

# Children, Young People and Education Committee

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Meeting Venue:

**Committee Room 1 – Senedd**

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Meeting date:

**Wednesday, 9 July 2014**

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Meeting time:

**09.15**

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Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales



For further information please contact:

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## Agenda

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**09.15 – 09.30 – Private Pre-meeting**

**1 Introductions, apologies and substitutions**

**2 Higher Education (Wales) Bill – Evidence session 7 (09.30 – 10.30)**

(Pages 1 – 40)

CYPE(4)-19-14 – Paper 1

Minister for Education and Skills

Huw Lewis AM, Minister for Education and Skills

Neil Surman, Head of Higher Education Division

Grace Martins, Lawyer

**3 Papers to note**

**Letter from the Minister for Education and Skills following the meeting on 5 June**

**2014** (Pages 41 – 47)

CYPE(4)-19 -14 - Paper to note 2

**Letter from the Minister for Education and Skills to the Chair of the Finance Committee** (Pages 48 – 55)

CYPE(4)-19-20 - Paper to note 3

**Letter from the Minister for Education and Skills to the Chair of the Constitutional and Legislative Affairs Committee** (Pages 56 – 72)

CYPE(4)-19-14 - Paper to note 4

**4 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:**

Item 5

**5 Consideration of Committee forward work programme (10.30 – 11.00)** (Pages 73 – 77)

CYPE(4)-19 - 14 - Private paper 5

# Agenda Item 2

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Huw Lewis AC / AM  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref LF/HL/0633/14

Ann Jones AM  
Chair  
Children, Young People and Education Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

02 July 2014

Dear Ann,

## **CHILDREN, YOUNG PEOPLE AND EDUCATION COMMITTEE - STAGE 1 SCRUTINY OF THE HIGHER EDUCATION (WALES) BILL**

Following my attendance at the Children, Young People and Education Committee on 5 June, I have listened with interest to the further evidence provided to the Committee by various stakeholders from around Wales. In advance of my second appearance before the Committee on 9 July, I would like to take the opportunity to provide some further written evidence on some of the issues raised in scrutiny of the Bill to date.

### **Need for legislation**

I note that a number of stakeholders, including HEFCW and Higher Education Wales ("HEW"), have discussed the need for a Bill at this time. They have also referenced the Diamond Review of higher education funding and student finance as part of these discussions. I would like to reiterate that the Higher Education (Wales) Bill is not dependant on the Diamond Review and will seek to address important, immediate issues which impact on students and higher education in Wales more generally.

Most notably, it will seek to replace the existing regulatory framework for higher education which is based entirely on the imposition and enforcement of terms and conditions of HEFCW recurrent funding. As a result of the large reductions in HEFCW funding direct to HE institutions this regulatory framework is no longer fit for purpose. HEFCW is unable to attach terms and conditions to the large amounts of student tuition fee support paid to institutions via students, and the remaining levels of recurrent support may be too low to justify meaningful terms and conditions. It is therefore questionable whether HEFCW is able now and in the immediate future, through continued reliance upon terms and conditions of funding, effectively to discharge its statutory responsibilities for the regulation of fees, quality assurance and financial regulation of HE in Wales. I consider it vital that the Funding Council should have appropriate powers to oversee such matters given the continuing significant levels of public investment in the HE sector in Wales.

For these reasons, I am of the clear view that this Bill is needed now. It will seek to introduce a robust, yet proportionate, regulatory framework which is not dependent on the imposition of terms and conditions of HEFCW recurrent funding. It is important to dispel any misconception that this Bill introduces a new regulatory system with significant new and draconian functions for HEFCW. Almost all of the activity undertaken by HEFCW as a result of this Bill already happens under the existing statutory framework.

### **Institutional autonomy and academic freedom**

I have also noted that HEW has raised issues in relation to institutional autonomy and academic freedom. I would like to stress that I value and respect these two important principles and have sought to protect them in introducing this Bill. To be clear, the existing funding powers and restrictions set out in the Further and Higher Education Act 1992 will not be repealed. The Welsh Ministers will still be subject to the same restrictions in terms of individual institutions, courses and staff when providing direct funding to HEFCW. Furthermore, section 6(5) of this Bill builds additional protection relating to academic freedom and institutional autonomy into the new regulatory framework. When prescribing matters which must be included in fee and access plans, the Welsh Ministers may not require a plan to include provision which refers to particular courses or the manner in which they are taught, supervised or assessed or provision relating to the criteria for the admission of students. These matters will remain the responsibility of institutions.

### **Regulatory control and public funding**

During their written and oral evidence HEW queried the relationship between regulatory control under the Bill and public funding. One of the key drivers behind the Bill is to enable HEFCW to continue to undertake its existing statutory functions, albeit on a revised statutory footing. This was acknowledged by HEFCW during their evidence session, where they stated that the operational relationship between the Funding Council and institutions was unlikely to change as a result of the Bill. The key components of the Bill relate to fee limits and access arrangements, quality assessment and the financial management of institutions. All of these elements are connected to public funding, in that they relate to the delivery of courses attended by publicly-funded students.

### **Subordinate legislation**

HEW have described this Bill as a 'framework' Bill and have expressed concerns about the level of detail which has been left to subordinate legislation. On this point, I was pleased to hear the positive comments by Committee Members and others, which acknowledged that a significant amount of detail is set out on the face of the Bill.

I would like to reiterate that, in general, the matters left to subordinate legislation deal with matters of technical and practical detail which will require updating from time to time. I do not accept that it is not possible to understand the full scope and implications of the Bill as a result of the number of powers to make subordinate legislation. The intention and scope of the Bill is clear, with the vast majority of detail being set out on the face of the Bill. In short, this is not a framework Bill. In addition, to further assist with the scrutiny process, I have published a statement of policy intent alongside the Bill, which provides further detail on our plans for subordinate legislation.

On a related point, I note that HEW and NUS Wales have raised the specific powers to make regulations which may amend the Bill or other pieces of primary legislation (the so called 'Henry VIII powers)'. These powers are set out at sections 13(3), 37(3) and 55(3) of the Bill. In respect of the first two powers, which are restricted to amending provision of this Bill, I would like to make clear that they are designed to provide additional protection to institutions. For example, if HEFCW are provided with new powers of sanction under section 13, then it is important that the Welsh Ministers can also attach the same procedural safeguards as apply to other HEFCW sanctions under the Bill. This would include the application of the warning notice and review procedure in sections 40 to 43. Similarly, it is important that the same procedural safeguards can be attached to a notice under section 37(1).

These powers are not designed, as has been suggested, to provide the Welsh Ministers with an unfettered power to change the statute book. Rather, they will enable the Welsh Ministers to make relatively minor changes to related provisions of this Bill which primarily would protect the interests of institutions.

Furthermore, contrary to what has been suggested, the power in section 55(3) is not unusual or controversial in any way. This power enables the Welsh Ministers to make consequential and transitional provision which may amend, repeal or revoke pieces of primary legislation. It is a 'tidying up' provision which has no substance of its own and exists only to deal with what can be broadly described as 'consequential provision'. Again, the Welsh Ministers will not be able to use this power to make any changes of substance. It is simply designed to enable the effective operation of the new regulatory framework established under the Bill and ensure a smooth transition from the current framework to the new one.

## **Fee and Access Plans**

The evidence provided to Committee to date has raised a number of matters concerning the proposed operation of fee and access plans. Firstly, the new plans will for the most part be similar to the fee plans required under the current regime. There will, of course, be some changes to the scope of application of the new plans, the enforcement of the commitments made by institutions in their approved plans as well as an increased focus on the evaluation of the outcomes of the plans. I have outlined the key changes below.

Under the new system it is entirely possible that new institutions or providers may apply to HEFCW for approval of a fee and access plan. These providers may have no previous relationship with HEFCW. This presents opportunities and challenges, including the potential for more varied tuition fee levels across Wales. The Bill acknowledges this potential for variation, by enabling regulations, under section 7(3), to provide for matters to be taken into account by HEFCW when considering whether to approve or reject a fee and access plan.

There has been speculation about the balance of HEFCW's focus on the outcomes of approved plans versus the delivery of activities. I should like to explain further the policy intention behind the proposed operation of fee and access plans. Section 15 places HEFCW under a duty to monitor the delivery of fee and access plan commitments and to evaluate the effectiveness of approved plans both individually and generally. These functions augment the arrangements under the current system. My intention is for HEFCW to monitor delivery of the activities to which institutions commit in their approved plans, as well as for increased attention to be given to the effectiveness of fee and access plans in

achieving improvements in fair access to higher education and the promotion of higher education throughout Wales.

Section 51 confers a function on HEFCW to identify good practice relating to the promotion of equality of opportunity in connection with access to higher education and the promotion of higher education. This is similar to HEFCW's existing function under section 40A of the Higher Education Act 2004. My intention is that HEFCW will utilise its findings from the evaluation of the effectiveness of fee and access plans to inform production of good practice information and advice. Regulated institutions will be required to take account of any information and advice given by HEFCW in the preparation of new fee and access plans.

It will of course take some time for HEFCW to evaluate the effectiveness of fee and access plans and the evidence provided to Committee has correctly emphasised this point. Improving access to higher education requires long-term, sustained action which needs to be informed by best practice. It is likely that this will become an increasingly important component of HEFCW's role in future and will contribute to driving up the effectiveness of fee and access plans over time.

Section 4(2) provides that the maximum period of duration of fee and access plans may be prescribed in regulations. Under the current system the maximum duration of plans is two years although to date HEFCW has requested the submission of new plans on an annual basis. My intention is that in the long term this duration could be extended up to five years when the operation of the new system has embedded and institutions and HEFCW are familiar with the monitoring and evaluation of the plans. There is no contradiction between an annual renewal of plans and HEFCW's long-term evaluation of the effectiveness of plans.

### **Guidance powers**

HEW have expressed concerns about the Bill making provision to place institutions under a duty to take into account guidance (including information and advice) issued or given by HEFCW. I very much hope that HEW are not suggesting that institutions should be free to simply ignore guidance issued to them by a regulatory body. This is an unacceptable proposition. HEW's objection is hard to understand, particularly in view of the fact that all the requirement entails is that institutions have regard to relevant guidance. It does not require compliance with the guidance. If there is a good reason for not following the guidance, institutions are able to depart from it.

