

Number: WG21191



Llywodraeth Cymru
Welsh Government

www.cymru.gov.uk

Welsh Government

Consultation – summary of responses

Higher Education (Wales) Bill

Technical consultation

Date of issue: April 2014

Higher Education (Wales) Bill

Audience	Higher education institutions; further education institutions; Higher Education Funding Council for Wales; third sector organisations and representative bodies.
Overview	This document provides a summary of the responses received by the Welsh Government to the <i>Higher Education (Wales) Bill</i> technical consultation.
Action required	None – for information only.
Further information	Enquiries about this document should be directed to: Legislation Team Corporate Services Division Department for Education and Skills Welsh Government Freepost NAT 8910 Cathays Park Cardiff CF10 3BR Tel: 029 2082 6585 e-mail: highereducationwalesbill@wales.gsi.gov.uk
Additional copies	This document can be accessed from the Welsh Government's website at www.wales.gov.uk/consultations
Related documents	<i>Higher Education (Wales) Bill</i> technical consultation www.wales.gov.uk/consultations/education/higher-education-wales-bill-technical-consultation/?lang=en

Contents

Introduction	1
Responses summary	2
Revised regulatory system	3
Fee controls and fair access	5
Quality assessment	11
Financial and governance assurance	14
Cross-cutting issues	21
List of respondents	22

Introduction

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. In a Written Statement of 6 March 2013, the Minister for Education and Skills indicated that his officials would undertake further analysis and development of the higher education proposals and that he would bring forward provisions relating to higher education reform through legislation later in this Assembly term.

The **Higher Education (Wales) Bill Technical Consultation** was published on 20 May 2013. The purpose of the document was twofold:

- to present the Welsh Government's response to the **Further and Higher Education (Wales) Bill White Paper** consultation, and
- to undertake further engagement with stakeholders on the technical detail of Welsh Government's legislative proposals.

The technical consultation sought views on how the revised regulatory system should operate within the proposed framework. It included the following areas:

- 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; and
- financial and governance assurance.

The consultation period ended on 29 July 2013. This document provides a summary of the responses received to the consultation. Copies of non-confidential responses received in their original format and language can be viewed at

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

We would like to take this opportunity to thank everyone who responded to the consultation for their contributions.

Responses summary

The technical consultation asked for responses to 25 questions. A total of 21 responses were received and the following table provides a breakdown of those who responded:

Government sponsored bodies	3
Representative bodies	4
Unions	3
Higher education institutions	9
Further education institutions	-
Individuals	1
Other	1
Total	21

Revised regulatory system

Question 1: In light of the increased regulatory role proposed for HEFCW should amendments be made to the Council's name?

The majority of respondents to this question considered that HEFCW's existing name should be retained. Reasons cited for not favouring amendments to the Council's name included:

- the perceived benefits attached to retention of the current brand identity, reputation and public profile of HEFCW;
- the potential risk of causing confusion for students, institutions and stakeholders;
- the loss of consistency with arrangements elsewhere in the UK; and
- the costs associated with such a change outweighing any benefits.

Some respondents expressed no strong preference but cautioned that consideration should be given to the costs associated with making amendments and that such costs should be factored into decision making. Only one respondent to this question favoured amendments but qualified their answer citing concerns about the potential cost implications of a change in name.

Question 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 the 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:

- (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?

The majority of HE institutions that responded to this question considered the proposal for the franchisor to be responsible for either applying for a fee plan or requesting cases-by-case designation of its courses to be in line with current practice. However some concern was expressed about the ability of the franchising institution to directly influence the delivery arrangements of the franchisee. Additionally the FE sector response supported the proposed approach in respect of full-time HE courses.

The perceived benefits of the proposed approach included:

- enabling students studying franchised courses delivered by small institutions to benefit from the fee plan commitments of the franchisor;
- that it would not prevent FE institutions with franchised provision from applying for fee plan in their own right; and
- that requiring the franchisee to have charitable status as well as the franchisor would help to ensure that the financial subsidy derived from the Welsh Government's tuition fee grants and loans are not used to benefit shareholders.

