

## Summary of Consultation Responses

The key points from responses to the consultation are provided below, together with HEFCW's decision in respect of each of the points.

### **Question 1: Are the principles set out on page 4 of the Statement reasonable; are there any others that should be included?**

All responses were broadly supportive of the principles outlined in the Statement. However, some comments were received and are provided below together with HEFCW's decision on each of these:

- The principle on accountability refers only to the intervention process, with the same need for accountability regarding the decisions reached.

**HEFCW decision:** The text in the Principles section of the Statement has been amended accordingly.

- How is HEFCW accountable and to whom? One institution wished to see an independent and impartial oversight of reasonableness and fairness under the intervention processes.

**HEFCW decision:** We believe it is clear that HEFCW is accountable to Welsh Ministers and that institutions may therefore make representations to the Minister or seek judicial review if they consider HEFCW has not acted reasonably or fairly.

- A more complete reference to institutional autonomy is needed, with confirmation that universities remain autonomous entities.

**HEFCW decision:** The text in the Principles section of the Statement has been amended accordingly.

- An indication of what is a 'reasonable timescale' should be provided in the Principles section of the Statement.

**HEFCW decision:** Due to the varied nature and complexity of the issues that may result in non-compliance, it is not possible to provide detail on timescales.

- The principle that 'HEFCW will always act reasonably' should include examples in relation to: giving due regard to institutional autonomy at all times; and avoiding unnecessarily duplicating the actions of other regulatory organisations.

**HEFCW decision:** The text in the Principles section of the Statement has been amended accordingly.

- The principle that ‘HEFCW will always act fairly’, should be amended such that HEFCW base its decisions on all the relevant information.

**HEFCW decision:** Text has been included stating that HEFCW will base its decision on consideration of all the relevant information, as some information may be relevant but have no significant influence on the decision that is made.

- The principles regarding statutory duties (e.g. data protection) should be treated more generically in the Statement.

**HEFCW decision:** We have made separate, rather than generic reference, to the various statutory duties, as these may have a bearing on the operation of the Transitional Statement of Intervention that needs to be highlighted. For example, data protection is an issue that will need to be taken account of when liaising with institutions and other regulators regarding allegations.

- A principle should be included that ‘any proposed intervention takes full account of the cyclical nature of the Higher Education business cycle, with regard to the impact of intervention on successive recruitment and enrolment cycles’.

**HEFCW decision:** Whilst the importance of the HE business cycle is acknowledged, where formal intervention is required, this cannot be delayed or short-cut to avoid impact on the recruitment/enrolment cycle. It would also be hoped that institutions address compliance issues at an early stage such that formal intervention can be avoided.

- The Principles section should be amended to include text regarding due attention being paid to the risks posed to the student experience and to other stakeholders’ interests by any intervention, through a risk management approach.

**HEFCW decision:** Relevant text has been included in the principles regarding due attention to student and stakeholder interests.

- The principle that ‘any intervention will be proportionate to the severity of the issue that HEFCW is seeking to address’ should be amended to include text defining severity in numerical terms, e.g. in relation to financial amount or number of students affected.

**HEFCW decision:** We cannot be specific about what HEFCW would do under various scenarios regarding amounts of money; number of students affected etc., due to the range and combination of potential parameters that may be involved. However, we have included text to state in broad terms that intervention would be proportionate to severity as assessed on a case-by-case basis.

- A statement should be included that in terms of any public communications HEFCW will seek to work with the HEI concerned.

**HEFCW decision:** HEFCW will not normally publish information other than Compliance and Reimbursement Directions, as required under the terms of The 2015 Act. However, HEFCW will work with an institution to help manage the narrative where information is published by third parties.

- Paragraphs 10 (regarding the universities' status as charitable organisations) and 11 (regarding academic freedom) should also be principles.

**HEFCW decision:** These paragraphs have been included as principles.

- Text should be included in the Principles section regarding not unnecessarily duplicating the actions of bodies with authority or statutory responsibility, such as the Quality Assurance Agency, Charity Commission, Office of the Independent Adjudicator for Higher Education and the Competition and Markets Authority.

**HEFCW decision:** Relevant text has been included in the Principles section.

- Text should be included in the Principles section stating that an intervention in relation to quality should be undertaken on the basis of objective findings by an independent, impartial and suitably competent authority.

