

# Tertiary Education and Research (Wales) Bill 2021 Bill Summary

November 2021



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# Tertiary Education and Research (Wales) Bill 2021

## Bill Summary

November 2021

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The Tertiary Education and Research (Wales) Bill was laid before the Senedd on 01 November 2021.

The Member in Charge is the Minister for Education and Welsh Language.

The Bill dissolves the Higher Education Funding Council for Wales (HEFCW) and creates a new Welsh Government sponsored body to be known as the Commission for Tertiary Education and Research (CTER).

This body will be responsible for the funding, oversight and regulation of tertiary education and research in Wales.

Tertiary education encompasses post-compulsory education and includes higher education, further education, apprenticeships, 6th forms and adult community learning. At present HEFCW regulates and provides funding for higher education, whilst Welsh Government does so for the other tertiary education sectors – the Commission will combine these activities into one body.

The Bill and Explanatory Memorandum are published on the Senedd website.



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# 1. Executive summary

## Background

In 2015 Welsh Government commissioned Professor Ellen Hazelkorn to review the oversight of post-compulsory education in Wales, with a 'special reference' to the future of HEFCW.

Professor Hazelkorn sets out a number of challenges and recommendations for the tertiary education sector in her final report, **Towards 2030**. In responding to the report, the then Welsh Government identified what it considers are its two '**primary recommendations**':

- Develop an overarching vision for the post-compulsory education and training (PCET) sector
- Establish a new arm's-length body responsible for the oversight, strategic direction and leadership of the sector

The Bill takes forward the second of these recommendations by creating a new Welsh Government sponsored body called the Commission for Tertiary Education and Research (the Commission).

The powers of HEFCW and the Welsh Ministers will be consolidated and new powers created, all of which will be exercisable by the Commission so that it can regulate, oversee, and fund the whole tertiary education sector as one. HEFCW will be dissolved.

## Welsh Minister's control

The Commission will be accountable to Welsh Ministers and the Welsh Ministers will be able to influence the Commission. The Bill provides that the Commission must have regard to any guidance issued by the Welsh Ministers and gives the Welsh Ministers the power to issue general directions to the Commission about the exercise of its functions. Welsh Ministers may also confer supplementary functions on it appoint Commission Members including the Chair, and they may also modify the strategic plan of the Commission subject only to consulting it.



## Scope of the Commission

Projecting current funding levels forward shows that the Commission would command resourcing of over £800 million a year, meaning it would control more funding than any other Welsh public body outside of the Welsh NHS. The providers regulated and funded by it would be delivering provision to over 300,000 learners and students during an academic year.

## Policy objectives

Chapter 1 of the Explanatory Memorandum (EM) provides a concise description of the Bill.

The policy objectives that the Bill is intended to help achieve are not clearly delineated in Chapter 3. Chapter 3 does set out:

- that the Bill creates a Welsh Government sponsored body (the Commission) and that it is the policy intent for the Commission to be able to deal with the previously separate post-16 education sectors ‘as a single sector’.
- that Welsh Government has drafted a **non-statutory** vision for the tertiary education sector, and describes the establishment of the Commission as a ‘key aspect’ of delivering that vision, contending that the Commission’s strategic duties are aligned to it. Beyond Chapter 3, Chapter 7 sets out five high level goals for the Commission (which differ in many respects from the goals in the vision) and 11 high level objectives for the Commission. The high-level goals are:
  - A system that strengthens Wales’ economic wellbeing and foundations, encourages enterprise, responds to employer needs and enables a relevant and growing research base.
  - A system that enables learning, assessment and progression through the medium of Welsh.
  - A learner focused system that promotes lifelong learning and delivers effective choice and guidance, and equitable access to appropriate learning pathways and opportunities.
  - A high resilience, integrated, sustainable and responsive system that promotes collaboration, excellence, and regulates with autonomy.
  - A system supported by collaborative and engaged providers that enhance the communities they serve.

Whilst the vision may in practice be reflected in the statement of strategic priorities Welsh Ministers must make under the Bill, the Bill places no explicit duty on the Welsh Ministers or the Commission to have direct regard to it.

## Parts and key points within each

### Part 1

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Part 1 of the Bill makes provision to establish the Commission for Tertiary Education and Research and sets out the general duties of the Commission.

- **The Commission** must submit for approval to Welsh Ministers a strategic plan that addresses both the statement of strategic priorities **Welsh Ministers** must make under the Bill, and the Commission's suite of nine strategic duties.
- **Welsh Ministers** can issue a direction to the Commission about the exercise of any of its functions which it must comply with.
- The Higher Education Funding Council for Wales (HEFCW) is dissolved.

### Part 2

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Part 2 makes provision for the registration and regulation by the Commission of tertiary education providers.

- **Welsh Ministers** will be under a duty to set out the categories of registration under which providers can be registered, create new initial and ongoing mandatory conditions for registration beyond those already on the face of the Bill, and set the details regarding registration conditions on fee limits and equal opportunities.
- This Part contains an escalatory enforcement mechanism for **the Commission** to enforce compliance with conditions. Generally, the Commission can monitor compliance, it can advise on compliance, it can carry out reviews relevant to compliance, it can issue a direction (preceded by a warning notice), and finally it can de-register a provider. Safeguards in the form of a review process are provided for in the Bill.

- **The Commission** gains some agency over Estyn and funding for Estyn’s inspection activities for tertiary education provision will come from the Commission. This will mean Estyn’s budget will be derived from two sources (one directly from Welsh Government for its duties in relation to schools, and the second from the Commission). This Part contains duties and powers for Estyn over tertiary education provision.
- **Welsh Ministers** will have a power to intervene in the conduct of further education institutions (only), where amongst other matters it thinks an institution is being mismanaged. The powers include being able to remove some or all of a governing body, appoint replacements, and instigate the disciplinary process for the dismissal of staff that governors have the power to dismiss. Welsh Government states these powers are re-enacted from existing powers in the Further and Higher Education Act 1992.

### Part 3

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Part 3 makes provision for the Welsh Ministers to fund the Commission and for the Commission’s functions in respect of securing and funding of tertiary education and research (higher and further education, tertiary education and training, and sixth forms).

- **Welsh Ministers** will have powers to provide funding to the Commission. **Welsh Ministers may** attach terms and conditions to this funding. The Explanatory Memorandum states that to protect the autonomy of the Commission and providers, and to protect academic freedom, the Bill places certain limitations on the terms and conditions Welsh Ministers can place on their funding to the Commission.
- **The Commission** may also attach terms and conditions to its funding for higher education, further education, tertiary education, training and apprenticeships. The Commission is free to impose any conditions it ‘considers appropriate’, subject to limited restrictions and a duty to consult such persons as the Commission considers appropriate.
- **Welsh Ministers** have powers to exert high level control of the funding the Commission provides for education provision by being able to make regulations to link funding eligibility to being registered in certain categories in the register created in Part 2 of the Bill.

- **Welsh Ministers** have powers to provide funding to the Commission for specific courses (set by regulations) to for example address gaps in provision; but it cannot oblige the Commission to do anything that would result in the Commission ‘being required to provide such courses’.
- **Welsh Ministers** will be able to fund higher education courses directly in very limited circumstances but will otherwise have no general power to fund higher education provision directly. **Welsh Ministers** will however have powers to fund further education provision directly, alongside the Commission.
- The Bill provides for a prioritised approach to securing further education. **The Commission** must secure proper facilities for 16-19 year olds, proper facilities for targeted groups of persons over 19, and then reasonable facilities for all others aged over 19. The Explanatory Memorandum sets out that the intention is that current 16-19 entitlements provided for by the Learning and Skills Act 2000 will continue.
- **The Commission** has powers to fund research and innovation. The Bill provides for the Commission to have regard to the ‘Haldane Principle’ when funding research – a key ask of stakeholders alongside safeguards on academic freedom and institutional autonomy. The principle is further explained in S103 of this paper.
- **Welsh Ministers** are able to issue a financial support direction to the Commission where it thinks a provider’s financial affairs are being mismanaged, which the Commission must comply with.

#### Part 4

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Part 4 makes provision about apprenticeships.

- The Explanatory Memorandum sets out that a policy aim is to make the apprenticeship system more flexible and more responsive to employer demand. The primary mechanism for achieving this in the Bill appears to be that the specification apprenticeship frameworks must meet if they are to be approved, will no longer require a statutory instrument to be amended.

- **The Commission** must publish apprenticeship frameworks and will have powers to issue certificates of completion. It can delegate these functions and these are already currently undertaken by a third-party.
- Frameworks will have to be published to be eligible to be part of a Welsh apprenticeship and thereby allow apprentices to be funded to undertake them.

### Part 5

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Part 5 makes provision about learner protection, complaints procedures and learner engagement.

- The Bill allows **Welsh Ministers** to broaden the range of learners who can access the Office of the Independent Adjudicator (OIA). The OIA deals with unresolved complaints from higher education learners. The Bill will allow Welsh Ministers to make regulations to allow learners from other tertiary education providers, such as colleges, to access the OIA. This means that until regulations are made, the OIA will only remain accessible to those already able to access it (currently higher education students).
- The Explanatory Memorandum sets out that an aim of the reforms is to make the tertiary education system more learner focussed. The Commission must prepare a Learner Engagement Code which generally speaking, providers will need to adhere to. The intention for the Code requirement is to ensure learners are able to give their views on the education they receive and have their interests represented within their institutions in a consistent manner.

### Part 6

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Part 6 makes provision about information, advice and guidance from and to the Commission and the Welsh Ministers.

