

Draft TER(W) Bill consultation response

1. About this response

- 1.1. The following response is the joint submission of Universities Wales and the Chairs of Universities in Wales.
- 1.2. Universities Wales represents the interests of universities in Wales and is a National Council of Universities UK. Universities Wales's membership encompasses 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.
- 1.3. 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.
- 1.4. Universities in Wales play an essential economic and social role for communities throughout Wales. They generate around £5bn of the Welsh economy's output and nearly 50,000 jobs across Wales. Their activities transform the prospects of individuals, promoting equality of opportunity and social justice, and supporting communities and businesses throughout Wales. With consistently leading student experience satisfaction, Welsh universities supply over 36,000 graduates each year, responding to shifting skills requirements of the workforce and generating business opportunities. Based on their international reputation and global connections, universities attract students all over the world each year bringing significant inward investment.
- 1.5. In particular, Welsh universities are responsible for around 44% of all research and innovation investment in Wales, judged to be world-leading both in terms of its excellence and its economic and social impact. 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. Universities' activities are a necessary and essential component in driving the economic recovery and renewal in Wales in the post-COVID landscape.
- 1.6. A response to the Welsh Government's specific consultation questions is provided in Appendix 1 using the pro forma. However, since these questions do not fit neatly with the key issues we have identified, they should be read in conjunction with our main response, below.
- 1.7. Universities will want to be able to deliver on the intended objectives of a new Commission and we would welcome the opportunity to engage further in the development of a Draft Bill, given that it does not appear to deliver the Welsh Government's intentions in some serious respects as stands.

2. Summary

- 2.1. We support the Welsh Government's intention to build on the strengths of current higher education and post-compulsory education systems in Wales and agree with many of the proposals in the draft legislation. In particular, this includes the proposals to establish baseline registration requirements for all providers which focus on the quality of education and better protect the interests of learners and promote the engagement of learners at all institutions in Wales.
- 2.2. We have significant concerns about aspects of the Draft Bill in its current form. In general, the regulatory system remains unnecessarily complex, burdensome and focused on detail rather than a strategic approach.
- 2.3. There are three key aspects in particular which appear to prevent the Draft Bill from working as intended:
 - the need for better recognition and reflection of the institutional autonomy and academic freedom of universities
 - issues relating to the extent to which the Bill retains or extends Ministers' direct powers rather than working through the Commission
 - issues relating to the independence and potential effectiveness of the Commission.
- 2.4. It is essential that the Draft Bill protects the institutional autonomy and academic freedom of universities, which we know is the Welsh Government's stated intent. We believe there is further work to do on this area and we would welcome engagement to address these issues.
- 2.5. There are gaps in the way the protections in existing higher education legislation have been transferred to the Draft Bill which need to be addressed so that they also apply to the Commission's powers to fund universities for further education or apprenticeships, for instance, or the Welsh Ministers' powers to fund universities. There also needs to be statutory protection of a general duty to protect institutional autonomy as well as academic freedom on the face of the Draft Bill. The general duty designed to prevent conflict with universities' legal obligations as charities should be extended to cover all of the powers set out in the Draft Bill.
- 2.6. The general duties to protect institutional autonomy and academic freedom, and the duty to enable universities to perform their obligations as charities should apply to both the Commission and the Welsh Ministers in light of their new powers.
- 2.7. We are concerned about the introduction of new powers for the Welsh Ministers to intervene in areas and in ways that have not been permitted by the legislation before - such as the funding of particular courses and areas of research, and powers to impose registration requirements.
- 2.8. We are also concerned about the potential consequences of the new powers of the Welsh Ministers to fund providers directly, by-passing the Commission, and the lack of limitations on those powers compared to the Commission's.
- 2.9. We welcome the Welsh Government's intention that the Commission will be an independent body operating at arms-length from government. However, for the body to be able to operate independently and effectively, we believe that the proposed

constitutional arrangements and the powers that Welsh Ministers seek to retain in parallel should be amended.

- 2.10. We would like clarification on how the responsibility for quality assurance is divided between the Commission and Estyn and how it would apply in relation to further education in universities. We also believe that the designated body to perform the Commission's quality assessment functions should be appointed by the Commission and not government.
- 2.11. It is essential that research and innovation in universities is given the support and recognition that it currently receives elsewhere in the UK, but we are not convinced that the arrangements for Research Innovation Wales deliver on this intention.
- 2.12. We also have significant concerns about the new powers to require and share information, particularly in so far as it provides greater access for commercially sensitive information on individual institutions for use by Welsh Ministers rather than the Commission.
- 2.13. We have significant concerns about the implications for institutional governance arrangements. We regret that the Welsh Government has chosen not to remove the power to dissolve higher education corporations in Wales against their will. Indeed, the Welsh Government has chosen to extend its powers to change the statutory requirements for HECs' instruments and articles of government by regulations. The purpose and implications of the proposed Commission's powers to set requirements in relation to the effectiveness and management of governance also need to be understood.
- 2.14. We believe that it is essential that these issues are addressed before the introduction of a Bill in order to retain the integrity of the current higher education system and the benefits it brings for people and communities in Wales.

3. Institutional autonomy and academic freedom

- 3.1. 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, and how they recruit staff and students.
- 3.2. In the current global environment, where trust in education and independent science is being eroded and politicised, institutional autonomy and academic freedom are important principles which, as a modern forward-facing Wales, we should embrace and champion.
- 3.3. Universities in Wales have a responsibility to set their own strategic direction which they are committed to doing in consultation with their key stakeholders. The institutional autonomy and academic freedom of universities have a tangible impact on the investment that they are able to secure for Wales through their activities, which in turn impacts the success and prosperity of Wales's communities. Without the protection of institutional autonomy and academic freedom our ability to form partnerships both domestically and internationally will be impaired.
- 3.4. Similarly, without a system that protects and champions autonomy and academic freedom, we would disadvantage Wales in securing world-leading researchers and staff.

- 3.5. Damage to the reputation for independence would have major consequences for Welsh universities' ability to compete with other research institutions and providers within the UK and internationally and to attract students, staff and business and research contracts. There is evidence which suggests a correlation between autonomy and university rankings, and other countries where autonomy is more limited have identified this as a major obstacle to competitiveness – most recently in India, for instance¹.
- 3.6. Despite the intention of Welsh Government, a major issue throughout the Draft Bill is the need for better recognition and protection of institutional autonomy and academic freedom. The Welsh Government expressly commits in the Memorandum to maintaining the current protections of the institutional autonomy and academic freedom of universities but both concepts also need to be protected by the legislation itself.
- 3.7. The existing 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.
- 3.8. 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.
- 3.9. The existing legislation also protects the wider institutional autonomy of Welsh universities in several critical respects. It ensures that the Welsh Ministers remain at arms-length and leave funding decisions at institution level to HEFCW by imposing a 'class requirement'. 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.
- 3.10. 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.

¹ For a recent example, see the THE article of 11.11.20 on recent developments at the University of Delhi which reports that "experts on Indian higher education believe the events highlight much bigger issues related to autonomy and political interference that need to be addressed if the country wishes to improve its competitiveness on the world stage. As one commentator in Joyce Lau's report on the wrangling at Delhi puts it, "the politicisation of public universities and their limited autonomy, vis-à-vis the government", is potentially a bigger obstacle to Indian universities competing internationally than Covid-19."

- 3.11. 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.
- 3.12. We have consistently stressed the importance of institutional autonomy and academic freedom, as described above, as cornerstones of the UK higher education system and its international reputation as one of the best higher education systems in the world. For universities, this has very significant real-world impact.
- 3.13. It is also important to recognise that the statutory protections that are currently in place also ensure that universities are not subject to requirements that conflict with their other legal duties under UK law. This includes avoiding conflict with legal duties as charities, their classification and status for purposes of national accounting (which could have significant consequences for both universities and government), and potential conflict with competition and consumer law.
- 3.14. As discussed below, the Draft Bill does not include the necessary protections to deliver the Welsh Government's stated intentions on academic freedom and institutional autonomy. This includes:
 - seemingly unintended gaps in the transfer of existing protections in the funding legislation
 - fewer limitations on the powers when exercised by the Welsh Ministers rather than the Commission
 - a number of new regulatory and other powers which are not subject to equivalent limitations and have the potential to cause significant issues for universities.
- 3.15. These are discussed in more detail in the sections below.

