



1. Introduction

- 1.1. This document provides some early provisional comments on the Tertiary Education and Research (Wales) Bill as laid on 1 November 2021. The Bill will establish the Commission for Tertiary Education and Research (CTER), as an independent funding and regulatory body responsible for the oversight of tertiary education and research in Wales. The Commission will replace HEFCW, which will be dissolved, and take on a number of functions of the Welsh government in relation to tertiary education.
- 1.2. Committee members will appreciate that further work is required on a range of areas to understand the scope and likely impact of the provisions and reach a collective view. We have provided this interim submission at the request of the committee but will provide a formal response by the committee's consultation deadline of 17 December 2021.
- 1.3. With the above caveats, the following provides a brief outline of our provisional views on the Bill and the key areas of present concern or investigation, ahead of our full response to the Committee's consultation.

2. Summary

- 2.1. Universities Wales has consistently supported the Welsh Government's intention to build on the strengths of the current higher education and post-compulsory education systems in Wales. For Wales' future prosperity, 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.
- 2.2. We are pleased that significant progress has been made since the consultation on the Draft Bill. The Bill as introduced includes a range of amendments in response to our previous representations to government which go some way to meaningfully address the concerns we expressed in our response to the consultation on the Draft Bill (see [here](#)).

- 2.3. 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 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.
- 2.4. Inevitably, however, there are a number of 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.
- 2.5. Many of our concerns are around the extent to which the Commission is empowered to act at an arm's length of government, a necessity for an effective arm's length body. Similarly, although there has been progress in ensuring the existing protections around academic freedom, charity status and institutional autonomy are maintained, there remain gaps in the Bill as laid.
- 2.6. Our initial appraisal of the Bill has highlighted some key areas that we would want to be addressed including:
- **Further exploration of how the detail on registration and regulation will be managed.** This includes the Commission's powers to impose specific conditions for individual institutions ([point 5 in this document](#)).
 - The need for a **general duty in relation to institutional autonomy** and related amendments which reflects existing protections ([point 6](#)). **This is a fundamental ask** which would ensure existing protections are maintained and also would help mitigate a number of separate concerns.
 - How to ensure **balanced funding and transparent funding decisions** ([point 9](#)).
 - The retained and strengthened powers in relation to **Higher Education**

Corporations which only apply to a small number of institutions and are not in line with the Law Commission's recommendation. We feel the purpose and rationale of retaining and strengthening this power is not clear ([point 7](#)).

2.7. 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**, some of which would be addressed through a general duty in relation to institutional autonomy above ([point 9](#)).
- **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 ([point 13](#)).
- Power for Ministers to **modify the Commission's strategic plan**.
- Questions around **information powers** ([point 12](#)).

2.8. While we welcome the flexibility of the Bill to deal with potential changes, it would be useful to have 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.

2.9. The timescales for implementation of the Commission also remain a very 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.

3. The context of universities

3.1. 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 and 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.

- 3.2.** 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.
- 3.3.** 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, expertise and community support is in part highlighted [here](#).
- 3.4.** Wales faces significant challenges: climate change, shifting demographics and the impact of automation and technological change on some of our largest occupation sectors². 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.
- 3.5.** 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.

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

² <https://uniswales.ac.uk/media/Solving-Future-Skills-Challenges-in-Wales.pdf>

- 3.6. 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 medics, working with the NHS to provide a critical pipeline of talent to help ensure it has the resources it needs to respond to the challenges it faces both now and in the future.

4. Outstanding questions

- 4.1. Although the key changes generally appear to be positive and the system overall looks potentially workable, there remain significant questions and more work is needed to assess how far these changes have in practice addressed the issues we raised in our consultation response ([here](#)).

5. Overall regulatory framework and balance of detail on the face of the Bill.

- 5.1. We have previously expressed our support for the Welsh Government's intention to build on the strengths of current higher education and post-compulsory education systems in Wales. In particular, this includes the proposals to establish baseline registration requirements for all providers which focus on the quality of education, better protect the interests of learners and promote the engagement of learners at all institutions in Wales. We have also welcomed the intention to reduce the unnecessary administrative burdens and complexity of the current system, and increase flexibility.
- 5.2. However, **there is a 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 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 regulation, making it difficult to assess the workability of proposals.**

- 5.3. The limited 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.
- 5.4. **The Bill as drafted also includes a significant Henry VIII power to subsequently amend primary legislation through regulations.** If this is relied on this could mean that key features of the Bill are decided without the full primary legislative process.

