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## Consultation – summary of responses

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

Summary of responses to proposed regulations under  
sections 37–40 of the Higher Education (Wales) Act 2015

Date of issue: January 2016

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

<b>Audience</b>	Higher education institutions, further education institutions, other providers of higher education and respondents to the consultation.
<b>Overview</b>	Summary of responses to the 'additional matters' specified in the Welsh Government's consultation on proposed regulations as provided for by the Higher Education (Wales) Act 2015.
<b>Action required</b>	None – for information only.
<b>Further information</b>	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: <a href="mailto:HEDConsultationsMailbox@wales.gsi.gov.uk">HEDConsultationsMailbox@wales.gsi.gov.uk</a>
<b>Additional copies</b>	This document can be accessed from the Welsh Government's website at <a href="http://www.gov.wales/consultations">www.gov.wales/consultations</a>
<b>Related documents</b>	<i>Regulations as provided for by the Higher Education (Wales) Act 2015</i> (2015) consultation document <a href="http://www.gov.wales/docs/dcells/consultation/150317-consultation-en1.pdf">www.gov.wales/docs/dcells/consultation/150317-consultation-en1.pdf</a> <i>Regulations as provided for by the Higher Education (Wales) Act 2015</i> (2015) summary of responses document <a href="http://www.gov.wales/docs/dcells/consultation/150814-sor-he-act-en.pdf">www.gov.wales/docs/dcells/consultation/150814-sor-he-act-en.pdf</a>

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## Background

1. The Welsh Government made five sets of regulations under the Higher Education (Wales) Act 2015 ('the Act') in July 2015. Prior to the making of those regulations, consultation<sup>1</sup> took place (17 March 2015–12 May 2015). A summary of responses to some elements of that consultation was published in August 2015<sup>2</sup>.
2. The Welsh Government explained that it was considering making regulations under Part 5 (sections 37–40) and section 52 of the Act. A number of questions were asked. This document summarises the responses and outlines what the Welsh Government has done as a result of the consultation.

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<sup>1</sup> <http://gov.wales/consultations/education/regulations-from-the-higher-education-wales-act/?status=closed&lang=en>

<sup>2</sup> <http://gov.wales/consultations/education/regulations-from-the-higher-education-wales-act/?status=closed&lang=en>

## Part 5 of the Higher Education (Wales) Act 2015

3. Part 5 (sections 37–40) of the Act makes provision for the withdrawal of approval etc. of fee and access plans. A charitable institution in Wales which provides higher education may apply to the Higher Education Funding Council for Wales ('HEFCW') for the approval of a fee and access plan. It is proposed that, if approved, certain courses of the institution become 'automatically designated'<sup>3</sup>. Students who undertake designated courses may be eligible for financial support from the Welsh Government.
4. Section 37 is concerned with notice to refuse a new fee and access plan. Subject to any transitional protection for continuing students which is set out in the proposed student support regulations for academic year 2017/18, without a fee and access plan in place, students would not be eligible for support. The Act provides that where HEFCW give notice under section 37, they may subsequently withdraw the notice (where, for instance, the institution resolves the issue in question) and the restriction ceases to apply.
5. Section 38 is concerned with HEFCW's duty to withdraw approval of a fee and access plan. This duty arises where HEFCW is satisfied that an institution no longer falls within section 2(3) of the Act i.e. is no longer a charitable institution in Wales providing higher education.
6. Section 39 is concerned with HEFCW's power to withdraw approval of a current fee and access plan. When a plan is withdrawn, students may no longer be eligible for support (but as above, this is subject to any transitional protection afforded by the student support regulations at the time).
7. Section 40 is concerned with the publication of notices issued under sections 37–39.
8. The consultation document noted that the Welsh Ministers were considering whether to make regulations under these sections. However, given the impact on a regulated institution should any of these powers be used, consultation was necessary to ensure the views of the higher education sector informed the drafting of subordinate legislation.
9. Of particular concern were the 'matters' that may be taken into account in connection with each power (section 37(7)(b), 38(2)(a) and 39(4)). The results of the consultation are reported against each section below but a common theme was that there should be 'safeguards' in place to protect against the powers of section 37–39 being used inappropriately. The Welsh Government carefully considered this as described in 'Safeguards' below.

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<sup>3</sup> This is contingent upon express provision for this being included in the higher education student support regulations for academic year 2017/18.

