

# HIGHER EDUCATION (WALES) ACT 2015

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS OF THE ACT

#### **Part 1 – Introduction**

##### *Section 1 - Overview of the Act*

10. This section describes the content of the Act.

#### **Part 2 – Fee and Access Plans**

##### *Section 2 – Application by institution for HEFCW’s approval of fee and access plan*

11. 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. The institution needs to be an institution in Wales that provides higher education and is a charity.
12. An institution will be “in Wales” if its activities are either principally or wholly carried on in Wales. For this purpose, the Open University will be an institution “in Wales” (see section 57(3)).
13. *Section 2(4)* enables the Welsh Ministers to make regulations about the making of applications under this section. Such regulations could require an institution to provide certain types of supporting information.

##### *Section 3 – Designation of other providers of higher education*

14. This section enables the Welsh Ministers to designate a charitable provider of higher education in Wales, which would not otherwise be regarded as an institution, as an institution for the purposes of the Act and any regulations made under it. A designation will be made on an application by the provider concerned. This power might, for example, be exercised to designate a provider which is not able to award degrees but which provides other courses of higher education at a lower level on the credit and qualifications framework. Alternatively the power might be exercised to designate a provider which is a charitable company limited by guarantee which provides courses of higher education. Such providers might not regard themselves as an “institution” for the purposes of section 2 but may nevertheless wish for those courses to be 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 under that section. A provider of higher education which is designated under section 3 of the Act will still need to satisfy all of the elements of section 2(3) of the Act in order to apply to HEFCW for approval of a fee and access plan.
15. Under section 3(4), the Welsh Ministers are able to make regulations about the making of applications by such providers, the withdrawal of a designation and the effect of such a withdrawal. The regulations might, for instance, make provision about the type of information that is to support an application for designation. Regulations might also provide that, where a provider’s designation has been withdrawn, the provider is to

continue to be treated as an institution for a limited period and in relation to certain elements of the new regulatory framework.

#### ***Section 4 – Period to which plan relates***

16. Fee and access plans must specify the period in respect of which they are to have effect. Section 4(2) provides that the period must not exceed two years. Regulations may substitute a different period, but before making such regulations, the Welsh Ministers must consult the bodies and persons referred to in section 4(4). 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.

#### ***Section 5 – Fee limit***

17. This section requires a fee and access plan to specify, or provide for the determination of, a fee limit in relation to each “qualifying course” and in respect of each academic year of the course which begins during the period to which the plan relates.
18. A “qualifying course” is a course that is wholly or principally provided in Wales and which is described in regulations. Section 5(2)(b) enables the Welsh Ministers to make such regulations and section 5(7) restricts the Welsh Ministers’ ability to discriminate between certain classes of course in prescribing descriptions of “qualifying course”. For these purposes, it is intended that the courses to be prescribed as “qualifying courses” will be those courses of higher education that are currently designated for the purposes of student support by regulations made under section 22 of the Teaching and Higher Education Act 1998 (including first degree courses and courses for the Diploma of Higher Education, the Higher National Diploma, the Higher National Certificate and the Certificate of Higher Education). The only postgraduate courses that are to be capable of being qualifying courses are courses of initial teacher training (section 5(6)).
19. In providing for the determination of a fee limit, rather than specifying a fee limit, a fee and access plan might, for instance, specify that an inflationary increase is to apply to course fees from one academic year to the next. Alternatively, a plan might provide for a fee limit by reference to the maximum fee amount which is prescribed in regulations.
20. “Fees” for these purposes are course fees, including admission, registration and tuition fees (see section 57(1)). The fees that are to be taken into account for the purposes of the fee limit are fees that are payable to the institution by a “qualifying person”, namely a person (excluding international students) who is described in regulations. Section 5(5) enables the Welsh Ministers to prescribe classes of person for these purposes. 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.
21. A fee limit in a plan must in any event not exceed the maximum amount which is to be prescribed in regulations.
22. **Section 5(9)** enables regulations to provide for the circumstances in which fees payable to a person other than a regulated institution (such as fees payable to a franchisee providing a course on behalf of a regulated institution under franchise arrangements) by a qualifying person are to be treated for the purposes of the fee limit as payable to the regulated institution.

#### ***Section 6 – Promotion of equality of opportunity and higher education***

23. This section requires a fee and access plan to include any provisions relating to the promotion of equality of opportunity in connection with access to higher education or the promotion of higher education which are prescribed by regulations.
24. Regulations may, for instance, require the governing body of an institution to commit, by way of its fee and access plan, to take measures to attract applications from

prospective students who, as at the date of the plan's approval, are members of groups that are under-represented in higher education. This might in practice involve outreach measures such as the provision of summer schools or engagement with schools or colleges, with the intention of widening participation by attracting students who might otherwise not consider entering higher education at all or not consider applying to particular institutions.

25. Regulations may also require governing bodies of institutions to commit, through their fee and access plans, to take measures to retain students who are members of under-represented groups. These measures might include both academic and pastoral support such as study skills support or coaching and mentoring programmes which are tailored to meet the specific needs of under-represented groups in higher education.

