

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Report on the Higher Education (Wales) Bill

October 2014



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

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The Constitutional and Legislative Affairs Committee

The Committee was established on 15 June 2011 with a remit to carry out the functions of the responsible committee set out in in Standing Orders 21.2 and 21.3 and to consider any other legislative matter, other than the functions required by Standing Order 26, referred to it by the Business Committee.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Alun Davies
Welsh Labour
Blaenau Gwent



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

The following Member was also a member of the Committee during this inquiry:



Julie James
Welsh Labour
Swansea West

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The Committee's Recommendations

Recommendation 1. we recommend that the Minister reviews the use of discretionary powers to make regulations with a view to amending the Bill to ensure that:

- it provides clarity for stakeholders about how the new regulatory system will work; and
- Welsh Ministers are under a duty to make regulations where this will ensure the most effective and efficient regulatory system possible.

(Page 15)

Recommendation 2. in view of the tight timetable for implementation of the Bill, we recommend that the Welsh Government keeps in regular contact with stakeholders and as part of that process, provides them with a detailed implementation programme for the Bill as soon as possible, notifying them of any changes to this programme at the earliest opportunity.

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Recommendation 3. we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 2(4) in the first instance.

(Page 19)

Recommendation 4. we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 3(4).

(Page 20)

Recommendation 5. we recommend that the Minister should table amendments to section 4 of the Bill:

- specifying on its face, the maximum period in respect of which a fee and access plan is to have effect; and
- permitting the maximum period to be amendable by means of statutory instrument, subject to the affirmative procedure.

(Page 22)

Recommendation 6. we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under sections 5(2), 5(3) and 5(5) in the first instance.

(Page 23)

Recommendation 7. we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 6(1). (Page 25)

Recommendation 8. we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 7(3). (Page 26)

Recommendation 9. we recommend that the Minister should consider tabling an amendment to section 9(2) of the Bill to clarify its intention. (Page 27)

Recommendation 10. we recommend that an Assembly procedure is applied to the making of a code under section 28 of the Bill similar to that contained in section 13 of the Welsh Government's Gender-based Violence, Domestic Abuse and Sexual Violence (Wales) Bill (as introduced). (Page 28)

Recommendation 11. we recommend that the negative procedure is applied to orders made in accordance with section 56(3)(b). (Page 29)

1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee's ("the Committee") is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

Introduction and consideration of the Bill

4. On 19 May 2014 the Minister for Education and Skills, Huw Lewis AM ("the Minister") introduced the Higher Education (Wales) Bill ("the Bill") and accompanying Explanatory Memorandum.¹
5. On 20 May 2014, the Minister wrote to the Chair of the Children, Young People and Education Committee, Ann Jones AM (copied to this Committee) providing a Table of Derivations and a statement outlining the policy intent for regulations to be made under the Bill.²
6. The National Assembly's Business Committee referred the Bill to the Children and Young People Committee for consideration, setting the deadline of 3 October 2014 for reporting on its general principles.
7. We received correspondence about the Bill from Higher Education Wales³ on 11 June 2014.⁴

¹ Welsh Government, *Higher Education (Wales) Bill - Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, May 2014

² Welsh Government, *Higher Education (Wales) Bill - Policy intent for regulations to be made under the Bill*, May 2014

³ Information about Higher Education Wales is available at: www.hew.ac.uk/

8. We considered the Bill on 16 June 2014. Following our meeting, the Minister wrote to us on 2 July 2014⁵ and 23 July 2014,⁶ responding to questions raised at that meeting. The Minister's letters are attached at Annexe 1 and Annexe 2 respectively.

⁴ Available at: www.senedd.assemblywales.org/documents/s28375/CLA4-17-14%20-%20Paper%203.pdf

⁵ Letter from Huw Lewis AM, Minister for Education and Skills, *Constitutional and Legislative Affairs Committee – Stage 1 scrutiny of the Higher Education (Wales) Bill*, 2 July 2014

⁶ Letter from Huw Lewis AM, Minister for Education and Skills, *Constitutional and Legislative Affairs Committee – Stage 1 scrutiny of the Higher Education (Wales) Bill*, 23 July 2014

2. Background

Purpose of the Bill

9. The Explanatory Memorandum accompanying the Bill describes the Bill as making:

“provision for a revised regulatory framework for higher education in Wales. It will achieve this by providing the Higher Education Funding Council for Wales (HEFCW) with the necessary functions to assure the quality of higher education provision, enforce tuition fee controls and fee plan requirements and establish a framework for the organisation and management of the financial affairs of providers of higher education in Wales whose courses are automatically designated for student support purposes.”⁷

10. The Bill’s primary policy objectives are stated as to:

- “(a) ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government backed higher education grants and loans;
- (b) safeguard the contribution made to the public good arising from the Welsh government’s financial subsidy of higher education;
- (c) maintain a strong focus on fair access to higher education; and
- (d) preserve and protect the institutional autonomy and academic freedom of universities.”⁸

11. The Explanatory Memorandum adds that:

“The Welsh Government has been mindful to develop an approach that:

- reflects recent changes to the student support and higher education funding arrangements and the ongoing changes in the higher education landscape;

⁷ Explanatory Memorandum, paragraph 1

⁸ Explanatory Memorandum, paragraph 4

- takes account of feedback received from consultation exercises;
- is proportionate in its application and allows for continuity of HEFCW's role as relevant authority for fair access in Wales whilst placing HEFCW's functions on a revised statutory footing."⁹

⁹ Explanatory Memorandum, paragraph 6

3. Legislative Competence

Background

12. The Explanatory Memorandum indicates that the National Assembly has the competence to make provision in the Bill by virtue of paragraph 5 (Education and Training) of Part 1 of Schedule 7 to the *Government of Wales Act 2006*.

Evidence

13. When asked about any discussions that he had had with the UK Government, the Minister said:

“I am satisfied that the Bill does fall within the competence of the Assembly, and, to my knowledge, no-one has disputed that.”¹⁰

Our view

14. We note that no issues have been raised with the Minister regarding the National Assembly’s ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

¹⁰ Constitutional and Legislative Affairs (“CLA”) Committee, *RoP [paragraph 5]*, 16 June 2014

4. Powers to make subordinate legislation – general observations

Evidence

15. Higher Education Wales felt that:

“The Bill leaves many of the proposals of the Technical consultation to be dealt with through subsequent subordinate legislation, which makes it difficult to fully assess the impact of the Bill and consequent changes particularly in terms of their impact for key issues such as universities’ charity status and classification for purposes of national accounting.”^{11 12}

16. They were concerned at the use of the negative procedure for subordinate legislation “in the large majority of cases”¹³ and added:

“The extensive use of regulations also raises issues about the commencement and feasibility of implementation of the Bill, intended to apply for 2016/17. It is clear that the Bill cannot be implemented without the prior exercise of many of these powers.”¹⁴

17. The Minister explained why he had provided a document detailing the policy intent for regulations to be implemented under the Bill. He said:

“Members will be aware that the First Minister did make a commitment that where a Government Bill contained powers for Welsh Ministers to make subordinate legislation, and where it was not appropriate or possible for the draft subordinate legislation to be made available during the Bill process, a policy intent statement would be submitted. It is simply there to provide greater clarity for Members.”¹⁵

¹¹ Higher Education Wales, Written Evidence

¹² The Welsh Government issued a consultation paper, *Higher Education (Wales) Bill: Technical consultation*, in May 2013, seeking views on how the revised regulatory system should operate within the proposed framework.

¹³ Higher Education Wales, Written Evidence

¹⁴ *ibid*

¹⁵ CLA Committee, *RoP [paragraph 7]*, 16 June 2014

18. The Minister indicated that he was content with the balance between what is on the face of the Bill and what is left to regulations,¹⁶ adding that “it is not a framework Bill”.¹⁷

19. The Minister also told us:

“This is a technical Bill, and I think that that is reflected, really, in terms of the number of powers that are subject to the negative procedure ... as is established, and has been established, in previous legislation, this is all a question of whether those powers are narrow and technical, or whether they are broader. Of course, we rely then on the Counsel General’s advice to make sure that we steer a correct path through that consideration.”¹⁸

20. We asked the Minister about the discretionary powers provided to Welsh Ministers to make certain regulations, rather than an absolute mandatory requirement i.e the use of “may” in the drafting of the Bill rather than “must” in respect of the making of regulations. The Minister summarised his position in a letter to us of 2 July 2014, stating that:

“A duty to make regulations is only appropriate where the regulations in question and the duty are very limited in scope. I also start from the presumption that Government should regulate only to give effect to the overall legislative scheme or otherwise when the need for such regulation is established on some other grounds. I acknowledge that in a number of cases the system established under the Bill will not be able to perform effectively without regulations in place ... However, other draft provisions are more permissive in nature in order to permit regulations to be made where they might assist the operation of the new regime or where circumstance or experience demonstrate a need for regulation in those areas.”

21. The Minister also provided an analysis of the use of “may” and “must” throughout the Bill in an annexe to his letter of 2 July 2014.

¹⁶ CLA Committee, *RoP [paragraphs 9 and 10]*, 16 June 2014

¹⁷ CLA Committee, *RoP [paragraph 10]*, 16 June 2014

¹⁸ CLA Committee, *RoP [paragraph 18]*, 16 June 2014

22. In a subsequent letter on 23 July 2014, the Minister identified how aspects of the new regulatory system to be introduced by the Bill could operate on the basis of statutory guidance. In closing the Minister said:

“It is my view that the new regulatory system could operate adequately on the basis of guidance alone. However, it may become necessary for regulations to be made to bring clarity to certain processes or to respond to changes to the higher education sector in Wales, the nature of HEFCW’s operations or the manner of delivery of courses.”

