

# Full Statement of Intervention

**Draft for consultation**



Noddir gan  
**Lywodraeth Cymru**  
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## Background

1. Prior to the implementation of the current higher education fees and funding regime in 2012/13, the principal source of public funding of the higher education sector in Wales was recurrent grant funding from HEFCW to institutions under the terms of the Further and Higher Education Act 1992. This act included a requirement that HEFCW make provision for the assessment of the quality of education in those institutions that it funds. HEFCW attaches terms and conditions to its funding<sup>1</sup>, which relate to, amongst other things, the financial management of institutions and more recently the level of fees charged by institutions. HEFCW has also been able to withhold funding in the event of unsatisfactory quality<sup>2</sup>. The administration and enforcement of terms and conditions of HEFCW funding has therefore been the principal means by which the higher education sector was regulated in Wales.
2. Following the introduction of the non-means tested tuition fee grant in 2012/13, funding which was previously provided by the Welsh Government to HEFCW and then allocated by HEFCW to institutions in Wales, was re-directed to the Welsh Government's student support budget. The amount of financial support paid by HEFCW to institutions in Wales has hence reduced and consequently HEFCW's ability to attach terms and conditions to that support has also reduced. Therefore the effectiveness of the higher education regulatory regime, which relies on HEFCW imposing terms and conditions of funding relating to fee controls, quality of education and financial management, has been diminished.
3. For this reason, the Higher Education (Wales) Act 2015 (The 2015 Act)<sup>3</sup> has sought to introduce a new higher education regulatory framework for Wales which was not reliant on terms and conditions of HEFCW recurrent funding. The 2015 Act sets out the regulatory functions of HEFCW and makes provision for a new higher education regulatory system for Wales. **Institutions regulated under The 2015 Act are those institutions to which an approved fee and access plan relates** (see Section 7(5)(b) of The 2015 Act)<sup>4</sup>. The 2015 Act aims to:
  - a. ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government backed higher education grants and loans;
  - b. safeguard the contribution made to the public good arising from the Welsh Government's significant financial subsidy of higher education;
  - c. maintain a strong focus on fair access to higher education; and

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<sup>1</sup> Memorandum of Assurance and Accountability (parts 1 and 2).

<sup>2</sup> Unsatisfactory Quality Procedures

<sup>3</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

<sup>4</sup> See also Sections 26 and 27(8) of The 2015 Act

- d. preserve and protect the institutional autonomy and academic freedom of our universities.

The 2015 Act sets out HEFCW's regulatory powers in relation to student fees; as well as in relation to the quality of education and institutions' financial management. These powers include those in relation to intervention by HEFCW where necessary to ensure compliance with The 2015 Act. HEFCW's other powers under The 2015 Act and its remaining powers under The Further and Higher Education Act 1992 mean that HEFCW will continue to have wider role that is not solely focused on remedial action and compliance.

4. The 2015 Act received Royal Assent on 12 March 2015 and has commenced, i.e. come into force, in stages with HEFCW's functions, duties and powers under The 2015 Act coming into force at different times:
  - The provisions in relation to Compliance and Reimbursement Directions to address issues in respect of the charging of excess fees; Directions in Respect of Inadequate Quality; and Other Measures in Respect of Inadequate Quality, together with the associated regulations, came into force on 1 September 2015.
  - The provision in relation to Withdrawal of Approval of an Existing Fee and Access Plan) will come into force on 1 August 2016, only for actions taken under the Section 38 of The 2015 Act.
  - The remaining provisions in relation to Directions in Respect of Failure to Comply with General Requirements of an Approved Fee and Access Plan; Directions in Respect of Failure to Comply with the Financial Management Code; Other Measures in Respect of Failure to Comply with the Financial Management Code; Refusal to Approve a New Fee and Access Plan under Section 37 of The 2015 Act; and Withdrawal of Approval of an Existing Fee and Access Plan) under Section 39 of The 2015 Act, are anticipated will come into force on 1 September 2017.

**Note**

**Fee and Access Plans** only relate to full time undergraduate and PGCE provision and to qualifying persons (as defined under The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015).

5. The powers in respect of inadequate quality are underpinned by a requirement under Section 17 of The 2015 Act that HEFCW assess, or make arrangements for the assessment of, the quality of education. Similarly, the powers in respect of compliance with the Financial Management Code are underpinned by the duty under Section 27 of The 2015 Act that HEFCW prepare and publish the Financial Management Code.

6. Section 52 of The 2015 Act places HEFCW under a duty to produce a statement in respect of its intervention functions (the Statement of Intervention). The Statement of Intervention must be published following a consultation process involving the governing bodies of regulated institutions and other appropriate persons.
7. HEFCW has previously published a Transitional Statement of Intervention<sup>5</sup>, for the purposes of section 52 of The 2015 Act, to provide a public and transparent framework within which HEFCW was to operate for the period from 4 February 2016 until superseded by this full Statement of Intervention. The Transitional Statement of Intervention set out HEFCW's powers in relation to Compliance and Reimbursement Directions; Directions in Respect of Inadequate Quality; and Other Measures in Respect of Inadequate Quality. The Transitional Statement of Intervention will be superseded by this full Statement of Intervention, with effect from 1 August 2016, although most of the additional powers provided under this full Statement of Intervention are anticipated will not come into effect until 1 September 2017.
8. This full Statement of Intervention relates to the following intervention functions as set out under The 2015 Act:
  - Section 11 provides for intervention in respect of a failure to comply with Section 10(1) of The 2015 Act regarding limits on student fees. This intervention takes the form of Compliance and Reimbursement Directions. This intervention function came into effect from 1 September 2015.
  - Section 19 provides for intervention through Directions in Respect of Inadequate Quality. This intervention function came into effect from 1 September 2015.
  - Section 20 provides for intervention through Other Measures in Respect of Inadequate Quality. This intervention takes the form of the provision of advice and assistance, or the review of other matters in relation to quality. This intervention function came into effect from 1 September 2015.
  - Section 33 provides for intervention through Directions in Respect of Failure to comply with the Financial Management Code. It is anticipated that this intervention function will come into effect from 1 September 2017.
  - Section 34 provides for intervention through Other Measures in Respect of Failure to comply with the Financial Management Code. This intervention takes the form of the provision of advice or assistance, or the review of any matters considered by HEFCW to be relevant to compliance with The Code. It is anticipated that this intervention function will come into effect from 1 September 2017.

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[www.hefcw.ac.uk/documents/publications/circulars/circulars\\_2016/W16%2005HE%20Annex%20B%20Transitional%20Statement%20of%20Intervention.pdf](http://www.hefcw.ac.uk/documents/publications/circulars/circulars_2016/W16%2005HE%20Annex%20B%20Transitional%20Statement%20of%20Intervention.pdf)

- Section 37 provides for refusal to approve a new Fee and Access Plan. This intervention takes the form of a Notice of Refusal to Approve a New Fee and Access Plan. It is anticipated that this intervention function will come into effect from 1 September 2017.
- Sections 38 and 39 provide for the withdrawal of approval of a Fee and Access Plan. This intervention takes the form of a Notice of Withdrawal of a Fee and Access Plan. This intervention function will come into effect from 1 August 2016 in respect of actions under Section 38 and it is anticipated from 1 September 2017 in respect of actions under Section 39.
- Sections 42 to 44 provide for Warning Notice and review procedures that apply to all Directions and notices included in section 41(1) of The 2015 Act. These apply to the above procedures as they come into effect.

Further detail in respect of the legislation underpinning the issue of the above Notices and Directions and the associated processes in respect of Warning Notices and the review of Notices and Directions is provided under the Higher Education (Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>6</sup>.

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<sup>6</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)



## Roles and Responsibilities

9. To reduce the requirement for intervention, it will be important for governing bodies of regulated institutions to be authoritative and informed, having oversight of all aspects of institutional strategy and key decisions. Principles of good governance are outlined in the Higher Education Code of Governance published by the Committee of University Chairs<sup>7</sup> (CUC). The CUC Higher Education Code of Governance notes that, whilst the governing body must respect the role of the Senate/Academic Board and other bodies involved in academic governance, it should still receive assurance that academic risks, such as those in relation to quality assurance, are being effectively managed.
10. HEFCW's role under The 2015 Act will be to monitor compliance by regulated institutions with Fee and Access Plans (including Fee Limits), requirements in respect of the Quality of education; and the Financial Management Code, among other powers and monitoring functions. HEFCW will intervene only where necessary and reasonable to ensure that the students, the institution and the wider higher education sector are protected from, the charging of excess fees; provision of inadequate quality or provision likely to become inadequate; unacceptable fee and access plans and fee and access plan delivery; and poor management and governance of financial affairs.

### Note

**A regulated institution** is an institution to which an approved Fee and Access Plan relates. Another body may provide education on behalf of a regulated institution (usually under franchise arrangements).

11. Where intervention is required, HEFCW will operate in a reasonable manner, as reflected in the following principles, and also in the intervention processes outlined below in relation to: compliance with limits on student fees; compliance with general requirements of approved Fee and Access Plans; addressing inadequate quality and preventing quality from becoming inadequate; compliance with the Financial Management Code; refusal to approve new Fee and Access Plans; and Withdrawal of Fee and Access Plans. Through the processes and principles set out in this Statement, HEFCW aims to pursue an approach to intervention that is consistent with the Regulators' Code<sup>8</sup>.

<sup>7</sup> [www.universitychairs.ac.uk/wp-content/uploads/2015/02/Code-Final.pdf](http://www.universitychairs.ac.uk/wp-content/uploads/2015/02/Code-Final.pdf)

<sup>8</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300126/14-705-regulators-code.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf)

## Purpose and Principles

In addition to safeguarding the interests of students, HEFCW intervention may be essential in order to ensure that the reputations of the institution and the wider higher education sector are protected, and potentially to minimise risk to public funds and/or publically-funded assets. Intervention will be required when an institution has failed to satisfactorily address serious issues, despite being given reasonable time, support and/or advice to do so, or where an issue is sufficiently serious that more immediate action must be taken.

The following principles will be adhered to by HEFCW in exercising its intervention powers under The 2015 Act:

- **HEFCW will focus on promoting good practice and early prevention of potential compliance issues, wherever possible.** HEFCW will encourage and promote compliance, placing an emphasis on the avoidance or early resolution of compliance issues, rather than remedial intervention.
- **HEFCW will seek to work in partnership with institutions in the first instance.** Prior to any formal intervention under The 2015 Act, HEFCW will normally seek to work with the institution(s) to address issues through dialogue and the provision of advice or support where necessary.
- **HEFCW will only intervene under The 2015 Act when necessary.** HEFCW's intervention powers will normally be exercised in instances where a partnership approach has failed to address issues via dialogue with the senior management of an institution within a reasonable timescale, although HEFCW may resort to formal intervention at an earlier stage where an issue is sufficiently serious. Such serious issues might include, for instance: widespread or systematic non-compliance regarding fee levels, a more limited number of flagrant cases of overcharging, or serious quality issues that require immediate intervention in order to protect the interests of students and other stakeholders. When intervening, HEFCW will seek to work with the institution, where appropriate, to address non-compliance.
- **Any intervention will be proportionate to the severity of the issue that HEFCW is seeking to address.** HEFCW will consider interventions on a case-by-case basis, based on the severity of the issue that is to be addressed.

### Purpose and Principles (continued)

- **HEFCW will always act reasonably.** For example, institutions are autonomous entities and HEFCW will give due regard to institutional autonomy at all times. HEFCW will also avoid unnecessary duplication of the actions of other regulatory organisations (e.g. the Charities Commission, the Office of the Independent Adjudicator for Higher Education and the Competition and Markets Authority) and will give consideration to student and stakeholder interests when intervening.
- **HEFCW will pay due regard to the wider impact of any intervention.** Whilst HEFCW will consider the impact of intervention, such as any impact in relation to the national accounting classification of institutions, HEFCW may have a statutory duty to intervene that would take precedence over such considerations.
- **HEFCW will always act fairly.** For example, when intervening, HEFCW will base its decisions on consideration of all the relevant information, with any decisions that are taken being fair to institutions and to students and their sponsors (e.g. when agreeing the timescale for reimbursement of excess fees).
- **Intervention processes will be transparent and consistent.** HEFCW will undertake formal intervention in accordance with published processes as set out in this Statement of Intervention.
- **Intervention actions will be targeted.** Interventions undertaken by HEFCW will focus only on those areas where there has been non-compliance and will seek only to address specific compliance issues that have been identified.
- **HEFCW will seek to end its intervention as soon as reasonably possible.** HEFCW's intervention will cease as soon as the identified issues have been resolved and any underlying issues addressed.
- **HEFCW will be accountable for its decisions.** The intervention processes operated by HEFCW will be subject to scrutiny, including through review of any Notices or Directions issued.

**Purpose and Principles (continued)**

- **HEFCW will give due regard to impact on protected characteristics and the Welsh language when undertaking its intervention functions.** HEFCW has responsibilities in respect of the 2010 Equality Act under the Public Sector Equality Duty Wales.
- **HEFCW will pay due regard to data protection.** Whilst HEFCW may need to share information with institutions and other relevant bodies (e.g. the Office of the Independent Adjudicator for Higher Education) in relation to allegations of non-compliance under The 2015 Act, HEFCW will not share a complainant's details unless explicit permission has been given by the complainant.
- **HEFCW will give due regard to issues relating to the publication of information.** HEFCW is required under The 2015 Act to publish Compliance and Reimbursement Directions once they have been given. HEFCW will only publish other information in relation to non-compliance with The 2015 Act exceptionally, where this is in the public interest to do so. In all instances we will notify the institution(s) concerned prior to the publication of information. Where information is published by third parties, HEFCW will liaise with the institution(s) affected as appropriate.
- **HEFCW will give due regard to issues relating to the disclosure of information under the Freedom of Information Act.** HEFCW is subject to the Freedom of Information (Fol) Act 2000. This gives a public right of access to any information that we hold, which therefore may be disclosed on request under the terms of the Fol Act. We have a responsibility to decide whether any information should be made public or treated as confidential. We may refuse to disclose information in exceptional circumstances, such as where disclosure of information would prejudice commercial interests. As and when we determine that information should be made publicly available, through disclosure under the Fol Act, we will consult with the institution(s) concerned prior to its release in accordance with our Fol procedures.
- **HEFCW will not intervene in a way that is incompatible with the governing documents of an institution.** This is a requirement set out at Section 47 of The 2015 Act. For chartered institutions these governing documents include the Royal Charter and any Instruments which require the approval of the Privy Council. For Higher Education Corporations and Further Education Corporations the governing documents are the institution's instrument of government and articles of government. For any institutions that are companies that do not fall within the above categories the governing instruments are the company's memorandum and articles of association.

**Purpose and Principles (continued)**

- **HEFCW will not intervene in a way that demands a governing body do anything that is incompatible with any obligations or restrictions as a charitable organisation.**

This is a requirement set out at Section 47 of The 2015 Act. Where necessary, HEFCW will liaise with the Charity Commission prior to initiating any intervention.

- **HEFCW will take into account the importance of protecting academic freedom when exercising its intervention powers.** This is a requirement set out at Section 48 of The 2015 Act. The 2015 Act states that academic freedom includes the freedom of institutions to determine:

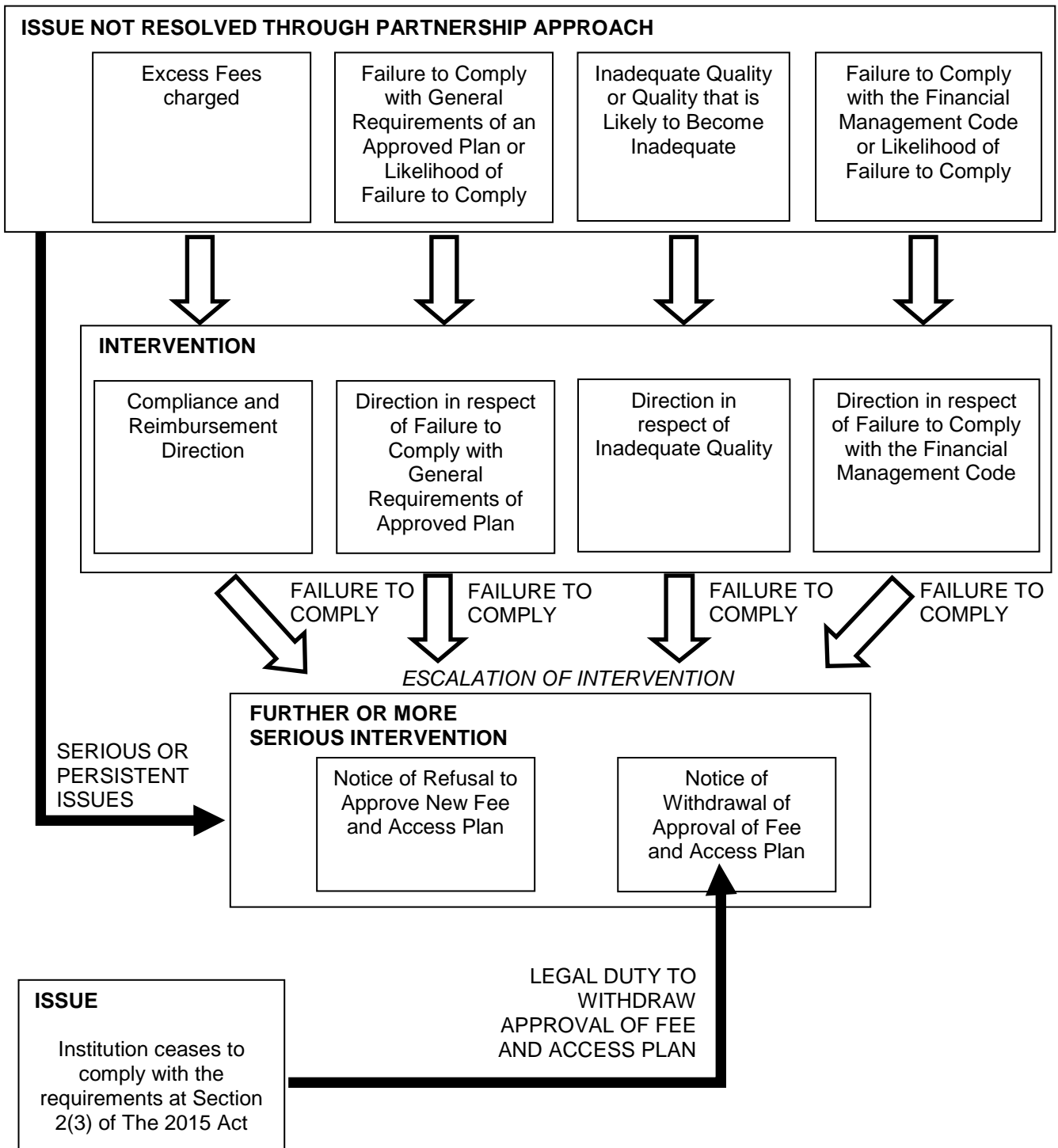
- the contents of courses and the manner in which they are taught, supervised and assessed;
- the criteria for the admission of students and to apply those criteria in particular cases; and
- the criteria for the selection and appointment of academic staff and to apply those criteria in particular cases.

These points should be viewed in the context of institutions' responsibilities under the Public Sector Equality Duty Wales, including in relation to: eliminating unlawful discrimination; advancement of equality of opportunity; and fostering good relations between people of different groups.

12. In addition, Section 49 of The 2015 Act requires that HEFCW take account of any guidance issued by Welsh Ministers when exercising its functions under The 2015 Act.

## Overview of Intervention Processes

13. The following diagram provides an overview of the various processes by which HEFCW can exercise its intervention powers. The various intervention powers are covered separately in each section of this Statement of Intervention. As outlined in the Purposes and Principles section above, HEFCW's intervention powers will normally be exercised in instances where a partnership approach has failed to address issues within a reasonable timescale, although HEFCW may resort to formal intervention at an earlier stage where an issue is sufficiently serious.



## Intervention in Relation to Limits on Student Fees (In effect from 4 February 2016)

### Basis for intervention

14. This section relates to HEFCW intervention in respect of limits on student fees through Compliance and Reimbursement Directions. These interventions apply where HEFCW is satisfied that the governing body of an institution has failed to comply with section 10(1) of the Higher Education (Wales) Act in relation to limits on student fees. Section 10(1) of The 2015 Act states that the governing body of an institution within subsection (2) must ensure that regulated course fees do not exceed the applicable fee limit. Institutions falling within subsection (2) are all those with an approved fee and access plan (whether or not that plan is still in force).

#### Note

**Regulated course fees** are the fees paid to an institution by a qualifying person:

- a. in connection with the person's undertaking a qualifying course; and
- b. in respect of an academic year applicable to that course, where that year begins at a time within the period specified under section 4 of the institution's most recent fee and access plan (whether or not the plan is still in force).

**The most recent fee and access plan** is the institution's fee and access plan most recently approved in accordance with section 7 of The 2015 Act.

**Fee and access plans are 'in force'** from the day of approval until the end of the plan period (or until approval is withdrawn by HEFCW under Section 38 or 39 of The 2015 Act).

**The applicable fee limit** is:

- a. In a case where the institution's most recent fee and access plan specifies a fee limit for the course and year in question, that limit;
- b. In a case where the institution's most recent fee and access plan provides for the determination of a fee limit for the course and year in question, that limit as determined in accordance with the plan.

**Excess fees** are regulated course fees, to the extent that those fees exceed the applicable fee limit (as quantified for the purposes of the duty under section 10(1) with which the governing body has failed to comply).

