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Llywodraeth Cymru
Welsh Government

Eich cyf/Your ref
Ein cyf/Our ref

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

17 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 9 July, I agreed to provide some further information in response to some questions from Committee members. For ease of reference, I have set out my further evidence below underneath each of the action points provided by the Committee following the evidence session.

"Given that the Bill as drafted does not require all the regulations specified to be made 'must' by the Welsh Ministers, can the Minister confirm if there is sufficient legislative provision in the Bill to enable HEFCW to undertake all of its functions effectively and deliver all the Welsh Government's policy intentions?"

I can confirm that there is sufficient provision in this Bill to enable HEFCW to undertake all of its functions effectively and to deliver on Welsh Government policy. In my written response to the Constitutional and Legislative Affairs Committee ("CLA Committee") of 2 July 2014, I set out in some detail why the Welsh Ministers have been provided with powers, as opposed to various duties, to make regulations in this Bill. In summary, a duty to make regulations is only appropriate where the regulations in question and the associated duty are very limited in scope (for example section 43(3) of the Bill requires the Welsh Ministers to make regulations in connection with the review of notices and directions).

I also acknowledged that some regulations will need to be made at an early stage in order for the regulatory system established under the Bill to work effectively. In this regard, I am hoping to provide the Committee with copies of draft regulations during Stage 2 scrutiny.

During the recent evidence session, I also noted that specific reference was made to section 2(4) of the Bill and section 34 of the Higher Education Act 2004. Section 2(4) enables the Welsh Ministers to make regulations about the making of applications for

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approval of a fee and access plan. As explained in my letter to the CLA Committee, institutions will be able to make applications to HEFCW for approval of a fee and access plan without these regulations being made. However, if necessary, these regulations will enable the Welsh Ministers to bring further clarity to the application process. This may be particularly helpful in relation to applications by new entrants to the system which have not previously had a relationship with HEFCW.

In addition to the Welsh Ministers' power to make regulations, it will also be open to HEFCW to issue information and advice to institutions on the application process under section 51(3) of the Bill. I hope this will allay some of the concerns expressed by Committee members in relation to HEFCW's ability to issue guidance to institutions and in particular the read across with section 34(3) of the Higher Education Act 2004 (the power to issue guidance about the matters to which it will have regard in determining fee plan applications).

Can the Minister provide clarification on points raised in the evidence from HEW:

"[29] The new powers mean that HEFCW can refuse to approve a fee and access plan not just for non-compliance with the fee and access plan itself but for non-compliance with quality directions or the financial Code."

In relation to the first point, it is important to note that fee and access plans provide the entry point into the new regulatory system. Approval by HEFCW of a fee and access plan will result in an institution becoming a regulated institution for the purposes of the Bill. Therefore, it is appropriate that the power to refuse to approve a new fee and access plan is linked to the actions and activity required across the regulatory framework.

Section 36 of the Bill provides that HEFCW may give notice to an institution's governing body that it will not approve a new fee and access plan if one of the conditions set out in section 36(3) is satisfied.

The conditions in section 36(3) are as follows: that a governing body has failed to comply with the requirement in section 10(1) that its regulated fees do not exceed the applicable limit (section 36(3)(a)); that it has not complied with the general provisions of its approved fee and access plan (section 36(3)(b)); that it has failed to comply with a direction under section 19 in respect of improving the quality of education or preventing the quality of education from becoming inadequate (section 36(3)(c)); that it has failed to comply with a direction under section 32 in respect of dealing with, or preventing, a failure to comply with the financial management code (section 36(3)(d)).

Where HEFCW has given notice under section 36 of the Bill, it must not approve a proposed fee and access plan before the end of the period specified in the notice. It is therefore correct to say that HEFCW may not approve a new fee and access plan where there is non compliance with one or more of the conditions provided for in section 36(3). It should be kept in mind though that, in the case of a failure to comply with the general provisions of an approved plan (section 36(3)(b)), a governing body is not to be treated as having failed to comply with those provisions where HEFCW are satisfied that the governing body has taken all reasonable steps to comply with them.

In the case of a failure to comply with a direction under either section 19 in respect of inadequate quality, or section 32 in respect of a failure to comply with the code, it is the failure to comply with a direction that triggers the giving of notice under section 36. In issuing a direction, HEFCW will have had to have followed the appropriate procedure and applied the accompanying safeguards set out in Part 6 of the Bill (as they would to the issuing of a notice under section 36(1)).

To be clear, I consider that a failure to deliver education of adequate quality and/or a failure to comply with the proposed financial management code are matters which could impact adversely on the educational experience of students and on the reputation of the regulated HE sector in Wales and that, subject to the procedural protections outlined above, HEFCW needs to be empowered to take action in the event of such failures. I would repeat here what I said to the Committee – that this legislation is intended to provide HEFCW with effective powers to regulate an increasingly diverse and unpredictable higher education sector. Regrettably, we have seen very recently the Home Office and UK Visa and Immigration take urgent action to deal with alleged student visa fraud affecting institutions across the UK. We cannot take it for granted that all potential providers of higher education in Wales in future will be "traditional" campus-based universities akin to the current publicly-funded institutions represented by Higher Education Wales. It would, in my view, be irresponsible for Government not to provide HEFCW with the tools to do the job when faced with such an unpredictable HE landscape going forward.

"[30] The Bill partially reintroduces an existing provision for England (section 37(2) HEA 2004) which provides that a governing body is not to be treated as having failed 'if the governing body has shown that it has taken all reasonable steps to comply'. This safeguard does not appear to extend to enforcement provisions more generally, however, as it continues to do in England."