**HEFCW decision:** Whilst quality interventions should be based on objective findings, the wording suggested did not allow sufficient flexibility to take account of the potential changes to quality assessment arrangements.

- Text should be included in the Principles section regarding the intention to work with an institution to remedy non-compliance (if appropriate).

**HEFCW decision:** Text has been amended to emphasise this point.

- The focus of HEFCW's actions should remain where possible on promoting good practice and early prevention of potential issues in relation to compliance, rather than remedial action.

**HEFCW decision:** Text has been included to emphasise this point.

- HEFCW should pay due regard to the wider impact of any intervention or the way it intervenes, including the implications for the national accounting classification of institutions.

**HEFCW decision:** We have included text to this effect, but have made it clear that HEFCW may have a statutory duty to intervene which would take precedence over such considerations.

**Question 2: Are there any issues with the approach to be taken by HEFCW prior to the initiation of formal intervention?**

Responses were broadly supportive of the approach to be taken by HEFCW prior to the initiation of formal intervention. However, some comments were received and are provided below together with HEFCW's decision on each of these:

- Provide more detail on the signals for intervention in cases where quality 'is likely to become inadequate'. This is a distinctive feature of the Welsh system and therefore further examples should be provided.

**HEFCW decision:** The current quality review process takes account of provision which is likely to become inadequate, as it looks at processes, which are likely to demonstrate problems before provision becomes inadequate. The QAA concerns method also provides an opportunity to investigate provision that is likely to become inadequate.

- Given the role of governing bodies, it would be helpful for HEFCW to include clerks to governing bodies in informal communication prior to initiation of formal intervention.

**HEFCW decision:** All communication re informal intervention will be copied to the Chair of the governing body and Clerk to the governing body.

- One of the principles states that 'HEFCW will only intervene under the Act when necessary.' It may be helpful to have some indication as to the type of issues that would be considered sufficiently serious for HEFCW to bypass a partnership approach.

**HEFCW decision:** We have included text to indicate the type of issues that require more immediate intervention.

- It is not made clear whether, in liaising with the Office for the Independent Adjudicator for Higher Education (OIA) and/or Competition and Markets Authority (CMA), HEFCW would advise the Accountable Officer at an early stage that an issue had come to their attention. It was also not clear if or how HEFCW would determine whether they would wait until the OIA/CMA had concluded their own processes before initiating intervention, or initiate formal intervention alongside.

**HEFCW decision:** We have included text to emphasise that HEFCW would advise the Accountable Officer at an early stage that an issue had come to their attention and that HEFCW would generally wait for OIA/CMA processes unless the issue was sufficiently serious that more immediate action was required, with this to be decided on a case by case basis.

- It is possible for a single complaint to go through five different processes: the University's own complaints and appeals processes, a potential judicial review, an investigation by the OIA/CMA, and then an investigation by HEFCW.

**HEFCW decision:** We have included text in the Principles section confirming that HEFCW would seek to avoid unnecessarily duplicating the actions of other regulatory organisations, although it should be noted that HEFCW has a statutory role in respect of intervention under The 2015 Act.

- HEFCW should seek to ensure that students (and staff) follow the appropriate internal procedures at their institution, and that HEFCW should commit to making appropriate inquiries to the institution concerned.

**HEFCW decision:** HEFCW's allegations procedure is being revised and will highlight that students follow appropriate internal procedures first. The Transitional Statement of Intervention already commits HEFCW to contact the Accountable Officer in the first instance.

- HEFCW should review its current procedures for dealing with external complaints with stakeholders to ensure that they are fit for purpose in the new regulatory context.

**HEFCW decision:** HEFCW's allegations procedures are being revised.

**Question 3: Are there any issues that may arise in respect of other regulators (e.g. OIA)?**

Responses were broadly supportive of the approach to be taken by HEFCW in respect of its liaison with other regulators. However, some comments were received and are provided below together with HEFCW's decision on each of these:

- It would be helpful to outline the slightly different circumstances which would trigger OIA or CMA involvement, or HEFCW involvement.

**HEFCW decision:** Whilst, for the purpose of brevity, detail on triggers for OIA or CMA involvement has not been included, the text has been revised to emphasise that the circumstances that trigger HEFCW intervention (Fees in excess of the level set out in an approved Fee and Access Plan) may be slightly different to those that trigger OIA or CMA involvement.

- Need clarification from HEFCW about the triggers they envisage that would mean having to intervene before other regulators have concluded their investigations.

