

Guidance issued to HEFCW by the Welsh Ministers under section 49 of the Higher Education (Wales) Act 2015

Contents

Chapter	Page	
1	Introduction	3
	Academic and institutional freedoms	8
2	Enforcement of the general requirements of approved fee and access plans	10
	<ul style="list-style-type: none"> • Introduction • HEFCW’s monitoring functions • Regulated institutions – duty to co-operate • Directions in respect of failure to comply with general requirements of approved fee and access plans • Timing of issuing a direction • Procedural requirements • Failure to comply with a direction under section 13 	
3	Financial affairs of regulated institutions	20
	<ul style="list-style-type: none"> • Introduction • Financial management code <ul style="list-style-type: none"> ○ Purpose of the Code ○ Preparation and approval ○ Publication of the Code ○ Scope of the Code ○ Application of the Code • Compliance with the Code <ul style="list-style-type: none"> ○ HEFCW’s monitoring function ○ Regulated institutions – duty to co-operate ○ HEFCW’s powers of entry and inspection • Failure to comply with the Code 	
4	Intervention functions under sections 37 to 39	31
	<ul style="list-style-type: none"> • Introduction • HEFCW’s duty to withdraw a fee and access plan (section 38) <ul style="list-style-type: none"> ○ Institution in Wales ○ Higher education ○ Charitable status • Institutions which no longer satisfy section 2(3) 	

- HEFCW’s discretionary intervention powers under section 37 and section 39
- Principles and expectations
- HEFCW’s power to refuse to approve a new fee and access plan (section 37)
- Withdrawal of a notice of refusal to approve a new fee and access plan
- HEFCW’s power to withdraw approval of an existing fee and access plan (section 39)
- Procedural requirements
- Publication of notices
- Student support protection for students at institutions that no longer have an approved fee and access plan
- Quality assessment at institutions that no longer have an approved fee and access plan

5 Reports to be made by HEFCW 47

- Annual reports
- Purpose of the annual report
- Form and content of the annual report
- Reporting periods
- Special reports

6 Statement of Intervention 53

- Introduction
- Principles and expectations
- Preparation of the Statement of Intervention
- Purpose of the Statement of Intervention
- Form and content of the Statement of Intervention
- Consultation and publication

1 Introduction

- 1.1 Prior to academic year 2012/13, the principal source of public funding of the higher education sector in Wales took the form of recurrent grants payable by HEFCW to institutions. These grants were subject to terms and conditions and the administration and enforcement of those terms and conditions provided the principal method of regulating the higher education sector in Wales. Following the introduction of the non-means tested tuition fee grant funding in academic year 2012/13, the funding which was previously provided by the Welsh Government to HEFCW and then allocated by HEFCW to institutions, was redirected to the Welsh Government's student support budget. Accordingly, a new regulatory system in respect of higher education was required which did not rely on the enforcement of terms and conditions of funding in respect of grants paid by HEFCW to institutions.
- 1.2 The Higher Education (Wales) Act 2015 ("the 2015 Act") establishes a revised regulatory system for higher education in Wales. The new arrangements will not rely on HEFCW providing financial support to institutions under Part 2 of the Further and Higher Education Act 1992 ("the 1992 Act") or Part 3 of the Education Act 2005 ("the 2005 Act"). This guidance is issued by the Welsh Ministers under section 49 of the 2015 Act. That section requires HEFCW to take any such guidance into account in the exercise of its functions by virtue of the 2015 Act.
- 1.3 As the new regulatory system introduced by the 2015 Act does not rely on the application of terms and conditions of funding, there have necessarily been some changes to HEFCW's functions. The purpose of this guidance is to assist HEFCW to prepare for full implementation of the new regulatory system from the 2017/18 academic year with particular reference to:
- HEFCW's fee and access plan monitoring and enforcement functions (**section 13 and sections 15 to 16**);

- HEFCW’s functions relating to the financial assurance of regulated institutions¹ and the financial management code (“the Code”) (**sections 27 to 36**);
- HEFCW’s intervention functions relating to the loss of approved fee and access plan status (**sections 37 to 40**);
- HEFCW’s reporting functions (**sections 50 to 51**); and
- HEFCW’s duty to prepare and publish a statement on how it proposes to exercise its intervention functions (“Statement of Intervention”) (**section 52**).

1.4 A number of HEFCW’s functions came into force earlier this year. Those which are particularly relevant to this guidance include:

- HEFCW’s power to issue compliance and reimbursement directions to the governing body of a regulated institution in respect of excess fees (**section 11**);
- HEFCW’s power to issue guidance about the steps to be taken by the governing body of a regulated institution for the purpose of complying with a compliance and reimbursement direction and the related duty on the governing body that receives a compliance and reimbursement direction to take that guidance into account (**section 12**);
- HEFCW’s duty to monitor institutions’ compliance with fee limits (**section 15(1)(a)**);

¹ a regulated institution is an institution in Wales which has an approved fee and access plan in force that will be subject to the requirements of the new regulatory system

- HEFCW’s quality assessment duty and associated powers of direction, advice or assistance where the quality of education, or a particular course of education, provided by or on behalf of a regulated institution is deemed to be inadequate or likely to become inadequate (**sections 17 to 20**);
- HEFCW’s duty to prepare and consult on its Code (**section 27² to 28**);
- HEFCW’s duty to provide special reports to the Welsh Ministers on compliance with fee limits or the quality of education provided by or on behalf of regulated institutions, or a particular regulated institution, if directed to do so by the Welsh Ministers (**section 51(1)(a) and (e)**); and
- HEFCW’s duty to prepare and consult on its Statement of Intervention and to publish a statement in respect of those interventions exercisable during the transitional period (**section 52**)³.

1.5 This guidance should be read alongside guidance issued by the Welsh Ministers in June 2015 which related to the functions that HEFCW will exercise from May 2015 onwards, including those functions referred to above. This guidance also refers to the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015 (“the 2015 Regulations”).

² Section 27 is partially in force. Section 27(1) in so far as it relates to the preparation of the Code came into force on 25 May 2015. Section 27(2), 27(3), 27(7) and 27(8) came into force on the 25 May 2015. Section 27(9) came into force on the 1 September 2015.

³ Section 52(1) came into force on the 25 May 2015 in relation to the preparation of a statement and on the 1 September 2015 in relation to the publication of a statement in connection with section 52(5)(a), (c) and (d) i.e. HEFCW’s functions under section 11 (compliance and reimbursement directions), section 19 (directions in respect of inadequate quality) and section 20(1) and (2) (other measures in respect of inadequate quality) of the 2015 Act. Functions under sections 52(2) and (3) in relation to the revision of and consultation on the statement came into force on the 1 September 2015. Section 52(4) came into force on the 20 May 2015 for the purpose of making regulations and section 52(5) (intervention functions) came into force on the 25 May 2015. Section 52(1) came into force for all remaining purposes on 3 February 2016.

1.6 The remaining functions to which this guidance relates will be commenced (to the extent that they have not already been commenced) at appropriate times prior to full implementation of the new regulatory system from the 2017/18 academic year. These functions include HEFCW's:

- Duty to monitor regulated institutions' compliance with the general requirements of their approved fee and access plans **(section 15)⁴**;
- Power to issue a direction to the governing body of a regulated institution in respect of its failure, or likely failure, to comply with a general requirement of the institution's approved fee and access plan **(section 13)**;
- Duty to prepare and publish a Code relating to the organisation and management of the financial affairs of regulated institutions **(section 27)⁵**;
- Duty to monitor, or make arrangements for the monitoring of, compliance by each regulated institution with the requirements of the Code **(section 31)**;
- Powers to provide advice or assistance to the governing body of a regulated institution with a view to improving the organisation or management of the institution's financial affairs, to direct the governing body to take (or not take) specified steps in order to address or prevent a failure to comply with the Code, and to undertake, or make arrangements for another person to

⁴Section 15(1)(a) namely HEFCW's duty to monitor and evaluate compliance with section 10(1) came into force on 1 September 2015.

⁵ As per footnote 2 above.

undertake, a review of any matters relevant to an institution's compliance with the Code (**section 33 and section 34**);

- Power to enter a regulated institution's premises and inspect, copy or take away documents found on the premises for the purpose of monitoring or undertaking a review of any matters relevant to the institution's compliance with the Code (**section 36**);
- Duty to withdraw approval of a regulated institution's fee and access plan in the event that it is satisfied that the regulated institution no longer satisfies the requirements of section 2(3) of the 2015 Act (**section 38**)⁶;
- Power to refuse to approve a new fee and access plan or to withdraw approval of an existing fee and access plan if certain conditions are met (**section 37 and section 39**)⁷;
- Duty to submit an annual report to Welsh Ministers on the exercise of its functions at the end of each reporting period and to provide special reports if directed to do so by Welsh Ministers (**section 50 and section 51**)⁸; and
- Duty to prepare and publish a statement on how it proposes to exercise its intervention functions under the 2015 Act (**section 52**)⁹.

