

**Regulations as provided for by the Higher Education (Wales) Act 2015  
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.

## **2. Introduction**

- 2.1. The following paragraphs contain the response of Universities Wales to the Welsh Government consultation published on 19 March 2015.<sup>1</sup> This asks for comments on five sets of regulations arising from the Higher Education (Wales) Act 2015 (which received Royal Assent on 12 March 2015) and related matters. Our response includes the questions from the template provided.

## **3. General comments**

- 3.1. We very much welcome the Welsh Government's decision to consult on these regulations prior to introduction. Our response has been informed by further dialogue with Welsh Government officials to clarify a number of matters of detail. We have also benefitted from the prior publication of four of the five sets of Regulations in an early draft form in October 2014, published during the progress of the HE (Wales) Bill. We see such consultation as this as important for avoiding potential difficulties arising from the major change introduced by the HE (Wales) Act 2015 and we hope that this will continue to be a recipe for the future.
- 3.2. The main area of concern in relation to these regulations is to ensure that there is clarity about how and when the powers in the Act and Regulations will be exercised. A number of significant amendments were made to the Bill as it passed through the Assembly which much improved the Act in this respect, 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 and proportionate exercise of powers. Specifically in relation to the draft regulations which we had an opportunity to view in October 2014, we believed that there were a number of matters which should have been dealt with on the face of the Bill instead of through regulations because of their nature and importance. In our view it is important to take this opportunity

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<sup>1</sup> <http://gov.wales/consultations/education/regulations-from-the-higher-education-wales-act/?lang=en>

to clarify how the new powers can be used to ensure that they are used appropriately, particularly in the regulations relating to the fee and access plans.

- 3.3. Otherwise, we have attempted to identify any issues with the detail of the regulations that could potentially cause difficulty in implementation. In general, however, it is probably fair to say that these appear to be more technical in nature, and with due further consideration do not raise issues of major concern to us at this stage.

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

- 4.1. 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 has sought advice on in this 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.
- 4.2. 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.
- 4.3. 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.

- 4.4. 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.
- 4.5. 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.

***Question 1 Is there other information that you believe should accompany an application for designation?***

- 4.6. 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.
- 4.7. 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 at the discretion of 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.

- 4.8. 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.
- 4.9. 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.
- 4.10. 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.
- 4.11. 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?

**Question 2 Do you have any comments on The Higher Education (Designation of Other Providers of Higher Education) (Wales) Regulations 2015?**

- 4.12. See our general comments in paragraph 4.1 following, above.

## 5. The Higher Education (Qualifying Courses and Persons) (Wales) Regulations 2015

- 5.1. Section 5 of HE (Wales) Act 2015 ensures that fees charged in respect qualifying persons on qualifying courses must not exceed the limits set out in the approved fee and access plan for an institution.
- 5.2. This provision will effectively replace the current provisions in the Higher Education Act 2004 which make it a condition of funding that fees charged in respect of qualifying persons and courses do not exceed the limits set out in the approved fee plan for an institution (s.28 HEA 2004). In accordance with the HEA 2004, the definitions of qualifying courses and persons are currently prescribed under the [Student Fees \(Qualifying Courses and Persons\) \(Wales\) Regulations 2011](#):
- Qualifying courses have to be HE courses which have been designated for purposes of student support (under Teaching and Higher Education Act 1998) and are provided by a publicly-funded institution whose activities are carried on in Wales. (Reg 3).
  - Qualifying persons are listed in schedule, but exclude in particular a person who holds an HE qualification and the qualifying course leads to an equivalent or lower qualification. (Reg 4)
- 5.3. From this it can be seen that the definition of qualifying courses needed to be changed, as the new regulatory framework is meant to apply irrespective of whether an institution is publicly-funded or not. It also needs to align with the definitions used for purposes of student support arrangements to ensure that the fee limits are in place for those provided with student support.

### ***Question 3 Are there specific circumstances in which the fee limit should not apply to particular courses that would otherwise be a qualifying course?***

- 5.4. In general, we welcome the intention to look at specific exemptions to the fee limits.
- 5.5. Where a course is closed to the public and provided for a company/institution, the case for imposing a fee limit would appear to be less compelling than for standard provision. We would envisage that this exemption would only apply in a very limited number of cases as the number of full-time undergraduate courses that meet the broader requirements of a 'qualifying course' (e.g. length of study) under these regulations is likely to be very small. Provided that a workable definition can be found, however, we would support this.
- 5.6. More generally, we believe that fee limits for universities needs to be further reviewed in the context of both the Diamond Review and in the further development of the new regulatory framework for higher education in Wales. In its responses to consultations on both the HE (Wales) Bill and the Specific course designation process, Universities Wales

highlighted issues with the Welsh Government's intended policy of setting fee limits for 'regulated institutions' (falling within the provisions of the HE (Wales) Act 2015) but not to for institutions whose courses are eligible for student support under specific course designation arrangements. Particularly if the maximum fees that regulated institutions can charge becomes lower, either through market forces or future regulations, the package of regulation and benefits available for providers applying for specific course designation becomes increasingly attractive. The ability to charge unlimited fees, supported only by a £6k fee loan for students, could potentially provide greater financial returns and a reduced regulatory burden. In our view the whole policy in this area needs to be reviewed in considering arrangements for specific course designation, and we look forward to the outcomes of this consultation.

