

Post legislative scrutiny of the Higher Education (Wales) Act 2015

December 2019



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Post legislative scrutiny of the Higher Education (Wales) Act 2015

December 2019



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Chair's foreword

One focus of the Higher Education (Wales) Act 2015 was on achieving continuity with an existing but seemingly weakened system of regulation that was based on grants - it was not an Act that set a distinctive or ambitious agenda.

The contrast with published plans for the proposed tertiary education bill could not be starker. Whilst the HE Act 2015 stressed continuity, the new bill is expected to have transformation at its heart. We expect to see a bill which seeks to significantly reshape the post-16 education sector in Wales, bringing together diverse providers in a sector which will have a very different dynamic under a new arms-length Commission.

With such change imminent, we wanted to ensure the lessons from the HE Act were understood and learnt, particularly since the Minister has explained she expects to carry parts of the Act forward into the new bill. This has meant conducting post-legislative scrutiny of the Act a little bit earlier than we would normally do, but with the bill expected early in 2020, it was now or never.

We heard quite considerable criticism of the HE Act, mainly focusing on its failure to create a complete system of HE regulation, its unsatisfactory addressing of student interests, and its not providing an effective means to align providers behind national priorities. These issues are of such consequence, and are so much a part of the fabric of the 2015 Act, that we agree with the Minister's intention to repeal it. Because it is to be repealed, the recommendations we make in this report in relation to it are what we think are realistically possible before any new tertiary education and research Commission is established.

Whilst it is critical that we apply the lessons learned from the HE Act to the tertiary education bill, it is also important not to pre-empt the detailed scrutiny that will happen when the new bill is introduced to the Assembly. We have therefore limited our recommendations on the new bill to important principles, principles which we expect to see reflected in the new bill when it is introduced in 2020.

It is clear to us that the new bill must provide a way of making sure providers, above all their governing bodies, are incentivised to embrace any national priorities and combine them seamlessly and meaningfully into their own strategies - the fee and access plan approach has failed in this respect.

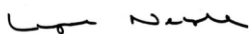
It is also clear to us that there must be a far better conception of what student interests are and that the bill should seek to safeguard them. The current

conception in legislation is completely out of touch with the things that we know really matter to students; things like: mental-health provision, their general well-being, having access to affordable accommodation, value for money, facilities on campus, employability, student services and so on.

We can do better.

Whilst public funding must be safeguarded and invested wisely, we must not lose focus on the learners and students who will likely, in a few years' time, expectantly enter a new tertiary education sector. The report by Professor Hazelkorn which began this journey to a reformed sector had learners at its centre – lifelong learners of all ages, genders and talent, who would be able to move seamlessly across providers on learning pathways and methods of delivery that best suited them.

We are very anxious that this inspiring ambition for transformative lifelong learning and what this means for the people of Wales is not squeezed and wrung out of the tertiary education bill. The HE Act is focused on providers, the next Act must be focused more on learners.



Lynne Neagle AM
Chair

Recommendations

Recommendation 1. That the Welsh Government explain the rationale behind the student funding regulations allowing non-HEFCW publicly funded institutions to have automatic designation of their part-time and postgraduate provision, and what the benefits and disbenefits of this approach are..... Page 26

Recommendation 2. That the Welsh Government explain how it does, (or how it would), maintain oversight over automatically designated part-time and postgraduate provision where the recurrent grant does not originate from HEFCW. Page 26

Recommendation 3. That the Welsh Government provide a register of all the courses relevant to recommendation 2, with each course entry setting out the quality assurance arrangements that are applicable and the body that is accountable for oversight. This register should also include details of all specifically designated courses, should be placed online within 90 days of this report's publication, and should be subject to regular updating. Page 26

Recommendation 4. That the Welsh Government, as part of its response to this report, provide details of any instance in which Welsh Ministers have individually designated a course of higher education, against the recommendation of HEFCW. The justification for any such decisions should also be set out in the response. Page 26

Recommendation 5. That the Welsh Government reflect on the lessons from the prescriptive and fragmented nature of the regulatory framework created by the 2015 Act and ensure that the forthcoming tertiary education bill creates a coherent and integrated post-16 system. This bill should be drafted to create a legislative framework that is flexible enough to cope with unanticipated changes that could occur years or decades into the future. Page 28

Recommendation 6. That the Welsh Government ask HEFCW to share any key findings or actions that emerge from the review of sector governance currently being undertaken by Gillian Camm on behalf of providers..... Page 32

Recommendation 7. That the Welsh Government ensure that, subject to safeguards, accountability and consultation, the Commission for Tertiary Education and Research (the Commission) has the scope to imagine and put into place the detailed powers, interventions, incentives and sanctions it feels are required for the effective regulation of a varied and dynamic tertiary education

sector that will evolve over time in unanticipated ways. In short, the Commission must be allowed to create what HEFCW calls the “regulatory machinery”.... Page 34

Recommendation 8. That the tertiary education bill allows the Commission to set the conditions for good governance and does not hinder its ability to intervene as early as possible in cases of suspected poor or ineffective governance..... Page 34

Recommendation 9. That HEFCW provide a copy of any evaluations of fee and access plans it has conducted to date..... Page 38

Recommendation 10. That the Welsh Government work with HEFCW and other stakeholders toward the aim of identifying how the secondary legislation made under the 2015 Act in relation to fee and access plans can be amended to:

- reduce their administrative burden as far as possible;
- strengthen their effectiveness..... Page 38

Recommendation 11. That the Welsh Government ensure that the new tertiary education bill enables the Commission to set a regulatory and funding environment in which providers are incentivised to adopt outcomes seamlessly into their own strategies, thereby ensuring governing bodies and their providers are wholly aligned behind them..... Page 40

Recommendation 12. That the Welsh Government amend its specific course designation policy so that it takes into consideration a wider and more reasonable concept of student interests than the current “threshold” model of course quality, financial sustainability and “public good” (defined in practice in HEFCW guidance as widening access)..... Page 46

Recommendation 13. That the Welsh Government, in the tertiary education bill, shifts the emphasis from regulation based on the sum of public funding at stake, to a greater focus on regulation based on a reasonable, inclusive and relevant understanding of student interests, ensuring the bill supports and safeguards them. This should enable learners to have their reasonable student expectations met at any regulated post-16 provider..... Page 46

Recommendation 14. That the Welsh Government, via the tertiary education bill, ensure that suitable learner voice mechanisms are established and maintained by all providers regulated by the Commission, and that the student voice must be given due regard by the Commission itself. This will help ensure that what represents student interests can evolve over time..... Page 47

Recommendation 15. That the Welsh Government publish a draft tertiary education bill to allow stakeholders to engage with the details of the proposed legislation. Page 51

Recommendation 16. That the Welsh Government set out how it intends to ensure business continuity of the vital day-to-day functions of the current regulatory and funding bodies (such as making normal regular payments of funding to providers) during the transition to the new Commission. Page 51

Recommendation 17. That the Welsh Government explain how it intends to ensure that the corporate memories in HEFCW and the Welsh Government are not lost in the transition to the new Commission. Page 52

Recommendation 18. That the Welsh Government ensure that the tertiary education bill provides for suitable transition arrangements and that a shadow Commission is established as soon as practicable to help provide for a smooth transition to the new body. Page 52

Recommendation 19. That the Welsh Government provide copies of the year one and year two evaluations it committed to in the Explanatory Memorandum of the 2015 Act. If these reviews have not been conducted, an explanation of the reasons why they have not should be provided. Page 52

1. Background to the inquiry

The Higher Education (Wales) Act 2015 received Royal Assent in March 2015 and was fully implemented from August 2017. The Welsh Government plans to introduce a tertiary education bill in early 2020 that would repeal the 2015 Act but also carry forward some parts of it into the new legislation.¹ We were keen to learn the lessons from the 2015 Act before the new bill is introduced.

1. In 2018 we agreed to undertake post-legislative scrutiny of the Higher Education (Wales) 2015 Act (the 2015 Act). The aim of this work was to understand the lessons from the making and implementation of the 2015 Act and apply them to the tertiary education bill which is expected to be introduced by the Welsh Government in 2020.

2. As the 2015 Act has only been fully implemented for just over two years, insufficient time has passed to enable a full assessment of its success. Nevertheless, as only a very limited window of opportunity now exists for us to learn lessons from the 2015 Act in advance of the tertiary education bill's introduction next year, our report seeks to identify the main benefits and disadvantages of the 2015 Act with a view to improving future legislation.

Terms of reference

3. We agreed to look at the following:

- if the 2015 Act is achieving its aims, and if not why;
- if the costings have been achieved, and if not why;
- if the Act has achieved overall value for money;
- how well the Act has been implemented and is working in practice, including any unintended consequences;

¹ The reforms have gone by various names and acronyms: in this report the term PCET bill, PCET reforms, and tertiary education bill will be used. PCET stands for Post-Compulsory Education and Tertiary Education (a sector in Welsh Government proposals that include higher education, further education, work-based learning, adult community learning and 6th forms in).

- the outcomes from the Welsh Government’s formal reviews of the Act; and
- any good practice and lessons learned from both the Act and its preparation (i.e. the process by which the Act was formulated, drafted, consulted on and so forth).

Evidence and recommendations

4. We held a written consultation from 8 March 2019 until 3 May 2019, receiving 12 responses. In addition, we held two oral evidence sessions on 18 July 2019 and 26 September 2019. A list of written responses and witnesses is provided at Annex A and B respectively. We would like to thank all those who contributed to our work.