I firmly believe that it is entirely appropriate to place a clear duty on institutions to take account of relevant guidance in making decisions about steps to be taken in order to comply with a direction about compliance with fee limits and reimbursement, decisions about improving or maintaining the quality of education they provide, decisions in respect of the organisation and management of financial affairs or best practice in respect of equality of opportunity and the promotion of HE.

It is very common for legislation to require the targets of guidance to have regard to it in performing their functions. While it is the case that the application of the ordinary principles of administrative law will lead to a duty to have regard to guidance, I do not believe that in this case it is appropriate to have such a duty left to be implied because institutions may not be susceptible to the process of judicial review in every case. Whether they are will depend on the facts of each case and on the nature of the institution. The nature of institutions is also likely to become more diverse in future with the arrival of new entrants to the sector.



The imposition of a duty to take guidance (including information and advice) into account makes for clarity of the legal expectation which is that if you are the target of guidance you have to have regard to it in exercising your functions.

I must also point out that where HEFCW have a power under the Bill to issue guidance to institutions, HEFCW are also placed under a duty to consult institutions before issuing that guidance.

### **Eligibility criteria for regulated institutions**

In their written evidence to the Committee HEW indicated that the eligibility requirements for determining which providers may apply to HEFCW for approval of a fee and access plan are unclear. I do not accept this point. Section 2 of the Bill sets out three clear requirements in respect of eligibility:

- 1) an applicant must be an institution in Wales;
- 2) the applicant must be an institution which provides higher education; and
- 3) it must be a charity.

For these purposes, section 54(3) confirms that an institution in Wales is one whose activities are carried on wholly or principally in Wales.

I also note that there has been some confusion around the scope and purpose of section 3 of the Bill. This section does not allow the Welsh Ministers to designate additional providers as regulated institutions, nor is it wholly concerned with providers who provide lower level higher education courses. Instead, it enables the Welsh Ministers to designate charitable providers of higher education in Wales as '*institutions*' for the purposes of section 2. Such providers may not normally be classed as '*institutions*' for these purposes. To be clear, these providers will still need to meet the other eligibility requirements and apply for approval of a fee and access plan under section 2, irrespective of their designation under section 3. Designation under section 3 does not confer automatic regulated status.

### **The regulatory system**

HEW raised a number of queries in relation to the scope of the regulatory system provided for in the Bill. In particular they have referred to part-time courses, automatic and case-by-case designation and quality assessment. The Committee will note that I have already provided further evidence on some of these issues in my letter of 27 June.

However, I would like to rebut the implication that the Bill 'leaves important gaps in the overall regulatory framework for higher education in Wales'. The Bill is indeed reliant on universities and other providers becoming regulated institutions, but this is nothing new. The current system is reliant on universities accepting HEFCW funding, just like the new system is reliant on institutions wanting access to the most generous elements of the student support package for their students (automatic course designation). Entrance into the regulated Welsh HE sector has always been, and will continue to be, voluntary.

Furthermore, I do not accept the argument that the Bill does not deal with the whole regulatory system. As stated above, this legislation is about replacing elements of the existing statutory framework for higher education which are no longer fit for purpose. I have not sought to make changes to other elements of the statutory framework which are still working effectively. For example, automatic and case-by-case course designation will

continue to be dealt with via the annual set of student support regulations made under the Teaching and Higher Education Act 1998. Whilst complex, this is nothing new so I see no reason why it should not be understood by the HE sector in Wales.

On a related point, HEW have stated that in the absence of further legislation there will be no public body with a duty to provide quality assurance for unregulated providers (i.e. those not subject to an approved fee and access plan). That is correct, but again this is nothing new. HEFCW's current quality assessment duty under section 70 of the Further and Higher Education Act 1992 only extends as far as 'funded' or regulated providers. This is equivalent to their new duty which is limited to education provided by, or on behalf of regulated institutions (those with an approved fee and access plan in place). The different formulation of the two quality assessment duties simply reflects the revised nature of the voluntary regulatory system. The position has not changed.

### **Charity Commission/ONS**

HEW have raised concerns over the impact of the Bill on the charitable status of institutions. To be clear, whilst the funding system for HE will be on a new statutory footing, operationally the system will be very similar to the current one where HEFCW undertakes similar activities albeit via terms and conditions of funding. My officials have consulted the Charity Commission, who I understand have also provided evidence to the Committee. My view on this point is unchanged: the Bill will not affect institutions' ability to comply with charity law. Further, in written evidence to the Committee the Charity Commission have indicated that they have "no concerns about the policy intentions of the Bill, or the proposed new regulatory framework, in terms of charity law, the charitable status of HEIs whose courses are funded by the Welsh Government, or charity regulation"

To put this matter beyond doubt my officials will continue to engage with the Charity Commission to pre-empt any possible issues that could arise, for instance, at the amending stages.

In terms of ONS classification, I believe the Bill is a proportionate and measured response to the necessity of maintaining public confidence in the funding system for higher education in Wales. I do not see any need to engage with ONS. The Bill is intended to strike the appropriate balance between maintaining institutions' independence while at the same time safeguarding the significant amount of public money that is invested in the higher education sector and ensuring that students receive the highest quality of education. As I explained to the Committee, the situation when compared to FE institutions is readily distinguishable. FE institutions are directly funded by the Welsh Government, whereas the HE sector is funded through HEFCW (which separates HE institutions from government), student tuition fees and other income.

### **Rights of entry and inspection of documents**

HEW, in both their written and oral evidence, describe the powers of entry and inspection in sections 22 and 35 of the Bill as "new" and unnecessary. They also refer to legal advice that describes the powers as draconian. I do not accept that interpretation.

The purpose of the Bill is to provide HEFCW with the means to continue its existing work in assessing the quality of education and monitoring the financial management of institutions. In order for HEFCW to be able to carry out this work it must be able to gain entry to premises and to inspect documents as it considers appropriate.

In the vast majority of cases I would expect institutions and HEFCW to come to amicable arrangements but the Bill must make provision for those occasions, however rare, when an institution refuses to co-operate by allowing HEFCW entry to its premises or to inspect documents.

It is important to remember that the right for HEFCW to enter premises and to inspect documents is not new. HEFCW can currently provide for a right of entry to premises and to inspect documents through its terms and conditions of funding.

In the absence of funding to which terms and conditions can be attached an alternative mechanism is needed to ensure that HEFCW is able to continue to undertake its work in assessing the quality of education and monitoring the financial management of institutions. That includes, when necessary, having a right to enter premises and inspect documents.

The Bill achieves this by establishing a new statutory framework, but in operational terms little changes. Sections 22 and 35 provide for a person authorised by HEFCW to enter the premises of a regulated institution and to inspect, copy or take away documents found on those premises. Those sections replace terms and conditions of funding that HEFCW can currently impose. They provide a mechanism to ensure that HEFCW can continue to require entry to premises and to inspect documents.

I do not consider that it is unusual for legislation to make provision for a right of entry and inspection of documents in this context and nor do I consider that the Bill is draconian. The powers in the Bill are proportionate and are subject to adequate safeguards by requiring notice to be given other than in very limited circumstances and for the powers to be exercised only at reasonable times. HEW also refers to what they consider to be similar powers available to H M Revenue and Customs. In my view such comparisons are misplaced given the very different context in which H M Revenue and Customs operate.

### **Financial management code**

For the avoidance of doubt I wish to clarify that there are no regulation-making powers arising from Part 4 of the Bill. HEFCW's functions of preparing, consulting on, issuing and keeping under review the proposed financial management code will not be supported by regulations. Currently HEFCW develops, consults on and issues a financial memorandum applicable to funded institutions. Under the new regulatory framework HEFCW will be required to consult all regulated institutions on a draft financial management code and will additionally be required to provide a summary of those consultation responses when they submit the draft code to the Welsh Ministers for approval. It is intended that the Code will be published and take effect from the start of the 2016/17 academic year. This will allow HEFCW sufficient time to prepare, consult on and gain approval of the Code. For the 2015/16 academic year, HEFCW will continue assure the financial management arrangements of higher education institutions via its existing financial memorandum.

The proposed arrangements for oversight of the management of the financial affairs of regulated institutions are therefore similar to those currently in force. However, in future they would not be dependent on the application of terms and conditions of funding for their enforcement. It is unlikely that there would be conflict between the proposed code and any arrangements that HEFCW may consider necessary to put in place to deal with ongoing terms and conditions of funding granted under section 65 of the Further and Higher Education Act 1992. That will be a matter for HEFCW to determine, in consultation with the sector.

Additionally, although I cannot foresee circumstances under which institutions would be unable to provide assurances to third parties with whom they have contractual arrangements as a consequence of complying with the new Code, I have asked my officials to explore this matter further with Higher Education Wales to ensure that we fully understand their concerns.

### **Cross-border issues**

HEW raised concerns about the provisions of the Bill which restrict HEFCW's functions in respect of fee limits and quality assessment to courses provided by Welsh institutions in Wales. As stated in my previous evidence to the Committee, we have reserved our position on legislative competence in these areas.

However, as you will be aware, my officials are currently in discussion with their counterparts in the Department for Business Innovation and Skills and the Wales Office on this issue. These discussions are focused on bringing forward an Order under section 150 of the Government of Wales Act 2006. This Order would seek to extend the functions of HEFCW in respect of courses provided in England by Welsh institutions and would therefore resolve the concerns raised by HEW. This Order is referred to in the Explanatory Memorandum published alongside this Bill and throughout my evidence to the Assembly to date.

### **Transitional arrangements**

I would also like to take this opportunity to provide some clarity on the transitional arrangements which will apply under the Bill. If passed, the Bill will not be fully implemented until academic year 2016/17. This will provide institutions and HEFCW with the opportunity to fully prepare for the introduction of the new regulatory framework.

However, I am proposing some transitional arrangements in respect of academic year 2015/16. These arrangements are primarily designed to protect students who will be undertaking courses at Welsh institutions during this transitional year. Institutions who commit to fee limits for this academic year (via fee plans approved under existing legislation) will be required to comply with those limits. If they fail to comply, HEFCW will be able to take action to bring about compliance. I consider this to be perfectly appropriate.

