest that the current power to refuse a new fee plan has been insufficient to exercise an effective maximum fee level or clear reason to assume this would change under the proposed arrangements.
- 5.7. In practice, 'compliance'/'non-compliance' would also need to be carefully defined. This would include ensuring that there is a level of tolerance that reflects the realistic levels of institutional control over average fee levels which can vary according to changes in cohorts and student profile. We would prefer to see a system of graded penalties which reflects this. We would also resist any automatic triggers in this respect.

**Question 4** - *Do you agree with the proposal to extend HEFCW's relevant authority role in order that it may evaluate the effectiveness of fee plans both individually and across the Welsh higher education sector?*

- 5.8. No. In our view, we need to be very careful about increasing the level of public controls or moving towards an inspection regime along the lines e.g. for schools (see comments below, para 5.13). From the Consultation Document it is not clear that proposed new controls serve a clear purpose or are made necessary by the changes in funding arrangements.

**Question 5** - *Do you agree that transitional protection should be made available for students who have commenced their studies with a regulated provider which subsequently has approval for its fee plan withdrawn or approval of a fee plan is refused upon renewal?*

- 5.9. Yes, we view the protection of students as extremely important. However, we would welcome further clarification about how this might operate in practice, particularly in relation to the potential impact on continuing duties and contracts between the university and students and potentially other parties (including sponsors, businesses and employers, and partners) and how the transition arrangements would be funded.

**Question 6** - *Do you agree with the proposal that all institutions and other providers with an approved plan in force should be subject to the same core requirements?*

5.10. In our view it is essential that the same core requirements should be in place, and be seen to be in place, for all providers of higher education across the UK. This should apply to those with an approved fee plan and other providers.

**Question 7** - *Do you agree with the proposal for HEFCW to be required to take account of the proposed level of fee in determining whether fee plan commitments are sufficient?*

5.11. We agree that expectations should reflect the level of income received through fee plans and the extent to which this is genuinely additional, particularly where this is effectively substituting for direct grant (see also our comments elsewhere in relation to the unrestricted fee levels for unregulated providers e.g. paragraphs 4.6, 5.12 and 5.15-16). We understand that HEFCW already take the proposed fee level into account in their evaluation, however, and further statutory provision may be unnecessary or unhelpful in this respect.

**Question 8** - *Do you agree with the proposed value of £6,000 for the 'threshold' fee amount?*

5.12. Yes, subject to our general comments about implementing these proposals. In the past, fee plan requirements have been intended to apply only to the additional income accessed as a result of the fee plan agreement. Under the proposed arrangements, their function in this respect is less clear and there is no limit on the fee income for unregulated providers – both of which we have highlighted as issues. The £6,000 threshold is consistent, however, with the level of tuition fee support available to students undertaking courses with unregulated providers.

**Question 9** - *Do you agree with the range of proposed sanctions to be made available to HEFCW and that HEFCW, as relevant authority should have discretion in their application?*

5.13. As identified above, there appears to be little basis for extending the current range of controls, and we are concerned at the impact of moving towards an inspection regime. Across the UK and Europe more widely it is recognised that different approaches to regulation are appropriate for schools and higher education, and it is important for Wales that universities remain subject to the robust peer review mechanisms which have led to the UK being seen as having the most sought after quality system in the world. In certain instances, there is potential for mismatch between the powers/sanctions proposed and the issues they are intended to remedy. Would a spending direction be appropriate for failure to achieve fee plan

targets, even where funding has been spent in their pursuit, for instance? In line with general principles of good regulation<sup>13</sup>, we would like to ensure that any new regulatory controls serve a clear purpose and are proportionate, and that alternatives are pursued wherever possible.

**Question 10** - *It is proposed that where HEFCW (as relevant authority) decides to withdraw its approval of a fee plan, the institution or provider affected may apply for a review of that decision to an independent panel / person. Do you consider this review mechanism to be sufficient or is there a need for any additional review or appeal arrangements? If so please specify what such arrangements might entail.*

5.14. If we continue to pursue these proposals which still require further consideration, we agree that there needs to be a robust and transparent independent appeals mechanism. Our members have not identified any specific issues with the proposed mechanism at this stage, but would look forward to further discussion in development of its detail.