23. In terms of the timeframe for making the regulations, the Minister told us:

“It is a tight timescale, but it is doable. We do intend to take a phased approach—we do want a smooth transition from the existing regulatory system ... I would hope to have the regulations available in draft form for the Assembly to scrutinise at Stage 2, and the intention is also to consult stakeholders on the draft regulations at the appropriate time. So, that would lead us into a timescale where we are still confident that we can hit implementation, in full, for the 2016-17 academic year.”¹⁹

Our view

24. We accept that this Bill is not as framework in nature as other Welsh Government Bills we have scrutinised; nevertheless we do believe that some sections lack clarity. As a consequence, we consider that there is room for improvement to ensure that those affected by the legislation have a clearer and fuller picture of how it will impact on them should the Bill receive Royal Assent.

25. We acknowledge that the Welsh Government will use the Counsel General’s guidelines on the choice of affirmative or negative procedure in drafting legislation. While they are extremely helpful, we will come to our own view on a particular provision based on a range of factors, including our own analysis of the Bill and the context of each provision.

¹⁹ CLA Committee, *RoP [paragraph 21]*, 16 June 2014

26. We have noted the Minister's views on the use of discretionary and mandatory powers to make regulations. We note the clarification provided in the Minister's letter of 2 July 2014.

27. As a broad principle, we do not agree with the Minister's view that

“A duty to make regulations is only appropriate where the regulations in question and the duty are very limited in scope.”

28. It seems a particularly inflexible approach. A duty to make regulations could depend on a range of factors including, for example, the content of the provision which introduces the power and the need for certainty amongst stakeholders.

29. For this Bill, we believe the Welsh Government should identify what provisions are essential to make the new regulatory system work efficiently and, depending on the circumstances, either include them on the face of the Bill or through regulations that Welsh Ministers are under a duty to introduce. This is of paramount importance, particularly where the Welsh Government itself acknowledges, for either case, that it would make for a more efficient and effective system. Other non-essential matters could easily be provided by means of a separate, discretionary regulation-making power. In our view this represents a sensible and effective approach to law-making.

Recommendation 1: we recommend that the Minister reviews the use of discretionary powers to make regulations with a view to amending the Bill to ensure that:

- it provides clarity for stakeholders about how the new regulatory system will work; and**
- Welsh Ministers are under a duty to make regulations where this will ensure the most effective and efficient regulatory system possible.**

30. Chapter 5 of our report sets out our views on the procedures to be applied to regulation-making powers. Where we recommend the affirmative procedure, we would expect the Bill to place a duty on Welsh Ministers to make such regulations.

31. We commented on the Minister's description of the Bill as being technical (see paragraph 19 above) during his evidence session.²⁰

32. There is a danger that by referring to a Bill as technical, it could be construed as implying that it contains matters of detail that are of little significance or consequence, and as a result, of minor importance such that there would not be much merit in giving it serious thought and analysis.

33. In our view referring to a Bill as technical should therefore be avoided. Any Bill, whether it contains significant policy content, is more administrative in nature or contains predominantly matters of detail will impact on bodies and /or individuals (albeit in different ways) and potentially place legal obligations on them. It is our duty to ensure that we undertake our scrutiny function rigorously, irrespective of the content of the Bill and the nature of its provisions. It is as a consequence of our scrutiny that we will come to our own judgement about the nature and type of Bill, and whether we believe, improvement (if any) is needed to the way it is drafted.

34. The Minister's provision of information about the policy intent of the regulations is extremely helpful, particularly in determining which procedure should apply to the regulations, and we commend the Minister for doing so.

35. However, as a general rule, we do not believe that advance information to the Assembly of what is going to appear in regulations should be used as an argument to minimise the amount of information placed on the face of the Bill. That should always be based on sound principles of making good law that enables the Bill's purpose to be clearly identified by those who read the legislation as enacted and to provide as much clarity as possible to those affected by the proposed law. We also believe that such an approach is more likely to deliver the Welsh Government's policy goals in the most efficient way possible.

36. We note the timescale for implementation of the Bill and accompanying regulations put forward by the Minister and the concerns raised by Higher Education Wales.

²⁰ CLA Committee, RoP [paragraph 47], 16 June 2014

37. Given that, subject to its successful passage through the Assembly, Royal Assent is scheduled for March 2015, we believe that the implementation timetable is very tight. We are also concerned that this is going to place significant demands on HEFCW and other stakeholders affected by the legislation. This highlights the need for greater clarity and certainty around the provisions of the Bill (as we highlight in recommendation 1) to ensure that stakeholders are able to prepare effectively and in good time for its implementation.

Recommendation 2: in view of the tight timetable for implementation of the Bill, we recommend that the Welsh Government keeps in regular contact with stakeholders and as part of that process, provides them with a detailed implementation programme for the Bill as soon as possible, notifying them of any changes to this programme at the earliest opportunity.

5. Powers to make subordinate legislation – observations on specific powers

38. The Bill contains 8 Parts, 57 sections and 1 Schedule.

39. The Bill contains 27 powers to make subordinate legislation. They are summarised in Part 5 of the Explanatory Memorandum. Further information about the provisions is contained in the Welsh Government's statement of policy intent for the regulations²¹ and the Minister's letter of 2 July 2014.²²

40. We have restricted our comments to those issues that have given rise to the most concern.

Part 2: Fee and access plans

41. Part 2 of the Bill (sections 2-16) makes provision for fee and access plans to replace plans under the *Higher Education Act 2004*. The purpose of the plans is to promote equality of opportunity and higher education. Institutions that have approved plans will have greater flexibility in the setting of fees. Institutions that do not have fee and access plans will be able to apply for the designation of individual courses for the purposes of statutory student support.

Section 2 – Fee and Access Plans

42. Section 2 permits the governing body of a certain type of institution to apply to HEFCW for approval of a fee and access plan. The institution must be an institution in Wales which provides higher education and is a charity. Section 2(4) enables the Welsh Ministers to make provision, via regulations, about the making of applications for approval of a fee and access plan. The Welsh Government expects that HEFCW will require certain information or documentation from institutions applying to them for approval of a fee and access plan and the regulations will outline this information.²³

²¹ Welsh Government, *Higher Education (Wales) Bill – Policy intent for regulations to be made under the Bill*, May 2014

²² Letter from Huw Lewis, Minister for Education and Skills, *Constitutional and Legislative Affairs Committee – Stage 1 scrutiny of the Higher Education (Wales) Bill*, 2 July 2014

²³ Statement of policy intent for the regulations, page 5

43. The regulations would be subject to the negative procedure because “there is a technical and administrative aspect” to them “which, maybe updated on a regular basis.”²⁴

44. The Minister told us that:

“The regulations would only deal with matters of technical detail relating to applications for approval of a fee and access plan. They would not prevent or inhibit the operation of the new regulatory system, which is what we are outlining in the Bill.”²⁵

Our view

45. We note that the Welsh Government expect HEFCW to require certain information to accompany an application. We consider this information to be of sufficient importance to the fee and access plan process to require a more robust procedure for the making of the regulations in the first instance.

Recommendation 3: we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 2(4) in the first instance.

Section 3 – Designation of other providers of higher education

46. Section 3 enables the Welsh Ministers to designate a charitable provider of higher education in Wales as an ‘institution’ for the purposes of the Bill and any subordinate legislation made under it. Such a provider would not normally be regarded as an ‘institution’ under the Bill. A designation may be made on an application by the provider concerned.

47. Section 3(4) enables the Welsh Ministers to make regulations about applications for designation, the making and withdrawal of designations, including matters to be taking into account when considering whether to make or withdraw a designation, and the effect of a withdrawal of designation.

²⁴ Explanatory Memorandum, Chapter 5, page 62

²⁵ CLA Committee, *RoP [paragraph 14]*, 16 June 2014

48. The regulations are subject to the negative procedure because they “prescribe technical and administrative matters, which may be updated from time to time.”²⁶

Our view

49. We believe that these regulations have the potential to result in a significant policy change and should be subject to a more robust procedure.

Recommendation 4: we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 3(4).

Section 4 – Period to which plan relates

50. Section 4 requires a fee and access plan to specify the period in respect of which it is to have effect. Under sub-section (2), the Welsh Ministers may prescribe in regulations the maximum period to which a fee and access plan is to have effect. Any period specified in a fee and access plan must not exceed this maximum period.

