

Cyflwynwyd yr ymateb hwn i ymchwiliad y [Pwyllgor Plant, Pobl Ifanc ac Addysg i egwyddorion cyffredinol y Bil Addysg Drydyddol ac Ymchwil \(Cymru\)](#)

This response was submitted to the [Children, Young People and Education Committee inquiry into the general principles of the Tertiary Education and Research \(Wales\) Bill](#)

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Ymateb gan: Y Brifysgol Agored yng Nghymru  
Response from: The Open University in Wales

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The Open  
University  
Y Brifysgol  
Agored

WALES CYMRU

# THE TERTIARY EDUCATION AND RESEARCH (WALES) BILL

Response by The Open University  
in Wales to the inquiry by the  
Children, Young People and  
Education Committee on the  
general principles of the bill

# CONTENTS

<b>ABOUT THE OPEN UNIVERSITY IN WALES</b>	<b>3</b>
<b>CONTACT</b>	<b>3</b>
<b>1. INTRODUCTION</b>	<b>4</b>
<b>2. THE POSITION OF THE BILL IN RESPECT OF THE OPEN UNIVERSITY IN WALES</b>	<b>5</b>
Power to provide for The Open University to be treated as a tertiary education provider in Wales	5
<b>3. STRATEGIC FRAMEWORK FOR TERTIARY EDUCATION AND RESEARCH</b>	<b>7</b>
Strategic duties	7
Strategic priorities	8
Academic freedom and freedom of speech	8
<b>4. REGISTRATION AND REGULATION OF TERTIARY EDUCATION PROVIDERS</b>	<b>9</b>
Registration model	9
Ongoing registration conditions concerning equality of opportunity	10
Fee limit statements	10
Quality assurance	11
<b>5. SECURING AND FUNDING TERTIARY EDUCATION AND RESEARCH</b>	<b>12</b>
Outcome agreements	12
Collaboration	12
Funding and training for (eligible) persons over 19	12
<b>6. LEARNER PROTECTION, COMPLAINTS PROCEDURES AND LEARNER ENGAGEMENT</b>	<b>15</b>
Learner protection plans	15
Learner Engagement Code	15
<b>7. SCHEDULES</b>	<b>16</b>
Associate learner member	16
<b>8. BARRIERS TO IMPLEMENTATION</b>	<b>17</b>
The Open University in Wales	17
Legislation in the Westminster parliament	17
Legislative competence	17
Appropriateness of Ministers' subordinate legislation powers	17

## ABOUT THE OPEN UNIVERSITY IN WALES

The Open University was established in 1969, with its first students enrolling in 1971. It is a world-leader in providing innovative and flexible distance learning opportunities at higher education level. It is open to people, places, methods and ideas. It promotes educational opportunity and social justice by providing high-quality university education to all who wish to realise their ambitions and fulfil their potential.

Over 14,500 students across Wales are currently studying with the OU. There are OU students in every Senedd constituency and we are the nation's leading provider of undergraduate part-time higher education. Almost three out of four OU students are in employment while they study and with an open admissions policy, no qualifications are necessary to study at degree level. Over a third of our undergraduate students in Wales join us without standard university entry level qualifications.

## CONTACT

**Cerith D. Rhys Jones**

External Affairs Manager, The Open University in Wales

Email: [cerith.rhys-jones@open.ac.uk](mailto:cerith.rhys-jones@open.ac.uk) Phone: 029 20 262 765