Similarly, the transitional arrangements will enable HEFCW to continue to assess the quality of education provided by, or on behalf of, Welsh institutions during academic year 2015/16. If HEFCW consider that the quality of education at a Welsh institution is inadequate, or likely to become inadequate, during this academic year, then they may take action to resolve this problem. Again, I do not consider this to be controversial.

During this transitional year, I expect HEFCW to prepare and consult on the first financial management code. This will not be introduced until full implementation in academic year 2016/17.

Finally, I would like to reassure the Committee that I am aware of the importance of ensuring a smooth transition between the existing statutory framework and the one proposed under this Bill and will ensure that the necessary arrangements are in place at the appropriate time.

I hope this additional information will assist the Committee in their further scrutiny of the Bill and I look forward to providing further evidence at my second appearance on 9 July.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Huw Lewis', written in black ink.

**Huw Lewis AC / AM**  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills

Huw Lewis AC / AM  
Y Gweinidog Addysg a Sgiliau  
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Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref LF/HL/0544/14

Ann Jones AM  
Chair  
Children, Young People and Education Committee  
National Assembly for Wales  
Cardiff Bay  
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27 June 2014

## **CHILDREN, YOUNG PEOPLE AND EDUCATION COMMITTEE - STAGE 1 SCRUTINY OF THE HIGHER EDUCATION (WALES) BILL**

Following my attendance at the Children, Young People and Education Committee on 5 June I agreed to provide Members with further details in the following areas: Higher Education Funding Council for Wales' functions; costs; part time courses; operating arrangements for medical schools and the relationship between HEFCW and QAA.

Before I respond in detail to each of the areas, I would like to take this opportunity to clarify the arrangements for specific course designation being progressed by way of legislation. The Bill does not provide for either automatic or specific course designation, my intention is to consult on new requirements for specific course designation with the aim of introducing rigorous quality assurance and robust checks on the financial health of institutions delivering such courses. Any new arrangements for specific course designation will be progressed by way of the Welsh Ministers' existing regulation making powers under the Teaching and Higher Education Act 1998. Therefore new legislation is not needed.

Now turning to the specific areas Members sought clarity on, please find detailed responses below:

### HEFCW's functions

In my Plenary statement I indicated that not all of HEFCW's functions can be included in the revised regulatory system and that it will not be a direct replacement for the existing funding-based system. The Bill will amend, repeal and replace certain of HEFCW's current functions. The Bill provisions build on HEFCW's existing functions under the Further and Higher Education Act 1992 and the Higher Education Act 2004, recasting and consolidating them in the context of the new regulatory system. These changes will ensure that HEFCW continues to be able to enforce tuition fee limits and fee and access plan commitments, and

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provide assurance about the quality of education and the organisation and management of regulated institutions' financial affairs.

HEFCW's function to allocate funding to institutions under section 65 of the 1992 Act will remain in force and HEFCW will continue to be able to attach terms and conditions to such funding. However, following the introduction of the new tuition fee regime the amount of funding available to be allocated has significantly reduced and institutions are now less dependent on HEFCW grant funding and more reliant instead on tuition fee income from students which is heavily subsidised by the Welsh Government. The Bill does not make provision for a revised approach to the manner in which HEFCW will support delivery of the Welsh Government's policy priorities; it is restricted to the introduction of a new regulatory system.

Moving from a system of funding controls to a system of statutory regulation presents an opportunity for the Council to re-define its relationship with the sector. In my remit letter to HEFCW for 2014/15 I made clear my expectation that the funding regime introduced in 2012/13 requires a fundamental reappraisal of the relationship between Government, the Funding Council and HE institutions in Wales. The new funding regime for higher education in Wales brings with it new expectations on our universities. The Welsh Government continues to make a very substantial investment through HEFCW in respect of the funding which goes direct to institutions in Wales and the Tuition Fee Grant and loans paid to Welsh-domiciled students at Welsh institutions. This shift in funding and change in role means that the Council will need to identify new ways of working in partnership with the sector to influence behaviour and to support the delivery of policy aims. My expectation is that this work should include identifying ways in which the Council's enhanced role can foster a stronger recognition by institutions of the link between their status as designated bodies in receipt of public funding and their responsibility to ensure positive outcomes for all learners. I look to the Funding Council and our HE institutions to develop a more robust partnership through which the national strategic priorities set out in my remit letter can be delivered.

### Costs

The additional cost to HEIs in Wales of introducing the Bill is estimated to be £1.6m over the first five years of operation. Implementing the Bill will mean costs are incurred by Welsh Government, higher education institutions (HEIs) and the Higher Education Funding Council for Wales (HEFCW).

These costs have been estimated using a task-based model. The Bill has been carefully analysed in order to ascertain all the tasks that will be undertaken in the operation of the new regulatory framework. The number of days taken to complete each task has been estimated and appropriate wage rates and overhead costs have been used to arrive at cost estimates for those tasks that will be undertaken regularly, as well as the cost of sanctions.

The Bill has been costed as Option Three in the RIA. Excluding the costs of any sanctions (returned to below) the estimated costs of the Bill are recorded in table one.

**Table 1**

The regular costs of the Bill

£	2015/16	2016/17	2017/18	2018/19	2019/20
Fee plan approval and automatic	341,000	331,000	331,000	341,000	331,000
Fee plan monitoring and evaluation	301,000	366,000	470,000	374,000	470,000
Quality assurance	405,000	434,000	434,000	490,000	434,000
Financial assurance	471,000	574,000	536,000	580,000	577,000
Subordinate legislation*	49,000	49,000	0	0	0
Development, training, oversight	99,000	99,000	29,000	29,000	29,000
<b>TOTAL</b>	<b>1,666,000</b>	<b>1,853,000</b>	<b>1,800,000</b>	<b>1,814,000</b>	<b>1,841,000</b>

\* The development of legislation arising as a direct consequence of the Bill.

Some of this cost reflects, in part, continuing activity, tasks which are carried out presently and which will continue to be carried out upon introduction of the Bill (and which are required by its provisions)—existing costs. Additional costs, on the other hand, are costs which arise for two reasons:

- i. there may be some increased complexity in managing and administering the existing tasks.
- ii. the Bill introduces wholly new tasks (as a result of the shift from a system based upon funding levers associated with terms and conditions to one based upon express regulatory functions ).

The table below, then, details:

- additional costs—the cost of wholly new regulatory tasks introduced by the Bill; and the increase in cost of continuing tasks. The analysis assumes a 25% increase in the cost of continuing tasks.
- existing costs—the existing cost of continuing tasks.



**Table 2**

Additional costs of the Bill, and existing costs

£	2015/16	2016/17	2017/18	2018/19	2019/20
Additional	556,000	549,000	496,000	493,000	537,000
Existing	1,109,000	1,303,000	1,303,000	1,321,000	1,303,000
<b>TOTAL</b>	<b>1,666,000</b>	<b>1,853,000</b>	<b>1,800,000</b>	<b>1,814,000</b>	<b>1,841,000</b>

The incidence of these costs between HEIs, HEFCW and Welsh Government is readily identified from the task analysis which underpins the cost model. The additional cost to HEIs in Wales of introducing the Bill is estimated to be £1.6m over the first five years of operation.

**Table 3**

Incidence of the additional costs of the Bill

£	2015/16	2016/17	2017/18	2018/19	2019/20	TOTAL
Welsh Government	172,000	113,000	29,000	87,000	29,000	430,000
HEFCW	126,000	128,000	104,000	97,000	145,000	600,000
Institutions <sup>†</sup>	258,000	308,000	363,000	308,000	363,000	1,600,000
<b>TOTAL</b>	<b>556,000</b>	<b>549,000</b>	<b>496,000</b>	<b>493,000</b>	<b>537,000</b>	<b>2,631,000</b>

<sup>†</sup> There are currently 10 institutions with fee plans and the analysis therefore assumes 10 institutions.

Finally, should 'sanctions' (used here as shorthand for activity relating to rectifying any breaches of the regulatory framework) be required further costs would be incurred. It is not possible to predict with any certainty which sanctions would be required, or when. The two scenarios used in the RIA (p.95) provided a range of possible additional costs to HEIs, from £73,000 to £188,000.

### Part time courses

Paragraph 112 of the Explanatory Memorandum indicates that "There may be a small number of institutions, including the Open University in Wales, and possibly some FE institutions and private providers which only deliver part-time HE courses. Part-time provision delivered by these providers will fall outside the scope of HEFCW's new quality assessment duty, which relates only to education provided by, or on behalf of, regulated institutions."

I would like to clarify that education delivered by providers which only deliver part-time courses will only fall outside the scope of HEFCW's new quality assessment duty for as long as part-time fees remain unregulated. Part-time fees become regulated at a future date,

providers which only deliver part-time courses will be able to apply to HEFCW for approval of a fee and access plan in the same way as providers of full-time courses. Subject to HEFCW's approval of their plans they will become regulated institutions and part-time education delivered by such providers will fall within the scope of HEFCW's quality assessment duty. In summary, there is nothing in the Bill which prevents the education delivered by providers which only offer part-time courses being subject to HEFCW's quality assessment duty in the future and there is not a 'gap' in coverage of such education for the reasons set out below.

I anticipate that the majority of part-time courses currently delivered in Wales will be within scope of the quality requirements under the new regulatory framework. This is because HEFCW's quality assessment duty will cover all courses (whether full or part-time), delivered by institutions in Wales with an approved fee and access plan in place.

HEFCW's new quality assessment duty will also cover certain franchised courses. HEFCW will be required to secure the quality assessment of franchised courses delivered in Wales on behalf of regulated Welsh institutions. My officials are currently in discussions with the UK Government about a proposed Order under section 150 of the Government of Wales Act 2006. One of the aims of this Order is to extend HEFCW's quality assessment duty to cover education delivered in England by a franchisee on behalf of a regulated Welsh franchisor. However, any provision delivered by a franchisee in Wales under arrangements with a franchisor in England will be a matter for HEFCE and we must rely on the regulatory systems that they have in place in this situation.

In addition, HEFCW will be able to secure quality assessment arrangements at funded institutions which only deliver part-time courses through terms and conditions of funding (in the same way as they do now). This is because HEFCW will continue to pay some recurrent funding to institutions for part-time courses for the foreseeable future. As explained above, this may only be an interim measure. If part-time fees become regulated then the education delivered by or on behalf of part-time only providers will fall within the scope of HEFCW's new quality assessment duty.