⁶ Section 38 is partially in force. Section 38(2) came into force on 20 May 2015 for the purpose of making regulations. Section 38(3) came into force for all purposes on 3 February 2016

⁷ Sections 37 and 39 are partially in force. Section 37(7) and 39(4) came into force on 20 May 2015 for the purpose of making regulations.

⁸ Section 51 is partially in force. Section 51(1)(a), 1(e) and (2) came into force on the 1 September 2015.

⁹ As per footnote 3 above.

Academic and institutional freedoms

- 1.7 Sections 47 and section 48 of the 2015 Act relate to the exercise of HEFCW's functions and the protection of institutional autonomy and academic freedom.
- 1.8 Section 47 of the Act is concerned with compatibility with charity law and the governing documents of institutions. In the discharge of any of its functions under the 2015 Act HEFCW cannot require the governing body of an institution to do anything that is incompatible with any legal obligation or legal restriction that applies to the governing body by virtue of the institution being a charity. Section 47 also places a general restriction on the exercise of all of HEFCW's functions in the Act which prevents HEFCW from requiring the governing body of an institution to do anything which is incompatible with the governing documents of the institution. The governing documents of an institution are defined in section 47(2) of the 2015 Act.
- 1.9 HEFCW will need to be particularly mindful of the restrictions of sections 47(1)(a) and 47(1)(b) in discharging its functions in respect of the development and application of the Code and the exercise of its intervention powers under the 2015 Act.
- 1.10 Section 48 of the Act imposes a general duty on HEFCW to take into account the importance of protecting academic freedom in exercising its functions under the Act. In particular, HEFCW must take into account the importance of protecting the freedom of institutions:
- (a) to determine the contents of particular courses and the manner in which they are taught, supervised or assessed;
 - (b) to determine the criteria for the admission of students and to apply those criteria in particular cases; and

- (c) to determine the criteria for the selection and appointment of academic staff and to apply those criteria in particular cases.

2 Enforcement of the general requirements of approved fee and access plans

Introduction

- 2.1 The arrangements for the monitoring and enforcement of fee and access plans build on HEFCW's previous monitoring and enforcement functions for fee plans under the Higher Education Act 2004 ("the 2004 Act").
- 2.2 Fee and access plans form the centre-piece of the new regulatory system and HEFCW's monitoring and evaluation functions have been strengthened under the 2015 Act as compared to the previous arrangements under the 2004 Act. The Welsh Government's intention is that there should be a greater focus by regulated institutions on compliance with their fee and access plan commitments and to allow for greater public awareness of the outcomes of HEFCW's monitoring and evaluation of the plans.
- 2.3 When taking action to enforce the general requirements of fee and access plans, HEFCW will be required to focus on the measures which governing bodies of regulated institutions have committed to deliver in their approved plans. HEFCW will only be able to give a direction to the governing body of a regulated institution to take (or not to take) specified steps for the purpose of dealing with, or preventing a failure to comply with a general requirement, where it is satisfied that the governing body has failed, or is likely to fail, to comply with such a requirement. Governing bodies which fail to deliver the commitments made in their plans are afforded an additional safeguard where HEFCW consider that they have taken all reasonable steps to comply with the requirements of their plans.

HEFCW's monitoring functions

2.4 Under section 15(1)(b) of the 2015 Act, HEFCW is required to monitor regulated institutions' compliance with the general requirements of their approved plans. Guidance issued by the Welsh Ministers in June 2015 and January 2016 refer to HEFCW's other monitoring functions under section 15 of the 2015 Act. Although the 2004 Act does not include an explicit duty to monitor or evaluate fee plans it was accepted that HEFCW would need to undertake these activities in order to meet its functions under Part 3 of the 2004 Act concerning the approval and enforcement of fee plans. Guidance issued by the Welsh Government to HEFCW in March 2011 on fee plan approval and enforcement included a section on monitoring and reviewing progress. HEFCW will need to consider the most efficient and effective means of monitoring compliance with the general requirements of approved fee and access plans. HEFCW should engage students and their representatives in this process. Whilst developing its monitoring arrangements HEFCW should consider minimising administrative burdens on regulated institutions whilst providing assurance to students and their sponsors¹⁰ that robust monitoring arrangements are in place.

2.5 It is expected that HEFCW will consider its monitoring duties whilst preparing its guidance to institutions on the development of fee and access plans. HEFCW is expected to request sufficient information from institutions in fee and access plans to enable it to effectively monitor progress against the measures that the institutions have committed to undertake. In doing this HEFCW should be mindful of the administrative burden to institutions of completing their fee and access plans. The Welsh Minister's guidance to HEFCW on fee and access plans (issued January 2016) highlighted the importance of ensuring that measures included in fee and access plans are SMART (Specific, Measurable, Achievable, Realistic and Time bound). Ensuring that

¹⁰ A sponsor is an individual or organisation that provides financial support to a student to study at their chosen institution

measures are SMART will enable HEFCW to determine whether a regulated institution has undertaken the measures that it has committed to in its plan.

Regulated institutions - duty to co-operate

- 2.6 Under section 16(1) of the 2015 Act the governing body of a regulated institution must ensure the provision to HEFCW of such information, assistance and access to the institution's facilities as HEFCW reasonably requires for the purposes of discharging its monitoring functions under section 15(1)(b) of the 2015 Act. The duty to co-operate also applies in respect of HEFCW's other functions under section 15 of the 2015 Act.
- 2.7 If HEFCW is satisfied that the governing body of a regulated institution has failed to comply with this co-operation duty, it is expected that HEFCW's initial course of action would be to attempt to resolve the situation through discussion with the institution's senior management. However, should such an approach fail to resolve the situation, HEFCW may direct the governing body to take (or not to take) specified steps for the purpose of securing the provision of information, assistance or access for the purpose of monitoring compliance with the general requirements of approved plans, as detailed in the paragraph above.
- 2.8 A direction to enforce compliance with the duty to co-operate for the purpose of monitoring and evaluating compliance and effectiveness is not subject to the warning notice and review procedures set out in sections 42 to 44 of the 2015 Act (as further detailed below). The rationale underpinning this approach is that such directions merely seek to provide HEFCW with access to information and the consequences for an institution are not the same as those which may result from other directions that require an institution to take certain actions to rectify a regulatory breach. Furthermore, if the governing

body should fail to comply with such a direction (once issued) the direction is enforceable by way of injunction on the application of HEFCW. The court has an inherent discretion as to whether or not to grant HEFCW the requested injunction. It is considered that such judicial oversight constitutes sufficient protection against HEFCW acting unreasonably in seeking access to an institution's premises, records, documents and staff.

Directions in respect of failure to comply with general requirements of approved fee and access plans

- 2.9 HEFCW is expected to notify the governing body if it is satisfied that the governing body has failed to comply, or is likely to fail to comply, with a general requirement of its fee and access plan. Where possible, HEFCW is also expected to seek to resolve the situation through voluntary action by the governing body within an agreed timescale. However, it is recognised that in some circumstances seeking voluntary action would not be appropriate. HEFCW should be mindful of the interests of students and their sponsors in agreeing timescales for voluntary action.
- 2.10 However, should such an approach fail to resolve the situation, in accordance with section 13 of the 2015 Act, HEFCW may give a direction to the governing body of a regulated institution if it is satisfied that the governing body has failed to comply with a general requirement of the institution's fee and access plan, and at the time of the failure, the fee and access plan was approved under section 7 of the 2015 Act. HEFCW may also give the governing body a direction if it is satisfied that the governing body is likely to fail to comply with a general requirement of the regulated institution's approved 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.¹¹ The direction would require the governing body to take (or not to take) specified steps for the purpose of dealing with or preventing the failure to comply. HEFCW's functions under section 13 of the 2015 Act will come into force from the 2017/18 academic year.

2.11 Section 13(5) of the 2015 Act prevents HEFCW giving a direction to the governing body of a regulated institution under this section where it is satisfied that the governing body has taken all reasonable steps to comply with the general requirement in question. For example, the governing body of a regulated institution may commit in its approved plan to provide a bursary for low income students from Community First areas. Due to the low number of eligible students applying for the bursary the number of bursaries awarded was considerably less than the number set out in the approved plan, despite the institution widely publicising the availability of the bursary. HEFCW may, after considering the details of the actions the institution had taken to make students and prospective students aware of the availability of the bursary, be satisfied that the governing body has taken all reasonable steps to comply with the general requirement.

