

Number: **WG18516**



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## Consultation Document

### Higher Education (Wales) Bill

Welsh Government response to the higher education proposals of the FE and HE (Wales) Bill White Paper, and further technical consultation

Date of issue: **20 May 2013**

Action required: Responses by **29 July 2013**

# Higher Education (Wales) Bill

## Overview

The Further and Higher Education (Wales) Bill White Paper published in July 2012 set out the Welsh Government's proposals concerning reform of the current higher education (HE) regulatory framework. Fifty-five written responses to the White Paper consultation exercise were received and revisions have been made to the Welsh Government's proposals as a result of the feedback. The consultation summary report can be accessed at [www.wales.gov.uk/consultations/education/feandhebill/?status=closed&lang=en](http://www.wales.gov.uk/consultations/education/feandhebill/?status=closed&lang=en)

The purpose of this document is twofold:

- to present the Welsh Government's response to the higher education proposals in the White Paper consultation
- to undertake further engagement with stakeholders on the technical detail of Welsh Government's legislative proposal.

The technical consultation seeks views on how the revised regulatory system should operate within the proposed framework. Responses will inform refinements to the proposals including forthcoming legislation. It covers:

- introduction of a revised approach to the designation of higher education courses for the purpose of statutory student support
- arrangements for the enforcement of tuition fee cap and fee plans
- quality assessment of higher education provision
- financial and governance assurance.

## How to respond

Responses to this consultation should be e-mailed/posted to the address below to arrive by **29 July 2013** at the latest.

## Further information and related documents

Large print, Braille and alternate language versions of this document are available on request.

The consultation documents can be accessed from the Welsh Government's website at [www.wales.gov.uk/consultations](http://www.wales.gov.uk/consultations)

## Contact details

Enquiries about this document should be directed to:

Brendan Murtagh  
Legislation Team  
Corporate Services Division  
Department for Education and Skills  
Welsh Government  
Freepost NAT 8910  
Cathays Park  
Cardiff  
CF10 3NQ

e-mail: [highereducationwalesbill@wales.gsi.gov.uk](mailto:highereducationwalesbill@wales.gsi.gov.uk)

Tel: 029 2082 6585

## **Data protection**

### **How the views and information you give us will be used**

Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

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# 1. Introduction

- 1.1 The Further and Higher Education (Wales) Bill White Paper published in July 2012 set out the Welsh Government's proposals concerning reform of the current higher education (HE) regulatory framework. 55 written responses were received to the White Paper consultation exercise and revisions have been made to the Welsh Government's proposals as a result of the feedback. The consultation summary report can be accessed at <http://wales.gov.uk/consultations/education/feandhebill/?status=closed&lang=en>
- 1.2 The purpose of this document is twofold:
- to present the Welsh Government's response to the White Paper consultation (**Part A**); and
  - to undertake further engagement with stakeholders on the technical detail of Welsh Government's legislative proposals (**Part B**).
- 1.3 Part A summarises the feedback received to the White Paper consultation and sets out which proposals are to be progressed in legislation.
- 1.4 The technical consultation at Part B builds on the White Paper proposals and sets out the Welsh Government's intentions for a revised higher education regulatory framework including amendments to the functions of the Higher Education Funding Council for Wales (HEFCW) and changes to the arrangements for designation of higher education courses for the purpose of statutory student support.
- 1.5 This document seeks your views on how the revised regulatory system should operate within the proposed framework. Responses will inform refinements to the current proposals including forthcoming legislation. The technical consultation covers:
- introduction of a revised approach to the designation of higher education courses for the purpose of statutory student support;
  - arrangements for the enforcement of the tuition fee cap and fee plans;
  - quality assessment of higher education provision; and
  - financial and governance assurance.

The deadline for responses is **29 July 2013**.

## 2. Part A: Welsh Government response to the Further and Higher Education (Wales) Bill White Paper consultation

### Outcomes of the White Paper consultation exercise

- 2.1 This section summarises the feedback received to the White Paper consultation and sets out which proposals are to be progressed in legislation and those which are not. A full summary of the consultation responses is available on the Welsh Government web site.
- 2.2 The White Paper focused on the legislative changes necessary to ensure that HEFCW<sup>1</sup> has the appropriate powers and duties under the new higher education funding arrangements. In addition, the White Paper proposed to strengthen HEFCW's statutory duties relating to quality assessment of higher education as well as implementing Programme for Government commitments to strengthen the learner voice and improve the student experience. Additionally, the White Paper sought stakeholders' views on proposals for the Welsh Ministers to directly fund higher education in strategically appropriate circumstances.
- 2.3 Following consideration of the consultation responses it has been decided that the following proposals **will not** be taken forward in the forthcoming Bill:
- to enable higher education provision to be funded directly by Welsh Ministers in instances where it is strategically appropriate to do so;
  - to place HEFCW under a duty to secure that provision is made for enhancing the quality of higher education; and
  - to extend current dispute resolution arrangements and to strengthen requirements relating to student union funding and the development of Student Charters.

The rationale for these decisions is outlined below.

### Supporting partnership and collaborative activities

- 2.4 The consultation sought stakeholders' views on two questions:
- Do stakeholders agree that a provision for Welsh Ministers to directly fund higher education in strategically appropriate circumstances would be beneficial for partnership and collaborative activities?

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<sup>1</sup> The Higher Education Funding Council for Wales is referred to as HEFCW and 'the Council' in this document and these terms are used interchangeably.

- Would there be any disadvantages arising from Welsh Ministers funding higher education provision directly in strategically appropriate circumstances?

There was a relatively even split between those in support of a provision for the Welsh Ministers to directly fund higher education in strategically appropriate circumstances, and those opposed to such a provision.

2.5 The feedback supporting the proposal included the following:

- the Welsh Government should be able to respond to special situations and fund higher education in strategically important areas in response to identified needs;
- investment in strategic areas is important and could encourage further transformational change;
- the proposal could be appropriate in certain circumstances and help to foster collaboration between HE institutions and other parties provided that there is not a detrimental impact on higher education funding; and
- the proposal could potentially contribute towards widening access and the need to safeguard the interests of learners in all areas of Wales, including the right to Welsh-medium provision.

2.6 However, the majority of respondents to the second question indicated potential disadvantages in their responses, including some of those who were in favour of a direct funding provision. Only one response specifically stated that there were no disadvantages. There were many reasons given for opposing the proposed provision and a range of disadvantages were cited, including:

- the provision could breach the long-held principle that institutions should operate at 'arms-length' from Government and/or could potentially interfere with institutional autonomy and academic freedom;
- the provision could be perceived as direct government intervention and encourage Office of National Statistics (ONS) reclassification of HE institutions as public bodies for accounting purposes or compromise the charitable status of universities;
- the provision would not necessarily achieve the kind of financial benefits, economies of scale, advantages etc cited in the White Paper as desired outcomes;
- the type of activities the Government wished to support could be funded within the existing legislative framework;
- the experience and expertise of HEFCW in higher education and funding was valued and was something that the Welsh Government would need time to develop; and



- there was a lack of transparency over when the provision would be used – how ‘strategically appropriate’ would be defined, where the money would come from and how it would be allocated etc.

2.7 Those responses opposed to the provision were not necessarily against Ministers directing funding towards Government strategic priorities. However some indicated that the Welsh Ministers’ annual remit letter to HEFCW and their acceptance of HEFCW’s corporate strategy continued to be the most appropriate mechanism for this. Other responses offered alternative suggestions some of which included:

- additional legislative powers for HEFCW to fund wider partnership activities and initiatives;
- amendments to HEFCW’s current processes for funding partnerships and consortia;
- fully exploring the potential of existing mechanisms such as HEFCW’s Reconfiguration and Collaboration and Strategic Development Funds using criteria linked to specific Government priorities;
- exploring other options such as how existing agencies can collaborate on such strategic issues; and
- a statutory duty for HEFCW to secure regional coherence in higher education delivery.

2.8 While there was support from stakeholders for the proposed provision, on balance it was considered that this was outweighed by the volume and nature of the disadvantages provided in the consultation responses.

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

2.9 The consultation sought stakeholders’ views on three questions:

- Do you agree that the proposed statutory duty to secure that provision is made for quality assessment and enhancement should extend to the following: all HE institutions; providers with degree awarding powers; and any other providers who offer courses which are designated for the purposes of student support operating in Wales (but which are not HE institutions or do not have degree awarding powers)?
- In relation to HEFCW having due regard to quality assurance and enhancement guidance provided by the Welsh Government, what guidance would be considered beneficial to quality assurance and enhancement?
- What other changes could be implemented to make the quality assurance system in Wales more robust?

2.10 The majority of responses received to the first question were in support of the proposal. Reasons provided included that it would ensure:

- consistency of quality assurance arrangements across all providers in Wales;
- a minimum level of quality to all students and fundamental to the learner voice and experience;
- equitable treatment across all types of providers; and
- wider protection of the HE reputation in Wales.

One reason supplied against the proposal was that quality assessment and enhancement should be proportionate to the extent to which individual providers participate in/benefit from student support arrangements. Another reason was that the new regulatory arrangements could potentially complicate existing quality assurance regulation arrangements for further education (FE) institutions.

- 2.11 It is possible that some respondents may have misunderstood both HEFCW's current statutory duties<sup>2</sup> and, although supportive of it, the intent of the proposed new duty. Several of the responses expressed concern that the proposal would negatively impact on the current service level agreement between HEFCW and the Quality Assurance Agency (QAA) or stressed that the responsibility for quality assessment should remain with QAA.
- 2.12 In relation to the second question, the responses offered constructive suggestions for guidance. Feedback indicated that the Welsh Government should ensure that any guidance avoids unnecessary duplication of monitoring and reporting activities and builds on existing arrangements. Some of the responses did not consider that it was appropriate for the Government to issue guidance; one reason supplied was that this was best left to the QAA and HEFCW.
- 2.13 In response to the third question, some comments indicated that the current process overseen by the QAA is already sufficiently robust. It was noted that additional controls could increase bureaucracy without benefiting learners and the current arrangements should be reviewed prior to changes being introduced. However, other comments provided helpful suggestions for increasing the robustness of the current system.
- 2.14 Feedback on the subject of quality enhancement was received across the responses to all three questions. There were no comments that expressed the need for a statutory duty in relation to quality enhancement or explicitly advised against one. There was support that the QAA, through a service level agreement, was best placed to provide HEFCW with the information it requires to assess the quality of provision and to ensure quality enhancement. It was clear that the QAA is considered an internationally recognised kitemark of quality and a strong UK brand, the visibility of which is a benefit to Wales.

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<sup>2</sup> The Further and Higher Education Act 1992 places HEFCW under a statutory duty to make arrangements for assessing the quality of the provision it funds or intends to fund, and to establish a quality assessment committee of which the majority of members are to be drawn from outside of the Council. HEFCW currently exercises this duty through a service level agreement with the Quality Assurance Agency for Higher Education (QAA).

Several responses emphasised the strong commitment to quality enhancement already being implemented in Wales, with activities underway and well established arrangements in place. These included but were not limited to the inclusion of a new Chapter on student engagement in QAA's Quality Code and the ongoing work of the Higher Education Academy.

2.15 While the responses were clearly supportive of the policy intention to focus on quality enhancement some cautionary feedback included:

- that higher education across the UK is experiencing a period of fluidity in a difficult economic environment and that the Welsh Government should avoid being too prescriptive with a new quality and enhancement duty for HEFCW; and
- that it should be ensured the proposed new duty for HEFCW met the intended objective and that consideration be given to a reciprocal duty for all providers to comply with HEFCW's requirements, including the costs of relevant quality assessment and enhancement requirements.

2.16 Part of the underpinning rationale for placing enhancement on a statutory basis was to demonstrate that quality of higher education is a long-term priority for the Welsh Government. However, in light of the activity in support of quality enhancement which is already underway consideration has been given as to whether a statutory provision is currently necessary. The consultation feedback does not indicate that a statutory duty is necessary to ensure that enhancement of the quality of higher education takes place, or provide any evidence to suggest that current enhancement activities are in some way deficient. It has been concluded that it would be prudent to allow time for the activities currently underway to embed and their effectiveness to be evaluated before making further changes.

## **Strengthening the learner voice**

2.17 The consultation sought stakeholders' views on three questions:

- What impact has the HEFCW guidance had so far on ensuring that student unions are provided with sufficient funding to deliver a common set of functions? What else should be done to satisfactorily achieve this aim?
- Is the common set of functions for student unions included in the HEFCW guidance appropriate?
- Has the HEFCW guidance been effective enough in ensuring that HE institutions develop student charters in consultation with student unions? If not, what else should be done to satisfactorily achieve this aim?

2.18 Most responses to the first question stated that the guidance issued by HEFCW had been useful. Some noted that it formalised existing practices and others that it was not possible to fully assess the impact of the guidance at this early stage. One response, although supportive of the guidance, expressed concern with its application, and suggested that the improvements made by institutions were not leading to fundamental and meaningful change.

Several responses suggested that the guidance should be reviewed and refreshed periodically to ensure that it continues to reflect best practice and remains relevant and appropriate.