**Question 11** - *Should regulated providers (i.e. those with an approved fee plan in force) whose higher education courses are subject to automatic designation for statutory student support purposes be able to exempt certain courses from automatic designation and the regulatory requirements associated with fee plans?*

5.15. This is potentially a critical feature of the regulatory system and further clarification of what would be envisaged by this is needed. One possibility, for instance, is that this could be used to allow regulated institutions to extend certain areas of provision outside of the student number controls and fee level restrictions on the same basis as unregulated providers, i.e. there would be no fee level restrictions and students would be able to access tuition fee support in the form of a loan only up to £6K. We could see some potential advantage to this in addressing some of the issues created by regulated/unregulated provider distinction. This could allow greater parity between regulated/unregulated providers to access unrestricted fee income. It would not fully address issues of parity between providers, however, while introducing undesirable further heterogeneity within the sector.

5.16. From further discussion of the proposals, however, our understanding is that the envisaged exemption would place provision outside of the student support regulation altogether, i.e. there would be no access even to the £6K loan for students. We are uncertain at this stage what that would mean for the regulatory framework to be applied to such provision, and this does not help to address the issues of income parity identified above. We understand that this would be limited in application to

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<sup>13</sup> See for instance see the Higher Education Better Regulation Group:  
<http://www.hebetterregulation.ac.uk/HEConcordat/Pages/default.aspx>

certain types of provision which are considered appropriate for exemption for student support. It is essential that further clarity is provided in relation to this.

## 6. Section 6 - Quality Assessment

### General comments

- 6.1. In our view, it is imperative that the same system for quality assurance is applied to all providers of higher education (e.g. regulated/non-regulated, public/private) and remains in all important respects the same across the UK. The existing UK-wide quality assurance arrangements have gained world-wide respect and, as part of that UK-wide system, Wales continues to attract one of the highest proportions of international students of any country, providing a significant boost to the economy in Wales and a richness to the culture of our universities. It is vital that this continues.
- 6.2. In relation to the proposed changes, we are concerned by the proposed separation of responsibility for HE quality assurance, for non-regulated and regulated providers in Wales. This creates the potential for actual or apparent divergence within the sector. In practice, HEFCW currently discharges its duty to make arrangements for assessing the quality of provision it funds through a service level agreement with the QAA. The Welsh Government may choose to do the same - and we note the work on the potential use of bilateral agreements by the Higher Education Better Regulation Group which may also help to harmonise arrangements appropriately in this context. We would prefer a system, however, that ensures that a single quality assurance system is applied.
- 6.3. We welcome the Welsh Government's intention that the revisions to HEFCW's duty should not significantly alter the quality assurance requirements applied to universities (paragraph 6.7). We are not yet convinced, however, that a diminution in direct funding necessitates an extension of the powers as proposed. In addition to the arguments outlined above about the level of funding available for leveraging policy, it should be recognised that the consequences of a judgment of unsatisfactory quality has far reaching and damaging impact for institutions in its own right.
- 6.4. There are also a number of potential issues which remain unclear at this stage. Under current arrangements, HEFCW has a statutory duty for quality assurance arrangements for all institutions which it funds. HEFCW would potentially be able (and be under a duty) to fund institutions for HE eligible activities whether or not the providers are 'regulated' as defined in the Consultation Document (for instance strategic funding to support high-cost or strategically important subjects). This would appear to provide conflicting duties for quality assurance (inter alia) for unregulated providers (which may include universities). In establishing a framework

for the longer term this is an issue – at the moment there are no exclusive part-time and postgraduate specialist institutions based in Wales only, but both would be unregulated providers funded by HEFCW unless these areas are also brought within the fee planning framework. Also, we would query whether the fee planning legislation is sufficiently flexible to accommodate special cases which are currently accommodated through the Financial Memorandum. If part-time provision is brought within the fee planning framework, for instance, there may be issues about how it could accommodate funding of institutions which a pan-UK basis (e.g. Open University in Wales).

- 6.5. The Consultation Document clarifies that there would be no parallel sanction to HEFCW's current power to impose financial penalties in the form of recovery/withholding of grant paid (para 5.19) at least, presumably, under the aegis of the fee plan legislation. Further clarity is needed over whether these powers could be applied in combination or intended to operate in parallel for distinct purposes in separate circumstances only. For instance, would the available remedies for quality assurance issues include financial remedies where there was also grant funding and if so to what extent would these apply?
- 6.6. Further comments in relation to the specific questions raised by the Welsh Government are provided below:

**Question 12** - *Do you agree that HEFCW's duty to make provision for assessing the quality of higher education delivered by regulated providers in Wales should extend to all courses of higher education falling within the scope of schedule 6 to the Education Reform Act 1988?*

- 6.7. No. The duty should extend to all higher education provision which is wider than both the courses covered by current student support regulation and the courses identified under Schedule 6 of the ERA 1988. Under existing arrangements, for instance, the Funding Council funds higher education level provision which may form part of a qualification or be awarded credits in its own right. We would not wish the situation to arise where this falls under different quality assurance arrangements.
- 6.8. There is also an issue about extending the quality assurance duty in respect of professional courses. Professional bodies would remain responsible for their professional awards and would continue to apply their own framework for assurance which universities must comply with.