51. According to the Explanatory Memorandum:

“Currently, regulations made under the Higher Education Act 2004 provide that the maximum period of time during which a plan may be in force is two years. It is intended that the maximum period to which a fee and access plan relates will be longer than two years. Limiting the period to which a plan relates means that institutions will need to develop new plans over time if they wish for their courses to continue to be designated by student support regulations.”²⁷

52. It also advises that the negative procedure is to be used for the regulations because “the detail is technical and may change from time to time”.²⁸

53. The statement of policy intent for the regulations states that the intention is that in the long term the maximum duration of fee plans will be extended up to five years.²⁹

²⁶ Explanatory Memorandum, Chapter 5, page 62

²⁷ Explanatory Memorandum, Annex B - Explanatory Notes, paragraph 18

²⁸ Explanatory Memorandum, Chapter 5, page 63

54. We asked the Minister why he had not chosen to fix a time period on the face of the Bill with a power to amend that subsequently by regulations. In response the Minister said:

“... the current maximum duration of a fee plan is prescribed in regulations as being two years. While the new system embeds itself, I have no intention of changing that duration. However, it remains important for Welsh Ministers to have flexibility and a power to prescribe the maximum duration of those fee plans.”³⁰

55. He added that:

“That flexibility is necessary here in order to accommodate changes that might be presented to us in the future. We could, for instance, in the future wish to extend things to five years, but I think it is important that while the system embeds, we do not have any sudden shift.”³¹

56. The Minister’s official added that:

“The future, both within Wales and outside Wales, in relation to HE and the types of providers, the way in which higher education is funded and the flows of students around the system are all very uncertain. If we were to set a maximum fee duration on the face of the Bill, any one of those circumstances could change in such a way that it would have to be brought back before the Assembly. We hope very much that the system will embed in such a way as to give us assurance that everything is working and we could seek then to extend the timescale for fee plans, perhaps to three or five years. However, in the current environment, certainly, I would not advise that. We do need a level of appreciation for just how volatile or uncertain the HE landscape is at present.”³²

Our view

57. We consider that for the purpose of providing clarity and certainty to stakeholders, the Minister should decide the maximum period in respect of which a fee and access plan is to have effect and to place

²⁹ Statement of policy intent for the regulations, page 7

³⁰ CLA Committee, *RoP [paragraph 53]*, 16 June 2014

³¹ CLA Committee, *RoP [paragraph 57]*, 16 June 2014

³² CLA Committee, *RoP [paragraph 58]*, 16 June 2014

that period on the face of the Bill, with it being amendable by statutory instrument.

Recommendation 5: we recommend that the Minister should table amendments to section 4 of the Bill:

- specifying on its face, the maximum period in respect of which a fee and access plan is to have effect; and**
- permitting the maximum period to be amendable by means of statutory instrument, subject to the affirmative procedure.**

Section 5 – Fee limit

58. Section 5 requires a fee and access plan to specify, or provide for the determination of, a fee limit in relation to each ‘qualifying course’.

59. Section 5(2)(b) enables the Welsh Ministers to prescribe in regulations descriptions of ‘qualifying courses’, while section 5(3) permits the Welsh Ministers to set the maximum amount of a fee limit specified in a fee and access plan. Section 5(5) enables the Welsh Ministers to prescribe classes of persons in regulations who will be ‘qualifying persons’ for the purposes of the fee limit. The Explanatory Memorandum states:

“It is intended that “qualifying persons” will include persons in the following categories who are ordinarily resident in the United Kingdom: persons who are settled in the United Kingdom, refugees and their family members and European Union nationals.”³³

60. The statement of policy intent for the regulations states that there is “no current intention to make any amendments to the definition of a ‘qualifying persons’” as prescribed in the existing *Qualifying Courses and Persons (Wales) Regulations 2011*.³⁴

61. Section 5(2) provides that at a fee limit for the purposes of the Bill is a limit on the fees payable by a ‘qualifying person’ to an institution in connection with the undertaking of a ‘qualifying course’. Section 5(9) enables the Welsh Ministers to make regulations which specify circumstances where fees payable to another person in connection

³³ Explanatory Memorandum, Annex B - Explanatory Notes, paragraph 22

³⁴ Statement of policy intent for the regulations, page 10

with a qualifying person's course, are to be regarded as fees payable to the institution in connection with that course. This power will apply where a course is provided by an institution or provider, on behalf of an institution with an approved fee and access plan in force (a regulated institution).

62. The regulation-making powers in section 5 are subject to the negative procedure because they deal with technical and administrative matters and may be updated or changed from time to time.³⁵

Our view

63. We consider that regulations made under sections 5(2), 5(3) and 5(5) are more than simply technical and administrative matters and accordingly, should be subject to a more robust scrutiny procedure.

Recommendation 6: we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under sections 5(2), 5(3) and 5(5) in the first instance.

64. In reaching this view, we note that the corresponding power in existing legislation is contained in the *Higher Education Act 2004*, and that the current limits were set by *The Student Fees (Amounts) (Wales) Regulations 2011*, which were made under the affirmative procedure as they were the first regulations made using that power.

Section 6 - Promotion of equality of opportunity and higher education

65. Section 6(1) requires a fee and access plan relating to an institution to include such provision on the promotion of equality of opportunity and the promotion of higher education as may be prescribed by the Welsh Ministers in regulations. This power enables the Welsh Ministers to prescribe the information on equality of opportunity and higher education for this purpose.

³⁵ Explanatory Memorandum, Chapter 5, pages 63-65

66. The regulations are subject to the negative procedure because “the detail of the regulations may change from time to time”.³⁶

67. When questioned the Minister indicated that the use of the negative procedure was to do with flexibility,³⁷ adding:

“... the power itself is of a detailed nature. It is relatively minor in terms of the overall scheme of the fee and access plan approval process. The negative procedure makes sense in that regard.”³⁸

68. In terms of changing to the affirmative procedure, the Minister said:

“I do not think that that really gives us much more in the way of scope. Over time, we will have evidence becoming available about just what is effective in terms of activities and interventions and good ideas that institutions might come up with that we might want to include in fee and access plans. That underscores the point that I am making about flexibility.”³⁹

69. The Minister’s official thought that:

“... the negative procedure would allow Welsh Ministers to make regulations to react more swiftly to include provisions in the detail of the regulations so that fee plans are working as well as they might in terms of ensuring fair access for students.”⁴⁰

70. In his letter of 2 July, the Minister indicated that the use of the negative procedure had been informed by application of the Counsel General’s guidelines and that the principal substance of the legislative scheme concerning the content of fee and access plans had been set out on the face of the Bill (for example at sections 6(3) and 6(4)).

Our view

71. In our report on the Education (Wales) Bill, we said that:

³⁶ Explanatory Memorandum, Chapter 5, page 66

³⁷ CLA Committee, *RoP* [paragraph 62], 16 June 2014

³⁸ CLA Committee, *RoP* [paragraph 62], 16 June 2014

³⁹ CLA Committee, *RoP* [paragraph 64], 16 June 2014

⁴⁰ CLA Committee, *RoP* [paragraph 67], 16 June 2014

“... the use of one procedure over the other, does not, in our view, offer any significant degree of flexibility or time-saving for the Welsh Government; it merely provides for varying degrees of scrutiny by the National Assembly.

“Conclusion 3: Using an argument of flexibility as a basis for deciding whether to use the negative procedure instead of the affirmative procedure (or vice versa) is not relevant and should not be used.”⁴¹

72. It is therefore disappointing to hear arguments of flexibility used to justify the use of the negative procedure in the Higher Education (Wales) Bill.

73. While we acknowledge that there is information on the face of the Bill, we believe that the regulations are so central to the Bill that they should be subject to the affirmative procedure.

Recommendation 7: we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 6(1).

Section 7 – Approval of fee and access plan

74. Under section 7, HEFCW may either approve or reject an application for approval of an institution’s fee and access plan.

75. Section 7(3) enables the Welsh Ministers to make regulations about matters to be taken into account by HEFCW in determining whether to approve or reject a plan.

76. The Minister’s letter of 2 July 2014 explained that:

“The intention is that HEFCW should be required to take into account the quality of education at the institution; the organisation of its financial affairs; and the adequacy of the measures committed to in the plan against the proposed tuition fee level. These requirements are designed to ensure that the interests of prospective students are protected and also to ensure that HEFCW adopts a proportionate approach to the approval of plans in line with the level of fees charged.

⁴¹ CLA Committee, *Report on the Education (Wales) Bill*, November 2013, page 18

They will also give applicant institutions an insight into the issues that HEFCW will be weighing up when considering their fee and access plans. This will be particularly useful for new applicants, who are applying for approval of a fee and access plan for the first time.”

77. As well as the Explanatory Memorandum stating that the negative procedure was appropriate because the regulations prescribe technical and administrative matters, the Minister’s letter stated that its use had been informed by the Counsel General’s guidelines. The affirmative procedure was not considered appropriate for the regulations, because:

“... they are relatively minor in the overall legislative scheme, if made they may need to be updated on a regular basis to take account of changes in the higher education landscape. It is also worth noting that HEFCW may approve or reject fee and access plans without these regulations being made.”

Our view

78. We believe that the regulations made under section 7(3) have the potential to have a significant impact on the viability and livelihoods of institutions providing higher education. For that reason we believe the affirmative procedure should apply.

Recommendation 8: we recommend that the Minister should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 7(3).

Section 9 – Variation of approved plan

79. The Welsh Ministers may, via regulations under section 9(1), enable approved plans to be varied in accordance with the procedure laid down in those regulations. The regulations must provide that a variation will only take effect if approved by HEFCW.

80. They are subject to the negative procedure because “the detail is technical and administrative in nature and may change from time to time”.⁴²

⁴² Explanatory Memorandum, Chapter 5, page 68

81. The Minister explained in his letter of 2 July that in his view the variation of approved plans is a matter more suited to regulations than guidance. He added:

“Whilst the new system for approving fee and access plans would operate without these regulations the Welsh Ministers intend to ensure continuity in the system by bringing forward regulations ... enabling institutions to apply to vary an already agreed plan during the lifetime of that plan. Regulations (rather than guidance under s.46) are more appropriate as regulations can deal with practical issues about how an institution might apply for a variation and how HEFCW considers a variation, whereas guidance is better suited to matters of best practice. The use of regulations to allow variation (rather than an express power on the face of the Bill) enables the Welsh Ministers to respond promptly to any changes in the sector, and if appropriate remove the ability of institutions to vary approved plans.”

