



Sarah Bartlett, Deputy Clerk
Children & Young People Committee
Legislation Office
National Assembly for Wales
Cardiff Bay, CF99 1NA.

25 July 2014

Dear Sarah

HE (Wales) Bill

Please find attached some comments from HEW on the Minister for Education and Skills' follow-up letter to the Children and Young People Committee dated 2 July 2014. We would be grateful if you could pass the information onto the Chair. We hope that it helps to clarify our position on a number of the issues identified in the Minister's letter at this stage.

Yours sincerely

Ben Arnold
Policy Adviser

Extracts from the letter to Ann Jones AM, Chair Children, Young People and Education Committee from Huw Lewis AM, Minister for Education and Skills as part of the Children, Young People and Education Committee stage 1 scrutiny of the Higher Education (Wales) Bill (letter dated 2 July 2014 and available on the NAFW website via this [link](#))

Original text of the letter from the Minister below with HEW comments in *italics*

ORIGINAL TEXT

Institutional autonomy and academic freedom

I have also noted that HEW has raised issues in relation to institutional autonomy and academic freedom. I would like to stress that I value and respect these two important principles and have sought to protect them in introducing this Bill. To be clear, the existing funding powers and restrictions set out in the Further and Higher Education Act 1992 will not be repealed. The Welsh Ministers will still be subject to the same restrictions in terms of individual institutions, courses and staff when providing direct funding to HEFCW.

Furthermore, section 6(5) of this Bill builds additional protection relating to academic freedom and institutional autonomy into the new regulatory framework. When prescribing matters which must be included in fee and access plans, the Welsh Ministers may not require a plan to include provision which refers to particular courses or the manner in which they are taught, supervised or assessed or provision relating to the criteria for the admission of students. These matters will remain the responsibility of institutions.

HEW COMMENTS

The Further and Higher Education Act 1992 will be repealed in relation to HEFCW's duty to assess the quality of education provided by institutions it funds (or intends to fund). The institutional and academic protections contained in the 1992 Act will continue to apply in relation to the administration of grant. However, they will not apply to the new regulatory controls proposed by the Bill.

The limited protections of academic autonomy contained in section 6(5) only apply to general fee plan provisions, and not the requirements of the Code which is not subject to any restrictions relating to institutional or academic autonomy. They are also not 'additional' in the sense of being new – they are simply transferred over from existing provisions in the Higher Education Act 2004.

ORIGINAL TEXT

Regulatory control and public funding

During their written and oral evidence HEW queried the relationship between regulatory control under the Bill and public funding. One of the key drivers behind the Bill is to enable HEFCW to continue to undertake its existing statutory functions, albeit on a revised statutory footing. This was acknowledged by HEFCW during their evidence session, where they stated that the operational relationship between the Funding Council and institutions was unlikely to change as a result of the Bill. The key components of the Bill relate to fee limits and access arrangements,

quality assessment and the financial management of institutions. All of these elements are connected to public funding, in that they relate to the delivery of courses attended by publicly-funded students.

HEW COMMENTS

Under the FHEA 1992, HEFCW may not set terms and conditions which relate to sums derived otherwise than from the Council (i.e. grant funding). Similarly, remedies under current fee plan legislation relate only to the HEFCW funding. In the 1992 Act, HEFCW also has a duty not to discourage institutions from attracting income from other sources. The Welsh Government claims to replicate existing levels of regulatory control as far as possible and points to the public funding used to support students in their private investment in higher education. However, the powers in the Bill enable the Welsh Government and HEFCW to make financial requirements which are not limited either to grant funding or the use of regulated fees (which together amount to about a quarter of universities' income), but may relate to the use of universities income from any source.

ORIGINAL TEXT

Subordinate legislation

HEW have described this Bill as a 'framework' Bill and have expressed concerns about the level of detail which has been left to subordinate legislation. On this point, I was pleased to hear the positive comments by Committee Members and others, which acknowledged that a significant amount of detail is set out on the face of the Bill.

