Constitutional and Legislative Affairs Committee

Meeting Venue:
Committee Room 2 - Senedd

Meeting date:
16 June 2014

Meeting time:
13.30

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

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Agenda

1 Introduction, apologies, substitutions and declarations of interest

2 Evidence in relation to the Higher Education (Wales) Bill (Pages 1 - 56)

(Indicative time 1.30 – 2.15pm)

Huw Lewis AM, Minister for Education and Skills;

CLA(4)-17-14 – Paper 1 – Statement of Policy Intent
CLA(4)-17-14 – Paper 2 – Table of Derivations
CLA(4)-17-14 – Paper 3 – Written Evidence from Higher Education Wales
CLA(4)-17-14 – Research Service Briefing
CLA(4)-17-14 – Legal Advice Note

3 Instruments that raise no reporting issues under Standing Order 21.2 or 21.3 (Pages 57 - 61)

CLA(4)-17-14 – Paper 4 – Statutory Instruments with clear reports

Negative Resolution Instruments

CLA406 - The Removal and Disposal of Vehicles (Amendment) (Wales) Regulations 2014

Negative procedure; Date Made: 30 May 2014; Date laid: 3 June 2014; Coming into force date: 27 June 2014

CLA407 - The Education (Consultation on School Term Dates) (Wales) Regulations 2014

Negative procedure; Date Made: 4 June 2014; Date laid: 6 June 2014; Coming into force date: 2 September 2014

CLA408 - The Plant Health (Miscellaneous Amendments) (Wales) Regulations 2014

Negative procedure; Date Made: 5 June 2014; Date laid: 9 June 2014; Coming into force date: 4 July 2014

CLA409 - The Higher Education Funding Council for Wales (Supplementary Functions) Order 2014

Negative procedure; Date Made: 5 June 2014; Date laid: 9 June 2014; Coming into force date: 2 August2014

CLA411 - The Local Authorities (Standing Orders) (Wales) (Amendment) Regulations 2014

Negative procedure; Date Made: 9 June 2014; Date laid: 10 June 2014; Coming into force date: 1 July 2014

Affirmative Resolution Instruments

CLA410 - The Local Government (Wales) Measure 2009 (Amendment) Order 2014

Affirmative procedure; Date Made: Not stated; Date laid: 10 June 2014; Coming into force in accordance with article 1

CLA412 - The Town and Country Planning (Non-Material Changes and Correction of Errors) (Wales) Order 2014
Affirmative procedure; Date Made: Not stated; Date laid: 10 June 2014; Coming into force date: 1 September 2014

CLA413 - The Town and Country Planning (Fees for Non-Material Changes) (Wales) Regulations 2014
Affirmative procedure; Date Made: Not stated; Date laid: 10 June 2014; Coming into force date: 1 September 2014

4 Evidence in relation to the Inquiry into Disqualification of Membership from the National Assembly for Wales (Pages 62 - 87)

(Indicative time 2.15 - 3.00pm)

Keith Bush QC

CLA(4)-17-14 - Paper 5 - Written Evidence
CLA(4)-17-14 - Research Service Briefing

5 Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business:

(vi) the committee is delberating on the content, conclusion or recommnedations of a report it proposes to publish; or is preparing itself to take evidence from any person;

Disqualification Inquiry Key Issues and Emerging Themes (Pages 88 - 160)
CLA(4)-17-14 - Paper 6 - Key Issues
CLA(4)-17-14 - Paper 7 - Summary of Written Evidence
CLA(4)-17-14 - Paper 8 - The National Assembly for Wales (Disqualification) Order 2010
CLA(4)-17-14 - Paper 9 - Disqualification Table 1

CLA(4)-17-14 – Paper 10 – Disqualification Table 2
CLA(4)-17-14 – Paper 11 – Extract from the Government of Wales Act 2006
CLA(4)-17-14 – Paper 12 – Letter to William Powell AM
CLA(4)-17-14 – Paper 13 – Letter to Russell George AM
CLA(4)-17-14 – Paper 14 – Letter from William Powell AM
CLA(4)-17-14 – Paper 15 – Letter to Secretary of State For Wales
CLA(4)-17-14 – Paper 16 – Letter from Secretary of State For Wales

Draft Report on the Legislative Consent Memorandum: Wales Bill (Pages 161 – 164)
CLA(4)-17 – 14 – Paper 17 – Draft Report

Draft Response to UK Government Review of Balance of Competences (Pages 165 – 173)
CLA(4)-17-14 – Paper 18 – Draft Response

Agenda Item 2

Llywodraeth Cymru
Welsh Government

Higher Education (Wales) Bill

Policy intent for regulations to be made under the Bill

May 2014

POLICY INTENT FOR PROPOSED REGULATIONS TO BE MADE UNDER THE HIGHER EDUCATION (WALES) BILL

1. This document provides an indication of the current policy direction for regulations that the Welsh Ministers intend to make using the powers in the Higher Education (Wales) Bill ('the Bill').

2. The Bill will make provision for a revised regulatory framework for higher education in Wales. It will achieve this by providing the Higher Education Funding Council for Wales ('HEFCW') with the necessary functions to assure the quality of higher education provision, enforce tuition fee controls and fee plan requirements and establish a framework for the organisation and management of the financial affairs of providers of higher education in Wales who have a fee and access plan approved by HEFCW.

3. The key components of the new regulatory framework are set out on the face of the Bill and will be commenced either on Royal Assent or in accordance with commencement orders made by the Welsh Ministers. However, the Bill does provide the Welsh Ministers with a number of regulation making powers that follow logically from what is clearly described on the face of the Bill. These will allow matters of procedural detail to be prescribed, and provide for future flexibility with regard to matters which may change from time to time.

4. With the exception of the power to commence provisions of the Bill by way of an order, the delegated powers provided by this Bill take the form of regulations. It is the Welsh Government's intention to consult on the detail of the proposed regulations prior to them being made.

5. This document provides information on the policy intentions for those regulations to be made under the Bill, if enacted.

6. In respect of the order making power for commencement, section 56 of the Bill provides that Part 1 and certain other provisions will come into force on the day on which the Act receives Royal Assent. The other provisions of the Bill will be commenced, by way of order, at such times as the Welsh Ministers consider appropriate or expedient. It is intended that certain provisions will be implemented for academic year 2015/16. This assumes that Royal Assent is achieved in early 2015 with subordinate legislation made during 2015 and transition to the new regulatory system during 2016 in time for full commencement in the 2016/17 academic year. A phased approach to implementation is considered to be necessary in order to ensure a smooth transition to the new regulatory framework.

7. This document should be read in conjunction with the:

Draft Bill

http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=256106&ds=5/2014

Explanatory Memorandum

http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs.htm?act=dis&id=256107&ds=5/2014

Technical Consultation

http://wales.gov.uk/consultations/education/higher-education-wales-bill-technical-consultation/?status=closed&lang=en

Summary of Responses to Technical Consultation

http://wales.gov.uk/consultations/education/higher-education-wales-bill-technical-consultation/?status=closed&lang=en

PART 2 – FEE AND ACCESS PLANS

8. This Part of the Bill will allow certain institutions in Wales to apply to HEFCW for approval of a fee and access plan. This Part also deals with the content of fee and access plans including a fee limit for certain courses. HEFCW will be required to monitor institutions' compliance with their fee and access plans (including fee limits) and this Part confers a number of new functions upon HEFCW to enable them to undertake this role.

9. The following guidance and regulations are referred to in the information relating to regulations to be made under Part 2 of the Bill:

   - The Student Fees (Approved Plans)(Wales) Regulations 2011 (SI 2011/884 (W.128)) Available at: http://www.legislation.gov.uk/wsi/2011/884/contents/made

   - Guidance to HEFCW on Fee Plan Approval and Enforcement, April 2011. Available at: http://wales.gov.uk/topics/educationandskills/publications/guidance/heplans/?lang=en

   - Higher Education (Wales) Bill Technical Consultation – (paragraphs 3.4, 4.24 4.5) Available at: http://wales.gov.uk/consultations/education/higher-education-wales-bill-technical-consultation/?lang=en

   - Qualifying Courses and Persons) (Wales) Regulations 2011. Available at: http://www.legislation.gov.uk/wsi/2011/691/contents/made

- The Education (Student Support) (Wales) Regulations 2013
  Available at: http://www.legislation.gov.uk/wsi/2013/3177/contents/made

10. The tables overleaf provide the policy intentions for each of the regulation making powers in this Part of the Bill.

REGULATIONS RELATING TO:	Applications for approval of a fee and access plan.
SECTION	2(4)

DESCRIPTION OF THE POWER/REGULATION

Section 2 permits the governing body of a certain type of institution to apply to HEFCW for approval of a fee and access plan. The institution must be an institution in Wales which provides higher education and is a charity.

Section 2(4) enables the Welsh Ministers to make provision, via regulations, about the making of applications for approval of a fee and access plan.

WHY THE REGULATION POWER IS REQUIRED

The information and requirements set out in these regulations are likely to be technical in nature and require updating on a regular basis. The regulations may require institutions to provide HEFCW with certain information or documentation alongside their applications for approval of a fee and access plan. These requirements regarding information and documentation are likely to change over time following changes in the delivery of higher education in Wales as well as technological advancements. The Welsh Ministers need the flexibility to respond to these changes which will ensure that the fee and access plan application process remains up to date.

POLICY INTENTION OF THE REGULATIONS

It is expected that HEFCW will require certain information or documentation from institutions applying to them for approval of a fee and access plan. The policy intention is these regulations will outline the information and documentation that institutions applying for approval of a fee and access plan will need to provide to HEFCW. This could include information which demonstrates that the education provided by the institution is of adequate quality and that the institution's financial management is robust. It may also include details of the type and range of higher education courses provided by the institution as well as information on the institution's record on, and future plans for, promoting access to its courses to students from a range of social and economic backgrounds.

It is also proposed the technical details about the application process will be set out in the regulations. This could include information on timescales, requirements to provide contact information as well as any other further information reasonably required by HEFCW.

REGULATIONS RELATING TO:	The designation of other providers of higher education.
SECTION:	3(4)

DESCRIPTION OF THE POWER/REGULATION

Section 3 enables the Welsh Ministers to designate a charitable provider of higher education in Wales as an 'institution' for the purposes of the Bill and any subordinate legislation made under it. Such a provider would not normally be regarded as an 'institution' under the Bill. A designation may be made on an application by the provider concerned.

Section 3(4) enables the Welsh Ministers to make 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.

WHY THE REGULATION POWER IS REQUIRED

The matters to be dealt with in these regulations are likely to be technical and administrative in nature and require updating on a regular basis. The regulations may require providers to provide the Welsh Ministers with certain information to accompany their applications for designation. These information requirements are likely to change over time following changes to the higher education sector as well as technological advancements.

Similarly, the procedures and processes associated with making or withdrawing designations may change over time as different providers seek to enter the higher education sector in Wales. This regulation making power will allow the Welsh Ministers to respond to the changes.

POLICY INTENTION OF THE REGULATIONS

This power could 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. Such a provider might not regard itself as an "institution" for the purposes of section 2 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 under that section.