### Part 7

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Part 7 makes miscellaneous provision in respect of higher education corporations in Wales and other general provisions.

- **Welsh Ministers** will retain their power to dissolve higher education corporations (HECs) (four of Wales' 8 universities are HECs and 4 are established by Royal

Charter). When doing so Welsh Ministers need only consult the HEC it intends to dissolve. There are no further conditions attached to doing so other than a general requirement to have acted reasonably. The Explanatory Memorandum gives no specific rationale for preserving this wide-ranging power other than Welsh Government considers it a 'desirable position'.

## Powers

- The Bill contains 47 powers to make regulations and 1 power to make commencement orders, 26 of these by the negative procedure.
- There are 9 powers in the Bill conferred on **Welsh Ministers** to issue guidance, issue a direction or create a list (the lists relate to a list of trade unions relevant to the Commissions governing body)
- There are 17 powers in the Bill conferred on **the Commission** to issue guidance, create a Code, or issue a direction. .

## Costs & commencement

The Explanatory Memorandum sets out that the net additional cost of the preferred option (establishing the Commission) is £45 million over a 10 year appraisal period from 2021-22. Welsh Government sets out in its Explanatory Memorandum that the Commission will cost approximately £5 million more a year to operate than current arrangements from 2023-24 onwards.

The Explanatory Memorandum explains that:

- It has not been able to quantify cost savings.
- Indirect costs to other bodies have not been quantified. The Explanatory Memorandum lists 10 categories of bodies that may or may not incur additional costs due to the Bill.
- Benefits have not been quantified.

It goes on to state that there is uncertainty around the assumptions used, meaning a variance of around 30% on the forecast figures should be considered. The table below shows the effect of a 30% increase in forecast costs.

**Illustrative sensitivity analysis for 30% potential variance for figures set out in the RIA**

<b>Cost description</b>	<b>Years</b>	<b>Cost (£,000)</b>	<b>+ 30% (£,000)</b>
<b>Transitional costs</b>	2021-22 to 2023-24	9,949	12,934
<b>Welsh Government staffing and associated costs</b>	2021-22 to 2022-23	22,976	29,869
<b>HEFCW staffing and associated costs</b>	2021-22 to 2022-23	7,308	9,500
<b>Recurrent Commission running costs</b>	2023-24 to 2030-31	158,221	205,687
<b>Total costs</b>	2021-22 to 2030-31	198,454	257,990
<b>Less: 'Do Nothing' costs</b>	2021-22 to 2030-31	153,420	153,420
<b>Net additional costs</b>	2021-22 to 2030-31	45,034	104,570

*The RIA does not set out to which figures the 30% variance applies, therefore for illustrative purposes it has been applied uniformly across all costs. Source: final column Senedd Research calculations, remainder Welsh Government Explanatory Memorandum*

## 2. Background to the Bill

In 2015 Welsh Government commissioned Professor Ellen Hazelkorn to review the oversight of post-compulsory education in Wales, with a 'special reference' to the future of HEFCW.

As part of this, Professor Hazelkorn was asked to advise on the effectiveness of current arrangements, and to make recommendations for the future over-sight of post-compulsory education.

The full terms of reference of her review can be found [here](#).

### Professor Hazelkorn's recommendations

Professor Hazelkorn sets out a number of challenges for the tertiary education sector in her final report, [Towards 2030](#). These challenges included the need to create greater coherence across the post-compulsory education sector; and the need to develop more coherent learning and career pathways 'for all ages, gender and talent'.

To help meet the challenges set out in her report, Professor Hazelkorn made six key recommendations. These were to:

- Develop an overarching vision for the post-compulsory education system for Wales.
- Establish a single new authority as the single regulatory, oversight and coordinating authority for the post-compulsory education sector.
- Place the needs of learners at the centre of the educational system by establishing flexible learning and career pathways.
- Civic engagement should be embedded as a core mission for all providers.
- Create a better balance between supply-led and demand-led education and research provision.
- Create the appropriate policies, processes and practices to encourage better long-term and joined-up thinking about the educational needs and requirements for



Wales.

## Welsh Government response and policy development

In responding to the Toward 2030 report, the then Welsh Government identified what it considers are the reports' two 'primary recommendations':

- Develop an overarching vision for the PCET sector.
- Establish a new arm's-length body responsible for the oversight, strategic direction and leadership of the sector.

Welsh Government **began consulting** on taking these forward in 2017, followed by a technical consultation in 2018. In 2019, the Fifth Senedd's Children Young People and Education Committee conducted **post-legislative scrutiny of the Higher Education (Wales) Act 2015** intended to inform the development of the Bill, and which Welsh Government claims informed the final Bill.

The introduction of the Bill was originally intended for spring 2020, but pandemic pressures instead saw it published as a **draft bill for consultation**.

Welsh Government's Explanatory Memorandum **lists 14 changes** to the 2021 Bill as introduced, from the 2020 draft bill. Significant changes include:

- Replacing the general duties of the Commission with a 'suite' of nine new strategic duties.
- Making changes intended to ensure the duties on the Commission and Welsh Ministers around academic freedom are clear.
- Removing any provision for Access and Opportunity Plans, and instead 'move to a more strategic, outcomes focused approach'.

## Current regulatory & funding landscape

The regulation, oversight and funding of the tertiary education sector is split between different parts of Welsh Government and HEFCW.

- Higher education is regulated, overseen, and partly funded by HEFCW. HEFCW

provides grants to institutions for higher education provision and to conduct research and innovation. The majority of sector funding comes from tuition fees paid directly to institutions meaning regulation of the sector is largely through the Higher Education (Wales) Act 2015, alongside terms and conditions HEFCW attaches to its grant funding. This [report](#) on post legislative scrutiny of the 2015 Act provides more details on the current system and the issues found with it. Quality of provision is reviewed by the UK-wide Quality Assurance Agency on behalf of HEFCW.

- Further education provision is secured by Welsh Government making grants to further education institutions each year. The providers are regulated by Welsh Government via the terms and conditions attached to this grant funding. Current legislation has the effect of Welsh Government prioritising funding to secure further education provision for 16-19 year olds, over provision for those aged over 19. Estyn inspects further education provision.
- Apprenticeship provision is secured by Welsh Government conducting a competitive tendering exercise every 5 years. Successful bidders receive annual funding from Welsh Government and must abide by the terms and conditions of that funding. The terms and conditions include detailed requirements for carrying on apprenticeship provision. Estyn inspects apprenticeship provision.
- Adult Community Learning is funded by Welsh Government’s Community Learning Grant. Providers must again abide by the terms and conditions of that funding. Estyn inspects this provision.
- Sixth Form funding is provided by Welsh Government to local authorities. Estyn inspects sixth form provision.

## The potential scope of the new Commission

The funding made available by Welsh Government for tertiary education provision in its [2021-22 Final budget](#) totalled over £800 million. It includes £500 million for FE provision, £203 million for HE provision, £4.4 million for adult community learning and £113 million for work-based learning. This does not include European funding, nor £90m allocated to 6th form for the 2020/21 academic year.

Assuming that this level of funding were broadly maintained, the Commission would control more funding than any other Welsh public body outside of the Welsh NHS.

The providers regulated and funded by it would be delivering provision to over 300,000 learners and students during an academic year.

## 3. Bill Summary

### Policy objectives of the Bill

Under Standing Order 26.6, the Member in Charge of a Bill must also lay an Explanatory Memorandum that sets out the policy objectives of the Bill. The Bill's Explanatory Memorandum explains this requirement is met by Chapter 3 of the memorandum which addresses the purpose and intended effect of the legislation.

However, the policy objectives that the Bill is intended to help achieve are not clearly delineated in Chapter 3. By way of explanation, Chapter 3 contains only one explicit reference to a 'policy objective' in paragraph 3.59 regarding broadening the choice for learners to study through the medium of Welsh.

Chapter 3 does set out:

- that the Bill itself creates a Welsh Government Sponsored Body (the Commission) and that it is the policy intent for the Commission to be able to deal with the previously separate post-16 education sectors 'as a single sector'. Welsh Government also states that 'one of the principal aims' in establishing the Commission is to create a body able 'to deal with the strategic planning and funding across the whole of the tertiary education sector and research and innovation sector in relation to Wales'.
- that Welsh Government has drafted **a vision for the tertiary education sector**, and describes the establishment of the Commission both as a 'key aspect' of delivering that vision, and as a 'critical step' toward realising Welsh Government's goals 'in respect of education reform'. The vision is not statutory – it is not mentioned in the Bill. The vision describes 5 areas, all of which are stated as being aligned with a Future Generations Well-being goal. The vision followed the publication of the draft Bill – it was published on 26 November 2020, whilst the draft Bill was published on 14 July 2020.
- that the Bill requires the Commission to develop a strategy setting out how it will both respond to Welsh Ministers' strategic priorities, and how it will discharge a suite of nine statutory duties. Whilst the vision may in practice be reflected in the statement of strategic priorities Welsh Ministers must make under the Bill, the Bill places no explicit duty on Welsh Ministers or the Commission to have direct

regard to it Beyond Chapter 3, Chapter 7 sets out five high level goals for the Commission (which differ in many respects from the goals in the vision) and 11 high level objectives for the Commission. The high-level goals are:

- A system that strengthens Wales' economic wellbeing and foundations, encourages enterprise, responds to employer needs and enables a relevant and growing research base.
  - A system that enables learning, assessment and progression through the medium of Welsh.
  - A learner focused system that promotes lifelong learning and delivers effective choice and guidance, and equitable access to appropriate learning pathways and opportunities.
  - A high resilience, integrated, sustainable and responsive system that promotes collaboration, excellence, and regulates with autonomy.
  - A system supported by collaborative and engaged providers that enhance the communities they serve.
- that Welsh Government intends that learners are able to move 'seamlessly' from compulsory education to post-compulsory education and training and that at the core this will be a system that is:
- Easy for learners to navigate.
  - Is valued by the public.
  - Creates a highly skilled society.
  - Helps tackle inequalities.
  - Is globally renowned.
  - Has civic mission at its heart.

