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c/o Ewen Brierley  
Submitted by email to: [assurance@hefcw.ac.uk](mailto:assurance@hefcw.ac.uk)

13 November 2015

Dear David

## **HEFCW W15/23HE Consultation on the Transitional Statement of Intervention**

Please find below our comments on the Draft Transitional Statement of Intervention (the 'Statement'), in response to the above Circular. Subject to the comments below, we are satisfied that this Statement should be used in the transitional period.

### **Question 1: Are the principles set out on page 4 of the Statement reasonable; are there any others that should be included?**

We very much welcome the explicit incorporation of the principles set out in this Statement (under paragraph 9, page 5 ff), and it is important that HEFCW can be held to them in the exercise of its new intervention functions.

We would recommend that HEFCW consider including the following additional principles in particular:

- The focus of HEFCW's actions will remain where possible on promoting good practice and early prevention of potential issues in relation to compliance, rather than remedial action.
- HEFCW will pay due regard to the wider impact of any intervention or the way it intervenes, including the implications for national accounting classification of institutions that may arise from any intervention action.

Otherwise, a number of the principles cited are in fact a restatement of miscellaneous existing statutory duties such as its duties under the Equality Act 2010 or in relation to data protection and freedom of information. We suggest that it might be useful to treat these more generically i.e. the principle that HEFCW will perform its functions in accordance with all relevant statutory duties.

We assume that these are likely to form the basis of the full statement of intervention, which will be the subject of later consultation. At this stage we note that a significant number of the new powers will not be brought into force during the transitional period and include a number of requirements of 'reasonableness'. We will look forward to reviewing the principles again for the full Statement of Intervention to ensure they remain appropriate – and in particular are likely to look more closely at how 'reasonableness' will be interpreted in practice.

## **Question 2: Are there any issues with the approach to be taken by HEFCW prior to the initiation of formal intervention?**

We would expect the informal stage to be the most important in practice. From the workshop event which we attended it is clear that these processes could be used more than could perhaps be expected on first consideration. For instance, we are confident that no university would intentionally breach the maximum fee limits. However, HEFCW have highlighted a number of areas where problems can occur in their experience - particularly in relation to franchise provision and notices of fees to SLC. We also note the potential for disagreement where an inflationary increase is charged under a fee plan (and providers may need to be very clear exactly how this will be calculated to avoid issues).

A key issue to arise from discussions at HEFCW's workshop on implementation related to how HEFCW would handle allegations relating to either fees or quality in future. It was suggested that HEFCW should seek to ensure that students (and staff) follow the appropriate internal procedures at their institution, and that HEFCW should commit to making appropriate inquiries to the institution concerned.

In relation to fee limits, for instance, the Statement refers to HEFCW's existing policy for 'dealing with allegations concerning institutions funded by HEFCW'. This already states that complaints from staff or students should be addressed through an institution's internal procedures. However, the policy is based on the statutory relationship between HEFCW and institutions through the terms and conditions of grant (i.e. the Further and Higher Education Act 1992) rather than the new Act.

We recommend that HEFCW reviews its current procedures for dealing with external complaints with stakeholders to ensure that they are fit for purpose in the new regulatory context. All stakeholders need to have a clear understanding of how allegations should be raised and dealt with by HEFCW and within institutions, and institutions may need to review their own complaints procedures and information accordingly. How far would HEFCW wish to encourage direct allegations? If a student/staff member is to be expected to have exhausted internal procedures before raising an allegation, are current internal procedures appropriate? A prompt review of this may be particularly important given the need for institutions to ensure for purposes of consumer rights requirements, that the complaints processes are transparent.

## **Question 3: Are there any issues that may arise in respect of other regulators (e.g.OIA)?**

In general, HEFCW signals an approach which seeks to coordinate investigations by other bodies such as the OIA or CMA, but to reserve the right to intervene directly if necessary. This seems a reasonable position but will need working through carefully. While it is possible that these different bodies could effectively investigate or take action on the same matter (e.g. overcharged fees) and consider similar issues, the legal basis on which they would consider a matter would be different and the bodies could legitimately reach different verdicts on the basis of the same evidence. At the same time, it would appear desirable to reduce the duplication of processes and evidence, or unnecessary differences in evidence or process which could increase the chance of inconsistency between bodies.