- 2.19 Most responses to the second question agreed that HEFCW's guidance on the common set of functions for student unions was appropriate although it was suggested that this should be regularly reviewed. One response noted that it would be useful to revisit the functions to explore how they may be developed in the future to reflect a more 'progressive' partnership. Another response indicated that with increasing demands on available resources it may be necessary to review the functions and prioritise them. The responses provided some suggestions for further (non-legislative) work that could be undertaken and highlighted good practice and work already underway in the sector. Only two responses did not agree that the guidance was appropriate on the basis that student unions should not be held accountable to the institution but to their membership.
- 2.20 Most responses to the third question noted that HEFCW's guidance had been effective in ensuring that institutions developed charters in consultation with student unions and that the dialogue with the union was informed and constructive. One response stated that no material change was required as systems for partnership working were already well-established; however the value of codifying this partnership in a charter was acknowledged. Another noted that the guidance was sophisticated enough to take account of the institution's particular structure. Several responses supported a regular review of student charters however some considered that whilst HEFCW should not be prescriptive in how HE institutions and student unions review their charters, guidance on undertaking an effective and robust review would be helpful to ensure the charter is fit for purpose. Many suggestions were provided in relation to the development of student charters including that the existing Student Engagement Group should be utilised in the future to consider what additional support or guidance could be given to both universities and student unions.
- 2.21 Overall it has been concluded there has been insufficient time to judge the impact of HEFCW's guidance on student union funding and the development of student charters. Without clear evidence of need it would be inappropriate to include provisions relating to student union funding and the development of student charters in legislation at this time. Progress in these areas will continue to be taken forward via collaboration with the higher education sector and students. HEFCW has been requested to monitor the impact of the student union funding and student charter guidance documents and to provide reports to the Welsh Government on these matters by November 2013.
- 2.22 The White Paper stated that it will become increasingly important for all students enrolled on courses which the Welsh Government has designated for statutory student support purposes to have recourse to the Office of the Independent Adjudicator (OIA) complaints scheme (or alternative provision in Scotland and Northern Ireland). Currently, a student's access to dispute resolution procedures varies according to the type of provider at which they

study. All English and Welsh universities (whether publicly or privately funded) and other publicly funded HE institutions are qualifying institutions for the purposes of the OIA complaints scheme and have to comply with the requirements of the scheme. The OIA has also put arrangements in place for some non-qualifying institutions to join the scheme on a voluntary basis. If an HE provider is not a qualifying institution for the purposes of the scheme or a voluntary member of the scheme, students at that institution will not be able to refer their complaint to the OIA.

Stakeholders' views were sought on the following question:

- Do you agree that all HE institutions and providers offering courses designated for statutory student support should comply with OIA student dispute resolution arrangements (on an institution-wide basis)?

2.23 The majority of respondents agreed that all providers offering courses designated for statutory student support should be required to comply with the OIA student dispute resolution arrangements on an institution-wide basis. It was considered that such a requirement would help protect learners' interests and establish a level playing field for all providers of higher education. Other feedback included that institutions should be encouraged to have a complaints and appeals process for applicants as these currently fall outside the remit of the OIA and that all HE institutions should have internal complaints procedures, which are adequate to meet the needs of students, before they join the OIA Scheme. One response highlighted the work of the OIA and the QAA and the forthcoming Memorandum of Understanding (MoU) between the two organisations. It was noted that the MoU will lead to the sharing of relevant information and in some cases applicants to the OIA complaints scheme may be referred to QAA Concerns scheme (and vice versa). It was also noted that the development of a section of the QAA's Quality Code concerning complaints and appeals is intended to provide a set of expectations for higher education providers.

2.24 The practicalities associated with making provision for private providers and FE institutions to comply with the OIA complaints scheme require careful consideration. For instance the vast majority of private providers seeking designation of their courses for the purpose of Welsh Government statutory student support are located in England and also deliver their courses in England. As the scheme operates on an England and Wales basis any potential amendments will be discussed with the Department for Business, Skills and Innovation.

## **Proposals to be taken forward in legislation**

2.25 The proposals relating to revised arrangements for the continued regulation of higher education provision delivered in Wales are to be progressed in legislation. The majority of the proposals which are to be progressed were set out in section 4.1 (New funding and student-support arrangements) of the White Paper. They have been further developed in light of consultation responses and are to be integrated with revised arrangements for quality

assessment and fair access to higher education (sections 4.3 and 4.4 of the White Paper respectively).

2.26 The White Paper sought stakeholders views on the following questions related to regulatory oversight of higher education:

- Do you agree that provision should continue to be made for the Welsh Government to provide support to students who seek to access designated HE courses delivered by private providers?
- What are the advantages and disadvantages of maintaining such support?
- Do you agree that all providers of HE in Wales which offer courses which are designated for the purposes of student support should be required to comply with arrangements:
  - on an institution-wide basis (concerning financial and quality assurance and dispute resolution via the OIA); and
  - arrangements in respect of individual courses (fair access arrangements, fee regulation, information provision and student number controls)?
- Do you agree that all HE institutions and providers offering courses designated for statutory student support should comply with fair access arrangements in relation to those courses; and
- How can the fair access arrangements be improved? Do you agree there is a need for change through strengthened powers for HEFCW?

2.27 Overall, stakeholders' responses indicated that the continued provision of student support to learners accessing designated courses delivered by private providers, accompanied the proposed revisions to regulatory arrangements, should contribute towards a level playing field for all providers and maximise student choice. However, respondents considered that the proposal to maintain such support could result in an increased call on the Welsh Government's student support budget and some reservations were expressed about for-profit organisations benefiting from Welsh Government-backed student loans. Respondents strongly supported the introduction of revised regulatory proposals for all providers of higher education in Wales which offer courses which are designated for the purposes of student support.

2.28 The majority of responses agreed with the proposals but cited a number of disadvantages and caveats. Several respondents commented that continued provision of student support to learners who access designated courses delivered by private providers accompanied by the proposed new regulatory arrangements would contribute towards a level playing field for all providers. However, other responses disagreed with this view as private providers have access to other funds and the fees they charge are not regulated. It was considered by those respondents that continuation of the existing approach would be more equitable, enabling learner access to designated courses delivered by both public and private institutions and consistent with the Welsh

Government's objective for learners ordinarily resident in Wales to have access to a wide range of higher education courses and providers. The responses indicated that one of the main disadvantages to the proposal was the potential for an increased call on the Welsh Government's student support budget. A number of concerns were raised in relation to private providers.

- 2.29 The majority of responses agreed that all providers of higher education in Wales which offer courses which are designated for the purpose of student support should be required to comply with arrangements in respect of individual courses for fair access, fee regulation, information provision and student number controls. Respondents argued that a consistent approach to these arrangements would be in the best interest of both students and institutions and also protect and enhance the reputation and quality of Welsh higher education. However, it was noted by a number of respondents that these arrangements should be both reasonable and proportionate.
- 2.30 All respondents agreed in principle that all higher education institutions and providers offering courses designated for statutory student support should be required to comply with fair access arrangements in relation to those courses. The rationale for this response focused on three broad issues: protecting the interests of the learner, protecting the public purse and establishing a level playing field to all providers of higher education. However, there was also concern expressed that the revised requirements should not place institutions at a competitive disadvantage to others in the UK sector. Clarification was sought on the geographical scope of the proposals.
- 2.31 Related to the proposed revised arrangements for tuition fee controls there was a mixed response to the question of whether HEFCW's powers relating to fair access should be strengthened. The majority of higher education institutions that responded to this question were unconvinced of the need for HEFCW to have stronger powers in this area. However, some respondents recognised that additional powers may be required to ensure that all providers comply with fair access processes and others argued that the processes regarding fee plans needed to be strengthened in order to improve fair access arrangements. The intention is to strengthen HEFCW's powers in relation to fair access arrangements in the context of the revised regulatory framework.
- 2.32 In developing our proposals for a revised regulatory system it has been necessary to adapt the scope of the proposals set out in the White Paper so that the proposals satisfy the following conditions:
- they are within the National Assembly's legislative competence;
  - they provide for regulatory control over higher education provision supported by Welsh Government backed grants and loans;
  - they are proportionate in their application; and
  - they are practically deliverable.

The revised regulatory framework is the subject of the technical consultation (part B of this document) and the following sections describe both the proposed controls and the future operation of the framework. Stakeholders' views are sought on its implementation.



## Part B: Technical consultation

### 3. The need for change

- 3.1 This section sets out why a revised legislative framework for the regulation of higher education in Wales is needed and sets the context for the changes presented in section 4 of this paper.
- 3.2 The Welsh Government responded to the decision by the UK Government to substantially increase higher education tuition fees in England by introducing new higher education funding and statutory student support arrangements specific to the needs of Wales. The new arrangements were introduced from the 2012/13 academic year for students commencing full-time undergraduate higher education courses from 1 September 2012 and have implications for the way in which HEFCW discharges its functions.
- 3.3 HEFCW has a statutory duty, under the Further and Higher Education Act 1992, to secure that provision is made for assessing the quality of education provided in institutions for whose activities the Council provides, or is considering providing, financial support. HEFCW currently discharges this duty via the Quality Assurance Agency (QAA) and enforces specific requirements concerning the quality of higher education via conditions attached to the funding it allocates to institutions. HEFCW's requirements in respect of institutions' financial health and governance arrangements are also implemented via conditions attached to funding made available to institutions. These conditions are included in the financial memoranda between the Council and individual institutions.
- 3.4 The current arrangements for higher education tuition fees are underpinned by the Higher Education Act 2004 which makes provision for institutions in Wales charging fees above the basic amount (currently £4,000) to secure equality of access to higher education.<sup>3</sup> These arrangements have been implemented under the new fees regime in the form of fee plans and in March 2011, HEFCW was designated as the body with statutory responsibility in Wales for the approval and enforcement of fee plans. In line with the new arrangements for the regulation of tuition fees from 1 September 2012, 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. An institutional fee plan must set out measures, such as outreach work and financial support, to be delivered by the institution to promote higher education and equality of access to higher education. HEFCW's ability to enforce fee controls and fee plan commitments is also underpinned by conditions attached to funding which the Council allocates to institutions.

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<sup>3</sup> Welsh Ministers have made regulations under the Higher Education Act 2004 which set out the requirements for fair access, namely: The Student Fees (Approved Plans) (Wales) Regulations 2011 (SI 2011/884) (W.128) and The Higher Education Act 2004 (Relevant Authority) (Designation) (Wales) Regulations 2011(SI 2011/658) (W. 96).

- 3.5 Under the new funding arrangements introduced from academic year 2012/13, a significant proportion of higher education recurrent grant funding (previously allocated to institutions by HEFCW under section 65 of the Further and Higher Education Act 1992), will start to be paid out by HEFCW through student tuition fee grants. Such grants to which eligible students are entitled, stand outside the regime through which the Welsh Government makes funding available to HEFCW to fund higher education. Over time this shift in funding will have implications for the continued discharge of HEFCW's functions.
- 3.6 HEFCW's influence over the higher education sector through conditions attached to the recurrent grant allocated to institutions will reduce over time as a significantly greater proportion of institutions' funding is derived from tuition fees. This has implications for the way in which HEFCW:
- imposes fee controls and enforces fee plan commitments;
  - makes provision for the assessment of the quality of higher education; and
  - provides assurance about institutions' financial health and governance arrangements.
- 3.7 The higher education landscape is undergoing significant change both in terms of the type of provision and the nature of the provider base, for example, growth in e-learning and distance learning and a more differentiated provider base with more higher education courses being offered by FE institutions and by other providers. In addition, as the recurrent grant allocated by HEFCW to Welsh HE institutions is replaced by fee income, it will become increasingly difficult to rely on HEFCW's existing functions in order to: enforce fee controls, assess the quality of higher education provision and provide assurance about the use of public funds. The regulatory controls administered by HEFCW need to operate in relation to the full range of courses which the Welsh Ministers automatically designate for statutory student support. Consequently, HEFCW's functions need to be amended to reflect the higher education landscape changes and the tuition fee support and funding arrangements.
- 3.8 The Welsh Government considers that all institutions and other providers offering higher education courses which are designated for the purpose of statutory student support should be required to comply with regulatory controls in order to protect the interests of students, taxpayers and Welsh society (although there will be a greater measure of control in respect of those courses which are automatically designated for the purposes of student support proportionate to the nature of support made available). A new regulatory framework for higher education is needed to provide assurance about the financial health and governance of higher education providers and the quality of their provision, to enforce fee controls and to safeguard equality of opportunity to access higher education in Wales. The Welsh Government's intention is to bring forward a bill during this Assembly's term to seek provision for HEFCW to have regulatory oversight of all higher education courses automatically designated for statutory student support delivered in

Wales. The specific provisions to be sought are described in the sections which follow.

## 4. A revised regulatory system

- 4.1 This section describes the existing arrangements under which courses of higher education are designated for statutory student support, outlines the current statutory student support arrangements and provides an overview of the proposed revised regulatory framework further details of which follow in sections 5, 6 and 7.
- 4.2 It is important to note that the **Welsh Government's statutory student support package (as summarised in Fig. 2) does not form part of this consultation**. However, the Welsh Government is committed to supporting students wherever we can; widening access and ensuring those who are disadvantaged can access higher education wherever they choose to study. At the centre of our policy on student finance is the principle that access to higher education should be on the basis of the individuals' ability to benefit and not on the basis of what they can afford to pay.
- 4.3 This is why we have put in place the most equitable student finance system which will provide the following levels of support during the lifetime of this Government:
- Over £800 million for the tuition fee grant;
  - Over £750 million on maintenance grants; and
  - Around £1.8 billion for tuition fee and maintenance loans.
- 4.4 Additionally the consultation **does not cover part-time higher education courses** as the fees for those courses are not currently regulated. However, part-time higher education continues to be a priority for the Welsh Government and it is envisaged that part-time courses will be included within the scope of the revised regulatory framework when the time is right. We will, of course, consult with key stakeholders to work through the implications of such a move before it is implemented.
- 4.5 Although changes to HEFCW's statutory functions are proposed, it is envisaged that the Council will retain a statutory duty to secure that provision is made for assessing the quality of education provided by institutions in Wales and will also retain its statutory function as the relevant authority in Wales for the approval and monitoring of fee plans.