Our view

82. While we are broadly content with section 9, we believe that section 9(2) would benefit from re-drafting to make it clear that the section applies to proposals by the institution in question (rather than HEFCW or a third party) to vary the approved plan.

Recommendation 9: we recommend that the Minister should consider tabling an amendment to section 9(2) of the Bill to clarify its intention.

Part 4: Financial Affairs of Regulated Institutions

83. Part 4 (sections 27-35) imposes a duty on HEFCW to publish a code relating to the ‘organisation and management of the financial affairs of regulated institutions’. Regulated institutions will be required to comply with the Code and HEFCW will be given powers to monitor and enforce compliance.

Section 28 – Procedure for approval of the code

84. Section 28 sets out the procedure for approval of the code, which includes a requirement for HEFCW, following consultation with the governing body of each regulated institution, to submit a draft or

revised code for approval by Welsh Ministers. Welsh Ministers are required by section 28(6) to lay an approved draft before the National Assembly.

85. We note that the Explanatory Memorandum states:

“There was general support for additional scrutiny following HEFCW’s consultation on the draft Code. Many respondents stated a preference for HEFCW to be required to submit the post-consultation version of the Code to Welsh Ministers who in turn, if satisfied, would lay it before the National Assembly for Wales for approval.”⁴³

86. Asked why there was no procedure attached to the making of the code, the Minister told us:

“It is pure practicality ... I do not see that there is any other place to put this other than in the lap of the Welsh Government. I think that if we did anything other than that, the level of detailed scrutiny and oversight that would be required would end up overwhelming the Assembly, basically.”⁴⁴

Our View

87. We believe that the only value in laying a code before the Assembly, in accordance with this section as currently drafted, is to draw it to Members’ attention. We believe that the code is of sufficient importance to require an Assembly procedure to apply to its making.

88. We believe that section 13 of the Welsh Government’s Gender-based Violence, Domestic Abuse and Sexual Violence (Wales) Bill (as introduced) contains a procedure in relation to statutory guidance that could apply equally to the code. Under this procedure, Welsh Ministers are required to consult on draft guidance and to lay the draft guidance before the Assembly. The guidance may not be issued if, within a 40 day period, the Assembly resolves not to approve it.

Recommendation 10: we recommend that an Assembly procedure is applied to the making of a code under section 28 of the Bill similar to that contained in section 13 of the Welsh Government’s

⁴³ Explanatory Memorandum, paragraph 190

⁴⁴ CLA Committee, *RoP [paragraph 148]*, 16 June 2014

**Gender-based Violence, Domestic Abuse and Sexual Violence
(Wales) Bill (as introduced).**

Part 8: General

Section 56 – Commencement

89. Section 56 contains a power to commence provisions of the Bill by order, to which no procedure would apply.

90. In line with our views on the making of commencement orders, we believe that such orders that make transitional, transitory or saving provision in connection with the coming into force of a provision should be subject to scrutiny and the negative procedure.

Recommendation 11: we recommend that the negative procedure is applied to orders made in accordance with section 56(3)(b).

Huw Lewis AC / AM
Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/HL/0645/14

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

02 July 2014

Dear David,

**CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE - STAGE 1
SCRUTINY OF THE HIGHER EDUCATION (WALES) BILL**

During my attendance at the Constitutional and Legislative Affairs Committee on 16 June, Members raised a number of questions about the Higher Education (Wales) Bill. This letter seeks to respond to the specific matters raised by Members. To aid the Committee's consideration further, however, I set out first the broad principles which have underpinned the drafting of the Bill.

When I introduced the Bill on 19 May 2014, and during my attendance at the Committee, I provided assurance that in preparing this legislation we have had regard throughout to the Counsel General's guidelines on subordinate legislation. The guidelines recognise that in each case there is a balance to be struck between:

- scrutiny by the Assembly;
- consumption of Assembly (or committee) time;
- the significance of the provisions in question; and
- the making of legislation in the most efficacious manner.

The guidelines outline a range of factors that may, to a greater or lesser extent depending on the context, either suggest the application of the "draft affirmative" procedure; or else require particular justification if a procedure other than "draft affirmative" procedure is applied. Those factors are:

- “1) powers that enable provision to be made that may substantially affect provisions of Acts of Parliament, Assembly Measures or Acts of the Assembly;
- 2) powers, the main purpose of which is, to enable the Welsh Ministers, First Minister or Counsel General to confer further significant powers on themselves;
- 3) powers to apply in Wales provisions of, for example, Acts of Parliament that in England, Scotland or Northern Ireland are contained in the Act itself (whether with or without modifications);
- 4) powers to impose or increase taxation or other significant financial burdens on the public;
- 5) provision involving substantial government expenditure;
- 6) powers to create unusual criminal provisions or unusual civil penalties;
- 7) powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion;
- 8) powers that impose onerous duties on the public (e.g. a requirement to lodge sums by way of security, or very short time limits to comply with an obligation).
- 9) powers involving considerations of special importance not falling under the heads above (e.g. where only the purpose is fixed by the enabling Act and the principal substance of the legislative scheme will be set out in subordinate legislation made in exercise of the power).”

As the analysis which follows I hope will demonstrate, where proposals relating to subordinate legislation in the Higher Education (Wales) Bill satisfy any of the above criteria they are to be subject to the affirmative procedure. For the most part, however, and as I also explained to the Committee, the subject matter of the proposed subordinate legislation deals with relatively minor practical detail in the overall legislative scheme; is likely to be updated on a regular basis or otherwise be subject to change; and circumstances may arise in which it may be necessary to legislate swiftly.

I contend, therefore, that the Bill as drafted allows for an appropriate balance between scrutiny by the Assembly and effective use of Assembly or Committee time.

Members also questioned why the Bill has not been drafted on the assumption that where regulations may be needed, there should be a duty to make them. A duty to make regulations is only appropriate where the regulations in question and the duty are very limited in scope. I also start from the presumption that Government should regulate only to give effect to the overall legislative scheme or otherwise when the need for such regulation is established on some other grounds. I acknowledge that in a number of cases the system established under the Bill will not be able to perform effectively without regulations in place. For instance regulations will need to be made which prescribe the maximum fee limit and description of qualifying persons

and qualifying courses. However, other draft provisions are more permissive in nature in order to permit regulations to be made where they might assist the operation of the new regime or where circumstance or experience demonstrate a need for regulation in those areas. My officials have undertaken an analysis of the use of the terms "may" and "must" throughout the Bill. That analysis is included as an annex to this letter. I trust that this additional information will be of assistance.

Part 2: Fee and access plans

Section 2: *Application by institutions for HEFCW's approval of fee and access plans*

This section permits the governing body of an institution of a certain type to apply to HEFCW for approval of a fee and access plan. Section 2(4) enables the Welsh Ministers to make regulations about the making of applications under this section. In specifying that the Welsh Ministers "may" make regulations under this section we have applied the principle that we will not be legislating unless it is necessary to do so. If regulations are not made that fact would not prevent institutions applying to HEFCW for approval of their plans.

Under the current system, institutions funded by HEFCW may apply to HEFCW for approval of a fee plan and there are no regulations in place which make provision about the making of such applications. HEFCW is able to issue guidance to institutions about the matters to which it will have regard in determining plan applications (section 34(3) of the Higher Education Act 2004 enables this) and there is nothing to prevent HEFCW also from issuing non-statutory guidance to institutions about the application process and the provision of supporting information.

Under the new regulatory system HEFCW could issue information and advice to institutions under section 51(3) about the application process for approval of fee and access plans and the information to be submitted as part of applications. Consequently institutions could be made aware by HEFCW of the process and information required for approval of fee and access plans without the need for the Welsh Ministers to make regulations. If the Welsh Ministers do not make regulations under this section that would not open HEFCW up to legal challenge. However, if, after operating the system either HEFCW or institutions indicate that the application process could be clarified then the Welsh Ministers' power under section 2(4) would enable regulations to be made to provide that clarity. For example, it may prove to be helpful to make regulations if there are new entrants to the system which have not previously applied to HEFCW for approval of a fee plan. There is a clear distinction to be drawn between a need to make regulations for the system to work and the discretionary use of a regulation making power to improve the operation of the system. The regulation power in section 2(4) falls into the latter category and consequently the Bill has been drafted to enable the Welsh Ministers to make regulations should they prove to be necessary.

Section 3: *Designation of other providers of higher education*

This section enables the Welsh Ministers to designate a charitable provider of higher education in Wales, which would not otherwise be regarded an institution, as an institution for the purposes of the Bill. Such designations will ensure that providers of higher education which may not be regarded as institutions are not prevented from applying to HEFCW for approval of a fee and access plan. A designation under section 3 does not mean that a charitable provider will automatically enter the new regulatory system established under the Bill. Following designation as an institution for the purpose of the Bill such a provider will still need to apply to HEFCW for approval of a fee and access plan, under section 2 of the Bill, in order to become a regulated institution. Consequently such providers will also need to satisfy the conditions at section 2 of the Bill namely, that it is an institution in Wales, that it delivers courses of higher education and that it is a charity.