The Open University will continue to be assessed by the QAA through existing arrangements which HEFCW has put in place with HEFCE.

In terms of private providers, the quality assessment arrangements will depend on whether their courses are designated for the purpose of student support. For providers which only deliver part-time courses this would be through the case-by-case designation route. The new arrangements proposed for case-by-case designation will not require amendments to primary legislation and so do not form part of the Bill. The new arrangements will however, include robust requirements for the quality of courses and will be subject to consultation in due course. If however a private provider's courses are not designated for the purpose of student support it would not be appropriate to impose quality assessment arrangements where the Government (or other public bodies) have no financial interest.

I have ensured that the regulatory framework has been designed to accommodate part-time courses in the future if a decision is taken to regulate part-time fees. Until such time, I am satisfied that the necessary arrangements exist to ensure all provision designated for student support will continue to be subject to stringent quality assessment requirements.

## Operating arrangements for medical schools

In terms of undergraduate medical education it is a matter for each higher education institution to ensure there are appropriate arrangements in place to enable their students to comply fully with the requirements of the General Medical Council and others in terms of meeting standards. These arrangements will also need to be structured in a way that best meets the requirements of an individual institution's undergraduate curriculum. I do not believe Health Boards or institutions would take the view that they would not want to be involved in those arrangements. From the perspective of Health Boards in Wales they would see this as an opportunity to show students the benefits of working in Wales and potentially see this as an opportunity to engage with them as potential future employees and to influence them through these opportunities.

The position is similar in relation to post graduate training. In the past trainees were routinely required to rotate between North and South Wales as part of many of the training programmes available. This caused some concerns amongst trainees, many of whom chose not to train in Wales because of this approach. However in response to recent questions on this issue the Minister for Health and Social Services has made it clear that no Welsh Government barriers exist to training being configured on a Wales / England basis where the benefits outweigh the disadvantages of doing so. The Deanery have been asked to ensure they take every opportunity to maximise this approach in the future. The Wales Deanery already have strong links with deaneries outside Wales and are working with them to secure the best arrangements for trainees.

These are therefore arrangements that fall within the remit of the individual establishments and outside the coverage of the Bill and in that respect will not be impacted by it. We will keep your concerns to mind however in order to ensure there is no unintended adverse impact.

## Relationship between HEFCW and QAA

The existing relationship between HEFCW and the QAA is based on HEFCW's quality assessment duty in section 70 of the Further and Higher Education Act 1992. This duty enables HEFCW to secure the provision of quality assessment activity through the QAA.

In preparing this Bill I have been keen to ensure that HEFCW retains the flexibility to engage the QAA in relation to quality assessment. For this reason, section 17 of the Bill enables HEFCW to discharge its quality assessment duty through arrangements with the QAA.

This will ultimately be a matter for HEFCW. However, I was pleased to note the evidence provided to the committee by Dr Blaney of HEFCW, which indicated an intention to maintain a UK wide approach to quality assessment. As the existing UK wide arrangements involve the QAA, I anticipate that this relationship will continue in the future.

In view of this ongoing relationship, I met with the QAA in December and provided an update on my proposals for this Bill and the potential implications for HEFCW and consequently for the activities undertaken by the QAA on their behalf.

My officials and HEFCW officers also meet with the QAA on a regular basis to discuss, amongst other things, specific and general issues which affect the delivery of higher education in Wales. However, as is the case now, the role of the QAA will focus on

assessing the quality of education provided by institutions in Wales, whereas the approval and monitoring of fee and access plans will remain a matter for HEFCW.

I trust that the information I have provided is helpful and clarifies the position on the issues above to the Committee, and I look forward to appearing before the Committee on 9 July 2014.

Best Regards  
Huw

**Huw Lewis AC / AM**  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills

# Agenda Item 3.2

Huw Lewis AC / AM

Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref LF/HL/0560/14

Jocelyn Davies AM  
Chair  
Finance Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

30 June 2014

## Higher Education (Wales) Bill – Clarification on costs in Annex

Thank you for your letter of 6 June 2014, regarding the costs associated with the Higher Education (Wales) Bill.

I am pleased that the Committee found the level of detail included in the Explanatory Memorandum helpful. The following table provides a breakdown of task days associated with the headline tasks recorded in the Regulatory Impact Assessment. In order to aid understanding, the 'sub-tasks' used in the cost analysis are also included.

I trust that this information is helpful and responds to the Committee's specific questions.

*Best Regards*  
*Huw*

**Huw Lewis AC / AM**  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills

	Junior	Middle	Senior	Specialist
<b>Fee plan approval and automatic designation</b>				
REGULAR				
Welsh Ministers to issue guidance to HEFCW on designation and fee plan approval	5	25	6	2
HEFCW to provide applicants with information concerning the designation process and requirements	5	15	5	3
HEFCW to provide applicants with information concerning regulatory requirements	5	15	5	3
Institutions to compile fee plans	12	60	10	5
Institutions to include provisions in respect of the retention of students who are members of groups which are under-represented in HE				
Institutions required to set out the proportion of their fee income above the threshold amount which they intend to apply to fee plan objectives				Info. only
HEFCW to receive and assess fee plans	5	25	16	2
HEFCW to have regard to the quality of education at the institution				
HEFCW to have regard to the financial stability of the institution				
HEFCW to have regard to the corporate governance arrangements in place				Info. only
HEFCW to establish the charitable status of applicant institutions				
HEFCW be required to take a proportionate approach when approving and enforcing fee plans dependent upon fee level				
SANCTIONS/COMPLIANCE				
Institutions to be able to apply for a variation of the fee plan	4	20	5	2
HEFCW to approve variations	2	20	9	2
HEFCW to withdraw approval of a fee plan if an institution ceases to have charitable status				See 'Fee plan refusal/withdrawal'
<b>Fee plan monitoring and evaluation</b>				
REGULAR				
Welsh Ministers to issue guidance to HEFCW on monitoring and evaluation	5	20	6	2
Institutions' Governing Bodies must monitor compliance with the plan and progress in achieving objectives	12	60	15	10

	Junior	Middle	Senior	Specialist
HEFCW to monitor and evaluate the effectiveness of plans individually and at the sector level and to use these to inform the development of good practice guidance	5	40	21	5
HEFCW to issue good practice advice on targeting of particular disadvantaged or under-represented groups		Incl. above		
Institutions with a fee plan to co-operate and engage with HEFCW for purposes of evaluation	4	20	5	2
HEFCW to be able to commission the gathering of information and the carrying out of research and analysis in support of evaluating fee plan outcomes	4	35	20	2
Institutions will be required to have due regard to good practice guidance issued by HEFCW		Info. only		
HEFCW to monitor fee plans and to determine the most effective monitoring arrangements for fee plans	5	40	18	2
<b>SANCTIONS/COMPLIANCE</b>				
Welsh Ministers may request that HEFCW undertakes reviews of fee plans as and when considered to be necessary		Individual items below		
when the Welsh Ministers want to receive a report from HEFCW on the <b>compliance</b> of regulated institutions generally	3	15	12	1
when the Welsh Ministers want to receive a report from HEFCW on the <b>compliance</b> of a specific regulated institution	3	25	9	2
when the Welsh Ministers want to receive a report from HEFCW on the <b>effectiveness</b> of regulated institutions generally	3	15	12	1
when the Welsh Ministers want to receive a report from HEFCW on the <b>effectiveness</b> of a specific regulated institution	3	25	9	3
HEFCW to be able to instruct an institution to invest a specific proportion of fee income on activities relating to promotion of equality of opportunity and/or promotion of HE		Sum of items below		
<b>Compliance Process I</b>	See 'Compliance Process I'			
<b>Compliance Process II</b>	See 'Compliance Process II'			
HEFCW to be able to amend the direction if the direction is partially discharged	3	12	6	2
HEFCW to be able to direct an institution to vary a fee plan to account for the spending direction	3	12	6	2
HEFCW to be able to refuse to approve a fee plan upon renewal where an institution has failed to comply with the general provisions of the plan	See 'Fee plan refusal/withdrawal'			
HEFCW to withdraw approval of a fee plan if an institution persistently fails to comply with the requirements of its fee plan	See 'Fee plan refusal/withdrawal'			

	Junior	Middle	Senior	Specialist
<b>Tuition fee controls</b>				
<b>SANCTIONS/COMPLIANCE</b>				
HEFCW to be able to issue guidance to institutions about the steps to be taken to comply with a fee limit	5	15	12	2
Welsh Ministers may issue guidance to HEFCW	5	20	6	5
HEFCW to consult appropriate institutions before issuing such guidance	5	15	15	2
Institutions governing body to have regard to guidance	Info. only			
HEFCW to be able to direct an institution to take action to comply with the appropriate fee limit and/or reimburse excess fees which have been paid to it.	Sum of items below			
Institution to reimburse fees	20	30	10	5
<b>Compliance Process I</b>	See 'Compliance Process I'			
<b>Compliance Process II</b>	See 'Compliance Process II'			
HEFCW to be able to amend the direction if the direction is partially discharged	3	12	6	2
HEFCW to make public an assessment of any institution which the Council considers not to have made sufficient progress against its fee plan	3	12	9	2
HEFCW to be able to refuse to approve a fee plan upon renewal where an institution has failed to comply with the fee limit specified in the plan	See 'Fee plan refusal/withdrawal'			
HEFCW to withdraw approval of a fee plan if an institution persistently fails to comply with fee limits	See 'Fee plan refusal/withdrawal'			
<b>Quality Assessment</b>				
<b>REGULAR</b>				
HEFCW to assess or make provision for the assessment of quality	4	20	18	4
Welsh Ministers to be able to provide guidance to HEFCW concerning the exercise of its quality assessment functions and the production of its annual report.	5	25	5	2
Welsh Ministers to consult with HEFCW before issuing guidance	1	3	1	0
HEFCW to have due regard to this guidance	Info. only			
HEFCW should prepare, consult on and publish a statement as to how it will exercise the new functions	5	30	18	4