5. We gathered evidence with a view to achieving two aims:

- 1.** Learning the lessons of the 2015 Act and making appropriate recommendations for the current arrangements considering the Act is to be repealed.
- 2.** Influencing the preparation of the tertiary education bill in light of those lessons.

6. In preparing our recommendations, we have been mindful of the more comprehensive scrutiny of the tertiary education bill which will be undertaken following its formal introduction to the Assembly. This will necessarily involve a broader range of stakeholders than those who have contributed to this more narrow and preliminary piece of work. In light of this, our report does not represent the totality of our views on the forthcoming reforms, nor does it represent any final conclusions should the tertiary education bill be referred to us. Rather, our recommendations are presented as important principles which we expect to see reflected in the new tertiary education bill.

2. How the HE (Wales) 2015 Act works

The 2015 Act does not itself create a complete regulatory system for higher education in Wales – it covers only full-time undergraduate provision. We heard that the wider regulatory system, covering part-time and postgraduate provision, actually relies on the student support regulations, and these are made under a different Act.

7. The then Higher Education (Wales) Bill was introduced in the National Assembly on 19 May 2014 and received Royal Assent on 12 March 2015. It came fully into force from 1 August 2017 with transitional arrangements in-place prior to this.² The Act is underpinned by seven sets of regulations which, amongst other matters, deal with the maximum level of tuition fees that can be charged to students for particular types of courses.³

8. Prior to the 2015 Act the regulatory system for providers was based on the terms and conditions HEFCW attached to its funding grants to institutions. From 2012/13, funding began to be diverted away from HEFCW grants and instead began to go to providers via:

- tuition fee loans; and
- the tuition fee grant paid directly to them by Welsh Government and the Student Loans Company on behalf of individual students.

9. It was considered possible for some institutions to start to receive such small levels of grant that it would be disproportionate to the regulatory duties and powers imposed on them, or that its suspension or withdrawal would have no material impact on a provider, eroding HEFCWs ability to regulate them. With the risk of the terms and conditions based regulatory system being weakened or even failing in some instances, the Welsh Government sought, through the 2015 Act, to create a regulatory framework that rested on something other than ever diminishing grant funding.

² [HEFCW website](#)

³ [HEFCW website](#)

- 10.** The Act aimed to achieve the following four objectives:
- 1.** “Robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government backed higher education grants and loans;
 - 2.** Safeguard the contribution made to the public good arising from the Welsh Government’s financial subsidy of higher education;
 - 3.** Maintain a strong focus on fair access to higher education; and
 - 4.** Preserve and protect the institutional autonomy and academic freedom of universities.”⁴

Regulated institutions

11. The Act creates a new and voluntary regulatory regime based on the concept of “regulated institutions”. By applying for and being awarded the status of a “regulated institution” a provider based in Wales enters the Welsh regulatory system. A provider becomes a regulated institution by submitting to HEFCW, and HEFCW then approving, a fee and access plan.

12. In return for now being subject to the regulatory system’s duties, powers and restrictions, a regulated institution effectively gains access to increased levels of public funding / subsidy under the student support regulations. This is because students can now receive a tuition fee loan of up to £9,000 for courses in Wales, payable directly to the provider in advance of course completion. Students who wish to study at a provider which is not a regulated institution can only access tuition fee loans of up to £6,165 for courses in Wales.

Fee and access plans

13. An approved fee and access plan is the gateway into the regulated system: by having one providers become regulated institutions. Whilst fee and access plans effectively unlock higher levels of student financial support for providers, they do so by also committing providers to investing a proportion of that additional income into widening access activity.

14. As well as widening access investment, fee and access plans also commit providers to not charging more than a maximum fee level for particular courses – at the moment applicable only to full-time undergraduate / PGCE courses. This

⁴ Welsh Government, revised [Explanatory Memorandum](#), Higher Education Bill

maximum limit is set at £9,000 by regulations (although providers can charge less than this if they wish).

15. Fee and access plans themselves seek to address two main matters:

- the full-time undergraduate / PGCE fees to be charged to students that year (fee levels which must be adhered to for that year and which must not exceed £9,000); and
- the objectives, provision and investment the provider will commit to widening access activity.

16. HEFCW sets an expectation that providers will spend a certain proportion of their regulated fee income on their widening access objectives. This level currently stands at between 14-17 per cent of full-time undergraduate and PGCE fee income.

17. Once a plan is approved and is in force, HEFCW has powers to monitor a regulated institution's compliance with its plan and its effectiveness. HEFCW also has powers to issue "directions" (enforceable by injunction) in cases of non-compliance with the "general requirements" of an approved plan, or withdraw approval of a plan mid-year. Such a withdrawal would force the provider out of the regulatory system created by the 2015 Act.

Other key provisions in the Act

18. Once a provider has become a regulated institution and has entered the regulatory system, they become subject to various duties and subject to HEFCWs powers.

19. Broadly HEFCWs powers relate to:

- fee and access plan monitoring (as discussed above);
- tuition fee limits;
- the quality of a regulated institutions provision;
- the management of a regulated institutions financial affairs; and
- being able to make interventions (issuing directions and imposing sanctions) in relation to the above matters.

- 20.** In practice, HEFCW “contracts out” quality assurance to the Quality Assurance Agency,⁵ a body which operates across the UK, and it has an arrangement with Estyn⁶ regarding the FE provision at the two relevant FE colleges which Estyn inspects on HEFCW’s behalf.
- 21.** HEFCW has powers to take action if it believes a regulated institutions quality of provision is inadequate or that it is likely to become inadequate.
- 22.** Amongst HEFCW’s regulatory powers are powers in relation to the financial affairs of institutions. The 2015 Act states that regulated institutions must comply with the Financial Management Code,⁷ a document prepared by HEFCW under the Act and approved by the National Assembly.
- 23.** The Financial Management Code sets out the requirements concerning the organisation and management of financial affairs to which regulated institutions must adhere.
- 24.** HEFCW has powers to issue directions if regulated institutions do not comply or are unlikely to comply with the Financial Management Code.
- 25.** Under the Act HEFCW “must set out how we propose to exercise our intervention functions”. These processes and its approach are set out in its “Statement of Intervention”.⁸ The statements includes information on how HEFCW will use the powers relating to quality and financial management.
- 26.** HEFCW’s approach to intervention is to operate an escalatory mechanism involving early dialogue and partnership working before moving to use its formal powers. HEFCW also has rights of entry and inspection under the Act which also places a duty on the governing bodies of regulated institutions to co-operate with HEFCW directions.

The lack of a cohesive regulatory framework

- 27.** The 2015 Act regulates full-time undergraduate provision and creates a regulatory system anchored on this specific type of provision. The 2015 Act does not offer a comprehensive regulatory framework that extends to part-time or post-graduate provision, nor by definition does it apply to providers without an

⁵ [Quality Assurance Agency](#) website

⁶ HEFCW and Estyn, [Protocol for partnership working between HEFCW and Estyn](#)

⁷ HEFCW, [Financial Management Code](#)

⁸ HEFCW, [Statement of Intervention](#)

approved fee and access plan (a fee and access plan isn't needed to deliver higher education in Wales).

28. In reality the overall regulatory framework for all higher education provision in Wales is the result of several pieces of legislation interacting together, namely:

- The 2015 Act itself;
- The student support regulations made under the Teaching and Higher Education Act 1998;
- The Further and Higher Education Act 1992 which allows HEFCW to attach terms and conditions to grant funding to providers (essentially the “old”, pre 2015 Act system which still operates in parallel with the 2015 Act since institutions still receive grants from HEFCW); and
- Any other legislation providing for education providers in Wales to be funded via recurring grant (i.e. further education colleges) with associated terms and conditions.

Designating courses for student support purposes

29. The rules relating to student support are not set out in the 2015 Act itself, but in regulations that are made under a different piece of legislation: the Teaching and Higher Education Act 1998.

30. Under the student support regulations a student is not able to access student support (student loan and maintenance support) unless the course they wish to enrol on is “designated” by Welsh Ministers as eligible for funding. Courses can be designated in one of two ways: “automatic designation” or “specific designation”.

- **Specific designation:** in the case of a provider who is not a regulated institution, they must apply for each of their full-time undergraduate courses to be designated on an individual basis under the “specific designation” process operated by HEFCW if they want their students to get student support. Whilst HEFCW operate the process, they do so based on the Welsh Government specific designation policy⁹ and it is the Welsh Minister who makes the designation decision, taking into consideration HEFCW's recommendation in each case. If the Welsh Minister decides to designate a course, that course then attracts student

⁹ HEFCW, [HEFCW Specific Designation Guidance](#), pg 2

financial support; however it will only attract a reduced level of support (£6,165 a year tuition fee loan for courses in Wales). This level of public funding reflects the fact that the requirements providers need to meet to achieve specific designation of a course are less comprehensive than being in the full regulatory system.

- **Automatic designation:** providers who are regulated institutions under the 2015 Act and who are therefore in the full regulatory system have their full-time undergraduate courses “automatically designated” for student support under the student support regulations. This means that there is no need to apply for each course to be specifically designated, they become designated by virtue of the provider being regulated. Because being regulated means being subject to more duties, powers and requirements, the level of public funding available increases and students can access loans of up to £9,000 a year for courses in Wales (compared to £6,165 above). Automatic designation is also in place in the case of providers who aren’t regulated but who receive recurrent grants from Welsh Ministers, except in this instance such providers only have their part-time undergraduate and postgraduate courses automatically designated. The recurrent grant does not have to be from HEFCW.