Section 3(4) enables the Welsh Ministers to make provision, via regulations about applications for designation, the making and withdrawal of designations, including matters to be taking into account when considering whether to make or withdraw a designation, and the effect of a withdrawal of designation. However, section 3 does not depend upon regulations being made to make it work. Providers of higher education could be designated as institutions by the Welsh Ministers without regulations being made under section 3(4) – there is nothing to prevent such providers applying to the Welsh Ministers for designation and indeed section 3(1) makes provision for that.

In specifying that the Welsh Ministers “may” make regulations under this section we have applied the principle that we will not be legislating unless it is necessary to do so. The number of providers applying for designation under section 3, especially in the near future, is likely to be limited and in the first instance it is unlikely that regulations will need to be made, however, the power set out in section 3(4) will enable regulations to be made if they prove to be necessary. Additionally, section 3(3) provides a default position that a provider designated as an institution is to be treated as an institution for the purposes of the Bill unless the designation is withdrawn.

Section 6: *Promotion of equality of opportunity and promotion of higher education*

Section 6(1) of the Bill requires that a fee and access plan must include such provisions relating to the promotion of equality of opportunity to access higher education or the promotion of higher education as may be prescribed. This provision enables the Welsh Ministers to make regulations. Information on the type of

provision relating to the promotion equality of opportunity and the promotion of higher education which may be included in regulations is set out on the face of the Bill in section 6(3).

The information and priorities associated with the promotion of equality of opportunity and the promotion of higher education is likely to change over time alongside changes to the higher education sector in Wales as well as developments in evidence about the effectiveness of activities and interventions which institutions include in their fee and access plans. This power will enable the Welsh Ministers to respond to these changes regularly by adapting the requirements imposed on institution's fee and access plans. Crucially, we do not yet know what HEFCW's evaluation of fee and access plans will identify and therefore need the flexibility to adapt the information and priorities associated with the promotion of access to higher education and the promotion of higher education from time to time.

The proposal that regulations made under section 6(1) are subject to the negative resolution procedure has been informed by application of the Counsel General's guidelines. Taking those guidelines into account it is my view that the regulation making power under this section does not fall into any of the categories to which the affirmative procedure should apply. A considerable amount of detail concerning provisions that may be prescribed in regulations made under section 6(1) is to be found on the face of the Bill at sections 6(3) and 6(4). Additionally, section 6(5) provides for certain restrictions on the requirements that may be included in regulations. I am therefore of the opinion that the principal substance of the legislative scheme concerning the contents of fee and access plans has been set out on the face of the Bill rather than being reserved to subordinate legislation. The regulations will provide further detail as to how the required content of fee and access plans is to be applied in the context of a wider range of tuition fees than under the current regime. Consequently regulations to be made under section 6(1) are suitable for the negative resolution procedure.

I hope to have these regulations available in draft form to allow Members to scrutinise them at Stage 2. The intention is to also consult stakeholders on the draft regulations at the appropriate time.

Section 7: *Approval of fee and access plans*

Under section 7 HEFCW may either approve or reject an application for approval of an institution's fee and access plan. Section 7(3) enables the Welsh Ministers to make regulations about matters to be taken into account by HEFCW in determining whether to approve or reject a plan.

The intention is that HEFCW should be required to take into account the quality of education at the institution; the organisation of its financial affairs; and the adequacy of the measures committed to in the plan against the proposed tuition fee level. These requirements are designed to ensure that the interests of prospective

students are protected and also to ensure that HEFCW adopts a proportionate approach to the approval of plans in line with the level of fees charged. They will also give applicant institutions an insight into the issues that HEFCW will be weighing up when considering their fee and access plans. This will be particularly useful for new applicants, who are applying for approval of a fee and access plan for the first time.

The proposal that regulations made under section 7(3) are subject to the negative resolution procedure has been informed by application of the Counsel General's guidelines. It is my view that the regulation making power under this section does not fall into any of the categories to which the affirmative procedure should apply. I do not consider that these regulations are appropriate for the affirmative procedure as they are relatively minor in the overall legislative scheme, if made they may need to be updated on a regular basis to take account of changes in the higher education landscape. It is also worth noting that HEFCW may approve or reject fee and access plans without these regulations being made.

Section 8: *Publication of an approved plan*

Section 8(1) enables the Welsh Ministers to make provision, via regulations, which requires an institution to publish its approved fee and access plan. Section 8(2) confirms that these regulations may make provision about how and when an approved fee and access plan is published. Section 8 of the Bill is derived from section 34(6) of the Higher Education Act 2004 which similarly makes provision for the Welsh Ministers to make regulations that may require institutions subject to an approved plan to publish their plans in the manner prescribed in regulations. Therefore, the use of regulations for the purpose of requiring publication of approved plans is not new and is already in operation under the current system. Furthermore, as institutions currently publish their approved fee plans are familiar with the need to ensure that those plans are made accessible to students and other interested parties it may not prove to be necessary to make these regulations. If however, feedback from HEFCW, students and other stakeholders indicates that there is a problem this regulation making power will allow the Welsh Ministers to legislate if it proves to be necessary to do so.

Section 9: *Variation of plans*

Section 9(1) enables Welsh Ministers to make regulations in order to allow approved plans to be varied in accordance with the procedure laid down in regulations. The regulations must provide that a variation will only take effect if approved by HEFCW. This power will be relevant where, following approval of a fee and access plan by HEFCW, an institution wishes to vary its approved plan. The Welsh Ministers currently have a similar power in section 36 of the Higher Education Act 2004.

Although, the Welsh Ministers would be able to issue guidance to HEFCW (as provided for in section 46 of the Bill) I consider the variation of approved plans to be a matter more suited to regulations than guidance. HEFCW would be required to take such guidance into account, but could divert from such guidance if it had good reason for doing so. The current legislative architecture under the Higher Education Act 2004 makes use of regulations for the purpose of providing certainty about the procedure and processes associated with variation of an approved fee plan and my intention is to do likewise in respect of the variation of approved fee and access plans under the new regulatory system.

The policy intention is to provide an effective procedure for approved plans to be varied during the lifetime of the plan. Variations to approved plans are more likely to raise practical issues about how an institution applies for a variation and how HEFCW considers a variation. My view is that regulations are a better means of dealing with such issues than guidance as they provide certainty. Guidance does not provide the same level of certainty; whilst institutions must have regard to guidance they are not obliged to follow it in all circumstances. Although institutions could apply for approval of a fee and access plan without these regulations being in place they could not apply to vary an already agreed plan during the lifetime of that plan.

Part 4: Financial affairs of regulated institutions.

For the avoidance of doubt I wish to clarify that there are no regulation making powers arising from Part 4 of the Bill. HEFCW's functions of preparing, consulting on, issuing and keeping under review the proposed financial management code will not be supported by regulations. Currently HEFCW develops, consults on and issues a financial memorandum applicable to funded institutions. Under the new regulatory framework HEFCW will be required to consult all regulated institutions on a draft financial management Code and will additionally be required to provide a summary of those consultation responses when they submit the draft code to the Welsh Ministers for approval.

Part 5: Withdrawal of approval of a plan

Section 36: *Notice of refusal to approve a new fee and access plan*

Under the proposed regulatory system if HEFCW are satisfied that a regulated institution has failed to comply with the applicable fee limits or general provisions of its approved fee and access plan, or has failed to comply with a direction from HEFCW concerning quality of its education or its financial management, HEFCW may give notice to the institution that they will not approve a new fee and access plan before the end of the period specified in the notice. This function is distinct from that of approval of a fee and access plan under section 4 of the Bill and forms one of

a menu of sanctions available to HEFCW in the event of an institution's failure to comply with specified requirements of new regulatory framework. The conditions under which HEFCW may give notice to the governing body of a regulated institution are set out on the face of the Bill at section 36(3).

Section 36(7) enables the Welsh Ministers to make regulations relating to the notices and decisions of HEFCW not to approve a new fee and access plan. This includes provision about the period specified in a notice during which HEFCW will not approve a new fee and access plan, the matters to be taken into account by HEFCW in deciding whether to give, or withdraw, such a notice and the procedure to be followed if such a notice is withdrawn. Regulations made under section 36(7) cannot be used to make additions to the conditions specified in section 36(3). This means that the conditions under which HEFCW may issue notice of refusal to approve a new fee and access plan cannot be changed by the proposed regulations.

It is expected the matters to be taken into account by HEFCW in deciding whether to give notice of their intention to refuse to approve a new plan might include consideration of the severity of the compliance failure and whether alternative courses of action may be appropriate. With regard to withdrawal of a notice it is expected that the matters to be taken into account by HEFCW might include any mitigating action taken by the institution (post issue of the notice) in order to effect its compliance with the conditions at section 36(3) of the Bill. I consider that these matters are appropriate for inclusion in regulations to be made by the negative procedure as they concern technical and procedural detail about the issuing of notices under section 36 of the Bill. These matters will require updating over time, following any changes to the higher education sector in Wales and in response to feedback received from HEFCW on the operation of their enforcement powers. For example, it may be appropriate to increase or reduce the maximum period a notice refusing to approve a new plan can apply for, following discussions and engagement with HEFCW on the effectiveness of such notices.

