Huw Lewis AC / AM
Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/HL/0645/14

David Melding AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

02 July 2014

Dear David,

CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE - STAGE 1 SCRUTINY OF THE HIGHER EDUCATION (WALES) BILL

During my attendance at the Constitutional and Legislative Affairs Committee on 16 June, Members raised a number of questions about the Higher Education (Wales) Bill. This letter seeks to respond to the specific matters raised by Members. To aid the Committee's consideration further, however, I set out first the broad principles which have underpinned the drafting of the Bill.

When I introduced the Bill on 19 May 2014, and during my attendance at the Committee, I provided assurance that in preparing this legislation we have had regard throughout to the Counsel General's guidelines on subordinate legislation. The guidelines recognise that in each case there is a balance to be struck between:

scrutiny by the Assembly;
consumption of Assembly (or committee) time;
the significance of the provisions in question; and
the making of legislation in the most efficacious manner.

The guidelines outline a range of factors that may, to a greater or lesser extent depending on the context, either suggest the application of the "draft affirmative" procedure; or else require particular justification if a procedure other than "draft affirmative" procedure is applied. Those factors are:

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1NA

English Enquiry Line 0845 010 3300
Llinell Ymholiadau Cymraeg 0845 010 4400
Correspondence.Huw.Lewis@wales.gsi.gov.uk

> “1) powers that enable provision to be made that may substantially affect provisions of Acts of Parliament, Assembly Measures or Acts of the Assembly;
> 2) powers, the main purpose of which is, to enable the Welsh Ministers, First Minister or Counsel General to confer further significant powers on themselves;
> 3) powers to apply in Wales provisions of, for example, Acts of Parliament that in England, Scotland or Northern Ireland are contained in the Act itself (whether with or without modifications);
> 4) powers to impose or increase taxation or other significant financial burdens on the public;
> 5) provision involving substantial government expenditure;
> 6) powers to create unusual criminal provisions or unusual civil penalties;
> 7) powers to confer unusual powers of entry, examination or inspection, or provide for collection of information under powers of compulsion;
> 8) powers that impose onerous duties on the public (e.g. a requirement to lodge sums by way of security, or very short time limits to comply with an obligation).
> 9) powers involving considerations of special importance not falling under the heads above (e.g. where only the purpose is fixed by the enabling Act and the principal substance of the legislative scheme will be set out in subordinate legislation made in exercise of the power).”

As the analysis which follows I hope will demonstrate, where proposals relating to subordinate legislation in the Higher Education (Wales) Bill satisfy any of the above criteria they are to be subject to the affirmative procedure. For the most part, however, and as I also explained to the Committee, the subject matter of the proposed subordinate legislation deals with relatively minor practical detail in the overall legislative scheme; is likely to be updated on a regular basis or otherwise be subject to change; and circumstances may arise in which it may be necessary to legislate swiftly.

I contend, therefore, that the Bill as drafted allows for an appropriate balance between scrutiny by the Assembly and effective use of Assembly or Committee time.

Members also questioned why the Bill has not been drafted on the assumption that where regulations may be needed, there should be a duty to make them. A duty to make regulations is only appropriate where the regulations in question and the duty are very limited in scope. I also start from the presumption that Government should regulate only to give effect to the overall legislative scheme or otherwise when the need for such regulation is established on some other grounds. I acknowledge that in a number of cases the system established under the Bill will not be able to perform effectively without regulations in place. For instance regulations will need to be made which prescribe the maximum fee limit and description of qualifying persons

and qualifying courses. However, other draft provisions are more permissive in nature in order to permit regulations to be made where they might assist the operation of the new regime or where circumstance or experience demonstrate a need for regulation in those areas. My officials have undertaken an analysis of the use of the terms "may" and "must" throughout the Bill. That analysis is included as an annex to this letter. I trust that this additional information will be of assistance.

Part 2: Fee and access plans

Section 2: *Application by institutions for HEFCW's approval of fee and access plans*

This section permits the governing body of an institution of a certain type to apply to HEFCW for approval of a fee and access plan. Section 2(4) enables the Welsh Ministers to make regulations about the making of applications under this section. In specifying that the Welsh Ministers "may" make regulations under this section we have applied the principle that we will not be legislating unless it is necessary to do so. If regulations are not made that fact would not prevent institutions applying to HEFCW for approval of their plans.