**Question 13** - *Do you agree with the proposed approach of making provision for HEFCW to be able to direct regulated providers to provide access to premises, records and documents for the purpose of quality assessment?*

6.9. No. The specific powers to obtain information and send in inspectors are new and would be unique to Wales. In line with our general comments to this section, no clear case has been made for the need for this in respect of universities and previous history would suggest that this is not required. We would regard a move towards an inspection system, such as used for schools, as inappropriate for higher education and this would be a significant difference in the levels of regulatory control for universities in Wales and other parts of the UK (see further 5.13 above). We would not support this for Welsh universities.

6.10. The consultation does not identify what powers would be put into place for the Welsh Government in respect of their QA role in relation to unregulated providers. We would welcome further clarification of any potential issues in relation to alternative providers.

**Question 14** - *In order to deal with case of unsatisfactory quality are the actions specified at paragraph 6.15 appropriate and adequate? Are there any other actions which you consider HEFCW should be able to undertake?*

6.11. No. We would welcome the continuation of existing powers to deal with unsatisfactory quality, as outlined in 6.14, but see no basis for and would not support an extension to the existing powers to deal with unsatisfactory quality as outlined in 6.15.

**Question 15** - *Do you consider that the person or person(s) requesting access to premises, records and documents for the purpose of HEFCW's quality assessment duty should be required to produce identification at the request of the institution or other provider which is the subject of the quality assessment .*

6.12. Yes, subject to our general comments above about the extension of HEFCW's powers in this respect. Our view is that increased powers of access and inspection are unnecessary. If the proposed new powers are implemented, however, we would support this especially given data protection requirements.

**Question 16** - *In the event of HEFCW revoking a fee plan are the safeguards set out at paragraph 6.18 appropriate and sufficient?*

6.13. No. We have argued above that it is unnecessary to extend HEFCW's powers to withdraw approval of a fee plan. If it is extended, we would welcome the proposals to strengthen the process for reviewing HEFCW's decisions accordingly, both in respect of making a decision provisional and in introducing independent review, as set out in paragraph 6.18. However, these are very much instruments of last resort and we would question whether these safeguards are sufficiently flexible.

**Question 17** - *Do you agree with the proposal that HEFCW be required to submit an annual report to the Welsh Ministers on the discharge of its quality assessment duty?*

6.14. Yes, on balance. The reality is that the primary assurance mechanism is the institutional review which is held every 5-6 years (subject to the current HEFCW Institutional Review consultation) and there is a concern that annual reporting could increase the information reporting burden on HEFCW and institutions unnecessarily. However, provided that in determining the scope of the reporting requirements it is ensured that reporting requirements are minimised, an annual report to Ministers could potentially provide further public reassurance without causing institutions significant difficulty.

**Question 18** - *Are the proposals in respect of franchised provision workable in practice?*

6.15. Yes. The current QAA practice places responsibility on the franchisor for ensuring the quality of the franchisee is sufficient and we would expect this to continue to be workable under the proposed arrangements for franchising universities. For franchisees, however, the proposals may introduce increased complexity and potential for conflict between different sets of requirements and lines of accountability where multiple franchise arrangements are in place and provision is franchised by a regulated provider, a regulated provider with exemptions, or an unregulated provider (whose quality assurance requirements are determined by the Welsh Government rather than HEFCW).