Possible disadvantages of the proposed approach included:

- the complexity of dealing with cross-border franchise arrangements;
- the potential for a franchisee which has arrangements with a number of partner institutions having to respond to the requirements of multiple fee plans; and
- the converse of this situation for a franchisor with multiple franchise arrangements in place having limited ability to ensure action by the various franchisees.

Only one alternative approach was put forward (by one respondent); that of franchisees being required to apply for a fee plan in respect of their franchised courses and subsequently being directly regulated by HEFCW as opposed to the franchisor.

Additional issues raised by respondents included:

- the need to ensure that the new regulatory arrangements do not limit the development of higher education provision in the further education sector;
- that transitional arrangements may be needed to allow franchisors to manage existing contractual agreements;
- to consider the potential for franchised courses delivered by regulated providers to be exempted from automatic course designation and fee plan requirements but to allow case-by-case designation of such courses;
- how best to ensure that a representative student voice is provided for across franchised courses in cases where representation structures are not well developed/not present at the franchisee; and
- that development of the franchisor's fee plan should reflect the needs of students studying on franchised courses; and the potential value of requiring franchisors to consult franchisees in the development of their fee plans.

Fee controls and fair access

Question 3: 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?

Just over half of the respondents that answered this question agreed with this proposal. Some of those who agreed with the proposal qualified their responses with the following comments:

- withdrawing approval for an approved plan mid term would be a serious step, that it would be important to use such a power in extremis only and that it should be proportionate to the problem identified;
- the effects on learners and the workforce of an approved plan being withdrawn should be assessed fully before such decisions are made;
- HEFCW should engage in extended dialogue with institutions to address any issues of concern before approval is withdrawn; and
- fee limits should apply to Welsh and EU domiciled students only and should not cover students from other parts of the UK and overseas students and that the content and purpose of fee plans correspond similarly to matters for which the Welsh Government has fiscal responsibility.

A number of respondents supported continuing HEFCW's ability to refuse to approve a new fee plan in extreme cases, but did not see the need for the current levels of control to be extended to enable a plan to be withdrawn mid-period. There was some confusion over the term 'fee limit'¹ and a number of responses referred to institutions' average fee income. One respondent suggested that the withdrawal of fee plan approval was not an appropriate sanction as it was unlikely to be used given it would cause considerable uncertainty and instability into the HE sector.

Question 4: 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?

The majority of those who answered this question were in favour of the proposal and their comments included that it would support the development of good practice on fee plan activities and investments and would reinforce the arms length principle for the funding of higher education. One respondent qualified their response by stating that the fee plan content and targets should relate to Welsh domiciled students only.

¹ The consultation document proposed that under the new regulatory framework a single maximum fee limit will be prescribed in regulations which will correspond to the existing 'higher amount' (currently £9,000) and that the tuition fees charged by regulated providers for full-time undergraduate courses must not exceed the limit specified in the provider's approved plan and must not exceed the maximum amount specified in regulations.

Some of the reasons included for rejecting this proposal were that:

- the current controls are robust and appropriate and that the case for change had not been made sufficiently in the consultation document; and
- the proposals appeared to be increasing public control over the HE sector and this could have implications for HE institutions' independence.

Question 5: 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?

All respondents that answered this question agreed that transitional protection should be made available for students under these circumstances. A few respondents asked for further clarity on how the transitional arrangements would operate particularly in relation to the potential impact on continuing duties and contracts between institutions and their students and potentially other parties (including sponsors, businesses, employers and partners) and how transitional arrangements would be funded.

One respondent suggested that an institution's students' union should be fully informed and involved in the stages leading up to the approval for its fee plan being withdrawn or approval of a fee plan being refused upon renewal so that it can be well-placed to support the affected students and, where necessary, to seek national support for their students.

