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27 November 2015

Dear Ellen

### **Review of the regulation and oversight of post-compulsory education and training in Wales**

Further to the Welsh Government's letter dated 22 October 2015 we offer the following comments in relation to the above Review.

From our perspective, this review provides a timely opportunity to consider and respond to some of the key challenges currently being faced by higher education across the UK and we look forward to working with you to explore options for the future that will ensure that arrangements remain fit for purpose and help to secure the best possible platform for higher education provision in Wales. Universities in Wales are national assets that bring widespread benefits to individuals, communities, the nation as a whole and government in Wales. As we look to the future, universities, and the growing proportion of people studying at them, will be the key drivers to creating a globally competitive economy. We need an environment in Wales which will foster greater creativity and prosperity and achieve the quality of life we aspire to. Universities have tremendous strength in their diversity, providing the capacity or potential capacity to be the main agent of change in Wales by creating a strong, knowledge-based economy and society. Future policy decisions should be informed by robust evidence, be financially sustainable and as flexible and resilient as possible to external change. We regard the work of this review as of vital importance in this respect.

The regulatory and funding arrangements for higher education have been subject to major change in recent years, as public grant funding has been reduced and fee limits for full-time undergraduate students have increased. This has required new approaches and arrangements for the regulatory oversight for the quality of education, financial assurance, and the continuing protection of student interests. New challenges are posed by the continuing expansion in the number of students across the UK, including a major growth in England of alternative providers now able to offer higher education. The major reductions in public funding have created significant problems for providers, including in particular higher cost subjects, part-time and

postgraduate provision and the dual-funding system for research. The recent UK Spending Review (which includes significant resource and capital funding for universities in England) highlights the ongoing need to address comparative funding levels to ensure that the universities in Wales remain competitive and sustainable in the context of a major global expansion in investment in higher education. An important issue for the Diamond Review will be to determine how this can be best achieved in future, which could have significant consequences for the current higher education framework and infrastructure. As student expectations have increased in line with fee levels, the Competition and Markets Authority (CMA) has underlined the applicability of consumer legislation for universities, publishing new sector guidance. The Funding Councils have also been charged with additional regulatory responsibilities in relation to e.g. regulation of institutions as charities (in England) and counter-terrorism legislation (the Prevent Duty). In response to this Wales has already introduced major regulatory reforms, in particular under the Higher Education Act (Wales) 2015. Much uncertainty has attended the outcomes of these developments, however, and the current review provides us with an opportunity to reflect on experience.

The recent BIS Green Paper, moreover, proposes further radical change in relation to the higher education regulation and infrastructure in England, including the future of the Higher Education Funding Council for England (HEFCE), potential changes to the criteria for awarding degree title and degree awarding powers. These legislative provisions will have many implications for Wales. Partly because of the major changes, the Office for National Statistics is also currently due to review the classification of universities for purposes of national accounting by June 2016. There is also added complexity for devolved arrangements in having sector bodies with a UK-wide remit – such as the HESA, the Higher Education Academy, UCAS and the Quality Assurance Agency – which need to be worked through in practice and we currently await the outcomes of the tendering exercise in relation to future quality assurance arrangements in particular. Complex questions arise about how we can best ensure we have the right infrastructure and sector organization to deal with the new challenges.

For these reasons we very much welcome the opportunity to consider with you how we can address these most effectively in future. As previously raised with you, however, the remit of the current review needs further clarification including how it is to be coordinated with the work of the Diamond Review, which has been commissioned to identify an overall solution to the long-term funding issues for higher education in Wales. It is clearly important that major change should not be introduced that could compromise the outcomes of the Diamond Review. We understand that it is your intention to produce an interim report in January 2016, and we look forward to further consultation and the opportunity to comment more fully at that stage. For the moment, our comments necessarily focus on two key issues which you raised in preliminary discussion: potential subject rationalization between universities, and the future of the Higher Education Funding Council for Wales. On these two matters we have highlighted some of the key considerations that will need to be taken into account in developing potential recommendations.

### Higher education legislation

Any recommendation would need to have due regard to the legislative boundaries within which universities operate, and the different position for universities compared to the post-16 education sector which falls under central government. Universities are not-for-profit charities who operate in highly regulated environment with direct public funding now amounting to less than 10 per cent of their total income.

Recommendations relating to university provision will need to take due account of the current legislation which seeks to preserve academic and institutional autonomy and ensures that intervention from the Welsh Government remains at arm's length. For example, the terms and conditions that can be imposed on institutions in receipt of grant funding are subject to a number of important statutory restrictions. The Welsh Government may not impose requirements which relate to a particular institution or institutions or frame them by reference to particular courses of study or programmes of research (including the contents of such courses or programmes and the manner in which they are taught, supervised or assessed) or to the criteria for the selection and appointment of academic staff and for the admission of students.

