



Llywodraeth Cymru  
Welsh Government

# **Higher Education (Wales) Bill**

## **Explanatory Memorandum**

Incorporating the  
Regulatory Impact Assessment  
and Explanatory Notes

May 2014

## **Higher Education (Wales) Bill**

### **Explanatory Memorandum to the Higher Education (Wales) Bill**

This Explanatory Memorandum has been prepared by the Department for Education and Skills of the Welsh Government and is laid before the National Assembly for Wales.

### **Member's Declaration**

In my view the provisions of the Higher Education (Wales) Bill introduced by me on the 19 May 2014 would be within the legislative competence of the National Assembly for Wales.

### **Huw Lewis AM**

Minister for Education and Skills  
Assembly Member in charge of the Bill

May 2014

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## 1. Description

1. The Higher Education (Wales) Bill will make provision for a revised regulatory framework for higher education in Wales. It will achieve this by providing the Higher Education Funding Council for Wales (HEFCW) with the necessary functions to assure the quality of higher education provision, enforce tuition fee controls and fee plan requirements and establish a framework for the organisation and management of the financial affairs of providers of higher education in Wales whose courses are automatically designated for student support purposes.
2. The Minister for Education and Skills has made the following statement:

*“In my view development of the provisions of the Higher Education (Wales) Bill has been undertaken with due regard to the United Nations Convention on the Rights of the Child, in accordance with the Rights of Children and Young Persons (Wales) Measure 2011”.*

## 2. Legislative background

3. The National Assembly for Wales has the legislative competence to make provision in the Higher Education (Wales) Bill under Part 4 of the Government of Wales Act 2006 (GoWA 2006). The relevant provisions of GoWA 2006 are set out in section 108 and Schedule 7. Paragraph 5 of Part 1 of Schedule 7 sets out the following subjects on which the Assembly may legislate under the heading “Education and Training” and which is reproduced below:

***Education and Training***

*5. Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge.*

*Exception—*

*Research Councils.*

### **3. Purpose and intended effect of the legislation**

4. The Welsh Government's primary policy objectives in relation to the Bill are to:
  - (a) ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government backed higher education grants and loans;
  - (b) safeguard the contribution made to the public good arising from the Welsh Government's financial subsidy of higher education;
  - (c) maintain a strong focus on fair access to higher education; and
  - (d) preserve and protect the institutional autonomy and academic freedom of universities.
  
5. The Welsh Government intends to achieve these objectives by:
  - (a) establishing a new regulatory framework applicable to all providers of higher education in Wales which seek automatic designation of their higher education courses for the purpose of student support;
  - (b) ensuring the new regulatory controls do not rely on HEFCW providing funding to those institutions and providers;
  - (c) requiring all higher education providers that benefit from the Welsh Government's financial subsidy in the form of statutory student fee loans or grants to have charitable status;
  - (d) requiring all higher education providers whose courses are automatically designated for statutory student support to commit to activity in support of equality of access to higher education; and
  - (e) building, as far as possible, on the existing system of controls established by HEFCW under its terms and conditions of funding.
  
6. In bringing forward this Bill the Welsh Government has been mindful to develop an approach that:
  - reflects recent changes to the student support and higher education funding arrangements and the ongoing changes in the higher education landscape;
  - takes account of feedback received from consultation exercises;

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- is proportionate in its application and allows for continuity of HEFCW's role as relevant authority for fair access in Wales whilst placing HEFCW's functions on a revised statutory footing.

### **Context**

7. Higher education ('HE') in Wales is provided by eight universities, the Open University as well as five colleges of further education. Undergraduate and postgraduate student numbers continue to grow. Undergraduate enrolments at Welsh HE institutions increased from 92,755 in 2000/01 to 111,860 in 2010/11, a growth of 21%, while postgraduate enrolments rose by 60%.
8. The public funding of HE in Wales started to change from academic year 2012/13. This followed the adoption of many of the recommendations of the Browne Review<sup>1</sup>, which was commissioned by the UK Government in November 2009 to consider the future direction of higher education funding in England. The major change was to allow institutions in England to charge fees of up to £9,000 per year, and provide students with access to loans to cover the costs of this increase in fees.
9. The Welsh Government responded to the Browne Review by also allowing institutions in Wales, who were in receipt of HEFCW funding, to charge tuition fees of up to £9,000 per annum. Such institutions were only able to charge fees above £4,000 per annum if they were able to demonstrate a commitment to widening access to higher education and other related policy objectives.
10. In addition, students from Wales were provided with access to a non means tested tuition fee grant, to cover the cost of the increase in tuition fees across the United Kingdom. Entitlement to this new tuition fee grant, along with an accompanying tuition fee loan, was set out in the annual set of student support regulations made by the Welsh Ministers. Responsibility for student finance and support was transferred to the Welsh Ministers under provisions of the Higher Education Act 2004.
11. Prior to the changes outlined above, the principal source of public funding of the HE sector in Wales had taken the form of recurrent grants (for teaching or other activities) payable from HEFCW to institutions. HEFCW administers funds made available by the Welsh Ministers and

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<sup>1</sup> The Independent Review of Higher Education Funding and Student Finance, 12 October 2010

<http://webarchive.nationalarchives.gov.uk/+/hereview.independent.gov.uk/hereview/>

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others, by providing financial support to institutions throughout Wales. HEFCW attaches terms and conditions to this financial support, which relate to, amongst other things, the level of fees charged by institutions, the quality of education delivered by institutions and the financial management of institutions. The administration and enforcement of terms and conditions of HEFCW funding is therefore the principal method of regulating the higher education sector in Wales.

12. Following the introduction of the non-means tested tuition fee grant, funding which was previously provided by the Welsh Government to HEFCW and then allocated by HEFCW to institutions in Wales, was re-directed to the Welsh Government's student support budget. The amount of financial support paid by HEFCW to institutions in Wales has reduced and consequently the ability of HEFCW to attach terms and conditions to that support has also reduced. Therefore the HE regulatory regime, which relies on HEFCW imposing terms and conditions of funding relating to fee controls, quality of education and financial management, will no longer operate effectively.
13. For this reason the Bill seeks to introduce a new HE regulatory framework for Wales which is not reliant on terms and conditions of HEFCW recurrent funding. The Bill seeks to provide HEFCW with a number of new statutory functions which will enable them to effectively monitor the level of fees charged, the quality of education delivered and the financial management of institutions delivering higher education within Wales.

### ***Background – higher education funding***

14. According to the Wales Audit Office<sup>2</sup>, the financial health of HE institutions in Wales<sup>3</sup> is generally sound. The total income of the sector is forecast to grow. As at July 2012, institutions forecast that income would remain broadly flat in cash terms between 2011/12 and 2012/13, at around £1.26 billion, before increasing to £1.45 billion in 2015/16. Most Welsh institutions have strong levels of cash resources compared to their expenditure. Institutions also have strong levels of discretionary reserves.
15. Institutions also forecast that grant income in 2015/16 would be £226 million lower than in 2011/12 but expect tuition fee income to be £375 million higher in 2015/16 than in 2011/12. This shift in funding arrangements is the principal reason for the introduction of this Bill and is returned to below.

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<sup>2</sup> Higher education finances, Wales Audit Office, November 2013.

<sup>3</sup> Excludes the Open University in Wales.



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16. The sector is economically important. Estimates<sup>4</sup> suggest that Welsh HE institutions have around £413 million in export earnings, and have a total (multiplied) output of £3 billion. Some 16,000 full time equivalent jobs are created directly by HEIs and a further 17,500 full time equivalent jobs are generated outside the sector.

### ***The existing higher education regulatory framework***

17. HEFCW, a Welsh Government Sponsored Body, was established under the provisions of the Further and Higher Education Act 1992 (FHEA 1992). Their primary role to date has been to administer funds made available by the Welsh Ministers and others for the purpose of providing financial support for activities eligible for funding under section 65 of the FHEA 1992 and section 86 of the Education Act 2005. These activities predominantly relate to the provision of higher education, teacher training and other activities of higher education institutions in Wales but also include the provision of certain HE courses by FE institutions in Wales. HEFCW's existing functions are principally set out in Part 2 and Schedule 1 of the FHEA 1992 and Part 3 of the Education Act 2005. Additionally HEFCW has functions under Part 2 of the Higher Education Act 2004 concerning the enforcement and approval of fee plans as described below.
18. The regulation of publicly funded higher education in Wales is currently achieved through the application and enforcement of terms and conditions attached to teaching and other grants allocated by HEFCW to institutions. The higher education regulatory framework comprises three key components namely, the quality assessment of education provided by institutions, the enforcement of tuition fee limits and fee plan commitments and the financial assurance of institutions. Sanctions for non-compliance with terms and conditions largely rest on HEFCW withholding (or threatening to withhold) grant funding.

### ***Quality assessment***

19. HEFCW has a statutory duty under section 70 of FHEA 1992 to secure that provision is made for assessing the quality of education provided in institutions for whose activities they provide, or are considering providing, financial support. HEFCW discharges this duty via a service level agreement with the Quality Assurance Agency for higher education ('QAA') and has enforced specific requirements concerning the quality of

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<sup>4</sup> The Economic Impact of Higher Education in Wales, Viewforth Consulting, Ltd, June 2013.

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higher education via terms and conditions of funding<sup>5</sup>. HEFCW is also required to establish a quality assessment committee of which the majority of members are to be drawn from outside of HEFCW.

### ***Tuition fee controls, fee plans and fair access***

20. The Higher Education Act 2004 sets out the mechanism for controlling tuition fees in Wales. Tuition fees charged to certain students undertaking certain courses at institutions which receive funding from HEFCW are subject to a 'cap' above which fees may not be charged. This is achieved by attaching relevant terms and conditions to the funding allocated to institutions by HEFCW. This system of tuition fee regulation in Wales has been in place since academic year 2012/13.
21. In March 2011, HEFCW was designated by the Welsh Ministers<sup>6</sup> as the body with statutory responsibility in Wales for the approval and enforcement of fee plans. All institutions in receipt of funding from HEFCW which seek to charge fees above £4,000 per annum for full-time undergraduate level courses are required to have an approved fee plan in place.
22. If an institution has an approved fee plan in place, that institution can charge tuition fees to certain students ('qualifying students') undertaking certain courses ('qualifying courses') up to a 'higher amount' which is currently £9,000 per year. If the institution does not have an approved plan in place, the institution can only charge tuition fees to such students undertaking such courses up to the 'basic amount', currently set at £4,000 per year. These basic and higher amounts are prescribed in regulations<sup>7</sup> made by the Welsh Ministers under section 28 of the Higher Education Act 2004 which provides that in respect of any qualifying course, the 'qualifying fees' (fees payable by a qualifying person undertaking a qualifying course) must not exceed the basic or higher amount, as applicable.
23. Institutions in Wales seeking to charge tuition fees above the basic amount must secure equality of access to higher education. This arrangement has been implemented by requiring institutions to compile and submit fee plans to HEFCW for approval. An institutional fee plan must set out measures, such as outreach work and financial support, to

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<sup>5</sup> HEFCW Guidance Circular: W12/16HE: Unsatisfactory Quality Procedures May 2012.

<sup>6</sup> See The Higher Education Act 2004 (Relevant Authority) (Designation)(Wales) Regulations 2011 (SI 2011/658 (W.96)).

<sup>7</sup> The Student Fees (Amounts) (Wales) Regulations 2011 (SI 2011/885 (W.129)).

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be delivered by the institution to promote higher education and equality of access to higher education. HEFCW's ability to enforce fee plan commitments has been contingent upon terms and conditions attached to the funding which HEFCW allocates to institutions.

### ***Financial assurance***

24. Presently, HEFCW undertakes financial assurance work by placing obligations on institutions through conditions of funding. These obligations relate, amongst other things, to financial management, risk management, information on financial commitments and provision of accounts and other financial information.
25. HEFCW's requirements in respect of institutions' financial management arrangements have also been implemented via conditions attached to funding. These conditions are included in the financial memoranda between HEFCW and individual institutions<sup>8</sup>.

### ***Higher education funding and statutory student support***

26. Following the increase in tuition fees from academic year 2012/13 the Welsh Government introduced new student support arrangements for those students ordinarily resident in Wales. A consequence of this change is that the proportion of income received by institutions from Welsh Government backed tuition fee support will steadily increase over time with a corresponding decline in the income received from HEFCW grants. Tuition fee support, to which eligible students are entitled, stands outside the regime through which the Welsh Government makes funding available to HEFCW to pass on to institutions to fund higher education.
27. The table below records the forecast position.

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<sup>8</sup> W08/36HE Revised Financial Memorandum and Audit Code of Practice, HEFCW, 2008.  
[www.hefcw.ac.uk/working\\_with\\_he\\_providers/institutional\\_assurance/institutional\\_assurance.aspx](http://www.hefcw.ac.uk/working_with_he_providers/institutional_assurance/institutional_assurance.aspx)

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**Table 1: The allocation of higher education funding**

Financial year	2012	2013	2014	2015
	-13	-14	-15	-16
	£m			
Projected HEFCW allocation*	373.4	380.0	362.0	360.0
Tuition fee grant payable**	47.8	127.0	186.0	219.0
Remaining for HEFCW to allocate to other priorities	325.6	253.0	176.0	141.0
	%			
Proportion of HEFCW allocation paid as tuition fee grants	12.8	33.4	51.4	60.1

\*The figures for 12-13 and 13-14 include in year transfers from Welsh Government to HEFCW. There are no estimates included for the value of these transfers from 14-15.

\*\*Assumes a 100% take-up rate. Actual figures have been included for the financial year 2012-13.

28. Although some residual funding is likely to still be paid out by HEFCW from 2015-16 onwards, there can be no guarantee that each institution delivering higher education in Wales will receive part of this funding. Therefore, some institutions may not be subject to any HEFCW terms and conditions and consequently be under no obligation to comply with the existing regulatory framework.
29. Even if an institution does receive part of any remaining residual funding, the amounts involved may be relatively small. This gives rise to a risk that an institution could refuse HEFCW funding in order to avoid what may then be perceived as relatively onerous obligations in HEFCW's terms and conditions. Any residual funding may relate to specific activities to be undertaken by institutions, such as research or estates projects. In such scenarios, there is a question as to whether it would be reasonable for HEFCW to impose general terms and conditions on an institution relating to education delivery.
30. Higher education courses must be designated by the Welsh Ministers to enable students to access financial support. Courses may be *automatically* or *specifically* designated, as set out below. The amount and nature of the support available reflects the differing regulatory requirements and 2013/14 comprises:

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- up to £9,000 (tuition fee loan of up to £3,465 and tuition fee grant of up to £5,535) for automatically designated courses; and
  - up to £6,000 (tuition fee loan only) for specifically designated courses.
31. A two-tier system operates in respect of the regulatory controls applied to HE courses designated by the Welsh Ministers for the purpose of statutory student support. Under the existing arrangements:
- relevant courses<sup>9</sup> at publicly funded institutions (*i.e.* those maintained or assisted by recurrent grants out of public funds) are designated automatically for this purpose; and
  - private providers (*i.e.* those which are not maintained or assisted by recurrent grants out of public funds) can request specific designation for their courses.
32. Under the current arrangements all relevant HE courses delivered by publicly funded institutions are automatically designated for the purpose of statutory student support. The majority of this provision is subject to fee controls, quality assessment and financial assurance applied through terms and conditions attached to HEFCW's funding.
33. The existing legislative framework does not make provision for HEFCW to have regulatory oversight of those HE providers operating in Wales which are not in receipt of funding from HEFCW. Such providers (including some Further Education ('FE') institutions) can have their relevant courses designated for the purposes of statutory student support, and consequently Welsh Government-backed grants and loans could contribute to their delivery costs, without being subject to the regulatory framework.
34. In contrast, HE courses delivered by non-publicly funded providers (including for-profit and charitable organisations) are not currently eligible for automatic course designation. Such organisations must apply to the Welsh Government for designation of their HE courses on a case-by-case basis under the specific course designation process. The regulatory oversight applied to specifically designated courses is minimal and does not enable quality assessment or financial assurance of the provider. The Welsh Government intends to amend the arrangements for specific course designation in due course. Such amendments do not require changes to be made to primary legislation.

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<sup>9</sup> For academic year 2013/14, these courses are listed in Schedule 2 to the Education (Student Support) (Wales) Regulations 2012 (SI 2012/3097 (W.313) as amended by SI 2013/765 (W.91) and SI 2013/1965 (W.190)).

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35. In summary, as a consequence of the new tuition fee and student support arrangements, the financial relationship between HEFCW and institutions has weakened. Whilst the overall quantum of funding available to HEFCW has decreased the Welsh Government continues to make a significant contribution towards the cost of higher education provision in Wales through the provision of government backed tuition fee grants and loans. This shift in funding means that the current regulatory framework based on HEFCW's conditions of funding will no longer function in the manner originally intended. The continued regulation of education delivered by or on behalf of institutions providing higher education in Wales is in the public interest.

### ***Who is affected by the Bill?***

36. The Bill will amend, repeal and replace some of HEFCW's existing functions. The Bill provisions build on HEFCW's functions provided for by the Further and Higher Education Act 1992 and the Higher Education Act 2004 consolidating and recasting them in the context of the new regulatory framework. It will apply principally to institutions with an approved Welsh fee and access plan in place ("regulated institutions"). HEFCW will amongst other things be required to develop, consult on and publish a statement of intervention policy and a code relating to the organisation and management of the financial affairs of regulated institutions. HEFCW will also be provided with new powers of enforcement and a range of intervention sanctions to be applied in the event of a regulated institutions' failure to comply with regulatory requirements.
37. Provisions sought in the Bill concerning the approval of fee and access plans will sit alongside changes to the arrangements for the automatic designation of higher education courses as set out in the annual set of student support regulations made by the Welsh Ministers. These changes will affect all higher education providers whose activities are conducted wholly or principally in Wales and who wish their courses to be automatically designated for student support. All such institutions will be required to apply to HEFCW for approval of a fee and access plan. In return for the benefits received as a result of automatic course designation, institutions will need to agree to comply with fee and access plan requirements and the other regulatory requirements set out in the Bill.
38. The interests of students, taxpayers and Welsh society will be protected by the implementation of robust regulatory controls which ensure the enforcement of tuition fee limits and fee and access plan commitments, and provide assurance about the quality of education and the organisation and management of a regulated institution's financial affairs.

***Implementation and delivery plan***

39. The key components of the new regulatory framework are set out on the face of the Bill and will be commenced either on Royal Assent or in accordance with commencement orders made by the Welsh Ministers. However, the Bill does provide the Welsh Ministers with a number of regulation making powers. The Welsh Government considers these regulation making powers to be essential in order to: (a) prescribe matters of procedural detail and (b) provide for future flexibility with regard to matters which may change from time to time.
40. The powers to make subordinate legislation are summarised in section 5 of this Memorandum. The Welsh Government will consult on the content of the subordinate legislation where it is considered appropriate to do so. The precise nature of consultation will be decided when the proposals are formalised.
41. The Bill also makes provision for the Welsh Ministers to issue guidance to HEFCW in respect of the exercise of their functions under the Bill. HEFCW will be required to have regard to such guidance and the Welsh Ministers intend to consult HEFCW prior to issuing guidance and to work with and support HEFCW in successfully implementing the new regulatory framework.
42. The Bill requires HEFCW to prepare, consult on, publish and keep under review both a statement of its intervention policy and a new financial management code. The Welsh Government intends to adopt a phased approach to implementation of new regulatory framework in order to allow time for HEFCW to consult on their statement of intervention policy and to prepare and consult on the new financial management code. Implementation will commence from academic year 2015/16. This assumes that Royal Assent is achieved in early 2015 with subordinate legislation made during 2015 and transition to the new regulatory system during 2016 in time for full commencement in the 2016/17 academic year. A phased approach to implementation is considered to be necessary in order to ensure a smooth transition to the new regulatory framework.

***Transitional arrangements***

43. The Bill is part of the wider reforms to higher education funding and student finance introduced in Wales from 2012/13. Transition to the new funding arrangements is now largely complete and the student support package for full-time study is settled. Whilst further consideration will be given to the student support arrangements for part-time study until such time as tuition fees are regulated for part-time courses they will not fall within the scope of fee and access plans and institutions which only

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provide part-time courses will not be subject to the new regulatory framework.

44. The Welsh Government recognises the need for transitional arrangements to apply in respect of fee plans approved by HEFCW under the current legislation as those plans will be in force during the 2015/16 academic year. The Bill therefore makes provision for institutions which have a fee plan approved by HEFCW under the current regime to be treated, for certain purposes, as regulated institutions under the Bill during the 2015/16 academic year.
45. In the interests of transparency and fairness only certain components of the regulatory framework will apply during the 2015/16 academic year. The Bill makes provision for tuition fee limits as approved by HEFCW in fee plans applicable to the 2015/16 academic year to be enforceable and for HEFCW to be able to direct institutions to rectify instances of inadequate quality during the transitional period. However, it is intended that the full range of HEFCW's enforcement powers will not be commenced until the 2016/17 academic year when all institutions will have the opportunity to make fresh applications to HEFCW for approval of new fee and access plans for the 2016/17 academic year.

### ***Risk if legislation is not made***

46. The current legislation relating to higher education funding and regulation is no longer sufficient to allow HEFCW to enforce tuition fee limits and fee plan commitments, or take action in the event of inadequate quality of education or inadequacies in the financial management of institutions. The introduction of the new regulatory framework is a necessary consequence of the recent changes made to higher education funding and student support in Wales, which were driven by the increase in levels of tuition fees across the UK.
47. Failure to legislate would mean that regulation of higher education in Wales would no longer be enforceable. HEFCW would not be able give assurance to the Welsh Ministers, taxpayers and students that institutions which offer courses designated for statutory student support (and which are in receipt of substantial funding from the Welsh Ministers via fee tuition fee grants and loans for students ordinarily resident in Wales) are subject to tuition fee limits and fee plan requirements. This could potentially impact adversely on students undertaking courses of higher education at institutions in Wales.
48. The Welsh Government considers that the reputation of the Welsh higher education sector is paramount and that it would be adversely impacted by failure to make provision for the continued assessment of the quality of higher education in Wales. Without the proposed legislation there is a risk that quality assessment of higher education in Wales could



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not be enforced. This could potentially result in adverse outcomes for students and institutions and damage the reputation of the Welsh higher education sector.

49. Primary legislation is required to amend HEFCW's current functions and make the provisions necessary for the introduction of a new higher education regulatory framework which is fit for purpose in the context of the higher education funding and student support arrangements introduced from 2012/13.

### ***Territorial extent***

50. The Bill applies in relation to Wales. The Welsh Government proposes to seek an Order under Section 150 of the Government of Wales Act 2006 in respect of the regulation of courses provided in England by institutions in Wales.

### ***Overview of the Bill***

51. The Bill enables HEFCW to continue to exercise regulatory controls over education delivered in Wales by certain institutions without reliance on the provision of financial support to those institutions. It is intended that institutions in Wales which wish for their HE courses to be automatically designated for statutory student support will need to have a fee and access plan in force, approved by HEFCW. Institutions in Wales which have an approved fee and access plan in force will be subject to the requirements of the new regulatory framework.
52. HEFCW will continue to monitor and enforce the commitments made by regulated institutions in their fee and access plans. This will include the monitoring of, and enforcement of, compliance with tuition fee limits. Additionally, HEFCW will continue to be subject to a duty to secure the assessment of the quality of education. That duty will apply to courses provided by, or on behalf of, regulated institutions. HEFCW will also continue to be able to provide assurance about the financial management arrangements of regulated institutions. Regulated institutions will be obliged to comply with the requirements of a new financial management code instead of the current financial memorandum between HEFCW and the institutions which they fund.
53. Many of the obligations that the Bill will place on regulated institutions will be similar to those presently imposed by HEFCW and enforced through terms and conditions of funding. For example, regulated institutions will be able to set their own tuition fees up to a maximum amount which the Welsh Ministers will prescribe in regulations. Regulated institutions will be required to comply with the general provisions of their fee and access plans and to provide HEFCW with

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information to allow the monitoring of their compliance with the commitments made in the those plans.

54. The new regulatory framework will differ from the current framework in a number of respects. For example, institutions in Wales (institutions whose activities are wholly or principally carried on in Wales) that wish to apply for approval of a fee and access plan will have to demonstrate that they are charities. Also, it is intended that regulated institutions will be required to include provision in their fee and access plans which requires them to take measures to retain students from groups which are under represented in HE. In addition, it is intended that regulated institutions will need to include provisions in their fee and access plans which sets out information about the amount of fee income that they intend to expend on the furtherance of fee and access plan objectives.
55. The Bill strengthens HEFCW's monitoring and enforcement functions. For example, the Bill confers an express function on HEFCW to evaluate the effectiveness of fee and access plans. HEFCW may use their findings to develop good practice information and advice. Separately, the Bill enables HEFCW, in certain circumstances, to give a direction to a regulated institution to comply with a tuition fee limit as specified in the institution's plan and / or to reimburse tuition fees paid to it where those fees exceed the tuition fee limit. Also, the Bill obliges HEFCW to monitor, or make arrangements for the monitoring of, regulated institutions' compliance with the new financial management code. The Bill enables HEFCW, in certain circumstances, to give a direction to a regulated institution to take steps in order to rectify inadequate quality of education or to take steps for the purpose of dealing with a failure to comply with the requirements of the financial management code. If necessary, HEFCW will be able to enforce those directions by application to the courts for an injunction. The Bill also confers a power upon HEFCW to withdraw their approval of a fee and access plan, subject to certain conditions being satisfied.
56. The Bill will confer additional functions upon HEFCW. For example, the Bill will oblige HEFCW to prepare, consult on, publish and keep under review a code relating to the organisation and management of the financial affairs of regulated institutions. Regulated institutions will need to comply with requirements imposed by the code. The Bill also confers functions upon HEFCW which will increase the transparency of the regulatory system. For example, HEFCW will be required to report to the Welsh Ministers annually on the exercise of their functions under the Bill. The Bill enables the Welsh Ministers to direct HEFCW to provide special reports on the compliance of regulated institutions with their approved plans and also on the effectiveness of those plans both individually and at the sector level. Additionally, HEFCW will be required to prepare, consult on, publish and keep under review a statement of how they propose to exercise their functions which enable them to intervene in

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relation to the regulated activities of institutions. HEFCW will also be required to publish any notice that they give to an institution that they will not approve a new fee and access plan for that institution or any notice that they give to an institution that they are withdrawing their approval of that institution's fee and access plan.