3. Gaps in the higher education regulatory system

We heard that inconsistencies and gaps exist in the higher education regulatory system. We also heard that the current legislation means it is possible for providers to deliver higher education in Wales with no official oversight from HEFCW. It is very fortunate in our view that the Act has not been tested by the same level of change seen in higher education in England.

31. The Explanatory Memorandum which accompanied the 2015 Act explains that one of the legislation’s objectives is to ensure robust and proportionate regulation of institutions whose courses are supported by Welsh Government backed higher education grants and loans.¹⁰

32. During our inquiry, it has become clear to us that the scope of the Act is far narrower in reality, focusing instead on creating a regulatory framework for only those institutions who seek automatic designation of their courses for the purposes of student support.¹¹

33. However, examining the relevant legislation¹² shows that the 2015 Act doesn’t achieve this either. Universities Wales told us:

“The [Act] only partly implements the Welsh Government’s original proposals as set out in the Technical consultation in June 2013 to provide a holistic HE system.”¹³

¹⁰ Welsh Government revised [Explanatory Memorandum](#), section 3, 4, (a)

¹¹ Welsh Government revised [Explanatory Memorandum](#), section 3, 5, (a)

¹² [The Education \(Student Support\) \(Postgraduate Master’s Degrees\) \(Wales\) Regulations 2019; The Education \(Student Support\) \(Wales\) Regulations 2018; The Education \(Postgraduate Doctoral Degree Loans\) \(Wales\) Regulations 2018.](#)

¹³ Written evidence, CYPE Committee, HEA 05, para 2.7

Designation of courses for student support

34. The automatic and specific designation of courses for student support are lynchpins of the current regulatory system. Students cannot receive student support to study on a course unless it is designated in one of these two ways. Although crucial to the operation of the provisions of the 2015 Act, designation arrangements rely on student support regulations made under the Teaching and Higher Education Act 1998.¹⁴

35. Stakeholders explained to us that neither part-time nor postgraduate were regulated under the 2015 Act. When asked about this the Minister told us:

“I have to say that, at present, we’ve not identified an urgent reason to designate these courses as qualifying courses for the purposes of a fee limit.”¹⁵

36. Bethan Owen of HEFCW explained to us as well that the wording within the student support regulations can result in gaps in HEFCW oversight for part-time and postgraduate courses:

“[Whilst] Part-time and postgraduate provision don’t fall within the regulatory framework of fee and access plans, [they are] automatically designated for student support at Welsh publicly funded institutions. So, there is a gap.”¹⁶

37. This can occur when institutions who just deliver part-time and postgraduate courses also receive the public funding mentioned above from sources other than HEFCW. In these cases, as Bethan Owens explained to us, HEFCW has no official oversight or powers over those courses since the public funding doesn’t come from HEFCW.

38. The figure on the following pages demonstrates in simplified form how the student support regulations allow providers access to Welsh Government backed loans and grants, and where and how gaps can appear.

39. When asked about what this means in practice for the quality of the provision at providers that receive public funds but do not fall under HEFCW oversight, David Blaney, Chief Executive of HEFCW told us:

¹⁴ [The Teaching and Higher Education Act 1998](#)

¹⁵ Oral evidence, CYPE Committee, RoP [para 24], 26 September 2019

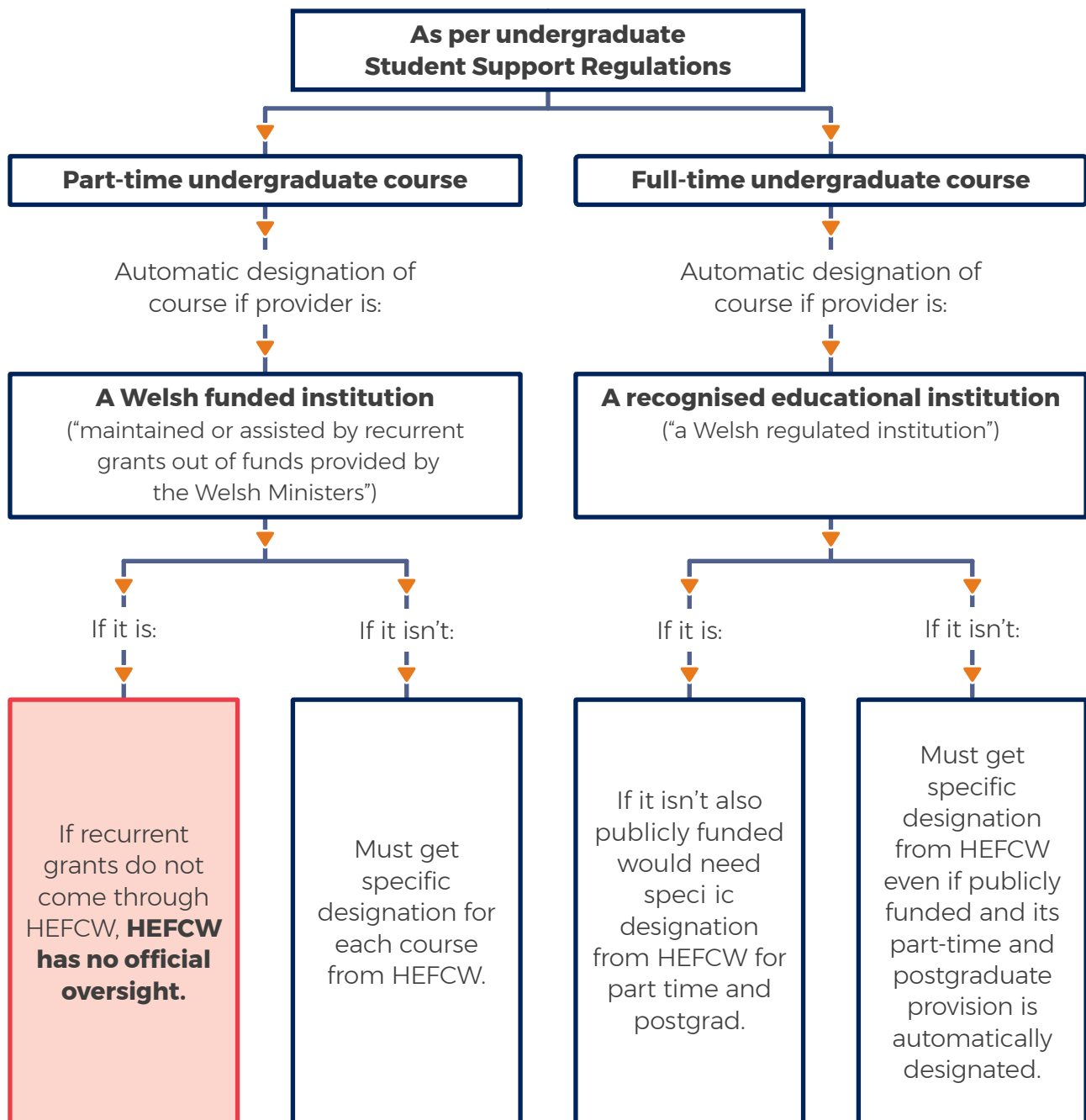
¹⁶ Oral evidence, CYPE Committee, RoP [para 51], 18 July 2019

“It’s not to say that there is a quality problem with those providers. The reality is that we wouldn’t know because they’re not required to go through the quality machinery that our regulations otherwise require. So, there could be a problem.”¹⁷

¹⁷ Oral evidence, CYPE Committee, RoP [para 57], 18 July 2019

Wales HE regulatory framework

This figure shows how, under the relevant student support regulations, it is possible for a provider to receive Welsh Government backed funding to deliver higher education in Wales, but not come under HEFCW oversight. The figure assumes that a provider meets all other requirements for automatic or specific designation.



Source: The Education (Student Support) (Postgraduate Master Master’s Degrees) (Wales) Regulations 2019; The Education (Student Support) (Wales) Regulations 2018; The Education (Postgraduate Doctoral Degree Loans) (Wales) Regulations 2018.



As per postgraduate Masters Student Support Regulations

Automatic designation of course if provider is:

A Welsh funded institution
("maintained or assisted by recurrent grants out of funds provided by the Welsh Ministers")

If it is:

If recurrent grants do not come through HEFCW, may still get automatic designation **but HEFCW has no official oversight.**

If it isn't:

Must get specific designation for each course from HEFCW, comes under HEFCW oversight.

As per Doctoral Loan Student Support Regulations

Automatic designation of course if provider is:

A Welsh funded institution
("maintained or assisted by recurrent grants out of funds provided by the Welsh Ministers")

If it is:

If recurrent grants do not come through HEFCW, may still get automatic designation **but HEFCW has no official oversight.**

If it isn't:

Must get specific designation for each course from HEFCW, comes under HEFCW oversight.

Inconsistencies in the legislation

40. It was also drawn to our attention that the interaction between the various pieces of legislation relevant to funding and regulating higher education allows for a number of other inconsistencies to emerge, further complicating the regulatory system.

