

HEFCW Circular W14/02HE Fee Plans 2015/16 - Consultation on detailed proposals for change Submission from Higher Education Wales

1. About Higher Education Wales

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

2. The consultation

2.1. The Higher Education Funding Council for Wales (HEFCW) published its current consultation on detailed proposals for new fee plan arrangements from 2015/16 on 17 January 2014 requesting responses by 28 February 2014.¹ This follows HEFCW's consultation on the high-level proposals which ended on 5 March 2013², and whose outcomes were reported in April 2014.³ In response to concerns raised by HEW in its response, the implementation of the high-level proposals were delayed for a year to seek further legal advice and give further consideration to the sector's comments. For our comments on the proposals in general, reference should also be made to HEW's response to the high-level proposals.⁴ The following HEW response sets out a collective view from our Members on a few key areas of principle, and is not a substitute for responses from individual universities who will be addressing the detail of the consultation in their replies tailored to their particular circumstances.

3. Targets to be included

3.1. We understand that HEFCW has now received legal advice that appears to confirm that they may include all corporate strategy targets with the exception of those related to ITT, research council income, reconfiguration and collaboration and governance. This means that through the fee plans HEFCW will seek to set and enforce targets which relate not only to full-time undergraduate students who pay the fees regulated by the fee planning legislation, but to part-time, overseas, postgraduate or professional course students who are not subject to increased fees or new support arrangements.

¹ HEFCW Circular [W14/02HE](#).

² HEFCW Circular [W13/01HE](#).

³ HEFCW Circular [W13/10HE](#).

⁴ For the HEW response see: <http://www.hew.ac.uk/wp/media/2013-March-Consultation-High-Level-Proposals-for-Fee-Planning-from-2014-15.pdf>

- 3.2. The legal advice that we have received in a related context is that HEFCW seeks to rely on a generous interpretation of the regulations. We also note that under the Higher Education Act 2004, fee plans in England and Wales alike must include provisions to promote the equality of opportunity. However, 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 the equivalent plans in England.⁵
- 3.3. At this stage, HEFCW should note that we reserve our position in relation to the legal scope, recognising that the future regulatory framework is currently under review and wishing to work with HEFCW on the most pragmatic way forward in the current circumstances. If agreement is not reached with institutions on any matter of substance, however, and the Council seeks to rely on its interpretation in not approving fee plans, the Council should bear in mind the potential for future challenge.
- 3.4. On this note the Council will also need to be mindful that, whether or not within the scope of their strict legal powers, excessive regulatory control through the fee planning process or any other means could place the Office for National Statistics (ONS) classification of universities as Non-profit Institutions Serving Households (NPISH) and charity status at risk. The Council must ensure that the exercise of any fee plan controls is appropriate and proportionate. If necessary the sector would seek rulings on this from the appropriate authorities.

4. Assessment of targets and plans

- 4.1. It is essential, in our view, that HEFCW adopts maximum flexibility in its approach to implementing fee planning arrangements, particularly in the short term:
- The use of targets needs to be approached flexibly and with due sensitivity to their limitations. The extent to which the process for setting targets is sufficiently scientific, despite HEFCW's attempts (para.18), is questionable – and this may always be the case despite further data improvements. HEFCW's proposed process essentially consists of comparing a university's forecast to an equal contribution towards the sector target (measured in percentage change and overall share), and examining three years of historical data (paras 21-28). A robust target setting model would need to take into account a much wider range of factors including potential impact of changes in the external environment in Wales and across the border, underlying differences in institutional and student profiles, subject mix, and demographic trends in the population. We welcome that this is only intended as a first-step or a pre-cursor to dialogue and negotiation with universities. HEFCW rightly proposes to take into account a wider range of factors

⁵ <http://www.offa.org.uk/guidance-notes/how-to-produce-an-access-agreement-for-2015-16/> para. 18.

in reaching agreement on targets (see paragraphs 18 and 22 in particular) but there is no detail on how this would operate and it appears inevitably to leave much to subjective assessment.

- The limits of the available data need to be appreciated. In particular, the lag nature of reported data is a serious issue for target setting and monitoring. The main data sets used by the indicators (e.g. HESA data) are published up to two years behind the year to which they refer. Fee plan actions often take a number of years to have a real impact (e.g. employment, or access). It would be inappropriate to assess achievement against fee plans against years for which the fee plan actions can have no impact.
- We welcome HEFCW's recognition of the need to be realistic in the current uncertain and volatile environment in which HE is operating and assurance that the rationales for achievement or otherwise would be looked at very carefully in that context (para.36).
- We assume that, in line with the legal advice relied on by HEFCW, universities would have reciprocal flexibility to include expenditure against any of the incorporated target areas in their fee plans in demonstrating that universities have invested a 'reasonable proportion' of new fee income in 'equality of opportunity' and 'promotion of higher education' as required by current legislation.
- In particular, we believe that HEFCW needs to review its timetable arrangements to ensure they are sufficiently workable and flexible in the first year of implementation in particular, in order to provide the maximum opportunity to address individual universities' concerns. In our previous response, we pointed to an alternative approach which focused on pre-agreement dialogue rather than a submission and appeal process which could be usefully reconsidered for the future.

