

HIGHER EDUCATION (WALES) ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS 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.