## Part 1: Strategic framework for tertiary education and research

Part 1 establishes the Commission for Tertiary Education and Research (the Commission) and the strategic framework for its operation. The Commission will exercise new functions created by the Bill, the existing statutory functions of HEFCW, and many existing functions of Welsh Ministers in relation to further education and training.

The Commission will be accountable to the Welsh Ministers and the Welsh Ministers will be able to influence the Commission – the Bill provides that the Commission

must have regard to any guidance issued by the Welsh Ministers and gives the Welsh Ministers the power to issue general directions to the Commission about the exercise of its functions; Welsh Ministers may also confer supplementary functions on it. Welsh Ministers also appoint Commission Members including the Chair and they may also modify the strategic plan of the Commission subject only to consulting it.

## The Commission

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- (S1) Establishes the Commission for Tertiary Education and Research and introduces Schedule 1. Schedule 1 sets out that the Commission's members will comprise a chair, a deputy chair and between 4 and 14 ordinary members, **all appointed by Welsh Ministers**. The Commission will have associate members with two persons representing the workforce (**appointed by Welsh Ministers**), one person representing Commission staff (who must be a member of a Commission recognised trade union and is appointed by a statutory committee of the Commission, see below), and one person representing learners (**appointed by Welsh Ministers**). The Commission will be required to maintain 3 committees: a Research and Innovation Committee chaired by the Commission's deputy chair; a Quality Committee to advise on the quality of tertiary education; and a staff member appointment committee to appoint the associate staff member. The first Chief Executive will be appointed by Welsh Ministers for up to four years, with the subsequent chief executive appointments being made by the Commission itself but with **the approval of Welsh Ministers**.

## The Commission's strategic duties

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- (S2-10) The Commission's nine strategic duties that it must discharge. These are:
  - Promote life-long learning that offers a variety of levels, types and modes of study.
  - Promote equality of opportunity including participation for under-represented groups and to reduce any attainment gap that arises from social, cultural, economic or organisational factors. The Bill defines under-represented groups for the purposes of this duty.
  - Encourage participation in tertiary education, by both learners and employers.
  - Promote continuous improvement in tertiary education and research, including by having regard to the importance of ensuring that the tertiary education workforce is able to provide high quality education.

- Promote collaboration and coherence in tertiary education and research.
- Contribute to a sustainable and innovative economy. The Bill defines the term sustainable economy.
- Promote tertiary education through the medium of Welsh. The Commission must encourage people to study through the medium of Welsh and take all reasonable steps to ensure the workforce can meet reasonable demand to study through the medium Welsh.
- Promote a civic mission by further and higher education institutions. The section defines civic mission.
- Promote a global outlook including promoting opportunities in tertiary education for persons ordinarily resident in Wales to study, teach or carry out research elsewhere in the world.

### Strategy for tertiary education and research

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- (S11) **Welsh Ministers** must publish a statement setting out their strategic priorities for tertiary education and research, and may amend it at any time.
- (S12-14) The arrangements for the Commission's strategic plan. These sections set out that the Commission must prepare a strategic plan that shows how it intends to discharge its 9 strategic duties and address the Welsh Minister's statement of priorities made under S11. **Welsh Ministers may** approve the plan or **they may approve it after they themselves have modified it** (in which case they must consult with the Commission). S14 sets out the arrangements for the Commission to review its plan from time to time.

### Academic freedom

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- (S15-16) Provisions for academic freedom for higher education providers and freedom of speech for staff at higher education providers. These sections require **Welsh Ministers and the Commission** to have regard to academic freedom and freedom of speech. The sections relate only to higher education (bearing in mind higher education can be delivered by further education institutions and other non-university bodies). The sections define both academic freedom and freedom of speech. There are additional 'safeguards' for institutional and academic freedom in other provisions of the Bill.

## Compatibility with charity law

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- (S17) Compatibility with charity law and governing documents. Currently, all Welsh universities and all further education institutions in Wales are registered charities. This provision prevents the Commission from requiring the governing bodies of providers that are charities to act in breach of their obligations as Trustees of a charity. It also prevents the Commission from requiring governors to do anything incompatible with their governing documents (e.g. their Royal Charter).

## Welsh Minister's guidance and directions

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- (S18-19) Welsh Ministers' guidance and power to give general directions. The Commission must have regard to guidance from Welsh Ministers, but also **Welsh Ministers may** issue general directions to the Commission about the exercise of any of its functions with which it must comply. The section includes various limitations and safeguards that are intended to protect the autonomy of institutions and the Commission.

## Additional functions of the Commission

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- (S20) **Allows Welsh Ministers**, by regulations, to confer supplementary functions on the Commission.

## Dissolution of HEFCW

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- (S21-22) Dissolves HEFCW and introduces Schedule 2. Schedule 2 makes provision about schemes for the transfer of staff and property, rights and liabilities from both HEFCW and Welsh Ministers to the Commission.

## Part 2: Registration and regulation of tertiary education providers

Broadly the Bill provides for regulation and policy leverage via two approaches:

- terms and conditions attached to funding from the Commission
- the creation of a register of providers that may require registered providers to meet relevant conditions for the category under which they are registered and any specific conditions the Commission considers appropriate to an individual provider.

Part 2 concerns the creation of this register and the associated regulatory machinery

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to give it effect. Not all categories or conditions of registration are on the face of the Bill, these can be added to, deleted or amended in particular circumstances by the Commission or Welsh Ministers.

Registration is by application by the provider – it is therefore voluntary and providers can choose to remain outside the regulatory system established by the Bill (although it may be the case the Commission has powers in relation to inspection and quality assurance for non-registered providers in Wales). However, being part of the regulatory system is likely to bring benefits and access to funding, thus providing an incentive for institutions to apply.

By not being registered this could mean the provider being unable to access some or all Commission funding, or their students being unable to access the full range of student financial support (access to student financial support is set by regulations made under the Teaching and Higher Education Act 1998).

### Chapter 1 – Registration of tertiary education providers

#### The register and registration procedure

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- (S23-24) The register and the procedure for registering. **The Commission must** maintain a register of tertiary education providers. The register is the primary means provided for in the Bill for regulating tertiary education providers who wish to be registered. There will be different categories of registration. These are not set out on the face of the Bill but **will be specified by Welsh Ministers by regulations**. The categories are relevant as different conditions can and will be attached to different categories along with potentially differing levels of access to Commission funding. The Commission must enter a provider on the register in the category the provider requests if it meets the criteria set out in S23(4).

#### Registration conditions

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- (S25) Initial registration conditions. To be registered a provider must satisfy initial registration conditions. These relate to (i) education quality, (ii) governance and management, and (iii) the financial sustainability of the provider. **Welsh Ministers may** create more initial registration conditions by regulations. These conditions are in-line with current requirements on regulated institutions in the higher education sector for receiving public funding.

- (S26) General ongoing registration conditions. **The Commission must** determine and publish general ongoing registration conditions that providers must satisfy if they are to otherwise remain on the register. **The Commission** can create different conditions for different categories and for different descriptions of providers within categories, and decide to disapply some or all to particular providers.
- (S27-28) Specific ongoing registration conditions. **The Commission can** impose ongoing conditions on a specific individual provider in the register, and vary or remove them. The Commission might exercise this power if there are specific matters it requires a provider to address. **The Commission must** ensure that registration requirements and conditions are proportionate to the risk it assesses. Proportionate is not defined on the face of the Bill for this purpose.
- (S29) Mandatory ongoing conditions. Once registered, the Commission must ensure that certain ongoing conditions of registration are in place. These conditions apply to all providers in all categories and cannot be disapplied. The eight conditions are set out on the face of the Bill and include conditions related to the quality of education, financial sustainability and conditions relating to requirements for governing bodies to notify the Commission of certain events.
- (S30) Fee limit mandatory ongoing condition. Where a provider is registered under a ‘fee limit category’, and where it is providing qualifying courses, the Commission must ensure the ongoing registration conditions includes a fee limit condition. The fee limit category is **to be specified by Welsh Ministers in regulations**, as is a qualifying course – neither is on the face of the Bill. A fee limit condition requires a registered provider to which it applies to have a fee limit statement, and make sure that the fees for regulated courses do not exceed the fee limit. The fee limit **is set by Welsh Ministers by regulations** (see S41). In practical terms, it will mean institutions which must be registered under the fee limit category will not be able to charge tuition fees more than the maximum amount set in regulations (currently £9,000 in Wales).
- (S31) Equal opportunity mandatory ongoing conditions. Similar to S30 above, **Welsh Ministers may specify categories of registration** to which an equal opportunities mandatory ongoing condition must apply. This means the Commission is required to ensure that the ongoing registration conditions of any provider registered under such categories includes conditions requiring the delivery

of measurable outcomes against several aims as set out on the face of the Bill. These aims are: to increase participation in tertiary education by under-represented groups, retain learners from the same group, reduce attainment gaps, and support under-represented learners finishing their courses.