**HEFCW decision:** We have included text to indicate the type of issues that require more immediate intervention, with the need for intervention to be determined on a case-by-case basis.

- There may need to be new reporting requirements on compliance with OIA recommendations that relate to section 10 of the Act, to ensure that institutions inform HEFCW when they have fulfilled Recommendations relating to the reimbursement of fees.

**HEFCW decision:** Where HEFCW has not initiated formal intervention in relation to compliance and reimbursement of excess fees, we will liaise with institutions and the OIA such that we are kept aware of progress on compliance.

- In relation to quality assurance, HEFCW has an overlapping duty with for instance the Welsh Government in respect of further education. As indicated below, arrangements for quality assurance for instance, only extend in this Statement to higher education and not to other levels of provision. It will be necessary to ensure that HEFCW has appropriate arrangements in place to coordinate the exercise of duties appropriately.

**HEFCW decision:** HEFCW is developing a Memorandum of Understanding with Estyn to address this issue. As noted in the Principles, we will not unnecessarily duplicate the actions of bodies with authority or statutory responsibility.

Several comments were made regarding Annex A of the draft Transitional Statement of Intervention:

- Annex A Paragraph 11 - It is unclear whether a judgement of 'requires improvement to meet UK expectations' equates to 'inadequate quality', the latter of which is defined at para 10 as 'if it is not adequate to meet the reasonable needs of those receiving education or undertaking the course'.

**HEFCW decision:** Whether a judgment of 'requires improvement to meet UK expectations' equates to inadequate quality will be considered on a case-by-case basis.

- Annex A Paragraph 12 - It is concerning that the judgements of a PSRB may be automatically relied upon, as the quality, nature and scope of those processes varies hugely and tends to apply at a course level rather than institute-wide. Aside from this it is clear that the role of PSRBs relates only to the narrow accreditation of provision for the purposes of professional/statutory registration. A course may be of high quality in all respects relating to the award and learning experience but insufficiently compliant for the purposes of professional registration. Providing this does not have an adverse effect on currently enrolled students or potentially misleads prospective students there is no risk as such to quality.

**HEFCW decision:** We will not automatically rely on the judgments of a PSRB, we will only 'consider' on the basis of the judgments of a PSRB. Such consideration will be on a case-by-case basis.

- Annex A Paragraph 20 – This indicates HEFCW could intervene earlier when 'it is not considered that the regulated institution will be able to address the problems within a suitable timescale.' There is no reassurance to institutions about who might form such an opinion and the basis on which it would be reached.

**HEFCW decision:** Text has been included stating that the HEFCW Chief Executive would form an opinion based on the evidence, including consultation with the institution as appropriate, in line with the Principles.

- Annex A Para 23 – This does not seem to allow for a similar process, equivalent to that in paragraphs 13-19, to take place in respect of quality reviews by PRSBs or Estyn; and it is essential that the process takes account of similar follow-up actions before formal intervention is initiated.

**HEFCW decision:** Normally we would expect to allow for follow-up actions prior to intervention although this would depend on the opinion of the HEFCW Chief Executive (see Paragraph 20).

- Annex A Para 23 – It seems draconian to conclude automatically that provision is inadequate on the basis of two successive judgements of ‘requires improvement to meet UK expectations’ in any category. If it were in the same category that such a judgement was made, this would seem reasonable, but if judgement were to be passed in relation to very different issues it should depend on the nature and materiality of the issues in question.

**HEFCW decision:** The text in paragraph 23 states that we may also implement the interventions, so it is hence not an automatic next step that HEFCW will implement intervention. This will be determined on a case-by-case basis and will depend on the issues concerned and the severity of their impact.

- Concern is that intervention could be triggered on the basis of HEFCW’s own strategic engagement with providers (sixth bullet). Institutions would want to be reassured that intervention could only be initiated on the basis of objective evidence or after HEFCW had initiated a review of the issues of potential concern from an independent, impartial and competent authority.

**HEFCW decision:** We have inserted text to the effect that intervention would only be initiated on the basis of objective evidence. However, as the arrangements for assessment of quality may change we cannot tie intervention to a review by an independent authority.

#### **Question 4: Are there any gaps or issues in relation to the way the intervention processes are set out?**

Responses identified a number of gaps or issues in relation to the way the intervention processes were set out:

- The distinction between the different stages of intervention might not always be readily apparent in practice, so it would be sensible for any communication from HEFCW to state the basis on which it is intervening, i.e. the stage and the sub-element of the stage in question.