## Section 37

10. The consultation document noted that regulations were likely to specify the period in which a new fee and access plan would not be approved as a maximum of one year (in connection with section 37(7)(a)). No responses were received which disagreed with this and regulations will be made accordingly. A similar provision has been in place for some time under section 38 of the Higher Education Act 2004.
11. Regulations will also be made under section 37(7)(c). This section enables the Welsh Ministers to make regulations about the procedure to be followed in connection with the withdrawal of a notice to refuse a new fee and access plan. It is proposed that regulations will prescribe that the regulated institution and the Welsh Ministers be notified of the withdrawal in writing and that reasons for withdrawal of the notice be supplied to both.
12. Questions 13 and 14 of the consultation document asked respondents to consider what matters HEFCW might be required to take into account when considering whether to issue notice to refuse to approve a new fee and access plan, and whether they had any other comments.
13. Two respondents asked whether financial support would be put in place to assist an institution which suffered financially from a notice to refuse to approve a new fee and access plan. No such provision is planned.
14. Three respondents noted that the publication of a notice before a review procedure had concluded was potentially problematic insofar as the decision to issue the notice may not be confirmed. The Welsh Government accepts this and it is proposed that regulations will ensure that a notice is only published after a review procedure is complete (should the institution in question seek a review) and HEFCW provide confirmation to the institution that the notice has effect (see paragraph 23 below).
15. One respondent noted that issuing a notice should only be undertaken after a full review process. Sections 41–44 of the Act, together with the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015<sup>4</sup> prescribe how a review process will apply to notices under this section and the period during which a notice is not to be treated as having been given by HEFCW.
16. One respondent noted that a notice may be issued on a failure which relates to a ‘minor matter’ and that safeguards are required. The Welsh Government believes adequate safeguards are in place (see paragraphs 24–26). Further, under regulation 7(c) of the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015, an application for a review of a notice or direction may be made where the governing body considers that the notice or direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

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<sup>4</sup> S.I. 2015/1485(W.164).

## **Section 38**

17. The warning (section 42) and review (section 44) procedure applies to notices issued under sections 37 and 39, but not section 38. The consultation asked respondents to consider whether the warning and review procedure should apply to section 38. Section 38 is concerned with HEFCW's duty to withdraw approval of fee and access plan when the institution is no longer a charitable institution providing higher education in Wales. Respondents were unanimous in their view that it should. The Welsh Government intends to make regulations which apply sections 42–44 to notices under section 38. Although section 38(3) allows section 41–44 to be amended or applied, with or without modifications, the Welsh Government does not intend to amend or modify any provision of sections 41–44.
18. One respondent noted that evidence on charitable status might be a matter for confirmation by the Charity Commission. The Act provides that the duty to withdraw approval does not arise unless HEFCW is satisfied that (amongst other things) an institution is no longer a charity. While this might include seeking advice from the Charity Commission, it is not thought that legislation is needed on this matter.

## **Section 39**

19. The questions asked about section 39 were similar to those asked about section 37 and the responses were likewise similar. Respondents were asked what matters HEFCW might take into account when deciding whether to withdraw approval of a fee and access plan, and for any other comments they may have.
20. As with section 37, it is proposed that notices issued under section 39 will only be published when any review process is complete and HEFCW provide confirmation to the institution that the notice has effect (see paragraph 23 below). One respondent raised this.
21. The issue of a notice being used inappropriately or for minor matters was raised. As with section 37, the Welsh Government believes that appropriate safeguards are in place as noted at paragraph 16 above.

## **Section 40**

22. Section 40 states that regulations may be made about how and when HEFCW must provide a copy of a notice issued under section 37, 38 or 39 to the Welsh Ministers and how and when HEFCW must publish such a notice.
23. Respondents were clear that notices should not be published before any review process is complete. The Welsh Government agrees. Regulations will ensure that a notice is only treated as having been given (i.e. the point at which it has effect) by HEFCW after a review process (if any) is complete and that a notice is published within seven days of being given. It is proposed that a copy of the notice be provided

to the Welsh Ministers immediately it is initially issued to the governing body of the institution concerned (i.e. before any possible review etc.). As indicated above, notices issued in connection with section 37 may be withdrawn, and it is proposed that HEFCW will be required to remove any withdrawn notice from its website.

## **Safeguards**

24. The consultation highlighted concerns from stakeholders about the possible inappropriate use of some powers and the need for appropriate safeguards. Some comments offered by respondents are:

- (In connection with section 37) [i]t is a concern that the Act allows HEFCW to refuse to approve a plan on potentially slender grounds i.e. an institution has failed to comply with a general requirement of its approved plan. The Act ensures that an institution is not to be treated as having failed to comply with a general requirement if, in HEFCW's view, it has taken all reasonable steps to comply. However, a key point we raised in relation to the Bill, is that this does not prevent the failure in question relating to a minor matter.

