

EXPLANATORY MEMORANDUM TO THE HIGHER EDUCATION (FEE AND ACCESS PLANS) (NOTICES, PROCEDURE AND PUBLICATION) (WALES) REGULATIONS 2016

The Explanatory Memorandum has been prepared by the Department for Economy, Skills and Natural Resources of the Welsh Government and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Higher Education (Fee and Access Plans) (Notices, Procedure and Publication) (Wales) Regulations 2016. I am satisfied that the benefits outweigh any costs.

Huw Lewis AM
Minister for Education and Skills
25 February 2016

Description

1. The Higher Education (Fee and Access Plans) (Notices, Procedure and Publication) (Wales) Regulations 2016 ('the Regulations') make provision in respect of notices under sections 37, 38 and 39 of the Higher Education (Wales) Act 2015 ('the Act') and how and when the Higher Education Funding Council for Wales ('HEFCW') are to comply with their duties under section 40(1) of the Act.

Matters of special interest to the Constitutional and Legislative Affairs Committee

2. None.

Legislative background

3. The Welsh Ministers are able to make these regulations in reliance of the powers in sections 37(7)(a), 37(7)(c), 38(2)(b), 38(3) and 40(2) of the Act. The Regulations are subject to annulment (negative procedure).

Purpose and intended effect of the legislation

4. The Act establishes a revised regulatory framework for higher education in Wales. An institution in Wales which provides higher education and which is a charity may apply to HEFCW for the approval of a fee and access plan. It is proposed that the higher education courses of an institution with an approved fee and access plan – a 'regulated institution' – will be designated for the purpose of student support. Students on such courses may be eligible to apply for financial support from the Welsh Ministers. The Act confers new functions upon HEFCW, allowing them to undertake fee limit and fee plan monitoring, quality assurance and financial assurance of regulated institutions.

5. The Act confers a range of powers upon HEFCW which enable prudent and proportionate regulation of regulated institutions. In particular:

- Section 37 of the Act gives HEFCW the power to refuse to approve a new fee and access plan, where, for example, HEFCW are satisfied that an institution has failed to comply with a fee limit of a general requirement of its fee and access plan;
- Section 38 places HEFCW under a duty to withdraw approval of fee and access plan where HEFCW are satisfied that the institution is no longer an institution in Wales, no longer providing higher education or is no longer a charity; and
- Section 39 gives HEFCW the power to withdraw approval of a fee and access plan, where, for example, an institution has persistently failed to comply with a fee limit or the quality of education is seriously inadequate.

Section 40 prescribes what HEFCW must do when it gives notice in connection with sections 37–39.

6. The purpose of the Regulations is:

- to establish the maximum period in which a new fee and access plan may not be approved by HEFCW under section 37 as one year (when notice to refuse to approve a new fee and access plan is given);
- to ensure that the regulated institution and the Welsh Ministers are notified in writing and reasons supplied where HEFCW withdraws their notice to refuse to approve a new fee and access plan;
- to apply sections 41–44 of the Act to notices given under section 38 (duty to withdraw approval of a fee and access plan), which will establish a warning and review procedure for such notices. This procedure will ensure that, before issue a notice under section 38 of the Act, HEFCW must first issue a warning notice and consider any subsequent representations from the institution. This procedure also ensures that the institution is able to seek an independent review in the event that a notice is given by HEFCW under section 38; and
- to ensure that a copy of a notice issued under sections 37–39 is provided to the Welsh Ministers immediately and published by HEFCW within seven days.

Consultation

7. A formal consultation exercise which informed the development of the Regulations took place between 17 March 2015 and 12 May 2015. The outcome is included in the Regulatory Impact Assessment below.

REGULATORY IMPACT ASSESSMENT

8. The Welsh Ministers' Code of Practice on carrying out regulatory impact assessments for subordinate legislation was considered in relation to the Regulations. A Regulatory Impact Assessment ('the Assessment') is required and follows. It summarises the likely costs and benefits of complying with the Regulations, establishing:

- the administrative, compliance and other costs to which the Regulations will give rise;
- the timescales over which costs are expected;
- on whom the costs will fall; and
- the benefits that will accrue.

9. The Regulations are set in the context of achieving the overall policy objectives of the Act. The Higher Education (Wales) Bill Explanatory Memorandum¹ records the objectives as to:

- ensure robust and proportionate regulation of institutions in Wales whose courses are supported by Welsh Government higher education grants and loans;
- safeguard the contribution made to the public good arising from the Welsh Government's financial subsidy of higher education;
- maintain a strong focus on fair access to higher education; and
- preserve and protect the institutional autonomy and academic freedom of universities.

10. The Explanatory Memorandum for the Higher Education (Wales) Bill incorporated a regulatory impact assessment, including an analysis of costs and benefits. Annex A of that Explanatory Memorandum explained the methodology used to arrive at cost estimates and was further elaborated in a letter from the Minister for Education and Skills to the Finance Committee of the National Assembly for Wales². The information and methodology employed in that assessment describes the costs and benefits of the Regulations and is used here.