Question 6: 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?

The majority of respondents who answered this question agreed with the proposal that all institutions and other providers with an approved plan in force should be subject to the same core requirements. Some of the reasons given for supporting the proposal included that it would: create a fair and equitable system; protect the interests of students; provide assurance to the Welsh Government that funding is directed to the delivery of appropriate provision; and promote a level of consistency across Welsh higher education.

Other comments included: the importance of proportionality in relation to the design and implementation of fee plans for smaller regulated providers; that institutions should be enabled to build on their individual strengths; the need for requirements within fee plans to focus on meeting the needs of students and potential students and that these may differ in relation to full-time and part-time courses and between institutions.

One respondent argued that an independent students' union or association should be a core requirement to remove the risk of inconsistent student representation across regulated providers, particularly as the new regulatory

framework may result in providers other than the traditional HE institutions applying for fee plan approval.

Some of the comments made by those who gave a negative response to this question included that the consultation had not clearly defined the core requirements and that there was a concern that the proposal would result in HEFCW's corporate targets being imposed on all institutions.

Question 7: 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?

The majority of respondents that answered this question agreed with the proposal and suggested that it would allow HEFCW to take a proportionate approach to fee plan approval and implementation.

A number of respondents did not understand the need to move from the current arrangements. Other respondents asked for clarification about how the fee level will be taken into account and considered that HEFCW should consult on the criteria it will use when evaluating and approving fee plans. It was queried whether HEFCW would possess the requisite knowledge and expertise to make judgements on fee levels.

Other comments included: that the commitment made in the fee plans should be based on the institution's own mission and vision and not prescribed by HEFCW; and that the fee level should be considered alongside other institutional sources of income.

Question 8: Do you agree with the proposed value of £6,000 for the 'threshold' fee amount?

The majority of the respondents that answered this question agreed with the proposed value. Some of reasons given for supporting this proposed value included that it mirrors the current basic fee level in England, and that it is consistent with the proposed level of tuition fee support available to students undertaking courses with providers whose courses are specifically designated for statutory student support.

Some of the reasons given for not supporting the proposed value included: that no reasoned explanation for setting the threshold at £6,000 was provided in the consultation; that Welsh HE institutions would need to set their fees at £8,000 at least to enable to compete with institutions in England and elsewhere in the UK; and that the threshold would encourage some providers to focus their offer on cheap to run/ high demand provision whilst avoiding any commitment to fee plan expenditure.

One respondent noted that currently any institution that charges over £4,000 is required to outline how they will spend a proportion of that additional fee income in their fee plan. The respondent added that they felt that although it is proposed that all providers will have to complete a fee plan to be a regulated provider, having a threshold of £6,000 would be, when compared with current

arrangements, a less robust way of monitoring and directing expenditure of additional fee income.

Question 9: 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?

Just over half of the respondents that answered this question agreed with some, if not all, of the proposed sanctions. A number of respondents believed that the range of sanctions proposed for HEFCW were reasonable, provided measured and appropriate means of encouraging compliance with the fee plan requirements and would help ensure the high standard and reputation of HE provision is maintained in Wales. A number of respondents also agreed that HEFCW should use its discretion in the application of these sanctions but stressed the importance of this discretion being applied in an open and transparent manner.

Other comments included that:

- HEFCW should have the option to extend its powers of direction beyond the current proposal which only applies to fee income above £6,000;
- as a consequence of the introduction of new funding arrangements, the premia that was used by HEFCW to promote access into higher education and other appropriate public priorities related to equality will disappear in the new funding environment. It would therefore be appropriate for HEFCW to be able to instruct institutions to spend a specific sum (reflecting the fee plan) in order to address strategic priorities in the context of access and equality; and
- copies of any letters sent to the regulated provider specifying action to be taken or providing a warning notice should also be sent to the institution's students' union to ensure they can meet the needs of their student body and ensure their students' interests and welfare.