The policy intention is that these regulations will require providers applying to the Welsh Ministers for designation as an 'institution' to provide certain information or documentation alongside their application. The information which the Welsh Ministers might reasonably expect an applicant provider to supply would concern proof of the provider's operation in Wales and of its charitable status. The regulations may also specify how an application is to be made (for example in writing).

Under section 3(4), the Welsh Ministers are able to make regulations about the making of applications by such providers, the withdrawal of a designation and the effect of such a withdrawal.

To protect the interests of existing students it is proposed the regulations will specify that where a provider's designation as an institution is withdrawn, the provider is to continue to be treated as an 'institution' for a limited period and in relation to certain elements of the new regulatory framework established under the Bill.

REGULATIONS RELATING TO:	Maximum period in respect of which a fee plan is to have effect.
SECTION:	4(2)
DESCRIPTION OF THE POWER/REGULATION	
Section 4 requires a fee and access plan to specify the period in respect of which it is to have effect. Under sub-section (2), the Welsh Ministers may prescribe in regulations the maximum period to which a fee and access plan is to have effect. Any period specified in a fee and access plan must not exceed this maximum period.	
WHY THE REGULATION POWER IS REQUIRED	
The maximum period in respect of which a fee and access plan is to have effect is likely to change over time in response to changes to the higher education sector in Wales. This regulation power is required to enable the Welsh Ministers to respond to these changes. The Welsh Ministers currently have a similar regulation making power in section 35(2) of the Higher Education Act 2004.	
POLICY INTENTION OF THE REGULATIONS	
Fee plans became a statutory requirement in Wales for institutions charging tuition fees over a specified amount (£4,000) in relation to certain qualifying courses commencing in the 2012/13 academic year. Currently the maximum duration of fee plans is prescribed in regulations as being 2 years. The intention is that in the long term this will be extended up to 5 years. The policy intention is to reduce the administrative burdens on both HEFCW and institutions in light of the new power sought for HEFCW to monitor institutions' compliance with the provisions of approved fee plans and to evaluate the effectiveness of those plans. However, due to the need for the new system to embed it is expected the maximum duration of fee plans will not be extended beyond 2 years in the first set of regulations. Currently Regulation 8 of the Student Fees (Approved Plans) (Wales) Regulations 2011 specifies the maximum period during which a plan is to be in force.	

REGULATIONS RELATING TO:	Description of qualifying courses.
SECTION:	5(2)(b)

DESCRIPTION OF THE POWER/REGULATION

Section 5 requires a fee and access plan to specify, or provide for the determination of, a fee limit in relation to each 'qualifying course'.

Section 5(2)(b) enables the Welsh Ministers to prescribe in regulations descriptions of 'qualifying courses'. Such courses must be wholly or principally provided in Wales.

WHY THE REGULATION POWER IS REQUIRED

Qualifying courses are courses that will attract a fee limit. This regulation making power is required to provide the Welsh Ministers with the flexibility to respond to changes in the student support system or higher education sector in Wales. For example, if a new range of courses are designated for student support purposes (meaning certain students attending those courses are eligible to receive Welsh Government student support), those courses are likely to become 'qualifying courses' for the purposes of the new fee limit and the wider regulatory framework.

The Welsh Ministers currently have a similar regulation making power in section 28(6) of the Higher Education Act 2004.

POLICY INTENTION OF THE REGULATIONS

The definition of "qualifying courses" is likely to be closely connected to those courses automatically designated for student support funding by regulations made under section 22 of the Teaching and Higher Education Act 1998. In general terms, the description of a qualifying course is likely to be restricted to undergraduate higher education courses provided wholly or principally in Wales. This will include first degree courses, Higher National Diplomas (HNDs), Higher National Certificates (HNCs) and courses for the initial training of teachers. It is likely that courses which are delivered on behalf of a regulated institution under franchise arrangements with another institution or provider will be included in the definition of "qualifying courses" in the regulations.

Qualifying courses are currently prescribed in Regulation 3 of the (Qualifying Courses and Persons) (Wales) Regulations 2011.

REGULATIONS RELATING TO:	Maximum fee limits
SECTION:	5(3)

DESCRIPTION OF THE POWER/REGULATION

A fee limit specified in, or determined in accordance with, a fee and access plan must not exceed a specified maximum amount. Section 5(3) enables the Welsh Ministers to set this maximum amount.

WHY THE REGULATION POWER IS REQUIRED

The maximum fee limit applicable to certain higher education courses ('qualifying courses') is likely to change over time, in response to changes in student support policy, the fees in other UK administrations and other economic and social factors. This regulation making power will provide the Welsh Ministers with the flexibility to respond to these changes.

The Welsh Ministers currently have a similar regulation making power in section 28(6) of the Higher Education Act 2004.

POLICY INTENTION OF THE REGULATIONS

Under the current system the Welsh Ministers prescribe a basic and higher fee amount in regulations. Institutions can charge tuition fees up to the basic amount without having an approved fee plan in force. Institutions charging fees above the basic amount need to have an approved fee plan in force. Under the new system, it is proposed the Welsh Ministers will only prescribe a single fee amount which will be the maximum fee chargeable by an institution with an approved fee and access plan in force (a regulated institution).

It is proposed this single fee amount will be prescribed at £9,000 in the first set of regulations. This corresponds with the existing higher amount, which is the maximum fee chargeable by those institutions with an approved fee plan in place.

The Student Fees (Amounts) (Wales) Regulations 2011 prescribe the basic and higher amounts which relevant institutions may charge by way of tuition fees for full-time undergraduate courses.

REGULATIONS RELATING TO:	The meaning of ‘qualifying persons’
SECTION:	5(5)

DESCRIPTION OF THE POWER/REGULATION

A fee limit specified in, or determined by, a fee and access plan will only apply to fees payable by ‘qualifying persons’. Section 5(5) enables the Welsh Ministers to prescribe classes of persons in regulations who will be ‘qualifying persons’ for the purposes of the fee limit. International students will not be ‘qualifying persons’ for the purposes of section 5 or the associated regulations.

WHY THE REGULATION POWER IS REQUIRED

Prescribing the classes of persons who will be ‘qualifying persons’ for the purposes of the fee limit is a technical issue which may need updating from time to time. This power will provide the Welsh Ministers with the flexibility to update the meaning of ‘qualifying persons’ as and when required.

The Welsh Ministers currently have a similar regulation making power in section 28(6) of the Higher Education Act 2004.

POLICY INTENTION OF THE REGULATIONS

These regulations will prescribe the classes of person to which the ‘fee limit’ will apply (where those persons are undertaking qualifying courses).

‘Qualifying persons’ as currently prescribed in regulation 4 of the Qualifying Courses and Persons (Wales) Regulations 2011 are similar, but do not mirror, ‘eligible students’ as prescribed in the Education (Student Support) (Wales) Regulations 2013. The current definition of ‘qualifying persons’ includes the following groups, all of which must be ordinarily resident in the UK on the first day of the first academic year of the course:

- Persons who are settled in the UK;
- Refugees and their family members;
- Persons with leave to enter or remain and their family members;
- EEA migrant and their family members;
- Persons who are settled in the United Kingdom and have exercised a right of residence elsewhere;
- Children of Swiss nationals; and
- Children of Turkish workers.

The current definition of ‘qualifying persons’ also includes EU nationals.

There is no current intention to make any amendments to the definition of a ‘qualifying persons’ as prescribed in the current regulations.

REGULATIONS RELATING TO:	Fees payable to other persons
SECTION	5(9)
DESCRIPTION OF THE POWER/REGULATION	
Section 5(2) confirms that a fee limit for the purposes of the Bill is a limit on the fees payable by a 'qualifying person' to an institution in connection with the undertaking of a 'qualifying course'. This corresponds with the standard position, where fees are payable by students to institutions delivering their courses. Section 5(9) enables the Welsh Ministers to make regulations which specify circumstances where fees payable to another person in connection with a qualifying person's course, are to be regarded as fees payable to the institution in connection with that course. This power will apply where a course is provided by an institution or provider, on behalf of an institution with an approved fee and access plan in force (a regulated institution).	
WHY THE REGULATION POWER IS REQUIRED	
This regulation making power is required to enable the Welsh Ministers to respond to changes in the way fees are charged by higher education institutions in Wales. This power will ensure that institutions which enter into franchise arrangements with other institutions or providers are unable to circumvent the statutory fee limit by arranging for their partner institutions to charge fees to students. This would protect students by ensuring that they are not charged additional fees, which brings the total amount of fees payable above the statutory fee limit.	
POLICY INTENTION OF THE REGULATIONS	
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. The policy intention of these regulations is to ensure that the fees payable by students (qualifying persons) do not exceed the statutory fee limit, even where those fees are payable to a person other than a regulated institution responsible for the course.	

REGULATIONS RELATING TO:	The promotion of equality of opportunity and the promotion of higher education.
SECTION:	6(1)
DESCRIPTION OF THE POWER/REGULATION	
Section 6(1) requires a fee and access plan relating to an institution to include such provision on the promotion of equality of opportunity and the promotion of higher education as may be prescribed by the Welsh Ministers in regulations. This power enables the Welsh Ministers to prescribe the information on equality of opportunity and higher education for this purpose.	
WHY THE REGULATION POWER IS REQUIRED	
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. This power will enable the Welsh Ministers to respond to these changes by adapting the requirements imposed on institution's fee and access plans. The Welsh Ministers currently have a similar power in section 33 of the Higher Education Act 2004.	
POLICY INTENTION OF THE REGULATIONS	
The policy intention is that these regulations will build on the requirements set out in existing regulations. Currently Regulations 3 and 4 of the Student Fees (Approved Plans)(Wales) Regulations 2011 set out the required contents of a fee the plan. The intention is to restate a number of the existing requirements, such as the requirement for a plan to require the governing body to take measures to attract applications from under-represented groups and the requirement to make information available about financial assistance available. It is also intended to incorporate new requirements concerning measures to be taken to retain students who are members of under-represented groups and also a requirement in relation to the setting out of expenditure in relation to the objectives of a plan if fees are to be charged above a specified threshold amount	

REGULATIONS RELATING TO:	Approval or rejection of a fee and access plan
SECTION:	7(3)

DESCRIPTION OF THE POWER/REGULATION

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.

WHY THE REGULATION POWER IS REQUIRED

The matters which will be relevant to a decision by HEFCW to approve or reject an institution's fee and access plan are likely to change over time. These matters may be influenced by the types of institution applying for approval, the range of courses offered in Wales and other changes to the higher education sector. This power will enable the Welsh Ministers to update the fee and access plan approval process in accordance with these changes.

The Welsh Ministers currently have a similar power in section 34(5) of the Higher Education Act 2004.

POLICY INTENTION OF THE REGULATIONS

Conditions concerning the approval or rejection of a proposed plan are set out on the face of the Bill (section 7(2)). The policy intention is that when deciding whether to approve a proposed plan that HEFCW should be obliged to take into account additional matters which reflect the different types of institution which may apply for approval of a fee and access plan and the wider range of fee levels which are to be subject to fee and access plan requirements under the new regulatory system.