In relation to quality assurance, HEFCW has an overlapping duty with for instance the Welsh Government in respect of further education. As indicated below, arrangements for quality assurance for instance, only extend in this Statement to higher education and not to other levels of provision. It will be necessary to ensure that HEFCW has appropriate arrangements in place to coordinate the exercise of duties appropriately.

## **Question 4: Are there any gaps or issues in relation to the way the intervention processes are set out?**

The Statement in general provides a helpful guide to the legislation in this area, bringing together the provisions of the Act and regulations. For the most part the statement follows the legislation closely, and is

successful in striking a balance between readability and precision. In some places, however, amendment to the detail appears to be necessary or beneficial. These are set out in the Appendix.

Where possible it would be helpful to build the flexibility into the Statement to cope with potential changes while still pointing to current requirements. For instance, in para 24 HEFCW's duty extends to including any prescribed information. It would be sensible to state this while also pointing to the current regulations in force.

On a presentational front, the Statement sets out provisions made by the Act and in regulations. Despite the references that have been included, however, it is not always clear which requirements are made under the Act, under regulations, or HEFCW's own. It would help to distinguish between the statutory and non-statutory elements of the process more clearly in the text e.g. the time limits in paragraphs 22 and 23 are set by HEFCW. Technically, HEFCW is required by law to publish its statement of intervention, but not to follow it, so it essentially remains a guide to HEFCW's intention on matters of implementation not prescribed by statute.

#### **Question 5: Are the proposed process timescales that are not set out under Regulation reasonable?**

Many of the timescales in the process are determined either by the Act or Regulations in considerable detail: while this provides procedural protection for institutions it is generally in the interests of all stakeholders for matters to be resolved as swiftly as due process will allow. The timescales proposed by HEFCW for parts of the process which are not prescribed by statute appear to us to provide reasonable limits, but in general HEFCW should seek where possible to achieve earlier resolution in practice.

Our members have not expressed particular views to us on the timescales, but we would raise the following questions:

- If no additional information is required, for instance, we would expect HEFCW to make a decision on the basis of representations made in respect of a warning notice earlier than the 60 days limit it has set itself: (see para 22). For instance, HEFCW could commit to making a decision within 28 days unless further information is required, and 60 days in any event?
- Once satisfied that a provider has complied with a compliance and reimbursement direction, we would expect HEFCW to remove a published direction from its website as soon as possible – and it is in the sector's interests to do so. It is not easy to see why this should take up to 7 days from a formal decision: (see para 36). Could HEFCW commit to removing the published direction within 2 working days, for instance?
- Once a Direction has been formally 'given' (i.e. the opportunity to review the direction has been exhausted or it has been accepted), HEFCW proposes to give an institution 60 days to comply with a compliance or reimbursement direction (para 35), or 60 days to *start* to address the identified quality issues (para 64). It is not immediately clear why it should take 60 days to comply with a compliance or reimbursement direction, particularly given the long process of review – unless HEFCW is satisfied that there are good reasons why this should take longer, and it may be worth building in the flexibility of indicating a shorter timescale (e.g. 28 days) which could be extended to the 60 day period if need be. Similarly, we would expect institutions not only to have started to address identified quality issues by the 60 day stage, but to have made appropriate progress by that stage and satisfactorily address the issues according to an appropriate timetable set by HEFCW. Should HEFCW include a reference to an appropriate timetable for completing actions?

## **Question 6: Are there any issues with the way that HEFCW is planning to implement the Transitional Statement of Intervention?**

Most of the issues that we can identify stem not from HEFCW's implementation, but from the Act itself.

### Franchise provision

Paragraph 39 of HEFCW's Statement highlights an issue in relation to franchise provision. From this September, courses provided by external providers on behalf of regulated institutions (i.e. under franchise arrangements) do not fall under the new provisions of the Act. Seemingly, the only way to ensure they are covered would be for these to be formally varied (i.e. new agreements made).