# 1. INTRODUCTION

- 1.1. The Open University (OU) in Wales welcomes the opportunity to submit this written evidence to the Children, Young People and Education Committee in respect of the Tertiary Education and Research (Wales) Bill.
- 1.2. This evidence supplements the interim note submitted to the committee on 17 November 2021 and the oral evidence given by representatives of the OU in Wales on 2 December 2021.
- 1.3. As one of Wales' nine universities, the OU in Wales is eager to ensure that the Tertiary Education and Research (Wales) Bill provides a suitable framework to ensure that everyone in Wales can benefit from a robust and sustainable post-compulsory education system.
- 1.4. We remain supportive of the principle and objective of the Tertiary Education and Research (Wales) Bill. We regard the bill as an opportunity to ensure that learning throughout life is a realistic prospect for everyone in Wales, for the benefit of individuals as well as of the economy and society at large.
- 1.5. This bill should be used as an opportunity to ensure that the post-compulsory education and training system reflects the changing nature of learning, thereby ensuring that Wales is well-equipped to respond to the challenges and the opportunities it will face in the future.
- 1.6. The committee will know that the OU in Wales is a constituent part of the wider Open University, and our position is therefore unique in the higher education sector. We are especially eager that this bill provides a funding and regulatory environment which is conducive to our being able to continue to make higher education a realistic prospect for thousands of people across Wales who would not otherwise have that opportunity.
- 1.7. The committee will be further aware that, because of our unique position as part of a UK-wide university, the activities of the OU in Wales are not considered to be mainly or wholly delivered in Wales. Consequently, the bill establishes<sup>1</sup> the power of the Welsh Ministers to designate us as a tertiary education provider in Wales for the purposes of the bill.
- 1.8. It is our understanding that it is the Welsh Government's policy intention to exercise those powers and that the OU in Wales should become a registered provider for the purposes of the bill.
- 1.9. The committee will note that, because the exact nature of our funding and regulatory relationship with the Commission for Tertiary Education and Research will be determined in regulations, this evidence refers in broad terms to what might be applicable to us in due course.
- 1.10. Where this evidence refers to specific provisions included in the bill or any of its associated documents, the relevant section will be cited in the footnotes, for the committee's ease of reference.
- 1.11. In the interests of transparency, we notify the committee that this written evidence is informed by legal advice which we have received.

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<sup>1</sup> Section 140

## 2. THE POSITION OF THE BILL IN RESPECT OF THE OPEN UNIVERSITY IN WALES

### Power to provide for The Open University to be treated as a tertiary education provider in Wales

- 2.1. As described in the introduction, the OU in Wales occupies a unique position as one of the nine Welsh universities but also a part of the wider Open University, which operates across all four nations of the United Kingdom. Indeed, legally, the OU in Wales is not a separate entity to The Open University, and the committee will note that many of our core functions are a shared endeavour, undertaken on behalf of the whole university.
- 2.2. Nevertheless, we are clearly one of Wales' nine universities, and with over 14,500 students spread across every Senedd constituency and hundreds of staff and academics based across Wales, and as the nation's largest provider of part-time undergraduate courses, we are an integral part of the higher education sector.
- 2.3. We have received legal advice which confirms that, in order for us to be able to benefit from the applicability of the main framework for funding and regulation outlined in this bill, it will be necessary to exercise the Welsh Ministers' power<sup>2</sup> to provide for us to be treated as a tertiary education provider in Wales. Our view is that this should be done in a timely and considered fashion.
- 2.4. We are encouraged that the Welsh Government understands our unique, but complicated, circumstances and we share the aspiration of the Welsh Ministers that the regulatory burden borne by us should be proportionate and not administratively onerous.
- 2.5. As described in further detail at point 4.10 below, our overriding objective is to reach a position where we can continue activities in Wales for the benefit of learners and the economy and deliver on our social justice mission. Achieving this requires ongoing eligibility, in common with the other higher education providers, to receive public funds, and that care be given to ensure that the associated regulatory requirements are proportionate, not duplicative, or overly onerous, and account for assurances that might be relied upon from other UK regulators.
- 2.6. The explanatory memorandum envisages<sup>3</sup> that a regulation(s) in respect of the OU in Wales "may be to apply the registration conditions, learner protection plans and other provisions to the Open University in order to ensure funding and protection for learners in Wales undertaking courses of study with the Open University."
- 2.7. We note the oral evidence given by the Minister for Education and Welsh Language before the committee on 18 November 2021 that "implementation would need to be staged". We recognise that that is a pragmatic and appropriate response to the large amount of detailed work that will need to be undertaken to move from intention to implementation.
- 2.8. In our previous evidence to the committee and in our discussions with the Ministers and his officials to date, we have recognised the importance of sufficient and expert resources to be applied to the task not only of drafting the necessary regulations, but also engaging with stakeholders to ensure that the Welsh Government's own preferred methodology of co-creation is embraced.

