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Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills



Llywodraeth Cymru  
Welsh Government

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Ann Jones AM  
Chair  
Children, Young People and Education Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

02 July 2014

Dear Ann,

### **CHILDREN, YOUNG PEOPLE AND EDUCATION COMMITTEE - STAGE 1 SCRUTINY OF THE HIGHER EDUCATION (WALES) BILL**

Following my attendance at the Children, Young People and Education Committee on 5 June, I have listened with interest to the further evidence provided to the Committee by various stakeholders from around Wales. In advance of my second appearance before the Committee on 9 July, I would like to take the opportunity to provide some further written evidence on some of the issues raised in scrutiny of the Bill to date.

#### **Need for legislation**

I note that a number of stakeholders, including HEFCW and Higher Education Wales (“HEW”), have discussed the need for a Bill at this time. They have also referenced the Diamond Review of higher education funding and student finance as part of these discussions. I would like to reiterate that the Higher Education (Wales) Bill is not dependant on the Diamond Review and will seek to address important, immediate issues which impact on students and higher education in Wales more generally.

Most notably, it will seek to replace the existing regulatory framework for higher education which is based entirely on the imposition and enforcement of terms and conditions of HEFCW recurrent funding. As a result of the large reductions in HEFCW funding direct to HE institutions this regulatory framework is no longer fit for purpose. HEFCW is unable to attach terms and conditions to the large amounts of student tuition fee support paid to institutions via students, and the remaining levels of recurrent support may be too low to justify meaningful terms and conditions. It is therefore questionable whether HEFCW is able now and in the immediate future, through continued reliance upon terms and conditions of funding, effectively to discharge its statutory responsibilities for the regulation of fees, quality assurance and financial regulation of HE in Wales. I consider it vital that the Funding Council should have appropriate powers to oversee such matters given the continuing significant levels of public investment in the HE sector in Wales.

For these reasons, I am of the clear view that this Bill is needed now. It will seek to introduce a robust, yet proportionate, regulatory framework which is not dependent on the imposition of terms and conditions of HEFCW recurrent funding. It is important to dispel any misconception that this Bill introduces a new regulatory system with significant new and draconian functions for HEFCW. Almost all of the activity undertaken by HEFCW as a result of this Bill already happens under the existing statutory framework.

### **Institutional autonomy and academic freedom**

I have also noted that HEW has raised issues in relation to institutional autonomy and academic freedom. I would like to stress that I value and respect these two important principles and have sought to protect them in introducing this Bill. To be clear, the existing funding powers and restrictions set out in the Further and Higher Education Act 1992 will not be repealed. The Welsh Ministers will still be subject to the same restrictions in terms of individual institutions, courses and staff when providing direct funding to HEFCW. Furthermore, section 6(5) of this Bill builds additional protection relating to academic freedom and institutional autonomy into the new regulatory framework. When prescribing matters which must be included in fee and access plans, the Welsh Ministers may not require a plan to include provision which refers to particular courses or the manner in which they are taught, supervised or assessed or provision relating to the criteria for the admission of students. These matters will remain the responsibility of institutions.

### **Regulatory control and public funding**

During their written and oral evidence HEW queried the relationship between regulatory control under the Bill and public funding. One of the key drivers behind the Bill is to enable HEFCW to continue to undertake its existing statutory functions, albeit on a revised statutory footing. This was acknowledged by HEFCW during their evidence session, where they stated that the operational relationship between the Funding Council and institutions was unlikely to change as a result of the Bill. The key components of the Bill relate to fee limits and access arrangements, quality assessment and the financial management of institutions. All of these elements are connected to public funding, in that they relate to the delivery of courses attended by publicly-funded students.

### **Subordinate legislation**

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

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

On a related point, I note that HEW and NUS Wales have raised the specific powers to make regulations which may amend the Bill or other pieces of primary legislation (the so called 'Henry VIII powers)'. These powers are set out at sections 13(3), 37(3) and 55(3) of the Bill. In respect of the first two powers, which are restricted to amending provision of this Bill, I would like to make clear that they are designed to provide additional protection to institutions. For example, if HEFCW are provided with new powers of sanction under section 13, then it is important that the Welsh Ministers can also attach the same procedural safeguards as apply to other HEFCW sanctions under the Bill. This would include the application of the warning notice and review procedure in sections 40 to 43. Similarly, it is important that the same procedural safeguards can be attached to a notice under section 37(1).

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

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

## **Fee and Access Plans**

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

Under the new system it is entirely possible that new institutions or providers may apply to HEFCW for approval of a fee and access plan. These providers may have no previous relationship with HEFCW. This presents opportunities and challenges, including the potential for more varied tuition fee levels across Wales. The Bill acknowledges this potential for variation, by enabling regulations, under section 7(3), to provide for matters to be taken into account by HEFCW when considering whether to approve or reject a fee and access plan.

