

**W16/08HE Guidance on partnership arrangements for provision delivered by external providers
on behalf of regulated institutions in Wales
A consultation 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. Universities Wales' Governing Council consists of the Vice-Chancellors of all the universities in Wales and the Director of the Open University in Wales.¹

2. Introduction

- 2.1. The following comments respond to the consultation on the proposed arrangements for provision delivered by external providers on behalf of regulated institutions in Wales, published by the Higher Education for Wales (HEFCW) on 8 February 2016.²
- 2.2. The guidance relates to the first year of the full introduction of the major new regulatory system for higher education in Wales introduced by the Higher Education (Wales) Act 2015 (the 2015 Act). The consultation is also closely related to HEFCW's parallel consultation on its fee and access plan guidance³, also issued on 8 February 2016, which takes into account the guidance issued by the Welsh Government published on 29 January 2016.⁴
- 2.3. We have focussed on discussing a number of key issues below. The comments on the distinction between regulated institutions and external providers, in particular, expand on our response to HEFCW's consultation on the fee and access plan guidance and should be read alongside this response.⁵ In addition, we have provided brief answers to HEFCW's specific consultation questions in the Appendix.

3. General comments

- 3.1. We welcome the current opportunity to comment on its draft guidance. From the outset we should recognise that many of the issues we identify in our response stem not from HEFCW's policy but from shortcomings in the 2015 Act itself, which we commented on during the passage of the legislation. We appreciate the very significant efforts that HEFCW

¹ For further information about Universities Wales see: <http://www.uniswales.ac.uk/>.

² HEFCW Circular W16/08HE Guidance on partnership arrangements for provision delivered by external providers on behalf of regulated institutions in Wales (available [here](#)).

³ HEFCW Circular W16/07HE (see HEFCW's website for the [Circular](#) and [Annex](#)).

⁴ HEFCW Circular W16/03HE (see HEFCW's website for the [Circular](#), the Welsh Government's [Covering Letter](#), and the Welsh Government's [Guidance](#)).

⁵ See the Universities Wales consultations webpage, [here](#).

has made to work with HE sector to resolve these issues within the very challenging deadlines for implementation. Our view, however, is that the partnership guidance as currently proposed needs substantial re-writing if it is to serve its intended purpose.

3.2. The key issues from our perspective, which we discuss in more detail section by section below, are as follows:

- The guidance on different types of partnership arrangement is muddled and confusing. We question in particular the usefulness of attempting to explain the new statutory requirements in terms of the currently recognised distinctions between franchise and validation activity. We think that the guidance should start afresh based on the new statutory definitions given in the 2015 Act, and any separate funding or data requirements. (section 6 below).
- The advice needs to be consistent with the fee and access plan guidance. (section 6 below).
- Greater consistency and precision is needed throughout the document in the use of different terms and definitions. (see 4.1 in particular).
- The scope of the partnership guidance is unclear. The guidance does not cover all forms of partnership arrangement, but is not restricted to 2015 Act arrangements either. We think it would be helpful to focus on 2015 Act arrangements as a matter of priority, following this up with further guidance on other forms of partnership arrangements if necessary. (section 5).
- HEFCW needs to be clearer about the status of its guidance, including whether its guidance is mandatory to follow, mandatory to take into account or simply advice on good practice. This includes clarifying its relationship to the Welsh Government guidance (section 4, and 7.11), using more consistent terminology (e.g. section 7.1), and specifically identifying the source and nature of any powers or duties relied on.
- HEFCW may need to review its approach to identifying the location of an institution (section 6.11-6.12).
- The proposed guidance on duration of agreements and period of notice for voluntary termination appear to be excessive (section 7).
- HEFCW may need to review its guidance relating to the transitional year. In particular, we would welcome clarification on how HEFCW intends to apply requirements to have a HERW assessment as precondition for approval of a fee and access plan for existing partnership arrangements.
- The guidance will need to be updated to take into account the recently laid amendment to the 2015 regulations. We would also welcome further advice on their impact (section 6.13 below).

