

Response to Children, Young People and Education Committee Stage 1 Consultation: Tertiary Education and Research (Wales) Bill

1. About this response

- 1.1. The following response is the joint submission of Universities Wales and the Chairs of Universities Wales (ChuW) to the Children Young People and Education Committee's Stage 1 consultation on the Tertiary Education and Research (Wales) Bill as laid on 1 November 2021.

2. Summary

- 1.1. Universities Wales and ChUW have consistently supported the Welsh Government's intention to establish a commission. It is crucial we ensure that this legislation is as good as it can be and supports a Commission that is effective and long-lasting.
- 1.2. Significant progress has been made since the consultation on the Draft Bill (see [here](#) for our response). The Bill now includes a more focused set of nine strategic duties. This is a welcome change and, broadly, the strategic duties are ones that we support in principle. We welcome the recognition of the important contribution that universities make to the wider social and economic well-being of Wales. Welsh universities continue to play a pivotal role in their local and regional economies as well as in the national economic prosperity of Wales, including helping to drive the economic recovery and renewal in Wales in the post-COVID landscape.
- 1.3. Inevitably, however, there are several outstanding matters of importance. To ensure that the Bill can deliver on its strategic duties, the Welsh Government's stated aims and objectives, and deliver a long-lasting settlement for tertiary education, research and innovation, there are a number of areas we feel should be addressed:

- **Add a general duty to ensure institutional autonomy, alongside** related amendments which would enable universities to continue to deliver in the complex regulatory and funding environment in which they operate (paragraph 5). **This is a fundamental ask** which would ensure existing protections are maintained and help mitigate a number of separate concerns.
 - Strengthen the strategic duties to include a more prominent **duty in relation to research and innovation** ([paragraph 5](#)).
 - Add general duties to ensure **balanced and transparent funding decisions** ([paragraph 7](#)).
 - Amend the **powers to ensure that no universities constituted as Higher Education Corporations** can be dissolved against their will and remove new measures inexplicably introduced through this Bill to extend powers to prescribe the content of their governing documents ([paragraph 4](#)).
 - **Further explore how the detail on registration and regulation will be managed.** This includes amending the Commission's powers to impose specific conditions for individual institutions ([paragraph 6](#)).
- 1.4. In addition to these areas, there are a number of matters on which we expect to further engage with the Welsh Government and the Senedd to address concerns:
- Queries around **funding powers and protections**, ([paragraph 7](#)).
 - **Power for Welsh Government to give general directions** which, while similar to previous powers, can be made via publication rather than order/statutory instrument which would mean no scrutiny or approval from the Senedd ([paragraph 10](#)).
 - Power for Ministers to **modify the Commission's strategic plan without its approval** ([paragraph 10](#)).
 - The new consent requirements in relation to passing on the Commission's (or the Welsh Ministers') **funds to collaborating bodies** – to ensure that these are workable ([paragraph 7](#)).
 - Questions around **information powers** including the need for amends to

provide clarity and assurance on the onward use of commercially sensitive information ([paragraph 9](#)).

- 1.5. It would be useful to have further information on how the Welsh Government has prepared for possible UK developments which would impact the provisions in this Bill. It is also essential that full Senedd scrutiny (through affirmative resolution) measures are adopted for the substantial matters of regulation which remain to be put in place through secondary legislation.
- 1.6. The timescales for implementation of the Commission also appear to be particularly challenging. The Welsh Government is still currently working towards launching the new Commission in 2023. We need a better understanding of how the Welsh Government intends to phase in arrangements under transitional provisions, before we can be confident that they are workable and that the Commission and Welsh Ministers will have adequate opportunity to develop remaining arrangements with the sector before implementation.

2. The context of universities – what is at stake?

- 2.1. Making sure that this Bill is fit for purpose will be critical for Wales, not just Welsh universities and their students.
- 2.2. Welsh universities play a fundamental role across the Welsh economy and society. Recent analysis by Viewforth Consulting found that Welsh universities:
 - generate over £5.3bn of output
 - make up 11.8% of all Welsh service sector export earnings
 - generate one in every 20 jobs in Wales¹

These benefits are felt in communities across the country, including in areas that do not have a university presence.

- 2.3. Welsh universities are responsible for around 41% of all research and innovation investment in Wales². Research and innovation are critical to tackling the key challenges Wales faces including climate change and achievement of the Welsh Government's ambitions for future generations.

¹ <https://uniswales.ac.uk/media/The-economic-impact-of-higher-education-in-Wales.pdf>

² StatsWales, HERD as a percentage of total R&D expenditure in Wales, 2019 [here](#)

Universities' activities are a necessary and essential component in driving the economic recovery and renewal in Wales in the post-COVID landscape.

- 2.4. Our universities take seriously their responsibilities to people in Wales and our communities. We are the only UK nation where all universities are signed up to a civic mission framework that sets out our activities and ambitions around supporting communities and public services. We are also the only UK nation where all universities are accredited living wage employers.
- 2.5. Throughout the pandemic, our universities' role in tackling economic, social and health challenges came into greater focus. Universities' civic response to the pandemic in areas such as training, research, and community support is in part highlighted [here](#).
- 2.6. Wales faces significant challenges: climate change, shifting demographics and the impact of automation and technological change on some of our largest occupation sectors³. The work our universities undertake in delivering education, skills and research and innovation will be a crucial element in mitigating these risks while making the most of the opportunities they offer.
- 2.7. Contributions made by universities and their students through knowledge and skills exchange, partnerships and support for local employers have huge potential to help businesses, industries, and other partners to continue, recover and thrive following the pandemic. Research by the National Centre for Entrepreneurship in Education (NCEE), predicts that over the next five years, universities in Wales will:
 - Give 4,000 years' worth of upskilling and training to businesses and charities.
 - Help 1,300 new businesses and charities to be formed.
 - Be part of regeneration projects worth £536 million to the Welsh economy.
- 2.8. Universities have a crucial role to play in training the healthcare workers who have played such a pivotal role in the country's response to the pandemic. In the next five years we will train 10,000 nurses and 4,000 doctors, working with the NHS to provide a critical pipeline of talent to help ensure it has the

³ <https://uniswales.ac.uk/media/Solving-Future-Skills-Challenges-in-Wales.pdf>

resources it needs to respond to the challenges it faces now and in the future.