4. Retained powers and direct intervention by the Welsh Ministers

- 4.1. A second key issue throughout the Draft Bill is the retention of powers, which have been shared rather than transferred outright to the Commission, and the addition of new powers which provide the Welsh Ministers with greater opportunity to intervene directly at institution level or for particular projects, courses or areas of research.
- 4.2. The additional powers do not include the existing protections of institutional autonomy and academic freedom and also provide a route to funding which bypasses the Commission. Instead of being helpful as intended, this has the potential to undermine the authority of the Commission and impact on its ability to operate and make decisions effectively.
- 4.3. It is not clear what benefits increasing the opportunities for direct intervention would deliver. This approach also has significant resource implications (discussed below). We support the advice of the Weingarten Review that the government's resources are best directed towards concentrating on policy at a sector level and leaving the Commission to decide how to implement its detail.

5. Independence and effectiveness of the Commission

- 5.1. The third area of concern which is the independence and potential effectiveness of the Commission.
- 5.2. Again, we welcome the Welsh Government's stated intention that the Commission should be an independent body, operating at arms-length from government but within a strategic planning and funding framework established by Welsh Ministers.
- 5.3. A large part of this is clearly related to the Welsh Government's retention of powers rather than outright assignment to the Commission. A clear division of responsibilities is essential for the Commission to operate effectively, and with the necessary authority to work on the sector's behalf with its peer-bodies in other countries and internationally.
- 5.4. The clear independence and separation of functions in the existing legislation in turn enables universities to fulfil their legal duties as charities to act independently from government and continue to comply with the requirements of competition and consumer law. At the same time, universities continue to contribute to government policy objectives and to remain accountable for any public investment received.
- 5.5. We think that the Welsh Government needs to review its relationship with the Commission to enable the latter to **operate efficiently and effectively at arms-length** from government as intended.
- 5.6. We are also concerned that there are issues with the constitution and membership of the Commission in this respect, particularly in the extent to which appointments are made by the Welsh Ministers.
- 5.7. The specific issues relating to these themes and further issues relating to specific parts of the Draft Bill are discussed in more detail below.

6. The general duties

- 6.1. 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, generating £5bn of output and nearly 50,000 jobs across Wales each year.
- 6.2. Universities are an essential component in driving the economic recovery and renewal in Wales in the post-COVID landscape and expect to play a vital role in support of the Welsh Government policy agendas for catalysing growth of the economy, skills growth and employment in Wales and in support of Future Generations Wales objectives.
- 6.3. Although the proposed Commission's new duties are supported in principle, it is a matter of making sure that their exercise does not undermine the independence or effectiveness of universities or conflict with their legal duty to act solely for their charitable purposes.
- 6.4. We would strongly urge that the general duties any Bill that might in future be laid before the Senedd include a **general duty to protect the institutional autonomy** of universities, not just academic freedom. This general duty, as is already

established in law elsewhere in the UK, should also apply to the Welsh Ministers in the exercise of their regulatory and funding powers as proposed under the Draft Bill.

- 6.5. In stark contrast to arrangements elsewhere in the UK, the Draft Bill only recognises academic freedom in its general duties. The recognition of institutional autonomy is particularly important given the new and wide ranging general powers and duties being placed on the Commission whose exercise could potentially conflict. For this reason, it is not enough to simply transfer the existing specific duties relating to funding and regulation.
- 6.6. Furthermore, its drafting of the general **duty to protect academic freedom** should be strengthened to provide the same level of protection as the corresponding duties elsewhere in the UK and this duty should apply to the Welsh Ministers too. At the moment, it is not defined as a simple duty to protect academic freedom but, rather, as a duty to 'have regard to the importance' of it.
- 6.7. This definition should also be expanded to include the statutory protection of the freedom of institutions to determine academic matters, and to provide better protection for universities in turn protecting of the academic freedom of staff and researchers in universities as well, including the freedom of academic staff "to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions".
- 6.8. The existing provision that the Commission may not require an institution to do anything that is incompatible with its **legal obligations as a charity or its governing documents** is transferred to the Draft Bill. However, it only applies to the Commission, and now only applies to its regulatory functions in part 2 and not its wider functions including, for instance, its funding and information powers, or the pursuit of its wider general duties. We would like to see this duty also apply to the Welsh Ministers.
- 6.9. The lack of protection for institutional autonomy and academic freedom upfront in the Draft Bill 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, regionally and nationally.

7. The Commission's constitution and membership

- 7.1. We support the intention to have 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.
- 7.2. As currently drafted, however, we have significant concerns about the level of **independence of the Commission**, reflecting in particular the division of powers and responsibilities between it and the Welsh Government and the constitutional arrangements including in particular the appointment of members by the Welsh Ministers. In particular, we believe that the following areas need to be addressed:
 - **Determining the Strategic framework.** To be able to operate independently the Commission must be able to determine its own strategy in response to

Welsh Ministers' steers. The Welsh Ministers should not be able to modify the Commission's strategy without their consent, as drafted.

- **Retained/parallel powers.** In addition to introducing some parallel powers for HE the Welsh Government has retained funding powers for HE which it can exercise alongside the Commission. These arrangements risk undermining the independence and authority of the Commission.
- **Appointment of members and Research Innovation Wales.** All members of the Commission and RIW are appointed by the Welsh Ministers. In the case of RIW, this notably contrasts with appointment of members for Research England which are primarily appointed by UKRI itself.
- **New powers to directly fund higher education.** This is more likely to undermine the operation of the Commission than support it. By-passing the Commission by funding universities directly also undermines the arrangements designed to ensure that providers remain independent from government, as the Welsh Ministers powers are not subject to any of the limitations which would apply if the funding was provided by the Commission instead. Although intended to apply to HE in limited circumstances, the actual drafting of the direct funding powers allows a potentially much wider application than suggested (see under funding, below, for further discussion of this).

- 7.3. There remain inherent risks with a new body with the size and complexity proposed. Despite the changes that have been made in response to the technical consultation, it will not be as effective in discharging its functions as a body which focuses on a specific sector. The new body must have the skills, expertise and specialist knowledge to deal effectively with the different sectors within its remit, and the necessary resource to genuinely fulfil its enhanced role and develop effective relationships with providers.
- 7.4. The Commission's membership will include staff and student union representatives as associated members in addition to 4-14 ordinary members none of whom are specifically related to or representatives of higher education. We remain unconvinced that the Commission's membership will have sufficient experience/expertise in higher education and have the necessary capacity/infrastructure and resource to deal with higher education in the way that the current funding and regulatory body does.
- 7.5. We are also concerned that this body is unlikely to realise any of its potential benefits as a cross-sector body without significant additional resources— a lesson that the independent reviews of issues which led to the dissolution of ELWa clearly identified. As discussed under costings, below, the resource assumptions do not appear to reflect this.

8. New funding powers

- 8.1. The proposed new funding powers for the Welsh Ministers and the Commission **in relation to higher education and research** are intended to mirror the existing provisions under the FHEA 1992.

