

Consultation on the Full Statement of Intervention 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 proposed Full Statement of Intervention (FSOI) as set out by the Higher Education Funding Council for Wales (HEFCW) in Circular W16/23HE, published on 7 July 2016.
- 2.2. Under the Higher Education (Wales) Act 2015, HEFCW must publish a statement setting out how they propose to exercise their intervention functions. Before doing so they must consult with all regulated institutions, and any other persons they think appropriate. HEFCW published its Transitional Statement of Intervention (TSOI) in February 2016,¹ and published further guidance on fee and access plans² and partnership arrangements³ in April 2016. A copy of Universities Wales response to the consultations on these is available from its website.⁴

3. General

- 3.1. HEFCW currently intends that its FSOI will be effective from September 2016. The commencement orders relating to the outstanding provisions, confirming when they will be commenced, have not been laid as yet. However, nearly all of the additional intervention functions covered by the Full Statement are not expected to come into force until September 2017. The one clear exception at this stage is HEFCW's duty (under s.38 of the Act) to withdraw approval of fee and access plan if a regulated institution ceases to be in Wales, provide higher education, or to be a charity. This commences in August 2016. Also, during the transitional period, only limited provisions will apply to plans approved under the 2004 Act. HEFCW will need to

¹ W16/05HE Transitional Statement of Intervention, 4 Feb 2016 (see [here](#)).

² W16/12HE 2017/18 Fee and Access Plan guidance, 18 April 2016

³ W16/13HE Guidance on partnership arrangements for franchise education provided on behalf of regulated institutions in Wales, 25 April 2016.

⁴ See here.

make it very clear what functions are in force and where special arrangements apply during the remainder of the transitional period up to September 2017, and we suggest that HEFCW add a section to clarify this.

- 3.2. HEFCW has sought to focus its consultation on the additional powers outlined in the Full Statement, and our response reflects this. HEFCW's specific questions accordingly relate to its new powers to refuse or withdraw plan approval (under ss. 37-39 of the 2015 Act), the related warning and review procedures (under ss.40-42). It also asks specifically about HEFCW's power to secure information, assistance and access (although these powers are already in force for fee limits and quality assurance purposes). The changes between the TSOI and the FSOI, are far more extensive than is covered by HEFCW's consultation questions, however. The Transitional Statement only dealt with the interventions in relation to fee limits and quality. The sections in the FSOI on fee and access plans, the sections on the Code, and the sections on the 'escalation' of intervention in relation to fee limits and quality, are all new.
- 3.3. Notably, for instance, HEFCW has not specifically highlighted or consulted on its new powers to issue directions in relation to compliance with general requirements of a fee and access plan (treated at paragraph 48), which will come into force in September 2015. This is expressly listed by the Act as one of HEFCW's 'intervention functions' that must be included in the FSOI.
- 3.4. In particular, our response should be read in conjunction with our comments on Financial Management Code consultation, as we have raised issues in relation to its consistency with the currently proposed FSOI. As highlighted below, a number of comments that we have previously raised in relation to the Transitional Statement of Intervention also remain relevant, particularly in the context of the further consultations on partnership guidance and fee plan guidance.

4. Securing Information, Assistance or Access

Question 1: Are there any issues in respect of the explanations of how HEFCW would secure information, assistance or access?

- 4.1. HEFCW's monitoring functions and a regulated institution's duty to cooperate are set out in three different places in the 2015 Act: monitoring fee plans including compliance with fee limits, compliance with general requirements, and the effectiveness of plans (s.16), quality assessment (s.21), and financial affairs (s.35).
- 4.2. As indicated in the FSOI, the warning and review procedures do not apply in relation to these powers. If HEFCW is satisfied that an institution has failed to comply it may

issue a direction to the institution to take specified steps without first issuing a formal warning notice, and the direction is enforceable by injunction. In our view, it is regrettable that the 2015 Act does not provide procedural safeguards for an institution in this context (an issue we raised during the passage of the Bill). We ask HEFCW to be particularly careful in its exercise of this power.

- 4.3. Given the lack of any warning and review procedure in the Act, we would like HEFCW to set out its own protocol for both HEFCW and regulated institutions to follow which will ensure that formal compliance directions are only issued as part of a well-defined and appropriate escalation procedure. HEFCW states in each instance that it will first attempt to resolve the situation through discussion with the Accountable Officer. The pre-direction protocols could helpfully be expanded and strengthened in the FSOI.
- 4.4. HEFCW also state that they would first write to the institution to request any such information, assistance or access, within a reasonable timescale to be set by HEFCW. This is only stated for requests relating to quality assessment and the financial affairs, however, and not in relation to fee plans/fee limits. The exact recipient of the request is also unclear, as paragraphs 81 and 112 refer to the Head of the Institution whereas paragraphs 89, 119 and 121 refer to the governing body. As currently drafted the Financial Management Code provides that the Head of the Institution is not always the Accountable Officer, and the duty to cooperate applies to the governing body in any case. HEFCW may wish to review these sections for consistency.
- 4.5. We note that, in general, HEFCW has not ventured far beyond paraphrasing the relevant statutory provisions in relation to fee limits (p.15), fee plan requirements (p.27), quality assessment (pp.41-42), or financial affairs (pp.53-56).
- 4.6. However, HEFCW's descriptions in the FSOI currently fail to make clear that there are some very important qualifications to the power/duty in the Act. In each case the regulated institution has a duty to ensure that a person exercising HEFCW's functions has 'such information, assistance, and access *to the institution's facilities* as the person *reasonably requires for the purposes of exercising the function*' (our italics). The text should be amended to clarify that:
 - access is to facilities (not for instance, persons or committees – see below),
 - the power/duty relates to specific purposes only, as set out in the Act
 - the duty is subject to such provision being 'reasonably required'.
- 4.7. In particular, we are concerned at the suggestion that HEFCW could use this power to attend and address meetings of the governing body or management board about