### ***Section 7 – Approval of fee and access plan***

26. Where the governing body of an institution applies to HEFCW under section 2 for approval of a fee and access plan, it is for HEFCW to either approve the plan or reject the plan. HEFCW cannot approve a plan unless they are satisfied that the applicant institution is an institution in Wales that provides higher education and is a charity. HEFCW will either approve or reject a plan by giving notice to the governing body of the institution concerned. Sections 41 to 44 of the Act provide for the procedure that is to apply in respect of notice rejecting a plan.
27. **Section 7(3)** enables regulations to provide for matters which are to be taken into account by HEFCW when determining whether to approve or reject a plan under this section. Regulations might, for instance, make provision for HEFCW to take into account the quality of education provided by the applicant institution and the organisation and management of its financial affairs.
28. Section 7(4) defines the period in which an approved fee and access plan is in force. This concept of a plan being “in force” is relevant to the references in the Act to a “regulated institution”, in that a “regulated institution” is an institution that has a plan which is currently in force. This means, for instance, that the duty under section 16 (duty to co-operate in relation to HEFCW’s monitoring and evaluation functions) applies only for so long as a plan is actually in force.

### ***Section 8 – Publication of approved plan***

29. This section enables regulations to require the governing body of a regulated institution to publish its approved plan. It is intended that regulations will require governing bodies to publish the approved plan in a manner which makes it conveniently accessible to students enrolled at the institution and to prospective students.

### ***Section 9 – Variation of approved plan***

30. Regulations may allow for the governing body of a regulated institution to vary its approved plan. The governing body of an institution may, for instance, wish to include additional provisions in its plan relating to the promotion of equality of opportunity. Any regulations made under this section must however provide for a variation to take effect only if approved by HEFCW. Regulations might, for instance, set out how applications for variations are to be made and might provide that a warning notice procedure is to apply to a decision about the variation of a plan.

### ***Section 10 – Limits on student fees***

31. This section requires the governing body of an institution, in relation to which a fee and access plan has been approved, to ensure that “regulated course fees” do not exceed the “applicable fee limit”, whether or not the fee plan is still in force.

32. “Regulated course fees” are defined in section 10(3). They are fees payable to the institution by a qualifying person in connection with that person undertaking a qualifying course in respect of an academic year of that course which begins during the period to which the institution’s most recently approved fee plan relates (namely the period specified under section 4). The “applicable fee limit” is the fee limit for the course and year in question which is set out in the institution’s most recently approved fee and access plan.
33. An institution which has a plan in force will be required to ensure that fees for academic years which start within the period to which the plan relates comply with the applicable fee limit. Where an institution’s plan has expired (where the period to which the plan related has ended), or where HEFCW have withdrawn their approval for a plan under either section 38 (HEFCW’s duty to withdraw approval) or section 39 (HEFCW’s power to withdraw approval), the governing body of the institution will be required to ensure that fees for academic years starting within the period to which the fee plan related continue to comply with the applicable fee limit. This means that if, for instance, HEFCW withdraw their approval of an institution’s plan, qualifying students at the institution will not lose the fee protection that would have been afforded by the fee limit during the period to which the withdrawn plan related.

### ***Section 11 – Compliance and reimbursement directions***

34. This section enables HEFCW to give a direction to the governing body of an institution where they are satisfied that the governing body has failed to ensure that regulated course fees do not exceed the applicable fee limit under section 10(1). HEFCW may direct the governing body to comply with section 10(1) and/or reimburse fees that have been paid to the institution to the extent that they exceed the applicable fee limit. So for instance if fees above the fee limit have been charged but not yet paid, a direction to comply could be given; whereas if fees have actually been paid in excess of the limit, the governing body could be required both to reimburse the excess and to comply with the limit in future.
35. A direction given under section 11 may specify the steps that are (or are not) to be taken by the governing body for the purpose of ensuring that regulated course fees do not exceed the applicable fee limit. A direction may also specify the manner in which excess fees are to be reimbursed (or may be reimbursed). For instance, excess fees might be reimbursed through a reduction of fees payable by a qualifying student in respect of a future academic year of that student’s course. Section 11(4) requires HEFCW, in giving a direction under this section, to give a copy of the direction to the Welsh Ministers and to publish it. Section 11(5) enables the Welsh Ministers to make regulations about how and when HEFCW are to publish a direction given under this section. Regulations might, for instance, require HEFCW to publish the direction on their website.

### ***Section 12 – Supplementary provision about compliance and reimbursement directions***

36. This section allows HEFCW to issue guidance about the steps to be taken by the governing body of an institution in complying with a direction given under section 11. Guidance might provide for the circumstances in which excess fees are to be reimbursed directly to a student and the circumstances in which excess fees are to be reimbursed through the Student Loans Company Limited. Section 12(3) requires a governing body, in complying with such a direction, to take into account any guidance issued by HEFCW under this section. Before issuing guidance, HEFCW must consult the governing body of each regulated institution and may consult the governing bodies of other institutions in Wales that provide higher education and are charities as HEFCW think appropriate.

