

**National Assembly for Wales**  
Constitutional and Legislative  
Affairs Committee

**Report on the Further and Higher  
Education (Governance and  
Information) (Wales) Bill**

July 2013



Cynulliad  
Cenedlaethol  
Cymru

National  
Assembly for  
Wales

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## Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders 21. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

## Current Committee membership



**David Melding (Chair)**  
Deputy Presiding Officer  
Welsh Conservatives  
South Wales Central



**Suzy Davies**  
Welsh Conservatives  
South Wales West



**Julie James**  
Welsh Labour  
Swansea West



**Eluned Parrott**  
Welsh Liberal Democrats  
South Wales Central



**Simon Thomas**  
Plaid Cymru  
Mid and West Wales

In accordance with Standing Order 17.48, William Powell AM and Jocelyn Davies AM substituted for Eluned Parrott AM and Simon Thomas AM.



**William Powell**  
Welsh Liberal Democrats  
Mid and West Wales



**Jocelyn Davies**  
Plaid Cymru  
South Wales East

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# 1. Introduction

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## *The Committee's remit*

1. The remit of the Constitutional and Legislative Affairs Committee's ("the Committee") is to carry out the functions of the responsible committee set out in Standing Order 21<sup>1</sup> and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

## *Introduction and consideration of the Bill*

4. On 29 April 2013, the then Minister for Education and Skills, Leighton Andrews AM ("the Minister") introduced the Further and Higher Education (Governance and Information) (Wales) Bill ('the Bill') and accompanying Explanatory Memorandum.<sup>2</sup>
5. The National Assembly's Business Committee referred the Bill to the Children and Young People Committee for consideration, setting the deadline of 19 July 2013 for reporting on its general principles.
6. We considered the Bill in private on 20 May 2013 and agreed to write to the Minister seeking information on some of its provisions. A copy of our letter is attached at Annexe 1. A copy of the Minister's response is attached at Annexe 2.
7. Further correspondence is attached at Annexes 3 and 4.

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<sup>1</sup> National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, December 2012

<sup>2</sup> National Assembly for Wales, *Further and Higher Education (Governance and Information) (Wales) Bill, Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes*, April 2013

## 2. Background

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### *Purpose of the Bill*

8. The Explanatory Memorandum accompanying the Bill explains that it:

“...seeks to enhance the autonomy and decision making abilities of Further Education Institutions by removing and modifying existing legislative controls on them”.<sup>3</sup>

9. The Explanatory Memorandum adds that:

“The Welsh Government’s policy objective is for FEIs to have the flexibility and freedom to make decisions about the delivery of learning to meet the needs of learners and their local communities”.<sup>4</sup>

10. In terms of the National Assembly’s legislative competence to make the Bill, the Explanatory Memorandum explains that the National Assembly for Wales has the competence to make provision for and in connection with education and training by virtue of subject heading 5 in Schedule 7 to the *Government of Wales Act 2006*.

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<sup>3</sup> Explanatory Memorandum, paragraph 1  
<sup>4</sup> Explanatory Memorandum, paragraph 20



### 3. Legislative Competence

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#### *Evidence on legislative competence*

11. In our letter to the Minister on 23 May 2013 we asked for confirmation that he was not aware of any concerns or issues relating to the legislative competence of the Assembly in relation to any provision of the Bill.

12. In his letter to us, the Minister explained:

“Officials have had regular discussion with UK Government officials who understand the objectives of the Bill. The UK Government has not during those discussions raised any objection to what is included in the Bill ... the Explanatory Memorandum summarises the Government’s view on legislative competence. No adverse issue relating to the Assembly’s competence in relation to this Bill has been identified and consequently it has not been considered necessary to discuss legislative competence with the UK Government”.<sup>5</sup>

#### *Our view*

13. We note that no issues have been raised in discussions between Welsh and UK Government officials regarding the ability of the National Assembly to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

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<sup>5</sup> Letter from the Minister for Education and Skills to the Chair of the Constitutional and Legislative Affairs Committee, 23 May 2013

## 4. Powers to make subordinate legislation – general observations

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14. The Bill contains 11 sections and 2 Schedules. Sections 1 to 8 are relevant to further education and section 9 is relevant to higher education.

### *Section 3 – Dissolution of further education corporations*

15. Only section 3 (Dissolution of further education corporations) delegates new subordinate legislation-making powers to Welsh Ministers.

16. The Explanatory Memorandum explains that:

“The effect of this is to remove the Welsh Minister’s power to dissolve FECs [further education corporations] and transfer their property, rights and liabilities to another education provider.....the type of body will be specified in regulations”.<sup>6</sup>

17. We wrote to the Minister on 23 May 2013 to ask why the power provided for in section 3 would be subject to the negative procedure<sup>7</sup> and why the bodies to be included in the regulations could not be included on the face of the Bill.