Timing of issuing a direction

2.12 HEFCW is able to give a direction in respect of the failure to comply with a general requirement of an approved fee and access plan whilst the approved plan is in force¹² or 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. HEFCW is also able to give a direction to the governing body of an institution if it is satisfied that the governing body is likely to fail to

¹¹ The term "general requirements" is defined in section 6(7) of the 2015 Act.

¹² Section 7(4) of the 2015 Act provides that the period within which a plan is "in force" is the period beginning with the day on which it is approved, and ending with the earlier of either the day on which the period to which the plan relates expires (i.e. the end of the academic year in respect of which the plan has effect); or the date of the notice by which HEFCW withdraws its approval under section 38 or 39 of the 2015 Act.

comply with a general requirement of the institution's plan which is in force. HEFCW is able to require an institution to take specified steps in a direction for the purpose of dealing with, or preventing the failure to comply, even if those steps are to be taken (or not to be taken) after the fee and access plan in question has ceased to be in force and whether or not a new approved fee and access plan relates to the institution in question at the time that the direction is issued.

- 2.13 By way of example, if HEFCW is satisfied that an institution has failed to comply with a general requirement of its 2017/18 approved plan, HEFCW may issue a direction during the period to which the plan is in force (from the day it is approved) or after the approved plan had ceased to be in force at the end of July 2018, provided that the failure to comply with the general requirement took place when the plan was in force (i.e. from the date of its approval until the end of July 2018).
- 2.14 The Welsh Government considers this provision necessary to allow HEFCW to enforce the commitments made by institutions at the time they were regulated and to ensure that students' interests are protected. It will be a matter for HEFCW to determine whether or not to seek enforcement in such circumstances.

Procedural requirements

- 2.15 Sections 42 to 44 in Part 6 of the 2015 Act make provision in respect of the warning notices that must be issued in respect of the notices and directions listed in section 41(1), the information that must be given with those notices and directions and how those notices and directions can be reviewed. The 2015 Regulations make further detailed provision in respect of the notices and directions listed in section 41(1) of the 2015 Act.

- 2.16 The warning and review procedures set out in Part 6 of the 2015 Act and the 2015 Regulations apply to directions issued by HEFCW under section 13 of the 2015 Act. These procedural requirements are designed to ensure a robust and transparent approach to the issuing of notices and directions as well as to the process of review which is available to institutions. The requirements are set out below. The requirements do not apply to a direction given by HEFCW where that direction only revokes an earlier direction which HEFCW has issued to an institution.¹³
- 2.17 Under this procedure, if HEFCW proposes to give a governing body a notice or direction to which sections 42 to 44 of the 2015 Act apply, HEFCW must first issue a warning notice to the governing body of the regulated institution. The warning notice must set out the proposed direction; state HEFCW's reasons for proposing to give the direction and inform the governing body that it may make representations to HEFCW about the proposed direction. In accordance with regulation 3 of the 2015 Regulations, such representations must be made to HEFCW in writing within a 40 day period, beginning with the date of the warning notice.
- 2.18 If, having considered any representations received from the governing body of a regulated institution, HEFCW determines that it is appropriate to proceed with the issuing of a direction it must, at the same time that it issues the direction, provide the governing body with a statement which sets out the reasons for giving the direction; informs the governing body that it may apply for a review of the direction under section 44 of the 2015 Act and include the information prescribed under regulation 6 of the 2015 Regulations.
- 2.19 If, having taken any representations received from the governing body in respect of the proposed direction into account, HEFCW decides not

¹³ Section 41(2) of the 2015 Act.

to give the direction, HEFCW must give the governing body notice of that decision.

2.20 If HEFCW issue a governing body with a direction under section 13 of the 2015 Act, the governing body may make an application for a review of the direction under section 44 of the 2015 Act. The grounds under which such an application can be made are set out in regulation 7 of the 2015 Regulations. Regulation 8 prescribes the procedure for applying for a review. The review will be carried out by a person, or a panel of persons, appointed by the Welsh Ministers.

2.21 The point at which a direction is to be treated as having been given to the governing body (ie, the point at which it has effect) is laid out in regulation 4 of the 2015 Regulations.¹⁴ This is the date on which the first of the following events occurs:

- (a) the governing body notifies HEFCW in writing that it accepts the direction;
- (b) the expiry of the period within which the governing body may apply for a review of the direction under section 44 of the 2015 Act and the governing body has not applied for a review;
- (c) a review of the direction under section 44 of the 2015 Act has concluded and HEFCW has notified the governing body in writing that the direction has effect.

2.22 Section 46 of the 2015 Act states that if HEFCW gives a direction to a governing body under the Act, that direction must be in writing. Having given a direction, HEFCW is able to vary or revoke that direction by a later direction.

¹⁴ Regulation 4 does not apply for the purposes of calculating the period within which a governing body may apply for a review under regulation 8(a).

Failure to comply with a direction under section 13

- 2.23 Section 45 of the 2015 Act states that where HEFCW gives a governing body a direction under the Act, that governing body must 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. If requested to do so by the governing body, HEFCW is required to give notice to the governing body stating whether it is satisfied that the governing body has complied with the direction (or with a particular requirement of the direction.)
- 2.24 As an alternative to an injunction HEFCW is able to issue a notice of refusal to approve a new fee and access plan under section 37 of the 2015 Act as a means to enforce compliance with a direction issued under section 13. HEFCW is also able to withdraw approval of an institution's existing fee and access plan under section 39 of the 2015 Act if it is satisfied the governing body has failed to comply with a direction under section 13 or that the governing body has persistently failed to comply with the general requirements of its fee and access plan. More detailed guidance on HEFCW's intervention functions under section 37 and 39 of the 2015 Act is provided in paragraphs 4.12 to 4.41. Paragraphs 6.12 to 6.14 of this guidance document refer to the expectation that HEFCW's Statement of Intervention will provide examples of the type of circumstances in which HEFCW may consider it appropriate to enforce compliance with directions under section 13 of the 2015 Act through the use of a section 37 or 39 notice rather than a court injunction.
- 2.25 The warning and review procedures set out in section 42 to section 44 of Part 6 of the 2015 Act and the 2015 Regulations will apply if HEFCW decides to issue a notice of refusal to approve a new fee and access

plan (under section 37 of the 2015 Act) or a notice to withdraw approval of a fee and access plan (under section 39 of the 2015 Act). Paragraphs 4.42 to 4.47 refer.

3 Financial affairs of regulated institutions

Introduction

- 3.1 Part 4 of the 2015 Act makes provision for HEFCW's financial assurance functions. Under the new regulatory system HEFCW will be required to prepare and publish a Code relating to the organisation and management of the financial affairs of regulated institutions and to monitor, or make arrangements for the monitoring of institutions' compliance with that Code. Part 4 of the Act also makes provision for HEFCW to intervene in the event that a regulated institution fails to comply with the requirements of the Code.

Financial management code

Purpose of the Code

- 3.2 It is intended that the Code will build upon the financial assurance activities that HEFCW currently carries out under its financial memorandum with the institutions that it funds. In the absence of terms and conditions of funding, the Code will provide a means for HEFCW to continue to assure the financial management of regulated institutions and ensure that they are well run, have effective and efficient financial management arrangements in place and are sustainable for the future. The Welsh Government consider this essential in order to protect the interests of students, safeguard public funds and preserve the reputation of higher education in Wales.

Preparation and approval

- 3.3 Section 27 of the 2015 Act places HEFCW under a duty to prepare, publish and keep under review a Code relating to the organisation and management of the financial affairs of regulated institutions.
- 3.4 Section 28 of the 2015 Act sets out the procedure that HEFCW must follow before publishing the first Code or any subsequent revision to the Code. In preparing the first Code or a revised Code HEFCW must consult with the governing bodies of each regulated institution and any other persons it thinks appropriate before submitting a post consultation version to the Welsh Ministers for their approval. Section 29 sets out the procedure in the event that the Welsh Ministers do not approve the draft Code submitted by HEFCW.
- 3.5 Should the Welsh Ministers approve the draft Code submitted by HEFCW, they must, under section 30 of the Act, lay it before the National Assembly for Wales for a period of 40 days, during which time the Assembly can pass a resolution not to approve it.
- 3.6 It is expected that HEFCW's Code will come in to force from the 2017/18 academic year at which point all institutions with an approved fee and access plan will be obliged to comply with the requirements imposed on them by the Code. To ensure sufficient time for the approval of the Code in accordance with the procedures laid down by the Act, HEFCW will need to submit a draft of the first Code to the Welsh Ministers under section 28(1)(b) during September 2016.
- 3.7 Guidance on the preparation, consultation and approval of the Code was provided to HEFCW in June 2015 and should be read in conjunction with this guidance.