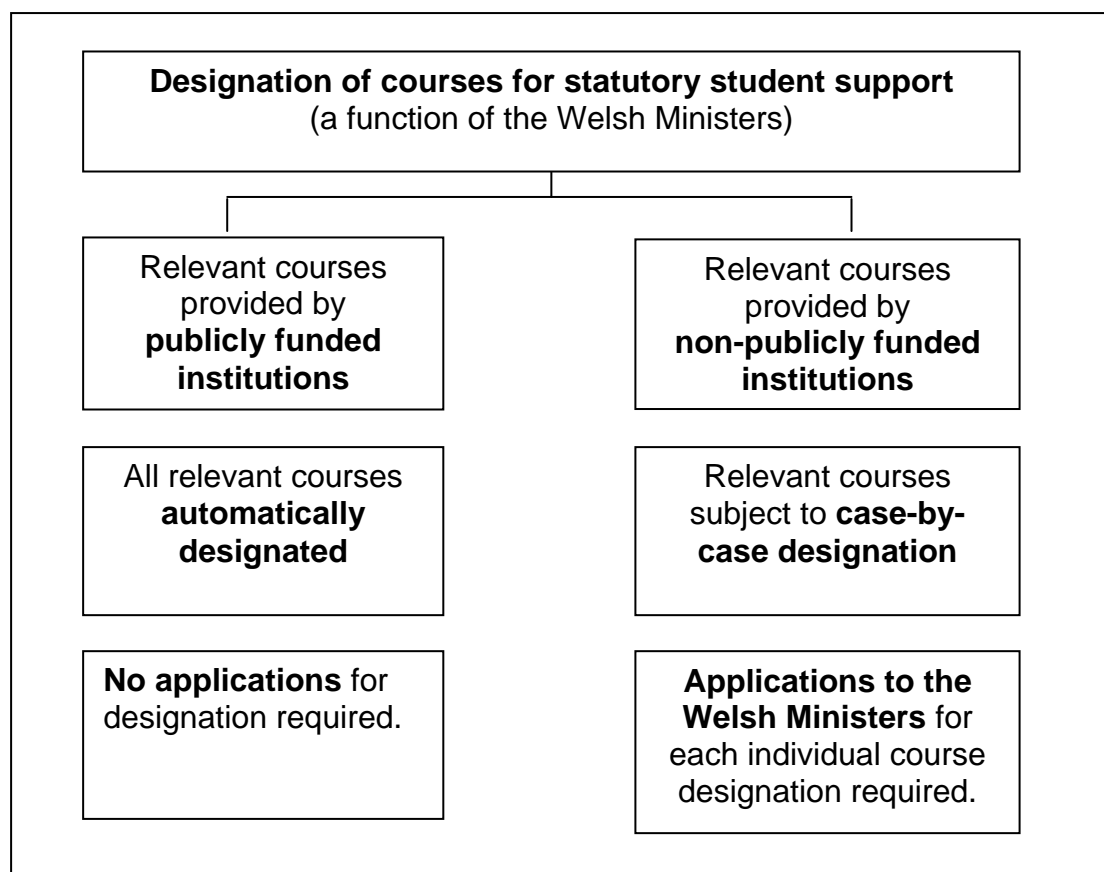
### **Designation of courses for the purpose of statutory student support**

- 4.6 Currently, students ordinarily resident in Wales have access to a wide range of higher education courses as a consequence of the Welsh Ministers making available statutory student support. Under the existing arrangements, relevant

courses<sup>4</sup> at publicly funded institutions (*i.e.* those maintained or assisted by recurrent grants out of public funds) are designated **automatically** for this purpose; however, private providers (*i.e.* those which are not maintained or assisted by recurrent grants out of public funds) may also request **specific (case-by-case)** designation for their courses. A summary of the existing process is depicted in figure 1 below.

- 4.7 The existing system distinguishes between institutions on the basis of their funding arrangements. In light of the recent changes to both higher education funding and statutory student support in Wales it will be necessary to introduce revised arrangements not only for the automatic designation of higher education courses but also the wider regulatory system to which institutions offering such designated courses are to be subject. The changes to higher education funding and student support introduced in 2012/13 require revisions to be made to both the categorisation of providers of higher education courses and to the existing course designation arrangements.

Fig 1: Summary of current arrangements for course designation



- 4.8 Under current arrangements, eligible students who are ordinarily resident in Wales may apply for financial support from the Welsh Government to undertake designated courses. The amount and nature of the support available reflects

<sup>4</sup> For academic year 2012/13, these courses are listed in Schedule 2 to the Assembly Learning Grants and Loans (Higher Education) (Wales) (No.2) Regulations 2011 (SI 2011/886) (W.130), as amended by SI 2011/1978 (W.218); SI 2012/14 (W.5); and SI 2012/1156 (W.139).

the differing regulatory requirements currently applied to publicly funded institutions and private providers as shown below:

Fig 2: Summary of current tuition fee support arrangements

**Tuition fee support\* for eligible students undertaking full-time undergraduate courses:**

- **Automatically** designated courses: **up to £9,000**  
(tuition fee loan of up to £3,465 and tuition fee grant of up to £5,535)
- **Specifically** designated courses: **up to £6,000**  
(tuition fee loan only)

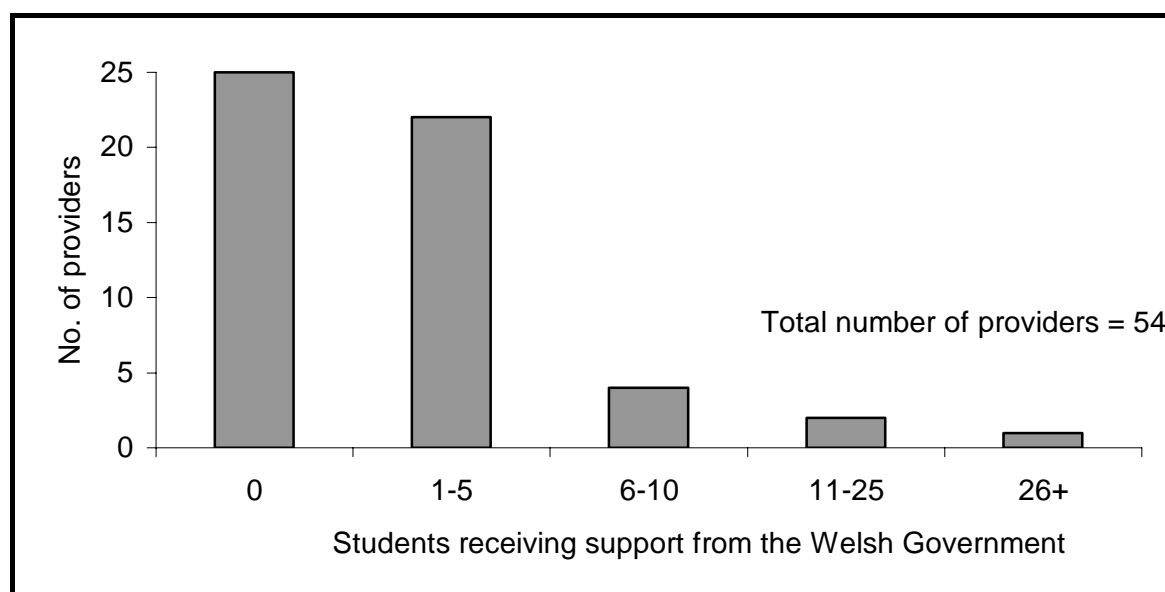
\*Full details of the current statutory student support package and eligibility requirements may be accessed at: <http://www.studentfinancewales.co.uk>

## Case-by-case course designation

- 4.9 The Welsh Government proposes to amend the existing arrangements for both automatic and case-by-case course designation and to introduce a revised approach which does not rely on institutions being in receipt of recurrent funding from HEFCW. A consequence of the amendments is that the current definitions of '**publicly funded**' and '**non-publicly funded**' institutions will no longer be applicable in the context of the regulation of higher education provision nor in the designation of higher education courses for the purpose of statutory student support. This revised approach is necessary due to changes in the way in which higher education provision in Wales is funded and in light of the significantly increased volume of Welsh Government funding allocated through the statutory student support regime.
- 4.10 The Welsh Ministers already have discretion to designate full-time courses offered by higher education providers which are not publicly funded for the purpose of statutory student support. The basis on which higher education courses are designated for the purposes of statutory student support has not changed since 1998 when the first regulations providing for case-by-case designation of courses were made under the provisions of the Teaching and Higher Education Act 1998. The current course designation criteria applied by the Welsh Ministers in respect of applications for case-by-case designation concern the nature of the course including its duration, the age of students for whom it is intended, minimum entry standards and accreditation arrangements. The existing arrangements do not require that the provider satisfies requirements regarding its financial viability, quality assurance or provision of a students' complaints scheme.

4.11 The Welsh Government is currently supporting 144 students attending case-by-case designated courses delivered by private providers during the 2012/13 academic year. Currently there are 54<sup>5</sup> providers with one or more courses designated by the Welsh Ministers of which 25 had no students receiving support from the Welsh Government in the 2012/13 academic year (Figure 3). Of the remainder, the majority had very small numbers of students in receipt of Welsh Government support; only one had more than 25 such students.

Fig 3. Providers with case-by-case designated courses and the number of students receiving support (2012/13) [data: Student Loans Company]



4.12 The White Paper consultation sought stakeholders' views on the continuation of the Welsh Government's financing of statutory student support for case-by-case designated courses delivered by private providers. Part A of this document outlines the responses received to the White Paper consultation. Having taken account of the responses to the White Paper consultation the Welsh Government has concluded that it is necessary to balance the provision of a wide range of study opportunities available to students ordinarily resident in Wales with the potentially significant costs incurred from a demand-led budget. A key consideration in ensuring the sustainability of public expenditure on student support is the public benefit from the subsidy derived from the Welsh Government backed tuition fee loans.

### Charitable status

4.13 In making student support available to eligible students, the Welsh Government incurs significant costs. Those costs include an element which results from the fact that such loans continue to benefit from a Government subsidy and that a proportion of the loans will be written off

<sup>5</sup> Actually, 48 providers, but four have multiple campuses and have been analysed separately.

before they are repaid. These factors reflect the full economic cost of providing tuition fee loans to eligible students. A consequence of the availability of such loans from the Welsh Government is that HE institutions and providers do not themselves need to establish credit facilities for students. The Welsh Government considers that institutions and other providers effectively benefit from a Welsh Government subsidy both in terms of its underwriting of loans and through the provision of the tuition fee grant. As such, the Welsh Government has an interest in the provision that is supported by the subsidy derived from student loans.

- 4.14 The Welsh Government considers that all higher education institutions and other providers which benefit from a degree of financial subsidy in the form of statutory student fee loans or grants should be expected to make a contribution to the wider public good. A means of ensuring that such subsidy is not used to benefit shareholders of for-profit institutions and other providers is to require that all such bodies seeking designation of their courses from the Welsh Government have charitable status.
- 4.15 **This will mean the application of a new requirement at the outset of the course designation process in which the institution or other provider will be required to confirm that it has charitable status for both automatic and case-by-case designation arrangements.** The loss of charitable status by an institution or provider with a fee plan in force will result in the withdrawal of approval for that fee plan. We propose to introduce **transitional measures** which ensure that students who have commenced their higher education courses with such a provider or institution are able to continue to receive Welsh Government student support in order to complete their studies, in the event of loss of charitable status.