It is not clear to us that HEFCW is able to *require* institutions to update its partnership agreements (i.e. create new ones for purposes of the Act) – and we would like the wording in paragraph 39 to be amended accordingly if it is not. Universities are likely to wish to do so, however, in order to ensure that such courses continue to be designated for purposes of student financial support arrangements in future, assuming that their partnership agreements permit. At the moment student support arrangements are not linked directly to the Act. Until the current regulations are replaced, the automatic designation of courses for purposes of student support will continue to depend on whether the institution is publicly funded (i.e. in receipt of grant funding) or not.<sup>1</sup> In future, it is intended that automatic designation will depend on being a regulated institution under the Act. However, the recent Student Finance Information Notice dated 10 November 2015 does not indicate a change in this respect for next year's regulations, applying for academic year 2016/17.

Until such time as the agreements are varied, this would mean that such courses are not subject to fee controls and quality regulation under the new Act. During the passage of the Bill, when we raised this issue, the Welsh Government suggested that courses not covered by the Act could still potentially be regulated through the use of the financial memorandum and terms of conditions of grant funding, powers which HEFCW retain under the 1992 Act. As neither the current Financial Memorandum nor the Revised Financial Memorandum which is expected to replace it in the near future specifically cover fee limits (or indeed franchise arrangements explicitly), it may be worth reviewing the terms and conditions of grant for the transitional period to ensure that there is coverage where needed (and that there is appropriate grant funding for franchise provision if necessary). From this September HEFCW's powers and duties in relation to the quality of education it funds under the 1992 Act were removed, and HEFCW would need to be certain that it has a firm legal basis for imposing terms and conditions in respect of quality since it does not have a duty for such provision under either Act.

It would be helpful if HEFCW could provide some guidance to institutions on the matters that need to be taken into account in reviewing their partnership agreements. For instance, regulated institutions will need to ensure that they are able to exercise their duties in relation to fee charges in the transition period, and in future their fee and access plan requirements.

### Fees

The Regulations only require HEFCW to provide the Welsh Ministers with a copy and publish the Direction once the opportunity of review process has been rejected or exhausted (see para 26 and 27 based on Regulations 4 and 11). Changes to the draft Regulations were made specifically to avoid early publication to prevent harm from publishing a direction which is subsequently withdrawn. We believe that this should be amended (in the text and on the flowchart) to avoid earlier provision.

### Quality

We understand that there will be a separate consultation on the quality criteria to be used, as required by the Act. It is HEFCW's intention to rely on existing quality arrangements as far as possible, and we welcome this approach. At the same time we recognise that these will need to be thoroughly reviewed to

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<sup>1</sup> The Education (Student Support) (Wales) Regulations 2015, Regulation 5(1)(e)

ensure that they are fit for purpose given the changes to HEFCW's quality assurance duty that have been introduced by the 2015 Act. Specifically:

- The providers covered (or potentially covered) are different. The duty extends to regulated institutions, no longer institutions which HEFCW funds. As highlighted above, there is a particular issue relating to franchise provision under existing partnership agreements during the transitional period. Part-time and postgraduate only providers cannot become regulated institutions as current arrangements stand (although special provision is made for the Open University, and it is possible that part-time provision may be brought within the 2015 Act at a future date). The Welsh Government has suggested that HEFCW should use its powers under the 1992 Act to ensure that appropriate arrangements are in place for institutions it funds but do not have an approved fee and access plan. Care will need to be taken to ensure that arrangements can be coordinated in this respect.
- The range of provision which is covered is different. HEFCW is responsible for the quality of all education provided by (or on behalf of) a regulated institution. The current arrangements referred to in the Statement only relate to higher education at the moment, and further guidance for other levels of provision would appear to be required.
- The territorial extent of the powers is different. HEFCW's duty only extends to the provision of regulated institutions wholly or principally in Wales. By separate statutory provision (a s.150 order), a reciprocal arrangement has been established with England to ensure that provision in England falls under the regulation of the Act – but no similar arrangements are in place for elsewhere in the UK or beyond. This leaves potential differences in the coverage of existing quality assurance arrangements and hence the possible outcomes of an assessment, which may need to be considered carefully in relation to HEFCW's 2015 Act duties and current arrangements. A negative quality assessment based on provision that does not fall under HEFCW's duty for instance, should presumably not provide the basis for triggering its regulatory powers.
- The statutory test of inadequate quality is different. The 2015 Act test is based on the reasonable needs of those receiving the education or undertaking the course. HEFCW have chosen to interpret this so that the reasonable needs will be considered to be met if a provider obtains judgments of 'Meet(s) UK expectations' or better in all four judgment categories in a QAA review: (see Annex A, para 11). However, a potential issue is that this test is not directly addressed by the current arrangements, and must be inferred. The expectations and indicators currently used by the QAA' UK Quality Code for Higher Education, for instance, do not apply a 'reasonable needs' test or similar, and although it arguably amounts to the same thing the approach is rather different with an emphasis on a range of indicators including e.g. information to inform choice, opportunities, and processes of student engagement. For the transitional period, the approach suggested by HEFCW seems the most sensible. However, HEFCW should ensure, for instance, that the QAA criteria are clearly mapped and considered in the context of the statutory test within future documentation.
- The duty extends not just to inadequate quality, but quality that is likely to become inadequate. It is not immediately clear that current arrangements respond sufficiently to this explicit change. HEFCW themselves have identified that the quality assurance arrangements focus more on outcomes and are in some instances better suited for the assessment of current rather than future quality arrangements. Care will need to be taken to ensure that appropriate emphasis is placed on monitoring and enforcing future arrangements.