15. The governing body of an institution is responsible for ensuring that excess fees are not charged. HEFCW will monitor and assess potential issues in relation to fee levels, through the monitoring of fee data and allegations against institutions<sup>9</sup>, and through HEFCW's institutional assurance processes, including audit where appropriate. The governing bodies of regulated institutions will also be subject to a compliance duty under Section 16(1) of The 2015 Act, which requires them to provide HEFCW with such information, assistance and access to the institution's facilities as HEFCW reasonably requires for the purposes of monitoring compliance with fee limits. Where HEFCW is satisfied that a governing body has failed to provide such information, under Section 16(2), HEFCW may direct the governing body to take (or not to take) specified steps for the purpose of securing the provision of the required information, assistance or access.

#### **Securing Information, Assistance or Access**

In the event of failure to provide information, assistance or access, HEFCW will attempt to resolve the situation through discussion with the institution's Accountable Officer. Should that fail to resolve the issue, HEFCW may direct the governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is needed, through the issuing of a **Direction to Enforce Compliance with the Duty to Cooperate** for the Purpose of Monitoring and Evaluating Compliance and Effectiveness under Section 16(2) of The 2015 Act (sent to the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer).

A Direction to Enforce Compliance with the Duty to Cooperate for the Purpose of Monitoring and Evaluating Compliance and Effectiveness is not subject to the warning and review procedure set out at Sections 42 to 44 of The 2015 Act. Once such a Direction is issued, the institution will be required to comply with the request for information, assistance or access within a reasonable timescale set by HEFCW (which will be set out in the Direction). In the event of non-compliance with this Direction, HEFCW may seek enforcement by means of injunction, with the judicial oversight provided by the court ensuring scrutiny of the exercise of these HEFCW powers.

16. Where an institution receives an allegation which includes an element in respect of the charging of excess fees, the governing body of the institution will be required to inform HEFCW of the details of the complaint at the earliest reasonable opportunity, even if the allegation has been referred to the Office of the Independent Adjudicator for Higher Education (OIA) or the Competition and Markets Authority (CMA). This is because HEFCW has a duty under Section 15(1)(a) of The 2015 Act to

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[www.hefcw.ac.uk/working\\_with\\_he\\_providers/institutional\\_assurance/allegations\\_concerning\\_institutions.aspx](http://www.hefcw.ac.uk/working_with_he_providers/institutional_assurance/allegations_concerning_institutions.aspx)



monitor institutions' compliance with fee limits. In addition, HEFCW may liaise with the OIA or the CMA, as relevant, to ensure that information is shared as required. Where HEFCW receives an allegation in respect of the charging of excess fees from an individual (or group of individuals), the individual will be expected to have pursued the issue via the institution's procedures in the first instance.

17. Where HEFCW is satisfied that the governing body of an institution has failed to comply with section 10(1) of The 2015 Act in relation to limits on student fees (i.e. it has charged fees in excess of those set out in the relevant fee and access plan), section 11 of The 2015 Act states that HEFCW may take action to rectify the situation by issuing a Compliance and Reimbursement Direction to direct the governing body of the institution to do either or both of the following:
  - a. To comply with section 10(1) of the Higher Education (Wales) Act in order to ensure that the regulated course fees do not exceed the applicable fees limit.
  - b. To reimburse excess fees paid to the institution.
18. The stages of this intervention process that are provided for under sections 42 to 44 of The 2015 Act and the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>10</sup> are outlined below, together with the associated checks and balances. However, as set out in the section on Purpose and Principles above, HEFCW will initially engage with institutions through a partnership approach in order to address issues in respect of the charging of excess fees

### **Prior to Intervention**

19. Where an issue in respect of the charging of excess fees has been brought to HEFCW's attention, HEFCW will contact the Accountable Officer of the institution (normally the Head of the institution) to discuss and verify the issue and to clarify what actions have already been taken to comply and to reimburse any excess fees (all correspondence at this informal stage will be copied to the Clerk to the governing body and Chair of the governing body). Where actions have not yet been taken by the institution, a reasonable timescale will be agreed for the institution to comply and to reimburse the excess fees that have been charged. In agreeing this timescale, it should be noted that HEFCW must balance the institution's view regarding the reasonableness of any timescale with the need to reimburse students and their sponsors at the earliest reasonable opportunity.
20. Where an allegation in relation to the charging of excess fees has been raised with the OIA or CMA prior to being relayed to HEFCW, HEFCW may await the outcome of the OIA or CMA processes, prior to initiating formal intervention, in order to avoid unnecessary duplication of action. Whilst HEFCW will seek to avoid unnecessary duplication, it should be

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<sup>10</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

noted 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. HEFCW will liaise closely with the OIA or CMA in such circumstances and may choose to initiate formal intervention prior to the completion of these bodies' processes if this is considered to be necessary to address serious non-compliance issues. Where HEFCW is to liaise with the OIA or CMA, HEFCW would advise the Accountable Officer of the institution at an early stage whether HEFCW is to await the outcome of OIA or CMA processes. HEFCW reserves the right to initiate action in parallel to the OIA or CMA, where necessary to address serious non-compliance.

21. HEFCW will normally only initiate formal intervention where an institution has failed to take appropriate action to comply and reimburse excess fees within an agreed timescale. Where serious failures are identified, such as repeated, widespread or systemic instances of the charging of excess fees, or where there is evidence of a flagrant disregard for the fee levels set out in an agreed Fee and Access Plan, HEFCW may decide that it is necessary to initiate formal intervention at an early stage. HEFCW will be mindful of the circumstances of the case when considering formal intervention, including the institution's explanation of why excess fees were charged (e.g. administrative error); the likelihood of the institution addressing the issue voluntarily if given further time; the number of students affected; the extent to which fees have been overcharged; and any other relevant factors.

### **The Intervention Process**

22. When intervening, for the purpose of clarity, all communication from HEFCW in respect of intervention will clearly state the stage and any sub-element of the intervention process to which it relates.

#### **Stage 1: Warning Notice**

23. Before HEFCW can proceed to issue a Compliance and Reimbursement Direction to an institution, HEFCW must provide the governing body of that institution with a warning notice (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). The warning notice will:
  - a. Set out the proposed Compliance and Reimbursement Direction;
  - b. State HEFCW's reasons for proposing to give it;
  - c. Inform the governing body that it may make representations about the proposed Compliance and Reimbursement Direction;
  - d. Specify the period from the date of issue within which, and the way in which, representations may be made.

Checks and balances

24. From issue of the warning notice, governing bodies will have up to 40 days to make representations in writing to HEFCW, with all representations to be sent to the HEFCW Chief Executive. Where representations are not received, no Compliance and Reimbursement Direction will be issued until after this 40 day period.
25. Where representations are received, HEFCW will undertake to review these and decide on whether to issue a Compliance and Reimbursement Direction within 40 days of receipt of the representations, except where the submission of additional information is required in order for HEFCW to be able to adequately consider representations. In such instances, the additional information will be requested within 28 days of receipt of the representations and should be submitted by the institution within 28 days of this HEFCW request, in order for a decision to be made within 60 days of receipt of the original representations. Where representations are received, no Compliance and Reimbursement Direction will be issued until after the completion of this process.
26. Decisions regarding the issuing of a Compliance and Reimbursement Direction will be made by the HEFCW Chief Executive. Where a decision is taken to not issue a Compliance and Reimbursement Direction, HEFCW will send a notice to the governing body within 14 days of that decision to inform them of the decision and the reasons for this.

**Stage 2: Compliance and Reimbursement Direction**

27. When issuing the Compliance and Reimbursement Direction to an institution (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), Section 43 of The 2015 Act requires that HEFCW provide a statement to the governing body of that institution. The statement will:
  - a. Set out HEFCW's reasons for issuing the Compliance and Reimbursement Direction;
  - b. Inform the governing body that it may apply for a review of the Compliance and Reimbursement Direction, providing information on the grounds for review, the review process and details of to whom an application for review should be made; and
  - c. Include any other prescribed information set out under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 at Regulation 6, i.e. the date of issue of the notice or direction; when the notice or direction is to be treated as having been given; the grounds in Regulation 7 on which an application for a review may be made; the procedure in Regulation 8 that a governing body must follow in order to apply for a review; and the name and address of the Review Panel to whom an application for a review must be made.

28. The Compliance and Reimbursement Direction that is issued may specify:
- a. The steps that are (or are not) to be taken by the governing body for the purpose of compliance with section 10(1);
  - b. The manner in which reimbursement of excess fees is to be, or may be, effected.

The Compliance and Reimbursement Direction may be varied or revoked by the issue of a later Direction.

29. Regulation 4 under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>11</sup> states that a notice or Direction specified in Section 41(1) of The 2015 Act is to be treated as having been given on the day that the first of the following events occurs:
- a. The governing body notifies HEFCW in writing that it accepts the Compliance and Reimbursement Direction;
  - b. The time limit to apply for a Review of the Compliance and Reimbursement Direction under Section 44 of The 2015 Act has expired and the governing body has not applied for a review;
  - c. A review of the Compliance and Reimbursement Direction under Section 44 of The 2015 Act has concluded and HEFCW has notified the governing body in writing that the Direction stands.
30. Once a Compliance and Reimbursement Direction is given (see paragraph 29 above), HEFCW must immediately provide a copy of the Direction to Welsh Ministers. Whilst a Compliance and Reimbursement Direction will not be shared with Welsh Ministers until the point at which it is given, HEFCW will need to provide briefing to Welsh Government officials (and hence to Welsh Ministers) at the point of first issuing the Direction. The Compliance and Reimbursement Direction will also be published on the HEFCW website [www.hefcw.ac.uk](http://www.hefcw.ac.uk) within seven days of being given and will remain on the website until either the Direction is revoked by HEFCW, or HEFCW is satisfied that the Direction has been complied with.

#### Checks and balances

31. Where HEFCW issues an institution with a Compliance and Reimbursement Direction, Section 44 of The 2015 Act provides the ability for the governing body of that institution to apply for a review of the Direction.
32. The Higher Education Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 specify that an application for a review may be made on one or more of the following grounds:

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<sup>11</sup> <http://gov.wales/docs/dcells/consultation/150317-fee-access-regs.pdf>

- a. The governing body presents a material factor for consideration to which, for good reason, it had not previously drawn HEFCW's attention;
- b. The governing body considers that HEFCW has disregarded a material factor it should have considered;
- c. The governing body considers that the Direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

Regulation 8 states that applications for review must be made within 40 days of issue of the Compliance and Reimbursement Direction, with applications made in writing as outlined in the Direction. The application for review must specify the grounds for review and include: a copy of the direction to be reviewed; a copy of the statement issued in accordance with Section 43 of The 2015 Act (see Paragraph 27); and information in support of the application. It should be noted that, under Regulation 7(2), an application for a review of the Compliance and Reimbursement Direction cannot be made where a governing body has notified HEFCW in writing that it accepts the Direction.

33. The review is to be carried out by a Person, or Panel of persons, appointed by the Welsh Ministers. Upon receiving an application for a review, the Person or Panel appointed by the Welsh Ministers will provide the governing body and HEFCW with an anticipated timetable for completing the review. The review Panel will give HEFCW details of the Direction to be reviewed, details of the grounds on which the review application has been made and a copy of the information supplied by the governing body in support of the application for review. The review Panel may make a written request for further information from either HEFCW or the governing body for the purposes of the review. Any request for further information made by the Panel will be sent to HEFCW and the governing body at the same time. HEFCW or the governing body will be required to provide any information requested by the Panel within 28 days of the issue of the request if it is to be considered. Under Regulation 9(8), the Panel will consider whether it is appropriate to allow representations from either HEFCW or the governing body in respect of any further information submitted to it in response to its request for such information; and if it considers it appropriate to allow representations, it will notify HEFCW and the governing body accordingly. The review Panel will ensure that both HEFCW and the governing body are in receipt of all information submitted by the other party.
34. The review Panel will take account of the requested information submitted by HEFCW and the governing body in making its decision. The Panel will prepare a written report that is sent to both HEFCW and the governing body at the same time. HEFCW will take account of the review Panel's report and reconsider its decision to issue the Direction. HEFCW will then notify the governing body in writing within 40 days as to whether the Direction stands or not, and provide reason for that decision. If HEFCW's decision is that the Direction should stand, that decision will be binding on the governing body of the institution.

35. Under Section 12 of The 2015 Act, HEFCW may issue guidance about the steps to be taken for the purpose of complying with a Compliance and Reimbursement Direction. Before issuing such guidance, HEFCW will consult the governing bodies of all regulated institutions, as well as any other institutions in Wales that provide higher education and that are charities, which HEFCW considers to be appropriate. A governing body to which a Compliance and Reimbursement Direction has been issued must take account of such guidance.

### **Stage 3: Compliance and Reimbursement**

36. The governing body of the institution will be expected to consider the Compliance and Reimbursement Direction at the earliest possible opportunity, in order that it can agree measures to reduce the fee level to ensure that it complies with Section 10(1) of The 2015 Act (i.e. that the fee level does not exceed the applicable fee limit). The governing body will be expected to write to all affected persons within 60 days of the Direction being given (see paragraph 29).
37. In instances where the Compliance and Reimbursement Direction is not given until after students have commenced their courses, and excess fees have already been charged, it is likely that excess fees will need to be refunded. The mechanism for refunding excess fees will be dependent on whether the fees are self-financed or paid on students' behalf via the statutory student support system.
- For self-financing students, excess fees will need to be refunded to the students directly or an arrangement made with the students whereby future fees are reduced in order to take account of the overpayment.
  - For students in receipt of statutory student support, an overpayment of support may be recovered via the Student Loans Company (SLC). The institution would be expected to notify the SLC of the required reduction in fees, thereby allowing the automatic recovery of overpaid fee support by the SLC on behalf of each UK administration.
38. Unless otherwise agreed by HEFCW, excess fees are to be repaid, or recovery arrangements put in place via the SLC, within 60 days of the Compliance and Reimbursement Direction being given (see paragraph 29).
39. The governing body will be expected to notify HEFCW in writing once compliance and reimbursement actions have been completed. Following completion of the compliance and reimbursement actions by the institution, HEFCW will seek to consider the information from the governing body regarding compliance within 14 days. If requested by the institution's governing body, HEFCW will give written notice to the governing body stating whether they are satisfied that it has complied

with the Direction (or with a particular requirement of the Direction). Once satisfied, HEFCW will remove the Compliance and Reimbursement Direction from its website at the earliest opportunity and at most within 7 days.

#### **Stage 4: Enforcement**

40. Where HEFCW issues a Compliance and Reimbursement Direction to the governing body of an institution, the governing body must comply with the Direction (subject to the outcome of any review of the Direction - see Stage 2 above). In the event that a governing body fails to comply satisfactorily (in HEFCW's opinion) with the Direction within the above timescale, the Direction will be enforceable by injunction in accordance with section 45 of The 2015 Act. HEFCW decisions on whether to proceed to injunction will take account of the particular circumstances of the case. Decisions on enforcement will be taken in line with the general principles of intervention outlined on pages 8 to 12 of this document.
41. In the event of persistent and/or serious non-compliance, HEFCW may consider the refusal to approve a new Fee and Access Plan and/or the withdrawal of approval of an existing Fee and Access Plan under Sections 37 and 39 of The 2015 Act respectively. The circumstances under which HEFCW will consider escalating its intervention in respect of Limits on Student Fees to the use of these powers under Sections 37 or 39 of The 2015 Act are outlined below.

#### **Escalation of Intervention in respect of Limits on Student Fees**

42. HEFCW may consider escalation of intervention in respect of Limits on Student Fees to a Refusal to Approve a New Fee and Access Plan under Section 37 of The 2015 Act under the following circumstances:
  - **Where an institution has persistently failed to comply with Student Fee Limits.** Whilst escalation of intervention would be determined on a case-by-case basis, such persistent failure to comply with Student Fee Limits would generally take the form of multiple instances of charging of excess fees (including the repetition or continuation of the same issue) over a period of time, indicating a serious or systemic weakness in institutional processes. The level of overcharging in each individual case need not necessarily be substantial to indicate a systemic weakness. It should be noted that the escalation of intervention would normally only be undertaken where an institution has failed to show voluntary progress to address the identified serious/systemic failings within a reasonable period of time set by HEFCW.
  - **Where serious non-compliance with Student Fee Limits has been identified** that warrants more severe intervention than the issue of a Compliance and Reimbursement Direction, but where the withdrawal of a Fee and Access Plan would be excessive. Whilst escalation of intervention would be determined on a case-

by-case basis, the judgement of what constitutes serious non-compliance would be based on the extent to which non-compliance has been, or is suspected to have been, intentional or fraudulent, and/or on the potential impact of the failure to comply on a range of stakeholders and issues (e.g. students, staff, institutional sustainability, public finances and wider impact on the higher education sector etc.). Serious non-compliance might include, for example, circumstances in which HEFCW has clear reason to believe that an institution has shown blatant disregard for Student Fee Limits (e.g. advertising fees at an excess level, complicity in overcharging by senior management or governing body members etc.), but might comply were pressure to be exerted on the institution.

43. In the most serious circumstances, HEFCW may instead (or additionally) consider escalation of intervention in respect of Limits on Student Fees to the Withdrawal of an Approved Fee and Access Plan under Section 39 of The 2015 Act. This action would only be taken in the following extreme circumstances, where it is clearly evident that other interventions will not be effective:

- **Where an institution has persistently failed to comply with Student Fee Limits** and where the withdrawal of a Fee and Access Plan would be needed to protect students, their sponsors and/or other stakeholders from ongoing institutional failure to comply. Whilst escalation of intervention would be determined on a case-by-case basis, the circumstances when this approach might be used include, for example:
  - Where the institution has failed to comply with Student Fee Limits on multiple occasions (including the repetition or continuation of the same issue) over a period of time and HEFCW has clear reason to believe that serious ongoing management or governance failures will prevent compliance for the foreseeable future.
  - Where the institution has failed to comply with Student Fee Limits on multiple occasions (including the repetition or continuation of the same issue) over a period of time and HEFCW has clear reason to believe that the institution will continue to show blatant disregard for Student Fee Limits.
  - Where the institution has failed to comply with Student Fee Limits on multiple occasions (including the repetition or continuation of the same issue) over a period of time and HEFCW has clear reason to believe that the institution has undertaken related actions that are fraudulent or illegal.
- **Where an institution has failed to comply with a Compliance and Reimbursement Direction** and where the withdrawal of a Fee and Access Plan would be needed to protect students, their sponsors and/or other stakeholders. Whilst escalation of intervention would be determined on a case-by-case basis, the

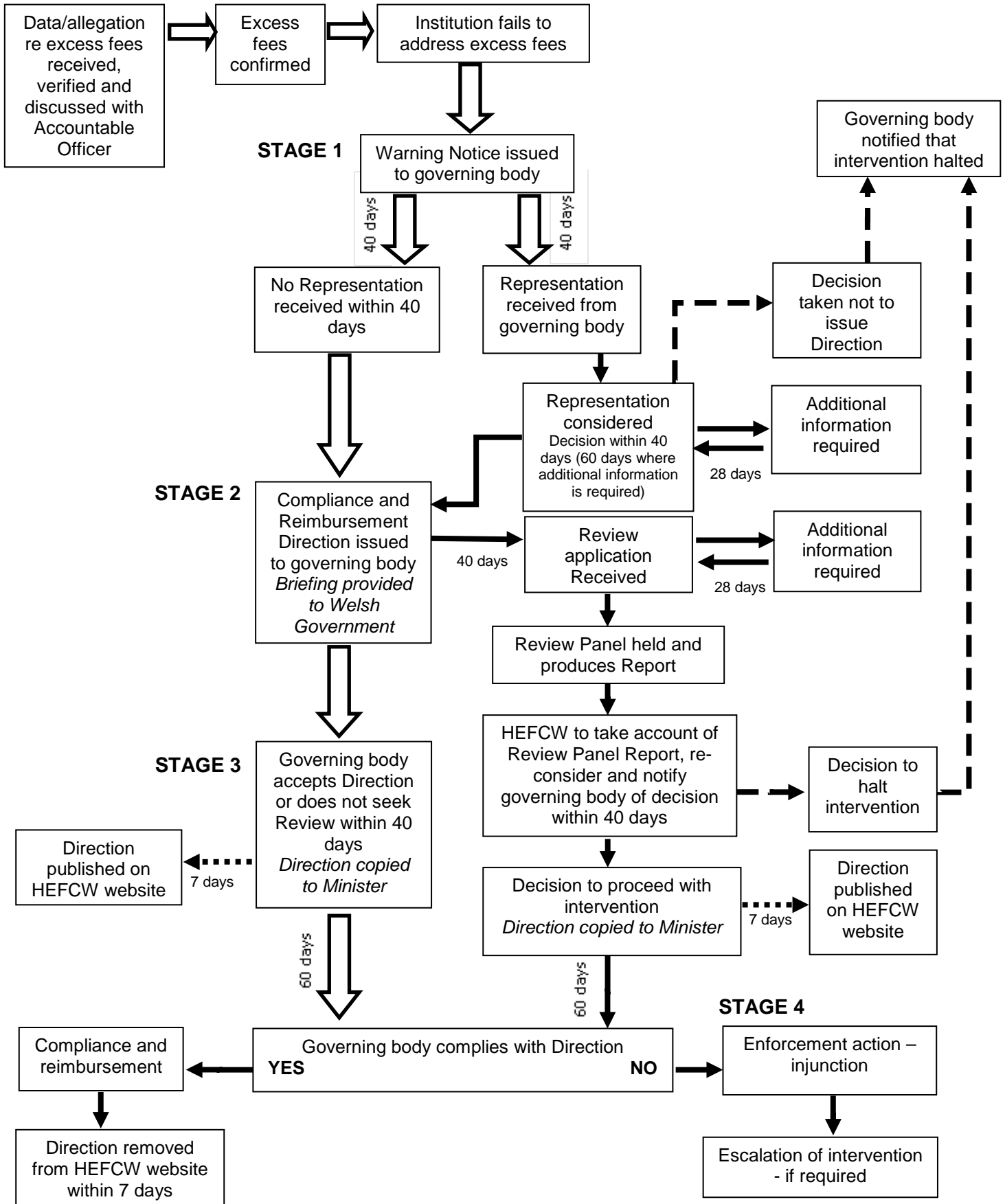


circumstances when this approach might be used include, for example:

- Where the institution has failed to comply with a Compliance and Reimbursement Direction and HEFCW has clear reason to believe that the institution will continue to show blatant disregard for Student Fee Limits.
  - Where the institution has failed to comply with a Compliance and Reimbursement Direction and any associated enforcement action through injunction.
  - Where the institution has failed to comply with a Compliance and Reimbursement Direction and HEFCW has clear reason to believe that the institution will persist in its refusal to engage with HEFCW due to serious management or governance failures.
  - Where the institution has failed to comply with a Compliance and Reimbursement Direction and HEFCW has clear reason to believe that the institution has undertaken related actions that are fraudulent or illegal.
44. Interventions under Sections 37 and 39 of The 2015 Act would only be undertaken *in extremis*, where HEFCW has clear reason to believe that intervention through the issue of a Compliance and Reimbursement Direction is unlikely to be sufficient or successful. Interventions under Sections 37 and 39 of The 2015 Act are outlined in this Statement of Intervention from pages 65 and 79 respectively.