**HEFCW decision:** Text has been included to that effect.

- Clearer guidance is needed on the point at which publication of the fact that HEFCW is in correspondence with the institution is made.

**HEFCW decision:** The Statement makes it clear that HEFCW will only publish Compliance and Reimbursement Directions as required under The 2015 Act.

- The flow chart of actions to be undertaken by HEFCW and the Institution should make it clear that the issue, if not already resolved prior to intervention, can be resolved after the warning but before the issue of the Direction.

**HEFCW decision:** Text has been included to that effect.

- The flow chart regarding Compliance and Reimbursement intervention process should include an earlier box about ensuring that the allegation about over-charging is correct.

**HEFCW decision:** A box has been included in the flow chart accordingly.

- More information is needed on how issues of proportionality will be applied.

**HEFCW decision:** We cannot be specific about what HEFCW would do under various scenarios regarding amounts of money, number of students affected etc., due to the range and combination of potential parameters that may be involved. However, we have included text to state in broad terms that intervention would be proportionate to severity as assessed on a case-by-case basis.

- Many of the actions listed in relation to reimbursement of fees are undertaken by the management of the university. The Accountable Officer should inform the governing body that this action has been taken.

**HEFCW decision:** This will be for the governing body to oversee as they are ultimately responsible under The 2015 Act.

- What is the relationship between Directions on quality issued by HEFCW and those which may be issued by the QAA or equivalent body? Any communications on the issue must be coordinated.

**HEFCW decision:** HEFCW will coordinate any communications on the issue.

- The flow chart for the Compliance and Reimbursement intervention process does not contain any reference to informal discussions held with the Accountable Officer.

**HEFCW decision:** Text has been included in the flow chart accordingly.

- In the Intervention Process in respect of Inadequate Quality a stage is included with the wording 'Institution fails to address quality issues'. A similar set of words should be inserted into the flow chart on the Compliance and Reimbursement intervention process.

**HEFCW decision:** Text has been included in the flow chart accordingly.

- In both flow charts there is reference to 'HEFCW reconsiders' if a Direction is not issued or is not upheld. It would be better to state that the investigation is ended at that point.

**HEFCW decision:** The flow charts have been amended accordingly. Where a Direction is not upheld by the Review Panel, HEFCW will take account of the Review Panel's report, reconsider its decision to issue the Direction, and decide on whether to halt, or proceed with, the intervention.

- No timescales are given for situations where a warning notice has been issued and no representation is made.

**HEFCW decision:** Text has been included in the flow chart to clarify the timescale as 40 days.

- It is not clear what the timescale is before HEFCW can apply for an injunction, if the governing body neither accepts the Direction nor applies for a review.

**HEFCW decision:** Text has been included in the flow chart accordingly to clarify that where a Review Application is not received after 40 days the Direction is also deemed to have been given, regardless of whether the Governing Body confirms its acceptance, and that this would be the starting point of the 60 day timescale for compliance prior to application for injunction.

- It may be advantageous to issue the Warning Notice to the Head of the Institution as well as the governing body, so that remedies may be considered immediately.

**HEFCW decision:** The Warning Notice will be copied to the Accountable Officer. However, by the Warning Notice stage HEFCW would already have liaised with the Accountable Officer regarding the compliance issue and action to comply should ideally have been taken.

- It is noted that a Direction will not be issued until after the 40 day period for application for a Review and that a decision would be taken about issuing a direction within 60 days. Given this provision, it would be appropriate for clarity, in paragraph 21, to remove the statement: 'No Compliance and Reimbursement Direction will be issued until after the completion of this 40 day period' and to add, at the end of paragraph 22: 'No Compliance and Reimbursement Direction will be issued until after the completion of this process'.

**HEFCW decision:** The text has been amended accordingly.

- Where possible flexibility should be built into the Statement to cope with potential changes while still pointing to current requirements. In paragraph 24 HEFCW's duty extends to including any prescribed information. It would be sensible to state this while also pointing to the current regulations in force.

**HEFCW decision:** We consider that the text already covers this.

- It is not always clear which requirements are made under the Act, under regulations, or HEFCW's own. It would help to distinguish between the statutory and non-statutory elements of the process more clearly in the text.

