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Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref LF/HL/0741/14

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

23 July 2014

Dear David,

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

During my attendance at the Constitutional and Legislative Affairs Committee on 16 June, Members requested additional information, in the form of a flow diagram, about whether the new regulatory system to be introduced by the Bill could operate on the basis of statutory guidance without the need for regulations. In order to illustrate the proposed working of the new regulatory system I am appending a diagram which deals with the fee and access plan application and approval process under the Bill.

The accompanying diagram (annex A) sets out a guidance only approach as a starting point and illustrates that the fee and access plan application and approval process can operate effectively without regulations being in place in respect of these processes. The flow diagram should be read in conjunction with the accompanying explanatory note (annex B) which provides an explanation as to various powers and functions of the Welsh Ministers and HEFCW within the Bill which are to be relied upon for the operation of the fee plan application and approval process.

As explained in the annex to my letter of 2 July there is an implicit requirement on the Welsh Ministers to make certain regulations under the Bill. Such regulations adopt the "prescribed" formulation and their making is necessary for the operation of the new regulatory system, examples include: the power under section 4(2) concerning the maximum duration of a fee and access plan, the powers under sections 5(2)(b), 5(3) and 5(5) which deal with qualifying courses, the maximum fee amount and qualifying persons respectively and the power under s6(1) concerning

the contents of fee and access plans. These regulations are therefore included at the outset of the process depicted in the flow diagram.

In the absence of regulations Welsh Ministers will be able to provide guidance to HEFCW concerning their functions and HEFCW will be able to specify in its information and advice to institutions details relating to the application and approval process and in respect of the determination of fee and access plans. However, the Bill provides for regulations to be made to bring clarity to the process or to respond to changes in the operating environment.

Members also questioned why the Bill has not been drafted on the assumption that where regulations may be needed, there should be a duty to make them. I provided a detailed response on this matter in my letter of 2 July which included an analysis of the use of the terms “may” and “must” throughout the Bill. It is my view that the new regulatory system could operate adequately on the basis of guidance alone. However, it may become necessary for regulations to be made to bring clarity to certain processes or to respond to changes to the higher education sector in Wales, the nature of HEFCW’s operations or the manner of delivery of courses.

I trust that the diagram and accompanying explanatory note clarifies matters for the Committee. I am also copying this letter to the Chair of the Children, Young People and Education Committee for information.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Huw Lewis', written in dark ink on a white background.

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

Introduction

The accompanying document provides a diagrammatic representation of the application and approval cycle for fee and access plans and demonstrates that these processes can operate effectively in the absence of regulations.

The process cycle assumes that regulations relating to the duration of a fee and access plan (Section 4(2)), qualifying courses (Section 5(2)(b)), fee limits (Section 5(3)) and qualifying persons (Section 5(5)) will be made. These regulations are implicitly required in order for the system to operate.

With these regulations in place, the diagram shows that the application and approval cycle operates initially on a guidance only basis. The guidance only cycle is illustrated using solid flow lines.

The regulation making process is shown as a subsidiary process using a dashed flow line which is triggered by and feeds back into the application and approval cycle at appropriate points. In the event that regulations are not made, the application and approval process can continue to operate on a guidance only basis.

Notes

1. The Bill makes provision for Welsh Ministers to issue guidance under Section 46. Guidance would be developed in consultation with HEFCW and could be used in the absence of regulations being made.

In relation to the application and approval this guidance could, amongst other things, relate to type of evidence that an institution may be required to provide in support of its application for a fee and access plan and matters that HEFCW should take into account in considering the approval of this application.

2. Under Section 46, HEFCW are required to take account of guidance issued by the Welsh Ministers.
3. Section 51(4)(c) allows HEFCW to provide information and advice concerning the effect of approval of a fee and access plan¹. It is envisaged that HEFCW may wish to make use of this advisory function in providing information to fee and access plan applicants about the requirements with which regulated institutions must comply. This guidance may, amongst other things, set out that HEFCW would take into account the quality of education and financial management at an institution in determining a plan and provide details of the information that institutions would be required to provide to HEFCW in order to demonstrate this.

¹ Paragraph 1 of Schedule 1 to the Further and Higher Education Act 1992 may also be relevant as well.

HEFCW may decide to provide detailed guidance to institutions including the consequences of having an approved fee and access plan and the expectations that HEFCW will have about how an application should be formulated. HEFCW may also set out its expectations concerning the monitoring and enforcement of plans in order that institutions are aware of the need to return information to HEFCW at stated times to allow for the monitoring of the delivery of plan commitments, and the actions HEFCW may take if those commitments are not met.

4. The core contents of a fee and access plan are laid out on the face of the Bill at Sections 4-6 (see 7 below). HEFCW may provide additional information or detail in relation to these requirements in their guidance to institutions and may do so whether regulations are in place or not.
5. Section 2 allows the governing body of an institution to apply to HEFCW for approval of a proposed fee and access plan relating to the institution if it is an institution in Wales that provides higher education and is a charity (section 2(3)).
6. Regulations made under Part 2 of the Bill relate to 4 broad areas namely, the application process, the contents of fee and access plans, the approval of a fee and access plan (and compliance with its general provisions) and the publication of a fee and access plan (also included are regulation making powers in respect of designation, prescribed courses, variation of an approved plan and compliance and reimbursement directions). These are as follows but are expanded upon in the Statement of Policy Intent² and in the analysis provided to the Committee on 2 July:

a) - Application process

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. The regulations could for example 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.

b) - Approval of a 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

² <http://www.senedd.assemblywales.org/mglIssueHistoryHome.aspx?IId=9722>

approve or reject a fee and access plan. 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.

c) -Contents of a fee and access plan

Under Section 4(2), the Welsh Ministers may prescribe in regulations the maximum period to which a fee and access plan is to have effect. 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 making power is required to enable the Welsh Ministers to respond to these changes. These regulations are necessary to enable the system to function effectively and as such there is an implicit requirement that they will be made.

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. Qualifying courses are courses that will attract a fee limit. These regulations are necessary to enable the system to function effectively there is an implicit requirement that they will be made.

Section 5(3) enables the Welsh Ministers to set a maximum amount for a fee limit. 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. The system could not operate effectively without these regulations and so there is an implicit requirement to make regulations.

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. This power will provide the Welsh Ministers with the flexibility to update the meaning of 'qualifying persons' as and when required. These regulations are necessary for the system to operate properly; there is an implicit requirement to make regulations.

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. It is required to enable the Welsh Ministers to respond to changes in the way fees are charged by higher education institutions in Wales.

Section 6(1) requires a fee and access plan relating to an institution to include such provision on the promotion of equality of opportunity or 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. 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.

d) - Publication of a fee and access plan

Section 8(1) 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. This regulation power will enable the Welsh Ministers to respond to changes over time and allow for a flexible and up to date approach to publication (see also 9 below).

7. Sections 4-6 set out requirements for the contents of fee and access plans. These include the period to which a plan relates, the fee limit and provisions relating to equality of opportunity or the promotion of higher education. Guidance issued by HEFCW to institutions may provide additional information or detail in relation to these requirements
8. Under Section 7(1) HEFCW must notify the governing body of an institution that it has either approved or rejected a fee and access plan.
9. The expectation is that institutions will publish their fee and access plans as a matter of course, however, Welsh Ministers have the power to issue regulations in respect of the publication of approved plans if this is considered necessary to ensure a consistency of approach.

Fee and Access Plan Application and Approval Cycle