Under the current system, institutions funded by HEFCW may apply to HEFCW for approval of a fee plan and there are no regulations in place which make provision about the making of such applications. HEFCW is able to issue guidance to institutions about the matters to which it will have regard in determining plan applications (section 34(3) of the Higher Education Act 2004 enables this) and there is nothing to prevent HEFCW also from issuing non-statutory guidance to institutions about the application process and the provision of supporting information.

Under the new regulatory system HEFCW could issue information and advice to institutions under section 51(3) about the application process for approval of fee and access plans and the information to be submitted as part of applications. Consequently institutions could be made aware by HEFCW of the process and information required for approval of fee and access plans without the need for the Welsh Ministers to make regulations. If the Welsh Ministers do not make regulations under this section that would not open HEFCW up to legal challenge. However, if, after operating the system either HEFCW or institutions indicate that the application process could be clarified then the Welsh Ministers' power under section 2(4) would enable regulations to be made to provide that clarity. For example, it may prove to be helpful to make regulations if there are new entrants to the system which have not previously applied to HEFCW for approval of a fee plan. There is a clear distinction to be drawn between a need to make regulations for the system to work and the discretionary use of a regulation making power to improve the operation of the system. The regulation power in section 2(4) falls into the latter category and consequently the Bill has been drafted to enable the Welsh Ministers to make regulations should they prove to be necessary.

Section 3: *Designation of other providers of higher education*

This section enables the Welsh Ministers to designate a charitable provider of higher education in Wales, which would not otherwise be regarded an institution, as an institution for the purposes of the Bill. Such designations will ensure that providers of higher education which may not be regarded as institutions are not prevented from applying to HEFCW for approval of a fee and access plan. A designation under section 3 does not mean that a charitable provider will automatically enter the new regulatory system established under the Bill. Following designation as an institution for the purpose of the Bill such a provider will still need to apply to HEFCW for approval of a fee and access plan, under section 2 of the Bill, in order to become a regulated institution. Consequently such providers will also need to satisfy the conditions at section 2 of the Bill namely, that it is an institution in Wales, that it delivers courses of higher education and that it is a charity.

Section 3(4) enables the Welsh Ministers to make provision, via regulations about applications for designation, the making and withdrawal of designations, including matters to be taking into account when considering whether to make or withdraw a designation, and the effect of a withdrawal of designation. However, section 3 does not depend upon regulations being made to make it work. Providers of higher education could be designated as institutions by the Welsh Ministers without regulations being made under section 3(4) – there is nothing to prevent such providers applying to the Welsh Ministers for designation and indeed section 3(1) makes provision for that.

In specifying that the Welsh Ministers “may” make regulations under this section we have applied the principle that we will not be legislating unless it is necessary to do so. The number of providers applying for designation under section 3, especially in the near future, is likely to be limited and in the first instance it is unlikely that regulations will need to be made, however, the power set out in section 3(4) will enable regulations to be made if they prove to be necessary. Additionally, section 3(3) provides a default position that a provider designated as an institution is to be treated as an institution for the purposes of the Bill unless the designation is withdrawn.

Section 6: *Promotion of equality of opportunity and promotion of higher education*

Section 6(1) of the Bill requires that a fee and access plan must include such provisions relating to the promotion of equality of opportunity to access higher education or the promotion of higher education as may be prescribed. This provision enables the Welsh Ministers to make regulations. Information on the type of

provision relating to the promotion equality of opportunity and the promotion of higher education which may be included in regulations is set out on the face of the Bill in section 6(3).

The information and priorities associated with the promotion of equality of opportunity and the promotion of higher education is likely to change over time alongside changes to the higher education sector in Wales as well as developments in evidence about the effectiveness of activities and interventions which institutions include in their fee and access plans. This power will enable the Welsh Ministers to respond to these changes regularly by adapting the requirements imposed on institution's fee and access plans. Crucially, we do not yet know what HEFCW's evaluation of fee and access plans will identify and therefore need the flexibility to adapt the information and priorities associated with the promotion of access to higher education and the promotion of higher education from time to time.