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<sup>2</sup> Section 140

<sup>3</sup> EM pp. 291-292, para 42

2.9. Whatever forms that staged approach takes will need to ensure that there is no gap in the OU in Wales' eligibility to be funded or the support available to our students, and that the regulatory burden placed upon us is not inadvertently increased during transition. In any case, it is our expectation, in line with the commitment given in the explanatory memorandum<sup>4</sup>, to be engaged very closely in the process of formulating the relevant regulations.

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<sup>4</sup> EM p. 292

## 3. STRATEGIC FRAMEWORK FOR TERTIARY EDUCATION AND RESEARCH

### Strategic duties

- 3.1. We very strongly welcome the introduction of the nine new strategic duties<sup>5</sup> of the Commission for Tertiary Education and Research. We believe these to be clear and comprehensive and are pleased that they reflect the breadth of what the post-compulsory education and training system can offer learners and society at large.
- 3.2. We are particularly pleased that the strategic framework includes a specific duty relating to lifelong learning<sup>6</sup> and that this is specified to include, on the face of the bill, a variety of levels of study, types of qualification, educational settings, and modes of study.
- 3.3. The OU in Wales has experienced significant growth in the number of students taking up part-time study with us since the introduction of the new student finance system in 2018. Particularly notable growth has been seen among some of Wales' most underprivileged communities.
- 3.4. The equality of opportunity duty<sup>7</sup>, therefore, is welcome. We believe this sets an important but attainable objective for us, as for other providers, not only to increase participation, but further to increase retention, to break down barriers to access, and to reduce awarding gaps.
- 3.5. However, we have two specific concerns, which we ask the committee to consider:
- 3.6. Firstly, the equality of opportunity duty refers<sup>8</sup> to 'the end of courses of tertiary education'. Without qualification or specification on the face of the bill, the use of this phrases raises the risk that success for undergraduate study might only be defined by the number of graduates generated from three-year Bachelor's degrees. We believe this to be an outdated view of the variety and purpose of higher education.
- 3.7. It is our hope, as we seek to 'build back fairer' after the pandemic, that our higher education system will become more flexible and responsive to the needs of learners, employers, and providers alike. If the bill were to define success as reaching 'the end of courses', our view is that that would represent a barrier to achieving a more flexible and responsive system because such a traditional view of learning suggests the system will not be futureproofed against changing patterns of learning.
- 3.8. Indeed, many students at the OU in Wales do not take up study with us with the intention of completing a full degree programme. Many are content to study a module or two at a time – to boost their confidence, support upskilling or skilling needs, or flex their studies around their many other responsibilities.
- 3.9. Such wording does not suggest to us that flexibility is being embedded in this new system from the outset. We would regard that as a missed opportunity.
- 3.10. Secondly, the same duty refers<sup>9</sup> to 'gaps in attainment'. We strongly support the principle that the Commission should be subject to a duty to promote the reduction of such gaps, and believe that the onus for reducing such gaps should be on providers, not learners.

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<sup>5</sup> Sections 2-10

<sup>6</sup> Section 2

<sup>7</sup> Section 3

<sup>8</sup> Section 3 (1) (b)

<sup>9</sup> Section 3 (1) (c)

- 3.11. We stress the importance that efforts on the part of the Commission to reduce attainment, or awarding, gaps should encompass disparities across a number of measures, and not be limited to grade outcomes alone. For example, such efforts should also include addressing disparities in respect of progression between levels of learning. The accessibility of flexible learning opportunities is an important enabler in this work.
- 3.12. How 'attainment' is measured across the post-16 sector should reflect the reality that success can take different forms for different groups of students. It is for providers to be proactive in addressing and responding to the needs and expectations of all learners.

## Strategic priorities

- 3.13. We appreciate that the Welsh Ministers are accountable to the Senedd for the strategic priorities they set for and in connection with tertiary education and research and innovation, and that it should be for the Commission for Tertiary Education and Research to discharge those priorities.
- 3.14. That said, we have some reservations that the Welsh Ministers are empowered<sup>10</sup> to amend their statement of strategic priorities at any time. We also note that the Welsh Ministers are empowered<sup>11</sup> unilaterally to modify the Commission for Tertiary Education and Research's strategic plan.
- 3.15. We favour amending the relevant sections<sup>12</sup> to (a) allow proper strategic planning to take place, (b) give as much stability as possible to providers, and (c) ensure that the Commission for Tertiary Education and Research is fully able to operate at arm's length.