## Overview of the revised regulatory system

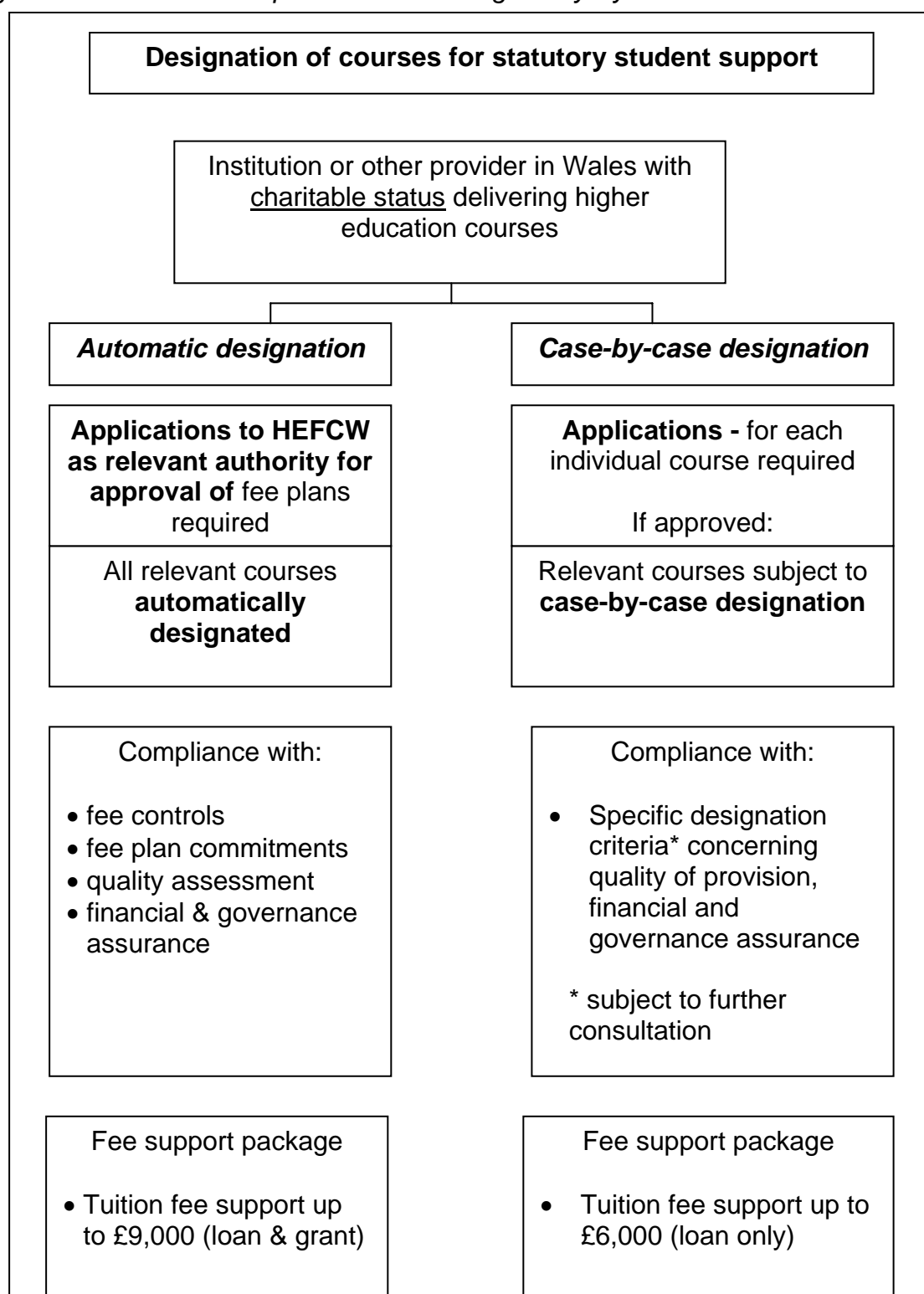
- 4.16 This section presents an overview of the proposed new regulatory system, describes the proposed amendments to HEFCW's statutory functions and outlines the controls and other requirements applicable to institutions and other providers with courses automatically designated for statutory student support. Subsequent sections provide further detail on specific aspects of the regulatory system, namely:
- fee controls and fair access (section 5);
  - quality assessment (section 6); and
  - financial and governance assurance (section 7).
- 4.17 Under the revised regulatory system providers of higher education courses in Wales **will have the option** to seek either *automatic* or *specific* designation of their higher education courses for the purpose of statutory student support. This decision will no doubt be informed by the regulatory requirements applicable to the two designation categories. The choice of designation route will be a matter for individual institutions and other providers to determine on



the basis of the nature of their provision and their ability to comply with the relevant regulatory requirements.

- 4.18 The intention is that the extent of regulatory requirements will be proportionate to the benefits derived i.e. more extensive regulation will be required of institutions and other providers 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 subject to specific case-by-case course designation. These requirements are illustrated in Figure 4 below.

Figure 4: Overview of Proposed Revised Regulatory System



4.19 Institutions and other providers who wish their higher education courses to be automatically designated will be required to:

- have an approved fee plan in force – charitable status will be necessary in order to apply for a fee plan

The range of institutions and other providers of higher education courses eligible to apply for a fee plan under the proposed regulatory framework could be wider than the range of institutions currently in receipt of funding from HEFCW. This may mean that some providers which have not previously had a fee plan in force will need to consider whether they can comply with the full range of regulatory controls. We envisage that HEFCW may need to provide information to such applicants about the requirements specified below.

Following successful application for approval of a fee plan the institution or provider must:

- comply with prescribed fee limits, as specified in regulations;
- comply with HEFCW's requirements in respect of the quality of their provision and arrangements for financial and governance assurance; and
- continue to have charitable status.

4.20 Institutions and other providers wishing to have their higher education courses designated on a case-by-case basis will be required to meet the following requirements:

- demonstrate that they have charitable status; and
- demonstrate that they comply with the Welsh Government's requirements in respect of the quality of their provision and arrangements for financial and governance assurance and continue to do so for the duration of the designation of their courses.

## **Operating the new regulatory framework – a revised role for HEFCW**

4.21 In designing the new regulatory framework our intention is to build on HEFCW's existing functions and conditions of funding. It will however be necessary to revise and update HEFCW's current functions to reflect the new funding environment. This will mean amending existing legislation to ensure that the Council has the necessary functions and duties to operate regulatory controls in respect of fee limits, fee plans, quality assessment and financial and governance assurance without the imposition of conditions of funding. Overall these changes will mean a greater regulatory role for HEFCW as its funding role decreases.

4.22 Under the revised regulatory framework HEFCW will:

- remain subject to a statutory duty to secure that provision is made for assessing the quality of higher education;
- retain a function to monitor institutions' financial health and governance arrangements;
- retain a role in enforcing fee controls; and
- retain a power to monitor and enforce fee plans.

4.23 The most significant change is that these functions will need to be adjusted to operate in the new funding environment and in future will **apply to all providers with an approved fee plan in force** as opposed to those institutions in receipt of recurrent funding from HEFCW. Additionally it is proposed that the Bill will establish **new arrangements for interventions and sanctions** in order to enforce compliance with the regulatory controls. These are set out in sections 5, 6 and 7.

4.24 As part of the operation of the new regulatory framework it is intended that HEFCW will undertake a 'gatekeeper' role in respect of the application process providing applicants with information concerning the designation process and the requirements associated with both the automatic designation and specific designation routes as appropriate. We consider that HEFCW is best placed to undertake this function, building on the Council's expert knowledge and significant experience of the performance of the Welsh higher education sector to date.

4.25 It is proposed that the function of case-by-case course designation will remain a function of the Welsh Ministers, however, we are currently considering the roles that HEFCW and the Student Loans Company (SLC) might play in the administration of the process. Arrangements for the specific designation of courses may be subject to future consultation.

## **Franchised and validated higher education courses**

4.26 Institutions and other providers of higher education courses may be involved in a variety of collaborative arrangements in order to deliver higher education courses. These arrangements may range from validation-only relationships in which an institution with UK degree awarding powers (a recognised body) validates the degree courses provided by another institution or provider which does not hold degree awarding powers (a listed body<sup>6</sup>) to arrangements in which the courses designed by the degree-awarding institution are delivered, or part-delivered by another institution or provider (franchise arrangements).

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<sup>6</sup> Listed bodies are those institutions and other providers which do not have power to award their own degrees but which offer complete higher education courses which lead to recognised UK degrees which are awarded by a separate institution with degree awarding powers. In relation to Wales, 'listed bodies' are currently set out in the Education (Listed Bodies) (Wales) Order 2012 (SI 2012/1259 (W.154).

<http://www.legislation.gov.uk/wsi/2012/1259/contents/made>

- 4.27 In the case of **validation-only** arrangements we consider that responsibility for the course rests with the institution or other provider which **delivers the course**. It is the institution or provider undertaking the delivery which will therefore be responsible either for applying for a fee plan or for case-by-case designation of its courses.
- 4.28 In the case of franchise arrangements, we recognise that a variety of delivery arrangements may exist e.g. the franchising institution (the franchisor) may design the course and set the tuition fee with the teaching undertaken by the franchisee. On the other hand the franchising institution may delegate the design, delivery and fee charging arrangements to the franchisee. There are also likely to be other combinations of arrangements which have developed over time. Some of these arrangements may have been established between two publicly funded institutions or alternatively between a publicly funded institution and a non-publicly funded provider.
- 4.29 Currently, higher education courses can be automatically designated for student support if they satisfy the requirements set out in the Welsh Government's student support regulations<sup>7</sup>. These requirements include, amongst other things, that the course is "*wholly provided by a publicly funded educational institution in the UK or provided by such an institution in conjunction with an institution outside the UK*". In this context, a course is considered to be provided by an institution if it provides the teaching and supervision which comprise the course.
- 4.30 There are a number of potential ways in which the new regulatory arrangements could be applied to franchised courses. We proposed that franchised courses should, generally, fall within the fee limit arrangements and also be automatically designated for the purposes of student support. In order to simplify accountability arrangements, we propose, as a starting point and subject to the points which follow, that under the new regulatory framework a franchised course will generally be a qualifying course<sup>8</sup> for the purposes of the fee limit if the institution or other provider **which franchises the provision (i.e. the franchisor) has an approved plan in force**. We propose that such courses should be automatically designated for the purposes of student support from the Welsh Government. In addition, we propose that an institution or other provider which does not have a fee plan in force should be able to apply for case-by-case designation of such courses.
- 4.31 Where an institution or other provider which has a fee plan in force franchises some of its higher education courses to an institution or provider which **does not have charitable status**, we propose that those courses will not be qualifying courses for the purposes of fee limits. We propose that such courses will not be automatically designated for the purposes of statutory student support from the Welsh Government. We would welcome views on

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<sup>7</sup> Regulation 5 of SI 2011/886 (as amended) provides the basis for the automatic designation of higher education courses for the purposes of the 2012/13 academic year.

<sup>8</sup> Courses which are subject to fee limits are 'qualifying courses' under the Student Fees (Qualifying Courses and Persons) (Wales) Regulations 2011 (SI 2011/691) as amended.

the merits of these proposals (further described in examples 6 to 8 below) and/or any difficulties that might arise from them.

## What are the implications for institutions and other providers of higher education courses?

4.32 Under the revised regulatory system there will be some changes to the arrangements for designation of higher education courses for statutory student support under both the automatic and specific designation routes. The examples below provide illustrations of implications for institutions and other providers seeking designation of their courses. Providers of higher education courses subject to the requirements of the new regulatory framework relating to automatic course designation are referred to as '*regulated providers*' from this point forward.

- **Example 1:** An institution in Wales with charitable status seeks *case-by-case* designation of one or more its higher education courses. What will it need to comply with?

**Answer:** Institutions and other providers seeking *case-by-case* designation are **not** *regulated providers* and will **not** be required to comply with fee controls or fee plans, but will need to satisfy the relevant criteria applied to case-by-case designations which are likely to concern the quality of their provision as well as the financial health, management and governance arrangements specified by the Welsh Government. These arrangements may be subject to further consultation in due course.

- **Example 2:** An institution in Wales with charitable status wishes for its higher education courses to be *automatically* designated. What will it need to comply with?

**Answer:** In order for an institution's higher education courses to be automatically designated it will need to have an approved fee plan in force. The institution will need to seek approval from HEFCW (as relevant authority in Wales). The effect of such a plan being in force will be that the institution will be a *regulated provider* and will need to comply with a fee cap of £9,000, meet fee plan commitments, comply with HEFCW's quality, financial and governance requirements as well as any directions that HEFCW may issue in respect of the regulatory controls.

- **Example 3:** An institution in Wales which does **not** have charitable status would like its higher education courses to be designated for statutory student support. What will it need to comply with?

**Answer:** Institutions and other providers which do not have charitable status will **not** be eligible to apply for a fee plan and consequently their higher education courses will not be eligible for automatic designation. Additionally, under the proposals for revisions to the case-by-case designation arrangements such providers will not be eligible to apply for specific course designation. This means that such providers will **not** be subject to fee controls

or fee plan requirements nor HEFCW's arrangements for quality, financial health or governance. Students will neither be able to access student support from the Welsh Government nor benefit from a tuition fee cap.

- **Example 4:** An institution in Wales which has charitable status, is charging tuition fees of less than £4,000 p.a. for full-time undergraduate courses and would like those courses to be *automatically* designated. What will it need to do?

**Answer** - This provider will be eligible to apply to HEFCW for approval of a fee plan. Approval of the fee plan will mean that the provider becomes a *regulated provider*; it will need to comply with fee controls and meet its fee plan commitments. It will also be subject to HEFCW's quality, financial and governance requirements and any directions issued by HEFCW in respect of the regulatory controls. This arrangement will also apply to institutions and other providers seeking to charge fees above £4,000 but no greater than £9,000.

- **Example 5:** A provider in Wales has charitable status and its courses are validated by a University or other institution with UK Degree Awarding Powers (i.e. the provider in Wales is a 'listed body and the validating institution a 'recognised body'). Will this provider be eligible to apply for approval of its a fee plan and thereby obtain automatic designation of its HE courses?

**Answer** – Yes, this provider (and any institution) in Wales which has charitable status and which is providing higher education courses will be eligible to apply for approval of a fee plan. Approval of a fee plan will lead to automatic designation of its higher education courses and the provider will be subject to fee controls and HEFCW's quality, financial and governance requirements. If the provider (or institution) does not wish to apply for approval of a fee plan, it may apply for case-by-case designation of one or more of its higher education courses if it so wishes.