The proposal that regulations made under section 6(1) are subject to the negative resolution procedure has been informed by application of the Counsel General's guidelines. Taking those guidelines into account it is my view that the regulation making power under this section does not fall into any of the categories to which the affirmative procedure should apply. A considerable amount of detail concerning provisions that may be prescribed in regulations made under section 6(1) is to be found on the face of the Bill at sections 6(3) and 6(4). Additionally, section 6(5) provides for certain restrictions on the requirements that may be included in regulations. I am therefore of the opinion that the principal substance of the legislative scheme concerning the contents of fee and access plans has been set out on the face of the Bill rather than being reserved to subordinate legislation. The regulations will provide further detail as to how the required content of fee and access plans is to be applied in the context of a wider range of tuition fees than under the current regime. Consequently regulations to be made under section 6(1) are suitable for the negative resolution procedure.

I hope to have these regulations available in draft form to allow Members to scrutinise them at Stage 2. The intention is to also consult stakeholders on the draft regulations at the appropriate time.

Section 7: *Approval of fee and access plans*

Under section 7 HEFCW may either approve or reject an application for approval of an institution's fee and access plan. Section 7(3) enables the Welsh Ministers to make regulations about matters to be taken into account by HEFCW in determining whether to approve or reject a plan.

The intention is that HEFCW should be required to take into account the quality of education at the institution; the organisation of its financial affairs; and the adequacy of the measures committed to in the plan against the proposed tuition fee level These requirements are designed to ensure that the interests of prospective

students are protected and also to ensure that HEFCW adopts a proportionate approach to the approval of plans in line with the level of fees charged. They will also give applicant institutions an insight into the issues that HEFCW will be weighing up when considering their fee and access plans. This will be particularly useful for new applicants, who are applying for approval of a fee and access plan for the first time.

The proposal that regulations made under section 7(3) are subject to the negative resolution procedure has been informed by application of the Counsel General's guidelines. It is my view that the regulation making power under this section does not fall into any of the categories to which the affirmative procedure should apply. I do not consider that these regulations are appropriate for the affirmative procedure as they are relatively minor in the overall legislative scheme, if made they may need to be updated on a regular basis to take account of changes in the higher education landscape. It is also worth noting that HEFCW may approve or reject fee and access plans without these regulations being made.

Section 8: *Publication of an approved plan*

Section 8(1) enables the Welsh Ministers to make provision, via regulations, which requires an institution to publish its approved fee and access plan. Section 8(2) confirms that these regulations may make provision about how and when an approved fee and access plan is published. Section 8 of the Bill is derived from section 34(6) of the Higher Education Act 2004 which similarly makes provision for the Welsh Ministers to make regulations that may require institutions subject to an approved plan to publish their plans in the manner prescribed in regulations. Therefore, the use of regulations for the purpose of requiring publication of approved plans is not new and is already in operation under the current system. Furthermore, as institutions currently publish their approved fee plans are familiar with the need to ensure that those plans are made accessible to students and other interested parties it may not prove to be necessary to make these regulations. If however, feedback from HEFCW, students and other stakeholders indicates that there is a problem this regulation making power will allow the Welsh Ministers to legislate if it proves to be necessary to do so.

Section 9: *Variation of plans*

Section 9(1) enables Welsh Ministers to make regulations in order to allow approved plans to be varied in accordance with the procedure laid down in regulations. The regulations must provide that a variation will only take effect if approved by HEFCW. This power will be relevant where, following approval of a fee and access plan by HEFCW, an institution wishes to vary its approved plan. The Welsh Ministers currently have a similar power in section 36 of the Higher Education Act 2004.

Although, the Welsh Ministers would be able to issue guidance to HEFCW (as provided for in section 46 of the Bill) I consider the variation of approved plans to be a matter more suited to regulations than guidance. HEFCW would be required to take such guidance into account, but could divert from such guidance if it had good reason for doing so. The current legislative architecture under the Higher Education Act 2004 makes use of regulations for the purpose of providing certainty about the procedure and processes associated with variation of an approve fee plan and my intention is to do likewise in respect of the variation of approved fee and access plans under the new regulatory system.

The policy intention is to provide an effective procedure for approved plans to be varied during the lifetime of the plan. Variations to approved plans are more likely to raise practical issues about how an institution applies for a variation and how HEFCW considers a variation. My view is that regulations are a better means of dealing with such issues than guidance as they provide certainty. Guidance does not provide the same level of certainty; whilst institutions must have regard to guidance they are not obliged to follow it in all circumstances. Although institutions could apply for approval of a fee and access plan without these regulations being in place they could not apply to vary an already agreed plan during the lifetime of that plan.

