Consultation on the Financial Management Code
A response by Universities Wales

1. About Universities Wales

1.1. Universities Wales represents the interests of universities in Wales and is a National Council of Universities UK (UUK). Universities Wales' Governing Council consists of the Vice-Chancellors of all the universities in Wales and the Director of the Open University in Wales.

2. Introduction

2.1. The following response sets out our comments on the draft Financial Management Code published by the Higher Education Funding Council for Wales (HEFCW) on 23 June 2016 in Circular W16/21HE.[1]

2.2. Under the Higher Education (Wales) Act 2015, HEFCW is required to prepare and publish a code relating to the organisation and management of the financial affairs. It will apply to all regulated institutions (i.e. those with a fee and access plan approved by HEFCW) from 1 September 2017, with the exception of the Open University which is not treated as a regulated institution for purposes of the Code (and is expected to remain subject to a separate financial memorandum with HEFCW).

2.3. The statutory procedure set out in the Act require HEFCW to consult on a draft Code before submitting it to the Welsh Government for approval, accompanied by a report setting out the reasons for the terms of the draft and a summary of the representations received during consultation. The Welsh Government may issue guidance that HEFCW must take into account, and direct HEFCW to submit a draft by a specific date. If the Welsh Government approves the draft, it must lay it before the National Assembly for Wales. The Code is automatically passed by the Assembly after 40 days of being laid, unless the Assembly resolves not to approve it.

2.4. At this stage, we are not aware that the Welsh Government has formally set a date for submission of the Code to it, but its current schedules indicate that it is planning on the basis of receiving the first draft by September 2016. The period for consultation, however, was envisaged to take place by the end of July, which means

[1] See HEFCW Circulars, here.

that the current timescales for consultation and iteration between HEFCW and the sector are notably tighter than originally planned.

2.5. The exercise of HEFCW's new powers of intervention in relation to the Code are subject to a separate parallel consultation to which Universities Wales will also be responding.[2]

3. Key points

3.1. We understand that HEFCW has sought to mirror the current arrangements in the Memorandum of Assurance and Accountability published by HEFCW in December 2015, subject to further alignment with UK/HEFCE guidance and any necessary revision required to translate the Memorandum into the new regulatory framework. This approach is consistent with the Welsh Government's intention and assurances expressed during the passage of the Bill. We think this is the right approach and HEFCW has been largely successful in achieving it.

3.2. However, there remain a number of significant issues to address which are discussed in more detail below:

- The need for clarity about the relationship between the Code and the Memorandum of Assurance and Accountability, and redrafting to ensure that they address their respective functions. (See Q1 comments)
- Concerns that the dual function of the Institutional Risk Review process may cause difficulties with the operation of the Code and identifying relevant breaches. (See Q9 comments)
- HEFCW's power to appoint/dismiss the 'accountable officer' – the potential for this to place ONS/charity status at risk given the new regulatory context. (See Q3 comments)
- Borrowing approval requirements - the potential for these to place ONS/charity status at risk given the new regulatory context. (See Q5 comments)
- Further work required to ensure that the Code does not attempt to incorporate inappropriate requirements e.g. that relate to terms and conditions of grant under the 1992 Act. (See Q1 and Q10 comments).
- Potential extension of the role of the Wales Audit Office in relation to regulated institutions. (See Q1 comments)
- Concern that regulated institutions will be required to subscribe to HESA as currently drafted in the Code. (See Q11 comments).

[2] See HEFCW W16/23HE Consultation on Full Statement of Intervention, here.

- The need for greater consistency in various reporting requirements and intervention thresholds in the Code with a clearer relation to the statutory definitions of 'failure' and 'serious failure' to comply (see Q8 comments).

4. Balance of the Code

Question 1: Do you agree that the code strikes an appropriate balance between institutional autonomy and regulation?

4.1. Neither agree nor disagree.

4.2. In general, we think that HEFCW has been successful in its stated aims of basing the Code on the current Memorandum of Assurance and Accountability (MoAA) modified as necessary to account for different types of regulated provider, and in removing provisions only allowable under the Further and Higher Education Act1992. We also believe that this is in essence the right approach. However, we would make a number of further comments in relation to HEFCW's proposals set out below.

Relationship between the Code and the MoAA

4.3. Firstly, the proposed relationship between the proposed Code and the MoAA, needs to be clarified urgently. As we see it, the provisions in the Act relating to the Code do not replace HEFCW's powers to apply terms and conditions of grant.

4.4. In so far as institutions are publicly funded, i.e. in receipt of Funding Council grant, we would expect accountability for that funding to continue to be covered by the MoAA. Contrary to the suggestion in the Consultation documents it will not necessarily be the case that regulated institutions are 'publicly funded' in the current statutory definition, i.e. receive Funding Council grant (p.2, Annex A). The Further and Higher Education Act 1992 remains HEFCW's only source of statutory powers in relation to institutions which it funds but are not 'regulated institutions'. This will automatically include, for instance, any institution which deals exclusively with part-time or postgraduate students, or whose activities include research only. The Act also specifically provides that the Code will not apply to the Open University.

4.5. Our assumption at the moment is that the Code does not directly replace the current MoAA, which would presumably continue to apply to all funded regulated institutions in addition to the Code, unless otherwise provided. This means, however, that the provisions of the Code and MoAA overlap as currently drafted.

4.6. From practical perspective, it would be very useful for there to be consolidation of requirements between the Memorandum of Assurance & Accountability and the

Financial Management Code, since there is much potential overlap. However, this is not always the case or appropriate.

4.7. On our view the two should be revised together and drafted to ensure that their respective coverage is appropriate and consistent. This could potentially be facilitated, for instance, by the future MoAA providing that compliance with relevant Code provisions is a term and condition of grant for regulated institutions who are publicly funded.

4.8. On the whole, HEFCW appears to have managed the difficult task of removing or rewording provisions in the MoAA that would not fall within the legal scope of the Code.

4.9. There are a number of instances, however, where provisions in the Code look as if they more rightly apply to funded institutions rather than regulated institutions and belong to the MoAA instead still. We note in particular, that references to public funding (i.e. grant funding) have been omitted, but not always replaced successfully. See, for instance, our comments in the Appendix on paragraphs 23, 79, 93, and Annex A para 2(g). On the whole references to value for money (VFM) have also been omitted (e.g. it is no longer specifically listed in the definition of 'high risk' in para 18), but a number of references retained and the rationale for this is not always clear or consistent. We note that the MoAA reflects the particular duties that HEFCW has in respect of ensuring the value for money in the use of public funding and the public accounting requirements which accompany that, i.e. grant funding under the 1992 Act.