- 8.2. In particular, the Welsh Government has clearly sought to transfer to the new legislation the existing 'limitations' on the powers of the Funding Council and Welsh Ministers (particularly the protections contained in the FHEA 1992), but their coverage is incomplete.
- 8.3. As currently drafted, the limitations on the **Commission's funding powers** which prevent it from imposing requirements which interfere with institutional autonomy and academic freedom only apply in full to the Commission's powers to fund higher education and not to all education provided by universities (see Table 1 in Appendix 2), and in this context higher education is narrowly defined as higher education courses. Fewer limitations apply to its powers to fund research and innovation. For instance, the proposed Commission does not have a duty to have regard to distinctive characteristics of institutions and is not required to consult first. There are no limitations on the proposed Commission's powers to specify terms and conditions in relation to funding for further education or apprenticeships, even when these delivered by a university. It is also noted there are no equivalent limitations on the exercise of the proposed Commission's regulatory powers (see under discussion of regulatory powers, below).
- 8.4. As drafted, there are also significant **inconsistencies between the limitations applied to Commission's powers and the Welsh Government's direct funding powers** where the latter retains parallel powers or added new ones: in general, the Welsh Government has not made itself subject to the same range of limitations that protect institutional autonomy and academic freedom, including in particular its powers to fund higher education directly.
- 8.5. The Draft Bill proposes to give the Welsh Ministers a number of new powers to fund higher education directly. It is not clear what the benefits of the new powers are or whether the benefits outweigh the clear risks and are drafted appropriately. Ministers, for instance, gain a power to fund specified institutions (s.80) or certain higher education courses (s.84), and 'other activities connected to tertiary education' (s.93). In the case of the power to fund certain courses (s.84), the explanatory notes indicate that it is meant to apply to a limited range of non-degree/professional courses only, but a concern is that the legislation itself appears to be capable of being applied much more widely as the list includes any course 'providing education at a higher level'.
- 8.6. A key issue with the direct funding powers is that Welsh Ministers' powers are subject to none of the limitations that would apply if it were the Commission that funded the institutions instead. When using its powers to fund higher education directly, for instance, unlike the Commission, the Welsh Ministers are not prevented from setting terms and conditions which relate to the funding that comes from other sources, or from discouraging funds from other sources. The Welsh Ministers do not have to have regard to the distinctive characteristics of institutions, or first consult with the institutions and representative bodies concerned (see Table 2 in Appendix 2).
- 8.7. The **Welsh Ministers' powers to set terms and conditions when funding the Commission** also have fewer limitations than before (see Table 3 in Appendix 2). In all cases, the Welsh Ministers are prevented from setting terms and conditions that relate to academic appointments and student admissions. However, the Draft

Bill proposes to remove the existing limitations to Ministers' funding powers which currently prevent them from **specifying particular courses and enable them to fund areas of research** when setting out terms and conditions of funding (though the limitation which prevents them specifying particular programmes of research still stands). In the case of funding for FE, even when this is delivered by universities, the Commission is not prevented from specifying particular courses or programmes of research at all.

- 8.8. These potentially allow the control of policy at a more detailed level of implementation than is operable. **The provisions are clearly modelled on England's, but the Welsh Ministers, unlike the Secretary of State, are not subject to a duty to have regard to the institutional autonomy of higher education institutions. This means the Draft Bill provides for the powers but without their corresponding limitations.**

9. New regulatory powers

- 9.1. Although the powers in many ways replicate existing arrangements for higher education there are some significant new powers which cause concern, and we would like to explore how we can redraft them with the Welsh Government to prevent potentially serious issues.
- 9.2. In particular, the powers to impose specific registration conditions need careful consideration. These are enforceable by injunction and the Commission should not be able, as the Draft Bill currently permits, to impose them on individual providers on any matter and at any time as it sees fit. Although this new power is subject to the 'proportionality' principle which means that the requirements must be proportionate to the Commission's assessment of the 'risks' the Draft Bill does not clarify what those 'risks' are and leaves it to the Commission to decide.
- 9.3. The power to set specific registration conditions risks inconsistent and unfair treatment of providers as well as a potential threat to the ability of institutions to govern their own affairs as required by charity law and for purposes of national accounting classification: the powers to set registration requirements should remain limited to setting class requirements which apply to all and are accepted on registration or after due consultation with all appropriate stakeholders.
- 9.4. Similarly, the Bill gives Ministers a new power to specify requirements relating to Access and Opportunity Plans in regulations for **particular courses or areas of focus**. The restriction which currently prevents an institution being required to incur **expenditure which exceeds the qualifying income** is also removed. The latter in particular can have a very significant impact on universities' ability to manage their financial affairs including satisfying lenders and borrowing requirements, and banking covenants.
- 9.5. Likewise, the Welsh Ministers' powers to set **mandatory initial and ongoing registration** conditions by regulations are too wide as currently drafted. These powers are not subject to any limitations (e.g. a duty to not conflict with charity law obligations) and it is a concern that they can conceivably cover any matter, including potentially governance, workforce arrangements or 'coherence' in tertiary education. We have concerns that Welsh Government could add any matter it wishes at a later stage without full legislative scrutiny. We would recommend that the additional areas

identified for potential change should be dealt with on the face of the Draft Bill rather than left to regulations. This includes, for instance, providing detail of the additional registration conditions for charity status and student complaints procedures.

10. The regulatory system and strategic oversight

- 10.1. We welcome the introduction of baseline requirements for all providers which focus on the quality of education and the increased focus on the interests and needs of students, including the better protection and representation of all learners across Wales. We feel the Bill could be improved, however, in terms of developing a more strategic approach.
- 10.2. The proposed **regulatory system** is more administratively complex and burdensome than the current system and may prevent providers from operating efficiently and effectively. Instead of choosing between alternative options proposed in the Technical consultation or giving the Commission the flexibility to use the appropriate tool for the task in hand, the legislation imposes all three systems on the Commission: a registration system, fee and access plan requirements and outcome agreements.
- 10.3. The **Access and Opportunity Plans**, with a few welcome but minor modifications (such as the ability to extend the period covered by the plans), essentially replicate existing fee and access plan arrangements. Universities gave clear evidence to the CYPE Committee's inquiry on the implementation of the HEWA 2015 which demonstrated the very great administrative burden and diversion of valuable resource that this imposes. The evidence given by students was that they had not found them helpful either. There are potentially better ways to monitor the use of resources and foster a more strategic approach.
- 10.4. In our view the proposed Commission should have much greater flexibility to choose how it manages its relationships with providers and to adopt the tools it sees as appropriate to carry out its functions without them being prescribed by legislation.
- 10.5. Much of the detail of proposed categories of provider are left to regulations. From the Memorandum we understand that universities are likely to come under an HE(advanced) category. We would welcome draft regulations being published alongside a Draft Bill for consultation or more detail included on the face of a Draft Bill. In particular, it is essential that a Draft Bill itself sets out how the legislation will apply to the Open University to avoid potentially damaging regulatory and funding uncertainty: it is not appropriate to leave the OU's inclusion and treatment to be decided later by regulations, particularly as these allow the effect of primary legislation to be modified without recourse to the full legislative scrutiny process.

11. Quality assurance arrangements

- 11.1. While we are broadly in agreement with the arrangements in the Draft Bill relating to quality assurance for higher education, there are two issues in particular that require further Consideration.
- 11.2. As we understand, the policy intention is for the Commission to be responsible for the quality assurance of education in higher education institutions and Estyn for

other providers. As drafted, however, Estyn would be under a duty to inspect FE provision in HE institutions. The Draft Bill provides that the proposed Commission “must assess the quality of higher education provided ... by each registered institution” (s.46), but that the Chief Inspector (i.e. Estyn) “must inspect further education ... funded by the Commission”. This appears to mean that Estyn and not the Commission has a duty to inspect FE delivered in HE, which we understand is not the policy intent.