4. Introduction

4.1. There are a number of points which would benefit from being included in the introduction and, in some instances, from greater drafting precision. In particular:

- The statutory definition of the Act is cited inaccurately in the introduction (para.2, p.1). The Act states that an external provider is a person who is responsible for ‘providing’ all or part of course of education on behalf of a regulated institution, rather than ‘delivering’ it. These terms can be interpreted very differently. This is particularly important as it relates to our comments (below) on the need for greater clarity about the application of the new statutory definitions.
- The introduction could be clearer that regulated institutions are under a statutory duty to take the guidance into account. Paragraph 4 (p.2) should read ‘must take account of this guidance, rather than is ‘expected to take account...’
- It would also be helpful, as we commented for the fee and access plan guidance, to clarify the relationship between HEFCW’s guidance and the Welsh Government’s from the outset. It is ultimately for HEFCW to determine how it takes into account the Welsh Government’s guidance, and there should be no confusion about which set of guidance applies or when HEFCW is relying on the Welsh Government’s guidance in default.
- It would be helpful for the guidance to make clearer that the 2015 Act gives HEFCW new direct powers in relation to external providers, in terms of access and inspection for instance, which providers need to be aware of.
- The point made in para 36 (p.9), that provision under partnership agreements in place prior to September 2015 is not covered by the Act, needs to be made upfront and more clearly. Providers/institutions need to ensure that the courses are covered by a fee and access plan under a new agreement in order to be eligible for student support, or the provider must apply for specific course designation. It is not simply an issue for quality assurance purposes.

5. Scope of the guidance

- 5.1. The scope of the guidance, in terms of the providers it is meant to apply to, is not very clear. In para 7, for instance, it is stated that the guidance primarily covers arrangements where provision is franchised from a regulated institution to an external provider (not validated? see comments below on the difficulties use of the term franchise in this context of the 2015 Act).
- 5.2. What are the partnerships referred to in the second sentence of paragraph 7? Does ‘other courses which have their courses automatically designated under the 2015 Act, simply mean other regulated institutions? In our view the guidance should also cover situations where one regulated institution provides a course in partnership with another.
- 5.3. The guidance is also intended to apply to part-time only providers, even though they cannot become regulated institutions under the 2015 Act. It is a concern that the guidance appears

to suggest that HEFCW has held an electronic consultation on arrangements for quality assessment of part-time only providers with institutions currently fitting that description only and has not consulted more widely/publicly (para 8, p.2): we would welcome this being clarified. The fact that the Act does not cover this type of provider, as we highlighted during the passage of the Bill, is a real concern for the sector, since HEFCW no longer has a duty to assess the quality of education at such providers and the lack of leverage that HEFCW potentially has in applying terms and conditions to grant funding was also the primary reason for introducing the 2015 Act.

- 5.4. There are also a number of other types of partnership that are seemingly not covered by the guidance at the moment. This includes, for instance, joint degrees, Welsh Medium Provision, and transnational education.
- 5.5. In our view, there is an urgent need to clarify the situation for arrangements that fall within the 2015 Act provisions, and to follow this up if with further separate advice and guidance on other forms of partnership if necessary.

6. Types of partnership

- 6.1. A key issue which we drew attention to in our response to HEFCW's consultation on the fee and access plan guidance is that there appears to be inconsistency between the guidance in the current document, the partnership guidance, and the guidance on fee and access plan (and the Welsh Government's guidance).
- 6.2. According to the Act an external provider is 'a provider who is responsible for providing all or some or part of a course **on behalf of** a regulated institution'.⁶ In brief, the guidance on the interpretation of this given in other documents is as follows:
- The Welsh Government guidance suggests that "where a course is provided on behalf of a regulated institution the regulated institution **normally has overall responsibility for the content and delivery of the course** (including quality assessment arrangements), but the teaching and supervision is provided either in part or in whole by another institution or provider" (para 3.31)
 - HEFCW's draft fee and access plan guidance appears to adopt the Welsh Government's guidance but its wording is not identical. Whether a partner is a regulated institution or external provider "is determined by which institution has **responsibility for the overall content and delivery** of the qualifying courses" (para 27).

⁶ HE(W)A 2015, s.17(3)