- **Example 6:** An institution in Wales which has a fee plan in place franchises some of its higher education courses to be delivered by a provider which does **not have charitable status**. Would those courses be subject to the fee cap and would they be automatically designated for the purpose of student support?

**Answer** – No, under the proposals, higher education courses delivered under franchised arrangements in which the franchisee does not have charitable status will not be qualifying courses for the purposes of fee limits set out in a regulated provider's fee plan. We propose that such courses will not be automatically designated for statutory student support from the Welsh Government.

- **Example 7:** an institution in Wales which has a fee plan in place franchises some of its higher education courses to be delivered by a provider which **has charitable status** but which does not have a fee plan in place. Would those

courses be subject to the fee cap? Would those courses be automatically designated for the purposes of student support?

**Answer** – We propose that the courses would be qualifying courses for the purposes of fee controls and would be automatically designated for the purposes of student support from the Welsh Government. It is proposed that higher education courses delivered under franchise arrangements in which the franchisor is a regulated provider and the franchisee has charitable status will be subject to fee limits and automatically designated.

- **Example 8:** An institution in Wales which has a fee plan in place franchises some of its higher education courses to be delivered by a provider in Wales **which also has its own a fee plan in place**. Would those courses be subject to the fee cap of the franchisor? Would those courses be automatically designated for the purposes of student support?

Answer – Yes, the courses would be subject to fee controls (the fee limits to be set by the franchisor's fee plan) and the course would be automatically designated for the purposes of student support.

- **Example 9:** Would a provider in Wales **which has charitable status** but which does not have an approved fee plan in force be able to seek case-by-case designation for a higher education course which it has franchised to a **charitable institution** whether or not that institution has an approved plan in force?

Answer – Yes, the provider would be able to seek case-by-case designation for such a course. The absence of an approved fee plan will mean that fee limits do not apply but if the course were to be specifically designated by the Welsh Ministers then eligible students attending the course could apply for Welsh Government student support.

- **Example 10:** Would a provider in Wales **which has charitable status** but which does not have an approved fee plan in force be able to seek case-by-case designation for a higher education course which it has franchised to **non-charitable institution**?

Answer – No, the provider would not be able to seek case-by-case designation for such a course. The absence of an approved fee plan will mean that fee limits do not apply but students attending the course could not apply for Welsh Government student support.

## **Consultation questions: a revised regulatory system**

1. **In light of the increased regulatory role proposed for HEFCW should amendments be made to the Council's name?**
2. **We recognise that a variety of franchising arrangements currently exist in Wales and that these have been developed under the funding system which operated prior to the introduction of new fees and student**

**support arrangements. We are particularly interested in your views as to how franchised provision should be dealt with under the new regulatory framework. In particular:**

- (a) Will the proposal for the institution or provider which franchises the course to be the body which is responsible for either applying for a fee plan or requesting case-by-case designation of its courses work in practice?**
- (b) Could this proposal result in any delivery issues? If so please identify those issues.**
- (c) Are there any alternative approaches which you wish to put forward for consideration?**



## 5. Fee controls and fair access

### Existing arrangements and why change is needed

#### Enforcement of fee limits

- 5.1 The current arrangements for tuition fee control rely on regulations<sup>9</sup> to prescribe fee limits which relevant institutions can charge by way of tuition fees for full-time undergraduate courses. Relevant institutions are those which receive grants, loans or other payments from HEFCW and the current fee limits are established by maximum basic and higher amounts set at £4,000 and £9,000 respectively. The courses to which the fee cap applies are also determined by regulations<sup>10</sup>.
- 5.2 Under the current arrangements relevant institutions which charge tuition fees above the basic amount are required to secure fair access to higher education. As of September 2012, all institutions in receipt of recurrent funding from HEFCW which seek to charge fees above £4,000 p.a. for full-time undergraduate level courses are required to have an approved fee plan in place. An institutional fee plan must set out measures, such as outreach work and financial support, to be delivered by the institution to promote higher education and equality of opportunity in connection with access to higher education. These arrangements are also provided for in regulations<sup>11</sup>.
- 5.3 HEFCW may currently impose financial penalties if an institution fails to comply with the relevant tuition fee cap or the provisions of its approved fee plan (where a fee plan is in place). In such circumstances HEFCW is able to seek repayment of funding paid or withdraw funding that has been awarded (but not paid). Due to changes in the way in which higher education is funded these sanctions will become less effective in future as the amount of recurrent funding allocated by HEFCW decreases and the amount of income derived from tuition fees increases.
- 5.4 To ensure that fee limits can continue to be imposed on institutions amendments to existing legislation will be needed to provide an alternative means of enforcing the limits prescribed in regulations. The existing arrangements are summarised in Figure 5.

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<sup>9</sup> The Student Fees (Amounts) (Wales) Regulations 2011.  
<http://www.legislation.gov.uk/wsi/2011/885/made>

<sup>10</sup> The Student Fees (Qualifying Courses and Persons) (Wales) Regulations 2011 as amended by S.I. 2011/1978 and S.I. 2012/1630.  
<http://www.legislation.gov.uk/wsi/2011/691/made>

<sup>11</sup> Student Fees (Approved Plans) (Wales) Regulations 2011.  
<http://www.legislation.gov.uk/wsi/2011/884/made>

## Fair access arrangements – fee plans

- 5.5 In March 2011 HEFCW was designated as the fair access regulator for higher education in Wales.<sup>12</sup> As relevant authority HEFCW has statutory responsibility for the approval and enforcement of higher education fee plans. Regulations<sup>13</sup> currently provide for the contents of fee plans to include a provision that requires the governing body of an institution to monitor in the manner set out in their plan its compliance with the plan's provisions and its progress in achieving its objectives as set out in the plan.
- 5.6 Currently – and in addition to the funding penalties mentioned above – the principal sanction available to HEFCW in relation to an institution which fails to comply with the general provisions of its approved fee plan is to refuse to approve a new fee plan for that institution on the expiry of its existing plan. (General provisions of a fee plan are those provisions, other than the fee limit, which relate to the promotion of equality of opportunity or the promotion of higher education). Under certain circumstances e.g. where an institution has made progress against its fee plan commitments but has not met all of the targets agreed in its plan, the refusal to approve its fee plan on renewal may be considered to be too severe a penalty and therefore not applied. We consider that it would be helpful for alternative sanctions to be available to HEFCW in such circumstances. The existing arrangements are summarised in Figure 5.
- 5.7 The Welsh Ministers' existing guidance<sup>14</sup> to HEFCW indicates that it is for the Council to determine the most effective monitoring arrangements for fee plans and that students and their representatives should be engaged in this process. At present HEFCW, as relevant authority, has an implied power to monitor institutions compliance with their fee plans. Notwithstanding that HEFCW has such an implied power, we consider that it would be helpful for HEFCW to have an express power in this regard. Additionally, we consider that HEFCW should be provided with an express power to evaluate of the effectiveness of fee plans either individually or generally.
- 5.8 With the recent increase in tuition fees which institutions in receipt of funding from HEFCW may charge to undergraduate students and changes to HEFCW's funding in support of widening access to higher education we consider that it is necessary to strengthen the existing statutory arrangements for fair access to higher education. In particular we consider that the system would benefit from greater transparency in respect of the availability of information about the progress made by institutions against their fee plan commitments.

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<sup>12</sup> The Higher Education Act 2004 (Relevant Authority) (Designation) (Wales) Regulations 2011. <http://www.legislation.gov.uk/wsi/2011/658/contents/made>

<sup>13</sup> The Student Fees (Approved Plans)(Wales) Regulations 2011. <http://www.legislation.gov.uk/wsi/2011/884/contents/made>

<sup>14</sup> *Guidance to HEFCW on Fee Plan Approval and Enforcement*, April 2011.

Fig 5: Summary of existing tuition fee and fair access controls

<p><b>Fee Limits:</b></p> <ul style="list-style-type: none"> <li>• apply to institutions receiving recurrent grant from HEFCW</li> <li>• £4,000 (basic amount) without an approved fee plan</li> <li>• £9,000 (higher amount) with an approved fee plan</li> </ul> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>• HEFCW may impose financial penalties on institutions which fail to comply with the relevant tuition fee limit in the form of recovery of grant paid or withholding grant awarded.</li> <li>• HEFCW may refuse to approve a new fee plan upon renewal if an institution has failed to comply with the fee limit specified in its approved fee plan.</li> </ul>
<p><b>Fee Plans:</b></p> <ul style="list-style-type: none"> <li>• Subject to approval and monitoring by HEFCW</li> <li>• Must set out institutions' commitments to promote equality of opportunity to access higher education and the promotion of higher education</li> <li>• Institutions must comply with the general provisions of their approved plans</li> </ul> <p><b>Sanctions:</b></p> <ul style="list-style-type: none"> <li>• HEFCW may refuse to approve a new fee plan upon renewal if an institution has failed to meet its fee plan commitments.</li> <li>• HEFCW may impose financial penalties on institutions which fail to comply with the general provisions of their approved plans in the form of recovery of grant paid or withholding grant awarded.</li> </ul>
<p><b>Exclusions:</b></p> <ul style="list-style-type: none"> <li>• The above controls <b>only</b> apply to institutions which are in receipt of recurrent grant support from HEFCW.</li> </ul>

## Arrangements under the new regulatory framework

5.9 The White Paper consultation sought stakeholders' views on whether the current arrangements for fair access to higher education could be improved and whether HEFCW's powers, including those as relevant authority, should be strengthened. Although there was a mixed response on this issue we consider that it is both necessary and appropriate to introduce some changes to the current arrangements as part of the new regulatory framework in light of the changes to HEFCW's recurrent funding arrangements and the possible impacts of those changes in respect of widening access to higher education in Wales.

## Enforcement of fee limits

- 5.10 Under the new regulatory framework there will be some changes to the current arrangements for the control of tuition fees in Wales. It is proposed that in future all those institutions and providers that have an approved fee plan in place (regulated providers) will have their relevant higher education courses automatically designated for the purpose of statutory student support. The principal change under the new arrangements will be the removal of the 'basic amount' (currently £4,000). The intention is that only a single maximum fee limit will be prescribed in regulations. We propose that this fee limit will correspond to the existing 'higher amount' which is currently £9,000.
- 5.11 Regulated providers will be required to comply with the following requirements:
- **the tuition fees charged for full-time undergraduate courses must not exceed the limit specified in the approved fee plan; and**
  - **in any event must not exceed the maximum amount specified in regulations.**
- 5.12 A key difference under the new regulatory framework is that all those institutions and providers that have an approved fee plan in place (regulated providers) will be required to comply with the fee limits set out in their plan as well as the general provisions of those plans. This is irrespective of the fee level charged for automatically designated courses. As now, the fee limits will only apply to qualifying courses undertaken by qualifying students as set out in regulations. In general, this means undergraduate level courses, PGCE courses, HND and HNC courses studied by full-time students undertaking their first degree or equivalent qualifications. It is proposed that the provisions to be sought in the Bill **will not** alter the range of courses to which the tuition fee controls apply.
- 5.13 Another difference as compared to the current arrangements is the manner in which the above controls are to be enforced. As previously described in section 4 of this document HEFCW will in future no longer enforce the application of tuition fee controls via terms and conditions attached to recurrent grant funding. Instead under the new regulatory framework provision will be made for HEFCW to be able to enforce fee controls as described below.
- 5.14 If HEFCW is satisfied that a regulated provider has failed to comply with the fee limits set out in its approved fee plan then we propose to make provision for HEFCW to be able to **direct the provider to:**
- take such action as is necessary to comply with the appropriate fee limit e.g. reduce the fee to the limit specified in the fee plan; and/or
  - reimburse excess fees which have been paid to it *i.e.* tuition fees which exceed the fee limit.

We consider that both of the above controls are necessary to ensure that regulated providers comply with the fee limits established in their approved plans and also to ensure that in the event of excess fees being charged and subsequently paid by students or their sponsors that those excess fees are reimbursed. To this end we intend to make provision for compliance with such a direction by HEFCW to be **enforceable by way of a Court injunction**.

- 5.15 Additionally if a regulated provider fails to comply with either a direction to adjust its fees so as to comply with the relevant fee limit or a direction to reimburse excess fees charged then we consider that HEFCW should be able to **issue a notification to refuse to approve the provider's fee plan upon renewal**.
- 5.16 In the case of **persistent failure** by a regulated provider to comply with fee limits we consider that HEFCW, as relevant authority, should be able to **withdraw its approval of that provider's fee plan during the life-time of the plan**. We propose that the withdrawal of such approval will result in a regulated provider losing its regulated status. We consider that what constitutes persistent failure should ultimately be a matter for HEFCW to determine. However, it could encompass a situation where a regulated provider fails to adhere to the limits set out in its fee plan on more than one occasion during the life-time of that plan. It may also include a situation where a regulated provider fails to comply with the fee limits in its fee plan and then fails to comply with a direction subsequently issued to that provider by HEFCW in respect of the initial failure.
- 5.17 We consider that where HEFCW determines that its approval should be withdrawn in respect of a regulated provider's fee plan on the grounds of a failure by that provider to comply with fee limits, HEFCW should also be able to notify that provider that it will refuse to approve a new fee plan for that provider during a specified period.
- 5.18 Figure 6 presents a summary of the differences between the current system of fee control arrangements and the proposed revised arrangements.