- 11.3. We would welcome the Welsh Government reviewing the technical detail of this section to ensure it delivers their policy intent. Unlike Estyn’s powers, the Commission’s powers are designed to deal with universities and the legislation makes them subject to protections of institutional autonomy and academic freedom. Our view is that oversight of FE provision in HE should be the duty of /the Commission, or that significant amendment will be needed to Estyn’s powers in relation to universities.
- 11.4. We also believe that designation of a quality body should be the responsibility of the Commission, as it is for HEFCW at present. It is important that the body is seen to be appointed independently from the government as it impacts on higher education’s international reputation for academic freedom.
- 11.5. We are also unclear what changes if any to the business model for funding the quality arrangements are implied. Before new provisions are introduced to allow the designated quality body to charge fees, the Welsh Government should make its plans clear including the resource implications for both the Welsh Government budgets and providers.

12. Research and innovation arrangements

- 12.1. It is absolutely essential that research and innovation in universities is given the support and recognition that it currently receives elsewhere in the UK, and in the most successful economies around the world.
- 12.2. Our universities are among the world leaders in research and innovation and have the highest percentage of ‘world leading’ research in terms of impact of any part of the UK. Welsh universities are responsible for around 44% of all research and innovation investment in Wales. The long-term growth of the economy and future jobs are driven above all by advancements made in research and innovation. Research and innovation is key to tackling the key challenges Wales faces including climate change and achievement of the Welsh Government’s ambitions for future generations. The importance and wide-ranging contribution of universities for our communities and businesses has been clearly demonstrated in the national effort in response to COVID-19.
- 12.3. In our view, there needs to be a more clearly articulated vision of how research and innovation will be given its due support and attention by these proposals.
- 12.4. We believe further consideration should be given to the formation of Research Innovation Wales (RIW). Its comparison with its counterpart in England, for instance, is instructive. Research England is a statutory committee of UKRI which exercises funding powers delegated to it and its members (with the exception of the chair) are appointed independently from government by UKRI itself. In Wales, RIW will be a

statutory committee which is an advisory committee which does not have its own powers and all appointments would be made by the Welsh Ministers. It is not clear this will position RIW to effectively engage with UKRI.

- 12.5. In terms of its authority and standing, it would be better for RIW to be more clearly independent from government and allow the Commission to determine the appointments. Further consideration, should be given as to whether the CEO of the Commission should also be a member of the RIW Committee, as is the case for UKRI.
- 12.6. In particular we would like confirmation of how the arrangements for research and innovation will help to deliver sustainable core (i.e. 'QR') funding for research, and deliver on the major investments in university research and innovation in Wales recommended by the Reid Review in order to prevent Wales from losing out on its fair share of UK research funding.
- 12.7. It is a concern that the Welsh Government is amending its powers to allow it to **specify areas of research** when setting the terms and conditions of funding for the Commission. This measure runs contrary to the Haldane principle – which is given statutory recognition in other parts of the UK - that such decisions are in general best left to be made by researchers themselves. It has the potential to undermine the strategic role and authority of the Commission.
- 12.8. We note that the Welsh Ministers will continue to be able to use their existing powers to fund research and innovation alongside the Commission. We would like to have greater clarity about how this will work.

13. Learner protection and engagement

- 13.1. 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.
- 13.2. However, further work is needed to limit the exercise of the Commission's powers as drafted before we can support the provisions.
- 13.3. The Commission can approve a learner protection plan 'with or without modifications' (s.114 (3)), which as drafted appears to allow the Commission to impose its own modifications. The Commission must be able to specify requirements as a condition for approval, but it would not be acceptable for them to impose them directly without the provider's consent.
- 13.4. As drafted the Commission is also given extensive new powers to impose legal requirements on providers via the Learner Engagement Code without any statutory limits. There is nothing to ensure that any such requirements are confined to the strict objectives of the Code and proportionate.
- 13.5. For example, it would be unacceptable for the Commission to be able to use these powers to impose governance or constitutional arrangements on providers in a way that could lead to conflict with universities' charitable duties or constitutional documents. We understand that this is not the policy intent and would welcome an

opportunity to work with the Welsh Government to redraft this section to make it clear.

- 13.6. Notably, the duty on the Commission to avoid conflict of this nature (in s.75) does not apply to this part of the Draft Bill and only currently extends to the set of regulatory functions in Part 2 of the Draft Bill. This should be amended to cover all its functions including its functions in this part (Part 5) and moved to the general duties section.

14. New information powers

- 14.1. The Draft Bill increases the powers of the Welsh Ministers to require information particularly at institution level. This includes requiring the Commission to provide information on financial sustainability and position of institutions. It also includes a statutory duty for providers of admission services (e.g. UCAS) to provide the Welsh Ministers directly with applications and admissions data at institution level for research purposes.
- 14.2. In our view it is inappropriate for the Welsh Ministers to require access to data at institution level data including admissions data. It would undermine the effective functioning of the Commission as an independent body and encourage direct intervention by the Welsh Government. The provision of information on individual institutions is commercially sensitive, with providers currently subject to strict competition law rules, and requires careful contextualisation if it is to be interpreted without being misleading.
- 14.3. This should be the function of the Commission as the independent body with the appropriate knowledge and experience of the sector to enable it to interpret and contextualise the information appropriately (as it is with HEFCW at present), and Welsh Government should continue to focus on sector level information, and concentrate on ensuring that the Commission has the necessary resources to build its expertise across PCET.
- 14.4. A further issue with this is that the Welsh Ministers can require from the Commission any information that relates to its functions, however loose that relation may be, and in turn the Commission can require it from institutions. We note that the provisions cover not just information relating to the Commission's functions but also information obtained in their performance – in other words even voluntary information shared in confidence. 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 and has the potential to undermine the applications of data protection principles. It is also likely to discourage the free sharing of information with the Commission, which is likely to be essential to a successful relationship with providers.
- 14.5. At the very least, we would like to see both the Welsh Ministers and Commission made subject general statutory duty to operate to an agreed protocol in relation to the collection and onward use of information, consistent with the approach of the General Data Protection Regulations – namely that all information must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.

15. Institutional governance and HECs

- 15.1. At a number of points in this Draft Bill we have concerns about its implications for the independent governance of universities.
- 15.2. It is a matter of considerable concern that the Welsh Government has not taken this opportunity to remove its **power to dissolve Higher Education Corporations** in Wales against their will. Instead of seeking to remove this power, the Draft 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.
- 15.3. 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.
- 15.4. The Welsh Government also took steps at around the same time to ensure that this problem was addressed for the further education sector in Wales.
- 15.5. It is unacceptable that in designing a new regulatory system which is meant to provide a fair and equitable basis for regulation across the PCET sector that the Welsh Government should preserve a measure that can only be exercised in relation to some universities and not others. We believe this power should be removed altogether by this Draft Bill.
- 15.6. It is a significant concern that the Welsh Government has chosen to extend its powers to change the **statutory requirements for HECs' instruments and articles of government** by regulations. Although subject to a duty to consult, this would enable them to introduce changes without the need to resort to primary legislation.
- 15.7. We have been given to understand that the policy intent is to help make a level playing field for providers of different types (i.e. HECs and those with Royal Charters). However, we do not believe this delivers the policy intent of the Welsh Government which would ensure that there is a level playing field, as is the case in other parts of the UK, and in fact just increases the disparity in the treatment of HECs compared to other providers.
- 15.8. We also note that the proposed approach is not consistent with previous policy proposals and is 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 of the current legislative requirements as to the content of the governing documents of HECs so as to enable those bodies to re-allocate provisions in accordance with guidance concerning public interest matters. This has already been addressed for HECs in England by the HERA 2017, which deregulated HECs in England and give them freedom to determine their own constitutions.
- 15.9. Given that the power to dissolve HECs against their will has not been removed, we do not consider it appropriate to make constitutional changes to HECs at this stage, and we note that this was not a proposal that was consulted on as part of the Technical consultation.