The intention is that HEFCW should be required to take into account the following:

- the quality of education at the institution and the organisation of its financial affairs in order to ensure that the interests of prospective students are protected;
- the adequacy of the measures committed to in the plan against the proposed tuition fee level in order to ensure a proportionate approach to approval of plans.

Currently Regulation 6 of the Student Fees (Approved Plans)(Wales) Regulations 2011 specifies the matters that the relevant authority (HEFCW) must have regard to when making any determination relating to the approval of a plan. Those matters include safeguarding of fair access to higher education and the desirability of protecting academic freedom. The intention is for those matters to be replicated in the regulations to be made under section 7(3) of the Bill.

REGULATIONS RELATING TO:	Publication of approved plans
SECTION:	8(1)
DESCRIPTION OF THE POWER/REGULATION	
This power enables the Welsh Ministers to require institutions with an approved fee and access plan to publish their approved plan. The regulations requiring publication may make specific provision on how and when a plan is to be published.	
WHY THE REGULATION POWER IS REQUIRED	
The requirements around the publication of approved plans are likely to change over time, in response to the number of people wishing to view plans, ease of access and changes in technology. This regulation power will enable the Welsh Ministers to respond to these changes and allow for a flexible and up to date approach to publication.	
POLICY INTENTION OF THE REGULATIONS	
The policy intention is that there should be greater transparency in respect of the availability of information about the progress made by institutions against their fee plan commitments. One element of this is to ensure that fee and access plans are published so that those with an interest in the approved plans can access them easily. Currently Regulation 7 of the Student Fees (Approved Plans)(Wales) Regulations 2011 requires institutions to publish approved plans in a manner which makes them conveniently accessible to students and prospective students. We do not intend to make any changes to this requirement in the first set of regulations.	

REGULATIONS RELATING TO:	Variation of approved plans
SECTION:	9(1)

DESCRIPTION OF THE POWER/REGULATION

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 may, via regulations, enable approved plans to be varied in accordance with the procedure laid down in those regulations. The regulations must provide that a variation will only take effect if approved by HEFCW.

WHY THE REGULATION POWER IS REQUIRED

The number and scope of requests for variations of approved plans is likely to change over time. In addition, the processes and procedures applying to variations is also likely to change depending on HEFCW's experience of past practice, technological changes and institutional preferences. This regulation power will enable the Welsh Ministers to respond to these changes.

The Welsh Ministers currently have a similar power in section 36 of the Higher Education Act 2004.

POLICY INTENTION OF THE REGULATIONS

The policy intention is to provide an effective procedure for approved plans to be varied during the lifetime of the plan. Currently, regulation 9 of the Student Fees (Approved Plans) (Wales) Regulations 2011 provides that an institution may seek to make changes to its fee plan during the lifetime of the plan and is required to seek approval from HEFCW to do so.

It is intended that the procedure for a variation of a plan should mirror the procedure that HEFCW must adopt in considering a proposed fee and access plan for the first time. Namely, that if HEFCW propose to reject the variation, they should give a warning notice which sets out their reasons and which allows the institution to make representations to HEFCW which are to be taken into account by HEFCW in deciding whether to refuse the variation. Additionally the intention is to make provision for a review of a decision by HEFCW to refuse to vary a plan as currently set out in Regulation 11 of the Student Fees (Approved) Plans Regulations 2011.

In assessing proposed changes, the Welsh Government would expect HEFCW to have regard to a key principle that students should know before committing to a course what fees they can expect to pay and that students should be protected against changing fee levels where the possibility of that change has not been notified to them at the time of application for the course.

REGULATIONS RELATING TO:	Copies and publication of compliance and reimbursement directions
SECTION:	11(5)
DESCRIPTION OF THE POWER/REGULATION	
Section 10 requires regulated institutions (those institutions with an approved fee and access plan in place) to comply with the fee limit set out in, or determined in accordance with, their approved plan. If a regulated institution fails to comply with a fee limit, section 11 provides HEFCW with the power to direct the institution to comply with the limit and reimburse any excess fees already paid. Such a direction is known as a 'compliance and reimbursement direction'. If such a direction is issued, section 11(4) requires HEFCW to publish it and provide a copy to the Welsh Ministers. The power in section 11(5) enables the Welsh Ministers to make provision in regulations about how and when HEFCW are to publish any compliance and reimbursement directions and provide copies to the Welsh Ministers.	
WHY THE REGULATION POWER IS REQUIRED	
The detail in these regulations relating to the publication and administration of compliance and reimbursement directions, will be technical and administrative in nature. It is also likely to change over time, following changes in HEFCW working practices, Welsh Minister requirements and advances in technology. This power will enable the Welsh Ministers to respond flexibly to these changes and include the relevant technical and administrative detail.	
POLICY INTENTION OF THE REGULATIONS	
The policy intention is to set out the procedural requirements relating to the publication and administration of compliance and reimbursement directions issued by HEFCW. This is likely to include a requirement on HEFCW to publish a compliance and reimbursement direction on their website following issue. The regulations may also require HEFCW to provide the Welsh Ministers with a copy of any compliance and reimbursement direction (via e-mail) prior to issue.	

REGULATIONS RELATING TO:	Failure to comply with general provisions of an approved plan
SECTION:	13(1)

DESCRIPTION OF THE POWER/REGULATION

This power enables the Welsh Ministers to make provision for the steps to be taken by HEFCW if they are satisfied that the governing body of an institution has failed to comply with the general provisions of its approved plan. Additionally the powers of this section allow for regulations to amend or apply (with or without modifications) any provision made by or under the Bill.

WHY THE REGULATION POWER IS REQUIRED

The core requirements for inclusion in a fee and access plan are to be set out in regulations made under section 6 of the Bill (see above). However, each plan will be unique as it reflects the individual circumstances of a given institution and it may also include specific measures which an institution has committed to implement because institutions may, in addition to the core requirements, include their own provisions relating to the promotion of equality of opportunity and/or the promotion of higher education. The power to make regulations will provide flexibility to deal with the enforcement of this non-standard aspect of fee and access plans.

POLICY INTENTION OF THE REGULATIONS

The policy intention is for HEFCW to be able to direct the governing body of an institution to deliver the measures it has committed to undertake in pursuance of achieving the objectives of its approved fee and access plan. It is intended that HEFCW will be required to follow certain procedural requirements when issuing such a direction and that institutions will be afforded a right to apply for a review of such directions.

The regulations are likely to confer a new power on HEFCW to direct the governing body of an institution to take steps to ensure compliance with the general provisions of its approved plan. Such steps might include the undertaking of activities which may involve expenditure to which the institution has already committed in its plan.

It is intended the regulations will define what constitutes failure to comply with the general provisions of an approved plan. For example, the regulations might provide that failure by the governing body of an institution to carry out measures committed to in its approved plan in connection with prospective students and students who are members of under-represented groups constitutes failure to comply with the general provisions of plan (section 6(3)(a) of the Bill). However it is intended that failure to achieve an objective set out in a plan (section 6(4)(a) of the Bill) will not constitute failure to comply with the general provisions of an approved plan. For example, if an institution's plan includes the objective of increasing the proportion of its student body drawn from under-represented groups and the institution does not achieve the objective then this will not constitute failure to comply with the general provisions of its plan and HEFCW will not be able to issue a direction. The policy intention is that such failures will be picked up through HEFCW's evaluation of the effectiveness of fee and access plans (section 15 of the Bill) and addressed through matters which HEFCW will take into account when considering approval of a new plan.

Additionally it is envisaged that the regulations may make provision about the procedure which HEFCW will be required to follow when giving a direction. For example, the regulations might require HEFCW to issue a warning notice to the governing body of an institution prior to giving a direction, allow the institution an opportunity to make

representations to HEFCW and also enable the governing body to apply for a review of a resulting direction by an independent person or panel.

It is envisaged the regulations may make provision about the steps that HEFCW may take if a governing body fails to comply with a direction. For example, the regulations might provide that HEFCW is able to withdraw its approval of a plan where they are satisfied that the governing body of an institution has failed to comply with a direction.

PART 3 – QUALITY OF EDUCATION

11. This Part of the Bill confers a number of new functions upon HEFCW relating to the assessment of the quality of education provided in Wales by or on behalf of a regulated institution and in relation to the steps that HEFCW may take if they are satisfied that quality of education is inadequate or likely to become inadequate. A regulated institution is an institution with an approved fee and access plan in place.

REGULATIONS RELATING TO:	External providers responsible for providing courses on behalf of regulated institutions
SECTION:	17(4)
DESCRIPTION OF THE POWER/REGULATION	
Section 17 places a duty on HEFCW to assess, or make arrangements for the assessment of, the quality of education provided by, or on behalf of, each regulated institution (an institution with an approved fee plan in place). This duty encompasses education provided by an external provider on behalf of a regulated institution. Section 17(3) confirms that an external provider is not a regulated institution, but is responsible for providing all or part of a course on behalf of such an institution. Section 17(4) enables the Welsh Ministers to make provision in regulations about the circumstances in which an external provider is, or is not to be treated as providing all, or part of a course on behalf of a regulated institution.	
WHY THE REGULATION POWER IS REQUIRED	
This power is required to enable the Welsh Ministers to respond flexibly to changes in the way courses are delivered to students. For example, the number of franchised courses (courses delivered on behalf of a regulated institution) may increase in the future along with the range of franchise partners. In addition methods of teaching and delivering courses may evolve over time, some of which may, or may not, be appropriate for assessment by HEFCW.	
POLICY INTENTION OF THE REGULATIONS	
Institutions and other providers of higher education courses may be involved in a variety of collaborative arrangements. The policy intention is that the regulations will provide, where necessary, for circumstances in which an external provider is, or is not, to be treated as providing all or part of a course on behalf of a regulated institution. An example of this could be individual tutors who help to deliver courses on behalf of regulated institutions. The regulations could confirm that these individuals should not be treated as external providers for the purposes of quality assessment.	

PART 4 – FINANCIAL AFFAIRS OF REGULATED INSTITUTIONS

12. This Part makes provision on the organisation and management of the financial affairs of regulated institutions. There are no regulation powers in this Part of the Bill.

PART 5 – FEE AND ACESS PLANS: WITHDRAWAL OF APPROVAL ETC.

13. This Part makes provision on the circumstances in which HEFCW may refuse to approve a new fee and access plan for an institution as well as the circumstances in which HEFCW must, or may, withdraw their approval of an existing fee and access plan.