Section 37 of the Higher Education Act 2004 (the 2004 Act) relates to sanctions that the Director of Fair Access in England ('the Director') may impose where an institution funded by the Higher Education Funding Council for England (HEFCE) has breached a condition in an English approved plan. Section 24(1)(c) of the 2004 Act provides that an element of the conditions that can be imposed by HEFCE on the governing body of an English institution is that it complies with "the general provisions of any English approved plan that is in force in relation to the institution during any part of the grant period during which it is in force". The effect of section 37(2) of the 2004 Act is that even where the Director considers that the governing body of an institution has failed to comply with section 24(1)(c) of that Act, the governing body is not to be regarded as having failed to comply with that section if the governing body shows that it has taken all reasonable steps to comply with the general provisions of its approved plan.

Section 38 of the 2004 Act contains the current equivalent provision that applies in Wales where a HEFCW-funded institution has failed to comply with the fee limits set out in its fee plan or the general provisions of its plan. It should be noted, however, that section 38 does not contain a safeguard similar to that in section 37(2). As such, no safeguard in the equivalent form currently exists for Welsh institutions. The Bill introduces a safeguard which is similar to section 37(2) for the first time in Wales, providing an extra layer of assurance to Welsh institutions.

I do think the premise of the question, i.e. that the Bill "partially reintroduces an existing provision" is wrong because such protection does not currently exist in Wales.
As regards the suggestion that the safeguard in England applies to "enforcement powers more generally", it is important to note that the only sanctions available to the Director and HEFCE under the 2004 Act in respect of English institutions which fail to comply with the general provisions of their plans are either the repayment, withdrawal or refusal to award grant funding or the refusal to approve a new plan. It is therefore not possible to make a direct comparison between the situation in England and HEFCW's proposed powers of enforcement under the Bill.

To be clear, section 37 of the 2004 Act applies both during the currency of an approved plan in England (financial requirements), as well as providing a potential sanction at the expiry of an approved plan (i.e. non approval of a new plan). In comparison, section 36(4) of the Bill follows the effect of section 37(2) of the 2004 Act in respect of a refusal to approve a new fee plan. Section 36(4) of the Bill provides that where there is a failure to comply with the general provisions of an approved fee and access plan, HEFCW can issue notice of their intention not to approve a new fee and access plan, except where they are satisfied that a governing body has taken all reasonable steps to comply with the general provisions of its plan. This in essence reflects the sanction in section 37(1)(b) of the 2004 Act and the corresponding safeguard in section 37(2) of that Act. I have though asked my officials to consider if the protection provided in section 36(4) of the Bill could be extended to other provisions of the Bill.

It should also be noted that section 37(1)(a) of the 2004 Act enables the Director to direct the Secretary of State or HEFCE to e.g. recover or withdraw grant funding from an institution. There is no equivalent sanction in the Bill given that the rationale underpinning the Bill is to move away from reliance on terms and conditions attaching to funding provided by HEFCW. Instead, the Bill provides separate provisions to deal with institutions that exceed the fee limits contained in their fee and access plans (see section 10) and failure to comply with the general provisions of plans (see section 13).

"Can the Minister please provide a definition as to what the term 'provided' within S17 means and will the Minister be considering validation programmes overseas / courses validated by an institution from Wales / courses validated at an institution overseas, outside Wales, but not necessarily a franchise."

Section 17 of the Bill deals with the assessment of the quality of education, I do not think it necessary to include a definition as "provided" in the context of section 17 of the Bill. It should be given its ordinary meaning which in my view is clear enough in this context.

In terms of validation of courses, institutions and other providers of HE courses may be involved in a variety of collaborative arrangements. Such arrangements may range from validation-only relationships in which an institution with UK degree awarding powers (a recognised body) validates the degree courses provided by another institution or provider which does not hold degree awarding powers (a listed body[1]) to arrangements in which the courses designed by the degree-awarding institution are provided, or part-provided by another institution or provider (franchise arrangements).

Under the requirements of the UK Quality Code[2] individual universities and other organisations that are legally entitled to award degrees (i.e. have degree awarding powers) are ultimately responsible for the academic standards and quality of higher education programmes leading to their qualifications. These degree-awarding bodies are independent and self-governing. They remain responsible for their qualifications regardless of where a programme is provided or who provides it on their behalf.

[1] Listed bodies are those institutions and other providers which do not have power to award their own degrees but which offer complete HE courses which lead to recognised UK degrees which are awarded by a separate institution with degree awarding powers. In relation to Wales, 'listed bodies' are currently set out in the Education (Listed Bodies) (Wales) Order 2012 (SI 2012/1259 (W.154).
http://www.legislation.gov.uk/wsi/2012/1259/contents/made

[2] UK Quality Code sets out the formal Expectations that all UK higher education providers reviewed by QAA are required to meet. It is the nationally agreed, definitive point of reference for all those who deliver or support UK higher education programmes.

As regards validated courses and the new regulatory system introduced by the Bill, a charitable institution in Wales which does not have degree-awarding powers but which provides degree courses which are conferred (validated) by a recognised body could either apply to HEFCW for approval of a fee and access plan or apply for case-by-case designation. Such an institution with an approved fee and access plan in place would be subject to the fee limit and fair access requirements of the Bill, to quality assessment and to the financial management code.

I trust this letter clarifies matters for the Committee, but should there be any further issues upon which you would find further detail of assistance please do contact me.

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