Part 4: Financial affairs of regulated institutions.

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.

Part 5: Withdrawal of approval of a plan

Section 36: *Notice of refusal to approve a new fee and access plan*

Under the proposed regulatory system if HEFCW are satisfied that a regulated institution has failed to comply with the applicable fee limits or general provisions of its approved fee and access plan, or has failed to comply with a direction from HEFCW concerning quality of its education or its financial management, HEFCW may give notice to the institution that they will not approve a new fee and access plan before the end of the period specified in the notice. This function is distinct from that of approval of a fee and access plan under section 4 of the Bill and forms one of

a menu of sanctions available to HEFCW in the event of an institution's failure to comply with specified requirements of new regulatory framework. The conditions under which HEFCW may give notice to the governing body of a regulated institution are set out on the face of the Bill at section 36(3).

Section 36(7) enables the Welsh Ministers to make regulations relating to the notices and decisions of HEFCW not to approve a new fee and access plan. This includes provision about the period specified in a notice during which HEFCW will not approve a new fee and access plan, the matters to be taken into account by HEFCW in deciding whether to give, or withdraw, such a notice and the procedure to be followed if such a notice is withdrawn. Regulations made under section 36(7) cannot be used to make additions to the conditions specified in section 36(3). This means that the conditions under which HEFCW may issue notice of refusal to approve a new fee and access plan cannot be changed by the proposed regulations.

It is expected the matters to be taken into account by HEFCW in deciding whether to give notice of their intention to refuse to approve a new plan might include consideration of the severity of the compliance failure and whether alternative courses of action may be appropriate. With regard to withdrawal of a notice it is expected that the matters to be taken into account by HEFCW might include any mitigating action taken by the institution (post issue of the notice) in order to effect its compliance with the conditions at section 36(3) of the Bill. I consider that these matters are appropriate for inclusion in regulations to be made by the negative procedure as they concern technical and procedural detail about the issuing of notices under section 36 of the Bill. These matters will require updating over time, following any changes to the higher education sector in Wales and in response to feedback received from HEFCW on the operation of their enforcement powers. For example, it may be appropriate to increase or reduce the maximum period a notice refusing to approve a new plan can apply for, following discussions and engagement with HEFCW on the effectiveness of such notices.

I also wish to clarify the position with regard to the provision at section 36(7)(a) which states:

> *"(7) Regulations may make provision about –*
> *(a) the period that may be specified in notice under this section;"*

The first reference to 'may' is concerned with enabling the Welsh Ministers to make regulations on any of the matters specified in section 36(7) (a) – (c). The second use of the word 'may' is entirely different in its context. The effect is not to permit a notice to specify a period as a notice is required to do this by virtue of subsection 36(2). The purpose here is to confer discretion on the Welsh Ministers to require a notice to specify a particular period, or to require a notice to specify one period within a range of permissible periods, or to confer discretion on HEFCW to determine

periods in accordance with certain formulae. The use of “may” in this context is to refer to the range of ways in which notice can potentially be specified in accordance with regulations. The use of the word “may” is entirely appropriate in both instances and does not result in any problems in relation to application of this regulation making power.

Section 37: *Duty to withdraw approval of a fee and access plan*

Section 37 requires HEFCW to withdraw their approval of a fee and access plan by giving notice to an institution if they are satisfied that the institution has ceased to: (a) be an institution in Wales; (b) provide higher education; or (c) be a charity.

Under section 37(2), the Welsh Ministers may make provision in regulations about the matters to be taken into account by HEFCW in determining whether to withdraw approval of a fee and access plan and the procedure to be followed in connection with giving notice of withdrawal of such a plan. Section 37(3) provides that the regulations may amend or apply (with or without modification) the procedural requirements relating to warning notices and representations (set out in sections 40 to 43) to any notice issued under section 37.

Section 37 only requires HEFCW to withdraw approval of a fee and access plan when HEFCW is satisfied that an institution no longer falls within section 2(3) of the Bill. Consequently, this section does not apply when something goes wrong under section 36 and is not connected in any way to HEFCW’s function of issuing notice of intention of refusal to approve a new fee and access plan.