18. In his response, on 23 May 2013 the Minister explained that:

“...the negative procedure is considered appropriate as the key duties imposed on further education corporations are set out on the face of the Bill, the regulations will be of a technical nature and are unlikely to be controversial. The powers do not enable provision that would change primary legislation; confer significant powers on Welsh Ministers; increase or impose significant financial burdens on the public; or create or confer unusual powers. It is also likely that the technical detail set out in regulations will be reviewed and may need to change from time to time”.<sup>8</sup>

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<sup>6</sup> Explanatory Memorandum, Annex 1, paragraph 16

<sup>7</sup> Letter from the Chair of the Constitutional and Legislative Affairs Committee to the Minister for Education and Skills, 23 May 2013

<sup>8</sup> Letter from the Minister for Education and Skills to the Chair of the Constitutional and Legislative Affairs Committee, 23 May 2013

19. In explaining why the bodies could not be included on the face of the Bill, the Minister said:

“The government proposes to consult with the further education sector and others with an interest in the further education sector on which persons or bodies a further education corporation can transfer its property, rights and liabilities to following a resolution to dissolve itself. It is likely that the persons or bodies prescribed for the purpose of receiving property, rights and liabilities on the dissolution of a further education corporation will need to be reviewed over time and where necessary changed.

...

I believe it is of the utmost importance that I consult on the person or bodies a further education corporation can transfer its assets and liabilities to in order to give all stakeholders, including unions, the opportunity to comment on the draft regulations.

...

In considering the appropriate procedure there has been recognition of the balance to be struck between scrutiny by the Assembly; consumption of Assembly (or committee) time; the significance of the provisions in the Regulations; and making legislation in the most efficacious manner”.<sup>9</sup>

### ***Our view***

20. Given the nature of the power, the negative procedure, as provided in section 3 of the Bill, is considered appropriate.

21. We are also content with the explanation provided in the Minister’s letter for including bodies in regulations rather than on the face of the Bill.

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<sup>9</sup> Letter from the Minister for Education and Skills to the Chair of the Constitutional and Legislative Affairs Committee, 23 May 2013

### ***Provisions that remove or reduce Ministerial powers***

22. Section 1 (Borrowing and investing by further education corporations), section 3 (Dissolution of further education corporations), section 4 (Designated institutions: instruments and articles of government), section 5 (Intervention by Welsh Ministers in respect of institutions within further education sector) and section 7 (Abolition of power to regulate higher education courses in further education sector) all relate to removing or reducing powers currently conferred on Welsh Ministers.

23. The Minister explained, in his letter at Annexe 1, the reasons for each of these provisions.

#### ***Our view***

24. We are content with the provisions that remove or reduce Ministerial powers.

### ***Section 10 – Commencement***

25. Section 10 states that section 9 (relating to Higher Education) and section 11 (Short title) will come into force on the day that the Bill receives Royal Assent.

26. The remaining sections will be brought into force on a date specified in an Order made by the Welsh Ministers and no procedure is prescribed for the making of the commencement order.

#### ***Our view***

27. It is standard practice that no procedure is prescribed for commencement orders and we are content with this approach.

28. However, we note that section 10(3)(b) permits a commencement order to include “transitional, transitory or saving provision” and that such provisions would be subject to no procedure. In our view this approach is not desirable because it does not represent an appropriate degree of scrutiny for such provisions.

**Recommendation: We recommend that the Minister should table an amendment to the Bill to remove subsection (3)(b) from the**

**commencement provision (section 10) and insert it as a new stand-alone section subject to the negative procedure.**

## **Annexe 1 – Letter from Chair, 23 May 2013**

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### **Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Constitutional and Legislative Affairs Committee**

Leighton Andrews AM  
Minister for Education and Skills  
5th Floor  
Tŷ Hywel  
Cardiff Bay  
CF99 1NA

23 May 2013

Dear Leighton,

#### **Further and Higher Education (Information and Governance) (Wales) Bill - Evidence to the Constitutional and Legislative Affairs Committee**

The Constitutional and Legislative Affairs Committee discussed its approach to scrutiny of the Further and Higher Education (Information and Governance) (Wales) Bill at a private meeting on 20 May 2013 and agreed that I would write to you on a number of issues.

Subject to your response, this may negate the need for you to attend a formal evidence session on 10 June 2013.

Therefore I would be grateful if we could receive your response ahead of our next meeting and no later than 30 May 2013.