I would like to reiterate that, in general, the matters left to subordinate legislation deal with matters of technical and practical detail which will require updating from time to time. I do not accept that it is not possible to understand the full scope and implications of the Bill as a result of the number of powers to make subordinate legislation. The intention and scope of the Bill is clear, with the vast majority of detail being set out on the face of the Bill. In short, this is not a framework Bill. In addition, to further assist with the scrutiny process, I have published a statement of policy intent alongside the Bill, which provides further detail on our plans for subordinate legislation.

HEW COMMENTS

The Bill incorporates 27 powers to make subordinate legislation, most of which will need to be exercised in order to make the Bill operational. We do not accept that the subordinate legislation deals with matters of technical and practical detail only. In our submission we point to numerous instances, where the matters delegated to subordinate legislation concern substantive and significant issues which can have important ramifications for providers and we believe further detail is required on the face of the Bill. No drafts have been seen or consultation taken place on the subordinate legislation at this stage.

ORIGINAL TEXT

On a related point, I note that HEW and NUS Wales have raised the specific powers to make regulations which may amend the Bill or other pieces of primary legislation (the so called 'Henry VIII powers'). These powers are set out at sections 13(3), 37(3) and 55(3) of the Bill. In respect of the first two powers, which are restricted to amending provision of this Bill, I would like to make

clear that they are designed to provide additional protection to institutions. For example, if HEFCW are provided with new powers of sanction under section 13, then it is important that the Welsh Ministers can also attach the same procedural safeguards as apply to other HEFCW sanctions under the Bill. This would include the application of the warning notice and review procedure in sections 40 to 43. Similarly, it is important that the same procedural safeguards can be attached to a notice under section 37(1).

These powers are not designed, as has been suggested, to provide the Welsh Ministers with an unfettered power to change the statute book. Rather, they will enable the Welsh Ministers to make relatively minor changes to related provisions of this Bill which primarily would protect the interests of institutions.

Furthermore, contrary to what has been suggested, the power in section 55(3) is not unusual or controversial in any way. This power enables the Welsh Ministers to make consequential and transitional provision which may amend, repeal or revoke pieces of primary legislation. It is a 'tidying up' provision which has no substance of its own and exists only to deal with what can be broadly described as 'consequential provision'. Again, the Welsh Ministers will not be able to use this power to make any changes of substance. It is simply designed to enable the effective operation of the new regulatory framework established under the Bill and ensure a smooth transition from the current framework to the new one.

HEW COMMENTS

The use of 'Henry VIII clauses' has been viewed as controversial in the past since it raises constitutional issues. We note that the Welsh Government already has powers to make primary legislation in the field of education. We are unconvinced by the need for these provisions which are so broadly drafted as to allow change for almost any matter. If any changes to primary legislation are required, we would prefer this to follow the due legislative process involving the full scrutiny of the National Assembly.

ORIGINAL TEXT

Fee and Access Plans

The evidence provided to Committee to date has raised a number of matters concerning the proposed operation of fee and access plans. Firstly, the new plans will for the most part be similar to the fee plans required under the current regime. There will, of course, be some changes to the scope of application of the new plans, the enforcement of the commitments made by institutions in their approved plans as well as an increased focus on the evaluation of the outcomes of the plans. I have outlined the key changes below.

HEW COMMENTS

HEW has outlined the extensive nature of these changes in its submission.

- *Increased application - in Wales, the fee and access plans will be applied to all areas covered by the HEFCW corporate strategy targets (see HEFCW Circular W14/02HE) with the exception of those related to ITT (which we assume may later be brought in depending on future regulations), research council income, reconfiguration and collaboration and governance.*

- *Increased freedom to determine requirements - our submission points in particular to the lack of protections of institutional and academic autonomy contained in the FHEA 1992.*
- *Increased enforcement powers – including the ability to make directions enforceable by injunction including expenditure directions which may relate to any of the universities' income.*

ORIGINAL TEXT

Guidance powers

HEW have expressed concerns about the Bill making provision to place institutions under a duty to take into account guidance (including information and advice) issued or given by HEFCW. I very much hope that HEW are not suggesting that institutions should be free to simply ignore guidance issued to them by a regulatory body. This is an unacceptable proposition. HEW's objection is hard to understand, particularly in view of the fact that all the requirement entails is that institutions have regard to relevant guidance. It does not require compliance with the guidance. If there is a good reason for not following the guidance, institutions are able to depart from it.