Fig. 6 Summary of Fee control arrangements

Current system	Proposed Regulatory Framework
<ul style="list-style-type: none"> <li>• Basic fee amount: £4,000 currently</li> <li>• Higher fee amount: £9,000 currently</li> </ul>	<p>Single fee cap (£9,000 proposed as at present)</p>
<p>HEFCW may impose financial penalties on institutions which fail to comply with the relevant tuition fee limit in the form of recovery of grant paid or withholding grant awarded.</p>	<p>No parallel sanction due to changes in the HE funding arrangements.</p>
<p>No parallel sanction</p>	<p>HEFCW may issue a direction requiring a regulated provider to:</p> <ul style="list-style-type: none"> <li>○ reduce the fee to the limit specified in the fee plan and/or</li> <li>○ reimburse tuition fees which exceed the fee limit.</li> </ul> <p>The direction is to be enforceable by way of injunction.</p>
<p>HEFCW may refuse to approve a new fee plan upon the expiry of an existing plan if an institution has failed to comply with the fee limit specified in its approved fee plan</p>	<p>HEFCW may refuse to approve a new fee plan upon the expiry of an existing plan if an institution has failed to comply with the fee limit specified in its approved fee plan (HEFCW may do so even where it has issued a direction to a regulated provider requiring it to comply with the relevant fee limit).</p>
<p>No parallel sanction</p>	<p>HEFCW may revoke an approved fee plan during the life-time of the plan if HEFCW considers that regulated provider has persistently failed to comply with fee limits</p>
<p>No parallel requirement exists</p>	<p>On application of any of the above sanctions HEFCW will be required to: send a letter to the regulated provider specifying the action taken and setting out HEFCW's reasons for taking it; send a copy of that letter to the Welsh Ministers; and publish it in order to ensure that interested parties may have access to details of the sanctions applied.</p>

- 5.19 Application of sanctions which result in either the withdrawal of approval of a fee plan during the life-time of the plan or the refusal to approve a new fee plan upon renewal of an existing plan will both potentially have significant consequences for institutions and their students. We therefore propose that protection mechanisms should be introduced as follows:
- **transitional measures** to ensure that students who have commenced their courses with a regulated provider are able to continue to receive Welsh Government student support in order to complete their studies; and
  - that prior to issuing a direction in respect of excess fees that HEFCW should be required to **issue a warning notice** which sets out the proposed direction, the reasons why HEFCW proposes to issue it and the period in which the regulated provider may make representations about HEFCW's proposal.
- 5.20 We propose that before proceeding with a direction HEFCW will be required to have **regard to any representations** received from the regulated provider. If, however, in HEFCW's opinion there remains a need to take action then HEFCW will be able to issue a notice of direction which contains the following:
- the specific direction to be complied with;
  - an explanation of why the direction has been issued; and
  - any additional information which may be prescribed by the Welsh Ministers.
- 5.21 Currently, a decision made by HEFCW, as relevant authority, to refuse to approve a proposed fee plan, to approve a variation to an existing plan, or approve a new fee plan during a specified period is subject to a review process whereby the applicant may seek a review of HEFCW's decision. We propose to extend the existing review process so that in the following circumstances a decision by HEFCW should in the first instance be regarded as a provisional decision:
- a decision to issue a direction relating to compliance with a fee limit; and
  - a decision to withdraw approval of a fee plan on the basis of a regulated provider's persistent failure to comply with fee limits.

Under this proposal the institution or other provider subject to the decision should be able to seek a review by an independent person or panel.

- 5.22 We intend to make provision for HEFCW to be able to issue guidance to institutions and other providers about the steps to be taken to comply with such directions and a requirement for regulated providers to have due regard to HEFCW's guidance.

## Monitoring and enforcement of fee plans

- 5.23 We consider that the role of HEFCW, as relevant authority, in the monitoring of fee plans and fair access arrangements would be strengthened by provision being made for HEFCW to **evaluate the effectiveness of approved plans** both individually and generally at the sector level and to make use of these evaluations to inform the development of good practice guidance on fee plan activities and investments. In order for HEFCW to assess the effectiveness of the activities and investment in support of promoting equality of opportunity to access higher education and the promotion of higher education HEFCW will require information on the outcomes of such activities and investments. These may take place over a number of years with a time lag for certain outcomes to become evident. We consider that it will be necessary for HEFCW to monitor the outcomes of such activities and investments over time in order to assess their effectiveness and overall progress made in meeting the objectives of fee plans.
- 5.24 In conjunction with the proposed power for HEFCW, as relevant authority, to evaluate the effectiveness of fee plans we intend to make provision for **HEFCW to be able to commission the gathering of information and the carrying out of research and analysis** in support of evaluating fee plan outcomes. The intention is for HEFCW to utilise the findings of such evaluations to inform the production of good practice guidance on the most effective fee plan activities and investments with the aim of improving fee plan outcomes. It is proposed that regulated providers will be required to have due regard to guidance issued by HEFCW<sup>15</sup>.
- 5.25 The principal sanction currently available to HEFCW in the absence of conditions attached to recurrent grant funding is the power to refuse to approve a fee plan upon renewal. This is a sanction with far reaching consequences for both providers and their students. We consider that application of this sanction should be reserved for the most significant cases of failure to comply with fee limits or the provisions of an approved plan. In the future, in situations where a regulated provider has made progress with its fee plan commitments but has not fulfilled the full requirements of its approved plan we consider that **alternative sanctions** should be made available to HEFCW, as relevant authority, which have the effect of encouraging compliance with fee plan requirements without removing the provider's approved plan status.
- 5.26 It is proposed that if HEFCW is satisfied that a regulated provider has failed to comply with the general provisions of its approved plan but that the failure does not, in HEFCW's opinion, warrant the refusal to approve the fee plan upon renewal then we propose that HEFCW should be able to **direct the regulated provider to spend a specified amount of its fee income on access and outreach activities**. We consider that the scope of such

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<sup>15</sup> At present, HEFCW may give advice to institutions about good practice relating to the promotion of equality of opportunity in connection with access to higher education and the promotion of higher education (section 40A of the Higher Education Act 2004).



directions should be limited to activities in support of fee plans' fair access objectives in order to reflect the changes to the existing widening access premium under HEFCW's revised funding arrangements<sup>16</sup>.

- 5.27 As fee plans only became a statutory requirement in Wales for institutions with relevant higher education courses commencing in the 2012/13 academic year there is not yet sufficient evidence to evaluate their impact. Therefore, we do not intend to make changes to the objectives of fee plans in the proposed legislation. However, as part of the revised regulatory system it will be necessary for the proposed legislation to make provision for the way in which fee plans are to be enforced.
- 5.28 One of the principal changes proposed to the existing arrangements is the removal of the basic fee amount and the requirement for all institutions and other providers who wish to have their higher education courses automatically designated for statutory student support to have an approved fee plan in force irrespective of the fee they seek to charge. This means that, in future, institutions and other providers seeking to charge fees of less than £4,000 p.a. that wish for their higher education courses to be automatically designated for statutory student support will be required to have an approved fee plan and to comply with the provisions of that plan in order for their courses to be so designated.
- 5.29 In light of the wider range of fee levels which are to be subject to fee plan requirements under the revised system we propose that HEFCW be required to take a **proportionate approach** when approving and subsequently enforcing fee plans as follows:
- Firstly, we propose that whilst all institutions and other providers applying for approval of a fee plan should be subject to the same core requirements as to the content of their plans, those which seek to charge fees **above a certain specified amount (the 'threshold' amount)** should also be required to set out in their fee plan the proportion of their fee income above the 'threshold' which they intend to apply in the furtherance of fee plan objectives.
  - Secondly, that HEFCW should be placed under a duty to take into account the **proposed level of fee** set out in applicants' fee plans when considering the content of those plans. This will mean that when considering approval of fee plans HEFCW will need to consider whether the amount of above 'threshold' fee income specified by applicants in their fee plans is sufficient.
- 5.30 The aim of these proposals is to ensure that a proportionate approach is adopted in relation to the level of the fee charged by fee plan applicants and that it reflects the full range of fees which will be covered by the new regulatory framework. We propose that the 'threshold' amount will be

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<sup>16</sup> Circular W13/09HE, HEFCW's Funding Allocations 2013/14 April 2013.  
<http://www.hefcw.ac.uk/publications/circulars/circulars.aspx>

established in regulations made by the Welsh Ministers. Our current thinking is that the 'threshold' amount should be of the order of £6,000. This is higher than the current basic amount of £4,000 - the fee level above which institutions funded by HEFCW must have an approved plan in force. In proposing £6,000 as a value for the 'threshold' amount we aim to balance the existing requirements on HEFCW-funded institutions with the wider application of fee plans to all institutions and other providers who may wish for their higher education courses are to be automatically designated for the purpose of statutory student support.

## **Spending direction**

- 5.31 In line with the proportionate approach to expenditure on fee plan objectives described above, we also propose that HEFCW should be able to direct a regulated provider to spend an amount of its above-threshold fee income on certain access and outreach activities where HEFCW considers that regulated provider has not complied with the general conditions of its fee plan. We propose that this new spending direction would be an additional sanction and that it would work as described below.
- 5.32 If HEFCW is satisfied that a regulated provider charging fees above the 'threshold' amount has failed to comply with the general provisions of its fee plan then HEFCW may issue a direction to the regulated provider, requiring it to spend a specified amount of its fee income which exceeds that threshold amount on access and outreach activities. We propose that the amount required by a spending direction is not to exceed the amount of expenditure agreed by HEFCW in an approved plan.
- 5.33 We propose that HEFCW should be required to issue a warning notice to an institution or provider indicating its intention to issue a spending direction to that institution / provider. We propose to make provision for regulated providers subject to such warning notices to make representations against the direction.

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

- 5.34 Additionally the existing sanction of HEFCW refusing to approve a new fee plan upon the expiry of an existing plan (where an institution or provider has failed to comply with the general provisions of its fee plan) will still be available to HEFCW. We envisage that this sanction should remain at HEFCW's disposal whether or not it has issued a spending direction to a regulated provider.

## **Withdrawal of approval of an existing fee plan**

- 5.35 In the case of persistent failure by a regulated provider to comply with the general provisions of its fee plan we consider that HEFCW, as relevant authority, should be able to withdraw its approval of that provider's fee plan during the life-time of the plan. We propose that the withdrawal of such approval will result in a regulated provider losing that regulated status. In

terms of what might constitute persistent failure for these purposes, we consider that this decision should ultimately be a matter for HEFCW, but a persistent failure could arise where a regulated provider fails to adhere to the general provisions of its plan on more than one occasion during the life-time of that plan. Persistent failure may also arise where a regulated provider fails to comply with the general provisions of its fee plan and then fails to comply with a spending direction subsequently issued to that provider by HEFCW in respect of the initial failure.

- 5.36 We consider that where HEFCW determines that its approval should be withdrawn in respect of a regulated provider's fee plan on the grounds of a failure by that provider to comply with the general provisions of its plan, HEFCW should also be able to notify the provider that it will refuse to approve a new fee plan for that provider during a specified period.

### **Application of sanctions**

- 5.37 We propose that the application of specific sanctions be at HEFCW's discretion on the basis of particular circumstances of the non-compliance. We would expect HEFCW to take account of whether efforts have been made by a regulated provider to comply with the requirements of an approved plan or whether such a provider has persistently failed to comply with any given requirement. To this end and in relation to HEFCW's power to refuse to approve a new fee plan on the expiry of an existing plan, we propose to amend existing legislation in order to allow HEFCW, as relevant authority, to take into account mitigating circumstances when considering whether or not to exercise that power. We propose that if, as a result of information provided by a regulated provider, HEFCW is satisfied that the provider has taken all reasonable steps to comply with the general provisions of its plan then it should not be considered to have failed to comply with the general provisions of its existing plan. Figure 7 presents a summary of the differences between the current system and the proposed revised arrangements.
- 5.38 As with the arrangements for control of fee levels, the application of sanctions which result in either the withdrawal of the relevant authority's approval for a fee plan, or the refusal to approve a new fee plan upon renewal of an existing plan will both have potentially significant consequences for institutions and other providers and their students. We therefore consider that the proposed arrangements should include **transitional measures** which ensure that students who have commenced their higher education courses with a regulated provider are able to continue to receive Welsh Government student support in order to complete their studies.

5.39 Currently, a decision made by HEFCW, as relevant authority, to refuse to approve a proposed fee plan, to approve a variation to an existing plan, or approve a new fee plan during a specified period is subject to a review process whereby the applicant may seek a review of HEFCW's decision. We propose to extend the existing review process so that in following circumstances a decision by HEFCW should in the first instance be regarded as a provisional decision:

- a decision to issue a spending direction; and
- a decision to withdraw approval of a fee plan on the basis of a regulated provider's persistent failure to comply with the general provisions of its approved plan.

Under this proposal the institution or other provider subject to the decision should be able to seek a review by an independent person or panel.

5.40 Finally, the Welsh Ministers' current guidance to HEFCW concerning the Council's fee plan monitoring and enforcement role indicates that HEFCW should continue to be mindful of the need for transparency, accountability, consistency and proper targeting when considering the activities and targets outlined in institutions' fee plans. However, currently HEFCW does not have a statutory power to make public an assessment of any institution which the Council considers not to have made sufficient progress against its fee plan. We consider that provision of such a power, for use in conjunction with the application of sanctions would increase the transparency of HEFCW's fee plan monitoring and enforcement role. This would encourage regulated providers to speedily rectify any failures of compliance identified by HEFCW. Additionally the requirement to make public any failures to comply with fee plan requirements would raise the profile of the fee plan monitoring process and the associated use of HEFCW's powers of intervention.