41. We received evidence which suggested one such significant inconsistency had arisen in relation to oversight and inspection of providers as a consequence of the 2015 Act. HEFCW and Estyn told us that HEFCW has become responsible for the quality of all provision at two Further Education colleges which, for historical reasons, have become regulated institutions under the 2015 Act.¹⁸

42. Normally it is Estyn that has oversight of further education (FE) provision and HEFCW higher education (HE) provision. The 2015 Act however sees HEFCW and Estyn both having a legal duty toward the quality of FE provision at the two FE colleges. The Minister argued that this was a deliberate provision of the Act and not an error or anomaly:

“[...] my understanding is that it was not an unintended consequence, it was an expectation built into the Act that HEFCW and Estyn would work together on these matters.”¹⁹

43. Evidence from ColegauCymru, representing the further education sector, suggested that this arrangement was not felt by the sector to be onerous or burdensome. They attributed this to the fact that HEFCW and Estyn have come to an agreement for Estyn to inspect the two colleges on behalf of HEFCW.²⁰

44. Nonetheless, David Blaney explained that, in different circumstances, the 2015 Act could have seen considerable duplication of inspection:

“So, if we [Estyn and HEFCW] were not such good friends, you could imagine that we would both be going in there [both separately inspecting FE]. As it is, we have a perfectly good operational relationship with Estyn. We don’t send our people in to look at stuff that they’re already doing. So, operationally, we’re making it work, but

¹⁸ Grŵp Llandrillo Menai and NPTC Group

¹⁹ Oral evidence, CYPE Committee, RoP [para 116], 26 September 2019

²⁰ Oral evidence, CYPE Committee, RoP [para 321], 18 July 2019

actually I suspect—. My view is that that particular issue in the 2015 legislation was a mistake.”²¹

45. Jassa Scott of Estyn told the Committee that the arrangement “works because we’ve made it work”.²²

Our view on the 2015 Act’s regulatory system

46. Our predecessor Committee noted concerns about the comprehensiveness of the regulatory system in its original Stage One report on the then HE Bill in 2014.²³ Our post-legislative scrutiny of the 2015 Act suggests those concerns have been borne out.

47. Based on the evidence we have gathered, we believe the 2015 Act is too rooted in the higher education landscape of its time and too focused on one type of provider: regulated institutions offering full-time undergraduate courses.

48. In light of the gaps in regulation that this creates in Wales, we believe the Welsh Government has been fortunate that the regulatory system has not been tested by the scale of change experienced in the higher education landscape in England. In our view, a substantial increase in alternative private providers, and providers offering an array of non-full-time undergraduate courses, would pose a significant challenge to our current arrangements.

49. We note that for postgraduate, part-time and sub-degree higher education courses (HND and HNC level²⁴), the 2015 Act has no direct effect if a provider is not also a regulated institution. This is despite the potential for providers in Wales to deliver only these types of higher education provision. We also note that whilst HEFCW administer the process for specific designation of courses, in practice it makes recommendations to the Welsh Minister, with whom the decision ultimately lies.²⁵

50. It was unclear to us why the student support regulations have been cast in such a way that can result in HEFCW having no official oversight over some higher education provision. We are keen to learn where the necessary oversight of these providers’ quality sits if not with HEFCW. Whilst we understand that provision of

²¹ Oral evidence, CYPE Committee, RoP [para 75], 18 July 2019

²² Oral evidence, CYPE Committee, RoP [para 89], 18 July 2019

²³ [HE Bill Stage One report](#)

²⁴ Broadly equivalent to Year 1 and Year 2 of an undergraduate degree

²⁵ HEFCW, [Specific Designation Guidance](#), pg 18

this nature is currently limited in scale, we are conscious that this could change in the future.

51. We agree with Universities Wales’s overarching conclusion that:

“The opportunity to develop a fully integrated system [via the 2015 Act] was missed.”²⁶

Recommendation 1. That the Welsh Government explain the rationale behind the student funding regulations allowing non-HEFCW publicly funded institutions to have automatic designation of their part-time and postgraduate provision, and what the benefits and disbenefits of this approach are.

Recommendation 2. That the Welsh Government explain how it does, (or how it would), maintain oversight over automatically designated part-time and postgraduate provision where the recurrent grant does not originate from HEFCW.

Recommendation 3. That the Welsh Government provide a register of all the courses relevant to recommendation 2, with each course entry setting out the quality assurance arrangements that are applicable and the body that is accountable for oversight. This register should also include details of all specifically designated courses, should be placed online within 90 days of this report’s publication, and should be subject to regular updating.

Recommendation 4. That the Welsh Government, as part of its response to this report, provide details of any instance in which Welsh Ministers have individually designated a course of higher education, against the recommendation of HEFCW. The justification for any such decisions should also be set out in the response.

Lessons for the tertiary education bill

The **regulatory framework of the new PCET sector must be coherent, consistent and in particular, future-proof.**

52. In our view, the tertiary education bill must not be another missed opportunity to deliver a coherent and integrated regulatory system. Without this,

²⁶ Written evidence, CYPE Committee, HEA 05, para 2.8

it is difficult to see how the ambitions contained in the Welsh Government's White Paper²⁷ can be realised.

53. With this in mind, we are concerned by Estyn's evidence regarding their apprehension that smaller types of publicly funded post-16 provision appear to be missing from Welsh Government proposals:

"In terms of any future post-compulsory education and training Bill, I think we're concerned that [...] there's a very large number of smaller sectors that don't get mentioned a lot in that kind of debate, which we currently inspect, and the list is really quite long."²⁸

54. We agree with Universities Wales that the forthcoming tertiary education bill will need to be effective in a larger, more diverse sector that will have a different dynamic to the present HE sector. We further agree that the sector may not always, nor everywhere, be characterised by the positive relationships HEFCW and higher education providers currently enjoy. Professor Julie Lydon of Universities Wales explained:

"[...] at the moment, you can't really see a significant impact [from alternative providers], because actually it's such a modest part of the sector. But we'll need to anticipate that, actually, in the future, there will be other people providing this."²⁹

55. As such, we welcome the Minister's statement that:

"We [the Welsh Government] will need to ensure that the new [tertiary education and research] commission has powers to regulate and to futureproof."³⁰

56. We also agree with HEFCW that the level of detail in the current Further and Higher Education Act 1992—the legislation which established HEFCW—has considerable merit and deserves careful consideration. David Blaney, Chief Executive of HEFCW, explained:

"It's very instructive to look at that, the 1992 Act that set up the funding council. If you look at the clauses that relate to the actual funding council—only about a dozen clauses or something like that [...] It

²⁷ Welsh Government, [Public good and a prosperous Wales](#) technical consultation

²⁸ Oral evidence, CYPE Committee, RoP [para 59], 18 July 2019

²⁹ Oral evidence, CYPE Committee, RoP [para 231], 18 July 2019

³⁰ Oral evidence, CYPE Committee, RoP [para 99], 26 September 2019

basically says, 'You'll have a council, you'll do some funding and you'll sort out quality.' The reason that the 1992 legislation is still workable today is precisely because it wasn't over-specified. The funding council, over the years, has been able to construct the operational arrangements to do that."³¹

Recommendation 5. That the Welsh Government reflect on the lessons from the prescriptive and fragmented nature of the regulatory framework created by the 2015 Act and ensure that the forthcoming tertiary education bill creates a coherent and integrated post-16 system. This bill should be drafted to create a legislative framework that is flexible enough to cope with unanticipated changes that could occur years or decades into the future.

³¹ Oral evidence, CYPE Committee, RoP [para 121], 18 July 2019

4. HEFCW's powers under the 2015 Act

Effective governance is fundamental to safeguarding public funding and protecting student interests. Whilst HEFCW gained new powers under the 2015 Act, we heard that in practice these powers are very difficult to use and are not suitable for preventing or managing the serious risk of poor governance in the sector.

57. The 2015 Act provides HEFCW with a range of new sanctions and powers over regulated institutions.³² This ensures that HEFCW can take action against a regulated institution even if that institution has not received a grant from HEFCW.

58. However, during our inquiry, we heard:

- significant practical issues around using the powers and sanctions exist; and
- despite high-profile concerns relating to Swansea University³³ and the University of Wales Trinity St David,³⁴ HEFCW has never made use of these powers and sanctions.³⁵

59. Overall the evidence we received on HEFCW's powers reflected concerns around the general usefulness of the powers and sanctions; their proportionality; and their inability to effectively and directly address actual and suspected governance issues.