	Junior	Middle	Senior	Specialist
HEFCW to issue guidance to regulated institutions concerning quality assessment.	5	30	18	4
Guidance to include maintaining a subscription to QAA			Info. only	
Institutions to have due regard to guidance			Info. only	
HEFCW to establish and maintain a committee to provide advice on its quality assessment duty including any such functions conferred on it by the Welsh Ministers	4	12	9	18
HEFCW to submit an annual report to the Welsh Ministers on the discharge of its quality assessment functions	4	12	9	2
Welsh Ministers able to direct HEFCW as to the form and content of the annual report	5	15	1	1
Institutions under an obligation to engage with the quality assessment arrangements	20	80	10	10
<b>SANCTIONS/COMPLIANCE</b>				
HEFCW to issue a direction to a regulated institution which would require them to allow access to premises, records and documents	10	30	30	12
HEFCW to be able enforce compliance with such a direction by way of a Court injunction	10	30	40	12
HEFCW may direct regulated institutions to take or refrain from taking certain steps to rectify any weakness in quality				
<b>Compliance Process I</b>			See 'Compliance Process I'	
<b>Compliance Process II</b>			See 'Compliance Process II'	
HEFCW to be able to issue a notice of intent to refuse to approve a fee plan upon renewal	3	15	15	6
HEFCW to be able to withdraw such a notice	3	15	15	6
HEFCW to be able to direct an institution to develop and implement action plans to address failures/weaknesses in quality	15	40	5	2
Such plans would be subject to HEFCW's approval	6	24	30	8
HEFCW may take additional action where it is considered that an institution is failing to meet quality requirements			Individual items below	
HEFCW to be able to send in a support team	3	15	15	2
HEFCW to be able to undertake additional assurance reviews	2	10	6	1
HEFCW to be able to attend and address meetings of the governing body / management board of a regulated institution	2	15	8	2

	Junior	Middle	Senior	Specialist
Institutions to be under a duty to comply with the above measures	5	20	5	2
HEFCW to be able enforce compliance with such a direction by way of a Court injunction	2	10	15	2
<b>HEFCW should be able to withdraw its approval of the regulated institution's fee plan</b>	See 'Fee plan refusal/withdrawal'			
<b>Financial assurance</b>				
REGULAR				
Welsh Ministers to be able to issue guidance in connection with the preparation of the Financial Management Code	5	25	5	3
Welsh Ministers to lay the Code before the National Assembly	4	5	1	2
HEFCW to prepare and publish a Financial Management Code	2	8	12	2
HEFCW to keep the Code under review	2	5	2	1
HEFCW to consult upon a draft of the Code or any subsequent review	2	8	12	2
Institutions under a duty to comply with requirements imposed by the Code	20	80	10	10
Institutions to have regard to this guidance	Info. only			
HEFCW to submit a draft of the Code following consultation to the Welsh Ministers for approval	1	2	2	0
HEFCW to issue the Code to regulated institutions and to make the Code publicly available by publication on its website	2	2	0	0
HEFCW to be able to commission efficiency studies related to the Code	5	60	20	1
HEFCW to monitor the financial arrangements in place at regulated institutions	5	20	12	5
HEFCW should be required to prepare, consult on and publish a statement of the Council's policy on the exercise of its proposed intervention powers	2	5	5	2
Welsh Ministers to prescribe the manner in which HEFCW should prepare, consult on and publish a statement of intervention powers	5	10	2	2
HEFCW to consult on a draft policy and revised draft following a review	Incl. above			
Welsh Ministers to issue guidance on the matters to be included in the intervention policy	5	20	3	4
HEFCW to have regard to that guidance	Info. only			
Institutions under a duty to engage with the assurance arrangements put in place by HEFCW and provide assistance, access and information	10	20	5	2

	Junior	Middle	Senior	Specialist
HEFCW to be able to issue a direction, enforceable by way of an injunction, to a regulated institution which would require them to allow access (to premises, records etc)	5	30	18	4
HEFCW should be required to provide an annual report to the Welsh Ministers detailing how the Council has discharged its financial assurance functions	2	8	6	1
Welsh Ministers to be able to issue guidance as to form and content	5	10	2	1
<b>SANCTIONS/COMPLIANCE</b>				
HEFCW to intervene in the event of a regulated provider failing to comply (or being likely to fail to comply) with the Code's requirements	Covered below			
HEFCW to be able to issue a direction to an institution to take or refrain from taking certain steps				
<b>Compliance Process I</b>	See 'Compliance Process I'			
<b>Compliance Process II</b>	See 'Compliance Process II'			
As an alternative to an injunction HEFCW to give notice of the intention to refuse to approve a fee plan upon renewal	See 'Fee plan refusal/withdrawal'			
HEFCW to have the ability to withdraw a notice that it will not approve a fee plan upon renewal	2	20	12	2
HEFCW to provide written notification to an institution when the direction has been complied with	2	8	12	2
HEFCW to be able to support an institution	Individual items below			
HEFCW to be able to send in a support team	5	35	21	4
HEFCW to be able to undertake reviews	4	8	4	1
HEFCW to be able to attend and/or address a governing body or committee	1	35	18	4
Institution under a duty to have regard to advice etc given by HEFCW	5	15	7	5
HEFCW to be able to withdraw approval of an approved fee plan if the failure to comply with the Code is sufficiently serious	See 'Fee plan refusal/withdrawal'			
<b>Definition of institution</b>				
Welsh Ministers to amend Recognised and Listed Bodies Orders regularly	10	5	1	6
<b>Fee plan refusal/withdrawal</b>				
HEFCW to withdraw approval of a fee plan	Sum of items below			
Welsh Ministers to issue guidance to HEFCW on the exercise of its ability to withdraw a fee plan	5	20	3	5

	Junior	Middle	Senior	Specialist
<b>Compliance Process I</b>	See 'Compliance Process I'			
Upon withdrawal of a fee plan, transitional measures will be required to enable students to remain eligible for support	15	25	10	10
<b>HEFCW to be able to refuse to approve a fee plan upon renewal</b>	Sum of items below			
<b>Compliance Process I</b>	See 'Compliance Process I'			
Upon refusal of a fee plan, transitional measures will be required to enable students to remain eligible for support	As above			
<b>Compliance processes</b>				
<b>Compliance Process I</b>	Sum of items below			
HEFCW required to issue a warning notice	1	10	6	2
Institutions subject to such warning notices to be able to make representations against the direction	5	25	10	2
HEFCW will be required to have regard to any representations received from the regulated institution	1	10	6	2
HEFCW will be able to issue a notice of direction	1	10	9	2
Institutions subject to the decision should be able to seek a review by an independent person or panel	2	8	5	0
HEFCW will be required to reconsider its decision having regard to any recommendation	1	10	5	2
Institutions to be under a duty to comply with the direction	5	25	10	2
HEFCW to revoke the direction when the direction is discharged	1	6	3	1
<b>Compliance Process II</b>	Sum of items below			
HEFCW to be able enforce compliance with such a direction by way of a Court injunction	2	14	10	3

# Agenda Item 3.3

Huw Lewis AC / AM

Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref LF/HL/0645/14

David Melding AM  
Chair  
Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

02 July 2014

Dear David,

## **CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE - STAGE 1 SCRUTINY OF THE HIGHER EDUCATION (WALES) BILL**

During my attendance at the Constitutional and Legislative Affairs Committee on 16 June, Members raised a number of questions about the Higher Education (Wales) Bill. This letter seeks to respond to the specific matters raised by Members. To aid the Committee's consideration further, however, I set out first the broad principles which have underpinned the drafting of the Bill.

When I introduced the Bill on 19 May 2014, and during my attendance at the Committee, I provided assurance that in preparing this legislation we have had regard throughout to the Counsel General's guidelines on subordinate legislation. The guidelines recognise that in each case there is a balance to be struck between:

- scrutiny by the Assembly;
- consumption of Assembly (or committee) time;
- the significance of the provisions in question; and
- the making of legislation in the most efficacious manner.

The guidelines outline a range of factors that may, to a greater or lesser extent depending on the context, either suggest the application of the "draft affirmative" procedure; or else require particular justification if a procedure other than "draft affirmative" procedure is applied. Those factors are:

- “1) powers that enable provision to be made that may substantially affect provisions of Acts of Parliament, Assembly Measures or Acts of the Assembly;
- 2) powers, the main purpose of which is, to enable the Welsh Ministers, First Minister or Counsel General to confer further significant powers on themselves;
- 3) powers to apply in Wales provisions of, for example, Acts of Parliament that in England, Scotland or Northern Ireland are contained in the Act itself (whether with or without modifications);
- 4) powers to impose or increase taxation or other significant financial burdens on the public;
- 5) provision involving substantial government expenditure;
- 6) powers to create unusual criminal provisions or unusual civil penalties;
- 7) powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion;
- 8) powers that impose onerous duties on the public (e.g. a requirement to lodge sums by way of security, or very short time limits to comply with an obligation).
- 9) powers involving considerations of special importance not falling under the heads above (e.g. where only the purpose is fixed by the enabling Act and the principal substance of the legislative scheme will be set out in subordinate legislation made in exercise of the power).”

As the analysis which follows I hope will demonstrate, where proposals relating to subordinate legislation in the Higher Education (Wales) Bill satisfy any of the above criteria they are to be subject to the affirmative procedure. For the most part, however, and as I also explained to the Committee, the subject matter of the proposed subordinate legislation deals with relatively minor practical detail in the overall legislative scheme; is likely to be updated on a regular basis or otherwise be subject to change; and circumstances may arise in which it may be necessary to legislate swiftly.

I contend, therefore, that the Bill as drafted allows for an appropriate balance between scrutiny by the Assembly and effective use of Assembly or Committee time.

Members also questioned why the Bill has not been drafted on the assumption that where regulations may be needed, there should be a duty to make them. A duty to make regulations is only appropriate where the regulations in question and the duty are very limited in scope. I also start from the presumption that Government should regulate only to give effect to the overall legislative scheme or otherwise when the need for such regulation is established on some other grounds. I acknowledge that in a number of cases the system established under the Bill will not be able to perform effectively without regulations in place. For instance regulations will need to be made which prescribe the maximum fee limit and description of qualifying persons

and qualifying courses. However, other draft provisions are more permissive in nature in order to permit regulations to be made where they might assist the operation of the new regime or where circumstance or experience demonstrate a need for regulation in those areas. My officials have undertaken an analysis of the use of the terms "may" and "must" throughout the Bill. That analysis is included as an annex to this letter. I trust that this additional information will be of assistance.