**Flow Chart: Compliance and Reimbursement Intervention Process**

Intervention may be halted at any point if the institution complies.



## **Intervention in Respect of Failure to Comply with General Requirements of an Approved Fee and Access Plan** (It is anticipated that this will come into effect from 1 September 2017)

### **Basis for Intervention**

45. This section relates to HEFCW intervention in respect of failure to comply with general requirements of an approved Fee and Access Plan through Directions in Respect of a Failure to comply with General Requirements of Approved Plan. This intervention applies where HEFCW are satisfied that:
- There has been a failure by the governing body to comply with a general requirement of a Fee and Access Plan relating to the institution; and at the time of the failure, the Fee and Access Plan was approved under Section 7 of The 2015 Act; or
  - The governing body is likely to fail to comply with a general requirement of the institution's approved Fee and Access Plan.

#### **Note**

**The general requirements of an approved Fee and Access Plan** are outlined under Section 6 of The Act and Regulations 5 and 6 of the Higher Education (Fee and Access Plans)(Wales) Regulations 2015. These requirements relate to the promotion of equality of opportunity and higher education. These include provisions requiring the governing body to:

- a. Take measures to attract applications from prospective students who are members of under-represented groups (or to secure the taking of such measures).
- b. Take measures to retain students who are members of under-represented groups (or to secure the taking of such measures).
- c. Provide financial assistance to students (or to secure the provision of such assistance).
- d. Make available to students or prospective students information about financial assistance available to students from any source (or to secure that such assistance is available).

The Fee and Access Plan must also:

- a. Set out objectives, with Specific, Measurable, Achievable, Realistic and Time-bound (SMART) measures, relating to the promotion of equality of opportunity and the promotion of higher education.
- b. Set out expenditure in respect of those objectives (i.e. specify the proportion of Fees to be spent on the objectives).

**Note (continued)**

- c. Set out how the governing body is going to monitor: compliance with the provisions of the Plan; and progress in meeting the objectives in the Plan relating to the promotion of equality of opportunity and the promotion of higher education.

- 46. The governing body of an institution is responsible for ensuring that the institution complies with the general requirements of its approved Fee and Access Plan. HEFCW will monitor this compliance (as required at Section 15(1)(b) of The 2015 Act) through its usual approval, monitoring and reporting processes. Further information on these monitoring and reporting processes is provided in Fee and Access Plan Guidance<sup>12</sup>.
- 47. It should be noted that the governing bodies of regulated institutions will also be subject to a compliance duty under Section 16(1) of The 2015 Act, which requires them to provide HEFCW with such information, assistance and access to the institution's facilities as HEFCW reasonably requires for the purposes of monitoring compliance with the general requirements of its approved Fee and Access Plan. Where HEFCW is satisfied that a governing body has failed to provide such information, under Section 16(2), HEFCW may direct the governing body to take (or not to take) specified steps for the purpose of securing the provision of the required information, assistance or access.

**Securing Information, Assistance or Access**

In the event of failure to provide information, assistance or access, HEFCW will attempt to resolve the situation through discussion with the institution's Accountable Officer. Should that fail to resolve the issue, HEFCW may direct the governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is needed, through the issuing of a **Direction to Enforce Compliance with the Duty to Cooperate** for the Purpose of Monitoring and Evaluating Compliance and Effectiveness under Section 16(2) of The 2015 Act (sent to the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer).

A Direction to Enforce Compliance with the Duty to Cooperate for the purpose of monitoring and evaluating compliance and effectiveness is not subject to the warning and review procedure set out at Sections 42 to 44 of The 2015 Act. Once such a Direction is issued the institution will be required to comply with the request for information, assistance or access within a reasonable timescale set by HEFCW (which will be set out in the Direction). In the event of non-compliance with this Direction, HEFCW may seek enforcement by means of injunction, with the judicial oversight by the court ensuring scrutiny of the exercise of these HEFCW powers.

<sup>12</sup> [www.hefcw.ac.uk](http://www.hefcw.ac.uk)

48. Where HEFCW are satisfied that the governing body of an institution has failed to comply with a general requirement of its Fee and Access Plan, or is likely to fail to comply with a general requirement of its approved Plan, Section 13(1) of The 2015 Act states that HEFCW may give a Direction in Respect of Failure to Comply with General Requirements of Approved Plan. This Direction would require the governing body to take (or not to take) specified steps to deal with or prevent its failure to comply. It should be noted that HEFCW may not give such a Direction if they are satisfied that the governing body has taken all reasonable steps to comply with the requirement in question.

**Note**

**HEFCW will normally deem a governing body to have taken all reasonable steps to comply** where it is evident that sufficient effort has been made by the institution to deliver the requirement but where factors outside the institution's control (e.g. external political or economic factors and issues arising from collaboration with another institution) have resulted in non-compliance.

For example, the governing body of an institution may commit in its approved Fee and Access Plan to provide bursary assistance to a certain number of students. The actual number of students which subsequently receive a bursary is lower than the number set out in the Plan because the number of eligible students applying for the bursary is lower than expected, despite the bursary being widely publicised. In that scenario, HEFCW might, after considering the details of the actions the institution had taken to make prospective students aware of the availability of the bursary, be satisfied that the governing body had taken all reasonable steps to comply with the general requirement.

49. HEFCW may intervene in respect of failure to comply with general requirements of an approved Fee and Access Plan whilst the approved Fee and Access Plan is in force or at a time when the Plan is no longer in force, provided the Plan was in force at the time of failure (or likelihood of failure).
50. The stages of this intervention process that are provided for under sections 42 to 44 of The 2015 Act and the Fee and Access Plans (Notices and Directions)(Wales) Regulations 2015<sup>13</sup> are outlined below, together with the associated checks and balances. However, as set out in the section on Purpose and Principles above, HEFCW will initially engage with institutions through a partnership approach in order to discuss what steps have been, and/or are being, taken to comply with the general requirements of the approved Fee and Access plan.

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<sup>13</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

## Prior to Intervention

51. Where an issue in respect of a failure to comply with a general requirement of an approved Fee and Access Plan has been identified, HEFCW will contact the Accountable Officer of the institution (normally the Head of the institution) to discuss the issue and to clarify what actions have already been taken to comply and to understand any factors that may have impacted on compliance (all correspondence at this informal stage will be copied to the Clerk to the governing body and Chair of the governing body). Where action to address identified compliance issues is possible, either within the lifetime of the approved Fee and Access Plan or subsequently, HEFCW may request an institution take such action as is needed to enable compliance within a reasonable timescale set by HEFCW. In agreeing this timescale, it should be noted that HEFCW must balance the institution's view regarding the reasonableness of any timescale with the interests of students and their sponsors and the need to address compliance at the earliest reasonable opportunity.
52. HEFCW will normally only initiate formal intervention where an institution has failed to take appropriate action to comply with the general requirements of its approved Fee and Access Plan within an agreed timescale. However, where serious failures are identified, such as an inadequate effort by the institution to deliver against Plan requirements or repeated failure to comply, HEFCW may decide that it is necessary to initiate formal intervention at an early stage. HEFCW will be mindful of the circumstances of the case when considering formal intervention, including the institution's explanation of why it has failed to comply; the likelihood of the institution addressing the issue voluntarily if given further time; and any other relevant factors.

## The Intervention Process: Directions in Respect of a Failure to Comply with General Requirements of Approved Plan

53. When intervening, for the purpose of clarity, all communication from HEFCW in respect of intervention will clearly state the stage and any sub-element of the intervention process to which it relates.

### Stage 1: Warning Notice

54. Where an institution has failed to comply with general requirements of its approved Fee and Access Plan and has not taken all reasonable steps to comply, HEFCW may initiate the intervention process in respect of failure to comply with general requirements of an approved plan. Before HEFCW proceeds to issue a Direction in Respect of Failure to Comply with General Requirements of Approved Plan to an institution HEFCW will provide the governing body of that institution with a Warning Notice. The Warning Notice will:
  - a. Set out the proposed Direction in Respect of Failure to Comply with General Requirements of Approved Plan;

- b. State HEFCW's reasons for proposing to give it;
- c. Inform the governing body that it may make representations about the proposed Direction;
- d. Specify the period from the date of issue within which, and the way in which, representations may be made.

Checks and balances

- 55. From issue of the Warning Notice, institutions will have up to 40 days to make representations to HEFCW, with all representations to be sent to the HEFCW Chief Executive. Where representations are not received, no Direction in Respect of Failure to Comply with General Requirements of Approved Plan will be issued until after the completion of this 40 day period.
- 56. Where representations are received, HEFCW will undertake to review these and decide on whether to issue a Direction in Respect of a Failure to Comply with General Requirements of Approved Plan within 40 days of receipt of the representations, except where the submission of additional information is required in order for HEFCW to be able to adequately consider representations. In such instances, the additional information will be requested within 28 days of receipt of the representations and should be submitted by the institution within 28 days of this HEFCW request, in order for a decision to be made within 60 days of receipt of the original representations. Where representations are received no Direction in Respect of a Failure to Comply with General Requirements of Approved Plan will be issued until after the completion of this process.
- 57. Decisions regarding the issuing of a Direction in Respect of Failure to Comply with General Requirements of Approved Plan will be made by the HEFCW Chief Executive. Where a decision is taken to not issue a Direction in Respect of Failure to Comply with General Requirements of Approved Plan, HEFCW will send a notice to the governing body within 14 days of that decision to inform them of the decision and the reasons for this.

**Stage 2: The Direction in respect of Failure to Comply with General Requirements of Approved Plan**

- 58. When issuing the Direction in Respect of Failure to Comply with General Requirements of Approved Plan to an institution (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), Section 43 of The 2015 Act requires that HEFCW provide a statement to the governing body of that institution. The statement will:
  - a. Set out HEFCW's reasons for issuing the Direction in Respect of Failure to Comply with General Requirements of Approved Plan;

- b. Inform the governing body that it may apply for a review of the Direction in Respect of Failure to Comply with General Requirements of Approved Plan, providing information on the grounds for review, the review process and details of to whom an application for review should be made; and
  - c. Include any other prescribed information set out under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 at Regulation 6, i.e. the date of issue of the notice or direction; when the notice or direction is to be treated as having been given; the grounds in Regulation 7 on which an application for a review may be made; the procedure in Regulation 8 that a governing body must follow in order to apply for a review; and the name and address of the Review Panel to whom an application for a review must be made.
59. The Direction in Respect of Failure to Comply with General Requirements of Approved Plan that is issued may specify the steps that are (or are not) to be taken by the governing body for the purpose of dealing with or preventing the failure to comply. The Direction in Respect of Failure to Comply with General Requirements of Approved Plan may be varied or revoked by the issue of a later Direction.
60. Regulation 4 under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>14</sup> states that a notice or Direction specified in Section 41(1) of The 2015 Act is to be treated as having been given on the day that the first of the following events occurs:
- a. The governing body notifies HEFCW in writing that it accepts the Direction in Respect of Failure to Comply with General Requirements of Approved Plan;
  - b. The time limit to apply for a Review of the Direction in Respect of Failure to Comply with General Requirements of Approved Plan under Section 44 of The 2015 Act has expired and the governing body has not applied for a review;
  - c. A review of the Direction in Respect of Failure to Comply with General Requirements of Approved Plan under Section 44 of The 2015 Act has concluded and HEFCW has notified the governing body in writing that the Direction stands.

#### Checks and balances

61. Where HEFCW issues an institution with a Direction in Respect of Failure to Comply with General Requirements of Approved Plan, Section 44 of The 2015 Act provides the ability for the governing body of that institution to apply for a review of the Direction.

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<sup>14</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)



62. The Higher Education Fee and Access Plans (Notices and Directions)(Wales) Regulations 2015<sup>15</sup> specify that an application for a review may be made only on the following grounds:
- a. The governing body presents a material factor for consideration to which, for good reason, it had not previously drawn HEFCW's attention;
  - b. The governing body considers that HEFCW has disregarded a material factor it should have considered;
  - c. The governing body considers that the Direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

Regulation 8 of the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 states that applications for review must be made within 40 days of issue of the Direction in Respect of Failure to Comply with General Requirements of Approved Plan, with applications made in writing as outlined in the Direction. The application for review must specify the grounds for review and include: a copy of the direction to be reviewed; a copy of the statement issued in accordance with Section 43 of The 2015 Act; and information in support of the application. It should be noted that, under Regulation 7(2), an application for a review of the Direction in Respect of Failure to Comply with General Requirements of Approved Plan cannot be made where a governing body has notified HEFCW in writing that it accepts the Direction.

63. The review is to be carried out by a Person, or Panel of persons, appointed by the Welsh Ministers. Upon receiving an application for a review, the Person or Panel appointed by the Welsh Ministers will provide the governing body and HEFCW with an anticipated timetable for completing the review. The review Panel will give HEFCW details of the Direction to be reviewed, details of the grounds on which the review application has been made and a copy of the information supplied by the governing body in support of the application for review.
64. The review Panel may make a written request for further information from either HEFCW or the governing body for the purposes of the review. Any request for further information made by the Panel will be sent to HEFCW and the governing body at the same time. HEFCW or the governing body will be required to provide any information requested by the Panel within 28 days of the issue of the request if it is to be considered. Under Regulation 9(8), the Panel will consider whether it is appropriate to allow representations from either HEFCW or the governing body in respect of any further information submitted to it in response to its request for such information; and if it considers it appropriate to allow representations, it will notify HEFCW and the governing body accordingly. The review Panel will ensure that both HEFCW and the governing body are in receipt of all information submitted by the other party.

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<sup>15</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

65. The review Panel will take account of the requested information submitted by HEFCW and the governing body in making its decision. The Panel will prepare a written report that is sent to both HEFCW and the governing body at the same time. HEFCW will take account of the review Panel's report and reconsider its decision to issue the Direction. HEFCW will then notify the governing body in writing within 40 days as to whether the Direction stands or not, and provide reason for that decision. If HEFCW's decision is that the Direction should stand, that decision will be binding on the governing body of the institution.

### **Stage 3: Compliance**

66. The governing body of the institution will be expected to consider the Direction in Respect of Failure to Comply with General Requirements of Approved Plan at the earliest possible opportunity, in order that it can agree measures to comply with the requirements of its approved Fee and Access Plan. The governing body will be expected to initiate the necessary actions within 60 days of the Direction being given (see paragraph 60).
67. The governing body will be expected to notify HEFCW in writing that the Direction in Respect of Failure to Comply with General Requirements of Approved Plan actions have been completed. Following completion of the Direction actions by the institution, HEFCW will seek to consider the information from the governing body regarding compliance within 14 days. If requested by the institution's governing body, HEFCW will give written notice to the governing body stating whether they are satisfied that it has complied with the Direction (or with a particular requirement of the Direction).

### **Stage 4: Enforcement**

68. Where HEFCW issues a Direction in Respect of Failure to Comply with General Requirements of Approved Plan to the governing body of an institution, the governing body must comply with the Direction (subject to the outcome of any review of the Direction - see Stage 2 above). In the event that a governing body fails to comply satisfactorily (in HEFCW's opinion) with the Direction within the above timescale, the Direction will be enforceable by injunction in accordance with section 45 of The 2015 Act. HEFCW decisions on whether to proceed to injunction will take account of the particular circumstances of the case. Decisions on enforcement will be taken in line with the general principles of intervention outlined on pages 8 to 12 of this document.
69. As a means to enforce compliance with a Direction in Respect of Failure to Comply with General Requirements of Approved Plan, HEFCW may consider the refusal to approve a new Fee and Access Plan under Section 37 of The 2015 Act as an alternative to injunction. The circumstances, under which HEFCW will consider use of the powers

under Section 37 of The 2015 Act, rather than injunction, are outlined below.

70. In the event of persistent and/or serious non-compliance, HEFCW may consider the refusal to approve a new Fee and Access Plan and/or the withdrawal of approval of an existing Fee and Access Plan under Sections 37 and 39 of The 2015 Act respectively. The circumstances under which HEFCW will consider escalating its intervention in respect of Failure to Comply with General Requirements of Approved Plan to the use of these powers under Section 37 or 39 of The 2015 Act are outlined below.

#### **Escalation of Intervention in respect of Failure to Comply with General Requirements of Approved Plan**

71. HEFCW can enforce compliance with a Direction in respect of Failure to Comply with General Requirements of Approved Plan through the issue of a Notice of Refusal to Approve a New Fee and Access Plan (under Section 37 of The 2015 Act) as an alternative to enforcement through injunction. This alternative means of enforcement would normally only be used under the types of circumstances outlined below:

- **Where an institution has not complied with a Direction in respect of Failure to Comply with General Requirements of Approved Plan and there is clear reason to believe that it will not comply with an injunction** such that additional pressure must be brought to bear in order to enforce compliance. Whilst escalation of intervention would be determined on a case-by-case basis, the belief that an institution will not comply with an injunction might be based on, for example:
  - Blatant disregard by the institution's governing body for compliance with the Direction in respect of Failure to Comply with General Requirements of Approved Plan (e.g. a refusal to discuss; ongoing failure to come to a decision on compliance; or a decision not to comply);
  - Evidence of previous non-compliance with an injunction; or
  - An ongoing unwillingness, or inability, of the governing body to engage with HEFCW.

72. HEFCW may also consider escalation of intervention in respect of Failure to Comply with General Requirements of Approved Plan to a Refusal to Approve a New Fee and Access Plan under Section 37 of The 2015 Act under the following circumstances:

- **Where an institution has persistently failed to comply with General Requirements of Approved Plan.** Whilst escalation of intervention would be determined on a case-by-case basis, such persistent failure to comply with General Requirements of Approved Plan would generally take the form of multiple instances

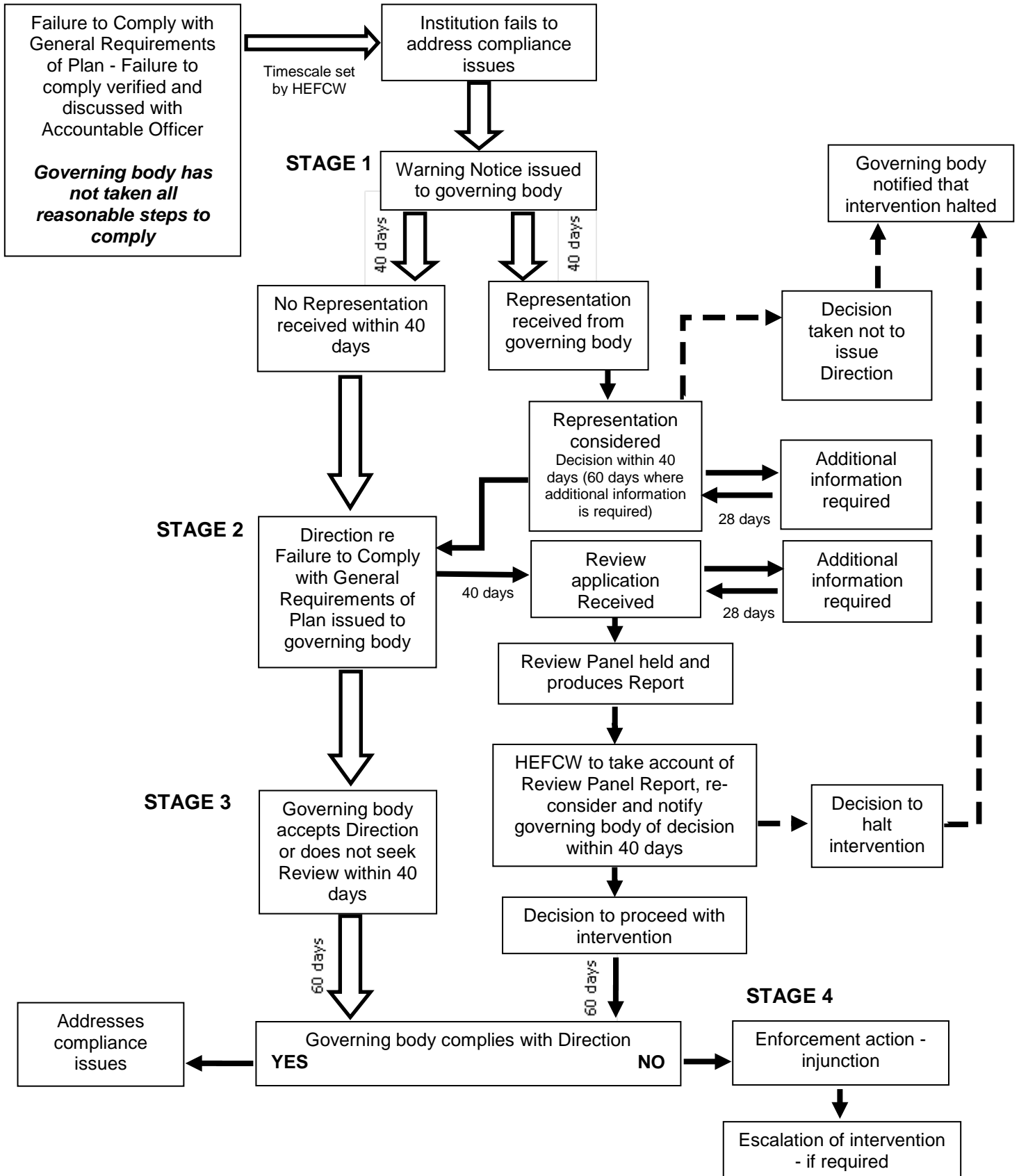
of failure to comply with the General Requirements of Approved Plan (including the repetition or continuation of the same issue) over a period of time, indicating a serious weakness in institutional management and governance, or an ongoing disregard for the need to deliver on the General Requirements of Approved Plan. It should be noted that the escalation of intervention would normally only be undertaken where an institution has failed to show voluntary progress to address the identified failings within a reasonable period of time set by HEFCW.