- (S32-33) Further mandatory ongoing registration conditions and Commission guidance. **Welsh Ministers may by regulations** specify new ongoing mandatory registration conditions. The Commission must publish guidance to providers about ongoing registration conditions (general, mandatory and specific).

### Monitoring and enforcement of registration conditions

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- (S34-36) **The Commission must** monitor compliance with registration conditions; it may offer advice and guidance on compliance; and it may conduct reviews of any matters it considers relevant to compliance with ongoing registration conditions. Reviews may be carried out by another ‘person’ such as Estyn.
- (S37-38) Directions and failure to comply with ongoing registration conditions. Alongside S35 and S36 (guidance and reviews respectively), S37 is another escalatory step for the Commission to use in ensuring compliance with ongoing registration conditions. **The Commission may issue** a direction to a governing body (subject to the procedure set out in S73-76 which require a warning notice to be issued first) to comply with a condition where it is satisfied the provider will, or has failed to comply. S38 relates to guidance which the Commission may publish in relation to complying with a direction.

### De-registration

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- (S39-40) De-registration. This section sets out when **the Commission must**, and when it **may** de-register a provider. **The Commission must** de-register a provider in certain circumstances, with **Welsh Ministers able to** add additional circumstances by regulations. Otherwise the Commission may de-register a provider in two sets of circumstances as part of the final escalatory ladder that also includes guidance, reviews and directions (S35, S36 and S37 as above). The Commission may de-register a provider if it has already exercised its S37 powers and there is a further or additional breach of conditions, or if the breach is so serious its S37 powers are insufficient to deal with it. S40 sets out the de-registration procedure which requires the Commission to notify the governing body of an institution of its intention to de-register, and give it at least 28 days to make rep-

resentations. If the Commission proceeds, de-registration generally only occurs after a period of time during which the institutions can make an application for review under S43.

- (S41-42) Voluntary de-registration, de-registration with consent and change of category. **The Commission must** remove a provider from a category in the register, or the register itself if their application to do so meets the requirements set out on the face of the Bill. S42 allows the Commission to register a provider that has been removed from a category in another category if the governing body consents and other conditions are met.

### Registration decision reviews

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- (S43) Registration decision reviews. Providers may request a review of significant decisions relating to their registration. The review will be carried out by a person or panel appointed by the Welsh Government under S77 of the Bill. A provider may request a review of a decision when the Commission has:
  - Refused registration in a category of the register under S23 (the register).
  - Imposed or varied a specific condition of registration under S27 (specific ongoing registration conditions).
  - De-registered a provider from a category or the register under S39 (de-registration).
  - Set a date to remove a provider from a category under S40(6) (date of removal from register at Commission's instigation) or S41(7) or 41(8) (date of voluntary removal from register).

### Fee limit statements

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- (S44-46) Fee limit statements and their approval. S30 requires providers registered in a fee limit category to have an approved fee limit statement. In effect, providers with an approved fee limit statement would not be able to charge more than the 'maximum amount' for qualifying courses (currently £9,000 a year for regulated courses). In England, the regulatory framework allows providers additional access to public funding if they are registered in a fee limit category. The current higher education regulatory regime under the HE Act (Wales) 2015 also provides for more access to public funding in return for limiting fee levels to a maximum amount. As now, the Bill specifically excludes international students from the fee limit who may still be charged higher fees.

- (S47) Validity of contract. If a student is expected to pay fees that are higher than the applicable fee limit, then the provider cannot recover the excess fee but will still be bound by the rest of the contract, including its duty to provide education to the student. This provision would capture both deliberate and inadvertent instances (for example if a provider has a number of fee limits for different courses and they are mistakenly charged a higher one due to administrative error).

## Chapter 2 - Quality assurance and improving quality

### General quality assurance functions

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- (S48) Quality assurance frameworks. **The Commission may** publish a quality assurance framework, or more than one framework. Such a framework is intended to be a high level policy document that concerns key matters such as the criteria for assessing tertiary education quality, roles and responsibilities, and the processes for doing so. The Commission must consult Estyn. Upon the framework being published the Commission, Estyn and the body the Commission designates to undertake higher education quality assurance (see S54) must have regard to it. This means that unlike HEFCW, the Commission will have agency over the activity of Estyn (in relation to tertiary education).
- (S49-51) These sections provide a similar escalatory intervention mechanism as under S34-36 but this time in relation to education quality. **The Commission must** monitor and promote improvement in the quality of tertiary education. It may also provide advice and guidance to improve quality or prevent quality from becoming inadequate. And it may carry out reviews that are relevant to the quality of tertiary education or a particular course of tertiary education. It has powers do this for any tertiary education provided in Wales even if it is not provided by a registered provider or funded / secured by the Commission.

### Assessment of quality in higher education

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- (S52-53) Assessment of quality in **higher education. The Commission must** itself assess or make arrangements for the assessment of the quality of higher education delivered by each registered provider and delivered on behalf of a registered provider (for example if a university has a franchise agreement with another provider to deliver courses on its behalf). **The Commission may** also carry out such assessments or make such arrangements for the assessment of the quality of higher education provided in Wales by any tertiary education provider. This power

seemingly extends beyond regulated providers to any higher education delivered by tertiary education providers in Wales – giving the Commission wider ranging powers than currently enjoyed by HEFCW in relation to quality assurance of higher education under the 2015 Act. **The Commission must** publish reports of each assessment and **Welsh Ministers may** make regulations to specify intervals of assessment and the timing of report publication. Once a review has been completed the Bill requires registered providers to develop an action plan for responding to the review. The Commission can then issue directions (S37) in relation to such an action plan and use its powers of de-registration under S39.

- (S54) Designating a body to conduct the assessment of higher education quality. This section introduces Schedule 3 which concerns the matters around designating a body to conduct quality assessment on behalf of the Commission. The Commission has the power to assess quality itself, but in practice it may designate an external body to do it. This is similar to current HEFCW powers who have designated the Quality Assurance Agency (the QAA) to undertake assessments on its behalf. The QAA assesses higher education quality in all UK nations. Whilst Schedule 3 sets out that the Commission can designate anybody that meets the criteria set out on the face of Schedule 3, in practice currently only the QAA is likely to be acceptable to stakeholders and meet the requirements of Schedule 3 which include the body being able to ‘command general confidence’ from a broad range of registered HE providers.

### Inspection of further education or training etc

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- (S55) Duty of Estyn to inspect and report. Whilst the Bill provides for the Commission or a designated body to assess the quality of higher education, **Estyn** must inspect and report on the other types of tertiary education such as further education, sixth forms, and apprenticeships. The section also sets out that **Welsh Ministers may make regulations setting out the interval of inspections and the timing of reports.**
- (S56) This gives Estyn powers to inspect a wider range of tertiary education than set out in S55 if the provider asks it to inspect.
- (S57-59) Duty to provide information and advice to the Commission and Welsh Ministers. This section places a duty on Estyn to keep the Commission and Welsh Ministers informed about matters as set out in the sub-sections and to respond

to requests from the Commission and Welsh Ministers on various matters as set out in the sub-sections. S59 **allows Welsh Ministers to** confer other functions on Estyn by regulations.

- (S60) Action plans following inspections. Similar to S53 for higher education, providers must respond to an inspection by publishing an action plan. Like in S53 the Commission has powers to issue directions or de-register providers in relation to this requirement.
- (S61) Area inspections. **Estyn must** carry out area inspections if the Commission asks it to. This section sets out the scope of area inspections and requirements in relation to them.
- (S62) Rights of entry for Estyn. This section gives Estyn powers of entry and powers of inspection. Sub-section(5) provides for it to remain a criminal offence to wilfully obstruct Estyn.
- (S63) **The Commission may** direct Estyn to carry out surveys and studies or Estyn may do so itself.
- (S64) Annual report. **Estyn must** normally publish an annual report under the Education Act 2005. This section states that the report must now include an account of its activity under this Chapter of the Bill.
- (S65) Estyn’s annual plan. **Estyn must** prepare a plan for each financial year that sets out funding and expenditure it thinks will be necessary to carry out its duties across all its inspection remit. This plan must also contain information as to how Estyn will manage the funding the Commission gives it under S66 to carry out its duties under this Bill in relation tertiary education (as well as its ‘usual’ funding from Welsh Ministers it gets currently).
- (S66) Funding inspections. Funding sources for Estyn will be separated under this Bill. **The Commission must** provide such funding to Estyn as the Commission considers appropriate for carrying out Estyn’s function in relation to tertiary education funded or secured by the Commission. Welsh Ministers will no longer be responsible for providing Estyn funding for its activity that relates discharging its duties under this Chapter (but they will still provide the funding for its du-

ties in relation to school inspections). **The Commission must** consult with Estyn over its funding allocation and it must approve the parts of the annual plan in (S65) that relate to its duties under this Chapter. **The Commission can** require Estyn to amend its plan in order to receive funding under this section.

### Chapter 3 - Further enforcement and procedural provisions

#### Intervention in the conduct of further education institutions

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- (S67-70) Grounds for intervention. The Bill **gives Welsh Ministers** (not the Commission) the power to intervene (S68) in **further education institutions** when certain grounds for intervention are met as set out in S67. These powers were previously set out in the Further and Higher Education Act 1992. S69 requires the Commission to notify Welsh Ministers if it believes the grounds for intervention apply. **Welsh Ministers** must publish a statement setting out how they propose to exercise these powers. The intervention powers in S68 are significant as they **enable Welsh Ministers** (after consultation with the Commission) to:
  - Remove all or any members of the further education providers governing body (it cannot direct a governing body to dismiss staff, but it can direct a governing body to undertake the disciplinary process for dismissing them)
  - Appoint new members to any vacancies (including from vacancies created from exercising the above power)
  - Direct the governing body to take steps or not take steps to deal with the grounds for Welsh Ministers intervention.