REGULATIONS RELATING TO:	Notice of refusal to a approve a new fee and access plan
SECTION:	36(7)
DESCRIPTION OF THE POWER/REGULATION	
If HEFCW are satisfied that a regulated institution has failed to comply with certain requirements set out in the Bill, an approved fee and access plan or a direction issued under the Bill, they 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. These requirements relate to fee limits, the quality of education and the financial affairs of regulated institutions. Section 36(7) enables the Welsh Ministers to make provision in regulations relating to the notices and decisions by 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.	
WHY THE REGULATION POWER IS REQUIRED	
The circumstances in which HEFCW may refuse to approve a new fee and access plan are set out in section 36(3) of the Bill. The power in section 36(7) enables the Welsh Ministers to provide further detail in regulations on specific procedural elements associated with a decision by HEFCW not to approve a new plan. The matters to be dealt with in the regulations will require updating over time, following changes to the higher education sector in Wales and in response to feedback received from HEFCW. 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.	
POLICY INTENTION OF THE REGULATIONS	
The intention is that these Regulations will set out specific procedural requirements relating to a decision by HEFCW not to approve a new plan. It is expected that the procedural requirements will include 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. It is currently proposed that the maximum period of time that a notice can be in place will be 1 year. This corresponds with the current maximum period prescribed in the Student Fees	

(Approved Plans) (Wales) Regulations 2011 in relation to the existing fee capping regime. It is expected that if HEFCW decide to issue a notice they will be required to notify the institution concerned in writing and publish this notice on their website. Also if HEFCW decide to withdraw a notice this should also be communicated to the institution concerned in writing and published on their website.

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 condition s at section 36(3) of the Bill.

REGULATIONS RELATING TO:	Duty to withdraw approval
SECTION:	37(2) and (3)
DESCRIPTION OF THE POWER/REGULATION	
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 be an institution in Wales, provide higher education or 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 plan and the procedure to be followed in connection with giving notice of a withdrawal. The regulations may also apply (with or without modification) the procedural requirements relating to warning notices and representations (as set out in sections 40 to 43) to any notice issued under section 37.	
WHY THE REGULATION POWER IS REQUIRED	
The regulation power is required to enable the Welsh Ministers to update from time to time the processes and procedures associated with withdrawing approval of an institution's fee and access plan.	
POLICY INTENTION OF THE REGULATIONS	
It is expected that these Regulations will set out the matters to be taken into account by HEFCW in determining whether to withdraw approval of a fee plan and the procedure to be followed in connection with giving notice of a withdrawal in circumstances where if they are satisfied that the institution has ceased to be an institution in Wales, provide higher education or be a charity. These Regulations may require HEFCW to take into account decisions of the Charity Commission in relation to institutions which they believe no longer have charitable status and information concerning the extent of an institution's operations in Wales. It is also intended that these regulations will make provision for procedural requirements similar to those provided for in sections 41, 42 and 43 of the Bill which could require HEFCW to issue a warning notice indicating their intention to withdraw approval of a plan, setting out the reasons for the proposed withdrawal and providing the institution with an opportunity to make representations against the issue of such a notice prior to withdrawal of approval of a plan.	

REGULATIONS RELATING TO:	Power to withdrawal approval of a fee and access plan
SECTION:	38(3)

DESCRIPTION OF THE POWER/REGULATION

Section 38 provides HEFCW with the power to withdraw approval of a fee and access plan in certain circumstances. These are where an institution has persistently failed to comply with a fee limit or the general provisions of their approved plan, the quality of education delivered at the institution has been found to be seriously inadequate, or there has been a serious failure to comply with the financial management code.

Section 38(3) enables the Welsh Ministers to specify in regulations matters to be taken into account by HEFCW in deciding whether to withdraw approval of a fee and access plan under this section.

WHY THE REGULATION POWER IS REQUIRED

This power is required to enable the Welsh Ministers to respond to changes in the way higher education is delivered in Wales. If these changes lead to concerns around the quality of education or the financial stability of institutions in Wales, the Welsh Ministers may wish to specify these as matters to be considered by HEFCW in determining whether to withdraw approval of a fee and access plan. The Welsh Ministers may also want to make further provision around persistent failures to comply with fee limits and/or the general provisions of fee and access plans.

POLICY INTENTION OF THE REGULATIONS

Subject to the conditions specified at section 38(2) of the Bill being satisfied HEFCW is to have discretion as to withdraw its approval of a fee and access plan. In the operation of this discretion the policy intention is that regulations will set out the matters which HEFCW is to take into account when deciding whether to give notice of their intention to withdraw approval of a fee and access plan. These matters may include for example, defining what constitutes persistent failure to comply with fee limits or the general provisions of an approved plan, the impact of failure to deliver education of adequate quality in reaching a determination of serious inadequacy and whether breaches of the financial management Code have impacted on the financial stability of the institution in reaching a determination of serious failure to comply with the Code.

REGULATIONS RELATING TO:	Publication of notices issued under Part 5
SECTION:	39(2)
DESCRIPTION OF THE POWER/REGULATION	
Section 39 requires HEFCW to give a copy of any notice issued under Part 5 of the Bill to the Welsh Ministers. It also requires HEFCW to publish such a notice. Section 39(2) enables the Welsh Ministers to make provision in regulations about the way in which HEFCW must give copy of a notice to the Welsh Ministers and publish the notice, and about when they must do so.	
WHY THE REGULATION POWER IS REQUIRED	
The requirement for HEFCW to publish notices is set out on the face of the Bill. This power will enable the Welsh Ministers to prescribe technical and administrative detail relating to how and when such notices are to be published. This detail may need amending from time to time as a result of technological advances and experience from past practice as to the effectiveness of the publication requirements in reaching a wide audience.	
POLICY INTENTION OF THE REGULATIONS	
The intention is that regulations will specify the manner in which HEFCW is to publish notices and also the timing of their publication. This is likely to include a requirement to publish notices on a specified website or in a newspaper and that a specified period of time may be required to elapse between issuing of a notice and its publication.	

PART 6 – NOTICES AND DIRECTIONS GIVEN BY HEFCW

14. This Part makes provision on the procedures to be followed by HEFCW in relation to certain actions that they may take in respect of regulated institutions. These procedures include the giving of warning notices and the ability of institutions to apply for reviews.

REGULATIONS RELATING TO:	Requirement to give a warning notice
SECTION:	41(2)(d)
DESCRIPTION OF THE POWER/REGULATION	
Where HEFCW proposes to give various notices or directions to a regulated institution (as described in section 40(1)), section 41 requires HEFCW to first give a regulated institution a warning notice. A warning notice must set out the proposed notice or direction, the reasons for its proposed issue and must also inform the regulated institution of its right to make representations. Section 41(2)(d) enables the Welsh Ministers to make provision in regulations about the period within which representations about a proposed notice or direction may be made by a regulated institution. It also enables provision to be made about the way in which representations may be made.	
WHY THE REGULATION POWER IS REQUIRED	
The detail relating to the requirements and content of warning notices is set out on the face of the Bill. This power will enable the Welsh Ministers to prescribe technical and administrative detail relating to representations on proposed notices or directions made by regulated institutions. This detail may need updating from time to time as a result of technological advances and lessons from past practice.	
POLICY INTENTION OF THE REGULATIONS	
It is currently intended that representations must be made to HEFCW in writing and the period in which such representations must be received is within 40 calendar days of the date of the warning notice. This will align with the period provided for in Regulation 13 of the Student Fees (Approved Plans) (Wales) Regulations 2011 which stipulates that a provisional decision becomes final if the governing body does not apply for a review within 40 calendar days.	

REGULATIONS RELATING TO:	Information to be given with notices and directions
SECTION:	42(c)
DESCRIPTION OF THE POWER/REGULATION	
If HEFCW give a notice or direction as described in section 40(1), they must at the same time give the regulated institution a statement which sets out their reasons for giving the notice or direction and which informs the institution that it may apply for a review of the notice or direction under section 43. Section 42(c) enables the Welsh Ministers to prescribe other information in regulations which must be included in a statement accompanying a relevant notice or direction.	
WHY THE REGULATION POWER IS REQUIRED	
The information which must be included in a statement accompanying a notice or direction under section 40(1) is set out on the face of the Bill. This power enables the Welsh Ministers to require additional information to be included in a statement and is required to keep the statement up to date with current practice.	
POLICY INTENTION OF THE REGULATIONS	
As stated above, the majority of information which must be included in a statement is set out on the face of the Bill. These regulations may additionally require a statement to include provision which informs a regulated institution that a copy of a notice or direction will be given to the Welsh Ministers and published.	

REGULATIONS RELATING TO:	Reviews of notices and directions
SECTION:	43(3)

DESCRIPTION OF THE POWER/REGULATION

Section 43 concerns the review of a notice or direction as described in section 40(1). This section will apply once HEFCW has decided to give such a notice or direction to a regulated institution. At this point a regulated institution may apply for a review of the notice or direction, which will be undertaken by either a person, or panel of persons, appointed by the Welsh Ministers.

Section 43(3) requires the Welsh Ministers to make regulations in connection with these reviews. These regulations may make provision on:

- the grounds on which an application for a review may be made;
- the period within which an application for a review may be made;
- the way in which an application for a review may be made;
- the procedure to be followed by a person or panel carrying out a review;
- the steps to be taken by HEFCW following a review; and
- treating a notice or direction as not being given until specified steps have been taken or until a specified period has expired.

WHY THE REGULATION POWER IS REQUIRED

This power is required to enable the Welsh Ministers to update the review process from time to time, in line with changes to the higher education sector in Wales and in response to feedback on reviews from HEFCW and other interested stakeholders.

The Welsh Ministers currently have a similar power in section 39 of the Higher Education Act 2004.

POLICY INTENTION OF THE REGULATIONS

It is envisaged these Regulations will make provision about the grounds on which an application for review may be made by a governing body. Such grounds of review might, for instance, include the governing body being able to present a material factor for consideration which was not, for good reason, previously drawn to HEFCW's attention, the governing body considering that HEFCW has disregarded a material factor which they should have considered in deciding to give the notice or direction, or that they consider the notice or direction to be disproportionate.

Regulations may also provide for the period within which, and the way in which, an application may be made. For instance, regulations might provide that a governing body is to apply for a review in writing and within 40 calendar days of the date of the notice or direction.

Provisions could be included in these Regulations about the procedure to be followed by a person or panel carrying out a review and the steps to be taken by HEFCW following a review. Such regulations might, for instance, require the panel to make a recommendation as a result of the review and require HEFCW to reconsider its decision to give the notice or direction in light of that recommendation.

Regulations may also provide for a notice or direction to which section 43 applies not to be treated as having been given by HEFCW until specified steps have been taken or until a specified period has expired. Regulations might, for instance, provide that the notice or direction is not to be treated as having been given until a review has been completed or until the time for applying for a review has expired (without an application being made by the

governing body concerned). This would mean that a notice did not take effect, or that a governing body was not required to comply with a direction, while a review was taking place or an application for a review could still be made.

Currently the review process which applies in respect of the approval and enforcement of fee plans under the Higher Education Act 2004 is set out at Regulations 10 to 18 of the Student Fees (Approved Plans) (Wales) Regulations 2011.

PART 7 – SUPPLEMENTARY FUNCTIONS OF HEFCW

15. This Part confers functions on HEFCW in relation to the provision of reports to the Welsh Ministers and the provision of information and advice to interested parties.