- 6.3. At the moment HEFCW's draft Partnership guidance (paras 20-28) is very confusing, and appears to adopt a different formulation and approach again. It seeks to clarify the responsibilities of regulated institutions and external providers in terms of (HEFCE's) current set of definitions of franchise and validation arrangements.⁷ As recognised in the partnership guidance, these definitions are based on a broader set of criteria which focus on **control and contractual responsibility for a student**. The HEFCW partnership guidance suggests that the responsibilities are determined on the basis of **control** in relation to a subsidiary (para.21), or **control and contractual relationship** in relation to data returns (para 24, **with exceptions** for KIS returns).
- 6.4. We question in particular the usefulness of attempting to explain the new statutory requirements in terms of the currently recognised distinctions between franchise and validation activity.
- 6.5. Courses have traditionally been provided under a wide array of different partnership arrangements between institutions, which can vary significantly in terms of their nature. Universities have previously recognised a broad distinction between franchise and validation arrangements for purposes of funding and data returns. Even within these categories, however, the control, the delivery of the course, ownership/intellectual property rights, and provision of associated services and facilities, and arrangements for enrolling a student can all vary substantially. The partnership guidance suggests that there is one single contract and, for purposes of funding and data returns, students have generally regarded as the responsibility of the institution it formally enrolls with. However, the contractual relationships that arise between the partnership institutions and a student are typically not so straightforward. In reality the student can have multiple contracts with an institution for different things and contracts with both partners (see the CMA guidance for an indication of the potential complexity).
- 6.6. The Partnership guidance does not explicitly link responsibilities to the new statutory definitions and it should. In our view, it would be clearer and preferable to clarify the respective responsibilities for a regulated institution/external provider in terms of the 2015 Act definitions, rather than attempt to first shoe-horn them into current franchise and validation definitions (which are not universally applied and recognised in the form stated in any case). However, the BIS guidance referred to offers an approach to linking the statutory definitions with responsibilities that HEFCW could further consider as the alternative.
- 6.7. We think it would be helpful to specify data and information requirements separately from guidance on when an institution is a regulated institution/external provider under 2015 Act. In doing so, it would be helpful to clarify the following at the same time:

⁷ Partnership Guidance para 20; referring to <http://www.hefce.ac.uk/pubs/year/2015/CL,182015/>

- on which institutions the responsibility falls (regulated institution/external provider, funded institution, or institution in receipt of student support),
- the basis of the responsibility (e.g. under the 1992 Act, 2015 Act or other),
- Where there have been any changes in the application of these requirements e.g. where this now means extra responsibilities for those formerly delivering courses under typical pre-2015 Act franchise arrangements.

6.8. For instance, what is the future source of the KIS information requirement? The 2015 Act (if so where – e.g. a fee and access plan requirement?) or the 1992 Act as currently? As a result, will it apply to all regulated institutions, or funded institutions only? Also, what is the position for student complaints responsibilities? The provisions in the HEA 2004 on the Office of Independent Adjudicator (OIA) and student complaints procedures, we understand now applies to all institutions with courses designated for purposes of student support.

6.9. The table on pp6-7 if developed further could be potentially useful. However, at the moment it is unclear whether it is attempting to prescribe who should have a particular responsibility, or simply describe a typical arrangement. As a consequence it is unclear how it should be used. The table suggests for instance, that fees are paid to a regulated institution in a franchise partnership, but to the validated partner in a validation arrangement. For much of the activity recorded as franchise in the past, however, fees have been paid to the franchisee and funding awarded to the franchisor (who then typically shared a portion under the terms of their agreement). Arrangement for paying fees may not be a reliable indicator on the issues of control of provision or contractual responsibility.

6.10. The table also excludes validation partnerships where the validated partner does not have degree awarding powers, without clearly pointing to how these would be dealt with. Further guidance on this would be helpful (presumably tying in with para 28 of the fee and access plan guidance).

Criteria for being an institution in Wales

6.11. According to the 2015 Act, if at any point location of the institution changes so it is no longer in Wales, HEFCW is under a duty to withdraw its regulated institution status. The draft template circulated at the Fee and Access Plan event in February 2016 appears to confirm that HEFCW intends the location to be based on full-time undergraduate and PGCE location primarily.

6.12. In our response to the fee and access plan guidance we have queried this approach. In the current context, however, we note that, if HEFCW's proposed approach is adopted, there is a particular need to clarify how student numbers should be recorded in a partnership, given the potential for this to alter the overall proportion of students at a regulated institution recorded as in Wales. There is a risk that a strict numerical approach could deter institutions from developing suitable opportunities for partnership arrangements, or that it

would place the status of institutions close to the student thresholds at a level of risk that is unacceptable for both institutions and students. We have argued that HEFCW needs to retain sufficient flexibility in its approach to cope with this kind of situation.

Amending regulations

6.13. We note that, since the consultation was published, the Welsh Government has laid amending regulations which affect partnership arrangements under the 2015 Act: The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) (Amendment) Regulations 2016, which are due to come into force on 26 March 2016.⁸ We understand that these will mean that external providers will also have to be charities. For the transitional year (2016/17), it will also mean that external providers will have to have been in receipt of public-funding at the time of making an offer of a place (i.e. grant funding from HEFCW or the Welsh Government), and the courses will have to have been (previously and separately?) designated for purposes of student support. We assume that the final guidance will incorporate any changes that come into force. We would also welcome further advice on the likely impact of these amendments, however, particularly given that they have been introduced at such short notice.