A number of those who did not agree with the proposal were not convinced that the range of proposed sanctions were necessary and considered that the current controls were sufficient. Other comments included that:

- the proposal to 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 HE puts HEFCW in the position of managing directly the affairs of institutions and seems to direct inputs rather than encouraging outputs;
- giving HEFCW latitude to determine whether or not it should apply sanctions runs the risk of inconsistent treatment and legal challenge;

- the planned recourse to court injunctions in the event of non-compliance would not reflect a partnership approach;
- the concept of “spending directions” lacks vision and other solutions should be explored such as redeployment of existing resources or increasing expenditure in some core academic areas;
- spending directions could place HEFCW in the position of managing directly the affairs of an independent institution; and
- action to redress any non-achievement of targets should be developed in partnership, drawing on local expertise and knowledge.

Question 10: It is proposed that where HEFCW (as the 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?

The majority of the respondents that answered this question considered the review mechanism to be appropriate in principle but a number suggested that further clarification was required on how the review process would operate, including how the independent review would function and what the scope and powers of the reviewer(s) would be. Other comments included that:

- the review process should be proportionate and should not be onerous or expensive for institutions to undertake;
- the procedure should allow referral to an ombudsman to comment on regularity of procedures;
- a two-stage approach is needed where HEFCW decides to withdraw approval of a fee plan, including an initial review which allows for representations to be made directly to HEFCW before an appeal, if necessary, to an independent panel;
- any independent review panel should include external student representation; and
- the intent to withdraw approval should remain a confidential matter between HEFCW, the HE provider and the appeals panel/person until such time as the appeal has been completed and that adequate time should be given for appeal.

A number of respondents stated that they were not in favour of new powers being given to HEFCW, nor the range of sanctions that are proposed to be made available to the Council, but did agree that if these arrangements were put in place then an independent review process would be essential. It was suggested that the configuration of review panels should be subject to further consultation, that the panels should be configured in a way that is sensitive to the diversity of the sector, and that institutions should be given every opportunity to make a robust case for their plans.

Question 11: Should regulated providers (i.e. those with an approval 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?

There was a mixed response to this question. A number of respondents agreed that certain courses should be exempt from automatic designation and the regulatory requirements associated with the fee plans. Respondents gave examples of courses on which students are not in receipt of Welsh Government student support including courses that are targeted exclusively at international students and non accredited continuing professional development provision that is paid for by employers.

A number of respondents asked for clarification on how this proposal would work in practice. Respondents suggested that a process should be put in place to determine which courses should be exempt from automatic designation which would be agreed by HEFCW. It was suggested that such provision should fall within the scope of the proposed arrangements for quality assurance and governance.

Some of the respondents who disagreed with this proposal questioned the fairness of allowing the exemption of certain courses from regulatory requirements and argued that affording institutions such freedoms could undermine the increased regulatory function of HEFCW and create a two-tier regulatory system for the provision of HE courses.

Quality assessment

Question 12: 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?

The majority of respondents that answered this question were in agreement with the proposal with comments stressing the importance of all courses and providers being on a level playing field in terms of the quality and standards of their courses.

There was some concern that the scope of the duty excluded credit-rated modules that do not necessarily form a course. Whilst the technical consultation provided further clarification on the proposal for HEFCW to retain a statutory duty for quality assessment, a level of misunderstanding about this proposal was evident in the consultation responses.

Question 13: 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?

The majority of respondents agreed with this proposal and comments included that requests should be reasonable, proportionate and information only used in connection with quality assessment purposes. A minority perceived this proposal as implementing an 'inspection' regime, which would provide a significant difference in the levels of regulatory control for universities in Wales as compared with other parts of the UK. The technical consultation indicated that this was not the policy intention. Some respondents also indicated it was an unnecessary provision on the basis that institutions would comply with access requests voluntarily. Other comments suggested that a right to speak to students, staff and other stakeholders of the institution should also be included.