57. The Bill creates procedural safeguards for regulated institutions. For example, HEFCW will be required to give a warning notice to a regulated institution if they intend to take enforcement action in relation to the institution's failure to comply with fee limits, the general provisions of its approved plan or in the event of inadequate quality of education or failure to comply with the requirements of the financial management code. Warning notices must inform institutions that they are able to make representations about HEFCW's intended enforcement action. HEFCW will, in turn, be obliged to take such representations into account in determining whether or not to proceed with enforcement action. Additionally, it is intended that institutions are to be afforded the right to request a review where HEFCW decides to proceed with the enforcement action. It is intended that such reviews will be undertaken by an independent person or panel appointed by the Welsh Ministers.
58. The remainder of this chapter explains each of the components of the regulatory framework and the provisions of the Bill in more detail and are set out under the following headings:
- New higher education regulatory framework;
  - Quality Assessment;
  - Assurance of Financial Management; and
  - Arrangements which apply across the regulatory framework

### ***New higher education regulatory framework***

#### *Regulated institutions*

59. The Welsh Government considers that all institutions and other providers whose activities are either wholly or principally carried on in Wales and who offer HE courses which are automatically designated for the purpose of Welsh Government statutory student support should be required to comply with regulatory controls in order to protect the interests of students, taxpayers and Welsh society.
60. As a consequence of the changes to student support and higher education funding in 2012, the defining feature of the institutions to which regulatory controls are to apply is the automatic designation of their HE courses for the purpose of Welsh Government student support. Automatic designation of courses is provided for separately to this Bill, in

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regulations made under section 22 of the Teaching and Higher Education Act 1998. The existing regulatory framework is to be redesigned to allow regulatory controls to be applied to all institutions and other providers whose HE courses are automatically designated for the purposes of Welsh Government student support. To achieve this aim institutional fee and access plans will form the centrepiece of the new regulatory framework. Under the new arrangements, institutions and other providers that want their courses to be automatically designated will need to have a fee and access plan in force, as approved by HEFCW.

61. The current regulatory and student support systems make distinctions between 'publicly funded' and 'private' institutions in Wales. Save for part-time courses, those distinctions will not be applicable under the new regulatory framework in Wales. Instead, it is intended that all institutions or providers in Wales which have an approved fee and access plan in force will have their relevant HE courses automatically designated for Welsh Government student support and that they will fall within the remit of HEFCW's regulatory functions i.e. will be '*regulated institutions*'. To this end, the Bill provides that institutions in Wales which provide HE and which are charities may apply to HEFCW for HEFCW's approval of a proposed fee and access plan. It is proposed that other providers of HE in Wales which are charities but which are not regarded as institutions will be able to apply to the Welsh Ministers to be designated and treated as an institution for the purposes of the new regulatory framework.

### *Charitable status*

62. In making student support available to eligible students, the Welsh Government incurs significant costs. These costs include the direct costs of grants as well as the costs of making student loans available to eligible students. The Welsh Government is required to account for the full cost of loans, reflecting the fact that some loans will not be re-paid (for example, due to recipients not reaching the earnings threshold for repayment or defaulting on repayment).
63. The Welsh Government considers that all providers of HE that benefit from Welsh Government financial subsidy in the form of statutory student loans or grants should be expected to make a contribution to the wider public good. Therefore the Bill provides that an institution which seeks HEFCW's approval of a fee and access plan must be a charity. The Bill enables the Welsh Ministers to make regulations concerning the making of applications for approval of a proposed fee and access plan. The intention is that such regulations could require applicants to provide information to HEFCW which demonstrates both their status as an institution in Wales and as a charity prior to HEFCW processing their applications. Currently, all chartered universities and institutions

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conducted by higher education corporations or further education corporations in Wales are charities.

64. Although the loss of charitable status by an institution is considered unlikely the Bill provides for such an eventuality and places HEFCW under a duty to withdraw approval of a fee and access plan if a regulated institution ceases to be a charity. It is proposed that transitional measures implemented through the student support regime (student support regulations made under section 22 of the Teaching and Higher Education Act 1998) will ensure that students who have commenced their HE courses with such an institution are able to continue to receive Welsh Government student support in order to complete their studies. It is proposed that regulations will enable institutions to seek a review of a decision of HEFCW to withdraw approval of a fee and access plan in such circumstances.

### *Entry to the new regulatory system*

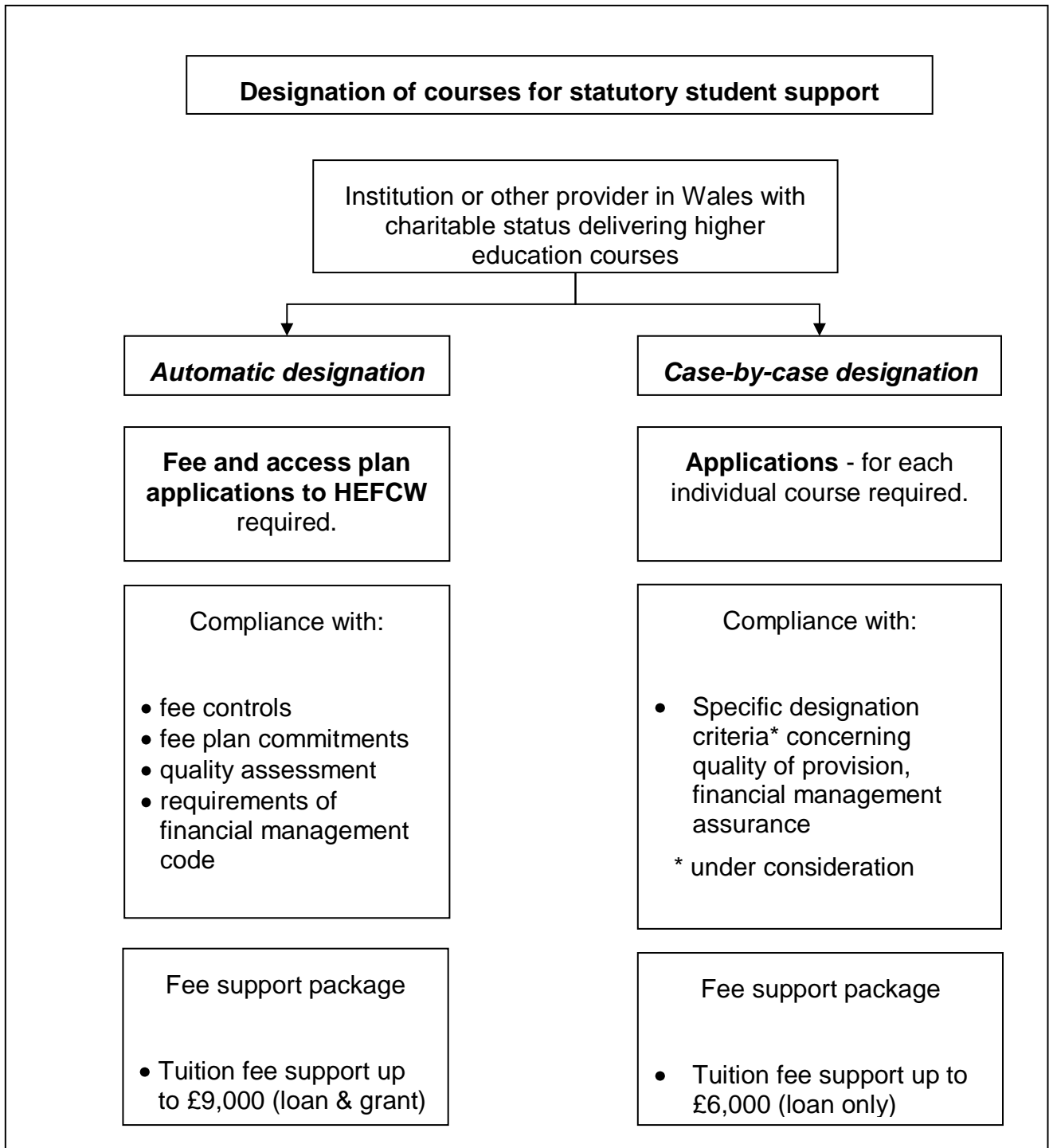
65. Entry into the new regulatory system will be optional. It is for institutions to decide whether they wish for their HE courses to be automatically designated for the purposes of student support or whether they wish to apply for specific designation of their HE courses. The extent of the regulatory requirements will be proportionate to the benefits derived. More extensive regulation will be required of those institutions which benefit from automatic designation of their courses as their students will have access to the full tuition fee grant and loan package as compared to the more limited support provided in respect of courses designated on a specific (case-by-case) basis.
66. It is intended that those institutions which have courses designated for statutory student support but which do not have an approved fee and access plan in force will be required to comply with conditions of designation which are to be introduced under the specific (case-by-case) course designation process. The revised arrangements for the specific designation process can be made without the need for amendments to primary legislation and will be taken forward by administrative means separately to this Bill.
67. The new regulatory system could result in some institutions or providers in Wales making applications to HEFCW for the approval of a prospective fee and access plan for the first time. HEFCW will be able to provide prospective applicants with information concerning the regulatory requirements associated with both course designation routes.
68. In determining whether to approve a fee and access plan, it is proposed that HEFCW take into account any matters which the Welsh Ministers specify in regulations. It is intended that HEFCW will need to take into account such matters as the adequacy of the quality of education and

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the financial stability of the applicant. These pre-requisites will minimise the possibility of an institution receiving approval of its fee and access plan but subsequently failing to satisfy the requirements of the new regulatory system and potentially having approval of its plan withdrawn.

69. It is also proposed that HEFCW will be required to take account of quality and financial management issues when determining prospective fee and access plans from institutions which currently have approved plans in force under the Higher Education Act 2004. However, as HEFCW will already have comprehensive information about the quality of education and financial management of such institutions this should not be an onerous task. It is proposed that the information to be provided by new applicants could include, for example, a QAA Educational Oversight Review (in relation to quality of education), current accounts (in relation to financial management) and other relevant information. The intention is that the Welsh Ministers will issue further guidance to HEFCW in this regard.
  
70. The specific, case-by-case, designation of courses will remain a function of the Welsh Ministers. How HEFCW might play a role in the administration of the process is being considered. Specific, case-by-case, designation is not covered by this Bill. Figure 1 below illustrates the two designation pathways and provides an overview of the proposed controls.

Figure 1: Course designation pathways



71. The choice of designation route is to be a matter for individual institutions and providers to determine on the basis of their provision and their ability to comply with the relevant regulatory requirements. It is envisaged that the vast majority of those providers which currently have fee plans in force (namely all universities in Wales, save for the University of Wales and some further education institutions in receipt of

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funding from HEFCW) will wish their HE courses to continue to be subject to automatic designation.

72. The Bill enables HEFCW to provide information and advice to prospective applicants (prior to an application for approval of a fee and access plan). The intention is that HEFCW will act as a first point of contact for such applicants and might provide information and advice regarding the requirements with which institutions must comply following approval of a fee and access plan. The aim is to ensure that all applicants are fully aware of their obligations prior to becoming a regulated institution.

### *Collaborative provision involving franchise arrangements*

73. Regulated institutions may elect to enter into franchise arrangements with other institutions or providers to deliver part or all of certain courses on their behalf. The Welsh Government considers that responsibility for fee limits applied to courses and the quality of education of such courses should rest with the franchising institution. Under the new regulatory framework, where a regulated institution enters into franchise arrangements with partner organisations the regulated institution will be responsible for ensuring that any qualifying courses are included in its fee and access plan, that the relevant fee limits for those courses are complied with and that the quality of the education provided on those courses is adequate. The Bill makes provision in this regard across each of the elements of the regulatory framework in respect of HE courses provided by, or on behalf of, regulated institutions. The choice of franchise partner will remain a matter for individual institutions to determine and care will need to be exercised by institutions in their choice of franchise partners.

### *Validated Courses*

74. In the case of validated courses (for example, where a regulated institution which has no degree awarding powers provides a qualifying degree course which leads to a degree being conferred by another provider) that degree course will need to be included in the regulated institution's fee and access plan and will be subject to the fee limit set by that regulated institution.

### *Part-time courses*

75. The fees for part-time HE courses are not regulated at present in Wales and such courses are therefore not currently subject to fee plan requirements. However, the revised regulatory framework has been designed to accommodate part-time courses in future, subject to fee regulation being introduced. For the time being, any institutions or providers in Wales which only offer part-time HE courses will not need to



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have a fee and access plan in force in order for their courses to be automatically designated for the purposes of student support.

### *Designation of courses in England, Scotland and Northern Ireland*

76. The arrangements for the automatic designation of HE courses delivered by publicly funded institutions in England, Scotland and Northern Ireland remain unchanged and the Welsh Government will continue to rely on the fee control, quality assessment and financial assurance arrangements which are in place in each administration.
77. In order that students who are ordinarily resident in Wales may receive tuition fee support from the Welsh Government to undertake HE courses delivered by publicly funded institutions or providers based elsewhere in the UK it will be necessary to continue to make provision (in student support regulations) to automatically designate such courses for statutory student support.

### *Tuition fee controls*

78. Currently, regulations<sup>10</sup> prescribe the tuition fee limits (the basic and higher amounts) which HEFCW-funded institutions are able to charge for qualifying HE courses. For the purposes of the new regulatory framework, the Bill provides for a maximum fee limit, to be prescribed in regulations which will apply in relation to qualifying courses provided by regulated institutions. As such there will no longer be a basic amount of fees. A regulated institution will have its HE courses automatically designated for the purpose of statutory student support (by way of regulations made under section 22 of the Teaching and Higher Education Act 1998). The fees that such an institution may charge in respect of its qualifying courses will be subject to the maximum fee limit. The intention is that the maximum limit will correspond to the current 'higher amount' of £9,000.
79. Under the new regulatory framework, the following requirements will apply to regulated institutions. These requirements are similar to those of the current system:
  - the tuition fees charged to qualifying persons undertaking qualifying courses must not exceed the limit specified in their approved fee and access plan;

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<sup>10</sup> The Student Fees (Amounts) (Wales) Regulations 2011.  
<http://www.legislation.gov.uk/wsi/2011/885/made>

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- in any event tuition fees must not exceed the maximum amount specified in regulations; and
  - institutions will need to comply with the general provisions of their approved plans.
80. The Bill provides a new mechanism for enforcement of tuition fee limits. If HEFCW are satisfied that an institution has failed to comply with a fee limit set out in its approved plan then they will be able to issue a *compliance and reimbursement* direction to require the institution to:
- take such action as is necessary to comply with the fee limit e.g. reduce the fee to the limit specified in the fee and access plan; and/or
  - reimburse excess fees which have been paid to it i.e. tuition fees which exceed the fee limit.
81. The nature of such a direction will depend on whether excess fees charged have been paid to the institution. In cases where the fees have been charged but not paid, HEFCW would only issue a direction which requires the institution to take steps to comply with the relevant fee limit. However, if fees which are in excess of the fee limit have been paid to the institution then the direction could require that the institution both reimburses those excess fees and complies with the fee limit in future. The direction may specify the manner in which reimbursement of excess fees is to be effected.
82. The Bill enables HEFCW to issue guidance about the steps that institutions will need to take in order to comply with a compliance and reimbursement direction. The Bill obliges HEFCW to undertake consultation before issuing such guidance. The approach that an institution takes in respect of any reimbursement of fees is likely to depend on the status of the student(s) and whether they are self-financing or in receipt of statutory student support. Reimbursement in the case of a student in receipt of student support could involve repayment via the Student Loans Company.
83. HEFCW's power to refuse to approve a new fee plan upon the expiry of an existing plan will remain at their disposal if an institution fails to comply with the fee limits specified in its approved plan. This sanction will be available regardless of whether or not HEFCW has issued a compliance and reimbursement direction.
84. Finally, the Bill enables HEFCW to withdraw their approval of an institution's fee and access plan during the lifetime of the plan in cases of persistent failure by the institution to comply with fee limits or where an institution fails to comply with a compliance and reimbursement direction. What constitutes persistent failure will be a matter for HEFCW

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to determine. It is not envisaged that HEFCW will apply this sanction unless, in their opinion, the situation is otherwise unresolvable and the institution in question should, in the interests of future students, no longer be entitled to have its higher education courses automatically designated for student support purposes.

### *Procedural requirements*

85. The Bill requires HEFCW to give a warning notice where they propose to issue a compliance and reimbursement direction, where they propose to refuse to approve a new fee and access plan (where they are satisfied that an institution has failed to comply with fee limits) or where they propose to withdraw, by way of notice, their approval of an institution's fee and access plan (where they are satisfied that an institution has persistently failed to comply with fee limits or has failed to comply with a compliance and reimbursement direction). The Bill makes provision for institutions to be able to make representations to HEFCW about the proposed direction or notice. The Bill obliges HEFCW to take any such representations received into account before deciding whether to give the direction or notice. Where HEFCW proceed with giving a direction or notice, the Bill provides for HEFCW's decision to be subject to review by an independent person or panel of persons appointed by the Welsh Ministers.
86. The Bill requires the Welsh Ministers to make regulations in connection with such reviews. Such regulations may provide for the grounds on which an application for review may be made, the period in which applications for review are to be made and the procedure to be followed by the person or panel of persons carrying out a review. Regulations may also specify the steps to be taken by HEFCW following a review. The intention is that these procedural requirements will ensure that institutions' interests are fairly protected and that HEFCW's decisions are reviewable in a transparent manner and according to a prescribed process. Regulations may also provide for a direction or notice not to be treated as having been given by HEFCW until specified steps have been taken or until a specified period has expired. Regulations which, for example, provide that the direction or notice is not to be treated as having been given until the review process has been completed or until the time for applying for a review has expired (without an application being made) would provide an important safeguard for institutions.
87. Subject to the outcome of any review, if an institution does not take the necessary steps set out in a direction then HEFCW, may on application to the courts seek an injunction to enforce the direction. Such an injunction might require the institution to take, or refrain from taking, certain steps in order to comply with the fee limits appropriate to its circumstances and / or to reimburse any excess fees charged. The intention behind this approach is to ensure that the interests of students

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and/or their sponsors are protected and to ensure that HEFCW is empowered to enforce fee limits in the event that an institution refuses to comply with a direction. It is anticipated that an institution would, in most circumstances, take the necessary action to rectify its failure to comply with the fee limits voluntarily and only in the most exceptional circumstances would HEFCW need to seek an injunction to enforce a compliance and reimbursement direction.

### *Fee and access plans*

88. For the purposes of the current regulatory framework under the Higher Education Act 2004, HEFCW is designated as the “relevant authority” for the approval and enforcement of fee plans in Wales. This statutory role was conferred on HEFCW, by regulations, in March 2011 as one of a number of changes introduced as part of the (then) new HE funding and tuition fee arrangements in Wales. The Bill directly confers these approval and enforcement functions upon HEFCW and extends them in order to reflect the context of the new regulatory framework.
89. Fee plans have been a statutory requirement in Wales for HEFCW-funded institutions in respect of courses which commenced from the 2012/13 academic year where tuition fees exceed £4,000. The outcomes of institutions’ activities and investments in support of fee plan objectives will take time to become evident and it has not been possible to date to evaluate the effectiveness of the plans. Therefore, the Bill does not seek to make significant amendments to the content of fee plans. However, the Welsh Government has taken the opportunity to strengthen specific elements of the plans. Additionally, the Welsh Government considers that the plans should be renamed to reflect the contribution they are intended to make to improving equality of opportunity in connection with access to higher education. The Bill therefore makes provision for ‘*fee and access plans*’.
90. Students from groups which are under-represented in HE may require additional support, whether financial, academic or pastoral, in order to complete their courses. While guidance<sup>11</sup> issued under the Higher Education Act 2004 by the Welsh Ministers to HEFCW concerning fee plan approval includes the expectation that institutions will include measures in their plans to address the retention of students from groups that are under represented in higher education, the Bill allows

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<sup>11</sup> Guidance to HEFCW on Fee Plan Approval and Enforcement, Welsh Government, March 2011, issued under section 32(4) of the Higher Education Act 2004.

<http://wales.gov.uk/topics/educationandskills/publications/guidance/heplans/?lang=en>

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regulations to be made which can require fee and access plans to include such provision.

91. In light of the removal of the basic fee amount and thus the wider range of fee levels which will be subject to fee and access plan requirements under the revised system, it is intended that HEFCW will be required to take a proportionate approach when approving and subsequently enforcing fee and access plans as follows:
- Firstly, whilst all institutions applying for approval of a plan are, in general, to be subject to the same core requirements as to the content of their plans, it is intended that only those which seek to charge fees above a certain level (the 'threshold' amount) are to be required to set out in their plan the proportion of their fee income above the threshold which they intend to apply in the furtherance of plan objectives. The intention is that the Welsh Ministers will prescribe the 'threshold' amount in regulations.
  - Secondly, it is intended that HEFCW will be required, by regulations, to take into account the proposed level of fee set out in applicants' fee plans when considering the content of those plans and will need to consider whether the amount of above threshold fee income specified by applicants in their fee plans is sufficient. The intention is that HEFCW will monitor this commitment as part of its overall monitoring of the progress made by institutions in delivery of their fee and access plans.

### *Duration of plans*

92. Under the current regulatory framework, the maximum duration of fee plans is currently prescribed in regulations as being 2 years. The intention is that in the long term this will be extended up to 5 years. To require HEFCW to continue to review fee plans every 2 years would be burdensome and potentially unnecessary in light of the new power sought for HEFCW to monitor institutions' compliance with the provisions of approved fee plans and to evaluate the effectiveness of those plans. Additionally, the Bill enables the Welsh Ministers to direct HEFCW to produce special reports about institutions' compliance with the provisions of their approved plans and the effectiveness of those plans as and when considered necessary.

### *Monitoring and enforcement of plans*

93. The Bill strengthens HEFCW's monitoring and enforcement role by requiring HEFCW to evaluate the effectiveness of approved plans both individually and generally. In order to assess the effectiveness of the activities and investments of regulated institutions to promote higher education and equality of opportunity in connection with access to higher

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education, HEFCW will require information on their outcomes. It is recognised that there may be a time lag for certain outcomes to become evident. HEFCW will be able to commission the gathering of information and the carrying out of research and analysis in support of its evaluation function. The intention is that HEFCW will utilise the findings of such evaluations to inform the production of good practice information and advice on the most effective fee plan activities and investments with the aim of improving fee plan outcomes. HEFCW currently has a similar function under section 40A of the Higher Education Act 2004 whereby they may give good practice advice to HEFCW-funded institutions. The Bill requires regulated institutions to take any good practice information and advice given by HEFCW into account in exercising their functions.

94. The sanctions currently available to HEFCW under the Higher Education Act 2004, in the event of an institution failing to comply with the general provisions of its approved plan, are:
- issuing a notification to the governing body of the institution concerned that, on the expiry of the institution's existing plan, a new plan will not be approved during a specified period (of up to one year)<sup>12</sup>; and
  - the imposition of financial requirements on the governing body of the institution<sup>13</sup>.
95. Given the reduced level of funding being provided by HEFCW to institutions, the Bill preserves the first of the above sanctions by conferring a power on HEFCW to refuse to approve a new fee and access plan where it is satisfied that certain conditions are met (including where an institution has failed to comply with the general provisions of its approved plan). The intention is that this sanction should be reserved for significant cases of non-compliance with the general provisions of an approved plan due to the far reaching consequences for institutions and their students. Under the new regulatory framework, it is intended that where an institution has made progress with its fee and access plan commitments but has not fulfilled the full requirements of that plan, HEFCW is to have access to alternative sanctions in order to encourage compliance. To this end, the Bill confers a regulation-making power on the Welsh Ministers which will allow regulations to make provision concerning the steps to be taken by HEFCW if they are satisfied that a regulated institution has failed to comply with the general provisions of its approved plan.

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<sup>12</sup> See section 38 of the Higher Education Act 2004 and regulation 10(3) of the Student Fees (Approved Plans) (Wales) Regulations 2001 (S.I. 2011/ No. 884 (W.128)).

<sup>13</sup> See section 28(3) and (4) of the Higher Education Act 2004.

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96. The intention is that regulations will confer a power on HEFCW to be able to direct a regulated institution to take steps to ensure compliance with the general provisions of its approved plan. It is intended that the power to issue a *fee and access plan compliance direction* will provide HEFCW with an alternative to issuing a notice of intention to refuse to approve a new fee and access plan. It is proposed that such directions will allow an institution to tackle deficiencies in its compliance by taking remedial action and preserve its approved plan status. Additionally, regulations may also provide for the procedure that HEFCW must follow in giving such a direction. It is proposed that the procedure provided for in regulations will align with the procedure which is to apply to compliance and reimbursement directions. Namely, the giving of a warning notice by HEFCW prior to issuing a direction, the ability of institutions to make representations about the proposed direction and recourse to apply for a review of a direction by an independent person or panel of persons.
97. In order to provide clarity for institutions, it is intended that regulations will specify what constitutes failure to comply with the general provisions of an approved plan. For example, failure to undertake measures committed in an approved plan in respect of students and prospective students who are members of under-represented groups in higher education could constitute failure to comply with the general provisions of an approved plan i.e. failure to deliver summer schools and outreach activities, failure to provide pastoral or study skills support or failure to honour bursary commitments. Whereas, failure to achieve an objective set out in a plan (e.g. to attract more applications from members of under-represented groups) may not be considered to be a “failure to comply with the general provisions of a plan” but instead demonstrates the lack of effectiveness of the interventions specified in the plan.
98. Under the new regulatory framework, the option of giving notice of refusal to approve a new plan where an institution has failed to comply with the general provisions of its plan will remain available to HEFCW whether or not they have given a direction under the proposed regulations.
99. The Bill provides that if HEFCW are satisfied that an institution has persistently failed to comply with the general provisions of its approved plan, they will be able (subject to the warning notice and review procedures) to withdraw their approval of the plan. This provides HEFCW with an additional, more immediate, sanction as compared to their power to refuse to approve a new fee plan, although in respect of the latter, there is no requirement for the failure to comply with the general provisions of the plan to be “persistent”.

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### *Procedural requirements*

100. Where HEFCW proposes to give a notice refusing to approve a new fee and access plan (on grounds that an institution has failed to comply with the general provisions of its plan) or a notice withdrawing their approval of a fee and access plan (on grounds that an institution has persistently failed to comply with the general provisions of its plan), the Bill requires HEFCW to give a warning notice to the institution concerned. The Bill provides that institutions will be able to make representations to HEFCW about the proposed notice. The Bill requires HEFCW to take any such representations into account in deciding whether to give the notice. Where HEFCW proceeds with giving notice, the Bill provides for HEFCW's decision to be subject to review by an independent person or panel of persons appointed by the Welsh Ministers.
101. The Bill requires the Welsh Ministers to make regulations in connection with such reviews and paragraph 88 of this memorandum refers. It is intended that these requirements will be similar to the existing procedures provided for by the Higher Education Act 2004 and regulations which have been made by the Welsh Ministers<sup>14</sup> and provide some continuity with the existing arrangements for fee plan enforcement.
102. As regards HEFCW's powers to give notice refusing to approve a new fee and access plan where they are satisfied that an institution has failed to comply with the general provisions of its plan, the Bill provides a degree of protection for institutions. An institution is not to be treated as having failed to comply with the general provisions of its approved plan if HEFCW are satisfied that the institution has taken all reasonable steps to comply with those provisions. If, as a result of information provided by a regulated institution, HEFCW are satisfied that the institution has taken all reasonable steps to comply with the general provisions of its fee and access plan, then HEFCW would not be able to refuse to approve a new fee and access plan on grounds that the institution had failed to comply with those provisions.

### *Guidance*

103. Under the Higher Education Act 2004, the Welsh Ministers are currently able to provide guidance<sup>15</sup> to HEFCW in respect of the performance of their fee plan approval and enforcement functions under that Act and HEFCW must have regard to that guidance in performing those functions. The Bill enables the Welsh Ministers to issue guidance to

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<sup>14</sup> The Student Fees (Approved Plans) (Wales) Regulations 2001 (S.I. 2011/ SI No. 884 (W.128)).

