

# **Universities Wales and Chairs of Universities Wales joint response to the Welsh Government’s consultation on the Regulation of Higher Education Providers in Wales**

## **About this response**

The following response is the joint submission of Universities Wales and the Chairs of Universities Wales.

Universities Wales represents the interests of universities in Wales. Our membership encompasses the Vice Chancellors of all the universities in Wales and 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.

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.

### **.Summary**

1. How the registration categories will work will depend on further regulations and decisions to be taken by the Commission. We would welcome further information and discussion on how the proposed categories are intended to work, and how these are intended to be applied or further developed.
2. We appreciate that the Commission will be able to set different registration conditions for different descriptions of provider within a category. However, applying substantially different requirements for different types of provider within a category, could potentially defeat the purpose of having distinct registration categories or lead to unfairness. It will be essential to ensure the same high standards of education quality as are currently required to access funding are clearly seen to be maintained.
3. We support the principle that the regulations should make sure the register includes all information required to ensure a provider meets its minimum statutory requirements for eligibility, including being a “tertiary education provider in Wales”. We recommend this includes “institution” status and “main location of activities”.
4. The information requirements and definitions relating to collaborative provision in the draft regulations could perhaps also benefit from further discussion. This was one of the most challenging areas in implementing the 2015 Act. The 2022 Act itself does not refer to or use the term ‘franchise arrangements’ and it is not clear that the definition as proposed in the regulations will work exactly as intended.

5. The proposed new registration condition relating to prospective student information, could potentially have additional resource costs for the Commission, not covered by current budgets. Given the potential for overlap with the role of the CMA and the existing duties on providers to comply with consumer law, we would welcome further discussion on how this could be made to work in ways that provide additional benefit and protection for students within the resources available to the Commission.
6. We agree that six years is an appropriate interval for assessing quality but recommend that the regulations impose a duty to set quality assess periodically, while leaving the period itself to be determined by the Commission.

## Introduction

1. We welcome the Welsh Government's publication of draft regulations relating to implementation of the Tertiary Education and Research (Wales) Act 2022 (including draft regulations relating to registration, decision review and designation of providers), and offer the following comments in response to the consultation.

## Consultation questions

### Registration categories and conditions

*Question 1 – We have provisionally entitled the registration categories as “Higher Education Core” and “Higher Education Alternative”. Do you agree with these titles, or do you have alternative suggestions?*

2. We agree that the titles are appropriate in so far as the categories are currently proposed. However, there are more important matters that merit comment.
3. The Welsh Government provided a brief outline of its intended registration categories in its statement of intent, accompanying the Bill as introduced, which the current proposals are consistent with, but this is the first formal opportunity to engage in a more detailed discussion of this critical aspect of the new system.
4. We note that many of the essential features are left to be determined by the Commission or implemented through regulations stemming from other legislation – such as the student support regulations. While we agree with this as a general approach, it is difficult to be confident that these are the right categories and advise on the right package of benefits and regulatory requirements at this stage without a clearer picture of the intended direction. We would welcome further information on how the proposed categories are intended to work, and how these are intended to be applied or further developed as basis for further discussion before the regulations are finalised.
5. For universities, registration in the proposed HE core category would mean funding, student support, fee limit arrangements that largely mirror existing arrangements for regulated institutions with an approved fee and access plan under the 2015 legislation. The regulatory arrangements are also similar on the face of the

legislation but there is likely to be more significant change in practice as the detail is developed.