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Outstanding issues

Although the key changes generally appear to be positive and the system overall looks potentially workable, further amendment is required in a number of areas to address the issues we raised in our response to the consultation on the Draft Bill ([here](#)) and to be confident that the Bill is fit for purpose.

3. General duties - Institutional autonomy and academic freedom.

Our key concern is the continuing absence of a **general duty on the Welsh Ministers and Commission to respect institutional autonomy**, as already established for higher education elsewhere in the UK such as in the Higher Education and Research Act 2017.

Universities Wales and ChUW strongly recommend the Bill be amended to include a general duty on institutional autonomy that would apply to Ministers and the Commission.

Institutional autonomy and academic freedom are cornerstones of higher education and play an important role in our international competitiveness and, accordingly, in the benefits universities are able to deliver for communities.

- 3.1. Institutional autonomy and academic freedom were key areas of concern we highlighted in relation to the Draft Bill. Institutional autonomy and academic freedom are cornerstones of higher education both in the UK and internationally. As principles, they underpin how our universities conduct research and innovation, how they develop and deliver and teaching and learning.
- 3.2. There is evidence which suggests a correlation between autonomy and university rankings and points to the lack of comparative autonomy as a major obstacle to competitiveness⁴. Without a system that protects and promotes autonomy and academic freedom, we risk disadvantaging Wales in securing world-leading researchers and staff, and impairing our universities' ability to form partnerships and to compete for business and research contracts, both domestically and internationally.

⁴ Referenced here: <https://uniswales.ac.uk/media/Universities-Wales-response-to-the-Draft-Tertiary-Education-and-Research-Bill-consultation.pdf>

- 3.3. As constituted, universities in Wales are not public bodies but registered charities and have a legal duty to act independently from government and determine their own objectives and strategic direction, which they are committed to doing in consultation with their key stakeholders.
- 3.4. Preserving their independence is essential to ensure that they are not reclassified as central government for purposes of national accounting, which would have major consequences for the Welsh Government's accounts and budget. Universities are also subject to UK competition law which requires that they act independently from other providers in relation to the UK higher education market.
- 3.5. The existing higher education legislation secures academic freedom of Welsh universities in a number of ways. Specific limitations in FHEA 1992 mean that when Welsh Ministers fund HEFCW their terms and conditions may not be framed 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.
- 3.6. In exercising its functions HEFCW is under a duty to take into account the importance of academic freedom which includes the freedom of institutions to determine the contents of particular courses and the manner in which they are taught, supervised or assessed. It also includes the freedom to determine the criteria for the admission of students and for the selection and appointment of academic staff.
- 3.7. The existing legislation also protects the wider institutional autonomy of Welsh universities in several critical respects. By imposing a 'class requirement, it ensures that the Welsh Ministers remain at arms-length and leave funding decisions at institution level to HEFCW. When funding HEFCW the Welsh Ministers can impose requirements in respect of every institution, or every institution falling within a class or description, but must not otherwise set requirements which relate to activities carried on by any particular institution or institutions.
- 3.8. It also ensures that universities, while remaining subject to terms and conditions for any public funding they receive, are free to determine the use of their other resources. HEFCW may only set terms and conditions in relation to

the funding which it provides, and not university funding from other sources. HEFCW is also under a duty to have regard to the desirability of not discouraging any institution from maintaining or developing its funding from other sources.

3.9. Diversity within the sector is also protected by placing a duty on HEFCW to recognise the importance of the distinctive characteristics of institutions in making its funding decisions.

3.10. The Welsh Government has on a number of occasions expressed its commitment to institutional autonomy and academic freedom. In the 2017 White Paper⁵ the Welsh Government, for instance, stated:

“The Welsh Government recognises the importance of institutional autonomy. Institutions must be free to make the decisions that are in their best interests and in the interests of their learners and communities. Innovation, responsiveness, institutional autonomy and academic freedom are principles that both the Welsh Government and the new Commission will continue to respect.

We are committed to upholding institutional autonomy and guaranteeing academic freedom. Both of these principles are vital in any modern democracy.”

3.11. In relation to academic freedom, we strongly welcome the changes since the Draft Bill including extending the duty to have regard to the importance of academic freedom to the Welsh Ministers. However, further work appears to be needed on the drafting of the provision to ensure that it includes research and innovation. At the moment, it appears to apply only to higher education.

3.12. Our key concern is the continuing absence of a **general duty on the Welsh Ministers and Commission to respect institutional autonomy**, as already established for higher education elsewhere in the UK such as the Higher Education and Research Act 2017. The lack of protection for institutional autonomy upfront in the Bill as laid contributes to a broader weakening of the existing protections of institutional autonomy and academic freedom. This could impact on the world-leading status of our universities and, in doing so, limit or even undermine the benefits universities bring to Wales locally,

⁵ https://gov.wales/sites/default/files/consultations/2018-02/170620_consultation-en.pdf

regionally and nationally.

