

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 Wales:¹
 - Universities in Wales are more important to their national economy than universities in the rest of the UK.
 - More than 10,000 students from Welsh universities enter employment in Wales each year, and a first degree increases marginal earnings by around 27%.
 - More than half of Wales' investment in research and development comes from universities.
 - Universities are major employers in their own right with a turnover of around £1.3bn.
 - For every £100 million invested in universities a further £103 million is generated in the Welsh economy.
 - Due to the strong link between higher education and long-term economic prosperity, there is rapidly growing competition from countries across the world to invest in higher education as a priority.
 - Higher education is a catalyst for social mobility and universities in Wales have a strong track record of widening participation from under-represented student groups.
 - Universities in Wales attract a high proportion of overseas students, and are responsible for a significant share 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. From the outset we would like to emphasise our desire to be as facilitative as possible throughout the legislative process to assist in

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](#)).

ensuring that the result is high quality legislation. More detailed commentaries on the issues contained in the Bill are provided in Annexes A and B.

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. 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 Annex A to this submission. 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 a number of important provisions 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 does not 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 adequately serves the interests of students who are expected to pay the regulated fees.

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).

We also note that the student complaints legislation would continue to apply to the current list of specified institutions including universities, 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 into account and a 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.”

- 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. 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 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 before it is enacted. The use of powers to make subordinate legislation should also be reviewed to avoid unintended consequences in this respect (see Question 7 below and Annex B).

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 that the Bill is heavily reliant on all universities becoming regulated providers. For instance, the Bill removes HEFCW's duty to assess quality of funded institutions, so in absence of further legislation there would be no arrangements in place for unregulated providers. The Welsh Government's policy intent in relation to fee limits and the regulatory controls for unregulated providers remain unclear. The automatic designation of courses of regulated institutions for purposes of student support also remains subject to separate legislative provision.
19. At the same time, the framework appears to be unable to cater for some obvious potential changes in future. Postgraduate or research specialists could not be brought within the Bill's regulation; part-time specialist providers could only be brought within it by introducing fee limits. The greater regulatory complexity increases the potential for divergence in the sector. For instance, quality assurance would be the duty of HEFCW for regulated institutions, but the intention is that 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 as the existing and new legislation could potentially apply to the same institution if funded, e.g. in relation to financial assurance.
20. 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

21. In addition to the serious concerns we have raised above, we are concerned about the lack of protections against enforcement of fee plan requirements in this section (see Annex A, paras 23, 25-6 and 30 in particular). 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 in many instances do not ensure sufficient scrutiny or consultation (see further Annex B).

Quality assurance

22. 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 (see Annex A paras 33-5). There may also be an issue about the fact that existing courses delivered via franchise would not be covered, only new ones (see s.17 of the Bill). 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

23. 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.

24. 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 detail of the Code, subject to appropriate limits – 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.

25. 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?

26. 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 status as Non Profit Institutions Serving Households (NPISH) status for purposes of national accounting.

27. 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?

28. 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.

29. 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.

30. 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?

31. 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.

32. 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.
33. 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 where we would question the use of the negative 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. Further comments on the key areas of concern at present are provided in Annex B.
34. 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.
35. 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 substitute for identifying required changes to primary legislation on the face of the Bill.

36. 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.

37. 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.
38. 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.
39. 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.
40. 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.

41. 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.
42. 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?

43. 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.
44. 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.

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 disproportionate, 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 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 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 (or super-affirmative) resolution procedure should be 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.*

Comments on the powers to make subordinate legislation in the HE (Wales) Bill

General Comments:

- This is an extract from the live working document that HEW is currently using to identify the key areas where we currently have concerns about the use of regulations or the procedure which has been provided. It should be noted that this document is provisional only, and is submitted only as an aid to identifying the areas of key concern as we see them at this stage. This does not intended to imply that we agree with the procedure provided in the remainder of provisions
- Areas of key concern are indicated in red. Amber is used to indicate other areas of significant concern or areas that require further consideration or advice before we can reach a firm view. It should be noted that this relies on a number of key assumptions such as that all universities would become regulated providers.
- In deciding whether or not to use subordinate legislation and the appropriate procedure to adopt, it is noted in particular that regulations cannot be amended so must be accepted or rejected in full. The negative resolution procedure means that the legislation passes automatically, unless objection is raised. The affirmative procedure ensures that there is a vote on the regulation. A super-affirmative procedure also exists, which may add additional requirements e.g. consultation.
- We note that the procedure to be followed is set out by s.52 of the Bill, and all follow the negative resolution procedure, except:
 - s.13(1) - which follows the affirmative resolution procedure
 - s.37(2) – which follows the negative resolution procedure unless it amends the HE (Wales) Act 2015 itself in which case it follows the affirmative procedure
 - s.55(3) – which follows the negative resolution procedure unless it amends primary legislation in which it case it follows the affirmative procedure
 - s.56(3) (commencement orders) which follows no procedure- since commencement orders are not usually laid before the Assembly or scrutinised by Committee.

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Section	Provision	Appropriateness for delegated power, as stated in the Explanatory Memo	Form* and Procedure * (Regulations unless otherwise stated)	Reason for procedure, as stated in the Explanatory Memo	Comment
5(2)(b)	<p>Fee limit</p> <p>“a qualifying course is a course, of any prescribed description, that is wholly or principally provided in Wales”</p>	<p>The Bill provides for fee limits to apply only in relation to certain “qualifying courses”. Delegated powers are suitable because they will allow the descriptions of those courses to reflect both changes in student support and changes in the nature of courses provided. Section 28(6) of the Higher Education Act 2004 currently provides a power to make regulations describing “qualifying courses”.</p>	Negative procedure	Prescribes technical and administrative matters, which may be updated from time to time	<p>Initial risk assessment: <input type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/> N</p> <p>The current power in HEA 2004 s.28(6), is also subject to the negative resolution procedure. However, we note that the consequences of being a prescribed course are far more significant under this Bill. In particular, the Bill has been specifically designed to allow part-time provision to be brought within the fee and access plan provisions potentially at a later date which would be achieved through this power. It is questionable, whether the negative procedure is sufficient in this context to ensure that there is an appropriate level of scrutiny of such a change and its implications.</p>

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<p>6(1)</p>	<p>Promotion of equality of opportunity and higher education</p> <p>“A fee and access plan relating to an institution must include such provisions relating to the promotion of equality of opportunity or the promotion of higher education as may be prescribed.”</p>	<p>Delegated powers are suitable as the flexibility afforded by regulations is needed to ensure that the content of plans reflects any changes to the higher education sector. A similar power currently exists in section 33 of the Higher Education Act 2004.</p>	<p>Negative procedure</p>	<p>The detail of the regulations may change from time to time.</p>	<p>Initial risk assessment: </p> <p>Suitable procedure? </p> <p>The regulations in this area could have a major impact for universities, and is a key area where the regulations may have an impact on NPISH and charity status due to the comparative lack of protections for institutional and academic autonomy and the significant increase in the powers of legal enforcement, as identified in the Main response. This is a key area where a super-affirmative procedure would appear to ensure a more appropriate level of consultation and scrutiny.</p>
<p>7(3)</p>	<p>Approval of fee and access plan</p> <p>“Regulations may make provision about matters to be taken into account by HEFCW in making any determination in respect of approval or rejection of a plan under this section.”</p>	<p>Conditions concerning the approval or rejection of a proposed plan are set out on the face of the Bill. Suitable for delegated powers as it enable the Welsh Ministers to provide additional detail as to the matters that HEFCW are to take into account in determining applications and reflect the different types of institution that may apply for approval. A similar power exists in</p>	<p>Negative procedure</p>	<p>Prescribes technical and administrative matters, which may be updated from time to time</p>	<p>Initial risk assessment: </p> <p>Suitable procedure? </p> <p>The requirements set under these regulations could have a significant impact on institutions, determining their regulated status or providing significant policy leverage (see concerns above for 6(1)). As such they may also impact on NPISH and charity</p>