## Academic freedom and freedom of speech

- 3.16. We welcome the inclusion of specific duties, applicable to the Welsh Ministers and to the Commission, in respect of academic freedom<sup>13</sup>. We believe these duties to be proportionate and appropriate.
- 3.17. The committee will be aware that similar provisions are being considered in a bill<sup>14</sup> which is currently progressing through the Westminster parliament. The provisions in that bill have a wider scope than those contained in this bill.
- 3.18. If both bills receive Royal Assent in due course, the OU in Wales will want to be assured that we will not be subject to conflicting duties or duplicative regulation in respect of academic freedom and/or freedom of speech by the Commission for Tertiary Education and Research (in respect of the OU in Wales) and the Office for Students (in respect of the OU as a whole).

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<sup>10</sup> Section 11 (2)

<sup>11</sup> Section 13 (2) (b)

<sup>12</sup> Sections 11-14

<sup>13</sup> Sections 15-16

<sup>14</sup> Higher Education (Freedom of Speech) Bill | HC Bill | (2021-22) | 167 2021-22



## 4. REGISTRATION AND REGULATION OF TERTIARY EDUCATION PROVIDERS

### Registration model

- 4.1. While we are broadly supportive of the registration model<sup>15</sup> set out in the bill, we note that the relative lack of detail, both on the face of the bill and its associated documents, makes assessing how this model will work in practice, and any impacts it may have on the OU in Wales, a challenge.
- 4.2. For example, the bill requires<sup>16</sup> the Welsh Ministers to specify one or more categories of registration for which the Commission must make provision in the register of tertiary education providers. Meanwhile, the statement of policy intent outlines that the Welsh Government presently proposes<sup>17</sup> two categories: Higher Education Providers (Core) and Higher Education Providers (Alternative).
- 4.3. Beyond the implications of one category or another for the provision student support funding, the bill also provides that different conditions may be determined for different categories of registration<sup>18</sup>; the statement of policy intent envisages this being the case<sup>19</sup>.
- 4.4. The statement of policy intent also notes that it is intended, subject to there being two proposed categories of registration, to prescribe in relevant regulations<sup>20</sup> that providers can only register in one of the categories.
- 4.5. As such, it is presently impossible for us to assess whether this model is appropriate, and fully to understand any unintended impacts it may have or limitations it may place on us. We would encourage the committee to seek further clarification from the Welsh Government.
- 4.6. As described in the introduction, our position is unique to the higher education sector in that we are clearly one of the nine Welsh universities but, as part of the legal structure of the wider Open University, our activities cannot be said to be wholly or mainly carried out in Wales.
- 4.7. While our regulatory relationship with the Commission remains to be determined, we are eager to avoid as far as possible a situation wherein regulation while already applies to The Open University as a whole through the Office for Students is duplicated by the Commission for Tertiary Education and Research.
- 4.8. We view this as an opportunity to strike an appropriate balance between maximising the potential of harmonised standards across the nations of the UK and minimising an overly onerous regulatory burden on providers.
- 4.9. In respect of the balance of detail of what is included on the face of this bill vs. what will be determined in regulations, the committee will note that the question of the entirety of the OU in Wales' future funding and regulatory relationship is left to secondary legislation. While this provides the opportunity to work officials and the Welsh Ministers to ensure that those regulations are correct and proportionate, it also means that we currently lack any certainty as to our future relationship with the Commission for Tertiary Education and Research.
- 4.10. Our objective is to reach a position where The Open University can continue its activities in Wales for the benefit of learners and the economy and deliver on our social justice mission. This will require:

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<sup>15</sup> Part 2, Chapter 1

<sup>16</sup> Section 23 (2)

<sup>17</sup> SoPI, p. 10

<sup>18</sup> Section 26 (2)

<sup>19</sup> SoPI, pp. 9-12

<sup>20</sup> Section 23 (6)

- 4.10.1. ongoing eligibility to be in receipt of public funds, in common with other higher education providers, for our learning and teaching and appropriate research and innovation activities, and
- 4.10.2. care to ensure that the associated regulatory requirements:
- are proportionate,
  - are not subject to duplicative or overly onerous requirements, and
  - take into account assurances that might be relied upon from other UK regulators.
- 4.11. Achieving such a position will require a considerable amount of work and resource both by the OU in Wales, supported by colleagues from across the university, and the Welsh Government.