In turn, the Funding Council must not impose terms and conditions of grant which do not relate to any sums derived otherwise than from the Council (i.e. grant funding). The Funding Council has to have regard to the desirability of not discouraging any institution from maintaining or developing funding from other sources (which would apply to course provision for instance), and must have regard to the denominational character and distinctive characteristics of an institution, i.e. an institution's individual mission.

The Higher Education (Wales) Act 2015 (which applies automatically to all universities for the transitional period but will require opt-in from universities from 2017 in order to continue to apply) sets clear boundaries for the exercise of the new statutory powers. It ensures that the powers to prescribe the content of a regulated institution's fee and access plan may not be exercised so as to require the plan to include provision referring to particular courses or the manner in which courses are taught, supervised or assessed – or relating to the criteria for the admission of students. The provisions must also not require an institution to incur expenditure which exceeds its fee income from the courses which are subject to a fee limit in its plan. In turn, the Funding Council has a duty to ensure that it takes into account the importance of academic freedom, and to ensure that it does not require a regulated institution to do anything which is incompatible with its legal obligations as a charity.

Recommendations relating to HEFCW will similarly need to take due account of its particular legislative role and context, and we would not expect the BIS proposals for HEFCE to be automatically mirrored in Wales. Although HEFCE and HEFCW share the same functions or have similar functions in many respects there are a number of significant differences that reflect a Welsh context that must be taken into account in considering future changes. Most obviously, its new powers under the Higher Education Act 2015 give it a new regulatory role and powers which are not dependent on grant arrangements. Unlike arrangements in England, where OFFA has overseen fee plans promoting access to higher education, HEFCW already oversees fee plans in Wales and these have included not only promoting access but promoting higher education more generally (this effectively continues under the 2015 Act). HEFCW also has separate statutory responsibility for ITT.

The Funding Councils are subject to a number of additional statutory duties some of which differ for England and Wales. So for instance, HEFCW has a role in recent Welsh legislation intended to prevent violence against women. On the other hand, unlike its counterpart in England, HEFCW is not the charity regulator for universities; the Charity Commission is. A key question to be resolved at the moment is who should be the monitoring authority for higher education providers in Wales in relation to the Prevent Duty and counter-terrorism legislation – HEFCE has been delegated this role in England. Although the Welsh Government has powers to legislate in respect of education in Wales, an important exception is Research

Councils –an important issue to address for Wales will be how the dual system of research funding can be continued in future and the future role of the funding council in this.

Finally, the Higher Education Wales (Act) means that HEFCW is now responsible for a wider range of providers than before – for instance, regulated providers now include a number of further education institutions and could in future extend to any provider of higher education in Wales which is a charity. HEFCW has a quality assurance duty in respect of all education of a regulated institution – this means, for instance, that it now has a parallel duty in respect of further education provision along with the Welsh Government/Estyn. Arrangements for the specific designation of courses for purposes of statutory student support at providers who are not automatically covered have not yet been finalised, and at the very least greater clarity is needed in terms of how this will work on a practical level and HEFCW's potential role.

In summary, this means that your review and recommendations in relation to universities, including any proposals relating to subject rationalization, will need to be consistent with the legislative provisions for institutional and academic autonomy. The report and recommendations will also need to take into account the specific legislative framework and statutory duties of HEFCW. Recommendations in relation to future administration of research funding also need to potentially address issues relating to Welsh Government's devolved powers in respect of research councils.

### Charity law

All universities in Wales are charities, and are directly regulated by the Charity Commission. In essence, a charity exists solely to carry out its charitable purposes. The independence of universities is important for charity law. The Commission's guidance for instance is clear that it is not, for example, to implement government policy or carry out directions of a governmental authority.

HEFCW would need to consider any recommendations very carefully before implementing them in the light of its duty under the HE (Wales) Act identified above. Actions or policies implemented by the Welsh Government or other parties will also need to be very carefully considered to ensure that there is no cumulatively increased risk to the fulfillment of charity obligations.

Clearly, loss or breach of charity status would have catastrophic and business-critical consequences for universities in financial and reputational terms. As well as contractual and other potential legal ramifications, loss of charity status would mean that under the HE (Wales) Act 2015, HEFCW must withdraw approval of the fee and access plan/ regulated institutions status, and this in turn could have implications for the statutory student finance support arrangements for students on their courses. It is also noted that even if charity status is not lost it is possible for actions to place governors in breach of their charitable obligations and at risk of personal liability.

On this front, we note that the Charity Commissions' comments on the HE (Wales) Bill indicated that the development of sector initiatives involving voluntary arrangements and guidance on best practice, for instance, are clearly less problematic than proposals which involve mandatory requirements.

I should like, therefore, to emphasise that your report and recommendations should ensure that there is no increased risk for universities in terms of their charity status or charitable obligations.