<u>Wales Audit Office and public audit arrangements</u>

4.10. We are also concerned that the translation of the MoAA into the Code is in danger of inadvertently extending the role of the Wales Audit Office and the reach of public sector auditing arrangements beyond their current statutory basis (see our comments on paragraphs 16, 24, 42, 70, and 160).

<u>Increased regulatory control and risk to charity and ONS status</u>

4.11. A second key issue is that, although the subject matter of the Code may not have changed very much from the MoAA, the range of powers of enforcement and sanction that HEFCW will have it its disposal under the 2015 are significantly more varied and greater. This means that it is not appropriate in all instances to simply mirror existing content.

4.12. Governing bodies, must comply with any requirement imposed by the Code, and must take into account any guidance contained in it (s.27). HEFCW also gains significant powers to enforce the Code under the Act:

- If HEFCW is satisfied that a governing body has failed *or is likely to* fail to comply with a requirement imposed by the Code, HEFCW may (subject to procedural requirements and further detail):
    - direct a governing body to take specified steps for the purpose of dealing with or preventing a failure to comply (s.32). If it is satisfied that a governing body has failed to comply with a direction, HEFCW may apply to enforce it by injunction, or refuse to approve a new fee and access plan (s.37).
    - give a governing body advice or assistance which it must take into account (s.33)
    - carry out a review of compliance (s.34)
    - direct a governing body to provide information, assistance or access to facilities (s.35), enforceable by injunction.
    - authorise a person to enter premises and inspect, copy and carry away documents (s.36)
- If HEFCW are satisfied that there has been a serious failure to comply with the Code, it may withdraw approval of a fee and access plan (i.e. remove regulated institution status) (s.39)

4.13. We draw attention to a number of points in the Appendix, where the proposals may need to reviewed in the light of the change of regulatory nature. In particular, see our comments below and in the Appendix on the borrowing/financial commitment approval requirements (paras 89-91), and the power to remove the 'accounting officer' (paras 58-60) which raise potentially significant issues in relation to ONS classification and charity status.

Reporting requirements

4.14. The Code places a significant number of reporting requirements on institutions. For instance, para 13 (serious concerns about organisation and management), 43 (actions or policies appear incompatible with Code requirements), 49 (violation of Nolan principles), 61 (any event or forecast event with a material adverse impact on the financial position of the institution). These all have different thresholds. Assuming that the Code clearly establishes these as requirements (see our comments on the individual paragraphs), they should all fall under a uniform test e.g. that there is or is likely to be a failure/serious failure to comply with Code.

4.15. In aggregate these appear unnecessarily burdensome: see also reporting requirements in 56 (deviation from expected maximum term of office for independent

governors), 76 (notification of changes in senior roles), 86 (negative net cash forecasts), 146 (removal or resignation of internal auditors).

5. Financial viability definition

Question 2: Do you agree that the definition of financial viability should be consistent with 'going concern' over the short to medium term?

5.1. Agree.

5.2. In general, we welcome this approach. As the Circular points out the terms is generally well-understood. HEFCW may wish to take the further comments into consideration however.

5.3. In accounting circles, the 'going concern' concept is recognised as one of the fundamental accounting principles: see in particular the International Accounting Standard (IAS) 1 and FRS 102. The accounting concept implies that the business will continue in operation for the foreseeable future. A business will be a going concern unless there is an intention to liquidate or cease the business or no realistic alternative. On this assumption, assets on a balance sheet are generally valued at cost rather than net realisable value on break-up. Any material uncertainties that may cast significant doubt on an entity's ability to continue as a going concern must be disclosed.

5.4. HEFCW could consider strengthening their proposed definition to capture 'intention' as well. Particularly, where regulated institutions form part of a group structure, the intentions of an institution or a subsidiary and its parent will be important. We are aware in particular of the potential for regulated institutions to include a wide range of different institutions in future.

5.5. HEFCW propose that this be applied to 'short to medium term' which is not clearly defined, but illustrated by a few potential examples (e.g. to cover a three year degree programme). The key requirement must surely be that a regulated institution will be able to meet, in so far as is reasonably foreseeable, its obligations under the approved fee and access plan so long as it remains in force or will be treated as such under the Act. This would mean during the period of the plan, and beyond it in so far as exit arrangements provide for student protection etc. Its financial viability above and beyond this would arguably be irrelevant, however, and we would like to ensure that regulated institutions are not placed at risk of being held in breach of the Code when their continuation as a going concern at a point in the future, on a voluntary basis or otherwise, does not affect their plan commitments. We suggest that this could possibly be redrafted to take this into account.

5.6. The last point highlights the importance of ensuring that there are clear and appropriate exit arrangements in place to ensure that students in particular are covered in event of an institution ceasing, voluntarily or otherwise, to be a going concern.

5.7. One of the most striking points of contrast between regulatory arrangements for England and Wales is that England focuses less on financial viability and more on ensuring that there are appropriate exit arrangements in place. As currently proposed in the Higher Education and Research Bill, for instance, financial viability is not even a requirement in itself. The Office for Students may impose access and participation plan conditions for instance that include student protection plan conditions, and public interest governance conditions (clause 13). The emphasis in Wales is on the prevention and avoidance. Arguably, however, there should be greater emphasis on making arrangements to deal with financial non-viability. We would welcome further discussion on appropriate exit plans including contingency arrangements and student protection measures, that could help to avoid damage to sector reputation in the event of an institution ceasing to be a going concern.

5.8. On a more minor note, it would be helpful to include a definition of 'going concern' in the glossary. Care also needs to be taken not to confuse the precise interpretation of going concern as used in the financial statements with the term as used in the context of the Code, if different.

5.9. We note that the term 'financial viability' is not used in the Act which only states that the Code relates to the organisation and management of financial affairs. The HE Fee and Access Plan (Wales) Regulations 2015 made 'financial viability' one the matters that HEFCW must take into account when approving a fee and access plan. The Welsh Government's guidance published in March 2016 (para 4.38), which HEFCW is required to take into account, also refers to financial viability in relation to section 39 (the power to withdraw approval of a Code): 'where it seriously threatens the continued financial viability of an institution'. HEFCW appears to have accordingly adopted the concept of 'financial viability' from these.

5.10. However, the Welsh Government guidance also refers to 'sustainability'. According to the Welsh Government guidance, the purposes of the Code include ensuring that institutions "are well run, have effective and efficient financial management arrangements in place and are sustainable for the future. The Welsh Government consider this essential in order to protect the interests of students, safeguard public funds and preserve the reputation of higher education in Wales."