6. Institutional autonomy and academic freedom.

- 6.1. This was a key area 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.
- 6.2. 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 competitiveness³. Without a system that protects and champions autonomy and academic freedom, we disadvantage Wales in securing world-leading researchers and staff, and impair our universities' ability to form partnerships and to compete for business and research contracts, both domestically and internationally.
- 6.3. As constituted, universities in Wales are not public bodies but 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. Preserving their independence is essential to ensure that they are not reclassified as central government for

³ Referenced here: <https://uniswales.ac.uk/media/Universities-Wales-response-to-the-Draft-Tertiary-Education-and-Research-Bill-consultation.pdf>

purposes of national accounting, which would have major consequences 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.

- 6.4. There has been significant progress made in addressing the issues we raised in relation to the Draft Bill, particularly in relation to academic freedom. Nevertheless, there remain significant issues that need to be addressed.
- 6.5. 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. Further work appears may be needed on its drafting to deliver the intended protection, however: the duty at the moment applies only in relation to higher education provision (which does not appear to include, for instance, research and innovation).
- 6.6. There are remaining gaps in the limitations on funding powers which have been transferred from FHEA 1992. There are some remaining specific areas of concern relating to regulatory powers, as highlighted further below.
- 6.7. The Welsh Ministers have no general duty in relation to protecting the institutional autonomy of universities. Equivalent duties are in legislation elsewhere in the UK such as the Higher Education and Research Act 2017.
- 6.8. Despite the very welcome extension to the Commission's duty to ensure compatibility with charity law (s.17), the new duty continues to apply only to the exercise of the Commission's powers and not the Welsh Ministers' and does not appear to fully cover the remaining gaps in the limitations on funding powers transferred from FHEA 1992 or resolve some of the specific areas of concern relating to regulatory powers.

7. Higher education corporations – autonomy and governance

- 7.1. We continue to be concerned that the Welsh Government has retained its

power to dissolve Higher Education Corporations 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.

- 7.2. 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 decisions that indicated that its exercise would mean reclassification of the universities to central government from the not-for-profit sector.
- 7.3. We feel the purpose and rationale of retaining and strengthening this power is not clear. In designing a new regulatory system, which is meant to provide a fair and equitable basis for regulation across the PCET sector, the Welsh Government is seeking to preserve a measure that relates to a small number of institutions.
- 7.4. The Welsh Government has also chosen to extend its powers to change the statutory requirements for HECs' instruments and articles of government by regulations. This runs contrary to the Law Commission recommendations in 2017, which as part of its review of unnecessary regulatory burdens on charities, recommended that the Welsh Government should take steps to remove of the current legislative requirements as to the content of the governing documents of HECs.

8. General and strategic duties

- 8.1. There have been significant changes in this area, and they are broadly ones that we 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.
- 8.2. Our key concern is the continuing absence of a general duty on the Welsh Ministers and Commission to respect institutional autonomy, and a duty on the

Welsh Ministers to prevent their powers being exercised in ways that would require universities to act incompatibly with charity law or their governing documents. These two amendments would help to address some of concerns with a number of specific provisions of the Bill.

- 8.3. We welcome the intent to give a clearer statement of strategic direction and duty. We feel that there is a case for research and innovation to feature more clearly in the Commission's ambitions and duties, and our initial impression is that there may be further scope for improving the general coherence and consistency with the other parts of the Bill.

9. Funding powers and duties

- 9.1. The funding powers and duties in the Bill are largely intended to mirror existing legislation. In relation to higher education, the Welsh Government's 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 have been transferred successfully in legislation that has succeeded it in all other parts of the UK.
- 9.2. However, there remain some seemingly unintended but concerning gaps in the limitations on setting terms and conditions of funding, which remain essentially as detailed in our response to the Draft Bill. 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:
- In relation to the Commission's powers to fund institutions, for instance, this means that in certain instances there is no longer a duty to consult with universities, to have regard to their distinctive characteristics (or their denominational character), or to ensure that the terms and conditions of funding only relate to the funding that comes from the Commission and to ensure that the Commission does nothing to discourage a university from having funding from other sources. There are currently no limitations on the

Welsh Minister's powers to fund universities directly.

- When funding the Commission, the Welsh Ministers are no longer prevented from specifying particular courses and programmes or areas of research when setting the Commission's terms and conditions of funding.

9.3. One of our general concerns with funding arrangements for the Commission is how it will effectively balance its duties across the full tertiary education, research and innovation landscape. 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.