REGULATIONS RELATING TO:	Statement of intervention functions
SECTION:	49(4)
DESCRIPTION OF THE POWER/REGULATION	
Section 49 requires HEFCW to prepare and publish a statement setting out how they propose to exercise certain of their intervention functions. Before publishing this statement HEFCW must consult the governing body of each regulated institution and any other persons they think appropriate. Section 49(4) enables the Welsh Ministers to make provision in regulations about the statement, including its preparation, form and content, publication and consultation requirements.	
WHY THE REGULATION POWER IS REQUIRED	
This power is required to enable the Welsh Ministers to make further technical and administrative provision in respect of HEFCW's statement on intervention functions. The requirements as to the form and content of the statement, as well as publication, may change over time. This power will provide the Welsh Ministers with the flexibility to respond to these changes.	
POLICY INTENTION OF THE REGULATIONS	
The regulations are likely to require HEFCW to publish a copy of the finalised statement on their website. They may also require HEFCW to send a copy of the published statement to each regulated institution. The regulations may also require the statement to include a section on each of HEFCW's intervention functions as set out in section 49(5).	

REGULATIONS RELATING TO:	Definition of fees
SECTION:	54(1)
DESCRIPTION OF THE POWER/REGULATION	
The definition of “fees” is set out in section 54(1). This includes a number of types of fees which are excluded for the purposes of the definition. In addition to the fees excluded on the face of the Bill, the Welsh Ministers also have a power to make regulations which exclude other types of fee for this purpose.	
WHY THE REGULATION POWER IS REQUIRED	
The types of fee, and the ways in which they are charged, are likely to change over time alongside changes to the higher education sector in Wales. This power will provide the Welsh Ministers with the flexibility to respond to these changes to ensure that the regulatory framework established under the Bill still operates effectively.	
POLICY INTENTION OF THE REGULATIONS	
There are no plans to exclude further types of fee from the definition of “fees” at this time. However this situation will be kept under review in line with changes to the way fees are charged to students by institutions.	

BIL ADDYSG UWCH (CYMRU) – TABL TARDDIADAU

Bwriedir i'r ddogfen hon roi cymorth anffurfiol wrth gynnal dadl ar y Bil yng Nghynulliad Cenedlaethol Cymru. Er bod gofal wedi ei gymryd i sicrhau bod y ddogfen mor gywir ag y bo'n rhesymol ymarferol, nid yw'n honni bod yn awdurdodol, ac ni ddylid dibynnu arni fel pe bai'n awdurdodol.

Bwriedir i'r tablau atodedig ddarparu gwybodaeth ynghylch tarddiad y darpariaethau ym Mil Addysg Uwch (Cymru). Nid ydynt yn darparu canllawiau diffiniol na chyflawn, a dylid eu ddarllen ar y cyd â'r Bil a'r nodiadau esboniadol ar y Bil.

Yr Allwedd i'r Byrfoddau

(1) DAU 2004: Deddf Addysg Uwch 2004;

(2) DABU 1992: Deddf Addysg Bellach ac Uwch 1992;

(3) O.S. 2011/884: Rheoliadau Ffioedd Myfyrwyr (Cynlluniau wedi eu Cymeradwyo) (Cymru) 2011; a

(4) Mae "a." yn dynodi adran.

BIL ADDYSG UWCH (CYMRU) - TABL TARDDIADAU		
ADRAN/PARAGRAFF	**DEDDFWRIAETH SY'N BODOLI EISOES**	**NEWID SYLWEDDOL**
RHAN 1 – Cyflwyniad		
1	Newydd	-
RHAN 2 – Cynlluniau Ffioedd a Mynediad		
2	a.34(1), DAU 2004	Oes
3	Newydd	-
4	a.35, DAU 2004	Yn rhannol
5(1)	a.33(1), DAU 2004	Yn rhannol
5(2)(a)	a.33(1), DAU 2004	Yn rhannol
5(2)(b)	a.28(6), DAU 2004 (diffiniad o "qualifying course")	Yn rhannol
5(2)(c)	a.28(6), DAU 2004 (diffiniad o "academic year")	Yn rhannol
5(3)	a.33(1), DAU 2004	Yn rhannol
5(4)	a.33(1), DAU 2004	Yn rhannol
5(5)	a.28(6) (diffiniad o "qualifying person") ac a.29(1), DAB 2004	Yn rhannol
5(6)	a.41(1), DAU 2004 (diffiniad o "course")	Nac oes
5(7)	a.29(2), DAU 2004	Nac oes
5(8)	a.29(1), DAU 2004	Yn rhannol
5(9)	a.28(5), DAU 2004	Oes
6(1)	a.33(3)(a), DAU 2004	Nac oes
6(2)	a.33(3)(b), DAU 2004	Nac oes
6(3)(a)	a.33(5)(a), DAU 2004	Nac oes
6(3)(b)	Newydd	-
6(3)(c)	a.33(5)(b), DAU 2004	Nac oes
6(3)(d)	a.33(5)(c), DAU 2004	Nac oes
6(4)(a)	a.33(5)(d), DAU 2004	Nac oes

BIL ADDYSG UWCH (CYMRU) - TABL TARDDIADAU		
ADRAN/PARAGRAFF	**DEDDFWRIAETH SY'N BODOLI EISOES**	**NEWID SYLWEDDOL**
6(4)(b)	Newydd	-
6(4)(c)	a.33(5)(e), DAU 2004	Nac oes
6(5)	a.33(6), DAU 2004	Nac oes
6(6)	a.33(5)(a), DAU 2004	Nac oes
6(7)	a.33(4), DAU 2004	Nac oes
7(1)	a.34(2) ac a.34(4), DAU 2004 a rheoliad 5 o O.S. 2011/884	Yn rhannol
7(2)	Newydd	-
7(3)	a.34(4), a.34(5) ac a.34(7)(b), DAU 2004	Nac oes
7(4)	Newydd	-
7(5)	Newydd	-
7(6)	Newydd	-
7(7)	Newydd	-
8	a.34(6), DAU 2004	Nac oes
9	a.36(1) ac a.36(2)(b), DAU 2004	Nac oes
10(1)	a.28(1)(a), DAU 2004	Oes
10(2)	Newydd	-
10(3)	a.28(1)(a) ac a.28(6) (diffinio "qualifying fees"), DAU 2004	Oes
10(4)	Newydd	-
10(5)	a.28(1)(a), DAU 2004	Oes
11	Newydd	-
12	Newydd	-
13	Newydd	-
14	Newydd	-
15(1)(a)	a.33(5)(f), DAU 2004	Oes
15(1)(b)	a.33(5)(f), DAU 2004	Oes
15(1)(c)	Newydd	-

BIL ADDYSG UWCH (CYMRU) - TABL TARDDIADAU		
ADRAN/PARAGRAFF	**DEDDFWRIAETH SY'N BODOLI EISOES**	**NEWID SYLWEDDOL**
15(1)(d)	Newydd	-
15(2)	Newydd	-
16(1)	a.33(5)(f), DAU 2004	Oes
16(2)	Newydd	-
RHAN 3 – Ansawdd yr Addysg		
17(1)	a.70(1)(a), DABU 1992	Oes
17(2)	Newydd	-
17(3)	Newydd	-
17(4)	Newydd	-
18	Newydd	-
19	Newydd	-
20	Newydd	-
21	Newydd	-
22	Newydd	-
23	Newydd	-
24	Newydd	-
25(1)	a.70(1)(b), DABU 1992	Yn rhannol
25(2)	a.70(1)(b), DABU 1992	Yn rhannol
25(3)(a)	a.70(2)(b), DABU 1992	Nac oes
25(3)(b)	a.70(3), DABU 1992	Yn rhannol
25(4)	a.70(3), DABU 1992	Nac oes
25(5)	a.70(4), DABU 1992	Nac oes
26	Newydd	-
RHAN 4 – Materion Ariannol Sefydliadau Rheoleiddiedig		
27	Newydd	-
28	Newydd	-
29	Newydd	-
30	Newydd	-
31	Newydd	-
32	Newydd	-

BIL ADDYSG UWCH (CYMRU) - TABL TARDDIADAU		
ADRAN/PARAGRAFF	**DEDDFWRIAETH SY'N BODOLI EISOES**	**NEWID SYLWEDDOL**
33	Newydd	-
34	Newydd	-
35	Newydd	-
RHAN 5 – Cynlluniau Ffioedd a Mynediad: Tynnu Cymeradwyaeth yn Ôl etc		
36(1)	a.38(1), DAU 2004	Yn rhannol
36(2)	a.38(1), DAU 2004	Yn rhannol
36(3)(a)	a.38(1), DAU 2004	Yn rhannol
36(3)(b)	a.38(1), DAU 2004	Yn rhannol
36(3)(c)	Newydd	-
36(3)(d)	Newydd	-
36(4)	Newydd (er bod darpariaeth debyg mewn grym o ran Lloegr o dan a.37(2), DAU 2004)	-
36(5)	Newydd	-
36(6)	Newydd	-
36(7)(a)	a.38(2), DAU 2004	Nac oes
36(7)(b)	a.38(3)(a), DAU 2004	Yn rhannol
36(7)(c)	Newydd	-
36(8)	a.38(3)(b), DAU 2004	Oes
37	Newydd	-
38	Newydd	-
39	Newydd	-
RHAN 6 – Hysbysiadau a Chyfarwyddydau a Roddir gan CCAUC		
40(1)(a)	a.34(4) ac a.39, DAU 2004 a rheoliadau 5, 11(a) a 12 i 18 o O.S. 2011/884	Yn rhannol
40(1)(b)	Newydd	-
40(1)(c)	Newydd	-
40(1)(d)	Newydd	-
40(1)(e)	a.38(3)(b) ac a.38(3)(c),	Yn rhannol

BIL ADDYSG UWCH (CYMRU) - TABL TARDDIADAU		
ADRAN/PARAGRAFF	**DEDDFWRIAETH SY'N BODOLI EISOES**	**NEWID SYLWEDDOL**
	DAU 2004 a rheoliadau 10, 11(c) a 12 i 18 o O.S. 2011/884	
40(1)(f)	Newydd	-
40(2)	Newydd	-
41	a.34(4), DAU 2004 a rheoliad 5 o O.S. 2011/884 (i'r graddau y mae a.41 o'r Bil yn ymwneud â hysbysiad o dan a.7(1)(b) o'r Bil) a.38(3)(b) ac a.38(3)(c), DAU 2004 a rheoliad 10 o O.S. 2011/884 (i'r graddau y mae a.41 o'r Bil yn ymwneud â hysbysiad o dan a.36 o'r Bil) Fel arall, mae adran 41 o'r Bil yn newydd (o ran cyfarwyddyd o dan a.11, a.19 neu a.32 o'r Bil neu hysbysiad o dan a.38 o'r Bil)	Yn rhannol
42	a.34(4), DAU 2004 a rheoliad 5 o O.S. 2011/884 (i'r graddau y mae a.42 o'r Bil yn ymwneud â hysbysiad o dan a.7(1)(b) o'r Bil) a.38(3)(b) ac a.38(3)(c), DAU 2004 a rheoliad 10 o O.S. 2011/884 (i'r graddau y mae a.41 o'r Bil yn ymwneud â hysbysiad o dan a.36 o'r Bil) Fel arall, mae a.42 o'r Bil yn newydd (o ran cyfarwyddyd o dan a.11,	Oes