Publication of the Code

- 3.8 All regulated institutions will be required to comply with the Code from the 2017/18 academic year. It is therefore expected that HEFCW will wish to publish its first Code before that date. To allow for this, it is anticipated that HEFCW's duty to publish the Code under section 27(1) will be come into force in autumn 2016.
- 3.9 As set out in section 30(7) of the Act, HEFCW is permitted to publish the Code only if the National Assembly does not bring forward a resolution not to approve during the 40 day period in which the Code is laid before it. The Welsh Government will notify HEFCW whether or not the Assembly has resolved not to approve the Code during the 40 day period. If no such resolution is brought forward, HEFCW must publish the version of the Code laid before the National Assembly for Wales.
- 3.10 Welsh Ministers expect HEFCW to publish its Code on its website as soon as possible after receiving notification from the Welsh Government that the National Assembly for Wales has not brought forward a resolution not to approve the Code during the 40 day period during which the Code was laid before it. HEFCW should also send the Code directly to all regulated institutions and their respective student unions and other interested stakeholders. We anticipate that under most circumstances publication of the Code and the issue to stakeholders should be possible within 7 days of receiving notification from the Welsh Government that no resolution has been brought forward by the Assembly.

Scope of the Code

- 3.11 The Code will form a key component of the new regulatory system and will be central to HEFCW's financial assurance functions under the new arrangements.
- 3.12 It is a matter for HEFCW to determine the content and operational detail of the Code in consultation with regulated institutions and other stakeholders, however, the 2015 Act sets out a broad framework in respect of the matters to which it can relate.
- 3.13 Under section 27, the Code must relate to how a regulated institution organises and manages its financial affairs and can, amongst other things, make provision about:
- the accounting and audit arrangements of regulated institutions;
 - circumstances where HEFCW consent is required before a regulated institution is able to enter into certain transactions; and
 - the provision of information to HEFCW.
- 3.14 Under section 27(3) of the Act, provisions within the Code can take the form of a requirement or guidance. All regulated institutions with an approved fee and access plan must comply with any requirement imposed on it under the Code and take account of any guidance that it contains. We expect HEFCW to clearly identify in the Code those matters that are guidance and those that are requirements with which regulated institutions must comply.

Application of the Code

- 3.15 Whilst it is intended that a single Code will apply to all regulated institutions, it is recognised that there may be circumstances where it may be necessary to take account of different categories of providers in the application of the Code.
- 3.16 Section 27(7) of the Act allows the Code to make different provision for different purposes, including for different institutions and different descriptions of institutions. It is expected that HEFCW will consider exercising such differentiation in how the Code affects different types of regulated institution, for example in order to minimise the administrative burden placed on institutions and take account of existing data collection and financial return processes which may be in place for certain types of institution. In particular, HEFCW should give consideration to the financial assurance arrangements already in place for further education (“FE”) institutions in receipt of funding from the Welsh Government.
- 3.17 It is anticipated that HEFCW will continue to secure assurance from HEFCE about the financial management of the Open University (OU) and as such, section 27(8) of the Act makes provision for the OU not to be subject to HEFCW’s Code.

Compliance with the Code

HEFCW’s monitoring function

- 3.18 Section 31 of the 2015 Act places HEFCW under a duty to monitor, or make arrangements for the monitoring of each regulated institution’s compliance with the Code.

- 3.19 In discharging this function, the Act enables HEFCW to either undertake monitoring itself or arrange for another person to do so for it. This would, for example, allow HEFCW, if it so wishes, to monitor FE institutions that are regulated institutions by making arrangements with the Welsh Government which currently undertakes the financial assurance role in relation to the FE sector in Wales. Such an arrangement would avoid duplication of assurance and help reduce the administrative burden placed on FE institutions. In making such arrangements careful consideration will need to be given to issues of data protection and ensuring that necessary consents are obtained for the collection and use of information.
- 3.20 It is anticipated that HEFCW's monitoring duty under section 31 will come into force from the 2017/18 academic year.

Regulated institutions - duty to co-operate

- 3.21 Under Section 35 of the Act, the governing body of a regulated institution must co-operate with HEFCW, or any party that HEFCW has entered into an arrangement with, for the purposes of discharging its monitoring function under section 31. The duty to co-operate requires the governing body of a regulated institution to ensure the provision of information, assistance and access to facilities in connection with these functions. The duty to co-operate also applies in respect of HEFCW's power to provide advice and assistance under section 34 of the Act and to HEFCW's powers of entry and inspection under section 36. Further details in respect of section 34 and section 36 powers are provided in paragraphs 3.39 and 3.40 and paragraphs 3.23 to 3.26 below.
- 3.22 If an institution fails to comply with its duty to co-operate, it is expected that HEFCW will, in the first instance, seek to resolve the situation through dialogue with the institution. If this course of action is not successful HEFCW is able to direct that institution to provide the

required information, assistance and access to facilities. Such a direction is enforceable by an injunction and is not subject to the notice and review procedures set out in sections 42 to 44 of the 2015 Act. The rationale underpinning this approach is explained in paragraph 2.8 of this guidance.

HEFCW's powers of entry and inspection

- 3.23 Section 36 of the 2015 Act provides a person authorised in writing by HEFCW, with the power to enter the premises of a regulated institution and to inspect, copy and take away documents for the purpose of exercising monitoring functions under section 31 or to carry out a review under section 34(2).
- 3.24 Any person exercising the power of entry and inspection must have written authorisation from HEFCW. This includes both HEFCW officers and/or persons appointed by HEFCW for the purpose of exercising functions under section 31 or 34(2) of the Act. A copy of this authorisation must be provided by the person exercising the power of entry and inspection if requested to do so by the regulated institution.
- 3.25 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.
- 3.26 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. For example, entry without notice might be appropriate where HEFCW considers that relevant documents are likely to be removed from the institution's premises or destroyed if notice is given.

Failure to comply with the Code

- 3.27 Under current arrangements, HEFCW is able to recover or withdraw funding in order to address financial management issues discovered through its assurance activities. Under the new funding arrangements this action will not be open to HEFCW. The 2015 Act therefore provides HEFCW with new powers of intervention to address non compliance with the Code.
- 3.28 If HEFCW is satisfied that the governing body of a regulated institution has failed, or is likely to fail, to comply with requirements imposed by the Code, it is able to make use of the intervention powers provided for by sections 33 and 34 of the Act.
- 3.29 As is the case under the current system, where possible, it is expected that HEFCW will, in the first instance, seek to provide support to an institution to resolve identified problems in relation to the organisation and management of its financial affairs and its compliance with the Code.
- 3.30 However, if this support does not result in the required improvements, section 33 of the 2015 Act makes provision for HEFCW to be able to direct a governing body to take, or not take, specified actions in order to deal with or prevent a failure to comply with the Code.
- 3.31 In the event that HEFCW propose to issue a direction to a regulated institution that has failed, or is likely to fail, to comply with the Code, the procedural requirements laid out in sections 42 to 44 of the 2015 Act and in the 2015 Regulations will apply. These procedural requirements are designed to ensure a robust and transparent approach to the issuing of notices and directions as well as to the process of review which is available to the institution. HEFCW should note that these procedural requirements are not applicable to a direction that provides only for the revocation of an earlier direction.

3.32 Should HEFCW propose to give a governing body a direction where an institution has failed, or is likely to fail, to comply with the Code, it must first issue a warning notice to the governing body. The warning notice must:

- Set out the proposed direction;
- State HEFCW's reason for giving it; and
- Inform the governing body that it may make representations to HEFCW about the proposed direction. The timescale in which such representations may be made are set out in regulation 3 of the 2015 Regulations and is currently prescribed as 40 days, beginning with the date of the warning notice.

3.33 If, having considered any representations received from the governing body of a regulated institution, HEFCW determines that it is appropriate to proceed with the issuing of a direction, it must, at the same time, provide the governing body with a statement which:

- Sets out the reasons for giving the direction;
- Informs the governing body that it may apply for a review of the direction under section 44 of the 2015 Act.
- Includes the information prescribed under regulation 6 of the 2015 Regulations.

3.34 If, after considering representations received by the institution, HEFCW decides not to proceed with the direction, it must give the governing body notice of that decision.