- 15.10. Another area of concern is the Commission's new power to set registration conditions which explicitly relate to 'effectiveness of governance and management' not just 'financial management'. This is significant departure from the current legislation and further amendment is needed to ensure that its exercise does not place the Commission at risk of being in breach of its duty to avoid conflict with legal obligations as charities.
- 15.11. We welcome clarification in the legislation itself that this does not enable changes to institutional governance to be imposed or enable the Commission to impose specific requirements or arrangements for governance or management. The regulatory relationship needs to be firmly based on assurance, which focuses on the effectiveness of an institutions chosen arrangements, rather than prescription of their detail which would clash with their institutional autonomy.

16. Cost and value for money

- 16.1. The estimated additional cost of £47m over a 10-year period for the Welsh Government budget for this option (Option 6a) does not cover the full costs of implementing this legislation.
- 16.2. The Memorandum confirms that no attempt has been made as yet to identify the costs to universities and other stakeholders and the figures cited focus on the impact for the Welsh Government budget only. Our 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 regime. Even more significant, however, were the opportunity costs arising from the diversion of time and resource.
- 16.3. The impact assessment identifies this option as the most expensive of the options considered. However, the main additional costs it identifies do not appear to arise from increased investment in the Commission itself, but represent additional costs required to retain staff and by the Welsh Government to hold the Commission to account (and presumably to exercise its retained parallel functions).² As the Memorandum correctly notes, "this may raise questions about the efficacy and value for money of moving many of these functions outside of government".
- 16.4. Learning the lessons identified in the reviews of ELWa, 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.³
- 16.5. As indicated above, there are a number of significant issues in the current Draft Bill that will need to be addressed before a Bill is introduced.

² See p.142 para 7.124: on the disadvantages of Option 6 (the preferred option) and for detail of the costings of option 6a, the chosen option, see in particular the comments in the Explanatory Memorandum at p.117 and p.147,

³ See the Rawlings Report and Peat Report (2002) whose recommendations were accepted by the Welsh Government.

APPENDIX 1 – Universities Wales/ Chairs of Universities in Wales pro forma response

Civic mission

The Draft Bill (Section 7(4)) defines “civic mission” to mean “action for the purpose of promoting or improving the economic, social, environmental or cultural well-being of Wales (including action that may achieve any of the well-being goals in section 4 of the Well-being of Future Generations (Wales) Act 2015.”

1. Do you agree the approach taken to civic mission in the Draft Bill will be useful to the Commission in discharging its functions?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

No, not as drafted. See sections 3 & 6 of our main response for fuller comment.

Universities make a major contribution to civic mission and the wider economic and social objectives in Wales. Rooted within their communities, they transform lives providing a catalyst for social change, and supply the needs of the economy with highly skilled graduates. They also act as major anchors for regional and international investment, attracting world class talent, creating employment and supporting industry and businesses for benefit of their regions and the whole of the UK.

The pandemic, for instance, has thrown a spot light on how universities in Wales have provided vital support for local health boards, the NHS and their local communities making laboratories, facilities, accommodation and further research resources available to the NHS, producing PPE and other equipment, developing testing, and helping to prepare and train-up key workers and fast-tracking training of medical students in support. A wealth of tangible examples of Welsh universities’ civic response to COVID-19 are provided in the Universities Wales report (see [here](#)).

We support the notion in principle and any measures which may help the Commission to encourage, support and recognise the important civic contribution of universities. However, this must be achieved through partnership and the Commission’s duty to promote civic mission in Wales is potentially problematic for universities without further amendment to the Bill to balance it.

In particular, it will be essential to avoid any possibility that the Commission exercise this duty in ways that are incompatible with the charitable status and duties of universities, their governing documents, or their status as independent not-for-profit institutions for purposes of national accounting. As charities, universities are under a legal duty to act exclusively for the charitable purpose of providing higher education and not, for instance, to implement public policy.

To avoid this, the general duties of the Commission should include an explicit general duty to protect the institutional autonomy of universities, not just academic freedom.

The duty in s.75 should also become a general duty. This provides that the Commission has no power to require a governing body to do anything which is incompatible with its legal obligations as a charitable body or the governing documents of its institution. However, the duty only applies to its powers in section 2 at the moment. The duty in s.75 should also be extended to cover all the Commission’s functions in the Bill.

The needs of the learner

Learner Protection

2. The Commission will need to determine the format and contents of Learner Protection Plans in consultation with stakeholders (Section 114(6) and (7)), including how the plans are to be communicated to learners and prospective learners. Do you agree with this approach?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

No, not as drafted. See section 13 of our main response for fuller comment.

We strongly support the introduction of a base-line requirement for all institutions that will help to give greater protection for students. It is appropriate that the Commission should develop the detail of this, and that it should be in consultation with providers and students.

However, the drafting of the statutory framework for this needs to be amended before we can support the proposed approach. The Commission can approve a learner protection plan 'with or without modifications' (s.114 (3)), which as drafted appears to allow the Commission to impose its own modifications. The Commission must be able to specify requirements as a condition for approval, but it would not be acceptable for them to impose them directly without the provider's consent.

We would expect that the appropriate persons for consultation would include both providers and students, and it would be better to expressly include these.

Learner Engagement Code (Section 117)

3. The Commission's aim will be to ensure that the interests of learners are represented, and every learner has the opportunity to participate and give their views. Are you confident that the Learner Engagement Code is likely to be inclusive of all learners, and sufficiently representative of the whole of the Post-16 sector?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

No, not as drafted. See section 13 of our main response for fuller comment.

We strongly support the introduction of a base-line requirement for all institutions that will ensure they have adequate learner engagement arrangements in place. It is appropriate that the Commission should develop guidance and clear expectations to support this, and that it should be in consultation with providers and students.

However, as drafted the Commission is given extensive new powers to impose legal requirements on providers via the Learner Engagement Code without any statutory limits. There is nothing to ensure that any such requirements are confined to the strict objectives of the Code and proportionate.

It would be unacceptable for the Commission to be able to use these powers to impose governance or constitutional arrangements on providers in any way that could lead to conflict with universities' charitable duties or constitutional documents. Notably, the duty on the Commission to avoid conflict of this nature (in s.75) only currently extends to the set of regulatory functions in Part 2 of the Bill. It needs to cover all its functions including its functions in this part (Part 5).

Information, Advice and Guidance

4. The Draft Bill (Section 93) allows the Commission to fund information, advice or guidance for learners in Wales. Are there further considerations that should be taken into account to ensure that all learners receive advice or guidance to support learner pathways, transition and progression to enable them to make a contribution to, and succeed, in a fair and inclusive society and a thriving economy?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

Yes, there are further considerations that need to be taken into account before these provisions can be regarded as adequate. See section 15 or our main response for fuller comment.

It is not necessary or helpful for the Welsh Ministers to retain statutory powers to fund providers directly if they are giving the Commission the powers and responsibility to do so. It is also not appropriate that only the Commission but not the Welsh Ministers must have regard to the needs of persons with additional learning needs and desirability of facilities that would assist them (see s.92). The retention and exercise of parallel powers is more likely to undermine than support the work of the Commission.

For universities, it is unacceptable that the funding powers in this section (s.93) are not subject to the limitations in line with existing provisions in the FHEA 1992. There is considerable confusion in the Welsh Government's implementation of its express intention to continue to protect academic and institutional autonomy of universities.

This is particularly concerning in this context given that provisions will expressly allow either the Welsh Ministers or the Commission to delegate the provision of resources to a third party. This section should be amended to more narrowly prescribe the circumstances in which this could happen and arrangements to ensure there is appropriate governance of any funding powers delegated.

School sixth form reorganisation proposals

The Commission will have a role in relation to maintained school sixth form reorganisation. The Draft Bill enables the Commission to direct a local authority to bring forward re-organisation proposals, or bring forward its own proposals, in limited circumstances. The limitations on what would trigger such an approach would be consulted on and included in amendments to the statutory School Organisation Code.

5. Do you agree that the School Standards and Organisation code is the most appropriate vehicle for setting out the systems and processes and do you have any views on what those triggers should be?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

Neither Yes or No. We are not best placed to comment on arrangements as they apply directly in relation to school sixth forms.