4.2. We would query the approach proposed by HEFCW in a number of areas:

- HEFCW's proposed starting point for negotiation is that universities should all contribute positively and equally pro rata towards the attainment of each of the corporate strategy targets. We believe this is unhelpful and unrealistic and sends the wrong signals to wider stakeholders. Overall positive growth in all areas is unlikely to be the case given population trends and full marketization in England, and will also vary markedly depending on institution. This also seems to be at odds with HEFCW's intention to recognise institutional diversity and diversity of mission.
- Universities must be free to set and pursue their own missions. International excellence is essential for a viable and vibrant HE sector in Wales, and the strong likelihood is that this in turn will depend on a diverse sector. Particularly given resource constraints and the competitive international environment, universities will need to make strategic choices about the balance and priority of different

objectives, and it will not be appropriate to expect all institutions to be travelling in the same direction on all indicators.

- A comparison to the UK average will also not always be appropriate, particularly as funding and regulatory change increase the potential for very different contexts between UK constituent countries.
- We note with concern, that HEFCW now intends to examine every institutional target relating to a corporate strategy indicator, irrespective of whether the sector target is forecast to be met or not. We question whether it is a good use of HEFCW's resources to negotiate with institutions on fine detail of its contributions. Unless there is a clear case for requiring intervention, this approach is a potential recipe for excessive control or micro-management of universities which could place the NPISH and charity status of universities at risk.
- HEFCW needs to exercise great care that its exercise of any powers are appropriate and proportionate and are not driven by objectives which do not belong to the fee planning legislation. In particular, HEFCW must ensure that it does not fail to reach agreement on targets and achievement over issues of detail which do not materially affect the overall contribution of a university and that any assessment of fee plans is taken on overall balance. In England, we note that the Government made it clear from the start in their original letter of guidance to OFFA that milestones set out in institutions access agreements are their own, and that "failure to meet milestones should not in itself be grounds for any kind of sanction", and that "It is theoretically possible, although very unlikely, that an institution's milestones are... so unambitious as to cast serious doubt on their commitment to safeguarding or improving access at all. The legislation therefore gives [Offa] the right to refuse to approve an agreement on that basis" (para 6.6.2).⁶ In Wales, HEFCW's powers should similarly only be used as a last resort for serious failure to comply with the fee planning regulation.

4.3. Finally, we are concerned about the proposed use of an independent panel to assess achievement against plans. Comments from our members have emphasised in particular the need for much greater clarity relating to the group's remit and highlighted the lack of detail on how this would operate. Attention has been drawn to the costs and issues of ensuring that there is appropriate political/stakeholder representation, and concerns expressed about how the recommendations of the external group would feed into the decision-making process and be viewed externally. It has been suggested that, if used at all, (a) the group should be advisory only and not make direct recommendations to Council - it is HEFCW's duty to assess the plans not an external

⁶<http://webarchive.nationalarchives.gov.uk/20100210151716/http://www.dcsf.gov.uk/hegateway/uploads/OFFA%20final%20guidance%20letter%20October%202004.pdf>

Panel's and this could create unnecessary confusion, (b) its remit should be limited to comment on the overall assessment and should avoid recommendations on detail/specific indicators. Comments to us also suggested that the use of a panel would perhaps be more appropriate for an appeals process - but noted that there is already a statutory appeals process which requires a panel. In our view, HEFCW should not proceed with this proposal until it has been further clarified and reviewed and alternatives explored with the sector.

5. Conclusion

5.1. At this stage many of the concerns we previously expressed in relation to the high-level proposals for extending the use of fee planning legislation remain. In the absence of more sophisticated data models, the 'scientific' approach is limited, and there is a serious reputational risk that the targets and university data will be misinterpreted or misapplied by external stakeholders. There is a danger that policy levers operate too narrowly through targets which were originally set for other purposes and are only partially representative of strategy objectives. There is a lack of comparable protection of institutional autonomy in the fee planning legislation compared to the legislation relating to grant funding. We are concerned that the extended use of corporate strategy indicators detracts from the fee plans role in providing students and the wider public with a clear understanding of the relation between the additional funding and its consequent investment. More generally, we would question how far management through a detailed set of targets of this nature is in line with the principle of proportionality in public regulation. At a time when recurrent grant allocations to universities in Wales is set to become less than 10% of their total income, there remain more fundamental questions about what regulatory issues these proposals address. We also remain concerned about the impact of these proposals and their exercise in terms of their impact on the NPISH and charity status of universities.

5.2. For these reasons we are concerned that HEFCW is seeking to extend the use of fee planning controls at this point, prior to the outcomes of the HE (Wales) Bill Technical consultation and the Diamond Review of HE. We strongly urge HEFCW to be flexible in their approach and responsive to the concerns that HEW and individual institutions have raised in this consultation, in working with the sector to manage a period of uncertainty and transition. In our view, the implementation of the new proposals for 2015/16 should again be postponed and current arrangements continued with for the time being, until the outcomes of the HE (Wales) Bill and future regulatory changes are clearer.

HIGHER EDUCATION WALES
28 February 2014