## **Part 2: Fee and access plans**

### **Section 2: *Application by institutions for HEFCW's approval of fee and access plans***

This section permits the governing body of an institution of a certain type to apply to HEFCW for approval of a fee and access plan. Section 2(4) enables the Welsh Ministers to make regulations about the making of applications under this section. In specifying that the Welsh Ministers "may" make regulations under this section we have applied the principle that we will not be legislating unless it is necessary to do so. If regulations are not made that fact would not prevent institutions applying to HEFCW for approval of their plans.

Under the current system, institutions funded by HEFCW may apply to HEFCW for approval of a fee plan and there are no regulations in place which make provision about the making of such applications. HEFCW is able to issue guidance to institutions about the matters to which it will have regard in determining plan applications (section 34(3) of the Higher Education Act 2004 enables this) and there is nothing to prevent HEFCW also from issuing non-statutory guidance to institutions about the application process and the provision of supporting information.

Under the new regulatory system HEFCW could issue information and advice to institutions under section 51(3) about the application process for approval of fee and access plans and the information to be submitted as part of applications. Consequently institutions could be made aware by HEFCW of the process and information required for approval of fee and access plans without the need for the Welsh Ministers to make regulations. If the Welsh Ministers do not make regulations under this section that would not open HEFCW up to legal challenge. However, if, after operating the system either HEFCW or institutions indicate that the application process could be clarified then the Welsh Ministers' power under section 2(4) would enable regulations to be made to provide that clarity. For example, it may prove to be helpful to make regulations if there are new entrants to the system which have not previously applied to HEFCW for approval of a fee plan. There is a clear distinction to be drawn between a need to make regulations for the system to work and the discretionary use of a regulation making power to improve the operation of the system. The regulation power in section 2(4) falls into the latter category and consequently the Bill has been drafted to enable the Welsh Ministers to make regulations should they prove to be necessary.

### **Section 3:** *Designation of other providers of higher education*

This section enables the Welsh Ministers to designate a charitable provider of higher education in Wales, which would not otherwise be regarded an institution, as an institution for the purposes of the Bill. Such designations will ensure that providers of higher education which may not be regarded as institutions are not prevented from applying to HEFCW for approval of a fee and access plan. A designation under section 3 does not mean that a charitable provider will automatically enter the new regulatory system established under the Bill. Following designation as an institution for the purpose of the Bill such a provider will still need to apply to HEFCW for approval of a fee and access plan, under section 2 of the Bill, in order to become a regulated institution. Consequently such providers will also need to satisfy the conditions at section 2 of the Bill namely, that it is an institution in Wales, that it delivers courses of higher education and that it is a charity.

Section 3(4) enables the Welsh Ministers to make provision, via regulations about applications for designation, the making and withdrawal of designations, including matters to be taking into account when considering whether to make or withdraw a designation, and the effect of a withdrawal of designation. However, section 3 does not depend upon regulations being made to make it work. Providers of higher education could be designated as institutions by the Welsh Ministers without regulations being made under section 3(4) – there is nothing to prevent such providers applying to the Welsh Ministers for designation and indeed section 3(1) makes provision for that.

In specifying that the Welsh Ministers “may” make regulations under this section we have applied the principle that we will not be legislating unless it is necessary to do so. The number of providers applying for designation under section 3, especially in the near future, is likely to be limited and in the first instance it is unlikely that regulations will need to be made, however, the power set out in section 3(4) will enable regulations to be made if they prove to be necessary. Additionally, section 3(3) provides a default position that a provider designated as an institution is to be treated as an institution for the purposes of the Bill unless the designation is withdrawn.

### **Section 6:** *Promotion of equality of opportunity and promotion of higher education*

Section 6(1) of the Bill requires that a fee and access plan must include such provisions relating to the promotion of equality of opportunity to access higher education or the promotion of higher education as may be prescribed. This provision enables the Welsh Ministers to make regulations. Information on the type of



provision relating to the promotion equality of opportunity and the promotion of higher education which may be included in regulations is set out on the face of the Bill in section 6(3).

The information and priorities associated with the promotion of equality of opportunity and the promotion of higher education is likely to change over time alongside changes to the higher education sector in Wales as well as developments in evidence about the effectiveness of activities and interventions which institutions include in their fee and access plans. This power will enable the Welsh Ministers to respond to these changes regularly by adapting the requirements imposed on institution's fee and access plans. Crucially, we do not yet know what HEFCW's evaluation of fee and access plans will identify and therefore need the flexibility to adapt the information and priorities associated with the promotion of access to higher education and the promotion of higher education from time to time.

The proposal that regulations made under section 6(1) are subject to the negative resolution procedure has been informed by application of the Counsel General's guidelines. Taking those guidelines into account it is my view that the regulation making power under this section does not fall into any of the categories to which the affirmative procedure should apply. A considerable amount of detail concerning provisions that may be prescribed in regulations made under section 6(1) is to be found on the face of the Bill at sections 6(3) and 6(4). Additionally, section 6(5) provides for certain restrictions on the requirements that may be included in regulations. I am therefore of the opinion that the principal substance of the legislative scheme concerning the contents of fee and access plans has been set out on the face of the Bill rather than being reserved to subordinate legislation. The regulations will provide further detail as to how the required content of fee and access plans is to be applied in the context of a wider range of tuition fees than under the current regime. Consequently regulations to be made under section 6(1) are suitable for the negative resolution procedure.

I hope to have these regulations available in draft form to allow Members to scrutinise them at Stage 2. The intention is to also consult stakeholders on the draft regulations at the appropriate time.

### **Section 7: *Approval of fee and access plans***

Under section 7 HEFCW may either approve or reject an application for approval of an institution's fee and access plan. Section 7(3) enables the Welsh Ministers to make regulations about matters to be taken into account by HEFCW in determining whether to approve or reject a plan.

The intention is that HEFCW should be required to take into account the quality of education at the institution; the organisation of its financial affairs; and the adequacy of the measures committed to in the plan against the proposed tuition fee level. These requirements are designed to ensure that the interests of prospective

students are protected and also to ensure that HEFCW adopts a proportionate approach to the approval of plans in line with the level of fees charged. They will also give applicant institutions an insight into the issues that HEFCW will be weighing up when considering their fee and access plans. This will be particularly useful for new applicants, who are applying for approval of a fee and access plan for the first time.

The proposal that regulations made under section 7(3) are subject to the negative resolution procedure has been informed by application of the Counsel General's guidelines. It is my view that the regulation making power under this section does not fall into any of the categories to which the affirmative procedure should apply. I do not consider that these regulations are appropriate for the affirmative procedure as they are relatively minor in the overall legislative scheme, if made they may need to be updated on a regular basis to take account of changes in the higher education landscape. It is also worth noting that HEFCW may approve or reject fee and access plans without these regulations being made.

#### **Section 8:** *Publication of an approved plan*

Section 8(1) enables the Welsh Ministers to make provision, via regulations, which requires an institution to publish its approved fee and access plan. Section 8(2) confirms that these regulations may make provision about how and when an approved fee and access plan is published. Section 8 of the Bill is derived from section 34(6) of the Higher Education Act 2004 which similarly makes provision for the Welsh Ministers to make regulations that may require institutions subject to an approved plan to publish their plans in the manner prescribed in regulations. Therefore, the use of regulations for the purpose of requiring publication of approved plans is not new and is already in operation under the current system. Furthermore, as institutions currently publish their approved fee plans are familiar with the need to ensure that those plans are made accessible to students and other interested parties it may not prove to be necessary to make these regulations. If however, feedback from HEFCW, students and other stakeholders indicates that there is a problem this regulation making power will allow the Welsh Ministers to legislate if it proves to be necessary to do so.

#### **Section 9:** *Variation of plans*

Section 9(1) enables Welsh Ministers to make regulations in order to allow approved plans to be varied in accordance with the procedure laid down in regulations. The regulations must provide that a variation will only take effect if approved by HEFCW. This power will be relevant where, following approval of a fee and access plan by HEFCW, an institution wishes to vary its approved plan. The Welsh Ministers currently have a similar power in section 36 of the Higher Education Act 2004.

Although, the Welsh Ministers would be able to issue guidance to HEFCW (as provided for in section 46 of the Bill) I consider the variation of approved plans to be a matter more suited to regulations than guidance. HEFCW would be required to take such guidance into account, but could divert from such guidance if it had good reason for doing so. The current legislative architecture under the Higher Education Act 2004 makes use of regulations for the purpose of providing certainty about the procedure and processes associated with variation of an approved fee plan and my intention is to do likewise in respect of the variation of approved fee and access plans under the new regulatory system.

The policy intention is to provide an effective procedure for approved plans to be varied during the lifetime of the plan. Variations to approved plans are more likely to raise practical issues about how an institution applies for a variation and how HEFCW considers a variation. My view is that regulations are a better means of dealing with such issues than guidance as they provide certainty. Guidance does not provide the same level of certainty; whilst institutions must have regard to guidance they are not obliged to follow it in all circumstances. Although institutions could apply for approval of a fee and access plan without these regulations being in place they could not apply to vary an already agreed plan during the lifetime of that plan.

#### **Part 4: Financial affairs of regulated institutions.**

For the avoidance of doubt I wish to clarify that there are no regulation making powers arising from Part 4 of the Bill. HEFCW's functions of preparing, consulting on, issuing and keeping under review the proposed financial management code will not be supported by regulations. Currently HEFCW develops, consults on and issues a financial memorandum applicable to funded institutions. Under the new regulatory framework HEFCW will be required to consult all regulated institutions on a draft financial management Code and will additionally be required to provide a summary of those consultation responses when they submit the draft code to the Welsh Ministers for approval.

#### **Part 5: Withdrawal of approval of a plan**

##### **Section 36:** *Notice of refusal to approve a new fee and access plan*

Under the proposed regulatory system if HEFCW are satisfied that a regulated institution has failed to comply with the applicable fee limits or general provisions of its approved fee and access plan, or has failed to comply with a direction from HEFCW concerning quality of its education or its financial management, HEFCW may give notice to the institution that they will not approve a new fee and access plan before the end of the period specified in the notice. This function is distinct from that of approval of a fee and access plan under section 4 of the Bill and forms one of

a menu of sanctions available to HEFCW in the event of an institution's failure to comply with specified requirements of new regulatory framework. The conditions under which HEFCW may give notice to the governing body of a regulated institution are set out on the face of the Bill at section 36(3).

