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04 December 2020

Zenny Saunders  
Deputy Director PCET Reform  
Skills, Higher Education and Lifelong Learning  
Welsh Government  
Cathays Park  
Cardiff  
CF10 3NQ

Dear Zenny

### **Draft Tertiary Education and Research (Wales) Bill**

Please find attached the response from HEFCW to the Welsh Government Consultation on the Draft Tertiary Education and Research (Wales) Bill. This response has been approved by the Council and informed by discussion across the full range of Council committees, benefitting from the varying perspectives of the broad stakeholder base with which we routinely engage. The consultation response form is structured to prompt responses to a large number of detailed questions, but the Council wishes to make a number of overarching points in this covering letter which should be taken as an integral part of our response.

The Council remains firmly of the view that there is much to be gained for Wales from the establishment of a single post-compulsory education and training sector, regulated and funded by a single arm's length body. We advocated this to Professor Ellen Hazelkorn in our initial submissions to her in 2015, notwithstanding the obvious impact on HEFCW. The comments which follow reflect concerns we perceive with the way in which the legislation has been drafted, but should in no way be taken to imply we do not remain supportive of the broad aims outlined by Professor Hazelkorn and agreed by the Welsh Government.

Our overarching sense of the draft Bill and the development of policy to inform it, is one of an opportunity missed. The thrust of the Hazelkorn report, accepted by the Welsh Government, was first to establish a clear vision for the PCET sector in Wales, with a clear intention that the sector should be cohesive and integrated, with administrative arrangements which facilitated better the meeting of employer and student needs, and removed the tensions around current interfaces between the sectors.

The establishment of the new Commission was the second recommendation which, we would argue, was subordinate to the first. Legislation to develop that single authority should have been based on a vision, providing a clear line of sight to how

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new legislation could enable that vision to be realised. The point has been made repeatedly that the approach adopted, where officials have prioritised the development of legislation in the absence of an agreed vision, risked development of legislation which fails to deliver the Hazelkorn aims. Unfortunately, our view is that the draft legislation fails to facilitate the establishment of a cohesive PCET sector and fails to establish proper arrangements for proper arm's length operation of the new Commission.

The draft legislation fails to facilitate the establishment of a cohesive PCET sector because it largely retains the discrete pre-existing regulatory and funding machinery for the current discrete FE, HE, VI<sup>th</sup> form and work-based learning sectors. No evident attempt has been made to harmonise these arrangements. Current complexities of regulation, funding and quality assessment, far from being simplified, have been hard-wired into the new legislation. This is particularly disappointing, given that development of this response to Hazelkorn has been in train for such a long time. There was scope for being more ambitious, as implied by the Welsh Government endorsement of Hazelkorn recommendations. A new Commission will only be able to deliver a more cohesive system should it be enabled to apply its functions to all providers consistently and proportionately. The introduction of the concept of the register goes some way to enabling that. Even if the requirements for registration were expanded to apply across the whole PCET sector, though, the Commission would still be hindered by the duties placed on it from the legacies of existing legislation hard-wired into this draft legislation.

We have been told that the intention is that the Commission could move to a more harmonised position over time. In reality, though, as we have experienced with the Higher Education (Wales) 2015 Act, once arrangements are cast in legislation, particularly primary legislation, it is not possible to operate outwith those provisions, nor to morph to new arrangements over time, whilst continuing to operate lawfully. This problem is exacerbated by the sheer level of detail in which the draft of this primary legislation has been written. Our attached detailed responses to the consultation draw attention to a large number of operational challenges we perceive in the way the legislation has been drafted. This is informed by our unique position of deep understanding of how an arm's length body has to operationalise such legislation and our understanding of how legislation can enable or constrain an arm's-length body from operating effectively. In identifying these challenges, we are not advocating the introduction of yet more detail to address the deficiencies. It would be far better for the legislation to be cast at a much higher level. This would allow greater flexibility in operation as well as scope to future-proof the legislation in the context of an increasingly volatile operating environment.

The draft legislation also provides for Welsh Ministers to retain powers and to increase the number of safeguards they currently have. For an arm's-length body to work effectively, it needs to operate without such constraints or uncertainty about whether another organisation will duplicate or undermine what it is trying to achieve. In this regard, the draft legislation betrays a lack of trust in the operation of an arm's-length body, a recommendation of Hazelkorn with which, again, the Welsh Government agreed but which is now being undermined by the draft bill. Ultimately, Welsh Ministers will fund the organisation, appoint its members and set its remit. Additionally, the Commission would be subject to potential judicial review, duty bound to consult,

subject to equalities and Welsh language requirements as well as the Well-being of Future Generations legislation. They should together be more than sufficient safeguards for Welsh Ministers, without adding further safeguards as the draft legislation does.

A number of these issues are also exposed through examination of the explanatory memorandum. It asserts (on page 119) that a number of benefits will be associated with the introduction of the Bill, including:

- 'consistency of approach to the regulation of institutions across the PCET sector...'
- 'Increase in learner participation rates',
- 'reduction in attainment and outcomes gaps...'
- 'a more coherent and consistent funding model across the PCET sector',
- 'better alignment between funding and cost of the same provision delivered across the PCET system'.

The explanatory memorandum doesn't identify how the introduction of the Bill will achieve any of these benefits and the fact that many of the current regulatory and funding arrangements are to be hard-wired into the new legislation will prevent benefits, arising from greater consistency and coherence, from being achieved.

The explanatory memorandum is revealing in other ways. Most of the assessment of deficit associated with the status quo focuses on arrangements pertaining to the higher education sector, with only cursory treatment of other sectors. There is, for example, detailed assessment of the contextual challenges facing higher education, as well as the financial challenges for each university, but no similar assessment of the challenges facing further education. This is an extraordinarily biased approach and doesn't provide confidence that the assessment of options has been adequately thorough. We also note (page 128) that the status quo would continue 'real challenges for the Welsh Government in forging an effective partnership with HEFCW and the HE sector in driving forward its priorities and ensuring accountability for the funding it provides'. The last significant Welsh Government higher education policy was 'For our Future', published in 2009, followed by a 'policy statement' in 2013. Since then, Welsh Government priorities have presumably been expressed via the annual remit letter to HEFCW, which actions we have consistently delivered. It is not clear, therefore, which priorities have not been delivered in the current arrangements.

The fact that this is the first we have heard of these challenges, particularly in ensuring accountability for the funding provided by Welsh Government, is a matter of very deep concern. As Accountable Officer, I would welcome a full explanation of these assertions along with an explanation as to why they were placed in the public domain before any attempt was made to raise them with me.

As we have set out in our response to the consultation, the current provisions in the draft Bill have missed the opportunity to establish a harmonised regulatory and funding regime for the tertiary education sector. It hard-wires in the pre-existing arrangements, making the delivery of key anticipated benefits of greater cohesion and consistency unattainable. In this respect, the draft Bill, with the associated very significant transitional costs, offers little beyond the current arrangements. It is not sufficient just

to establish a new body: the legislation needs to enable that body to address the cultural challenges without the impediment of retaining current discrete regulatory, funding and quality assurance arrangements with all their complexities.

It will be clear from the above, and the attached, that we are disappointed by the draft bill. We remain, though, open to working with you and your colleagues to reflect further on how legislation could more effectively developed to deliver what Wales needs.

Yours sincerely

A handwritten signature in black ink that reads "David". The letters are cursive and slightly slanted to the right.

**David Blaney**