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Consultation – summary of responses

Regulations as provided for by the Higher Education (Wales) Act 2015

Date of issue: August 2015

Regulations as provided for by the Higher Education (Wales) Act 2015

Audience	Higher education institutions, further education institutions, other providers of higher education and respondents to the consultation.
Overview	Summary of responses to the Welsh Government's consultation on proposed regulations as provided for by the Higher Education (Wales) Act 2015.
Action required	None – for information only.
Further information	Enquiries about this document should be directed to: Higher Education Division Skills, Higher Education and Lifelong Learning Directorate Welsh Government Cathays Park Cardiff CF10 3NQ e-mail: HEDConsultationsMailbox@wales.gsi.gov.uk
Additional copies	This document can be accessed from the Welsh Government's website at www.gov.wales/consultations
Related documents	<i>Regulations as provided for by the Higher Education (Wales) Act 2015</i> (2015) www.gov.wales/docs/dcells/consultation/150317-consultation-en1.pdf

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Background

1. The Welsh Government intends to make regulations to implement elements of the Higher Education (Wales) Act 2015 ('the Act'). The regulations are required to ensure that the regulatory framework provided for by the Act is implemented effectively.

2. A consultation took place between 17 March 2015 and 12 May 2015 on five sets of regulations:

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

3. Meetings with the Higher Education Council for Wales ('HEFCW') and Universities Wales (a National Council of Universities UK) took place during the consultation period. A total of nine responses were received. A number of changes to the regulations have been made as a result of the consultation. Responses were received from:

- Estyn
- Universities Wales;
- Higher Education Funding Council for Wales;
- Cardiff University;
- Cardiff Metropolitan University;
- Aberystwyth University;
- University of Wales Trinity Saint David;
- Bridgend Carers Centre/Action for Children; and
- The Open University in Wales.

4. The Welsh Government is grateful to all those who responded. A small number of respondents asked that their responses be made available to other policy areas in Welsh Government. This has been done. The Open University's response was principally concerned with any extension of the regulations to part-time higher education and noted the need for further consultation in the event of this happening. The response was carefully analysed but had no direct implications for the draft regulations and is not included below (but will be re-considered if it is proposed to extend regulations to part-time provision in the future). The response received from Bridgend Carers Centre/Action for Children was also not directly related to the draft regulations; it was noted but is not included below.

Summary of changes

5. The changes described below have been made to the regulations as a result of consultation.

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

6. The Welsh Government received a detailed response on one particular aspect of these regulations which has led to the elements of the regulations being re-drafted. Specifically the interaction between two regulations was re-examined: i) the matters to be taken into account by HEFCW in considering whether to approve a fee and access plan (regulation 7 of the draft regulations) and the information to be supplied with an application (regulation 3). It was noted that regulation 3 was, or should, be solely concerned with the information to be supplied as part of an application and that it was not as clear as it could be that this was the case. Regulation 7 is concerned with the matters that HEFCW must take into account when determining whether to approve an application for a fee and access plan. As originally drafted, regulation 7 cross-referenced regulation 3.

7. Regulation 7 has been amended so as to expressly include as matters informing the determination of whether to approve or reject a fee and access plan the areas about which information will be provided under regulation 3. Regulation 3 was re-drafted so that it was clearer that it was concerned with the information to be supplied as part of an application.

8. The cumulative effect is to ensure greater clarity on the matters to be taken into account by HEFCW when considering whether to approve an application for a fee and access plan, and the information which must support an application.

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

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

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

10. The draft regulations have changed as a result of consultation. Respondents noted that one part of the process – the timescale associated with the Review Panel producing a report – was not defined. A change has been made to the regulations to

accommodate this. The Review Panel will now provide HEFCW and the governing body of the regulated institution with an anticipated timescale for its review.