- **Where serious non-compliance with General Requirements of Approved Plan has been identified** that warrants more severe intervention than the issue of a Direction in respect of Failure to Comply with General Requirements of Approved Plan, but where the withdrawal of a Fee and Access Plan would be excessive. Whilst escalation of intervention would be determined on a case-by-case basis, the judgement of what constitutes serious non-compliance would be based on the extent to which non-compliance has been, or is suspected to have been, intentional or fraudulent, and/or on the potential impact of the failure to comply on a range of stakeholders and issues (e.g. students, staff, institutional sustainability, public finances and wider impact on the higher education sector etc.). Serious non-compliance might include, for example, circumstances in which HEFCW has clear reason to believe that an institution has shown blatant disregard for delivery of the General Requirements of Approved Plan but might comply were sufficient pressure to be exerted.
73. In the most serious circumstances, HEFCW may instead (or additionally) consider escalation of intervention in respect of Failure to Comply with General Requirements of Approved Plan to a Withdrawal of an Approved Fee and Access Plan under Section 39 of The 2015 Act. This action would only be taken in the following extreme circumstances, where it is clearly evident that other interventions will not be effective:
- **Where an institution has persistently failed to comply with the General Requirements of Approved Plan** and where the withdrawal of a Fee and Access Plan would be needed to protect students, their sponsors and/or other stakeholders from an ongoing institutional failure to comply. Whilst escalation of intervention would be determined on a case-by-case basis, the circumstances when this approach might be used include, for example:
    - Where the institution has failed to comply with the General Requirements of Approved Plan on multiple occasions (including the repetition or continuation of the same issue) over a period of time and HEFCW has clear reason to believe that serious ongoing management or governance failures will prevent compliance with the General Requirements of Approved Plan for the foreseeable future.

- Where the institution has failed to comply with the General Requirements of Approved Plan on multiple occasions (including the repetition or continuation of the same issue) over a period of time and HEFCW has clear reason to believe that the institution will continue to show blatant disregard for the General Requirements of Approved Plan.
  - Where the institution has failed to comply with the General Requirements of Approved Plan on multiple occasions (including the repetition or continuation of the same issue) over a period of time and HEFCW has clear reason to believe that the institution has undertaken related actions that are fraudulent or illegal.
  - **Where an institution has failed to comply with a Direction in Respect of Failure to Comply with General Requirements of Approved Plan**, and where the withdrawal of a Fee and Access Plan would be needed to protect students, their sponsors and/or other stakeholders. Whilst escalation of intervention would be determined on a case-by-case basis, the circumstances when this approach might be used include, for example:
    - Where the institution has failed to comply with a Direction in Respect of Failure to Comply with General Requirements of an Approved Plan and HEFCW has clear reason to believe that the institution will continue to show blatant disregard for General Requirements of Approved Plan.
    - Where the institution has failed to comply with a Direction in Respect of Failure to Comply with General Requirements of an Approved Plan and any associated enforcement action through injunction.
    - Where the institution has failed to comply with a Direction in Respect of Failure to Comply with General Requirements of an Approved Plan and HEFCW has clear reason to believe that the institution will persist in its refusal to engage with HEFCW due to serious management or governance failures.
    - Where the institution has failed to comply with a Direction in Respect of Failure to Comply with General Requirements of an Approved Plan and HEFCW has clear reason to believe that the institution has undertaken related actions that are fraudulent or illegal.
74. Interventions under Sections 37 and 39 of The 2015 Act would only be undertaken *in extremis*, where HEFCW has clear reason to believe that an injunction is unlikely to be complied with, or where intervention through the issue of a Direction in respect of Failure to Comply with General Requirements of Approved Plan is unlikely to be sufficient or successful. These interventions are outlined in this Statement of Intervention from pages 65 and 79 respectively.

**Flow Chart: The Intervention Process in Respect of Failure to Comply with General Requirements of Approved Plan**

Intervention may be halted at any point if the institution complies.



## Intervention in Relation to Inadequate Quality (In effect from 4 February 2016)

### Basis for intervention

75. This section relates to HEFCW intervention in respect of inadequate quality of higher education provision through Directions and other measures. Sections 19 and 20 of The 2015 Act outline those interventions that apply where HEFCW is satisfied that, in accordance with Section 18 of The 2015 Act:
- a. The quality of education provided by or on behalf of a regulated institution is inadequate or likely to become inadequate; or
  - b. The quality of a particular course of education so provided is inadequate or likely to become inadequate.

#### Note

**Assessment of quality** - Section 17 of The 2015 Act states that HEFCW must make arrangements for the assessment of the quality of education provided in Wales:

- a. by each regulated institution; and
- b. on behalf of each regulated institution.

This encompasses all the education provided by, or on behalf of, a regulated institution (including part-time provision), irrespective of whether that formally constitutes a course that results in a qualification, including modules and bite-size provision.

For quality assessment purposes, education provided outside of Wales is to be treated as provided in Wales if it is part of a course that is provided principally in Wales. Information on HEFCW arrangements for the assessment of the quality of education is provided at [www.hefcw.ac.uk](http://www.hefcw.ac.uk).

**The quality of education** or of a course of education, under the terms of section 18 of The 2015 Act, is deemed to be inadequate if it is not adequate to meet the reasonable needs of those receiving the education or undertaking the course. For the purposes of interventions by HEFCW, details of what is meant by inadequate quality under current quality assessment arrangements are provided at [www.hefcw.ac.uk](http://www.hefcw.ac.uk).

**A regulated institution** is an institution to which an approved fee plan relates. Other bodies can provide all or part of a course on behalf of a regulated institution. In terms of quality assessment, a course is not to be treated as provided on behalf of a regulated institution if provided under arrangements that were made before 1 September 2015 unless the agreement has been re-signed or an addendum added after that date.

### Note (continued)

Under Section 26 of The 2015 Act, an institution is to be treated as a regulated institution where its existing fee and access plan has ceased to be in force, and no new fee and access plan is in force, and a designated course is being provided by, or on behalf of, the institution. A designated course is one that is designated for the purposes of Section 22 of the Teaching and Higher Education Act 1998 by regulations made by the Welsh Ministers under that section.

It should be noted that, in addition to intervention in relation to inadequate quality (as outlined in this Statement of Intervention), Regulation 7 of The Higher Education (Fee and Access Plans) (Wales) Regulations 2015 provides that the quality of education provided by, or on behalf of, the institution must be taken into account by HEFCW when considering approval or rejection of a Fee and Access Plan.

76. Courses provided by another body on behalf of a regulated institution in Wales will be included within HEFCW's new quality of education duties. This is only applicable for those arrangements that came into place on or after 1 September 2015. In terms of quality assessment, a course cannot be classified as being provided on behalf of a regulated institution if the arrangements under which it was provided were made before 1 September 2015, unless the agreement has been re-signed or had an addendum added after that date.
77. HEFCW will be responsible for monitoring and assessing potential issues in relation to inadequate quality or quality that is likely to become inadequate, including through: the quality assessment review process<sup>16</sup>; the statutory inspection of certain courses by Estyn (e.g. initial teacher training); liaison with professional, statutory and regulatory bodies; strategic engagement with institutions<sup>17</sup>; and institutional assurance work including the monitoring of allegations against institutions<sup>18,19</sup>. It should be noted that HEFCW will only initiate intervention based on objective evidence of inadequate quality or quality that is likely to become inadequate.
78. Where an allegation in relation to inadequate quality has been raised with the OIA or CMA prior to being relayed to HEFCW, HEFCW may await the outcome of the OIA or CMA processes, prior to initiating formal intervention, in order to avoid unnecessary duplication of action. However, HEFCW will liaise closely with the OIA or CMA in such circumstances and may choose to initiate formal intervention prior to the completion of these bodies' processes if this is considered to be necessary to address serious non-compliance issues.

<sup>16</sup> [www.hefcw.ac.uk/policy\\_areas/learning\\_and\\_teaching/teaching\\_quality\\_assurance.aspx](http://www.hefcw.ac.uk/policy_areas/learning_and_teaching/teaching_quality_assurance.aspx)

<sup>17</sup> [www.hefcw.ac.uk/working\\_with\\_he\\_providers/strategic\\_engagement/strategic\\_engagement.aspx](http://www.hefcw.ac.uk/working_with_he_providers/strategic_engagement/strategic_engagement.aspx)

<sup>18</sup> [www.hefcw.ac.uk/working\\_with\\_he\\_providers/institutional\\_assurance/institutional\\_assurance.aspx](http://www.hefcw.ac.uk/working_with_he_providers/institutional_assurance/institutional_assurance.aspx)

<sup>19</sup> [www.qaa.ac.uk/concerns](http://www.qaa.ac.uk/concerns)



79. In respect of the quality assessment being undertaken on behalf of HEFCW, Section 24 of The 2015 Act enables HEFCW to issue or approve guidance regarding:
- The criteria to be applied by the person undertaking quality assessment; and
  - The matters that HEFCW will take into account in determining whether the quality of a course of education is inadequate or likely to become inadequate.

Before issuing such guidance, HEFCW will consult the governing bodies of all regulated institutions, as well as any other institutions in Wales that provide higher education and that are charities, which HEFCW considers to be appropriate.

80. More generally in respect of quality, Section 23 of The 2015 Act enables HEFCW to also issue or approve guidance regarding any matter they think relevant to improving or maintaining the quality of education provided by or on behalf of regulated institutions (e.g. QAA guidance). This includes good practice for maintaining or improving the quality of education, as well as practical examples relevant to educational delivery. Before issuing or approving such guidance, HEFCW will consult the governing bodies of all regulated institutions, as well as any other institutions in Wales that provide higher education and that are charities, which HEFCW considers to be appropriate. The governing bodies of regulated institutions are required to take this advice into account.
81. As outlined at Section 21(1) of The 2015 Act, the governing bodies of all regulated institutions have a duty to cooperate with HEFCW, or an agency working on behalf of HEFCW, for quality assessment purposes. Similarly, as outlined at Section 21(2) of The 2015 Act, the governing bodies of other bodies providing education on behalf of a regulated institution (i.e. franchise providers) also have a duty to cooperate with HEFCW, or an agency working on behalf of HEFCW, for quality assessment purposes (provided that they are covered under a partnership agreement made after 1 September 2015). For both types of provider, this cooperation includes the provision of such information, assistance and access to facilities as is reasonably required for quality assessment purposes. HEFCW will write to the Head of the institution to request any such information, assistance or access, with a reasonable timescale to be agreed with the institution.
82. Where HEFCW considers that an institution's governing body has not complied with its duty to cooperate at Sections 21(1) and 21(2) of The 2015 Act, Section 21(3) of The 2015 Act provides for HEFCW to direct the governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is required for quality assessment purposes. This provision applies to both Regulated Institutions and other bodies providing education on behalf of a regulated institution. In addition, under Section 22 of The 2015 Act, HEFCW (or a

person authorised in writing by HEFCW) has powers in relation to entry and inspection that may be used to obtain the documentation needed for quality assessment purposes. It should be noted that this power would only be used as a last resort and after giving reasonable notice in writing to the governing body of the regulated institution or a body providing education on behalf of a regulated institution.

### **Securing Information, Assistance or Access**

In the event of failure to provide the information, assistance or access that is required for quality assessment purposes, HEFCW will attempt to resolve the situation through discussion with the Accountable Officer of the regulated institution or the body providing education on behalf of the regulated institution, as the case may be. Should that fail to resolve the issue, HEFCW may direct the relevant governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is needed, through the issue of a **Direction to Enforce Compliance with the Duty to Cooperate** with Quality Assessment under Section 21(3) of The 2015 Act (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer).

A Direction to Enforce Compliance with the Duty to Cooperate with Quality Assessment is not subject to the warning and review procedure set out at Sections 42 to 44 of The 2015 Act. Once such a Direction is issued the regulated institution or body providing education on behalf of the regulated institution, as the case may be, will be required to comply with the request for information, assistance or access within a reasonable timescale set by HEFCW (which will be set out in the Direction). In the event of non-compliance with the Direction, HEFCW may seek enforcement by means of injunction, with the judicial oversight by the court ensuring scrutiny of the exercise of these HEFCW powers.

In the event that entry to the premises of the regulated institution or the premises of a body providing education on behalf of the regulated institution is required to obtain the information required for quality assurance purposes, HEFCW may exercise the **Power of Entry and Inspection** under Section 22 of The 2015 Act. HEFCW will provide reasonable notice in writing to the governing body of the regulated institution (sent to the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), and if relevant, to the governing body of the body providing education on behalf of the regulated institution, if its staff or authorised agents are to exercise this power.

### **Securing Information, Assistance or Access (continued)**

When exercising the Power of Entry and Inspection, HEFCW will only seek entry at reasonable times, will not require a person to do anything other than at a reasonable time and will not seek entry to dwellings (e.g. staff or student accommodation) without the express agreement of the occupier. Whilst HEFCW would normally give reasonable notice when exercising this Power of Entry and Inspection, HEFCW would not be required to give such notice in urgent cases or in circumstances where giving notice would defeat the object of entry and inspection.

Such circumstances might include, for example, a considered belief that documentation may be fabricated, amended or destroyed were reasonable notice to be given.

83. Where HEFCW is satisfied that the quality of education or a course provided by, or on behalf of, a regulated institution is inadequate or likely to become inadequate, Section 19 of The 2015 Act states that HEFCW may take action to rectify the situation by issuing a Direction in Respect of Inadequate Quality. This directs the governing body of the institution to take steps (or not to take steps) to improve the quality of the education or course, or to prevent the quality of the education or course from becoming inadequate. In addition, Section 20 of The 2015 Act states that HEFCW may take action to rectify the situation via Other Measures in Respect of Inadequate Quality. These Other Measures may be used to provide the governing body of the institution with advice or assistance in order to improve the quality of the education or course, or to prevent the quality of the education or course from becoming inadequate. This advice will be clearly marked as statutory advice provided under The 2015 Act, with the governing body required to take this advice into account.
84. The stages of these intervention processes that are provided for under Sections 42 to 44 of The 2015 Act are outlined below, together with the associated checks and balances. However, as set out in the section on Purpose and Principles above, HEFCW will initially engage with institutions through a partnership approach in order to address issues in respect of inadequate quality.

### **Prior to Intervention**

85. Following receipt of an assessment of inadequate quality, or quality that is likely to become inadequate, from the agency undertaking quality assessments on behalf of HEFCW (the QAA or any successor quality assessment body), HEFCW will contact the Head of the regulated institution to discuss the actions that are to be taken to address the identified quality issues (all correspondence at this informal stage will be copied to the Clerk to the governing body and Chair of the governing

body). Regulated institutions will generally have a period of up to 12 months to implement an action plan to the satisfaction of HEFCW and/or its agents. Information on the current Wales quality review process and arrangements for implementation and follow up of action plans in respect of inadequate quality are outlined on the HEFCW website [www.hefcw.ac.uk](http://www.hefcw.ac.uk). These arrangements are separate to the statutory intervention processes outlined in this Transitional Statement of Intervention and may be revised independently of the Statement in order to reflect any changes in quality assessment arrangements.

86. Where HEFCW, or its agents, are satisfied that, after a reasonable period, a regulated institution has failed to address identified quality issues through the arrangements for implementation and follow up of action plans in respect of inadequate quality, it may issue a Direction in Respect of Inadequate Quality to direct the governing body of that institution to address the issues. HEFCW may also undertake Other Measures in Respect of Inadequate Quality. These intervention processes are outlined below, together with the associated checks and balances. HEFCW will be mindful of the circumstances of the case when considering formal intervention, including the likelihood of the regulated institution addressing the quality issues voluntarily if given further time; the severity of the issues; and any other relevant factors. Whilst HEFCW will normally work in partnership with regulated institutions in the first instance, where serious quality issues are identified HEFCW may decide that it is necessary to initiate formal intervention at an early stage. Such serious quality issues may require immediate intervention in order to protect the interests of students and/or the reputation of the wider Higher Education sector.

### **The Intervention Process: Other Measures in Respect of Inadequate Quality**

87. Separate to the issuing of a Direction in Respect of Inadequate Quality, or in support of such a Direction, where HEFCW (or its agents) are satisfied that a regulated institution has failed to address identified quality issues (either in respect of inadequate quality or quality that is likely to become inadequate) within a reasonable period (see paragraph 86), Section 20 of The 2015 Act states that HEFCW may intervene through Other Measures in Respect of Inadequate Quality. These Other Measures may take place prior to or in parallel with the issuing of a Direction in Respect of Inadequate Quality and are outlined below.

#### **Advice or Assistance**

88. HEFCW will generally seek to consult with the governing body of a regulated institution prior to giving advice or assistance. HEFCW may give advice or assistance to the governing body with a view to:
- a. Improving the quality of the education or course, or

- b. Preventing the quality of the education or course from becoming inadequate.

Such advice or assistance might include, amongst other potential actions:

- Requesting institutions to develop and implement action plans to address the failures/weaknesses found in a quality assessment (with plans subject to HEFCW approval);
- Sending in a support team;
- Undertaking or arranging for additional assurance reviews to be undertaken with the aim of identifying whether there are any systemic weaknesses which need to be addressed; and
- Attending and addressing meetings of the governing body or management board about any matter arising from a quality assessment.

HEFCW will write to the governing body of the regulated institution to initiate the provision of this advice or assistance (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). Section 20(3) of The 2015 Act requires that the governing body take into account any advice provided by HEFCW in seeking to address the identified quality issues.

### **Review of Other Matters Relevant to Quality**

89. HEFCW may carry out, or arrange for another person to carry out, a review of any matters that they think are relevant to the quality of education provided by or on behalf of the regulated institution. As outlined at Sections 21(1) and 21(2) of The 2015 Act, the governing body of the regulated institution or another body providing education on behalf of the regulated institution must cooperate with the person or agency undertaking such a review, providing information, assistance and access to their facilities as reasonably required for the purpose of undertaking the review. HEFCW would write to the governing body to request any such information, assistance or access, with a reasonable timescale to be agreed with the regulated institution.
90. Where HEFCW is satisfied that the governing body of either the regulated institution's or the body providing education on behalf of the regulated institution has not complied with its duty to cooperate at Sections 21(1) and 21(2) of The 2015 Act, Section 21(3) of The 2015 Act provides for HEFCW to direct the governing body of the regulated institution to take (or not to take) specified steps in order to secure the information, assistance or access that is required for review purposes. In addition, under Section 22 of The 2015 Act, HEFCW (or a person authorised in writing by HEFCW) has powers in relation to entry and inspection that may be used to obtain the documentation needed for quality review purposes. It should be noted that this power would only be used as a last resort and after giving reasonable notice in writing to the

governing body of the regulated institution or, in relation to education provided on behalf of the regulated institution, the regulated institution and the other body who provides education on behalf of the regulated institution.

### **The Intervention Process: Directions in Respect of Inadequate Quality**

91. When intervening, for the purpose of clarity, all communication from HEFCW in respect of intervention will clearly state the stage and any sub-element of the intervention process to which it relates.

#### **Stage 1: Warning Notice**

92. Where a regulated institution has failed to satisfactorily address the identified quality issues after a reasonable period (to be determined on a case-by-case basis), as assessed in accordance with The 2015 Act and in line with the arrangements for implementation and follow up of action plans in respect of inadequate quality, HEFCW will initiate the intervention process in respect of inadequate quality. Before HEFCW proceeds to issue a Direction in Respect of Inadequate Quality to a regulated institution HEFCW will provide the governing body of that regulated institution with a warning notice (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). The warning notice will:
  - a. Set out the proposed Direction in Respect of Inadequate Quality;
  - b. State HEFCW's reasons for proposing to give it;
  - c. Inform the governing body that it may make representations about the proposed Direction;
  - d. Specify the period from the date of issue within which, and the way in which, representations may be made.

#### Checks and balances

93. From issue of the warning notice, governing bodies will have up to 40 days to make representations in writing to HEFCW, with all representations to be sent to the HEFCW Chief Executive. Where representations are not received, no Direction in Respect of Inadequate Quality will be issued until after the completion of this 40 day period.
94. Where representations are received, HEFCW will undertake to review these and decide on whether to issue a Direction within 40 days of receipt of the representations, except where the submission of additional information is required in order for HEFCW to be able to adequately consider representations. In such instances, the additional information will be requested within 28 days of receipt of the representations and should be submitted by the institution within 28 days of the HEFCW request, in order for a decision to be made within 60 days of receipt of the original representations. Where representations are received, no

Direction in Respect of Inadequate Quality will be issued until after the completion of this process.