I firmly believe that it is entirely appropriate to place a clear duty on institutions to take account of relevant guidance in making decisions about steps to be taken in order to comply with a direction about compliance with fee limits and reimbursement, decisions about improving or maintaining the quality of education they provide, decisions in respect of the organisation and management of financial affairs or best practice in respect of equality of opportunity and the promotion of HE.

It is very common for legislation to require the targets of guidance to have regard to it in performing their functions. While it is the case that the application of the ordinary principles of administrative law will lead to a duty to have regard to guidance, I do not believe that in this case it is appropriate to have such a duty left to be implied because institutions may not be susceptible to the process of judicial review in every case. Whether they are will depend on the facts of each case and on the nature of the institution. The nature of institutions is also likely to become more diverse in future with the arrival of new entrants to the sector.

The imposition of a duty to take guidance (including information and advice) into account makes for clarity of the legal expectation which is that if you are the target of guidance you have to have regard to it in exercising your functions.

I must also point out that where HEFCW have a power under the Bill to issue guidance to institutions, HEFCW are also placed under a duty to consult institutions before issuing that guidance.

HEW COMMENTS

HEW welcomed the role of HEFCW in developing best practice and guidance in its submission. However, we question the merit of making it mandatory to take into account. As the Minister recognises in this paragraph, this will make institutions susceptible to the process of judicial review. In reality, quality assurance or financial assurance assessments require institutions to take account of accepted best practice. HEFCW may also continue to require information from institutions demonstrating how they have taken any best practice into account. The scope of the powers is so wide (e.g. 'the promotion of higher education') that mandatory guidance can cover almost any matter. Universities are not public bodies exercising functions on behalf of government. They are

independent charitable bodies which exist to provide higher education for the public benefit. In short, powers to issue guidance which is mandatory to take into account are unnecessary, may add to the administrative burden of regulated institutions, and increase the risk of litigation.

ORIGINAL TEXT

Eligibility criteria for regulated institutions

In their written evidence to the Committee HEW indicated that the eligibility requirements for determining which providers may apply to HEFCW for approval of a fee and access plan are unclear. I do not accept this point. Section 2 of the Bill sets out three clear requirements in respect of eligibility:

- 1) an applicant must be an institution in Wales;
- 2) the applicant must be an institution which provides higher education; and
- 3) it must be a charity.

For these purposes, section 54(3) confirms that an institution in Wales is one whose activities are carried on wholly or principally in Wales.

I also note that there has been some confusion around the scope and purpose of section 3 of the Bill. This section does not allow the Welsh Ministers to designate additional providers as regulated institutions, nor is it wholly concerned with providers who provide lower level higher education courses. Instead, it enables the Welsh Ministers to designate charitable providers of higher education in Wales as ‘institutions’ for the purposes of section 2. Such providers may not normally be classed as ‘institutions’ for these purposes. To be clear, these providers will still need to meet the other eligibility requirements and apply for approval of a fee and access plan under section 2, irrespective of their designation under section 3. Designation under section 3 does not confer automatic regulated status.

HEW COMMENTS

There remains confusion over this section. Section 3 enables providers of higher education in Wales that are charities but would not be regarded as an institution for the purposes of the act (i.e. are not automatically eligible to apply for a fee plan) to apply to the Welsh Government for special designation to apply. According to the Explanatory Notes on s.3, which may be taken into account in judicial interpretation of the legislation: “This power might be exercised to designate a provider which is not able to award degrees but which provides other courses of higher education at a lower level on the credit and qualifications framework” as “such an institution might not consider itself an ‘institution’ for purposes of section 2”. However, such providers already appear to be covered by the definition/eligibility requirements in s.2: according to the definition section (s.54) ‘higher education’ means a course of any description mentioned in the Education Reform Act 1988 (Schedule 6) which includes any course of study, whether for an examination or otherwise, that is higher in standard than GCE A-level and includes HNCs/HNDs and degrees. In other words, it would appear that either s.3 is redundant or the drafting of s.2 has not given effect to the Welsh Government’s intention.