BIL ADDYSG UWCH (CYMRU) - TABL TARDDIADAU		
ADRAN/PARAGRAFF	**DEDDFWRIAETH SY'N BODOLI EISOES**	**NEWID SYLWEDDOL**
	a.19 neu a.32 o'r Bil neu hysbysiad o dan a.38 o'r Bil)	
43	a.39, DAU 2004 a rheoliadau 11 i 18 o O.S. 2011/884 (i'r graddau y mae a.43 o'r Bil yn ymwneud â hysbysiad o dan a.7(1)(b) o'r Bil a hysbysiad o dan a.36 o'r Bil) Fel arall, mae a.43 o'r Bil yn newydd (o ran cyfarwyddyd o dan a.11, a.19 neu a.32 o'r Bil neu hysbysiad o dan a.38 o'r Bil)	Yn rhannol
44	Newydd	-
45	Newydd	-
RHAN 7 – Swyddogaethau Atodol CCAUC		
46	a.32(4), DAU 2004	Nac oes
47(1)	a.40A(1), DAU 2004	Yn rhannol
47(2) a (3)	a.40A(2), DAU 2004	Yn rhannol
47(4) a (5)	a.40A(1), DAU 2004	Yn rhannol
47(6)	Newydd	-
48(1)(a)	Newydd	-
48(1)(b)	a. 40A(2), DAU 2004	Yn rhannol
48(1)(c)	a.40A(2), DAU 2004	Yn rhannol
48(1)(d)	Newydd	-
48(1)(e)	Newydd	-
48(2)	Newydd	-
49	Newydd	-
50(1)	a.40A(3)(a)	Nac oes
50(2)	a.40A(3)(b)	Nac oes

BIL ADDYSG UWCH (CYMRU) - TABL TARDDIADAU		
ADRAN/PARAGRAFF	**DEDDFWRIAETH SY'N BODOLI EISOES**	**NEWID SYLWEDDOL**
51(1)	a.40A(4)	Yn rhannol
51(2)	Newydd	-
51(3) a (4)	Newydd	-
RHAN 8 – Cyffredinol		
52	Newydd	-
53	Newydd	-
54	Newydd	-
55	Newydd	-
56	Newydd	-
57	Newydd	-
Atodlen		
Rhan 1 (paragraffau 1 i 26)	Yn cynnwys mân ddiwygiadau a diwygiadau canlyniadol	-
Rhan 2 (paragraffau 27 i 31)	Newydd (yn cynnwys darpariaeth drosiannol)	-

FAO: David Melding, AM (Chair)
c/o Gareth Williams (Clerk)
Constitutional and Legislative Affairs Committee

Dear David

HE (Wales) Bill

We wonder if the Constitutional and Legislative Affairs Committee will consider making a Stage 1 report in relation to the HE (Wales) Bill, introduced on 19 May 2014? As anticipated the Bill proposes major changes to the regulatory system for universities in Wales, and is a substantive and complex piece of legislation. At this stage, in advance of reaching a firm view on the contents of the Bill, we would like to make sure – in the interests of all parties – that the Bill benefits from full scrutiny and due process and there are a number of issues which we feel may benefit from your Committee's attention.

In particular,

- The Bill leaves many of the proposals of the Technical consultation to be dealt with through subsequent subordinate legislation, which makes it difficult to fully assess the impact of the Bill and consequent changes particularly in terms of their impact for key issues such as universities' charity status and classification for purposes of national accounting.

- In the light of the above, a key concern is that in the large majority of cases, the negative resolution procedure is proposed which means that the legislation can be passed automatically without consultation or requiring a majority vote. It also means that the legislation cannot be amended, and must be accepted or rejected as a whole.

- The extensive use of regulations also raises issues about the commencement and feasibility of implementation of the Bill, intended to apply for 2016/17. It is clear that the Bill cannot be implemented without the prior exercise of many of these powers. We also note that the transitional arrangements appear to depend in part on what regulations are brought into force in the transitional period.

- In three instances, the Bill incorporates powers to amend either the Act itself or other primary legislation through the means of subsequent regulations (i.e. 'Henry VIII powers'). In the past such powers have been controversial and used with great caution, since changes to primary legislation may be made without the normal oversight of the Assembly.

- The Bill also confers significant new powers on HEFCW which are legislative and judicial in character. This includes, for instance, new statutory powers to issue guidance which is mandatory for institutions to take account of, wide powers to determine and enforce fee plan requirements, and the ability determine and enforce a financial code. We would welcome comments on the use of these.

- We submitted evidence to your Committee's Inquiry on law-making in the 4th Assembly, prior to the introduction of the Bill on 19 May 2014, which raised concerns about the lack of prior consultation on a Draft Bill. We would welcome the committees dealing with this Bill being mindful of the potential need for flexibility in reviewing the Stage 1 timescales in this light.

We are currently preparing a response for the Children & Young People Committee by 18 June 2014, and would be happy to submit further comments at that stage if you would find it helpful.

Best wishes

Ben

Ben Arnold
Policy Adviser / Cynghorwr Polisi
Higher Education Wales / Addysg Uwch Cymru

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Constitutional and Legislative Affairs Committee
Statutory Instruments with Clear Reports
16 June 2014

CLA406 - The Removal and Disposal of Vehicles (Amendment) (Wales) Regulations 2014

Procedure: **Negative**

The Removal and Disposal of Vehicles Regulations 1986 ("the 1986 Regulations") allow civil enforcement officers to remove vehicles which have been permitted to remain at rest on a road in a civil enforcement area in Wales. The 1986 Regulations (as amended by the 2008 Statutory Instruments) refer to the Civil Enforcement of Parking Contraventions (General Provisions) (Wales) Regulations 2008 and the Civil Enforcement of Parking Contraventions (Penalty Charge Notices, Enforcement and Adjudication) (Wales) Regulations 2008, which have since been revoked and replaced.

These Regulations are intended to further amend the 1986 Regulations to refer to the Civil Enforcement of Road Traffic Contraventions (General Provisions) (Wales) Regulations 2013.

CLA407 - The Education (Consultation on School Term Dates) (Wales) Regulations 2014

Procedure: Negative

These Regulations provide the detail on the consultation which the Welsh Ministers are to undertake prior to exercising their power of direction to 'set' school term dates for maintained schools in Wales.

CLA408 - The Plant Health (Miscellaneous Amendments) (Wales) Regulations 2014

Procedure: Negative

These Regulations make amendments to plant health legislation applying in Wales.

Regulation 2 amends the Potatoes Originating in Egypt (Wales) Regulations 2004 (S.I. 2004/2245) (W.209) to enforce Commission Implementing Decision 2011/787/EU, which concerns emergency measures which may be taken against the dissemination of Ralstonia solanacearum (Smith) Yabuuchi et al. as regards potatoes originating in Egypt.

Regulation 3 provides for an information gateway between Her Majesty's Revenue and Customs (HMRC) and the Welsh Ministers for the purposes of the Plant Health (Wales) Order 2006 (S.I. 2006/1643) (W.158) and for an offence in relation to wrongful disclosure of information.

Regulation 4 makes amendments to the Plant Health (Wales) Order 2006 to enforce Decision 1/2010 of the Joint Committee on Agriculture (2011/83/EU), which relates to plant health controls on trade in plant material with Switzerland.

CLA409 - The Higher Education Funding Council for Wales (Supplementary Functions) Order 2014

Procedure: Negative

Section 69(5) of the Further and Higher Education Act 1992 provides that the Welsh Ministers may, by order, confer or impose on the Higher Education Funding Council for Wales ('HEFCW') such supplementary functions relating to the provision of education as they think fit.

This Order confers supplementary functions on HEFCW. The functions conferred by this Order are functions exercisable by the Welsh Ministers in

regulations made under section 22 of the Teaching and Higher Education Act 1998.

The functions conferred on HEFCW by article 2 of this Order relate to the payment of the new fee grant to institutions delivering higher education (and the recovery of overpayments of such grant) and requesting and receiving information connected to the payment of the new fee grant. These functions apply in respect of students starting designated higher education courses on or after 1 September 2014.

CLA410 - The Local Government (Wales) Measure 2009 (Amendment) Order 2014

Procedure: **Affirmative**

Part 2 of the Local Government (Wales) Measure 2009 ("the Measure") introduces a system of community planning in Wales. Section 38(1) of the Measure provides a list of public bodies which are referred to as 'community planning partners' under Part 2 of the Measure. These bodies are required to participate in community planning. This list includes police authorities.

In accordance with the Police Reform and Social Responsibility Act 2011 ("the 2011 Act"), police authorities were abolished and replaced with Police and Crime Commissioners. To reflect the change made by the 2011 Act, article 2 of this Order removes police authorities from the list of community planning partners in the Measure and replaces them with Police and Crime Commissioners.

CLA411 - The Local Authorities (Standing Orders) (Wales) (Amendment) Regulations 2014

Procedure: **Negative**

These Regulations amend the Local Authorities (Standing Orders) (Wales) Regulations 2006 to reflect provisions in the Local Government (Wales) Measure 2011 and concerning the process of appointing, dismissing and conducting disciplinary investigations of certain officers of authorities.

CLA412 - The Town and Country Planning (Non-material changes and Correction of Errors) (Wales) Order 2014

Procedure: **Affirmative**

This Order makes provision in relation to Wales which corresponds to section 96A of the Town and Country Planning Act 1990. The Order also makes supplementary provision in section 96A in relation to Wales. Section 96A(4) provides that a local planning authority can only make a non-material change to a planning permission if an application is made by or for a person with an interest in the land concerned. Article 2 inserts subsection (10) which states when a person has "an interest in the land".

Article 3 makes provision which has effect corresponding to section 184 of the Planning Act 2008. Section 184 removed the requirement in section 56 of the Planning and Compulsory Purchase Act 2004 in relation to England, that the appropriate consent must be obtained to an error in a decision document being corrected. The amendments in article 3 remove the requirement to obtain consent to the correction of errors in decision documents in relation to Wales.

CLA413 - The Town and Country Planning (Fees for Non-Material Changes) (Wales) Regulations 2014

Procedure: **Affirmative**

These Regulations provide for the payment of fees to local planning authorities in Wales in respect of applications for non-material changes to planning permission made under section 96A of the Town and Country Planning Act 1990. These Regulations also make provision for exemptions from those fees in certain circumstances.

NATIONAL ASSEMBLY FOR WALES

CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

Inquiry into Disqualification of Membership from the National Assembly for Wales

Evidence submitted to the Committee by Keith Bush QC

28 April 2014

A. Introduction

(a) The author of this submission is a Barrister (Gray's Inn 1977) and was, between 2007 and 2012, Chief Legal Adviser to the National Assembly for Wales. Prior to that he had practised at the Bar from 1977 to 1999 and from 2006 to 2007 and had been a legal adviser to the Welsh Government (1999 to 2006). This included a period as Legislative Counsel, when he was responsible for instructing Parliamentary Counsel on a number of UK Parliament Bills, including the Bill which became the Government of Wales Act 2006 ("GOWA 2006"). He is currently Honorary Director of the Legal Wales Foundation, an Honorary Research Fellow of Swansea University College of Law, Part-time Senior Lecturer in Legislation at that University and a Recorder who sits regularly in the County Court. He is a member of the Law Commission's Advisory Committee for Wales.