5.11. From discussions with HEFCW we are aware that much has been made of the distinction between viability and sustainability. In translating from the MoAA to the Code, HEFCW has systematically adopted the term 'viability' in preference to 'sustainability' (see e.g. para 87, 108, 109), and it is important to ensure that there is consistency between matters taken into account in approving a new plan as required by regulations and ongoing Code requirements under the Act. However, in our view this does not mean that HEFCW must narrowly distinguish between viability and sustainability where it is not appropriate to do so.

6. Appointment of accountable officer

Question 3: Do you agree that the governing body should appoint an officer to be accountable to HEFCW for compliance with the terms of the Code?

6.1. Neither agree nor disagree.

6.2. In our view, the Board of Governors should appoint the accountable officer. The key issue is whether HEFCW should be able to dismiss her/him.

6.3. In this respect, we reiterate some of the concerns that we expressed in relation to the proposed revisions to the Financial Memorandum in September 2015 that led to the current provisions in the MoAA. Under previous provisions, the head of the institution was required to be the 'designated officer'. The role was replaced with the role of 'accountable officer' in the MoAA, aligning with arrangements in England. Both the 'designated officer' under the previous arrangements and 'accounting officer' in the new MoAA were responsible to the governing body for ensuring that conditions in the Financial Memorandum are complied with, and providing HEFCW with assurances to that effect. However, there were two key differences. Firstly, another senior officer could become the 'accounting officer'. Secondly, HEFCW would be able to make the governing body remove the role from a holder and appoint another senior officer as the accountable officer in extreme circumstances.

6.4. The concern we raised is that, despite the assurances that this is not intended to influence the employment relationship, the effect of exercising this provision could arguably be tantamount to constructive dismissal. The Code describes the role of the accountable officer as accountable for the organisation and management of the institution's financial affairs and for reporting to HEFCW on behalf of the institution's governing body (see the Glossary). The Articles of Government for a number of institutions, however, state that the Board of Governors shall be responsible for the appointment, assignment, suspension and dismissal of the Vice-Chancellor. In turn they state that the Vice-Chancellor is responsible for the organisation, management, direction and leadership of the institution, and for the managing its

budget and resources. This leaves room for significant concern that this could raise potential issues about the independence of the institutions in making appointments and to potential conflict with the Articles and Instruments of Government.

6.5. Our Members expressed their support on balance for aligning arrangements with England in relation to the revisions to the Financial Memorandum in September 2015. We would again ask, however, that HEFCW satisfies itself that retaining this provision in the new regulatory context will not have unforeseen consequences. The very different regulatory contexts for applying these provisions needs to be fully considered. The revised Financial Memorandum in England has been largely applied on a voluntary basis in absence of significant grant funding for institutions, and the potential for withdrawal of grant funding (if any) provides limited leverage; in Wales, the Code is supported by a range of regulatory sanctions including being enforceable by injunction. For charity law purposes and purposes of ONS/national accounts classification, the underlying issue is the extent of government control. Although the Code is not seeking to change the MoAA as such, it could be seen as significantly changing the balance of control.

6.6. If there is any doubt on this issue, this provision should be left out or replaced with a version that is more clearly compatible with constitutional and charity law requirements. There are a number of options for this. One would be to revert to arrangements similar to those used in the 2008 version of the Financial Memorandum. Another approach, suggested in our comments in the Appendix, is that the power to refuse approval is clearly only exercisable as an extreme measure of last resort (which ONS comments have elsewhere previously suggested could be an acceptable approach): this would require significant work to revise the current text accordingly.

7. Governance of financial affairs

Question 4: Do you agree that the included requirements relating to governance are those that are necessary for the proper organisation and management of financial affairs?

7.1. Agree.

7.2. On the whole we agree and recognise that these are largely mirrored in the MoAA. For our comments on the potential conflict of the borrowing approval requirements and senior accounting officer appointment/removal see above. These are areas of potential conflict with the governance arrangements that need to be reviewed carefully.

7.3. Otherwise, in particular, we question whether the reporting requirements in relation to all changes in the senior executive team, remains still too onerous and is necessary in practice. See further our comments on the definition provided in the Glossary in the Appendix. If this effectively equates to higher paid staff, this will relate to more than a hundred posts at some universities in Wales.

7.4. One difficulty in applying the Code is that it cannot be assumed that regulated institutions are publicly funded or treat them as such. It can assume that all regulated institutions will be charities – though not necessarily HE charities (there is a question whether the current SORP would apply in all instances – which is perhaps why references to it in the MoAA were removed from the Code). We can't assume that a provider that is recognised as an institution for purposes of the Act will be recognised as an institution for purposes of funding – this is particularly relevant in the case of group structures involving parents and subsidiaries. It is possible that a subsidiary is recognised as an institution for purposes of the Code/Act but not for purposes of funding. In other words there Code will apply to the subsidiary directly but the MoAA only as part of the group structure.

7.5. There are some parts of the Code that we would like to consider further in this respect. For instance, there are potentially different legislative requirements in respect of audit arrangements e.g. ERA 1988 (see comments on para 151) and Companies Act. Some may not be covered by either (the WG envisaged the possibility of an charity that provides HE in Wales becoming regulated institutions – see also our comments on group structures). See our comments on the Glossary definitions of governing body and governing documents in particular.

7.6. The internal structure of an institution can also vary significantly, and we need to make sure that appropriate assumptions or provisions have been made. See paras 116 and 117 (assumptions about appointment of internal and external auditors and the committee structures and roles in this). We note that the Code requires a regulated institution to have an audit committee (para 119), and an internal audit function (para 134). A new requirement relating to the composition of the audit committee is that the regulated institution must have at least one member with relevant experience gained in a finance or audit role (para 123). It provides that a regulated institution should have a finance committee or equivalent (para 130), although it does not make this a requirement (para 131). Where an institution does have a finance committee or equivalent, the Code makes it a requirement that there is not cross-over in membership between the finance and audit committees.

8. Borrowing permission

Question 5a: Do you agree that the proposed approach of setting the threshold to be commensurate with 5x EBITDA (once more data is obtained) is appropriate?

8.1. Neither agree nor disagree.

8.2. First of all, it is not clear what is actually being proposed in terms of limits. Annex B, for instance, refers to a 'financial commitments' threshold (e.g. Annex B title, C2), but elsewhere references are made to the 'borrowing threshold'. It is unclear from the Code whether we are in fact talking about borrowing limits, financial commitments limits (in so far as they may be different), or both.