**HEFCW decision:** To add further references throughout would be unnecessary as it is clear from The 2015 Act which provisions are statutory. This would also detract from the readability of the document.

### **Question 5: Are the proposed process timescales that are not set out under Regulation reasonable?**

Responses did not raise fundamental objections, although a number of points were raised regarding timescales in general:

- The timescales are long, given the effect a pending Direction could have on the reputation of a university. We suggest that all interim periods, between appeals, responses etc. are limited to 28 days.
- **HEFCW decision:** Such timescales are as set out in The 2015 Act and associated regulations and therefore cannot be amended.
- A definition of the timescale over which 'quality is likely to become inadequate' should be included.

**HEFCW decision:** The definition of a timescale over which quality will become inadequate cannot be included as this would limit the ability to intervene where required.

- The flow chart on inadequate quality should be amended to include the detailed steps which are taken by the HERW process if an organisation is deemed not to meet expectations in any one area.

**HEFCW decision:** The flow-chart focuses on the intervention process, and only shows prior steps where needed to show the gateway into that formal intervention process. Including detail of HERW actions that take place prior to formal intervention would change the focus and tie the Statement to the detail of a quality assessment process which may change.

- HEFCW could consider strengthening the wording of paragraph 36 to state: 'Once satisfied, HEFCW will remove the Compliance and Reimbursement Direction from its website at the earliest opportunity and at most within 7 days'.

**HEFCW decision:** The text has been amended accordingly.

- At paragraph 21, the process allows institutions 40 days to make representations to HEFCW, which should be adequate, although at para 22 we note that HEFCW proposes to allow itself 60 days to consider the

representations made. Should HEFCW not adopt the same discipline as that of the governing body, unless it requires additional information from the institution, in which case the deadline should be extended to 60 days?

**HEFCW decision:** The text has been amended such that where HEFCW does not require further information a response will be provided within 40 days.

- Para 36 should impose a time deadline on HEFCW (e.g.14 days) for the consideration of notice from an institutions that compliance and reimbursement actions have been completed.

**HEFCW decision:** Text has been included to the effect that HEFCW will seek to consider information from the institution regarding compliance within 14 days. This has been set as an aspiration as the complexity of information regarding compliance could require analysis that takes longer than 14 days to complete.

- Paragraph 55 allows the institution 40 days to make representations to HEFCW as per paragraph 21. However, given that issues raised in respect to quality are likely to be far much more complex and less clear-cut than issues relating to fee charging, this may not be enough, particularly if the timing falls in a vacation period.

**HEFCW decision:** It is not possible to extend the timescale for making representations to over 40 days, as this timescale is as set out in The 2015 Act and associated regulations.

- The ability to schedule consideration of specific cases into a Board meeting may prove to be problematic at certain times in the year (e.g. during accepted holiday periods).

**HEFCW decision:** Regulated institutions will need to put in place arrangements (e.g. *ad hoc* electronic meetings, delegation etc.) to enable governing body responses within the required timescales.

- It is noted that a Direction will not be issued until after the 40 day appeal period and that a decision will be taken about issuing a direction within 60 days. Given this provision, it would be appropriate, in paragraph 21, to remove the statement: 'No Compliance and Reimbursement Direction will be issued until after the completion of this 40 day period' and to add, at the end of paragraph 22: 'No Compliance and Reimbursement Direction will be issued until after the completion of this process'.

**HEFCW decision:** The text has been amended accordingly.

- If a Compliance and Reimbursement Direction has been prompted by information that came to light in the course of the OIA review of a complaint it will be important to be clear how the Direction relates to compliance with the OIA recommendation. The issuing of a Direction should not lead to a delay in the reimbursement of fees recommended in an OIA complaint outcome.

**HEFCW decision:** HEFCW will seek to put in place a Memorandum of Understanding to underpin effective communication with the OIA.

- It is not immediately clear why it should take 60 days to comply with a compliance or reimbursement direction, particularly given the long process of review.

**HEFCW decision:** HEFCW consider it reasonable to allow an institution 60 days to comply. However, where an institution complies earlier the intervention may be halted sooner and in the case of a Compliance and Reimbursement Direction this may be removed from the website.

- Should HEFCW include a reference to an appropriate timetable for completing actions?

**HEFCW decision:** Actions will be on a case-by-case basis and to include a timetable in the Statement would restrict the ability to intervene in the most appropriate manner.