6. However, for other institutions the changes are more significant, and we would like to better understand current expectations and how the changes could impact on the resources and operation of the Commission, particularly given the current budget pressures facing the Welsh Government. For instance:
  - The proposed changes, including wider eligibility for registration, could potentially lead to greater demand and increased pressure on existing budgets.
  - The HE Alternative category as proposed would enable HE providers in Wales who are not charities to gain automatic designation for student support for the first time (albeit support at the lower level).
7. The wider range of different types of provider within a category could also present challenges in terms of setting appropriate regulatory requirements that fit all providers within a category.
8. We would want to ensure, for instance, that the same high standards of education quality that are currently required to access higher education and research funding are clearly seen to be maintained in the HE Core category. Notably, under the current system, higher education providers who are not higher education corporations must have university title - which in turn means they have to have degree awarding powers and have gone through a rigorous application process.
9. Under the new system, the Commission will be able to set different registration conditions for different descriptions of provider within a category. However, applying substantially different requirements for different types of provider within a category, could potentially defeat the purpose of having distinct registration categories or lead to arrangements that are neither proportionate nor consistent.
10. We would like to develop a better shared understanding of the principles on which the differences in regulatory requirements between and within registration categories will be further developed. In particular, how the Commission interprets its duty under the 2022 Act to ensure that the conditions it imposes are 'proportionate' to its 'assessment of the risks posed' will be key. The corresponding legislation in England is clearer: the conditions imposed should be proportionate to the risks posed by an institution that it will not meet the regulatory requirements. In short, the greater the risk to the student or public finance, the greater the regulatory requirements should be.
11. Our view is that this legislation presents a great opportunity to reshape current regulatory arrangements to focus more on the risks of undertaking education with a provider from a student's perspective. It will be essential, in particular, to ensure that new regulatory requirements reflect any increased risks to students that any potential expansion through new categories and types of providers may create.
12. At the same time, one of the key opportunities of the new legislation is the potential to reduce some of the unnecessary administrative burdens that hinder the institutions in focussing their resources on their education and research.

## Register information

*Question 2 – Do you agree with the suggested information that must be contained within a provider’s entry in the register? Is there any proposed content that should be added or removed from the regulations?*

13. We agree with the Welsh Government’s approach to set out the minimum register requirements in the regulations, enabling the Commission to determine further information requirements as needed.
14. In this light, we agree that the regulations should ensure the register contains all necessary information to confirm that the provider meets the statutory requirement of being a “Tertiary Education Provider in Wales”. The 2022 Act further defines this as an institution providing tertiary education, including tertiary education provided on its behalf, whose activities are wholly or mainly carried on in Wales. In this light, we recommend the further inclusion of:
  - “Main location of activities”, in line with the wording of the statutory test as to whether the provider is “in Wales” or not.
  - “Institution” status (and whether or not designated as one by the Welsh Government under the Designation regulations).
15. We note that if a provider’s status as a “tertiary education provider in Wales” and/or its constituent elements are explicitly included in the register, this would ensure that any change which affected this status would be notifiable to the Commission (under s.31(1)(f) of the 2022 Act).
16. In particular, the wording of the information requirements for collaborative provision in the draft regulations could perhaps benefit from further discussion to ensure the provisions work as intended. From experience, the definitions and provisions relating to collaborative arrangements as drafted in the 2015 Act were among the most challenging to interpret and implement.
17. It will be important that the register clearly identifies where another provider is providing education on the registered provider’s behalf, as the other provider will not need to register. According to the consultation commentary, an institution that delivers courses on behalf of a registered provider under ‘franchise arrangements’ would not have to register, as it is the “organisation with overall responsibility for the course” that would need to register.
18. The 2022 Act does not refer to or use the term ‘franchise arrangements’, however. The 2022 Act imposes registration conditions in relation to education that a provider provides or ‘has provided on its behalf’. It also imposes an initial (and ongoing) registration condition that where a provider has ‘validation arrangements’ that these are effective. “Validation arrangements” includes “arrangements between an applicant tertiary education provider and another education provider under which the applicant tertiary education provider awards a qualification to a student at the other provider or authorises the other provider to award a qualification on its behalf”.

19. The term ‘Franchise arrangements’ is only used in the proposed regulations and covers two situations: “arrangements between a registered provider and another education provider under which the registered provider provides higher education to a student on behalf of the other provider or authorises the other provider to provide higher education to a student on its behalf”.
20. It is not fully clear that this definition of ‘franchise arrangements’ covers exactly the same as the definitions in the Act i.e. ‘education provided by the provider or on its behalf’ (e.g. what constitutes ‘authorisation’ for this purpose?) or leaves a clear distinction between ‘franchise’ and ‘validation arrangements’. ‘Franchise arrangements’ as defined in the proposed regulations would seem to include situations where the applicant/registered provider provides the education but the other provider awards the qualifications, i.e. under validation arrangements.
21. The regulations do not attempt to clarify further what is meant by ‘providing education’. Does this simply mean ‘teaching’, or depend on who has “overall responsibility for a course” as suggested by the consultation commentary? If the latter, what is that based on - contractual/legal obligations to the students, registration arrangements, or data return rules etc?
22. Given the potential complexities of collaborative provision, it may be better to use a definition that more closely/obviously matches the parent legislation i.e. ‘education provided by another provider on its behalf’ and leave CTER the flexibility to work through the definitions further.
23. Otherwise, the proposed information requirements appear largely unproblematic, but it may still be better to leave them to the Commission to determine rather than to set them down in regulations. We note that the proposed list is largely based on the suggested information requirements in the Welsh Government’s guidance for assessing fee and access plan applications. The actual information that HEFCW requires, however, is necessarily more detailed and nuanced in many places.<sup>1</sup>
24. Potential information to consider further down the line could also include for instance:
- The ‘Legal’ name, details of previous names/name changes,
  - company type/legal form of constitution? e.g. Royal Charter, HEC etc (cf. Companies register)?
  - Corporate/group structures?
  - Registration conditions applicable and any specific conditions of registration imposed
  - HESA and UCAS provider reference numbers
  - Governing documents and details of governing body
25. As the Welsh register develops it has the potential to play an increasingly useful role for key stakeholders including prospective students (particularly international