**Question 4 Do you have any other comments on the Higher Education (Qualifying Courses and Persons) (Wales) Regulations 2015?**

- 5.7. In the revised version of these Draft Regulations 'qualifying courses' is defined as those courses which are capable of being designated under the Teaching and Higher Education Act (THEA) 1998, and not the Education (Student Support) (Wales) Regulations 2013, as they were in the version published in October 2014. An issue which we previously identified in relation to the October version was that this meant that a qualifying course had to be wholly provided by a publicly funded education institution i.e. 'maintained or assisted by recurrent grants out of public funds'. This meant that an institution which was not in receipt of recurrent grant could not get student support, contrary to the intention of the act. We are pleased to see that this revision to the Draft Regulations appears to address this issue.
- 5.8. It is noted, however, that the THEA 1998 allows courses to be designated irrespective of whether they are provided in Wales or not (and are frequently used to designate courses provided by institutions in England). Given that the Act (s.5(2)(b)) provides that a qualifying course must be wholly or principally provided in Wales, does this also need to be stated/clear in the Regulations?
- 5.9. On a related issue, we would welcome confirmation of any progress made in relation to making arrangements for quality assurance of courses delivered outside of Wales. We understand that in respect to England an order by the Secretary of State under s.150 of the Government of Wales Act 2006 is intended to address the issue that HEFCW's duty to assure the quality of education under the new Act (s.17) will only extend to courses provided in Wales (or courses provided outside Wales which are principally delivered in Wales).
- 5.10. Part-time courses, as expected, are explicitly excluded from the list of qualifying courses. We note, however, that the applicability of the current regulations would need to be carefully reviewed should part-time provision be brought within the Regulations at a future

a date. Given that future regulations relating to qualifying courses will be introduced under the National Assembly's negative resolution procedure, it is all the more important for there to be a full consultation prior to doing so.

- 5.11. We would also be grateful for further clarification on the coverage of 'qualifying persons'. In essence, we would expect the fee limits to apply to those students who are eligible to receive student support in the form of fee grant and loans. Regulation 4(2) excludes anyone who already holds a higher education qualification at an equivalent or higher level from being a 'qualifying person'. The wording of this regulation has not changed from the Student Fees (Qualifying Courses and Persons) (Wales) Regulations 2011. However, this does not tally precisely with the Education (Student Support) (Wales) 2015 Regulations 2015 which instead prevents students who have already attained a UK honours degree from receiving support (as in the new regulations there is an exception for initial teacher training and degrees leading e.g. to becoming a doctor, dentist, social worker, architect). It appears that student support eligibility and fee limits for 'qualifying persons' apply to potentially different sets of students.

## **6. The Higher Education (Fee and Access Plans) (Wales) Regulations 2015**

- 6.1. The most important changes to the current set of Regulations that we believe need to be made concern the regulations relating to the Fee and Access plans. 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**

- 6.2. 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."
- 6.3. 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).

- 6.4. It is important that this Regulation is not used to specify application **criteria**, and is limited to specifying supporting **information** as the Explanatory Notes to the Act suggested would be its purpose. The way this is currently drafted is of concern as Regulation 3 (issued under s.2(4) of the Act) can be amended in future using the negative resolution process, whereas amendment of Regulation 7 (issued under section 7(3) of the Act) will continue to require the affirmative resolution procedure in future – i.e. they require a greater level of scrutiny by the National Assembly before being enacted. ‘Criteria’ such as this should continue to be subject to the higher level of scrutiny.
- 6.5. 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 wider students and wider stakeholders.

### **Regulation 7**

- 6.6. 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. We have previously argued that any ‘matters to be taken into account’ are in effect 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.
- 6.7. In particular, Regulation 7 identifies financial viability, financial arrangements and quality of education as matters to be taken into account. It is noted that these are not currently grounds for approving or rejecting a plan in the Act. Seriously inadequate quality of education or serious failure to comply with the Code, however, are grounds for withdrawing approval of a plan (section 39). It would make sense in practice, therefore, for there to be due consistency in this respect and to ensure that providers have appropriate quality and financial arrangements from the outset.
- 6.8. As discussed above, however, there is a clear danger that new criteria are introduced dressed as ‘information’ requirements. Regulation 7 currently makes ‘information required by Regulation 3’ a matter to be taken into account. This should be avoided in our view, and this Regulation should not simply rely on a cross-reference to Regulation 3, which can be amended in future by negative resolution procedure.
- 6.9. 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.