#### **Question 6: Are there any issues with the way that HEFCW is planning to implement the Transitional Statement of Intervention?**

Responses did not raise fundamental issues with the way that HEFCW is planning to implement the Transitional Statement of Intervention. However, some comments were received and are provided below together with HEFCW's decision on each of these:

- Greater clarity is required regarding the points at which inadequate quality can be identified. The flow chart refers only to QA Assessment. Paragraph 23 refers to identification of risks to quality by a PSRB, through HEFCW strategic engagement, or other lack of cooperation.

**HEFCW decision:** The flow-chart focuses on the intervention process, and only shows prior steps where needed to show the gateway into the intervention process. However, the wording has been amended in the flow chart to signpost quality processes prior to intervention and to provide examples of sources of information used to identify inadequate quality.

- Welsh HEIs which seek to operate both in competition with and in partnership with English and Scottish HEIs will wish it to be understood that their compliance regime is with the QAA or succeeding UK-wide body. The additional HEFCW Direction regime should not confuse potential applicants who are applying to universities in England and Wales.

**HEFCW decision:** The Statement is clearly aimed at institutions. Further detail cannot be included on quality processes as these are still under development.

- HEFCW should consider adding wording to paragraph 14, to encourage students to use institutional procedures to address concerns about fee levels before resorting to HEFCW intervention.

**HEFCW decision:** Text has been included to that effect. Reference will also be made in HEFCW's revised allegation procedures to the need to raise such issues with the institution in the first instance.

- The legal basis of HEFCW charging an institution for advice or assistance (paragraph 51) is unclear.

**HEFCW decision:** We have removed all text regarding charging for advice or assistance from the Statement.

- Annex A Paragraph 33 which deals with concerns that provision may become inadequate appears to have none of the safeguards referred to in relation to inadequate quality, and could perhaps be better incorporated into paragraph 29.

**HEFCW decision:** Text has been amended accordingly.

- It would be advantageous if the Head of the Institution, as well as the Governing Body, were notified of the Warning Notice.

**HEFCW decision:** Text has been amended accordingly.

- It would be useful to clarify how the Governing Body would be contacted, i.e. through the Clerk to Governors, or through the Chair of the Governing Body.

**HEFCW decision:** All communication with the governing body would be via the Chair of the governing body and Clerk to the governing body.

- Paragraph 39 of HEFCW's Statement highlights a legal issue in relation to franchise provision. From September 2015, courses provided by external providers on behalf of regulated institutions (i.e. under franchise arrangements) do not fall under the new provisions of The 2015 Act. The only way to ensure they are covered would be for these to be formally varied (i.e. new agreements made). It is not clear that HEFCW is able to require institutions to update partnership agreements (i.e. create new ones for purposes of The 2015 Act). Universities are likely to wish to do so, however, in order to ensure that such courses continue to be designated for purposes of student financial support arrangements in future, assuming that their partnership agreements permit. At the moment student support arrangements are not linked directly to The 2015 Act. Until the current regulations are replaced, the automatic designation of courses for purposes of student support will continue to depend on whether the institution is publicly funded (i.e. in receipt of grant funding). In future, it is intended that automatic designation will depend on being a Regulated institution under the Act. However, the recent Student Finance Information Notice dated 10 November 2015 does not

indicate a change in this respect for next year's regulations, applying for academic year 2016/17.

Until such time as the agreements are varied, this would mean that such courses are not subject to fee controls and quality regulation under the new Act. During the passage of the Bill, when we raised this issue, the Welsh Government suggested that courses not covered by the Act could still potentially be regulated through the use of the Financial Memorandum and terms of conditions of grant funding, powers which HEFCW retains under the 1992 Act. As neither the current Financial Memorandum nor the Memorandum of Assurance and Accountability, which is expected to replace it in the near future, specifically cover fee limits (or indeed franchise arrangements explicitly), the terms and conditions of grant for the transitional period might be reviewed to ensure that there is coverage where needed (and that there is appropriate grant funding for franchise provision if necessary).

From September 2015 HEFCW's powers and duties in relation the quality of education it funds under the 1992 Act were removed, and HEFCW would need to be certain that it has a firm legal basis for imposing terms and conditions in respect of quality since it does not have a duty for such provision under either Act.

It would be helpful if HEFCW could provide some guidance to institutions on the matters that need to be taken into account in reviewing their partnership agreements.

**HEFCW decision:** HEFCW has sought legal advice on these points and the text has been amended slightly to reflect the clarified position.