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<sup>1</sup> See HEFCW W22/19HE: 2023/24 Fee and access plan application guidance, [here](#).

students), graduates and employers. We note that the OfS register in England includes additional information in a number of respects. Pragmatically, however, we agree that at this stage we should concentrate on the regulatory essentials.

## Registration conditions

*Question 3 – Do you agree with the inclusion of the two proposed further initial conditions in the regulations?*

26. We agree that **charity status** should be an initial/ongoing condition to access to higher levels of student support and funding (i.e. for registration in the HE core category). For higher and further education this effectively mirrors the current position in Wales. Providers who are not charities would now potentially get automatic course designation for student support (at the lower level) which in theory could mean increased risks for students and in terms of value for money for public investment in student loans. However, we are satisfied that CTER has sufficient flexibility to ensure that the regulatory requirements for the alternative category are appropriate and proportionate, and we will look forward to working with them further on the detail of how the categories would operate in practice.
27. The further initial condition relating to **information for prospective students** is less straightforward, although we support the intention to increase the safeguards for prospective students applying to university.
28. The new requirement could have additional resource costs for the Commission, not covered by current budgets. Given the potential for overlap with the role of the CMA and the existing duties on providers to comply with consumer law, we would welcome further discussion on how this could be made to work in ways that provide additional benefit and protection for students within the resources available to the Commission.
29. We would also not wish the Commission to put itself in a position that encourages potential litigation against it if expectations are unrealistic or failed (though the Act does not explicitly create a statutory tort). It may be better to introduce this condition at a later stage/in future regulations, after working through these issues with the Commission in more detail, and when the detail of any conditions relating to student complaints procedures and coverage of the OIA's independent complaint scheme are also worked through.

*Question 4 – Are there any other further initial conditions that you think should be included in the regulations?*

30. No. We agree that it would be better to leave the Commission with the flexibility to determine any further conditions.

**Question 5** – *Do you agree with the further mandatory ongoing conditions proposed for inclusion in the regulations?*

31. We agree that the regulations should ensure that registered providers notify the Commission of any changes that could mean they no longer meet the statutory requirements to register. This includes their status as a 'TEP in Wales', which in turn requires that the providers are 'institutions'.
32. We note, however, that this new condition is not needed if the statutory register information requirements cover this in the first place, as any change would be notifiable under s.31(1)(f) of the Act.
33. It may be preferable to ensure that the statutory information requirements are revised to cover this fully, as we recommend above, rather than to introduce a separate condition.

**Question 6** – *Are there any other mandatory ongoing conditions that you think should be included in the regulations?*

34. No. In general, we support the approach that the Commission should determine further conditions and details, rather than those being set out in regulations, and it would be better to work with the Commission in identifying any additional needs when up and running fully.

## Decision Review

**Question 7** – *Do you agree with the arrangements proposed for decision reviews?*

35. Yes. These are closely modelled on arrangements for regulated institutions under the existing legislation<sup>2</sup> and we are content with the changes in so far as they have been made.
36. The one exception is that it may be helpful to review Reg 9 (Commission's duties after a review). The Commission has a duty to reconsider its decision if recommended to do so, but not a duty to take the recommendations and or findings into account unlike the corresponding 2015 regulations (Reg 10). Adding an explicit duty to take the recommendations into account in line with existing regulations would seem appropriate.