8.3. Paragraph C8 in Annex B defines 'financial commitments' as those that are on the balance sheet, in accordance with FRS102. 'Financial commitments' is not a term that is defined or used in the FRS 102 (or indeed another applicable accounts guideline e.g. SORP, in so far as we are aware). At some points in the Code financial commitments are discussed as if they are equivalent to financial instruments (which are defined in the FEHE SORP as a 'contract that gives rise to a financial asset of one entity and a financial liability or equity instrument of another entity'), at other points as if they are equivalent to liabilities or simply significant investments. The term 'commitments' has a specific meaning in a number of contexts (e.g. pensions commitments) but is also used to define a wider set of obligations than covered by strict contract. The Glossary in the Code implies that the term is defined by the Companies acts. However, the only reference is the Companies Act 1985 which refers to 'other financial commitments' as a catch all 'relevant for assessing the company's state of affairs'. The general public would probably normally understand a financial commitment as a large investment which would significantly affect or tie up resources over a significant period of time. The nature of the financial commitments is very unclear from the Code. At the moment, we assume that the threshold is intended to relate to borrowing, and not to all forms of investment. However this needs to be confirmed and clarified in the text of the Code.

8.4. It is a concern that HEFCW has not confirmed the proposed threshold and related details at this stage and that it is not yet subject to consultation. We assume that HEFCW will seek to ensure that there is consultation on this before the Code is put forward to the Ministers for approval, in line with statutory requirements, as we would wish to avoid any potential objection on grounds of process.

8.5. As commented in response to the consultation on revisions to the Financial Memorandum in September 2015, we agree with the principle of aligning practice with England as far as possible and appropriate. The use of EBITDA (Earnings Before Interest, Tax, Depreciation and Amortisation) has its own strengths and

limitations, however. Some concerns have been reported to us at about the appropriateness of the measure. In particular a concern was raised about the potential volatility of this test when applied to individual institutions in practice. In turn there is a risk that institutions in the sector are deterred from borrowing at an appropriate level.

8.6. It is important to ensure the agreed metric appropriately takes into consideration the underlying risk of financial commitments previously deemed off-balance sheet which now come onto balance sheet under FRS102. EBITDA will need to be carefully defined to ensure it reflects underlying financial performance and those funds which are considered 'free cash' to service the institution's financial commitments. That said we believe we need to follow the guidance that should be issued by FSSG as to what measure they will be using for financial sustainability. If HEFCW are not confident of the appropriate threshold at this stage, they should explore including a provision in the Code that allows a margin of adjustment within very clear and specific boundaries, after consultation with the sector.

8.7. As in the current MoAA, we note that the threshold is not intended as a limit, but as the trigger-point for obtaining written permission for increasing financial commitments above this level. We are aware, however, that the ONS has previously highlighted that the requirement to obtain approval before making significant investments or borrowing, or that prevent an institution from ending its relationship with the government are key indicators of public sector control. The key factor that was cited by the ONS as determining a reclassification of the FE sector to central government in 2010 was the need for borrowing approval. The issues over borrowing consent in the statutory provisions has also led to changes in the statutory provisions in this respect e.g. the Higher Education and Research Bill that will remove such requirements for higher education corporations in England, and for FE colleges in Wales the Further and Higher Education (Governance and Information) (Wales) Act. Given the increase of enforcement powers and sanctions that come with placing this in the Code whose status is similar to legislative provisions in many respects, HEFCW will need to make sure that this provision does not place ONS classification or NPISH status at risk.

8.8. We note in particular that focus of the MoAA when assessing borrowing permission is on 'good value' and this has simply been translated into the Code. In our view, the emphasis under the Code should be financial viability, and to avoid ONS/charity issues the Code must provide that permission would only be refused in extreme cases as matter of last resort. See, for instance, our comments on paragraphs 89 to 93 in the Appendix. If there is any doubt on this matter, the approval requirement should be amended to ensure that it is clearly compatible or removed altogether.

Question 5b: Do you agree that we should consider maintaining parity with the borrowing threshold in England, provided that the threshold is acceptable to us?

8.9. Agree.

8.10. We agree with HEFCW that a consistency of approach with other UK funding councils where possible and appropriate. However, the specific proposals and any future revisions to them should be the subject of formal consultation. The difference in regulatory context also needs to be taken into account.

9. Acting in the student interest

Question 6: Do you agree that HEFCW has a responsibility to act in the student interest in respect of financial requirements?

9.1. Neither agree nor disagree.

9.2. HEFCW's duty in relation to the Code, as set out in the Act does not specifically refer to students (in contrast to the arrangements for quality assurance and the fee and access plan provisions). The Explanatory Memorandum which originally accompanied the HE (Wales) Bill identified a range of interests that the assurance of financial management was intended to protect including the use of public funds and the interests of students, taxpayers and the Welsh Government.[3]

9.3. We agree with the importance of the role of the Code in protecting student interests. See our comments above on the need to identify exit arrangements more clearly and our comments in the Appendix on para 78 (student complaints), in particular.

9.4. However, in terms of interpreting HEFCW's legal duty, it would probably be unwise and unnecessary in our view to gloss on the statutory provisions in this respect or to view this as a separate duty of its own in relation to the Code. See the Appendix for our comments on paragraph 52, in particular.

10. Audit Code of Practice

Question 7: Do you agree that the Audit Code of Practice is fit for purpose?

10.1. Agree

[3] P.41

10.2. On the whole we agree, that the proposed Audit Code of Practice in the Code is fit for purpose. However, there are a number of issues that HEFCW will need to consider further.

10.3. In particular, the Audit Code of Practice outlines a regulated institutions duty to report any 'serious weakness'. From paragraph 171 of the Code it is clear that a serious weakness is not automatically considered a breach of the Code, and that a serious weakness would only lead HEFCW to conclude that there has been a breach in the Code in rare circumstances. It is not all clear how this fits with the wording of the Act, which distinguishes between 'failure and serious failure', and how consistent this is with the approach taken elsewhere in the Code.

10.4. A potential weakness of the proposed Audit Code of Practice, which is based on the current MoAA arrangements, is that it makes assumptions about the future shape and constitution of regulated institutions. In particular, we note that the HE and Research Bill will mean that the constitutional arrangements of higher education providers, at least in England, have much greater variation. See our comment, for instance, on para 119 in the Appendix.

11. Exercise of discretion in invoking the Statement of Intervention

Question 8: Do you agree that HEFCW should exercise discretion in respect of breaches of the Code, rather than automatically invoking the Statement of Intervention?

11.1. Yes.

11.2. As we interpret the Act, HEFCW must exercise its discretion, except for the list of mandatory cases set out in the Act. The key issue is how that discretion will be exercised. In this respect, we welcome the clear declaration (para 20) that HEFCW will act reasonably at all times.

11.3. The Act distinguishes between failure and serious failure in relation to the Code (see our analysis in Q1 above).

11.4. The Code sets the provision that allows HEFCW to exercise its discretion in paragraph 5: 'HEFCW may decide that it does not need to intervene through the Statement of Intervention where it considers that the effects of the failure are not severe or that the institution's proposed actions to remedy the failure are acceptable to HEFCW'. However, this could perhaps be worded more clearly. It is not clear what 'severe' would constitute in this context.