- The Regulations only require HEFCW to provide the Welsh Ministers with a copy of a Compliance and Reimbursement Direction and publish the Direction once the opportunity of review process has been rejected or exhausted. Changes to the draft Regulations were made specifically to avoid early publication to prevent harm from publishing a direction which is subsequently withdrawn. We believe that this should be amended (in the text and on the flowchart) to avoid earlier provision.

**HEFCW decision:** The Statement has been amended to reflect that HEFCW will not share Compliance and Reimbursement Directions with Welsh Ministers until the opportunity of a review process has been rejected or exhausted or the review process completed. However, HEFCW will need to provide briefing to Welsh Government officials upon issue of a Compliance and Reimbursement Direction and this has been highlighted in the Statement.

- There will be a separate consultation on the quality criteria to be used, as required by The Act. It is HEFCW's intention to rely on existing quality arrangements as far as possible, and we welcome this approach. At the same

time we recognise that these will need to be thoroughly reviewed to ensure that they are fit for purpose given the changes to HEFCW's quality assurance duty that have been introduced by The 2015 Act.

**HEFCW decision:** HEFCW will take account of this point as new arrangements for quality assessment are developed across the different countries of the UK.

- In some instances it would help to more clearly identify where the provisions apply to a regulated institution and or an external provider. The Act introduces key new powers to intervene directly in relation to external providers.

**HEFCW decision:** HEFCW has sought legal advice on this point and the text has been amended slightly, where appropriate, to reflect the clarified position.

**Question 7: Are there likely to be any unintended consequences that may arise as a result of any aspect of the Transitional Statement of Intervention?**

Responses did not raise major concerns, although some comments were received highlighting unintended consequences, which are provided below together with HEFCW's decision on each of these:

- The possible negative impact on recruitment for any Institution involved in a Direction from HEFCW, or even a Warning, could be extremely severe. It should be incumbent on HEFCW to undertake risk assessment and impact assessment for the individual HEI concerned before moving to Warning stage, to assess proportionality, the timescale and number of cohorts to be affected, and the impact on Welsh HE as a whole.

**HEFCW decision:** Where formal intervention is required, HEFCW will likely have already had informal engagement with an institution over a period of time and will have no option but to move to a formal process. However, relevant text has been included in the Principles section regarding due attention to student and stakeholder interests.

- Paragraph 40 of the draft Statement describes the mechanisms that HEFCW will use to monitor and assess potential issues in relation to inadequate quality or quality that is likely to become inadequate. The list of mechanisms includes HEFCW's 'strategic engagement with institutions', a very broadly defined process that was designed for a very different purpose. Use of 'strategic engagement' for this purpose is likely to have ramifications. Higher education providers are likely to regard it solely as a regulatory process and engage with it on that basis, militating against the 'free and fluid' exchange of information that HEFCW has desired in relation to strategic planning.

**HEFCW decision:** We have inserted text to the effect that intervention will only be initiated on the basis of objective evidence. Strategic engagement provides a valuable route for identifying issues at an early stage, but will need to be followed up to obtain objective evidence where a concern has been identified.

- There is concern regarding the requirement for all agreements with external providers to be signed after 1 September 2015. We understand that the Funding Council is investigating ways in which the intended consequence of this clause can take effect without the need to re-sign every contract.

**HEFCW decision:** All agreements with external providers will need to be re-signed and separate guidance is to be provided on partnerships.

- We are concerned about the levying of charges for advice and assistance.

**HEFCW decision:** All text regarding charges for advice and assistance has been removed.

- Care will need to be taken not to implement the Statement in ways which increase the risk of ONS reclassification for purposes of national accounts. The powers to issue directions and statutory advice are particular areas where HEFCW will need to ensure that it follows the principles set out under paragraph 9. We recommend that HEFCW commits itself to ensuring that any statutory guidance or advice is made in writing and clearly marked as such.

**HEFCW decision:** Any statutory advice or guidance will need to be clearly marked as such.

**Question 8: Are there any other issues in relation to the Statement which you would like to highlight?**

Responses highlighted a number of other issues, which are summarised below together with the HEFCW decision on each of these:

- With regards to the note in paragraph 51 that HEFCW will pass to cost of any advice or assistance from external bodies to the institution, we would appreciate further guidance on when such an action would be taken and what safeguards there will be to prevent the escalation of costs for consultancy work not commissioned by the institution involved.