Usefulness and proportionality of powers and sanctions

60. HEFCW told us:

“[...] the sanctions available to HEFCW via the Higher Education (Wales) Act 2015 operate slowly and are largely existentially threatening to providers. This makes the sanctions difficult to use and does not allow

³² [List of HEFCW's regulatory powers and sanctions](#)

³³ BBC story re: [sacking of Professor Richard Davies](#)

³⁴ University of Wales, Trinity St David, [Annual Report 2018](#), pg 26

³⁵ Oral evidence, CYPE Committee, RoP [para 31], 18 July 2019

for swift formal intervention to address problems proportionately through our legal powers.”³⁶

61. David Blaney, Chief Executive of HEFCW went on to explain:

“We’ve never had to use our intervention powers, and our sense of how we regulate is that the intervention powers are really used in circumstances where a provider knows exactly what they’ve got to do and are steadfastly refusing to do it and, happily, we don’t have providers who behave like that.”³⁷

62. David Blaney clarified further that if a provider did “steadfastly” refuse to do what they knew they must do:

“The tools at the moment are a little bit nuclear. So, we can direct, we can get people to spend money on activity, but all of that can be legally challenged. Then, in the extreme, we can refuse to give them a fee plan, which means that we close them, effectively, because their access to income dries up overnight. Are we going to go there? Well, actually, they have to believe that I might, but it would be a pretty nuclear option to do it.”³⁸

63. In contrast, Universities Wales believed that the powers and sanctions were drafted in the 2015 Act in such way that there was a risk they could be used disproportionately:

“[...] there remain potential issues in some areas e.g. potential for the powers to give directions enforceable by injunction to be used for minor matters.”³⁹

64. Professor Julie Lydon of the University of South Wales explained that the 2015 Act is framed in such a way that there was a risk that a “quite minor matter” over one of the 37 targets in her institutions fee and access plan could see a “very, very severe penalty applied [which] could end up meaning that we can’t operate”.⁴⁰

65. The Minister did not agree that HEFCW’s powers are inflexible:

³⁶ Written evidence, CYPE Committee, HEA 09, para 1.5

³⁷ Oral evidence, CYPE Committee, RoP [para 31], 18 July 2019

³⁸ Oral evidence, CYPE Committee, RoP [para 114], 18 July 2019

³⁹ Written evidence, CYPE Committee, HEA 05, para 2.6

⁴⁰ Oral evidence, CYPE Committee, RoP [para 178], 18 July 2019

“I don’t think [HEFCW’s] powers are frightening. It’s very clear what powers are available to HEFCW, and they’re certainly more than just the ability to, maybe, lean on an institution. Clearly, there is a system by which there is the ability to, you know, ramp up and escalate levels of intervention in the sector by HEFCW, but I certainly wouldn’t describe them as inflexible or not having weight.”⁴¹

Powers to address governance issues

66. On governance the Committee recognises the critical role effective governance plays in the higher education sector, and the role it plays in safeguarding public funding and student interests.

67. We were very concerned therefore by the evidence presented by UCU (the University and College Union) highlighting concerns that the 2015 Act fails to both provide HEFCW with the tools necessary to make effective governance interventions, and fails to set the conditions for good governance.

68. Margaret Phelan of UCU told us that the circumstances in which HEFCW is able to take formal action under the 2015 Act are actually just the visible manifestations of deeper governance issues that will have arisen some time beforehand.⁴²

69. UCU went on to explain to us that, as well as not enabling early formal interventions into governance matters, the 2015 Act fails to focus on the prevention of governance issues because it does not make direct provision for ensuring the effective operation of the governing bodies themselves:

“I think from our perspective, the real issue is governance—the structures that we have around the regulatory governance of the sector is where the problem is located.”⁴³

70. The Minister explained that whilst HEFCW in practice seeks governance assurance via mechanisms outside the 2015 Act it was fair to say that the legislation:

“[...] does not directly address issues around governance in the sector. [...] But governance—we’ve talked briefly about some recent history within

⁴¹ Oral evidence, CYPE Committee, RoP [para 42], 26 September 2019

⁴² Oral evidence, CYPE Committee, RoP [para 401], 18 July 2019

⁴³ Oral evidence, CYPE Committee, RoP [para 401], 18 July 2019

the sector that I think has certainly brought the issue of governance to the fore once again.”⁴⁴

71. The Minister went on to explain that an independent review into governance was currently underway, Chaired by Gillian Camm of the Leadership Foundation for Higher Education. The Minister explained that she was:

“[...] glad that there’s been recognition from within the sector themselves that they need to make sure, and they need to give confidence, that governance arrangements are what they should be.”⁴⁵

Our view on the powers and sanctions in the 2015 Act

72. In our view there is little use having powers that in practice are difficult to utilise and which cannot address directly key matters such as early intervention when governance issues are uncovered or suspected.

73. Sanctions framed, for example, around an event as general and ill-defined as “a failure to comply with the general requirements of a fee and access plan”⁴⁶ can present a situation in which HEFCW has difficulty using its powers, whilst the sector simultaneously perceives a real risk of disproportionate action from HEFCW.

74. We were, however, satisfied that it is the very need to use powers in the 2015 Act reasonably and proportionately that makes them difficult to use in practice, and that the risk of them being wielded by HEFCW for “minor matters”, as argued by Universities Wales, is in fact a very minor risk. Nonetheless, on the basis of the need to draft legislation clearly, and for it to have practical effect, we agree with the wider point of principle expressed by Ben Arnold of Universities Wales that:

“The big message for us [on using powers for minor matters] is perhaps not so much that this has been an issue in practice, but that there is an opportunity to improve.”⁴⁷

Recommendation 6. That the Welsh Government ask HEFCW to share any key findings or actions that emerge from the review of sector governance currently being undertaken by Gillian Camm on behalf of providers.

⁴⁴ Oral evidence, CYPE Committee, RoP [para 103], 26 September 2019

⁴⁵ Oral evidence, CYPE Committee, RoP [para 106], 26 September 2019

⁴⁶ See [HEFCWs list of powers and sanctions](#)

⁴⁷ Oral evidence, CYPE Committee, RoP [para 163], 18 July 2019

Lessons for the tertiary education bill

The tertiary education bill must ensure the proposed new post-16 education body, the Commission for Tertiary Education and Research (known as “CTER” or “the Commission”) can **set the conditions for ensuring good governance at providers**, and that it can formally intervene when governance issues are suspected.

75. Effective governance is fundamental to safeguarding public funding and protecting student interests.

76. We are very aware of recent high-profile issues in Swansea University and the University of Wales Trinity St David. We note that these issues have arisen in what Universities Wales have argued are “traditional providers” with “strong track records”.⁴⁸

77. As required by the 2015 Act, both institutions are charities. This underlines to us that it should not be assumed that charitable status in itself offers a defence against poor governance, and that there is no room for complacency or a hands-off approach when it comes to ensuring good institutional governance.

78. As such, we welcome the Minister’s statement that the Welsh Government is:

“Exploring how the [Tertiary Education] Bill could introduce a regulatory condition in respect of good governance, and a commission would be able to set expectations with regard to good governance.”⁴⁹

The **Commission should have the ability to set the regulatory machinery** and amend it when necessary as the sector evolves, subject to suitable consultation, accountability and safeguards (which is largely how the higher education sector was regulated between 1992 and 2015).

79. We were convinced by HEFCW’s argument that the 2015 Act is “over specified” and too prescriptive, leaving it and the regulatory machinery created by it vulnerable to changes in the sector. David Blaney told us:

“The lesson from [the 2015 Act] is not to over-specify the legislation. That doesn’t mean advocating the use of framework legislation, with the detail to be added later by secondary legislation. It means

⁴⁸ Written evidence, CYPE Committee, HEA 05, para 7.4

⁴⁹ Oral evidence, CYPE Committee, RoP [para 108], 26 September 2019

accepting that the logic of having an arm's length body is that you trust that body to develop the operational machinery, albeit with an expectation that they will consult as appropriate, and that they will act reasonably (or be challenged)."⁵⁰

80. We were encouraged to learn that the Welsh Government has been considering the issues raised by HEFCW around its ability to use its powers and is seeking to include in the tertiary education bill a range of more flexible powers and sanctions:

“Looking ahead to the new Bill, I would want to see and be very keen to ensure that there are sufficiently flexible [...] and soft regulatory powers that the [new] commission could exercise. Those powers, for instance, could include the ability to offer advice and guidance, rather than, maybe, punitive interventions, and powers to undertake enhanced monitoring of institutions to ensure compliance with regulatory conditions...”⁵¹

Recommendation 7. That the Welsh Government ensure that, subject to safeguards, accountability and consultation, the Commission for Tertiary Education and Research (the Commission) has the scope to imagine and put into place the detailed powers, interventions, incentives and sanctions it feels are required for the effective regulation of a varied and dynamic tertiary education sector that will evolve over time in unanticipated ways. In short, the Commission must be allowed to create what HEFCW calls the “regulatory machinery”.

Recommendation 8. That the tertiary education bill allows the Commission to set the conditions for good governance and does not hinder its ability to intervene as early as possible in cases of suspected poor or ineffective governance.

⁵⁰ Written evidence, CYPE Committee, HEA 09, pg 1

⁵¹ Oral evidence, CYPE Committee, RoP [para 44], 26 September 2019

5. Fee and access plans

Fee and access plans are the mechanism under the 2015 Act to maintain a focus on fair access to higher education. As currently cast and managed, we do not believe that they are fit for purpose.

81. Fee and access plans are the means for achieving the Act's objective of maintaining a strong focus on widening access.⁵² The evidence we received was very critical of fee and access plans and the fee and access planning process.