***Section 13 – Directions in respect of failure to comply with general requirements of approved plan***

37. HEFCW may give a direction to the governing body of an institution if they are satisfied that the governing body has failed to comply with a general requirement of the institution's fee and access plan. A general requirement of a plan is a provision included in a plan which requires the governing body of an institution to do (or not to do) specified things (section 6(7) refers). The direction would require the governing body to take (or not to take) specified steps for the purpose of dealing with the failure to comply. HEFCW are able to give such a direction at a time when the plan in question is no longer in force, provided that the plan was in force at the time of the failure.
38. HEFCW are also able to give a direction to the governing body of an institution if they are satisfied that the governing body is likely to fail to comply with a general requirement of the institution's plan which is in force. Such a direction would require the governing body to take (or not take) specified steps for the purpose of preventing the failure to comply.
39. [Section 13\(5\)](#) prevents HEFCW giving a direction to the governing body of an institution under this section where they are satisfied that the governing body has taken all reasonable steps to comply with the general requirement in question. For example, the governing body of an institution may commit in its approved plan to provide summer school courses for a specified number of school pupils who might not otherwise consider entering higher education. The actual number of pupils who subsequently attend the summer school courses is lower than the number set out in the approved plan despite the institution widely publicising the courses and working with local schools to promote take-up of the provision. HEFCW may, in that scenario, be satisfied that the governing body has taken all reasonable steps to comply with the general requirement.
40. The warning notice and review procedures in sections 41 to 44 apply to directions under section 13.

***Section 14 – Validity of contracts***

41. The legal relationship between an institution and its students is principally a contractual relationship (albeit that the relationship is not solely defined by contract law). This section applies where a contract between an institution and a qualifying person in respect of that person undertaking a qualifying course provides for the payment of fees by the person which exceed the applicable fee limit. (As to the applicable fee limit, see section 10(5).)
42. [Section 14\(2\)](#) provides that such a contract is to be treated as providing for the payment of fees which are equivalent to the applicable fee limit. So where a student refuses to pay any excess fees specified in a contract, the institution will not be able to recover the excess fees. But the contract will remain otherwise enforceable, in terms of the institution's duty to provide education to the student, despite the contract providing for the payment of fees which exceed the applicable fee limit (section 14(3)).

***Section 15 – HEFCW's duty to monitor and evaluate compliance and effectiveness***

43. This section requires HEFCW to monitor regulated institutions' compliance with section 10(1) (the requirement to ensure that regulated course fees do not exceed the applicable fee limit). HEFCW are also required to monitor regulated institutions' compliance with the general requirements of their plans. (See section 6(7) for the meaning of "general requirements".) HEFCW need to monitor institutions' compliance with both section 10(1) and the general requirements of approved plans in order to exercise their functions under sections 11, 37 and 39.
44. This section also requires HEFCW to evaluate the effectiveness of each plan, and plans generally, in promoting equality of opportunity in connection with access to higher

education and promoting higher education. HEFCW needs to evaluate the effectiveness of approved plans in order to exercise their function of giving good practice information and advice under section 54.

***Section 16 – Monitoring and evaluating compliance and effectiveness: duty to co-operate***

45. This section requires governing bodies of regulated institutions to co-operate with HEFCW for the purposes of HEFCW’s monitoring and evaluation functions under section 15.
46. The duty to co-operate requires governing bodies to ensure the provision of information, assistance and access to facilities as may be required by HEFCW for the purposes of those functions. By way of comparison, plans under the existing provisions of the Higher Education Act 2004 must require the governing body of an institution to provide HEFCW with such information as HEFCW may reasonably require.
47. HEFCW may give a direction to a governing body if HEFCW are satisfied that the governing body has failed to comply with its duty to co-operate. The direction may require a governing body to take, or not to take, steps to secure the provision of information, assistance or access to facilities. The warning notice and review procedures set out in Part 6 of the Act do not apply to such a direction.

**Part 3 – Quality of Education**

***Section 17 – Assessment of quality of education***

48. This section requires HEFCW to assess or make arrangements to assess the quality of education in Wales provided by and on behalf of regulated institutions. (For this purpose, education in Wales includes education provided outside Wales, if the education forms part of a course that is provided principally in Wales.)
49. Currently HEFCW may arrange for other bodies to undertake assessments of institutions it funds on matters relating to the quality of education. This includes arrangements that HEFCW makes with the Quality Assurance Agency for Higher Education (QAA) and Estyn (in respect of teacher training). This section will permit HEFCW to make similar arrangements with the QAA, Estyn or other bodies to assess the quality of education provided by and on behalf of regulated institutions.
50. This section also defines “external provider” for the purpose of the Act. It also enables the Welsh Ministers to prescribe by way of regulations the circumstances in which a person is or is not to be treated as being responsible for providing a course of education on behalf of a regulated institution. It also provides that a course is not to be classified as being provided on behalf of a regulated institution if the arrangements under which it is provided were made before the section comes into force.
51. An “external provider” is likely to be another institution or provider which delivers all or part of a course on behalf of a regulated institution under franchise arrangements.
52. It is likely that regulations will provide that individual lecturers or tutors will not be treated as being responsible for providing a course of education on behalf of a regulated institution.
53. Guidance issued or approved by HEFCW under section 24 may include criteria to be applied by a person assessing the quality of education.

***Sections 18 to 20 – Education of inadequate quality***

54. **Section 18** sets out the meaning of inadequate quality.