- 3.13. Particularly given the extended powers of intervention in this Bill, the Welsh Ministers should also be placed under a **duty in relation to compatibility with charity law and governing documents**, not just the Commission. The Welsh Ministers currently have powers which could be exercised in ways which conflict with the obligations of governing bodies in this respect, including the powers to impose terms and conditions of funding on providers without any limitations.
- 3.14. The above amendments would help to address some of our concerns with specific provisions of the Bill detailed.
- 3.15. There are remaining gaps in the limitations on funding powers which have been transferred from FHEA 1992, which are not fully addressed by the extension of the general duties. These are discussed further under [paragraph 7](#) below.
- 3.16. There are some remaining specific areas of concern relating to regulatory powers, as discussed under [paragraph 6](#) below.

4. Higher education corporations

We recommend that the Bill be amended to **ensure that no universities constituted as Higher Education Corporations** can be dissolved against their will and to remove new measures inexplicably introduced through this Bill to extend powers to prescribe the content of their governing documents.

- 4.1. We continue to be concerned that the Welsh Government has retained its power to dissolve Higher Education Corporations (HECs) in Wales against their will. Instead of seeking to remove this power, the Bill makes it easier to exercise, enabling the Welsh Government to transfer property on dissolution more easily where rights of pre-emption and return or similar are involved.
- 4.2. We feel the purpose and rationale for retaining and strengthening this power is not clear. The new regulatory system is meant to provide a fair and equitable basis for regulation across the PCET sector. The power applies only to the three institutions in Wales that are HECs. It is inequitable that the Welsh Government is seeking to preserve a measure that relates to a small number of institutions for historical reasons only.
- 4.3. Furthermore, all universities in Wales are charities directly registered with the Charity Commission. Universities' governing bodies are subject to the legal duties of trustees including the duties of care and prudence⁶. Similarly, consumer law applies generally to the relationship between universities and undergraduate students⁷. Given these legal duties, it is difficult to conceive of a situation where a backstop to dissolve an HEC without the consent of the governing body would be required.
- 4.4. The power to dissolve HECs against their will was removed in 2017 in England in the light of a potential review of the sector by ONS, and previous ONS

⁶ The legal duties on the governing bodies of universities in Wales are outlined here: https://s3.eu-west-2.amazonaws.com/assets.creode.advancehe-document-manager/documents/lfhe/asset_images_docs/research_resources/g2g/GTG_Trustee_4WEB_1506342054637_1.pdf_1572866044.pdf

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415732/Undergraduate_students_-_your_rights_under_consumer_law.pdf

decisions that indicated that its exercise would mean reclassification of the universities to central government from the not-for-profit sector. The Secretary of State may only dissolve a HEC in England if requested to do so by that HEC. Similarly, the Secretary of State must not transfer property to another body without the HEC's consent.

- 4.5. The key issue from our perspective is **the ability to dissolve an HEC without the consent of the governing body of the institution**. We would strongly recommend that the Bill be amended so that Welsh Ministers' power to dissolve an HEC is with the proviso that such power should be capable of being exercised only at the instigation and with the consent of the institution itself.
- 4.6. The current legislation could be easily amended to this effect by placing the Welsh Ministers under a duty to obtain its prior consent, before using their powers to dissolve the institution or transfer its property.
- 4.7. The Welsh Government has also chosen to extend its powers to change the statutory requirements for HECs' instruments and articles of government by regulations.
- 4.8. This approach appears to be directly contrary to the recommendations of the Law Commission which, in 2017 as part of its review of unnecessary regulatory burdens on charities, recommended that the Welsh Government should take steps to remove the current legislative requirements as to the content of the governing documents of Welsh HECs so as to enable those bodies to re-allocate provisions in accordance with guidance concerning public interest matters: Technical issues in Charity Law, LC375 (2017) para 5.149ff.
- 4.9. As pointed out by the Law Commission, this has already been addressed for HECs in England by the HERA 2017, which gave them freedom to determine their own constitutions.
- 4.10. We believe these constraints should be removed and HECs in Wales empowered to amend their Instruments and Articles of Government, providing that such amendments are not incompatible with their status as charities.
- 4.11. The Bill should be amended to remove the strengthening of the Welsh Government's powers to change the statutory requirements of HECs' instruments and articles.

5. Strategic duties - Research and Innovation

We recommend the Bill be amended to include a **strategic duty in relation to research and innovation**.

Core funding for research and innovation builds the foundations of the research base ensuring it has the capacity to undertake high quality innovative research, supports the research infrastructure and enables universities to secure investment to Wales. With the broad scope of the Commission, it will be imperative that the Commission is incentivised to promote research and innovation including basic or fundamental research.

- 5.1. There have been significant changes in the area of strategic duties which we broadly support in principle. We welcome the recognition of the important contribution that universities make to civic mission and wider social and economic well-being of Wales. Welsh universities continue to play a pivotal role in their local and regional economies as well as in the national economic prosperity of Wales, including helping to drive the economic recovery and renewal in Wales in the post-COVID landscape.
- 5.2. We welcome the intent to give a clearer statement of strategic direction. Although research and innovation features in the strategic duties of the Bill – for example to promote ‘improvement of tertiary education and research’ or to ‘promote an innovative and sustainable economy’ – there is a gap in the duties on an explicit focus on promoting research and innovation.
- 5.3. HEFCW’s funding for research and innovation is a key part in enabling our universities to go out and secure greater investment to Wales. This funding builds the foundations of the research base ensuring it has the capacity to undertake high quality innovative research and by supporting the research infrastructure.
- 5.4. With the broad scope of the Commission, it will be imperative that the Commission is incentivised to promote research and innovation including basic or fundamental research.
- 5.5. As such, we feel that a **strategic duty in relation to research and innovation** should feature more prominently and clearly in the Commission’s ambitions and strategic duties.

