

HIGHER EDUCATION (WALES) ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS OF THE ACT

Part 6 – Notices and directions given by HEFCW

Section 41 – Application of sections 42 to 44

119. Sections 42 to 44 are concerned with the giving of warning notices by HEFCW before they give certain notices and directions to the governing body of an institution, the information that HEFCW are to supply with those notices and directions and the process of review that is available in respect of those notices and directions.
120. By way of comparison, existing provisions under the Higher Education Act 2004 provide for HEFCW to give notice to the governing body of an institution where they are minded to refuse to approve the institution's proposed plan or to refuse to approve a new plan during a specified period on the expiry of the institution's existing plan. Those existing provisions allow for the governing body to make representations to HEFCW and require HEFCW to consider any such representations before they make a decision. The existing provisions also allow for the governing body to apply to a person or panel of persons appointed by the Welsh Ministers for a review of HEFCW's decision (which has effect, in the first instance, as a provisional decision).
121. The notices and directions to which sections 42 to 44 apply are described in section 41(1). Those notices and directions do not include a notice under section 38 (HEFCW's duty to withdraw approval) nor do they include directions under sections 16, 19 or 35 (directions concerning a failure to co-operate). Sections 42 to 44 do not apply to a direction given by HEFCW where that direction only revokes an earlier HEFCW direction.

Section 42 – Proposed notices and directions: requirement to give warning notice

122. Where HEFCW propose to give a notice or direction described in section 41(1) to the governing body of an institution, HEFCW must first give the governing body a warning notice.
123. A warning notice must set out the proposed notice or direction and state HEFCW's reasons for proposing to give it. The warning notice must also inform the governing body that it may make representations about the proposed notice or direction. Regulations may provide for the period within which and the way in which such representations may be made. For instance, regulations might provide that HEFCW are to receive representations in writing and that they must receive any such representations within 40 calendar days of the date of the warning notice.

Section 43 – Information to be given with notices and directions

124. If HEFCW give a notice or direction described in section 41(1) to the governing body of an institution, they must at the same time give that governing body a statement which sets out HEFCW's reasons for giving the notice or direction and which informs the

governing body that it may apply for a review of the notice or direction under section 44. The statement must also include any other information that is required to be included by regulations. Regulations might, for instance, require a statement to inform the governing body that a copy of the notice or direction will be given to the Welsh Ministers and published (in the case of direction under section 11 or notices under sections 37 or 39).

Section 44– Review of notices and directions

125. This section concerns the review of a notice or direction described in section 41(1) once HEFCW have decided to give such a notice or direction to the governing body of an institution. This section is based on section 39 of the Higher Education Act 2004 and the review procedure is likely to be similar to the review procedure in place under that Act.
126. The governing body of an institution to which the notice or direction is addressed may apply for a review of that notice or direction. A review is carried out by either a person or a panel or persons appointed by the Welsh Ministers.
127. The Welsh Ministers are required to make regulations under this section in connection with reviews.
128. Regulations may make provision about the grounds on which an application for review may be made by a governing body. Such grounds of review might, for instance, include the governing body being able to present a material factor for consideration which was not, for good reason, previously drawn to HEFCW's attention, or the governing body considering that HEFCW have disregarded a material factor which they should have considered in deciding to give the notice or direction.
129. Regulations may also provide for the period within which and the way in which an application may be made. For instance, regulations might provide that a governing body is to apply for a review in writing and within 40 calendar days of the date of the notice or direction.
130. Regulations may also make provision about the procedure to be followed by a person or panel carrying out a review and the steps to be taken by HEFCW following a review. Such regulations might, for instance, require the panel to make a recommendation as a result of the review and require HEFCW to reconsider its decision to give the notice or direction in light of that recommendation.
131. Regulations may also provide for a notice or direction to which section 44 applies not to be treated as having been given by HEFCW until specified steps have been taken or until a specified period has expired. Regulations might, for instance, provide that the notice or direction is not to be treated as having been given until a review has been completed or until the time for applying for a review has expired (without an application being made by the governing body concerned). This would mean that a notice did not take effect, or that a governing body was not required to comply with a direction, while a review was taking place or an application for a review could still be made.

Section 45 – Directions: compliance and enforcement

132. Where HEFCW give a governing body a direction under the Act, that governing body is required to comply with the direction. If the governing body fails to comply with the direction, HEFCW can apply to the court for the direction to be enforced. An injunction granted by the court may require an institution to take certain steps or refrain from taking certain steps.

Section 46 – Directions: general

133. If HEFCW give a direction to a governing body under the Act, that direction must be in writing. Having given a direction, HEFCW are able to vary that direction or revoke that direction by a later direction. Sections 42 to 44 do not apply to a direction that provides

*These notes refer to the Higher Education (Wales) Act 2015 (c.1)
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only for the revocation of an earlier direction, but they apply to a direction varying an earlier direction to which those sections did apply (see section 41).