However, we continue to have very serious concerns about the expanded responsibilities the Commission and the risk that they will detract from its capacity to provide the necessary support and oversight for individual sectors. See sections 7 and 17 of our main response in particular for fuller comment.

Strengthening collaboration

6. Part 3 of the Draft Bill provides functions to fund mainstream school sixth forms, further education, higher education, apprenticeships and adult learning and research and innovation related to educational providers. Do you think there are any further funding or other functions that will enable greater collaboration across the tertiary education sector?

Yes

No
Please add any

Neither Yes or No
additional comments in the box

below:

Yes, the funding functions in Part 3 need significant further revision to ensure that they are fit for purpose and operate as intended (see below). There are also alternatives that are more likely to achieve greater collaboration across the tertiary education sector.

It is essential that collaboration is achieved through active encouragement and facilitation, and that the exercise of any funding or regulatory powers does not conflict with competition rules or the legal duties of universities as independent charities.

Welsh Language/Welsh-medium

We would like to know your views on the effects that the establishment of the Commission (Section 8) 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.

7. What effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?

Please add any comments in the box below:

We support the general role of the Commission in encouraging participation in tertiary education through the medium of Welsh (s.8) and the clear intention to continue to support providers at all levels of education in this area.

However, as drafted, we are concerned that there is no equivalent duty for the Welsh Ministers to provide resources that match the Commission's legal duty to ensure that sufficient tertiary education is provided. This in turn could have significant consequences for the Commission's capacity to resource and fund other activities.

We do not think that it is acceptable for the Bill to make an exception in relation to Welsh Medium to the principle that Welsh Ministers should not set terms and conditions that relate to particular courses or parts of a course of study (see s.79(7)). This is more likely to discourage rather than facilitate developments. More significantly, it is a clear erosion of the principle of academic freedom which the Welsh Government have previously committed to protect and is absolutely essential for the reputation and international attractiveness of the higher education system in Wales.

Welsh Language/Welsh-medium

8. Please also explain if you believe the provision included in the Draft Bill to establish the Commission could be formulated or changed so as to have increased positive effects on opportunities for people to use the Welsh language.

Please add any comments in the box below:

The Bill needs to be revised in relation to Welsh language provisions to ensure that opportunities are not discouraged – see our comments under Q.7 in relation to matching resources to its responsibilities, and the need for the Welsh Ministers’ funding powers to be appropriately limited to avoid serious conflict with universities’ academic freedom.

Welsh Language/Welsh-medium

9. What are your views on the duties to be placed on the Commission in relation to Welsh-medium tertiary education?

Please add any comments in the box below:

See Q.7. As drafted, we are concerned that there is no equivalent duty for the Welsh Ministers to provide resources that match the Commission's legal duty to ensure that sufficient tertiary education is provided. This in turn could have significant consequences for the Commission's capacity to resource and fund other activities.

Registration

10. Do the proposals for Access and Opportunity Plans (Sections 32-41) go far enough in ensuring that the Commission has the powers to drive transformative change in widening access and opportunity in higher education?

Yes

No

Please add any

Neither Yes or No

additional comments in the box

below:

No, the arrangements in sections 32-41 are more likely to hinder than help to widen access and opportunity.

The Access and Opportunity Plans largely replicate existing fee and access plan arrangements. There are some minor improvements such as the possibility of increasing the period to which the plan relates through future regulations (e.g. to 5 years), explicit recognition that the plans may include measures to address gaps in attainment as well as to attract and retain students, and explicit inclusion of part-time undergraduates not just full-time students. However, these will do little to address the fundamental problems with this approach. The Access and Opportunity Plans will still be far too administratively complex and burdensome to prepare and monitor, their content remains prescribed by legislation in too much detail, and the focus on detail is not well-suited to foster a strategic approach.

As they stand, the arrangements do not deliver the Welsh Government's express intention to move to a more strategic and flexible system based on outcomes. Instead of replacing the current system based on fee and access plans and giving the Commission the flexibility to decide on the most appropriate tool for promoting wider access itself, the Bill has kept them and added 'outcome agreements' and a registration system as well. Furthermore, as currently drafted in the legislation, the so-called 'outcome agreements' do not involve agreements at all. The agreements must 'set out the activities to be carried out by that person for the purposes of contributing to the objectives of the Commission's strategic plan' (s.78(4)). The proposed arrangements bear little relation to the recommendations of the Weingarten review.

We also cannot accept that the Welsh Government is seeking to remove a number of the existing limitations to its powers to prescribe content which currently prevent them being exercised in a way that conflicts with academic and institutional autonomy of universities. If we contrast the arrangements under s.6(5) HE(W)A 2015) with the corresponding provision in s.35(5) of the Draft Bill, we can see that the Welsh Ministers effectively gain powers to specify requirements in regulations for particular courses or areas of focus. The restriction which currently prevents an institution being required to incur expenditure which exceeds the qualifying income is also removed. These limitations and restrictions must be reinstated.

Registration

11. Will the proposed powers for the Commission to monitor, review, and ensure compliance with registration requirements (Sections 22-26) provide sufficient flexibility for it to regulate proportionately and appropriately?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

No. Further amendment to the provisions is needed to ensure that the new powers set out in sections 22-26 are proportionate and appropriate.

In particular, the new powers of the Commission (in section 15) to impose specific conditions on any individual institutions at any point in time, including at the point of registration or later, are excessive. Although subject to a duty to ensure that that all registration conditions are proportionate to its assessment of the risks involved (s.16), there is no further indication of what the relevant risks are in this context and seemingly no recourse for a provider that disagrees with the Commission's assessment. Without limiting this power to circumstances of clear and extreme need, this could lead to unfair and inconsistent treatment of providers and simply encourage micro-management of individual institutions' affairs.

Similarly it is also not appropriate that that the Bill gives the Commission powers to impose mandatory requirements in relation to the 'effectiveness of governance and management', without the legislation being clearer that this must not amount to a power enabling the Commission to impose its own governance or management arrangements. Any direct interference with governance arrangements is likely to be challengeable on grounds that it conflicts with charity law.

We note that the exercise of the Commission's powers in this part are subject to the duty not to require an institution to act in conflict with its legal duties as a charity or its governing documents (s.75). However, this does not extend to the Welsh Ministers powers to prescribe conditions of registration in this section, which it should.

It is a concern that the detail of the initial registration requirements is not set out in the Bill or prescribed by regulations. The Commission is free to determine the conditions subject to a duty to publish a document setting out the requirements to be met.

Quality

12. The Draft Bill (Sections 42-60) proposes a more aligned and coordinated approach to quality and inspection across tertiary education. Do the proposed arrangements find the right balance between building upon the current arrangements in higher education, further education and training and maintained school sixth forms and working towards a more aligned and coordinated approach across the tertiary education sector?

Yes

No
Please add any

Neither Yes or No
additional comments in the box

below:

No, not as yet. While we are broadly in agreement with the arrangements in the Draft Bill relating to quality assurance for higher education, there are two issues in particular that need to be addressed before we can support the arrangements.

Responsibilities for quality assurance of tertiary education are divided between the Commission (for higher education providers) and Estyn (for further education and training) and provisions made for the two institutions to work together.

As we understand it, the intention was to make the Commission responsible for all provision offered by HE providers. However, that as currently drafted, it is Estyn that appears to have the duty to inspect FE provision in HE institution. We agree that it should be the Commission's responsibility and this should be amended.

As currently drafted the Bill gives the Welsh Ministers the final say on designation of a quality body. We believe that the responsibility for this decision should rest with the Commission, as it does with HEFCW does at present. For higher education, it is essential for the quality body to be seen as independent from government.

We note that the Bill also legislates to enable the designated quality body to charge fees. In our view, the Welsh Government needs to be clearer about its reasons for introducing this, its policy intentions and resource assumptions, and the implications for providers.