There has been speculation about the balance of HEFCW's focus on the outcomes of approved plans versus the delivery of activities. I should like to explain further the policy intention behind the proposed operation of fee and access plans. Section 15 places HEFCW under a duty to monitor the delivery of fee and access plan commitments and to evaluate the effectiveness of approved plans both individually and generally. These functions augment the arrangements under the current system. My intention is for HEFCW to monitor delivery of the activities to which institutions commit in their approved plans, as well as for increased attention to be given to the effectiveness of fee and access plans in

achieving improvements in fair access to higher education and the promotion of higher education throughout Wales.

Section 51 confers a function on HEFCW to identify good practice relating to the promotion of equality of opportunity in connection with access to higher education and the promotion of higher education. This is similar to HEFCW's existing function under section 40A of the Higher Education Act 2004. My intention is that HEFCW will utilise its findings from the evaluation of the effectiveness of fee and access plans to inform production of good practice information and advice. Regulated institutions will be required to take account of any information and advice given by HEFCW in the preparation of new fee and access plans.

It will of course take some time for HEFCW to evaluate the effectiveness of fee and access plans and the evidence provided to Committee has correctly emphasised this point. Improving access to higher education requires long-term, sustained action which needs to be informed by best practice. It is likely that this will become an increasingly important component of HEFCW's role in future and will contribute to driving up the effectiveness of fee and access plans over time.

Section 4(2) provides that the maximum period of duration of fee and access plans may be prescribed in regulations. Under the current system the maximum duration of plans is two years although to date HEFCW has requested the submission of new plans on an annual basis. My intention is that in the long term this duration could be extended up to five years when the operation of the new system has embedded and institutions and HEFCW are familiar with the monitoring and evaluation of the plans. There is no contradiction between an annual renewal of plans and HEFCW's long-term evaluation of the effectiveness of plans.

### **Guidance powers**

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

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

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

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

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

### **Eligibility criteria for regulated institutions**

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

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

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

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

### **The regulatory system**

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

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

Furthermore, I do not accept the argument that the Bill does not deal with the whole regulatory system. As stated above, this legislation is about replacing elements of the existing statutory framework for higher education which are no longer fit for purpose. I have not sought to make changes to other elements of the statutory framework which are still working effectively. For example, automatic and case-by-case course designation will

continue to be dealt with via the annual set of student support regulations made under the Teaching and Higher Education Act 1998. Whilst complex, this is nothing new so I see no reason why it should not be understood by the HE sector in Wales.

On a related point, HEW have stated that in the absence of further legislation there will be no public body with a duty to provide quality assurance for unregulated providers (i.e. those not subject to an approved fee and access plan). That is correct, but again this is nothing new. HEFCW's current quality assessment duty under section 70 of the Further and Higher Education Act 1992 only extends as far as 'funded' or regulated providers. This is equivalent to their new duty which is limited to education provided by, or on behalf of regulated institutions (those with an approved fee and access plan in place). The different formulation of the two quality assessment duties simply reflects the revised nature of the voluntary regulatory system. The position has not changed.

### **Charity Commission/ONS**

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

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

In terms of ONS classification, I believe the Bill is a proportionate and measured response to the necessity of maintaining public confidence in the funding system for higher education in Wales. I do not see any need to engage with ONS. The Bill is intended to strike the appropriate balance between maintaining institutions' independence while at the same time safeguarding the significant amount of public money that is invested in the higher education sector and ensuring that students receive the highest quality of education. As I explained to the Committee, the situation when compared to FE institutions is readily distinguishable. FE institutions are directly funded by the Welsh Government, whereas the HE sector is funded through HEFCW (which separates HE institutions from government), student tuition fees and other income.

### **Rights of entry and inspection of documents**

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

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

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

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

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

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

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

### **Financial management code**

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

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

Additionally, although I cannot foresee circumstances under which institutions would be unable to provide assurances to third parties with whom they have contractual arrangements as a consequence of complying with the new Code, I have asked my officials to explore this matter further with Higher Education Wales to ensure that we fully understand their concerns.

### **Cross-border issues**

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

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

### **Transitional arrangements**

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

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

Similarly, the transitional arrangements will enable HEFCW to continue to assess the quality of education provided by, or on behalf of, Welsh institutions during academic year 2015/16. If HEFCW consider that the quality of education at a Welsh institution is inadequate, or likely to become inadequate, during this academic year, then they may take action to resolve this problem. Again, I do not consider this to be controversial.

During this transitional year, I expect HEFCW to prepare and consult on the first financial management code. This will not be introduced until full implementation in academic year 2016/17.

Finally, I would like to reassure the Committee that I am aware of the importance of ensuring a smooth transition between the existing statutory framework and the one proposed under this Bill and will ensure that the necessary arrangements are in place at the appropriate time.

I hope this additional information will assist the Committee in their further scrutiny of the Bill and I look forward to providing further evidence at my second appearance on 9 July.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Huw Lewis', written in black ink.

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