- 5.6. The Welsh Government could usefully review the wording of the strategic duties alongside the duties in relation to funded research and innovation under s.104, for instance. There may be further scope for improving the general coherence and consistency with the other parts of the Bill as well.
- 5.7. We also discuss below our reasons for welcoming an amendment which places a general duty on the Welsh Ministers and Commission to ensure its funding allocations are made in accordance with a **balanced funding principle** (see under funding below).

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6. Regulation and registration conditions

A significant amount of detail on the regulation of tertiary education is left to regulations with a lack of detail on the face of the Bill. Given this, it is essential that these regulations be developed with full Senedd scrutiny.

There are some key areas where we seek amendment including the power to **impose ongoing registration conditions for specific, individual institutions** and the need for **the detail of the initial conditions to be subject to a duty to consult**.

We would also welcome the significant Henry VIII power in section 141 being reviewed and its potential use more narrowly limited.

- 6.1. **There is an unexpected lack of detail in the Bill as laid and its accompanying documentation about many of its basic features** including what the basic categories of registration will look like, who they will apply to and what requirements they will contain. Much of this we would have expected to have been confirmed with the laying of the Bill, placed on the face of the Bill itself or in accompanying draft regulations. Instead, **many important policy decisions appear to be left to future regulations, making it difficult to assess the workability of proposals**.
- 6.2. We would like the Welsh Government to clarify their current policy intentions, identify more clearly what regulations need to be laid and put in place before the Commission becomes operational in that light.
- 6.3. The indications in the Statement of Policy intent suggest that the Welsh Government is currently considering a registration system focused on those who provide higher education, and that there will be two categories: higher education (core) and higher education (alternative) which largely appears to replicate the status quo. Greater policy clarity would enable us to have confidence that there will be workable arrangements in place from the start and to help us plan for implementation.
- 6.4. In general, the powers to set registration conditions as drafted would benefit

from being further rationalised to reduce their complexity and the potential for requirements to proliferate. There appears to be no practical distinction between initial and ongoing conditions for instance – providers must start with and continue to comply with the conditions at all times. There also appears to be no clear distinction between conditions which are labelled as mandatory and those which are not: they are equally mandatory for the providers they apply to.

- 6.5. The priorities for amendments to address our remaining concerns in this area, however, relate to the following specific provisions, particularly where these impact on institutional autonomy.
- 6.6. The first relates to the Commission's power to **impose specific ongoing registration conditions** (s.27) for particular institutions, enforceable by injunction. The Commission should not be able, as the Bill currently permits, to impose conditions of this kind on individual providers in relation to any matter and at any time as it sees fit. This is a power which if exercised could cause the Commission to be in breach of its duty to not require universities to act incompatibly with their charity law requirements. The Commission's power to impose conditions should be limited to setting conditions which apply to all providers of a particular category, class or description only.
- 6.7. The increased flexibility for the Commission to determine the detail of the initial registration conditions (s.25) on quality, effectiveness of governance & management, and financial sustainability is broadly welcomed. However, the power of the Commission to determine the **detail of the initial conditions by publication** should be made subject, at the very least, to a duty to consult.
- 6.8. A key and welcome change since the Draft Bill is that the requirement to have Access and Opportunity Plans in place is removed and replaced by fee plan statements, fee plan requirements and a new set of equal opportunity conditions.
- 6.9. The changes appear to give the Commission greater flexibility and could potentially help to **reduce unnecessary regulatory burden**. Much, however, will depend on how these are implemented in practice and what requirements the Welsh Ministers place on the Commission through regulations.
- 6.10. We would also welcome clarity on the **equal opportunity conditions** (s.31) as drafted, despite our support for such conditions in principle. The Bill provides

that the Commission must impose ongoing registration conditions for each provider in specified categories, requiring the delivery of measurable outcomes to further each of the aims specified in that section of the Bill.

- 6.11. The extent to which this enables individually tailored conditions to be imposed on providers within the specified category is unclear to us and clarity would be welcomed. If the formulation of the condition were to apply to each provider identically, this would appear to make it difficult or impossible to set meaningful requirements. On the other hand, if the conditions can be individually tailored it would mean that individual outcomes can be imposed rather than agreed – effectively becoming ‘outcome agreements’ without the agreement. We think that it will be very important for us to work with the Welsh Government to identify how this will work in practice and clarify this on the face of the Bill.
- 6.12. At one stage in the consultations, outcome agreements were proposed as a potential alternative to the registration system. The Bill includes the power to require outcome agreements, as well as the registration conditions. We would like greater clarity about the policy intent and how the outcome agreements may be applied.
- 6.13. **It is a concern that the Bill as drafted also includes a significant Henry VIII power which allows the Welsh Ministers to subsequently amend primary legislation through regulations.** This allows the Welsh Ministers to amend by regulations any enactment, including either primary or secondary legislation. As drafted, it allows not just incidental or consequential provisions but supplementary provisions to be made, and for the purpose of any provision in the Bill. The use of such clauses in legislation is highly controversial since it reduces the role of the Senedd in scrutinising changes to primary legislation, and should only be exercisable in strictly limited circumstances. We would welcome this section (s.141) being reviewed and its potential use more narrowly limited.
- 6.14. We appreciate that a balance has to be struck and that an important part of the consideration has been the need to futureproof the legislation as far as possible for future changes in a wider UK context. There are a number of UK developments that could have a significant impact on the Welsh funding and regulatory developments, including the suite of legislation announced in the Queen’s speech earlier this year and the UK Government’s anticipated reforms

to post-18 funding which is likely to necessitate a policy response from Welsh Government.