11.5. At the moment there appears to be a lack of consistency between the approach and thresholds for intervention set out in the draft Full Statement of Intervention and the Code. FSOI para 117 (p.55) for instance suggests a different formula for exercising discretion on intervention (see also FSOI para 139, 141 and 145 – we will comment more fully on this in our separate submission to that consultation).

11.6. In particular, in the Code and FSOI we need to be clear about what will be treated as a 'serious failure to comply with the Code', which is the requirement for exercise of powers to withdraw plan approval under s.39 of the Act. The Code identifies that some matters can be more serious than others (para 112). The current Code does not, however, refer to 'serious failure' (as in the Act) or 'serious non-compliance' (as in the FSOI para 141 – also para 139 FSOI (p.61) and 141 (p.62)). Confusingly the Code refers instead to serious weaknesses (paras 62, 164-173, 171, 172) and serious concerns (para 13).

12. Link between risk and Statement of Intervention functions

Question 9: Do you agree that the linkage between the risk assessment process and the Statement of Intervention is clear and appropriate?

12.1. Disagree.

12.2. We are concerned that the Institutional Risk Review appears to be conflating two objectives in a way that could cause difficulty: risk of financial non-viability, and risk of non-compliance with the Code requirements (see our comments in the Appendix on para 18).

12.3. These objectives are different in nature and separate assessments may not lead to the same conclusion. Non-compliance does not necessarily indicate risk to financial viability. Similarly, risk to financial viability does not indicate non-compliance - other than in respect of the duty to remain financially viable as set out in para 27.

12.4. We would like to avoid confusion for external audiences for whom the previous risk assessments have provided useful information on the financial health of an institution.

12.5. In our view this means keep the monitoring of viability/compliance separate and or as treated as separate assessments within a single reporting framework, renamed e.g. to Institutional Risk and Compliance Review.

12.6. We have highlighted above (under Question 8) the need for greater consistency with FSOI outline of intervention.

13. Regulatory requirements and good practice

Question 10: Do you agree that the Code strikes an appropriate balance between 'must' and 'should' provisions?

13.1. On the whole the Code does strike an appropriate balance in our view. However, this is not always straightforward and there remain a significant number of instances to review. See, for instance, our comments in the Appendix on paragraphs 22, 36, 38, 40, 42, 44, 91, and 124.

13.2. More generally, we are not sure that the Code sets out the legal nature of the provisions of the Code clearly enough. Institutions must take into account the provisions of the Code even if they are not marked 'should'. There appears to be no middle ground in the Act, i.e. that provisions are either requirements or guidance. If HEFCW intends provisions to be purely informational in nature and to not carry the force of statutory guidance this should be clearly stated/provided (see comments on para 6 in the Appendix in particular). There are number of instances in the Appendix where the nature of the provisions and status needs to be clarified in this regard.

14. Other matters

Question 11: Do you have any other comments?

14.1. A list of comments in page order is included in the Appendix to this response.

14.2. In particular the following points are noted:

- HESA subscriptions. It is in our view inappropriate to require regulated institutions to subscribe to HESA as currently worded. See our comments and suggestions on paragraph 71 in the Appendix.

- Indicators and monitoring. HEFCW may wish to review the Code requirements for consistency in relation to financial viability indicators, and monitoring and reporting requirements (e.g. para 32, 86 and 88(f) – see comments in Appendix).

- Interpretation of the Code. Given the quasi-legislative status of the Code and the gravity of the implications that could follow from applying different interpretations, we question whether it is appropriate for HEFCW to provide that it shall be the final arbiter on all matters of interpretation (para 10). See further our comments

on para 10 in the Appendix. The removal or amendment of this provision, including an appeals/resolution process which allows for independent adjudication should be investigated.

Universities Wales
August 2016

Appendix

Draft Financial Management Code – list of issues in page order

Paras 1-2. The MoAA includes a paragraph highlighting its relationship with previous versions of the Financial Memorandum. The Code should clearly state its relationship with the current MoAA.

Para 6. The Act does not appear to provide for a middle ground: provisions are seemingly either requirements or guidance. This could be interpreted to mean that institutions must take into account the provisions of the Code even if they are not marked 'should'. HEFCW needs to distinguish clearly in the Code not only between 'must' and 'should' provisions, but between statements that are merely informational or declaratory in nature and those which, for purposes of the Act, will be treated as 'guidance'. There should be a clear statement to the effect that unless marked with 'should' the provisions of the Code are not to be treated as 'guidance' for purposes of the Act. Alternatively, the Code needs to be redrafted to ensure that it only contains 'must' and 'should' provisions.

Para10. Matters of interpretation will have a significantly increased impact and importance under the 2015 Act, and could trigger a much wider range of different regulatory actions. It is no longer appropriate for HEFCW to reserve itself the position of final arbiter on all matters of interpretation, as it currently does under the MoAA. Given the general applicability of interpretation and need for consistency in the way it is applied, we also question with matters of interpretation should be resolved in dialogue 'with the institution concerned' only.

Para 13. The Code provides that HEFCW CEO must inform an institution's governing body if (s)he has 'serious concerns' about the institution's organisation and management. This is adapted from para 17 of the MoAA. However, the test of 'serious concerns' is not directly related to the purpose of the Code and the 2015 Act requirements. The 'serious concerns' also does not appear to be a term that is used in the FEHE SORP or applicable accounting guidance and standards either. FRS 102, for instance, requires an entity to disclose '**material** uncertainties related to events or conditions that cast significant doubt upon the entity's ability to continue as a going concern' (FRS 102, para 3.9). A test which is consistent with the tests under the Act/used elsewhere would be preferable. Note that the accountable officer must report anything that appears to be 'incompatible with a requirement of the Code' to HEFCW, which appears to be a lower threshold (para 43).

Para 14, footnote 4. This reference should be to ss.30 and 31, not s.32 of the 2015 Act.

Para 16. It is not clear why HEFCW would need to share the Institutional Risk Reviews with the Wales Audit Office (WAO). Provision is made for this under the MoAA (para 19), on the basis that these relate to public funding i.e. grant funding. The WAO does not have direct powers/duties in relation to universities at present, however, only in relation to HEFCW. The Code should not extend the role of the WAO by treating all university income as public funding – see comments under Question 1.

Para 18. The proposed Institutional Risk Review arrangements and definition of 'high risk' appear to be conflating two different risks: financial risk/viability, and risk on non-compliance. These could be very different in nature with very different impacts e.g. failure to obtain consent before borrowing. The nature and objectives of the IRR need to be reviewed/clarified: keep the monitoring of viability/compliance separate and or rename the report e.g. to Institutional Risk and Compliance Review. Non-compliance does not in many cases indicate risk to financial viability. See discussion of our concerns with this under Question 9.