7. The guidance itself

7.1. In general, the guidance proposed by HEFCW in this section (paragraphs 34 following), could be classed as good practice guidance and contains little of concern from our perspective. However, in some cases it has a particular significance in the context of the 2015 Act. In general, we wonder whether it would be helpful for the current guidance to focus on clarifying the 2015 Act implications, and once these have been clarified, return to separate update of HEFCW's more general advice on best practice.

7.2. On a point of drafting, we note that in many places, particularly in the sections in bold, the guidance uses the word 'must'. Given that HEFCW's guidance sets out matters 'to be taken into account', and seemingly not enforceable requirements, 'should' would appear to be the more appropriate wording.

Multiple partnerships

7.3. It may be helpful to expand on the guidance for provision outside Wales. Paragraph 15 notes that provision outside Wales is not covered by HEFCW's quality assurance duty, except for in England where it is covered by a reciprocal arrangement between governments.

⁸ See [here](#) for the regulations, and [here](#) for the explanatory memorandum. See [here](#) for the 2015 regulations which they amend.

- 7.4. The guidance on serial arrangements appears to be sound in essence, but needs some further work. Firstly, the drafting would benefit from greater precision. Is the prohibition against subcontracting meant to apply to 'the work in its entirety', 'responsibility for the delivery of provision overall', or 'course delivery' only? Secondly, the prohibition on subcontracting is presented as a mandatory requirement: HEFCW need to be clear about the basis for this if they intend to rely on their 2015 Act powers.

Negotiating partnerships and agreements

- 7.5. The 2015 Act gives HEFCW direct powers in relation to external providers e.g. in terms of access, inspection and cooperation with information requirements. Should partners be encouraged to recognise and address this in their arrangements to avoid potential issues?

Duration of agreements

- 7.6. It is noted that HEFCW is recommending a duration that significantly exceeds the current maximum duration of a fee and access plan, which is currently limited by the 2015 Act to two years. We would welcome further guidance on how providers/institutions would be expected to balance the need for contractual continuity, and the uncertainty of continued fee and access plan approval and requirements.
- 7.7. The notice period for voluntary termination of an agreement by one party, looks excessive given the fee and access plan durations at present, and it would perhaps make sense for institutions to align agreements with fee and access plan arrangements more clearly. On the other hand we would expect termination arrangements to cater for cohorts of students who have already commenced to pursue their courses to an appropriate outcome, which may be longer than three years.
- 7.8. In making provision for termination of agreements particular care will need to be taken to cover e.g. loss of regulated institution status under the 2015 Act.

Financial and funding arrangements

- 7.9. HEFCW propose that only the regulated institutions in franchise arrangement would be allowed to receive tuition fees. We would welcome further discussion of the reasons for seeking to impose this, including any issues for SLC payments. It is also not clear on what basis HEFCW can insist upon it.

Student number limits

- 7.10. HEFCW could expand on its guidance in relation to setting thresholds for course viability. Institutions for instance may need to exercise particular care to ensure that their decision processes and timing of decisions for withdrawing provision are compliant with CMA guidance.

Validated provision

7.11. It should be noted that the partnership guidance would not be mandatory for validated provision, since the providers are not regulated institutions.

7.12. The guidance in para 79 is potentially helpful to include but needs some correction: it is not necessary to have a fee and access plan in order to charge student fees, only to access certain levels of student support. In fact, the Welsh Government's proposal was to cap the student fee at a maximum for regulated institutions (and provision by external providers on their behalf) at £9k, but to allow other institutions to recruit to any fee level.

7.13. It is of significant concern that details of the specific course designation process have not yet been confirmed by the Welsh Government at this stage. It will be imperative for all concerned to confirm the alternatives available to including provision within a fee and access plan as soon as possible, and in any event before providers make an application.

Universities Wales
21 March 2016

Appendix:

Consultation questions

Q1 Should this guidance cover any other types of partnership arrangements?

No, there is a general need for much greater clarity about the guidance for different types of partnership. Guidance on other partnerships is needed, but this guidance should focus on the 2015 Act implications. See comments in the main text.

Q2 Is there any existing provision which falls outside of the descriptions of partnership arrangements set out above.

The current definitions do not fit neatly with the new statutory distinctions between a regulated institution and an external provider.

Q3 Does any of the guidance above need clarification or updating? If so, please provide details.

Yes, in particular see comment on question 1.

Q4 Is there any additional information which should be covered in this guidance? If so, please provide details.

No. It may be preferable, however, to provide guidance on the HE (Wales) Act 2015 requirements and other guidance.

Q5 Do you have any comments on the appropriateness of the guidance in this document? If so, please provide details.

See the comments above.