Question 14: 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?

Paragraph 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*
- *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.

Although the difference was marginal, more respondents disagreed that the actions specified at paragraph 6.15 were appropriate and adequate and supported the continuation of HEFCW's existing powers and sanctions rather than the functions specified above. Other comments indicated that the actions must be transparent, reasonable, proportionate and consistently applied. Clarification was also provided to indicate that institutions rather than HEFCW, as implied in the consultation document, currently develop action plans based on the recommendations of any review or investigation by the Quality Assurance Agency for Higher Education (QAA) or HEFCW. Additionally transitional arrangements for the protection of learners were considered to be necessary in the event of HEFCW's withdrawal of approval of a fee plan on the grounds of inadequate quality.

Question 15: 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?

The majority of respondents considered that assessors should produce identification, particularly as there could be data protection issues arising from providing access to records and documents for quality assessment purposes. A small number of respondents did not consider identification to be necessary because they disagreed with the proposal to allow HEFCW to direct a regulated institution to provide access to its premises, records and documents and did not consider there was a need to legislate to enable this access for quality assessment purposes.

Question 16: In the event of HEFCW revoking a fee plan are the safeguards set out at paragraph 6.18 appropriate and sufficient?

Paragraph 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.

Although the difference was marginal, more respondents agreed that the safeguards set out at paragraph 6.18 were appropriate and sufficient than disagreed with this question.

Many of the comments surrounded the process of how this sanction would operate in practice rather than the sanction itself. These included that the appeals process must give sufficient time for providers to make representations and that an independent review panel would help ensure fairness and equity in the process. Two respondents indicated that engagement with staff, and not just managers of institutions, should take place.

The responses which disagreed that the safeguards would be sufficient appeared to oppose the sanction to revoke a fee plan, rather than the adequacy of the proposed safeguards, although one response questioned whether the safeguards were sufficiently flexible. Another response indicated there seemed to be only one safeguard i.e. that the initial decision was provisional. A lack of detail on the process to be followed seemed to be a concern.

Question 17: 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?

The majority of respondents were in favour of this proposal and indicated that it would provide transparency. However those opposed to the proposal indicated that the QAA Institutional Review reports are the key mechanism for reporting on the quality of HE provision.

Concern was expressed about the potential additional workload for institutions arising from this proposal. It is possible that the proposal for HEFCW to submit an annual report on how it has discharged its quality duty was misunderstood as a requirement for institutions to complete reports on their individual quality arrangements.

Question 18: Are the proposals in respect of franchised provision workable in practice?

The majority of respondents agreed that the proposal is workable in practice and aligns with current QAA practice for the franchisor to be responsible for ensuring that the quality of the courses delivered by a franchisee is satisfactory. Comments indicated that for franchisees, however, the proposals could introduce increased complexity and potential for conflict between different sets of requirements and lines of accountability where multiple franchise arrangements are in place with different types of provider.

Financial and governance assurance

Question 19: Do you agree that HEFCW should be required to consult on the proposed Financial and Corporate Governance Code?

There was overwhelming support for this proposal with all respondents who answered this question agreeing that HEFCW should consult the Code. While the remaining respondents did not express an opinion either way on this question, one indicated general support for such sector led initiatives. It was felt that the requirement to consult aligned with current obligations and would ensure that relevant stakeholders have an opportunity to input into the content and operation of the Code and ensure that it recognised important principles such as sector autonomy, particularly as sanctions could be far reaching. Two respondents felt that HEFCW should be required to consult and follow the scrutiny process, not only on the initial Code, but on subsequent revisions.

Staff and student representatives that responded to the consultation stressed the need for them and any other interested parties to be included as consultees.

One respondent agreed that HEFCW should be required to consult if legislation required HEFCW to approve a Code, however, they did not feel that HEFCW should be directly involved in developing the Code. Their view was that the point of regulation should be to ensure that HEFCW is satisfied that each HE provider has adopted and is using an acceptable and appropriate code, and that any divergence from that code is justified. In practice, they felt that this meant that HE providers would subscribe to the code established by the Committee of University Chairs.