<sup>15</sup> Guidance to HEFCW on Fee Plan Approval and Enforcement, Welsh Government, March 2011, issued under s32(4) of the HE Act 2004.



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HEFCW on its new function of evaluating the effectiveness of approved fee and access plans. The Bill requires HEFCW to take that guidance into account in exercising their functions. Additionally, the Welsh Ministers intend to issue guidance to HEFCW about the factors to be taken account in determining which of the sanctions to apply in cases of failure by a regulated institution to comply with fee limits and/or the general provisions of its approved plan.

104. The Bill 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. The 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. The Bill requires regulated institutions to take account of any information and advice given by HEFCW (for instance, in the preparation of new fee and access plans). The Welsh Government considers that this will become an increasingly important component of HEFCW's role in future.

### *Validity of students' contracts with their institutions*

105. If an institution charges fees above the limit set out in its approved fee and access plan then it is feasible that some students could refuse to pay excess fees charged by an institution prior to HEFCW becoming aware of, or taking action to rectify, the situation. In principle, an institution could seek to issue legal proceedings against those students for the unpaid excess fees or refuse to educate those students until they have paid the full amount that the institution considers due.
106. In order to protect the interests of students and to avoid any uncertainty as to the effect of an institution-student contract providing for the payment of excess fees, the Bill provides that such a contract is to be treated as providing for the payment of fees which are equivalent to the applicable fee limit. A student who refuses to pay those excess fees will be protected in that the institution would not be able to recover the excess fees from the student. The institution's duty to continue to provide education to the student would continue, even though the contract provides for the payment of excess fees.

### **Quality Assessment**

107. The assessment of the quality of higher education is essential in order to ensure that academic standards are upheld, that students receive a high quality learning experience and that the reputation of Welsh higher education is maintained. The current enforcement of quality assessment requirements, under arrangements put in place by HEFCW, ensures that deficiencies in quality can be promptly identified and measures taken to

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address them in order to limit disruption for students and reputational damage to the individual institutions and to Welsh higher education as a whole.

### *Assessment duty*

108. HEFCW currently has a statutory duty to secure that provision is made for assessing the quality of education provided in institutions for whose activities they provide, or are considering providing financial support. HEFCW is also required to establish a quality assessment committee of which the majority of members are to be drawn from outside of the Council. HEFCW has established a Student Experience, Teaching and Quality Committee and currently discharge their assessment duty through a service level agreement with the Quality Assurance Agency for Higher Education (QAA) and a memorandum of understanding with Estyn.
109. The Bill sets out a revised duty which requires HEFCW to assess, or make arrangements for the assessment of, the quality of education provided by, or on behalf of, each regulated institution in Wales. As now, it will remain a matter for HEFCW to determine how their quality assessment duty is discharged. It is envisaged that HEFCW will maintain their existing arrangements with the QAA and Estyn in this regard. The revised duty is not designed to introduce an inspection regime; it will provide the necessary statutory underpinning to replicate the current quality assessment arrangements as closely as possible without reliance on terms and conditions of funding.
110. HEFCW's current quality assessment duty encompasses all the education delivered by a funded institution irrespective of whether some of its courses are not directly funded by HEFCW. The Welsh Government considers that there is a legitimate public interest in ensuring that all courses delivered by a regulated institution are subject to HEFCW's quality assessment duty. This will protect the interests of students and the reputation of the Welsh HE sector nationally and internationally. Therefore, HEFCW's new quality assessment duty will continue to encompass all the education provided by a regulated institution.
111. HE courses franchised by a regulated institution will also be included within the new duty. By franchised we mean courses provided wholly or partly by another institution (regulated or otherwise), on behalf of a regulated institution. The Welsh Government considers there to be a public and reputational interest in the quality of such courses, and therefore they will also fall within the scope of HEFCW's new quality assessment duty. The duty will not apply in respect of validation-only arrangements i.e. if an institution in Wales validates the HE courses of another provider then it will be for that provider to apply for a fee and

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access plan if it wishes its courses to be automatically designated for Welsh Government statutory student support, and if successful, to comply with HEFCW's quality assessment requirements.

112. The fees of part-time HE courses are not presently regulated and thus fall outside the scope of fee plans and the new arrangements for automatic course designation that will apply to full-time courses. However, part-time courses delivered by regulated institutions will fall within the scope of HEFCW's new quality assessment duty, as the duty will apply across the range of courses delivered by these institutions. It is thought that this will cover the majority of part-time courses currently delivered in Wales. 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. However, HEFCW will be able to maintain quality assessment arrangements at institutions which they fund through relevant terms and conditions of funding. This is because HEFCW will continue to pay some recurrent funding to institutions for part-time courses for the foreseeable future.

### *Quality Assurance Committee*

113. The current requirement for HEFCW to establish and maintain a Committee to advise them on their quality assessment activity will remain. The Bill enables the Committee to provide advice on the discharge of HEFCW's new quality assessment functions.
114. The Bill continues to require that the majority of members of the Committee will remain independent of HEFCW and have experience of the provision of higher education either within the UK or internationally as HEFCW considers appropriate. HEFCW will continue to determine the number of members of the Committee and the terms on which they hold and vacate office.
115. In order to avoid unnecessary disruption to the work of the Committee, the Bill provides transitional provision to allow for the appointments of existing Committee members to continue forward as if they had been originally appointed to the Committee under the revised arrangements.

### *Rights of entry and access*

116. Previously HEFCW was able to ensure compliance with their quality assessment activity by applying and enforcing terms and conditions of recurrent funding. As this will no longer be possible, it is necessary to provide a mechanism by which HEFCW is able to enforce compliance

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with the quality assessment process. The Bill places regulated institutions, and providers who provide courses on behalf of regulated institutions, under an obligation to provide HEFCW with the necessary information, assistance and access as HEFCW, or its agents, require in relation to their quality assessment activity.

117. Additionally, the Bill confers upon a person carrying out a quality assessment (e.g. a person authorised by HEFCW such as a QAA assessor) a power to enter the premises of a regulated institution, as well as a power to inspect, copy and take away documents. This power will also apply in relation to external providers who provide courses on behalf of regulated institutions. Consultation feedback indicated that discussions with staff and students form a fundamental component of the current quality assurance process. These discussions will be provided for as part of the duty on institutions to provide information, assistance and access as referred to above. As a consequence of stakeholder feedback, the Bill makes provision that the person(s) undertaking quality assessment on behalf of HEFCW will be required to provide identification upon request.
118. While HE institutions and other providers have a reputational interest in complying with the quality assessment requirements, the Welsh Government considers it necessary to provide HEFCW with a means of enforcing compliance. In cases of obstruction, the Bill will enable HEFCW to issue a direction to a regulated institution, or an institution providing a course on behalf of a regulated institution, to require them to provide the necessary information, assistance and access. Should an institution fail to comply with such a direction then HEFCW will be able to apply to the courts for an injunction to enforce its rights of access and entry. This approach should provide sufficient leverage to HEFCW to ensure compliance with its quality assessment activity.

### *Unsatisfactory quality*

119. HEFCW has established a procedure to deal with cases of unsatisfactory quality at the institutions which it currently funds. This 'Unsatisfactory Quality Procedure'<sup>16</sup> sets out the actions that HEFCW may take to deal with the unsatisfactory quality of management of academic standards of awards and/or quality of the learning opportunities available to students, or where they consider an institution to be at higher risk in terms of the quality of its provision. The principal sanction presently available to HEFCW is to restrict an institution's access to funding.

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<sup>16</sup> W12/16HE Unsatisfactory Quality Procedures: revised HEFCW Guidance circular 18 May 2012

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120. The actions that HEFCW may take are set out in its Unsatisfactory Quality Procedure and include:
- making arrangements for a support team to help the institution in question resolve the quality issue(s);
  - in the case of HE institutions, undertaking a special assurance review to establish whether there are wider issues about management capability and governance; and
  - in the case of directly funded FE institutions, liaising with the Welsh Government as main funders, and with Estyn if appropriate, over action to be taken.
121. HEFCW's 'Unsatisfactory Quality Procedure' will normally be applied when the procedures set out in the Institutional Review Wales handbook have failed to result in sufficient improvement as judged by the QAA in consultation with HEFCW and/or it is considered that the institution will not be able to address the problem(s) within a suitable timescale without input or support from other agencies. However, the Unsatisfactory Quality Procedure may also be instigated where HEFCW identifies an institution to be at higher risk in terms of the quality of provision via inspections or reviews undertaken by Estyn or professional, statutory and regulatory bodies and also by HEFCW's own strategic engagement process. Such intervention allows HEFCW to provide early support and put in place preventative measures with the aim of reducing the risk of inadequate quality materialising and less negative impact on learners and the reputation of the sector.
122. The intention is to build on HEFCW's existing practice in the new regulatory framework. The Bill therefore confers new functions on HEFCW regarding the actions which it and/or its appointed assessor may take subject to HEFCW being satisfied that the quality of education provided by, or on behalf of a regulated institution is inadequate or at risk of becoming inadequate. Currently in the event of inadequate quality HEFCW might arrange for a support team to assist an institution resolve the issue(s) contributing to inadequate quality. For example the provision of external support from peer reviewers for a particular subject, or experts with specific expertise to support the institution address identified weaknesses. Alternatively HEFCW might undertake a special assurance review in order to establish whether there are wider issues concerning management, capability or governance contributing to inadequate quality. The Bill makes provision to allow HEFCW to be able to provide similar support to regulated institutions as is currently provided under its existing procedures for dealing with inadequate quality and tackling the risk of quality of provision becoming inadequate.
123. Where a finding of inadequate quality has been made, the Bill enables HEFCW to give advice or assistance to regulated institutions with the

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aim of improving the quality of their education or preventing the quality of their education becoming inadequate. Such action might include:

- requesting institutions to develop and implement action plans to address the failures/weaknesses found in a quality assessment (such plans would be subject to HEFCW's approval);
- sending in a support team,
- undertaking or arranging for additional assurance reviews to be undertaken with the aim of identifying whether there are any systematic weaknesses which need to be addressed; and
- attending and addressing meetings of the governing body or management board about any matter arising from a quality assessment.

A regulated institution must take into account any advice given to it by HEFCW.

### *Direction powers*

124. It is envisaged that as at present HEFCW will initially seek to support an institution to rectify shortcomings in the quality of its education. However, if such interventions do not result in improvements then it will be necessary for HEFCW to be able to enforce its requirements. Therefore the Bill provides for HEFCW to be able to direct a regulated institution to take (or not to take) specified steps in order to improve the quality of education or to prevent the quality of education from becoming inadequate. Such directions might require, for example, an institution to improve its quality assurance procedures, to address deficiencies in the academic standards of its degrees, to improve the student learning experience, to take action to address shortcomings identified as the result of a QAA Institutional Review or to address risks to the quality of education identified by HEFCW. HEFCW will be able to issue such directions in respect of education delivered by partner institutions on behalf of a regulated institution under franchise agreements. Such directions will be addressed to the regulated institution as it is responsible for ensuring that courses delivered on its behalf comply with HEFCW's quality assessment requirements.

125. As with certain other direction powers, the Bill places a requirement on HEFCW to issue a warning notice to a regulated institution indicating its intention to issue a direction to that institution. The warning notice must inform the regulated institution of its right to make representations on the proposed direction and the period in which such representations should be made. The Welsh Ministers may by regulations make provision about the timing of representations made by regulated institutions to HEFCW.

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The warning notice should also set out the proposed direction and the reasons why HEFCW proposes to issue it.

126. Before proceeding with a direction HEFCW will be required to take into account any representations received from the regulated institution. It will then be a matter for HEFCW to determine whether or not the direction should be issued. If HEFCW determines that the direction should be issued, they will be required to set out their reasons for issuing the direction and inform the regulated institution of their right to a review. The Welsh Ministers may also prescribe in regulations other information which should accompany an issued direction.
127. A regulated institution subject to a direction on inadequate quality will be able to seek a review by an independent person or panel. The Bill requires the Welsh Ministers to make regulations in connection with such reviews. These regulations may provide for the grounds on which an application for review may be made, the period in which applications for review are to be made and the procedure to be followed by the person or panel of persons carrying out a review. Regulations may also specify the steps to be taken by HEFCW following a review. The intention is that these procedural requirements will ensure that institutions' interests are fairly protected and that HEFCW's decisions are reviewable in a transparent manner and according to a prescribed process. Regulations may also provide for a direction or notice not to be treated as having been given by HEFCW until specified steps have been taken or until a specified period has expired (i.e. is a provisional decision in the first instance). This will provide an important safeguard for institutions.
128. If an institution fails to comply with a direction relating to inadequate quality, HEFCW may, on application to the courts, seek an injunction to enforce the direction.

### *Refusal to approve a fee and access plan upon renewal*

129. As an alternative to seeking an injunction following a failure by a regulated institution to comply with a direction relating to inadequate quality, the Bill enables HEFCW to issue notification of their intention not to approve an institution's fee and access plan upon renewal. The notice will specify the period of time during which HEFCW will not approve a new fee and access plan. The procedural requirements relating to warning notices and rights of review (as set out above in relation to directions on inadequate quality (paragraphs 125 - 127), will also apply in relation to notices of refusal to approve a new fee and access plan.
130. The Welsh Ministers may, via regulations, make provision about the period of time that a notice of refusal may apply, the matters to be taken

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into account by HEFCW when deciding whether to give, or withdraw, a notice and the procedural requirements relating to withdrawal of a notice.

### *Withdrawal of approval of a fee and access plan*

131. The Bill also provides for HEFCW to be able to withdraw approval of a fee and access plan during the life-time of that plan in cases of serious inadequate quality. Although this sanction has far reaching consequences it will protect a significant proportion of the Welsh Government's investment in higher education delivered by regulated institutions, the interests of learners and the reputation of the Welsh HE sector. The procedural requirements relating to warning notices and rights of review (as set out in relation to directions on inadequate quality (paragraphs 125- 127), will also apply in relation to notices of withdrawal of fee plan approval. The Welsh Ministers may also, by regulations, make provision about the matters to be taken into account by HEFCW in deciding whether to give notice to withdraw approval of a fee and access plan.

### *Transitional measures in respect of quality assessment*

132. Where an institution ceases to have an approved fee and access plan in force, the annual set of student support regulations made by the Welsh Ministers will provide protection for students who started courses at a time when an approved plan was in place. This is necessary as approved fee plan status will be a condition of automatic designation under the student support regulations. Further information on this transitional protection is set out in paragraphs 176 - 178.

133. Where a regulated institution's approved plan status is withdrawn or not renewed for any reason, HEFCW's quality assessment duty and associated functions will continue to apply in respect of courses which continue to be undertaken by students receiving Welsh Government student support. This links closely with the transitional measures in the student support regulations explained at paragraphs 176-178. This will ensure that students who have already commenced their studies continue to receive education of an acceptable quality and any planned quality assessment reviews are undertaken.

134. In cases where HEFCW's quality assessment duty is to continue despite the absence of approved plan status, the Bill enables HEFCW to direct an institution to comply with its quality assessment requirements as well as provide further advice and assistance where necessary. Any directions issued will be enforceable by injunction. This will provide an enforcement mechanism in the absence of the possibility of withdrawing an approved plan (which has already been withdrawn) and act as an incentive to comply with HEFCW's continuing quality assessment requirements.



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### *Guidance*

135. The Bill will enable HEFCW to issue or approve guidance about any matter they think relevant to improving or maintaining the quality of education delivered by or on behalf of regulated institutions. This guidance will set out good practice for maintaining and improving the quality of education, as well as practical examples relevant to educational delivery. Regulated institutions will be required to take into account any guidance issued or approved by HEFCW. As a result, HEFCW will be required to consult each regulated institution, and any other person they think appropriate, before issuing or approving this guidance.
136. HEFCW may also issue guidance on the procedures and criteria to be applied by a person undertaking a quality assessment in pursuance of their new quality assessment duty. This guidance may also set out the factors to be taken into account when determining whether the quality of education is inadequate, or, is likely to become inadequate. This will give regulated institutions a clear picture of what is expected of them in advance of a quality assessment.

### ***Assurance of Financial Management***

137. HEFCW currently undertakes assurance activities relating to the organisation of financial affairs of HE institutions they fund. This protects the use of public funds and the interests of students, taxpayers and the Welsh Government. The arrangements also safeguard other public funds (e.g. Research Council grants) as HEFCW provides assurance on institutions 'as a whole' as opposed to assurance on a specific grant scheme.
138. The legal basis of financial management assurance is the financial memorandum (and other terms and conditions of funding) between HEFCW and individual institutions. The responsibility for ensuring that institutions comply with this memorandum and related guidance rests with the governing body of the institution. HEFCW carries out assurance work at institutions, monitoring financial health and undertaking regular reviews of estates and capital development plans.
139. The Bill will enable HEFCW to provide assurance about the financial management for all institutions with an approved fee and access plan. The intention is to build on HEFCW's existing functions and practice in order to ensure regulated institutions:

- are well run and comply with published financial management requirements;
- have effective and efficient finance systems; and

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- are sustainable for the future.

### *Financial management code*

140. In order to put HEFCW's financial management assurance function on a statutory footing the Bill requires HEFCW to:

- (a) prepare and publish a financial management code ('the Code');
- (b) keep the Code under review; and
- (c) consult relevant stakeholders prior to publication of the Code (or any subsequent revisions).

141. The Code will form a key component of the new regulatory framework. Preparation of the Code will be a fundamental aspect of HEFCW's regulatory role and will be undertaken at arms' length from the Welsh Ministers following consultation with regulated institutions and others. The Bill allows for provisions within the Code to take the form of a requirement or guidance. A regulated institution will be placed under a duty to comply with a requirement imposed by the Code and to take into account any guidance contained in the Code. This will ensure that guidance, which will assist institutions' compliance with the Code, is integral to the Code.

142. The detailed content of the Code is not contained in the Bill nor is it to be prescribed in secondary legislation. The Code will relate to the organisation and management of a regulated institution's financial affairs and may include provisions about the following:

- the circumstances in which HEFCW's consent is required before a regulated institution may enter into certain financial transactions specified in the Code;
- accounting and audit arrangements at regulated institutions; and
- the provision of information to HEFCW.

### *Consultation on and approval of the Code*

143. The Bill places a requirement on HEFCW to consult on the development of the Code, and any subsequent revisions, with all regulated institutions and any other persons as they think appropriate. The intention is that this will ensure that all relevant stakeholders are aware of the proposed content and have an opportunity to contribute to the Code's development.

144. Given the significance of the Code in respect of the operation of the new regulatory framework an additional stage of scrutiny is provided for

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before the Code is finalised. The Bill places a requirement on HEFCW to submit the post-consultation version of the Code to the Welsh Ministers for their approval. If the Welsh Ministers approve the Code they must lay it before the National Assembly for Wales for information. This procedure will also apply when HEFCW makes revisions to the Code. Once the Code has been approved by the Welsh Ministers and has been laid before the National Assembly, HEFCW must publish the Code.

### *Guidance from the Welsh Ministers*

145. The Bill provides the Welsh Ministers with a power to issue guidance to which HEFCW must have regard when developing the Code. The guidance could set out the general principles that HEFCW should take into account in developing the Code. For example the type or nature of transactions that should be specified in the Code as requiring HEFCW's prior written consent; the type and nature of information that an institution would be required to provide HEFCW; where elements of the Code should not apply in particular circumstances; or to a class of institutions, and details relating to the preparation, consultation process and publication of the Code. This together with the requirement for HEFCW to consult on a draft of the Code and for Welsh Ministers to approve the Code (and subsequent revisions) will provide an adequate safeguard against those concerns raised by stakeholders in their feedback to the Technical Consultation proposals. It will also maintain the arms length relationship between government and providers of higher education and allow HEFCW the freedom to develop the Code's detail.

### *Application of the Code*

146. The Bill places all regulated institutions under an obligation to comply with the requirements of the Code and to take account of guidance contained in the Code. A single Code will be applicable to all regulated institutions but it may be necessary for the Code to explicitly recognise differences between providers. The position of the Open University is unique in that for the purpose of the Further and Higher Education Act 1992 it is defined as being both an institution in Wales and an institution in England. That position is reflected in the Bill. The Open University is however a single legal entity with its administrative base in England. The Open University is subject to a separate financial memorandum with the Higher Education Funding Council for England (HEFCE) and the intention is that HEFCW will continue, as at present, to secure assurance from HEFCE about the financial management of the Open University. The Bill therefore does not make provision for the Open University to be subject to the financial management Code.

147. The Bill places HEFCW under a duty to make provision to secure the monitoring of compliance with the requirements imposed by the Code.

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HEFCW can either undertake monitoring themselves or arrange for another person to do so for them. This will enable HEFCW (if it so wishes) to monitor FE institutions that are regulated institutions by making arrangements with the Welsh Government which currently undertakes the financial assurance role in relation to the FE sector in Wales. This has the advantage of, avoiding duplication of assurance. It will also enable HEFCW to appoint an assessor or make use of external auditors as necessary.

### *Consent requirements for certain financial transactions*

148. Under HEFCW's current Financial Memorandum<sup>17</sup> with HE institutions, institutions are required to obtain HEFCW's consent for certain financial commitments. The Financial Memorandum also outlines instances where HEFCW's consent is required in respect of the sale or disposal of land or buildings. These restrictions are in place to ensure the long term financial sustainability of HE institutions, and to protect public investment in the sector and the interest of students. HEFCW considers that the current arrangement which requires HEFCW's consent for specified financial commitments is viewed as beneficial by many HE institutions as it provides additional assurance and lowers the risk to lenders. HEFCW also consider that current practice provides a level of assurance to other providers of public funding such as Research Councils. The requirements of the Code must be robust enough for this to continue.
149. The Code will include the circumstances in which HEFCW's consent is required before an HE institution can enter into certain financial transactions. The limits to those circumstances are to be set out in the Code. The Code will be subject to consultation with regulated institutions and others that HEFCW considers appropriate. The draft Code will also be subject to approval by the Welsh Ministers. Inclusion of this requirement will contribute to safeguarding the long term financial sustainability of institutions; ensure the effective use of public funding and the quality of students' education.

### *Right of entry and access*

150. Under current arrangements, HEFCW monitors financial management assurance through the review of information, documents and HEI returns. Cyclical, on-site reviews also take place<sup>18</sup>. Such arrangements are currently enforced by terms and conditions of funding and it is

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<sup>17</sup> W08/36HE: Revised Financial Memorandum and Audit Code of Practice, HEFCW, 2008  
[www.hefcw.ac.uk/working\\_with\\_he\\_providers/institutional\\_assurance/institutional\\_assurance.aspx](http://www.hefcw.ac.uk/working_with_he_providers/institutional_assurance/institutional_assurance.aspx)

<sup>18</sup> These requirements are outlined at paragraphs 24-28, 56-58 and 59-64 of W08/36HE: Revised Financial Memorandum and Audit Code of Practice, HEFCW, 2008

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important HEFCW does not have less power in this regard than is currently the case. In order to enable HEFCW to effectively monitor HE institutions' compliance with the Code, governing bodies of regulated institutions are placed under a duty to co-operate with HEFCW or the person carrying out monitoring activities for HEFCW. The duty to co-operate requires an institution to provide information, assistance and access to the institution's facilities as are reasonably required for the purpose of monitoring compliance with the Code. The Bill makes provision for HEFCW or a person appointed by them to secure access to a regulated institution's premises, records and persons for the purpose of monitoring an institution's compliance with the Code. The Bill also makes provision to require that the person(s) undertaking assurance activities must provide identification if requested.

151. Where a regulated institution fails to comply with the duty to co-operate the Bill provides for HEFCW to direct an institution to take steps (or refrain from taking steps) to secure the provision of information, assistance or access. Failure to comply with a direction is, enforceable by way of injunction.

### *Enforcement of the Code*

152. Currently, where problems are discovered via HEFCW's assurance activities, HEFCW can seek to recover amounts of recurrent funding or refuse to release future funding. This action will not be open to HEFCW in the future in light of the new funding arrangements. The Bill provides HEFCW with access to additional powers of intervention and sanctions for non-compliance with the Code. This is necessary to protect the interests of learners and the reputation of higher education in Wales.

153. If financial mismanagement is discovered HEFCW currently would:

- make arrangements for setting up a support team to help the institution resolve the financial mismanagements discovered;
- in the case of HE institutions, undertake a special assurance review to establish whether there are wider issues about management capability and governance; and
- in the case of FE institutions, stay informed of the progress against any recovery plan put in place by liaising with the Welsh Government as main funders.

154. In line with the arrangements for quality assessment HEFCW may initially wish to seek to support the institution to comply with the requirements of the Code or to provide support to assist an institution comply with the requirements of a direction. Therefore the Bill makes provision for HEFCW to give advice or assistance to an institution with a

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view to improving the organisation or management of an institution's financial affairs. This might include:

- sending in a support team;
- addressing meetings of the governing body/management board of a regulated institution about any matter arising from a failure to comply with the Code.

155. In the event of a breach of the Code, the Bill places institutions under a duty to ensure that HEFCW is provided with information, assistance and access to facilities in order that it can provide support to institutions. Institutions must also take account of any advice that HEFCW provides.

156. The Bill allows HEFCW to direct regulated institutions to take action or refrain from action as necessary to deal with or prevent failure to comply with the Code. The Bill requires HEFCW to issue a warning notice to a regulated institution indicating their intention to issue a direction to that institution. Regulated institutions will be able to make representations about the proposed direction. The warning notice should set out the proposed direction, the reasons why HEFCW proposes to issue it, and the period during which and the manner in which the regulated institution may make representations about the proposed direction.

157. Before proceeding with a direction HEFCW will be required to have regard to any representations received from the regulated institution. It will be a matter for HEFCW to determine each case on its merits taking into account the representations received. When issuing a direction, HEFCW will be required to set out their reasons for the direction in writing and give details of the institution's right to seek a review. The institution may apply for a review of the direction by an independent person or panel.

158. In the event that an institution fails to comply with a direction, it will be enforceable by injunction on application by HEFCW. It is likely that enforcement by injunction will be appropriate in instances where the breach of the Code is technical in nature, such as the failure to provide documents or information required under the Code or where an institution is directed to refrain from taking certain action.

### *Notice of refusal to approve a fee and access plan on renewal*

159. As an alternative to seeking an injunction to enforce a direction and in line with the approach adopted in respect of quality assessment, the Bill provides for HEFCW to be able to issue notification of refusal to approve an institution's fee plan upon renewal. The decision not to approve a fee plan on renewal will be a provisional decision subject to an independent

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review. The procedural requirements set out at paragraphs 85-87 of this Memorandum are to apply to this sanction.