- The duty also highlights HEFCW's responsibilities in relation to particular courses, not just quality at an institution in general. Paras 29 and 30 in the Annex A outline proposals for investigating allegations. As discussed above, it will be important to ensure that the procedures for dealing with allegations from staff/students other stakeholders are reviewed in detail to ensure they are fit for purpose.
- Future arrangements with the QAA or successor body are uncertain at this stage, and on a practical basis arrangements will need to be revisited as the outcomes of the retendering process become clear.

Otherwise, the 2015 Act gives HEFCW new powers to issue advice that institutions must take into account in relation to quality. An important issue we highlighted in the passage of the Bill is that any communication could otherwise potentially be interpreted as statutory advice and this would significantly increase the effective influence and control of HEFCW, and raise ONS/charity law issues. We ask that HEFCW commits itself in this Statement to ensuring that any statutory advice is in writing and clearly marked as such, to avoid confusion and enable non-statutory advice to be more freely used. See our detailed comments on paragraph 46 and 51.

A key issue arising from the HEFCW workshop related to HEFCW's intention to charge institutions for issuing advice or providing assistance as part of its intervention process for inadequate quality. As highlighted at HEFCW's recent workshop event, we would question whether HEFCW *has* the statutory powers to enable it to do so – and if not, this should be amended in the Statement. We also question whether it *should* seek to do so. In general, regulatory bodies do not have powers to pass the costs of regulation on to those who are regulated, and in our view this would set an alarming precedent (e.g. regulators would potentially be regarded as serving their own financial interests in taking regulated action). In particular:

- Any *assistance* bearing costs for an institution which is provided without the consent of that institution would be hard to construe as 'assistance'. In our view it is necessary that any assistance provided is provided with the institution's consent. Otherwise, in reality it could be regarded as a form of a direction and should follow the formal procedure set out by the Act.
- Also, should HEFCW feel it necessary to issue *statutory advice* (i.e. under s.20), this presumably would arise from fulfilment of HEFCW's statutory quality assurance duty and not the request of the institution concerned. We do not believe that this section was intended to provide a further power of sanction or control. There may also be consequences for national accounting classifications and charity law, if the powers are interpreted to enable HEFCW to impose its costs on institutions.
- We understand that the rationale for thinking that an institution should help to pay for the costs of any assistance which is specific to it, although we cannot support it as proposed. The only area that this could perhaps be considered further in our view, is where HEFCW provides assistance specific to a particular institution at that institutions request with consent to the costs, outside of the intervention process i.e. where it is genuinely a service provided at the voluntary request of the institution and not essential to the fulfilment of HEFCW's statutory functions (which should be adequately funded by the Welsh Government).

### General

From the more detailed comments there also a number of minor issues of a general nature to consider further. For instance:

- In some instances it would help to more clearly identify where the provisions apply to a regulated institution and or an external provider. The Act introduces key new powers to intervene directly in relation to external providers. See our detailed comments on paras 42, 44-45, 51 in the Appendix for instance.
- We would welcome HEFCW checking the Statement again to ensure that it is consistent with the Revised Financial Memorandum. See our comments on paragraph 48 for instance.