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7. Funding powers and duties

We recommend the introduction of a **balanced funding duty, possibly paired with duties on transparent funding decisions.**

This will help address a key challenge for the Commission which will be how to allocate funding across the full scope of its activities in line with policy intent rather than being driven by statutory requirements.

- 7.1. A key challenge for the Commission will be balancing the competing demands upon its resources to ensure that the wide benefits of tertiary education and research, including the role of research and innovation, are secure.
- 7.2. We understand that the Welsh Government is investigating a number of potential options to address this which may include the introduction of a **balanced funding principle**, possibly paired with a duty on transparent funding decisions. We would strongly support general duties in relation to these and would be happy to work with the Welsh Government on potential amendments accordingly.
- 7.3. There is already precedent for a ‘balanced funding principle’ in higher education legislation elsewhere in the UK. This could perhaps suggest a form of wording along the lines that the Welsh Ministers and Commission must ensure a reasonable balance is achieved in the allocation of funding as between the Commission’s different functions, including the funding of further education and training, higher education, and research and innovation .
- 7.4. More broadly, the funding powers and duties in the Bill in relation to higher education are largely intended to mirror existing legislation, which we welcome.
- 7.5. But by comparison, the drafting is far more complex than in existing legislation, which increases the risk of unintended consequences. The Commission has six separate powers which could be used to fund activities in universities, for instance, each with different purposes and with different rules.
- 7.6. In general, these powers could benefit from further review to ensure they work together coherently and that there are no significant gaps, overlaps or inconsistencies.

- 7.7. It is hard to see where funding for civic mission related activities or other non-course activities such as well-being support could be funded under the powers as currently defined in relation to either higher education, which is defined narrowly in terms of higher education courses (s.85 & 86), or research and innovation (s.102).
- 7.8. There are a number of areas relating to funding powers that we feel need to be prioritised for further amendment including the extent to which the existing limitations on powers to impose terms and conditions of funding on providers have not been transferred from FHEA 1992 and the new consent requirements and arrangements in relation to passing on funding to collaborative bodies.
- 7.9. In relation to the **limitations on the powers of the Commission and the Welsh Ministers to impose terms and conditions of funding**, the Welsh Government has previously expressed an intention to maintain existing academic freedom and autonomy protections from the Further and Higher Education Act 1992. These have long served as cornerstones for protection of the institutional autonomy and academic freedom of universities across the UK and continue to apply in legislation that has succeeded it in all other parts of the UK.
- 7.10. However, there remain some concerning gaps in the limitations as transferred to this Bill. We understand the gaps are unintended (with the exception of the changes in relation to the Welsh Ministers powers to specify particular courses or areas of research in its terms and conditions) but no changes have been made since the Draft Bill despite our detailed evidence on where the gaps are. It does not appear that these are fully covered by the extension of the general duties in relation to compatibility with charity law and academic freedom.
- 7.11. In relation to the Commission's funding powers, for instance:
- When funding research and innovation or apprenticeships it is not clear why the Commission, unlike HEFCW, will not be under a duty to consult with universities on funding policy changes. All funding powers should be subject to this requirement as a matter of prudent and responsible practice in our view.
 - It is not clear why the Commission is obliged to have regard to the 'distinctive characteristics' of providers when funding under some headings

but not others - such as when funding research and innovation. HEFCW's duty under FHEA 1992 to have regard to the distinctive characteristics and denominational character' of universities was included to ensure that a diversity of different missions could be pursued within the sector. Diversity within the sector is every bit as important for a healthy and thriving education system in the 21st century as it was in 1992, if not more so.

- 7.12. We see it as essential that the existing limitations on the funding powers are retained, and that the Bill is amended accordingly.
- 7.13. Similarly, we would like to see further amendment in relation to the Welsh Ministers' funding powers. There are currently no limitations on their powers to fund universities directly at all, despite the expansion of their direct funding powers (e.g. in relation to Welsh Medium provision). In our view, these should be subject to the same limitations that apply to the Commission when funding providers.
- 7.14. Although most of our concerns in relation to academic freedom have now been addressed, we remain concerned that the Welsh Ministers will no longer be prohibited from specifying **particular courses and or areas of research** when setting the Commission's terms and conditions of funding. We are not convinced that a sufficient rationale has been put forward for the removal of these protections. As well as posing risks to academic freedom the use of these powers potentially undermines the Commission's strategic role.
- 7.15. A second area of key concern in relation to the funding powers is the **new consent requirement in relation to passing on funding to collaborative bodies**. It is entirely appropriate that providers be accountable for the onward use of Commission funding. We understand the rationale for the consent provision is the protection of the use public funding particularly where it is passed on to bodies that are not directly regulated by the Commission.
- 7.16. However, we are concerned that the arrangements may not be workable as they currently stand. A more limited consent requirement was introduced in England in 2017 in relation to passing on funds provided by the Office for Students (OfS) to 'qualifying connected institutions' but this only applied to teaching funds and no similar provision was made for UKRI i.e. for research and innovation. **Notably, OfS appears to have scaled back references to this requirement in its terms and conditions of funding since 2019,**