Question 20. (a) Do you agree that following HEFCW's consultation on the draft Code that further scrutiny should be provided for?

Overall there was general support for additional scrutiny of the Code from respondents, with option 2 (that HEFCW should be required to submit the post-consultation version of the Code to Welsh Ministers who in turn, if satisfied with the draft Code lay it before the National Assembly for Wales for approval) being preferred by many. Some respondents agreed the need for additional scrutiny, but felt that this should be undertaken externally with HEFCW being required to take into account the outcomes.

Of those that were not in favour, one respondent believed that there would be no benefit from additional scrutiny. Others felt that such scrutiny may erode the arms lengths principle. One respondent considered that additional scrutiny was not necessary but supported option 3 (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) if it were to be required.

A number of respondents felt there was a need to consider the implications of the National Assembly or Welsh Government approving the Code pointing out

that the current statutory framework places a number of restrictions on the terms and conditions that can be placed on HEFCW. The potential implications of this proposal on the Office of National Statistics (ONS) classification² of providers were also raised.

Question 20 (b) If ‘Yes’ then which of the options set out in paragraph 7.12 do you prefer and why?

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.*

As outlined above, of those that saw the need for additional scrutiny, option 2 was the most commonly supported route. Other respondents in favour of additional scrutiny suggested that further consideration was required as to what form this should take, with a number not supportive of any of the options proposed or putting forward a view that scrutiny should be undertaken externally.

Question 21 (a) Do you agree with the parameters of the proposed Code in paragraph 7.11?

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*

² A number of respondents expressed concern that the proposals in the technical consultation could be perceived as direct government intervention potentially resulting in the Office for National Statistics (ONS) reclassifying HE institutions as public bodies for accounting purposes. HE institutions are currently classified by ONS as non-profit institutions serving households (NPISH).

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.*

Of those that responded to this question, the majority broadly agreed with the parameters proposed above but raised a number of key points.

- The Code must be in proportion to the risks of non compliance and should not place undue additional burden on providers bearing in mind the sector is already extensively audited and bound by a number of compliance instruments. An extra code or greater detail is unnecessary.
- It would be beneficial to make explicit that management of the provider encompasses strategic planning.
- Institutional governance arrangements should also require the monitoring and reporting against all HEFCW guidance.
- There is a need for institutional governance arrangements of each institution to be taken into account and to ensure that provisions do not conflict with the requirements of the Charity Commission.
- There is a need to consider the impact of regulation on ONS classification.
- The code needs to take into account of existing financial and governance assurance arrangements for designated FE institutions.
- Accounts form part of financial statements so they may not need to be stated within the wording of the first parameter.

Question 21(b) Should the parameters apply equally to all institutions and other providers with an approved plan in force?

There was strong support for this principle with all but one of those that responded to this question believing that parameters should apply equally to all institutions so as to ensure a fair and consistent approach. One respondent, whilst agreeing broadly with this principle, felt that institutions whose business is predominantly delivered in other parts of the UK and who are subject to regulation in other parts of the UK should not be bound by the same parameters as those providers operating solely in Wales. This would ensure that providers operating on a pan UK basis are not subject to multiple and potentially conflicting regulation.

One respondent did not agree that all providers should be bound by the same parameters. They felt that parameters should vary significantly to recognise those regulated providers, such as designated FE institutions, who already have a Financial Memorandum in place with the Welsh Government and comply with financial management and governance requirements under this

arrangement. This respondent was of the view that these requirements should remain extant and be explicitly taken into account in the HEFCW code.

Question 21(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?