55. HEFCW may issue or approve guidance about factors that they may take into account when determining whether quality of education is inadequate (see section 24).
56. **Section 19** provides for HEFCW to give directions to the governing body in the case of inadequate quality.
57. A direction may require a governing body to take steps (or not take steps) to improve the quality of education or of a course, or to prevent the quality of education or a course from becoming inadequate. For example, a direction might include a requirement to:
- improve aspects of an institution’s quality assurance procedures; or
  - address deficiencies in the academic standards of degrees.
58. A direction might also require improvements to the quality of education provided on behalf of a regulated institution by partner institutions under franchise agreements.
59. The warning notice and review procedures in sections 41 to 44 apply to directions under section 19.
60. **Section 20** permits HEFCW, in the case of inadequate quality, to give advice or assistance to the governing body of a regulated institution or to carry out or arrange a review of an institution. This will permit HEFCW to provide support to regulated institutions in a similar way to the support they provide to institutions that they currently fund.
61. Advice and assistance given by HEFCW is to be with a view to improve the quality of education or a course of education; or to prevent the quality of the education or course of education from becoming inadequate.
62. It is anticipated that HEFCW might use this power to arrange for a support team to assist an institution to improve the quality of education; for example a team consisting of peer reviewers or management specialists. Alternatively HEFCW might arrange for a targeted review of a particular institution, for example to identify whether there are wider operational issues contributing to inadequate quality.

### ***Section 21 – Quality assessment etc: duty to co-operate***

63. This section requires governing bodies of regulated institutions and external providers (see section 17 for the definition of “external provider”) to co-operate with persons exercising functions under section 17 (assessment of quality of education) and section 20 (advice, assistance and reviews in cases of inadequate quality).
64. The duty to co-operate requires governing bodies to ensure the provision of information, assistance and access to facilities required by a person for the purposes of those functions.
65. HEFCW may give a direction to a governing body if HEFCW are satisfied that a governing body has failed to comply with its duty to co-operate. The direction may require a governing body to take, or not take, steps to secure the provision of information, assistance or access to facilities. A direction given under this section is not subject to the warning notice and review procedures set out in sections 41 to 44.

### ***Section 22 – Quality assessment etc: powers of entry and inspection***

66. **Section 22** provides for a right of entry and inspection for the purpose of exercising functions under sections 17 (assessment of quality of education) or 20(2) (review of matters relating to the quality of education).
67. A person authorised in writing by HEFCW may enter the premises of a regulated institution or external provider and may inspect, copy or take away documents found on the premises.

68. The power of entry and inspection may only be exercised after giving the governing body reasonable notice except in cases of urgency or where giving notice would defeat the object of exercising the power of entry or inspection. Entry without notice might be appropriate where HEFCW consider that relevant documents are likely to be removed from the institution's premises or destroyed if notice is given.
69. The power of entry and inspection may only be exercised at reasonable times and does not include a power to enter a dwelling (such as student or staff accommodation) without the agreement of the occupier.
70. Before exercising a power under this section a person must produce a copy of their authorisation from HEFCW if required to do so.

### ***Section 23 – Guidance about matters relevant to quality***

71. This section permits HEFCW to issue or approve guidance about matters relating to improving or maintaining the quality of education provided by or on behalf of regulated institutions. It is considered that it may not always be necessary for HEFCW to issue guidance but they may wish to rely on guidance issued by bodies with expertise of quality in education. For example this would allow HEFCW to approve guidance issued by the QAA.

### ***Section 24 – Guidance about criteria for assessing quality***

72. This section permits HEFCW to issue or approve guidance on certain matters relating to the assessment of quality. As with section 23 it allows HEFCW to approve guidance issued by other bodies where they think appropriate. HEFCW cannot issue or approve guidance or revised guidance under section 24 without first consulting the governing body of each regulated institution and any other person that they think appropriate. This reflects the requirement in respect of guidance issued or approved by HEFCW under section 23.
73. The guidance may be about criteria to be applied by a person assessing the quality of education under section 17 and may also set out matters that HEFCW will take into account in determining whether the quality of education, or of a course of education, is inadequate.

### ***Section 25 – Committee to advise HEFCW about exercise of quality assessment functions***

74. HEFCW in exercising their current functions under the Further and Higher Education Act 1992 are required by section 70(1)(b) of that Act to establish a committee to advise on the exercise of its quality assessment duty.
75. **Section 25** requires HEFCW to establish a committee to advise on the exercise of their quality assessment functions under the Act.
76. Subsections (3) and (4) set out the requirements for membership of that committee. Subsection (4) makes provision for what HEFCW must take into account when appointing members who fall within subsection (4) to that committee. One member of the committee must be a person who appears to HEFCW to represent the interests of students (subsection (3)). As for the other members, the effect of subsection (4) is that the requirements for membership are similar to that for the Quality Assessment Committee established by HEFCW under section 70(1)(b) of the Further and Higher Education Act 1992. Members of that committee on the date on which this section comes into force will become members of the committee established by HEFCW under this section: see paragraph 31 of the Schedule to the Act (which contains consequential and transitional provisions).
77. Schedule 1 to the Further and Higher Education Act 1992 (which contains supplementary powers for HEFCW) applies to the committee established by this section



as it does to committees established by HEFCW under paragraph 8 of that Schedule. For example, it will allow HEFCW to pay travel and other allowances to members of the committee who are not members of HEFCW's council.

### ***Section 26 – Application of Part 3 where institution ceases to have approved plan***

78. **Section 26** provides for the quality assessment functions in Part 3 of the Act to continue in certain circumstances following an institution's fee and access plan ceasing to be in force (either at the end of the period to which the plan relates or as a result of HEFCW withdrawing the plan's approval).
79. HEFCW's quality assessment duty will continue for as long as an institution is providing courses for which students are eligible to receive statutory student support provided by the Welsh Ministers. It is proposed that the Welsh Ministers will continue to designate courses for student support purposes in respect of those students who began a course before the fee and access plan ceased to be in force.
80. The ongoing duty on HEFCW under this section to quality assess education seeks to offer ongoing protection for students who commenced their courses at a time when an institution had a fee and access plan in place.