Section 36(7) enables the Welsh Ministers to make regulations relating to the notices and decisions of HEFCW not to approve a new fee and access plan. This includes provision about the period specified in a notice during which HEFCW will not approve a new fee and access plan, the matters to be taken into account by HEFCW in deciding whether to give, or withdraw, such a notice and the procedure to be followed if such a notice is withdrawn. Regulations made under section 36(7) cannot be used to make additions to the conditions specified in section 36(3). This means that the conditions under which HEFCW may issue notice of refusal to approve a new fee and access plan cannot be changed by the proposed regulations.

It is expected the matters to be taken into account by HEFCW in deciding whether to give notice of their intention to refuse to approve a new plan might include consideration of the severity of the compliance failure and whether alternative courses of action may be appropriate. With regard to withdrawal of a notice it is expected that the matters to be taken into account by HEFCW might include any mitigating action taken by the institution (post issue of the notice) in order to effect its compliance with the conditions at section 36(3) of the Bill. I consider that these matters are appropriate for inclusion in regulations to be made by the negative procedure as they concern technical and procedural detail about the issuing of notices under section 36 of the Bill. These matters will require updating over time, following any changes to the higher education sector in Wales and in response to feedback received from HEFCW on the operation of their enforcement powers. For example, it may be appropriate to increase or reduce the maximum period a notice refusing to approve a new plan can apply for, following discussions and engagement with HEFCW on the effectiveness of such notices.

I also wish to clarify the position with regard to the provision at section 36(7)(a) which states:

*“(7) Regulations may make provision about –  
(a) the period that may be specified in notice under this section;”*

The first reference to 'may' is concerned with enabling the Welsh Ministers to make regulations on any of the matters specified in section 36(7) (a) – (c). The second use of the word 'may' is entirely different in its context. The effect is not to permit a notice to specify a period as a notice is required to do this by virtue of subsection 36(2). The purpose here is to confer discretion on the Welsh Ministers to require a notice to specify a particular period, or to require a notice to specify one period within a range of permissible periods, or to confer discretion on HEFCW to determine

periods in accordance with certain formulae. The use of “may” in this context is to refer to the range of ways in which notice can potentially be specified in accordance with regulations. The use of the word “may” is entirely appropriate in both instances and does not result in any problems in relation to application of this regulation making power.

**Section 37: *Duty to withdraw approval of a fee and access plan***

Section 37 requires HEFCW to withdraw their approval of a fee and access plan by giving notice to an institution if they are satisfied that the institution has ceased to: (a) be an institution in Wales; (b) provide higher education; or (c) be a charity.

Under section 37(2), the Welsh Ministers may make provision in regulations about the matters to be taken into account by HEFCW in determining whether to withdraw approval of a fee and access plan and the procedure to be followed in connection with giving notice of withdrawal of such a plan. Section 37(3) provides that the regulations may amend or apply (with or without modification) the procedural requirements relating to warning notices and representations (set out in sections 40 to 43) to any notice issued under section 37.

Section 37 only requires HEFCW to withdraw approval of a fee and access plan when HEFCW is satisfied that an institution no longer falls within section 2(3) of the Bill. Consequently, this section does not apply when something goes wrong under section 36 and is not connected in any way to HEFCW’s function of issuing notice of intention of refusal to approve a new fee and access plan.

Regulations are not required under section 37 for the section to operate. HEFCW will be able to satisfy themselves as to whether an institution is no longer in Wales, is no longer providing higher education or is no longer a charity without regulations. However, if as a consequence of operating the system HEFCW, institutions or other stakeholders consider that the process for withdrawal of approval of a fee and access plan would work more efficiently or effectively with matters being set out in regulations then the power at section 37(2) enables the Welsh Ministers legislate should that prove to be necessary. I am however starting from the principle of not legislating unless there is a proven need to do so. The regulation making power provides the necessary flexibility in a process which has not previously been operated by HEFCW.

## **Matters not falling within the scope of the Bill**

Finally, it may be helpful if I clarify the situation with respect of case-by-case course designation. The Bill does not provide for either automatic or specific course designation, my intention is to consult on new requirements for specific course designation with the aim of introducing rigorous quality assurance and robust checks on the financial health of institutions delivering such courses. Any new arrangements for specific course designation will be progressed by way of the Welsh Ministers' existing regulation making powers under the Teaching and Higher Education Act 1998. Therefore new legislation is not needed.

I trust that the information is helpful and provides clarity to Members. I will write further to address issues on which Members have requested additional information in due course. I am also copying this letter to the Chair of the Children, Young People and Education Committee for information.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Huw Lewis', written in dark ink on a white background.

**Huw Lewis AC / AM**

Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills

## Use of “may” and “must” for regulation making powers

### Part 2 – Fee and access plans

#### Section 2

**S.2(4):** Regulations “may” make provision. This concerns the making of applications for approval of a fee and access plan. The system would operate without these regulations (albeit perhaps not as efficiently) because regulations are not actually required to make the provision operative; a governing body of an institution within s.2(3) could apply to HEFCW even if no regulations were in place. We think it would only be appropriate to include a duty where both the duty and the regulations are narrow in scope. It is therefore our view no change to “must” is required because the regulation making power in s.2(4) encompasses a variety of matters.

#### Section 3

**S.3(4):** This section concerns the designation of other charitable providers of HE in Wales who would not otherwise be designated as “institutions”. This means that designated institutions will be covered by the provisions of the Bill and regulation made under the powers in it. This might for example be a provider that whilst not providing degrees, does provide other courses of higher education at a lower level on the credit and qualifications framework but may nevertheless wish for those courses to be automatically designated by student support regulations (for the purposes of student support from the Welsh Ministers) and to be able to apply for approval of a fee and access plan. The system would operate without these regulations (albeit perhaps not as efficiently). Regulations therefore provide the vehicle for supplemental detail involving the mechanics of application, but are not actually required to make the provision operative as applications for designation could be made without any regulations having been made; on this basis we believe there is no need to include “must”. As with s.2(4) we also think it would only be appropriate to impose a duty to make regulations where the scope of the regulations is narrow. In this case the scope of the regulations that might be made under s.3(4) is potentially wide and would therefore not be amenable to becoming a duty (because the system for designation could in theory operate without regulations ever being made).

#### Section 4

**S.4(2):** The sub-section adopts the “prescribed” formulation and concerns the maximum period to which fee and access plans relate. Whilst the system could operate without these regulations, we recognise that it would operate more effectively with regulations being made which set such a limit. In this instance we believe there is an implicit requirement to make regulations. It is recognised by the Welsh Ministers that in order for the system to work effectively regulations are necessary; it would therefore not be in the interests of the Welsh Ministers to fail to bring such regulations forward. As such there is no need to change the current “prescribe” formulation to refer to “regulations must make provision”.

#### Section 5

Overview: section 5 provides for regulations to set out qualifying courses and persons, and to set the maximum amount that can be specified in a fee and access plan, as well as the treatment of fees

paid in the case of franchised courses. Together these regulations will form the foundations of the regulatory regime contained in the Bill.

**S.5(2)(b):** The paragraph adopts the “prescribed” formulation. This concerns descriptions of qualifying course. The system could not operate properly without these regulations. There is therefore an implicit requirement on the Welsh Ministers to make regulations and, as such, there is no need to change the “prescribe” formulation to refer to “regulations must make provision”. If the Welsh Ministers were to commence s.5(2)(b) with no intention of making qualifying course regulations, then an issue of rationality may arise as there would be no way of knowing what would be a qualifying course. Under the current regime qualifying course regulations have been made, and there is no reason why the Welsh Ministers would not make such regulations under this provision were it enacted.

**S.5(3):** The sub-section adopts the “prescribed” formulation. This concerns the prescription of a “maximum amount”. The system could not operate effectively without these regulations. There is an implicit requirement to make regulations as such there is no need to change the “prescribe” formulation to refer to “regulations must make provision”. If the Welsh Ministers were to commence s.5(2)(a) with no intention of making provision on maximum fees then the fee and access plan system would not function properly as applications for approval of fee and access plans could not be made without knowing the maximum amount.

**S.5(5):** The sub-section adopts the “prescribed” formulation. This concerns descriptions of qualifying person. The system could not operate properly without these regulations. There is an implicit requirement to make regulations and, as such, there is no need to change the “prescribe” formulation to refer to “regulations must make provision”. If the Welsh Ministers were to commence s.5(2)(a) but not make qualifying persons regulations, then the fee and access plan system would not function properly as there would be no way of knowing who is a qualifying person for purpose of s.5(2)(a).

**S.5(9):** Regulations may make provision in respect of fees being treated as paid to a provider who has an approved fee and access plan in place, rather than to another person i.e. being paid to the franchisor institution rather than the franchisee institution. We recognise that a variety of franchise arrangements may exist and some or all of the fees charged for a qualifying course may be payable to a partner institution. Regulations will ensure that the total fees paid by a student do not exceed the maximum fee limit, even where the fees are paid to two different institutions. The system could still operate without these regulations but as a matter of policy it is intended to bring forward such regulations to protect the interests of students.

## **Section 6**

**S.6(1):** This section adopts the “prescribed” formulation and concerns the contents of fee and access plans relating to equality of opportunity or promotion of higher education. Whilst the system could operate without these regulations, we recognise that it would operate far better with regulations in place setting out what should be included within a fee and access plan. In this instance, we would argue that there is an implicit requirement to make regulations based on them being part of the foundation required to make the new system effective. As such, we are of the view that there is no need to change the “prescribe” formulation to refer to “regulations must make provision”.



Additionally given the breadth and range of matters that might be included in these regulations, and the fact that they may need periodically to be updated to keep pace with the changing demographics of the student population in Wales; it is in our view highly questionable whether an express duty would be appropriate.

## **Section 7**

**S.7(3):** Regulations may make provision about the matters that HEFCW must take into account when deciding whether or not to approve a fee and access plan. The system for approval or rejection can operate without regulations being in place (albeit perhaps not as efficiently). Regulations will provide details of supplemental factors HEFCW must consider in light of the potentially wide range of providers who may apply for approval. Given the potential range of providers that may apply to HEFCW and the changing nature of the sector changes may need to be made quite quickly to the factors HEFCW considers. The system could however operate without regulations with HEFCW determining whether or not to approve fee and access plans for example by taking account of guidance provided by the Welsh Ministers under section 46; on this basis we believe it is appropriate for “may” rather than “must” to be used.