- 3.35 Under Section 46 of the 2015 Act, a direction given to the governing body by HEFCW must be in writing and may be revoked by a later direction.
- 3.36 Where HEFCW has issued a direction in respect of an institution that has failed, or is likely to fail, to comply with the Code to the governing body of a regulated institution, the governing body may apply for a review of that direction. The grounds on which an institution can apply for a review are set out under regulation 7 of the 2015 Regulations. The procedure for applying for a review is set out at regulation 8.
- 3.37 The point at which a direction is to be treated as having been given to the governing body (ie, the point at which it has effect) is laid out in regulation 4 of the 2015 Regulations (see paragraph 2.21).
- 3.38 If a governing body of an institution fails to comply with a direction relating to the Code, HEFCW may make an application to enforce the direction by injunction. Alternatively, HEFCW is able to issue a notice of refusal to approve a new fee and access plan under section 37 of the Act as a means of enforcing compliance with the direction. More detailed guidance on HEFCW's intervention powers under section 37 is provided at paragraphs 4.17 to 4.36 of this guidance. It is expected that HEFCW's Statement of Intervention will provide examples of the type of circumstances where HEFCW may consider it appropriate to enforce a direction through the use of a section 37 notice rather than an injunction.
- 3.39 Section 34 of the 2015 Act enables HEFCW to provide advice and assistance to the governing body of a regulated institution in order to improve the organisation or management of the institution's financial affairs. This might for example include:

- Setting up a support team to assist the institution improve the organisation or management of its financial affairs or comply with the Code;
- Carrying out, or arranging for another person to carry out, a special assurance review of any matters that HEFCW consider relevant to an institutions compliance with the Code; or
- Attending or addressing meetings of the governing body in respect of any matters relating to the organisation or management of the institutions financial affairs or compliance with the Code.

3.40 Such action may be used as an alternative to a direction in addressing or preventing failures to comply with the Code or as a means to support an institution comply with steps specified in a direction.

3.41 In the event that HEFCW is satisfied that there has been a serious failure by a regulated institution to comply with the Code, section 39 of the Act allows HEFCW to withdraw its approval of the institution's existing fee and access plan. Intervention under section 39 will have significant consequences for a regulated institution and as such it is expected that HEFCW's Statement of Intervention will provide examples of the type of circumstances which HEFCW considers to constitute a serious failure to comply with the Code. More detailed guidance in respect of HEFCW's intervention powers under section 39 of the Act is provided in paragraphs 4.37 to 4.41 of this guidance.

4 Intervention functions under sections 37 to 39

Introduction

- 4.1 Part 5 of the Act is concerned with HEFCW's intervention functions under the new regulatory system and relates to the loss of approved fee and access plan status. Sections 37 to 39 make provision for HEFCW to refuse to approve a new fee and access plan or to withdraw approval of an existing fee and access plan if certain conditions are met. Section 40 relates to the publication of notices issued under sections 37 to 39.

HEFCW's duty to withdraw a fee and access plan (section 38)

- 4.2 In order for an institution to remain within the regulated HE sector in Wales it must continue to satisfy the requirements of section 2(3) of the 2015 Act. Those requirements are that it is an institution in Wales that provides higher education and is a charity.
- 4.3 It will be a matter for HEFCW to determine whether an institution with an approved fee and access plan continues to meet these requirements. The Welsh Government's guidance concerning HEFCW's fee and access plan approval and monitoring functions included information about the satisfaction of the requirements of section 2(3) of the 2015 Act. That information is summarised below to assist HEFCW in making a determination of whether an institution continues to meet those requirements.

Institution in Wales

- 4.4 As defined in section 57(3)(a) of the 2015 Act an institution is deemed to be "in Wales" if its activities are wholly or principally carried on in Wales. For the purposes of HEFCW's functions under the 2015 Act,

principally means the majority of an institutions activity is in Wales. This formulation follows that of section 62(7)(a) of the Further and Higher Education Act 1992.

Higher education

- 4.5 Section 57(1) of the Act defines higher education as education provided by means of a course of any description mentioned in Schedule 6 of the Education Reform Act 1988.

Charitable status

- 4.6 All regulated institutions must be charities.
- 4.7 In England and Wales, most charities are registered with the Charity Commission unless they are exempt. Those charities that are exempt from registration are overseen by a Principal Regulator. Additionally, some charities are excepted from charity regulation altogether in England and Wales due to their income falling below a certain threshold, it is considered unlikely that such charities will seek entry to the regulated HE sector in Wales.
- 4.8 In making a determination about the charitable status of an institution, HEFCW may in addition to considering evidence provided by an institution also seek the advice of the appropriate Charity or Principal Regulator for the institution in question.

Institutions which no longer satisfy section 2(3)

- 4.9 In order to discharge its functions under section 38 of the 2015 Act, HEFCW will need to regularly review whether regulated institutions continue to satisfy the requirements of section 2(3) of the Act. It is expected that reviews would be undertaken on at least an annual basis and that HEFCW may wish to use the fee and access plan application process as a means of undertaking the necessary checks. HEFCW may also wish to consider requesting regulated institutions to notify it of any changes to their ability to satisfy the requirements of section 2(3), for example, changes to the geographic balance of their provision which mean they are no longer deemed to be “in Wales”, if they cease to provide courses of higher education and/or if they are no longer a charity.
- 4.10 If HEFCW is satisfied that an institution no longer meets the requirements of section 2(3), section 38 of the Act places it under a duty to give the governing body of that institution notice that approval of its fee and access plan will be withdrawn. This will mean that an institution will lose its regulated status and its courses will no longer be designated for the purposes of student support.
- 4.11 It is the Welsh Government’s intention that similar procedural requirements that apply to other notices and directions under the 2015 Act be applied to any notices which HEFCW may issue under section 38. It is anticipated that regulations will make the necessary provision in due course.

HEFCW's discretionary intervention powers under section 37 and section 39

4.12 Section 37 and section 39 of the Act confer discretionary intervention powers on HEFCW. Under section 37 HEFCW is able to give notice to a regulated institution that it will not approve a new fee and access plan if specified conditions are met. Section 39 provides HEFCW with the power to withdraw its approval of an existing fee and access plan in certain circumstances.

Principles and expectations

4.13 The application of HEFCW's intervention functions under section 37 and section 39 of the 2015 Act could have significant consequences for a regulated institution and its students, however, the Welsh Government considers these sanctions to be necessary in order to protect the interests of students', preserve the reputation of the higher education sector in Wales and safeguard the significant public investment in higher education.

4.14 It is expected that HEFCW will exercise these intervention functions in accordance with the following principles:

- Where possible, HEFCW should seek to resolve issues through dialogue with institutions and through the provision of informal support and assistance.
- Intervention under section 37 and section 39 should only occur when absolutely necessary.

- HEFCW must act reasonably. Where appropriate, this includes allowing sufficient time for a regulated institution to rectify the identified regulatory failure.
- The action proposed by HEFCW should be proportionate to the regulatory failure in question.
- Where possible, HEFCW should discuss proposals to exercise an intervention function with the governing body, or the head of the institution or provider concerned.

4.15 Whilst it is expected that HEFCW will, where possible, seek to resolve issues through dialogue and informal support, the Welsh Government recognise that such an approach may not be appropriate in all circumstances, for example, where HEFCW consider more urgent and immediate action necessary to address more serious regulatory failures.

4.16 HEFCW should also be mindful that these, or any other intervention functions conferred on it under the 2015 Act, are not exercised in a manner which conflicts with the protections to academic freedom and institutional autonomy set out in section 47 and 48 of the Act (see paragraphs 1.7 to 1.10 of this guidance), and that HEFCW must always comply with general public law requirements

HEFCW's power to refuse to approve a new fee and access plan (section 37)

4.17 Under the 2004 Act, HEFCW was able to refuse to approve a new fee plan on the basis of non-compliance with limits on student fees or the general provisions of an institution's approved plan. Educational quality and financial management did not form part of these arrangements but

were regulated through terms and conditions of funding under the 1992 Act.

- 4.18 In the absence of terms and conditions of funding, the new regulatory system gives HEFCW power to refuse to approve a new fee and access plan and in so doing to include in its decision making process matters of educational quality and financial management where the governing body of an institution has failed to comply with a direction issued to it in respect of these matters.
- 4.19 The 2015 Act enables HEFCW to issue a notice to the governing body of a regulated institution that it will not approve a new fee and access plan for a specified period if it is satisfied that the institution has failed to comply with the following conditions set out under section 37(3):
- a) Its duty under section 10(1) of the Act to ensure that regulated course fees do not exceed the applicable fee limit laid out in its approved fee and access plan;
 - b) A general requirement of its approved fee and access plan:
 - c) A direction issued under section 13 in respect of a failure to comply with the general requirements of its approved fee and access plan;
 - d) A direction in respect of inadequate quality issued under section 19 of the Act;
 - e) A direction in respect of a failure to comply with the Code issued under section 33 of the Act.
- 4.20 If HEFCW gives a notice to a regulated institution under section 37 of the Act, it must not approve a new fee and access plan relating to that

institution for the period specified in the notice or until the notice has been withdrawn.