See our further comments in section 11 of our main response on quality arrangements.

Research and Innovation

13. Should the Commission's functions in relation to research and innovation (Sections 95-97) be broadened beyond just registered tertiary education providers?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

No.

It is absolutely essential that research and innovation in universities is given the priority in support and recognition that it currently receives elsewhere in the UK, and in the most successful economies around the world.

We agree that the Commission should only fund registered providers and not other organisations, as currently drafted. We believe that the Commission should concentrate on the PCET sector, and particularly universities who are already responsible for nearly 50% of all research and innovation investment in Wales. We note, however, that the Welsh Ministers will continue to be able to use their existing powers to fund research and innovation alongside the Commission. We would like to have greater clarity about how this will work, including about the administration of EU replacement funding, before we can be confident that it can do so effectively.

In our view, there needs to be a much more clearly articulated vision of how research and innovation will be given its due support and attention by these proposals. For our fuller comments on this area see section 12 of our main response.

The Explanatory Memo makes it clear that the Welsh Ministers will continue to be able to use their existing powers alongside the new funding powers of the Commission for research and innovation. There needs to be further clarity about how these powers will be used.

We question if arrangements for the Research Innovation Wales will be seen as sufficiently independent. All appointments will be made by the Welsh Ministers. The CEO of the Commission will not be a member.

Apprenticeships

14. The Commission will be responsible for apprenticeship frameworks (Sections 104-107) and the Welsh Ministers will be responsible for the preparation and issuing of core requirements in the Welsh Apprenticeship Specification (WAS) (Sections 101-103). Do you agree with this balance of powers?

Yes

No
Please add any

Neither Yes or No
additional comments in the box

below:

No.

With the establishment of the Commission we are not convinced that that this is the best approach, however. In our view these should be functions of the Commission instead, particularly for degree apprenticeships.

We have difficulty in seeing why apprenticeships should be treated fundamentally differently from other forms and modes of learning in terms of funding and regulatory powers, and the Welsh Ministers' high level of direct control over apprenticeships detracts from the Commission's role.

In particular it is very concerning that the Commission's funding powers for apprenticeships are not subject to the same 'limitations' which protect institutional autonomy and academic freedom as other funding powers in the proposed Draft Bill, which we understand is contrary to the Welsh Government's intention.

See section 14 of our Main response for further comment.

Apprenticeships

15. Does the Draft Bill (Part 4) provide adequate strategic drivers to develop and maintain the integrity of apprenticeships in Wales, ensuring they meet industry requirements?

Yes

No
Please add any

Neither Yes or No
additional comments in the box

below:

Neither yes or no.

If the Welsh Government establishes the Commission we do not see it is helpful or appropriate that the Welsh Government should seek to reserve the power to specify the occupational sectors for apprenticeships; it would be better that this is left to the Commission and providers themselves to identify industry requirements and develop the appropriate strategy.

See section 14 of our Main response for further comment.

The needs of the economy and employers

16. The Commission has a duty to have regard to “the reasonable requirements of industry, commerce, finance, the professions and other employers regarding tertiary education and research and innovation” (Section 2(1)(b)). In your opinion, does this duty go far enough and do you think it will have a meaningful impact based on its current formulation?

Yes

No
Please add any

Neither Yes or No
additional comments in the box

below:

Neither Yes or No.

The legal duty is sufficient, but there are likely to be more important factors in practice. This includes the level of resource and capacity of the Commission to conduct this work. We remain concerned that the work of the Commission and the development of its role may be undermined by the retention of parallel powers and responsibilities by the Welsh Government – particularly where the Welsh Government appears to be expressly reserving its role in relation to identifying industry requirements in relation e.g. to apprenticeships.

For further comments on general duties see section 6 of our main response.

Funding

A focus on outcomes:

17. The Draft Bill (section 79) provides for an approach to funding based on Outcome Agreements. This will allow the Commission, through its funding decisions and negotiations with funded bodies, to contribute to the achievement of the Welsh Ministers' strategic priorities for tertiary education and research. Please see the Explanatory Memorandum for details of the policy intention underpinning outcome agreements (paragraphs 3.56 -3.58 and 3.145 – 3.147 refer). Does this approach strike the right balance between strategic funding priorities and the needs of individual learning providers?

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

No.

As they stand, the provisions of the Bill do not deliver the Welsh Government's express intention to move to a more strategic approach based on outcomes. Instead of replacing the current system based on fee and access plans it has kept them in the form of Access and Opportunity Plans and added administrative layers including 'outcome agreements' and a registration system which all force the Commission to focus on detail at the expense of a more strategic approach.

As prescribed in the Draft Bill the '**outcome agreements**' are not 'outcome' agreements at all, as defined in the Draft Bill, but 'activity' agreements: they must set out 'activities' contributing to the Commission's objectives. This approach has little in common with the recommendations of the Weingarten Review. The resulting model is more likely to encourage resource-intensive micro-management of activities rather than fostering a strategic approach which focuses on outcomes. Even if the definition is redrafted, we are not convinced that there is sufficient evidence around the value of outcome agreements to justify their mandatory inclusion as a statutory strategic tool, and believe that the legislation could introduce another level of unnecessary bureaucracy.'

In our view the Commission does not need all three regulatory systems should have much greater flexibility to choose how it manages its relationships with providers and to adopt the tools it sees as appropriate to carry out its functions without them being prescribed by legislation.

See section 10 of our main response for fuller comment.

Regulatory Impact Assessment

18. The financial implications of the Draft Bill are set out in Part 2 of the Draft Explanatory Memorandum. Please consider whether you think our costings need to take account of anything else?

Please add any comments in the box below:

The Regulatory Impact Assessment is deficient in a number of significant respects.

It does not attempt to identify the costs for institutions/providers or other stakeholders at all. It only focuses on the budgetary costs for the Welsh Government. As was evidenced in relation to the Higher Education Wales Act, the legislation can be expected to have significant direct costs for institutions both in terms of resource and staff time, and the opportunity costs are much higher still – particularly when providers need to be focussing their efforts on regeneration in the light of COVID-19 and securing their place in the post-Brexit global market.

According to the analysis, this Bill implements the most expensive option for the Welsh Government. However, from the notes on the costings it appears that the additional cost is not investment in the functioning of the new Commission but is primarily attributable to the Welsh Government retaining capacity in departments to ensure the ‘accountability’ of the Commission – and presumably the apparatus to exercise the parallel powers that it has retained. The retention of these parallel powers appears to be an expensive way of making the Commission less effective.

It is notable that the costings appear to have otherwise focussed on identifying the costs of reorganising existing resources currently delivering these functions in HEFCW and the Welsh Government. It is a major concern that that cost of delivering additional cross-sector responsibilities is not explicitly recognised and modelled, given that this was one of the key failures identified in the planning for ELWa. It is essential that the Commission is given enough resource to cover its additional responsibilities to avoid a repeat.

Regulatory Impact Assessment

19. We would like you to consider the possible costs and benefits to specific bodies, institutions, organisations or individuals as a result of the Draft Bill. Please provide any comments or evidence here:

Although we have not been able to consider the financial impact of this Bill itself on universities at this stage, a few observations on this costings of the HE(W)A 2015 may be helpful to illustrate some key points.

Our analysis to CYPEC identified that the Welsh Government's estimates of the costs HE(W)2015 had been far too low, and in particular had focused on its own costs rather than on those of the stakeholders involved. Our best estimate as provided to the Welsh Government and CYPEC was that the direct additional costs of HEW(A) 2015 for Welsh universities and Universities Wales was in the region of £4.3m with ongoing additional costs of around £0.53m. Including HEFCW's own published estimates of its additional costs the additional cost for higher education in Wales was estimated at around £4.93m, with ongoing costs of around £0.61m.