11. Respondents also noted that the scope for interaction with and representation to the Review Panel was limited. The draft regulations allow the Review Panel to request further information from either the governing body of a regulated institution or HEFCW. The regulations have been changed to allow the Review Panel to seek further representations on this information, should it wish.

12. There was particular concern on the timing of publication of a direction issued in connection with section 11 of the Act (a compliance and reimbursement direction). In the original draft, a direction must be published when it is issued. A regulated institution may apply for a review which may result in HEFCW deciding not to give the direction. Respondents pointed out that unnecessary 'harm' may be experienced in such circumstances. The regulations have been changed in light of this. A direction will not now be published until, in the event that a review is applied for, a review is complete and the direction is given.

13. The regulations have also been reordered slightly, moving the regulation concerned with the issuing of directions under section 11 of the Act to the end of the regulations to provide clarity for the reader. Finally, the opportunity has been taken to re-draft some parts of the regulations to improve clarity; the underlying policy intent is unchanged.

14. The cumulative effect is to avoid 'harm' from publishing a direction which is subsequently withdrawn, and to ensure greater clarity on and openness of the Review Panel process.

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

15. Five respondents commented directly on these regulations.

16. The principal concern expressed and implied by responses was that the regulations are unclear on the type of provider that could be designated. This has been noted. The purpose of the regulations is to enable providers of higher education in Wales which are charitable to be able to apply for designation as an institution when they would otherwise not be treated as such for the purpose of the Act. Should an application be approved, the provider may then apply for a fee and access plan. (The regulations are not concerned with the designation of 'alternative providers' of higher education for the purposes of student support.) The Explanatory Notes, included in the Bill Explanatory Memorandum¹, provide further explanation of this part of the Act.

17. Respondents suggested additions to the information to be provided to support an application including:

¹ <http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?lId=9722>

- financial accounts;
- awarding bodies, when an applicant makes awards from more than one body;
- locality of provision and provision outside Wales;
- projected student numbers; and
- the stage in its 'life' that a provider has reached and its riskiness.

18. Financial information is assessed by the fee and access plan application process. Information on awarding bodies is required by the regulations (the regulation implies the plural). Locality is required (insofar as the applicant must demonstrate it is providing higher education in Wales). Provision outside Wales is not relevant for the regulations – the Act requires only that an applicant demonstrate that it provides higher education in Wales to be considered for designation. Projected student numbers is not a relevant consideration for designation under the Act. On riskiness, designation is intended only to enable a provider to apply for a fee and access plan; should a plan be approved, the provider then becomes subject to the regulatory framework provided for by the Act.

19. A number of further observations were made including:

- Welsh Government to publish its reasons for approving/rejecting in order to help provide consistency over time and provide transparency;
- regulations to require that an applicant provide information to demonstrate that provider would not (but for the designation) be regarded as an institution for the purposes of the Act;
- there may be a risk that Welsh Government (via designation) and HEFCW (via fee and access plan approval) could arrive at different conclusions on charitable status; and
- similarly, there may be duplication in the effort to gather/supply this information.

20. These were considered carefully and noted but none were deemed to be matters for regulations.

21. A number of comments related to guidance on the designation process. These were noted.

22. No changes were made to these regulations as a result of consultation.

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

23. Six respondents commented upon these draft regulations.

24. Question three sought views on whether there were any circumstances in which the fee limit should not apply to courses which would normally be qualifying

courses. Including an exemption in regulations at this time is not required to ensure the regulatory framework provided for by the Act is implemented effectively but Welsh Government are minded to ensure that the regulations do not give rise to any unintended consequences for fee charging by institutions.

25. A number of respondents suggested that courses offered to companies might be exempted. Two respondents termed these 'closed' courses; a course offered to the employees of a company or members of a profession. Welsh Government agrees with the idea that such courses might, in principle, be exempted. Further policy development will though be required before any exemption is considered. As such, the regulations will not at this time be amended to include any exemption and the current policy position is maintained.