## Ongoing registration conditions concerning equality of opportunity

- 4.12. We repeat the concern expressed at point 3.6. above that retaining students 'to the end of courses' is noted as a specific aim of providers' mandatory ongoing registration conditions.<sup>21</sup>

## Fee limit statements

- 4.13. We welcome the removal of Access and Opportunity Plans, which were proposed in the Draft Bill published in 2020, from this bill.
- 4.14. As noted at point 3.7. above, our hope is that this bill can be used as a mechanism to facilitate a more flexible and responsive higher education system; one which is equipped to respond to changing demographics, a change economy, and changing demand-side requirements.
- 4.15. It is our expectation that, over the course of the coming years, students will wish to study in different ways and at different times. This will necessarily require a more flexible approach to finance, in which, for example, students are able to draw on financial support for smaller packages of study.
- 4.16. We have some reservations that the bill's provisions in respect of fee limit statements<sup>22</sup> have the potential to limit the flexibility of any future model. The explanatory memorandum notes<sup>23</sup> that these provisions would replace the fee limit function of fee and access plans.
- 4.17. We are concerned that this may represent a missed opportunity to embed flexibility in this new system from the outset, and that these provisions may be overly prescriptive.

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<sup>21</sup> Section 31 (2) (b)

<sup>22</sup> Sections 30 and 44

<sup>23</sup> EM para 3.131

## Quality assurance

- 4.18. We welcome that this bill vests responsibility for the publication of quality assurance frameworks<sup>24</sup> and the designation of a quality body<sup>25</sup> in the Commission for Tertiary Education and Research.
- 4.19. The committee will note that most of the OU in Wales' curriculum is delivered on a pan-UK basis and that, as a result, the OU in Wales is limited in the control it can bring to bear in respect of our curriculum separate from our UK-wide provision. The committee will also note that the OU in Wales is currently subject to six-yearly Quality Enhancement Reviews, undertaken by the Quality Assurance Agency for Higher Education, which satisfy the requirements of the Higher Education Funding Council for Wales.
- 4.20. The quality assurance model implemented by the Commission for Tertiary Education and Research will need as a minimum to be as flexible as the current process, avoiding, wherever possible, any duplicative or overly onerous regulation.
- 4.21. The explanatory memorandum notes<sup>26</sup> the expectation that the Commission for Tertiary Education and Research would play a "coordinating and facilitating role" between Her Majesty's Chief Inspector of Education and Training in Wales and the designated higher education quality assurance body in respect of providers where there is both higher and further education provision. However, the operation of the Chief Inspector's functions and the relationship between the Chief Inspector and the designated higher education quality assurance body remain extremely complex. We do not believe that the bill provides sufficient clarity<sup>27</sup> for us to be able to assess how these provisions would impact us.

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<sup>24</sup> Section 48

<sup>25</sup> Section 54

<sup>26</sup> EM para 3.184

<sup>27</sup> Section 55

## 5. SECURING AND FUNDING TERTIARY EDUCATION AND RESEARCH

### Outcome agreements

- 5.1. The bill enables<sup>28</sup> the Welsh Ministers to require the Commission for Tertiary Education and Research to enter into an outcome agreement with a provider to whom it proposes to provide financial assistance. While some limitations are placed on what the broad terms and conditions of funding might entail<sup>29</sup>, no further detail of what outcome agreements may or may not contain is offered on the face of the bill.
- 5.2. The explanatory memorandum notes<sup>30</sup> that it is envisaged that outcome agreements could, in the first instance, be required for local authorities (in respect of maintained sixth forms) and further education and training providers.
- 5.3. We do not necessarily favour the bill setting out in absolute detail what outcome agreements should include. However, we are eager to avoid outcome agreements becoming a device for catch-all quasi-regulation, or where they become overly onerous or unresponsive to the individual circumstances of the OU in Wales.