#### Access to information and facilities

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- (S71-72) Duty to co-operate and powers of entry and inspection. These sections require certain providers (as set out on the face of the Bill) to cooperate with the Commission with regards to its duties relating to monitoring and improving quality (S49, S51 and S52). S72 gives the Commission powers to authorise a person in writing to enter and inspect certain providers (as set out on the face of the Bill) in relation to monitoring and reviewing compliance with registration conditions (S34 and S36) or in relation to monitoring quality (S49, S51, S52).

#### Warning and review procedure

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- (S73-75) Warnings and notices. **The Commission may** issue directions in relation



to registration conditions (S37) and the duty to cooperate with the Commission and provide information etc., (S71); and it may issue notices in relation to rejecting fee limits or revisions of them (S45). **The Commission must** give a warning notice and provide time for the governing body to make representations before issuing directions and notices. S73-75 set out the process for issuing these directions and notices (S75), and the process for issuing the warning notices (S74).

- (S76-77) Review. If a governing body receives a notice or direction for a reason listed in S73, or if it is refused registration or the Commission changes its registration category or conditions under S43, then it can apply for a review since these decisions will have a fundamental impact on providers. S77 sets out that **Welsh Ministers** must appoint a person or panel to conduct the review and may make regulations regarding reviews. This means in practice that governing bodies will be able to seek a review relating to:
  - Directions in respect of a failure to comply with on-going registration conditions (S37)
  - Notice of a rejection of a fee limit statement or rejection of a variation of one (S45)
  - Directions in relation to a failure to co-operate with the Commission to provide information etc. (S71)
  - Decisions related to refusal to register a provider in a category of the register (S23); imposing or varying specific ongoing registration conditions (S27); removal of a provider from a category of the register (S39); the date when decisions to remove a provider from a category take effect (S40 and 41).

### Miscellaneous duties

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- (S78) Financial sustainability. **The Commission must** monitor the financial sustainability of registered providers and certain tertiary education providers as set out on the face of the Bill, including those funded under S94. **The Commission must** send Welsh Ministers each year a report on the financial outlook of those providers which includes relevant patterns, trends and other matters which it has identified. The Bill does not require this to be published.
- (S79) **The Commission must** publish a statement setting out how it will use its powers of intervention (similar to the duty imposed by S70 on Welsh Ministers to do the same for their powers). The Bill defines the Commission's powers of intervention (the two escalatory ladders related to registration and quality of ed-

education explained above):

- (S34) duty to **monitor** compliance with ongoing registration conditions
- (S35) **advice and assistance** in relation to the above
- (S36) **reviews** of compliance with conditions
- (S37) **directions** in respect of a failure to comply with ongoing registration conditions (applies in the case of actions plans following inspections and quality assurance reviews) – subject to review procedure
- (S39) **de-registration** – subject to review procedure
- (S49) **monitoring** quality
- (S50) **advice and assistance** in relation to the above
- (S51) **review** relevant to the quality of tertiary education
- (S71) **directions** in respect of a failure to comply with a duty to cooperate. Subject to review procedure.

## Directions

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- (S80) Enforcement of directions. If Welsh Ministers or the Commission give a governing body a direction under Part 2 of the Bill it must comply with it. The direction will be enforceable by injunction.

## Chapter 4 - General

- (S81) Welsh Ministers can designate a provider of tertiary education to be treated as an ‘institution’ (institution as defined by S139).
- (S82) This section provides definitions of particular terms used in Part 2.

## Part 3: Securing and funding tertiary education and research

This Part sets out the funding arrangements for securing tertiary education, training and research. Funding may be used as a policy lever, both by attaching terms and conditions to it and by funding and ring-fencing particular activity and matters.

In order to protect the autonomy of the Commission, providers, and academic freedom, Welsh Ministers have certain limitations (set out on the face of the Bill) placed on the terms and conditions they can attach to the funding to the Commission. However, in turn the Commission may attach any terms and conditions it considers

appropriate (subject to limited restrictions and a duty to consult such persons as the Commission considers appropriate) when it funds tertiary education and research and other activities in relation to it.

Access to funding can be controlled by Welsh Ministers by the making of regulations to link eligibility for funding with the need to be registered (on the register created by Part 1) or being registered in a particular category.

### Funding the Commission

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- (S83) Welsh Ministers' powers to fund the commission and limitations on it. S83 gives **Welsh Ministers the power** to fund the Commission and to also make this funding subject to terms and conditions. The terms and conditions may include a requirement for the Commission to enter into an outcome agreement with a person to whom it provides funding. S83 sets out in more detail what an outcome agreement is. Outcome agreements are intended to be a key policy lever for both Welsh Ministers and the Commission to ensure providers that it funds align with the Commission and therefore Welsh Ministers' priorities and its strategic duties in S2-10.
- (S84) Protecting Commission and institutional autonomy. This section sets out what Welsh Ministers cannot put into the terms and conditions of its funding to the Commission under S83. These are intended to safeguard the autonomy of the Commission, providers, and academic and research freedom. There are additional protections for funding that is provided for higher education (S85 and 86) and research (S102). These amongst other things **prevent Welsh Ministers** from attaching terms and conditions that would compel the Commission to fund or not fund certain higher education courses and also prevent them being made in relation to course content, teaching or assessment. The additional limitations in sub-sections (4), (5) and (6) of section 84 only apply to higher education and research funding, but they do not apply in turn to courses being provided and assessed through the medium of Welsh. This means **Welsh Ministers** can allocate funding to the Commission targeted at Welsh medium provision.

### Funding of higher education

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- (S85-86) Powers to fund higher education provision. S85 provides the Commission with powers to fund certain providers in order to support the provision of higher education by them or on their behalf, with sub-section (4) placing limita-

tions on the Commission's ability to fund initial teacher training unless the training meets requirements set out in regulations. **Welsh Ministers will control** the eligibility of providers to receive funding under S85 by regulations which will set out which categories of registration a provider must be registered in to be eligible for funding under S85. S86 **gives Welsh Ministers the power** to make regulations to specify 'eligible courses' which the Commission may then fund outside of the registration system. The intention is that Welsh Ministers can fill gaps in provisions for certain subjects or locations.

- (S87) Terms and conditions. This section gives **the Commission powers** to attach terms and conditions to funding made under S85 and S86. The terms and conditions may be what the Commission considers appropriate – it is not clear to what extent there are safeguards beyond those set out later in S88. The terms and conditions cannot relate to how funds derived from other sources, such as income generated by the provider's activities, must be used. **The Commission must** attach certain terms and conditions to funding made under S86 which are intended to make up for the provider not being subject to registration conditions (since S86 **gives the Commission powers** to fund providers outside of the registration system).
- (S88) **The Commission must** have regard when funding under S85 and 86 to the desirability of maintaining any distinctive characteristics of a provider. It also must have regard to not discouraging a provider from maintaining or developing funding from other sources. This provision is again intended as a safeguard to institutional autonomy.
- (S89) **Provides Welsh Ministers powers** to directly fund a specific and narrow range of higher education courses as set out in the Education Reform Act 1988 (i.e. non-degree courses in preparation for professional examinations at a higher level or providing education at a higher level).

### Further education and training

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- (S90-92) Duties to secure 'proper' and 'reasonable' further education, 'relevant' education and training facilities. S90 to 92 sets out **the Commission's duties and powers** to secure further education and training for those aged 16-19, eligible persons over 19, and for everyone else aged over 19. The intention of these three provisions is that the Commission prioritises its funding for further education and

training. Firstly on (i) securing proper provision for 16-19 years, and specific relevant education and training for specific eligible persons over 19; and then (ii) securing reasonable provision for everyone else aged over 19. The Bill aims to achieve this by the Commission having to fund 'proper' facilities for those aged 16-19 and for specific relevant education and training for specific eligible persons over 19 (eligible persons will be specified in regulations), and then fund 'reasonable' facilities for non-eligible person aged over 19. The regulations to define eligible persons can address matters such as age, status, income and educational attainment. Welsh Government describes this prioritisation policy as an 'expansion of current policy' but that the intention nonetheless is to 'retain the current entitlements for learners aged 16-19' with regards to the requirement for local curricula under the Learning and Skills Act 2000.

- (S93) S93 sets out the requirements to which the **Commission must** have regard when securing proper and securing reasonable facilities in S90-92. These include having regard to the requirements of employers, delivery through the medium of Welsh and the abilities of different persons.
- (S94-95) These sections set out the **powers of Welsh Ministers and the Commission** to provide financial support for further education and training and provide financial support to persons. Both **Welsh Ministers and the Commission** may 'fund any person to provide further education or training wholly or mainly in Wales, and further education or training to learners ordinarily resident in Wales'. This means funding for both providers, but also directly to learners in the form of financial support (i.e. transport costs, childcare costs). This broad power may be tempered by **Welsh Ministers by S95 which allows Welsh Ministers to** make regulations to specify that the provision of resourcing made to providers under S94 can only be made to registered providers in certain categories of registration. In turn, the regulations may specify exceptions to the above that mean **Welsh Ministers or the Commission can** directly fund provision by un-registered providers for specific education and training. This would allow the provision of learning that was too specialist or not cost-effective for registered providers to offer.
- (S96) Terms and conditions. This section sets out that where the Commission or Welsh Ministers provide financial resources under S94 they may attach the terms and conditions they consider appropriate. The section sets out what these may cover and what they must cover, such as a prohibition on the charging of fees to 16-19 year olds in further education and training.