OPTIONS

11. Three options were considered ahead of consultation. 'Do nothing' would not make any new regulations. 'Do minimum' makes the subordinate legislation that is required to ensure the regulatory framework operates as intended. 'Do minimum and consider further safeguards' is the most complex of the options, and is explained further below. In the end, a final option between the latter two options was selected, after consultation, as preferable.

¹ <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9758-em-e.pdf?langoption=3&ttl=PRI-LD9758-EM%20-%20Higher%20Education%20%28Wales%29%20Bill%20-%20Explanatory%20Memorandum>

² <http://www.senedd.assembly.wales/documents/s28913/FIN4-14-14ptn1.pdf>

Option 1 Do nothing

12. In this option, no further regulations would be made. This would leave problematic gaps in the legislation which would frustrate the implementation of the regulatory framework provided for by the Act. As an example, section 37(7)(a) enables regulations to be made on the period in which a new fee and access plan will not be approved by HEFCW. Without making subordinate legislation, this period would be unclear.

13. The direct financial costs of this option are zero, as there would be no change in the current arrangements. However, by not making subordinate legislation, the full policy intent of the Act would not be realised.

14. Other than not imposing any direct costs, there is no benefit to this option.

Option 2 Do minimum

15. This option involves making the subordinate legislation that is required to ensure the regulatory framework operates as intended. The Welsh Ministers would not use all the regulation making powers provided for in sections 37–40. Rather, legislation would be limited to key aspects of the regulatory framework. As an example, regulations relating to section 37(7)(a) (period in which a new fee and access plan will not be approved) would be made, as would regulations under sections 37(7)(c) (procedure to be followed in connection with the withdrawal of a notice) and 40(2) (how and when HEFCW are to comply with section 40(1)).

16. Notably, the regulation powers of sections 37(7)(b), 38(2) and 39(4) would not be exercised. Each provides for the regulations to make provision for the matters HEFCW must take into account when issuing a notice under each of the sections. The Welsh Ministers were minded to consider making subordinate legislation in these areas; the impact of a notice under section 37–39 on a regulated institution could be significant. Further, the Welsh Ministers were considering making regulations under section 38(3), so as to require the warning notice and review procedure to apply in connection with notices issued under section 38. In a do minimum option, these powers would not be exercised.

17. The costs of this option would have been minimal. The subordinate legislation possible under sections 37–40 and required to ensure that the regulatory framework operates as intended is limited to a few key requirements. None of these impose large costs. The benefit would be that the regulatory framework of the Act operates as intended.

Option 3 Do minimum and consider further safeguards

18. This option builds upon the second option, making the subordinate legislation required to ensure the regulatory framework operates as intended, but also includes consideration of those powers noted above; namely sections 37(7)(b), 38(2) and 39(4) and of 38(3).

19. The Welsh Ministers consulted upon the exercise of these powers in 2015³. The consultation did not provide any convincing rationale for specifying the ‘matters’ for the purposes of sections 37(7)(b), 38(2)(a) and 39(4). However, stakeholders were strongly in support of the Welsh Ministers exercising the power in section 38(2)(b) and 38(3), in order that a warning notice and review procedure may apply in connection with notices issued under section 38 (HEFCW’s duty to withdraw approval of a fee and access plan in certain circumstances)⁴.

20. The final option selected, then, was the ‘do minimum’ option with the addition of regulations under section 38(3). This ensures that the regulatory framework works as intended and provides for a further safeguard when HEFCW issues a notice under section 38 of the Act.

COSTS

21. As context, table 5 of the Bill Explanatory Memorandum, reproduced as **table 1**, provides cost estimates for the various regulatory functions provided for by the Act.

Table 1 Regular costs of the Act

£000s	2015/16	2016/17	2017/18	2018/19	2019/20
Fee plan approval and automatic designation	341	331	331	341	331
Fee plan monitoring and evaluation	301	366	470	374	470
Quality assurance	405	434	434	490	434
Financial assurance	471	574	536	580	577
Subordinate legislation [†]	49	49	0	0	0
Development, training, oversight	99	99	29	29	29
TOTAL	1,666	1,853	1,800	1,814	1,841

[†] The development of legislation arising as a direct consequence of the Act. Five sets of regulations and two commencement orders have been made to date.

22. **Table 2** highlights the incidence of the cost associated with the Regulations. The table shows costs falling to the Welsh Government, regulated higher education

³ *Regulations as provided for by the Higher Education (Wales) Act 2015*, WG24659, Welsh Government, 2015.

⁴ *Summary of responses to proposed regulations under sections 37–40 of the Higher Education (Wales) Act 2015*, WG 27546, Welsh Government, 2016.

institutions and HEFCW. Costs do not fall on any other body or individual.

Table 2 Incidence of costs

	Welsh Govt.	HEIs†	HEFCW*	Others
Notices, Procedure and Publication	•	•	•	

(† HEIs – higher education institutions. * HEFCW – Higher Education Funding Council for Wales.)