Of those that responded to this question the vast majority agreed with this approach feeling that it provided a useful framework and that HEFCW would be best placed to develop the detail of the Code. The importance of doing this in consultation with the sector was stressed by some respondents. One respondent agreed with the approach but felt the parameters were inadequate. One respondent did not agree with the approach feeling that it provided HEFCW with too much discretion and latitude. Of those that did not express a preference many saw this approach as generally positive within their comments.

Question 21(d) Under what circumstances, if any, should HEFCW's consent be required for regulated providers to enter into certain financial transactions?

A number of respondents indicated a need to consider this issue in light of issues around ONS classification. Some were of the view that such controls should feature in the Code, saw merit in providers requiring HEFCW consent in certain circumstances or viewed current controls as being sufficient. Others felt that a requirement for HEFCW consent was not appropriate. Key issues in the responses to this question included:

- Responsibility for risk and the knowledge and expertise to manage it reside with institutions not HEFCW;
- Universities and other higher education providers are independent organisations and should therefore be allowed to develop their own financial strategies and implement them without reference to the Funding Council;
- There is a need for a review of whether current restrictions are still necessary in light of new funding arrangements;
- In the interest of openness and transparency, it is important that regulated providers should make public any plans to enter into certain financial transactions and for HEFCW to step in if these do not appear to be in the interest of the provider or the sector as a whole;
- It is difficult to envisage a situation where existing controls would be insufficient;
- It may be more appropriate for regulated providers to seek advice from HEFCW as to whether a financial transaction could cause difficulties in relation to the approval or renewal of a fee plan;
- In relation to designated FE institutions, it is not necessary for HEFCW's consent to be required. Financial monitoring and control

already takes place under arrangements with the Welsh Government;
and

- Only in extreme circumstances, should HEFCW's consent be required, for example, where loans are taken on that could impact on the providers' financial sustainability or ability to deliver HE.

Question 22: Should HEFCW be required to consult on and publish a statement of its intervention policy?

Of those that responded to the question, all agreed that HEFCW should be required to consult on and publish a statement of its intervention policy. It was broadly agreed that it is important for the policy to be clear and transparent and developed in consultation with all interested parties. Key points raised by respondents included:

- This would prevent legal challenge should there be any suggestion that providers were treated differently;
- The interventions policy should be couched in terms of HEFCW's role of providing a mechanism to ensure the high quality and financial sustainability of the Welsh sector;
- If these proposals are to be taken forward, the consequences of intervention could have a significant impact on reputation, financial sustainability, partnership with other organisations and stakeholders and ultimately students. A clear and transparent policy should be developed in consultation with the sector and should be published;
- This would ensure that all parties are clear about circumstances in which intervention will be applied. In order to take into account issues which cannot be seen at this stage, the intervention policy should contain rubrics that allow HEFCW to intervene at its discretion;
- The power to intervene is a significant one and a transparent policy would be essential;
- Intervention could have a significant impact on an institution's ability to deliver HE and, in extreme cases, remain in business, so HEFCW should consult on and publish its intervention policy; and
- HEFCW should be required to consult on and publish a statement of its policy. Transparency is vital to ensure that intervention can be judged fairly and challenged where necessary.

Question 23: 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?

Of those that responded to this question the vast majority did not support the proposals, seeing an extension of HEFCW's powers in this regard as being inappropriate or unnecessary. Respondents argued that the withdrawal of

approval of a fee plan without the appropriate notice of intention would be inappropriate because of the serious implications this action would have to the HE institution and the HE sector in Wales.

Many felt that institutions should be issued with warnings, notices of intentions and that phased penalties should be used. Some respondents felt that such a sanction may be necessary in extreme cases particularly where serious financial mismanagement had been proven and there was a need to maintain public confidence. One respondent felt that this sanction should also be available in respect of failures in quality or governance. Key comments included:

- HEFCW should issue a compliance direction thereby affording the provider the opportunity to avoid dispute and or legally challenge the direction;
- The institution should always receive a warning and time to improve before HEFCW can withdraw a fee plan. It should be HEFCW's duty to support an institution in helping them address any unsatisfactory quality or financial mismanagement;
- Given the powers of the Charity Commission in this regard it is not clear why such an extension of power is being suggested;
- It would set a dangerous precedent whereby universities could have acceptable fee plans overturned because of unrelated issues; and
- While we agree with this in cases of serious financial mismanagement, it is vitally important that the code and intervention policy be developed in consultation with the sector, that student unions be kept informed and that there is a clear definition of what constitutes serious financial mismanagement.