any matter arising from an identified failure to comply with the Code (para 119). In practice, attendance to explain issues in person may be welcomed by institutions. However, imposing attendance could conflict with constitutional arrangements/governance documents, and the attendance of meetings should remain clearly a matter for governing bodies to determine. Para 120 suggests that not allowing HEFCW to advise the governing body or management board in this way could be deemed a failure to cooperate and enforced by direction/injunction. We note, however, that it would rarely if ever be 'reasonably required' if there are alternative ways of communicating with the governing body. Paragraphs 119 and 120 need to be reviewed to address our concerns.

- 4.8. More generally, HEFCW should set out more clearly how it intends to interpret 'reasonably required'. Our view is that 'required' should be interpreted as 'necessary' and not simply 'asked for' in this context. If HEFCW wish to rely on its power to enforce cooperation through direction, it should not be sufficient for HEFCW to regard a matter as simply preferable or convenient.

5. Refusal to approve a new Fee and Access Plan - Section 37 of The 2015 Act

Question 2: Are there any issues in respect of the explanations of the types of circumstances under which HEFCW would escalate intervention to use of its powers under Section 37 of The 2015 Act?

- 5.1. Yes. In general, we welcome HEFCW's intention to exercise its powers under sections 37 to 39 of the Act only as part of a clear escalation process. There are significant issues in the description of this in the FSOI as currently drafted, however.
- 5.2. A key difference between the power to refuse to approve a new plan (under s.37 of the 2015 Act) and the power to withdraw approval of an existing plan (under s.39) is that the latter requires a higher threshold to be met before HEFCW can exercise its power.
- 5.3. In relation to the financial Code, HEFCW can refuse to approve a new plan where there is a '*failure*' to comply with a direction in respect of a failure to comply with the Code, but can only withdraw approval for an existing plan where there is '*serious failure*' to comply with the Code. HEFCW, however, state that they will consider refusing to approve a new plan in the event of '*persistent and/or serious* non-compliance (para 139). In para 145, HEFCW states that it will normally only consider refusing approval for a new fee and access plan where 'the failure to comply is *serious*', and it expands on what it considers as '*serious failure*' for these purposes in the box on p.66. Similarly, there is inconsistency and some confusion in relation to the relevant thresholds for refusing or withdrawing plan approval in relation to fee

plan requirements and fee limits: e.g. see the use of the term 'serious' in the context of s.37 powers at paragraph 149 (and compare paragraphs 71-72).

- 5.4. HEFCW's guidance is extremely unhelpful as it appears to confuse the separate thresholds for sections 37 and 39 and apply the wrong statutory test. HEFCW will need to review its terminology generally to avoid confusion with terms that have a specific legal significance in the context of the 2015 Act.
- 5.5. The confusion appears to be more than a simple matter of terminology, however. The general description of the exercise of powers under s.37 set out on pages 65 following is inconsistent with the description of those powers described in relation to particular areas. In the box following paragraph 145 (p.66) HEFCW refers, for instance, to intentional and fraudulent behaviour in the context of the exercise of section 37 – but this fits with the situations described in paragraph 141 in relation to powers under s.39 relating to financial affairs and not in relation to powers under s.37 as described in paragraph 140.
- 5.6. Notably, the 'persistent failure' is not expressly a ground for exercising powers under s.39 (power to withdraw plan approval) in relation to the Code. Paragraph 117, however, suggests that 'serious failure' includes 'repeated failure', and could trigger early formal intervention.
- 5.7. We note that the Code as currently drafted, does not attempt to identify 'serious failure' at all. We would welcome HEFCW reviewing these together to ensure that the concept of 'serious failure' is dealt within in the Code (which contains statutory requirements and guidance), and not just the FSOI (which does not have legal force), and that the two approaches are consistent.

Question 3: Is the explanation of the basis for HEFCW's use of the powers under Section 37 of The 2015 Act on pages 65-66 sufficiently clear?

- 5.8. No. See comments page 65-66 under Question 2.

Question 4: Is the explanation of the intervention process in respect of the powers under Section 37 of The 2015 Act on pages 67-72 sufficiently clear?