I also wish to clarify the position with regard to the provision at section 36(7)(a) which states:

*“(7) Regulations may make provision about –
(a) the period that may be specified in notice under this section;”*

The first reference to ‘may’ is concerned with enabling the Welsh Ministers to make regulations on any of the matters specified in section 36(7) (a) – (c). The second use of the word ‘may’ is entirely different in its context. The effect is not to permit a notice to specify a period as a notice is required to do this by virtue of subsection 36(2). The purpose here is to confer discretion on the Welsh Ministers to require a notice to specify a particular period, or to require a notice to specify one period within a range of permissible periods, or to confer discretion on HEFCW to determine

periods in accordance with certain formulae. The use of “may” in this context is to refer to the range of ways in which notice can potentially be specified in accordance with regulations. The use of the word “may” is entirely appropriate in both instances and does not result in any problems in relation to application of this regulation making power.

Section 37: *Duty to withdraw approval of a fee and access plan*

Section 37 requires HEFCW to withdraw their approval of a fee and access plan by giving notice to an institution if they are satisfied that the institution has ceased to: (a) be an institution in Wales; (b) provide higher education; or (c) be a charity.

Under section 37(2), the Welsh Ministers may make provision in regulations about the matters to be taken into account by HEFCW in determining whether to withdraw approval of a fee and access plan and the procedure to be followed in connection with giving notice of withdrawal of such a plan. Section 37(3) provides that the regulations may amend or apply (with or without modification) the procedural requirements relating to warning notices and representations (set out in sections 40 to 43) to any notice issued under section 37.

Section 37 only requires HEFCW to withdraw approval of a fee and access plan when HEFCW is satisfied that an institution no longer falls within section 2(3) of the Bill. Consequently, this section does not apply when something goes wrong under section 36 and is not connected in any way to HEFCW’s function of issuing notice of intention of refusal to approve a new fee and access plan.

Regulations are not required under section 37 for the section to operate. HEFCW will be able to satisfy themselves as to whether an institution is no longer in Wales, is no longer providing higher education or is no longer a charity without regulations. However, if as a consequence of operating the system HEFCW, institutions or other stakeholders consider that the process for withdrawal of approval of a fee and access plan would work more efficiently or effectively with matters being set out in regulations then the power at section 37(2) enables the Welsh Ministers legislate should that prove to be necessary. I am however starting from the principle of not legislating unless there is a proven need to do so. The regulation making power provides the necessary flexibility in a process which has not previously been operated by HEFCW.

Matters not falling within the scope of the Bill

Finally, it may be helpful if I clarify the situation with respect of case-by-case course designation. The Bill does not provide for either automatic or specific course designation, my intention is to consult on new requirements for specific course designation with the aim of introducing rigorous quality assurance and robust checks on the financial health of institutions delivering such courses. Any new arrangements for specific course designation will be progressed by way of the Welsh Ministers' existing regulation making powers under the Teaching and Higher Education Act 1998. Therefore new legislation is not needed.

I trust that the information is helpful and provides clarity to Members. I will write further to address issues on which Members have requested additional information in due course. I am also copying this letter to the Chair of the Children, Young People and Education Committee for information.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Huw Lewis', with a stylized flourish at the end.

Huw Lewis AC / AM

Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills

Use of “may” and “must” for regulation making powers

Part 2 – Fee and access plans

Section 2

S.2(4): Regulations “may” make provision. This concerns the making of applications for approval of a fee and access plan. The system would operate without these regulations (albeit perhaps not as efficiently) because regulations are not actually required to make the provision operative; a governing body of an institution within s.2(3) could apply to HEFCW even if no regulations were in place. We think it would only be appropriate to include a duty where both the duty and the regulations are narrow in scope. It is therefore our view no change to “must” is required because the regulation making power in s.2(4) encompasses a variety of matters.

Section 3

S.3(4): This section concerns the designation of other charitable providers of HE in Wales who would not otherwise be designated as “institutions”. This means that designated institutions will be covered by the provisions of the Bill and regulation made under the powers in it. This might for example be a provider that whilst not providing degrees, does provide other courses of higher education at a lower level on the credit and qualifications framework but may nevertheless wish for those courses to be automatically designated by student support regulations (for the purposes of student support from the Welsh Ministers) and to be able to apply for approval of a fee and access plan. The system would operate without these regulations (albeit perhaps not as efficiently). Regulations therefore provide the vehicle for supplemental detail involving the mechanics of application, but are not actually required to make the provision operative as applications for designation could be made without any regulations having been made; on this basis we believe there is no need to include “must”. As with s.2(4) we also think it would only be appropriate to impose a duty to make regulations where the scope of the regulations is narrow. In this case the scope of the regulations that might be made under s.3(4) is potentially wide and would therefore not be amenable to becoming a duty (because the system for designation could in theory operate without regulations ever being made).

Section 4

S.4(2): The sub-section adopts the “prescribed” formulation and concerns the maximum period to which fee and access plans relate. Whilst the system could operate without these regulations, we recognise that it would operate more effectively with regulations being made which set such a limit. In this instance we believe there is an implicit requirement to make regulations. It is recognised by the Welsh Ministers that in order for the system to work effectively regulations are necessary; it would therefore not be in the interests of the Welsh Ministers to fail to bring such regulations forward. As such there is no need to change the current “prescribe” formulation to refer to “regulations must make provision”.

Section 5

Overview: section 5 provides for regulations to set out qualifying courses and persons, and to set the maximum amount that can be specified in a fee and access plan, as well as the treatment of fees

paid in the case of franchised courses. Together these regulations will form the foundations of the regulatory regime contained in the Bill.

S.5(2)(b): The paragraph adopts the “prescribed” formulation. This concerns descriptions of qualifying course. The system could not operate properly without these regulations. There is therefore an implicit requirement on the Welsh Ministers to make regulations and, as such, there is no need to change the “prescribe” formulation to refer to “regulations must make provision”. If the Welsh Ministers were to commence s.5(2)(b) with no intention of making qualifying course regulations, then an issue of rationality may arise as there would be no way of knowing what would be a qualifying course. Under the current regime qualifying course regulations have been made, and there is no reason why the Welsh Ministers would not make such regulations under this provision were it enacted.

S.5(3): The sub-section adopts the “prescribed” formulation. This concerns the prescription of a “maximum amount”. The system could not operate effectively without these regulations. There is an implicit requirement to make regulations as such there is no need to change the “prescribe” formulation to refer to “regulations must make provision”. If the Welsh Ministers were to commence s.5(2)(a) with no intention of making provision on maximum fees then the fee and access plan system would not function properly as applications for approval of fee and access plans could not be made without knowing the maximum amount.

S.5(5): The sub-section adopts the “prescribed” formulation. This concerns descriptions of qualifying person. The system could not operate properly without these regulations. There is an implicit requirement to make regulations and, as such, there is no need to change the “prescribe” formulation to refer to “regulations must make provision”. If the Welsh Ministers were to commence s.5(2)(a) but not make qualifying persons regulations, then the fee and access plan system would not function properly as there would be no way of knowing who is a qualifying person for purpose of s.5(2)(a).

S.5(9): Regulations may make provision in respect of fees being treated as paid to a provider who has an approved fee and access plan in place, rather than to another person i.e. being paid to the franchisor institution rather than the franchisee institution. We recognise that a variety of franchise arrangements may exist and some or all of the fees charged for a qualifying course may be payable to a partner institution. Regulations will ensure that the total fees paid by a student do not exceed the maximum fee limit, even where the fees are paid to two different institutions. The system could still operate without these regulations but as a matter of policy it is intended to bring forward such regulations to protect the interests of students.

Section 6

S.6(1): This section adopts the “prescribed” formulation and concerns the contents of fee and access plans relating to equality of opportunity or promotion of higher education. Whilst the system could operate without these regulations, we recognise that it would operate far better with regulations in place setting out what should be included within a fee and access plan. In this instance, we would argue that there is an implicit requirement to make regulations based on them being part of the foundation required to make the new system effective. As such, we are of the view that there is no need to change the “prescribe” formulation to refer to “regulations must make provision”.

Additionally given the breadth and range of matters that might be included in these regulations, and the fact that they may need periodically to be updated to keep pace with the changing demographics of the student population in Wales; it is in our view highly questionable whether an express duty would be appropriate.

Section 7

S.7(3): Regulations may make provision about the matters that HEFCW must take into account when deciding whether or not to approve a fee and access plan. The system for approval or rejection can operate without regulations being in place (albeit perhaps not as efficiently). Regulations will provide details of supplemental factors HEFCW must consider in light of the potentially wide range of providers who may apply for approval. Given the potential range of providers that may apply to HEFCW and the changing nature of the sector changes may need to be made quite quickly to the factors HEFCW considers. The system could however operate without regulations with HEFCW determining whether or not to approve fee and access plans for example by taking account of guidance provided by the Welsh Ministers under section 46; on this basis we believe it is appropriate for “may” rather than “must” to be used.

Section 8

S.8(1): Regulations may require a governing body to publish the institution’s approved plan. The system will operate without these regulations, and so we take the view that “may” is in this context appropriate. In any event the existing power in section 34(6) of the Higher Education Act 2004 requiring publication is formulated as “may” and so it would seem odd to move away from this formulation when the current system has worked effectively in this regard. In section 8(1) “may” is used to denote a permission; the Welsh Ministers “may” make regulations. Whereas in 8(2) “may” is used to indicate the possibility that the regulations “may” make provision about how the plan is published.