26. One respondent suggested that exempting certain courses may lead to Welsh Government setting fee levels. This was noted.

27. Question four asked for any other comments on these regulations. One comment noted that a heading in the schedule was repeated (relating to the definition of EU nationals). The regulations have been changed to omit this.

28. One respondent asked a question about the congruence between the definition of 'qualifying persons' and those persons that are eligible to receive support (suggesting that they should in effect be the same). This issue was analysed carefully. In short, the definitions have evolved through various iterations of regulations concerned with student support and fee limits. The Welsh Government concluded there is no issue which prevents current policy being implemented as intended but intend to keep under review the relevant regulations to determine whether any improvement may be made. The regulations currently replicate in this regard the equivalent extant regulations² because the policy on qualifying persons has remained unchanged.

29. Other comments noted issues with respect to student support (noted but not a matter for these regulations) and the courses of higher education to which the regulations apply (which is provided for in these and other regulations).

30. In summary, one change was made to these regulations as a result of consultation. Respondents may wish to note that the regulations have since been changed to include additional provision relating to certain courses and the treatment of certain fee and access plans during the transitional period. Additional drafting changes have been made and the title of the regulations has changed accordingly.

² The Student Fees (Qualifying Courses and Persons) (Wales) Regulations S.I. 2011/691 (W.103).

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

31. These regulations attracted more comment than any other set of regulations, perhaps indicative of the central role which fee and access plans have in the regulatory framework.

32. Question five asked whether respondents thought that the regulations should be more prescriptive on what might be included in fee and access plans relating to the promotion of higher education. The overwhelming sentiment was that they should not, that regulations should be 'enabling' rather than 'prescriptive' in this area. One response noted that 'fair access' was not defined by the Act or the regulations; this is not a new requirement. Other respondents noted that 'financial viability' was not defined. It is not intended to be prescriptive on this matter, as HEFCW already has extensive interaction with and knowledge of higher education institutions which it may use in assessing financial viability. Guidance may be issued but the onus will remain on the applicant.

33. Question six asked for other comments. There was some comment that the information required regarding financial viability and so on was 'out of place' in a fee and access plan and made the document less useful for students and other interested parties. While the information must accompany an application and will be a factor in HEFCW's determination of whether to accept or reject a fee and access plan, it does not form part of a plan. One respondent noted that information regarding the provision of financial assistance to students and the aggregate cost of a course should not be included in a fee and access plan; the regulations do not require that a fee and access plan contain such information, but must include provision for assistance to be provided and to inform students of the aggregate fees of a course.

34. Some respondents questioned whether there should be a direct reference to the requirements of the Act when assessing applications or, similarly, that such criteria were irrelevant as the Act will ensure that a provider with a fee and access plan is well-managed, providing education of an adequate quality and so on. The Welsh Government is clear that there is a difference between applying for a fee and access plan and the regulation of a provider once a plan has been approved.

35. One respondent suggested that nothing in the regulations prevented approval being withheld due to minor matters. HEFCW is bound to act reasonably, and no change to the regulations is required. The same respondent suggested that there should be clear reference to i) the need to maintain academic freedom and institutional autonomy and ii) the need to maintain a diverse higher education sector. The former is provided for in the Act. On the latter, it was not thought that the regulations do anything to jeopardise this.

36. Changes have been made to these regulations. The Welsh Government received a detailed submission regarding the interaction of two parts of the regulations: i) the matters HEFCW must take into account when considering an application for approval (regulation 7 of the draft regulations) and the information to be supplied by an applicant (regulation 3). The respondent noted that regulation 3 was cross-referenced by regulation 7. It was noted that regulation 3 was, or should, be solely concerned with the information to be supplied as part of an application and that it was not clear that this was the case. The Welsh Government has re-drafted the regulations so that regulation 3 is now concerned with information to be supplied and regulation 7 includes all the matters to be taken into account, with no cross-referencing.