82. Whilst no stakeholders who contributed to our inquiry objected to the concept of widening access or believed that the 2015 Act's widening access objective was inappropriate, criticisms were raised in relation to:

- the bureaucratic nature of fee and access plans;⁵³
- their role in relation to central university strategies;⁵⁴
- their focus on inputs and investment rather than outcomes;⁵⁵
- the annual planning cycles, and short-timeframes for submission;⁵⁶ and
- the need to write and submit new plans before previous plans have come into force, let alone been evaluated for effectiveness.⁵⁷

83. HEFCW stated:

“Whilst it is still a little early to definitively comment on the effectiveness of fee and access plans given that the first fee and access plans have still not been fully evaluated, we do have concerns about how effective fee and access plans, in the way they are set out in the 2015 Act, can be in achieving the policy objectives.”⁵⁸

⁵² See Chapter 2 for how fee and access plans work

⁵³ Written evidence, CYPE Committee, HEA 08

⁵⁴ Oral evidence, CYPE Committee, RoP [para 236], 18 July 2019

⁵⁵ Oral evidence, CYPE Committee, RoP [para 67], 26 September 2019

⁵⁶ Written evidence, CYPE Committee, HEA 04

⁵⁷ Oral evidence, CYPE Committee, RoP [para 24], 18 July 2019

⁵⁸ Written evidence, CYPE Committee, HEA 09, para 1.11

84. HEFCW also explained that the 2015 Act has prevented it from establishing a coherent and national approach to setting widening access outcomes with institutions free to set their own targets and objectives:

“The protection of the autonomy of institutions has been set out to such an extent in the 2015 Act where we have been advised that, legally, we cannot require regulated institutions to focus on national outcomes to improve equality of opportunity and promote higher education in Wales.”⁵⁹

85. David Blaney addressed this point further, explaining that HEFCW, through its less formal relationships with providers, has been able begin to get providers to address national priorities:

“The fee and access plans are about individual institutions and, as I say, we were advised that we couldn’t require them to address national priorities. In reality, we’re starting to do that a bit now, but it’s not supported by the regulatory machinery.”⁶⁰

86. Professor Julie Lydon described the complexity of her institution’s fee and access plan, explaining that:

“The fee and access plans at the moment are incredibly drawn out, long documents. They’re almost indecipherable to anybody, even to some colleagues in the institutions. They’re not things that get pinned up on the wall, because in the case of mine, it’s 67 pages long and there are lots of targets.”⁶¹

87. Cardiff University made a similar point about the bureaucratic burden of the plans:

“We would encourage a review of the requirements of the Fee & Access Plan as the level of administrative activity required to comply with the Act appears disproportionate to the benefits.”⁶²

88. A number of sector representatives, including Professor Julie Lydon, suggested that institutional strategies, developed by universities themselves, are the dominant driver of institutional aspirations around widening access. They

⁵⁹ Written evidence, CYPE Committee, HEA 09, para 1.12

⁶⁰ Oral evidence, CYPE Committee, RoP [para 8], 18 July 2019

⁶¹ Oral evidence, CYPE Committee, RoP [para 170], 18 July 2019

⁶² Written evidence, CYPE Committee, HEA 08, para 3.1

implied that the often much larger, more detailed and more prescribed fee and access plans play a subsidiary role. Professor Elizabeth Treasure of Aberystwyth University told us that there was “a degree of retrofitting”⁶³ with Professor Julie Lydon elaborating:

“We are ahead of the Act, because actually our job is to think about the five and 10-year horizon. That’s the job of vice-chancellors, and actually, we’re in a business where we’re not turning out Mars bars [...] So, actually, our strategies are already set.”⁶⁴

Collaboration and widening access

89. HEFCW, Estyn and UCU argued that fee and access plans, and other provisions in the 2015 Act, do not facilitate or encourage collaboration between institutions on the widening access agenda.⁶⁵

90. Estyn states that its research has shown some evidence that decisions on compulsory school age curriculums can begin to adversely impact vulnerable learners well before they are able to make their own post-16 or university choices.⁶⁶

91. UCU went further, arguing that fee and access plans can encourage providers to compete for students rather than collaborating on widening access:

“[Fee and access plans] bear no relation to past government policy on re-configuration and collaboration, and effectively set up institutions in both the FE and HE sector to compete with one another for students. It fails to require institutions to collaborate to provide strategies which address the governments’ broader education policy agenda, for example Widening Access.”⁶⁷

92. The Minister set out her view on fee and access plans, saying:

“I’d like to think we can all agree around the principle of what a fee and access plan is hoping to achieve, but I think there are better ways of doing it, and I think we should take the opportunity of reform to look at how we can do it better.”⁶⁸

⁶³ Oral evidence, CYPE Committee, RoP [para 236], 18 July 2019

⁶⁴ Oral evidence, CYPE Committee, RoP [para 240], 18 July 2019

⁶⁵ Written evidence, CYPE Committee, HEA 09, 03 and 10

⁶⁶ Written evidence, CYPE Committee, HEA 03, pg 3

⁶⁷ Written evidence, CYPE Committee, HEA 10, pg 3

⁶⁸ Oral evidence, CYPE Committee, RoP [para 72], 26 September 2019

93. The Minister went on to explain that she felt the plans are too focused on inputs rather than outcomes but that progress had been made on the widening access agenda:

“Undoubtedly, despite the limitations of [fee and access plans], I do think we’re making progress in terms of access, but I don’t think we can necessarily point to the fee and access plans as being the driver for some of those improvements.”⁶⁹

Our view on the 2015 Act’s fee and access plans

94. We fully support the drive for fair access to higher education. We also recognise that providers are committed to the widening access agenda and have demonstrated significant effort in this area.

95. However, the evidence we received suggested overwhelmingly that fee and access plans are not fit for purpose. We were told that they are bureaucratic, resource intensive for HEFCW and universities and that they focus too much on inputs. Because of the length of time the process requires plans must be written without knowing how effective the last two plans have been. The Minister also explained that she was not sure that fee and access plans are the “driver for some of [the] improvements” she argued are being seen in widening access.⁷⁰

96. Considering that the Minister has stated an intention that fee and access plans will be carried forward into the tertiary education bill, and also considering that large sums of publicly backed funding are accounted for in the plans, we believe scope exists to consider making reasonable improvements to fee and access plans in the period before any new arrangements are commenced.

Recommendation 9. That HEFCW provide a copy of any evaluations of fee and access plans it has conducted to date.

Recommendation 10. That the Welsh Government work with HEFCW and other stakeholders toward the aim of identifying how the secondary legislation made under the 2015 Act in relation to fee and access plans can be amended to:

- reduce their administrative burden as far as possible;
- strengthen their effectiveness.

⁶⁹ Oral evidence, CYPE Committee, RoP [para 70], 26 September 2019

⁷⁰ Oral evidence, CYPE Committee, RoP [para 70], 26 September 2019

Lessons for the tertiary education bill

The bill must facilitate the Commission being able to **establish an environment in which providers are incentivised to adopt national or Commission outcomes and priorities seamlessly into their own strategies.**

97. Whilst HEFCW has strengthened powers and sanctions under the 2015 Act, we heard that in practice it relies on building and maintaining positive relationships with providers, working in partnership, and seeking to influence them toward contributing to national priorities.⁷¹ We also heard that this is achieved in part due to the small size of the sector.⁷²

98. HEFCW's most prominent lever, fee and access plans, relate only to the relatively narrow objectives of widening access. In our view, beyond widening access, HEFCW's ability to lever delivery of national priorities is surprisingly restricted if such priorities are not accompanied by associated hypothecated funding to providers.

99. We agree with the Minister that in future, tertiary education providers that benefit from public subsidy and funding should be expected to contribute to a wider range of national priorities, and that, on the whole, the focus should be on outcomes and not outputs or inputs:

“Personally, I wholeheartedly believe that tertiary education providers should contribute to national goals and outcomes as part of what I'd describe as a civic mission. I'm determined that any legislation that I bring forward and any commission that I establish will be empowered to enable that to happen through its regulatory and funding powers.”⁷³

100. We agree with the concept of Outcome Agreements which the Minister intends to introduce as part of the tertiary education bill, but recognise that measuring progress towards outcomes is a difficult task.

101. If Outcome Agreements are to succeed, we believe that they must play a central rather than peripheral role in provider planning and strategy setting. Whatever outcomes or priorities are set or negotiated by the Commission, those outcomes must somehow be adopted seamlessly within providers own strategies

⁷¹ See HEFCW's latest [corporate strategy](#), which sets out that it is a “funder, regulator and influencer”

⁷² Oral evidence, CYPE Committee, RoP [para 247], 18 July 2019

⁷³ Oral evidence, CYPE Committee, RoP [para 30], 26 September 2019

and plans. We believe that this will help ensure that governing bodies are also aligned behind them, which is a critical consideration.

102. Incentivising a varied set of autonomous providers to align meaningfully with national priorities is a difficult task. We recognise that too rigid an approach risks Outcome Agreements becoming window dressing and box-ticking, while too light-a-touch risks too little ambition. This is especially true in a sector that may evolve to contain very different types of provider.

Recommendation 11. That the Welsh Government ensure that the new tertiary education bill enables the Commission to set a regulatory and funding environment in which providers are incentivised to adopt outcomes seamlessly into their own strategies, thereby ensuring governing bodies and their providers are wholly aligned behind them.

6. Regulation, autonomy and student interests

In our view, the 2015 Act and other relevant legislation offers a minimalist conception of student interests. This is out of touch with student expectations and current debates in the sector. Our inquiry also illustrated that the 2015 Act does not allow HEFCW to set national outcomes for providers to align behind, and that outside of widening access, its formal policy levers are surprisingly limited.

103. The Explanatory Memorandum which accompanied the HE (Wales) Bill stated that one of the legislation's central principles was to ensure that providers would be regulated in proportion to the amount of public funding at stake.⁷⁴

104. We took evidence on whether the 2015 Act had achieved a proportional level of regulation and had protected institutional autonomy. The evidence reflected a complex set of views and opened a significant debate on whether the basis of regulation should be proportional to:

- the amount of public funding at stake (as currently); or
- the risk to student interests (and, if so, a further discussion on what constitutes student interests).