## Competition law and other market legislation

Universities are subject to competition law, and the implications of any recommendations must be considered very carefully in this light, as any collusive behaviour could potentially be seen as anti-competitive. The Competition Act 1998, for instance, prohibits agreements or concerted practices between universities (or other institutions) which have as their object or effect the prevention, restriction or distortion of competition in the UK. In particular, it appears that agreements which have the effect of restricting competition such as controlling or sharing markets or limiting/controlling provision would fall under this prohibition. Both the Competition and Markets Authority (CMA) and the European Commission have the power to impose significant fines for anti-competitive agreements. Moreover, breaches of competition law may give rise to criminal liability for individuals, and damages claims from third parties, as well as adverse reputational impact.

We note that competition law may be infringed even if the parties do not actually agree on the anticompetitive act but exchange confidential information, for example relating to their costs through benchmarking activities, in a context where it can reasonably be assumed that this could have the result of reducing uncertainty on the part of their competitors as to their future pricing intentions. There is a notable precedent in education, for instance, of the OFT finding independent schools in breach of competition law by exchanging information about their proposed fees through participation in a survey.

The UUK's advice for the HE sector, for instance, highlights in particular that "Universities should therefore form their **own independent view** of the fees to be charged or for example **courses to be offered** and should not exchange information on their future pricing intentions (or any other price sensitive information)." It also highlights the need to avoid any exchange between them of other commercially sensitive information as a serious infringement of competition law (as it did several years ago in relation to fee-paying schools). An organization, such as e.g. Funding Council or Universities Wales, could also be implicated as having facilitated any such agreement or exchange of information. It would not be a sufficient defence to claim that the government encouraged universities to act in anti-competitive ways.

It is also noted that the imposition of concerted practices by government/the public sector could also potentially be regarded as an indicator for public control for purposes of charity law and national accounting classification.

The impact for other market legislation such as the consumer protection and fair trading would also need to be investigated carefully. The Competition and Markets Authority for instance introduced new guidance on the application of consumer protection legislation for universities in 2015, reflecting recent consolidation and reform of the law and the changes in fees and funding arrangements for universities, which would need to be carefully addressed.

As a result it is imperative that your report and recommendations ensure that it does not force or encourage universities to breach competition law or other market legislation. Particular care must be taken in relation to any proposals to rationalize subject provision between providers or share commercially sensitive information in this context, either through concerted arrangements or imposition.

## National accounting classification and implications

We need to be particularly vigilant about the potential implications for national accounting classification. Universities are officially classified as Non Profit Institutions serving Households (NPISH) i.e. as non-market producers in the private sector. Particular care is needed at the moment as the Office for National Statistics is currently in the process of reviewing the classification of universities in Wales and the UK. The ONS is due to report by June 2016 and will take into account the changes to the EU national classification rules and recent changes to the funding and regulation of universities including the new regulatory system introduced by the Higher Education (Wales) Act 2015.

The ONS will consider two issues in particular: 1) whether universities are market or non-market producers, in the light of changes to fee arrangements, and 2) whether universities are public or private organisations, particularly given the recent legislative changes for universities, including the HE (Wales) Act, and changes in the European national accounting classification (ESA 2010) implemented from September 2014. Under the ESA 2010 classification framework, the market/non-market and public/provider classification together determine which quadrant of the classification framework institutions fall under. If the ONS decide that universities are public organisations they would be reclassified as 'central government' or - if they are also regarded as market producers - as 'public non-financial corporations'. If the ONS decide that universities are private market producers they are likely to be classified as 'private non-financial corporations'.

The loss of NPISH status and reclassification as central government could potentially have a very damaging impact on the international reputation of the sector. There would be significant consequences for the DfES budget, which in turn would have serious implications for the sector – in particular surpluses and losses would become Welsh Government funds and would have to be managed within their overall budget. If universities lost NPISH status and became part of the public sector then it would also be necessary for the universities affected to conduct a comprehensive review of all their contracts and legal agreements with third parties. Particular areas of concern include: employment arrangements and collective employment agreements; banking covenants to ensure there is no breach of covenant; and representations and warranties as to a university's legal status in commercial agreements, joint ventures etc.

The risk of reclassification needs to be taken very seriously. Further education corporations were reclassified from NPISH to central government by the Office for National Statistics in 2010. In Wales, a primary purpose of the Further & Higher Education (Governance & Information) (Wales) Act was to address this and restore their status. The Welsh Government who have clearly stated their desire for this not to happen to universities in Wales, introduced a number of amendments to the HE (Wales) Act 2015 in light of concerns raised about its implications, although it is likely that the increased regulation of the Bill has increased the extent of public sector control and risk of reclassification, which means that future developments need to be made with particular care in order to avoid a reclassification.