Regulations are not required under section 37 for the section to operate. HEFCW will be able to satisfy themselves as to whether an institution is no longer in Wales, is no longer providing higher education or is no longer a charity without regulations. However, if as a consequence of operating the system HEFCW, institutions or other stakeholders consider that the process for withdrawal of approval of a fee and access plan would work more efficiently or effectively with matters being set out in regulations then the power at section 37(2) enables the Welsh Ministers legislate should that prove to be necessary. I am however starting from the principle of not legislating unless there is a proven need to do so. The regulation making power provides the necessary flexibility in a process which has not previously been operated by HEFCW.

Matters not falling within the scope of the Bill

Finally, it may be helpful if I clarify the situation with respect of case-by-case course designation. The Bill does not provide for either automatic or specific course designation, my intention is to consult on new requirements for specific course designation with the aim of introducing rigorous quality assurance and robust checks on the financial health of institutions delivering such courses. Any new arrangements for specific course designation will be progressed by way of the Welsh Ministers' existing regulation making powers under the Teaching and Higher Education Act 1998. Therefore new legislation is not needed.

I trust that the information is helpful and provides clarity to Members. I will write further to address issues on which Members have requested additional information in due course. I am also copying this letter to the Chair of the Children, Young People and Education Committee for information.

Yours sincerely

Huw Lewis AC / AM
Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills

Use of "may" and "must" for regulation making powers

Part 2 – Fee and access plans

Section 2

S.2(4): Regulations "may" make provision. This concerns the making of applications for approval of a fee and access plan. The system would operate without these regulations (albeit perhaps not as efficiently) because regulations are not actually required to make the provision operative; a governing body of an institution within s.2(3) could apply to HEFCW even if no regulations were in place. We think it would only be appropriate to include a duty where both the duty and the regulations are narrow in scope. It is therefore our view no change to "must" is required because the regulation making power in s.2(4) encompasses a variety of matters.

Section 3

S.3(4): This section concerns the designation of other charitable providers of HE in Wales who would not otherwise be designated as "institutions". This means that designated institutions will be covered by the provisions of the Bill and regulation made under the powers in it. This might for example be a provider that whilst not providing degrees, does provide other courses of higher education at a lower level on the credit and qualifications framework but may nevertheless wish for those courses to be automatically designated by student support regulations (for the purposes of student support from the Welsh Ministers) and to be able to apply for approval of a fee and access plan. The system would operate without these regulations (albeit perhaps not as efficiently). Regulations therefore provide the vehicle for supplemental detail involving the mechanics of application, but are not actually required to make the provision operative as applications for designation could be made without any regulations having been made; on this basis we believe there is no need to include "must". As with s.2(4) we also think it would only be appropriate to impose a duty to make regulations where the scope of the regulations is narrow. In this case the scope of the regulations that might be made under s.3(4) is potentially wide and would therefore not be amenable to becoming a duty (because the system for designation could in theory operate without regulations ever being made).

Section 4

S.4(2): The sub-section adopts the "prescribed" formulation and concerns the maximum period to which fee and access plans relate. Whilst the system could operate without these regulations, we recognise that it would operate more effectively with regulations being made which set such a limit. In this instance we believe there is an implicit requirement to make regulations. It is recognised by the Welsh Ministers that in order for the system to work effectively regulations are necessary; it would therefore not be in the interests of the Welsh Ministers to fail to bring such regulations forward. As such there is no need to change the current "prescribe" formulation to refer to "regulations must make provision".

Section 5

Overview: section 5 provides for regulations to set out qualifying courses and persons, and to set the maximum amount that can be specified in a fee and access plan, as well as the treatment of fees

paid in the case of franchised courses. Together these regulations will form the foundations of the regulatory regime contained in the Bill.

S.5(2)(b): The paragraph adopts the "prescribed" formulation. This concerns descriptions of qualifying course. The system could not operate properly without these regulations. There is therefore an implicit requirement on the Welsh Ministers to make regulations and, as such, there is no need to change the "prescribe" formulation to refer to "regulations must make provision". If the Welsh Ministers were to commence s.5(2)(b) with no intention of making qualifying course regulations, then an issue of rationality may arise as there would be no way of knowing what would be a qualifying course. Under the current regime qualifying course regulations have been made, and there is no reason why the Welsh Ministers would not make such regulations under this provision were it enacted.