## **7. Section 7 - Financial and Governance Assurance**

### **General comments**

7.1. Our comments in this section are closely related to our comments on fee planning in general (see our general comments on Section 5 above). In particular, at this stage it is not easy to see how the Financial Governance assurance arrangements could be accommodated within existing fee plan arrangements and the Consultation Document makes clear that the existing statutory framework would need to be amended to accommodate the new proposals (paragraph 7.6). In general, we welcome an appropriate degree of latitude for HEFCW to implement proposals in this sphere and would seek to avoid a narrowly prescriptive approach. At the same time, the Consultation Document proposes considerable discretion on the part of HEFCW with few clear restraints other than in terms of process of consultation which raises concerns surrounding the potential for corporate control and impact on NPISH status. We are unclear how far this could accommodate the recent proposals for changes to fee planning arrangements including the use of corporate

strategy targets for instance. We would welcome further clarity about the nature of the proposed changes and how the Financial and Corporate Governance Code could operate alongside or instead of a Financial Memorandum. Responses from our members highlighted the need to agree exactly how this would be determined and what it would cover before legislation is put in place.

- 7.2. Further comments in relation to the specific questions raised by the Welsh Government are provided below:

**Question 19** - *Do you agree that HEFCW should be required to consult on the proposed Financial and Corporate Governance Code?*

- 7.3. Yes. Before exercising its discretion to impose terms and conditions under the current statutory framework (s.66 FHEA 1992), HEFCW is required to consult with any particular institution or representative body which appears to the Council to be concerned. This should continue to apply under any new statutory framework and would mean that HEFCW should be required to consult and follow the scrutiny process not just for the initial development of the Code but for any change that is proposed.

**Question 20** - *(a) Do you agree that following HEFCW's consultation on the draft Code that further scrutiny should be provided for?*

*(b) If 'Yes' then which of the options set out in paragraph 7.12 do you prefer and why?*

- 7.4. Yes. On balance, if implemented, we would like to see a requirement for HEFCW to submit its Code for external scrutiny and to take into account the outcomes. However, further consideration needs to be given to the implications of the National Assembly for Wales or the Welsh Government in approving the Code. Under current statutory framework, there are a number of restrictions on the terms and conditions that the Welsh Government could impose on HEFCW, and we would expect this to continue to be the same.

**Question 21** - *(a) Do you agree with the parameters of the proposed Code in paragraph 7.11?*

*(b) Should the parameters apply equally to all institutions and other providers with an approved plan in force?*

*(c) Should these parameters be set out in the proposed Bill with the operational detail of the Code left as a matter for HEFCW to develop?*

*(d) Under what circumstances, if any, should HEFCW's consent be required for regulated providers to enter into certain financial transactions?*

- 7.5. If the legal vehicle for regulating institutions is changed to fee-plan legislation as proposed, we believe that the current parameters for setting terms and conditions on financial and governance assurance should remain unchanged for universities. The continuing operation in parallel of the Financial Memorandum and grant-based powers under current legislation is an issue and may cause conflict between differing legal powers/duties. We would like to see a single set of terms and conditions for all universities and potentially all providers: the parameters should apply to all regulated providers and unregulated providers in receipt of funding.
- 7.6. An extension of the current parameters for determining financial and governance assurance arrangements without identical statutory restrictions in their exercise may impact on the NPISH status of universities. Careful consideration needs to be given to the restrictions to be put in place to avoid this.
- 7.7. There may be further scope for reviewing whether the current restrictions on universities in respect of certain transactions are necessary, however, particularly in light of ONS guidance on status/classification. It is less clear to us what restrictions should be in place for providers other than universities e.g. regulated private providers who hold degree awarding powers but not university title, where historically there have been no restrictions in place.

**Question 22** - *Should HEFCW be required to consult on and publish a statement of its intervention policy?*

- 7.8. Yes, if we move forward with these proposals. The consequences of intervention could have a significant impact on reputation, financial sustainability, partnership with other organisations and stakeholders, and ultimately students. A clear and transparent policy should be developed in consultation with the sector and published.

**Question 23** - *Do you agree that where HEFCW is satisfied that a regulated provider has demonstrated serious financial mismanagement that HEFCW should be able to withdraw approval of that provider's fee plan whether or not it has issued a direction to that provider to comply with the requirements of the Code?*

- 7.9. No, we would not support an extension of HEFCW's powers in this respect which we view as unnecessary. We would additionally not support any withdrawal without notice on grounds that this may seriously compromise an institution's ability to provide higher education for its students.

**Question 24** - *Are the safeguards set out at paragraph 7.16 appropriate and sufficient?*

7.10.No. In addition to the points raised above, we would add that a provisional decision should not be used as this could have a serious detrimental impact on the institution before a final decision is reached.