### Collaboration

- 5.4. The bill empowers the Commission for Tertiary Education and Research to consent, not content, withdraw consent, and make its consent conditional, to the provision of payments to collaborating bodies<sup>31</sup>. The bill also requires the Commission to keep any consent given by it, under the relevant sections, under review<sup>32</sup>.
- 5.5. The committee will know that OU in Wales, in common with all higher education providers, often collaborates with a wide range of other organisations and bodies, including those that would not be regulated by the Commission.
- 5.6. While we understand the rationale<sup>33</sup> that the purpose of these powers is to allow the Welsh Ministers and the Commission to protect the interests of students, the proper use of public money, and the reputation of the tertiary education and research sector, we would welcome clarification of the intended use of these powers and how they would work in practice.

### Funding and training for (eligible) persons over 19

- 5.7. We welcome that the bill provides specifically for the provision of education and training of persons<sup>34</sup>, and eligible persons<sup>35</sup>, over the age of 19. We note the oral evidence given by the Minister for Education and

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<sup>28</sup> Section 83 (2) (c)

<sup>29</sup> Section 84 (6)

<sup>30</sup> EM para 3.229

<sup>31</sup> Sections 85-105

<sup>32</sup> Section 105 (8)

<sup>33</sup> EM p. 67

<sup>34</sup> Section 92

<sup>35</sup> Section 91

Welsh Language before the committee on 18 November 2021 and his explanation of the rationale for requiring 'proper' facilities for some learners and 'reasonable' facilities for others.

- 5.8. It is our view that all persons, eligible for the purposes of the bill or otherwise, should be able to access equally proper learning opportunities throughout life. We appreciate, however, the Minister's explanation that this disparity provides flexibility which "allows the progressive expansion of lifelong learning for the first time".
- 5.9. We understand that these provisions are still being developed by the Welsh Government and will be informed by the outputs of the commissioned study by the Wales Centre for Public Policy. The committee will note that the OU in Wales has contributed its views to that work.
- 5.10. Prioritising eligible learners, in the first instance, appears to us to be a sensible approach. It is well established that uptake of lifelong and higher learning opportunities is lower among groups of people with little previous engagement with education beyond the mandatory, and such groups of people are more likely to live in financially underprivileged areas and to have lower household incomes. Criteria such as these are noted on the face of the bill<sup>36</sup>, which we welcome.
- 5.11. We have some reservations that embedding the disparity between 'reasonable' and 'proper' facilities in primary legislation could become a practical barrier to the progressive expansion of lifelong learning, as envisaged by the Minister.
- 5.12. The explanatory memorandum concedes<sup>37</sup> that that disparity would mean that the Commission for Tertiary Education and Research "would need to give priority to meeting the learning and skills needs of the younger age group and those adults over the age of 19 who meet the criteria set out regulations...". As such, we are concerned that the wording presently on the face of the bill may be too prescriptive and may thus limit the flexibility which the Minister desires.
- 5.13. The explanatory memorandum notes<sup>38</sup> that relevant education may be specified by reference to subject, level of study, and type of qualification, inter alia. We would welcome the inclusion of a specific reference to method of delivery.
- 5.14. Neither the bill itself nor any of its associated documents refer in this context to distance and online provision. Our opinion is that this kind of provision will become increasingly important over the coming years; inclusion of this kind of provision from the outset would be a welcome indication that the progressive expansion of lifelong learning will include that which is delivered online and at distance.
- 5.15. Indeed, the committee will note that developing and delivering high-quality online and distance provision often carries unseen costs; it cannot be assumed that such delivery is cheaper simply because it doesn't require a physical setting. If the Commission were to need to prioritise 'proper' facilities (as noted in point 5.12 above), we are concerned that sufficient and sustainable funding would not be available for the expansion of distance and online provision.
- 5.16. The bill itself also makes specific reference to study at levels 1, 2, and 3<sup>39</sup>. We understand the rationale for this and agree that promoting access to these levels of learning among eligible persons for the purposes of this bill is a necessary first step.
- 5.17. However, we would welcome a balancing provision in the bill which makes unambiguous the objective to also promote progression from those levels to higher levels of study. 'Lifelong learning' does not simply mean accessing a course at levels 1-3 as an adult; rather it should mean that learning is a progressive and continuous process.

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<sup>36</sup> Section 91 (8) (a)

<sup>37</sup> EM para 3.264

<sup>38</sup> EM para 3.260

<sup>39</sup> Section 91 (4) (b)

5.18. More broadly, these provisions are framed specifically in terms of further education. We do not believe that it is the Welsh Government's intention to limit these funding mechanisms to further education providers but would welcome clarification that our understanding is correct.