S.5(3): The sub-section adopts the "prescribed" formulation. This concerns the prescription of a "maximum amount". The system could not operate effectively without these regulations. There is an implicit requirement to make regulations as such there is no need to change the "prescribe" formulation to refer to "regulations must make provision". If the Welsh Ministers were to commence s.5(2)(a) with no intention of making provision on maximum fees then the fee and access plan system would not function properly as applications for approval of fee and access plans could not be made without knowing the maximum amount.

S.5(5): The sub-section adopts the "prescribed" formulation. This concerns descriptions of qualifying person. The system could not operate properly without these regulations. There is an implicit requirement to make regulations and, as such, there is no need to change the "prescribe" formulation to refer to "regulations must make provision". If the Welsh Ministers were to commence s.5(2)(a) but not make qualifying persons regulations, then the fee and access plan system would not function properly as there would be no way of knowing who is a qualifying person for purpose of s.5(2)(a).

S.5(9): Regulations may make provision in respect of fees being treated as paid to a provider who has an approved fee and access plan in place, rather than to another person i.e. being paid to the franchisor institution rather than the franchisee institution. We recognise that a variety of franchise arrangements may exist and some or all of the fees charged for a qualifying course may be payable to a partner institution. Regulations will ensure that the total fees paid by a student do not exceed the maximum fee limit, even where the fees are paid to two different institutions. The system could still operate without these regulations but as a matter of policy it is intended to bring forward such regulations to protect the interests of students.

Section 6

S.6(1): This section adopts the "prescribed" formulation and concerns the contents of fee and access plans relating to equality of opportunity or promotion of higher education. Whilst the system could operate without these regulations, we recognise that it would operate far better with regulations in place setting out what should be included within a fee and access plan. In this instance, we would argue that there is an implicit requirement to make regulations based on them being part of the foundation required to make the new system effective. As such, we are of the view that there is no need to change the "prescribe" formulation to refer to "regulations must make provision".

Additionally given the breadth and range of matters that might be included in these regulations, and the fact that they may need periodically to be updated to keep pace with the changing demographics of the student population in Wales; it is in our view highly questionable whether an express duty would be appropriate.

Section 7

S.7(3): Regulations may make provision about the matters that HEFCW must take into account when deciding whether or not to approve a fee and access plan. The system for approval or rejection can operate without regulations being in place (albeit perhaps not as efficiently). Regulations will provide details of supplemental factors HEFCW must consider in light of the potentially wide range of providers who may apply for approval. Given the potential range of providers that may apply to HEFCW and the changing nature of the sector changes may need to be made quite quickly to the factors HEFCW considers. The system could however operate without regulations with HEFCW determining whether or not to approve fee and access plans for example by taking account of guidance provided by the Welsh Ministers under section 46; on this basis we believe it is appropriate for "may" rather than "must" to be used.

Section 8

S.8(1): Regulations may require a governing body to publish the institution's approved plan. The system will operate without these regulations, and so we take the view that "may" is in this context appropriate. In any event the existing power in section 34(6) of the Higher Education Act 2004 requiring publication is formulated as "may" and so it would seem odd to move away from this formulation when the current system has worked effectively in this regard. In section 8(1) "may" is used to denote a permission; the Welsh Ministers "may" make regulations. Whereas in 8(2) "may" is used to indicate the possibility that the regulations "may" make provision about how the plan is published.

Section 9

S.9(1): Regulations may provide for an approved plan to be varied. This power mirrors similar powers in the Higher Education Act 2004 (section 36) which are formulated as "may", therefore any change to "must" would appear unnecessary. Whilst the new system for approving fee and access plans would operate without these regulations the Welsh Ministers intend to ensure continuity in the system by bringing forward regulations under this new section enabling institutions to apply to vary an already agreed plan during the lifetime of that plan. Regulations (rather than guidance under s.46) are more appropriate as regulations can deal with practical issues about how an institution might apply for a variation and how HEFCW considers a variation, whereas guidance is better suited to matters of best practice. The use of regulations to allow variation (rather than an express power on the face of the Bill) enables the Welsh Ministers to respond promptly to any changes in the sector, and if appropriate remove the ability of institutions to vary approved plans.