**Question 7: Are there likely to be any unintended consequences that may arise as a result of any aspect of the Transitional Statement of Intervention?**

In particular, care will need to be taken not to implement the Statement in ways which increase the risk of ONS reclassification for purposes of national accounts. This is a particularly live issue for universities at the moment given that the ONS is due to review the classification of universities by Spring 2016, and the financial, reputational and other consequences for both universities and government resulting from any reclassification could be major. The powers to issue directions and statutory advice are particular areas where HEFCW will need to ensure that it follows the principles set out under paragraph 9. We have also highlighted a potential issue with the suggestion that HEFCW may seek to make institutions bear the costs of other measures in relation to quality (see comments on paragraph 21). In particular, we recommend that HEFCW commits itself to ensuring that any statutory guidance or advice is made in writing and clearly marked as such (see comments on paragraph 46 and above).

**Question 8: Are there any other issues in relation to the Statement of which you would like to highlight?**

We would welcome comment in the statement itself to highlight that the statement is limited by the Act to specified intervention functions only, and that HEFCW's other powers under the Act - and remaining powers under the 1992 Act – mean that it will continue to have a wider role that is not focussed on remedial action and compliance. HEFCW's role and powers – such as the powers to give information and advice, for instance - point to the continuation of a much more supportive, collaborative, and strategic role which we would welcome.

We hope that you find these comments useful and would of course be happy to discuss any comments further.

Yours sincerely

Ben Arnold  
Policy Adviser

## Appendix –

### Further comments on detail

- Para 14, p.10 and footnote 6: This cites the draft regulations, not the regulations as enacted. This should be amended.
- Para 21, p.11 ‘institutions will have up to 40 days to make representations’: The representations covered by the provisions of the Act must be made by governing bodies and be in writing. Should this be clarified in this paragraph?
- Para 24(b), p.12 ‘providing information on the grounds for review... should be made’. We do not see a rationale for this text being different to para 59(c). The text appears to refer to duties under Regulations 6 and 8 of the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015. However, these are covered in paragraph 24(c) – and more accurately. We suggest removing this text.
- Para 24 (c), p.12: Would it be helpful to cross-refer to paragraph 29?
- Para 24 end, p.12 ‘upon being issued’: The Regulations only require HEFCW to provide the Welsh Ministers with a copy and publish the Direction once the opportunity of review process has been rejected or exhausted (see para 26 and 27 based on Regulations 4 and 11). Changes to the draft Regulations were made specifically to avoid early publication to prevent harm from publishing a direction which is subsequently withdrawn. We believe that this should be amended (here and on the flowchart) to avoid earlier provision and publication. It also not easy to see why this should be treated different to a quality direction (see para 59).
- Para 29, p.13 ‘only on the following grounds’: more accurately and helpfully, this could be stated as ‘on one or more of the following grounds’.
- Para 29, p.13 ‘a copy of the notice or direction to be reviewed’: omit ‘notice’, as the current process only relates to compliance and reimbursement directions (and ‘notices’ can easily get confused with e.g. warning notices).
- Para 29, p.13 ‘statement issued in accordance with s.43 of the Act’: it would be helpful to cross-refer to para 24, for ease of use.
- Para 30, p.14 ‘required to provide any information requested ... within 28 days’: The Regulations simply states that the Review Panel is not obliged to consider info submitted after 28 days, but does not exclude it from doing so. Neither the Act nor the regulations give the Review Panel powers to require information or place a duty on either party to submit it – either within 28 days or indeed at all! We suggest that this text is reviewed/amended.
- Para 31, p.14 ‘must take account of all information’: the panel is not obliged to consider information arriving more than 28 days after request (see comment above). Strictly speaking the Regulations only explicitly requires the Panel to take into account any further information that they have requested and any representations allowed in relation to further information (under Regulation 9(4) and 9(8)(c)) – not all information submitted!
- Para 31, p.14 ‘if the outcome of the review is that the Direction should stand’: outcome of the review panel or HEFCW’s decision? It is presumably the latter, but may be helpful to clarify.
- Para 32, p.14 ‘institutions in Wales that provide higher education or that are charities’: this is inaccurate and should read ‘and that are charities’.
- Para 34, p.15 ‘Direction ... not issued until after’: Should this be ‘given’ rather than ‘issued’? i.e. once the opportunity for review has been exhausted and the Direction stands?
- p.16 Flow Chart: On the compliance and reimbursement flow chart it would be helpful to show the informal stages as well (like the Flowchart for inadequate quality directions).
- Notes, p.17 ‘the quality of education’: This is a key point and probably needs to come out of the ‘notes’ section.