10. Regulatory powers and registration conditions

10.1. The Bill sets out a new regulatory system which is based on a system of registration, with a complex system of powers to set different registration conditions for different categories of registration. The Commission is given very significant powers of enforcement and intervention, largely mirroring existing enforcement and intervention arrangements under the Higher Education (Wales) Act 2015. These powers are additional to the Commission's powers to set terms and conditions of funding and require outcome agreements, which can be used for a wider set of providers who receive funding.

10.2. There remain some specific provisions of concern which do not appear to have changed since the Draft Bill, which if exercised could seemingly for instance cause the Commission to be in breach of its duty to not require universities to act incompatibly with their charity law requirements.

10.3. This includes for instance, the Commission's power to impose specific registration conditions for particular institutions, enforceable by injunction. The view we expressed in response to the Draft Bill is that the Commission should not be able, as the Bill currently permits, to impose them on individual providers on any matter and at any time as it sees fit. We have argued the power should be limited to setting class requirements which apply to all providers or a

particular description.

- 10.4. We strongly support the introduction of a base-line requirement for all institutions 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.
- 10.5. However, further work is needed to limit the exercise of the Commission's powers as drafted before we can support the provisions.

11. Regulatory burden and complexity

- 11.1. 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. We are currently working through the detail of the changes.
- 11.2. At this stage, the changes appear to be positive in terms of giving the Commission greater flexibility and potentially reducing unnecessary regulatory burden. Much will depend on how these are implemented in practice and what requirements the Welsh Ministers place on the Commission through regulations. As noted above, there is limited information on the new arrangements for different categories of provider and much is left to regulations to later determine.
- 11.3. 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 they may be applied.

12. New Information Powers

- 12.1. We expressed significant concerns in the Draft Bill about the Welsh Ministers' new information powers, and these have not changed in the Bill as laid. This includes a new power (modelled on a similar power in HERA 2017) to require application-to-acceptance information for research on 'any topic approved by

them’, and the power to require to the Commission to give them any information ‘relating to or obtained in the performance of any of its functions’.

12.2. Both of these powers as drafted raise potential issues about the use/onward use of commercially sensitive information on individual institutions, and could discourage rather than promote sharing of information.

13. Independence and operation of the Commission.

13.1. 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.

13.2. In our response to the Draft Bill we outlined several aspects that appeared to potentially compromise the independent operation of the Commission and potential effectiveness. In particular, the retained powers concurrently exercisable by the Welsh Ministers in relation 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 support it.

13.3. 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.

13.4. In particular, the Welsh Ministers should not 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 above).

13.5. The new provisions in the Bill as laid to give general directions to the Commission is also a significant concern, as drafted, since unlike its equivalent in FHEA 1992, the directions are not made by order (i.e. under the legislative process).

14. Timescales and implementation.

- 14.1. The timescales for implementation of the Commission also remain a very 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.
- 14.2. 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).
- 14.3. The lack of detail on many of the key features of the new regulatory arrangements as noted above exacerbates the issue. Our evidence to 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.
- 14.4. The lessons from the reviews of EIWa, 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.

15. UK Internal Markets Act 2020.

- 15.1. 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 to us how far the Bill's provisions are fully compatible with it.

- 15.2. The first issue is that it is not clear how far the UK Internal Market Act 2020 applies to universities. 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](#)).
- 15.3. 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.
- 15.4. The application of the Act to the Bill is legally complex and we are still working through the potential ways it 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 Draft 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 Draft Bill are seemingly not confined to regulating the exercise of functions ‘of a public nature’ for purposes of IMA 2020 and further clarity on IMA’s interpretation would be needed to do so effectively.
 - 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 Draft Bill, both the Commission and the Welsh Government have powers to set registration conditions that do not relate specifically to public functions. "

15.5. 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 to judicial review the Act is take place in January 2022. This may mean a decision before the end of the Stage 1 is reached. However, we remain concerned to avoid higher education becoming the test case in this area.

16. Other UK developments and Augar

- 16.1. We currently expect the UK Government to announce a series of potentially major post-16 education reforms in England in the next few weeks 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 often require a policy response from Wales.
- 16.2. 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, Freedom of Speech Bill which the Welsh Government recognise may impact on the TER(W) Bill. Some of the legislation applies directly to higher education in Wales such as the Charities Bill and proposals on audit and corporate governance, and others to UK infrastructure such as Advanced Research and Invention Agency Bill.
- 16.3. 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.
- 16.4. 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.

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Universities Wales

17 November 2021