Section 11

S.11(5): Regulations may make provision about how and when HEFCW gives a copy of a compliance and reimbursement direction to the Welsh Ministers, and about how and when HEFCW must publish the direction. The detail contained in regulations under this section will be administrative and

technical in nature and requirements may change over time, for example as HEFCW's working practices develop or technology advances. The system would still operate without these regulations. The use of regulations though will future proof the system, enabling amendments to be made about how and when HEFCW publish such a direction in light of experience gleaned from operating the new system. Directions will be of interest to students and prospective students; the use of regulations will help ensure there is flexibility in enabling access to them.

Section 13

S.13(1): Regulations may make provision as to steps to be taken by HEFCW where regulated institutions fail to comply with the general provisions of its approved plan. This concerns compliance by institutions with their fee and access plans. The core requirements of a fee and access plan are set out in section 6, this section provides flexibility to deal with the enforcement of non-standard aspect of fee and access plans. For instance regulations may confer a power on HEFCW to direct the governing body of an institution to take steps to ensure compliance with the general provisions of its approved fee and access plan. Regulations provide a mechanism for defining what constitutes a failure to comply with the general provisions of an approved plan. The system would operate without these regulations. Since the regulations need to be responsive and able to cover a number of areas we take the view that in this context "may" is appropriate. As regulations under section 13 may amend the Bill the affirmative procedure is appropriate.

Part 3 – Quality of education

Section 17

S.17(4): Regulations may make provision about the circumstances in which a person is (or is not) to be treated as responsible for providing a course. The rationale for this power is to enable a flexible approach to be adopted by the Welsh Ministers enabling them to respond to changes in the numbers of franchised courses and/or the manner in which such courses are delivered. The statement of policy intent gives the example of excepting individual tutors who help to deliver courses on behalf of regulated institutions. The regulations could confirm that such individuals should not be treated as external providers for the purposes of quality assessment. The regulations will be narrow in scope and technical in nature. The system would operate without these regulations and so the use of "may" in this context is appropriate.

Part 5: Fee and access plans: withdrawal of approval etc

Section 36

S.36(7): Regulations may make provision about the period that may be specified in a notice refusing to approve a new fee and access plan; matters to be taken into account by HEFCW in deciding whether to give notice or withdraw such notice; and the procedure to be followed in connection with a withdrawal of notice. There may in time be a need to vary regulations made under this section by for example specifying a different period of notice during which HEFCW cannot approve a fee and access plan, or by specifying matters that HEFCW must take into account whether to give or withdraw notice as well as specific procedural elements associated with a decision by HEFCW not to renew a fee and access plan. The system would operate without these regulations so it is our view that "may" rather than "must" would be appropriate here.

Section 37

S.37(2) and (3): Regulations may make provision about matters to be taken into account by HEFCW in making a determination that an institution is no longer within s.2(3) and the procedure to be followed when giving notice of withdrawal of approval. Section 37(1) provides that HEFCW must withdraw approval of an institution's fee and access plan where HEFCW is satisfied that the institution no longer falls within s.2(3). The use of "must" here is appropriate because it sets out the action that HEFCW must take if HEFCW is "satisfied" a regulated institution is no longer within s.2(3). Regulations under this section "may" though set out the matters that HEFCW should consider in determining whether an institution still falls within s.2(3), for example decisions of the Charity Commission where HEFCW believe the institution no longer has charitable status. Regulations may also make provision about procedural requirements in connection to s.37(2)(b) by amending or applying (with or without modification) sections 41,42 and 43 enabling institutions to have recourse to a defined process in the event of a proposed withdrawal of a fee and access plan. We are of the view that the balance between "must" and "may" is appropriate in this section given regulations will set out procedural requirements, and can be revised in light of experience gleaned from operating the new system.

Section 38

S.38(3): Regulations may make provision about matters to be taken into account by HEFCW in deciding whether to give notice of withdrawal of approval. The system would operate without regulations given the conditions which may give rise to HEFCW deciding to withdraw approval of a plan are set out on the face of the Bill (s.38(2)). Regulations will though add supplemental detail by setting out the factors that HEFCW must consider in deciding whether to give notice, but regulations are not necessary for the section's operation. Regulations serve to provide a layer of detail setting out the factors for HEFCW to consider when exercising its discretion. On this basis we think that the use of the word "may" is entirely appropriate.

