



1. Introduction

1.1 In December 2020, ChUW (the Chairs of Universities Wales) and Universities Wales submitted a joint response to the Welsh Government’s consultation on the draft Tertiary Education and Research (Wales) Bill. The response is available [here](#). The present paper, which has been prepared at the request of Senedd officials, provides some provisional and interim comments from ChUW on the Bill as laid in the Senedd on 1 November 2021. In preparing it, Chairs have had the benefit of sight of the interim paper submitted to the Committee by Universities Wales, whose contents they fully endorse. Further work is required on a range of issues before the Chairs’ full and definitive response to the Bill as laid can be formulated. ChUW and Universities Wales are working on a further joint response to the Committee’s consultation on the Bill and this will be submitted by the 17 December deadline.

1.2 In their response to the consultation on the draft Bill, ChUW and Universities Wales concluded that *“although there are aspects of the Draft Bill that we support, overall there is very significant further work required before this Draft Bill can be fit for purpose and deliver the Welsh Government’s intentions”*. In considering the Bill as laid in the Senedd, Chairs have been heartened to note the significant progress that has been made since the initial consultation. The Bill includes a number of welcome amendments that go some way to address concerns that universities had previously expressed. However, some aspects of the Bill remain problematic and require further work. The underlying rationale for certain of its provisions is not always clear. The full range of Chairs’ concerns will be addressed in the formal response to the Committee’s consultation. For the purposes of the present paper, Chairs will focus on three issues¹:

- the need for a general duty in relation to **institutional autonomy**; and
- Welsh Ministers’ powers in relation to **Higher Education Corporations**; and
- the need to ensure **balanced funding and transparency** in funding decisions.

¹ These are also among the issues addressed in the interim submission made by Universities Wales.

2. Institutional autonomy

- 2.1 As the interim Universities Wales submission states, “institutional autonomy and academic freedom are cornerstones of higher education both in the UK and internationally [and] they underpin how our universities conduct research and innovation, how they develop and deliver and teaching and learning”. It points to evidence that suggests a correlation between autonomy and universities’ domestic and international competitiveness. It notes that universities in Wales are charities that have a legal duty to act independently from government and to determine their own objectives and strategic direction and that they are also subject to UK competition law which requires that they act independently from other providers in relation to the UK higher education market. A clear acknowledgment that universities are autonomous institutions is necessary to ensure their continuing competitiveness, as well as the continuing protections and benefits afforded by charitable status², and their compliance with charity law.
- 2.2 The Bill as laid contains a number of welcome improvements and amendments in the area of academic freedom. For example, the duty to have regard to the importance of academic freedom has been extended to include the Welsh Ministers as well as the Commission (although the duty currently applies only to higher education provision and does not appear to cover other university activities, including research and innovation). The addition of duties relating to terms of freedom for members of academic staff to test received wisdom and to put forward new ideas and controversial or unpopular opinions, and relating to freedom for institutions to manage their affairs, for example in respect of courses and research, is also welcome.
- 2.3 The Welsh Government has on a number of occasions expressed its commitment to institutional autonomy. For example, the Ministerial Guidance on the implementation of the Higher Education (Wales) Act 2015 contains (at paragraph 100) the unequivocal statement:

The Welsh Government respects the autonomy of institutions including their academic freedom.

² Chairs endorse the point made in the Universities Wales submission that there remain in the Bill specific provisions, such as the Commission’s power to impose specific registration conditions for particular institutions, that could conflict with the Commission’s duty not to require universities to act incompatibly with their charity law requirements.

The 2017 White Paper consultation on PCET reform, *Public Good and a Prosperous Wales – Building a reformed PCET system*, contains the following:

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

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

There are also references to autonomy in the Explanatory Memorandum.

2.4 However, and despite the case that was made for this during the consultation on the draft Bill, a general duty in respect of institutional autonomy that corresponds to the new provisions for academic freedom has not been included on the face of the Bill as laid³. Nor has a general duty on the Welsh Ministers to prevent their powers being exercised in ways that would require universities to act incompatibly with charity law or their governing documents. For the reasons given above, these matters are of fundamental concern and **Chairs continue strongly to urge that the Bill be amended to make good these omissions.**

3. Higher Education Corporations

3.1 Chairs continue to be concerned that the Bill provides for Welsh Government to retain its power to dissolve Higher Education Corporations (HECs) in Wales against their will. Indeed, the Bill makes it easier for this power to be exercised since it enables the Welsh Government to transfer property on dissolution more easily where rights of pre-emption and return or similar are involved.