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		<p>section 34(5) of the Higher Education Act 2004.</p>			<p>status, as identified in the Main response.</p> <p>The Bill only provides that HEFCW must reject an institution which does not meet the institutional eligibility requirements and does not otherwise set out the conditions to be taken into account. The matters to be taken into account should be set out more fully on the face of the Bill, allowing amendment of detail. A super-affirmative procedure would appear to ensure a more appropriate level of consultation and scrutiny.</p>
<p>9(1)</p>	<p>Variation of approved plan</p> <p>“Regulations may provide for an approved plan to be varied.”</p>	<p>Certain functions of HEFCW in determining whether to approve or reject a proposed plan are set out on the face of the Bill. Suitable for delegated powers as the Regulations will allow for plans to be varied once approved and provide the flexibility to set out how applications for variations are made and the process that is to apply to a decision about the variation of a plan.</p> <p>A similar power exists in section 36 of the Higher Education Act 2004.</p>	<p>Negative procedure</p>	<p>The detail is technical and administrative in nature and may change from time to time.</p>	<p>Initial risk assessment: <input type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/> N</p> <p>See comments for s.7(3) to which this is closely related. Further policy detail and principles should be included on the face of the Bill or this should be dealt with through an affirmative or super-affirmative procedure. It is noted in particular, that a concern would be that variation is used to impose new requirements or changes mid-term which compromise performance of a plan which</p>

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					has already been approved, or has (in effect) retrospective application.
13(1)	<p>Power to make provision about failure to comply with general provisions of plan</p> <p>s.13(1)-(3) with omission as indicated:</p> <p>(1) Regulations may make provision as to steps to be taken by HEFCW if they are satisfied that the governing body of a regulated institution has failed to comply with the general provisions of the institution’s approved plan.”</p> <p>(2) The regulations may (among other things) make provision— [List omitted]</p> <p>(3) Regulations under this section may (among other things) amend or apply, with or without modifications, any provision made by or under this Act.</p>	<p>This power provides the Welsh Ministers with the flexibility to provide for the steps to be taken by HEFCW if they are satisfied that the governing body of an institution has failed to comply with the general provisions of its approved plan.</p>	Affirmative procedure	<p>Affirmative procedure is appropriate where regulations are able to amend primary legislation.</p>	<p>Initial risk assessment: <input checked="" type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/></p> <p>The provisions in this section may have significant consequences for universities, including charity and NPISH status. The affirmative procedure is proposed. We query if this should be more detailed on the face of the Bill, or the super-affirmative procedure should be used consistent with the comments on s.6 and s.7.</p>
49(4)	<p>Statement in respect of intervention functions</p> <p>s.49(1)-(4):</p> <p>(1) HEFCW must prepare and publish a statement setting out how they propose to exercise their intervention functions.</p>	<p>The requirement that HEFCW prepare and publish a statement which sets out how they propose to exercise certain functions is set out on the face of the Bill. The Bill also lists the functions in question. The Bill also</p>	Negative procedure	<p>There is a technical and administrative aspect to these regulations. The subject matter of these regulations may be updated from time to time.</p>	<p>Initial risk assessment: <input checked="" type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/></p> <p>This requires further consideration at this stage.</p>

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	<p>(2) HEFCW— (a) must keep the statement under review; 15 (b) may revise it. (3) Before publishing the statement or a revised statement, HEFCW must consult— (a) the governing body of each regulated institution, and (b) any other persons they think appropriate. (4) Regulations may make provision about— 20 (a) the preparation of the statement (including as to its form and content); (b) its publication; (c) the consultation to be carried out under subsection (3).</p>	<p>requires that HEFCW keep the statement under review and requires HEFCW to consult before publishing the statement or a revised statement. Delegated powers are suitable they will allow provision about the preparation and publication of the statement and the consultation that HEFCW is to carry out.</p>			<p>We note in particular that regulations may make provision about the content of the statement. This may have important practical consequences for how HEFCW chooses to exercise its functions which may merit a higher level of scrutiny than afforded by the negative procedure.</p>
<p>54(1)</p>	<p>Interpretation</p> <p>“fees” (“ffioedd”) means fees in respect of, or otherwise in connection with, undertaking a course, including admission, registration, tuition and graduation fees, and fees payable to an institution for awarding or accrediting any part of the course, but excluding— (a) fees payable for board or lodging; (b) fees payable for field trips (including any tuition element of such fees); (c) fees payable for attending any graduation or other ceremony; (d) any other fees prescribed for</p>	<p>Delegated powers are suitable as flexibility is needed to ensure that the definition of fees reflects changes to the way in which courses may be provided by the higher education sector.</p>	<p>Negative procedure</p>	<p>The detail is of a technical nature and may change from time to time</p>	<p>Initial risk assessment: <input checked="" type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/></p> <p>This requires further consideration. The ways in which this definition could be extended and its potential impact is unclear. We note that the inclusion in the definition section means that this power is automatically commenced when the Act takes effect. On a point of drafting principle, it is not clear from the act itself that this section establishes a</p>

