

Briefing on the HE (Wales) Act 2015 Regulations (as laid before the National Assembly for Wales on 16 June 2015)

1. Introduction

1.1. The Welsh Government laid the following regulations before the National Assembly for Wales on 16 June 2015:

- The Higher Education (Amounts) (Wales) Regulations 2015 (see here for the [Draft](#), and [Explanatory Memo](#))
- The Higher Education (Designation of Providers of Higher Education) (Wales) Regulations 2015 (see here for the [Draft](#), and [Explanatory Memo](#))
- The Higher Education (Fee and Access Plans) (Wales) Regulations 2015 (see here for the [Draft](#), and [Explanatory Memo](#))

1.2. The regulations comprise three of the five sets of regulations which were subject to consultation ending in May 2015 (see here for the [consultation](#)). No further outcomes or statements regarding the consultation have been published at this stage. The remaining regulations to be published are:

- The Higher Education (Qualifying Courses and Persons) (Wales) Regulations 2015
- The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015

1.3. The regulations all follow the affirmative resolution procedure. The regulations were considered by the Constitutional and Legislative Affairs Committee on 29 June 2015 (see [here](#)), and we understand that the current date for Plenary to consider a motion to approve the legislation is scheduled for 7 July 2015.

2. Summary

2.1. In general, only a small number of amendments have been made to these three sets of Regulations following consultation. Our comments on these drafts remain as submitted to the Welsh Government during consultation (see [here](#) for a copy). We have updated our comments for this briefing to take the changes into account, which can be summarised as follows:

- We have identified no issues in relation to the “Amounts” regulations.
- Our main concern in respect of the regulations concerning the “Designation of other providers of HE” (and section 3 of the HE (Wales) Act 2015), is that it is unclear who would use this process (see section 4 below). The grounds on which decisions will be

based are also unclear, and consequently it is difficult to assess whether or not the information requirements are appropriate. While the impact for the current HE sector would be indirect, there is a danger that instead of providing a helpful process this creates uncertainty or complication for providers and HEFCW.

- Our main area of concern relates to the “Fee and Access Plans” regulations (see section 5 below). When considered with the provisions of the HE (Wales) Act 2015 itself, these could (and should in our view) go further to ensure that there is adequate protection of institutional and academic autonomy and reasonable exercise of powers. We think further regulations are required to amend these fee and access plan regulations to ensure that HEFCW must exercise its powers reasonably and proportionately and does not reject, refuse to approve, or withdraw plan approval for minor matters.
 - Otherwise, we have queried whether the fee and access plan regulations enable HEFCW to request all the information relevant to approval of an application to become a regulated institution. We have also stressed the need to distinguish carefully between ‘informational’ requirements, ‘matters to be taken into account’ and assessment criteria, to ensure that the powers under the Act are applied appropriately. These stem from different powers in the act, and follow different procedures. The rewording of Regulation 3 appears to be helpful, but Regulation 7 still stipulates that all information requirements are ‘matters to be taken into account’. One consequence of this approach would presumably be that any change to information requirements would need to be brought under the affirmative procedure in future.
- 2.2. Our comments on the remaining draft regulations and related issues can also be found in the Universities Wales response (see [here](#) for a copy).

3. The Higher Education (Amounts) (Wales) Regulations 2015

- 3.1. The Regulations as laid incorporates a number of minor changes following consultation. We have identified no significant issues in relation to these regulations.

4. The Higher Education (Designation of Other Providers of Higher Education) (Wales) Regulations 2015

- 4.1. The Regulations as laid incorporate a number of minor amendments only. Our comments remain as submitted in relation to the consultation.
- 4.2. Our main concern in respect of section 3 of the Act and these regulations, is that it is still unclear who could use this process – and this makes it all the more difficult to answer the specific questions which the Welsh Government sought advice on in their consultation. During the passage of the Bill through the National Assembly for Wales, we made extensive

representations on section 3 to clarify how this section operated. As a result of this, the Explanatory Notes accompanying the Bill were amended to help clarify this, but in our view this remains an issue.

- 4.3. As we understand it, section 3 of the Act and these regulations are intended to provide a preliminary process for determining whether a provider can become a regulated institution in cases of doubt about whether it meets the requirement of being an 'institution' or not. If the Welsh Government, as a result of a provider's application, decides that that the provider in question is an 'institution' then it will be for HEFCW to determine whether the institution meets the remaining criteria set out in section 2 of the Act, i.e. that it is an 'institution in Wales', that it provides higher education and that it is a charity.
- 4.4. According to s.3 of the Act, a provider of higher education can apply to the Welsh Government for a designation, if it "(a) provides higher education in Wales and is a charity, but (b) would not (but for the designation) be regarded as an institution for the purposes of this Act." The Explanatory Note to the Act, which can be taken into account in judicial interpretation, now includes two examples of the kind of provider envisaged:

(a) "This power might, for example, be exercised to designate a provider which is not able to award degrees but which provides other courses of higher education at a lower level on the credit and qualifications framework."