We further note that s.2(3)(a)&(b) refers to ‘an institution in Wales that provides higher education’ whereas s.3(2)(a) refers to a provider that ‘provides higher education in Wales’. It is not clear

whether this difference is intentional. As a result, however, some have interpreted this as meaning that s.2 applies to institutions 'in Wales', whereas s.3 applies if the institution is based outside Wales but delivers higher education in Wales.

More generally, we note that although institutions are required to be charities, they do not have to be higher education charities – i.e. their charitable purposes and duties may be entirely different.

ORIGINAL TEXT

The regulatory system

HEW raised a number of queries in relation to the scope of the regulatory system provided for in the Bill. In particular they have referred to part-time courses, automatic and case-by-case designation and quality assessment. The Committee will note that I have already provided further evidence on some of these issues in my letter of 27 June.

However, I would like to rebut the implication that the Bill 'leaves important gaps in the overall regulatory framework for higher education in Wales'. The Bill is indeed reliant on universities and other providers becoming regulated institutions, but this is nothing new. The current system is reliant on universities accepting HEFCW funding, just like the new system is reliant on institutions wanting access to the most generous elements of the student support package for their students (automatic course designation). Entrance into the regulated Welsh HE sector has always been, and will continue to be, voluntary.

HEW COMMENTS

As things stand it is not clear what the respective packages will be for regulated and unregulated providers in terms of student support and fee limits. Although the intention is apparently to give regulated institutions access to the more generous elements of the student support package, this is not yet clear. The key benefit identified for regulated institutions is that they will have access to the grant element in addition to the loan element of student support – but since fee grants are currently paid from HEFCW's budget, this would not appear to provide a net gain for universities. If Further Education Institutions or new providers becoming regulated institutions, this would also impact on the grant available for existing universities.

ORIGINAL TEXT

Furthermore, I do not accept the argument that the Bill does not deal with the whole regulatory system. As stated above, this legislation is about replacing elements of the existing statutory framework for higher education which are no longer fit for purpose. I have not sought to make changes to other elements of the statutory framework which are still working effectively. For example, automatic and case-by-case course designation will continue to be dealt with via the annual set of student support regulations made under the Teaching and Higher Education Act 1998. Whilst complex, this is nothing new so I see no reason why it should not be understood by the HE sector in Wales.

On a related point, HEW have stated that in the absence of further legislation there will be no public body with a duty to provide quality assurance for unregulated providers (i.e. those not subject to an approved fee and access plan). That is correct, but again this is nothing new. HEFCW's current

quality assessment duty under section 70 of the Further and Higher Education Act 1992 only extends as far as 'funded' or regulated providers. This is equivalent to their new duty which is limited to education provided by, or on behalf of regulated institutions (those with an approved fee and access plan in place). The different formulation of the two quality assessment duties simply reflects the revised nature of the voluntary regulatory system. The position has not changed.

HEW COMMENTS

The position under the Bill changes significantly. HEFCW's duty to assess the quality of education will only extend to regulated institutions under the Bill, not those which it funds or intends to fund (as is currently the case). This means that certain types of providers would not be subject to the quality assurance arrangements, even if they are funded and their courses cannot be the subject of an approved fee and access plan. HEW has provided the Children & Young People Committee with additional evidence on the apparent gaps in the scope of the proposed quality assurance arrangements for part-time specialist providers. Postgraduate and research specialist providers could not be included in a fee and access plan. The current legislation allows all institutions which HEFCW funds or is considering funding (it does not contrary to this paragraph) apply to regulated institutions.

ORIGINAL TEXT

Charity Commission/ONS

HEW have raised concerns over the impact of the Bill on the charitable status of institutions. To be clear, whilst the funding system for HE will be on a new statutory footing, operationally the system will be very similar to the current one where HEFCW undertakes similar activities albeit via terms and conditions of funding. My officials have consulted the Charity Commission, who I understand have also provided evidence to the Committee. My view on this point is unchanged: the Bill will not affect institutions' ability to comply with charity law. Further, in written evidence to the Committee the Charity Commission have indicated that they have "no concerns about the policy intentions of the Bill, or the proposed new regulatory framework, in terms of charity law, the charitable status of HEIs whose courses are funded by the Welsh Government, or charity regulation"

To put this matter beyond doubt my officials will continue to engage with the Charity Commission to pre-empt any possible issues that could arise, for instance, at the amending stages.