The basis of regulation

105. The Minister argued that the Act regulates in proportion to the amount of public funding that is at stake:

“I believe that the Act has struck that proportionality. When you look at public moneys going into institutions, I think that the Act is proportionate, myself.”⁷⁵

106. Universities Wales argued for a system of regulation that is more proportional to the risk to student interests, not just public funding:

⁷⁴ Welsh Government, revised [Explanatory Memorandum](#), para 65

⁷⁵ Oral evidence, CYPE Committee, RoP [para 92], 26 September 2019

“There is further scope for future arrangements to better address the needs and interests of the full range of students.”⁷⁶

107. In relation to what constitutes student interests, the Minister referred to the tests providers must pass under the current Welsh Government policy in order to have their courses individually designated:

“[...] the three crucial questions that those providers have to answer are quality—is what they’re providing to students of a good quality—the financial viability of the institution—again, to try to protect the interests of the students who may find themselves embarking on a course in an institution that isn’t viable—as well as their contribution to [...] public good.”⁷⁷

108. The Committee notes that this means there are no wider requirements regarding matters like the overall student experience, student well-being, or value for money - all debates that have become rightfully much more prominent over the last few years and which feature prominently in the work of the NUS⁷⁸ and in debates within the sector.⁷⁹⁸⁰⁸¹ For all intents and purposes, the same conception underpins providers who are regulated and have automatic designation of their courses.

Institutional autonomy and national priorities

109. On autonomy, we heard that the 2015 Act offers HEFCW almost no policy levers beyond fee and access plans. Furthermore, in HEFCW’s view, these plans are constrained by the inability to set national outcomes. The main policy levers utilised by HEFCW in the past and which it argued was the most effective, were the terms and conditions attached to their funding to providers.⁸²

110. Margaret Phelan of UCU told us:

⁷⁶ Written evidence, CYPE Committee, HEA 05, para 7.3

⁷⁷ Oral evidence, CYPE Committee, RoP [para 16], 26 September 2019. **HEFCW guidance** states that “public good” relates to the same duties regulated providers must undertake around widening access

⁷⁸ www.nus.org.uk/en/news/research-publications/

⁷⁹ <https://wonkhe.com/tag/value-for-money/>

⁸⁰ <https://wonkhe.com/tag/health-wellbeing/>

⁸¹ <https://wonkhe.com/tag/mental-health/>

⁸² Oral evidence, CYPE Committee, RoP [para 20], 18 July 2019

“The reality is that before they changed the funding model, HEFCW had really quite powerful financial levers in terms of what they could and couldn’t do. Once a decision was made that the funding followed the student, then all of those powers and funding levers that were available to HEFCW were no longer there.”⁸³

111. David Blaney explained:

“[the] importance of being able to have some sense of national priorities is important, because, actually, you have a policy context set by the Government, and we want to encourage institutions to respond to those policy priorities, and one of the best ways of doing that is to have some national targets for that.”⁸⁴

112. We asked the Minister whether she wished the Welsh Government could align the sector with national outcomes. The Minister responded by stating:

“Well, it’s not something I wish I could do; I think that we’re doing it [...] I think we’re seeing some success in using the remit letter to influence national outcomes.”⁸⁵

113. The Minister elaborated on the use of HEFCW’s annual remit letter as a key policy lever, beyond widening access:

“The remit letters are a really important way in which we can lay out those national priorities. I don’t think there’s anything in the legislation per se that prevents those national priorities being articulated and being acted upon.”⁸⁶

114. The Minister also stated that there is a need to ensure a balance is struck between institutional autonomy and being able to lever a sector which benefits from public subsidy into delivering national priorities:

“What we have to strike the balance of as well is at what point those powers seem to be [...] interfering with the principle of autonomy within an institution. So, there’s that balance to be struck, isn’t there, about creating a regulatory regime, which I’m very keen and the Act attempted to do, which was to enshrine institutional autonomy, and

⁸³ Oral evidence, CYPE Committee, RoP [para 403], 18 July 2019

⁸⁴ Oral evidence, CYPE Committee, RoP [para 7], 18 July 2019

⁸⁵ Oral evidence, CYPE Committee, RoP [para 33], 26 September 2019

⁸⁶ Oral evidence, CYPE Committee, RoP [para 12], 26 September 2019

that's really really important, but also a regulatory regime, the ability to influence and to develop and to deliver national outcomes and the power to intervene in that sector.”⁸⁷

Relative levels of risk

115. On the regulatory focus of the 2015 Act, like the Minister, Bethan Owens of HEFCW argued that the current level of regulation for established providers is appropriate:

“The current level is appropriate in view of the challenging environment the sector is in at the moment.”⁸⁸

116. Universities Wales maintained that the institutions that come under the 2015 Act represent less of a risk than alternative / private providers with shorter track-records. They explained that such providers do not currently, nor would ever be able to, come under the 2015 Act and would only need to meet the reduced regulatory requirements of specific course designation.⁸⁹ Professor Julie Lydon of the University of South Wales argued:

“[...] you do not want, actually, the part of the sector that is probably the most highly regulated, the most highly accountable—and, actually, according to the Wales Audit Office, is highly capable of managing its own affairs—to be the only bit any future Act covers when, actually, there are providers who are perhaps more questionable in their ability to operate.”⁹⁰

117. Professor Elizabeth Treasure stated:

“There are providers that may be higher risk—they need higher levels of scrutiny—and then providers with a track record in participating in national quality schemes can have a slightly lighter touch. And it seems to be slightly reversed at the moment.”⁹¹

118. Universities Wales set out the position of the sector as follows:

⁸⁷ Oral evidence, CYPE Committee, RoP [para 74], 26 September 2019

⁸⁸ Oral evidence, CYPE Committee, RoP [para 100], 18 July 2019

⁸⁹ Written evidence, CYPE Committee, HEA 05, para 7.4

⁹⁰ Oral evidence, CYPE Committee, RoP [para 189], 18 July 2019

⁹¹ Oral evidence, CYPE Committee, RoP [para 246], 18 July 2019

“The current system provides strictest regulation of the institutions who pose the lowest risk [the 8 traditional universities in Wales]. [There is] Potential for regulatory measures to focus better on areas of greatest need. At the moment the regulation has been increased for institutions that have already strong track records, rather than new and alternative providers.”⁹²

Our view on regulation, autonomy and student interests

119. We considered the question of whether regulation should be centred on the amount of public funding at stake (the Welsh Government’s position), or on the perspective of higher education students (Universities Wales and NUS Wales’ position).

120. In our view, the 2015 Act and the specific course designation criteria takes too narrow a view of student interests, seeing them mainly in terms of course quality and provider financial sustainability – the “threshold model”. We believe that this is model is one which is increasingly anachronistic in the context of sophisticated student expectations and an ever-increasing focus on for example student well-being, the overall student experience, and graduate employability. In our view every student should have their reasonable expectations met by any provider in Wales.

121. We were not entirely convinced by the Minister’s argument that the remit letter provides a fully effective policy lever. Whilst the letter has certainly seen some policy aims delivered, we do not believe that it is an appropriate mechanism to robustly align the sector with national priorities over longer periods of time. Moreover, given the evidence we have received about HEFCW’s powers, it is not clear to us how HEFCW can effectively monitor and drive alignment unless policies in the remit letter are accompanied by hypothecated funding from the Minister.

122. On autonomy, it is clear to us that there is currently a gap between the Minister’s aim of better alignment with national priorities and HEFCW’s view on its ability to set national priorities. We agree with the principle that bodies benefitting from public funding and publicly subsidised funding should be expected to make appropriate contributions to wider outcomes, and that this can be achieved without compromising institutional autonomy.

⁹² Written evidence, CYPE Committee, HEA 05, para 7.4

123. Whilst it is not possible to amend the 2015 Act in the time available, we believe there is scope to amend the Welsh Government’s specific course designation policy, which is not statutory. In our view it could be amended to address a wider conception of student interests, particularly as this is a route to public funding more likely to be used by non-traditional providers. We recognise that specific course designation should not have a higher threshold than providers need to meet to become regulated institutions under the 2015 Act, but we also believes that the status quo can be improved.

Recommendation 12. That the Welsh Government amend its specific course designation policy so that it takes into consideration a wider and more reasonable concept of student interests than the current “threshold” model of course quality, financial sustainability and “public good” (defined in practice in HEFCW guidance as widening access).

Lessons for the tertiary education bill

The tertiary education bill must allow for **a more inclusive and relevant conception of student and learner interests** and it must facilitate their protection.

124. The evidence we received from NUS Wales showed that the interests of students extend far beyond the narrow conception discussed above. NUS Wales gave us a flavour of the high level of student expectation within the higher education sector:

“NUS Wales currently operates on the assumption that this [tertiary education] vision would be framed around education which is accessible to all, flexible and portable in its delivery, and delivered and designed in partnership with students and their unions, informed by the Wise Wales Principles of Partnership.”⁹³

125. We believe that student interests extend to matters including, but not limited to, well-being, the student experience, value for money and employability on graduation, but in anycase these should be set out by students themselves via effective learner representation mechanisms.

Recommendation 13. That the Welsh Government, in the tertiary education bill, shifts the emphasis from regulation based on the sum of public funding at stake, to a greater focus on regulation based on a reasonable, inclusive and relevant

⁹³ Written evidence, CYPE Committee, HEA 04, pg 4

understanding of student interests, ensuring the bill supports and safeguards them. This should enable learners to have their reasonable student expectations met at any regulated post-16 provider.

