

EXPLANATORY MEMORANDUM TO THE HIGHER EDUCATION (FEE AND ACCESS PLANS) (NOTICES AND DIRECTIONS) (WALES) REGULATIONS 2015

The Explanatory Memorandum has been prepared by the Department for Education and Skills of the Welsh Government and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015. I am satisfied that the benefits outweigh any costs.

Huw Lewis AM
Minister for Education and Skills

07 July 2015

Description

1. These Regulations prescribe arrangements for the issue and review of notices and directions provided for by the Higher Education (Wales) Act 2015 ('the Act').

Matters of special interest to the Constitutional and Legislative Affairs Committee

2. None.

Legislative background

3. The Regulations are made using the powers of sections 11(5), 42(2)(d), 43(c) and 44(3) of the Higher Education (Wales) Act 2015.

Purpose and intended effect of the legislation

4. The Act makes provision for the Higher Education Funding Council for Wales ('HEFCW') to issue warning notices and directions to regulated institutions in the following circumstances:

- rejection of a proposed fee and access plan (section 7(1)(b));
- a compliance and reimbursement direction (section 11);
- directions in respect of failure to comply with general requirements of an approved plan (section 13);
- directions in respect of inadequate quality (section 19);
- directions in respect of failure to comply with the Code (section 33);
- refusal to approve a new fee and access plan (section 37); and
- withdrawal of approval of a fee and access plan (section 39).

5. Part 6 of the Act makes provision for the procedure for issuing notices and directions.

6. The purpose of the Regulations is to prescribe:

- the time within and way in which representations about a proposed notice or direction may be made by a regulated institution;
- information that must be included in a statement accompanying a relevant notice or direction that is issued by HEFCW to a regulated institution;
- the time within which an application for review of a notice or direction may be made and the grounds for application;
- the procedure to be followed when a review is carried out, including requests for further information by a review panel;
- what HEFCW must do with the report of a review; and
- how and when HEFCW are to publish a compliance and reimbursement direction under section 11 of the Act and provide a copy to the Welsh Ministers.

7. The Welsh Ministers intend that the process for issuing and reviewing notices and directions in connection with the Act should be transparent, allow the institution

adequate opportunity to present evidence, and be as swift as reasonably possible.

8. Institutions may make representations about proposed notices and directions. HEFCW must provide certain information with a notice or direction (in addition to its reasons, as provided for by section 43(a) of the Act). Institutions may apply for a review of a notice or direction to a review panel. A review panel may request further evidence from HEFCW and/or the governing body and the other may be invited to make representations about the information supplied. The review panel must prepare a report, and HEFCW must take the report into account when reconsidering their decision to issue a notice or direction.

9. The Regulations also make provision about the issue of a compliance and reimbursement direction within section 11 of the Act (when fees in excess of 'regulated course fees' have been charged). The direction is to be published only after any review and until revoked or HEFCW is satisfied that the direction has been complied with.

Consultation

10. A formal consultation exercise on these Regulations took place between 17 March 2015 and 12 May 2015. The outcome is included in the Regulatory Impact Assessment below.

REGULATORY IMPACT ASSESSMENT

11. The Welsh Ministers Code of Practice on carrying out regulatory impact assessments was considered in relation to the Regulations. A Regulatory Impact Assessment ('the Assessment') is required and follows.

12. The Welsh Ministers intend to make five sets of Regulations using powers from the Higher Education (Wales) Act 2015:

- The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015
- The Higher Education (Amounts) (Wales) Regulations 2015
- The Higher Education (Fee and Access Plans) (Wales) Regulations 2015
- The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015
- The Higher Education (Designation of Providers of Higher Education) (Wales) Regulations 2015

13. Together, the Regulations prescribe certain indispensable features of the regulation of higher education in Wales. **This Assessment therefore considers the impact of the Regulations as a whole.** It summarises the likely costs and benefits of complying with the Regulations, establishing:

- the administrative, compliance and other costs to which the Regulations will give rise;
- the timescales over which costs are expected;
- on whom the costs will fall; and
- the benefits that will accrue.

14. The Regulations are set in the context of achieving the overall policy objectives of the Act. The Higher Education (Wales) Bill Explanatory Memorandum¹ records the objectives as to:

- ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government higher education grants and loans;
- safeguard the contribution made to the public good arising from the Welsh Government's financial subsidy of higher education;
- maintain a strong focus on fair access to higher education; and
- preserve and protect the institutional autonomy and academic freedom of universities.