following consultation.⁸

- 7.17. We are concerned about unintended consequences arising from these provisions, particularly in the area of research and innovation where there is no equivalent provision in England. Requiring pre-approval for using research and innovation funding to collaborate with business could present a significant barrier to strengthening knowledge exchange and innovation in Wales, possibly incentivising businesses to prioritise that activity elsewhere in the UK.
- 7.18. Existing business behaviour in relation to degree apprenticeships provides an illustration of how barriers to collaboration can have unintended consequences: we are aware of a number of large employers who have moved staff to office bases in England to access degree apprenticeships there.
- 7.19. We would welcome these powers being amended (or clarified) to ensure that the Commission is not required to individually agree every potential collaborative arrangement or type of collaboration. This would provide a significant barrier to collaboration and place an unmanageable and unnecessary burden on the Commission as well as providers.
- 7.20. We will follow up with the Committee on how these concerns could be addressed. We would be happy to explore a number of potential options with the Welsh Government that could make it more manageable in practice – for instance, removing the requirement in relation to research and innovation, and between registered providers (or other specified categories of provider).
- 7.21. We question, however, whether the consent requirement is needed at all in the Bill, as the Commission has sufficient flexibility to make such requirements through terms and conditions of funding in such cases as it considers appropriate.
- 7.22. The new power of the Welsh Ministers (added since the Draft Bill) to specify what matters the Commission should take into account when approving consent also seem unnecessary and would be better left to the Commission to determine.

⁸ Following consultation ([here](#)), OfS removed references to qualifying connected institutions in its terms and conditions for 2019/20 published on 29 March 2019 “as we do not believe that these are relevant for 2019-20” (p.3, [here](#)).

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8. Learner protection and engagement

We would strongly recommend **amending the provisions around Learner Protection Plans which allow the Commission to impose its own modifications without the provider's agreement.** The Commission must be able to specify requirements as a condition for approval. It should then be a matter for the governing body to determine whether to accept the modifications.

- 8.1. We strongly support the introduction of a baseline requirement for all providers, whether implemented through registration or funding terms and conditions, that will help to give greater protection for students and ensure they have adequate learner engagement arrangements in place. It is appropriate that the Commission should develop the detail of this, and that it should be in consultation with providers and students.
- 8.2. However, further work is needed to limit the exercise of the Commission's powers as drafted before we can support the provisions.
- 8.3. The Commission can approve a **learner protection plan** 'with or without modifications' (s.114 (3)), which as drafted allows the Commission to impose its own modifications without the provider's agreement. The Commission must be able to specify requirements as a condition for approval. It should be a matter for the governing body to determine whether to accept the modifications. Following this, it will be for the Commission to decide whether to approve or reject the plan. However, attempts to impose the modifications directly without the provider's consent would seemingly risk the Commission being in breach of its duty in relation to charity law, and means the legislation is relying on provisions that are unworkable. This phrase should be removed.
- 8.4. We also currently have reservations about the precise drafting of the **Learner Engagement Code**. Universities in Wales have a long and proud history of involving students individually and collectively, through groups such as students' unions, in their decision-making. This has been a valuable asset in Welsh higher education and one we are keen to retain.
- 8.5. As currently drafted, the Bill enables the Code to make different provision for different purposes including for different relevant providers or descriptions of

relevant provider. We think this is the wrong approach in principle. In line with the approach taken elsewhere in the Bill including on quality assurance and regulation, this should be amended so that the Commission takes a provision-based rather than provider-based approach. In particular, it should not enable the Commission to make provisions that only relate to specific individual providers.

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9. New Information Powers

We would welcome an amendment to the Bill to provide clarity and assurance regarding the onward use of commercially sensitive information that could be obtained through the new information powers.

The sharing of commercially sensitive information during the recruitment cycle, or financial information presented without context, could advantage or disadvantage providers in a way incompatible with competition law.

We would also ask that Section 126 be amended so that Welsh Ministers cannot require that the Commission share information that is 'obtained in the performance of any of its functions' if that information does not relate to its functions.

- 9.1. We expressed significant concerns in relation to the Draft Bill about the Welsh Ministers' new information powers, and these have not changed in the Bill as laid.
- 9.2. The Bill increases the powers of the Welsh Ministers to require information particularly at institution level. This includes requiring the Commission to provide information on the financial sustainability and position of institutions. It also includes a statutory duty for providers of admission services (eg UCAS) to provide the Welsh Ministers directly with applications and admissions data at institution level for research purposes.
- 9.3. The Welsh Ministers new information power in relation to admissions data enables the Welsh Ministers to directly obtain detailed information at provider level for research on any topic it approves. The new information power would give direct access to information that is not published or necessarily verified by the providers themselves. All such data would require careful contextualisation if it is to be interpreted without being misleading, a role for which the Commission would be better equipped.
- 9.4. The provision of information on individual institutions is commercially sensitive, The mid-cycle data has a particular commercial sensitivity and implications for competition law, where the release of information could still affect ongoing recruitment and the institution's financial position.
- 9.5. We would welcome an amendment to the Bill to provide clarity and assurance

regarding the onward use of commercially sensitive information that could be obtained through the new information powers.

- 9.6. A further issue with this is that the Welsh Ministers can require from the Commission any information that relates to its functions or 'obtained in the performance of its functions', and in turn the Commission can require it from institutions. In other words, even information shared by institutions voluntarily and in confidence would have to be passed on to the Welsh Ministers if required.
- 9.7. The Draft Bill provides no safeguards for the onward use of information provided either to the Commission, or by the Commission to the Welsh Ministers. It is also likely to discourage the free sharing of information with the Commission, which is essential to a successful relationship with providers.
- 9.8. The Charity Commission's guidance also indicates that as one of the criteria for charity status, they would expect that charities to not agree to conditions that undermine the confidentiality of their discussions (Guidance RR7 para 8).
- 9.9. We would ask that Section 126 be amended so that Welsh Ministers cannot require the Commission to share information that is 'obtained in the performance of any of its functions' if that information does not relate to its functions.
- 9.10. As above, we would welcome a clear statement and clarification on how data obtained through these powers would be used.