- (S97) Means test. This allows the **Commission or Welsh Ministers** to carry out or fund means tests and to take these into account when ascertaining any entitlement for persons to financial support to enable them to receive further education or training.
- (S98) Funding for school sixth-forms. This provides the **Commission power to** fund education provided by school sixth forms maintained by local authorities and impose ‘appropriate’ terms and conditions for that funding.
- (S99) Additional Learning Needs. This section **requires the Commission to** have regard to the needs of people with additional learning needs and the desirability of facilities being available which would assist the discharge of duties under the Additional Learning Needs and Education Tribunal (Wales) Act 2018. Welsh Government explains that the policy intention for S99 is that **the Commission will** ‘secure general, proper, and reasonable facilities for learners with ALN’. It goes on to say that the intention is ‘that local authorities will, under the 2018 Act, be responsible for funding and securing specialist provision on an individual basis, including any necessary board and lodging’.
- (S100) Financial support for other activities. This section gives **the Commission or Welsh Ministers the power to** fund a wide range of activities in relation to tertiary education. These include the provision of information, advice and guidance about education and training in Wales; the provision of facilities designed to form links between employers and providers; and to fund tertiary education through the medium of Welsh.

### Financial support for apprenticeships

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- (S101) Funding for apprenticeships and developing an apprenticeship framework. This section **gives the Commission powers to** fund providers of an ‘approved Welsh apprenticeship’ and to fund a person to develop one. The Commission can attach terms and conditions to this funding as it deems appropriate, albeit the Bill requires the Commission to apply certain conditions as set out in sub-section (7). **Welsh Ministers may** make regulations to restrict eligibility for this funding to providers registered in certain categories, and as in S95 for education and training funding, make exceptions. A provider can pass on funding to a ‘collaborating body’ in a sub-contracting arrangement with the consent of the Commission. It is not clear within existing published information if providers must currently gain

the consent of Welsh Government to do so. Currently, apprenticeships are delivered by a network of further education institutions and private and third-sector training providers who have successfully bid to be awarded contracts on a 5 year basis.

### Research and innovation

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- (S102-103) Financial support for research and innovation. The Commission may fund research and innovation at a specified provider, which means a registered provider registered in a specific category as per regulations made by Welsh Ministers. This suggests that **the Commission will only have powers to** fund universities since there is no provision for bodies that are not involved in tertiary education to be registered under the Bill. The Commission can attach terms and conditions that it deems appropriate. There were calls from stakeholders to the 5th Senedd's Economy, Infrastructure and Skills Committee **for the Commission to be able to fund a wider range of bodies such as Amgueddfa Cymru** as they are able to access research grants from the UK research funding body UKRI. See Senedd Research's comprehensive **briefing on research and innovation in Wales** for background information on the research system in the UK. Sub-section 103(4) states the Commission must have regard to 'the principle that decisions on individual research or innovation proposals are best taken forward following an evaluation of the quality and likely impact of the proposals'. Welsh Government explain that this is in-line with the Haldane Principle which is explained on page 16 of the briefing above. Whilst the Bill does not use the term 'Haldane Principle' the wording in sub-section (4) is identical to the description of the principle used in the Higher Education and Research Act 2017 (**S103 of the 2017 Act**).
- (S104) Other functions in relation to research and innovation. The Commission must promote awareness of the research and innovation activity it funds, disseminate results and encourage more research and innovation activity. It must report on research and innovation in its annual report.

### Collaborating bodies: consent

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- (S105) Controls on funding passed on to collaborating bodies. **Welsh Ministers may** make regulations to effectively set controls around funding being passed on to collaborating bodies (i.e. sub-contractors). This is achieved by Welsh Ministers being able to make regulations to require the Commission to consider certain matters when it gives its consent for funding to be passed onto collaborating

bodies. It is common for universities and apprenticeship providers to franchise or sub-contract provision to other bodies – it is not clear if Welsh Government or HEFCW consent is required currently if providers pass on funding from Welsh Ministers or HEFCW.

### Financial support directions

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- (S106) If it appears to Welsh Ministers that the financial affairs of a relevant person (registered providers and persons in receipt of funding under specific provision as set out in the section) have or are being mismanaged, they may issue a financial direction to the Commission which it must comply with.

## Part 4: Apprenticeships

Apprenticeships are within the portfolio of the Minister for Economy rather than the Minister for Education and the Welsh Language, the Member in charge of this Bill. They are delivered by a **network of training providers** on the basis of a competitive tendering process approximately once every 5 years. These providers (the main contractors) are contracted by Welsh Government to deliver apprenticeship provision and they may in turn use sub-contractors to deliver provisions on their behalf.

Apprentices must complete an apprenticeship framework to receive an apprenticeship certificate. Frameworks are broadly speaking the qualifications, knowledge and practice needed to meet the required standards to gain a certificate of completion. Frameworks are approved (issued) by Welsh Government and must conform to a specification set out by Welsh Government, but they can be developed by persons outside Welsh Government. Certificates are issued by a contracted certifying authority on behalf of Welsh Government.

Welsh Government manage the demand for apprenticeships by restricting access based on age, existing qualifications, volume and location of learners, apprenticeship subject and level. Apprenticeship provision will come under the remit of the Commission.

### Introductory

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- (S107-110) Meanings of apprenticeship terms. These sections define the following terms:
  - Approved Welsh apprenticeship: this is an arrangement that takes place



under an approved Welsh apprenticeship agreement (or is an alternative Welsh apprenticeship) where the work takes place wholly or mainly in Wales. It must satisfy any conditions in regulations that the **Welsh Ministers may make**.

- Approved Welsh apprenticeship agreement: the agreement must provide for a person to work for reward in an occupation that has a relevant apprenticeship framework which has been published. **Welsh Ministers may** make regulations to specify further conditions.
- Alternative Welsh apprenticeship: this **allows Welsh Ministers** to make regulations to allow an apprenticeship to be treated as an approved Welsh apprenticeship in certain cases. The Explanatory Memorandum gives the example of a self-employed person.
- Apprenticeship framework: a framework is a document that sets out the conditions that need to be completed to achieve an approved Welsh apprenticeship. In lay terms, it is the course of work and study that an apprentice has to follow to gain their apprenticeship. Broadly speaking, a framework usually requires the completion of a specific qualification(s) and a set number of hours of practice and work, although this can vary but only within the specification of the current specification (see below on SASW).

### Functions of the Welsh Ministers

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- (S111-112) **Welsh Ministers may** specify requirements in relation to apprenticeship frameworks. Currently Welsh apprenticeship frameworks must meet the Specification of Apprenticeship Standards in Wales (SASW). Broadly these set out what a framework must have in it and what it needs to address. For example all frameworks under the current SASW must set out details around the occupational competencies, and technical knowledge needed to complete it, and that these can be separate qualifications or combined into one. A key difference between the current SASW and the powers intended in S111 is that the current SASW can only be changed by statutory instrument, which is not required under S111 – this is intended to make the system more responsive. S112 requires Welsh Ministers to consult on the specification.

### Functions of the Commission

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- (S113-114) Preparation and publication of frameworks in a register. This section allows **the Commission to** prepare or have prepared apprenticeship frameworks. An apprenticeship framework cannot form part of an approved Welsh appren-

ticeship until it is published and the Commission may publish frameworks it has not developed or had developed itself. **The Commission must** keep published frameworks under review and review or withdraw them where it determines they should be. **The Commission must** maintain and publish a register of apprenticeship frameworks. Current frameworks are published by (but not approved by) the Federation of Industry Sector Skills and Standards (FISSS). Welsh Government itself currently approves (issues) apprenticeship frameworks.

- (S115-116) Gives **the Commission powers** to issue certificates for those who have completed a Welsh apprenticeship. The current certifying authority for apprenticeship certificates is the FISSS. S116 **allows the Commission to** designate a person to which to delegate the issuing of apprenticeship certificates and the publication of them.

### Supplementary provisions about apprenticeship agreements

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- (S117-120) These sections address technical matters such as not treating an approved Welsh apprenticeship agreement as a contract of apprenticeship (i.e. their not being a common law apprenticeship), the transfer of copyright from author to the Commission when a framework is published by the Commission, and Crown Servants being able to undertake apprenticeships.

## Part 5: Learner protection, complaints procedures and learner engagement

- (S122) Learner Protection Plans. **The Commission may** give notice to a relevant tertiary education provider ‘asking’ it to submit a learner protection plan to the Commission on or before a certain date. ‘Relevant provider’ is defined in sub-section (10). Learner protection plans are intended to protect the interests of learners if a course ceases to be delivered for any reason, and to support a person to transfer to another course of tertiary education. Once a notice has been given the enforcement of the plan is through conditions of registration and terms and conditions of funding. **The Commission has discretion** as to whether or not to submit a notice to a provider. The practicalities of an effective learner protection plan are likely to be extremely complex and require collaboration between many parties.
- (S123-124) Complaints. **The Commission must** take steps to ensure that a relevant tertiary education provider has in place a complaints procedure and makes

learners aware of how to access it. S124 amends the Higher Education Act 2004 to allow Welsh Ministers to make regulations to widen the range of learners that can access the Office of the Independent Adjudicator (OIA) which handles unresolved complaints beyond higher education students. Welsh Government explain that the intent is for access to the OIA to be extended gradually to allow the OIA time to build its capacity.