³ By contrast, the Higher Education and Research Act requires the Office for Students (OfS) to have regard in performing its functions to “the need to protect the institutional autonomy of English higher education providers” and goes on to state that, in performing its functions, the OfS must have regard to guidance given to it by the Secretary of State and that, in giving such guidance “the Secretary of State must have regard to the need to protect the institutional autonomy of English higher education providers”.

- 3.2 Chairs are not clear as to the purpose and rationale for retaining and strengthening this power. It is also the case that the power applies only to the three HECs in Wales and not to the five chartered universities. In the case of the latter, significant constitutional hurdles would have to be overcome if dissolution or merger were needed. It is inequitable that equivalent arrangements do not apply in the case of HECs. The power to dissolve HECs against their will was removed in 2017 in England in the light of a potential review of the sector by ONS and concerns that the exercise of this power would mean reclassification of the universities to central government from the not-for-profit sector.
- 3.3 There may be an argument for Welsh Ministers to retain the power to dissolve an HEC but only with the proviso that such power should be capable of being exercised only at the instigation and with the consent of the institution itself. This view would appear to be supported by the evidence given to the Committee on 18 November by the Chief Executive of HEFCW⁴.
- 3.4 **Chairs would wish to see an amendment to the Bill whereby to include a duty for Ministers to consult an HEC and to seek its consent, before using their powers to dissolve the institution or change its instruments and articles of government.**
- 3.5 Chairs are also concerned that the Bill provides for the extension of the Welsh Government's powers to change the statutory requirements for HECs' instruments and articles of government by regulations. In 2017, as part of its review of unnecessary regulatory burdens on charities, the Law Commission recommended that the Welsh Government should take steps to remove of the current legislative requirements as to the content of the governing documents of HECs.

4. Balanced funding and transparency

- 4.1 One of the challenges that will be faced by the Commission will be the need to ensure equitable and fair treatment of all parts of the PCET sector. It will be important that the Commission is able effectively to balance its funding duties across the sector as a whole, including in respect of universities' role in research and

⁴ Dr David Blaney said then: The difficulty with the legislation as proposed is for Ministers to dissolve an HEC against the will of the governing body, and we see that as a significant problem. We're not entirely sure that there's a clear rationale for that put in the explanatory memorandum, and let's not forget there are only three providers in the system that are HECs ... (<https://record.senedd.wales/Committee/12467>).

innovation, and to ensure that resource requirements for one part of the sector do not adversely impact on another. To that end, **Chairs would wish to see the introduction in the Bill of a balanced funding principle and a duty on transparent funding decisions.**

Chairs of Universities Wales

23 November 2021

The Chairs of Universities Wales (ChUW) came into being in 2004 to provide a forum for discussion for Chairs of University Governing Bodies in Wales and to act as the representative body for them. Its aims are to:

- support the HE sector in developing the highest standards of governance appropriate within a sector comprised of autonomous institutions, serving a multiplicity of stakeholders and vital to the nation's prosperity;
- promote best practice in university governance;
- work with individual governors to develop their knowledge and skills, as these relate to the good governance of their institutions, through (for example) governor development programmes;
- address strategic policy issues pertaining both to trends in HE as a whole and to the particular responsibilities of members of governing bodies;

and its guiding principles are to:

- be an enabling body which seeks to ensure that its members are well informed of relevant issues and developments, so that they are better able to discharge their roles for the accountability and sustainability of their institutions;
- be a constructive body which seeks to contribute the distinctive experience, knowledge and perspective of its members;
- be a body which provides a forum and network for members where they can share common issues and concerns in a supportive environment;
- conduct its business without prejudice to the autonomy of the institutions of its members.

The members of ChUW as of 23 November 2021 are:

Mrs Marian Wyn Jones, Chair of ChUW and Chair of Council, Bangor University

Ms Louise Evans, Chair of the Board of Governors, University of South Wales

Professor Stuart Palmer FREng FInstP FLSW, Chair of Council, Cardiff University

Ms Maxine Penlington OBE FLSW, Chair of the Board of Governors, Wrexham Glyndŵr University

Mr Bleddyn Phillips, Chair of Council, Swansea University

Dr Emyr Roberts, Chair of Council, Aberystwyth University

Mr John Taylor, Chair of the Board of Governors, Cardiff Metropolitan University

The Venerable Randolph Thomas, Chair of Council, University of Wales Trinity Saint David