6.10. 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.

6.11. 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**

6.12. 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.

***Question 5 Do you think the Regulations should be more prescriptive in terms of what should be included in a fee and access plan relating to the promotion of higher education? What else might be included?***

6.13. No, in general we do not think the regulations should be more prescriptive about content in the fee and access plans, and the content of the plans should remain a matter to be determined between the regulated institution and HEFCW.

6.14. However, it is important to clarify in these regulations how these powers should be used to ensure that these provisions are not used in ways that lead to an erosion of institutional autonomy and academic freedom (as discussed above), and ensures that HEFCW does not exercise its powers disproportionately for minor matters.

**Question 6 Do you have any other comments on the Higher Education (Fee and Access Plans) (Wales) Regulations 2015?**

6.15. 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 (see below, on further regulations).

**7. The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015**

7.1. As outlined in our response to the Bill, our main area of concern is the substantive rather than procedural safeguards. Regulation 7 in particular relates to substantive matters and we previously argued should have been treated on the face of the Bill. Regulation 7 provides that the grounds for an institution to make an application to review a notice or direction given under sections 41-44, namely: a material factor not previously considered, or which HEFCW should have considered, or because the governing body considers that the notice/direction is disproportionate in view of all of the relevant facts.

**Question 7 Has sufficient time been allowed for the various processes?**

7.2. Yes, in general. We recognise that the process must provide as far as possible a means of resolution that is both fair and swift, in the interests of all parties. However, we note that there is no timescales attached to setting up and reporting of the Review Panel. Provision should be made to ensure that this is set up and meets as soon as possible and within a specified maximum time period. Once the Review Panel has considered the case, there needs to be flexibility (as provided) to call for any necessary further information – but again the regulations should, as far as possible, ensure that the Review Panel consideration does not indefinitely postpone an outcome.

**Question 8 Is the information to be supplied with a notice or direction sufficient? Is there any other information you think ought to accompany a notice or direction?**

7.3. The notice or direction should specify the grounds on which the decision has been made and those factors which were regarded as material, not just the grounds for reviewing the notice/direction (which would presumably reflect the wording of Regulation 7). Without this information it will be very difficult for institutions to respond appropriately, particularly within the timescales prescribed. As discussed above (paragraph 6), any criteria applied in decision making need to be clear and consistent.

**Question 9 Do you agree that the grounds on which a review may be made are sufficient to allow reasonable challenge?**

- 7.4. In our view there should also be grounds for review where the Governing Body has evidence to show that material information on which HEFCW has based its decision was incorrect or incomplete.
- 7.5. The ground in 7(c) should not be limited to instances where a decision is 'disproportionate in view of all the relevant facts which were considered by HEFCW'. The words in italics/underlined (by us) should be deleted.

**Question 10 Will the review procedure achieve the objective of being transparent and sufficiently well-informed?**

- 7.6. The key difficulty in this respect is that HEFCW retains the final decision. HEFCW only has to take the Review Panel's report into account and give reasons for its decision. It is not bound by them. In essence this process assists HEFCW in reviewing its own decision. Further consideration needs to be given as to whether this can be strengthened to ensure that the Panel's report can be seen to play an effective role.
- 7.7. From the consultation document it appears that the Welsh Government considered including an additional opportunity to respond to any further evidence, but felt that the procedure should be sufficient. It is important, however, in our view that all parties continue to have an opportunity to respond to further evidence given to the panel, particularly in terms of its accuracy within a reasonable timescale.
- 7.8. Further guidance including flow-diagrams would help to improve the transparency of the process, though this is not a matter for the regulations themselves.

**Question 11 Do you have any other comments on the Higher Education (Fee and Access Plans) (Review, Notices and Directions) (Wales) Regulations 2015?**

- 7.9. See above (7.1) and our comments on publication of notices (Question 19 below). In general, it must be recognised that issuing a notice or direction could be very damaging for the institution and the sector more widely. If an institution is successful in obtaining a positive review of HEFCW's decision, publication of the notice may still have caused unnecessary damage. Notices and directions should only be issued as measures of the last resort, and the Welsh Government should further consider whether publication of notices before the end of the review process and the institution has had an opportunity to respond or rectify any matters would be in the interests of the institutions, the wider HE sector, or students.