- (S125) Learner Engagement Code. **The Commission must** prepare and publish a Learner Engagement Code. This provision is intended to respond to the finding in the Toward 2030 report that the tertiary education system was insufficiently learner focussed. This code can cover matters such as ensuring the interests of learners are effectively represented; that they have opportunities to participate in decision-making; and that they can give their views. The Code will apply to relevant providers and relevant decisions by the provider. Compliance will be enforced where relevant through registration and terms and conditions of funding. It is anticipated by Welsh Government that the Code will need to ‘allow for a degree of proportionality’ for different types and sizes of provider if necessary.

### Part 6: Information, advice and guidance

- (S126-131) These sections set out provisions regarding information sharing. They encompass:
  - Information and advice that the Commission must give to Welsh Ministers
  - The Commission’s powers to request information from other persons
  - Provision to allow specified bodies to share information with the Commission
  - Powers for Welsh Ministers to request application-to-acceptance information (this is likely to be requested from UCAS) to be given to the Welsh Ministers or the Commission for limited research purposes
  - How Welsh Ministers may use application-to-acceptance information
  - The powers of the Commission to give advice and issue guidance to any person about the provision of tertiary education or any other matter connected with the Commission’s functions
- (S132) This section **allows Welsh Ministers or the Commission** to carry out research, setting out the subjects on which it may be conducted. This power does not relate to research and innovation conducted by other institutions, it relates to the Commission itself undertaking research on matters such as education or

training in Wales and connected matters. Where the Commission or Welsh Ministers provide funding for another body to conduct this research they may attach terms and conditions as they consider appropriate.

## Part 7: Miscellaneous and general

### Higher education corporations

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- (S133-134) These sections contain technical provision relating to the governing documents of higher education corporations (HECs). In Wales, universities are either HECs (there are 4) or universities established by Royal Charter (there are 4 of these). HECs are governed according to their governing documents. Current law, in the view of a Law Commission review, places barriers for HECs to review and amend their governing documents. The provisions in these sections will allow, at a future date explains the Explanatory Memorandum, the proposals from the Law Commission review on simplifying the amendment of governing documents to be brought forward. Welsh Government explains stakeholder feedback influenced this decision to not make immediate changes.
- (S135) Welsh Ministers powers to dissolve HECs. S128 of the Education Reform Act 1988 **enables Welsh Ministers, by order, to dissolve HECs**. This is a wide-ranging power that goes further than in England where the Secretary of State may only dissolve a HEC at its own request. Welsh Ministers under S128 of the 1988 Act need only to consult the HEC of their intention. S128 of the 1988 Act was the power used to dissolve the former universities of Newport and Glamorgan to form the University of South Wales (USW), and was the power Welsh Ministers proposed to exercise to bring about the further dissolution of UWIC / Cardiff Met and transfer its assets to USW. S135 preserves this power for Welsh Ministers. The Explanatory Memorandum does not set out a clear rationale for preserving this power despite the Welsh Government consulting on removing it. The EM explains ‘The Welsh Government consider it necessary to retain the Welsh Ministers’ power to dissolve a higher education corporation in circumstances where a request has not been made’ by the HEC.

### Consultation about careers services

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- (S136) Careers Wales will remain the body responsible for delivering careers information advice and guidance to learners. However, **Welsh Ministers must** consult the Commission on an annual basis with regard to the strategic priorities for this

activity.

## General

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This section contains various technical and miscellaneous provisions. Select provisions are summarised below.

- (S138) Regulations. This provision sets out those regulations where a draft must be laid before and be approved by resolution of the Senedd via the affirmative procedure<sup>1</sup>. The Bill contains 47 powers for Welsh Ministers to make regulations and one power to make orders regarding the commencement of provisions – 27 of these are via the negative procedure<sup>2</sup>.
- (S140) The Open University does not fall into the definition of a tertiary education provider in Wales as its activities do not fall mainly or wholly in Wales. This provision allows Ministers to make regulations to treat it as such, but they must consult with it before making such regulations.
- (S143) Commencement. Only S138-141 and S143-144 of the Bill come into force the day after Royal Assent. All other provisions will be commenced by order.

## Schedules

There are 4 schedules to the Bill. These are discussed in the main body of the summary above:

- Schedule 1 – Commission for Tertiary Education and Research
- Schedule 2 – Transfers of property and staff to the Commission
- Schedule 3 – Assessing higher education: designated body
- Schedule 4 – Minor and consequential amendments

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<sup>1</sup> This means that the Welsh Ministers must lay a draft of the regulations before the Senedd and the regulations cannot be made unless the Senedd approves the draft.

<sup>2</sup> This means that the regulations will be made by the Welsh Ministers before they are laid before the Senedd. The Senedd can annul the regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid.

## 4. Costs and impacts of the Bill

### Options appraisal

Welsh Government initially considered 6 options and 5 sub-options as follows:

- Option 1: Business as usual
- Option 2: Consolidation across the sector and use of existing powers to modify the duties and responsibilities of HEFCW
- Option 3: Adopting the approach developed in England
- Option 4: Centralisation
  - Option 4a: Transferring all functions to Welsh Government and dissolving HEFCW
  - Option 4b: As above but with a separate body for research
- Option 5: Establishing a small-scale Tertiary Education Authority (TEA) to absorb most of HEFCWs functions and take on responsibility for certain other functions
  - Option 5a: TEA would take on functions for further education, apprenticeships, some aspects of sixth forms, and higher education.
  - Option 5b: As above but with duties to develop labour market intelligence and regional skills partnerships and advise Welsh Government on tertiary education future strategy.
  - Option 5c: As 5b but with a separate body for research.
- Option 6: Establishing a large-scale Tertiary Education Authority to take on all of HEFCWs functions and other functions across the sector.

Welsh Government discounted options 2, 3 and 5 at an early stage. The Explanatory Memorandum sets out more details on the options then taken forward (1, 4 and 6). The preferred option was Option 6, establishing a large-scale TEA i.e. the Commission. Welsh Government sets out that the do nothing approach would perpetuate existing challenges whilst centralisation would not have realised the full range of beneficial outcomes.

## Costs and assumptions

The Explanatory Memorandum sets out that the net additional cost of the preferred option (establishing the Commission) is £45.034 million over a 10 year assessment period. These costs are made up of transitional costs, current costs for Welsh Government and HEFCW until the Commission is established, and then on-going Commission costs for the remainder of the 10 year assessment period.

<b>Option 6 costing, source: Bill Explanatory Memorandum</b>		
<b>Cost description</b>	<b>Years</b>	<b>Cost (£,000)</b>
<b>Transitional costs</b>	2021-22 to 2023-24	9,949
<b>Welsh Government staffing and associated costs</b>	2021-22 to 2022-23	22,976
<b>HEFCW staffing and associated costs</b>	2021-22 to 2022-23	7,308
<b>Recurrent Commission running costs</b>	2023-24 to 2030-31	158,221
<b>Total costs</b>	2021-22 to 2030-31	198,454
<b>Less: 'Do Nothing' costs</b>	2021-22 to 2030-31	-153,420
<b>Net additional costs</b>	2021-22 to 2030-31	45,034

The transitional costs include assumptions for £2 million for redundancy, and £4.9 million for ICT costs alongside other costs.

From 2024-25 when the cost model assumes the Commission will be fully established, its annual running costs are estimated at £19.760 million versus £15.142 million for current arrangements.

The EM explains that:

- It has not been possible to quantify cost savings
- Indirect costs to other bodies have not been quantified. The EM lists 10 categories of body that may or may not incur additional costs due to the Bill.
- Benefits have not been quantified

It goes on to state key assumptions to be:

- No inflationary or discounting figures have been applied to forecast figures
- There is considerable uncertainty around the cost of creating bespoke data software for the Commission (£1.150m has been estimated)

Given these uncertainties, the EM suggests a variance of around 30% on the forecast figures should be considered. The table below shows the effect of a 30% increase in forecast costs.



Illustrative sensitivity analysis for 30% potential variance for figures set out in the RIA			
Cost description	Years	Cost (£,000)	+ 30% (£,000)
..	..		
<b>Transitional costs</b>	2021-22 to 2023-24	9,949	12,934
<b>Welsh Government staffing and associated costs</b>	2021-22 to 2022-23	22,976	29,869
<b>HEFCW staffing and associated costs</b>	2021-22 to 2022-23	7,308	9,500
<b>Recurrent Commission running costs</b>	2023-24 to 2030-31	158,221	205,687
<b>Total costs</b>	2021-22 to 2030-31	198,454	257,990
<b>Less: 'Do Nothing' costs</b>	2021-22 to 2030-31	153,420	153,420
<b>Net additional costs</b>	2021-22 to 2030-31	45,034	104,570

*The RIA does not set out to which figures the 30% variance applies, therefore for illustrative purposes it has been applied uniformly across all costs. Source: final column is Senedd Research calculations, remainder of table, Welsh Government.*

Forecast costs used in the Explanatory Memorandum for establishing the Commission are shown overleaf in a table taken from the Explanatory Memorandum. Please note there are errors in the Welsh Government table but they do not impact the final costs.