5.41 We propose that in future and in exercising any fee control or fee plan sanction powers that HEFCW should be required to send a letter to the regulated provider which specifies the action taken and sets out HEFCW's reasons for taking it. Additionally, we intend that HEFCW should be obliged to send a copy of such letters to the Welsh Ministers and should be obliged to publish them in order to ensure that interested parties may have access to details of the sanctions applied.

Fig. 7 Summary of fee plan enforcement arrangements

Current system	Proposed Regulatory Framework
Institutions funded by HEFCW which charge fees above the basic fee (currently £4,000) required to have an approved fee plan in force.	All institutions and other providers in Wales seeking automatic designation of their HE courses will be required to apply to HEFCW for approval of their fee plan. Applicant bodies must be able to demonstrate charitable status and maintain that status for the duration of the plan.
HEFCW may impose financial penalties on an institution which fails to comply with the general provisions of their approved plan in the form of recovery of grant paid or withholding grant awarded.	No parallel sanction due to changes in the HE funding arrangements.
No parallel sanction exists	HEFCW may issue a direction requiring a regulated provider which fails to comply with the general provisions of its approved plan to spend a specified amount of its fee income on activities supporting equality of opportunity to access higher education.
HEFCW may refuse to approve a new fee plan upon the expiry of an existing plan if an institution has failed to comply with the general provisions of its approved fee plan.  No provision for mitigating circumstances currently exists	HEFCW may refuse to approve a new fee plan upon the expiry of an existing plan if an institution has failed to comply with the general provisions of its approved fee plan (HEFCW may do so even where it has issued a spending direction to a regulated provider).  If a regulated provider has taken all reasonable steps to comply with the general provisions of its approved plan then it should not be regarded as failing to comply with those provisions for the purpose of seeking approval of a new plan.
No parallel sanction exists	HEFCW may revoke an approved fee plan during the life-time of the plan if HEFCW considers that regulated provider has persistently failed to comply with the general provisions of its approved plan.
No parallel requirement exists	On application of any of the above sanctions HEFCW will be required to: send a letter to the regulated provider specifying the action taken and setting out HEFCW's reasons for taking it; send a copy of the letter to the Welsh Ministers; and publish it in order to ensure that interested parties may have access to details of the sanctions applied.

## **Consultation questions: fee controls and fair access**

- 1. Do you agree with the proposal that in cases of persistent failure to comply with fee limits that HEFCW should be able to withdraw its approval in respect of an approved plan?**
- 2. Do you agree with the proposal to extend HEFCW's relevant authority role in order that it may evaluate the effectiveness of fee plans both individually and across the Welsh higher education sector?**
- 3. Do you agree that transitional protection should be made available for students who have commenced their studies with a regulated provider which subsequently has approval for its fee plan withdrawn or approval of a fee plan is refused upon renewal?**
- 4. Do you agree with the proposal that all institutions and other providers with an approved plan in force should be subject to the same core requirements?**
- 5. Do you agree with the proposal for HEFCW to be required to take account of the proposed level of fee in determining whether fee plan commitments are sufficient?**
- 6. Do you agree with the proposed value of £6,000 for the 'threshold' fee amount?**
- 7. Do you agree with the range of proposed sanctions to be made available to HEFCW and that HEFCW, as relevant authority should have discretion in their application?**
- 8. It is proposed that where HEFCW (as relevant authority) decides to withdraw its approval of a fee plan, the institution or provider affected may apply for a review of that decision to an independent panel / person. Do you consider this review mechanism to be sufficient or is there a need for any additional review or appeal arrangements? If so please specify what such arrangements might entail.**
- 9. Should regulated providers (i.e. those with an approved fee plan in force) whose higher education courses are subject to automatic designation for statutory student support purposes be able to exempt certain courses from automatic designation and the regulatory requirements associated with fee plans?**

## 6. Quality assessment

### Current arrangements and why change is needed

- 6.1 In connection with its funding responsibilities HEFCW has a statutory duty to secure that provision is made for assessing the quality of education provided in institutions for whose activities the Council provides, or is considering providing financial support and 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 discharges its assessment duty through a service level agreement between the Council and the Quality Assurance Agency (QAA).
- 6.2 The assessment of the quality of higher education is essential in order to ensure that academic standards are maintained and that students receive a high quality learning experience. The current enforcement of quality standards under arrangements put in place by HEFCW ensure that deficiencies in quality can be promptly identified and measures taken to address them to avoid disruption for learners and reputational damage to both the individual institutions and to Welsh higher education as a whole.
- 6.3 HEFCW has put in place a procedure to deal with cases of unsatisfactory quality<sup>17</sup> at the institutions to which it currently provides funding. This 'unsatisfactory quality procedure' sets out the actions that HEFCW will 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 it considers 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 HEFCW funding streams. The aim of this sanction is to avoid further investment in institutions in which the quality of teaching and / or governance may be unsatisfactory.
- 6.4 HEFCW's statutory duty to secure that provision is made for the assessment of the quality of education provided by institutions for whose activities it funds, or intends to fund, is dependent on the provision of financial support. In light of the reduced funding allocated by HEFCW from 2012/13 onwards it is doubtful whether HEFCW's current duty to secure the assessment of the quality of education will remain fit for purpose. This could potentially result in adverse outcomes for learners and institutions alike and damage the reputation of the Welsh higher education sector. We consider that it will be necessary for HEFCW to have alternative sanctions available to apply in cases of unsatisfactory quality.

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<sup>17</sup> HEFCW Circular 12/16 HE: Unsatisfactory Quality Procedures:  
[http://www.hefcw.ac.uk/policy\\_areas/learning\\_and\\_teaching/teaching\\_quality\\_assurance.aspx](http://www.hefcw.ac.uk/policy_areas/learning_and_teaching/teaching_quality_assurance.aspx)

## Arrangements under the new regulatory framework

6.5 Under the new regulatory framework HEFCW's current duty to secure that provision is made for assessing the quality of the education provided in institutions which it funds or intends to fund will need to be revised. It is proposed that the revised duty will oblige HEFCW to secure that provision is made for assessing the quality of higher education courses **provided by regulated providers** *i.e.* those providers in Wales which have an approved fee plan in force.

## Scope of higher education provision subject to quality assessment

6.6 It is intended that HEFCW's revised assessment duty will extend to **all courses of higher education falling within the scope of schedule 6 to the Education Reform Act 1988**<sup>18</sup> which are delivered by regulated providers. These courses are as follows:

- (a) a course for the further training of teachers or youth and community workers;
- (b) a post-graduate course (including a higher degree course);
- (c) a first degree course;
- (d) a course for the Diploma of Higher Education;
- (e) a course for the Higher National Diploma or Higher National Certificate of the Business & Technician Education Council, or the Diploma in Management Studies;
- (f) a course for the Certificate in Education;
- (g) a course in preparation for a professional examination at higher level;
- (h) a course providing education at a higher level (whether or not in preparation for an examination).

The range of courses covered by schedule 6 to the Education Reform Act 1988 is wider than the range of courses falling within the scope of schedule 2 to the main higher education student support regulations for Wales<sup>19</sup> *i.e.* courses which may be designated for statutory student support. As public funds *e.g.* HEFCW's quality related research grants and monies from the UK Research Councils support delivery of a range of masters and research degrees, we

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<sup>18</sup> Schedule 6 to the Education Reform Act 1988 – Courses of Higher Education.  
<http://www.legislation.gov.uk/ukpga/1988/40/schedule/6>

<sup>19</sup> For academic year 2012/13, these are the Assembly Learning Grants and Loans (Higher Education) (Wales) (No.2) Regulations 2011 (S.I. 2011/886)(W.130), as amended.



consider that there is a public interest in ensuring that all the courses falling within schedule 6 above, when delivered by a regulated provider, should be subject to HEFCW's quality assessment duty.

- 6.7 As now, it is intended that it will remain a matter for HEFCW to determine how its revised quality assessment duty is discharged be that through the existing arrangements with the QAA or otherwise. The revisions to HEFCW's duty should not significantly alter the quality assurance requirements applied to institutions which have been in receipt of recurrent grants from HEFCW. However, as a consequence of the revised approach to course designation, in future, all institutions and other providers of higher education in Wales will have a choice as to whether or not to seek approval of a fee plan in order have their higher education courses automatically designated for student support. Those with approved plans in place will be subject to HEFCW's quality assessment requirements.
- 6.8 Additionally we propose that the requirement for HEFCW to establish and maintain a committee with the function of providing advice to the Council on the exercise of its quality assessment duty will remain. We envisage that the committee's role will be pivotal to HEFCW's work in coming years as the quality of higher education delivered in Wales and the reputation of the Welsh higher education sector remain Welsh Government priorities. It is proposed that the majority of members of the Committee will remain independent of the Council.

### **Cooperation with HEFCW's quality assessment requirements**

- 6.9 In future, HEFCW's revised quality assessment duty will not be reliant on the provision of recurrent grant funding to institutions. Consequently it will be necessary to provide a mechanism by which HEFCW is able to enforce compliance with the quality assessment process. We therefore intend to confer upon a person carrying out a quality assessment (e.g. QAA) a right of entry to institutions or other providers and a right to examine and take copies of records (whether written or electronic).
- 6.10 We consider that it will also be necessary to place regulated providers under an obligation to engage with the quality assessment arrangements put in place by HEFCW and to give HEFCW (or the Council's appointee) all the information that they require (within reason) in connection with the quality assessment process.
- 6.11 While higher education institutions and other providers have a reputational interest in complying with the quality assessment requirements we consider that it is both appropriate and necessary to provide a means of enforcing compliance with HEFCW's (or as the case may be HEFCW's appointees') right of access to premises, records and documents. Rather than adopting an approach which would result in a criminal offence for failure to comply with these requirements (similar to the statutory inspection regime which applies to schools and the further education sector) we considered that a more suitable means of achieving the desired outcome would be to enable HEFCW **to issue a direction to an institution or other provider which would require them to allow access to premises, records and documents** for the purpose of the Council's quality assessment duty.

6.12 We also propose that such a direction should be enforceable by way of an injunction. This approach would have the advantage of not subjecting non-compliant providers to a potential criminal offence and provide sufficient leverage for HEFCW to ensure that it can discharge its duty in the event of an institution or provider failing to allow access to its premises, records and documents.

## **Unsatisfactory quality – interventions and sanctions**

6.13 If HEFCW determines that the quality of higher education delivered by a regulated provider is not adequate to meet the reasonable needs of those undertaking the course it will be necessary for action to be taken in order to rectify the situation as quickly as possible to protect the interests of students and the reputation of the Welsh higher education sector.

6.14 We consider that HEFCW should continue to issue guidance in the form of circulars relating to unsatisfactory quality and the procedures that are to apply in cases of unsatisfactory quality. There are a number of actions which HEFCW currently undertakes in such cases and these are set out in HEFCW's Unsatisfactory Quality Procedure circular<sup>20</sup>, including:

- 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<sup>21</sup> - liaising with the Welsh Government as main funders, and with Estyn if appropriate, over action to be taken.

We propose that HEFCW should be able to continue to undertake actions similar to those above, although in future they will not be undertaken in connection with terms and conditions of HEFCW funding and will apply to all institutions and other providers which have an approved fee plan in force (*i.e.* to regulated providers).

6.15 We therefore propose to confer new functions on HEFCW concerning the actions which HEFCW may take in order to address unsatisfactory quality. We envisage that, subject to the Council being satisfied that the quality of education provided by regulated provider is unsatisfactory that the Council may do any / all of the following:

- issue action plans following a quality assessment;
- take additional action where it is considered that an institution is failing to meet quality requirements e.g. send in a support team, undertake additional assurance reviews; and

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<sup>20</sup> HEFCW Circular 12/16 HE: Unsatisfactory Quality Procedures.

<sup>21</sup> FE institutions in receipt of funding from HEFCW.

- attend and address meetings of the governing body / management board of an institution or other provider about any matter arising from a quality assessment.

We propose that HEFCW should have discretion as to the most appropriate intervention to apply taking into account the evidence associated with individual cases of unsatisfactory quality.

6.16 In order to protect the interests of students, the Welsh Ministers and taxpayers it will be necessary to ensure that if, following actions taken by HEFCW to rectify unsatisfactory quality, the quality of higher education courses delivered by a regulated provider remains unsatisfactory, or if in the opinion of HEFCW, the quality failures are so serious that there is an unacceptable risk to the reputation of the provision and the successful completion of students' courses then we propose that **HEFCW should be able to withdraw its approval of the regulated provider's fee plan.**

6.17 Although application of the sanction to **withdraw approval of** a fee plan would have far reaching consequences we consider that it would protect a significant proportion of the Welsh Government's investment in higher education delivered by regulated providers, the interests of learners and the reputation of the Welsh HE sector.

6.18 Currently, a decision made by HEFCW, as relevant authority, to refuse to approve a proposed fee plan, to approve a variation to an existing plan, or approve a new fee plan during a specified period is subject to a review process whereby the applicant may seek a review of HEFCW's decision. We propose to extend the existing review process so that a decision to withdraw approval of a fee plan on the basis of a regulated provider's failure to deliver provision of satisfactory quality should in the first instance be regarded as a provisional decision. Under this proposal the institution or other provider subject to the decision should be able to seek a review by an independent person or panel.