HEW COMMENTS

We welcome this. It is essential to put this matter beyond any doubt.

ORIGINAL TEXT

In terms of ONS classification, I believe the Bill is a proportionate and measured response to the necessity of maintaining public confidence in the funding system for higher education in Wales. I do not see any need to engage with ONS. The Bill is intended to strike the appropriate balance between maintaining institutions' independence while at the same time safeguarding the significant amount of public money that is invested in the higher education sector and ensuring that students receive the highest quality of education. As I explained to the Committee, the situation when

compared to FE institutions is readily distinguishable. FE institutions are directly funded by the Welsh Government, whereas the HE sector is funded through HEFCW (which separates HE institutions from government), student tuition fees and other income.

HEW COMMENTS

It is a major concern that the Welsh Government is not intending to seek assurances from the Office for National Statistics as urged by HEW. It is essential to put this matter beyond any doubt.

ORIGINAL TEXT

Rights of entry and inspection of documents

HEW, in both their written and oral evidence, describe the powers of entry and inspection in sections 22 and 35 of the Bill as “new” and unnecessary. They also refer to legal advice that describes the powers as draconian. I do not accept that interpretation.

The purpose of the Bill is to provide HEFCW with the means to continue its existing work in assessing the quality of education and monitoring the financial management of institutions. In order for HEFCW to be able to carry out this work it must be able to gain entry to premises and to inspect documents as it considers appropriate.

In the vast majority of cases I would expect institutions and HEFCW to come to amicable arrangements but the Bill must make provision for those occasions, however rare, when an institution refuses to co-operate by allowing HEFCW entry to its premises or to inspect documents.

It is important to remember that the right for HEFCW to enter premises and to inspect documents is not new. HEFCW can currently provide for a right of entry to premises and to inspect documents through its terms and conditions of funding.

In the absence of funding to which terms and conditions can be attached an alternative mechanism is needed to ensure that HEFCW is able to continue to undertake its work in assessing the quality of education and monitoring the financial management of institutions. That includes, when necessary, having a right to enter premises and inspect documents.

The Bill achieves this by establishing a new statutory framework, but in operational terms little changes. Sections 22 and 35 provide for a person authorised by HEFCW to enter the premises of a regulated institution and to inspect, copy or take away documents found on those premises. Those sections replace terms and conditions of funding that HEFCW can currently impose. They provide a mechanism to ensure that HEFCW can continue to require entry to premises and to inspect documents.

I do not consider that it is unusual for legislation to make provision for a right of entry and inspection of documents in this context and nor do I consider that the Bill is draconian. The powers in the Bill are proportionate and are subject to adequate safeguards by requiring notice to be given other than in very limited circumstances and for the powers to be exercised only at reasonable times. HEW also refers to what they consider to be similar powers available to H M Revenue and Customs. In my view such comparisons are misplaced given the very different context in which H M Revenue and Customs operate.

HEW COMMENTS

Under current arrangements HEFCW may make provisions relating to access and inspection as part of the terms and conditions of grant (i.e the Financial Memorandum). The current Financial Memorandum in Wales, for instance, provides that an institution shall provide the Council's Assurance Service with access to all books, records, information and assets. The HEFCW assurance service must be allowed unrestricted access to any work of the internal auditor, including the annual report, or correspondence between the internal and external auditors. In turn, internal auditors must also have unrestricted access to all records, assets, personnel and premises, and be authorised to obtain whatever information and explanations are considered necessary by the head of the internal audit service. More generally, the Financial Memorandum requires institutions to provide the Council, or agents acting on its behalf, whatever information the Council requires to exercise its functions under the 1992 Act, provided that the Council acts reasonably in its requests for information and has regard to the costs of providing this information, and, where appropriate, to its confidentiality. The Financial Memorandum does not make specific provision in relation to access and inspection for purposes quality assurance – it relies on cooperation for obtaining the necessary information for a satisfactory quality assessment which is mission-critical to universities.