## **Part 4 – Financial Affairs of Regulated Institutions**

### ***Section 27 – HEFCW's duty to prepare and publish a Code***

81. This section requires HEFCW to prepare, publish and keep under review a Code relating to the organisation and management of the financial affairs of regulated institutions.
82. Subsection (2) gives examples of matters that the Code may deal with. These may be similar to the requirements found in HEFCW's Financial Memorandum with institutions they fund and the Audit Code of Practice that HEFCW currently publishes. They include:
  - circumstances in which HEFCW's consent is required before an institution enters into specified transactions;
  - audit and accounting arrangements; and
  - the provision of information to HEFCW (for example, copies of accounts).
83. The Code may impose requirements with which regulated institutions must comply and give guidance which regulated institutions must take into account in managing their financial affairs.
84. Whilst it will be for HEFCW to prepare the Code it is anticipated that the Code will seek to achieve a similar framework of control in respect of a regulated institution's financial affairs to that currently imposed by terms and conditions of funding on institutions that receive HEFCW funding.

### ***Sections 28 – Procedure for approval of Code by Welsh Ministers***

85. This section sets out the procedure that HEFCW must follow before they can publish the first Code or a revised Code. HEFCW must consult the governing body of each regulated institution and submit a draft Code for approval by the Welsh Ministers.
86. It is anticipated that HEFCW will consult on a draft of the first Code during the 2015/2016 academic year with a view to the Code being published and taking effect for the start of the 2017/2018 academic year.

***Section 29 – Procedure if draft Code not approved by Welsh Ministers***

87. A draft of the first Code or a draft of a revised Code must be approved by the Welsh Ministers before it can be published by HEFCW. If the Welsh Ministers make a decision not to approve a draft submitted to them by HEFCW, they must give HEFCW notice of that decision and the reasons for it. This will trigger requirements in terms of the preparation of a new draft by HEFCW and its submission to the Welsh Ministers for approval or (in the case of a proposed revised Code) a decision by HEFCW that the Code will not be revised.

***Section 30 – Procedure if draft Code approved by Welsh Ministers***

88. Where the Welsh Ministers approve a draft Code submitted to them by HEFCW under section 28 or section 29, they must lay the approved draft before the National Assembly for Wales.
89. Within the period of 40 days beginning with the day on which the draft Code is laid by the Welsh Ministers, the National Assembly for Wales may resolve not to approve the draft. If the National Assembly for Wales resolves not to approve the draft, HEFCW may not publish the draft. If in that instance the draft is a draft of the first Code, HEFCW must submit a further draft of that Code to the Welsh Ministers. However, if the draft is a draft of a revised Code, HEFCW are able to decide whether to submit a further draft of the revised Code to the Welsh Ministers, although this is subject to the Welsh Ministers' power of direction under section 28(4). If no such resolution is passed by the National Assembly, HEFCW must publish the Code in the terms of the draft as approved by the Welsh Ministers.

***Section 31 – Monitoring compliance with the Code***

90. This section requires HEFCW to monitor or make arrangements for the monitoring of compliance with the Code by regulated institutions. HEFCW are able to undertake monitoring themselves or secure that monitoring is undertaken on their behalf by another person.
91. HEFCW may wish to arrange for another person to undertake monitoring of a group of regulated institutions where another body is already undertaking similar work, for instance the Welsh Ministers in respect of further education institutions that are also regulated institutions. Alternatively HEFCW might want to arrange for a specialist assessor or external auditor to undertake assurance functions.

***Sections 32 to 34 – Failure to comply with Code***

92. [Sections 32 to 34](#) provide HEFCW with enforcement powers if they are satisfied that a regulated institution has failed, or is likely to fail, to comply with requirements of the Code.
93. HEFCW may give directions to a governing body requiring it to take or not to take specified steps to:
- deal with the failure to comply with a requirement of the Code. For example to provide outstanding information required under the Code within a specified period of time or to make changes to financial controls to bring an institution back into compliance with the Code; or
  - prevent a failure to comply with a requirement of the Code. For example if an institution was intending to enter into a transaction that required HEFCW's consent, to direct an institution not to enter into that transaction without obtaining HEFCW's consent.
94. The warning notice and review procedures in sections 41 to 44 will apply to directions under section 33.

95. **Section 34** permits HEFCW to give advice or assistance to the governing body of a regulated institution or to carry out or arrange a review of an institution where it is satisfied that a regulated institution has failed or is likely to fail to comply with the requirements of the Code. The advice and assistance given by HEFCW is to be with a view to improving the organisation and management of a regulated institution's financial affairs.
96. Currently, if HEFCW identify examples of inadequate financial management they are able to establish support teams to assist an institution in making improvements. It is anticipated that HEFCW would want this approach to continue. HEFCW may seek to use this power to arrange for a support team to assist an institution improve the organisation and management of its financial affairs where HEFCW has identified a failure to comply with the Code. Alternatively HEFCW may arrange for a targeted review of a particular institution by specialist auditors, for instance where HEFCW are satisfied that a failure to comply with the Code is likely.