Para 21. This refers to the Framework Document. We note that this currently deals with Grant-in-aid, i.e. HEFCW's role under the 1992 only.

Para 22. Presumably this is intended to be guidance, as it doesn't state 'must'?

Para.23 (stewardship of funds). This is based on the wording of the MoAA, except that funding in the MoAA clearly referred to grant funding under the 1992 Act. The provisions are unclear and potentially inappropriate in this context, however. What are 'funds' in this context? Also, what is the 'purpose intended' outside of the clear context of e.g. terms and conditions of grant? HEFCW needs to clarify whether para 23 is informational/declaratory or guidance in nature. As drafted, these provisions are too vague and broad to be guidance for purposes of the Act. We assume that the MoAA will cover any grant, and this should not attempt to cover anything else other than organisation and management of financial affairs. This illustrates the need to HEFCW to review how the Code and the MoAA will operate alongside each other.

Para 24. See comments on WAO under Question 1. The WAO does not have direct powers/duties in relation to universities at present, however, only in relation to HEFCW. The Code should not extend the role of the WAO by treating all universities as a bodies subject to public audit.

Para 24. See para 16 comment (and Audit Comitteee of National Assembly for Wales).

Para 25. This provision was not in the MoAA. Given that the Code is now quasi-statutory and cannot be changed easily by HEFCW (as provided for by the MoAA), we suggest that this should be omitted or less specific. Alternatively, the obligation should be amended to 'should be aware of' rather than 'should take into account'. While the guidance from BUFDG , the Association of Colleges, and Leadership Foundation are all useful, they should not be elevated to the status of statutory guidance (i.e. guidance which must be taken into account) which this comes close to doing in the context of the Code.

Para 30. HEFCW must approve a parent company's guarantee, or the subsidiary's financial viability must be independent. Do we need to be more specific about the terms of the guarantee and the extent to which it provides a comparable level of protection, particularly if the subsidiary itself appears to be at risk on its own?

Para 32. The list of indicators seems broadly right, but it is not clear how these could be applied consistently. More precise indication of thresholds of risk and what sort of levels institutions should keep if they are to avoid concerns would be helpful, e.g. what would be considered a 'low level of liquidity'? How far should HEFCW take into account the institution's own financial policy and guidance on good practice in the sector? In general, this list also needs to be consistent with the indicators that it monitors (see para 86 on negative net cash forecasts for instance).

Para 32(a). This states that "Net cash outflow from operating activities in two consecutive periods." What is the definition of period in this context? For, instance the accounting period is defined in the document as "the period covered by the institution's audited financial statements, usually the 12 months from 1 August to 31 July." On the other hand, para 86 looks at negative cashflow of 30 days or more. Paragraphs 32(a) and 86 should be reviewed for consistency, and the definition of 'period' in 32(a) clarified.

Paras 35-37. This is based on MoAA para 71 but expresses the risk management requirement more clearly in terms of the statutory remit of the Code. It adds two paragraphs, however, that have no equivalent in the MoAA. They appear to be explanatory in nature, but

could potentially have the force of guidance under the Code which institutions must take account of (see our comments under Question 10). As such they appear unnecessary and potentially unhelpful. In para 36 it states that the senior executive team is accountable for setting objectives etc, but this may not reflect their actual organisational role or be consistent with the governing documents of the institution. Similar comments could be made in relation to e.g. 38 (head of an institution).

Para 40. The word 'personally' should be removed so that this it does not imply personal legal liability. HEFCW's powers under the 2015 Act lie in respect of the governing body, and the Code should not appear or attempt to extend them in this respect.

Para 42. See comments on the WAO and public accounting arrangements under Question 1. Is this guidance or a requirement? If the latter, this is problematic as it would appear to require the Accountable officer to appear before the Public Accounts Committee on any matter relating to the institution. This goes beyond the current statutory reach of the public accounts arrangements. It would be inappropriate for instance to force the Accountable Officer to appear in order to account for VCs or senior staff pay as determined by the Board of Governors, for instance.

Para 43. See our comments on reporting requirements under Question 1. Here the threshold (copied from the MoAA) is particularly low and potentially burdensome: the accountable officer must advise if any action or policy appears to be incompatible with the requirements of the Code. There needs to be some concept of materiality in this. Also, what is 'incompatible with a requirement' and is this the same as a failure to comply with the Code? HEFCW has applied a number of different tests/thresholds for reporting inherited from the MoAA which probably need to be reviewed together for purposes of the Code to make them more consistent and focus more clearly on the Act's requirements.

Para 44 (oversight of financial affairs). HEFCW need to make the status of this clear e.g. declaratory/informational , or guidance (the word 'must' is not used). In most instances, this description would accurate but would ultimately depend on the instruments and articles of governance surely? Making this a requirement where it is not would potentially create a conflict with charity status etc.

On the other hand, we appear to be missing an overarching requirement comparable to the requirements for key areas e.g. effective risk management policy (para 37), remaining financially viable (para 27). Para 44 could e.g. be preceded by 'The governing body must have robust governance arrangements that provide oversight of financial affairs'.

Para 49. Non-compliance with Nolan principles is, in many instances, very subjective and there is a risk of treating these as clear rules. It is very unclear at what point HEFCW should be informed of a 'violation'. Breach would not automatically mean financial risk (see the point about the need to keep the issues of compliance and financial risk distinct).

Para 50. This places a duty to be open about the 'financial position' of the institution. The duty is drawn too widely in the Code. This wording is based on the MoAA (para 50) but the MoAA duty only relates to the effect on funding provided by HEFCW. This needs to be either omitted (leaving the MoAA to deal with HEFCW funding as currently) or it needs to stress that this is subject to competition law and commercial confidentiality.

Para 52. Using the Code to impose a duty to consider student and public interest in its key decision making processes is potentially problematic in terms of charity law, appears to potentially extend beyond scope of regulated activities (i.e. into more general activities including research), and comes close to specifying an institutions mission/objectives.

Charity law requires that institution pursues its charitable objects, and includes a public benefit test. I would suggest this is amended either to substitute 'should' for 'must', or to add 'in so far as is consistent with their obligations under charity law' (or something similar).

Paras 58-60. As previously highlighted, HEFCW's power to remove the role of accounting officer from the CEO is potentially problematic, as it could be viewed as tantamount to constructive dismissal and/or conflict with instruments and articles of governance.

Para 59. The wording has been changed from 'in extremis and after all due process has been exhausted' to 'in exceptional circumstances'. The former wording is clearer that this could only be used as measure of last resort and should be retained (if the power to remove the role of the accountable officer is not removed altogether). The governing body and not HEFCW should determine who represents the institution and is responsible for meeting the requirements of the Code within the institution.