### *Withdrawal of an approved fee and access plan*

160. The Bill enables HEFCW to withdraw approval of an approved fee plan if they are satisfied that there has been serious failure by the governing body of an institution to comply with the Code.
161. A serious failure to comply with the Code is to be distinguished from other failures to comply with the Code. In the case of serious failure HEFCW will not be required to direct the governing body of an institution. Instead, HEFCW will have the power to move directly to giving notice of their intention to withdraw the fee plan in accordance with a procedure to be laid out in regulations. This will ensure that there is consistency across the proposed framework and that such action will only be taken in circumstances that require it. It will be for HEFCW, having taken into account guidance issued by the Welsh Ministers, to determine what constitutes “serious failure” to comply with the Code. A serious failure could, for example, be where HEFCW is satisfied that an institution is financially unstable, or circumstances in which evidence of fraudulent or otherwise unlawful financial activity have been identified.

### ***Arrangements which apply across the regulatory framework***

#### *Transitional arrangements for extant fee plans*

162. Currently HEFCW considers applications for fee plans submitted by institutions approximately 18 months prior to those plans coming into force. This period allows for fees to be set ahead of prospective students applying for courses.
163. The Bill provides for fee plans approved by HEFCW under the Higher Education Act 2004 (“2004 Plans”) to be treated as fee and access plans approved under this Bill for certain purposes up to and including 31 August 2016; i.e. for the 2015/16 academic year.
164. The Welsh Government’s policy is to ensure that HEFCW is able to enforce the tuition fee cap and the quality of education provided by institutions during the 2015/2016 academic year. 2004 Plans will be treated as fee and access plans for those purposes
165. The provisions in the Bill relating to the withdrawal of approval of a plan and compliance with the Code will not apply to 2004 Plans. These sanctions do not exist under the current system and the Welsh Government considers that it would not be fair to apply those particular

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sanctions in the 2015/16 academic year to institutions which applied for fee plan approval under the current system.

### *Statement on exercise of intervention powers*

166. The Welsh Government's policy is for HEFCW to use their intervention powers proportionately. The Bill requires HEFCW to prepare, consult on, publish and keep under review a statement of its policy on the exercise of its intervention powers. This statement will cover the following:

- compliance and reimbursement directions;
- directions in respect of inadequate quality and the application of other measures in respect of inadequate quality;
- directions in respect of failure to comply with the Financial Management Code and the application of other measures in respect of failures to comply with the Code;
- refusal to approval a new fee and access plan; and
- withdrawal of approval of a fee and access plan.

167. The Bill makes provision for the Welsh Ministers to be able to prescribe by regulations how HEFCW should prepare, consult on and publish its intervention statement. The Welsh Ministers also intend to use their power to give guidance to HEFCW to set out when it may or may not be appropriate for HEFCW to use its sanctions.

168. The Bill requires HEFCW to consult all regulated institutions and any other persons they think appropriate before publishing its statement of intervention policy or before revisions to the statement. This will ensure that regulated institutions and others are aware of the interventions which HEFCW may impose in the event of failure to comply with the requirements the regulatory framework, when and how those interventions will be applied and the consequences of non-compliance. The Bill places a further requirement on HEFCW to publish the statement. In terms of current practice HEFCW publishes consultations on the internet making them available for anyone to respond and this is expected to continue.

### *Publication of enforcement action*

169. The Welsh Ministers' current guidance to HEFCW concerning their fee plan approval and enforcement role indicates that HEFCW should be mindful of the need for transparency, accountability and consistency



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when considering the activities and targets outlined in institutions' fee plans.

170. The Bill requires HEFCW to provide the governing body of an institution with a statement setting out their reasons for giving the notice relating to the withdrawal or non approval of a fee and access plan or a compliance and reimbursement direction.
171. HEFCW will also be obliged to send a copy of any notice given to a regulated institution to the Welsh Ministers and to publish a notice. This will allow those interested to be aware of the sanctions applied, will increase the transparency of HEFCW's regulatory role and will encourage regulated institutions to speedily rectify any failures of compliance.

### *Annual and special reports*

172. To provide for external scrutiny of the operation of the new regulatory framework the Bill requires HEFCW to provide an annual report to the Welsh Ministers detailing how it has exercised its functions. This will ensure that the Welsh Ministers are informed of instances of financial or institutional mismanagement, failures to deliver education of adequate quality and the progress made by institutions in complying with their fee and access plan commitments.
173. The Welsh Government anticipates that the contents of annual reports will broadly align with HEFCW's current statement of annual assurance provided to the Welsh Government and the annual report required under the Higher Education Act 2004 concerning the discharge of HEFCW's current fee plan monitoring functions and consequently should not place any significant additional burdens on HEFCW. The intention is that such reports will detail any instances of the use of HEFCW's powers of intervention and provide increased transparency and accountability in the discharge of HEFCW's functions. The Welsh Ministers may direct HEFCW as to the form and content of the annual report.
174. In addition to annual reports the Welsh Ministers may from time to time direct HEFCW to provide them with special reports. Such reports might be required on an *ad hoc* basis as and when the Welsh Ministers consider necessary. For example, the Welsh Ministers might require a report about the quality of education at a particular institution if concerns have been raised about it or about the quality of education of courses provided under franchise arrangements in general. Alternatively the Welsh Ministers might require a special report on the effectiveness of approved plans generally in promoting equality of opportunity in connection with access to higher education.

### *Welsh Ministers' guidance to HEFCW*

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175. The Bill makes provision for HEFCW, in exercising their functions under the Bill, to take into account any guidance issued by the Welsh Ministers. The Welsh Ministers might issue guidance to HEFCW about:

- applications for and approval of fee and access plans;
- monitoring and evaluation of fee and access plans;
- assessment of quality of education;
- preparation of the Financial Management Code;
- preparation of the statement of intervention policy.

### *Protection of learners at an institution no longer having a fee and access plan*

176. Institutions and other providers that want their courses to be automatically designated for the purposes of statutory student support will need a fee and access plan approved by HEFCW. Statutory student support is provided by Regulations made under section 22 of the Teaching and Higher Education Act 1998.

177. In the event of a provider ceasing to have a fee and access plan the policy is that courses provided by it will cease to be treated as automatically designated for the purposes of student support. The Welsh Government recognises that the loss of automatic designation of courses could adversely affect existing students who started their courses at a time when a provider had a fee and access plan. Other than in exceptional circumstances the Welsh Government intends to protect those existing students in the student support regulations by providing for student support to continue.

178. The Bill provides for students not to lose fee protection if a provider ceases to have a fee plan. Where a plan has expired or where a plan has been withdrawn by HEFCW the Bill requires the governing body of an institution to ensure that fees for academic years starting within the period of its fee plan continue to comply with the relevant fee limit.

## 4. Consultation

### *The Further and Higher Education (Wales) Bill White Paper*

179. The First Minister in his legislative statement of July 2011 made a commitment to consult appropriately and engage meaningfully with our partners when developing legislation. In keeping with this statement the Department for Education and Skills issued a White Paper on 2 July 2012 on the proposals for the Further and Higher Education (Wales) Bill. The White Paper invited comments on the proposals for the Bill and was published on the Welsh Government website. The full consultation document is available at:

<http://wales.gov.uk/consultations/education/feandhebill/?status=closed&lang=en>:

180. As part of the Welsh Government's compliance with the United Nations' Convention on the Rights of the Child a consultation specifically tailored to young people was undertaken using an article and survey approach which made use of young peoples' websites and social media<sup>19</sup>. The survey included five questions which covered in a general sense the issues the Welsh Government was seeking views of young people on. The young person's version of the consultation document is available on the Welsh Government website at:

<http://wales.gov.uk/consultations/education/feandhebill/?status=closed&lang=en>:

181. The White Paper consulted on proposals comprising:

- new funding and student support arrangements;
- supporting partnership and collaborative activities;
- quality assurance and enhancement of higher education provision;
- strengthening the learner voice;
- access arrangements; and
- dispute resolution procedures.

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<sup>19</sup> Including CLIC online, Student Finance Wales, Careers Wales, Pupil Voice Wales and Facebook.

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182. The consultation ran for twelve weeks and concluded on 24 September 2011. The table below summarises the distribution of responses from various sectors.

**Table 2**  
**Summary of responses to the White Paper**

<b>Sector</b>	<b>Responses received</b>
Higher education institutions	10
Further education institutions	3
Representative and stakeholder bodies	21
Unions	7
Learners and young people	17
Individuals	4
<b>Total</b>	<b>62</b>

183. The outcomes of this consultation exercise have been used to inform the policy development process. This includes the decisions *not to proceed* with some provisions, namely proposals concerning the Welsh Ministers' ability to directly fund higher education, a statutory duty for HEFCW in relation to the quality enhancement (as opposed to assurance) and formalising existing processes to strengthen the learner voice.
184. A summary of the White Paper responses was published on 6 March 2013 and is available at:

<http://wales.gov.uk/consultations/education/feandhebill/?status=closed&lang=en>.

185. The Minister for Education and Skills indicated in the accompanying Written Ministerial Statement that further analysis and development on the higher education proposals would take place and noted his intention to seek the necessary legislative provisions later within this Assembly term. The Written Ministerial Statement is available at:

<http://wales.gov.uk/about/cabinet/cabinetstatements/2013/fehewwhitepaperbillresponses/?lang=en>.

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186. The key themes which emerged from the consultation responses are summarised below.

### *Summary of responses*

#### Funding and student support arrangements

- The continued provision of student support to learners accessing designated courses delivered by private providers, accompanied by the proposed regulatory arrangements, should contribute towards a level playing field for all providers and maximise student choice.
- The proposal to maintain such support could result in an increased call on the Welsh Government's student support budget.
- The responses strongly supported the regulatory proposals for all providers of higher education in Wales which offer courses which are designated for the purposes of student support.

#### Supporting partnership and collaborative activities

- The proposal could potentially interfere with institutional autonomy and academic freedom, and have a negative impact on the long-standing principle that universities should operate at arms-length from Government.
- The type of activities that the Welsh Government wished to support could be funded within the existing legislative framework.
- Respondents valued the experience and expertise in higher education and funding offered by the Higher Education Funding Council for Wales (HEFCW).
- The responses supported the intent to develop simplified, more efficient funding routes.

#### Quality assurance and enhancement of higher education provision

- There should be consistency of quality assurance arrangements and equitable treatment across all providers in Wales ensuring a minimum level of quality of provision to all learners.
- The responses supported the Welsh Government's focus on enhancing both the quality of provision and the learner experience.

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- Quality assurance and enhancement processes and procedures must maintain alignment and comparability with the rest of the UK.
- Respondents valued the experience and expertise of the Quality Assurance Agency for Higher Education.

### Strengthening the learner voice

- HEFCW guidance regarding student unions funding had been useful and should be regularly reviewed and updated so that it continued to reflect best practice.
- The common set of functions for student unions in HEFCW's guidance was appropriate.
- HEFCW guidance had been effective in ensuring that institutions developed charters in consultation with student unions through informed and constructive dialogue.
- There should be a regular review of student charters.

### Access arrangements and dispute resolution procedures

- All providers offering courses designated for statutory student support should be required to comply with fair access arrangements in relation to those courses and the Office of the Independent Adjudicator student dispute resolution arrangements on an institution-wide basis. This would help protect the interests of the learner and establish a level playing field to all providers of higher education.
- All institutions in receipt of public money should be required to comply with a common set of standards.

### ***Higher Education (Wales) Bill: Technical consultation***

187. The Technical Consultation was issued on 20 May 2013 and closed to responses on 29 July 2013. This set out the Welsh Government's response to the White Paper consultation and the provisions being sought in the Bill. It also invited views on how the revised regulatory system should operate namely:

- introduction of a revised approach to the designation of HE courses for the purpose of statutory student support;
- arrangements for the enforcement of the tuition fee cap and fee plans; and

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- arrangements for quality assessment of higher education provision; and financial and governance assurance.

188. The Technical Consultation is available on the Welsh Government website at:

<http://wales.gov.uk/consultations/education/higher-education-wales-bill-technical-consultation/?status=closed&lang=en>.

189. The outcomes of the consultation exercise were used to inform further policy development and production of the Bill. A summary report of the consultation responses has been published and is available at:

<http://wales.gov.uk/consultations/education/higher-education-wales-bill-technical-consultation/?status=closed&lang=en>

190. The table below summarises the distribution of responses from various sectors.

**Table 3: Summary of responses to the Technical Consultation**

Sector	Responses received
Higher education institutions	9
Further education institutions	-
Representative and stakeholder bodies	4
Unions	3
Government Sponsored Bodies	3
Learners and young people†	–
Individuals	1
Other	1
<b>Total</b>	<b>21</b>

† A young persons consultation was not undertaken as part of the Technical Consultation.

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### *Summary of responses*

#### Cross cutting issues

- The potential for duplication or extra bureaucracy due to the perceived number of additional powers and controls.
- The proposed requirement for providers to have charitable status in order for their HE courses to be automatically designated for statutory student support by the Welsh Ministers had potential to duplicate or conflict with existing legislation.
- The potential impact of the revised regulatory framework on the autonomy of institutions and their non-profit institutions serving households (NPISH) status.
- Concern that the consultation emphasis appeared to be on regulation rather than partnership with HEFCW, and whether the Council had the necessary capacity and resources to deliver its new obligations.
- That part-time HE provision which is not covered by the revised regulatory framework should be included as soon as possible to avoid the development of a two-tier system.

#### Revised regulatory system

- The majority of respondents considered that HEFCW's existing name should be retained. This was due to the benefits of the current brand identity, the reputation and public profile of HEFCW, the potential risk of confusion for students, institutions and stakeholders, the lack of consistency with elsewhere in the UK and the costs associated with the change.
- Some concern was expressed about the ability of a franchising institution to directly influence delivery arrangements of the franchisee.
- The need to ensure that all students' needs are fully represented in the revised regulatory system and that those studying under franchised course arrangements are treated equally.

#### Fee controls and fair access

- There was a mixed response to the proposal that in cases of persistent failure to comply with fee limits that HEFCW should be able to withdraw its approval of an approved plan.
- There was also a mixed response to the proposal to extend HEFCW's relevant authority role to evaluate the effectiveness of fee plans both individually and across the Welsh higher



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education sector on the basis current arrangements were robust enough.

- All the respondents agreed that transitional protection should be made for students enrolled with a regulated provider which has approval for its fee plan withdrawn or approval of a fee plan is refused upon renewal.
- There was a mixed response to the proposal that HEFCW should to be required to take account of the proposed level of fee in determining whether fee plan commitments are sufficient on the basis that the current arrangements were sufficient.
- A number of respondents agreed that the 'threshold' fee amount should be £6,000. Those in favour supported greater harmonisation with fee levels in England and the consistency with the maximum fee support available for courses subject to case by case designation. Others felt should be increased to the current average fee while another argued it was too high.
- A number of respondents agreed that the range of sanctions proposed for HEFCW were reasonable and that HEFCW should have discretion in their application. Others were not convinced about the necessity of the new sanctions and considered current controls to be sufficient. Others stressed the importance of the sanctions being applied in a fair and transparent manner.
- The majority felt that the review mechanism proposed in respect of HEFCW's power to withdraw its approval of a fee plan was appropriate in principle. Some suggested further clarification was required on how the review process would operate.
- A number of respondents agreed that certain courses should be exempt from both automatic designation and the regulatory requirement associated with fee plans. Examples were courses on which students are not in receipt of Welsh Government student support including courses that are targeted exclusively at international students and bespoke provision that is paid for employers. Some questioned the fairness of allowing the exemptions that could undermine the increased regulatory function of HEFCW and create a two-tier system for the provision of HE courses.

### Quality Assessment

- The majority agreed that HEFCW's duty to make provision for assessing the quality of higher education delivered by regulated providers in Wales should extend to all courses of higher education falling within the scope of schedule 6 to the Education Reform Act 1988.

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- The majority agreed with the proposal to enable HEFCW to direct regulated providers to provide access to premises, records and documents for the purpose of quality assessment. The small amount of opposition was due to a perception that the powers would be implementing an 'inspection' regime.
- There was a mixed response to the question of whether the actions to deal with cases of unsatisfactory quality specified in the consultation are appropriate and adequate. In the main, responses that disagreed with the proposal indicated support for the continuation of HEFCW's existing powers and sanctions, but not the amendments proposed in the Technical Consultation.
- The majority of respondents considered that the person or person(s) requesting access to premises, records and documents for the purpose of HEFCW's quality assessment duty should be required to produce identification at the request of the institution which is the subject of the quality assessment.
- Just over half of agreed that the safeguards set out in the Technical Consultation in the event of HEFCW revoking a fee plan are appropriate and sufficient. Much of the feedback surrounded the process of how this sanction would operate in practice rather than the sanction itself.
- The majority were in favour of the proposal that HEFCW be required to submit an annual report to the Welsh Ministers on the discharge of its quality assessment duty.
- The majority of respondents agreed that the proposals in respect of franchised provision would be workable in practice and indicated that they would align with the current Quality Assurance Agency (QAA) practice.

### Financial and governance assurance

- There was overwhelming support for the proposal that HEFCW should be required to consult on the proposed Financial and Corporate Governance Code. This would align with current obligations and ensure that stakeholders can contribute to the development and operation of the Code.
- There was general support for additional scrutiny following HEFCW's consultation on the draft Code. Many respondents stated a preference for HEFCW to be required to submit the post-consultation version of the Code to Welsh Ministers who in turn, if satisfied, would lay it before the National Assembly for Wales for approval.
- The majority broadly agreed with the parameters of the Code as proposed in the Technical Consultation. Some noted that the

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requirements of the Code should be in proportion to the risks of non compliance and should not place undue additional burden on providers. The possible impact of introduction of the proposed Code on the ONS classification of institutions was also raised.

- There was strong support for the parameters of the Code to apply equally to all institutions with an approved plan in force. Most supported the approach for the parameters to be set out in the proposed Bill with the operational detail of the Code developed by HEFCW in consultation with the sector.
- A number of respondents indicated the need to consider the potential impact on the ONS classification of institutions, of the provision for HEFCW's consent to be required for regulated providers to enter into certain financial transactions.
- There was strong support for HEFCW to be required to consult on and publish a statement of its intervention policy and the need for the policy to be clear and transparent and developed in consultation with all interested parties.
- The majority of respondents did not agree that where HEFCW is satisfied that a regulated provider has demonstrated serious financial mismanagement that HEFCW should be able to withdraw approval of that provider's fee plan whether or not it has issued a direction to that provider to comply with the requirements of the Code. Many respondents felt that this extension of HEFCW's powers would be inappropriate and argued that institutions should be issued with warnings, notices of intentions and that phased penalties should be used. However, some respondents felt that such a sanction may be necessary in extreme cases particularly where serious financial mismanagement had been proven.
- When asked whether the safeguards proposed concerning HEFCW's intervention powers were appropriate and sufficient, the majority of respondents (albeit slight) responded negatively. HE institutions were not supportive of the proposals to allow HEFCW to issue a provisional direction to enforce compliance with the Code and considered that this would be detrimental and potentially destabilising to the institution.

### ***Additional engagement***

191. There has been sustained engagement with HEFCW on the matters contained within the White Paper and technical consultation in the last two years. HEFCW has provided both challenge and support, has contributed positively to policy development, and, as a result, has had a

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meaningful influence on the provisions sought in the Bill. This process is ongoing.

192. Officials have also engaged directly with key stakeholders including Higher Education Wales (HEW), Colegau Cymru, the Open University in Wales and the National Union of Students (NUS) Wales in a series of discussion meetings held prior to the conclusion of the technical consultation.
193. Engagement with the UK Government's Department for Business, Innovation and Skills (DBIS) and the Wales Office to address certain cross-border issues arising from the proposed changes has been undertaken. Policy officials initiated contact on these matters and engagement ran in parallel with the technical consultation exercise.

## 5. Power to make subordinate legislation

194. The Bill contains provisions to make subordinate legislation. The Counsel General's guidance has been applied when identifying the procedures. The table on the following pages sets out in relation to each provision:
- the person upon whom, or the body upon which, the power is conferred;
  - the form in which the power is to be exercised;
  - the appropriateness of the delegated power; and
  - the applied procedure if any, together with the reasons why it is considered appropriate.
195. The Welsh Government will consult on the content of the subordinate legislation where it is considered appropriate to do so, The precise nature of consultation will be decided when the proposals are formalised.

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**Table 4: Summary of powers to make subordinate legislation for provisions in the Bill.**

Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
2(4)	Welsh Ministers	Regulations	The principal requirements for the governing body of an institution to be able to apply for approval of a plan are set out on the face of the Bill. This is suitable for delegated powers as it provides Welsh Minister with flexibility to add and amend in relation to the types of information which must support applications.	Negative procedure	There is a technical and administrative aspect to these regulations, which, maybe updated on a regular basis.
3(4)	Welsh Ministers	Regulations	Suitable for delegated powers as it enables Welsh Ministers to set out details as to how applications may be made, the circumstances in which designation may be withdrawn and the effect of withdrawal and in doing so respond to the changing nature of providers of higher education.	Negative procedure	Prescribes technical and administrative matters, which may be updated from time to time.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
4(2)	Welsh Ministers	Regulations	The Bill requires that a plan must specify the period to which it relates. The Regulations will allow Welsh Ministers to set the maximum period a plan can cover and in doing so, take account of changes to the higher education sector over time.	Negative procedure	The detail is technical and may change from time to time.
5(2)(b)	Welsh Ministers	Regulations	<p>The Bill provides for fee limits to apply only in relation to certain “qualifying courses”. Delegated powers are suitable because they will allow the descriptions of those courses to reflect both changes in student support and changes in the nature of courses provided.</p> <p>Section 28(6) of the Higher Education Act 2004 currently provides a power to make</p>	Negative procedure	Prescribes technical and administrative matters, which may be updated from time to time

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			regulations describing “qualifying courses”.		
5(3)	Welsh Ministers	Regulations	<p>The Bill provides for fee and access plans to specify a fee limit for an academic year of a qualifying course, subject to that fee limit not exceeding a maximum amount to be permitted in regulations. The regulations provide flexibility for the maximum amount to be amended.</p> <p>This power reflects a similar power in section 28(6) of the Higher Education Act 2004.</p>	Negative procedure	Prescribes technical and administrative matters, which may be updated from time to time
5(5)	Welsh Ministers	Regulations	The Bill provides for fee limits to apply only in relation to certain “qualifying persons”. Delegated powers are suitable because regulations provide the flexibility to	Negative procedure	Prescribes technical and administrative matters, which may be updated from time to time



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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			<p>prescribe classes of persons which can accommodate any changes to classes of person prescribed under section 1 of the Education (Fees and Awards) Act 1983 and other changes to the higher education sector.</p>		
5(9)	Welsh Ministers	Regulations	<p>The operation of fee limits and obligations of regulated institutions in relation to those fee limits are set out on the face of the Bill. This power will enable certain course fees which are payable to persons other than the institution to be treated as fees payable to the institution. Suitable for delegated powers as it enables the Welsh Ministers to be able to take account of the changes to the way in which courses are provided.</p>	Negative procedure	The detail is technical and may change from time to time

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
6(1)	Welsh Ministers	Regulations	<p>Delegated powers are suitable as the flexibility afforded by regulations is needed to ensure that the content of plans reflects any changes to the higher education sector.</p> <p>A similar power currently exists in section 33 of the Higher Education Act 2004.</p>	Negative procedure	The detail of the regulations may change from time to time.
7(3)	Welsh Ministers	Regulations	<p>Conditions concerning the approval or rejection of a proposed plan are set out on the face of the Bill. Suitable for delegated powers as it enable the Welsh Ministers to provide additional detail as to the matters that HEFCW are to take into account in determining applications and reflect the different types of institution that may apply for approval.</p> <p>A similar power exists in section</p>	Negative procedure	Prescribes technical and administrative matters, which may be updated from time to time

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			34(5) of the Higher Education Act 2004.		
8(1)	Welsh Ministers	Regulations	Suitable for delegated powers as it will provide the necessary flexibility to set out the way in which plans are published and when they are to be published.	Negative procedure	The detail is technical and administrative in nature and may change from time to time.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
9(1)	Welsh Ministers	Regulations	<p>Certain functions of HEFCW in determining whether to approve or reject a proposed plan are set out on the face of the Bill. Suitable for delegated powers as the Regulations will allow for plans to be varied once approved and provide the flexibility to set out how applications for variations are made and the process that is to apply to a decision about the variation of a plan.</p> <p>A similar power exists in section 36 of the Higher Education Act 2004.</p>	Negative procedure	The detail is technical and administrative in nature and may change from time to time.
11(5)	Welsh Ministers	Regulations	The circumstances in which HEFCW may give compliance and reimbursement direction and the requirements that may be imposed by such a direction are set out on the face of the Bill. Suitable for delegated powers as the Welsh Ministers will have flexibility to set	Negative procedure	The detail is technical and administrative in nature and may change from time to time.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			out how and when HEFCW are to give a copy of such a direction to them and how and when HEFCW are to publish the direction.		
13(1)	Welsh Ministers	Regulations	This power provides the Welsh Ministers with the flexibility to provide for the steps to be taken by HEFCW if they are satisfied that the governing body of an institution has failed to comply with the general provisions of its approved plan.	Affirmative procedure	Affirmative procedure is appropriate where regulations are able to amend primary legislation.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
17(4)	Welsh Ministers	Regulations	The Bill defines an “external provider” by reference to a person responsible for providing a course on behalf of a regulated institution. Delegated powers are suitable for making provision about the circumstances where a person is, or is not, to be treated as responsible for providing a course. This flexibility is necessary in order that the definition of “external provider” properly reflects changes in the way in which courses are provided to students.	Negative procedure	The detail is of a technical nature.
36(7)	Welsh Ministers	Regulations	The circumstances in which HEFCW may refuse to approve a new plan are set out on the face of the Bill. The Bill also sets out the procedure that is to apply in relation to such notices. Delegated powers are suitable because they will allow the Welsh Ministers to	Negative procedure	The detail is technical and administrative in nature and may change from time to time

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			provide detail as to the period that may be specified in the notice, the matters to be taken into account by HEFCW in determining whether to withdraw a notice and the procedure to be followed in connection with the withdrawal of notice.		
37(2)	Welsh Ministers	Regulations	The Bill provides for the circumstances in which HEFCW must withdraw their approval of a plan. Suitable for delegated powers as it enable the Welsh Ministers to specify the matters that are to be taken into account by HEFCW in making a determination under section 37 and the procedure that is to apply.	Negative, unless making changes to the provisions of this Bill, in which case affirmative	Affirmative procedure is appropriate where regulations amend primary legislation.  Negative procedure is appropriate where regulations are technical and administrative in nature.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
38(3)	Welsh Ministers	Regulations	The Bill permits HEFCW to withdraw its approval of a plan where they are satisfied that certain conditions have been met. Those conditions are set out on the face of the Bill. The Bill also specifies the procedure that is to apply to a notice under section 38. Delegated powers are suitable as they allow the Welsh Ministers to set out the matters to be taken into account in determining whether to give notice under section 38.	Negative procedure	The detail is technical and administrative in nature and may change from time to time
39(2)	Welsh Ministers	Regulations	The circumstances in which HEFCW are able to give a notice under Part 5 of the Bill are set out on the face of the Bill. Delegated powers are suitable they allow Welsh Ministers to set out how and when HEFCW are to give a copy of such a notice to them and how and when HEFCW are to publish the	Negative procedure	The detail is technical and administrative in nature and may change from time to time.