- (In connection with section 39) [w]e have previously expressed our concerns that s.39 of the Act allows HEFCW to withdraw approval of a plan for potentially minor matters. For instance, we would not like to see this power used, as it presently can, to withdraw approval for a persistent failure to comply with a general requirement of a plan which is minor in nature. Withdrawal on grounds of a single instance of failure to comply with a direction (which may be enforced by injunction) would also appear to be excessive unless it relates to significant and material failure to comply with prescribed requirements considered in the round.

25. The Welsh Government agrees that the powers ought not be used in such circumstances. The Welsh Government considered whether the ability to prescribe 'matters to be taken into account' might be used to develop additional safeguards, to guard against the issues raised above. However, officials are mindful of the following:

- As a statutory public body exercising public functions, the common law requires that HEFCW must act reasonably, take relevant factors into account and disregard all irrelevant factors in the exercise of their functions. In this respect, HEFCW is not completely free to exercise its functions in whatever way it wishes. HEFCW is subject to the principles of administrative law and these principles will apply in the exercise of HEFCW's functions under the Act. HEFCW must act in a manner that is procedurally fair and which accords with its own published policies. In this regard,

the common law already provides safeguards in relation to HEFCW's functions under Part 5 of the Act.

- Section 52 of the Act requires HEFCW to prepare and publish a statement setting out how it proposes to exercise its intervention functions. Regulated institutions may rely upon that statement. In connection with its preparation, HEFCW must take into account guidance issued by Welsh Ministers. Guidance on the preparation of the statement has been issued to HEFCW<sup>5</sup> and includes the following principles:

- where possible, HEFCW should seek to resolve issues through dialogue with institutions and through the provision of informal support and assistance;
- intervention will only occur when necessary;
- the action proposed by HEFCW will be proportionate to the regulatory failure or concern in question; and
- where possible, HEFCW should discuss proposals to exercise an intervention function with the governing body, or the head of the institution or provider concerned.

- The Act provides that, prior to issuing any notice to refuse to approve a new fee and access plan (section 37) or to withdraw approval of a fee and access plan (section 39), HEFCW must issue a warning notice and a regulated institution may make representations in respect of that warning notice. The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015 provide for a period of 40 days to make representations. When a notice is issued, a regulated institution has the ability to request a review to be carried out by an independent panel appointed by the Welsh Ministers. The grounds for review are provided by the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015. These grounds are:

- the governing body presents a material factor for consideration to which, for good reason, it has not previously drawn HEFCW's attention;
- the governing body considers that HEFCW have disregarded a material factor which they should have considered; and
- the governing body considers that the notice or direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

- Once a review completes, HEFCW must take into account the findings of the independent review panel. The warning notice and review process provides

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<sup>5</sup> Guidance issued to HEFCW by the Welsh Ministers under section 49 of the Higher Education (Wales) Act, 2015  
[http://www.hefcw.ac.uk/documents/publications/circulars/circulars\\_2015/W15%2012HE%20Annex%20A%20part%202.pdf](http://www.hefcw.ac.uk/documents/publications/circulars/circulars_2015/W15%2012HE%20Annex%20A%20part%202.pdf)

adequate opportunity for an institution to make a case should it feel that a sanction is not proportionate or justified. In practice, there is likely to have been even greater interaction between a regulated institution and HEFCW than the Act and regulations provide for, as specified in the Welsh Ministers guidance to HEFCW described above.

- The Welsh Government intends to legislate so that the warning (section 42) and review (section 44) provisions will also apply to notices issued under section 38, and the points made in the preceding paragraphs will therefore also apply to these notices.

26. Taking the above together, the Welsh Government considers that adequate safeguards are in place to ensure notices are not issued inappropriately.

## **Section 52**

27. The Welsh Government explained in the consultation document that it was not minded to make regulations in connection with section 52. Respondents generally agreed with the intention not to make regulations at this time. Two respondents noted the importance of guidance to HEFCW and from HEFCW to the sector. The Welsh Government has issued guidance to HEFCW in respect of the intervention functions exercisable during the transitional period (1 August 2015 to 31 August 2017), which includes the principles described at paragraph 25. Further guidance will be provided to HEFCW in respect of its remaining intervention functions under the 2015 Act in due course.