6.19 As in the case of **withdrawal of approval** of a fee plan due to persistent failure to comply with a fee limit or the general provisions of approved fee plan, we consider that **transitional measures should apply where approval is withdrawn on grounds of quality failures.** We propose that such measures should ensure that students who have commenced their higher education courses with a regulated provider can continue to receive Welsh Government student support in order to complete their studies.

6.20 We expect that HEFCW will exercise its new functions within the following principles:

- direct intervention will only occur when necessary;
- the intervention will be proportionate to the risk to students, public funding and the reputation of the Welsh HE sector; and
- that actions as far as possible will be agreed between the regulated provider and HEFCW.

Additionally we propose that HEFCW should prepare, consult and publish a statement as to how it will exercise the new functions in 6.15 above. This will ensure that institutions and other providers are fully aware of the Council's expectations.

- 6.21 We intend to make provision for HEFCW to be able to issue guidance to regulated providers concerning quality assessment. This will serve two purposes, it will set out the steps to be taken by a regulated provider where, in light of an assessment, HEFCW considers that the quality of education provided is unsatisfactory and secondly it will enable HEFCW to issue guidance about maintaining and improving the quality of higher education provision in Wales.
- 6.22 We propose that HEFCW should be required to **submit an annual report to the Welsh Ministers** on the discharge of its quality assessment functions including any interventions or enforcement action undertaken during the reporting period. This requirement will ensure that the Welsh Ministers are informed about any cases of unsatisfactory quality at regulated providers which have necessitated HEFCW to make use of its intervention powers.
- 6.23 Additionally, we propose to make provision for the 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. We are proposing that the Welsh Ministers should consult HEFCW before issuing such guidance.

## **Franchised courses**

- 6.24 Further to the proposals set out in section 4 concerning franchised provision, we propose that the institution or provider which franchises the higher education course (the franchisor) will be required to have an approved fee plan in force in order for franchised courses to be a qualifying course for fee controls and to be automatically designated for the purposes of statutory student support from the Welsh Government. We propose that the franchisor, as a regulated provider (rather than the franchisee), will need to comply with HEFCW's quality assessment requirements. We would welcome views as to whether this approach would work in practice.

## **Consultation questions: quality assessment**

- 1. Do you agree 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?**
- 2. Do you agree with the proposed approach of making provision for HEFCW to be able to direct regulated providers to provide access to premises, records and documents for the purpose of quality assessment?**
- 3. In order to deal with cases of unsatisfactory quality are the actions specified at paragraph 6.15 appropriate and adequate? Are there any other actions which you consider HEFCW should be able to undertake?**
- 4. Do you consider 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 or other provider which is the subject of the quality assessment?**
- 5. In the event of HEFCW revoking a fee plan are the safeguards set out at paragraph 6.18 appropriate and sufficient?**
- 6. Do you agree with the proposal that HEFCW be required to submit an annual report to the Welsh Ministers on the discharge of its quality assessment duty?**
- 7. Are the proposals in respect of franchised provision workable in practice?**

## 7. Financial and governance assurance

### Current arrangements and why change is needed

- 7.1 HEFCW undertakes assurance activities in respect of the financial health and corporate governance arrangements of the institutions for which it provides financial support. These arrangements provide safeguards for the use of public funds and protect the interests of students, taxpayers and the Welsh Government.
- 7.2 The assurance arrangements put in place by HEFCW are provided for by the conditions it attaches to funding allocations and are thus dependent on the continued granting of funds by HEFCW to institutions. Currently each institution is issued with an individual Financial Memorandum which sets out HEFCW's requirements in respect of the funding allocated to the institution and the associated monitoring arrangements. The designated officer of each directly funded institution is required to return to HEFCW a signed and dated copy of the Financial Memorandum for their institution. The responsibility for ensuring that the institution complies with this memorandum and related guidance<sup>22</sup> rests with the governing body of the funded institution.
- 7.3 Where instances of financial irregularities or poor governance are identified, HEFCW needs to be able to apply appropriate interventions and sanctions proportionate to the severity of the problem in order to protect the interests of learners and the reputation of higher education in Wales. Currently, where problems are discovered via HEFCW's assurance activities, HEFCW can seek to recover amounts of recurrent funding or refuse to release future tranches of funding to institutions. This action will not be open to HEFCW in the future as the amounts of recurrent funding will be significantly reduced.
- 7.4 Currently if financial mismanagement or poor governance is discovered HEFCW may:
- make arrangements with the institution's senior management to seek a common understanding of the issues, actions that have already been taken or are planned by the institution and as necessary set up a support team to investigate and resolve the issues 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 - liaise with the Welsh Government as the main funder of the institutions, and be kept informed of the progress against any recovery plan put in place.

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<sup>22</sup> HEFCW Guidance Circular: W08/36HE - Revised Financial Memorandum and Audit Code of Practice, November 2008

HEFCW will need to be able to undertake these types of actions in the future. Consequently existing legislation will need to be amended to make relevant provision for HEFCW's functions under the new funding arrangements.

- 7.5 In order to ensure that HEFCW is able to provide financial and governance assurance in respect of regulated providers (which therefore have their courses automatically designated for Welsh Government statutory student support) it will be necessary to make amendments to existing legislation. We consider that the application of a published set of financial and corporate governance requirements within the HE sector in Wales would enhance public trust and confidence. Providing HEFCW with the ability to set those requirements would also recognise its role in protecting the interests of those who access or invest in the HE sector in Wales.
- 7.6 We therefore propose to amend the existing statutory framework relating to HEFCW's functions to ensure that it is able to require regulated providers to comply with a **Financial and Corporate Governance Code**.

### **Arrangements under the new regulatory framework**

- 7.7 Our intention is that, where possible, the revised arrangements for financial and corporate governance assurance should build on HEFCW's existing functions and practice. However some changes will be necessary as a consequence of HEFCW's revised functions no longer operating on the basis of the application of conditions of funding.
- 7.8 Under the revised regulatory framework HEFCW's new role in respect of institutions and other providers in Wales which have an approved fee plan in force will be to ensure:
- that they are well run and comply with published corporate governance expectations and are reputable organisations;
  - their finance systems are effective and efficient; and
  - they are sustainable for the future.
- 7.9 In order to put HEFCW's financial and governance assurance function on a statutory footing we propose to:
- place HEFCW under a statutory duty to prepare and publish a Financial and Corporate Governance Code;
  - require HEFCW to keep the Code under review; and
  - require HEFCW to consult relevant stakeholders prior to publication of the Code (or any subsequent revisions).

### **Financial and corporate governance code**

- 7.10 The new Financial and Corporate Governance Code of Practice will form a key component in the revised regulatory framework. The Code will apply to any

provider of higher education courses in Wales which has an approved fee plan in force (regulated providers). We consider that HEFCW should be required to consult on the development of the Code. This requirement will ensure that all relevant stakeholders are aware of the proposed content and that they have an opportunity to input to the development of the Code.

7.11 The Code will be the means by which HEFCW can impose requirements on regulated providers as well as making provision for the communication of guidance concerning governance and financial management to which providers must have regard in the conduct of their business. We do not intend to prescribe the detailed content of the Code in legislation but we envisage that the legislation will allow for the requirements of the Code to encompass the following:

- the organisation and management of a regulated provider including the management of its financial affairs (past conduct and future planning) and the preparation of financial statements and accounts and the compliance with audit requirements;
- the circumstances in which HEFCW's consent is required before an regulated provider may enter into certain financial transactions specified in the Code; and
- the provision of information to HEFCW relating to the financial health, organisation and management of the regulated provider.

7.12 In line with its increased regulatory role we consider that it should be a matter for HEFCW to develop the operational detail and to consult on the draft Code. However, given the significance of the Code in respect of the operation of the new regulatory framework, we consider that an additional stage of scrutiny should be provided for before the code is finalised. We are considering the following options in this respect:

- that HEFCW should be required to submit the post-consultation version of the Code to the Welsh Ministers who in turn, if satisfied with the draft Code consent to its publication;
- that HEFCW should be required to submit the post-consultation version of the Code to the Welsh Ministers who in turn, if satisfied with the draft Code lay it before the National Assembly for Wales for approval; or
- that HEFCW should be required to submit the post-consultation version of the Code to be laid before the National Assembly for Wales without a requirement for approval.

7.13 Following publication of the Code, all regulated providers (i.e. those with an approved fee plan in force) will be required to comply with requirements of the Code. It is proposed that the Code should also include guidelines (in addition to requirements) relating to governance and financial management arrangements. We consider that regulated providers should be obliged to have regard to such guidelines. In order for an institution or other provider to retain its regulated provider status it will need to comply with the requirements of the Code. In line



with its new regulatory role we therefore intend to place HEFCW under a duty to make provision for the monitoring of compliance with the requirements imposed by the Code. We also propose to confer a power on HEFCW to intervene in the event of a regulated provider failing to comply with the Code's requirements.

## **Interventions**

7.14 In order to ensure that regulated providers comply with the requirements of the Code we propose to allow HEFCW to:

- direct a regulated provider to take action / refrain from action as necessary to comply with the requirements of the Code (where HEFCW is satisfied that a regulated provider has failed, or is likely to fail, to comply with such a requirement); and
- withdraw approval of an approved fee plan if in the Council's opinion a regulated provider has demonstrated serious financial mismanagement (which may include persistent failure to comply with the requirements of the Code).

7.15 We would expect HEFCW to exercise its intervention powers in accordance with the following principles:

- direct intervention will only occur when necessary;
- the level of intervention will be proportionate to the risk to learners and public funding; and
- actions, as far as possible, will be agreed between the governing body (where one exists) and the Head of the institution or provider concerned.

Withdrawal of approval for a fee plan is a significant and far reaching sanction and we would expect it only to be applied in the event of serious financial mismanagement. Nevertheless in the context of the new funding and student support regime we consider that such a sanction is necessary in order to protect the interests of students, the taxpayer and the Welsh Government.

7.16 In respect of HEFCW's interventions we propose that certain safeguards should be put in place as follows:

- Firstly, where HEFCW is minded to issue a direction the intention is to afford regulated providers an opportunity to make representations as to why a direction should not be issued. If, on review of information provided in such representations, HEFCW remains of the opinion that the direction should be issued then that will be a matter for the Council to determine in accordance with the published Code. When issuing a direction, HEFCW should be required to set out its reasons for the direction in writing.
- Secondly, to provide for external scrutiny it is proposed that HEFCW should be required to provide an annual report to the Welsh Ministers detailing how the Council has discharged its financial and governance assurance functions in the preceding year (including any use that has

been made of the Council's interventions powers). The intention is to ensure that the Welsh Ministers are informed of instances of financial or institutional mismanagement. This would be similar to the Council's current annual statement of assurance.

- Thirdly, we propose to extend the existing review process so that a decision by HEFCW to issue a direction, or a decision to withdraw approval of a fee plan on the basis of a regulated provider's serious financial mismanagement should in the first instance be regarded as a provisional decision. (Currently, a decision made by HEFCW, as relevant authority, to refuse to approve a proposed fee plan, to approve a variation to an existing plan, or approve a new fee plan during a specified period is subject to a review process). Under this proposal the institution or other provider subject to the decision should be able to seek a review by an independent person or panel.

7.17 Additionally, we consider that 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. This will ensure that stakeholders, including regulated providers are aware of the interventions which HEFCW may impose in the event of failure to comply with the requirements of the Code, when and how those interventions are to be applied and the consequences of non-compliance.

7.18 As with the arrangements for fee controls, fee plan compliance and quality assurance, we consider that the proposed arrangements concerning withdrawal of approval of a fee plan should include **transitional measures** which ensure that students who have commenced their higher education courses with a regulated provider are able to continue to receive Welsh Government student support in order to complete their studies.

7.19 Further to the proposals set out in section 4 concerning franchised provision, we propose that the institution or provider which franchises the higher education course (the franchisor) will be required to have an approved fee plan in force in order for franchised courses to be a qualifying course for the purposes of fee controls and to be automatically designated for student support from the Welsh Government. We propose that the franchisor, as a regulated provider (rather than the franchisee), will need to comply with HEFCW's Financial and Corporate Governance Code. We would welcome views as to whether this approach would work in practice.

## **Consultation questions: financial and governance assurance**

1. **Do you agree that HEFCW should be required to consult on the proposed Financial and Corporate Governance Code?**
2. **(a) Do you agree that following HEFCW's consultation on the draft Code that further scrutiny should be provided for?**

**(b) If 'Yes' then which of the options set out in paragraph 7.12 do you prefer and why?**

3. (a) Do you agree with the parameters of the proposed Code in paragraph 7.11?
  - (b) Should the parameters apply equally to all institutions and other providers with an approved plan in force?
  - (c) Should these parameters be set out in the proposed Bill with the operational detail of the Code left as a matter for HEFCW to develop?
  - (d) Under what circumstances, if any, should HEFCW's consent be required for regulated providers to enter into certain financial transactions?
4. Should HEFCW be required to consult on and publish a statement of its intervention policy?
5. Do you 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?
6. Are the safeguards set out at paragraph 7.16 appropriate and sufficient?