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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			notice.		
41(2)(d)	Welsh Ministers	Regulations	The Bill specifies that a warning notice must set out the proposed notice or direction, HEFCW's reasons for proposing to give it and inform the governing body of an institution that it may make representations about the proposed notice or direction. Delegated powers are suitable as they will allow the Welsh Ministers to specify the period within which and the way in which representations may be made.	Negative procedure	The detail is technical and administrative in nature and may change from time to time.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
42(c)	Welsh Ministers	Regulations	The Bill specifies that where HEFCW give a notice or direction of the type listed in section 40(1), they must at the same time give the governing body of the institution a statement which sets out HEFCW's reasons for giving the notice or direction and which informs the governing body that it may apply for a review. Delegated powers are suitable as they will allow the Welsh Ministers to require the statement to include other information.	Negative procedure	The detail is technical and administrative in nature and may change from time to time.
43(3)	Welsh Ministers	Regulations	The Bill provides that the governing body of an institution may, in certain circumstances, apply for a review where it receives a notice or direction from HEFCW which is listed in section 40(1). Suitable for delegated powers as it requires the Welsh Ministers to make	Negative procedure	There is a technical and administrative aspect to these regulations. The subject matter of these regulations may be updated from time to time.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			regulations which will provide the detail of the review process including the grounds for review, the period within which an application for review may be made and how a notice or direction is to be treated pending a review. A similar power currently exists in section 39 of the Higher Education Act 2004.		
49(4)	Welsh Ministers	Regulations	The requirement that HEFCW prepare and publish a statement which sets out how they propose to exercise certain functions is set out on the face of the Bill. The Bill also lists the functions in question. The Bill also requires that HEFCW keep the statement under review and requires HEFCW to consult before publishing the statement or a revised statement. Delegated powers are suitable they will allow provision about the preparation and	Negative procedure	There is a technical and administrative aspect to these regulations. The subject matter of these regulations may be updated from time to time.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
			publication of the statement and the consultation that HEFCW is to carry out.		
54(1)	Welsh Ministers	Regulations	Delegated powers are suitable as flexibility is needed to ensure that the definition of fees reflects changes to the way in which courses may be provided by the higher education sector.	Negative procedure	The detail is of a technical nature and may change from time to time

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
55(3)	Welsh Ministers	Regulations	This enables the Welsh Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provisions in consequence of, or for giving full effect to, a provision of the Bill	Negative unless making changes to primary legislation in which case, Affirmative	Affirmative procedure is appropriate where regulations amend or repeal primary legislation. Negative procedure is appropriate for other regulations which make technical provision only.
56(3)	Welsh Ministers	Order	Suitable for order because this provision enables the Welsh Ministers to provide for commencement of the Bill. Orders under section 56(3) may make transitional, transitory or saving provision.	No procedure	Commencement orders are technical in nature.

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Section :	Power conferred on	Form	Appropriateness for delegated power	Procedure	Reason for procedure
Schedule, paragraph 28(e)	Welsh Ministers	Regulations	The Bill provides for plans approved under the Higher Education Act 2004 to be treated during a transitional period and for certain purposes as a fee and access plan approved under section 7. Delegated powers are suitable as regulations will provide flexibility for such plans to be treated as plans approved under section 7 for the purposes of other enactments.	Negative procedure	Regulations are likely to provide for technical matters.
Schedule, paragraph 30(1)	Welsh Ministers	Regulations	Delegated powers are suitable as regulations provide the Welsh Ministers with flexibility to disapply provisions in or under paragraph 28 of the Schedule during the transitional period	Negative procedure	Regulations are likely to provide for technical matters of transition.

## PART 2 - REGULATORY IMPACT ASSESSMENT

196. A regulatory impact assessment has been completed in accordance with Standing Order 26.6(vi) for the proposed Bill and follows. There are no specific provisions in the Bill which charge expenditure on the Welsh Consolidated Fund

### 6. Options

197. Three options are outlined below and the advantages and disadvantages of each are briefly considered. An analysis of the costs and benefits of each follows in chapter 7.

#### ***Option 1: Do nothing – maintain the current arrangements***

198. The regulation of HE in Wales is enabled by HEFCW attaching terms and conditions to the funding that it allocates to HEIs. The 'do nothing' option would not change this arrangement.

199. The new arrangements for student support introduced in 2012/13 have significant implications for the continued discharge of HEFCW's statutory functions relating to the regulation of HE in Wales. As the amount of funding paid out through student tuition fee grants increases, so the amount of funding allocated by HEFCW to which it may attach terms and conditions reduces. There can be no guarantee that any given institution will continue to receive funding from HEFCW; even where they do, the sum may be so small as to make the threat of withdrawal of such funding ineffective as a sanction intended to ensure compliance with the regulatory framework.

200. The risk of non-compliance with the regulatory framework grows substantially in this option. The stewardship of public funding, the assurance of the quality of the education that students receive, tuition fee regulation and widening access policy objectives are all placed in jeopardy.

#### *Advantages*

- No additional costs.

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### *Disadvantages*

- Places the regulation of HE in Wales at risk and, by implication, the national and international reputation of Welsh HE.

201. The risks associated with this option mean it cannot be considered a prudent policy option and it is therefore presented only as a counterfactual to the two options discussed below.

### ***Option 2: Reform the functions of HEFCW to enable effective regulation and implement additional, strategically important policy proposals***

202. This option would introduce an Assembly Bill to reform the functions of HEFCW and thus allow the regulatory framework for HE in Wales to continue to operate effectively. It would also introduce additional, policy and regulatory provisions arising from the *Programme for Government*<sup>20</sup> and *For our Future* (2009)<sup>21</sup>. These proposals would:

- support partnership and collaborative activities by directly funding higher education in some circumstances;
- place quality enhancement (as opposed to assessment) of higher education provision on a statutory footing;
- strengthen the participation of learners in making the decisions that affect them; and
- extend dispute resolution procedures to a wider range of providers.

203. These proposals were formalised in *The Further and Higher Education (Wales) Bill White Paper*.

204. The responses to the White Paper led to a clear understanding of the advantages and disadvantages of these proposals. These have been summarised here in chapter 4 and presented in more detail in the *White Paper – summary of responses*. The Welsh Government response was published as part of the *Technical Consultation*. The key advantages and disadvantages of the proposals, taken as a whole, are listed below.

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<sup>20</sup> *Programme for Government*, Welsh Government, 2011.

<sup>21</sup> *For Our Future*, Welsh Government, 2009.



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### *Advantages*

- Revises the arrangements for the regulation of HE in Wales in light of the new funding arrangements and minimises the risk of non compliance;
- Makes progress against a number of other Welsh Government commitments and strategic policy objectives.

### *Disadvantages*

- Introduces policy changes that a number of respondents did not support;
- Introduces policy changes in areas where recently revised policies have yet to have their full impact;
- Introduces a large number of changes, complicating and increasing the cost of implementation, and increasing recurring operational costs.

205. Subsequent reflection, policy development and cost–benefit analysis resulted in a third, and preferred, option.

### ***Option 3: Reform the functions of HEFCW to enable effective regulation***

206. The preferred option introduces an Assembly Bill to reform the functions of HEFCW and allows the regulatory framework for HE in Wales to continue to operate effectively. No further policy proposals would be implemented.

207. This option focuses upon implementing the key and necessary changes (the minimum necessary to ensure continued and effective regulation) that will ensure the continued regulation of HE in light of changes to funding arrangements. These have been grouped into four broad areas:

- Fee plan approval and automatic designation;
- Fee plan monitoring and evaluation;
- Quality assurance; and
- Financial assurance.

208. The following policy proposals from option 2 will *not* be progressed by way of the Bill:

- support partnership and collaborative activities by directly funding higher education in some circumstances;

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- place quality enhancement (as opposed to assessment) of higher education provision on a statutory footing;
- strengthen the participation of learners in making the decisions that affect them; and
- extend dispute resolution procedures to a wider range of providers.

209. The Bill will establish a new regulatory framework for higher education institutions and other providers of higher education in Wales that have a fee and access plan in force, approved by HEFCW (Regulated Institutions). The new regulatory framework will not rely on HEFCW providing funding to those institutions and providers under Part 2 of the Further and Higher Education Act 1992.

### *Advantages*

- Revises the arrangements for the regulation of HE in Wales in light of the new funding arrangements and minimises the risk of non compliance;
- Makes progress against the fair access to HE policy objective;
- Controls the costs and complexity of implementation, controls recurring operational costs.

### *Disadvantages*

- While most respondents to the consultations accept the need for continued regulation of HE, not all do and thus there is likely to be some resistance to these proposals from some stakeholders;
- Some respondents to the consultations disagreed with the method (fee plans) proposed for regulation; Does not implement some potentially valuable policy proposals. Additional considerations

### ***Additional considerations***

210. The possibility of a 'do minimum' option was considered (subsequent to the White Paper and Technical Consultation) in order to determine whether there was a solution (legislative or non-legislative) which would enable the current regulatory functions to continue without incurring any significant additional costs.

211. It became apparent that a 'do minimum' option was not feasible as it would not provide adequate mitigation of the risk of an inadequate regulatory system. Option three develops the four broad headings where continued regulation is required fee plan approval, fee limits, quality

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assurance and financial assurance. These taken together and in their entirety provide the means by which effective regulation can continue. This is contrasted with 'do nothing' where regulation would be at significant risk of failing. An option between these two—'do minimum'—is not a realistic option as any significant changes to option three would place effective regulation at risk. Put another way, there is no option in which less could be done and still ensure an effective regulatory framework. A 'do minimum' option is not viable and was not developed further.

## 7. Costs and benefits

212. This chapter analyses the costs and benefits of the options of chapter 6. Costs have been given a financial value and are estimated for the first five years of operation. Attaching market values to benefits is extremely difficult and a description of benefits is therefore provided.
213. The assessment presents the best estimate of costs based on the information available. A note on the methodology used to estimate costs can be found at annex A. A number of assumptions have been used in the analysis and so costs have been rounded to the nearest £1,000 to reflect this. Some of the totals in the tables may not sum due to this rounding.

### Option 1: Do nothing – maintain the current arrangements

#### Costs

214. If the current system is maintained, there will be no immediate additional costs associated with implementation or operation. The table below records the estimated costs of the key regulatory tasks in the current arrangements, summarised under appropriate headings. These costs would continue to fall principally to HEFCW and institutions and, to a lesser extent, to Welsh Government.

**Table 1**

Total cost of option 1

£	2015/16	2016/17	2017/18	2018/19	2019/20
Fee plan approval and automatic designation	251,000	250,000	250,000	251,000	250,000
Fee plan monitoring and evaluation	234,000	293,000	293,000	293,000	293,000
Quality assurance	288,000	339,000	339,000	356,000	339,000
Financial assurance	336,000	421,000	421,000	421,000	421,000
<b>TOTAL</b>	<b>1,109,000</b>	<b>1,303,000</b>	<b>1,303,000</b>	<b>1,321,000</b>	<b>1,303,000</b>

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215. The risk of non compliance with terms and conditions, which enable the regulation of HE in Wales, grows in this option. It is difficult to assess the likelihood and impact of such an event. Further, imposing sanctions and penalties as provided for by the current terms and conditions of funding would become more difficult and the associated costs could rise.
216. Both these costs would, in the event of non compliance, add to the cost of doing nothing.
217. It is worth noting that the UK Government has also moved to reform the regulation of HE in England following the implementation of the Browne review. 'Do nothing' would appear to have been ruled out as a viable option in England, as in Wales<sup>22</sup>.

### **Benefits**

218. The principal benefit of this option is the avoidance of any implementation and recurring costs in a new system.

### **Option 2: Reform the functions of HEFCW to enable effective regulation and implement additional, strategically important policy proposals**

### **Costs**

219. The costs of option two are the sum of the costs of the additional policy proposals, listed below, plus the costs of option three, which is the cost to reform the regulatory functions of HEFCW. The costs of those proposals that are unique to option 2 are recorded separately from the costs of option three to enable comparison of the additional costs of this option to both option one and three. These proposals are:
- support partnership and collaborative activities by directly funding higher education in some circumstances;
  - place quality enhancement (as opposed to assessment) of higher education provision on a statutory footing;

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<sup>22</sup> The Higher Education Policy Institute ('HEPI') has undertaken an analysis of proposed changes in the regulatory system in England (*The Future Regulation of Higher Education in England*, Brown and Bekhradnia, Higher Education Policy Institute, 2013). England has broadly similar arrangements for student finance as Wales (except that the UK Government does not offer tuition fee grants) and the legislative framework which underpins regulation has been similar in England and Wales to date. The UK Government has chosen not to introduce legislation but to reform regulation by administrative means. While it is too early to assess how successful the approach may be, HEPI's critique suggests that the new system is 'fraught with risks' (p. 10).

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- strengthen the participation of learners in making the decisions that affect them; and
- extend dispute resolution procedures to a wider range of providers.

220. Annex A records how the costs of option two were estimated (para. 337). It should be noted that the proposal *to extend dispute resolution procedures to a wider range of providers* has not been costed (see para. 232 & 233).

**Table 2**

Cost of option 2

	2015/16	2016/17	2017/18	2018/19	2019/20
Supporting partnership and collaboration	831,000	822,000	754,000	763,000	754,000
Quality enhancement	278,000	276,000	227,000	278,000	276,000
Strengthening the learner voice	280,000	329,000	280,000	280,000	329,000
<b>SUB TOTAL</b>	<b>1,389,000</b>	<b>1,427,000</b>	<b>1,261,000</b>	<b>1,321,000</b>	<b>1,359,000</b>
Reform HEFCW's functions (option three)	1,666,000	1,853,000	1,800,000	1,814,000	1,841,000
<b>TOTAL</b>	<b>3,055,000</b>	<b>3,280,000</b>	<b>3,061,000</b>	<b>3,135,000</b>	<b>3,200,000</b>

221. Option 2 would cost around £3m each year, with the costs of the additional policy proposals accounting for a little less than half of this. This analysis excludes the cost of sanctions provided for by option 3 (see para. 254).

222. Table 3 presents the incidence of the costs of the additional policy proposals in option 2. The costs of the reforms also in option 3 are set out in table 6. Costs would fall to the Welsh Government, to HEFCW and to institutions.

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**Table 3**

The incidence of costs

	2015/16	2016/17	2017/18	2018/19	2019/20
Welsh Government	1,099,000	1,081,000	1,013,000	1,031,000	1,013,000
HEFCW	120,000	176,000	78,000	120,000	176,000
Institutions†	170,000	170,000	170,000	170,000	170,000
<b>TOTAL</b>	<b>1,389,000</b>	<b>1,427,000</b>	<b>1,261,000</b>	<b>1,321,000</b>	<b>1,359,000</b>

† There are currently 10 institutions with fee plans and the analysis of this chapter assumes 10 institutions for the purpose of cost analysis.

223. Costs of the additional policy proposals in option 2 are split between implementation and recurring costs in table 4. Implementation costs consist chiefly of the additional, new guidance that would be required to enable the operation of the new policies. Recurring costs are the ongoing administration and programme costs associated with the new policies. The split of the costs of the reforms also in option 3 are set out in table 7.

**Table 4**

Implementation and recurring costs

	2015/16	2016/17	2017/18	2018/19	2019/20
Implementation	206,000	69,000	0	0	0
Recurring	1,183,000	1,358,000	1,261,000	1,321,000	1,359,000
<b>TOTAL</b>	<b>1,389,000</b>	<b>1,427,000</b>	<b>1,261,000</b>	<b>1,321,000</b>	<b>1,359,000</b>

### **Benefits**

224. Options two and three have the introduction of legislation that would reform the regulatory functions of HEFCW in common. The benefits of this are identical between the two options and are summarised in the *Benefits* section of option three.

225. The additional proposals of option two also have some benefit. The responses to the White Paper led to a detailed understanding of the advantages and disadvantages of implementing these proposals. This

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allows the analysis of benefits to include some comments as to how far such benefits might be actually achieved in practice, or, equally, how far they should be discounted.

226. The principal benefits of the proposal to support partnership and collaborative activities by directly funding higher education in some circumstances are:

- (i) better integration of the planning and delivery of education and training for those aged over 16 years in a local or regional context;
- (ii) seamless progression routes for learners from schools, through further and/or higher education to work;
- (iii) a single funding stream for collaboration, simplifying the system; and
- (iv) collaborative bidding, reducing individual institutional or organisational costs.

227. The response to the consultation on this proposal provided a number of objections which lead to some discounting of these potential benefits. Two of particular note are the risk that such funding could breach the principle of institutional and academic autonomy with unintended consequences and that direct funding and control would risk HEIs in Wales being reclassified as part of the public sector. It was also noted that there is not necessarily anything to preclude the funding of such activities using existing legislation and administrative arrangements.

228. The proposal to place quality enhancement (as opposed to assessment) of higher education provision on a statutory basis was designed to ensure continued improvements in quality based upon a planned and managed approach, as opposed to an evolution based upon competition. It would signal the Welsh Government's commitment to supporting the HE sector to continue to improve quality.

229. Respondents to the consultation correctly pointed out that a great deal of policy-led quality enhancement activity was already underway and argued that more time should be given to allow such activities to develop before making new legislation. The benefits of quality enhancement are not obviously different in a policy-led voluntary approach as opposed to a statutory approach, assuming that providers embrace the policy, but the costs of legislating and implementing legislation are.

230. The benefits of strengthening the participation of learners in making the decisions that affect them is in having learners acting as active participants in shaping their own learning and improving the quality and relevance of the learning experience. HEFCW has issued guidance to institutions on these matters.



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231. The White Paper did not make any specific proposals to change this but invited feedback on how well the current approach is working. The responses were largely supportive of the current approach and suggested that insufficient time has elapsed to objectively evaluate its impact. It is judged that there are no obvious additional benefits to be gained from implementing further change at present.
232. Extending dispute resolution procedures was concerned with extending the role of the Office of the Independent Adjudicator ('OIA') as final (administrative) arbiter in complaint handling to all providers whose students are receiving statutory support, not just those that are statutory members of the OIA scheme (principally publicly funded universities). Ensuring a robust approach to complaint handling, such as that operated by the OIA, benefits students by virtue of their recourse to impartial, transparent and well-managed procedures in the event of an unresolvable dispute with their host provider. Institutions benefit by avoiding some of the costs associated with dispute handling and by being seen to adopt the well-regarded processes of the OIA.
233. The OIA is under no compulsion to accept any given body to its scheme unless they are statutory members. This practical difficulty has led to this proposal being progressed differently and by administrative rather than legislative means (and this proposal is therefore not costed).
234. This cost-benefit analysis suggests that there are only limited benefits to be gained from introducing the additional policy proposals at this time. The costs are not insubstantial. The cumulative effect is to remove the additional proposals and to progress the option, option three, which concentrates on reforming the ability of HEFCW to operate the core regulatory controls of the regulatory framework.

### **Option 3: Reform the functions of HEFCW to enable effective regulation**

#### **Costs**

235. The costs of option three have been estimated using a detailed model based upon the operational tasks determined by the provisions of the Bill. More detail can be found at Annex A.

#### *Regular costs*

236. Regular costs are defined here as the costs, associated with the provisions of the Bill, that will occur regularly and predictably. This is contrasted with the cost of sanctions as provided for in the Bill, here termed *exceptional* costs, which will only be incurred if sanctions are

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required. Regular costs are, then, reasonably predictable; exceptional costs are not.

237. The tables that follow (tables 5–7) record regular costs. It should be noted that these are total costs; for the additional costs of the Bill see paragraph 240. Exceptional costs are presented later in this section. Costs are summarised into six major headings that reflect the nature of the tasks implied by the provisions of the Bill (a more detailed list of tasks is at Annex A).

**Table 5**

The regular costs of option 3

£	2015/16	2016/17	2017/18	2018/19	2019/20
Fee plan approval and automatic designation	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. This cost, and the cost of development, training and oversight, has been estimated as noted in para. 346–347 of Annex A.

238. Costs will fall to the Welsh Government, HEFCW and institutions as detailed below.

**Table 6**

The incidence of regular costs

£	2015/16	2016/17	2017/18	2018/19	2019/20
Welsh Government	172,000	113,000	29,000	87,000	29,000

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HEFCW	203,000	199,000	175,000	185,000	216,000
Institutions†	1,292,000	1,541,000	1,596,000	1,541,000	1,596,000
TOTAL	1,666,000	1,853,000	1,800,000	1,814,000	1,841,000

† There are currently 10 institutions with fee plans and the analysis of this chapter assumes 10 institutions for the purpose of cost analysis.

239. These costs are split between implementation and recurring costs in table 7. Implementation costs are incurred during the first two years, as subordinate legislation is developed, guidance on the new framework is developed and issued, and HEFCW, in particular, is involved in managing change.

**Table 7**

Implementation and recurring costs

£	2015/16	2016/17	2017/18	2018/19	2019/20
Implementation	255,000	120,000	0	0	0
Recurring	1,412,000	1,733,000	1,800,000	1,814,000	1,841,000
TOTAL	1,666,000	1,853,000	1,800,000	1,814,000	1,841,000

### *Additional and existing costs*

240. It should be noted that the Bill makes no change to the eligibility of students for financial support. There is, therefore, no additional cost in tuition fee grants and loans arising from the Bill.
241. The total cost of implementing and operating the regulatory tasks (excluding sanctions) which accrue as a result of the provisions of the Bill are recorded above. 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). There is an additional cost introduced due to the increased complexity of this continuing activity—the mechanisms for compliance are necessarily different within a framework based upon fee plans compared to one based upon terms and conditions. Some tasks and costs are new. Separating these costs allows for clear comparisons to be made between the cost of implementing option 3 compared to options 1 and 2 (and a summary table is provided below).

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242. Tables 8–10, then, detail:

- *additional* costs—the cost of wholly new regulatory tasks introduced by the Bill; and the increase in cost of continuing tasks. These are the regularly occurring costs of introducing the Bill.
- *existing* costs – the existing cost of continuing tasks.

243. The tables below assume a 25% increase in the cost of continuing tasks. (Further detail on this approach can be found in paras. 343–345 of annex A).

**Table 8**

Additional costs of option 3, 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>

**Table 9**

Additional costs of Option 3 by task

£	2015/16	2016/17	2017/18	2018/19	2019/20
Fee plan approval and automatic designation	90,000	81,000	81,000	90,000	81,000
Fee plan monitoring and evaluation	67,000	73,000	177,000	81,000	177,000
Quality assurance	117,000	95,000	95,000	134,000	95,000
Financial assurance	135,000	153,000	115,000	159,000	156,000
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>556,000</b>	<b>549,000</b>	<b>549,000</b>	<b>493,000</b>	<b>537,000</b>

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244. The table below details where the additional costs of introducing the Bill will fall.

**Table 10**

Incidence of the additional costs of Option 3

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

245. As can be seen, the additional cost of the Bill is not inconsequential. The incidence of additional costs is returned to below after the cost of sanctions has been considered.

### *Sensitivity analysis*

246. The sensitivity of the above costs to changes in the underlying assumptions has been undertaken to provide estimates of how costs might change in response to unforeseen events (or a different set of underlying assumptions). The tables below present the results of this analysis. Two of the model's inputs were varied—wage rates (including on costs and overheads) and the number of days required to complete each task. A 2% compound annual rise in wages (and on costs and overheads) has been modelled as has a change of  $\pm 10\%$ ,  $\pm 25\%$  and  $\pm 50\%$  in the number of task days required to complete regular tasks. (Additional information can be found in annex A.) The tables below present the results of this analysis as it affects additional and total costs (excluding the cost of sanctions).

247. Wage inflation (table 11) would inevitably add to costs, although the amount added to the additional costs of the Bill is not particularly large.

**Table 11**

Change in additional and total costs as a result of an annual 2% increase in wage rates

+£	2015/16	2016/17	2017/18	2018/19	2019/20
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Additional costs	9,000	18,000	29,000	38,000	53,000
Total costs	31,000	71,000	108,000	147,000	189,000

248. The table that follows varies the number of task days that have been estimated as necessary to deliver the provisions of the Bill. Changes of  $\pm 10\%$ ,  $\pm 25\%$  and  $\pm 50\%$  are included (although there is no obvious reason to think that costs might increase by as much as 50%).

**Table 12**

Change in additional and total costs as a result of changed number of days required to complete tasks

$\pm\pounds$	2015/16	2016/17	2017/18	2018/19	2019/20
$\pm 10\%$ — additional costs	56,000	55,000	50,000	49,000	54,000
— total costs	167,000	185,000	180,000	181,000	184,000
$\pm 25\%$ — additional costs	139,000	137,000	124,000	123,000	134,000
— total costs	417,000	463,000	450,000	454,000	460,000
$\pm 50\%$ — additional costs	278,000	275,000	248,000	247,000	269,000
— total costs	833,000	927,000	900,000	907,000	921,000

249. The range of estimates—from approximately £50,000 per annum additional cost should task days increase by 10% to around £0.25m per annum for a 50% increase—highlights the need for monitoring the implementation of the provisions of the Bill (chapter 9).

250. Table 13 summarises the results of this analysis, detailing the cumulative effect of a 2% annual rise in wages (and overheads and on costs) and an increase of 10% in the number of task days required to complete the regulatory tasks.

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**Table 13**

Cost sensitivity summary; 10% increase in task costs plus 2% annual wage increase

£	2015/16	2016/17	2017/18	2018/19	2019/20
Additional cost increase	66,000	73,000	79,000	87,000	107,000
Additional costs—base	556,000	549,000	496,000	493,000	537,000
Total costs increase	199,000	256,000	288,000	328,000	373,000
Total cost—base	1,666,000	1,853,000	1,800,000	1,814,000	1,841,000

251. The table above includes ‘base’ costs for the purpose of comparison. The effect of the cost increases is not insignificant particularly in later years.
252. This sensitivity analysis provides a useful proxy for considering the impact of any risks associated with the introduction of the Bill. While no significant risks are anticipated—the Bill principally provides for the continuation of existing regulatory arrangements re-cast to account for changed funding arrangements—the analysis above demonstrates the possible increase in costs should introduction of the Bill prove more difficult and hence costly than expected.
253. Management and monitoring arrangements, necessary to control and/or respond to any cost pressures, are discussed briefly in chapter 9.

### *Exceptional costs*

254. As noted above, there are potential ‘exceptional costs’ associated with both Options 2 and 3. These exceptional costs, or ‘sanctions’<sup>23</sup>, are designed to provide appropriate controls to ensure compliance with the regulatory requirements. A range of possible activities are available. It will be for HEFCW to determine, within the legislative framework, which ought to apply and when.
255. Table 15 presents the total cost of sanctions (assuming each is undertaken once). However, costs are exceptional and would only be incurred when compliance activity is triggered. As such, predicting the

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<sup>23</sup> ‘Sanctions’ is used here as a shorthand for any exceptional, non regular, costs associated with the provisions of the Bill.

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actual costs that are likely to be incurred in any given time period is very difficult.