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	the purposes of this section;				power, particularly since it is in an 'interpretation' section.
55(3)	<p>Consequential and transitional provision etc</p> <p>(3) The Welsh Ministers may by regulations make such— (a) incidental, supplementary or consequential provision, or (b) transitional, transitory or saving provision, as they think appropriate in consequence of, or for giving full effect to, a provision of this Act. (4) The provision that may be made by regulations under this section includes provision amending, repealing or revoking an enactment.</p>	<p>This enables the Welsh Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provisions in consequence of, or for giving full effect to, a provision of the Bill</p>	<p>Negative unless making changes to primary legislation in which case, Affirmative</p>	<p>Affirmative procedure is appropriate where regulations amend or repeal primary legislation. Negative procedure is appropriate for other regulations which make technical provision only.</p>	<p>Initial risk assessment: <input type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/></p> <p>Further investigation/advice is required to determine how far this clause could be used to make changes which are not minor and purely technical. This is a clear example of a Henry VIII clause. Particularly given that the National Assembly has powers to make primary legislation for education, it is difficult to see why this is needed. In general, we share the view that amendments to primary legislation should be identified on the face of the Bill and support the principle that changes to primary legislation should be subject to strong scrutiny by the National Assembly. Similar comments could be made in relation to the use of Henry VIII clauses for section 13 and 37.</p>
Schedule, paragraph 28(e)	<p>TRANSITIONAL PROVISION</p> <p>Plans approved under the Higher Education Act 2004</p> <p>s.28: The plan is to be treated during the</p>	<p>The Bill provides for plans approved under the Higher Education Act 2004 to be treated during a transitional period and for certain purposes as a fee</p>	<p>Negative procedure</p>	<p>Regulations are likely to provide for technical matters.</p>	<p>Initial risk assessment: <input type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/></p>

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	<p>transitional period as being a fee and access plan that has been approved under section 7, for the purposes of—</p> <p>(a) sections 10 to 12, 14, 15(1)(a) and 16; 30 (b) sections 17 to 23; (c) section 28(2); (d) sections 48(1)(d), 49(3) and 51(1); (e) any other enactment, whenever enacted or made, specified in regulations (an “applied enactment”).</p> <p>But this is subject to any provision made under paragraph 30.</p>	<p>and access plan approved under section 7. Delegated powers are suitable as regulations will provide flexibility for such plans to be treated as plans approved under section 7 for the purposes of other enactments.</p>			<p>This needs further consideration – in the Main response we highlighted an issue in relation to the appropriateness of retrospective application of the provisions of the Bill to existing fee plans. This power appears to increase the potential for other legislation to be applied to existing plans during this period and to increase uncertainty regarding transitional arrangements. We also pointed to the fact that which provisions will apply during the transition period will in part depend on commencement orders.</p>
<p>Schedule, paragraph 30(1)</p>	<p>Plans approved under the Higher Education Act 2004</p> <p>para.30: (1) Regulations may make provision about the application of a provision referred to in paragraph 28(a) to (d), or an applied enactment, to a 2004 Act plan during the transitional period. (2) The regulations may (among other things) provide that a provision or an applied enactment— 20 (a) is not to apply to a 2004 Act plan during the transitional period, or (b) is to apply with modifications.</p>	<p>Delegated powers are suitable as regulations provide the Welsh Ministers with flexibility to disapply provisions in or under paragraph 28 of the Schedule during the transitional period</p>	<p>Negative procedure</p>	<p>Regulations are likely to provide for technical matters of transition.</p>	<p>Initial risk assessment: <input type="checkbox"/></p> <p>Suitable procedure? <input type="checkbox"/></p> <p>This needs further consideration - see the comments in relation to s.28.</p>