### ***Section 35 – Financial management: duty to co-operate***

97. This requires regulated institutions to co-operate with persons exercising functions under sections 31 (monitoring compliance with the Code), 34 (other measures in respect of failure to comply with the Code) and 36 (powers of entry and inspection).
98. The duty to co-operate requires governing bodies to ensure the provision of information, assistance and access to facilities required by a person for the purposes of those functions.
99. HEFCW may give a direction to a governing body if HEFCW are satisfied that a governing body has failed to comply with its duty to co-operate. The direction may require a governing body to take, or not take, steps to secure the provision of information, assistance or access to facilities. A direction given under this section will not be subject to the warning notice and review procedure set out in sections 41 to 44.

### ***Section 36 - Financial management: powers of entry and inspection***

100. This section provides for a right of entry and inspection for the purposes of exercising functions under section 31 (monitoring compliance with the Code) or 34(2) (review of matters relating to compliance with the Code).
101. A person authorised in writing by HEFCW may enter the premises of a regulated institution for those purposes. An authorised person may also inspect, copy or take away documents found on the premises.
102. The power of entry and inspection may only be exercised after giving the governing body reasonable notice. However, the requirement for reasonable notice is not required in cases of urgency or where giving notice would defeat the object of exercising the power of entry or inspection. Entry without notice might be appropriate where HEFCW consider that relevant documents are likely to be removed from the institution's premises or destroyed if notice is given, or where HEFCW are satisfied that there is a likelihood of imminent financial failure.
103. The power of entry and inspection may only be exercised at reasonable times and does not include a power to enter a dwelling (such as staff or student accommodation) without the agreement of the occupier.
104. Before exercising a power under this section a person must produce a copy of their authorisation from HEFCW if required to do so.

## **Part 5 – Fee and Access Plans: Withdrawal of Approval etc**

### ***Section 37 – Notice of refusal to approve new fee and access plan***

105. Notice of refusal to approve a new fee and access plan is one of the ways in which HEFCW can take enforcement action against an institution's non-compliance with:
- limits on student fees (under section 10);
  - a general requirement of an institution's approved plan;
  - a direction in respect of a general requirement of a plan (under section 13);
  - a direction in respect of inadequate quality of education (under section 19); and
  - a direction in respect of failure to comply with the Code (under section 32).
106. Currently HEFCW can refuse to approve a new fee plan under the Higher Education Act 2004 on the basis of non-compliance with limits on student fees or general provisions of an institution's approved plan. Whilst educational quality and financial management does not form part of the existing fee planning arrangements, HEFCW regulates an institution in respect of these matters through terms and conditions of funding.
107. Once notice has been given HEFCW must not approve a new fee and access plan until the period specified in the notice has expired. However, HEFCW may withdraw a notice at which point the restriction on approving a new plan ceases. For instance, HEFCW may consider withdrawing notice if they are satisfied that an institution has remedied the failing identified in a direction and it is not appropriate to continue with enforcement action.
108. Subsection (7) permits the Welsh Ministers to make regulations to provide for:
- the period that may be specified in a notice, during which HEFCW will not approve a new fee and access plan. For instance, this might provide that HEFCW cannot approve a new fee plan for a period of at least one year. Alternatively the maximum period for not approving a fee plan could be limited to one year;
  - matters that HEFCW must take into account in deciding whether to give or withdraw a notice. This might require HEFCW to consider whether the institution has (after the date for compliance) complied with a direction or adjusted its fees and repaid any student fees that have been overcharged;
  - the procedure to be followed on the withdrawal of a notice. For instance, this might require HEFCW to give notice of the withdrawal to the institution and/or, to publish in some form notice of withdrawal.
109. HEFCW may give a direction under section 13 to the governing body of an institution which was previously a regulated institution but is no longer a regulated institution, where that governing body failed to comply with a general requirement of a fee and access plan at a time when that plan was in force. Section 37(7) applies section 37 to institutions that are not regulated but which have failed to comply with a direction given under section 13.
110. [Sections 41 to 44](#) set out the warning notice and review procedures that apply to giving notice under this section.

### ***Section 38– Duty to withdraw approval***

111. This section requires HEFCW to withdraw their approval of a fee and access plan by giving notice to a governing body of an institution if they are satisfied that an institution has ceased to:

- be an institution in Wales (see section 57(3) for the definition of institutions in Wales);
  - provide higher education; or
  - be a charity.
112. The Welsh Ministers may by regulations under subsection (2) make provision about what matters HEFCW must take into account in determining whether they are required to withdraw approval. Those regulations might, for example, require HEFCW to take account of decisions made by the Charity Commission relating to the charitable status of an institution if they believe that an institution has lost its charitable status.
113. The procedural requirements in sections 41 to 44 (warning and review procedures) do not apply to this section. However regulations made under subsection (3) may provide for the procedure that HEFCW must follow. That includes amending, applying or modifying the requirements in sections 41 to 44 for the purposes of this section. That could, for instance, require HEFCW to give a warning notice to the governing body of an institution and to take account of representations made by the governing body before they decide whether they are required to withdraw an institution's fee and access plan.