Question 24: Are the safeguards set out at paragraph 7.16 appropriate and sufficient?

Para 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.

Although there was a mixed response to this question, the majority of respondents (albeit slight) were of the view that the safeguards proposed with regard to HEFCW's interventions were not appropriate and sufficient. The following were among the key points raised:

- HEFCW's intention to issue a direction should be confidential between HEFCW, the provider and appeals mechanism until any appeal has been concluded because of the impact on the institutions ability to recruit students and raise research and capital funding;
- A provisional decision should not be used as this could have a detrimental potentially destabilising impact on institutions and could reducing an institution's ability to take corrective action before a final decision is made;
- The proposed safeguards lack any real independence. The decision would remain with HEFCW and would not be open to external scrutiny or independent verification. The annual report to the Welsh Ministers would not provide any safeguard and could be a damaging instrument as it would be based on HEFCW's view and would not take into account the provider's interpretation. It is also likely to be retrospective; and
- There needs to be further clarification of the review process. One respondent strongly supported the inclusion of a duty to keep student unions informed being included in the Bill.

Cross-cutting issues

There were a number of cross cutting comments regarding the proposed revised regulatory system. These included:

- These proposals will increase the level of government control over the HE sector and potentially move towards an inspection regime.
- The revised regulatory system could lead to duplication or extra bureaucracy and could impact on the autonomy of institutions and their non-profit institutions serving households (NPISH) status.
- The proposed requirement for providers to have charitable status in order for their HE courses to be automatically designated for statutory student support by Welsh Ministers could potentially duplicate or conflict with existing legislation.
- The proposals should place a greater emphasis on HEFCW working in partnership with the sector.
- The case for extending HEFCW's powers remains unclear as considerable powers exist under the current statutory framework.
- HEFCW may not have the capacity or resources to deliver their obligations under the new regulatory framework.
- The scope of the proposed revised framework is limited and does not for example provide any control over the overall student support budget or provide for a similar level of assurance and protection for Welsh domiciled students who access student support from the Welsh Government and choose to study in other parts of the UK.
- There are a number of potential cross border issues to be resolved such as Welsh providers franchising into England, Welsh institutions with a secondary campus elsewhere in the UK, distance learning provision with students on either side of the border and English-based providers, either public or private, who wish to operate within Wales.
- Part-time HE provision should be included in the revised regulatory framework as soon as possible to avoid the development of a two-tier system.
- Thought should be given to ensure that all students are fully represented in the revised regulatory system and treated equally.
- HEFCW would potentially be able to fund institutions for HE eligible activities whether or not the providers are 'regulated' as defined in the consultation document (for instance strategic funding to support high-cost or strategically important subjects).
- Further clarification and engagement is required on the proposals outlined in the consultation document.

List of respondents

- 1 Charity Commission for England and Wales
- 2 Cardiff Metropolitan University
- 3 Coleg Cymraeg Cenedlaethol
- 4 Aberystwyth University
- 5 HEFCW
- 6 Quality Assurance Agency for Higher Education
- 7 Trevor Mayes
- 8 UNISON Wales
- 9 Anonymous
- 10 Estyn
- 11 Higher Education Better Regulation Group
- 12 Cardiff University
- 13 NASUWT Cymru
- 14 Higher Education Wales
- 15 Glyndŵr University
- 16 Colegau Cymru
- 17 Creative Skillset Cymru
- 18 Open University in Wales
- 19 Swansea University
- 20 Bangor University
- 21 NUS Wales