256. Two illustrative scenarios are therefore presented. These scenarios are based upon 'supportive' interventions, where HEFCW assists an institution that may be having problems meeting its commitments. Such supportive interventions are a normal and existing part of the regulation of HE in Wales. The more extreme sanctions that would lead to fee plan withdrawal or refusal to renew a fee plan upon its expiry are considered to be only applicable in the rarest of circumstances and are therefore not included in the scenarios.
257. The initial analysis presents the total costs of each scenario. In order to then profile costs across the five year period, the costs of scenario two are used. It is not immediately apparent that the level of compliance activity that is suggested by scenario two will be regularly required and this is considered therefore a prudent upper estimate.
258. Costs are grouped into the same headings as previously with the addition of 'tuition fee controls', 'refusal to renew a fee plan' and 'fee plan withdrawal' in which the tasks are related solely to exceptional activity.

**Table 15**

The total cost of sanctions

£	
Fee plan approval and course designation	23,000
Fee plan monitoring and evaluation	149,000
Tuition fee control	156,000
Quality assurance	280,000
Financial assurance	145,000
Refusal to renew a fee plan	85,000
Fee plan withdrawal	93,000
<b>TOTAL</b>	<b>931,000</b>

259. Table 16 details the incidence of costs. Costs largely fall to HEFCW and institutions. Costs to Welsh Government are generally expected to be small as the Welsh Government would only become involved in the most serious of circumstances.



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**Table 16**

The incidence of the cost of sanctions

£	
Welsh Government	45,000
HEFCW	621,000
Institutions	265,000
TOTAL	931,000

### Scenario one

260. In which:

- two institutions with fee plans request variations;
- Welsh Ministers request one review of the effectiveness of fee plans generally;
- one institution is directed to comply with the general provisions of its approved plan which may involve expenditure of fee income on activities relating to promotion of equality of opportunity/promotion of HE. The institution unsuccessfully appeals the decision;
- one institution is directed to develop and implement an action plan to address weaknesses in quality; and
- one institution that fails to comply with the Financial and Management Code is supported by HEFCW by way of a support team to address those failures.

261. The tables below detail the estimated cost of scenario one, grouped under the appropriate headings. Costs fall to both HEFCW and institutions. Costs to the Welsh Government are expected to be minimal in these scenarios.

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**Table 17**

The costs of sanctions in scenario 1

£	
Fee plan approval and course designation	46,000
Fee plan monitoring and evaluation	94,000
Quality assurance	47,000
Financial assurance	24,000
<b>TOTAL</b>	<b>211,000</b>

**Table 18**

The incidence of the cost of sanctions in scenario 1

£	
Welsh Government	0
HEFCW	137,000
Institutions	73,000
<b>TOTAL</b>	<b>211,000</b>

### Scenario two

262. As in scenario one, plus:

- a further one institution requests a fee plan variation;
- a further one institution is directed to comply with the general provisions of its approved plan which may involve expenditure of fee income on activities relating to promotion of equality of opportunity/promotion of HE;
- a further one institution is directed to develop and implement an action plan to address weaknesses in quality; and
- one institution fails to comply with a fee limit and is directed to take action to comply and reimburse excess fees and unsuccessfully contests the direction.

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**Table 19**

The costs of sanctions in scenario 2

£s	
Fee plan approval and course designation	69,000
Fee plan monitoring and evaluation	175,000
Tuition fee control	103,000
Quality assurance	93,000
Financial assurance	24,000
<b>TOTAL</b>	<b>464,000</b>

**Table 20**

The incidence of the cost of sanctions in scenario 2

£	
Welsh Government	0
HEFCW	276,000
Institutions	188,000
<b>TOTAL</b>	<b>464,000</b>

### *Profiling exceptional costs*

263. In order to profile these exceptional costs, further assumptions are required as to the occurrence of each in the five year period. The costs of scenario two are used here for the reasons noted above. The resulting cost profile is detailed below.

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**Table 21**

Profiled costs of sanctions in scenario 2

£	2015/16	2016/17	2017/18	2018/19	2019/20	Total
Fee plan approval and automatic designation	0	23,000	23,000	23,000	0	69,000
Fee plan monitoring and evaluation	0	12,000	82,000	0	82,000	175,000
Tuition fee control	0	0	0	103,000	0	103,000
Quality assurance	0	47,000	0	0	47,000	93,000
Financial assurance	24,000	0	0	0	0	24,000
<b>TOTAL</b>	<b>24,000</b>	<b>82,000</b>	<b>105,000</b>	<b>126,000</b>	<b>129,000</b>	<b>464,000</b>

264. The following section summarises both regular and exceptional costs to provide an overview of the additional costs of the Bill and how it compares to the other options of chapter 7.

***Summary: comparison with options 1 and 2***

265. Table 22 details the additional costs, including the estimated costs of sanctions, of option 2 and option 3 (the Bill) compared to option one (*i.e.* the additional costs of both options compared to doing nothing).

**Table 22**

The additional costs of option 2 and option 3 over option 1<sup>24</sup>

£	2015/16	2016/17	2017/18	2018/19	2019/20
Option 2	1,970,000	2,059,000	1,863,000	1,940,000	2,026,000
Option 3 (the Bill)	581,000	632,000	602,000	619,000	667,000

***Opportunity costs***

266. Opportunity costs — the economic value of the next best alternative to the one chosen in a situation of choice between mutually exclusive alternatives — are discussed briefly here.
267. Given that the Bill is designed to ensure the ongoing regulation of higher education, one formulation of its opportunity cost would focus on designing a different policy approach to deliver this objective and determining its economic value (benefit less cost). Consultation, policy development and legal advice have not resulted in any satisfactory alternative to the one chosen and therefore formulating an opportunity cost on this basis is difficult.
268. A reasonable alternative is to consider the economic value of not introducing the Bill and, therefore, of maintaining the current regulatory framework (option one).
269. In the event of significant failure in the higher education sector (in quality, access, financial control or tuition fee control), an event made more likely in the absence of enforceable regulation, costs would depend on the nature of the failing. As an example, a poorer quality of education which led to a lower degree award than may otherwise have been the case may permanently affect an individual’s earning potential; across a number of individuals and a lifetime’s employment, such costs could be substantial (a similar calculus might apply if fair access was inadequate).

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<sup>24</sup> This table includes the cost of sanctions/compliance activity as additional costs (based on the costs presented in Scenario 2 (Table 21)). Some of the sanctions that are provided for by the Bill are actions that can, and sometimes are, carried out at present. There is, then, some element of this cost which may be ‘existing’. However, given the exceptional nature of these costs and the necessary reliance on scenarios to present them, adding a further breakdown to ‘existing’ and ‘additional’ would be adding a spurious degree of accuracy to estimated costs.

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Further, any attempt to seek redress via an inadequate legal structure may prove more costly than would be the case as a result of the Bill. While an attempt to produce a central estimate of these costs would be very difficult, it seems reasonable to suggest that these costs could be quite high.

270. The benefits of option one have been noted above and are argued to be small. There is also potential benefit to be gained from reallocating the resources which will be used to support the implementation and recurring costs of the Bill. The additional cost of the Bill (excluding sanctions) as compared to the do nothing option is estimated at £1.6m over the first three years of operation. At a tuition fee of £9,000 per year, this represents a single (three year) cohort of 59 additional undergraduate students<sup>25</sup>.
271. Potential benefits, then, are not inconsequential but neither are they large. Costs, on the other hand, could be potentially high if the analysis above is accepted. The economic value of this alternative is not high; equally, the opportunity cost of the Bill is small. As noted, opportunity cost represents the economic value of the next best alternative to the one chosen. This analysis concludes that the value of any alternative to this Bill is likely to be small.

### **Benefits**

272. The principal benefit of option 3 is to ensure that there is a robust higher education regulatory framework in place. Learners—from Wales or elsewhere—can be confident of the quality of the education that they will receive and pay for. The financial health of the institutions at which they study will be assured. The control and regulation of tuition fees and a refreshed approach to widening access and retaining students from under represented groups will ensure that higher education remains open to all those who are capable of benefiting from it.
273. The public, for their part, can be confident that higher education providers continue to achieve a high standard in the conduct of their affairs and act in the public interest. Government expenditure on HE is managed in a strategic and controlled manner. Academic and institutional autonomy are unaffected.
274. This option enables a number of existing regulatory controls to continue to be effective in the new student support regime. It also introduces a small number of new controls that extend the options available to

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<sup>25</sup> This estimate is almost certainly too high; it does not account for the actual cost of providing tuition fee grants and loans which includes administration, loan default and delinquency, and foregone interest.

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HEFCW when dealing with identified problems. These provide for a more nuanced and proportionate approach to regulation than the do nothing option/current system which allows only for the withholding of funding and/or the refusal to renew a fee plan.

275. This option makes improvements to the transparency of the regulatory framework. Consultation with the sector becomes a duty on HEFCW, HEFCW will publish an interventions policy, guidance from Welsh Government is a feature, the proposed new Financial Code will be laid before the National Assembly, and annual reporting on quality and financial matters is incorporated.
276. Option 3 introduces the possibility of HEFCW withdrawing approval of an existing fee plan. Such a sanction would only be used in the most serious or egregious cases of failure by an institution. It will ensure that public monies do not continue to flow (other than for existing students) to institutions that have substantively or repeatedly failed to meet regulatory requirements.
277. This option also includes provision for HEFCW to address issues which are *likely* to become serious. This promotes, and recognises the value of, early identification and resolution of problems to avoid the possibility of more significant sanctions.
278. Option 3 makes a key change to the scope of the regulatory framework, ensuring a more consistent approach to regulation. All providers whose full time learners are receiving statutory student support are brought within the framework.
279. HEFCW's role as the principal body with which the HE sector interacts continues, but is redefined. HEFCW's role becomes regulator rather than funder, a consequence of the change in the funding arrangements for HE. Disruption and the cost of adjustment to the new regulatory framework is minimised, existing professional relationships and networks are left intact and the skills and experience of HEFCW's Council and Executive are maintained.
280. This option focuses effort on the widening access agenda. Fee and access plans must include provisions to retain students from under represented groups. A regulation making power has been sought in the Bill with the aim of making provision for the enforcement of fee plan commitments.
281. These are the principal strategic benefits of option 3. A fit-for-purpose, proportionate and transparent regulatory framework contributes to maintaining and enhancing the national and international identity and reputation of higher education institutions in Wales.

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282. A number of other benefits can also be identified:

- (v) Requiring providers to have charitable status as a condition of eligibility for application of approval of a fee and access plan will ensure that public funding for higher education continues to be used and invested for the public good.
- (vi) Requiring evidence of the quality of provision and of financial stability from new providers at the point of entry to the system—*i.e.* as a factor which HEFCW must take into account in considering approval of a fee and access plan—will protect the quality of experience and reputation of higher education in Wales.
- (vii) Tuition fee limits remain enforceable and new measures are introduced to ensure the return of any overcharged fees.
- (viii) The Bill will clarify the regulatory requirements for franchised provision, an area that has been less regulated previously. Learners can be certain of the scrutiny of the quality of franchised courses and the relationship with the franchising institution.
- (ix) Sector wide studies of the effectiveness of the approach to quality and widening access is made possible. Additionally, studies of the financial efficiency of the sector and individual institutions are made possible. These will result in the development of good practice guidance to the sector, reinforcing the focus on and effectiveness of quality assurance, widening access and financial efficacy.
- (x) The regulatory system will no longer be reliant on conditions of funding. Future changes to the funding system need not necessarily prompt changes to the regulatory system.

### **Conclusion**

283. Option 3 provides an effective regulatory framework for the Higher Education sector in Wales and has a lower additional cost compared to Option 2. For these reasons, option three was selected as the appropriate option to progress.

### **Specific Impact Assessments**

284. A number of specific impact assessments have been completed. Each is summarised below. The assessments show no significant impact is anticipated upon implementation of the Bill.

#### *Equality*

285. The Inclusive Policy Making model developed by the Welsh Government requires that all policy and legislation is developed ‘that meet(s) the



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identified needs of individuals and communities, placing a citizen focus based on the principles of human rights; fairness, respect, equality and dignity at the centre of all our policy actions'. Since the development of this model, the Equality Act 2010 has come in to force and the Welsh Government's Strategic Equality Plan published in April 2012 has further developed the requirement to 'ensure that public services and employment are fair, accessible, responsive to people's needs, and that communities are inclusive'.

286. The provisions being sought in the Bill will enable HEFCW to continue to provide assurance about the financial health and governance of higher education providers; assess the quality of their provision; enforce fee controls; and safeguard equality of opportunity to access higher education in Wales. It will ensure that all providers offering HE courses which are automatically designated by the Welsh Ministers for the purpose of statutory student support are required to comply with regulatory controls. This will protect the interests of all students, regardless of whether or not they are part of a group with protected characteristics, and help ensure accessibility and responsiveness.
287. An analysis of impacts against the interests of six groups with protected characteristics (according to age, disability, gender or transgender, race, religion or belief/non belief, and sexual orientation) and two further groups introduced by the Strategic Equality Plan (marriage/civil partnership, pregnancy/maternity) has been undertaken. No differential impact on these groups was identified. No impact was identified on human rights as defined by the Human Rights Act (1998).
288. HEFCW is subject to the Public Sector Equality Duty (contained in section 149 of the Equality Act 2010) and to the Welsh specific duties (being an authority listed in Part 2 of Schedule 19 of the Equality Act 2010). HEFCW is therefore required to comply with the same equality duties as other Welsh public authorities. These duties will be unaffected by the passage of the Bill.

### *United Nations Convention on the Rights of the Child*

289. The Bill does not contain any provisions which directly impact on children. However, today's children are future higher education students and the assessment of the impact on the rights of the child suggests that the Bill may affect the following right:

Article 12. Children have the right to say what they think should happen, when adults are making decisions that affect them, and to have their opinions taken into account.

290. With this in mind, the Welsh Government undertook a consultation tailored to young people alongside the White Paper. Young people were

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generally supportive of the principle of a well-regulated higher education sector. More detail can be found in the consultation report<sup>26</sup>.

### *Privacy*

291. The Bill seeks to fill a regulatory gap that has arisen as a result of changes to the way in which higher education is funded in Wales. This is to ensure that HEFCW can continue to enforce fee controls, fair access arrangements, make provision for quality assessment and financial management assurance of HE in Wales. There is no change in the personal data being processed by HEFCW, only the legislation underpinning it. This is not visible to the data subject and the processing is essentially unchanged from their perspective, which means there is no change to their existing privacy expectations.

292. A formal Privacy Impact Assessment is, therefore, not required for this proposal as the Bill will not result in the processing of any personal data.

### *Rural proofing*

293. Rural proofing is a commitment by the Welsh Government to ensure all policies and programmes take into consideration the needs of rural communities during the formulation and delivery of policy and which allows the impact of a policy or programme to be examined to determine whether it has a negative impact in rural areas.

294. Analysis demonstrates that there are no differential or negative impacts accruing to rural communities as a result of the Bill.

### *Sustainable development*

295. The Sustainable Development Scheme, One Wales: One Planet sets out the aspiration that the education system 'delivers a better future for the people of Wales, in particular, where high quality lifelong learning helps people reach their goals, creates better opportunities, empowers communities and helps provide the jobs and skills that people need'. The Bill will contribute to meeting this aspiration by implementing a robust and coherent regulatory system for higher education in Wales that will enable HEFCW to continue to:

- provide assurance about the financial health and governance of higher education providers;

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<sup>26</sup> White Paper – summary of responses, Further and Higher Education (Wales) Bill, 2013

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- assess the quality of their provision;
  - enforce fee controls; and
  - safeguard equality of opportunity to access higher education in Wales.
296. The approach to sustainable development is based around the principles of social justice and equality of opportunity and earlier sections highlight the contribution this legislation will make, particularly to the latter. The regulatory framework provided for by the Bill will help create an environment where as broad a range of people as possible can access higher education and participate effectively in society.
297. The Welsh Government's vision of a sustainable Wales is where 'Wales' economic growth is underpinned by the development of training and qualifications in key sectors and in key skills'. These proposals have been developed to address the long term needs of current and future generations participating in higher education in Wales. The Bill aims to create a stable, resilient, proportionate and fair regulatory system resulting in high quality higher education provision underpinned by equality of access for learners.
298. The approach to sustainable development also highlights the importance of involving the people and communities most affected by our proposals in their development. Through the engagement process discussed in chapter 4 learners and their representatives have had the opportunity to contribute to the Bill. This included consultation with the National Union of Students (Wales) as well as directly with learners via channels such as CLIC online, Student Finance Wales and Pupil Voice Wales.

### *Welsh Language*

299. At present, HEFCW, higher education institutions and further education corporations are under a statutory duty to publish Welsh Language Schemes. These schemes are prepared under the Welsh Language Act 1993 that requires public bodies, in providing a service to the public in Wales, to do so in a way that treats the English and Welsh languages equally. This includes education, academic provision and administrative arrangements and applies to students, staff and all those who use their services. The Bill will not detrimentally impact upon these existing statutory requirements, nor seek to change them.
300. The Welsh Language Measure 2011 replaced the Welsh Language Act 1993 over the next few years as the main piece of legislation dealing with the Welsh language. It is anticipated that the Measure will be substantially in force around the same time the Bill is commenced, or shortly after (subject to the respective timescales of each).

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301. The Measure provides that certain organisations and bodies have to comply with 'standards' which, once finalised, replace Welsh Language Schemes (section 25 of the Measure). These new standards will be introduced by the Welsh Language Commissioner. At the same time the Commissioner has recently announced a rolling programme to set new standards on other public, third sector, and private organisations in the future—including those in the higher education sector. Although this section is not currently in force it is likely to be by the time the Bill is commenced.
302. Welsh Language Standards can encompass service delivery, policy making, operational delivery, promotion and record keeping and they will be specified in more detail in regulations made by the Welsh Ministers (section 26). Schedule 6 of the Measure lists the various persons and bodies that are potentially subject to standards; it will be for the Commissioner to determine the exact nature of the applicable standards. Schedule 5 and 6 of the Measure lists various universities including Cardiff, Swansea and Aberystwyth universities, as well as HEFCW and higher education corporations.
303. On this basis it is not currently considered that this Bill will impact on the requirements of the Welsh Language Measure. Even if an institution in Wales chose not to apply for a fee plan, it would still be required to comply with Welsh Language Standards (if it falls within Schedules 5 and 6 and has been notified as such by the Commissioner) once section 25 of the Measure has been commenced.
304. If Welsh Language Standards are not in force by the time the Bill is commenced (or the Bill is commenced shortly before they come into force for HE institutions), the Welsh Government's current Welsh Language Scheme would still be applicable. Section 144(2) of the Measure states that Part 2 of the Welsh Language Act 1993 (dealing with schemes) will cease to apply to a person if and when that person first becomes subject to the duty under section 25(1) of the Measure to comply with a standard. On this basis the current Welsh Language Schemes would continue until standards are imposed by the Commissioner.

### *Other impacts*

305. Note was taken of the guidelines for assessing the impact of policy on a) the environment and b) biodiversity. Review suggests that there is no need to complete a full impact assessment on either of these topics.

## 8. Competition assessment

306. The provisions within the Bill will not affect business, or charities and/or the voluntary sector in ways which raise issues related to competition. The competition filter has not been applied.
307. The effect of the Bill on the relative competitive positions of HEIs in Wales and England was considered. The Bill makes no change to fee levels or student support and thus there should be no direct effect on (price) competition between the English and Welsh HE sectors. There is a quantifiable effect on individual institutional costs. Most institutions have no way to pass this cost on via increased fees as they are already charging the maximum allowable amount. Arguably, there is a small reduction in surplus/profit which reduces funds available for investment which might affect the competitive position into the longer term. However, the costs of the Bill to the sector are not significant (circa £0.5m p.a.) when compared to total revenues (circa £1.27bn in 2012/13<sup>27</sup>). The Bill should not affect any non price competition as the regulatory controls provide for similar outcomes in Wales as in England – for example, on quality.

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<sup>27</sup> Finance of HEIs by category and year, Stats Wales, retrieved 27 March 2014.

## 9. Post implementation review

308. The Bill is principally concerned with reforming the functions of HEFCW to enable it to continue to implement regulatory control. Review and evaluation will therefore focus on two items:

- how effective the new arrangements are proving in ensuring proper regulation; and
- whether the outcomes sought—tuition fee control, quality assurance, improved access and so on—are being achieved.

### *Implementation review*

#### *Ongoing review and monitoring*

309. The Higher Education Division of the Department for Education and Skills is planning for the implementation of the Bill using standard management techniques and documentation. Monthly progress reports will be compiled as part of normal business.

310. These will be informed by existing oversight arrangements. Welsh Government officials meet regularly with HEFCW's executive and with representatives of the higher education sector. Frequent *ad hoc* communication and engagement with HEFCW is also normal, providing additional opportunity for dialogue.

#### *Formal review points*

311. Formal review points at (approximately) one, two and three years after implementation are planned. These will allow officials to reflect on the effectiveness of the regulatory framework and progress against outcomes. These reviews will be timed to follow shortly after HEFCW has submitted its annual report(s), which will be a key input to the review process.

312. HEFCW will be placed under a duty to report annually on:

- the discharge of its quality assessment duty, including any action to taken to deal with issues of inadequate quality; and
- the discharge of its financial assurance functions including details of the exercise of its intervention powers.

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313. These reports, and associated discussion with HEFCW, will enable a judgement to be made as to the effectiveness of implementation of the Bill.
314. Additional data or studies may be sought to inform these reviews if monthly reporting has highlighted any issues which require further investigation. As examples, quantitative analysis is available on a range of relevant demographic and financial variables from Student Finance Wales, or, using the powers in the Bill, qualitative analysis of the effectiveness of fee plans or financial arrangements can be required from HEFCW.
315. Input may also be sought from the higher education sector (for example, via Higher Education Wales) to further inform these reviews.
316. The Minister for Education and Skills meets regularly with HEFCW's Council and the findings of these reviews may be used to inform discussion with the Council, if appropriate.
317. This provides the framework within which implementation of the Bill will be monitored over the first three years of its implementation. Full implementation of the Bill will take place over time as subordinate legislation is made, guidance is issued to institutions, and they respond, and so on. Allowing for three formal review points will allow the new regulatory framework to settle and evaluation to be comprehensive, while also providing ample early warning of any issues.
318. HEFCW's annual reports will be a permanent feature of the regulatory framework and thus will not cease after three years—review of implementation can continue. The approach outlined here is to ensure a particularly systematic and focused approach to review during the early years of implementation.

### ***Outcomes review***

319. The outcomes promoted by the regulatory framework—tuition fee controls, widening access, quality assurance, and financial assurance—will be reviewed using the same methodology and inputs as the review of implementation, with some one specific addition. The assessment of tuition fee controls and widening access outcomes may be informed by information produced as part of HEFCW's ongoing role in monitoring institutions' compliance with their fee plans.

## COSTING THE OPTIONS

### *The costing model*

320. A model to cost the options was developed with three inputs:
- a list of 80+ key tasks required to implement and deliver the regulatory framework specified by the Bill;
  - a breakdown against each task of the estimated number of staff input (days) required to complete the task; and
  - wage rates, including overheads and on costs.
321. In addition, a small number of 'off model' costs were estimated and included in the analysis.
322. Costs have been profiled over a five year period in order to provide a view of costs in the near future.
323. It should be borne in mind that while every effort has been made to provide an estimate of costs based upon a robust and transparent methodology they are necessarily a forecast of the future. To reflect this, all of the costs presented in the RIA have been rounded to the nearest £1,000 to reduce the risk of spurious accuracy in the analysis.

### *Tasks*

324. The list of tasks was compiled by reference to the provisions of the Bill and provides the basis for providing an estimate of the total costs of the Bill. All identifiable tasks were included in the analysis.
325. The list of tasks includes two broad categories: a) *existing* tasks that are already undertaken and will continue to form part of the regulatory framework (for example, fee planning) and b) *additional* tasks that are new and have been introduced by the Bill (for example, guidance from the Welsh Ministers to HEFCW on fee plan approval). These are further broken down into *regular* tasks—those that will form a normal part of business—and those that will only occur by *exception*—the sanctions introduced by the Bill.



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326. These tasks are referred to, for convenience, as the ‘key regulatory tasks’. While there can be confidence in this list accurately representing the provisions of the Bill and therefore the work that will be required by Welsh Government, HEFCW and regulated institutions to implement and operate the regulatory framework, and, exceptionally, impose and comply with sanctions, the model was not designed to capture the full costs of the regulation of higher education institutions in Wales.
327. Thus, while the Regulatory Impact Assessment refers to ‘the regulatory framework’ this is understood, for the purpose of costing, to refer to all those tasks (‘key regulatory tasks’) that are required to implement and deliver on an ongoing basis the provisions of the Bill.

### *Staffing*

328. Set against each task is the number of days required to complete it. This has been broken down to allow for three grades of staff input—junior, middle and senior—and specialist staff input (e.g. legal advice).
329. Tasks have been assigned to the Welsh Government, HEFCW or regulated institutions as appropriate, allowing quantification of where the costs will fall. Welsh Government officials estimated the workload of its tasks and HEFCW performed a similar analysis on the tasks falling to it.
330. A slightly different approach was taken with regulated institutions which is explained in the *Costs* section below.

### *Wage rates*

331. Wage rates—which include overheads and staff on costs—have been specified separately in the model for Welsh Government, HEFCW and regulated institutions. These have been further broken down by the staff grades used to estimate the workloads. Standardised rates have been used for Welsh Government. HEFCW provided their rates. Again, a slightly different approach was taken with regulated institutions, explained below.

### *Costs*

332. Costs, then, for any given task are estimated by multiplying the appropriate wage rate by the number of days required to complete the task for each grade. The total cost of the task is the sum of the costs for each staff grade.

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### *Regulated institutions*

333. A different approach was taken to estimating the cost of tasks that will fall to regulated institutions. Welsh Government officials estimated the costs using a two part method. Staff inputs were estimated by reference to administratively similar tasks falling to Welsh Government or HEFCW that had already been estimated, and then 'sense checked' by officials experienced in the operation of the current regulatory framework.
334. Wage rates were estimated using the rates supplied by HEFCW and increasing these by 10% to account for potentially slightly higher salaries and the higher overheads of institutions. HEFCW's rates are on average 35% higher, and institutions' rates 48% higher, than Welsh Government rates. Officials judge that these relative costs are of the right order of magnitude and provide a sound basis for costing.
335. The resulting costs (rates multiplied by task days) were also sense checked by officials experienced and involved in both the funding and regulation of higher education.

### **Option costs**

#### *Bill costs—option three*

336. The model allows the key regulatory tasks that will arise as a result of the Bill—option three—to be costed.

#### *Option two*

337. Option two has been costed in part using the model. Option two is the same as option three (reform the functions of HEFCW to enable effective regulation) but has a number of additional policy proposals:
- support partnership and collaborative activities by directly funding higher education in some circumstances;
  - place quality enhancement (as opposed to assessment) of higher education provision on a statutory footing;
  - strengthen the participation of learners in making the decisions that affect them; and
  - extend dispute resolution procedures to a wider range of providers.
338. These additional policy proposals were intentionally not narrowly defined in the Further and Higher Education (Wales) Bill White Paper (in order to ensure a wide ranging dialogue on possible policy solutions) and are not

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as well specified. Estimates of these costs have been informed by making assumptions as to the likely content of policy had these proposals been pursued and considering and comparing similar tasks from the detailed costing model. Further, the proposal to extend dispute resolution procedures was not costed (see para. 222 and 233). The costs of reforming the regulatory functions of HEFCW are identical in options two and three.