**Question 8** – *Are there any matters other than those listed that the Commission should be enabled to enforce in the event that a provider is de-registered?*

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<sup>2</sup> 2015 No. 1485 (W. 164) The Higher Education (Fee and Access Plans) (Notices and Directions) (Wales) Regulations 2015

37. We have not identified any at this stage.

## Quality assurance arrangements

*Question 9 - Do you agree with the principle of making regulations requiring that higher education must be quality assessed at least every six years to align with the statutory requirements for other parts of the post 16 sector and HEFCW's current practice set out in its quality assessment framework?*

38. We recommend that the regulations impose a duty to set quality assess periodically, but that the period itself should be determined by the Commission.

39. We agree that six years is an appropriate interval and is consistent with HEFCW's current Quality Assurance Framework, and also with Estyn's usual cycle of inspections in other parts of the post-compulsory education sector. However, the periods are not currently fixed in legislation (in either Wales or the rest of the UK) and we think that it is important to ensure the Commission has flexibility in implementation to adapt to changing circumstances as required – particularly given the increasingly divergent approaches in England and Wales.

## Impact assessment

*Question 10 – Do you anticipate any resource implications for your organisation arising from the regulations or registration system?*

40. It is very difficult to assess the impact at this stage since so many of the important details are left to the Commission to determine or future regulations.

41. We expect the implementation of the registration system to involve significant costs for universities in terms of both time and resources – particularly for senior management and for key stakeholder groups such as planners, finance directors and learning & teaching network – and high opportunity costs as a result.

42. Our estimate of the implementation costs of the HE(W)A 2015 for instance, as detailed in our response to Children, Young People and Education Committee's Post-legislative scrutiny of the Higher Education (Wales) Act 2015 in May 2019, was around £4.03m for universities up to 2018/19, with ongoing costs of around £0.53m (particularly associated with the fee and access plan arrangements). Perhaps the most significant cost, however, was the opportunity costs to universities which we estimated to be in the region of £11m.

43. Our analysis reflected very considerable costs relating to engagement with the consultations and development of the new policies, rules and guidance. This included the legislation, regulations pursuant to the Act, commencement orders, corresponding student support regulations (and consequential changes in other legislation), the different tranches of statutory guidance issued by the Welsh Government, guidance developed by HEFCW, revisions to the codes relating to

financial arrangements intervention, and related consultations on specific course designation.

44. A very significant amount of time and resource in implementing the 2015 Act was also spent on developing interim and transitional arrangements as well as final arrangements, which we hope the recent decisions on timetabling will help to minimise the costs of transition in implementing the 2022 legislation.
45. In addition, there are a number of potential ways in which the proposals set out in this consultation and partially implemented through the draft regulations could have significant resource implications for universities in terms of grant funding that will need to be carefully managed.
46. For instance, due to the regulatory changes there would be a potential increase in demand for certain Commission funding streams.
47. During the passage of the Bill, we also drew attention to the risks that the many different statutory duties would present to the Commission in calls for its budget, and the need to ensure an appropriate balance of funding.

**Question 11** – *Do you have any evidence which we could use to help us assess the costs and benefits of implementing the proposed registration system?*

**Question 12** – *Apart from HE providers and the Commission, are any other stakeholders likely to face costs arising from the registration system, either directly or indirectly? If yes please provide details of the stakeholders in the supporting comments.*

**Question 13** – *Do you think any of the proposals in this consultation could impact (positively or negatively) on any persons with protected characteristics covered by the general equality duty that is set out in the Equality Act 2010? If so, how could positive impacts be increased, or negative impacts be mitigated?*

We note that Equality Act 2010 duties currently apply to institutions who are considered to be within the higher and further education sectors in Wales as defined by the FHEA 1992 (for the purposes of the education acts generally). When the relevant provisions of the TER(W)A 2022 are commenced, the meaning of ‘higher education sector’ will be extended to also include: “tertiary education providers registered in a category specified by the Welsh Ministers, other than providers that are also institutions within the further education sector or schools” for purposes of the FHEA 1992.<sup>3</sup>

At the moment we do not know which registration category (or categories) the Welsh Government intends to specify as within the higher education sector. We presume this

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<sup>3</sup> See the prospective provision in TER(W)A 2022, Schedule 19 para 23 amending s.91 FHEA 1992. At the moment the proposal is to limit registration to HE providers so the definition of HE sector in FHEA 1992 would only include HE providers.

will be specified through separate regulations, and would welcome the opportunity for further discussion of the potential impacts.