The Bill introduces four new specific powers:

- *Section 21 of the Bill provides that regulated institutions and their external providers would be under a duty to cooperate with HEFCW by providing such information, assistance, and access to the institution's facilities as are reasonably required for purposes of assessing quality. If HEFCW is satisfied the institution has failed to comply, it may issue directions to comply (s.21), which would be enforceable by injunction.*
- *In addition, section 22 provides that HEFCW may enter the premises of a regulated institution (or its external provider) and inspect documents for purposes of assessing the quality of education, including carrying out reviews.*
- *Similar powers in relation to the Code is provided by section 33 and 34 in relation to the Code.*

Are these new powers necessary?

- *It is not clear why HEFCW/the Welsh Government could not instead continue relying on the existing arrangements for access, information and inspection for quality assurance purposes (which do not appear to rely on grant) or establish them under the Code in relation to financial assurance.*
- *It is unclear why separate powers of entry and inspection enforceable by injunction (s.22 and s.34) are required in addition to the powers in s.21 and s.33.*

Although the s.22 and s.34 powers are subject to procedural protections, this does not appear to be the case in relation to the s.21 and s.33 powers.

ORIGINAL TEXT

Financial management code

For the avoidance of doubt I wish to clarify that there are no regulation-making powers arising from Part 4 of the Bill. HEFCW's functions of preparing, consulting on, issuing and keeping under review the proposed financial management code will not be supported by regulations. Currently HEFCW develops, consults on and issues a financial memorandum applicable to funded institutions. Under the new regulatory framework HEFCW will be required to consult all regulated institutions on a draft financial management code and will additionally be required to provide a summary of those consultation responses when they submit the draft code to the Welsh Ministers for approval. It is intended that the Code will be published and take effect from the start of the 2016/17 academic year. This will allow HEFCW sufficient time to prepare, consult on and gain approval of the Code. For the 2015/16 academic year, HEFCW will continue assure the financial management arrangements of higher education institutions via its existing financial memorandum.

The proposed arrangements for oversight of the management of the financial affairs of regulated institutions are therefore similar to those currently in force. However, in future they would not be dependent on the application of terms and conditions of funding for their enforcement. It is unlikely that there would be conflict between the proposed code and any arrangements that HEFCW may consider necessary to put in place to deal with ongoing terms and conditions of funding granted under section 65 of the Further and Higher Education Act 1992. That will be a matter for HEFCW to determine, in consultation with the sector.

HEW COMMENTS

The Bill identifies three areas that the Code may potentially cover (restrictions on transactions without HEFCW consent, accounting & audit arrangements, and provision of information), but there is nothing in the Bill to limit what the Code can cover. We note that the Code is no longer a 'financial and governance' code for instance, which is a notable change since the Technical Consultation – but there is nothing in the legislation to prevent governance (or other matters) being covered. The Code can also be different for different institutions.

The provisions relating to the Code do not incorporate the protections of institutional and academic autonomy that are currently in place under the FHEA 1992, and apply when HEFCW sets terms and conditions of grant for institutions through the Financial Memorandum.

- In common with the provisions for use of the fee and access plans, this means, for instance, that there would be no legislation in place to prevent the Welsh Government from specifying requirements in relation to individual institutions, or which ensured that HEFCW must have regard to the denominational character or distinctive characteristics of institutions. The Bill would not prevent HEFCW from determining the criteria for the appointment and selection of academic staff.*
- Additionally, use of Code is not subject to the protections of academic autonomy which apply to the use of the general provisions of the fee and access plans (transferred across from the current Higher Education Act 2004). Whereas the general provisions of the fee and access plans may not refer to particular courses, the manner in which those courses are taught or relate to the admission of students (see s.6(5)), when using the Code there*

would be no such protections in place.

- *In particular, there are serious concerns that enforcement powers are not limited to the extent of grant or regulated fee income received and do not have to relate to activities which are supported by that income. Similarly, there would be no legislation to prevent HEFCW from discouraging institutions from obtaining income from other sources (as is currently the case when setting terms as part of the Financial Memorandum).*

The need to be clear about what matters the Code can or cannot include, and for those to be appropriately limited, is particularly important given the fact that HEFCW will be able to enforce any requirement it chooses to include in the Code e.g. through issuing directions enforceable by injunction.