**HEFCW decision:** All text regarding charges for advice and assistance has been removed.

- It may be helpful for HEFCW to consider its internal audit guidance to institutions to take account of the need to consider consideration of an audit of fee levels to provide annual assurance to the governing body and to HEFCW.

**HEFCW decision:** The precise form of this would need to be considered. In the first instance this might not take the form of formal guidance, rather briefing for relevant parties including internal auditors, governors etc.

- While the current definitions for quality assessment under the Quality Assurance Agency are appropriate, this current quality assurance system

could change during the period covered by the Transitional Statement. If this were to be the case, it would be important for HEFCW to consult again with the sector on any new definitions for quality assessment to be applied within the Transitional and Full Statement of Intervention.

**HEFCW decision:** HEFCW will consult with the sector on any new definitions for quality assessment. Annex A has been removed from the Statement, with a link to the inadequate quality process provided instead (Updated inadequate quality procedures are included separately at Annex C to this circular). This will enable quality assessment arrangements to be amended separately to the Transitional Statement of Intervention, as necessary.

- The intention to apply the statement retrospectively, once approved, to 1 September 2015 (paragraph 5) is irregular and inconsistent with the principles of good regulation

**HEFCW decision:** Whilst the powers were in place from 1 September, the Statement itself was not, so the text has been amended to reflect the date of publication of the Transitional Statement.

- Concerns that the maximum power of intervention proposed is to invoke Court proceedings by injunction. Not only may this prove a costly and time consuming exercise for HEFCW and all institutions concerned, it would result in the only recourse to be by Judicial Review which would seem to be unnecessarily onerous to all parties. There is no articulation of any other higher authority to which concerns regarding HEFCW's intervention strategy can be aired and balanced at present.

**HEFCW decision:** The arrangements are as set out in The 2015 Act. Ultimately institutions may make representations to the Minister or seek Judicial Review if they consider HEFCW has not acted reasonably or fairly.

- It will be important to ensure that governing bodies are supported in having the capacity and training to address responsibilities in this area.

**HEFCW decision:** HEFCW can work with the Clerks to governing bodies and this area might also be explored with the Leadership Foundation for Higher Education.

- We would welcome comment in the statement itself to highlight that the statement is limited by the Act to specified intervention functions only, and that HEFCW's other powers under the Act - and remaining powers under the 1992 Act – mean that it will continue to have a wider role that is not focussed on remedial action and compliance.

**HEFCW decision:** Brief text has been included to this effect.

## Other issues

A range of other points regarding suggested changes to wording were included with the consultation responses and changes have been made to the Statement text to address these points, where appropriate. For the purpose of brevity, only those key remaining issues have been summarised below:

- Notes, p.17 ‘the quality of education’: This is a key point and probably needs to come out of the ‘notes’ section.

**HEFCW decision:** It is in the notes section for the reason of emphasis.

- Paragraph 48, p.20 ‘HEFCW will contact the Head of the Regulated institution’. Is this consistent with the approach to be adopted under the Revised Financial Memorandum? Should this discussion be with the governing body, or involve direct communication with the governing body? Unlike previous arrangements (under the current Financial Memorandum) it is the governing body that is now specifically responsible. (The removal of the statutory powers and duties under the 1992 Act for the quality of education at institutions which HEFCW funds will now also need to be reflected in the Revised Financial Memorandum.).

**HEFCW decision:** Informal intervention will be led by the Accountable Officer, although the Governing Body will be informed via the Clerk and Chair.

- Para 51, p.21 ‘governing body of an institution’: Should this read ‘of a regulated institution’? It would be helpful to be clear that the advice and assistance that HEFCW may provide under s.20 only applies to regulated institutions and not external providers directly (unlike the powers of access and entry).

**HEFCW decision:** The text has been amended, where appropriate, to address this point.

- Paragraph 51 - Any assistance provided should require the consent of the institution. We ask that the Statement is amended to explicitly reflect this in relation to the given examples of assistance (i.e. bullets 2 to 4).

**HEFCW decision:** Assistance will usually, but not necessarily always, be provided with the consent of the institution, hence the requirement that the governing body take into account the advice provided.

- Paragraph 53 – ‘Regulated institution’s governing body’: Should this read ‘regulated institution’s or external provider’s governing body’?

**HEFCW decision:** The text has been amended, where appropriate, to address this point.