It is not clear, however, that this absence of powers to award degrees or level of HE provision are in fact considered to be grounds for application. We understand, for instance, that Further Education Institutions would not be expected to apply to the Welsh Government as they are self-evidently 'institutions'.

(b) "Alternatively the power might be exercised to designate a provider which is a charitable company limited by guarantee which provides courses of higher education."

From our perspective, it is difficult to see any objective ground for such a provider not being regarded as (or not regarding itself as) an 'institution'. It is further noted that it is a requirement of the Charities Act 2006 that all charities must be 'institutions' and that an institution is an institution whether incorporated or not, including any trust or undertaking. It is hard to see on what basis any provider who meets the criterion of being a charity, would not also be regarded as an institution for purposes of the HE (Wales) Act.

- 4.5. For clarity, we understand that this is not intended as a route for providers outside Wales to become regulated institutions. If the process operates as described above, an institution outside Wales could theoretically apply and receive a ruling from the Welsh Government that it is an 'institution', but its application would fall at the next hurdle when HEFCW applied the other criteria.

4.6. Finally, we understand that universities (and further education institutions) would both automatically be considered to be institutions. Putting this in perspective, this means that the main impact of these particular Regulations for universities would be indirect. It is not easy to foresee what providers if any would be likely to use this process. Clearly, the impact for universities is likely to be small if (as we understand is envisaged) this process would only be used in rare and unforeseen circumstances. Clearly, however, significant use of this process could have financial and other implications for the sector and Welsh Government.

Is there other information that you believe should accompany an application for designation?

4.7. The information requirements are difficult to assess given that the type of provider that could be covered by this provision is not very clear. In essence, the Act appears to be primarily intended for use in unforeseen circumstances, allowing the Welsh Government flexibility to decide on as need may arise. We recognise that if this is the case, it may be unhelpful to prescribe the types of information that could be relevant to a decision too narrowly and there is a case for retaining some flexibility.

4.8. At the same time, there is a danger that instead of providing a helpful process for avoiding argument as appears to be intended, this creates uncertainty for providers (and HEFCW), and leaves decisions by the Welsh Government which could be difficult to defend on an objective basis. In light of this, we would welcome any further attempt to clarify the criteria in the regulations as far as possible, and see it as vital that any determinations made by the Welsh Government are transparent and consistent. We would also suggest that the Welsh Government should publish its reasons for its decision to help ensure that decisions in future cases are consistently applied and to provide guidance to potential future applicants.

4.9. The Regulations currently require information about the applicant, charity status, the award, and location of delivery of the course. These clearly serve to provide evidence that the applicant is a 'provider of higher education in Wales and is a charity' i.e. eligible to apply under s.3 to the Welsh Government. However, none of the information clearly relates to the requirement that the provider 'would not (but for the designation) be regarded as an institution for the purposes of this Act' or provide material assistance to the Welsh Government in making a determination about whether the provider should be deemed an 'institution' or not. If charity status or any of this information is material to a determination, we would expect this to have been made clear by the Act itself. Otherwise, it may be helpful to request evidence of any grounds that the applicant feels are material to being regarded as an institution of purposes of the Act, along with an explanation of any obstacles to it being regarded as such already.

4.10. There is also potential for unnecessary duplication of information requirements and overlap in the roles of HEFCW and the Welsh Government in determining whether providers are eligible to apply to become regulated institutions which we should seek to minimise.

- 4.11. For instance, a significant part of the information requirement in these Regulations relates to charity status. Charitable status is something that HEFCW is required to verify separately in any case (as discussed above). From Regulation 4 it is clear that the provider, although required to be a charity, need not be registered with a charity regulator so it would be particularly important to require the appropriate evidence in such cases. However, this points to information duplication and theoretically, it could mean that Welsh Government and HEFCW reach different conclusions about whether a provider is a charity or provides HE in Wales, although we would hope these would be consistent in practice.
- 4.12. Notably, the Regulations do not rule out applications from providers outside Wales. From the information requested, it would be clear to applicants that their courses need to be delivered in Wales. However, the Regulations also make it clear, for instance, that an applicant could be a charity regulated by the Scottish or Northern Ireland authorities. This could mean that a provider applies to the Welsh Government and receive a determination that it is an institution, but would then be rejected by HEFCW on grounds that it is not 'in Wales'. Would it not be better for the Regulations to prevent this? Would it also not be better for there to be a single determination on institutional status and location and a single exercise in gathering that evidence?

5. The Higher Education (Fee and Access Plans) (Wales) Regulations 2015

- 5.1. The change to Regulation 3 appears to partly address one of the issues we identified (see below). Otherwise, the changes to these Regulations are minor, and our comments as submitted for the consultation remain the same.
- 5.2. As expressed in our consultation response, the most important changes to the proposed set of Regulations needed to be made in relation to the Fee and Access plan regulations. A number of significant amendments were made to the Bill as it passed through the Assembly which much improved the Act, which we strongly supported. However, there remained in our view a number of outstanding areas of concern particularly for such matters as institutional and academic autonomy and the reasonable exercise of powers. In particular, we would welcome further change to the regulations to ensure that HEFCW must exercise its powers reasonably and proportionately and does not reject, refuse to approve, or withdraw plan approval for minor matters. The key regulations are 3 to 7:

Regulation 3

- 5.3. Regulation 3 is made in accordance with section 2(4) of the Act which establishes that regulations 'may make provision about the making of applications for approval of a fee and access plan'. According to the Explanatory Notes which accompany the Act the regulations could, for instance, require an institution to provide "certain types of supporting information."
- 5.4. In our view, the information required under Regulation 3 should include all relevant supporting information. In particular, before HEFCW can approve a plan it must determine whether or not an 'institution' meets the requirements set out in s.2 of the Act, i.e. that it is an 'institution in Wales', provides higher education, and is a charity. On the face of it, Regulation 3 should include information requirements along the lines proposed in relation to the HE (Designation of Providers of HE) (Wales) Regulations 2015 relating to these criteria would appear to be relevant in this context (more so than in that context – see our comments above).
- 5.5. A point we made in our submission to the consultation was that it is important that Regulation 3 is not used to specify application **criteria**, and is limited to specifying **supporting information**. The previous wording of the regulations required e.g. that institutions *demonstrate* financial viability and adequate quality of education. Not only did this appear to be setting criteria rather than simple information requirements, it was potentially confusing in terms of the evidential requirements. For instance, the Act provides that *seriously* inadequate quality of education or *serious* failure to comply with the Code are grounds for withdrawing approval of a plan (section 39). We recommended that these Regulations were reviewed to ensure due consistency. The revision to the drafting of Regulation 3 appears to be an improvement in this respect (but see comments on Regulation 7).

5.6. We assume that, although this information may be required as part of the fee and access plan approval process, careful consideration will be given as to what is helpful to present in the final published fee and access plan for wider stakeholders. It will be important to ensure that the Fee and Access Plan still serves, as far as possible, its purpose in providing information which is helpful to students and wider stakeholders.

Regulation 7

5.7. Regulation 7 sets out the *matters to be taken into account* by HEFCW in approving or rejecting a plan. It is noted that the Act itself does not set out criteria for approving a plan, beyond those in section 2 of the Act. During the scrutiny of the HE (Wales) Bill we commented that that any 'matters to be taken into account' could potentially be used in effect to set criteria and should have been included on the face of the Bill. In absence of this, the Regulations need to set out the matters to be taken into account as clearly as possible.

5.8. In particular, Regulation 7 makes 'information required by Regulation 3' a matter to be taken into account, namely information relating to financial viability, financial arrangements and quality of education as matters.

5.9. In line with consultation comments, however, there remains a risk that 'information' requirements in these regulations are confused with 'matters to be taken into account'. We note in particular, according to the HE (Wales) Act 2015 information requirements (other than for the first set of regulations) may be amended by negative resolution procedure (s.2(4)), whereas 'matters to be taken into account' require an affirmative resolution procedure to be followed (s.7(3)). We previously commented that this Regulation should not increase the risk of this confusion by cross referencing the informational matters in Regulation 3 as 'matters to be taken into account'. We suggest that as it currently stands any revision to Regulation 3 would need to follow the affirmative resolution procedure in future, because of its use in Regulation 7.

5.10. Regulation 7 should perhaps instead be clear that there are three matters which will be taken into account, namely: the providers ability to meet the general requirements of the fee and access plan, the requirements of the Code and requirements relating to the quality of education.

5.11. To be used in practice, the specification needs to be more detailed: what is meant by financial viability? What standards or prerequisites are required for quality assurance? If the Regulations cannot cover this in more detail, they should ensure that HEFCW publishes clear guidance on the criteria prior to implementation. To maintain confidence in the sector, it will be essential to maintain transparency and consistency in decision making.

5.12. As these regulations stand, there is also a danger that approval could be withheld (or threatened to be withheld) on minor matters in a manner which is inconsistent with the Act's

stated primary policy objective to preserve and protect institutional autonomy and academic freedom of universities. We see it is as important for a provision to be added which explicitly requires HEFCW to act reasonably and proportionately, taking into account:

- the need to consider the effect of the plan as a whole and not to reject a plan on grounds of any matter which does not significantly or materially affect the extent to which a proposed plan would meet prescribed requirements.

Regulations 4 to 6

5.13. Despite the protections in these regulations (and Act), there remains a potential for these powers to be used for minor matters which could unnecessarily restrict institutional autonomy and academic freedom. This will ultimately be harmful not only for institutions themselves, but for students and wider stakeholders. Elsewhere, we have consistently pointed to the significant contribution that higher education as a large and successful independent sector currently makes to the Welsh economy and society, and the need for avoiding measures which could endanger this. In addition the list of factors that HEFCW must take into account, it is important to add the following (or similar) in our view:

- The importance of preserving institutional autonomy and academic freedom.
- The importance of maintaining a diverse higher education system which reflects the distinctive characteristics and aims of different institutions.

Other comments on the Fee and Access Plans Regulations

5.14. It is noted that these Regulations do not apply to withdrawing a fee plan (under section 3(4)(c) of the HE(W) Act 2015). For consistency, we would expect similar provisions to apply be introduced for withdrawing a fee plan.