Section 9

S.9(1): Regulations may provide for an approved plan to be varied. This power mirrors similar powers in the Higher Education Act 2004 (section 36) which are formulated as “may”, therefore any change to “must” would appear unnecessary. Whilst the new system for approving fee and access plans would operate without these regulations the Welsh Ministers intend to ensure continuity in the system by bringing forward regulations under this new section enabling institutions to apply to vary an already agreed plan during the lifetime of that plan. Regulations (rather than guidance under s.46) are more appropriate as regulations can deal with practical issues about how an institution might apply for a variation and how HEFCW considers a variation, whereas guidance is better suited to matters of best practice. The use of regulations to allow variation (rather than an express power on the face of the Bill) enables the Welsh Ministers to respond promptly to any changes in the sector, and if appropriate remove the ability of institutions to vary approved plans.

Section 11

S.11(5): Regulations may make provision about how and when HEFCW gives a copy of a compliance and reimbursement direction to the Welsh Ministers, and about how and when HEFCW must publish the direction. The detail contained in regulations under this section will be administrative and

technical in nature and requirements may change over time, for example as HEFCW's working practices develop or technology advances. The system would still operate without these regulations. The use of regulations though will future proof the system, enabling amendments to be made about how and when HEFCW publish such a direction in light of experience gleaned from operating the new system. Directions will be of interest to students and prospective students; the use of regulations will help ensure there is flexibility in enabling access to them.

Section 13

S.13(1): Regulations may make provision as to steps to be taken by HEFCW where regulated institutions fail to comply with the general provisions of its approved plan. This concerns compliance by institutions with their fee and access plans. The core requirements of a fee and access plan are set out in section 6, this section provides flexibility to deal with the enforcement of non-standard aspect of fee and access plans. For instance regulations may confer a power on HEFCW to direct the governing body of an institution to take steps to ensure compliance with the general provisions of its approved fee and access plan. Regulations provide a mechanism for defining what constitutes a failure to comply with the general provisions of an approved plan. The system would operate without these regulations. Since the regulations need to be responsive and able to cover a number of areas we take the view that in this context "may" is appropriate. As regulations under section 13 may amend the Bill the affirmative procedure is appropriate.

Part 3 – Quality of education

Section 17

S.17(4): Regulations may make provision about the circumstances in which a person is (or is not) to be treated as responsible for providing a course. The rationale for this power is to enable a flexible approach to be adopted by the Welsh Ministers enabling them to respond to changes in the numbers of franchised courses and/or the manner in which such courses are delivered. The statement of policy intent gives the example of excepting individual tutors who help to deliver courses on behalf of regulated institutions. The regulations could confirm that such individuals should not be treated as external providers for the purposes of quality assessment. The regulations will be narrow in scope and technical in nature. The system would operate without these regulations and so the use of "may" in this context is appropriate.

Part 5: Fee and access plans: withdrawal of approval etc

Section 36

S.36(7): Regulations may make provision about the period that may be specified in a notice refusing to approve a new fee and access plan; matters to be taken into account by HEFCW in deciding whether to give notice or withdraw such notice; and the procedure to be followed in connection with a withdrawal of notice. There may in time be a need to vary regulations made under this section by for example specifying a different period of notice during which HEFCW cannot approve a fee and access plan, or by specifying matters that HEFCW must take into account whether to give or withdraw notice as well as specific procedural elements associated with a decision by HEFCW not to renew a fee and access plan. The system would operate without these regulations so it is our view that "may" rather than "must" would be appropriate here.

Section 37

S.37(2) and (3): Regulations may make provision about matters to be taken into account by HEFCW in making a determination that an institution is no longer within s.2(3) and the procedure to be followed when giving notice of withdrawal of approval. Section 37(1) provides that HEFCW must withdraw approval of an institution's fee and access plan where HEFCW is satisfied that the institution no longer falls within s.2(3). The use of "must" here is appropriate because it sets out the action that HEFCW must take if HEFCW is "satisfied" a regulated institution is no longer within s.2(3). Regulations under this section "may" though set out the matters that HEFCW should consider in determining whether an institution still falls within s.2(3), for example decisions of the Charity Commission where HEFCW believe the institution no longer has charitable status. Regulations may also make provision about procedural requirements in connection to s.37(2)(b) by amending or applying (with or without modification) sections 41, 42 and 43 enabling institutions to have recourse to a defined process in the event of a proposed withdrawal of a fee and access plan. We are of the view that the balance between "must" and "may" is appropriate in this section given regulations will set out procedural requirements, and can be revised in light of experience gleaned from operating the new system.

Section 38

S.38(3): Regulations may make provision about matters to be taken into account by HEFCW in deciding whether to give notice of withdrawal of approval. The system would operate without regulations given the conditions which may give rise to HEFCW deciding to withdraw approval of a plan are set out on the face of the Bill (s.38(2)). Regulations will though add supplemental detail by setting out the factors that HEFCW must consider in deciding whether to give notice, but regulations are not necessary for the section's operation. Regulations serve to provide a layer of detail setting out the factors for HEFCW to consider when exercising its discretion. On this basis we think that the use of the word "may" is entirely appropriate.

Section 39

S.39(2): Regulations may make provision about how and when HEFCW gives a copy of a notice under section 36, 37 or 38 to the Welsh Ministers and about how and when HEFCW must publish such a notice. It is appropriate to require HEFCW to undertake these actions to ensure the Welsh Ministers retain an overview of the sector. Regulations would be entirely procedural in nature, specifying the timings for HEFCW to provide notices to the Welsh Ministers, and where notices should be published. Given this; the fact the requirement to publish is on the face of the Bill and that the system would operate without these regulations it is our view the power to make regulations should remain as "may".

Section 41

S.41(2)(d): " any provision made by regulations" as to the period within which, and the way in which representations are to be made in response to a proposed warning notice. These are administrative and technical provisions that may need updating from time to time in light of technological advances and experience gleaned from operation of the system. However the system will operate without

these regulations being made, on this basis we believe that the use of a discretion equivalent to “may” is entirely appropriate.

Section 42

S.42(c): The section adopts the “prescribed” formulation. Regulations can prescribe additional information to be included in a notice or direction issued under s.7(1)(b); s.11; s.19; s.32; s.36; or s.38. Section 42(a) and (b) already provide that HEFCW must include reasons for issuing a notice or direction, and alerting the governing body that it may apply for a review of the notice or direction. Regulations would provide for certain supplementary information to be included such as informing a regulated institution that a copy of a notice or direction will be given to the Welsh Ministers and published. This power enables the Welsh Ministers to ensure that statements keep pace with changes in practice by making changes as to the required content.

Section 43

S.43(3): The Welsh Ministers must by regulations make provision in connection with reviews under s.43. This power reflects existing provisions within section 39 of the Higher Education Act 2004. S.43(4) sets out what might be contained within regulations. Updates to the regulations might be required from time to time in light of feedback from the sector and HEFCW as to its operation.

Section 49

S.49(4): Regulations may make provision about preparation of the statement in respect of HEFCW’s intervention functions (including as to the statement’s form and content); its publication; the consultation to be carried out in relation to the statement in respect of intervention functions. These are procedural and technical provisions, and whilst relevant to HEFCW and the higher education sector are otherwise of limited interest. The intention is to provide the key components that HEFCW must address in preparation of the statement although in theory this could be achieved by the Welsh Ministers issuing guidance to HEFCW rather than via regulations. It will be for HEFCW to fill in the operational detail following consultation and dialogue with regulated institutions and other stakeholders. It may also be the case that requirements change over time and the Welsh Ministers will have power to respond to such changes. On this basis we believe it is appropriate to use “may” rather than “must” to afford the Welsh Ministers the degree of flexibility that is required to give proper and meaningful effect to this section.

Section 54

S.54(1): The section adopts the “prescribed” formulation. Certain fees can be excluded from the definition of “fees” in section 54(1). The system will operate without regulations being made. The power to make regulations is to future proof the system in the event that it becomes necessary to exclude other types of fee from the definition of fees.

Section 55

S.55(3): The Welsh Ministers may by regulations make such incidental, supplementary or consequential provision as they think appropriate in consequence of, or for giving full effect to, a

provision of the Bill. There may not be any incidental, supplementary or consequential provision required so this has to remain as “may”.

Section 56

S.56(2): Most provisions of the Bill come into force on such day as the Welsh Ministers may appoint by order. Commencement of provisions has to remain at the discretion of the Welsh Ministers so that they can respond to any unforeseen issues that may arise, and also to ensure the system is rolled out in a timely and well co-ordinated manner, enabling the new system to achieve the best results for the sector, students and HEFCW. On this basis “must” is inappropriate and removes this necessary degree of flexibility and responsiveness required to give proper effect to the legislation.

Schedule, paragraph 28(e): No reference to “may” or “must”. Regulations can specify any other enactment for which a 2004 Act plan is to be treated as a plan approved under the Bill. There may be no practical need for such regulations, but having such a power provides for a degree of future proofing to be made by enabling additional provisions to be added to those already listed in paragraph 28 should the need arise, so “must” would be inappropriate here.

Schedule, paragraph 30(1): Regulations may make provision about the application of a provision listed in paragraph 28(a) – (d) to a 2004 Act plan. This is again a safety mechanism to enable Welsh Minister to deal with any unforeseen circumstances that may arise after Royal Assent and affect the way in which 2004 Act plans are to be treated as fee and access plans. The system could operate without these regulations so “must” would be inappropriate.