## **8. The Higher Education (Amounts) (Wales) Regulations 2015**

***Question 12 Do you have any comments on the Higher Education (Amounts) (Wales) Regulations 2015?***

8.1. We have identified no significant issues in relation to these regulations at this stage.

## **9. Additional consultation matters**

### **Section 37 – Notice of refusal to approve a new fee and access plan**

***Question 13 What matters might HEFCW be required to take into account when deciding to issue a notice?***

9.1. The issue of a notice under this section could potentially have a devastating impact on recruitment and finance of an institution, and in turn undermine confidence in the sector. It is a concern that the Act allows HEFCW to refuse to approve a plan on potentially slender grounds i.e. an institution has failed to comply with a general requirement of its approved plan. The Act ensures that an institution is not to be treated as having failed to comply with a general requirement if, in HEFCW's view, it has taken all reasonable steps to comply. However, a key point we raised in relation to the Bill, is that this does not prevent the failure in question relating to a minor matter.

9.2. In our view, regulations should require that HEFCW to not exercise this power unless the failure relates to a matter which is significant and material in meeting the prescribed requirements of fee and access plan.

9.3. In issuing a notice HEFCW should be required to consider its timing and any interim arrangements that could be made pending review and resolution of any issues, to avoid unnecessary and unwanted adverse impact for students and allow the institution maximum opportunity to deal with the outcome.

***Question 14 Do you have any other comments?***

9.4. No.

### **Section 38 – Duty to withdraw approval**

***Question 15 Do you agree regulated institutions should be able to make representations about a notice? Do you think a review process is necessary or desirable in connection with a notice?***

- 9.5. We note that the Act already provides that regulated institutions would have the right to make representations about a notice and a review procedure in relation to HEFCW's duty to withdraw approval.
- 9.6. The Welsh Government is proposing to use the Henry VIII clause in section 38(3), which enables the sections of the Act to be amended through regulations. As we commented in relation to the Bill, the inclusion of such clauses does not encourage good legislative practice: the provisions can be amended without going through fuller scrutiny that applies to primary legislation, and there is lack of incentive to ensure that provisions contained in the Bill have been thought through properly at the time. This power should only be used in very clear cases of need.
- 9.7. In our view, the current provisions in the Act in this context are not optimal. In general the same grounds for review of a notice to withdraw approval should apply as for other notices. In particular, it is important to base decisions on correct information (see our comments above). However, since the duty to withdraw approval applies to the technical criteria set out in section 2 of the Act (that an institution is an 'institution in Wales', provides HE and is a charity) there is a case for arguing that alternative arrangements would be more suitable than the one currently set out in the HE (Wales) Act. In particular, instance evidence on charity status we would expect to be a matter of confirmation by the Charity Commission, rather than a matter for a Review Panel as currently provided in section 44.

***Question 16 Do you have any other comments?***

- 9.8. Not at this stage. We would welcome further consultation on any regulation relating to this in due course.

**Section 39 – Power to withdraw approval**

***Question 17 What matters might HEFCW be required to take into account when deciding to issue a notice?***

- 9.9. We have previously expressed our concerns that s.39 of the Act allows HEFCW to withdraw approval of a plan for potentially minor matters. For instance, we would not like to see this power used, as it presently can, to withdraw approval for a persistent failure to comply with a general requirement of a plan which is minor in nature. Withdrawal on grounds of a single instance of failure to comply with a direction (which may be enforced by injunction) would also appear to be excessive unless it relates to significant and material failure to comply with prescribed requirements considered in the round.
- 9.10. In our view, the regulations should additionally require HEFCW to not exercise this power unless the failure relates to a matter which is significant and material in meeting the prescribed requirements of fee and access plan. HEFCW should also be required to only

use this power when alternative interventions, with less potential for adverse impact, have been exhausted.

***Question 18 Do you have any other comments?***

9.11. Not at this stage. We would welcome further consultation on any regulation relating to this in due course.

**Section 40 – Publication etc. of notice**

***Question 19 Do you have any comments?***

9.12. Given that the review process is designed to identify and address any material grounds for review, early publication of a notice should be avoided. This is necessary to prevent potentially serious damage to an institution's reputation and major consequences for its student recruitment and other activities. In turn this could have significant consequences for the sector as a whole, undermining confidence with other regulated institutions in Wales.

9.13. In our view the notice/warning should not be made public until any grounds for review have been dealt with by due process and HEFCW's decision rests. An opportunity should also be provided to the institution to publish an agreed statement accompanying the publication addressing how the situation is being/will be remedied.

**Section 52 – Statement in respect of intervention functions**

***Question 20 Do you agree with the intention not to make regulations at this time? If not, what do you believe regulations should address?***

9.14. Yes, we agree with this decision.

***Question 21 Do you have any other comments?***

9.15. We note that the Welsh Ministers are not currently minded to make regulations on these additional consultation matters at this time, but wish to take views on certain matters before making regulations at some point in the future. We would like to emphasise that we see it is very important that further consultation takes place on any future regulations.

**Universities Wales**

**May 2015**