**Question 25** – *Do you have any related issues which we have not addressed?*

7.11. In the light of our above comments, we believe that further clarification and dialogue between the sector, the Welsh Government and the Funding Council is needed before we can give support to the proposals set out in the Consultation Document. We understand that these initial proposals are the start of the process of engagement, and we would expect the Welsh Government to consult on revised proposals as the result of further exploration of the issues and engagement with the sector. At this stage we recommend that further consideration is given to transitional arrangements that would allow immediate issues to be addressed while allowing the Welsh Government, HEFCW and the sector to work on a long-term solution. We would welcome greater clarity about the alternative approaches which the Welsh Government has considered and reasons for so far rejecting them. In the light of recent developments, however, we believe that further consideration should be given to alternative approaches, including for instance:

- *Continuation of the current statutory framework.* One option, which would in our view be preferable in the short term at least, is to continue to operate within the current statutory framework – and it is notable that England has recently announced their intention to do precisely that in their new Operating Framework. HEFCW is currently able to impose terms and conditions of grant through the Financial Memorandum subject to such terms and conditions as it sees fit with a number of important restrictions. Under current fee plan arrangements, HEFCW may also refuse to renew a new fee plan for failure to comply with fee limits. In both instances the financial remedies available to HEFCW are limited in their exercise to direct funding through grant, which the Welsh Government has identified as a key issue driving the current proposals. Despite a significant reduction in direct funding, however, there remain substantial levels of direct grant. Remedies in respect to the recovery of grant currently apply to the whole grant potentially and teaching grant is not specifically ring-fenced for use on teaching. To provide some perspective on this, for instance, the levels of recurrent grant for 2013/14 appear to range between around 7% to 20% of total income/turnover across the sector with all but one institution above 10%, although HEFCW may be able provide more recent turnover figures.<sup>14</sup> If non-recurrent grant from HEFCW is included the percentages are higher. The exceptional and unprecedented scale of the funding adjustments applied in 2008 to London Metropolitan University for over-claimed grant was applied at a rate of

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<sup>14</sup> See HEFCW Circular W13/09HE for grant allocations.

around 12% of turnover over three years and was sufficient to place the institution into a high-risk financial category. 10% of turnover is the maximum penalty that the Office of Fair Trading can impose on a business for a serious breach of law including those with aggravating circumstances. It is highly likely, in our view, that the level of financial leverage remaining to the Council would continue to act as a sufficient deterrent, and that any over spending from the public purse could be recovered.

- *Designation of courses for statutory student support.* A second option, which also initially appears to address the Welsh Government's priorities, is to explore the potential to use the power to withdraw designation of courses for statutory student support as a key control mechanism. In England, for instance, the Government has proposed this as the main mechanism for regulating alternative providers. At the moment, courses at universities are automatically designated. One possibility is that HEFCW is delegated the power to assign or withdraw course designation for purposes of statutory student support under the same conditions/restrictions that are currently in place to withdraw grant, loans or other payments to institutions. This would provide indirect financial sanctions/remedies that are limited to the levels of current fee grant payment whilst reflecting the fact that this income is not direct grant. On the face of it, this provides a potentially neater and less technically complicated approach which may help to address a number of key issues, including limiting the potential use of powers to their current scope/proportionate regulation, avoiding issues about NPISH status, and avoiding divergence in legislation between Wales and the rest of the UK.
- *Collaboration and working in partnership.* It is in the best interests of universities that rigorous assurance mechanisms are in place, and the ability for institutions and the Welsh Government to work through agreement should also not be overlooked – the work of the Higher Education Better Regulation Group, for instance, points to the potential use of bi-lateral agreements (potentially covering sanctions as well) as a flexible vehicle to provide appropriate levels of regulatory consistency and assurance.
- *Other options.* More generally, we would welcome the Welsh Government working further with the UK government to develop a solution that is sufficiently robust and flexible to allow policy differences within a recognisably UK-wide regulatory framework that preserves our international reputation. This would potentially allow change of all relevant legislation to be considered without issue in respect to devolved areas of legislative competence. Further options to be considered, for instance, could potentially include legislative provision to impose financial penalties, or relate to the treatment of income supported by fee grant, provided that the use of these could be appropriately restricted to avoid similar

issues relating to NPISH status and related issues. Pursuing these options with the UK Government may present a less resource-intensive and more cost effective option for the Welsh Government and also lead to a longer term solution across the UK sector.

## **8. Conclusion**

- 8.1. 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 Welsh Government and HEFCW in the further development of the proposals.

**Higher Education Wales  
July 2013**