15. The Explanatory Memorandum incorporated a regulatory impact assessment, including an analysis of costs and benefits. Annex A of the Explanatory Memorandum explained the methodology used to arrive at cost estimates and was further elaborated in a letter from the Minister for Education and Skills to the Finance

¹ <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9758-em-e.pdf?langoption=3&ttl=PRI-LD9758-EM%20-%20Higher%20Education%20%28Wales%29%20Bill%20-%20Explanatory%20Memorandum>

Committee of the National Assembly for Wales². The information in that assessment describes the costs and benefits of the Regulations and is used here.

OPTIONS

16. Two options have been considered: do nothing and do minimum. 'Do nothing' would not make any new Regulations; 'do minimum' makes that subordinate legislation that is required to ensure the regulatory framework operates as intended.

Option 1 Do nothing

17. In this option, no Regulations would be made. Existing subordinate legislation, together with the provisions of the Act, would provide the framework for the regulation of higher education in Wales.

18. Existing subordinate legislation is not compatible with the provisions and intent of the Act. Prior to the passing of the Act, regulation was based upon the financial relationship between the Higher Education Funding Council for Wales ('HEFCW') and an institution via terms and conditions of funding, as well as provisions in the Higher Education Act 2004. HEFCW was able to impose financial requirements on an institution (such as repayment of sums by a governing body, or a refusal to award funding) in order to address any institutional failure.

19. Tuition fees, paid by the student with support from government, are now the principal source of funding for (undergraduate) higher education. The proportion of funding passed to higher education institutions by way of teaching grant has declined steadily. The Bill Explanatory Memorandum recorded (table 1) that in 2012/13 12% of HEFCW's financial allocation was paid as tuition fee grants. By 2015/16, this was forecast to be 60%. The basis for regulation has weakened considerably as the amount of teaching grant has fallen. The Act rectifies this by requiring any higher education institution which wishes its courses to be automatically designated for the purpose of student support (allowing eligible students to apply for tuition fee grants and loans) to apply for the approval of a fee and access plan. Regulated institutions – those with an approved fee and access plan – must comply with the provisions of the Act.

20. The Act enables the Welsh Ministers to make subordinate legislation on a number of matters. This legislation is required to give full effect to the policy intent of the Act. Without this, the regulatory framework will not achieve its intended effect.

21. The direct financial costs of this option are zero, as there would be no change in the present arrangements. The wider costs could be substantial. The Act was designed to overcome significant and pressing inadequacies in the arrangements for the regulation of higher education in Wales (as recorded in the Explanatory Memorandum). By not making subordinate legislation, the full policy intent of the Act would not be realised.

22. Other than not imposing any direct costs, there is no benefit to this option.

² <http://www.senedd.assembly.wales/documents/s28913/FIN4-14-14ptn1.pdf>

Option 2 Do minimum

23. This option makes the subordinate legislation that is required to ensure the regulatory framework operates as intended. The Welsh Ministers would not use all the regulation making powers provided for by the Act. Rather, legislation would be limited to key aspects of the regulatory framework.

24. In addition to continuing the policy of limiting maximum fees, subordinate legislation would include various prescriptions on fee and access plans. Fee and access plans are central to the operation of the new regulatory framework. Subordinate legislation would also be made to prescribe how a provider who would not normally be classed as an institution for the purposes of the Act may apply for a designation. Specifically, the legislation would address:

- fee limits, and the courses and persons to which fee limits must apply;
- the content of fee and access plans, how to vary them, and the matters that HEFCW must take into account when considering plans and variations for approval or rejection;
- the issue and review of notices and directions in connection with section 41(1) of the Act, and the issue and publication of directions in the event of a failure by a regulated institution to comply with section 11 of the Act; and
- the designation of providers of higher education

25. By making subordinate legislation on these matters, the Welsh Ministers will ensure that the regulatory framework provided for by the Act operates effectively. Only that legislation necessary to ensure the framework works as intended is introduced ('do minimum'). Further Regulations will be made as and when necessary, allowing the system time to embed and lessons to be learnt from implementation.

26. This is the preferred option. Costs and benefits are detailed below.

COSTS

27. As context, table 5 of the Bill Explanatory Memorandum, reproduced as **table 1**, provides cost estimates for the various regulatory functions provided for by the Act.

Table 1 Regular costs of the Act

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

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

28. **Table 2** highlights the incidence of the cost associated with each set of Regulations. The table includes costs falling to Welsh Government, regulated higher education institutions and HEFCW. Costs do not fall on any other body or individual, except in the case where a provider applies for designation (discussed below).