23. The Regulations impose costs on:

- HEFCW who may issue notices under sections 37, 38 and 39 of the Act and must give a copy to the Welsh Ministers;
- HEIs who may make representations in respect of a proposed notices under section 38 of the Act;
- HEIs and/or HEFCW, who respond to requests for information from a review panel; and
- HEFCW in considering a review panel’s report in relation to a section 38 notice.

24. These costs are similar to those associated with the Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015 (S.I. 2015/1485).

25. Table 3 estimates the principal costs associated with the Regulations and shows their incidence.

Table 3 Cost of the Higher Education (Fee and Access Plans) (Notices, Procedure and Publication) (Wales) Regulations 2016

	£000s
Withdrawal of notice to refuse a fee and access plan	1 (HEFCW=1)
Issuing notices	39 (HEFCW=23, HEIs=16)
Review of notices	18 (HEFCW=6.5, HEIs=6, WG=5.5)

26. This is an estimate of the cost of issuing a notice and the review process, assuming an institution applies for a review. Issuing a notice, the largest item,

consists not only of HEFCW considering and issuing a notice, but institutions making representations and HEFCW considering them. Reviews include convening a Panel and its work, plus the cost of HEFCW and HEIs providing evidence.

27. Costs associated with notices are only incurred should a notice be issued by HEFCW and it is therefore not possible to predict if or when such costs may be incurred. Similarly, the timing of costs associated with the withdrawal of a notice to refuse a fee and access plan are not predictable, relying on both the issue of a withdrawal notice and then its subsequent withdrawal.

BENEFITS

28. The regulatory impact assessment in the Explanatory Memorandum for the Higher Education (Wales) Bill discussed the range of benefits that would accrue. Of particular relevance to the Regulations are:

The principal benefit...is to ensure that there is a robust higher education regulatory framework in place. Learners—from Wales or elsewhere—can be confident of the quality of the education that they will receive and pay for.

The control and regulation of tuition fees and a refreshed approach to widening access and retaining students from under represented groups will ensure that higher education remains open to all those who are capable of benefiting from it.

The public, for their part, can be confident that higher education providers continue to achieve a high standard in the conduct of their affairs and act in the public interest. Government expenditure on HE is managed in a strategic and controlled manner. Academic and institutional autonomy are unaffected.

This...enables a number of existing regulatory controls to continue to be effective in the new student support regime. It also introduces a small number of new controls that extend the options available to HEFCW when dealing with identified problems. These provide for a more nuanced and proportionate approach to regulation than the...current system....

29. Fee and access plans, and the associated system of issuing notices, are central to achieving widening access objectives, reinforcing the high standard of conduct among Welsh HEIs, and enabling proportionate and nuanced regulation.

OTHER IMPACTS

30. The Regulations have no impact on the statutory duties in sections 78 (Welsh language) and 79 (sustainable development) of the Government of Wales Act 2006 ('GOWA'). A continuing positive impact on Equality (section 77) is envisaged and is discussed in **table 4**. No impact is expected on the statutory partners in sections 72 – 75 of GOWA.

31. A range of other impact assessments have been considered including: children and young people, Welsh language, biodiversity, poverty, sustainable development,

rural proofing, health, Communities First, Third Sector, climate change, privacy, justice, habitat, environment and state aid. Impacts were identified in the case of children and young people and poverty, as recorded in **table 4**.

Table 4 Positive impacts

Policy area	Impact
Equality	Fee and access plans must demonstrate that a regulated institution will promote equality of opportunity. The system of regulation provided for by the Act and its subordinate legislation ensure this. The Regulations provide for certain procedural aspects which contribute to this.
Children and young people	A positive impact is anticipated on young people. Young people are the main beneficiaries of undergraduate higher education and thus the benefits from the Act and the subordinate legislation accrue to them.
Poverty	Graduates continue to earn more, on average, than non-graduates ⁵ . The Act and its associated subordinate legislation will ensure that higher education remains a dependable route out of poverty.

COMPETITION ASSESSMENT

32. The competition filter has been applied. No issues were identified.

CONSULTATION

33. A formal consultation exercise took place between 17 March 2015 and 12 May 2015. This included regulations in connection with sections 37–40 of the Act. The consultation was open to all. The Welsh Government ensured that all higher education institutions and other key stakeholders that may be affected by the legislation were notified of the consultation. Individual meetings were held with a small number of stakeholders.

34. Nine responses were received:

Estyn
Universities Wales
HEFCW
Cardiff University
Cardiff Metropolitan University
Aberystwyth University
University of Wales Trinity Saint David
Bridgend Carers Centre/Action for Children
The Open University in Wales

35. Responses were carefully analysed and a 'summary of responses' document

⁵ Graduate Labour Market Statistics: October-December Q4 2014. Department for Business, Innovation and Skills.

published to record that analysis and the action taken. Paragraph 21 here also notes the actions taken with respect to consultation on sections 37–40.