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Sarah McCarthy-Fry
Parliamentary Under Secretary of State for Schools and Learners

Sanctuary Buildings Great Smith Street Westminster London SW1P 3BT
tel: 0870 0012345 dcsf.ministers@dcsf.gsi.gov.uk

Mr Simon Lebus
Group Chief Executive
Cambridge Assessment
1 Hills Road
CAMBRIDGE
CB1 2EU

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Dear Simon Lebus

Thank you for your letter of 11 May addressed to the Secretary of State about clause 138 (as it is once again in the print emerging from the Commons) of the ASCL Bill. He has asked me to respond.

We had what I felt was a good and constructive debate on a number of Opposition amendments relating to this clause in Commons Committee, and I think that the speech that I made then addressed many of the concerns that you raise – if you have not read the speech I would encourage you to do so. Some of the points were also discussed again at Report stage on 5 May.

Before I respond to your detailed arguments, I would like to stress once again the very positive difference the Bill will make. Under the Education Act 1997, qualifications regulation is the responsibility of a body that was set up (as a Non-Departmental Public Body) to report directly to Ministers. Ministers hold the QCA to account and have the powers to influence their actions in a range of ways, including through a power under section 26(1)(a) of the Act specifically to direct the QCA in relation to any of its functions. In practice, of course, Ministers have tended to keep well away from regulatory issues; but the 1997 Act does mean that Ministers could currently, should they choose, get involved in detailed regulatory decisions, about grading, assessment or standards.

Under the Bill, qualifications regulation will instead be the responsibility of a body set up to be independent, and which will be accountable to Parliament. There is no equivalent of section 26(1)(a) – Ministerial influence over Ofqual is very carefully circumscribed. So I hope you will agree that - even given your reservations about clause 138 - the Bill will transform the independence and therefore the credibility of qualifications regulation compared to the current arrangements.

I hope you will also agree that Government has a legitimate interest in qualifications, particularly those offered to young people. Qualifications taken at 16 assess the National Curriculum - for which Ministers are accountable. And more generally, qualifications are key to determining the learning programmes which young people take, and can therefore have a major bearing on participation, attainment, engagement and progression for all young people - whatever their abilities or needs. It is entirely legitimate for Government to use qualifications policy as a means of achieving their educational objectives.

The question we therefore faced, in drafting the Bill, was how to provide for legitimate Ministerial interest in qualifications without compromising Ofqual's independence. The one thing we were clear about was that we needed explicit provision for this on the face of the Bill, for two reasons: first, because we needed a process that was transparent and open, and required Ministers, if necessary, to answer publicly for what they wanted from qualifications - no behind-the-scenes deals; and second, because, by providing for Ministers to influence some parts of a qualification, the Bill makes explicit Parliament's intention that Ministers should not be able to influence regulatory aspects. As you know, clause 138 limits a Secretary of State determination to the minimum requirements relating to knowledge, skills or understanding - not the criteria which set grading, assessment or standards. Without clause 138, this distinction between regulatory issues and those where Ministers have a legitimate interest would not be clearly established in the legislation. In this sense clause 138 provides important protection for Ofqual - and as you know, interim Ofqual are content with the provision (see for example Kathleen Tattersall's published letter to the Secretary of State of 10 February); and it would be damaging for it to be removed.

In practice, as we described in *Confidence in Standards* we envisage that criteria for qualifications such as GCSEs and Diplomas will be drafted and consulted on by QCDA, drawing on the work of subject associations, DDPs and others. They will then submit the draft criteria to Ofqual for adoption, and Ofqual will need to satisfy itself that the draft criteria enable standards to be maintained before deciding whether to adopt them. This check on the quality of criteria is a significant improvement on the current system. Therefore, a clause 138 determination would normally only be issued where, for some reason, Ofqual refused to adopt draft criteria containing knowledge, skills or understanding that the Secretary of State believed were important. It follows that I do not agree with the assumption in your section 3.1 about the purpose of the clause.

The indicative determination which you discuss in your letter was intended to show in general terms what a theoretical determination might have looked like, referring to those aspects of a Diploma in which Ministers have a legitimate interest. You are right, of course, that in reality such a determination would not have been issued in quite that form: Ministers would probably not have issued a determination immediately after the publication of the 2005 White Paper - at which point, as you say, the final shape of the Diplomas was not yet settled. A real determination would need to be subject to detailed and careful work, reflecting the particular circumstances of the time - you may be right that Ministers would conclude that it was inappropriate to make a determination which made reference to other qualifications (though those other qualifications may themselves have been subject to a determination, of course). As you know, we have committed publicly to consult on a Memorandum of Understanding with Ofqual about use of the clause 138 power, which will enable us to consider in detail what an appropriate process should be.

I therefore believe that many of your concerns are unwarranted. For example, on the final point of your section 2.2, if Ofqual had been unwilling to accept the content proposed by a DDP, and the Secretary of State believed that the content proposed was necessary, a determination may then have been issued - but I do not see why Ministers would want to issue a determination prior to sensible negotiation between the DDP and Ofqual.

However, I accept your general point in your section 4 that the content of a qualification, which may be the subject of a determination, may have a bearing on standards. This is why a determination can only ever specify the minimum requirements (to which Ofqual will of course presumably wish to add in developing criteria); and cannot specify how the qualification should be assessed or graded, which would be for Ofqual to decide given its standards objective and the requirements of the determination. On your section 5, the timeframe in the indicative letter was not part of the determination, as the wording "I should like the qualifications to be available from..." makes clear: Ofqual would not have been bound by the request, had it considered it inappropriate.

It is obviously true that we cannot legislate absolutely against an inappropriate determination, though it would not be in the interests of any Minister to issue a determination which could only be implemented at the cost of undermining confidence in the qualifications system. And, of course, if Ofqual had concerns about a determination (which must in any case be published) it could express those concerns publicly, and any Minister would need to be confident of their ground if they chose to disregard those concerns - about which the select committee, in the light of Ofqual's concerns, may wish to question them. Finally, if a determination led to Ofqual producing inadequate qualifications criteria, awarding bodies may choose not to submit qualifications against those criteria. These checks and balances against the inappropriate use of clause 138 seem to me powerful and appropriate.

No doubt these issues will be discussed further as the Bill makes its way through the Lords, but I hope this response is reassuring. My officials would be happy to discuss these issues with you further if that would be helpful.

I would be happy for you to share this response as you see fit. I am copying it to Kathleen Tattersall and to Delyth Morgan, my Ministerial colleague who will be responsible for this part of the Bill in the House of Lords.

Kind Regards

Sarah McCarthy-Fry

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