95. Decisions regarding the issuing of a Direction in Respect of Inadequate Quality will be made by the HEFCW Chief Executive. Where a decision is taken to not issue a Direction in Respect of Inadequate Quality, HEFCW will send a notice to the governing body within 14 days to inform them of the decision and the reasons for this.

### **Stage 2: The Direction in Respect of Inadequate Quality**

96. When issuing a Direction in Respect of Inadequate Quality to the governing body of a regulated institution (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), Section 43 of The 2015 Act requires that HEFCW provide a statement to the governing body of that regulated institution. The statement will:
- a. Set out HEFCW's reasons for issuing the Direction;
  - b. Inform the governing body that it may apply for a review of the Direction; and
  - c. Include any other prescribed information set out under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 at Regulation 6, i.e. the date of issue of the notice or direction; when the notice or direction is to be treated as having been given; the grounds in Regulation 7 on which an application for a review may be made; the procedure in Regulation 8 that a governing body must follow in order to apply for a review; and the name and address of the Review Panel to whom an application for a review must be made.
97. The Direction in Respect of Inadequate Quality that is issued will specify:
- a. The steps to be taken (or not to be taken) to improve the quality of the education or course; or
  - b. The steps to be taken (or not to be taken) to prevent the quality of the education or course from becoming inadequate.

The Direction in Respect of Inadequate Quality may be varied or revoked by a later Direction.

98. Regulation 4 under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>20</sup> states that a notice or Direction specified in Section 41(1) of the 2015 Act is to be treated as having been given on the day that the first of the following events occurs:
- The governing body notifies HEFCW in writing that it accepts the Direction;

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<sup>20</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

- The time limit to apply for a Review of the Direction under Section 44 of The 2015 Act has expired and the governing body has not applied for a review;
- 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 stands.

### Checks and balances

99. If HEFCW issues an institution with a Direction in Respect of Inadequate Quality, section 44 of The 2015 Act provides the ability for the governing body of that institution to apply for a review of the Direction. An application for a review may be made on one or more of the following grounds:
- a. The governing body presents a material factor for consideration to which, for good reason, it had not previously drawn HEFCW's attention;
  - b. The governing body considers that HEFCW has disregarded a material factor it should have considered;
  - c. The governing body considers that the Direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

Regulation 8 states that applications for review must be made within 40 days of issue of the Direction in Respect of Inadequate Quality, with applications made in writing as outlined in the Direction. The application for review must specify the grounds for review and include: a copy of the direction to be reviewed; a copy of the statement issued in accordance with Section 43 of The 2015 Act; and information in support of the application. It should be noted that, under Regulation 7(2), an application for a review of the Direction in Respect of Inadequate Quality cannot be made where a governing body has notified HEFCW in writing that it accepts the Direction.

100. The review is to be carried out by a person, or Panel of persons, appointed by the Welsh Ministers. Upon receiving an application for a review, the Panel will provide the governing body and HEFCW with an anticipated timetable for completing the review. The review Panel will give HEFCW details of the Direction in Respect of Inadequate Quality to be reviewed, details of the grounds on which the review application has been made and a copy of the information supplied by the governing body in support of the application for review. The review Panel may make a written request for further information from either HEFCW or the governing body for the purposes of the review. Any request for further information made by the Panel will be sent to HEFCW and the governing body at the same time. HEFCW or the governing body will be required to provide any information requested by the Panel within 28 days of the issue of the request if it is to be considered. Under Regulation 9(8), the Panel will consider whether it is appropriate to allow representations from either HEFCW or the governing body in respect of any further



information submitted to it in response to its request for such information; and if it considers it appropriate to allow representations, it will notify HEFCW and the governing body accordingly. The review Panel will ensure that both HEFCW and the governing body are in receipt of all information submitted by the other party.

101. The review Panel will take account of all the requested information submitted by HEFCW and the governing body in making its decision. The Panel will prepare a written report that is sent to both HEFCW and the governing body at the same time. HEFCW will take account of the review Panel's report and reconsider its decision to issue the Direction. HEFCW will then notify the governing body in writing within 40 days as to whether the Direction stands or not, and provide reason for that decision. If HEFCW's decision is that the Direction should stand, that decision will be binding on the governing body of the regulated institution.

### **Stage 3: Addressing inadequate quality or quality that is likely to become inadequate**

102. The governing body of the institution will be expected to discuss the Direction in Respect of Inadequate Quality at the earliest possible opportunity. It will then be expected to start to address the identified quality issues within 60 days of the Direction having been given (see paragraph 98) and to engage with HEFCW or its agents until they are satisfied that the issues outlined in the Direction in Respect of Inadequate Quality have been adequately addressed.
103. Following completion of the actions to address the identified quality issues by the institution, HEFCW will seek to consider any information from the governing body regarding compliance within 14 days. If requested by the regulated institution's governing body, HEFCW will give written notice to the governing body stating whether they are satisfied that it has complied with the Direction (or with a particular requirement of the Direction).

### **Stage 4: Enforcement**

104. Where HEFCW issues a Direction in Respect of Inadequate Quality to the governing body of an institution, the governing body must comply with the Direction (subject to the outcome of any review of the Direction - see Stage 2 above). In the event that a governing body fails to comply satisfactorily (in HEFCW's opinion) with the Direction within the above timescale, the Direction will be enforceable by injunction in accordance with section 45 of The 2015 Act. HEFCW decisions on whether to proceed to injunction will take account of the particular circumstances of the case. Decisions on enforcement will be taken in line with the general principles of intervention outlined on pages 8 to 12 of this document.

105. As a means to enforce compliance with a Direction in Respect of Inadequate Quality, HEFCW may consider the refusal to approve a new Fee and Access Plan under Section 37 of The 2015 Act an alternative to injunction. The circumstances, under which HEFCW will consider use of the powers under Section 37 of The 2015 Act, rather than injunction, are outlined below.
106. Whilst HEFCW will normally engage with an institution to address inadequate quality, in the event of seriously inadequate quality, HEFCW may consider the withdrawal of approval of an existing Fee and Access Plan under Section 39 of The 2015 Act. The circumstances under which HEFCW will consider escalating its intervention in respect of Inadequate Quality to the use of these powers under Section 39 of The 2015 Act are outlined below.

### **Escalation of Intervention in respect of Inadequate Quality**

107. HEFCW can enforce compliance with a Direction in respect of Inadequate Quality through the issue of a Notice of Refusal to Approve a New Fee and Access Plan (under Section 37 of The 2015 Act) as an alternative to enforcement through injunction. This alternative means of enforcement of a Direction in respect of Inadequate Quality would normally only be used under the types of circumstances outlined below:
- **Where an institution has not complied with a Direction in respect of Inadequate Quality and there is clear reason to believe that it will not comply with an injunction** such that additional pressure must be brought to bear in order to enforce compliance. Whilst escalation of intervention would be determined on a case-by-case basis, the belief that an institution will not comply with an injunction may be based on, for example:
    - Blatant disregard by the institution's governing body for compliance with the Direction in respect of Inadequate Quality (e.g. a refusal to discuss; ongoing failure to come to a decision on compliance; or a decision not to comply);
    - Evidence of previous non-compliance with an injunction; or
    - An ongoing unwillingness, or inability, of the governing body to engage with HEFCW.
108. In the most serious circumstances, HEFCW may instead (or additionally) consider escalation of intervention in respect of Inadequate Quality to a Withdrawal of an Approved Fee and Access Plan under Section 39 of The 2015 Act. This action would only be taken in the following extreme circumstances, where it is clearly evident that other interventions will not be effective:
- **Where the quality of education provided by, or on behalf of, the institution is seriously inadequate** and the withdrawal of a Fee and Access Plan would be needed to protect students, their

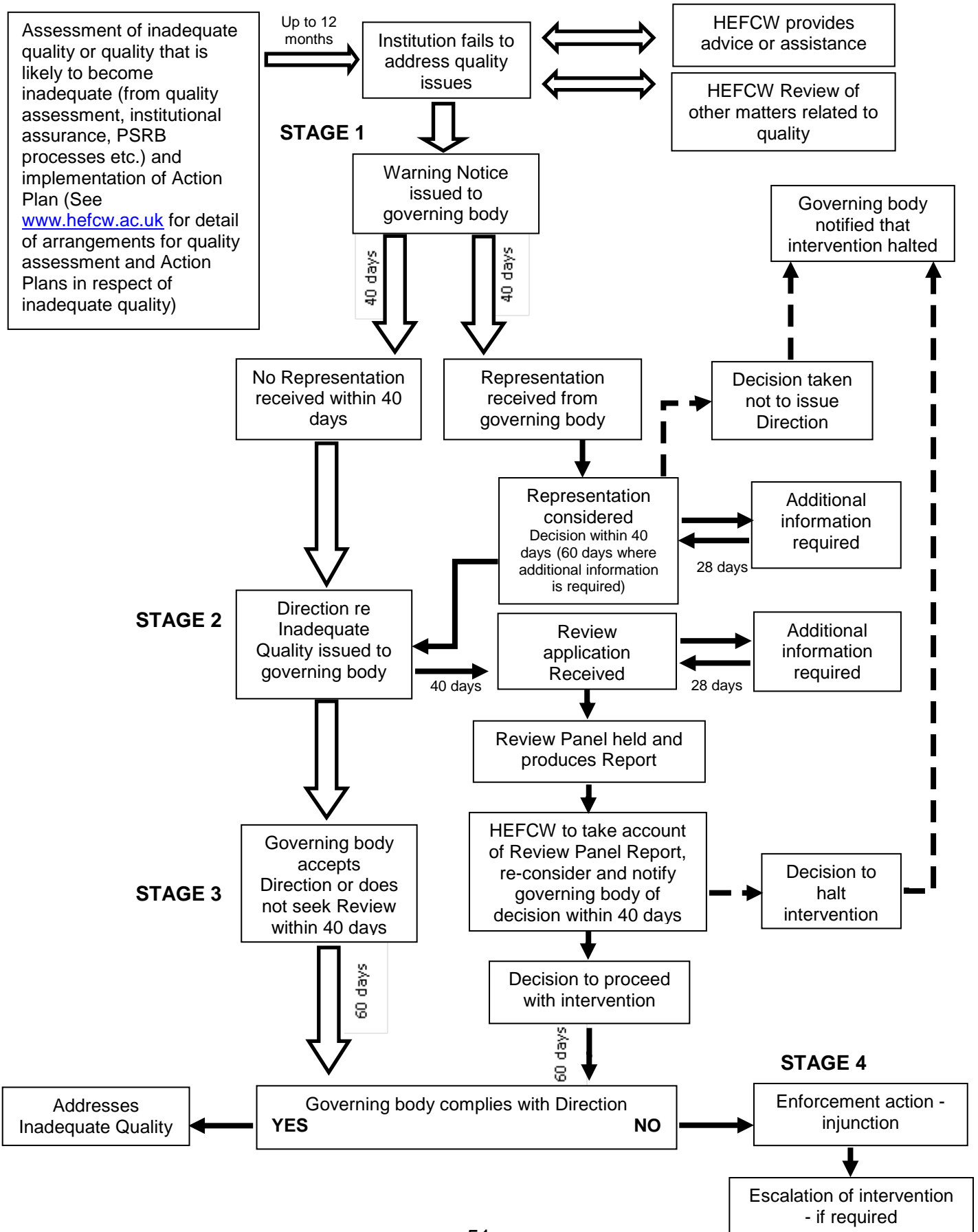
sponsors and/or other stakeholders. Whilst escalation of intervention would be determined on a case-by-case basis, the judgement of what constitutes the provision of education of seriously inadequate quality would be based on the extent to which this seriously inadequate quality has been, or is suspected to have been, intentional or fraudulent, and/or on the potential impact on a range of stakeholders and issues (e.g. students, staff, institutional sustainability, public finances and wider impact on the higher education sector etc.). The provision of education of seriously inadequate quality might include, for example:

- Circumstances in which HEFCW has clear reason to believe that an institution has shown blatant disregard for quality of education and would not comply with any other interventions (e.g. due to a persisting refusal to engage with HEFCW or to serious ongoing management or governance failures).
- Circumstances in which HEFCW has clear reason to believe that an institution has such chronic failings that it will be incapable of compliance in terms of the quality of education for the foreseeable future.
- Circumstances in which HEFCW has clear reason to believe that an institution has undertaken fraudulent or illegal actions in respect of the quality of education.

109. Interventions under Sections 37 and 39 of The 2015 Act would only be undertaken *in extremis*, where HEFCW has clear reason to believe that an injunction is unlikely to be complied with, or where intervention through the issue of a Direction in respect of Inadequate Quality is unlikely to be sufficient or successful given the serious nature of the quality issues. These interventions are outlined in this Statement of Intervention from pages 65 and 79 respectively.

## Flow Chart: The Intervention Process in Respect of Inadequate Quality

Intervention may be halted at any point if the institution complies.



## Intervention in Respect of Failure to Comply with the Financial Management Code

(It is anticipated that this will come into effect from 1 September 2017)

### Basis for Intervention

110. This section relates to HEFCW intervention in respect of failure (or likelihood of failure) to comply with the Financial Management Code (The Code)<sup>21</sup> through Directions and other measures. Sections 33 and 34 of The 2015 Act outline those interventions that apply where HEFCW are satisfied that, in accordance with Section 32 of The 2015 Act the governing body of a regulated institution has failed, or is likely to fail, to comply with a requirement imposed by The Code.

#### Note

**Financial Management Code** - Section 27 of The Act places a duty on HEFCW to prepare and publish a Financial Management Code, with The Code to make provision about the following matters, amongst others:

- Circumstances in which a regulated institution is to enter into a transaction of a class specified in The Code only with the consent of HEFCW;
- Accounting and audit arrangements of regulated institutions;
- The provision of information to HEFCW.

The provisions within The Code may take the form of requirements or guidance. The governing body of a regulated institution must:

- Comply with any requirement imposed by The Code
- Take into account any guidance contained in The Code.

It should be noted that, in addition to intervention in relation to failure to comply with the Financial Management Code (as outlined in this Statement of Intervention), Regulation 7 of The Higher Education (Fee and Access Plans) (Wales) Regulations 2015 provides that the financial viability of the institution; and the arrangements for the organisation and management of the institution's financial affairs must be taken into account by HEFCW when considering approval or rejection of a Fee and Access Plan.

111. Section 31 of The 2015 Act provides HEFCW with a duty to monitor, or to make arrangements for the monitoring of, compliance by each regulated institution with the requirements imposed by The Code. HEFCW will undertake this monitoring via a range of processes, including its strategic engagement with institutions<sup>22</sup>; and institutional

<sup>21</sup> Code to be published at [www.hefcw.ac.uk](http://www.hefcw.ac.uk)

<sup>22</sup> [www.hefcw.ac.uk/working\\_with\\_he\\_providers/strategic\\_engagement/strategic\\_engagement.aspx](http://www.hefcw.ac.uk/working_with_he_providers/strategic_engagement/strategic_engagement.aspx)

assurance work as well as the monitoring of allegations against institutions<sup>23</sup>. Information required from institutions under these processes may include, amongst other items: institutions' financial forecasts; audited financial statements; external audit and internal audit reports; and annual assurance returns.

112. As outlined at Section 35(1) of The 2015 Act, governing bodies have a duty to cooperate with HEFCW, or a person working on behalf of HEFCW, for the purposes of monitoring compliance with The Code. This cooperation would take the form of the provision of such information, assistance and access to facilities as is reasonably required for monitoring purposes. HEFCW would write to the Head of the institution to request any such information, assistance or access, within a reasonable timescale to be set by HEFCW.
113. Where HEFCW considers that an institution's governing body has not complied with its duty to cooperate with monitoring under Section 35(1) of The 2015 Act, Section 35(2) of The 2015 Act provides for HEFCW to direct the governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is required for monitoring purposes. In addition, under Section 36 of The 2015 Act, HEFCW (or a person authorised in writing by HEFCW) has powers in relation to entry and inspection that may be used to obtain the documentation needed for monitoring purposes.

#### **Securing Information, Assistance or Access**

In the event of failure to provide the information, assistance or access that is required for HEFCW to discharge its monitoring function under Section 31 of The 2015 Act, or to undertake activities provided for under Section 34 of The 2015 Act, HEFCW will attempt to resolve the situation through discussion with the institution's Accountable Officer. Should that fail to resolve the issue, HEFCW may direct the governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is needed, through the issuing of a **Direction to Enforce Compliance with the Duty to Cooperate** under Section 35(2) of The 2015 Act (sent to the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer).

A Direction to Enforce Compliance with the Duty to Cooperate is not subject to the warning and review procedure set out at Sections 42 to 44 of The 2015 Act. Once such a Direction is issued the institution will be required to comply with the request for information, assistance or access within a reasonable timescale set by HEFCW (which will be set out in the Direction).

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[http://www.hefcw.ac.uk/working\\_with\\_he\\_providers/institutional\\_assurance/institutional\\_assurance.aspx](http://www.hefcw.ac.uk/working_with_he_providers/institutional_assurance/institutional_assurance.aspx)

### **Securing Information, Assistance or Access (continued)**

In the event of non-compliance with the Direction, HEFCW may seek enforcement by means of injunction, with the judicial oversight by the court ensuring scrutiny of the exercise of these HEFCW powers.

In the event that entry to the institution's premises is necessary to obtain the information required for monitoring purposes under Section 31 of The 2015 Act, or to carry out a review under Section 34(2) of The 2015 Act, HEFCW may exercise the **Power of Entry and Inspection** under Section 36 of The 2015 Act. HEFCW will provide reasonable notice in writing to the governing body (sent to the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer) if its staff or authorised agents are to exercise this power.

When exercising the Power of Entry and Inspection, HEFCW will only seek entry at reasonable times, will not require a person to do anything other than at reasonable time and will not seek entry to dwellings (e.g. staff or student accommodation) without the express agreement of the occupier. Whilst HEFCW would normally give reasonable notice when exercising this Power of Entry and Inspection, HEFCW would not be required to give such notice in urgent cases or in circumstances where giving notice would defeat the object of entry and inspection. Such circumstances might include, for example, a considered belief that documentation may be fabricated, amended or destroyed were reasonable notice to be given.

114. Where HEFCW is satisfied that the governing body of a regulated institution is has failed, or is likely to fail, to comply with a requirement imposed by The Code, Section 33 of The 2015 Act states that HEFCW may take action to rectify the situation by issuing a Direction in Respect of Failure to Comply with The Code. This directs the governing body of the institution to take steps (or not to take steps) for the purpose of dealing with or preventing the failure to comply. In addition, Section 34 of The 2015 Act states that HEFCW may take action to rectify the situation via Other Measures in Respect of Failure to Comply with The Code. These Other Measures may be used to provide the governing body of the institution with advice or assistance in order to improve the organisation or management of the financial affairs of the institution.
115. The stages of these intervention processes that are provided for under Sections 42 to 44 of The 2015 Act are outlined below, together with the associated checks and balances. However, as set out in the section on Purpose and Principles above, HEFCW will normally engage with institutions through a partnership approach, in the first instance, in order to address issues in respect of failure to comply with The Code.

## **Prior to Intervention**

116. Where an issue in respect of a failure (or likelihood of failure) to comply with a requirement imposed by The Code has been identified, HEFCW will contact the Accountable Officer of the institution (normally the Head of the institution) to discuss and verify the issue and to clarify what actions have already been taken to comply (all correspondence at this informal stage will be copied to the Clerk to the governing body and Chair of the governing body). Where action to address identified compliance issues is possible, either within the lifetime of the approved Fee and Access Plan or subsequently, HEFCW may request an institution to take such action as is needed to enable compliance within a reasonable timescale set by HEFCW. In agreeing this timescale, it should be noted that HEFCW must balance the institution's view regarding the reasonableness of any timescale with the need to ensure compliance at the earliest reasonable opportunity.
117. HEFCW will normally only initiate formal intervention where an institution has failed to take appropriate action to comply with a requirement imposed by The Code within a reasonable timescale set by HEFCW. However, where serious failures (or likelihood of serious failures) are identified, such as inadequate organisation or management of the financial affairs of the institution, or repeated failure to comply, HEFCW may decide that it is necessary to initiate formal intervention at an early stage. HEFCW will be mindful of the circumstances of the case when considering formal intervention, including the institution's explanation of why it has failed (or there is a likelihood of failure) to comply; the likelihood of the institution addressing the issue voluntarily if given further time; and any other relevant factors.

## **The Intervention Process: Other Measures in Respect of Failure to Comply with the Code**

118. Separate to the issuing of a Direction in Respect of Failure to Comply with the Code, or in support of such a Direction, where HEFCW are satisfied that a regulated institution has failed to address identified compliance issues (either in respect of a failure to comply or a likely failure to comply) within a reasonable period set by HEFCW, Section 34 of The 2015 Act states that HEFCW may intervene through Other Measures in Respect of Failure to Comply with The Code. These Other Measures may take place prior to or in parallel with the issuing of a Direction in Respect of Failure to Comply with The Code and are outlined below.

### **Advice or Assistance**

119. Section 34(1) of The 2015 Act states that HEFCW may give advice or assistance to the governing body with a view to improving the organisation or management of the financial affairs of the institution.



Such advice or assistance might include, amongst other potential actions:

- Requesting institutions to develop and implement action plans to address the identified failures/weaknesses (or areas where there are a likelihood of failures) in the organisation or management of financial affairs (with plans subject to HEFCW approval);
- Sending in a support team to assist the institution to improve the organisation and management of its financial affairs or comply with the Code;
- Undertaking or arranging for additional assurance reviews to be undertaken with the aim of identifying whether there are any systemic weaknesses which need to be addressed; and
- Attending and addressing meetings of the governing body or management board about any matter arising from the identified failure to comply with The Code.