### ***Section 39 - Power to withdraw approval***

114. This section permits HEFCW to withdraw their approval of a fee and access plan where:
- a governing body has persistently failed to comply with limits on student fees or has failed to comply with a compliance and reimbursement direction;
  - a governing body has persistently failed to comply with the general requirements of an institution's approved plan or has failed to comply with a direction given under section 13;
  - the quality of education provided by or on behalf of the institution is seriously inadequate; or
  - there has been serious failure by the governing body of an institution to comply with the Code.
115. Persistent failure could (in the context of student fees and general requirements of an approved plan) consist of a number of separate failures or the repetition or continuation of the same failure. Section 39(3) reflects the provision at section 37(4). Section 39(3) provides that where HEFCW are satisfied that a governing body has taken all reasonable steps to comply with a general requirement of its approved plan, that governing body is not to be treated for the purposes of section 39(2)(b) as having failed to comply with that requirement. For example, the governing body of an institution may commit in its approved plan to provide bursary assistance to a certain number of students. The actual number of students which subsequently receive a bursary is lower than the number set out in the plan because the number of eligible students applying for the bursary is lower than expected, despite the bursary being widely publicised. HEFCW may, in that scenario, be satisfied that the governing body has taken all reasonable steps to comply with the general requirement.
116. The Welsh Ministers may by regulations make provision about what HEFCW must take into account when deciding whether to give notice that they are withdrawing their approval of a plan under this section. For instance, this might include a requirement for HEFCW to take account of the effect of inadequate quality of education on students or the effect of non-compliance with the Code on the financial stability of an institution.
117. The warning notice and review procedures in sections 41 to 44 apply to notice given by HEFCW under this section.

### ***Section 40 – Publication etc. of notice under Part 5***

118. This section requires HEFCW to give a copy of any notice they give under Part 5 to the Welsh Ministers and to publish the notice. Regulations made by the Welsh Ministers may make provision about the way in which HEFCW must give a copy of the notice to the Welsh Ministers and publish the notice, and about when they must do so. Regulations might include a requirement for HEFCW to provide the Welsh Ministers with a copy of the notice within a specified period of time of it being given to an institution. Regulations might also require HEFCW to publish the notice on a web site or in a newspaper.

## **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 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).

## **Part 7 – Supplementary provision about functions of HEFCW**

### ***Section 47 – Compatibility with charity law and governing documents of institutions***

134. **Section 47(1)(a)** and (b) place general restrictions on the exercise of HEFCW's functions under the Act.
135. The effect of section 47(1)(a) is that any requirements that HEFCW may impose on the governing bodies of institutions under the Act cannot require those governing bodies to act in breach of their obligations as charity trustees. (HEFCW might for instance impose requirements where HEFCW give a direction to an institution or as a provision of the financial management Code.)
136. Section 47(1)(b) provides that HEFCW cannot require the governing body of an institution to do anything that is incompatible with its governing documents. For these purposes, the governing documents of an institution are defined in section 47(2) in relation to an institution established by Royal charter, institutions conducted by higher education corporations or further education corporations, institutions designated under section 129 of the Education Reform Act 1988 or section 28 of the Further and Higher Education Act 1992 and other institutions conducted by companies.

### ***Section 48 – Duty to take into account importance of protecting academic freedom***

137. **Section 48** imposes a general duty on HEFCW to take into account the importance of protecting academic freedom in exercising their functions under the Act. In particular, HEFCW must take into account the importance of protecting the freedom of institutions to determine the matters listed in section 48(a) to (c). Where the exercise by HEFCW of a function under the Act has no relevance to the protection of institutional freedoms, or where the exercise of a function involves no choice on the part of HEFCW, the duty in section 48 will not, in practice, require HEFCW to take any additional action.

### ***Section 49 – Duty to take Welsh Ministers' guidance into account***

138. The Welsh Ministers may issue guidance to HEFCW relating to the exercise of HEFCW's functions under the Act. For instance, the Welsh Ministers might issue guidance to HEFCW as to the exercise of their monitoring and evaluation functions under section 15 relating to fee and access plans, or in relation to their duty under section 17 (assessment of quality of education). Similarly, the Welsh Ministers might issue guidance to HEFCW in connection with the preparation of the financial management Code or the statement of intervention policy (see section 52).

### ***Section 50 – Annual reports***

139. Existing provision in section 40A of the Higher Education Act 2004 requires HEFCW to provide an annual report to the Welsh Ministers on how HEFCW have performed their functions under that Act.
140. **Section 50** of the Act requires HEFCW to provide an annual report to the Welsh Ministers on how HEFCW have exercised their functions by virtue of the Act. HEFCW have flexibility to determine when the first reporting period should end, which will set the annual reporting period thereafter. The Welsh Ministers are able to specify requirements with which such a report must comply. Such a requirement might relate to the publication of the report but may also relate to the form and content of the report. As soon as possible after an annual report has been submitted to the Welsh Ministers by HEFCW, the Welsh Ministers must lay a copy of the report before the National Assembly for Wales.



### ***Section 51 – Special reports***

141. **Section 51** is similar to section 40A(2) of the Higher Education Act 2004. It requires HEFCW to provide a special report to the Welsh Ministers when directed to so do.
142. The Welsh Ministers might wish to receive a special report regarding the extent to which the governing body of an institution is complying with the fee limits set out in its approved plan or the quality of education provided at an institution (perhaps where concerns have been raised in relation to a particular institution). Equally, the Welsh Ministers might, given HEFCW's evaluation functions under section 15, wish to receive a report on the effectiveness of approved plans generally in promoting equality of opportunity in connection with access to higher education and in promoting higher education.

### ***Section 52– Statement in respect of intervention functions***

143. **Section 52** requires HEFCW to prepare and publish a statement which sets out how they propose to exercise certain of their functions. Those functions are described in section 52(5). Section 52(5) does not extend to HEFCW's powers of direction under sections 16, 21 or 35 which concern a governing body's duty to co-operate.
144. **Section 52(3)** requires HEFCW to consult the governing body of each regulated institution and any other persons they think appropriate before publishing the statement or revising the statement. Those other persons might include institutions which have previously been, but which no longer are, regulated institutions.