- 5.9. No. See comments on page 67 (para 149) under Question 2.
- 5.10. In addition, a serious omission in the FSOI is any reference to the protections contained in section 37(4) and 39(3) of the 2015 Act, which were the subject of much scrutiny during the passage of the Bill and are regarded as important. These specify that, in relation to general requirements of a fee and access plan, a governing body is not to be treated as having failed or persistently failed to comply if

HEFCW are satisfied that the governing body has taken all reasonable steps to comply with the requirement.

- 5.11. We would like HEFCW to set out how it intends to exercise these important provisions. What are reasonable steps for these purposes? How will HEFCW seek to satisfy itself in a way that would address concerns that the Act appears to enable HEFCW to umpire its own decisions?

6. Withdrawal of approval of a Fee and Access Plan - Section 38 of The 2015 Act

Question 5: Is the explanation on the basis for HEFCW's use of the powers under Section 38 of The 2015 Act on page 73 sufficiently clear?

- 6.1. The description of the process is generally clear. However, HEFCW has largely confined itself to setting out the relevant statutory process in accessible form, rather than expanding on how it will exercise its functions where it has discretion to do so.
- 6.2. In particular, the FSOI does not seek to clarify how it will interpret the requirements under section 2(3) of the 2015 Act. Section 38 provides that HEFCW must withdraw approval for a plan where an institution no longer meets (or is likely to no longer meet) the requirements that the regulated institution is 'in Wales', provides higher education, and is a charity. Although, the Welsh Government has provided some guidance on its interpretation which HEFCW is under a duty to take into account, it is ultimately for HEFCW to set out how these will be interpreted. As highlighted in the contexts of the consultations on fee and access plans for 2017/18 and the partnership guidance, these simple provisions can raise some significant issues particularly in the context of different entities within a group structure and practical guidance is required on these.
- 6.3. The omission of further detail on this front is particularly striking given that the s.38 power is the only new power to come into force before September 2017, i.e. which is essential to set out at this stage. We would expect HEFCW to incorporate more of the guidance on fee and access plans and partnership guidance currently contained in its circulars (see W16/12HE and W16/13HE) into the FSOI. In doing so, we would welcome a further review of the comments we made in response to the consultations on these. This included, in particular, a need to clarify the regulated institution/external provider distinction in relation to partnership and subsidiary arrangements, and a need to clarify how HEFCW will interpret the location criteria and related data specifications.

Question 6: Is the explanation of the intervention process in respect of the powers under Section 38 of The 2015 Act on pages 74-78 sufficiently clear?

6.4. Yes. This primarily describes the statutory process, which leaves little room for discretion.

7. Withdrawal of approval of a Fee and Access Plan - Section 39 of The 2015 Act

Question 7: Are there any issues in respect of the explanations of the types of circumstances under which HEFCW would escalate intervention to use of its powers under Section 39 of The 2015 Act?

7.1. No. See comments under Question 2 above. The confusion of terms needs to be rectified, and the different situations that would cause HEFCW to choose between s.37 and s.39 powers clarified.

Question 8: Is the explanation on the basis for use of the powers under Section 39 of The 2015 Act on pages 79-81 sufficiently clear?

7.2. No. In relation to p.80 (paragraph 188) specifically, HEFCW appears to be conflating the tests in relation to quality ('seriously inadequate') and financial affairs ('serious failure to comply'). These are very different in nature and require separate consideration.

Question 9: Is the explanation of the intervention process in respect of the powers under Section 39 of The 2015 Act on pages 82-86 sufficiently clear?

7.3. Yes. This primarily describes the statutory process, which leaves little room for discretion.

8. Other issues

Question 10: Are there any other substantive issues in relation to the content of the full Statement of Intervention which you would like to highlight?

8.1. Expanding on our comments under Question 5, we would like to see more of HEFCW's guidance on fee and access plans and partnership arrangements contained in the FSOI rather than left to be dealt with in Circulars. In doing this, we would welcome HEFCW revisiting our comments in relation to the consultations on these to ensure they are fully addressed.

8.2. We welcome the provisions of flow-charts which are in general a helpful aid to explaining the complex processes involved. HEFCW may wish to revisit its overview of intervention processes provided on p13, to ensure it has balanced accuracy with presentational simplicity as far as it can. For instance, a failure to comply with a direction relating to the Code would be grounds for refusal to approve a plan, but not for withdrawal according to the Act. Similarly, 'serious failure' to comply with Code

could lead straight to withdrawal of plan approval but not necessarily 'persistent' issues (unless these are interpreted as amounting to a serious issue).

- 8.3. Finally, HEFCW includes a new section on complaints (paras 212-214). This is also welcome. However, the HEFCW's Complaints procedure to which it refers was published in 2014, and (as previously highlighted) appears to require some revision to ensure that it is fit for purpose in the context of handling complaints relating to the exercise of powers and duties under the 2015 Act.

**Universities Wales
August 2016**