HEFCW will write to the governing body of the institution to initiate the provision of this advice or assistance (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). Section 34(3) of The 2015 Act requires that the governing body take into account any advice provided by HEFCW in seeking to address the identified failure (or likelihood of failure) to comply with The Code.

120. As outlined at Section 35(1) of The 2015 Act, the governing body of the regulated institution must cooperate with the person providing advice or assistance, with the institution to provide them with information, assistance and access to their facilities as reasonably required for that purpose. HEFCW would write to the governing body to request any such information, assistance or access, within a reasonable timescale set by HEFCW. As outlined in the box above on Securing Information, Assistance or Access, where HEFCW is satisfied that an institution's governing body has not complied with its duty to cooperate under Section 35(1) of The 2015 Act, Section 35(2) of The 2015 Act provides for HEFCW to direct the governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is needed.

### **Review of Matters Relevant to Compliance with the Code**

121. Section 34(2) of The 2015 Act states that HEFCW may carry out, or arrange for another person to carry out, a review of any matters that they think are relevant to the institution's compliance with The Code. As outlined at Section 35(1) of The 2015 Act, the governing body of the regulated institution must cooperate with the person undertaking such a review, providing information, assistance and access to their facilities as reasonably required for the purpose of the review. HEFCW would write to the governing body to request any such information, assistance or access, within a reasonable timescale set by HEFCW. As outlined in the box above on Securing Information, Assistance or Access, where

HEFCW is satisfied that an institution's governing body has not complied with its duty to cooperate under Section 35(1) of The 2015 Act, Section 35(2) of The 2015 Act provides for HEFCW to direct the governing body to take (or not to take) specified steps in order to secure the information, assistance or access that is required for review purposes.

122. Additionally, as outlined in the box above on Securing Information, Assistance or Access, where HEFCW is satisfied that an institution's governing body has not complied with its duty to cooperate under Section 35(1) of The 2015 Act, under Section 36 of The 2015 Act, HEFCW (or a person authorised in writing by HEFCW) has powers in relation to entry and inspection that may be used to obtain the documentation needed for review purposes.

### **The Intervention Process: Directions in Respect of Failure to Comply with the Code**

123. When intervening, for the purpose of clarity, all communication from HEFCW in respect of intervention will clearly state the stage and any sub-element of the intervention process to which it relates.

#### **Stage 1: Warning Notice**

124. Where an institution has failed to satisfactorily address its failure (or likelihood of failure) to comply with the requirements of The Code after a reasonable period set by HEFCW, HEFCW will initiate the intervention process in respect of Failure to Comply with The Code. Before HEFCW proceeds to issue a Direction in Respect of Failure to Comply with The Code to an institution HEFCW will provide the governing body of that institution with a Warning Notice (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). The Warning Notice will:
- a. Set out the proposed Direction in Respect of Failure to Comply with The Code;
  - b. State HEFCW's reasons for proposing to give it;
  - c. Inform the governing body that it may make representations about the proposed Direction;
  - d. Specify the period from the date of issue within which, and the way in which, representations may be made.

#### Checks and balances

125. From issue of the Warning Notice, institutions will have up to 40 days to make representations to HEFCW, with all representations to be sent to the HEFCW Chief Executive. Where representations are not received, no Direction in Respect of Failure to Comply with The Code will be issued until after the completion of this 40 day period.

126. Where representations are received, HEFCW will undertake to review these and decide on whether to issue a Direction in Respect of Failure to Comply with The Code within 40 days of receipt of the representations, except where the submission of additional information is required in order for HEFCW to be able to adequately consider representations. In such instances, the additional information will be requested within 28 days of receipt of the representations and should be submitted by the institution within 28 days of this HEFCW request, in order for a decision to be made within 60 days of receipt of the original representations. Where representations are received, no Direction in Respect of Failure to Comply with The Code will be issued until after the completion of this process.
127. Decisions regarding the issuing of a Direction in Respect of Failure to Comply with The Code will be made by the HEFCW Chief Executive. Where a decision is taken to not issue a Direction in Respect of Failure to Comply with The Code, HEFCW will send a notice to the governing body within 14 days of that decision to inform them of the decision and the reasons for this.

### **Stage 2: The Direction in Respect of Failure to Comply with the Code**

128. When issuing a Direction in Respect of Failure to Comply with The Code to an institution (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), Section 43 of The 2015 Act requires that HEFCW provide a statement to the governing body of that institution. The statement will:
- a. Set out HEFCW's reasons for issuing the Direction;
  - b. Inform the governing body that it may apply for a review of the Direction; and
  - c. Include any other prescribed information set out under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 at Regulation 6, i.e. the date of issue of the notice or direction; when the notice or direction is to be treated as having been given; the grounds in Regulation 7 on which an application for a review may be made; the procedure in Regulation 8 that a governing body must follow in order to apply for a review; and the name and address of the Review Panel to whom an application for a review must be made.
129. The Direction in Respect Failure to Comply with The Code that is issued will specify the steps to be taken (or not to be taken) in order to deal with or to prevent the institution's failure to comply. The Direction in Respect of Failure to Comply with The Code may be varied or revoked by a later Direction.

130. Regulation 4 under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>24</sup> states that a notice or Direction specified in Section 41(1) of the 2015 Act is to be treated as having been given on the day that the first of the following events occurs:

- The governing body notifies HEFCW in writing that it accepts the Direction;
- The time limit to apply for a Review of the Direction under Section 44 of The 2015 Act has expired and the governing body has not applied for a review;
- 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 stands.

#### Checks and balances

131. Where HEFCW issues an institution with a Direction in Respect Failure to Comply with The Code, Section 44 of The 2015 Act provides the ability for the governing body of that institution to apply for a review of the Direction. An application for a review may be made only on the following grounds:

- a. The governing body presents a material factor for consideration to which, for good reason, it had not previously drawn HEFCW's attention;
- b. The governing body considers that HEFCW has disregarded a material factor it should have considered;
- c. The governing body considers that the notice or Direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

Regulation 8 of the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 states that applications for review must be made within 40 days of issue of the Direction in Respect Failure to Comply with The Code, with applications made in writing as outlined in the Direction. The application for review must specify the grounds for review and include a copy of the notice or direction to be reviewed; a copy of the statement issued in accordance with Section 43 of The 2015 Act; and information in support of the application. It should be noted that, under Regulation 7(2), an application for a review of the Direction in Respect Failure to Comply with The Code cannot be made where a governing body has notified HEFCW in writing that it accepts the Direction.

132. The review is to be carried out by a person, or Panel of persons, appointed by the Welsh Ministers. Upon receiving an application for a review, the Person or Panel appointed by the Welsh Ministers will provide the governing body and HEFCW with an anticipated timetable

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<sup>24</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

for completing the review. The review Panel will give HEFCW details of the Direction in Respect of Failure to Comply with the Code to be reviewed, details of the grounds on which the review application has been made and a copy of the information supplied by the governing body in support of the application for review.

133. The review Panel may make a written request for further information from either HEFCW or the governing body for the purposes of the review. Any request for further information made by the Panel will be sent to HEFCW and the governing body at the same time. HEFCW or the governing body will be required to provide any information requested by the Panel within 28 days of the issue of the request. Under Regulation 9(8), the Panel will consider whether it is appropriate to allow representations from either HEFCW or the governing body in respect of any further information submitted to it in response to its request for such information; and if it considers it appropriate to allow representations, it will notify HEFCW and the governing body accordingly. The review Panel will ensure that both HEFCW and the governing body are in receipt of all information submitted by the other party.
134. The review Panel will take account of the requested information submitted by HEFCW and the governing body in making its decision. The Panel will prepare a written report that is sent to both HEFCW and the governing body at the same time. HEFCW will take account of the review Panel's report and reconsider its decision to issue the Direction. HEFCW will then notify the governing body in writing within 40 days as to whether the Direction stands or not, and provide reason for that decision. If HEFCW's decision is that the Direction should stand, that decision will be binding on the governing body of the institution.

### **Stage 3: Compliance with the Code**

135. The governing body of the institution will be expected to consider the Direction in Respect of Failure to Comply with The Code at the earliest possible opportunity, in order that it can agree measures to address any identified failures to comply (or areas where a likelihood of failure to comply has been identified). The governing body will be expected to initiate the necessary actions within 60 days of the Direction being given (see paragraph 130).
136. The governing body will be expected to notify HEFCW in writing that the Direction actions have been completed. Following completion of the compliance actions by the institution, HEFCW will seek to consider the information from the governing body regarding compliance within 14 days. If requested by the institution's governing body, HEFCW will give written notice to the governing body stating whether they are satisfied that it has complied with the Direction (or with a particular requirement of the Direction).

## Stage 4: Enforcement

137. Where HEFCW issues a Direction in Respect of Failure to Comply with The Code to the governing body of an institution, the governing body must comply with the Direction (subject to the outcome of any review of the Direction - see Stage 2 above). In the event that a governing body fails to comply satisfactorily (in HEFCW's opinion) with the Direction within the above timescale, the Direction will be enforceable by injunction in accordance with section 45 of The 2015 Act. HEFCW decisions on whether to proceed to injunction will take account of the particular circumstances of the case. Decisions on enforcement will be taken in line with the general principles of intervention outlined on pages 8 to 12 of this document.
138. As a means to enforce compliance with a Direction in Respect of Failure to Comply with the Code, HEFCW may consider the refusal to approve a new Fee and Access Plan under Section 37 of The 2015 Act an alternative to injunction. The circumstances, under which HEFCW will consider use of the powers under Section 37 of The 2015 Act, rather than injunction, are outlined below.
139. In the event of persistent and/or serious non-compliance, HEFCW may consider the refusal to approve a new Fee and Access Plan and/or the withdrawal of approval of an existing Fee and Access Plan under Sections 37 and 39 of The 2015 Act respectively. The circumstances under which HEFCW will consider escalating its intervention in respect of Failure to Comply with the Code to the use of these powers under Section 37 or 39 of The 2015 Act are outlined below.

### **Escalation of Intervention in respect of Failure to Comply with the Code**

140. HEFCW can enforce compliance with a Direction in respect of Failure to Comply with the Code through the issue of a Notice of Refusal to Approve a New Fee and Access Plan (under Section 37 of The 2015 Act) as an alternative to enforcement through injunction. This alternative means of enforcement would normally only be used under the types of circumstances outlined below:
- **Where an institution has not complied with a Direction in respect of Failure to Comply with the Code and there is clear reason to believe that it will not comply with an injunction** such that additional pressure must be brought to bear in order to enforce compliance. Whilst escalation of intervention would be determined on a case-by-case basis, the belief that an institution will not comply with an injunction may be based on, for example:
    - Blatant disregard by the institution's governing body for compliance with the Direction in respect of Failure to Comply with the Code (e.g. a refusal to discuss; ongoing failure to

come to a decision on compliance; or a decision not to comply);

- Evidence of previous non-compliance with an injunction; and
- An ongoing unwillingness, or inability, of the governing body to engage with HEFCW.

141. In the most serious circumstances, HEFCW may instead (or additionally) consider escalation of intervention in respect of Failure to Comply with the Code to the Withdrawal of an Approved Fee and Access Plan under Section 39 of The 2015 Act. This action would only be taken in the following extreme circumstances, where it is clearly evident that other interventions will not be effective:

- **Where serious non-compliance with the Code has been identified** that warrants more severe intervention than the issue of a Direction in respect of Failure to Comply with the Code, and where the withdrawal of a Fee and Access Plan would be needed to protect students, their sponsors and/or other stakeholders. Such serious non-compliance may relate to either a single failure, which on its own is of sufficient concern to warrant action being taken, or a series of repeated lesser failures which, when taken together, warrant action being taken. Whilst escalation of intervention would be determined on a case-by-case basis, the judgement of what constitutes serious non-compliance would be based on the extent to which non-compliance has been, or is suspected to have been, intentional or fraudulent, and/or on the potential impact of the failure to comply on a range of stakeholders and issues (e.g. students, staff, institutional sustainability, public finances and wider impact on the higher education sector etc.). Serious non-compliance would include, for example:
  - Circumstances in which HEFCW has clear reason to believe that an institution has shown blatant disregard for the Code and would not comply with any other interventions (e.g. due to persistent instances of non-compliance, a persisting refusal to engage with HEFCW or to serious ongoing management or governance failures).
  - Circumstances in which HEFCW has clear reason to believe that an institution has such chronic failings in the management or governance of its financial affairs that it will be incapable of compliance with The Code for the foreseeable future.
  - Circumstances in which HEFCW has clear reason to believe that an institution has undertaken fraudulent or illegal actions in respect of its compliance with the Code.

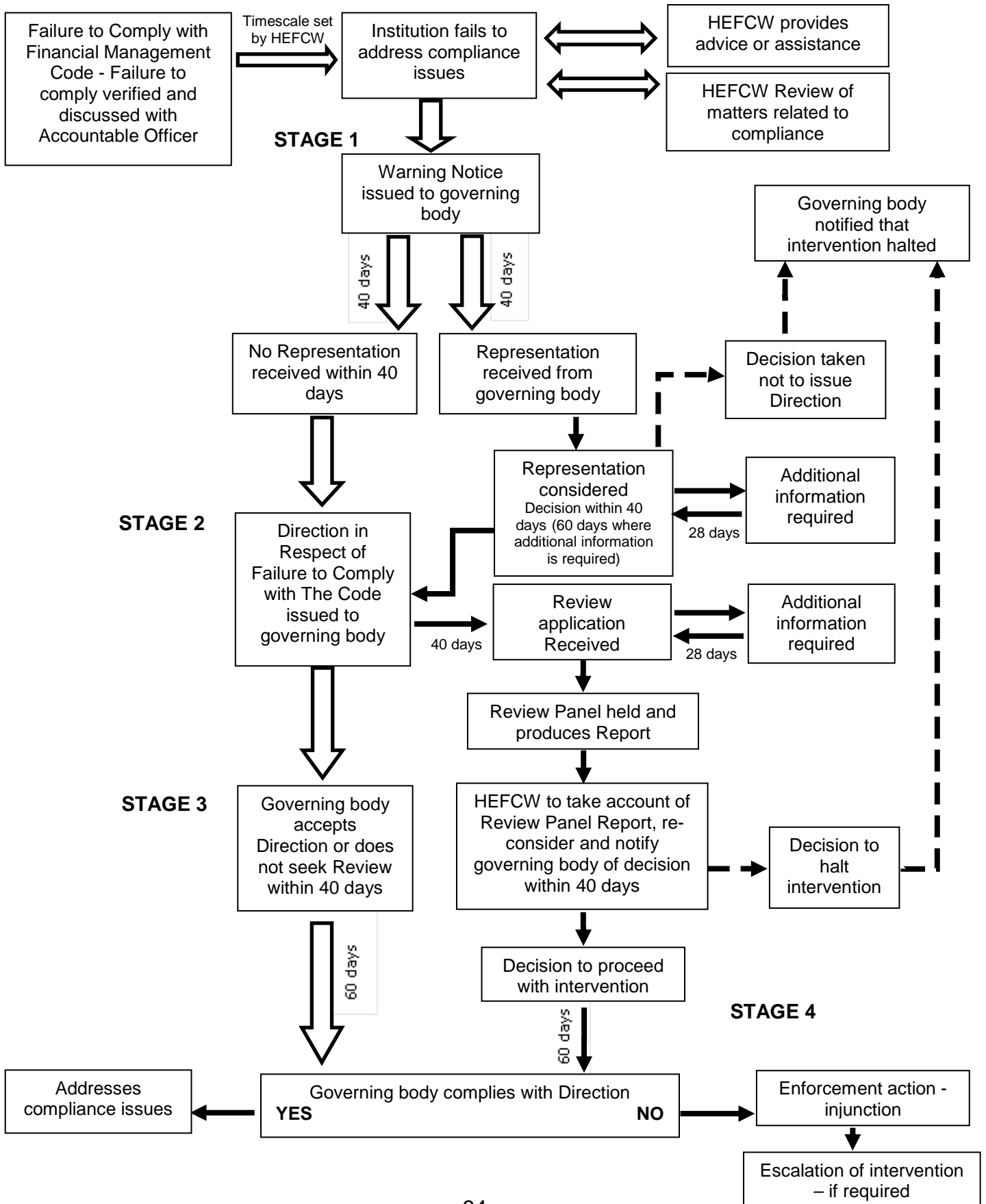
142. Interventions under Sections 37 and 39 of The 2015 Act would only be undertaken *in extremis*, where HEFCW has clear reason to believe that an injunction is unlikely to be complied with, or where intervention through the issue of a Direction in respect of Failure to Comply with the

Code is unlikely to be sufficient or successful given the persistent or serious nature of the non-compliance. These interventions are outlined in this Statement of Intervention from pages 65 and 79 respectively.



**Flow Chart: The Intervention Process in Respect of Failure to Comply with the Financial Management Code**

Intervention may be halted at any point if the institution complies.



## **Refusal to Approve a New Fee and Access Plan** (It is anticipated that this will come into effect from 1 September 2017)

### **Basis for Intervention**

143. This section relates to HEFCW's power to intervene through issuing a Notice of Refusal to Approve New Fee and Access Plan under Section 37 of The 2015 Act, which prohibits HEFCW from approving Fee and Access Plans proposed by an institution for a specified period where it is satisfied that the governing body of an institution has failed to comply with any one of the following conditions:

- **The duty at Section 10(1) of The 2015 Act to ensure that regulated course fees do not exceed the applicable fee limit** (i.e. that institutions do not charge excess fees).
- **A general requirement of the institution's approved Fee and Access Plan** (Section 6 of The 2015 Act).
- **A Direction in Respect of Failure to Comply with General Requirements of Approved Plan** (Section 13 of The 2015 Act).
- **A Direction in Respect of Inadequate Quality** (Section 19 of The 2015 Act).
- **A Direction in Respect of Failure to Comply with The Code** (Section 33 of The 2015 Act).

144. HEFCW may apply to court to enforce Directions in Respect of Failure to Comply with General Requirements of Approved Plan; Directions in Respect of Inadequate Quality; and Directions in Respect of Failure to Comply with The Code, by injunction if an institution fails to comply with the Direction. As set out in earlier sections of this Statement of Intervention, in the event that an institution fails to comply with such a Direction, HEFCW may escalate its intervention by issuing a Notice of Refusal to Approve New Fee and Access Plan.

145. HEFCW may also take the step of issuing a Notice of Refusal to Approve New Fee and Access Plan where an institution has failed to comply with either:

- **A general requirement of the institution's Fee and Access Plan.**
- **The institution's duty to ensure that regulated course fees do not exceed the applicable fee limit** (i.e. that the institution does not charge excess fees).

HEFCW will only normally consider issuing a Notice of Refusal to Approve New Fee and Access Plan where such failure to comply is serious. Whilst HEFCW can initiate use of these Section 37 powers as a first formal intervention step, Compliance and Reimbursement Directions or Directions in Respect of Failure to Comply with General Requirements

of Approved Plan would normally be issued first under most intervention circumstances.

**Note**

For the purposes of intervention under Section 37 of The 2015 Act HEFCW will make a judgement on what constitutes a **serious failure** to comply, based on the extent to which non-compliance has been, or is suspected to have been, intentional or fraudulent, and/or on the potential serious impact of the failure to comply on a range of stakeholders and issues (e.g. student experience and student interests, institutional financial viability, the protection of public investment and the reputation of the higher education sector etc.).

146. In view of the likely major impact on an institution of the refusal to approve its new Fee and Access Plan, the issue of a Notice of Refusal to Approve a New Fee and Access Plan will not be taken lightly and will normally only be utilised where other interventions have been unsuccessful, or in circumstances where a compliance issue is so serious that decisive action must be taken (e.g. to protect students, staff, public funds or the reputation of the wider Higher Education sector).

**Note**

Whilst an institution's governing body will be informed prior to the issue of a Notice of Refusal to Approve New Fee and Access Plan **it may not always be appropriate to engage with the institution via a partnership approach** at this stage. For example, the circumstances in which a Notice of Refusal to Approve New Fee and Access Plan is issued may be serious and urgent enough that informal engagement is no longer appropriate prior to initiation of the intervention.

Section 37(8) of The 2015 Act allows HEFCW to issue a Note of Refusal to Approve New Fee and Access Plan to an institution that no longer has regulated status. Such action would only be taken where that institution had failed to comply with a Direction in Respect of Failure to Comply with General Requirements of Approved Plan in relation to a period when it had an approved Fee and Access Plan in place.

147. The stages of this intervention process that are provided for under sections 42 to 44 of The 2015 Act and the Fee and Access Plans (Notices and Directions)(Wales) Regulations 2015 are outlined below, together with the associated checks and balances.

**Prior to Intervention**

148. As noted above, in view of the seriousness of the circumstances in which the issue of a Notice of Refusal to Approve New Fee and Access

Plan will be considered, it may not always be appropriate to engage with the institution via an informal partnership approach at this stage.

149. In the circumstances where:

- an institution's governing body has failed to comply with a Direction (Direction in Respect of Failure to Comply with General Requirements of Approved Plan, Direction in Respect of Inadequate Quality, or Direction in Respect of Failure to Comply with The Code), or with enforcement action in the form of an injunction linked to such a Direction; or
- a serious issue (in HEFCW's opinion) has been identified in respect of a failure to comply with general requirement of the institution's approved Fee and Access Plan; or
- a serious issue (in HEFCW's opinion) has been identified in respect of a failure to comply with general requirement of the institution's duty at Section 10(1) of The 2015 Act to ensure that regulated course fees do not exceed the applicable fee limit,

HEFCW will contact the governing body to discuss the issue. Where urgent action is required or where a governing body has demonstrated an unwillingness to engage, HEFCW may contact the governing body merely to notify them of the initiation of this intervention.