(b) As Chief Legal Adviser to the Assembly, the author was responsible for advising the Presiding Officer, Clerk, and Assembly Members generally, in relation to the situation that arose following the 2011 Assembly elections, when it emerged that two individuals who had been returned as Assembly Members at that election were, in fact, disqualified from being Assembly Members under section 16(1)(b) of GOWA 2006 because each continued to be a member of a body listed in Part 1 of the Schedule to the National Assembly for Wales (Disqualification) Order 2010 (SI 2010 No.2969) ("the 2010 Order").

(c) The submission will deal, in turn, with the specific questions raised by the Committee in its invitation to submit evidence.

B. Legislative framework and background

(a) Section 16(1) of GOWA 2006, which identifies classes of person disqualified from being Assembly Members, broadly follows the pattern set by section 1 of the House of Commons Disqualfication Act 1975 ("the 1975 Act"). (There are some further disqualifications, covered by section 16(2) and (4) of GOWA 2006, e.g. that relating to persons imprisoned for more than twelve months for criminal offences, but these are not relevant to the issue of those disqualifications which are, through the mechanism of Orders in Council under section 16(1)(b), effectively under the control of the Assembly.)

(b) The 1975 Act disqualifies from membership of the House of Commons:

(i) holders of judicial offices;

(ii) civil servants;

(iii) members of the regular armed forces;

(iv) police officers;

(v) members of legislatures outside the Commonwealth;

(vi) holders of offices described in Part II or III of Schedule 1 to the Act.

(c) GOWA 2006 disqualified from membership of the Assembly:

(i) persons in categories (i),(ii),(iii),(iv) and (v) above;

(ii) holders of offices designated by Order in Council made under section 16;

(iii) the Auditor General for Wales;

(iv) the Public Service Ombudsman for Wales;

(v) members of the staff of the Assembly itself.

(d) Section 16(1) of GOWA 2006 is parallelled, in very similar terms, by section 15(1)(d) of the Scotland Act 1998 and section 3(1) of the Northern Ireland Assembly Disqualification Act 1975 (applied to the current Assembly by section 36 of the Northern Ireland Act 1998).

(e) Orders in Council under section 16(1)(b) of GOWA 2006 (and corresponding Scottish and Northern Ireland enactments) therefore fulfill the same function as Parts II and III of Schedule 1 to the 1975 Act, which may, itself be amended from time to time by Order in Council under section 5 of that Act.

The background to the 1975 Act (and therefore, by extension, to section 16 of GOWA 2006) is the doctrine of the "separation of powers", i.e. the principle that, in a parliamentary democracy, one of the roles of the parliamentary body is to hold the executive (government) to account and that therefore members of the parliamentary body should, as far as possible, be free of interests which conflict with their ability to do so effectively. This principle was reflected in one of the fundamental constitutional statutes of the United Kingdom, the Act of Settlement 1701, which provided:

"That no Person who has an Office or Place of Profit under the King or receives a Pension from the Crown shall be capable of serving as a Member of the House of Commons."

(f) It is a feature of parliamentary democracy that the separation between parliament and government is not absolute (as it is, for example, under the US Constitution) in that Ministers are drawn from members of the parliamentary body and, indeed, must enjoy the "confidence" (i.e. backing) of the parliamentary body. Nevertheless the exlusion of

others holding “offices or places of profit” under the Crown was intended to eliminate from the House of Commons persons who were enjoying the patronage of Ministers and who were therefore less likely to scrutinise Ministers effectively.

(g) A second kind of conflict of interest which has become increasingly prominent, particularly over the last century, arises out of the development of offices and bodies exercising executive governmental functions, but not part of central government itself – the so-called “quangos”. Since such institutions are themselves subject to parliamentary scrutiny, membership of them has been accepted to be incompatible, for that added reason, with membership of the parliamentary body.

(h) One of the difficulties caused by the proliferation of “quasi-autonomous non-governmental organisations” (or “quangos”) in relation to disqualification from membeship of the House of Commons was the wide variety of forms that such bodies can take. This made it difficult, sometimes, to decide whether membership fell within the “office of profit under the Crown” test. After considerable discussion, and reports by two House of Commons committees, Parliament eventually moved (via the House of Commons Disqualification Act 1957 and the House of Commons Disqualification Act 1975) to a system of specifying (by listing in Schedule 1 of the 1975 Act, as amended from time to time) those offices which disqualify from membership of the House of Commons.

(i) Parts II and III of Schedule 1 to the 1975 Act orginally listed some 300 disqualifying offices. This has since grown, by amendment, to almost 500. The 2010 Order (i.e. the corresponding enactment relating to the Assembly) contains only 107 entries.

1.0 What rules and principles should underpin the disqualifying posts and employments contained in a revised National Assembly for Wales (Disqualification) Order?

1.1 The intention of Parliament in enacting section 16(1)(b) of GOWA 2006 was clearly to ensure that the same principle was applied in relation to the Assembly as that applied to the House of Commons by section 1(1)(f) and Parts II and III of Schedule 1 to the 1975 Act, namely that membership of the Assembly should not be open to those who hold an office that conflicts with the functions of a parliamentarians because:

(a) the office carries with it a significant financial benefit emanating from the Welsh Government; or

(b) the office is one which is, itself, subject to scrutiny by the Assembly.

1.2 Quite apart from any question of the lawfulness of any departure from that principle (i.e. from the principle that Orders in Council under section 16(1)(b) of GOWA should be framed according to the principles on which Parts I and II of Schedule 1 to the 1975 Act are based), the principle itself is a fundamental constitutional principle which should be preserved. It would be contrary to the exceptionally high standards of probity that the Assembly has set itself since its inception for the rules for avoiding conflicts of interest between membership of the Assembly and the holding of other offices to be relaxed.

1.3 Orders in Council under section 16(1)(b) of GOWA 2006 should therefore continue to be drafted so as to disqualify from membership of the Assembly those who hold any public office which:

(a) carries with it a significant financial benefit to that person that emanates from the Welsh Government; or

(b) is, itself, subject to scrutiny by the Assembly.

1.4 Clearly, the application of test (a) calls for a judgement as to what constitutes a significant financial benefit. It would seem obvious that an office which is unpaid, other than the reimbursement of expenses, ought not to generate a disqualification. The Memorandum from the First Minister suggests that in the past other remuneration, up to as

much as £10,000 per annum, has been disregarded. The author of this submission does not feel it appropriate to express a view on whether this is the right cut-off point but it is clearly an issue to which the Committee will want to give careful attention.

2.0 What changes should be made, if any, to the existing list of disqualifying posts and employments?

2.1 The application of the criteria identified in paragraph 1.3 above is a matter for informed consideration and the author is not, in general, equipped to scrutinise the extent to which the offices listed in the 2010 Order conform to those criteria or whether other offices, not currently listed, do so.

2.2 The exception is that there are clearly a number of offices currently designated which do not conform with the criteria in question because they are neither remunerated by the Welsh Government nor subject to scrutiny by the Assembly. Their activities do not relate to devolved matters, are not within the legislative competence of the Assembly and are affected by the exercise of executive functions of the Welsh Ministers.

2.3 Examples are:

The BBC Trust,

The British Transport Police Authority,

The Health and Safety Executive,

The Health Service Commissioner (i.e. for England) and

The Independent Case Examiner for the Department of Work and Pensions.

2.3 The above are examples. There are obviously many more that fall into the same category. It may be argued, of course, that the Assembly is closely, if indirectly, concerned with the activities of some of these offices or bodies, for example the BBC Trust (or, indeed Sianel Pedwar

Cymru) even if it has no direct mandate in relation to them. But that is equally true of many other bodies (e.g. the Crown Estate Commissioners, who figure in the disqualifications from being a Member of Parliament but not from being an Assembly Member). Clarity and consistency would therefore suggest that offices whose functions are not devolved should not give rise to formal disqualifications, particularly since the likelihood of someone wishing to be simultaneously a member of a body such as the BBC Trust and the Assembly is remote.

3.0 When should disqualifications take effect?

3.1 Currently, disqualification takes effect at the point at which a person is appointed to a disqualifying office (if that person is already an Assembly Member) or, if a person holding a disqualifying office seeks election as an Assembly Member, at the point at which that person, if successful, is "returned" i.e. formal notification is given by the returning officer to the Presiding Officer that the person has been elected (or, in fact "purportedly elected" because the return in question is void - see section 18(1) of GOWA 2006).

3.2 The matter is currently complicated by the fact that electoral law imposes a related, but separate, requirement relating to acceptance of nomination. Candidates for election to the Assembly are required to declare, to the best of their knowledge and belief, that they are not disqualified from membership of the Assembly (see Rule 9(4)(c)(ii) of the Election Rules set out in Schedule 5 to the National Assembly for Wales (Representation of the People) Order 2007 (SI 2007 No. 236)).

3.3 This second requirement bites at the time of acceptance of nomination, i.e. the candidate is required to make the declaration on the basis of the position *at that date*, which is anomalous, since GOWA 2006 only requires that a candidate is not disqualified *when returned.* If, therefore, a candidate is aware of a disqualification which exists at the time of nomination, he or she must not accept nomination unless

the disqualification has already been removed, e.g. by resigning from the office prior to accepting nomination.

3.4 So, in practice, the disqualification "takes effect" not when a disqualified candidate is elected but when a candidate accepts nomination, although, perversely, a candidate who is unaware of a disqualification has a further period of grace, ending when the return is submitted, to divest himself or herself of the disqualifying office.

3.5 In either case, the holder of a disqualifying office is required to divest himself or herself of that office before the outcome of the election is known. Since the purpose of disqualifications is to eliminate conflicts of interest on the part of those elected there seems to be no logical justification for, in effect, applying the disqualification to candidates rather than to those who have actually been elected.

3.6 There is ample logical justification for applying the disqualification after a candidate knows that he or she has been elected but before actually taking up office (i.e. before taking the oath or affirmation of allegiance). That is because any other rule requires a candidate to resign from an office before knowing whether or not he or she will be elected, with the result that those who do not wish to risk losing the office in question are deterred from standing for election or, alternatively, that office-holders are required to stand down from offices in which they are giving valuable public service only to find that they fail to be elected.

3.7 It is axiomatic, of course, that no-one can ever be *absolutely* certain of being elected, and, in practice, there are likely to be many candidates whose likelihood of being elected may be impossible even to estimate accurately in advance. This is particularly true of candidates for regional list seats, whose chances of being elected can depend entirely on their party's performance in individual constituencies in the region. Ironically, the prospect of a candidate on a party'r regional list being

elected is often inversely proportional to that party's performance generally. A stark illustration of this effect is the fact that the Leader of the Opposition in the Third Assembly failed to be elected to the Fourth Assembly as a direct result of his party's success in winning an extra constituency seat in the Mid and West Wales region.