10. Independence and operation of the Commission.

A key concern for us are the new provisions in the Bill as laid for Welsh Ministers to give **general directions**. Unlike the current powers to give directions, the new power would not require Ministers to give direction by statutory instrument meaning there would be no role for the Senedd in the scrutiny of the directions.

We would strongly recommend these provisions be amended to require such directions to be made by statutory instrument only. This would bring the provisions in line with existing legislation as well as with arrangements elsewhere in the UK.

- 10.1. It is vital that the Welsh Government succeeds in its intention to create a strong and independent body that is able to command the confidence of its stakeholders and that has the necessary resource, flexibility and authority to support higher education in Wales in the face of a highly competitive and rapidly developing wider UK and global economy.
- 10.2. In our response to the Draft Bill we outlined several aspects that appeared to potentially compromise the independent operation of the Commission and its potential effectiveness. In particular, the retained powers concurrently exercisable by the Welsh Ministers in relation to FE and HE risk undermining the independence and authority of the Commission. Similarly, the new powers to directly fund higher education are more likely in our view to undermine the operation of the Commission than to support it.
- 10.3. More generally, the extent to which the Welsh Ministers may intervene in the operation of the Commission and the potential to prescribe the detail of how it should regulate remains a concern.
- 10.4. A key concern for us are the new provisions in the Bill as laid to give **general directions** to the Commission, as drafted. Unlike its equivalent in FHEA 1992, the directions are not made by order (ie by statutory instrument following due legislative process) and the procedure which replaces it allows for a much more routine level of intervention that does not have benefit of Senedd scrutiny. We would strongly recommend these provisions be amended to require such directions to be made by order only. This would bring the provisions in line with

existing legislation as well as with arrangements elsewhere in the UK.

- 10.5. Similarly, we are concerned about the provisions for the Welsh Ministers to be able to **modify the Commission's strategy without its consent**, as drafted. This remains an issue as it also affects the ability of the Welsh Ministers to specify courses and areas of research in their terms and conditions of funding for the Commission (see paragraph 7, above).

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11. Financial implications

- 11.1. We are clear that that the additional cost of implementing this Bill and, in particular, the costs of establishing the new Commission will be considerable. We fully support the Welsh Government's commitment to making this level of additional investment in post-compulsory education and training in Wales given its critical role to the long-term economic and social prosperity of Wales..
- 11.2. However, we are concerned about the resource assumptions for the Commission and how well it would work in practice at meeting the Welsh Government's objectives without significant further investment.
- 11.3. The Explanatory Memorandum (p.93ff) estimates the additional costs of the Commission at £45 million over the ten year period, including £10m in transition costs most of which is related to IT costs. The additional costs otherwise relate primarily to staff retained by the Welsh Government (presumably to exercise its retained parallel functions and oversight of the Commission). It will have a recurrent additional cost of about £5m per year – including an additional £1m due to potentially changes in VAT status (Table A, p.208).
- 11.4. The cost estimates appear to be slightly lower than the estimates presented in the Draft Bill. However, there have been some significant extensions to the Commissions' duties since the Draft Bill including its duty to secure proper facilities for further education and training for eligible persons over the age of 19 (s.91), and powers to provide funding for innovative activities in maintained schools (s.94), and new strategic duties.
- 11.5. In light of these costings, we remain very mindful of the clear lessons to be heeded from the independent reviews on ELWa, the Welsh Government's previous attempt to bring the further and higher education sectors together under a single funding body. For the Commission to realise its potential benefits and function correctly, Welsh Government must be prepared to make a considerable additional investment on top of the simple restructuring of existing resources.⁹

⁹ See the Rawlings Report and Peat Report (2002) whose recommendations were accepted by the Welsh Government.

- 11.6. There has been no attempt to quantify costs for stakeholders including universities. Universities Wales' evidence to the CYPEC committee on the implementation of HE(W)A 2015 pointed to very significant costs to universities arising from dealing with the legislation and implementing the new regulatory regime¹⁰.
- 11.7. On best estimate, the implementation costs associated with that Act amounted to around £5m and additional ongoing costs of around £0.6m for universities. Much of the ongoing additional costs were specifically associated with the Fee and Access Plans, the precursor to Access and Opportunity Plans, which we note are no longer included in this Bill. However, as noted above, there remains very considerable potential for the statutory requirements and regulatory burden to increase significantly.
- 11.8. Even more significant than the direct costs in relation to HE(W)A 2015, however, were the opportunity costs arising from the diversion of time and resource. We can expect a similar cost for universities in seeking to implement the new Bill, and there is a very real risk in the current position that this could divert universities' full attention away from recovery from the pandemic.
- 11.9. There are perhaps further opportunities in particular to reduce some of the additional costs and difficulties of implementation by using existing infrastructure in HEFCW and we would encourage that this be factored into implementation arrangements.

¹⁰ Universities Wales evidence to CYPEC's Post-legislative scrutiny of the Higher Education (Wales) Act 2015, HEA05, 2019, [here](#).