- 4.21 The Welsh Government intends to make regulations in early 2016 which will prescribe the period to be specified in a notice during which HEFCW will not be able to approve a new fee and access plan for an institution that has been issued a notice under section 37. It is anticipated that this period will be similar to the period prescribed in connection with arrangements under the 2004 Act.
- 4.22 Guidance on the withdrawal of a notice of refusal to approve a new fee and access plan is provided in paragraphs 4.33 to 4.36 below.
- 4.23 The intended purpose of a notice issued under section 37 is principally to ensure compliance with the requirements of the new regulatory system where a regulated institution has either not complied with an earlier direction issued by HEFCW to resolve an identified regulatory breach or where HEFCW is satisfied that the regulatory failure is serious enough to warrant a more immediate application of the sanction.
- 4.24 A distinction is made between those the conditions set out at section 37(3)(a) and (b) of the Act and those at sections 37(3)(c) to (e).
- 4.25 Section 37(3)(a) and (b) enable HEFCW to issue a notice of refusal to approve a new fee and access plan without a corresponding direction under section 11 (a compliance and reimbursement direction) or section 13 (a direction in respect of a failure to comply with general requirements of an approved fee and access plan) of the Act having first been given. This carries forward the sanctions previously available to HEFCW under the 2004 Act whereby a notice of refusal could be issued in the event that an institution failed to comply with fee limits or the general provisions of its approved plan.

- 4.26 It is for HEFCW to determine having considered the circumstances of each individual case, when more immediate action under section 37(3)(a) or (b) may be appropriate, however, the intention is that such action should be reserved for more significant breaches in respect of fee limits or the general requirements of a fee and access plan or to resolve longer term issues of non compliance. It is expected that in most circumstances, HEFCW would initially seek to utilise its direction powers under section 11 or section 13 of the Act in order to rectify failures to comply with applicable fee limits or the general requirements of an approved fee and access plan. However, the Act does not preclude HEFCW from issuing a notice under section 37 without a corresponding direction under section 11 or 13 should it be satisfied that circumstances warranted such a course of action. For example, HEFCW may choose to issue a direction under section 11 or section 13 in order to address an immediate issue and enforce an institution's compliance with prescribed fee limits or with the general requirements of its approved fee and access plan whereas a notice to refuse to approve a new fee and access plan under section 37 may be considered more appropriate to address longer term issues concerned with an institution's failure to comply with fee limits or the general requirements of its plan.
- 4.27 For the purposes of section 37, an institution should not be treated as having failed to comply with a general requirement of its approved fee and access plan, if HEFCW is satisfied that it has taken all reasonable steps to comply with the requirement in question.
- 4.28 As an alternative to seeking an injunction for non compliance with a direction, sections 37(3)(c) to (e) of the 2015 Act enable HEFCW to issue a notice of refusal to approve a new fee and access plan where it is satisfied that an institution has failed to comply with a direction in respect of a failure, or likely failure, to comply with the general requirements of its approved fee and access plan (section 13); a direction given for the purpose of addressing inadequate quality or

preventing quality from becoming inadequate (section 19); or a direction in respect of a failure, or likely failure, to comply with the Code (section 33). Whilst HEFCW is able to issue a notice of refusal to approve a new fee and access plan under section 37 in respect of a failure to comply with applicable fee limits without a corresponding direction having first been put in place (see paragraphs 4.25 to 4.26 above), failure to comply with an earlier direction is required before HEFCW can take action under section 37 in respect of inadequate quality or non compliance with the Code. Unlike a breach of a fee limit, which is a factual matter, inadequate quality or non compliance with the Code may be more subjective. As such, the Act requires HEFCW to first issue a direction in relation to these matters before it is able to proceed to a notice of refusal to approve a new fee and access plan in the event that an institution fails to comply with the direction. In the case of a failure to comply with a general requirement of an approved plan, HEFCW is able to issue a notice under section 37 in the event that an institution fails to comply with a direction under section 13, however, the Act also permits HEFCW to take action under section 37 where an institution has failed to comply with a general requirement of an approved plan without having first issued a direction if it considers such action appropriate.

- 4.29 It is for HEFCW to determine when it considers a notice under section 37 is the appropriate means of enforcing compliance with a direction, however, it is expected that such action would only be taken in circumstances where HEFCW is satisfied that alternative means have not been or would not be successful or sufficient to ensure an institution takes the specified action to rectify the regulatory failure to which the direction relates.
- 4.30 Section 37(8) of the 2015 Act allows HEFCW to issue a notice of refusal to approve a new fee and access plan to an institution that no longer has regulated status. HEFCW can do this where that institution has failed to comply with an earlier direction issued under section 13 of

the Act (directions in respect of failure to comply with the general requirements of a fee and access plan) that relates to the period when it had an approved fee and access plan in place. This ensures that HEFCW has sufficient time to monitor an institution's compliance with the general requirements of its fee and access plan and to take action if instances of failure are identified after the plans have ceased to have effect, irrespective of whether the institution continues to be a regulated institution. The Welsh Government considers this provision necessary to allow HEFCW to enforce commitments made by institutions at the time they were regulated and to ensure that students' interests are protected. It will be a matter for HEFCW to determine whether or not to seek enforcement in such circumstances.

- 4.31 In the event that HEFCW issues a notice to a regulated institution under section 37 of the Act, the procedural requirements are laid out in sections 42 to section 44 and in the 2015 Regulations. Further details of these procedures are provided in paragraphs 4.42 to 4.47 below.
- 4.32 Should HEFCW not approve a new fee and access plan following the issue of a notice under section 37, the institution subject to the notice will lose its regulated status and its courses will no longer be automatically designated for student support purposes.

Withdrawal of a notice of refusal to approve a new fee and access plan

- 4.33 Section 37(6)(a) makes provision for HEFCW to be able to withdraw a notice of refusal to approve a new fee and access plan.
- 4.34 HEFCW can withdraw a notice issued under section 37 of the Act at any time and on any reasonable grounds. It is expected that, in most circumstances, HEFCW will withdraw a notice when the regulated institution has taken the steps prescribed by HEFCW to rectify the identified regulatory breach to which the notice relates.

4.35 However, in some circumstances, HEFCW may consider it appropriate to withdraw a notice prior to all of the prescribed actions being taken by the regulated institution. For example, where HEFCW is satisfied that an institution is making sufficient progress in taking the required steps to rectify the regulatory failure to which the notice relates, but where it is unable to take all actions before the next fee and access plan cycle, HEFCW may wish to consider early withdrawal of a notice to allow the institution to apply for approval of a new fee and access plan. In such circumstances, HEFCW is able to issue a new notice or direction if the institution subsequently fails to complete the steps necessary to fully address the regulatory failure. However, HEFCW should note that a new notice or direction would be subject to the full procedural requirements laid out in section 42 to section 44 of the Act and in the 2015 Regulations.

4.36 The Welsh Government intend to make regulations in early 2016 which will prescribe the procedure to be applied when a notice to refuse to approve a new fee and access plan is withdrawn by HEFCW.

HEFCW's power to withdraw approval of an existing fee and access plan (section 39)

4.37 Section 39 of the 2015 Act enables HEFCW to withdraw its approval of a regulated institution's fee and access plan if it is satisfied that:

- a) The governing body of the institution has persistently failed to comply with the applicable fee limits of its approved fee and access plan or has failed to comply with a compliance and reimbursement direction;

- b) The governing body has persistently failed to comply with the general requirements of its approved fee and access plan or has failed to comply with a direction under section 13 of the Act;
- c) The quality of education provided by, or on behalf of the institution is seriously inadequate; or
- d) There has been a serious failure by the governing body to comply with the Code.

4.38 It is for HEFCW to determine when it considers the application of its intervention functions under section 39 to be appropriate. However, the expectation is that this sanction will be used as a last resort in circumstances where HEFCW is satisfied that the regulatory breach is so significant or serious that it cannot be dealt with by other means. For example, this may be in circumstances where the failure seriously impacts on the student experience, where it seriously threatens the continued financial viability of an institution, where the quality of provision is considered so inadequate that it will have a serious negative effect on the education of students and which cannot be resolved by other sanctions, where the interests of students or the reputation of higher education in Wales are seriously at risk, or where there is a need to protect future public investment.

4.39 HEFCW should note that the Act enables it, in certain circumstances, to intervene under section 39 without having issued any previous direction or notice.

4.40 For the purposes of section 39, persistent failures to comply with fee limits or the general requirements of an approved plan (conditions set out at paragraphs 4.37 a) and b) above) could, for example, consist of a number of separate failures or the repetition or continuation of the same failure – this is a judgement that HEFCW will have to reach based on the nature of failure and the surrounding circumstances. As

is the case under section 37, an institution should not be treated as having failed to comply with a general requirement of its approved fee and access plan if HEFCW is satisfied that it has taken all reasonable steps to comply with the requirement in question.

- 4.41 Should HEFCW issue a notice to a regulated institution under section 39, the procedural requirements laid out in paragraphs 4.42 to 4.47 will apply.