### *Option one*

339. Option one has been costed using the model. A number of key regulatory tasks will continue under the Bill. By estimating the increase in compliance costs (a rate of 25% has been assumed) it is possible to estimate the costs of the unaffected tasks by adjusting the costs of those tasks in the model.

### ***Sanctions***

340. Sanctions have been modelled based on a limited number of scenarios. The costs incurred by the implementation of sanctions are exceptional—it is difficult to predict which sanctions may be required, when, and in how many cases.

### ***Recurring and implementation costs***

341. Recurring and implementation costs have been separated from the costs associated with implementing the various sanctions proposed by the Bill. Implementation costs are the total cost of all new tasks required to establish operation. In a number of cases, these costs will then become recurring (albeit not always annually) costs, most notably the costs associated with guidance which is required to establish operation but then become a recurrent feature of the new framework in later years.

### ***Incidence of costs***

342. The incidence of costs—upon which organisation/institution the costs fall—is readily calculated as tasks have been allocated accordingly.

### ***Total and additional costs***

343. The modelling of costs provides a basis for comparing the difference in costs between the three options. The model provides for an analysis of the total costs of the three options as well as the additional costs, compared to option one, of options two and three.

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344. Additional costs are two-fold: a) the cost of any entirely new tasks and b) the additional cost due to increased compliance or complexity of tasks which will continue in the new regulatory framework.
345. New tasks are readily identified. The additional cost of continuing tasks has been modelled by assuming an increase in those costs of 25%. This value has been sense checked by officials experienced and involved in the funding and regulation of higher education. This figure is varied in the sensitivity analysis.

### ***Off model costs—implementation***

346. The model provides for an assessment of the costs of implementing the Bill. The results of this modelling are not, however, thought to reflect all the costs of implementation. Three additional costs have been identified as not being fully captured by the model:
- organisational development and design costs associated with the increased emphasis on HEFCW's regulatory role (and concomitant decline in funding role);
  - staff development costs associated with the preceding; and
  - support costs falling to the Welsh Government.

347. These costs have been estimated by officials and are incorporated as an additional cost into the cost of option three.

### ***Discounting and inflation***

348. Costs have not been discounted. As benefits are not priced, there is no net present value calculation to perform and discounting costs would simply reduce the size of the figures in the tables without adding any particular insight.
349. Similarly, no allowance has been made for inflation (except in the sensitivity analysis). While some inflation is likely, the outlook for both cost (and wage) inflation is for only modest growth.

### ***Sensitivity analysis***

350. Sensitivity analysis has been performed by varying wage rates (including overhead/on costs) and the number of person days needed to complete each of the tasks.

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### *Wage rate sensitivity*

351. Current wage rates are known with certainty; future rates are not. Applying an increase in wage rates allows quantification of the sensitivity of the model to this variable to be tested. The Bank of England's February 2014 Inflation Report suggests 'the outlook is for only modest rises in wages'<sup>28</sup> The analysis contained in chapter 7 shows the result of a compounded 2% annual increase in wage rates (and associated overheads and on costs) on the additional costs of option three.

### *Task sensitivity*

352. A sensitivity analysis has been carried out on the costs of option three by scaling the days required to complete each task by  $\pm 10\%$ ,  $\pm 25\%$  and  $\pm 50\%$ . The results are incorporated into the analysis of chapter 7.

### **Tasks**

353. The headline tasks that were analysed using the above methodology are reproduced below. A number of these headline tasks have associated sub tasks (not included here). The headings in the table correspond to the headings used in the presentation of costs in chapter 7.

<b>Fee plan approval and automatic designation</b>
REGULAR
Welsh Ministers to issue guidance to HEFCW on designation and fee plan approval
HEFCW to provide applicants with information concerning the designation process and requirements
HEFCW to provide applicants with information concerning regulatory requirements
Institutions to compile fee plans
HEFCW to receive and assess fee plans
SANCTIONS/COMPLIANCE
Institutions to be able to apply for a variation of the fee plan

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<sup>28</sup> Inflation Report, p.33, Bank of England, February 2014.

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HEFCW to withdraw approval of a fee plan if an institution ceases to have charitable status
<b>Fee plan monitoring and evaluation</b>
REGULAR
Welsh Ministers to issue guidance to HEFCW on monitoring and evaluation
Institutions' Governing Bodies must monitor compliance with the plan and progress in achieving objectives
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
HEFCW to monitor fee plans and to determine the most effective monitoring arrangements for fee plans
<b>SANCTIONS/COMPLIANCE</b>
Welsh Ministers may request that HEFCW undertakes reviews of fee plans as and when considered to be necessary
HEFCW to be able to instruct an institution to comply with the general provisions of its approved plan which may involve expenditure of fee income on activities relating to promotion of equality of opportunity/promotion of HE
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
HEFCW to withdraw approval of a fee plan if an institution persistently fails to comply with the requirements of its fee plan
<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
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.
HEFCW to make public an assessment of any institution which the Council considers not to have made sufficient progress against its fee plan
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
HEFCW to withdraw approval of a fee plan if an institution persistently fails to comply with fee limits
<b>Quality assurance</b>
REGULAR

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HEFCW to assess or make provision for the assessment of quality
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.
HEFCW should prepare, consult on and publish a statement as to how it will exercise the new functions
HEFCW to issue guidance to regulated institutions concerning quality assessment.
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
HEFCW to submit an annual report to the Welsh Ministers on the discharge of its quality assessment functions
Institutions under an obligation to engage with the quality assessment arrangements
<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
HEFCW may direct regulated institutions to take or refrain from taking certain steps to rectify any weakness in quality
HEFCW to be able to direct an institution to develop and implement action plans to address failures/weaknesses in quality
HEFCW may take additional action where it is considered that an institution is failing to meet quality requirements
HEFCW should be able to withdraw its approval of the regulated institution's fee plan
<b>Financial assurance</b>
<b>REGULAR</b>
Welsh Ministers to be able to issue guidance in connection with the preparation of the Financial Code
HEFCW to prepare and publish a Financial Code
HEFCW to be able to commission efficiency studies related to the Code
HEFCW to monitor the financial arrangements in place at regulated institutions
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
Institutions under a duty to engage with the assurance arrangements put in place by HEFCW and provide assistance, access and information
HEFCW should be required to provide an annual report to the Welsh Ministers detailing how the Council has discharged its financial assurance functions

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SANCTIONS/COMPLIANCE
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
HEFCW to be able to support an institution
HEFCW to be able to withdraw approval of an approved fee plan if the failure to comply with the Code is sufficiently serious
<b>Definition of institution</b>
Welsh Ministers to amend Recognised and Listed Bodies Orders regularly
<b>Fee plan refusal/withdrawal</b>
HEFCW to withdraw approval of a fee plan
HEFCW to be able to refuse to approve a fee plan upon renewal
Upon refusal of a fee plan, transitional measures will be required to enable students to remain eligible for support
<b>Compliance processes</b>
<b>Compliance Process I</b>
HEFCW required to issue a warning notice
Institutions subject to such warning notices to be able to make representations against the direction
HEFCW will be required to have regard to any representations received from the regulated institution
HEFCW will be able to issue a notice of direction
Institutions subject to the decision should be able to seek a review by an independent person or panel
HEFCW will be required to reconsider its decision having regard to any recommendation
Institutions to be under a duty to comply with the direction
HEFCW to revoke the direction when the direction is discharged
<b>Compliance Process II</b>
HEFCW to be able enforce compliance with such a direction by way of a Court injunction



# **HIGHER EDUCATION (WALES) BILL**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes relate to the Higher Education (Wales) Bill introduced into the National Assembly for Wales on 19 May 2014.
2. They have been prepared by the Department for Education and Skills of the Welsh Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the National Assembly for Wales.
3. The Explanatory Notes should be read in conjunction with the Bill. They are not meant to be a comprehensive description of the Bill. Where an individual section of the Bill does not seem to require any explanation or comment, none is given.

### **BACKGROUND**

4. In 2011, the Welsh Ministers brought provisions in Part 3 of the Higher Education Act 2004 into force in relation to Wales. That Part enables the Welsh Ministers, when making grants to the Higher Education Funding Council for Wales (HEFCW), to impose a condition that, in providing financial support to an institution in Wales, HEFCW in turn is to impose a condition concerning the fees charged by the institution. These fee arrangements apply in relation to courses beginning on or after 1 September 2012.
5. For an institution without an approved plan (namely a plan approved by HEFCW), the condition imposed by HEFCW is that the fees charged are not to exceed a basic amount which is specified in regulations. For an institution with an approved plan, the condition is that the fees charged are not to exceed the amounts specified in the plan and that the institution is to comply with the general provisions of its approved plan concerning the promotion of equality of opportunity in connection with access to

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higher education and the promotion of higher education. The fees set out in the plan are not to exceed the higher amount which is specified in regulations.

6. In conjunction with those new fee arrangements, changes were introduced by the Welsh Ministers to the tuition fee support available from the Welsh Ministers to students undertaking courses of higher education. Funding that was previously provided to HEFCW by the Welsh Ministers and allocated by HEFCW to institutions in Wales under Part 2 of the Further and Higher Education Act 1992 and Part 3 of the Education Act 2005 has been redirected towards support available from the Welsh Ministers to students.
7. The redirection of funding means that the amount of financial support provided by HEFCW to institutions in Wales has reduced. As a consequence the current regulatory framework, which comprises the fee arrangements established by the Higher Education Act 2004, HEFCW's functions of assessing the quality of education provided by institutions (under Part 2 of the Further and Higher Education Act 1992) and the annual financial memorandum between HEFCW and institutions in Wales, no longer operates in the way that it used to. Specifically, as HEFCW is providing a reduced amount of financial support to institutions in Wales, there is less financial support in respect of which HEFCW can impose conditions for the purposes of the current fee arrangements and quality assessment regime and the annual financial memorandum.
8. The Bill will establish a new regulatory framework for higher education institutions and other providers of higher education in Wales that have a fee and access plan in force, approved by HEFCW (regulated institutions). The new regulatory framework will not rely on HEFCW providing financial support to those institutions and providers under Part 2 of the Further and Higher Education Act 1992 or Part 3 of the Education Act 2005.
9. Regulated institutions will be able to set their own fees, up to a maximum amount specified in regulations. The Bill will provide for HEFCW to enforce compliance with those fees. The Bill will also provide for HEFCW to assess the quality of education provided in Wales by and on behalf of regulated institutions. The Bill will provide for a financial management Code to apply to those institutions. It is intended that courses of higher education offered by regulated institutions will be designated for the purposes of tuition fee and maintenance support available to eligible students from the Welsh Ministers (specifically, designated by student support regulations made by the Welsh Ministers under section 22 of the Teaching and Higher Education Act 1998).

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10. A White Paper setting out the Welsh Government's initial policy proposals was published on 2 July 2012 and a summary of the responses received to the White Paper was published in March 2013. A subsequent technical consultation was published in May 2013. A summary of the responses received to the technical consultation was published April 2014.

## SUMMARY OF THE BILL

11. The Bill has eight Parts comprising 57 sections and one Schedule.
  - It will allow an institution in Wales which provides higher education and which is a charity to apply to HEFCW for approval of a fee and access plan. The Bill deals with the contents of a fee and access plan including a fee limit for courses which are to be prescribed in regulations.
  - It will require HEFCW to monitor institutions' compliance with their fee and access plans and to monitor the effectiveness of plans. The Bill will also confer functions upon HEFCW which they may exercise where they are satisfied that a regulated institution has failed to comply with a fee limit in its fee and access plan.
  - It will confer functions upon HEFCW relating to the assessment of the quality of education provided in Wales by or on behalf of a regulated institution and in relation to the steps that HEFCW may take if they are satisfied that the quality of education is inadequate or likely to become inadequate.
  - It will require HEFCW to prepare and publish a financial management Code which will apply to regulated institutions. The Bill will require HEFCW to monitor, or make arrangements for the monitoring of, institutions' compliance with the requirements of the Code. The Bill will also confer functions upon HEFCW which they may exercise where they are satisfied that a regulated institution has failed, or is likely to fail, to comply with a requirement of the Code.
  - It will make provision for the circumstances in which HEFCW may refuse to approve a new fee and access plan for an institution and the circumstances in which HEFCW must, or may, withdraw their approval of a fee and access plan.
  - It will make provision for the procedures to be followed by HEFCW in relation to the steps that they may take in respect of regulated institutions, including the giving of warning notices and the ability of institutions to apply for reviews.
  - It will confer functions on HEFCW in relation to the provision of reports to the Welsh Ministers and the provision of information and advice by HEFCW.

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- It will make consequential amendments to other Acts, including the Further and Higher Education Act 1992 and the Higher Education Act 2004.

## COMMENTARY ON SECTIONS OF THE BILL

### Part 1 - Introduction

#### **Section 1- Overview of the Bill**

12. This section describes the content of the Bill.

### Part 2 - Fee and Access Plans

#### **Section 2 - Application by institution for HEFCW's approval of fee and access plan**

13. 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. The institution needs to be an institution in Wales that provides higher education and is a charity.
14. An institution will be "in Wales" if its activities are either principally or wholly carried on in Wales. For this purpose, the Open University will be an institution "in Wales" (see section 54(3)).
15. Section 2(4) enables the Welsh Ministers to make regulations about the making of applications under this section. Such regulations could require an institution to provide certain types of supporting information.

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

16. This section enables the Welsh Ministers to designate a charitable provider of higher education in Wales, which would not otherwise be regarded as an institution, as an institution for the purposes of the Bill and any regulations made under it. A designation will be made on an application by the provider concerned. This power might be exercised to designate a provider which is not able to award degrees but which provides other courses of higher education at a lower level on the credit and qualifications framework. Such a provider might not regard itself as an "institution" for the purposes of section 2 but may nevertheless wish for those courses to be 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 under that section.

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17. Under section 3(4), the Welsh Ministers are able to make regulations about the making of applications by such providers, the withdrawal of a designation and the effect of such a withdrawal. The regulations might, for instance, make provision about the type of information that is to support an application for designation. Regulations might also provide that, where a provider's designation has been withdrawn, the provider is to continue to be treated as an institution for a limited period and in relation to certain elements of the new regulatory framework.

### **Section 4 - Period to which plan relates**

18. This section enables regulations to set the maximum period to which a fee and access plan may relate. Plans must specify the period in respect of which they are to have effect. Currently, regulations made under the Higher Education Act 2004 provide that the maximum period of time during which a plan may be in force is two years. It is intended that the maximum period to which a fee and access plan relates will be longer than two years. Limiting the period to which a plan relates means that institutions will need to develop new plans over time if they wish for their courses to continue to be designated by student support regulations. In developing new plans, governing bodies will have to take account of any good practice information and advice given by HEFCW under section 51.

### **Section 5 - Fee limit**

19. This section requires a fee and access plan to specify, or provide for the determination of, a fee limit in relation to each "qualifying course" and in respect of each academic year of the course which begins during the period to which the plan relates.
20. A "qualifying course" is a course that is wholly or principally provided in Wales and which is described in regulations. Section 5(2)(b) enables the Welsh Ministers to make such regulations and section 5(7) restricts the Welsh Ministers' ability to discriminate between certain classes of course in prescribing descriptions of "qualifying course". For these purposes, it is intended that the courses to be prescribed as "qualifying courses" will be those courses of higher education that are currently designated for the purposes of student support by regulations made under section 22 of the Teaching and Higher Education Act 1998 (including first degree courses and courses for the Diploma of Higher Education, the Higher National Diploma, the Higher National Certificate and the Certificate of Higher Education). The only postgraduate courses that are to be capable of being qualifying courses are courses of initial teacher training (section 5(6)).
21. In providing for the determination of a fee limit, rather than specifying a fee limit, a fee and access plan might, for instance, specify that an

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inflationary increase is to apply to course fees from one academic year to the next. Alternatively, a plan might provide for a fee limit by reference to the maximum fee amount which is prescribed in regulations.

22. "Fees" for these purposes are course fees, including admission, registration and tuition fees (see section 54(1)). The fees that are to be taken into account for the purposes of the fee limit are fees that are payable to the institution by a "qualifying person", namely a person (excluding international students) who is described in regulations. Section 5(5) enables the Welsh Ministers to prescribe classes of person for these purposes. It is intended that "qualifying persons" will include persons in the following categories who are ordinarily resident in the United Kingdom: persons who are settled in the United Kingdom, refugees and their family members and European Union nationals.
23. A fee limit in a plan must in any event not exceed the maximum amount which is to be prescribed in regulations.
24. Section 5(9) enables regulations to provide for the circumstances in which fees payable to a person other than a regulated institution (such as fees payable to a franchisee providing a course on behalf of a regulated institution under franchise arrangements) by a qualifying person are to be treated for the purposes of the fee limit as payable to the regulated institution.

### **Section 6 - Promotion of equality of opportunity and higher education**

25. This section requires a fee and access plan to include any provisions relating to the promotion of equality of opportunity in connection with access to higher education or the promotion of higher education which are prescribed by regulations.
26. Regulations may, for instance, require the governing body of an institution to commit, by way of its fee and access plan, to take measures to attract applications from prospective students who, as at the date of the plan's approval are members of groups that are under-represented in higher education. This might in practice involve outreach measures such as the provision of summer schools or engagement with schools or colleges, with the intention of widening participation by attracting students who might otherwise not consider entering higher education at all or not consider applying to particular institutions.
27. Regulations may also require governing bodies of institutions to commit, through their fee and access plans, to take measures to retain students who

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are members of under-represented groups. These measures might include both academic and pastoral support such as study skills support or coaching and mentoring programmes which are tailored to meet the specific needs of under-represented groups in higher education.

### **Section 7 – Approval of fee and access plan**

28. Where the governing body of an institution applies to HEFCW under section 2 for approval of a fee and access plan, it is for HEFCW to either approve the plan or reject the plan. HEFCW cannot approve a plan unless they are satisfied that the applicant institution is an institution in Wales that provides higher education and is a charity. HEFCW will either approve or reject a plan by giving notice to the governing body of the institution concerned. Sections 40 to 43 of the Bill provide for the procedure that is to apply in respect of notice rejecting a plan.
29. Section 7(3) enables regulations to provide for matters which are to be taken into account by HEFCW when determining whether to approve or reject a plan under this section. Regulations might, for instance, make provision for HEFCW to take into account the quality of education provided by the applicant institution and the organisation and management of its financial affairs.
30. Section 7(4) defines the period in which an approved fee and access plan is in force. This concept of a plan being “in force” is relevant to the references in the Bill to a “regulated institution”, in that a “regulated institution” is an institution that has a plan which is currently in force. This means, for instance, that the duty under section 16 (duty to co-operate in relation to HEFCW’s monitoring and evaluation functions) applies only for so long as a plan is actually in force.

### **Section 8 – Publication of approved plan**

31. This section enables regulations to require the governing body of a regulated institution to publish its approved plan. It is intended that regulations will require governing bodies to publish the approved plan in a manner which makes it conveniently accessible to students enrolled at the institution and to prospective students.

### **Section 9 – Variation of approved plan**

32. Regulations may allow for a plan which has been approved by HEFCW under section 7 to be varied. The governing body of an institution may, for instance, wish to include additional provisions in its plan relating to the promotion of equality of opportunity. Any regulations made under this section must however provide for a variation to take effect only if

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approved by HEFCW. Regulations might, for instance, set out how applications for variations are to be made and might provide that a warning notice procedure is to apply to a decision about the variation of a plan.

### **Section 10 – Limits on student fees**

33. This section requires the governing body of an institution, in relation to which a fee and access plan has been approved, to ensure that “regulated course fees” do not exceed the “applicable fee limit”, whether or not the fee plan is still in force.
34. “Regulated course fees” are defined in section 10(3). They are fees payable to the institution by a qualifying person in connection with that person undertaking a qualifying course in respect of an academic year of that course which begins during the period to which the institution’s most recently approved fee plan relates (namely the period specified under section 4). The “applicable fee limit” is the fee limit for the course and year in question which is set out in the institution’s most recently approved fee and access plan.
35. An institution which has a plan in force will be required to ensure that fees for academic years which start within the period to which the plan relates comply with the applicable fee limit. Where an institution’s plan has expired (where the period to which the plan related has ended), or where HEFCW has withdrawn its approval for a plan under either section 37 (HEFCW’s duty to withdraw approval) or section 38 (HEFCW’s power to withdraw approval), the governing body of the institution will be required to ensure that fees for academic years starting within the period to which the fee plan related continue to comply with the applicable fee limit. This means that if, for instance, HEFCW withdraw their approval of an institution’s plan, qualifying students at the institution will not lose the fee protection that would have been afforded by the fee limit during the period to which the withdrawn plan related.

### **Section 11 – Compliance and reimbursement directions**

36. This section enables HEFCW to give a direction to the governing body of an institution where they are satisfied that the governing body has failed to ensure that regulated course fees do not exceed the applicable fee limit under section 10(1). HEFCW may direct the governing body to comply with section 10(1) and/or reimburse fees that have been paid to the institution to the extent that they exceed the applicable fee limit. So for instance if fees above the fee limit have been charged but not yet paid, a direction to comply could be given; whereas if fees have actually been



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paid in excess of the limit, the governing body could be required both to reimburse the excess and to comply with the limit in future.

37. A direction given under section 11 may specify the steps that are (or are not) to be taken by the governing body for the purpose of ensuring that regulated course fees do not exceed the applicable fee limit. A direction may also specify the manner in which excess fees are to be reimbursed (or may be reimbursed).. For instance, excess fees might be reimbursed through a reduction of fees payable by a qualifying student in respect of a future academic year of that student's course. Section 11(4) requires HEFCW, in giving a direction under this section, to give a copy of the direction to the Welsh Ministers and to publish it. Section 11(5) enables the Welsh Ministers to make regulations about how and when HEFCW is to publish a direction given under this section. Regulations might, for instance, require HEFCW to publish the direction on their website.

### **Section 12 - Supplementary provision about compliance and reimbursement directions**

38. This section allows HEFCW to issue guidance about the steps to be taken by the governing body of an institution in complying with a direction given under section 11. Guidance might provide for the circumstances in which excess fees are to be reimbursed directly to a student and the circumstances in which excess fees are to be reimbursed through the student loans company. Section 12(3) requires a governing body, in complying with such a direction, to take into account any guidance issued by HEFCW under this section. Before issuing guidance, HEFCW must consult the governing body of each regulated institution and may consult the governing bodies of other institutions in Wales that provide higher education and are charities as HEFCW think appropriate.

### **Section 13 - Power to make provision about failure to comply with general provisions of plan**

39. This section enables the Welsh Ministers to make regulations concerning the steps to be taken by HEFCW if they are satisfied that the governing body of a regulated institution has failed to comply with the general provisions of its approved plan. (As to the general provisions of a plan, see section 6(7).)
40. Regulations under section 13 may make provision about what constitutes a failure to comply with the general provisions of an approved plan. Regulations might, for instance, provide that a failure by the governing body of a regulated institution to carry out measures in its plan in connection with prospective students and students who are members of under-represented groups is a "failure to comply with the general

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provisions of a plan". Equally, regulations may provide that a failure to achieve an objective set out in a plan is not a "failure to comply with the general provisions of a plan".

41. Regulations under this section may enable HEFCW to direct the governing body of a regulated institution to take steps to ensure compliance with the general provisions of its plan (including by way of expenditure). Regulations might, for instance, enable HEFCW to direct a governing body to incur expenditure that the governing body has committed to in its plan. Regulations may also make provision as to the procedure applicable in connection with giving such a direction. For instance, regulations might require HEFCW to give a warning notice to the governing body before it gives a direction and might also enable the governing body to apply for a review of the direction. Regulations may also make provision about the failure by a governing body to comply with a direction. For instance, regulations might provide that HEFCW is able to withdraw its approval of a plan where they are satisfied that the governing body of a regulated institution has failed to comply with the direction.

### **Section 14 – Validity of contracts**

42. The legal relationship between an institution and its students is principally a contractual relationship (albeit that the relationship is not solely defined by contract law). This section applies where a contract between an institution and a qualifying person in respect of that person undertaking a qualifying course provides for the payment of fees by the person which exceed the applicable fee limit. (As to the applicable fee limit, see section 10(5).)
43. Section 14(2) provides that such a contract is to be treated as providing for the payment of fees which are equivalent to the applicable fee limit. So where a student refuses to pay any excess fees specified in a contract, the institution will not be able to recover the excess fees. But the contract will remain otherwise enforceable, in terms of the institution's duty to provide education to the student, despite the contract providing for the payment of fees which exceed the applicable fee limit (section 14(3)).

### **Section 15 – HEFCW's duty to monitor and evaluate compliance and effectiveness**

44. This section requires HEFCW to monitor regulated institutions' compliance with section 10(1) (the requirement to ensure that regulated course fees do not exceed the applicable fee limit). HEFCW is also required to monitor regulated institutions' compliance with the general provisions of their plans. (See section 6(7) for the meaning of "general provisions".)

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HEFCW's duty to monitor institutions' compliance feeds through to their functions under sections 11, 35 and 37.

45. This section also requires HEFCW to evaluate the effectiveness of each plan and plans generally in promoting equality of opportunity in connection with access to higher education and promoting higher education. These functions feed through to HEFCW's function of giving good practice information and advice under section 51.

### **Section 16 - Monitoring and evaluating compliance and effectiveness: duty to co-operate**

46. This section requires governing bodies of regulated institutions to co-operate with HEFCW for the purposes of HEFCW's monitoring and evaluation functions under section 15.
47. The duty to co-operate requires governing bodies to ensure the provision of information, assistance and access to facilities as may be required by HEFCW for the purposes of those functions. By way of comparison, plans under the existing provisions of the Higher Education Act 2004 must require the governing body of an institution to provide HEFCW with such information as HEFCW may reasonably require.
48. HEFCW may give a direction to a governing body if HEFCW is satisfied that the governing body has failed to comply with its duty to co-operate. The direction may require a governing body to take, or not to take, steps to secure the provision of information, assistance or access to facilities. The warning notice and review procedures set out in Part 6 of this Bill will not apply to such a direction.

## **Part 3 - Quality of Education**

### **Section 17 - Assessment of quality of education**

49. This section requires HEFCW to assess or make arrangements to assess the quality of education in Wales provided by and on behalf of regulated institutions. (For this purpose, education in Wales includes education provided outside Wales, if the education forms part of a course that is provided principally in Wales.)
50. Currently HEFCW may arrange for other bodies to undertake assessments of institutions it funds on matters relating to the quality of education. This includes arrangements that HEFCW makes with the Quality Assurance Agency for Higher Education (QAA) and Estyn (in respect of teacher training). This section will permit HEFCW to make similar arrangements

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with the QAA, Estyn or other bodies to assess the quality of education provided by and on behalf of regulated institutions.