- Para 42, p.18 'HEFCW will consult .... which HEFCW considers appropriate': The Act only requires consultation of all regulated institutions and other persons that HEFCW thinks appropriate. This section would benefit from clarifying/amending. It looks as if HEFCW wishes to signal its intention to include all institutions that are potentially eligible to become regulated institutions, which we assume would be unproblematic for the transitional period at least. If so, however, the wording should read 'other institutions in Wales that provide higher education and are charities', not 'or are charities' (since we presume HEFCW does not wish to commit itself to consulting all charities in Wales).
- Para 42, p.19 'HEFCW will consult .... which HEFCW considers appropriate': See comment on paragraph 42, p.18 above.
- Paras 44-45: This advice conflates provisions relating separately to regulated institutions (s.21(1)) and external providers (s.21(2)). It would be helpful to highlight more clearly in particular that external providers (i.e. franchise providers) are subject to a direct duty to cooperate with HEFCW and that HEFCW now has statutory powers to direct external providers as well as regulated institutions to cooperate, enforceable by injunction (provided that they are covered under a partnership agreement made after September 2015). In paragraph 45, 'an institution's governing body' would more accurately be rendered 'a regulated institution's or external provider's governing body'.
- Para 46, p.19 'advice or assistance... becoming inadequate': s.20(3) of the Act stipulates that institutions must take any advice given by HEFCW into account. Could this be clarified/added here? Importantly, could HEFCW commit itself in this Statement to ensuring that any statutory advice is in writing and clearly marked as such, to avoid confusion and enable non-statutory advice to be more freely used? An important issue we highlighted in the passage of the Bill is that any communication could otherwise potentially be interpreted as statutory advice and this would significantly increase the effective influence and control of HEFCW, and raise ONS/charity law issues.
- Para 48, p.20 'HEFCW will contact the Head of the Regulated institution'. Is this consistent with the approach to be adopted under the Revised Financial Memorandum? Should this discussion be with the governing body, or involve direct communication with the governing body? Unlike previous arrangements (under the current Financial Memorandum) it is the governing body that is now specifically responsible. (The removal of the statutory powers and duties under the 1992 Act for the quality of education at institutions which HEFCW funds will now also need to be reflected in the Revised Financial Memorandum.)
- Para 51, p.21 'following consultation': The Act does not require prior consultation before providing statutory advice or assistance. We welcome HEFCW's commitment to prior consultation, but it may be helpful to clarify that that this is the case. See also our comments above (on para 46) for the need for the Statement to commit to such advice to be in writing and clearly marked as statutory.
- Para 51, p.21 'governing body of an institution': Should this read 'of a regulated institution'? It would be helpful to be clear that the advice and assistance that HEFCW may provide under s.20 only applies to regulated institutions and not external providers directly (unlike the powers of access and entry).
- Para 51, p.21 'such advice or assistance might include': As argued in the main submission, any assistance provided should require the consent of the institution. We ask that the Statement is amended to explicitly reflect this in relation to the given examples of assistance (i.e. bullets 2 to 4).
- Para 51, p.21 'the cost of such advice or assistance may be charged to the institution'. As argued in the main submission, we would not expect the cost of HEFCW exercising its statutory regulatory role to be passed on to institutions. This proposal should be removed – see discussion in the main response above.
- Para 53, p.21 'regulated institution's governing body': Should this read 'regulated institution's or external provider's governing body'?

- Para 53, p.22 'or external provider': Should this read 'or, in relation to an external provider, the external provider and the regulated institution on whose behalf its courses are delivered'.
- Para 55, p.22 'institutions will have up to 40 days to make representations': see comments on para 21 above.
- Para 61, p.24: see our comments on para 29.
- Para 62, p.24: see our comments on para 30.
- Para 63, p.24: see our comments on para 31.