Table 19.2: Summary of costs - Option 6 (Establish the Commission for Tertiary Education and Research)

	2021-22 (£,000)	2022-23 (£,000)	2023-24 (£,000)	2024-25 (£,000)	2025-26 (£,000)	2026-27 (£,000)	2027-28 (£,000)	2028-29 (£,000)	2029-30 (£,000)	Total (£,000)
<b>Transitional costs</b>										
Staff Costs	205	292	-	-	-	-	-	-	-	497
Board Costs	43	198	-	-	-	-	-	-	-	241
Redundancy	-	-	2,031	-	-	-	-	-	-	2,031
Non-payroll staff costs	39	132	260	-	-	-	-	-	-	431
IT Costs - capital	-	4,033	869	-	-	-	-	-	-	4,902
Other corporate costs	-	-	-	-	-	-	-	-	-	-
Location costs - capital	-	1,847	-	-	-	-	-	-	-	1,847
Programme Costs	-	-	-	-	-	-	-	-	-	-
<b>Total</b>	<b>287</b>	<b>6,502</b>	<b>3,160</b>	-	-	-	-	-	-	<b>9,949</b>
<b>Running Costs</b>										
Staff Costs	-	-	12,980	12,980	12,980	12,980	12,980	12,980	12,980	28,130
Board Costs	-	-	292	276	276	276	276	276	276	1,190
Redundancy	-	-	-	-	-	-	-	-	-	-
Non-payroll staff costs	-	-	383	383	383	383	383	383	383	1,000
IT Costs - capital	-	-	5,080	5,157	5,157	5,157	5,157	5,157	5,157	4,930
Other corporate costs	-	-	638	638	638	638	638	638	638	1,870
Location costs - capital	-	-	326	326	326	326	326	326	326	1,420
Programme Costs	-	-	-	-	-	-	-	-	-	0
<b>Total</b>	-	-	<b>19,699</b>	<b>19,760</b>	<b>19,760</b>	<b>19,760</b>	<b>19,962</b>	<b>19,760</b>	<b>19,760</b>	<b>158,221</b>
<b>Business as Usual</b>	<b>15,142</b>	<b>15,142</b>	-	-	-	-	-	-	-	<b>30,284</b>
<b>Total</b>	<b>15,429</b>	<b>21,644</b>	<b>22,859</b>	<b>19,760</b>	<b>19,760</b>	<b>19,760</b>	<b>19,962</b>	<b>19,760</b>	<b>19,760</b>	<b>198,454</b>

## Integrated Impact Assessments

Chapter 20 sets out the range of impact assessments conducted. Specific impact assessments have been conducted on the following topics:

- Children's rights (the Welsh Government has not identified any negative impacts set out)
- Equality
- Rural proofing
- Data
- Welsh language
- Biodiversity
- The Socio-Economic Duty
- Justice Impact Assessment

## 5. Response to the Bill

The Member in Charge, the Minister for Education and Welsh Language made a **statement in Plenary on 03 November 2021** introducing the Bill. Members raised the following matters during the statement.

Laura Jones MS welcomed the bringing together of the separate sectors under one body but raised concerns about the timing of the reforms considering the pressures of the pandemic and the new curriculum. She asked the Minister for more information on the appointments to the Board of the Commission, as well as making points regarding the need for effective learning pathways, the need for an interface between pre and post-16 provision and the importance of lifelong learning and apprenticeships.

The Minister responded:

*On the important question of timing, I absolutely understand the context for the question that the Member puts, but I do think that it's the confluence and the context in which we find ourselves that actually makes the need for the Bill more urgent, really. [...] The board's appointment will follow the public appointments route in the usual way, and a range of skills will be needed on the board from a range of backgrounds, both education but also industry and beyond. So, the initial appointments will be made in terms of the chair, the deputy chair, the chief executive for the first appointment on the board, by Welsh Government through the public appointments process [...] it is important that the Bill brings sixth forms within the compass of the commission, albeit indirectly in a sense, because I think that will lead to a more coherent set of arrangements. And I think she makes a very important point about ensuring that pre-16 education and post 16 is a sort of seamless journey in that sense, and I think this Bill is intended to bring some coherence at the point [...] In relation to apprenticeships, this Bill will, I think, transform the ability of our apprenticeship system to be responsive in the way that her question encourages it to be. There is a very significant investment programme that we have as a Government in relation to apprenticeships, and I think being nimble, being able to react to the needs of the economy in a way that is straightforward is at the heart of that, and the Bill will support that [...] she makes a set of important points in relation to lifelong learning. Again, one of the key duties on the commission is to promote that. There was a piece of work that we anticipate receiving imminently from the Wales Centre for Public Policy, which will help us understand better what the opportunities are in terms of lifelong learning.*

Sioned Williams MS welcomed aspects of the Bill but set out some concerns raised by stakeholders. These included concerns from NUS Cymru regarding the provisions in the Bill relating to learner engagement and voice; the safeguards for academic

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freedom; how the Bill will ensure universities will respond to the skills needs of Wales rather than acting as 'commercial entities'; and how the Bill will meet the challenges regarding provision through the medium of Welsh.

The Minister responded:

*In terms of the learner voice, I think that the new emphasis in the Bill is on that in the wake of what we've heard from stakeholders [...] The engagement code and the learner protection code, those two elements are very important in terms of giving a voice on the one hand, but also providing safety and security for the learner in circumstances, maybe, if a course comes to an end or the learner wants to move between courses, and the detail that can be provided in that code can provide a lot of support and security for learners in that context [...] I think that the representation on the board of the commission is important in terms of the learner voice. That's at the core of the new system, but the Bill has been introduced and there will be an extended period of scrutiny and further conversations with stakeholders—and I'm very happy to hear more if learners and representatives have ideas about how we can strengthen the approaches that the Member raised today [...] I agree entirely on the subject of academic freedom. That's on the face of the Bill as a requirement. There are also restrictions on what the Government can do in terms of requirements of the commission [...] The Member raised an important point about higher education corporations. And we thought, as we designed this part of the Bill, how to proceed with this question, and there was a discussion about the best way to go on this. Ultimately, we stuck to what's already in the law [...] The reason for that is that we need some kind of backstop under some circumstances in an emergency scenario that might arise, but there is a risk that, if the powers doesn't exist, the institution is not in a position to ask the Government to intervene, but also that we need a parliamentary Act in order to change the situation. So, it's a practical question, but, again, I'm happy to hear if people think that that needs to be strengthened, the ways of ensuring that, and public law of course is important here [...] On the face of the Bill, it is a duty that the commission does drive demand for post-16 education through the medium of Welsh, but I think there are a variety of ways that that can happen. The explanatory memorandum—a part of that does explain what kind of things the commission could do, but I'd be happy to discuss that in more detail with the committee if that's of interest because I think that there's a lot that we can do in that context*

Jenny Rathbone MS referred to the need to ensure parity of esteem between academic and vocational skills. She went on to ask the Minister “how you think this Bill will improve the accountability and proportionate oversight of tertiary education without some of the bureaucracy”?

The Minister responded:

*I think the Member makes an important point. I think there is a difference in approach in higher education and further education for reasons that I know that she will understand. And I think that illuminates a larger point that, whereas we want a single sector, there are a diversity of players within that sector, and I think that balance is the right balance to strike [...] I refer to the point about academic freedom, which Sioned Williams made, but there is a mechanism, of course, for registration in the Bill, and there's a range of ways in which the commission can engage with institutions who are not in compliance with their registration conditions. And it's a sort of gradually escalating set of interventions really about advice, and advice and engagement, and then there's the possibility of a direction and then more stringent enforcement activity for the most egregious, and one would hope and expect, unlikely scenario.*

Hefin David MS asked the Minister how the 'huge range of demands' for financial and other support from the bodies being regulated and funded by the Commission can be resolved in one body, and 'how will the transparency be provided and how will that be scrutinised to ensure that everyone in the new part is treated fairly'?

The Minister responded:

*The basic thesis underpinning the Bill is that it effectively will lead to more transparency in this way, and I think we're inspired, a little bit, by the experience in New Zealand of this when they established their equivalent commission, and it operates on a similar basis in the sense of Government setting the overall strategy and then the commission having its own strategic plan reflecting those requirements and so on. HEFCW already operates on a basis that is transparent in the way it allocates funding. It's publicly available, the criteria are established and the sums are dispersed in a way that is very public, and I think that is something that is easier to deliver in that sort of arm's-length environment. So, I actually think that the bringing together of the further education, the adult learning and the apprenticeship funding streams in that kind of arm's-length way will actually enhance the transparency in the way that, perhaps, HEFCW currently do for HE. The key advantage that the proposals in the Bill bring about is that the funding is allocated on the basis of that public strategy, if you like, so there's a strategy that is devised, that is consulted upon and that is transparent, and the boundaries, if you like, between institutions—or the historic boundaries at that point between the sources of funding are not the guide to how that money is allocated. So, I think those two routes will significantly enhance the transparency across the post-16 sector.*

## 6. Anticipated implementation timetable

The Bill contains no commencement dates for the creation of the Commission and dissolution of HEFCW. These will be made by order. The EM sets out that the Commission is expected to be fully operational by 2023-24, with a CEO costed from January 2023. The expected timetable of the Bill is as follows:

- Bill Introduction: 01 November 2021
- Stage 1 Ends: 15 March 2022
- Stage 2 begins: 16 March 2022
- Stage 3 begins: May 2022
- Royal Assent: August 2022

### Stakeholder concerns

Using the costing and timetable assumptions used by Welsh Government and the Senedd above, a CEO will be in-place four months after assent (meaning the selection process is likely to need to start no later than Royal Assent) and the Commission fully operational 4 months after that in April 2023. Stakeholders have expressed concerns during consultations by Welsh Government regarding what they argue is a very short timescale for implementation of a reform of this size.