Procedural requirements

- 4.42 Should HEFCW propose to issue a notice to a regulated institution under section 37 or section 39 of the 2015 Act, the procedural requirements laid out in section 42 to section 44 of the Act and in the 2015 Regulations will apply.
- 4.43 Under this procedure HEFCW must first issue a warning notice to the governing body of the regulated institution which sets out the proposed notice; states the reason for giving it; and informs the governing body that it may make representations to HEFCW about the proposed notice. Under regulation 3 of the 2015 Regulations such representations must be made within a 40 day period of the warning notice being given.
- 4.44 If, having considered any representations received from the governing body of a regulated institution, HEFCW determines that it is appropriate to proceed with the issuing of a notice of refusal to approve a new fee and access plan or to withdraw an approved fee and access plan, it must, at the same time, provide the governing body with a statement which sets out the reasons for giving the notice; informs the governing body that it may apply for a review of the notice under section 44 of the 2015 Act and includes the information prescribed under regulation 6 of the 2015 Regulations. If, after considering representations received by

the institution, HEFCW decides not to proceed with the notice, it must give the governing body notice of that decision.

- 4.45 The governing body may make an application for a review of the notice. The grounds under which such an application can be made are set out in regulation 7 of the 2015 Regulations. Regulation 8 prescribes the procedure for applying for a review.
- 4.46 The point at which a notice is to be treated as having been given to the governing body (ie, the point at which it has effect) is laid out in regulation 4 of the 2015 Regulations (see paragraph 2.21).
- 4.47 As referred to earlier in this guidance, it is intended that the Welsh Government will make regulations that will apply similar procedural requirements to those outlined above to notices issued under section 38 of the Act which relate to the withdrawal of an approved fee and access plan where a regulated institution no longer satisfies the requirements for entry to the regulatory system laid out in section 2(3) of the Act.

Publication of notices

- 4.48 If HEFCW gives a regulated institution a notice under section 37, section 38 or section 39 of the 2015 Act it must publish the notice and provide a copy to the Welsh Ministers.
- 4.49 It is anticipated that the procedure for the publication of such notices will be prescribed in regulations to be made in early 2016 and will be similar to that laid out in regulation 11 of 2015 Regulations for compliance and reimbursement directions.

Student support protection for students at institutions that no longer have an approved fee and access plan

- 4.50 Where an institution has had approval of its fee and access plan withdrawn by HEFCW under section 38 or section 39 of the 2015 Act, has had a new fee and access plan rejected or refused under section 7 or section 37, or has chosen to voluntarily exit the regulated system by not applying for a new fee and access plan, its courses will no longer be automatically designated for the purposes of student support.
- 4.51 The Welsh Government recognises that the loss of automatic designation of courses could adversely affect students who were registered with an institution at a time when that institution had an approved fee and access plan in place. It is intended that measures will be implemented through student support regulations made under section 22 of the Teaching and Higher Education Act 1998 that will make provision for student support to continue for these students.
- 4.52 Section 10(2) of the 2015 Act provides for students not to lose fee protection if a provider ceases to have a fee plan. Where a plan has expired or been withdrawn by HEFCW, the Act requires the governing body of an institution to ensure that fees for academic years starting within the period of its most recent fee and access plan continue to comply with the relevant fee limit for the duration of a students course.

Quality assessment at institutions that no longer have an approved fee and access plan

- 4.53 In the event that a regulated institution's approved fee and access plan is withdrawn or not renewed for any reason, HEFCW's quality assessment duty and direction functions set out in Part 3 of the Act will continue to apply in respect of courses which continue to be undertaken by students receiving Welsh Government student support (see section 26 of the 2015 Act). This will ensure that students who

had already commenced their studies at the time the institution ceased to have an approved fee and access plan will continue to receive education of an acceptable quality.

5 Reports to be made by HEFCW

Annual reports

- 5.1 Section 50 of the 2015 Act requires HEFCW to provide an annual report to the Welsh Ministers on how it has exercised its functions by virtue of the Act at the end of each reporting period.
- 5.2 It is envisaged that such reports would be submitted to the sponsor division within nine months of the end of each reporting period. However, we recognise that this may not always be possible and in such circumstances HEFCW should notify the sponsor division of the delay and the reason for it.
- 5.3 The 2015 Act requires that the Welsh Ministers must lay a copy of this annual report before the National Assembly for Wales.

Purpose of the annual report

- 5.4 The requirement for HEFCW to submit an annual report to Welsh Ministers is intended to provide increased transparency and accountability in relation to the way HEFCW has exercised its functions under the 2015 Act. In particular it will ensure that the discharge of HEFCW's regulatory functions is subject to an appropriate level of external scrutiny and that Welsh Ministers are informed of any significant matters of concern or instances where HEFCW has been required to exercise its intervention functions under the new regulatory system.

Form and content of the annual report

- 5.5 It is anticipated that the contents of the annual report will broadly align with HEFCW's current annual statement of assurance provided to the

Welsh Government and also the annual report previously required under section 40A of the 2004 Act (now repealed by the 2015 Act), which concerned the discharge of HEFCW's fee plan monitoring functions. Consequently, the provision of an annual report under the 2015 Act should not place any significant additional burdens on HEFCW.

5.6 It is expected that HEFCW's annual report to the Welsh Ministers will include the following:

- i) An explanation of how HEFCW has discharged its functions under:
 - a) Section 7 – approval of fee and access plans;
 - b) Section 15 – monitoring and evaluating compliance and effectiveness of fee and access plans;
 - c) Section 17 – assessment of the quality of education provided by or on behalf of regulated institutions; and
 - d) Section 31 – monitoring compliance with the Code.
- ii) The outcomes of the activities undertaken by HEFCW in discharging the functions listed at i) a) – d). This should include a summary of:
 - a) fee and access plan applications, approvals and rejections;
 - b) the regulated sector's compliance with fee limits and the general requirements of approved fee and access plans;

- c) quality assessment reviews undertaken and the outcomes of those reviews; and
 - d) the regulated sector's compliance with the Code.
- iii) Details of any failures by regulated institutions to comply with the requirements of the regulatory system and instances where HEFCW has used its intervention functions under:
- a) section 11 – compliance and reimbursement directions;
 - b) section 13 – directions in respect of a failure to comply with the general requirements of an approved fee and access plan;
 - c) section 19 – directions in respect of inadequate quality;
 - d) section 20 – other measures in respect of inadequate quality;
 - e) section 33 – directions in respect of a failure to comply with the Code;
 - f) section 34 – other measures in respect of failure to comply with the Code;
 - g) section 37 – notice of refusal to approve a new fee and access plan;
 - h) section 38 – HEFCW's duty to withdraw approval of a fee and access plan if a regulated institution no longer satisfies the requirement of section 2(3); and

- i) section 39 – HEFCW’s power to withdraw approval of an approved fee and access plan.

including details of the actions HEFCW has taken to resolve the regulatory failure in question and the progress made by the regulated institution in taking the necessary action; and

- iv) An assurance statement which includes an overview of the regulated sector’s compliance with the regulatory system laid down by the 2015 Act and highlights any areas of concern or risk.

5.7 It is expected that the first annual report submitted by HEFCW under the 2015 Act will also include details of how HEFCW has discharged other key functions such as those related to the development of the first Code and the preparation and publication of its Statement of Intervention.

5.8 Under section 50(3) of the 2015 Act the Welsh Ministers are able to specify by direction to HEFCW the requirements for the annual report. This includes requirements relating to its form and content. However, as this guidance provides details of the Welsh Government’s expectations in respect of the submission and broad content of the annual report, further direction under section 50(3) is not considered necessary at this point in time.

Reporting periods

5.9 For the purposes of the annual report, the initial reporting period will begin on the day on which section 50 provisions come into force and end on either the anniversary of that date or a date specified by HEFCW to the Welsh Ministers, whichever is the earlier. Each subsequent reporting period will follow 12 months after that date. It is

anticipated that section 50 provisions will be commenced from the 2017/18 academic year.

- 5.10 HEFCW should provide written notice to Welsh Ministers specifying the end date for the initial reporting period within 28 days of section 50 coming into force. The notice should also provide explanation of the reasons for this date.
- 5.11 Section 50(7) of the 2015 Act allows the Welsh Ministers to specify by direction how and when HEFCW is to give notice of the initial reporting period. In light of guidance provided above, the Welsh Ministers do not currently intend to issue a direction under section 50(7), however, in the event that notification of the initial reporting period has not been provided to Welsh Ministers within the timescale specified above, the Welsh Ministers will consider the issue of further direction under their section 50(7) powers.