150. Where an informal partnership approach has been adopted by HEFCW in the first instance and the governing body is unable or unwilling to comply, within a reasonable timescale set by HEFCW, further intervention may be initiated in the form of the issue of a Notice of Refusal to Approve New Fee and Access Plan. HEFCW will be mindful of the circumstances of the case when considering this further intervention, including the institution's explanation of why it has failed to comply; the likelihood of the institution addressing the issue(s) voluntarily if given further time; and any other relevant factors.

## **The Intervention Process**

### **Stage 1: Warning Notice**

151. Where an institution has failed to comply with previously issued Directions or to address the serious non-compliance issues outlined above after a reasonable period (timescale to be set by HEFCW), HEFCW may initiate the intervention process in respect of refusal to approve a new Fee and Access Plan. Before HEFCW proceeds to issue a Notice of Refusal to Approve New Fee and Access Plan to an institution, HEFCW will provide the governing body of that institution with a Warning Notice (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). The Warning Notice will:

- a. Set out the proposed Notice of Refusal to Approve a New Fee and Access Plan;

- b. State HEFCW's reasons for proposing to give it;
- c. Inform the governing body that it may make representations about the proposed Notice of Refusal to Approve New Fee and Access Plan;
- d. Specify the period from the date of issue within which, and the way in which, representations may be made.

#### Checks and balances

- 152. From issue of the Warning Notice, institutions will have up to 40 days to make representations to HEFCW, with all representations to be sent to the HEFCW Chief Executive. Where representations are not received, no Notice of Refusal to Approve a New Fee and Access Plan will be issued until after the completion of this 40 day period.
- 153. Where representations are received, HEFCW will undertake to review these and decide on whether to issue a Notice within 40 days of receipt of the representations, except where the submission of additional information is required in order for HEFCW to be able to adequately consider representations. In such instances, the additional information will be requested within 28 days of receipt of the representations and should be submitted by the institution within 28 days of this HEFCW request, in order for a decision to be made within 60 days of receipt of the original representations. Where representations are received, no Notice of Refusal to Approve New Fee and Access Plan will be issued until after the completion of this process.
- 154. Decisions regarding the issuing of a Notice of Refusal to Approve New Fee and Access Plan will be made by the HEFCW Chief Executive. Where a decision is taken to not issue a Notice of Refusal to Approve New Fee and Access Plan, HEFCW will send a notice to the governing body within 14 days of that decision to inform them of the decision and the reasons for this.

#### **Stage 2: Notice of Refusal to Approve a New Fee and Access Plan**

- 155. The Notice of Refusal to Approve a New Fee and Access Plan will set out the specified period in which HEFCW cannot approve a Fee and Access Plan from the institution. The specified period may take the form of a set period during which approval will not be given (e.g. six months) or a maximum duration of a period during which approval will not be given (e.g. up to six months). The specified period will not exceed one year.
- 156. When issuing a Notice of Refusal to Approve a New Fee and Access Plan to an institution (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), Section 43 of The 2015 Act requires that HEFCW provide a statement to the governing body of that institution. The statement will:

- a. Set out HEFCW's reasons for issuing the Notice;
- b. Inform the governing body that it may apply for a review of the Notice; and
- c. Include any other prescribed information set out under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 at Regulation 6, i.e. the date of issue of the notice or direction; when the notice or direction is to be treated as having been given; the grounds in Regulation 7 on which an application for a review may be made; the procedure in Regulation 8 that a governing body must follow in order to apply for a review; and the name and address of the Review Panel to whom an application for a review must be made.

157. Whilst the Notice of Refusal will not be shared with Welsh Ministers until the point at which it is given, HEFCW will need to provide briefing to Welsh Government officials (and hence to Welsh Ministers) at the point of first issuing the Notice. The Notice that is issued will confirm that HEFCW cannot approve a Fee and Access Plan from the institution for a specified period.

158. Regulation 4 under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>25</sup> states that a notice or direction specified in Section 41(1) of the 2015 Act is to be treated as having been given on the day that the first of the following events occurs:

- The governing body notifies HEFCW in writing that it accepts the Notice;
- The time limit to apply for a Review of the Notice under Section 44 of The 2015 Act has expired and the governing body has not applied for a review;
- A review of the Notice under section 44 of The 2015 Act has concluded and HEFCW has notified the governing body in writing that the Notice stands.

Once given, the Notice will be published on the HEFCW website within seven days.

159. HEFCW may withdraw the Notice of Refusal, thereby removing the refusal to approve a new Fee and Access plan. Grounds for withdrawal might include, for example, compliance (after the original deadline) with a previous Direction, such as through the adjustment of fees and reimbursement of any excess fees that have been charged. If withdrawn, HEFCW would send a Notice of Withdrawal to the governing body and remove the Notice of Refusal from the HEFCW website at the earliest opportunity and at most within seven days. HEFCW would also immediately copy the Notice of Withdrawal to Welsh Ministers.

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<sup>25</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

## Checks and balances

160. Where HEFCW issues an institution with a Notice of Refusal to Approve a New Fee and Access Plan, Section 44 of The 2015 Act provides the ability for the governing body of that institution to apply for a review of the Notice. An application for a review may be made only on the following grounds:
- a. The governing body presents a material factor for consideration to which, for good reason, it had not previously drawn HEFCW's attention;
  - b. The governing body considers that HEFCW has disregarded a material factor it should have considered;
  - c. The governing body considers that the notice or direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

Regulation 8 of the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 states that applications for review must be made within 40 days of issue of the Notice of Refusal to Approve a New Fee and Access Plan, with applications made in writing as outlined in the Notice. The application for review must specify the grounds for review and include a copy of the notice or direction to be reviewed; a copy of the statement issued in accordance with Section 43 of The 2015 Act (see Paragraph 156); and information in support of the application. It should be noted that, under Regulation 7(2), an application for a review of the Notice of Refusal to Approve a New Fee and Access Plan cannot be made where a governing body has notified HEFCW in writing that it accepts the Notice.

161. The review is to be carried out by a person, or Panel of persons, appointed by the Welsh Ministers. Upon receiving an application for a review, the Person or Panel appointed by the Welsh Ministers will provide the governing body and HEFCW with an anticipated timetable for completing the review. The review Panel will give HEFCW details of the Notice of Refusal to Approve a New Fee and Access Plan to be reviewed, details of the grounds on which the review application has been made and a copy of the information supplied by the governing body in support of the application for review.
162. The review Panel may make a written request for further information from either HEFCW or the governing body for the purposes of the review. Any request for further information made by the Panel will be sent to HEFCW and the governing body at the same time. HEFCW or the governing body will be required to provide any information requested by the Panel within 28 days of the issue of the request if it is to be considered. Under Regulation 9(8), the Panel will consider whether it is appropriate to allow representations from either HEFCW or the governing body in respect of any further information submitted to it in response to its request for such information; and if it considers it

appropriate to allow representations, it will notify HEFCW and the governing body accordingly. The review Panel will ensure that both HEFCW and the governing body are in receipt of all information submitted by the other party.

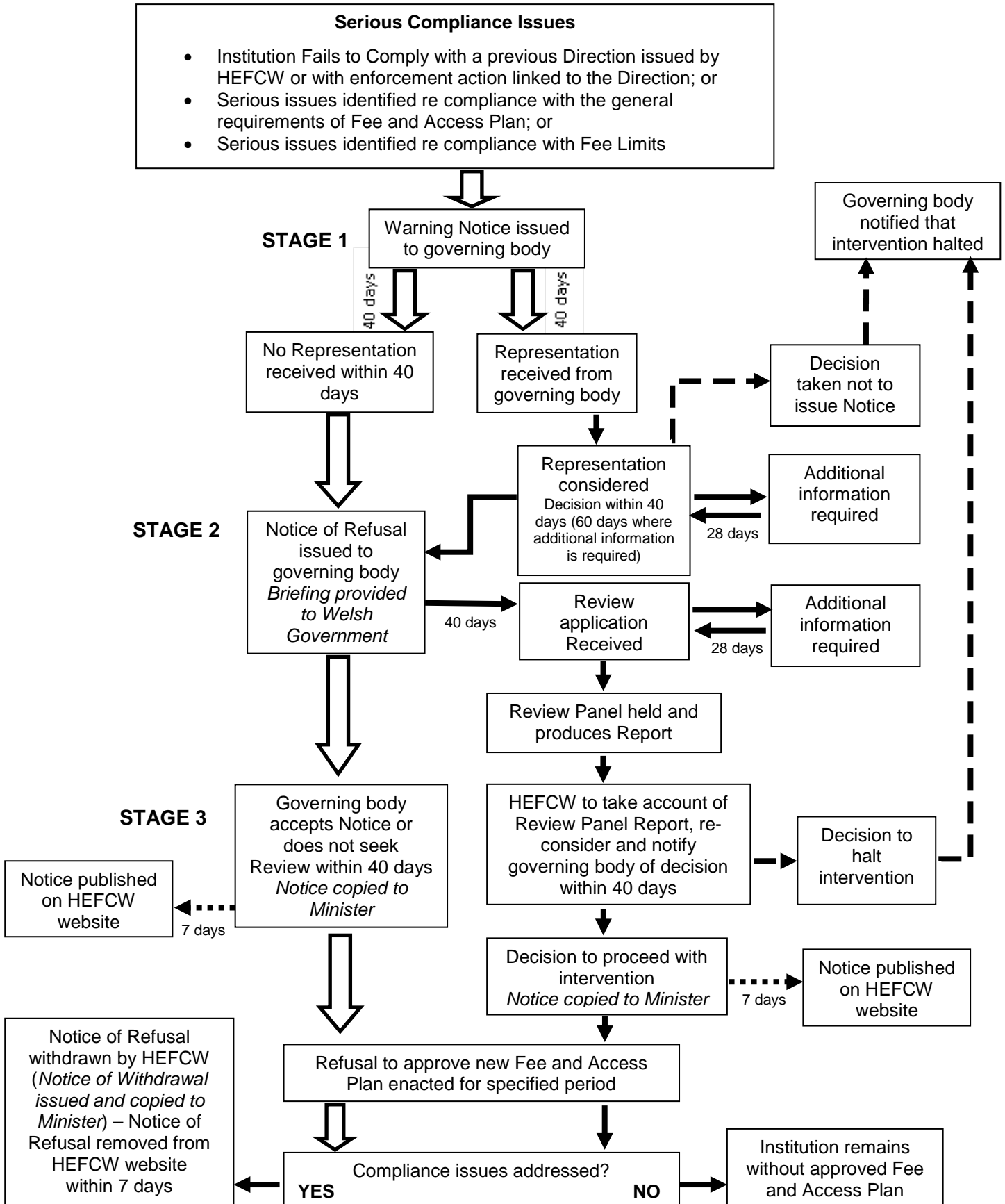
163. The review Panel will take account of the requested information submitted by HEFCW and the governing body in making its decision. The Panel will prepare a written report that is sent to both HEFCW and the governing body at the same time. HEFCW will take account of the review Panel's report and reconsider its decision to issue the Direction. HEFCW will then notify the governing body in writing within 40 days as to whether the Notice stands or not, and provide reason for that decision. If HEFCW's decision is that the Notice should stand, that decision will be binding on the governing body of the institution.

### **Stage 3: Refusal**

164. HEFCW will not be able to approve a new Fee and Access Plan from the institution for the period specified in the Notice of Refusal to Approve a New Fee and Access Plan.
165. As noted above, once the compliance issues have been addressed, HEFCW may withdraw the Notice of Refusal thereby enabling a Fee and Access Plan to be approved. If it considers it appropriate, HEFCW may also withdraw a Notice of Refusal if it is satisfied that the institution is making sufficient progress in taking the required steps but cannot fully complete all actions before the next Fee and Access Plan cycle.
166. Where an institution does not address the compliance issues, and the institution remains without an approved Fee and Access Plan, it will ultimately lose its regulated status with its courses no longer being automatically designated for student support purposes.



**Flow Chart: Refusal to Approve a New Fee and Access Plan**



## **Withdrawal of Approval of a Fee and Access Plan where HEFCW has a Legal Duty under Section 38 of The 2015 Act (In effect from 1 August 2016)**

### **Basis for Intervention**

167. This section relates to HEFCW's power to intervene through withdrawal of its approval of an existing Fee and Access Plan under Section 38 of The 2015 Act. The basis for intervention is outlined below, with the intervention involving the issue of a Notice of Withdrawal of Approval of Fee and Access Plan.

#### **Note**

**When initiating the withdrawal of an institution's Fee and Access Plan, HEFCW will strive to protect the interests of the students at the institution.** HEFCW might seek to do this, for example, by working in partnership with a third party institution to ensure that students are able to complete their courses under new arrangements.

168. Under Section 38 of The 2015 Act, HEFCW has a duty to intervene to withdraw approval of an existing Fee and Access Plan where an institution no longer complies with the requirements for approval of a Fee and Access Plan which are set out at Section 2(3) of The 2015 Act. These requirements are that the institution:

- Is in Wales (i.e. its activities are wholly or principally located in Wales);
- Provides higher education; and
- Is a charity.

HEFCW will monitor whether institutions continue to meet these requirements on at least an annual basis, including through the Fee and Access Plan application process.

169. In view of the legal duty upon HEFCW to initiate the process of withdrawal of approval where an institution no longer meets the requirements at Section 2(3) of The 2015 Act, the intervention process will be initiated with immediate effect in such circumstances.

#### **Note**

Where an institution no longer complies with the requirements at Section 2(3) of The Act, HEFCW is required under Section 38 to initiate the intervention process to withdraw approval of the institution's Fee and Access Plan. **Due to this legal requirement, under these circumstances HEFCW will not be able to engage with the institution via a partnership approach prior to initiating formal intervention.**

170. The stages of this intervention process that are provided for under sections 42 to 44 of The 2015 Act and the Fee and Access Plans (Notices and Directions)(Wales) Regulations 2015 are outlined below, together with the associated checks and balances.

### **Prior to Intervention**

171. As noted above, where an institution no longer complies with the conditions at Section 2(3) of The 2015 Act, HEFCW will proceed immediately to initiate the intervention in respect of withdrawal of approval of the institution's Fee and Access Plan.

### **The Intervention Process**

#### **Stage 1: Warning Notice**

172. Where an institution no longer complies with the conditions at Section 2(3) of The 2015 Act, HEFCW will initiate the intervention process in respect of withdrawal of approval of Fee and Access Plan.

173. Before HEFCW proceeds to issue a Notice of Withdrawal of Approval of Fee and Access Plan to an institution, HEFCW will provide the governing body of that institution with a Warning Notice (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). The Warning Notice will:

- a. Set out the proposed Notice of Withdrawal of Approval of Fee and Access Plan;
- b. State HEFCW's reasons for proposing to give it;
- c. Inform the governing body that it may make representations about the proposed Notice;
- d. Specify the period from the date of issue within which, and the way in which, representations may be made.

#### Checks and balances

174. From issue of the Warning Notice, institutions will have up to 40 days to make representations to HEFCW, with all representations to be sent to the HEFCW Chief Executive. Where representations are not received, no Notice of Withdrawal of Approval of Fee and Access Plan will be issued until after the completion of this 40 day period.

175. Where representations are received, HEFCW will undertake to review these and decide on whether to issue a Notice within 40 days of receipt of the representations, except where the submission of additional information is required in order for HEFCW to be able to adequately consider representations. In such instances, the additional information

will be requested within 28 days of receipt of the representations and should be submitted by the institution within 28 days of the HEFCW request, in order for a decision to be made within 60 days of receipt of the original representation. Where representations are received, no Notice of Withdrawal of Approval of Fee and Access Plan will be issued until after the completion of this process.

176. Decisions regarding the issuing of a Notice of Withdrawal of Approval of Fee and Access Plan will be made by the HEFCW Chief Executive. Where a decision is taken to not issue a Notice of Withdrawal of Approval of Fee and Access Plan, HEFCW will send a notice to the governing body within 14 days to inform them of the decision and the reasons for this.

### **Stage 2: Notice of Withdrawal of Approval of Fee and Access Plan**

177. When issuing a Notice of Withdrawal of Approval of Fee and Access Plan to an institution (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), Section 43 of The 2015 Act requires that HEFCW provide a statement to the governing body of that institution. The statement will:
- a. Set out HEFCW's reasons for issuing the Notice;
  - b. Inform the governing body that it may apply for a review of the Notice; and
  - c. Include any other prescribed information set out under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 at Regulation 6, i.e. the date of issue of the notice or direction; when the notice or direction is to be treated as having been given; the grounds in Regulation 7 on which an application for a review may be made; the procedure in Regulation 8 that a governing body must follow in order to apply for a review; and the name and address of the Review Panel to whom an application for a review must be made.
178. Regulation 4 under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 states that a notice or direction specified in Section 41(1) of the 2015 Act is to be treated as having been given on the day that the first of the following events occurs:
- The governing body notifies HEFCW in writing that it accepts the Notice;
  - The time limit to apply for a Review of the Notice under Section 44 of The 2015 Act has expired and the governing body has not applied for a review;
  - A review of the Notice under section 44 of The 2015 Act has concluded and HEFCW has notified the governing body in writing that the Notice stands.

Once given, the Notice will be published on the HEFCW website within seven days.

179. Whilst the Notice of Withdrawal of Approval of Fee and Access Plan will not be shared with Welsh Ministers until the point at which it is given, HEFCW will need to provide briefing to Welsh Government officials (and hence to Welsh Ministers) at the point of first issuing the Notice. The Notice that is issued will confirm that HEFCW will withdraw the approval for the institution's existing Fee and Access Plan.

#### Checks and balances

180. If HEFCW issues an institution with a Notice of Withdrawal of Approval of Fee and Access Plan, Section 44 of The 2015 Act provides the ability for the governing body of that institution to apply for a review of the Notice. An application for a review may be made only on the following grounds:
- a. The governing body presents a material factor for consideration to which, for good reason, it had not previously drawn HEFCW's attention;
  - b. The governing body considers that HEFCW has disregarded a material factor it should have considered;
  - c. The governing body considers that the notice or direction is disproportionate in view of all the relevant facts which were considered by HEFCW.

Regulation 8 of the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 states that applications for review must be made within 40 days of issue of the Notice of Withdrawal of Approval of Fee and Access Plan, with applications made in writing as outlined in the Notice. The application for review must specify the grounds for review and include a copy of the notice or direction to be reviewed; a copy of the statement issued in accordance with Section 43 of The 2015 Act; and information in support of the application. It should be noted that, under Regulation 7(2), an application for a review of the Notice of Withdrawal of Approval of Fee and Access Plan cannot be made where a governing body has notified HEFCW in writing that it accepts the Notice.

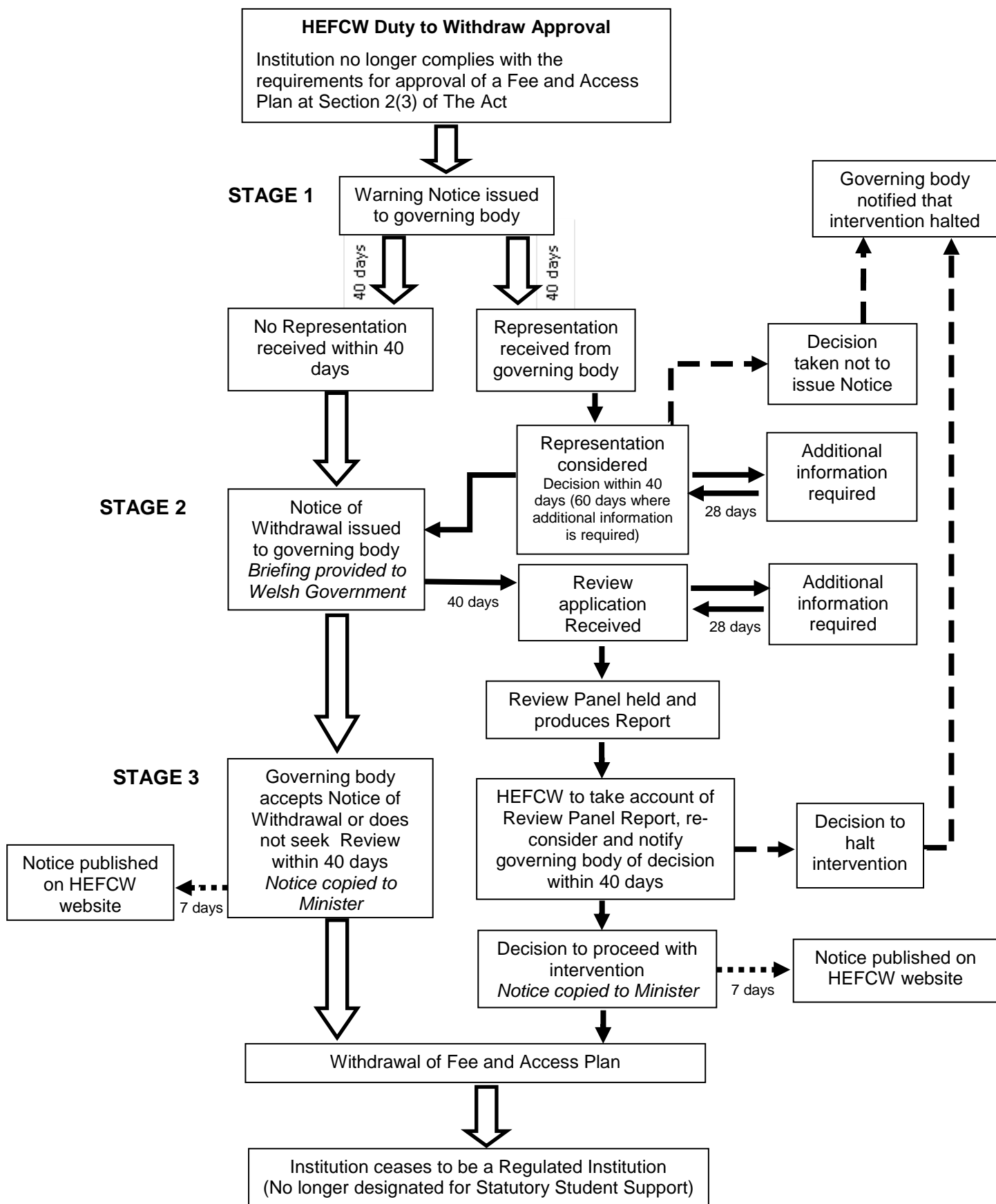
181. The review is to be carried out by a person, or Panel of persons, appointed by the Welsh Ministers. Upon receiving an application for a review, the Person or Panel appointed by the Welsh Ministers will provide the governing body and HEFCW with an anticipated timetable for completing the review. The review Panel will give HEFCW details of the Notice of Withdrawal of Approval of Fee and Access Plan to be reviewed, details of the grounds on which the review application has been made and a copy of the information supplied by the governing body in support of the application for review.