Section 39

S.39(2): Regulations may make provision about how and when HEFCW gives a copy of a notice under section 36, 37 or 38 to the Welsh Ministers and about how and when HEFCW must publish such a notice. It is appropriate to require HEFCW to undertake these actions to ensure the Welsh Ministers retain an overview of the sector. Regulations would be entirely procedural in nature, specifying the timings for HEFCW to provide notices to the Welsh Ministers, and where notices should be published. Given this; the fact the requirement to publish is on the face of the Bill and that the system would operate without these regulations it is our view the power to make regulations should remain as "may".

Section 41

S.41(2)(d): " any provision made by regulations" as to the period within which, and the way in which representations are to be made in response to a proposed warning notice. These are administrative and technical provisions that may need updating from time to time in light of technological advances and experience gleaned from operation of the system. However the system will operate without

these regulations being made, on this basis we believe that the use of a discretion equivalent to "may" is entirely appropriate.

Section 42

S.42(c): The section adopts the "prescribed" formulation. Regulations can prescribe additional information to be included in a notice or direction issued under s.7(1)(b); s.11; s.19; s.32; s.36; or s.38. Section 42(a) and (b) already provide that HEFCW must include reasons for issuing a notice or direction, and alerting the governing body that it may apply for a review of the notice or direction. Regulations would provide for certain supplementary information to be included such as informing a regulated institution that a copy of a notice or direction will be given to the Welsh Ministers and published. This power enables the Welsh Ministers to ensure that statements keep pace with changes in practice by making changes as to the required content.

Section 43

S.43(3): The Welsh Ministers must by regulations make provision in connection with reviews under s.43. This power reflects existing provisions within section 39 of the Higher Education Act 2004. S.43(4) sets out what might be contained within regulations. Updates to the regulations might be required from time to time in light of feedback from the sector and HEFCW as to its operation.

Section 49

S.49(4): Regulations may make provision about preparation of the statement in respect of HEFCW's intervention functions (including as to the statement's form and content); its publication; the consultation to be carried out in relation to the statement in respect of intervention functions. These are procedural and technical provisions, and whilst relevant to HEFCW and the higher education sector are otherwise of limited interest. The intention is to provide the key components that HEFCW must address in preparation of the statement although in theory this could be achieved by the Welsh Ministers issuing guidance to HEFCW rather than via regulations. It will be for HEFCW to fill in the operational detail following consultation and dialogue with regulated institutions and other stakeholders. It may also be the case that requirements change over time and the Welsh Ministers will have power to respond to such changes. On this basis we believe it is appropriate to use "may" rather than "must" to afford the Welsh Ministers the degree of flexibility that is required to give proper and meaningful effect to this section.

Section 54

S.54(1): The section adopts the "prescribed" formulation. Certain fees can be excluded from the definition of "fees" in section 54(1). The system will operate without regulations being made. The power to make regulations is to future proof the system in the event that it becomes necessary to exclude other types of fee from the definition of fees.

Section 55

S.55(3): The Welsh Ministers may by regulations make such incidental, supplementary or consequential provision as they think appropriate in consequence of, or for giving full effect to, a

provision of the Bill. There may not be any incidental, supplementary or consequential provision required so this has to remain as “may”.

Section 56

S.56(2): Most provisions of the Bill come into force on such day as the Welsh Ministers may appoint by order. Commencement of provisions has to remain at the discretion of the Welsh Ministers so that they can respond to any unforeseen issues that may arise, and also to ensure the system is rolled out in a timely and well co-ordinated manner, enabling the new system to achieve the best results for the sector, students and HEFCW. On this basis “must” is inappropriate and removes this necessary degree of flexibility and responsiveness required to give proper effect to the legislation.

Schedule, paragraph 28(e): No reference to “may” or “must”. Regulations can specify any other enactment for which a 2004 Act plan is to be treated as a plan approved under the Bill. There may be no practical need for such regulations, but having such a power provides for a degree of future proofing to be made by enabling additional provisions to be added to those already listed in paragraph 28 should the need arise, so “must” would be inappropriate here.

Schedule, paragraph 30(1): Regulations may make provision about the application of a provision listed in paragraph 28(a) – (d) to a 2004 Act plan. This is again a safety mechanism to enable Welsh Minister to deal with any unforeseen circumstances that may arise after Royal Assent and affect the way in which 2004 Act plans are to be treated as fee and access plans. The system could operate without these regulations so “must” would be inappropriate.