The Committee would be grateful if you could respond to the following questions:

1. What discussions have you had with the UK Government about the competence of the National Assembly to make this Bill and what issues, if any, has it raised with you?
2. In relation to Section 3:
  - a. why was the negative procedure chosen for regulations to be made under this section; and
  - b. please can you give example of the types of bodies that will be specified in these regulations by Welsh Ministers

in future and explain why it is not possible for a list of such bodies to be included on the face of the Bill?

3. Why do the provisions in Sections 1,3,4,5 and 7 remove or reduce powers currently conferred on Welsh Ministers? How and why is this approach different when compared to the higher education proposals you have recently issued for consultation?
4. Why has the Welsh Government not used this Bill as a vehicle to consolidate all legislation relating to further education governance in Wales?
5. Please can you explain the type of review the Welsh Government will be conducting one year on from the implementation of the Bill?

I look forward to hearing from you.

I am copying this letter to Ann Jones, Chair of the Children and Young People Committee.

Yours sincerely

A handwritten signature in black ink that reads "David Melding". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

**David Melding AM**  
**Chair**

## Annexe 2 – Letter from Minister, 23 May 2013

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Leighton Andrews AC / AM  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref: LF/LA/452/13

David Melding AM  
Committee Chair  
Constitutional and Legislative  
Affairs Committee  
Cardiff Bay  
Cardiff CF99 1NA

23 May 2013

*Dear David,*

**Further and Higher Education (Governance and Information) (Wales) Bill –  
Evidence to the Constitutional and Legislative Affairs Committee**

Dear David,

Thank you for your letter of 23 May 2013 regarding the Further and Higher Education (Governance and Information (Wales) Bill. Please see attached at **Doc 1** my response to your questions and I trust that Committee Members will find this helpful. I trust that I have responded constructively to your questions and that there is no requirement for me to appear before the Committee on 10 June? However, I am of course happy to attend to clarify any points that are unclear or if you would find it useful, my officials stand ready to assist.

I have copied in Ann Jones, Chair of the Children and Young People Committee.

*Yours sincerely,  
Leighton Andrews*

**Leighton Andrews AC / AM**  
Y Gweinidog Addysg a Sgiliau  
Minister for Education and Skills

Bae Caerdydd • Cardiff Bay  
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**Minister for Education and Skills – Response to Questions from Constitutional and Legislative Affairs Committee on Further and Higher Education (Governance and Information) (Wales) Bill**

**1. What discussions have you had with the UK Government about the competence of the National Assembly to make this Bill and what issues, if any, has it raised with you?**

Officials have had regular discussions with UK Government officials who understand the objectives of the Bill. The UK Government has not during those discussions raised any objection to what is included in the Bill. The Welsh Government's view of the Assembly's legislative competence was considered before introduction of the Bill and part 2 of the Explanatory Memorandum summarises the Government's view on legislative competence. No adverse issue relating to the Assembly's competence in relation to this Bill has been identified and consequently it has not been considered necessary to discuss legislative competence with the UK Government.

The Bill will amend the law relating to the governance of further education institutions in Wales and the Welsh Ministers' functions relating to further education institutions in Wales. The Bill does not make any change to the law as it currently applies to further education institutions in England or to existing functions of the Secretary of State.

**2. In relation to Section 3:**

**a. why was the negative procedure chosen for regulations to be made under this section; and**

**b. please can you give example of the types of bodies that will be specified in these regulations by Welsh Ministers in future and explain why it is not possible for a list of such bodies to be included on the face of the Bill?**

2a) Section 3 of the Bill inserts new sections 27 to 27B into the Further and Higher Education Act 1992. Those sections include regulation making powers for the Welsh Ministers that relate to:

- the information to be provided and publication requirements if a further education corporation proposes to dissolve itself;
- the consultation to be carried out by a further education corporation on proposals to dissolve itself; and
- the persons or bodies that a further education corporation can transfer its property, rights and liabilities to before dissolution.

Having regard to the Welsh Government's guidelines on choice of affirmative or negative procedure in subordinate legislation, the negative procedure is considered appropriate as the key duties imposed on further education corporations are set out on the face of the Bill, the regulations will be of a technical nature and are unlikely to be controversial. The powers do not enable provision that would change primary legislation; confer significant powers on the Welsh Ministers; increase or impose significant financial burdens on the public; or create or confer unusual powers. It is also likely that the technical detail set out in the regulations will be reviewed and may need to change from time to time.

2b) The government proposes to consult with the further education sector and others with an interest in the further education sector on which persons or bodies a further education corporation can transfer its property, rights and liabilities to following a resolution to dissolve itself. It is likely that the persons or bodies prescribed for the purpose of receiving property, rights and liabilities on the dissolution of a further education corporation will need to be reviewed over time and where necessary changed.