182. The review Panel may make a written request for further information from either HEFCW or the governing body for the purposes of the review. Any request for further information made by the Panel will be sent to HEFCW and the governing body at the same time. HEFCW or the governing body will be required to provide any information requested by the Panel within 28 days of the issue of the request if it is to be considered. Under Regulation 9(8), the Panel will consider whether it is appropriate to allow representations from either HEFCW or the governing body in respect of any further information submitted to it in response to its request for such information; and if it considers it appropriate to allow representations, it will notify HEFCW and the governing body accordingly. The review Panel will ensure that both HEFCW and the governing body are in receipt of all information submitted by the other party.
183. The review Panel will take account of all the requested information submitted by HEFCW and the governing body in making its decision. The Panel will prepare a written report that is sent to both HEFCW and the governing body at the same time. HEFCW will take account of the review Panel's report and reconsider its decision to issue the Direction. HEFCW will then notify the governing body in writing within 40 days as to whether the Notice stands or not, and provide reason for that decision. If HEFCW's decision is that the Notice should stand, that decision will enable HEFCW to proceed to withdraw approval.

### **Stage 3: Withdrawal of Approval**

184. Once the Notice of Withdrawal of Approval of Fee and Access Plan has been given (see Paragraph 178), withdrawal would normally be expected to take place with immediate effect in order to avoid any worsening of the impact on students, staff, public funds, publically funded assets etc.
185. The withdrawal of approval of the institution's Fee and Access Plan by HEFCW will mean that the institution ceases to be a Regulated Institution. The institution's courses will therefore no longer be automatically designated for the purposes of statutory student support.
186. In order to mitigate the impact of withdrawal of approval of the institution's Fee and Access Plan on existing students at the institution, measures will be implemented through student support regulations under Section 22 of the Teaching and Higher Education Act 1998. These will make provision for student support to continue for those students remaining at the institution. HEFCW's quality assessment duty and associated intervention functions will continue to apply in respect of those courses which continue to be undertaken by those remaining students.

**Flow Chart: Withdrawal of Approval of Fee and Access Plan where HEFCW has a legal duty to withdraw approval under Section 38 of The 2015 Act**



## **Withdrawal of Approval of a Fee and Access Plan by HEFCW under Section 39 of The 2015 Act**

**(It is anticipated that this will come into effect from 1 September 2017)**

### **Basis for Intervention**

187. This section relates to HEFCW's power to intervene in extremis through withdrawal of its approval of an existing Fee and Access Plan under Section 39 of The 2015 Act. This intervention power will only be used when HEFCW is satisfied that that the regulatory breach is so significant or serious that it cannot be dealt with by other means. The basis for intervention is outlined below, with the intervention involving the issue of a Notice of Withdrawal of Approval of Fee and Access Plan.

#### **Note**

**When initiating the withdrawal of an institution's Fee and Access Plan, HEFCW will strive to protect the interests of the students at the institution.** HEFCW may work with the Welsh Government to implement measures through student support regulations (under Section 22 of the Teaching and Higher Education Act 1998) to make provision for student support to continue for those students remaining at the institution. HEFCW may also seek to protect students by, for example, working in partnership with a third party institution to ensure that students are able to complete their courses under new arrangements.

188. HEFCW may withdraw approval of a Fee and Access Plan if they are satisfied that one of the conditions for intervention set out at Section 39(2) of The 2015 Act has been met. These conditions, which relate to individual requirements under The 2015 Act and strands of intervention, are as follows:

- The governing body of the institution has:
  - **Persistently failed to comply with the duty at Section 10(1) of The 2015 Act** to ensure that regulated course fees do not exceed the applicable fee limit (i.e. that institutions do not charge excess fees); and/or
  - **Failed to comply with a Compliance and Reimbursement Direction.**
- The governing body of the institution has:
  - **Persistently failed to comply with the general requirements of the institution's approved Fee and Access Plan** (see Section 6 of The 2015 Act).
  - **Failed to comply with a Direction in Respect of Failure to Comply with General Requirements of Approved Plan** (see Section 13 of The 2015 Act).



- The **quality of education** provided by or on behalf of the institution is **seriously inadequate**.
- There has been a **serious failure** by the governing body to comply with **The Financial Management Code** (The Code).

**Note**

For the purposes of this intervention HEFCW will make a judgement on:

- Whether a governing body has **persistently failed to comply** based on the duration, recurrence and frequency of a compliance issue or issues (persistent failure may consist of a number of separate issues or the repetition or continuation of the same issue). This judgement may also be informed by the stance taken by the institution's governing body with regard to compliance (e.g. steadfast refusal to engage with HEFCW or to comply with regulatory requirements).
- What constitutes a **serious failure**, based on the extent to which non-compliance has been, or is suspected to have been, intentional or fraudulent, and/or on the potential serious impact of the failure to comply on a range of stakeholders and issues (e.g. student experience, financial viability, the protection of public investment and the reputation of the higher education sector etc.).

189. Where an institution's governing body has failed to comply with a Compliance and Reimbursement Direction or with a Direction in Respect of Failure to Comply with General Requirements of Approved Plan, this may result in enforcement action via injunction (see earlier sections of Statement of Intervention). However, as set out above, in certain circumstances HEFCW may escalate the intervention process by issuing a Notice of Withdrawal of Approval of Fee and Access Plan.
190. Similarly, HEFCW may issue a Notice of Withdrawal of Approval of Fee and Access Plan where an institution's governing body persistently fails to comply with either the duty at Section 10(1) of The 2015 Act to ensure that regulated course fees do not exceed the applicable fee limit or with the general requirements of the institution's approved Fee and Access Plan (see Section 6 of The 2015 Act).
191. HEFCW may also take the step of proceeding to issue a Notice of Withdrawal of Approval of Fee and Access Plan where the quality of education provided by or on behalf of an institution is seriously inadequate or there has been serious failure by the governing body of an institution to comply with the Code.
192. In view of the likely major impact on an institution of the withdrawal of approval of its Fee and Access Plan, the issue of a Notice of Withdrawal

of Approval of Fee and Access Plan will not be taken lightly and will normally only be utilised as a measure of last resort where other interventions have failed, or in circumstances where a compliance issue is so serious that decisive action must be taken (e.g. to protect students, public funds or the reputation of the wider Higher Education sector).

193. The stages of this intervention process that are provided for under sections 42 to 44 of The 2015 Act and the Fee and Access Plans (Notices and Directions)(Wales) Regulations 2015 are outlined below, together with the associated checks and balances.

#### Note

Whilst an institution's governing body will normally be informed prior to the issue of a Warning Notice in respect of Withdrawal of Approval of Fee and Access Plan under Section 39 of The Act, **it may not always be appropriate to engage with the institution via a partnership approach.** For example, the circumstances in which a Notice of Withdrawal of Approval of Fee and Access Plan is issued may be serious enough (e.g. serious issues of non-compliance with The Code impacting on financial viability) that any informal engagement is no longer appropriate prior to initiation of the intervention.

#### Prior to Intervention

194. Where an institution's governing body has persistently failed to comply with any of: the duty at Section 10(1) of The 2015 Act to ensure that regulated course fees do not exceed the applicable fee limit; a Compliance and Reimbursement Direction; general requirements of the institution's approved Fee and Access Plan; a Direction in Respect of Failure to Comply with General Requirements of Approved Plan, HEFCW may, depending on the urgency of the situation in HEFCW's opinion, contact the governing body to discuss the issue. Where the governing body is unable or unwilling to comply, within a reasonable timescale set by HEFCW, the process leading to the issue of a Notice of Withdrawal of Approval of Fee and Access Plan will be initiated. HEFCW will be mindful of the circumstances of the case when considering this serious intervention, including the institution's explanation of why it has failed to comply; the likelihood of the institution addressing the issue(s) voluntarily if given further time; the interests of students and how these can be protected; and any other relevant factors. Where there is an urgent need for action (in HEFCW's opinion), HEFCW may not have time to engage with the governing body prior to initiating the intervention process.
195. Similarly, where serious failings have been identified in respect of the quality of provision or compliance with The Code, HEFCW may, depending on the urgency of the situation, contact the governing body to discuss the issue. Where the governing body is unable or unwilling to comply, within a reasonable timescale set by HEFCW, the process

leading to issue of a Notice of Withdrawal of Approval of Fee and Access Plan will be initiated. HEFCW will be mindful of the circumstances of the case when considering this serious intervention, including the institution's explanation of why it has such serious failings; the likelihood of the institution addressing the issue(s) voluntarily if given further time; the interests of students and how these can be protected; and any other relevant factors. Where there is an urgent need for action (in HEFCW's opinion), HEFCW may not have time to engage with the governing body prior to initiating the intervention process.

## **The Intervention Process**

### **Stage 1: Warning Notice**

196. Where an institution's governing body has persistently failed to address the above non-compliance issues in respect of excess fees or the general requirements of the Fee and Access Plan or has serious issues in respect of inadequate quality or compliance with The Code, HEFCW may initiate the intervention process in respect of withdrawal of approval of Fee and Access Plan.
197. Where HEFCW considers the issues to be not so urgent that immediate action is required, and has sought to engage further with the institution's governing body prior to initiating this intervention, HEFCW will initiate the intervention after a reasonable period (timescale to be set by HEFCW).
198. Before HEFCW proceeds to issue a Notice of Withdrawal of Approval of Fee and Access Plan to an institution, HEFCW will provide the governing body of that institution with a Warning Notice (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer). The Warning Notice will:
  - a. Set out the proposed Notice of Withdrawal of Approval of Fee and Access Plan;
  - b. State HEFCW's reasons for proposing to give it;
  - c. Inform the governing body that it may make representations about the proposed Notice;
  - d. Specify the period from the date of issue within which, and the way in which, representations may be made.

### Checks and balances

199. From issue of the Warning Notice, institutions will have up to 40 days to make representations to HEFCW, with all representations to be sent to the HEFCW Chief Executive. No Notice of Withdrawal of Approval of Fee and Access Plan will be issued until after the completion of this 40 day period.

200. Where representations are received, HEFCW will undertake to review these and decide on whether to issue a Notice within 40 days of receipt of the representations, except where the submission of additional information is required in order for HEFCW to be able to adequately consider representations. In such instances, the additional information will be requested within 28 days of receipt of the representations and should be submitted by the institution within 28 days of the HEFCW request, in order for a decision to be made within 60 days of receipt of the original representations. Where representations are received, no Notice of Withdrawal of Approval of Fee and Access Plan will be issued until after the completion of this process.
201. Decisions regarding the issuing of a Notice of Withdrawal of Approval of Fee and Access Plan will be made by the HEFCW Chief Executive. Where a decision is taken to not issue a Notice of Withdrawal of Approval of Fee and Access Plan, HEFCW will send a notice to the governing body within 14 days to inform them of the decision and the reasons for this.

### **Stage 2: Notice of Withdrawal of Approval of Fee and Access Plan**

202. When issuing a Notice of Withdrawal of Approval of Fee and Access Plan to an institution (sent via the Chair of the governing body and Clerk to the governing body and copied to the Accountable Officer), Section 43 of The 2015 Act requires that HEFCW provide a statement to the governing body of that institution. The statement will:
- a. Set out HEFCW's reasons for issuing the Notice;
  - b. Inform the governing body that it may apply for a review of the Notice; and
  - c. Include any other prescribed information set out under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 at Regulation 6, i.e. the date of issue of the notice or direction; when the notice or direction is to be treated as having been given; the grounds in Regulation 7 on which an application for a review may be made; the procedure in Regulation 8 that a governing body must follow in order to apply for a review; and the name and address of the Review Panel to whom an application for a review must be made.
203. Regulation 4 under the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015<sup>26</sup> states that a notice or direction specified in Section 41(1) of the 2015 Act is to be treated as having been given on the day that the first of the following events occurs:
- The governing body notifies HEFCW in writing that it accepts the Notice;

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<sup>26</sup> [www.legislation.gov.uk](http://www.legislation.gov.uk)

- The time limit to apply for a Review of the Notice under Section 44 of The 2015 Act has expired and the governing body has not applied for a review;
- A review of the Notice under section 44 of The 2015 Act has concluded and HEFCW has notified the governing body in writing that the Notice stands.

Once given, the Notice will be published on the HEFCW website within seven days.

204. Whilst the Notice of Withdrawal of Approval of Fee and Access Plan will not be shared with Welsh Ministers until the point at which it is given, HEFCW will need to provide briefing to Welsh Government officials (and hence to Welsh Ministers) at the point of first issuing the Notice. The Notice that is issued will confirm that HEFCW will withdraw the approval for the institution's existing Fee and Access Plan.

#### Checks and balances

205. If HEFCW issues an institution with a Notice of Withdrawal of Approval of Fee and Access Plan, Section 44 of The 2015 Act provides the ability for the governing body of that institution to apply for a review of the Notice. An application for a review may be made only on the following grounds:
- a. The governing body presents a material factor for consideration to which, for good reason, it had not previously drawn HEFCW's attention;
  - b. The governing body considers that HEFCW has disregarded a material factor it should have considered;
  - c. The governing body considers that the notice is disproportionate in view of all the relevant facts which were considered by HEFCW.

Regulation 8 of the Fee and Access Plans (Notices and Directions) (Wales) Regulations 2015 states that applications for review must be made within 40 days of issue of the Notice of Withdrawal of Approval of Fee and Access Plan, with applications made in writing as outlined in the Notice. The application for review must specify the grounds for review and include a copy of the notice or direction to be reviewed; a copy of the statement issued in accordance with Section 43 of The 2015 Act; and information in support of the application. It should be noted that, under Regulation 7(2), an application for a review of the Notice of Withdrawal of Approval of Fee and Access Plan cannot be made where a governing body has notified HEFCW in writing that it accepts the Notice.

206. The review is to be carried out by a person, or Panel of persons, appointed by the Welsh Ministers. Upon receiving an application for a review, the Person or Panel appointed by the Welsh Ministers will provide the governing body and HEFCW with an anticipated timetable

for completing the review. The review Panel will give HEFCW details of the Notice of Withdrawal of Approval of Fee and Access Plan to be reviewed, details of the grounds on which the review application has been made and a copy of the information supplied by the governing body in support of the application for review.

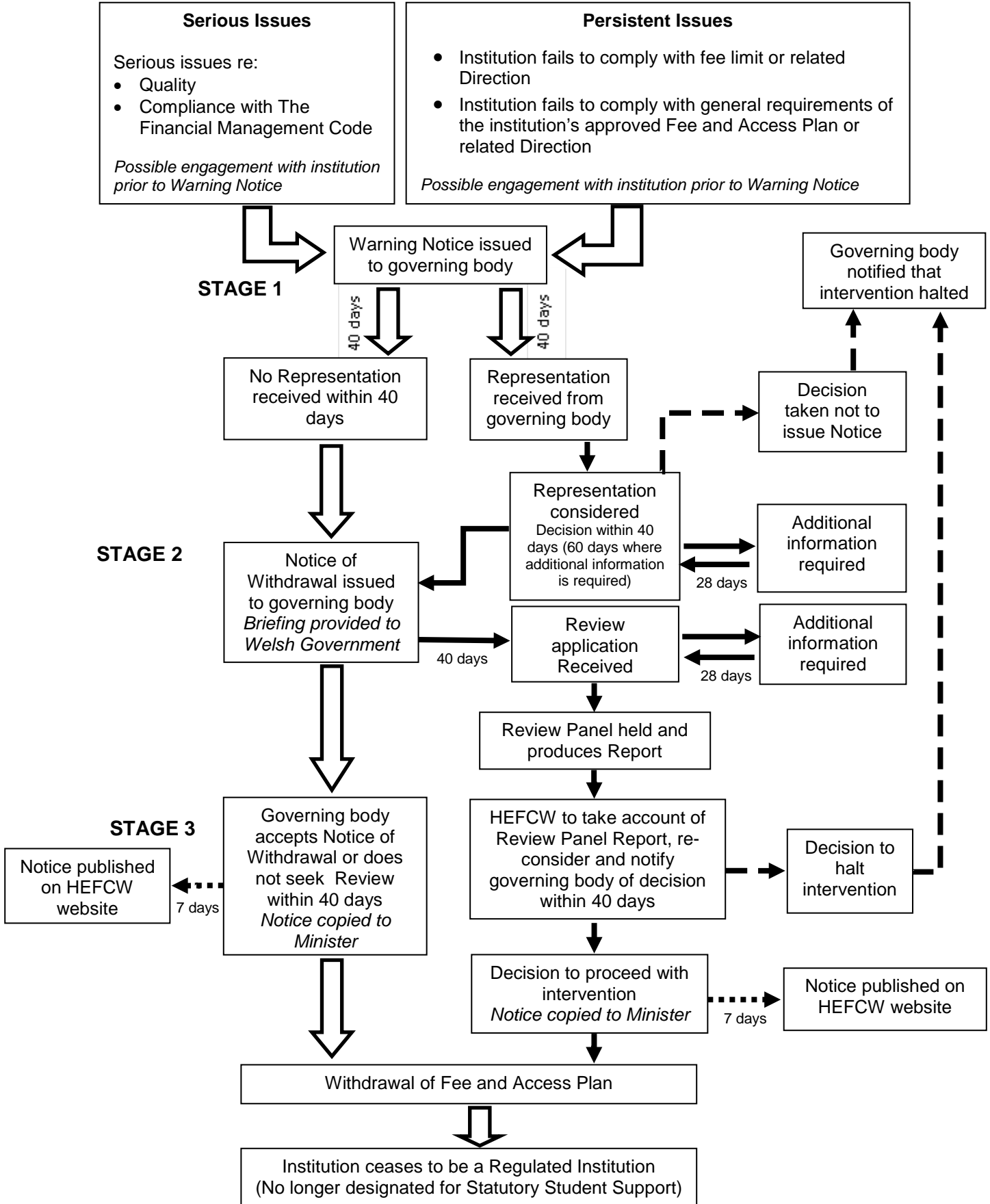
207. The review Panel may make a written request for further information from either HEFCW or the governing body for the purposes of the review. Any request for further information made by the Panel will be sent to HEFCW and the governing body at the same time. HEFCW or the governing body will be required to provide any information requested by the Panel within 28 days of the issue of the request if it is to be considered. Under Regulation 9(8), the Panel will consider whether it is appropriate to allow representations from either HEFCW or the governing body in respect of any further information submitted to it in response to its request for such information; and if it considers it appropriate to allow representations, it will notify HEFCW and the governing body accordingly. The review Panel will ensure that both HEFCW and the governing body are in receipt of all information submitted by the other party.
208. The review Panel will take account of all the requested information submitted by HEFCW and the governing body in making its decision. The Panel will prepare a written report that is sent to both HEFCW and the governing body at the same time. HEFCW will take account of the review Panel's report and reconsider its decision to issue the Direction. HEFCW will then notify the governing body in writing within 40 days as to whether the Notice stands or not, and provide reason for that decision. If HEFCW's decision is that the Notice should stand, that decision will enable HEFCW to proceed to withdraw approval.

### **Stage 3: Withdrawal of Approval**

209. Once the Notice of Withdrawal of Approval of Fee and Access Plan has been given (see Paragraph 203), withdrawal would normally be expected to take place with immediate effect in order to avoid any worsening of the impact on students, public funds, publically funded assets, reputation of the higher education sector etc.
210. The withdrawal of approval of the institution's Fee and Access Plan by HEFCW will mean that the institution ceases to be a Regulated Institution. The institution's courses will therefore no longer be automatically designated for the purposes of statutory student support.
211. In order to mitigate the impact of withdrawal of approval of the institution's Fee and Access Plan on existing students at the institution, measures will be implemented through student support regulations under Section 22 of the Teaching and Higher Education Act 1998. These will make provision for student support to continue for those students remaining at the institution. HEFCW's quality assessment duty and

associated intervention functions will continue to apply in respect of those courses which continue to be undertaken by remaining students.

**Flow Chart: Withdrawal of Approval of Fee and Access Plan by HEFCW under Section 39 of The 2015 Act**





## Complaints in Respect of HEFCW

212. HEFCW is committed to working in an open and accountable way and to responding positively to any complaints by improving procedures, correcting mistakes and learning from experience.
213. Should you have concerns regarding the way HEFCW has operated the procedures outlined in this Statement of Intervention, you may use HEFCW's [Complaints Procedure](#) to raise these issues. Information on this Complaints Procedure is provided on our website<sup>27</sup>.
214. Please note that all concerns regarding the grounds for issue of a Notice or Direction, under the processes outlined in this Statement of Intervention, must be aired through the relevant Review process, rather than via HEFCW's complaints procedure.

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<sup>27</sup> [www.hefcw.ac.uk/about\\_us/our\\_responsibilities/complaints\\_about\\_hefcw.aspx](http://www.hefcw.ac.uk/about_us/our_responsibilities/complaints_about_hefcw.aspx)