51. This section also defines “external provider” for the purpose of the Bill. It also enables the Welsh Ministers to prescribe by way of regulations the circumstances in which a person is or is not to be treated as being responsible for providing a course of education on behalf of a regulated institution. It also provides that a course is not to be classified as being provided on behalf of a regulated institution if the arrangements under which it is provided were made before the section comes into force.
52. An “external provider” is likely to be another institution or provider which delivers all or part of a course on behalf of a regulated institution under franchise arrangements.
53. It is likely that Regulations will provide that individual lecturers or tutors will not be treated as being responsible for providing a course of education on behalf of a regulated institution.
54. Guidance issued or approved by HEFCW under section 24 may include criteria to be applied by a person assessing the quality of education.

### **Sections 18 to 20 – Education of inadequate quality**

55. Section 18 sets out the meaning of inadequate quality.
56. HEFCW may issue or approve guidance about factors that they may take in to account when determining whether quality of education is inadequate (see section 24).
57. Section 19 provides for HEFCW to give directions to the governing body in the case of inadequate quality.
58. A direction may require a governing body to take steps (or not take steps) to improve the quality of education or of a course, or to prevent the quality of education or a course from becoming inadequate. For example, a direction might include a requirement to:
  - improve aspects of an institution’s quality assurance procedures, or
  - address deficiencies in the academic standards of degrees.

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59. A direction might also require improvements to the quality of education provided on behalf of a regulated institution by partner institutions under franchise agreements.
60. The warning notice and review procedures in sections 40 to 43 will apply to directions under section 19.
61. Section 20 permits HEFCW, in the case of inadequate quality, to give advice or assistance to the governing body of a regulated institution or to carry out or arrange a review of an institution. This will permit HEFCW to provide support to regulated institutions in a similar way to the support they provide to institutions that they currently fund.
62. Advice and assistance given by HEFCW is to be with a view to improve the quality of education or a course of education; or to prevent the quality of the education or course of education from becoming inadequate.
63. It is anticipated that HEFCW might use this power to arrange for a support team to assist an institution to improve the quality of education; for example a team consisting of peer reviewers or management specialists. Alternatively HEFCW might arrange for a targeted review of a particular institution, for example to identify whether there are wider operational issues contributing to inadequate quality.

### **Section 21 - Quality assessment etc: duty to co-operate**

64. This section requires governing bodies of regulated institutions and external providers (see section 17 for the definition of “external provider”) to co-operate with persons exercising functions under section 17 (assessment of quality of education) and section 20 (advice, assistance and reviews in cases of inadequate quality).
65. The duty to co-operate requires governing bodies to ensure the provision of information, assistance and access to facilities required by a person for the purposes of those functions.
66. HEFCW may give a direction to a governing body if HEFCW is satisfied that a governing body has failed to comply with its duty to co-operate. The direction may require a governing body to take, or not take, steps to secure the provision of information, assistance or access to facilities. A direction given under this section is not subject to the warning notice and review procedures set out in sections 40 to 43.

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### **Section 22 - Quality assessment etc: powers of entry and inspection**

67. Section 22 provides for a right of entry and inspection for the purpose of exercising functions under sections 17 (assessment of quality of education) or 20(2) (review of matters relating to the quality of education).
68. A person authorised in writing by HEFCW may enter the premises of a regulated institution or external provider and may inspect, copy or take away documents found on the premises.
69. The power of entry and inspection may only be exercised after giving the governing body reasonable notice except in cases of urgency or where giving notice would defeat the object of exercising the power of entry or inspection. Entry without notice might be appropriate where HEFCW consider that relevant documents are likely to be removed from the institution's premises or destroyed if notice is given.
70. The power of entry and inspection may only be exercised at reasonable times and does not include a power to enter a dwelling (such as student or staff accommodation) without the agreement of the occupier.
71. Before exercising a power under this section a person must produce a copy of their authorisation from HEFCW if required to do so.

### **Section 23 - Guidance about matters relevant to quality**

72. This section permits HEFCW to issue or approve guidance about matters relating to improving or maintaining the quality of education provided by or on behalf of regulated institutions. It is considered that it may not always be necessary for HEFCW to issue guidance but they may wish to rely on guidance issued by bodies with expertise of quality in education. For example this would allow HEFCW to approve guidance issued by the QAA.

### **Section 24 - Guidance about criteria for assessing quality**

73. This section permits HEFCW to issue or approve guidance on certain matters relating to the assessment of quality. As with section 23 it will allow HEFCW to approve guidance issued by other bodies where they think appropriate.
74. The guidance may be about criteria to be applied by a person assessing the quality of education under section 17 and may also set out matters that

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HEFCW will take into account in determining whether the quality of education, or of a course of education, is inadequate.

### **Section 25 - Committee to advise HEFCW about exercise of quality assessment functions**

75. HEFCW in exercising its current functions under the Further and Higher Education Act 1992 is required by section 70(1)(b) of that Act to establish a committee to advise on the exercise of its quality assessment duty.
76. Section 25 requires HEFCW to establish a committee to advise on the exercise of its quality assessment functions under this Bill.
77. Subsection (3) sets out the requirements for membership of that committee and subsection (4) makes provision for what HEFCW must take into account when appointing members to that committee. The requirement for membership of the committee will be similar to that for the Quality Assessment Committee established by HEFCW under section 70(1)(b) of the Further and Higher Education Act 1992. Members of that committee on the date on which this section comes into force will become members of the committee established by HEFCW under this section: see paragraph 31 of the Schedule to the Bill (which contains consequential and transitional provisions).
78. Schedule 1 to the Further and Higher Education Act 1992 (which contains supplementary powers for HEFCW) applies to the committee established by this section as it does to committees established by HEFCW under paragraph 8 of that Schedule. For example it will allow HEFCW to pay travel and other allowances to members of the committee who are not members of HEFCW's council.

### **Section 26 - Application of Part 3 where institution ceases to have approved plan**

79. Section 26 provides for the quality assessment functions in Part 3 of the Bill to continue in certain circumstances following an institution's fee and access plan ceasing to be in force (either at the end of the period to which the plan relates or as a result of HEFCW withdrawing the plan's approval).
80. HEFCW's quality assessment duty will continue for as long as an institution is providing courses for which students are eligible to receive statutory student support provided by the Welsh Ministers. It is proposed that the Welsh Ministers will continue to designate courses for student

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support purposes in respect of those students who began a course before the fee and access plan ceased to be in force.

81. The ongoing duty on HEFCW under this section to quality assess education seeks to offer ongoing protection for students who commenced their courses at a time when an institution had a fee and access plan in place.

### **Part 4 - Financial Affairs of Regulated Institutions**

#### **Section 27- HEFCW's duty to prepare and publish a Code**

82. This section requires HEFCW to prepare, publish and keep under review a Code relating to the organisation and management of the financial affairs of regulated institutions.
83. Subsection (2) gives examples of matters that the Code may deal with. These may be similar to the requirements found in HEFCW's Financial Memorandum with institutions they fund and the Audit Code of Practice that HEFCW currently publishes. They include:
  - circumstances in which HEFCW's consent is required before an institution enters into specified transactions,
  - audit and accounting arrangements, and
  - the provision of information to HEFCW (for example, copies of accounts).
84. The Code may impose requirements with which regulated institutions must comply and give guidance which regulated institutions must take into account in managing their financial affairs.
85. Whilst it will be for HEFCW to prepare the Code it is anticipated that the Code will seek to achieve a similar framework of control in respect of a regulated institution's financial affairs to that currently imposed by terms and conditions of funding on institutions that receive HEFCW funding.

#### **Sections 28 - 29 - Procedure for approval of Code**

86. These sections set out the procedure that HEFCW must follow before they can publish the first Code or a revised Code. HEFCW must consult the governing body of each regulated institution and submit a draft Code for approval by the Welsh Ministers.



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87. It is anticipated that HEFCW will consult on a draft of the first Code during the 2015/2016 academic year with a view to the Code being published and taking effect for the start of the 2016/2017 academic year.
88. Section 29 sets out the procedure if the Welsh Ministers make a decision not to approve a draft submitted to them.

### **Section 30 – Monitoring compliance with the Code**

89. This section requires HEFCW to monitor or make arrangements for the monitoring of compliance with the Code by regulated institutions. HEFCW is able to undertake monitoring itself or secure that monitoring is undertaken on its behalf by another person.
90. HEFCW may wish to arrange for another person to undertake monitoring of a group of regulated institutions where another body is already undertaking similar work, for instance the Welsh Ministers in respect of further education institutions that are also regulated institutions. Alternatively HEFCW might want to arrange for a specialist assessor or external auditor to undertake assurance functions.

### **Sections 31 to 33 – Failure to comply with Code**

91. Sections 31 to 33 provide HEFCW with enforcement powers if they are satisfied that a regulated institution has failed, or is likely to fail, to comply with requirements of the Code.
92. HEFCW may give directions to a governing body requiring it to take or not to take specified steps to:
  - deal with the failure to comply with a requirement of the Code. For example to provide outstanding information required under the Code within a specified period of time or to make changes to financial controls to bring an institution back into compliance with the Code, or
  - prevent a failure to comply with a requirement of the Code. For example if an institution was intending to enter into a transaction that required HEFCW's consent, to direct an institution not to enter into that transaction without obtaining HEFCW's consent.
93. The warning notice and review procedures in sections 40 to 43 will apply to directions under section 32.
94. Section 33 permits HEFCW to give advice or assistance to the governing body of a regulated institution or to carry out or arrange a review of an

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institution where it is satisfied that a regulated institution has failed or is likely to fail to comply with the requirements of the Code. The advice and assistance given by HEFCW is to be with a view to improving the organisation and management of a regulated institution's financial affairs.

95. Currently, if HEFCW identify examples of inadequate financial management they are able to establish support teams to assist an institution in making improvements. It is anticipated that HEFCW would want this approach to continue. HEFCW may seek to use this power to arrange for a support team to assist an institution improve the organisation and management of its financial affairs where HEFCW has identified a failure to comply with the Code. Alternatively HEFCW may arrange for a targeted review of a particular institution by specialist auditors, for instance where HEFCW are satisfied that a failure to comply with the Code is likely.

### **Section 34 - Financial management: duty to co-operate**

96. This requires regulated institutions to co-operate with persons exercising functions under sections 30 (monitoring compliance with the Code), 33 (other measures in respect of failure to comply with the Code) and 35 (powers of entry and inspection).
97. The duty to co-operate requires governing bodies to ensure the provision of information, assistance and access to facilities required by a person for the purposes of those functions.
98. HEFCW may give a direction to a governing body if HEFCW is satisfied that a governing body has failed to comply with its duty to co-operate. The direction may require a governing body to take, or not take, steps to secure the provision of information, assistance or access to facilities. A direction given under this section will not be subject to the warning notice and review procedure set out in sections 40 to 43.

### **Section 35 - Financial management: powers of entry and inspection**

99. This section provides for a right of entry and inspection for the purposes of exercising functions under section 30 (monitoring compliance with the Code) or 33(2) (review of matters relating to compliance with the Code).
100. A person authorised in writing by HEFCW may enter the premises of a regulated institution for those purposes. An authorised person may also inspect, copy or take away documents found on the premises.

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101. The power of entry and inspection may only be exercised after giving the governing body reasonable notice. However, the requirement for reasonable notice is not required in cases of urgency or where giving notice would defeat the object of exercising the power of entry or inspection. Entry without notice might be appropriate where HEFCW consider that relevant documents are likely to be removed from the institution's premises or destroyed if notice is given, or where HEFCW is satisfied that there is a likelihood of imminent financial failure.
102. The power of entry and inspection may only be exercised at reasonable times and does not include a power to enter a dwelling (such as staff or student accommodation) without the agreement of the occupier.
103. Before exercising a power under this section a person must produce a copy of their authorisation from HEFCW if required to do so.

### **Part 5 – Fee and Access Plans: Withdrawal of Approval etc**

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

104. Notice of refusal to approve a new fee and access plan is one of the ways in which HEFCW can take enforcement action against an institution's non compliance with:
  - limits on student fees (under section 10),
  - general provisions of an institution's approved plan,
  - a direction in respect of inadequate quality of education (under section 19), and
  - a direction in respect of failure to comply with the Code (under section 32).
105. Currently HEFCW can refuse to approve a new fee plan under the Higher Education Act 2004 on the basis of non compliance with limits on student fees or general provisions of an institution's approved plan. Whilst educational quality and financial management does not form part of the existing fee planning arrangements, HEFCW regulates an institution in respect of these matters through terms and conditions of funding.
106. Once notice has been given HEFCW must not approve a new fee and access plan until the period specified in the notice has expired. However, HEFCW may withdraw a notice at which point the restriction on approving a new plan ceases. For instance HEFCW may consider withdrawing notice if they are satisfied that an institution has remedied the failing identified in a direction and it is not appropriate to continue with enforcement action.

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107. Subsection (7) permits the Welsh Ministers to make regulations to provide for:
- the period that may be specified in a notice, during which HEFCW will not approve a new fee and access plan. For instance this might provide that HEFCW cannot approve a new fee plan for a period of at least one year. Alternatively the maximum period for not approving a fee plan could be limited to one year,
  - matters that HEFCW must take into account in deciding whether to give or withdraw a notice. This might require HEFCW to consider whether the institution has (after the date for compliance) complied with a direction or adjusted its fees and repaid any student fees that have been overcharged,
  - the procedure to be followed on the withdrawal of a notice. For instance this might require HEFCW to give notice of the withdrawal to the institution and/or, to publish in some form notice of withdrawal.
108. Sections 40 to 43 set out the warning notice and review procedures that apply to giving notice under this section.

### **Section 37- Duty to withdraw approval**

109. This section requires HEFCW to withdraw their approval of a fee and access plan by giving notice to a governing body of an institution if they are satisfied that an institution has ceased to:
- be an institution in Wales (see section 54(3) for the definition of institutions in Wales),
  - provide higher education, or
  - be a charity.
110. The Welsh Ministers may by regulations under subsection (2) make provision about what matters HEFCW must take into account in determining whether they are required to withdraw approval. Those regulations might, for example, require HEFCW to take account of decisions made by the Charity Commission relating to the charitable status of an institution if they believe that an institution has lost its charitable status.
111. The procedural requirements in sections 40 to 43 (warning and review procedures) do not apply to this section. However regulations made under subsection (3) may provide for the procedure that HEFCW must follow. That includes amending, applying or modifying the requirements in sections 40 to 43 for the purposes of this section. That could, for instance, require HEFCW to give a warning notice to the governing body of an institution and to take account of representations made by the governing

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body before they decide whether they are required to withdraw an institution's fee and access plan.

### **Section 38 - Power to withdraw approval**

112. This section permits HEFCW to withdraw their approval of a fee and access plan where:

- a governing body has persistently failed to comply with limits on student fees or has failed to comply with a compliance and reimbursement direction,
- a governing body has persistently failed to comply with the general provisions of an institution's approved plan,
- the quality of education provided by or on behalf of the institution is seriously inadequate, or
- there has been serious failure by the governing body of an institution to comply with the Code.

113. Persistent failure could (in the context of student fees and general provisions of an approved plan) consist of a number of separate failures or the repetition or continuation of the same failure.

114. The Welsh Ministers may by regulations make provision about what HEFCW must take into account when deciding whether to give notice that they are withdrawing their approval of a plan under this section. For instance this might include a requirement for HEFCW to take account of the effect of inadequate quality of education on students or the effect of non-compliance with the Code on the financial stability of an institution.

115. The warning notice and review procedures in sections 40 to 43 will apply to notice given by HEFCW under this section.

### **Section 39 - Publication etc of notice under Part 5**

116. This section requires HEFCW to give a copy of any notice they give under Part 5 to the Welsh Ministers and to publish the notice. Regulations made by the Welsh Ministers may make provision about the way in which HEFCW must give a copy of the notice to the Welsh Ministers and publish the notice, and about when they must do so. Regulations might include a requirement for HEFCW to provide the Welsh Ministers with a copy of the notice within a specified period of time of it being given to an institution. Regulations might also require HEFCW to publish the notice on a web site or in a newspaper.

### **Part 6 - Notices and directions given by HEFCW**

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### **Section 40 – Application of sections 41 to 43**

117. Sections 41 to 43 are concerned with the giving of warning notices by HEFCW before they give certain notices and directions to the governing body of an institution, the information that HEFCW are to supply with those notices and directions and the process of review that is available in respect of those notices and directions.
118. By way of comparison, existing provisions under the Higher Education Act 2004 provide for HEFCW to give notice to the governing body of an institution where they are minded to refuse to approve the institution's proposed plan or to refuse to approve a new plan during a specified period on the expiry of the institution's existing plan. Those existing provisions allow for the governing body to make representations to HEFCW and require HEFCW to consider any such representations before they make a decision. The existing provisions also allow for the governing body to apply to a person or panel of persons appointed by the Welsh Ministers for a review of HEFCW's decision (which has effect, in the first instance, as a provisional decision).
119. The notices and directions to which sections 41 to 43 apply are described in section 40(1). Those notices and directions do not include a notice under section 37 (HEFCW's duty to withdraw approval) nor do they include directions under sections 16, 19 or 34 (directions concerning a failure to co-operate). Sections 41 to 43 do not apply to a direction given by HEFCW where that direction only revokes an earlier HEFCW direction.

### **Section 41 – Proposed notices and directions: requirement to give warning notice**

120. Where HEFCW propose to give a notice or direction described in section 40(1) to the governing body of an institution, HEFCW must first give the governing body a warning notice.
121. A warning notice must set out the proposed notice or direction and state HEFCW's reasons for proposing to give it. The warning notice must also inform the governing body that it may make representations about the proposed notice or direction. Regulations may provide for the period within which and the way in which such representations may be made. For instance, regulations might provide that HEFCW is to receive representations in writing and that they must receive any such representations within 40 calendar days of the date of the warning notice.

### **Section 42 – Information to be given with notices and directions**

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122. If HEFCW give a notice or direction described in section 40(1) to the governing body of an institution, they must at the same time give that governing body a statement which sets out HEFCW's reasons for giving the notice or direction and which informs the governing body that it may apply for a review of the notice or direction under section 43. The statement must also include any other information that is required to be included by regulations. Regulations might, for instance, require a statement to inform the governing body that a copy of the notice or direction will be given to the Welsh Ministers and published (in the case of direction under section 11 or notices under sections 36 or 38).

### **Section 43- Review of notices and directions**

123. This section concerns the review of a notice or direction described in section 40(1) once HEFCW has decided to give such a notice or direction to the governing body of an institution. This section is based on section 39 of the Higher Education Act 2004 and the review procedure is likely to be similar to the review procedure in place under that Act.
124. The governing body of an institution to which the notice or direction is addressed may apply for a review of that notice or direction. A review is carried out by either a person or a panel or persons appointed by the Welsh Ministers.
125. The Welsh Ministers are required to make regulations under this section in connection with reviews.
126. Regulations may make provision about the grounds on which an application for review may be made by a governing body. Such grounds of review might, for instance, include the governing body being able to present a material factor for consideration which was not, for good reason, previously drawn to HEFCW's attention, or the governing body considering that HEFCW has disregarded a material factor which they should have considered in deciding to give the notice or direction.
127. Regulations may also provide for the period within which and the way in which an application may be made. For instance, regulations might provide that a governing body is to apply for a review in writing and within 40 calendar days of the date of the notice or direction.
128. Regulations may also make provision about the procedure to be followed by a person or panel carrying out a review and the steps to be taken by HEFCW following a review. Such regulations might, for instance, require the panel to make a recommendation as a result of the review and require HEFCW to reconsider its decision to give the notice or direction in light of that recommendation.

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129. Regulations may also provide for a notice or direction to which section 43 applies not to be treated as having been given by HEFCW until specified steps have been taken or until a specified period has expired. Regulations might, for instance, provide that the notice or direction is not to be treated as having been given until a review has been completed or until the time for applying for a review has expired (without an application being made by the governing body concerned). This would mean that a notice did not take effect, or that a governing body was not required to comply with a direction, while a review was taking place or an application for a review could still be made.

### **Section 44 - Directions: compliance and enforcement**

130. Where HEFCW gives a governing body a direction under the Bill, that governing body is required to comply with the direction. If the governing body fails to comply with the direction, HEFCW can apply to the court for the direction to be enforced. An injunction granted by the court may require an institution to take certain steps or refrain from taking certain steps.

### **Section 45 - Directions: general**

131. If HEFCW gives a direction to a governing body under this Bill, that direction must be in writing. Having given a direction, HEFCW is able to vary that direction or revoke that direction by a later direction. Sections 41 to 43 do not apply to a direction that provides only for the revocation of an earlier direction, but they apply to a direction varying an earlier direction to which those sections did apply (see section 40).

## **Part 7 - Supplementary functions of HEFCW**

### **Section 46 - Duty to take Welsh Ministers' guidance into account**

132. The Welsh Ministers may issue guidance to HEFCW relating to the exercise of HEFCW's functions under this Bill. For instance, the Welsh Ministers might issue guidance to HEFCW as to the exercise of their monitoring and evaluation functions under section 15 relating to fee and access plans, or in relation to their duty under section 17 (assessment of quality of education). Similarly, the Welsh Ministers might issue guidance to HEFCW in connection with the preparation of the financial management Code or the statement of intervention policy (see section 49).

### **Section 47 - Annual reports**

133. Existing provision in section 40A of the Higher Education Act 2004 requires HEFCW to provide an annual report to the Welsh Ministers on how HEFCW have performed their functions under that Act.



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134. Section 47 of the Bill requires HEFCW to provide an annual report to the Welsh Ministers on how HEFCW have exercised their functions by virtue of the Bill. HEFCW have flexibility to determine when the first reporting period should end, which will set the annual reporting period thereafter. The Welsh Ministers are able to specify requirements with which such a report must comply. Such a requirement might relate to the publication of the report but may also relate to the form and content of the report.

### **Section 48 – Special reports**

135. Section 48 is similar to section 40A(2) of the Higher Education Act 2004. It requires HEFCW to provide a special report to the Welsh Ministers when directed to so do.
136. The Welsh Ministers might wish to receive a special report regarding the extent to which the governing body of an institution is complying with the fee limits set out in its approved plan or the quality of education provided at an institution (perhaps where concerns have been raised in relation to a particular institution). Equally, the Welsh Ministers might, given HEFCW's evaluation functions under section 15, wish to receive a report on the effectiveness of approved plans generally in promoting equality of opportunity in connection with access to higher education and in promoting higher education.

### **Section 49 – Statement in respect of intervention functions**

137. Section 49 requires HEFCW to prepare and publish a statement which sets out how they propose to exercise certain of their functions. Those functions are described in section 49(5). Section 49(5) does not extend to HEFCW's powers of direction under sections 16, 21 or 34 which concern a governing body's duty to co-operate. Separately, section 13 (power to make provision about failure to comply with general provisions of plan) enables regulations made under that section to amend any provision made by this Bill. Regulations made under section 13 might, for instance, confer a new power of direction upon HEFCW and those regulations might amend section 49 so as to include that new power in section 49(5).
138. Section 49(3) requires HEFCW to consult the governing body of each regulated institution and any other persons they think appropriate before publishing the statement or revising the statement. Those other persons might include institutions which have previously been, but which no longer are, regulated institutions.

### **Section 50 – Information and advice to be given by HEFCW to Welsh Ministers**

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139. Section 50 is similar to the existing provisions in section 40A(3) of the Higher Education Act 2004. It provides that the Welsh Ministers can require HEFCW to provide such information and advice relating to the promotion of equality of opportunity in connection with access to higher education and the promotion of higher education as the Welsh Ministers may require. It also allows HEFCW to provide other information or advice relating to those matters to the Welsh Ministers.

### **Section 51 – Other information and advice**

140. The provisions in section 51(1) are similar to the existing provisions in section 40A(4) of the Higher Education Act 2004. Under section 51(1), HEFCW are able 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 and give information and advice about such practice to the governing body of a regulated institution, or to the governing bodies of such institutions generally. In developing any information and advice for these purposes, HEFCW will be able to take into account their evaluations made under section 15 of the Bill. Section 51(2) requires the governing body of a regulated institution to take any information and advice given by HEFCW under section 51(1) into account in exercising its functions.
141. Section 51(3) and (4) enables HEFCW to provide other information and advice. This could include providing information and advice to the governing body of an institution prior to that governing body making an application for approval of a fee and access plan under section 2. HEFCW might, for instance, provide information and advice regarding the requirements with which governing bodies of institutions must comply following the approval of a fee and access plan. Information and advice provided under these powers could also relate to the financial management of regulated institutions and their other functions.

## **Part 8 – General**

### **Sections 52 and 53 – Regulations and Directions**

142. Section 52 provides for regulations under the Bill to be made by statutory instrument. Most regulations will be subject to the negative resolution procedure. The exception is those regulations made under sections set out in subsection (4) that must be approved by resolution of the National Assembly for Wales, namely:
- section 13 (provision about failure to comply with general provisions of a plan),
  - section 37(2) (duty to withdraw approval) – if the regulations amend a provision of the Bill, and
  - section 55 (consequential and transitional provision) – but only if the regulations amend primary legislation.

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143. Section 53 makes provision about directions given by the Welsh Ministers.

### **Section 55 – Consequential and transitional provision etc**

144. As a result of the substantive provisions of the Bill, there need to be consequential amendments to, and repeals of, provisions in other legislation. These are set out in Part 1 of the Schedule to the Bill. Transitional provisions are set out in Part 2 of the Schedule to the Bill.

#### *Schedule*

145. Part 1 of the Schedule (paragraphs 1 to 26) lists those enactments to which consequential amendments are made. One effect of Part 1 of the Schedule will be to repeal the provisions of the Higher Education Act 2004 concerned with fee plans in so far as they relate to Wales.
146. Part 2 of the Schedule (paragraphs 27 to 31) makes provision for transitional arrangements. Transitional arrangements will apply to fee plans approved under the Higher Education Act 2004 which set fee limits for academic years beginning during the transitional period, which is the period up to and including 31 August 2016. The arrangements will provide for those plans to be treated as fee and access plans approved under this Bill for certain purposes. This will allow institutions with fee plans approved before the Bill comes into force to operate under the fee planning scheme established by the Bill.
147. Institutions that are subject to the transitional arrangements will be subject to most of the provisions of the Bill relating to limits on student fees and quality of education, but will not be subject to the Code.
148. Transitional arrangements will also require HEFCW to consult institutions with fee plans approved under the Higher Education Act 2004 on a draft Code and on a draft Statement of intervention policy. HEFCW will also be able to provide advice and assistance (under section 51(1)) to those institutions. It is anticipated that HEFCW will prepare and consult on the statement of intervention policy and the Code during the transitional period (see paragraph 29(2) of the Schedule). It is anticipated that the statement and the Code will take effect from September 2016.

### **Section 56 – Commencement**

149. This section deals with the commencement of the Act once it has received Royal Assent. It provides for Part 1(Overview of the Act) and most of the general provisions in Part 8 to come into force on the day on which Royal

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Assent is received. The substantive provisions of the Bill, contained Parts 2 to 7, section 56(1) and (2) and the Schedule, will come into force in accordance with orders made by the Welsh Ministers.

### **Section 57 - Short title etc**

150. Subsection (1) provides that the title of this Bill is the Higher Education (Wales) Bill. The Bill is to be included in the list of Education Acts set out in section 578 of the Education Act 1996 (subsection (2)). Any reference in legislation to “the Education Acts” will include a reference to this Bill.