Table 2 Incidence of costs

Regulations	Welsh Govt.	HEIs†	HEFCW*	Others
Qualifying Courses, Qualifying Persons and Supplementary Provision				
Amounts				
Fee and Access Plans		•	•	
Fee and Access Plans (Notices and Directions)	•	•	•	
Designation of Providers of Higher Education	•			•

(† HEIs – higher education institutions. * HEFCW – Higher Education Funding Council for Wales.)

29. **The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015** impose no direct costs. The Regulations are concerned with prescribing qualifying courses and persons for the

purpose of the fee cap.

30. **The Higher Education (Amounts) (Wales) Regulations 2015** also impose no direct costs. The Regulations specify the maximum fee amount which can be charged (the maximum fee is unchanged).

31. **The Higher Education (Fee and Access Plans) (Wales) Regulations 2015** impose costs on HEIs as they are required to include certain matters in their plans and publish those plans. Costs are also imposed on HEFCW which is required to take into account certain matters when making a determination whether to approve a fee and access plan.

32. **The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015** impose costs on HEFCW who issue and publish notices and directions, HEIs who make representations in respect of proposed notices and directions and apply for a review of a notice or direction, Welsh Government who must establish a review panel, HEIs and/or HEFCW in responding to requests for information from a review panel, and HEFCW in considering a review panel's report.

33. **The Higher Education (Designation of Providers of Higher Education) (Wales) Regulations 2015** impose a cost on Welsh Government in assessing an application for designation, and on the applicant ('others' in the table).

34. The Explanatory Memorandum established the likely costs of the tasks associated with implementing and operating the regulatory framework provided for by the Act. Using this framework, it is possible to determine the likely costs, in broad terms, of complying with the Regulations. Costs have been carefully reassessed in light of policy and operational developments since the passing of the Act.

Table 3 The Higher Education (Fee and Access Plans) (Wales) Regulations 2015

	£000s
Compilation and assessment of fee plans	314
Variation	23

35. The compilation and assessment of fee and access plans is a recurring annual cost to the regulated higher education sector³ and to HEFCW. The cost of variation is a unit cost – it is not possible to predict when and how often applications to vary a fee and access plan may be received, nor how complex a variation may be.

³ Assumed for the purpose of financial modelling to be 10 institutions, the number of providers that currently have an approved fee and access plan in place.

Table 4 The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015

	£000s
Issuing notices and directions	39
Review	18

36. This is an estimate of the cost of issuing one notice or direction and the review process, assuming an institution applies for a review. Costs associated with notices and directions are only incurred should a notice or direction be issued and it is therefore not possible to predict when such costs may be incurred. Costs accrue to the HEI to whom a notice/direction has been issued, to Welsh Government and to HEFCW.

Table 5 The Higher Education (Designation of Providers of Higher Education) (Wales) Regulations 2015

	£000s
Designation	10

37. This is an estimate of the cost of dealing with one application for designation. Costs associated with the designation of a provider arise only upon receipt of an application and, again, incidence cannot be predicted. Costs are borne by the applicant and Welsh Government.

BENEFITS

38. The regulatory impact assessment in the Explanatory Memorandum discussed the range of benefits that would accrue. Of particular relevance to the five sets of Regulations are:

The principal benefit...is to ensure that there is a robust higher education regulatory framework in place. Learners—from Wales or elsewhere—can be confident of the quality of the education that they will receive and pay for. The financial health of the institutions at which they study will be assured. The control and regulation of tuition fees and a refreshed approach to widening access and retaining students from under represented groups will ensure that higher education remains open to all those who are capable of benefiting from it.

The public, for their part, can be confident that higher education providers continue to achieve a high standard in the conduct of their affairs and act in the public interest. Government expenditure on HE is managed in a strategic and

controlled manner. Academic and institutional autonomy are unaffected.

This...enables a number of existing regulatory controls to continue to be effective in the new student support regime. It also introduces a small number of new controls that extend the options available to HEFCW when dealing with identified problems. These provide for a more nuanced and proportionate approach to regulation than the...current system....

39. By prescribing qualifying courses and qualifying persons and establishing a maximum fee amount, tuition fees continue to be regulated and affordable.

40. Fee and access plans, and the associated system of issuing notices and directions, are central to achieving widening access objectives, reinforcing the high standard of conduct among Welsh HEIs, and enabling proportionate and nuanced regulation.