Our analysis identified very considerable costs relating to engagement with the consultation and development of the proposals over several years as necessitated by the Act. In addition to the consultation and work on the Bill itself, there was a very significant follow-up work required on the pursuant regulations, and statutory guidance. A very significant amount of time and resource was spent on developing interim and transitional arrangements as well as final arrangements including the Fee and Access Plan guidance, partnership guidance (including renegotiating many contracts), the Full and Transitional Statements of Intervention, and the Financial Management Code. In some areas, the work continued for many years in consequence.

The key area for additional recurrent costs was (and remains) the fee and access plans which have been a major source of additional cost of the system, with institutions typically employing additional staff to deal with the additional requirements.

Although the direct costs were significant, the opportunity costs for universities in Wales were even more so. If the sums involved in direct costs were invested in research and innovation, for instance, Welsh universities could have been expected to attract around £11m more income from UK R&I funding on the basis of the correlation between investment and returns in UK R&I funding identified by the Reid Review. On the basis of previous economic analysis of the sector, the loss of wider income generation for other sectors in Wales was estimated at around £5m.

It is likely that the costs of the current Draft Bill are even more significant. For fuller comments on costs and value for money in relation to the Draft Bill see section 17.

Please add any comments in the box below:

New Normal

20. Do you think the pandemic causes particular issues for anything we propose in the Draft Bill?

Yes

No
Please add any

Neither Yes or No
additional comments in the box

below:

Yes.

Universities are currently dealing with the pandemic and have not been able to consider the Draft legislation and respond to the consultation to a degree that is essential to make sure that it is fit for purpose.

We urge the Welsh Government not to attempt to push through the proposals until the Bill can be fully and appropriately scrutinised.

PCET Reform

21. The Bill is a legislative vehicle to create a new body; the Commission for Tertiary Education and Research. Are there any additional levers that can be used to establish the cultural change needed to deliver the aims of the PCET reform agenda?

Yes

No
Please add any

Neither Yes or No
additional comments in the box

below:

Yes.

Cultural change will be best achieved through the voluntary collaboration between partners. The Commission and Welsh Government should continue to focus on the facilitation of opportunities.

A single body with responsibility for both FE and HE has been tried before in Wales in the form of HEFCW/ELWa. The simple creation of the CTER and collocation of responsibilities will not directly achieve these aims.

22. 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.

Please add any comments in the box below:

There are a number of major issues which a response to the above questions does not capture. These are set out in full in the main response above. These indicate that, although there are aspects of the Draft Bill that we support, overall there is very significant further work required before this Draft Bill can be fit for purpose and deliver the Welsh Government's intentions.

We believe that it is essential to the continued integrity of the current higher education system that these issues are addressed before the introduction of a Bill. In our view the matters are too numerous and problematic to be left to deal with once a Bill is laid, however, and will need to be addressed before a Bill is fit for introduction.

Responses to consultations are likely to be made public, on the internet or in a report. If you would prefer your response to remain anonymous, please tick here:

APPENDIX 2

TABLE 1: SUMMARY OF LIMITATIONS ON THE COMMISSION’S FUNDING POWERS

Has the equivalent limitation from FHEA 1992 been transferred?

Funding Power s.65(3) FHEA 1992	T&CS must only relate to payment from HEFCW s.65(4) FHEA 1992	Must not discourage funds from other sources s.66(2) FHEA 1992	Must have regard to denominational character s.66(3)(a) FHEA 1992	Must have regard to distinctive characteristics s.66(3)(b) FHEA 1992	Must consult with the institutions and representative bodies concerned s.66(1) FHEA 1992	Others not in FHEA 1992
80 Financial support for provision of HE by (or on behalf of) registered institutions of specified categories.	Yes - s.82(3)	Yes - s.83(1).	No	Yes - s.83(2)	Yes, partially (it must consult with those it considers appropriate) s.82(5)	
81 Financial support for HE courses specified in regulations	Yes - s.82(3)	Yes - s.83(1).	No	Yes - s.83(2)	Yes, partially (it must consult with those it considers appropriate) s.82(5)	
88 Financial support for FE or training	No	No	No	No	No	s.92
91 Funding of school sixth forms	No	No	No	No	No	
93 Financial support for other activities connected to tertiary education	No	No	No	No	No	s.92
94 Financial support for apprenticeships	No	No	No	No	No	
95 Financial support for research and innovation	Yes - s.96(3)	Yes - s.95(3)	No	No	No	s.96(4)

APPENDIX 2

TABLE 2: SUMMARY OF LIMITATIONS ON THE WELSH MINISTERS POWERS TO FUND HIGHER EDUCATION INSTITUTIONS DIRECTLY

Is there an equivalent limitation to FHEA 1992?

Funding Power s.65(3) FHEA 1992	T&CS must only relate to payment from [the Welsh Ministers] s.65(4) FHEA 1992	Must not discourage funds from other sources s.66(2) FHEA 1992	Must have regard to denominational character s.66(3)(a) FHEA 1992	Must have regard to distinctive characteristics s.66(3)(b) FHEA 1992	Must consult with the institutions and representative bodies concerned s.66(1) FHEA 1992	Others not in FHEA 1992
84 Financial support by Welsh Ministers for certain HE courses	No	No	No	No	No	
88 Financial support for FE or training	No	No	No	No	No	s.92
93 Financial support for other activities connected to tertiary education	No	No	No	No	No	s.92

APPENDIX 2

TABLE 3: SUMMARY OF LIMITATIONS ON THE WELSH MINISTERS' POWERS TO FUND THE COMMISSION

Funding Power FHEA 1992 s. The Secretary of State may make grants to [F36the HEFCW] of such amounts and subject to such terms and conditions as he may determine.	In relation to	Particular courses The Welsh Ministers T&Cs may not be framed by reference to particular courses of study or (including the contents of such courses and the manner in which they are taught, supervised or assessed) -s68(3) FREA 1992	Programmes of research The Welsh Ministers may frame their T&Cs by reference to particular programmes of research (including the contents of such programmes and the manner in which they are taught, supervised or assessed) -s68(3) FREA 1992	Academic appointments Must not relate to the criteria for the selection and appointment of academic staff - FHEA 1992 s.68(3)	Student admissions Must not relate to the admission of students - FHEA 1992 s.68(3)	Particular institutions 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 any particular institution or institutions - FHEA 1992 s.68(2)
78 Power of the WMs to fund the Commission	Higher Education – specified institutions (s.80)	Only partially - T&Cs may be framed by reference to a particular course but must not require the Commission to perform a function in a way which prohibits or requires the provision of a particular course – s.79(5). The T&Cs may also be framed by reference to courses or parts of courses of study being provided and assessed through the medium of Welsh – s.79(7)	Yes – s.79(6), but may specify 'areas of research or innovation if it is in the Commission's strategic plan' – s.79(4)	Yes – s.79(3)	Yes – s.79(3)	Yes, partially – s.79(1) but only limited "where it is a pre-condition of funding"
	Higher education – specified courses (s.81)	Only partially - T&Cs may be framed by reference to a particular course but must not require the Commission to perform a function in a way which prohibits or requires the provision of a particular course – s.79(5). The T&Cs may also be framed by reference to courses or parts of courses of study being provided and assessed through the medium of Welsh – s.79(7)	Yes – s.79(6), but may specify 'areas of research or innovation if it is in the Commission's strategic plan' – s.79(4)	Yes – s.79(3)	Yes – s.79(3)	Yes, partially – s.79(1) but only limited "where it is a pre-condition of funding"
	Further education or training (s.88)	No	No	Yes – s.79(3)	Yes – s.79(3)	Yes, partially – s.79(1) but only limited "where it is a pre-condition of funding"
	Research and innovation (s.95)		Yes – s.79(6), but may specify 'areas of research or innovation if it is in the Commission's strategic plan' – s.79(4)	Yes – s.79(3)	Yes – s.79(3)	Yes, partially – s.79(1) but only limited "where it is a pre-condition of funding"