Huw Lewis AC / AM
Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/HL/0741/14

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

23 July 2014

Dear David,

**CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE - STAGE 1
SCRUTINY OF THE HIGHER EDUCATION (WALES) BILL**

During my attendance at the Constitutional and Legislative Affairs Committee on 16 June, Members requested additional information, in the form of a flow diagram, about whether the new regulatory system to be introduced by the Bill could operate on the basis of statutory guidance without the need for regulations. In order to illustrate the proposed working of the new regulatory system I am appending a diagram which deals with the fee and access plan application and approval process under the Bill.

The accompanying diagram (annex A) sets out a guidance only approach as a starting point and illustrates that the fee and access plan application and approval process can operate effectively without regulations being in place in respect of these processes. The flow diagram should be read in conjunction with the accompanying explanatory note (annex B) which provides an explanation as to various powers and functions of the Welsh Ministers and HEFCW within the Bill which are to be relied upon for the operation of the fee plan application and approval process.

As explained in the annex to my letter of 2 July there is an implicit requirement on the Welsh Ministers to make certain regulations under the Bill. Such regulations adopt the “prescribed” formulation and their making is necessary for the operation of the new regulatory system, examples include: the power under section 4(2) concerning the maximum duration of a fee and access plan, the powers under sections 5(2)(b), 5(3) and 5(5) which deal with qualifying courses, the maximum fee amount and qualifying persons respectively and the power under s6(1) concerning

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the contents of fee and access plans. These regulations are therefore included at the outset of the process depicted in the flow diagram.

In the absence of regulations Welsh Ministers will be able to provide guidance to HEFCW concerning their functions and HEFCW will be able to specify in its information and advice to institutions details relating to the application and approval process and in respect of the determination of fee and access plans. However, the Bill provides for regulations to be made to bring clarity to the process or to respond to changes in the operating environment.

Members also questioned why the Bill has not been drafted on the assumption that where regulations may be needed, there should be a duty to make them. I provided a detailed response on this matter in my letter of 2 July which included an analysis of the use of the terms “may” and “must” throughout the Bill. It is my view that the new regulatory system could operate adequately on the basis of guidance alone. However, it may become necessary for regulations to be made to bring clarity to certain processes or to respond to changes to the higher education sector in Wales, the nature of HEFCW’s operations or the manner of delivery of courses.

I trust that the diagram and accompanying explanatory note clarifies matters for the Committee. I am also copying this letter to the Chair of the Children, Young People and Education Committee for information.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Huw Lewis', with a stylized flourish at the end.

Huw Lewis AC / AM

Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills

Introduction

The accompanying document provides a diagrammatic representation of the application and approval cycle for fee and access plans and demonstrates that these processes can operate effectively in the absence of regulations.

The process cycle assumes that regulations relating to the duration of a fee and access plan (Section 4(2)), qualifying courses (Section 5(2)(b)), fee limits (Section 5(3)) and qualifying persons (Section 5(5)) will be made. These regulations are implicitly required in order for the system to operate.

With these regulations in place, the diagram shows that the application and approval cycle operates initially on a guidance only basis. The guidance only cycle is illustrated using solid flow lines.

The regulation making process is shown as a subsidiary process using a dashed flow line which is triggered by and feeds back into the application and approval cycle at appropriate points. In the event that regulations are not made, the application and approval process can continue to operate on a guidance only basis.

Notes

1. The Bill makes provision for Welsh Ministers to issue guidance under Section 46. Guidance would be developed in consultation with HEFCW and could be used in the absence of regulations being made.

In relation to the application and approval this guidance could, amongst other things, relate to type of evidence that an institution may be required to provide in support of its application for a fee and access plan and matters that HEFCW should take into account in considering the approval of this application.

2. Under Section 46, HEFCW are required to take account of guidance issued by the Welsh Ministers.
3. Section 51(4)(c) allows HEFCW to provide information and advice concerning the effect of approval of a fee and access plan¹. It is envisaged that HEFCW may wish to make use of this advisory function in providing information to fee and access plan applicants about the requirements with which regulated institutions must comply. This guidance may, amongst other things, set out that HEFCW would take into account the quality of education and financial management at an institution in determining a plan and provide details of the information that institutions would be required to provide to HEFCW in order to demonstrate this.

¹ Paragraph 1 of Schedule 1 to the Further and Higher Education Act 1992 may also be relevant as well.

HEFCW may decide to provide detailed guidance to institutions including the consequences of having an approved fee and access plan and the expectations that HEFCW will have about how an application should be formulated. HEFCW may also set out its expectations concerning the monitoring and enforcement of plans in order that institutions are aware of the need to return information to HEFCW at stated times to allow for the monitoring of the delivery of plan commitments, and the actions HEFCW may take if those commitments are not met.

4. The core contents of a fee and access plan are laid out on the face of the Bill at Sections 4-6 (see 7 below). HEFCW may provide additional information or detail in relation to these requirements in their guidance to institutions and may do so whether regulations are in place or not.
5. Section 2 allows the governing body of an institution to apply to HEFCW for approval of a proposed fee and access plan relating to the institution if it is an institution in Wales that provides higher education and is a charity (section 2(3)).
6. Regulations made under Part 2 of the Bill relate to 4 broad areas namely, the application process, the contents of fee and access plans, the approval of a fee and access plan (and compliance with its general provisions) and the publication of a fee and access plan (also included are regulation making powers in respect of designation, prescribed courses, variation of an approved plan and compliance and reimbursement directions). These are as follows but are expanded upon in the Statement of Policy Intent² and in the analysis provided to the Committee on 2 July:

a) - Application process

Section 2(4) enables the Welsh Ministers to make provision, via regulations, about the making of applications for approval of a fee and access plan. The regulations could for example require institutions to provide HEFCW with certain information or documentation alongside their applications for approval of a fee and access plan. These requirements regarding information and documentation are likely to change over time following changes in the delivery of higher education in Wales as well as technological advancements. The Welsh Ministers need the flexibility to respond to these changes which will ensure that the fee and access plan application process remains up to date.

b) - Approval of a fee and access plan

Section 7(3) enables the Welsh Ministers to make regulations about matters to be taken into account by HEFCW in determining whether to

² <http://www.senedd.assemblywales.org/mglIssueHistoryHome.aspx?Ild=9722>

approve or reject a fee and access plan. The matters which will be relevant to a decision by HEFCW to approve or reject an institution's fee and access plan are likely to change over time. These matters may be influenced by the types of institution applying for approval, the range of courses offered in Wales and other changes to the higher education sector. This power will enable the Welsh Ministers to update the fee and access plan approval process in accordance with these changes.

c) -Contents of a fee and access plan

Under Section 4(2), the Welsh Ministers may prescribe in regulations the maximum period to which a fee and access plan is to have effect. The maximum period in respect of which a fee and access plan is to have effect is likely to change over time in response to changes to the higher education sector in Wales. This regulation making power is required to enable the Welsh Ministers to respond to these changes. These regulations are necessary to enable the system to function effectively and as such there is an implicit requirement that they will be made.

Section 5(2)(b) enables the Welsh Ministers to prescribe in regulations descriptions of 'qualifying courses'. Such courses must be wholly or principally provided in Wales. Qualifying courses are courses that will attract a fee limit. These regulations are necessary to enable the system to function effectively there is an implicit requirement that they will be made.

Section 5(3) enables the Welsh Ministers to set a maximum amount for a fee limit. The maximum fee limit applicable to certain higher education courses ('qualifying courses') is likely to change over time, in response to changes in student support policy, the fees in other UK administrations and other economic and social factors. The system could not operate effectively without these regulations and so there is an implicit requirement to make regulations.

Section 5(5) enables the Welsh Ministers to prescribe classes of persons in regulations who will be 'qualifying persons' for the purposes of the fee limit. This power will provide the Welsh Ministers with the flexibility to update the meaning of 'qualifying persons' as and when required. These regulations are necessary for the system to operate properly; there is an implicit requirement to make regulations.

Section 5(9) enables the Welsh Ministers to make regulations which specify circumstances where fees payable to another person in connection with a qualifying person's course, are to be regarded as fees payable to the institution in connection with that course. It is required to enable the Welsh Ministers to respond to changes in the way fees are charged by higher education institutions in Wales.

Section 6(1) requires a fee and access plan relating to an institution to include such provision on the promotion of equality of opportunity or the promotion of higher education as may be prescribed by the Welsh Ministers in regulations. This power enables the Welsh Ministers to prescribe the information on equality of opportunity and higher education for this purpose. The information and priorities associated with the promotion of equality of opportunity and the promotion of higher education is likely to change over time alongside changes to the higher education sector in Wales. This power will enable the Welsh Ministers to respond to these changes by adapting the requirements imposed on institution's fee and access plans.

d) - Publication of a fee and access plan

Section 8(1) enables the Welsh Ministers to require institutions with an approved fee and access plan to publish their approved plan. The regulations requiring publication may make specific provision on how and when a plan is to be published. This regulation power will enable the Welsh Ministers to respond to changes over time and allow for a flexible and up to date approach to publication (see also 9 below).

7. Sections 4-6 set out requirements for the contents of fee and access plans. These include the period to which a plan relates, the fee limit and provisions relating to equality of opportunity or the promotion of higher education. Guidance issued by HEFCW to institutions may provide additional information or detail in relation to these requirements
8. Under Section 7(1) HEFCW must notify the governing body of an institution that it has either approved or rejected a fee and access plan.
9. The expectation is that institutions will publish their fee and access plans as a matter of course, however, Welsh Ministers have the power to issue regulations in respect of the publication of approved plans if this is considered necessary to ensure a consistency of approach.

Fee and Access Plan Application and Approval Cycle

