Dear Colleagues,

HIGHER EDUCATION AND RESEARCH BILL – LORDS THIRD READING

Ahead of Lords Third Reading today, we wanted to take the opportunity to set out the Government position on the amendments, which have been tabled by Peers.

Lord Wallace of Tankerness’ amendment to include age as a characteristic in the transparency duty

We would like to take this opportunity to thank Lord Wallace, and other Peers who have engaged with us on the transparency duty - your contribution and expertise have been very much appreciated. During Committee stage, we agreed to reflect on the comments made about including ‘attainment’ as an additional category on which Higher Education providers will be required to provide to the OfS, and publish, information under the transparency duty. We were pleased to table an amendment to that effect at Report stage, and delighted that this was warmly received by the House. This will mean that the whole student lifecycle is covered by the duty and will support its focus on equality of opportunity.

The transparency duty is focussed on widening participation, and we have been at pains to balance the need for greater transparency on admissions and performance against the robustness of available data and burdens on providers. This means that we have prioritised those areas where a renewed emphasis on widening participation will have the most impact. We listened closely to the statements at Committee Stage and spent some time reflecting on them, including the desire that we include all of the protected characteristics listed in the Equality Act (2010) under the transparency duty. This is a matter we have considered in depth and we understand the sentiment behind this.

That is why we were delighted, at Report Stage, to be able to make a firm commitment to the House that we will ask the Office for Students (OfS) to undertake a consultation on what other information should be published by institutions. We have made this commitment having listened to the arguments put forward by Peers for the expansion of the transparency duty. While the Duty itself must remain balanced and proportionate, it is clear that greater transparency on characteristics such as age is desirable to support equality of opportunity through widening participation. The consultation will allow all stakeholders to contribute on what issues they feel are most pertinent, enabling expert discourse in determining what other information institutions might be expected to publish.
We can also confirm that when we ask the OfS to consult on additional categories, we will ask them to include age as one of the categories in the consultation. This will be in addition to the other protected characteristics under the Equality Act (2010). This means a much broader range of potential information can be considered which Peers have called for. In light of this future consultation, we do not believe it is right that we introduce one further characteristic at this stage when we have committed to looking at what other information should be published in the round through the consultation.

**Lord Mackay of Clashfern’s amendment on powers to enter and search**

We would like to thank Lord Mackay for his contribution to the debate and for the helpful discussions we have had with him on the OfS’ powers in relation to enter and search. These powers are an important part of the regulatory framework, and will allow serious breaches of registration and funding conditions such as financial irregularity to be tackled swiftly and effectively, safeguarding students and addressing concerns raised by NAO.

We agree with Lord Mackay that strong safeguards are needed to ensure these powers are used appropriately. The Bill specifies four tests before a warrant can be granted:

a. that reasonable grounds existed for suspecting a breach of a condition of funding or registration;
b. that the suspected breach was sufficiently serious to justify entering the premises;
c. that entry to the premises was necessary to determine whether the breach was taking place;
d. and that permission to enter would be refused or else requesting entry would frustrate the purpose of entry.

**Lord Mackay’s amendment does not seek to alter these conditions but would require the warrant to state these conditions had been met. The Government is of the view that this change would not create an extra legal safeguard and so is unnecessary.**

We recognise that in the past there may have been insufficient robustness in the scrutiny of warrant applications, and limited transparency about the reasons they were granted. However, in recent years this has changed with applications closely examined and often refused. The Practice Directions for courts make clear that such scrutiny is required and this is backed by an explicit legal requirement that a magistrate who issues a warrant endorses the grounds found and their reasons on the warrant.

We believe this amendment would work against the efforts of HM Courts and Tribunals Service to standardise and clarify the warrant process without either increasing the formal protections or substantively improving the transparency around warrants in practice. We therefore think it is unnecessary and undesirable.

Viscount Younger wrote in more detail on this subject to Lord Mackay on 15th March. This letter can be found in the House Library and a copy is attached.

We look forward to the debate this afternoon and hope we have reassured you on the Government’s position. We are placing a copy of this letter in the House library.

Yours ever,

James Younger

Viscount Younger of Leckie

Jo Johnson
HIGHER EDUCATION AND RESEARCH BILL: POWERS TO ENTER AND SEARCH

We are writing following the Lords Report debate on the amendment you tabled to the powers to enter and search in Schedule 5 of the Higher Education and Research Bill.

Thank you again for your valuable contribution to the debate on this matter. We undertook during the debate to consider your points before Third Reading. We have taken further advice from the HM Courts and Tribunals Service (HMCTS), and we are now writing to clarify the Government’s position.

The Government considers that the conditions set out in Schedule 5, which must be met for a warrant to be granted, constitute a strong and sufficient safeguard to ensure a warrant would be granted only where necessary. HMCTS have informed me that, when being asked to consider issuing a warrant, magistrates are always supported by a legal adviser who will be conversant with the law on powers of entry and relevant guidance. HMCTS issued in December last year updated guidance on search warrants in general to both the magistracy and the legal advisers from the Justices’ Clerks’ Society. In our view, the additional provision you are seeking would not add any further safeguards to the use of the new power in the Bill. In addition, there are two reasons why having a provision of this type in respect of a warrant issued under this power, but no other power, would be undesirable:

- If, for some reason, the information required to be endorsed on a warrant changes, then this will require separate primary legislation to change that information;

- We understand that HMCTS are currently actively trying to standardise processes for this type of application, because having different procedures for different types of warrant increases the risk of error, both on the part of the applicant and the JP. The critical risk is that a warrant might be issued in which some very small part of the process was not followed to the letter, with an ensuing litigation risk.
We hope that this clarifies our rationale for considering that Schedule 5 should stand as drafted. Please let me know if you would like to meet before Third Reading to discuss further.

We are placing a copy of this letter in the House library.

Yours ever,

James

VISCOUNT YOUNGER OF LECKIE

LORD YOUNG OF COOKHAM