12. Timescales and implementation.

- 12.1. The timescales for implementation of the Commission also remain a concern and appear to be particularly challenging. The Welsh Government is still currently working towards launching the new Commission in 2023, with arrangements phased in under transitional provisions.
- 12.2. The Welsh Government's costings accompanying the Bill (Explanatory Memorandum, p.210) currently assume that the interim CEO will be in post from February 2022 (i.e. before even Stage 1 of the Bill has been completed) and that an Advisory Committee will be appointed initially to take forward the appointment of the CEO and transition arrangements until the legislation allows the appointment of a Chair (commencing from 1 January 2023) and remaining Board members (from March 2023).
- 12.3. The lack of detail on many of the key features of the new regulatory arrangements as noted above exacerbates the issue. Our evidence to the CYPE Committee's inquiry on implementing the Higher Education (Wales) Act 2015 attests to the very considerable amount of time and resource required to deal with implementing regulations and arrangements and making sure they were fit for purpose. The time and costs – particularly the opportunity costs – were significantly underestimated at the time.
- 12.4. The lessons from the reviews of ELWa clearly point to the risks of underestimating the time and resource required to merge bodies together, with their differing systems, and to make them work.

13. UK Internal Market Act 2020.

13.1. We are very pleased to note that the Committee is explicitly looking at the potential complications arising from the UK Internal Market Act 2020 in relation to this Bill. **It is not yet** clear how far the Bill's provisions are fully compatible with it.

13.2. The first issue is that it is not clear how far the UK Internal Market Act 2020 applies to universities. Universities are excluded only in so far as they perform 'functions of a public nature', but the meaning of this phrase and what functions it covers in relation to universities is uncertain. The UK Government confirmed during the passage of the Bill that it was their intention to exclude tuition fees but that it was not clear how university services more generally would interact with the Act and this may need to be clarified in subsequent regulations (Letter to Lord Purvis, 2nd November 2020, [here](#)).

13.3. What is clear is that regulatory requirements already in force are not affected by the Act, so existing arrangements for universities in Wales remain unaffected for the moment, but any substantive change to them will mean that the Internal Market Act applies.

13.4. The application of the Act to the Bill is legally complex and we are still working through the potential ways the Bill could be affected. In relation to the Draft Bill, however, we have previously drawn attention to a number of areas that may need to be investigated further for potential conflict. None of these appear to have changed in the Bill as laid:

- The Bill relies on applying regulatory requirements to providers based in Wales only, not to providers from other parts of the UK, which means that it has the potential to be directly discriminatory for purposes of IMA 2020
- The regulatory requirements in the Bill are seemingly not confined to regulating the exercise of functions 'of a public nature' for purposes of IMA 2020 on our current best interpretation and it is difficult to see how we could be confident that the regulation only applies to functions of a public nature until IMA's application to universities has been clarified as indicated by the UK Government.

- For instance, differences in constitutional requirements and new information powers are not confined to ‘public functions’ only.
- The regulation of courses applies to all courses, irrespective of whether they are publicly funded or not.
- The Welsh Ministers and, in certain instances, the Commission can impose terms and conditions of funding which are not related to the use of public funds.
- In the Bill, both the Commission and the Welsh Government have powers to set registration conditions that do not relate specifically to public functions.

13.5. The outcome of the legal challenge to the Act in relation to Wales is also as yet not certain, which presents a further timing issue for this Bill. We understand that the hearing for the Welsh Government’s appeal against the Administrative Court’s refusal to grant permission for judicial review of the Act is to take place in January 2022. This may mean a decision before the end of Stage 1 is reached. However, we remain concerned to avoid higher education becoming the test case in this area.

14. Other UK developments and post-18 reforms

14.1. The UK Government has consistently outlined its intention to announce a series of potentially major post-18 education reforms in England in response to the Augar Review relating to fees, funding and student support measures in England which may need to be taken into account in further developing the Bill. For example, because there is a significant cross-border flow of students between England and Wales, changes to the English system will likely require a policy response from Wales.

14.2. In the meantime, there is a suite of legislation introduced following the Queen’s speech in May 2021 such as the Skills and Post-16 Education Bill and the Freedom of Speech Bill which the Welsh Government recognise may impact on the TER(W) Bill. Some of the legislation, such as the Charities Bill, as well as proposals on audit and corporate governance, applies directly to higher education in Wales; other legislation, such as Advanced Research and Invention Agency Bill, applies to UK infrastructure.

- 14.3. The Counsel General, in announcing the Welsh Government's legislative programme on 6th July 2021 ([here](#)), highlighted in particular that the Skills and Post-16 Education Bill and the procurement Bill 'clearly overlap' with the Welsh Government proposals.
- 14.4. We welcome the flexibility of the Bill to deal with potential changes, but we would welcome further information on how the Welsh Government has prepared for further UK developments in relation to the Bill. We would advocate avoiding relying too heavily on powers to determine aspects of the regulatory system without the full scrutiny of primary legislation.

About Universities Wales

Universities Wales represents the interests of universities in Wales and is a National Council of Universities UK. Universities Wales' Governing Council consists of the Vice-Chancellors of all the universities in Wales and the Director of the Open University in Wales. Our mission is to support a university education system which transforms lives through the work Welsh universities do with the people and places of Wales and the wider world.

About the Chairs of Universities Wales

The Chairs of Universities Wales (ChUW) is the representative body for the Chairs of the governing bodies of the universities in Wales. It provides a forum for Chairs to consider and formulate a collective view on key matters that fall within the purview of their governing bodies and underpin the effective operation of the universities and of the Welsh higher education sector as a whole for the benefit of Wales and its people.

Universities Wales and the Chairs of Universities Wales

17 December 2021