### ***Section 53 – Information and advice to be given by HEFCW to Welsh Ministers***

145. **Section 53** is similar to the existing provisions in section 40A(3) of the Higher Education Act 2004. It provides that the Welsh Ministers can require HEFCW to provide such information and advice relating to the promotion of equality of opportunity in connection with access to higher education and the promotion of higher education as the Welsh Ministers may require. It also allows HEFCW to provide other information or advice relating to those matters to the Welsh Ministers.

### ***Section 54 – Other information and advice***

146. The provisions in section 54(1) are similar to the existing provisions in section 40A(4) of the Higher Education Act 2004. Under section 54(1), HEFCW are able to identify good practice relating to the promotion of equality of opportunity in connection with access to higher education and the promotion of higher education and give information and advice about such practice to the governing body of a regulated institution, or to the governing bodies of such institutions generally. In developing any information and advice for these purposes, HEFCW will be able to take into account their evaluations made under section 15 of the Act. Section 54(2) requires the governing body of a regulated institution to take any information and advice given by HEFCW under section 54(1) into account in exercising its functions.
147. Section 54(3) and (4) enables HEFCW to provide other information and advice. This could include providing information and advice to the governing body of an institution prior to that governing body making an application for approval of a fee and access plan under section 2. HEFCW might, for instance, provide information and advice regarding the requirements with which governing bodies of institutions must comply following the approval of a fee and access plan. Information and advice provided under these powers could also relate to the financial management of regulated institutions and their other functions.

## **Part 8 – General**

### ***Sections 55 and 56 – Regulations and Directions***

148. **Section 55** provides for regulations under the Act to be made by statutory instrument. Most regulations will be subject to the negative resolution procedure. The exceptions are those regulations made under sections set out in subsection (4) that must be approved by resolution of the National Assembly for Wales, namely:
- the first set of regulations to be made under section 2(4) (making of applications for approval of a fee and access plan);
  - section 3(4) (provision about designation of other providers of higher education);
  - section 4(3) (regulations amending the maximum period set out in section 4(2));
  - the first set of regulations to be made under section 5(3) (maximum fee amount);
  - section 6(1) (provision relating to the promotion of equality of opportunity and higher education that must be included in a fee and access plan);
  - section 7(3) (matters to be taken into account by HEFCW in respect of the approval or rejection of a fee and access plan);
  - section 38(2) (duty to withdraw approval) – if the regulations amend a provision of the Act; and
  - section 58 (consequential and transitional provision) – but only if the regulations amend primary legislation.
149. **Section 56** makes provision about directions given by the Welsh Ministers.

### ***Section 58 – Consequential and transitional provision etc***

150. As a result of the substantive provisions of the Act, there need to be consequential amendments to, and repeals of, provisions in other legislation. These are set out in Part 1 of the Schedule to the Act. Transitional provisions are set out in Part 2 of the Schedule to the Act.

### ***Schedule***

151. Part 1 of the Schedule (paragraphs 1 to 26) lists those enactments to which consequential amendments are made. One effect of Part 1 of the Schedule will be to repeal the provisions of the Higher Education Act 2004 concerned with fee plans in so far as they relate to Wales.
152. Part 2 of the Schedule (paragraphs 27 to 31) makes provision for transitional arrangements. Transitional arrangements will apply to fee plans approved under the Higher Education Act 2004 which set fee limits for academic years beginning during the transitional period, which is the period up to and including 31 August 2017. The arrangements will provide for those plans to be treated as fee and access plans approved under the Act for certain purposes. This will allow institutions with fee plans approved before the Act comes into force to operate, to a limited extent, under the regulatory scheme established by the Act.
153. Institutions that are subject to the transitional arrangements will be subject to most of the provisions of the Act relating to limits on student fees and quality of education, but will not be subject to the Code.
154. Transitional arrangements will require the Welsh Ministers to consult institutions with fee plans approved under the Higher Education Act 2004 on any regulations to be made under section 4(3) during the transitional period. Transitional arrangements will also require HEFCW to consult such institutions on any guidance to be issued or approved

*These notes refer to the Higher Education (Wales) Act  
2015 (c.1) which received Royal Assent on 12 March 2015*

under section 24, on a draft Code and on a draft Statement of intervention policy. HEFCW will also be able to provide advice and assistance (under section 54(1)) to those institutions. It is anticipated that HEFCW will prepare and consult on the statement of intervention policy and the Code during the transitional period (see paragraph 29(2) of the Schedule). It is anticipated that the statement and the Code will take effect from September 2017.

***Section 59 – Commencement***

155. This section deals with the commencement of the Act once it has received Royal Assent. It provides for Part 1 (Overview of the Act) and most of the general provisions in Part 8 to come into force on the day on which Royal Assent is received. The substantive provisions of the Act, contained in Parts 2 to 7, section 59(1) and (2) and the Schedule, will come into force in accordance with orders made by the Welsh Ministers.

***Section 60 – Short title etc***

156. Subsection (1) provides that the title of the Act is the Higher Education (Wales) Act 2015. The Act is to be included in the list of Education Acts set out in section 578 of the Education Act 1996 (subsection (2)). Any reference in legislation to “the Education Acts” will include a reference to this Act.