Paras 61-62. There needs to be a clearer escalation process, so that only serious matters are a matter of notice to HEFCW, but others are dealt with and escalated appropriately internally. We appreciate that this replicates provisions in the current MoAA. However, a much clearer process which takes account of the new regulatory context and implications is needed. Para 61 in particular, needs to be redrafted to avoid excessive reporting burdens for both institutions and HEFCW. Para 62 appears to cover the situations that reporting to HEFCW is essential.

Para 70. This seeks to impose a duty to open inspection of books and records of an institution to the Auditor General for Wales. This is similar to the current provision in para 58 of the MoAA but replaces 'shall' with 'must', making it unequivocally a requirement. This is not appropriate in the context of the Code, however. Regulated institutions by definition do not need to be publicly funded, and they are not public sector. Funded institutions would be covered by a MoAA.

Para 71. This imposes a new requirement to subscribe to HESA. Regulated institutions are under a statutory obligation to provide HEFCW with required information. However, this effectively imposes a new funding/payment model and removes bargaining position of the sector in relation to HEFCW's chosen data collection agency. We would not support this as drafted, and the Code should be more closely modelled on the current provisions of the MoAA (para 60).

Paras 71-3. References to UCAS, Estyn and QAA are new and we question whether it is helpful to be this specific.

Para 73. The wording needs to be reviewed as it could be read to refer to institutions undertaking functions of QAA etc, rather than other agencies of HEFCW.

Para 74. The Code requires institutions to make students aware of HEFCW's data requirements, as set out in paras 66-73 of the Code, when collecting data to avoid breach of the data protection act requirements. Can valid consent be obtained on the basis of paras 66-73? HEFCW will need to ensure that the purposes to which the data will be used are specified clearly enough to enable institutions to obtain appropriate consent for the onward use of data in order avoid conflict between the duty to provide information and data protection requirements.

Para 75. See our comments in relation to declaratory statements (cf. para 35-37).

Para 76 (notification of changes to senior roles). HEFCW rightly omits the requirement to report the reasons for departure, as currently contained in the MoAA (paras 62 and 63). We

would expect future versions of the MoAA to do the same. It also removes the requirement to report the removal of the SET - the requirement to report their appointment of SET remains, however, which still looks excessive, particularly as HEFCW can at any point require the provision of any information it requires relating to SET members/structure.

Para 78. This (probably correctly, from a legal perspective) limits the institution's duty under the Code to student complaints relating to *financial matters*. HEFCW will need to ensure that student complaints procedures relating to quality, and other matters are dealt with through other powers however (e.g. in relation to quality).

Would it be helpful to add references to CMA guidance and duties under the OIA? All regulated institutions will be subject to OIA (and consumer protection law).

Para 79. The Framework Document relates to grant-in-aid setting terms and conditions in accordance with the FHEA 1992. It relates to institutions it funds only. In our view the reference to the Framework document could be misleading and should possibly be removed. If it can be justified, it should be possible to redraft it to retain the substance while more clearly aligning with the purposes of the Code. Is this needed in the Code, however? Note that Para 81 'institutions must manage their estate in a sustainable way' covers financial management generally. We would expect this duty to continue to apply to funded institutions through the separate MoAA, the case for including it in the Code, however is less clear. A decision to retain land or buildings which are no longer needed may be based on sound financial grounds, and would not automatically indicate issues in the organisation and management of financial affairs. (It might influence a decision about the need for grant investment conceivably however i.e. be a legitimate matter to consider in monitoring the use of grant funding).

Para 86. See comments on para 32. The list of risk indictors should be consistent with those monitored. This doesn't include negative cash forecasts at the moment, but does include a range of other indicators. Review?

Para 88. See comments on para 32 (and 86) in relation to liquid cash requirements.

Para 89. The proposals for the financial commitment threshold are still to be confirmed. We are concerned that the exact threshold could be seen as a key element lacking from the consultation/not being consulted on in accordance with the statutory requirement. Annex B is unclear whether 'borrowing thresholds' are being proposed, or this is a threshold for all 'financial commitments threshold'. This needs to be clarified.

Para 90. The requirement that an institution must obtain permission from HEFCW before entering any financial commitment above a specified threshold needs to be moderated to avoid conflict with charity/ONS status under the Code unless it is appropriately restricted to a back-stop measure. We suggest adding that permission would only be withheld if HEFCW are satisfied that this places the institution's financial viability at significant risk.

Para 91, final sentence. This hasn't been drafted using 'must' and it is unclear whether this is meant to be guidance or a requirement. As previously commented, a classification of 'high risk' could refer to Code compliance only and not financial viability. In this context, a requirement that any increase in financial commitments would require written permission appears to allow disproportionate control of the institutions finances/decisions and could have ONS/charity implications.

Para 93. This suggests that the primary consideration in determining whether to approve borrowing above the threshold or not is demonstration of 'good value'. This is more

appropriate in the context of the MoAA and grant funding. We query whether the focus in the Code should be on financial viability instead, however (making refusal to approve more of a measure of the last resort).

Para 95. Investment appraisal primarily considers marginal costs rather than full economic costs. Fully costed analysis may be undertaken but this is supplemental to an incremental cost analysis. We recommend that HEFCW amend the wording to reflect this, to avoid unnecessarily deterring investments.

Para 97. We note that HEFCW are omitting any reference to e.g. the FEHE SORP, and leaving this to be determined by the annual accounts direction instead. Should the SORP be applied by all regulated institutions? It is also noted that the HE and Research Bill removes the requirement that HECS in England have to comply with Funding Council accounts directions (s.82, Schedule 8, para 10, amending ERA 1988 s.128B). The current provisions are retained for Wales, however.

Para 109. High risk is defined as 'the institution has failed, or is likely to fail, to comply with a requirement imposed by the Code and the effect of this is to give rise to financial viability concerns over the short to medium term.' What if the code has been complied with but there are financial viability concerns? High Risk categorisation should depend on the assessment of financial risk. Compliance should be separately assessed. See comments on para 18 – the phrasing in para 18 should be made consistent with para 109 (by adding 'financial' before 'viability').

Para 111. The use of a second letter should be avoided if possible to avoid unnecessary administrative burden for institutions.

Para 117. Does this conflict with the advice on para 6? The Act only requires that they are taken into account.

Para 137. The required content of the Internal auditor's annual report has not been changed from the MoAA. We note that (external) auditors are required to take into account the specific requirements of the Code into account (para 156), and assume that this was intended for internal audit as well. The focus on VFM in particular appears to relate to the use of public funding, and we would expect it to continue to be covered by the MoAA. On the other hand, this does not make reference to financial viability or the organisation and management of financial affairs more generally. HEFCW should consider reviewing this accordingly.