Special reports

- 5.12 Section 51 of the 2015 Act places HEFCW under a duty to provide the Welsh Ministers with a special report if the Welsh Ministers direct it to do so.
- 5.13 Such reports would relate to a specific matter or matters as specified in section 51(1) of the Act, namely:
- (a) compliance with fee limits by regulated institutions generally or by a particular institution;
 - (b) compliance with the general requirements of approved fee and access plans generally, or with the general requirements of a particular approved fee and access plan;

- (c) the effectiveness of approved fee and access plans generally, or the effectiveness of a particular approved fee and access plan, in promoting equality of opportunity and promoting higher education;
- (d) any other matters specified in the direction that relate to the promotion of equality of opportunity or the promotion of higher education;
- (e) the quality of education provided by or on behalf of regulated institutions generally, or the quality of education provided by or on behalf of a particular regulated institution;
- (f) compliance by regulated institutions generally, or by a particular regulated institution, with requirements of the Code.

5.14 HEFCW's duty to provide special reports to the Welsh Ministers in respect of compliance with fee limits (section 51(1)(a)) and the quality of education provided by or on behalf of regulated institutions (section 51(1)(e)) came into force on 1 September 2015. It is expected that HEFCW's remaining duties under section 51 of the Act will be commenced from the 2017/18 academic year.

5.15 Under section 51(2), a direction from the Welsh Ministers can specify the form and content of the special report to be provided by HEFCW and the timescale in which it is to be submitted. In the event that a direction is issued by the Welsh Ministers, HEFCW must provide the special report in accordance with the specified requirements.

6 Statement of Intervention

Introduction

6.1 The 2015 Act confers a new range of regulatory functions on HEFCW. In order that regulated institutions and other institutions wishing to apply for entry to the regulated system understand the circumstances in which HEFCW is likely to exercise its principal regulatory functions, section 52(1) of the 2015 Act places HEFCW under a duty to prepare and publish a statement setting out how it proposes to exercise its intervention functions. HEFCW's intervention functions are listed in section 52(5) and relate to the following:

- compliance and reimbursement directions (**section 11**);
- directions in respect of failure to comply with general requirements of an approved plan (**section 13**);
- directions in respect of inadequate quality (**section 19**);
- the provision of advice and assistance to a governing body with a view to improving quality or preventing quality from becoming inadequate (**section 20(1)**);
- the carrying out of a review of matters relevant to the quality of education provided by or on behalf of an institution (**section 20(2)**);
- directions in respect of failure to comply with the Code (**section 33**);
- the provision of advice and assistance to a governing body with a view to improving the organisation or management of the financial affairs of an institution (**section 34(1)**);

- the carrying out of a review of matters relevant to an institution's compliance with the Code (**section 34(2)**);
- refusal to approve a new fee and access plan (**section 37**); and
- withdrawal of approval of an existing fee and access plan (**sections 38 and 39**).

6.2 HEFCW's intervention functions under section 11 (compliance and reimbursement directions), section 19 (directions in respect of inadequate quality) and section 20 (others measures in respect of inadequate quality) came into force on 1 September 2015 and are exercisable during the transitional period.

6.3 The Welsh Government anticipate that HEFCW's duty to withdraw a fee and access plan under section 38 will be commenced during 2016 and that the remaining intervention functions under sections 13 (directions in respect of a failure to comply with the general requirements of an approved plan), section 33 (directions in respect of a failure to comply with the Code), section 34 (other measures in respect of a failure to comply with the Code), section 37 (notice of refusal to approve a new fee and access plan) and section 39 (notice of withdrawal of an approved fee and access plan) will be commenced in 2017 and be exercisable by HEFCW from the 2017/18 academic year.

Principles and expectations

6.4 It is expected that HEFCW will exercise its intervention functions in accordance with the following principles and expectations:

- Where possible, HEFCW should seek to resolve issues through dialogue with institutions and through the provision of informal support and assistance.
- Intervention should only occur when absolutely necessary.
- HEFCW must act reasonably. Where appropriate, this includes allowing sufficient time for a regulated institution to rectify the identified regulatory failure.
- The action proposed by HEFCW should be proportionate to the regulatory failure in question.
- Where possible, HEFCW should discuss proposals to exercise an intervention function with the governing body, or the head of the institution or provider concerned.

6.5 Whilst it is expected that HEFCW will, where possible, seek to resolve issues through dialogue and informal support, the Welsh Government recognise that such an approach may not be appropriate in all circumstances, for example, where HEFCW considers more urgent and immediate action necessary to address more serious regulatory failures.

6.6 HEFCW must also ensure that it does not exercise any of its intervention functions in a manner that conflicts with the protections to academic freedom and institutional autonomy set out in section 47 and 48 of the Act and that it complies with general public law requirements. Guidance in respect of these protections is provided at paragraphs 1.7 to 1.10.

Preparation of the Statement of Intervention

- 6.7 HEFCW's duty to prepare a statement under section 52(1) came into force in May 2015. Provisions relating to the publication of its statement were commenced in September 2015, but only in respect of those interventions under section 11, section 19 and section 20 of the 2015 Act. Guidance issued in June 2015 provided advice on the preparation of HEFCW's Statement of Intervention in respect of its intervention functions exercisable during the transitional period.
- 6.8 HEFCW's duty to publish a statement in relation to its remaining intervention functions will be commenced in early 2016. HEFCW will be required to prepare, consult on and publish a statement relating to all of its intervention functions under the new regulatory system within a reasonable time of these provisions coming into force. Guidance provided in the remainder of this section relates to the preparation of that statement.

Purpose of the Statement of Intervention

- 6.9 It is intended that HEFCW's Statement of Intervention will provide a clear and transparent explanation of how HEFCW proposes to exercise its intervention functions. The statement should set out HEFCW's proposed approach to intervention and enable institutions to understand how and when HEFCW may intervene under the new regulatory system, how HEFCW will satisfy itself that intervention is necessary and the mechanisms that are in place to ensure that intervention occurs in a fair and proportionate manner.

Form and content of the Statement of Intervention

6.10 Under section 52(4) of the 2015 Act, the Welsh Ministers may make regulations concerning the preparation, publication and consultation of HEFCW's Statement of Intervention. This includes provision about the form and content of the statement. As outlined in guidance provided to HEFCW in June 2015, the Welsh Government does not at present intend to make regulations concerning these matters but HEFCW is required to take into account the Welsh Ministers' guidance in the exercise of its functions by virtue of the 2015 Act.

6.11 HEFCW will therefore have flexibility to determine the form and content of its Statement of Intervention. However, the expectation is that the statement will set out how HEFCW propose to exercise each of the intervention functions listed under section 52(5) of the 2015 Act. This includes both those interventions exercisable by HEFCW during the transitional period and those which will be exercisable upon full implementation of the regulatory system from the 2017/18 academic year.

6.12 The withdrawal of an approved fee and access plan under section 39 of the Act will have significant consequences for a regulated institution. It is therefore expected that HEFCW's Statement of Intervention will provide examples of the type of circumstances under which HEFCW may consider the withdrawal of approval of an approved plan to be appropriate. In particular, HEFCW's statement should provide an explanation of what it considers to constitute:

- persistent failures to comply with the applicable fee limits of an approved fee and access plan;
- persistent failures to comply with the general requirements of an approved fee and access plan;

- seriously inadequate quality of education provided by or on behalf of a regulated institution; and
- serious failures to comply with the Code.

6.13 The Statement of Intervention should also provide examples of the type of circumstances where HEFCW may consider the withdrawal of an approved fee and access plan under section 39 appropriate as a result of a regulated institution's failure to comply with an earlier direction under section 11 (compliance and reimbursement direction) or section 13 (direction in respect of a failure to comply with the general requirements of a fee and access plan) of the 2015 Act.

6.14 As laid out earlier in this guidance, HEFCW is able to issue a notice of refusal to approve a new fee and access plan under section 37 as an alternative to an injunction to enforce compliance with a direction under section 13, section 19 and section 33 of the 2015 Act. It is expected that HEFCW's Statement of Intervention will provide examples of the type of circumstances in which HEFCW may consider it appropriate to enforce compliance with such directions through the use of a notice of refusal to approve a new fee and access plan rather than a court injunction.

Consultation and publication

6.15 Before publishing its Statement of Intervention, section 52(3) of the 2015 Act places HEFCW under a duty to consult with the governing body of each regulated institution and any other persons it considers appropriate. It is expected that "other persons" may include for example Universities Wales, NUS Wales, the Open University and Colegau Cymru.

- 6.16 Having taken account of responses to its consultation, HEFCW should publish its final Statement of Intervention on its website in a timely manner and notify all regulated institutions and other persons that responded to the consultation of its publication.
- 6.17 Guidance was previously provided to HEFCW in June 2015 in relation to the preparation, consultation and publication of its Statement of Intervention for the transitional period. This guidance should be read in conjunction with that provided in June.