The Bill allows HEFCW to withdraw fee plan approval for serious failure to comply with the financial Code. It is noted, that the test proposed in the Technical consultation was that HEFCW could withdraw the fee plans where there had been serious financial mismanagement or persistent failure to comply with the Code. A question remains whether this test is the correct one, and whether the conditions which satisfy the test are sufficiently clear and detailed in the Bill itself.

The potential scope and use of the Code is a significant factor which has contributed to the advice we have received that the Bill overall has potential implications for charity law relating to universities and classification of universities for purposes of national accounting.

As recognised by in the Minister's comments, both the Code and conditions of grant (i.e. Financial Memorandum) would apply to regulated institutions in receipt of HEFCW funding. This could give rise to potential conflict in the exercise of the separate statutory functions. Although we note that the Welsh Government believes that this would be unlikely, we are unclear how this will operate at this stage.

Procedural issues:

The Bill requires that HEFCW consults with regulated institutions and others in drafting or revising the Code (this partially replicates existing requirements under the FHEA 1992) and provides a summary of the representations when submitting a draft to the Welsh Ministers. The consultation requirement is important but, but ultimately this does not prevent HEFCW (or the Welsh Government) from exercising their discretion as they see fit, so this is not seen as a substitute for addressing the substantive issues outlined above.

The Code is subject to approval by the Welsh Government, which makes the Welsh Government the final arbiter on the content of the Code. If the Welsh Government refuses to approve the Code, it must give reasons – but there are no provisions in the Bill which stipulate the conditions or criteria for when a Code can be refused (or incorporate the protections of the FHEA 1992 relating to the Welsh Government's power to make requirements).

In our response we said "In the light of this, too much discretion is left to determine the content of the Code through a non-legislative process. We believe that it should be for HEFCW and not the Welsh Government to determine the detail of the Code, subject to appropriate limits – but given the powers of enforcement and potential for wide interpretation, the limits need to be much more tightly prescribed than in the past through due legislative process overseen by the National Assembly."

ORIGINAL TEXT

Cross-border issues

HEW raised concerns about the provisions of the Bill which restrict HEFCW's functions in respect of fee limits and quality assessment to courses provided by Welsh institutions in Wales. As stated in my previous evidence to the Committee, we have reserved our position on legislative competence in these areas.

However, as you will be aware, my officials are currently in discussion with their counterparts in the Department for Business Innovation and Skills and the Wales Office on this issue. These discussions are focused on bringing forward an Order under section 150 of the Government of Wales Act 2006. This Order would seek to extend the functions of HEFCW in respect of courses provided in England by Welsh institutions and would therefore resolve the concerns raised by HEW. This Order is referred to in the Explanatory Memorandum published alongside this Bill and throughout my evidence to the Assembly to date.

HEW COMMENTS

We welcome this development and look forward to seeing a draft to ensure that it does address concerns. The current legislation places a duty on HEFCW in relation to the quality of education delivered by Welsh universities wherever it is delivered, and we would expect this to continue. At the moment it appears that the Order under s.150 would only cover HE provision in England, and the detail of the proposed legislation is uncertain. It is important to ensure that this issue is fully addressed before the Bill is passed.

ORIGINAL TEXT

Transitional arrangements

I would also like to take this opportunity to provide some clarity on the transitional arrangements which will apply under the Bill. If passed, the Bill will not be fully implemented until academic year 2016/17. This will provide institutions and HEFCW with the opportunity to fully prepare for the introduction of the new regulatory framework.

However, I am proposing some transitional arrangements in respect of academic year 2015/16. These arrangements are primarily designed to protect students who will be undertaking courses at Welsh institutions during this transitional year. Institutions who commit to fee limits for this academic year (via fee plans approved under existing legislation) will be required to comply with those limits. If they fail to comply, HEFCW will be able to take action to bring about compliance. I consider this to be perfectly appropriate.

HEW COMMENTS

We agree that institutions should remain committed to existing agreements and fee limits. However, we do not believe that it is appropriate to apply the new powers of enforcement and sanctions to existing agreements since they were not approved/agreed for these purposes.