3.8 The operation of the Additional Member system in Wales therefore adds to the unpredictability of a candidate's prospects of election and adds to the dilemma faced by the holder of a disqualifying office who is considering whether to offer himself or herself for election.

3.9 There is therefore an overwhelming case, in the interests of attracting the widest choice of candidates for selection and, potentially for election to the Assembly, for changing the current arrangements so that a disqualification based on holding a disqualifying office takes effect *after* it is clear that the person in question has been elected. The precise point at which this would occur depends on the alternative model chosen (alternatives are discussed below).

3.10 The point in time at which a disqualification takes effect is governed not by the terms of the Orders in Council designating the disqualifying office but by section 18 of GOWA 2006 ("Effect of disqualification") and any change would therefore require an amendment to that Act. The material provision is that in section 18(1) and (2) (with also the need for a consequential amendment to section 19 ("Judicial proceedings as to disqualification"). The implications of any change in relation to section 17 ("Exceptions and relief from disqualification") is also worth considering (see below). The proposals set out below are only relevant to those who are elected whilst holding a disqualifying office (of any kind – there is no reason to limit any change to those designated by Order in Council). There is no case for interfering with the effect of a sitting Assembly Member accepting a disqualifying office, i.e that this automatically results in the seat becoming vacant (section 18(3)).

3.11 There are two obvious ways in which section 18(1) and (2) might be amended to eliminate the current difficulty.

3.12 One solution would be to develop the approach taken, in part, by the Police and Social Responsibility Act 2011 in relation to Police and Crime Commissioners. That Act distinguishes between factors which disqualify a candidate from being *elected* as Commissioner and those which disqualify a candidate from *holding office*. The latter currently applies only to membership of parliamentary bodies (including Parliament and the Assembly) (see section 67) but it enables an MP or AM to stand for election as Commissioner and then to resign from the conflicting office *if elected*. Under section 70 a candidate who is elected is required to make a declaration of acceptance of office (which cannot be made if the candidate remains *at that stage* a Member of one of the specified legislatures) and may not act in the office of Commissioner until he or she has done so. If no declaration is made within two months the office of Commissioner for the area becomes vacant and a further election must be held.

3.13 This approach could very easily be adapted to the procedures of the Assembly which have a parallel mechanism to the declaration of acceptance of office, namely the taking of the oath or affirmation of allegiance. This must take place within two months (subject to extension by the Assembly) failing which the seat becomes vacant. It would not therefore involve any radical change if sections 18(1) and (2) of GOWA 2006 were amended to prevent a person disqualified from membership of the Assembly taking the oath or affirmation. This would provide a candidate with a period of grace of up to two months (during which period that person could not act as an Assembly Member or be paid a salary) to divest himself or herself of disqualifying offices. In practice this could be done by an immediate resignation, following election, from any such office so that current arrangements would not in fact change materially other than that a

candidate would be able to defer resigning from a disqualifying office until immediately after election rather than before nomination.

3.14 A more radical approach would be for any person who holds a disqualifying office to be deemed to have resigned from that office, with immediate effect, if returned as an Assembly Member.

3.15 The advantage of the former approach is that it involves the minimum change from current arrangements, and builds on the precedent set by the Police and Social Responsibility Act 2011. It would however continue to place the onus for carefully checking the current disqualifications before taking the oath or affirmation and would not eliminate altogether the potential for mistakes and misunderstandings. That potential would be very much reduced, of course. The fact of having been elected would concentrate the mind of the person in question on the issue of disqualification and in cases of doubt advice could be sought.

3.16 The latter, novel, approach would eliminate any potential for a disqualification being overlooked, but might give rise to uncertainties on the part of bodies of which elected candidates were members, since they would not necessarily receive any communication from those persons divesting themselves of membership.

3.17 Whichever solution were adopted would also require an amendment to the election rules so as to remove the requirement for candidates, when accepting nomination, to declare to that they are not (to the best of their knowledge and belief) disqualified *at that time.* There are, of course, some disqualifications under GOWA 2006 which are intended to prevent a person from being a *candidate*, e.g. the prohibition on standing in more than one constituency or region, and the need for a candidate to declare that he or she is not disqualified from *standing for election* in the particular constituency or region on that ground would need to be retained. But it is unclear, even under the law as it

currently stands, why it was ever thought necessary for the election rules to impose, in effect, a more stringent test (although modified by the "best of my knowledge and belief" qualification) to that imposed by GOWA 2006 itself.

4.0 Should Disqualification Orders be made by Privy Council bilingually?

4.1 Orders in Council under section 16(1)(b) of GOWA 2006 are Welsh legislation, in that they require approval by the Assembly alone and are made by Her Majesty on the advice of those Privy Councillors who advise her in relation to devolved matters, i.e. the First Minister. They are not subject to any scrutiny or approval by Parliament but only by the Assembly, whose official languages are English and Welsh (see section 35 of GOWA 2006, as amended).

4.2 Although Orders in Council are not (since they are formally made by Her Majesty) subject to any statutory requirement that they should be made bilingually (nor is there any legal reason why they should not). But the principle that the two language should be treated equally, which is fundamental to all aspects of devolved government in Wales suggests that such Orders in Council should be made in both languages.

5.0 What other matters should the Committee consider in considering this issue?

5.1 If the first suggestion made in answer to Question 4 were to be implemented (so that the point at which disqualifications based on disqalifying offices "bite" is deferred until after election) there would still be some potential (albeit a much reduced potential) for mistakes and misunderstandings. Would this justify the retention of the mechanism under section 17(3) of GOWA 2006 whereby the Assembly may resolve that a disqualification be "disregarded" provided the

ground had been removed (i.e. the person in question no longer holds the disqualifying office) and it is "proper" so to resolve?

5.2 The existence of the mechanism implies that there may be cases where genuine and excusable mistakes are made and that it is appropriate, in such cases for the person who has made the mistake to be relieved of the normal consequences of such a mistake.

5.3 The existence of such a mechanism appears to reflect the fact that, prior to the coming into force of the House of Commons Disqualification Act 1957 there were, from time to time, examples of Members of Parliament who had inadvertently fallen foul of the notoriously imprecise "office of profit under the Crown" disqualification. In such cases Parliament was prepared to relieve the individual, in cases of understandable misunderstanding, of the consequences, by passing an "Indemnity" Act (e.g. the Arthur Jenkins Indemnity Act 1941) reinstating the MP.

5.4 The 1957 Act retained, in part, the general "office of profit under the Crown" disqualification and, understandably, provided an alternative mechanism to individual Indemnity Acts as a means of dealing with the continuing risk of inadverent and excusable disqualifications. This mechanism was carried over into the House of Commons Disqualification Act 1975 (section 6(2)) and hence into the devolution statutes, despite the fact that the 1975 Act (and section 16 of GOWA 2006 and the corresponding Scottish and Northern Ireland provisions) are now based entirely on exhaustive lists of designated offices.

5.5 The power in section 17 of GOWA 2006 was used by the Assembly to relieve one of the disqualified persons who had been purportedly elected from the consequences of the disqualification. The revelation that the Assembly had the power to take such a step was clearly puzzling and troubling to many inside and outside the Assembly, particularly in view of the fact that the corresponding power had only

been used by the House of Commons on one occasion since 1975. It is certainly an unusual state of affairs that a legislative body should have the power to disapply the law in relation to a particular individual and the uniqueness of the procedure is underlined by the fact that the decision is entrusted not to the courts but to other legislators who are therefore required to sit in judgement on one of their own number and (if they are to avoid the possibility of challenge in the courts) to seek to do so without being influenced (either way) by party considerations.

5.6 There is a strong case for saying that section 17(3) is an anomalous survival of the time when disqualification was based on a vague and uncertain principle rather than a precise list of disqualifying offices. There may still, of course, be exceptional cases where mistakes are excusable (as the Assembly judged to be the case in relation to the individual in whose favour section 17(3) was invoked in 2011) but individual hardship must be weighed against legal certainty and constitutional rectitude. Even without any change to the point in time when a disqualification bites, the existence of the power in the case of the Assembly seems hard to justify. If the scope for mistakes were further reduced by enabling a candidate who had been elected to carry out a last check and to divest himself or herself of any disqualifying office, then it would seem to be impossible to justify giving candidates who failed to do so a further chance to avoid the consequences.

5.7 Finally, one of the factors that appears to have contributed, in one case, to the situation that arose in 2011, was the late stage at which the 2010 Order was made, namely on the 15 December 2010. (It came into force on the 11 January 2011.) It was not made, therefore, until less than 5 months before the election, and would not have been generally available to the public until about three months before nominations for the election (which was held on 5 May) closed.

5.8 The 2010 Order added disqualifications which had not applied to the previous election. This was of direct relevance to one of the

disqualified candidates subsequently elected. Since candidates for election are usually selected much earlier than the last few months before the election this gave rise to the obvious risk that plans might be made on the basis of the previous order and that the fact that requirements had become more stringent might be missed (as was, it appears, the case in relation to that candidate).

5.9 A very simple step, which would reduce the risk of new disqualifications being overlooked, would be to ensure that any major revision of the relevant Order in Council take place earlier – for example so that the Order is made at least a year before the relevant election. This would not be so early that the Welsh Government, when drafting the proposed Order, would be unable to foresee the creation of further disqualifying offices prior to the election and incorporate them into the Order.

Summary of Conclusions

(a) Orders in Council under section 16(1)(b) of GOWA 2006 should continue to be drafted so as to disqualify from membership of the Assembly those who hold any public office which:

(i) carries with it a significant financial benefit to the person in question which emanates from the Welsh Government; or

(ii) is, itself, subject to scrutiny by the Assembly;

(b) The question of what amounts to a significant financial benefit (the current cut-off appears to be £10,000 per annum) is a matter of judgement to which the Committee will need to give careful consideration;

(c) Disqualifications under Orders in Council should be limited to offices whose functions relate directly to devolved matters;

(d) The law should be changed so that disqualifications "bite" after, rather than before, a person is elected, but before that person seeks to take

up the office of Assembly Member, thereby enabling candidates to know whether or not they have been elected prior to having to relinquish a disqualifying office;

(e) This could be achieved either by giving elected candidates the opportunity to divest themselves of disqualifying offices after election but before taking the oath or affirmation or, alternatively, by providing that candidates who are elected automatically cease to hold disqualifying offices. Either of these approaches would require primary legislation;

(f) The Election Rules should no longer require candidates, when accepting nomination, to declare that, to the best of their knowledge and belief, they do not hold a disqualifying office;

(g) Orders in Council under section 16(1)(b) are a form of Welsh legislation and should be made bilingually;

(h) The power of the Assembly, under section 17, to relieve individuals of the consequences of disqualification should, if the point in time at which disqualifications bite is deferred until after election, be abolished;

(i) Orders in Council under section 16(1)(b) should be made at least twelve months before the date of the relevant Assembly general election.

Keith Bush QC

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Agenda Item 5.2

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