The purpose of the regulations which are set out in Chapter 5 of the Explanatory Memorandum and summarised above is to safeguard the interests of the learner and public investment.

I believe it is of the utmost importance that I consult on the person or bodies a further education corporation can transfer its assets and liabilities to in order to give all stakeholders, including unions, the opportunity to comment on the draft regulations.

For the purpose of consultation the type of bodies might include:

- a further education corporation,
- a designated institution;
- a local authority;
- a university, or a higher education corporation; or
- a body corporate established for purposes which include the provision of educational facilities.

Also, when a college resolves to dissolve itself, regulations will set out the procedure it must follow to ensure appropriate consultation takes place with all key stakeholders. Should a college fail to comply with these regulations, then Welsh Ministers will be able to intervene.

In considering the appropriate procedure there has been recognition of the balance to be struck between scrutiny by the Assembly; consumption of Assembly (or committee) time; the significance of the provisions in the Regulations; and making legislation in the most efficacious manner

**3) Why do the provisions in Sections 1,3,4,5 and 7 remove or reduce powers currently conferred on Welsh Ministers? How and why is this approach different when compared to the higher education proposals you have recently issued for consultation?**

FEIs were established in 1993 and classified for the purposes of national accounts as "Non-profit Institutions Serving Households" (NPISH). In national accounts terms, NPISH forms part of the private sector and this classification does not require college accounts to be consolidated with those of government.

In October 2010, the Office of National Statistics (ONS) announced that it would reclassify colleges as part of central government for the purpose of national accounts. For fiscal purposes the colleges need to be removed from national accounts, and once again be classified as non profit institutions serving households (NPISH). I am writing separately to the Chair of the Finance Committee on the fiscal implications of the reclassification.

The Bill seeks to enhance the autonomy and decision making abilities of colleges by removing and modifying the existing legislative controls on them and thereby

enabling ONS to consider reclassifying colleges as NPISH. In addition to the provisions in the Bill relating to the ONS issue, the Bill contains changes to some legislative controls that have never been used and there is no intention to use them.

**Section 1 – Borrowing and investing by further education corporations**

- Borrowing arrangements are a clear indicator of public sector control identified by the ONS. If we are to ensure this Bill results in a reversal of FEIs back to the NPISH status, then statutory control on borrowing needs to be removed.
- Also, this power is not thought to be necessary to ensure appropriate management of debt risk within the FE sector, it is proposed that this requirement will be removed.

**Section 3 – Dissolution of further education corporations**

- The ability to close a body is a clear indicator of public sector control identified by the ONS and needs to be repealed.
- If we are to ensure this Bill results in a reversal of FEIs back to the NPISH status, then statutory control on borrowing needs to be removed.

**Section 4 – Designated institutions: instrument and articles of government**

- This section removes the need for Ministerial consent to modify Instruments and Articles of government (similar to further education corporations).

**Section 5 – Intervention by Welsh Ministers in respect of institutions within further education sector**

- This section amends section 57 of the FHEA 1992 which enables the Welsh Ministers to intervene in a FEI if they consider that the FEI is being mis-managed or otherwise failing.
- The amendment gives the Welsh Ministers power, when using their intervention powers, to direct the governing body of a FEC to use its new powers to dissolve itself.
- It also removes the statutory duty for Welsh Ministers to prepare and keep under review an intervention policy. This is considered to be a matter of procedure and process which does not need to be a statutory requirement.

**Section 7 – Abolition of power to regulate higher education courses in further education sector**

- These powers have never been used.
- I am not aware of any issue presently that would result in these powers being used. They were very much intended to be used as a last step.

With regard to higher education, the technical consultation published on 20 May concerns the Welsh Government's proposals for a revised higher education regulatory framework. The consultation proposals concern the Higher Education Funding Council's (HEFCW's) functions and are not concerned with the Welsh Ministers' powers to control the strategic direction of HE institutions.

The Welsh Government considers that all institutions and other providers offering higher education courses which are designated for statutory student support should be required to comply with regulatory controls in order to protect the interests of students, taxpayers and Welsh society.

Currently HEFCW's ability to enforce fee controls and fee plan commitments is underpinned by conditions attached to the funding which the Council allocates to institutions. Similarly HEFCW's requirements in respect of quality assessment and financial and governance assurance are implemented via conditions attached to funding made available to institutions.

A revised regulatory framework for higher education in Wales is needed to provide assurance about the financial health and governance of higher education providers and the quality of their provision. It is also needed to enforce fee controls and to safeguard equality of opportunity to access higher education.