Para 151. The audit requirements of the ERA 1988 only apply to higher education corporations. Similarly, we can't assume that the Companies Act and its requirements in relation to statutory auditors will apply to all regulated institutions due to the very wide potential interpretation of 'institution' under the HE (Wales) Act. Is the Code seeking merely to remind institutions of existing statutory duties where they apply or is it seeking, effectively, to extend the provisions of these acts to all regulated institutions? This needs to be decided and clarified.

Para 160. This paragraph states "the Auditor General for Wales, head of the WAO, is the external auditor of both the Welsh Assembly Government and HEFCW.S/He has the right to inspect the accounts of any institution." This appears to be misleading as stated. Universities (and regulated institutions) are not public bodies and should not be open to inspection by a body whose responsibilities are the audit of public bodies. See our comments under Question 1 relating to the Wales Audit Office and public audit arrangements.

Para 164. See comments on para 62 on ‘serious weakness’ reporting requirement. The wording of this paragraph has been revised from the MoAA so that ‘beneficiaries’ has been replaced with ‘stakeholders’. This now appears too wide and should be defined more specifically or omitted.

Para 173. The requirement has been changed from the one in the current MoAA which states that HEFCW will only disclose information to someone outside HEFCW where legally obliged to do so. This should be amended to avoid excessive discretion in the onward use of data and avoiding difficulties for institutions in obtaining the appropriate data-subject’s consent for under data protection rules, given the wide latitude that this permits. This should be revised insert ‘where legally obliged to do so, as necessary to perform its legal duties under the Act, or after obtaining consent of the institution. ‘ before ‘HEFCW will only disclose such information after informing etc.’.

Para 179 (Signature). The signature requirement has been amended from the MoAA to include confirmation of ‘agreement’ in addition to confirmation of receipt – but the obligations of the Code are statutory and not contractual in nature, and this is not appropriate. It should be removed to avoid confusion. We note that Accountable Officer would have to have signatory authority as provided by the governing documents of the institution in order to bind the institution in any case (see our comments on HEFCW’s powers to remove the role of AO).

<u>Audit Code of Practice</u>

Para 119. The Code provides that the regulated institution must have an audit committee. This makes assumptions about the corporate structure of institutions (including the governing body and committees, and their composition e.g. ‘lay members’), that holds at the moment for universities in Wales but may not in future for all regulated institutions. The corporate structure of Higher Education Corporations (HECs) for instance has up until this point largely been determined by the Education Reform Act 1988 – but for institutions in England these provisions are being removed by the HE and Research Bill.

Para 124. ‘is not permitted’ – is this intended to be a requirement? If so, substitute wording containing ‘must’.

Para 142. Substitute ‘must’ for ‘should’? It is inconsistent that the duty to have a periodic assessment is guidance only, but that it is a requirement that such assessments must take place at least every five years.

Para 160. As we understand it, the Wales Audit Office does not have a general right to inspect the accounts of any institution, as stated in this paragraph. This has been adapted from the current MoAA (para A47), which made it clear that this only applied to institutions that received grant from HEFCW in connection with e.g. value for money investigations relating to HEFCW’s exercise of its functions. HEFCW is a public body for purposes of public audit arrangements, but universities are not. The Code should not extend the role of the WAO by treating all regulated institution income as public funding or all regulated institutions as ‘public bodies’, and this should remain a requirement for publicly funded institutions under the terms of the MoAA only.

Para 171. This makes it clear that serious weaknesses are not an automatic breach of the Code. How consistent is this e.g. with para 18?

Para 177. This states that governing bodies 'are responsible' for the appointment and removal of internal and external auditors. Is this intended as a statement of fact, as guidance or a requirement? (The latter should probably be avoided).

Annex A: Institutional Engagement Process

Annex A (all). Would it be helpful (and more consistent with Annex B) to preface the paragraph numbers with 'A' (e.g. A1, A2 etc)?

Para 2(g). The wording is inherited from the MoAA and makes reference to 'public funds' i.e. grant funding under the 1992 Act, which is appropriate for the MoAA but not the Code. The reference to 'public funds and/or the interests of the public and/or students' should be removed and replaced by wording that is more consistent with the purpose of the Code and the 2015 Act requirements, e.g. 'financial viability' or 'the organisation and management of financial affairs'.

Annex B: Approval of increases to a financial commitments threshold

Annex B (all) – Should paragraph numbers be prefaced with 'B' rather than 'C'?

C2. What is the financial commitments threshold and how does this differ from the 'borrowing threshold'?

C3. How does the 'borrowing threshold' differ from/relate to the 'financial commitments threshold'?

C3 metric. This looks potentially very volatile.

C8. Does 'financial commitments' effectively = borrowing?

C10. Exclusion of pension fund liabilities and provisions is not shown in C3 table. Should it be?

C11. This appears to make transitional provision, allowing higher financial commitment threshold for? Is this provision consistent with para 89 and C2?

C12. This Code provides that an institution need not apply for higher financial commitment threshold if cash-flow declines in this situation. Would this still be a breach of the Code, however? This needs to be clarified.

Annex C: Glossary

'Accountable officer '. This definition appears to describe and potentially conflict with the role of the Vice-Chancellor as provided for by the governing documents of a number of universities. See the concerns raised under Question 3 above.

'Financially viable'. See comments in main response on potential rewording of this.

'Senior Executive Team'. We welcome the clarification provided here that it is the senior management team as identified in the financial statements in accordance with the definition of FRS102. We note, however, that 'director' has a particular sense here and in company law – and is not necessarily equivalent with the title as typically used in universities. Furthermore, the FHESORP only requires institutions to identify higher paid staff in their financial statements.

'Governing body'. This definition needs to cater for very different potential constitutional arrangements that regulated institutions could have under the 2015 Act. However, it is not fully successful and needs to be clearer. It inaccurately distinguishes between higher

education corporation under (ii) and ‘universities’ under (iii): all HECs in Wales are universities and university title does not entail any particular constitution. At present, all universities in Wales are either conducted by higher education corporations or under Royal Charter, but there is a wider diversity of arrangements across the UK, and the 2015 Act allows a very wide definition of ‘institution’. It would also be helpful to clarify the position in the case of a subsidiary that is deemed to be a regulated institution in its own right.

‘Governing document’. The governing documents of a Higher Education Corporations would include the articles and instrument of government. For providers that are not conducted by companies, is this definition sufficiently specific? Further work on this may be required to cater for the potential complexity of constitutional arrangements under the 2015 Act.

‘2015 Act’. There are two entries for this in the Glossary.