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

37. Seven respondents commented directly on these regulations.

38. Question seven of the consultation document requested views on whether sufficient time had been allowed for the processes associated with the issue of notices and directions. Respondents generally agreed that the timescales were sufficient and that the process should be as swift as reasonably possible.

39. Respondents noted that one part of the process – the timescale associated with the Review Panel producing a report – was not defined. A change has been made to the regulations to accommodate this. The Review Panel will now provide HEFCW and the governing body with an anticipated timescale for its review. This will provide further clarity on timescales while allowing the Panel flexibility to ensure it has sufficient time to consider applications of varying complexity.

40. Question eight requested views on whether the information to be provided with a notice or direction was sufficient and whether there was other information that ought to be provided. Limited comments were received. One respondent noted the need for HEFCW to provide a 'rationale' for its decision. The Act requires reasons to be given with a notice or direction³. Similarly, one response suggested that there should be an elaboration of reasons by providing the grounds on which the decision to issue was made. Given that the issue of a notice or direction is only likely after extensive interaction with a regulated institution, it was not thought that the regulations need to change. One respondent noted that the source of information upon which the decision was made was desirable – in many cases this is likely to be clear.

41. One comment noted that independent assessment ought to be a feature. The Review Panel will be independent, and the underlying issue will in some circumstances have arisen because of external assessment (e.g. quality).

³ Section 43.

42. Question nine asked respondents to consider whether the grounds on which a review may be applied for are sufficient to allow reasonable challenge. Responses suggested that grounds might be added to encompass circumstances where:

- HEFCW has not understood a material factor; and
- HEFCW has based its decision on information which was incorrect or incomplete.

43. These responses were subject to detailed analysis to determine whether they were already provided for or required grounds to be added. On balance, it was felt that the regulations did not need changing. Regulations 7(b) and (c) (in the draft regulations) in particular provide reasonable scope for a range of challenges.

44. Question 10 sought views on whether the review procedure was sufficiently transparent and well-informed. Two comments stood out:

- that it is unclear how binding the report of the Review Panel is on HEFCW; and
- that there was no opportunity to respond to any evidence that a Review Panel requests.

45. On the former, the regulations state that HEFCW 'must' take account of the report. Further, HEFCW, as a public body, must act reasonably. On the latter, it was concluded that a change to the regulations would be beneficial. The draft regulations have been changed to allow the Review Panel to request representations on any further evidence submitted to it (under regulation 9(3) in the draft regulations). This will enable such representations but allow the Review Panel to ensure that the process is not compromised by repeated rounds of evidence and response.

46. Question 11 invited any other comments. There was particular concern on the timing of issue of a direction in connection with section 11 of the Act (a compliance or reimbursement direction). A direction may be issued and published before any review concludes (if the regulated institution applies for a review). Respondents pointed out that unnecessary 'harm' may be experienced if the decision of HEFCW after a review was not to give the direction. The regulations have been changed in light of this. A direction will not now be published until any review is complete.

47. In summary, three changes have been made to the regulations as a result of the consultation. The regulations have also been reordered slightly, moving the regulation concerned with the issuing of directions under section 11 of the Act to the end of the regulations. Finally, the opportunity has been taken to re-draft some parts of the regulations to improve clarity (the policy intent is unchanged).

The Higher Education (Amounts) (Wales) Regulations 2015

48. Six respondents commented directly on these regulations.

49. Comments were received which related to the Welsh Government's policy on fees and student support including:

- fee limits for sandwich courses;
- fee limits for study abroad; and
- allowing for inflationary and/or policy increases in fee limits.

50. These have been noted. The regulations replicate existing, unchanged fee limits while ensuring the limits will apply under the Act.

51. No changes were made to these regulations as a result of consultation.

Additional consultation matters

52. A number of other matters were consulted upon. No regulations have been made in connection with these. The Welsh Government will determine how to proceed with these in due course.