5.19. We would welcome clarity about the scope and timeframe of the planned review of adult education, as promised in the Programme for Government and noted in the statement of policy intent<sup>40</sup>.

5.20. We would also welcome clarification that this bill does not preclude the possibility of the (further) development of financial support to learners to access this kind of provision.

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<sup>40</sup> SoPI p. 30

## 6. LEARNER PROTECTION, COMPLAINTS PROCEDURES AND LEARNER ENGAGEMENT

### Learner protection plans

- 6.1. Whatever funding and regulatory relationship the OU in Wales has with the Commission for Tertiary Education and Research will need to account for the fact that the governance of The Open University is a centralised and whole-university function and, as such, provisions made by the OU in Wales sit within that broader context.
- 6.2. The committee will note that the OU has a Student Protection Plan, which is approved by the Office for Students, and which applies to all OU students, including those in Wales.
- 6.3. The implementation of learner protection plans<sup>41</sup> will therefore need to provide sufficient flexibility to account for the OU in Wales' individual circumstances. We note that the explanatory memorandum specifically envisages<sup>42</sup> the possibility of applying provisions in respect of learner protection plans, inter alia, to the OU in Wales.

### Learner Engagement Code

- 6.4. We welcome the learner-centred nature of the provisions in respect of a Learner Engagement Code<sup>43</sup>. The principle that learners should be represented in, have the opportunity to participate in, and have the opportunity to give their views on decision-making at their institution is one which we support and which we recognise as an important contributor to student success.
- 6.5. In preparing the Learner Engagement Code, the Commission for Tertiary Education and Research will need to have sufficient regard to how the engagement of part-time learners differs from the engagement of full-time learners. In the case of the OU in Wales, they are geographically dispersed, and many have complex family and personal lives, have a range of competing demands on their time, and have a variety of commitments and responsibilities beyond their learning.
- 6.6. The eventual Learner Engagement Code will need to reflect this reality and account appropriately for institutions such as ours for whom learner engagement is a complicated and resource-intensive activity, albeit an important one to which we are committed.

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<sup>41</sup> Section 122

<sup>42</sup> EM p. 291 (para 422)

<sup>43</sup> Section 125

## 7. SCHEDULES

### Associate learner member

- 7.1. We draw the committee's attention to the provision<sup>44</sup> for at least one person to be appointed by the Welsh Ministers to represent learners in tertiary education.
- 7.2. While not wishing to presuppose which bodies might be included in a list of bodies appearing to the Welsh Ministers to represent the interests of learners<sup>45</sup>, the committee will consider that there are few such bodies in Wales. It is in our view reasonable to presume that NUS Wales would be an obvious contender for this position.
- 7.3. The committee will wish to note that the Open University Students' Association is not a member of NUS.
- 7.4. Given that (a) the OU in Wales is the largest provider of part-time undergraduate higher education in Wales, and that (b) NUS cannot be expected to represent learners not in its membership, we suggest that these provisions may not be sufficient to ensure that the voice of part-time learners is represented at the highest level of the Commission for Tertiary Education and Research.
- 7.5. Furthermore, the bill variously refers to "at least one person"<sup>46</sup> and in the singular to "the associate learner"<sup>47</sup>. We encourage the committee to consider this apparent conflict on the face of the bill and to seek clarification as to the possibility of more than one associate learner member being appointed.
- 7.6. We accept that it is possible, at least in theory, that a person representing the voice of part-time learners could be appointed as an ordinary member<sup>48</sup>, but there is no guarantee of this.
- 7.7. Given that promoting and expanding access to and uptake of part-time higher education continues to be a priority of the Welsh Government, we suggest that ensuring that the voice of part-time learners is heard at the highest level of the Commission is a necessary and reasonable step.

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<sup>44</sup> Schedule 1 para 4 (1) (c)

<sup>45</sup> Schedule 1 para 7 (1) (c)

<sup>46</sup> Schedule 1 para 4 (1) (c)

<sup>47</sup> Schedule 1 para 7

<sup>48</sup> Schedule 1 para 2 (2)



## 8. BARRIERS TO IMPLEMENTATION

### The Open University in Wales

8.1. Purely in respect of the extent to which this bill would apply to the OU in Wales, the main barrier is that there remains a considerable amount of work to do to ensure that regulations in respect of us<sup>49</sup> are correct, proportionate, and timely. Please refer to section 2 of this evidence.