In relation to the public/private classification, the fundamental question is "does government exercise significant control over the general corporate policy of the unit?" The international guidance defines control as the ability to determine general corporate policy. Whether or not such control exists is assessed by examining the characteristics of the unit in terms of the "indicators of government control". Government control may be established by the strength of one of these indicators alone, or by the combined strength of evidence against a number of them.

A detailed consideration of these indicators for any recommendation is required as a number of criteria may be potentially applicable. In this context we note in particular, that contractual agreements which exert control over general policy, or even financing arrangements which result in narrow monitoring or use of the funds and a strong influence on general policy would be considered indicators of public control. Similarly, any provisions which determine the functions, objectives or operating provisions of the institution including budgetary and financial arrangements would be considered an indicator of public control.

It is also clear that different decisions on classification of different types of institution or even individual institutions within the HE sector could be reached, and that there are potentially a different set of risks for e.g. Higher Education Corporations, or those incorporated by Royal Charter.

It will be important to ensure that any change in the nature or role of HEFCW does not compromise the classification of universities – or indeed external perceptions about their independence. It will be vital in particular to preserve the arms-length principles which lie behind HEFCW's current statutory role and powers.

In summary, it is imperative that your report and recommendations ensure that there is no increase to the risk for universities in terms of their ONS classification for purposes of national accounting. Any proposals which seek to impose requirements relating to subject rationalization could raise potentially issues in this respect, and it is essential in particular that any changes to HEFCW do not place university classification at risk e.g. through erosion of the principle of operating at arms-length. This will require a careful assessment of the impact of any proposals against the new European accounting criteria and their cumulative impact alongside the full range of statutory provisions and sector requirements relating to universities.

### Concluding comments

Finally, in the light of the above, we offer some preliminary views in relation to the points raised.

In relation to subject rationalization, we welcome further means of encouraging pathways of progression between higher education and schools and other post-16 education providers. The approach to this will be very important, however, as we will need to ensure that any possible recommendations take due account of the legislative framework under which universities operate and does not compromise either their charity status, national accounting classification or competition rules about collective undertakings and sharing of information. This probably means that the starting point for recommendations must be voluntary cooperation on an individual basis, and indeed universities have a strong track record in this respect including such projects as the Universities Heads of the Valleys Initiative. It is also important to recognize that current subject provision reflects student choice, and we need to be careful not to reduce choice for students for whom a range of factors and distinguishing features between courses, delivery and providers may be important. Students in this context include the very considerable numbers from the EU, from other UK countries and from outside the EU.

In our view it is essential to retain a funding and oversight body for higher education in Wales. We regard this as crucial for managing risk and providing stability to the sector. A funding and oversight body for the sector in our view provides invaluable expertise and workable solutions to implementing government policy

to the benefit of Wales' economy and society. HEFCW has demonstrated how a dedicated body with specific expertise, understanding of the sector can effectively administer broad governmental policy, reducing the need for direct government intervention. This not only helps to avoid the potential issues we identify above (as outlined above) which could be potentially damaging for the sector. It also avoids direct intervention on matters of detail which a government would not normally be expected to be involved with (such as data returns and student number monitoring for instance), enabling its resources to be better focused on matters of policy.

Any changes to the role of HEFCW will need to take into account the specific context and functions of HEFCW, as outlined above. They will also need to take into account the role of HEFCE and other sector bodies which currently have a UK wide remit in a number of respects. One of the key areas being looked at by HEFCW as part of the implementation the HE (Wales) Act 2015 at the moment is how to coordinate arrangements for dealing with any concerns relating to higher education provision, given the various responsibilities of the CMA, and the Office of the Independent Adjudicator. There is also scope to clarify the roles and working arrangements between bodies in Wales with parallel duties under the new regulatory framework, particularly in relation to further education and alternative providers. The outcomes of consultation on arrangements for specific designation of courses for purposes of student support expected by Spring 2016 are likely to also have implications that need to be taken into account.

We must also emphasise that any new functions would also need to be adequately resourced. For instance, HEFCE is currently the monitoring authority for the Prevent Duty under counter-terrorism legislation, and we would in principle welcome a similar delegation of this role to HEFCW in relation to Wales due to their experience and understanding of the sector, but (particularly given the comparative size HEFCE) this may have implications for HEFCW that need to be addressed. More generally, sufficient resource would need to be available to any oversight body to fulfill its statutory obligations, particularly in relation to the new requirements of the HE (Wales) Act 2015.

Finally, the independence of this body is critical to support university autonomy, which gives universities the freedom to invest, borrow and earn income. This ability to manage their own affairs is crucial for Welsh universities as independent earnings now form the bulk of income for some universities in the absence of large amounts of public investment. In particular, it will be important to retain the current arms-length principles contained in the legislation and their observance in practice in relation to the ONS classification.

Yours sincerely

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