## **Section 8**

**S.8(1):** Regulations may require a governing body to publish the institution’s approved plan. The system will operate without these regulations, and so we take the view that “may” is in this context appropriate. In any event the existing power in section 34(6) of the Higher Education Act 2004 requiring publication is formulated as “may” and so it would seem odd to move away from this formulation when the current system has worked effectively in this regard. In section 8(1) “may” is used to denote a permission; the Welsh Ministers “may” make regulations. Whereas in 8(2) “may” is used to indicate the possibility that the regulations “may” make provision about how the plan is published.

## **Section 9**

**S.9(1):** Regulations may provide for an approved plan to be varied. This power mirrors similar powers in the Higher Education Act 2004 (section 36) which are formulated as “may”, therefore any change to “must” would appear unnecessary. Whilst the new system for approving fee and access plans would operate without these regulations the Welsh Ministers intend to ensure continuity in the system by bringing forward regulations under this new section enabling institutions to apply to vary an already agreed plan during the lifetime of that plan. Regulations (rather than guidance under s.46) are more appropriate as regulations can deal with practical issues about how an institution might apply for a variation and how HEFCW considers a variation, whereas guidance is better suited to matters of best practice. The use of regulations to allow variation (rather than an express power on the face of the Bill) enables the Welsh Ministers to respond promptly to any changes in the sector, and if appropriate remove the ability of institutions to vary approved plans.

## **Section 11**

**S.11(5):** Regulations may make provision about how and when HEFCW gives a copy of a compliance and reimbursement direction to the Welsh Ministers, and about how and when HEFCW must publish the direction. The detail contained in regulations under this section will be administrative and

technical in nature and requirements may change over time, for example as HEFCW's working practices develop or technology advances. The system would still operate without these regulations. The use of regulations though will future proof the system, enabling amendments to be made about how and when HEFCW publish such a direction in light of experience gleaned from operating the new system. Directions will be of interest to students and prospective students; the use of regulations will help ensure there is flexibility in enabling access to them.

### **Section 13**

**S.13(1):** Regulations may make provision as to steps to be taken by HEFCW where regulated institutions fail to comply with the general provisions of its approved plan. This concerns compliance by institutions with their fee and access plans. The core requirements of a fee and access plan are set out in section 6, this section provides flexibility to deal with the enforcement of non-standard aspect of fee and access plans. For instance regulations may confer a power on HEFCW to direct the governing body of an institution to take steps to ensure compliance with the general provisions of its approved fee and access plan. Regulations provide a mechanism for defining what constitutes a failure to comply with the general provisions of an approved plan. The system would operate without these regulations. Since the regulations need to be responsive and able to cover a number of areas we take the view that in this context "may" is appropriate. As regulations under section 13 may amend the Bill the affirmative procedure is appropriate.

## **Part 3 – Quality of education**

### **Section 17**

**S.17(4):** Regulations may make provision about the circumstances in which a person is (or is not) to be treated as responsible for providing a course. The rationale for this power is to enable a flexible approach to be adopted by the Welsh Ministers enabling them to respond to changes in the numbers of franchised courses and/or the manner in which such courses are delivered. The statement of policy intent gives the example of excepting individual tutors who help to deliver courses on behalf of regulated institutions. The regulations could confirm that such individuals should not be treated as external providers for the purposes of quality assessment. The regulations will be narrow in scope and technical in nature. The system would operate without these regulations and so the use of "may" in this context is appropriate.

## **Part 5: Fee and access plans: withdrawal of approval etc**

### **Section 36**

**S.36(7):** Regulations may make provision about the period that may be specified in a notice refusing to approve a new fee and access plan; matters to be taken into account by HEFCW in deciding whether to give notice or withdraw such notice; and the procedure to be followed in connection with a withdrawal of notice. There may in time be a need to vary regulations made under this section by for example specifying a different period of notice during which HEFCW cannot approve a fee and access plan, or by specifying matters that HEFCW must take into account whether to give or withdraw notice as well as specific procedural elements associated with a decision by HEFCW not to renew a fee and access plan. The system would operate without these regulations so it is our view that "may" rather than "must" would be appropriate here.

### **Section 37**

**S.37(2) and (3):** Regulations may make provision about matters to be taken into account by HEFCW in making a determination that an institution is no longer within s.2(3) and the procedure to be followed when giving notice of withdrawal of approval. Section 37(1) provides that HEFCW must withdraw approval of an institution's fee and access plan where HEFCW is satisfied that the institution no longer falls within s.2(3). The use of "must" here is appropriate because it sets out the action that HEFCW must take if HEFCW is "satisfied" a regulated institution is no longer within s.2(3). Regulations under this section "may" though set out the matters that HEFCW should consider in determining whether an institution still falls within s.2(3), for example decisions of the Charity Commission where HEFCW believe the institution no longer has charitable status. Regulations may also make provision about procedural requirements in connection to s.37(2)(b) by amending or applying (with or without modification) sections 41,42 and 43 enabling institutions to have recourse to a defined process in the event of a proposed withdrawal of a fee and access plan. We are of the view that the balance between "must" and "may" is appropriate in this section given regulations will set out procedural requirements, and can be revised in light of experience gleaned from operating the new system.

### **Section 38**

**S.38(3):** Regulations may make provision about matters to be taken into account by HEFCW in deciding whether to give notice of withdrawal of approval. The system would operate without regulations given the conditions which may give rise to HEFCW deciding to withdraw approval of a plan are set out on the face of the Bill (s.38(2)). Regulations will though add supplemental detail by setting out the factors that HEFCW must consider in deciding whether to give notice, but regulations are not necessary for the section's operation. Regulations serve to provide a layer of detail setting out the factors for HEFCW to consider when exercising its discretion. On this basis we think that the use of the word "may" is entirely appropriate.

### **Section 39**

**S.39(2):** Regulations may make provision about how and when HEFCW gives a copy of a notice under section 36, 37 or 38 to the Welsh Ministers and about how and when HEFCW must publish such a notice. It is appropriate to require HEFCW to undertake these actions to ensure the Welsh Ministers retain an overview of the sector. Regulations would be entirely procedural in nature, specifying the timings for HEFCW to provide notices to the Welsh Ministers, and where notices should be published. Given this; the fact the requirement to publish is on the face of the Bill and that the system would operate without these regulations it is our view the power to make regulations should remain as "may".

### **Section 41**

**S.41(2)(d):** " any provision made by regulations" as to the period within which, and the way in which representations are to be made in response to a proposed warning notice. These are administrative and technical provisions that may need updating from time to time in light of technological advances and experience gleaned from operation of the system. However the system will operate without

these regulations being made, on this basis we believe that the use of a discretion equivalent to “may” is entirely appropriate.

#### **Section 42**

**S.42(c):** The section adopts the “prescribed” formulation. Regulations can prescribe additional information to be included in a notice or direction issued under s.7(1)(b); s.11; s.19; s.32; s.36; or s.38. Section 42(a) and (b) already provide that HEFCW must include reasons for issuing a notice or direction, and alerting the governing body that it may apply for a review of the notice or direction. Regulations would provide for certain supplementary information to be included such as informing a regulated institution that a copy of a notice or direction will be given to the Welsh Ministers and published. This power enables the Welsh Ministers to ensure that statements keep pace with changes in practice by making changes as to the required content.

#### **Section 43**

**S.43(3):** The Welsh Ministers must by regulations make provision in connection with reviews under s.43. This power reflects existing provisions within section 39 of the Higher Education Act 2004. S.43(4) sets out what might be contained within regulations. Updates to the regulations might be required from time to time in light of feedback from the sector and HEFCW as to its operation.

#### **Section 49**

**S.49(4):** Regulations may make provision about preparation of the statement in respect of HEFCW’s intervention functions (including as to the statement’s form and content); its publication; the consultation to be carried out in relation to the statement in respect of intervention functions. These are procedural and technical provisions, and whilst relevant to HEFCW and the higher education sector are otherwise of limited interest. The intention is to provide the key components that HEFCW must address in preparation of the statement although in theory this could be achieved by the Welsh Ministers issuing guidance to HEFCW rather than via regulations. It will be for HEFCW to fill in the operational detail following consultation and dialogue with regulated institutions and other stakeholders. It may also be the case that requirements change over time and the Welsh Ministers will have power to respond to such changes. On this basis we believe it is appropriate to use “may” rather than “must” to afford the Welsh Ministers the degree of flexibility that is required to give proper and meaningful effect to this section.

#### **Section 54**

**S.54(1):** The section adopts the “prescribed” formulation. Certain fees can be excluded from the definition of “fees” in section 54(1). The system will operate without regulations being made. The power to make regulations is to future proof the system in the event that it becomes necessary to exclude other types of fee from the definition of fees.

#### **Section 55**

**S.55(3):** The Welsh Ministers may by regulations make such incidental, supplementary or consequential provision as they think appropriate in consequence of, or for giving full effect to, a

provision of the Bill. There may not be any incidental, supplementary or consequential provision required so this has to remain as “may”.

## **Section 56**

**S.56(2):** Most provisions of the Bill come into force on such day as the Welsh Ministers may appoint by order. Commencement of provisions has to remain at the discretion of the Welsh Ministers so that they can respond to any unforeseen issues that may arise, and also to ensure the system is rolled out in a timely and well co-ordinated manner, enabling the new system to achieve the best results for the sector, students and HEFCW. On this basis “must” is inappropriate and removes this necessary degree of flexibility and responsiveness required to give proper effect to the legislation.

**Schedule, paragraph 28(e):** No reference to “may” or “must”. Regulations can specify any other enactment for which a 2004 Act plan is to be treated as a plan approved under the Bill. There may be no practical need for such regulations, but having such a power provides for a degree of future proofing to be made by enabling additional provisions to be added to those already listed in paragraph 28 should the need arise, so “must” would be inappropriate here.

**Schedule, paragraph 30(1):** Regulations may make provision about the application of a provision listed in paragraph 28(a) – (d) to a 2004 Act plan. This is again a safety mechanism to enable Welsh Minister to deal with any unforeseen circumstances that may arise after Royal Assent and affect the way in which 2004 Act plans are to be treated as fee and access plans. The system could operate without these regulations so “must” would be inappropriate.

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