### Legislation in the Westminster parliament

8.2. The OU in Wales is not able to advise the committee but would suggest it seeks its own advice in respect of what conflicts exist, or may arise, with legislation arising from the Westminster parliament and the UK Government which may apply in Wales, including, but not limited to:

8.2.1. the Internal Markets Act 2020;

8.2.2. the Higher Education (Freedom of Speech) Bill;

8.2.3. the Skills and Post-16 Education Bill;

8.2.4. the Charities Bill;

8.2.5. the Advanced Research and Invention Agencies Bill;

8.2.6. the proposed Procurement Bill; and

8.2.7. any legislative developments arising from the UK Government's response to Sir Philip Augar's post-18 review of education and funding.

### Legislative competence

8.3. Again, the OU in Wales is not able to advise the committee but would suggest that it considers the conflict between the Welsh Ministers' view that this bill is entirely within legislative competence, and the view of the Llywydd that the provisions of s. 128 in respect of the Office for Students and the Secretary of State are not within legislative competence.

### Appropriateness of Ministers' subordinate legislation powers

8.4. We are satisfied that this bill has been amended to remove, or limit, many of the subordinate powers proposed in the Draft Bill of 2020 to be retained by the Welsh Ministers.

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<sup>49</sup> Section 140

- 8.5. However, the committee will note that the Welsh Ministers do still retain a range of powers over the operation of the Commission and that much of the detail of how this bill will operate in practice remains to be determined by regulations.
- 8.6. The committee will know well that the level of scrutiny that can be applied to secondary legislation, even that to which affirmative procedure applies, is considerably less than can be applied to primary legislation.
- 8.7. By way of illustration, this bill contains, inter alia, the power of the Welsh Ministers:
- 8.7.1. unilaterally to amend the Commission's strategic plan<sup>50</sup>;
  - 8.7.2. to give the Commission directions<sup>51</sup> with which it must comply<sup>52</sup>, and to confer additional functions on the Commission<sup>53</sup>;
  - 8.7.3. to prescribe additional initial and ongoing registration conditions<sup>54</sup>;
  - 8.7.4. directly to fund higher education courses<sup>55</sup>;
  - 8.7.5. to frame the terms and conditions of the funding it provides to the Commission for general purposes<sup>56</sup> and for the purposes of research and innovation<sup>57</sup> by reference to specific areas of research and innovation<sup>58</sup>;
  - 8.7.6. to frame the terms and conditions of the funding it provides to the Commission for higher education purposes<sup>59</sup> by reference to particular courses of study<sup>60</sup>;
  - 8.7.7. unilaterally to dissolve Higher Education Corporations<sup>61</sup>; and
  - 8.7.8. to amend, modify, repeal, or revoke any enactment, including an enactment contained in this bill<sup>62</sup>.
- 8.8. Significant progress has been made since the Draft Bill of 2020 and we welcome the principle outlined in the oral evidence given by the Minister for Education and Welsh Language before the committee on 18 November 2021 that "significant powers and responsibility and funding will be with the new body".
- 8.9. However, we encourage the committee to continue to consider the extent to which the retained powers, including subordinate legislation powers, of the Welsh Ministers affect the arm's length nature of the Commission for Tertiary Education and Research.
- 8.10. Ensuring the ability of the Commission fund and regulate the delivery of post-compulsory education and training and research and innovation in a stable, strategic, and sustainable manner, while respecting the autonomy of institutions, ought to be a priority. We invite the committee to consider whether sufficient amendment has been made to this bill, compared to the Draft Bill of 2020, to give effect to such a priority.

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<sup>50</sup> Section 13 (2) (b)

<sup>51</sup> Section 19 (1)

<sup>52</sup> Section 19 (8)

<sup>53</sup> Sections 20

<sup>54</sup> Sections 25 (3) and 32

<sup>55</sup> Section 89

<sup>56</sup> Section 83

<sup>57</sup> Section 102

<sup>58</sup> Section 84 (4)

<sup>59</sup> Sections 85-86

<sup>60</sup> Section 84 (5)

<sup>61</sup> Section 135

<sup>62</sup> Section 141



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