In short the higher education proposals for a new regulatory framework differ considerably from those which are the subject of this Bill and are concerned with amending HEFCW's existing functions in the context of the new higher education funding and student support arrangements.

Turning to higher education governance, I stated in the Further and Higher Education White Paper that I would allow time for higher education reconfiguration to progress and for the new funding arrangements to embed, before looking afresh at governance arrangements in the HE sector. At the time of publication of its decision to reclassify FE institutions as public sector bodies<sup>1</sup> for the purpose of National Accounts the ONS indicated that all UK universities would remain classified as 'private sector'. The ONS view at the time was that UK Universities enjoyed considerably greater freedom over their general corporate policy compared to the FE sector. Consequently the deregulatory provisions currently being sought in respect of FE institutions are not being applied to HE institutions at this time.

#### **4. Why has the Welsh Government not used this Bill as a vehicle to consolidate all legislation relating to further education governance in Wales?**

I recognise the aim to develop a Welsh statute book and the Welsh Ministers remain committed to achieving this in the future. The amendments made by this Bill represent relatively small changes to a more extensive statutory framework. It was considered that a consolidation of the wider law relating to further education institutions would not on this occasion have been an efficient use of resources given the limited policy changes that the Bill gives effect to.

#### **5. Please can you explain the type of review the Welsh Government will be conducting one year on from the implementation of the Bill?**

I will ask officials to undertake a quantified and qualitative review of how the Bill has been embedded in the FE sector, to identify what changes and improvements have taken place since Bill implementations. This will include information from the FE sector, namely Colegau Cymru, and information gathered by the Welsh Government in its monitoring of FE.

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<sup>1</sup> Classification of Sixth Form and Further Education Institutions, ONS, October 2010

## **Annexe 3 – Letter from Chair, 13 June 2013**

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### **Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol Constitutional and Legislative Affairs Committee**

Leighton Andrews AM  
Minister for Education and Skills  
5th Floor  
Tŷ Hywel  
Cardiff Bay  
CF99 1NA

13 June 2013

Dear Leighton,

#### **Further and Higher Education (Information and Governance) (Wales) Bill - Evidence to the Constitutional and Legislative Affairs Committee**

Thank you for last letter of 23 May 2013 providing written evidence to the Committee in relation to the Further and Higher Education (Information and Governance) (Wales) Bill. It was most helpful for our consideration of the Bill.

I am writing to clarify one point with you, in relation to your response to question 3, where reference is made to Section 1 and 3.

The following sentence appears in the first bullet point of the commentary on Section 1 and the second bullet in the commentary in Section 3.

“If we are to ensure this Bill results in a reversal of FEIs back to the NPISH status, then statutory control on borrowing needs to be removed...”

I would be grateful if you could confirm whether this is correct or accidental.

I look forward to hearing from you.

Yours sincerely

**David Melding AM  
Chair**

## Annexe 4 – Letter from Official, 27 June 2013

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Yr Adran Addysg a Sgiliau  
Department for Education and Skills



Llywodraeth Cymru  
Welsh Government

David Melding AM  
Committee Chair  
Constitutional and Legislative Affairs Committee  
Cardiff Bay  
Cardiff  
CF99 1NA

Ein cyf \* Our ref:

27 June 2013

Dear Mr Melding

**Further and Higher Education (Governance and Information) (Wales) Bill – clarification response to the Constitutional and Legislative Affairs Committee**

Thank you for your letter of 13 June 2013 to the then Minister for Education and Skills, requesting clarification on Sections 1 and 3 of the written evidence paper submitted to you on 23 May regarding the Further and Higher Education (Governance and Information) (Wales) Bill.

Given recent events, I am responding to the Committee in my capacity as the Senior Responsible Officer for the Bill.

Section 3 of the Bill refers to the dissolution of further education corporations and the intention in our written evidence to the Committee was to provide assurance that dissolution powers need to be transferred to the further education (FE) sector, if the Bill is to result in a reversal from the Office for National Statistics (ONS).

I can confirm that the inclusion of the second bullet "*If we are to ensure this Bill results in a reversal of FEIs back to the NPISH status, then statutory control on borrowing needs to be removed*" under Section 3 should not have been in the correspondence as the issue had already been included in Section 1, which deals with borrowing arrangements.

cont.



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Please accept my apologies for any confusion that this caused.

I have copied this letter to Ann Jones, Chair of the Children and Young People's Committee for information.

Yours sincerely,



Andrew Clark  
Deputy Director, Further Education and Apprenticeships Division

cc Ann Jones AM, Chair of the Children and Young People's Committee