The 2022 Act will mean that other types of HE provider who register in the specified category will now also be subject to the specific provisions for FE & HE (ss.90-94) and the public sector equality duty (s.149) in the Equality Act 2010 as well. Where that is the case, we think this could have a very positive impact for persons with protected characteristics who undertake their study at those institutions.

If the HE alternative category providers are not specified as within the HE sector, however, some but not other HE providers in that category could be subject to the equality duties of the Act. It may be worth considering alternative ways to ensure equality for persons with protected characteristics as part of the base-line requirements for all HE providers who register in the alternative category to access automatic course designation for student support.

Either way, it will be very important to ensure that the definition of the HE sector for purposes of the FHEA 1992 continues to work as intended across all the education acts and legislation which refer to it, and we note that England only includes its 'Approved fee cap' providers in its definition of HE sector accordingly.

**Question 14** - *Is there scope for any of the proposals in this consultation to promote equality of opportunity and foster good relations between people who share a relevant protected characteristic and those who do not?*

There are likely to be significant opportunities to strengthen protections for students and promote equality of opportunity for students when the 2022 Act is fully implemented, including through the development and use of learner protection plans and the learner engagement code. It will be important, however, that these regulations leave as much flexibility to the Commission as possible to implement.

**Question 15** - *Are there likely to be any negative impacts arising from the regulations on particular groups of people or particular places? If so, how could positive impacts be increased, or negative impacts be mitigated?*

**Question 16** - *We would like to know your views on the effects that establishing the register of tertiary education providers would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English. What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?*

**Question 17** - *Please also explain how you believe the proposed approach to regulations for establishing the register of tertiary education providers could be formulated or changed so as to have positive effects or increased positive effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language, and no adverse effects on opportunities for people to use the Welsh language and on treating the Welsh language no less favourably than the English language.*

48. We have no specific comments in relation to Questions 11 to 17 to offer at this stage, but will be happy to work with the Commission to monitor and address any issues.

*Question 18– We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.*

49. There are a number of matters the consultation does not have specific questions on that which it may be worth commenting on.

#### **50. Regulations on the designation of providers of HE**

51. This largely replicates the corresponding provision in HEWA 2015 and related regulations. As the consultation notes, the existing designation regulations have not been used – and it has always been hard to imagine situations where this kind of mechanism would be needed under the existing legislation, not least because all regulated institutions have to be charities, and that means they are all defined as institutions for purposes of charity law.

52. However, it is easier to envisage situations under the new legislation where status as an ‘institution’ could be less clear. The designation now covers applications from any tertiary education provider, not just a higher education provider. The new Act also covers a registered provider’s education provided at any location, not just higher education provided in Wales (a limitation of the current act). The ‘HE alternative’ category, if implemented as proposed, will enable non-charitable providers to register, which could embrace a wider range of persons or types of organisation.

53. The legislation does not attempt to define an ‘institution’. Instead, it puts in place a mechanism which allows the Welsh Ministers to decide whether a provider is an ‘institution’ for purposes of TER(W)A on application. It is not clear why this decision is the Welsh Ministers’ and not the Commission’s – particularly as the Commission is otherwise responsible for determining whether a provider is a ‘tertiary education provider in Wales’ or not.

54. To avoid this process being purely arbitrary, it is recommended that the regulations provide that the Welsh Ministers should develop and publish clearer guidance, which it should revise as required to reflect any determinations made on a case-by-case basis.

55. We note that the regulations explicitly provide that removal of designation as an institution, once granted, does not result in the removal of a provider from the register – even though it means the provider would no longer qualify as ‘tertiary education provider in Wales’. On the face of it, we would see a case for protect providers from changes in designation policy, but if the status of the provider has materially changed it is more difficult to see why it should remain registered. We would welcome further information and discussion on the types of provider that

might require designation in future, so we can better understand the risks that this could create.

#### **56. Official Statistics (Wales) (Amendment) Order 2024**

57. We note that this Order has been laid before the Senedd for approval, currently scheduled for Plenary on 20 February 2024. Given that the affirmative procedure is reserved for more significant regulations, we would have expected this to have been included in the current consultation or separately consulted on. We would welcome further discussion of the potential implications given that HEFCW is not currently specified as a body that produces official statistics and this could have implications for its workload and pre-release arrangements, particularly if the Commission will be expected to produce 'national statistics' to which an additional set of requirements will apply. It will mean the UK Statistics Authority will have additional powers request and obtain information as part of its oversight role, that may also apply to providers who are public authorities.