Recommendation 14. That the Welsh Government, via the tertiary education bill, ensure that suitable learner voice mechanisms are established and maintained by all providers regulated by the Commission, and that the student voice must be given due regard by the Commission itself. This will help ensure that what represents student interests can evolve over time.

7. Implementation and transition

It is clear to us that the implementation of the 2015 Act was more complicated and resource intensive than anticipated, yet it is relatively narrow in scope compared to the ambition proposed for the new bill. Considering the complexity of the reforms, we believe it is essential that the tertiary education bill provides for suitable transition and business continuity arrangements.

126. The evidence we received indicate that the implementation period of the 2015 Act, and the practical transition to the new regulatory regime, were both more resource intensive and complex than expected.⁹⁴

127. HEFCW explained that whilst it was difficult to estimate exact costs, the additional staff time required meant other aspects of its work being de-prioritised:

“Our estimated costs are more than that estimated by the Welsh Government previously. We estimated at the time that in order to implement the Act as effectively as possible we would have needed to employ extra staff. We were not able to achieve this and staff working on developing and implementing the Act were also responsible for continuing HEFCW’s ongoing work in addition to this. This has impacted on our ability to deliver our remit effectively.”⁹⁵

128. This view on costs was echoed by Universities Wales:

“[...] the actual costs for universities (including Universities Wales) appear to have significantly exceeded the Welsh Government’s estimates.”⁹⁶

129. HEFCW stated that it had incurred legal costs of £54,000 associated with the implementation of the 2015 Act. HEFCW also told us that the drafting of the 2015 Act caused issues interpreting and attempting to operationalise its provisions. HEFCW explained that the concept of “quality that was likely to become inadequate” contained within the 2015 Act in particular required considerable

⁹⁴ Written evidence, CYPE Committee, HEA 05, para 4.3; HEA 09 para 3.1

⁹⁵ Written evidence, CYPE Committee, HEA 09, para 3.1

⁹⁶ Written evidence, CYPE Committee, HEA 05, para 4.1

effort to understand and work-through with experts. Universities Wales echoed this theme:

“In terms of implementation, a very significant amount of time and resource was spent on developing interim and transitional arrangements as well as final arrangements including the Fee and Access Plan guidance, partnership guidance, the Full and Transitional Statements of Intervention, and the Financial Management Code (staged through revisions to the Financial Memorandum first).”⁹⁷

130. The Welsh Government has acknowledged that, whilst the Act has not resulted in any significant new costs to Welsh Government, HEFCW has incurred additional annual costs of some £250,000 a year.⁹⁸ The Minister explained to us that she has given assurances that HEFCW’s allocation will rise in the future, although it is was not made clear to us to what extent HEFCW will be able to use its additional allocation for its own running costs rather than disbursing it to the sector.

Our view on implementation and transition

131. The Act was fully commenced on 1 August 2017. Since then implementation efforts have largely been replaced with “business as usual” under the 2015 Act.⁹⁹

132. In our view, key lessons from the implementation of the 2015 Act have been:

- the under-estimation of resourcing required, even for a piece of legislation of relatively limited scope;
- the need for HEFCW to seek legal advice on matters that could have been set out clearly if there had been closer consultation during the drafting process.

⁹⁷ Written evidence, CYPE Committee, HEA 05, para 4.5

⁹⁸ Welsh Government, [evidence submission to inquiry](#)

⁹⁹ HEFCW, [Annual Regulatory Report 2017/18](#)

Lessons for the tertiary education bill

The far more complex and wide-ranging Tertiary Education reforms need **continuous stakeholder engagement** and an **orderly transition period**. This should include shadow arrangements and business continuity measures for the new Commission

133. The Welsh Government has conducted two formal consultation exercises and a series of consultation workshops in regard to the tertiary education reforms. Welsh Government officials explained that since those exercises, the more detailed provisions of the bill have not been discussed with stakeholders.

134. Huw Morris, Director Skills, Higher Education and Lifelong Learning, Welsh Government, explained:

“[...]the challenge of preparing a Bill is the balancing act between gathering in information—and there’s been a general consultation process and a technical consultation process—and wanting to make sure that the Bill that’s laid next year hasn’t been discussed with anybody else before it comes to be considered by the Senedd. So, the broad principles have been discussed, but specific details of what goes into a Bill or policy instructions that inform a Bill haven’t been the subject of consultation.”¹⁰⁰

135. We agree with HEFCW that considerable problems can emerge if the details of relevant forthcoming legislation are not consulted on:

“To avoid some of these [problems] the development of the legislation and the detail in the legislation should be discussed first with those who have experience of implementing current arrangements, such as HEFCW, before the legislation is laid in the Assembly.”¹⁰¹

136. Other key stakeholders have also explained that since the Welsh Government consultations, engagement on the detail of the bill has been limited. Estyn told us:

“The Welsh Government conducted some helpful stakeholder engagement prior to the technical consultation. However, there has been limited communication with stakeholders about the legislative

¹⁰⁰ Oral evidence, CYPE Committee, RoP [para 78], 18 July 2019

¹⁰¹ Written evidence, CYPE Committee, HEA 09, para 7.1

timescales going forward or opportunities to help shape the draft Bill.”¹⁰²

137. For reforms of this scale, we believe the publication of a draft bill would have been appropriate but note that no such undertaking has been made by the Welsh Government.

138. We are very concerned that history will repeat itself and the difficulties of implementing and transitioning to the new tertiary education system will be made unnecessarily problematic by a lack of consultation on the detail of the legislation and/or publication of a draft bill.

139. Several stakeholders, including Estyn, have argued for an implementation period to the 2015 Act. Estyn, using the example of the 2015 Act’s development and passage through the Assembly told us:

“We submitted evidence to your Committee’s Inquiry on law-making in the 4th Assembly, prior to the introduction of the [original Higher Education] Bill on the 19th June 2014 which raised concerns about the lack of consultation and engagement with the sector on detailed proposals or a Draft Bill following the close of the Technical consultation in June 2013. In our view many of the problems with the Bill that had to be ironed-out during the legislative passage or have remained, could have been avoided and dealt with more efficiently prior to its introduction.”¹⁰³

140. We are conscious of the need, in the transition to regulation by the new Commission, not to lose the considerable expertise, experience and knowledge of existing staff either in the Welsh Government and HEFCW.

Recommendation 15. That the Welsh Government publish a draft tertiary education bill to allow stakeholders to engage with the details of the proposed legislation.

Recommendation 16. That the Welsh Government set out how it intends to ensure business continuity of the vital day-to-day functions of the current regulatory and funding bodies (such as making normal regular payments of funding to providers) during the transition to the new Commission.

¹⁰² Written evidence, CYPE Committee, HEA 03, pg 3

¹⁰³ Written evidence, CYPE Committee, HEA 05, para 8.2

Recommendation 17. That the Welsh Government explain how it intends to ensure that the corporate memories in HEFCW and the Welsh Government are not lost in the transition to the new Commission.

Recommendation 18. That the Welsh Government ensure that the tertiary education bill provides for suitable transition arrangements and that a shadow Commission is established as soon as practicable to help provide for a smooth transition to the new body.

Recommendation 19. That the Welsh Government provide copies of the year one and year two evaluations it committed to in the Explanatory Memorandum of the 2015 Act. If these reviews have not been conducted, an explanation of the reasons why they have not should be provided.

Annex A: List of oral evidence sessions

The following witnesses provided oral evidence to the Committee on the dates noted below. [Transcripts of all oral evidence sessions](#) can be viewed on the Committee's website.

Date	Name and Organisation
18 July 2019	<p>Dr David Blaney, Chief Executive, Higher Education Funding Council for Wales</p> <p>Bethan Owen, Deputy Chief Executive, Higher Education Funding Council for Wales</p> <p>Meilyr Rowlands, Her Majesty's Chief Inspector, Estyn</p> <p>Jassa Scott, Strategic Director, Estyn</p> <p>Professor Julie Lydon, Chair, Universities Wales</p> <p>Professor Elizabeth Treasure, Deputy Chair, Universities Wales</p> <p>Ben Arnold, Policy Adviser, Universities Wales</p> <p>Maggie Griffiths, Assistant Principal, Grŵp Llandrillo Menai</p> <p>Emil Evans, Vice Principal, Cardiff and Vale College</p> <p>Mike Williams, Assistant Principal, Coleg Sir Gâr / Coleg Ceredigion</p> <p>Margaret Phelan, University and College Union Official</p> <p>Dr Bethan Winter, Policy and Communications Officer, University and College Union Wales</p> <p>Rob Simkins, President, National Union of Students Wales</p> <p>Joni Alexander, Interim Director, National Union of Students Wales</p>
26 September 2019	<p>Kirsty Williams AM, Minister for Education Welsh Government</p> <p>Huw Morris, Director of Skills, Higher Education and Lifelong Learning Group, Welsh Government</p>

Annex B: List of written evidence

The following people and organisations provided written evidence to the Committee. All consultation responses and additional written information can be viewed on the Committee's website.

Reference	Organisation
HEA 01	The College Merthyr Tydfil
HEA 02	Coleg y Cymoedd
HEA 03	Estyn
HEA 04	NUS Wales
HEA 05	Universities Wales
HEA 06	Cardiff and Vale College
HEA 07	University of South Wales
HEA 08	Cardiff University
HEA 09	Higher Education Funding Council for Wales (HEFCW)
HEA 10	University & College Union
HEA 11	Welsh Language Commissioner
HEA 12	UNISON Wales