OTHER IMPACTS

41. These Regulations have no impact on the statutory duties of sections 78 (Welsh language) and 79 (sustainable development) of the Government of Wales Act 2006 ('GOWA'). A continuing positive impact on Equality (section 77) is envisaged and is discussed in **table 6**. No impact is expected on the statutory partners of sections 72 – 75 of GOWA.

42. A range of other impact assessments were considered including: children and young people, Welsh language, biodiversity, poverty, sustainable development, rural proofing, health, Communities First, Third Sector, climate change, privacy, justice, habitat, environment and state aid. Impacts were identified in the case of children and young people and poverty, as recorded in **table 6**.

Table 6 Positive impacts

Policy area	Impact
Equality	The Higher Education (Fee and Access Plans) (Wales) Regulations 2015 require institutions to include a range of matters in their fee and access plans to demonstrate that they will promote equality of opportunity. The Regulations also require that the governing body of an institution takes steps to attract and retain students who are members of groups which are under-represented in higher education. These measures, together with the continued limit on fees, will ensure the promotion of equality opportunity is enhanced.
Children and young people	A positive impact is anticipated on young people. Young people are the main beneficiaries of undergraduate higher education and thus the benefits from the Act and the subordinate legislation accrue to them.

Poverty	Graduates continue to earn more, on average, than non-graduates ⁴ . The Higher Education (Fee and Access Plans) (Wales) Regulations 2015 provide for the promotion of higher education and the promotion of equality of opportunity, encouraging those from all socio-economic circumstance into higher education. The Higher Education (Amounts) (Wales) Regulations 2015 continue to limit maximum fees, ensuring higher education remains affordable. These are not new policies and it would be inappropriate to attribute an additional or new impact on poverty, but the Act and its associated subordinate legislation will ensure that higher education remains a dependable route out of poverty.
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COMPETITION ASSESSMENT

43. The competition filter has been applied. Other than a restriction on price (by establishing maximum fee limits), no issues were identified.

CONSULTATION

44. A formal consultation exercise on the Regulations took place between 17 March 2015 and 12 May 2015. The consultation was open to all. The Welsh Government ensured that all higher education institutions and other key stakeholders that may be affected by the legislation were notified of the consultation. Individual meetings were held with a small number of stakeholders.

45. Nine responses were received:

Estyn
Universities Wales
HEFCW
Cardiff University
Cardiff Metropolitan University
Aberystwyth University
University of Wales Trinity Saint David
Bridgend Carers Centre/Action for Children
The Open University in Wales

46. No adverse impacts were identified by respondents. Questions were asked on a number of matters relating to the Regulations⁵. Responses were carefully analysed and changes have been made to the Regulations as a result, as follows.

⁴ Graduate Labour Market Statistics: October-December Q4 2014. Department for Business, Innovation and Skills.

⁵ Consultation documents are available from <http://gov.wales/consultations/education/regulations-from-the-higher-education-wales-act/?status=closed&lang=en>

The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015.

47. The draft Regulations have changed, partly as a result of consultation. One minor change was made as a result of the consultation (removing the title preceding paragraph 10 of the Schedule; a similar change was made to the headings preceding paragraphs 3 and 7). Two additional Regulations have been added for reasons not connected to the consultation (the first relates to the meaning of 'provided in Wales' in connection with sections 5(2)(b) and 17(1) of the Act, and the second relates to the treatment of fee and access plans received before but approved after the transitional period begins). Regulation three has been changed to ensure that 'publicly funded' is not a criterion in determining qualifying courses. Finally, the definition of academic year in regulation 2 has been moved to the Schedule. The title of the Regulations has changed accordingly.

The Higher Education (Fee and Access Plans) (Wales) Regulations 2015

48. The draft Regulations have changed as a result of consultation. Regulation 7 was amended to include as matters the requirements of regulation 3. Regulation 3 was re-drafted to be solely concerned with the information to be supplied as part of an application. The cumulative effect is to ensure greater clarity on the matters to be taken into account by HEFCW when considering whether to approve an application for a fee and access plan, and the information which must support an application.

The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015

49. The draft Regulations have changed as a result of consultation. The Regulations will ensure that a direction issued under section 11 of the Act will not be published until the review process is complete (or the governing body has accepted the direction or no review has been applied for in the time limit). The Review Panel must inform the governing body and HEFCW of an anticipated timetable to complete a review. The Review Panel may request representations from the governing body or HEFCW on any information it has previously requested from the other. The cumulative effect is avoid 'harm' from publishing a direction which is subsequently withdrawn, and to ensure greater clarity on and openness of the Review Panel process. Some parts of the draft Regulations have also been re-drafted and re-ordered to aid understanding.