

**Number: WG40901**



Llywodraeth Cymru  
Welsh Government

Welsh Government  
**Consultation Document**

**Draft Tertiary Education and Research (Wales) Bill**

Date of issue: 14 July 2020

Action required: Responses by 04 December 2020

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

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<b>Overview</b>	This consultation gives stakeholders the opportunity to contribute to the proposals set out in the draft Tertiary Education and Research (Wales) Bill. The aim of the Draft Bill is to provide a clear and strong governance framework in Wales that will support the oversight, strategic direction and leadership of tertiary education and research in Wales.
<b>How to respond</b>	You can respond to the consultation by using the questionnaire at the back of the document; completing the online form and/or by attending one of the events that will be held between September and November.
<b>Further information and related documents</b>	<p><b>Large print, Braille and alternative language versions of this document are available on request.</b></p> <p>This consultation document includes the Education Minister’s Written Statement and specific questions that we would like you to consider. To aid this, there are a number of documents available, which are listed below:</p> <ul style="list-style-type: none"> <li>• Information booklet 1 – Shaping the Future of Post-16 Education in Wales</li> <li>• Information booklet 2 – A Summary of the Draft Tertiary Education and Research (Wales) Bill</li> <li>• Full Draft Tertiary Education and Research (Wales) Bill</li> <li>• Draft Explanatory Memorandum – Part 2 of which is the draft Regulatory Impact Assessment</li> <li>• Draft Integrated Impact Assessments</li> <li>• Draft Statement of Policy Intent in relation to subordinate legislation</li> </ul>
<b>Contact details</b>	<p>For further information: Post-Compulsory Education and Training (PCET) Reform Team</p> <p>Mailbox Address: PCETReform@gov.wales or DiwygioPCET@llyw.cymru</p>

## General Data Protection Regulation (GDPR)

The Welsh Government will be data controller for any personal data you provide as part of your response to the consultation. Welsh Ministers have statutory powers they will rely on to process this personal data which will enable them to make informed decisions about how they exercise their public functions. Any response you send us will be seen in full by Welsh Government staff dealing with the issues which this consultation is about or planning future consultations. Where the Welsh Government undertakes further analysis of consultation responses then this work may be commissioned to be carried out by an accredited third party (e.g. a research organisation or a consultancy company). Any such work will only be undertaken under contract. Welsh Government's standard terms and conditions for such contracts set out strict requirements for the processing and safekeeping of personal data.

In order to show that the consultation was carried out properly, the Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. If you do not want your name or address published, please tell us this in writing when you send your response. We will then redact them before publishing.

You should also be aware of our responsibilities under Freedom of Information legislation.

If your details are published as part of the consultation response then these published reports will be retained indefinitely. Any of your data held otherwise by Welsh Government will be kept for no more than three years.

## Your rights

Under the data protection legislation, you have the right:

- to be informed of the personal data held about you and to access it
- to require us to rectify inaccuracies in that data
- to (in certain circumstances) object to or restrict processing
- for (in certain circumstances) your data to be 'erased'
- to (in certain circumstances) data portability
- to lodge a complaint with the Information Commissioner's Office (ICO) who is our independent regulator for data protection.

For further details about the information the Welsh Government holds and its use, or if you want to exercise your rights under the GDPR, please see contact details below:

Data Protection Officer:  
Welsh Government  
Cathays Park  
CARDIFF  
CF10 3NQ

e-mail:

[Data.ProtectionOfficer@gov.wales](mailto:Data.ProtectionOfficer@gov.wales)

The contact details for the Information Commissioner's Office are:

Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

Tel: 01625 545 745 or  
0303 123 1113

Website: <https://ico.org.uk/>

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# **WRITTEN STATEMENT BY THE WELSH GOVERNMENT**

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<b>TITLE</b>	<b>Consultation on the Draft Tertiary Education and Research (Wales) Bill</b>
<b>DATE</b>	<b>14 July 2020</b>
<b>BY</b>	<b>Kirsty Williams MS, Minister for Education</b>

Following my Written Statement of 9 June 2020, today I announce the consultation on the Draft Tertiary Education and Research (Wales) Bill. The consultation will open today and close on 4 December 2020. The Welsh Government has already engaged widely with stakeholders throughout the development of these reforms and I have been grateful for all your valuable feedback. This has helped us further develop policy and draft the legislation which I believe is now able to provide flexibility for the Commission, once established, to develop and operate as an independent arms-length body.

It is crucial that we get these reforms right and we cannot afford to delay them indefinitely. This legislation presents an opportunity to ensure that the Welsh post-compulsory education and training sector operates effectively in the post Covid-19 context. Having meaningful engagement with our stakeholders on the substance of this Draft Bill will ensure that we shape the system so it's fit to face our future challenges.

The Bill as drafted, dissolves the Higher Education and Funding Council for Wales and establishes a new Commission for Tertiary Education and Research. The new Commission will be responsible for the whole of the tertiary education sector in Wales and will include Research and Innovation Wales as a committee of the new Commission.

The Commission will be placed under a duty to promote the pursuit of a civic mission by further and higher education institutions to improve the economic, social, environmental and cultural wellbeing of the communities they serve and Wales as a whole. This has never been more important than it is now.

The Draft Bill puts learners at the centre of the reforms and includes specific provisions to protect them in uncertain times, as well as, introducing a requirement for the Commission to publish a new code for learner engagement in the governance and management of providers.

The Commission will enable greater cohesion across the tertiary education sector by clearly promoting learner pathways, including how learners transition between compulsory and post-compulsory education. The Commission will be tasked with strengthening collaboration to boost quality and efficiency through more coherent

oversight structures to lead, support, monitor and evaluate the tertiary education sector against national, regional and local objectives. The Commission will be able to do this as we bring funding, oversight and support of Higher Education, Further Education, school sixth forms and apprenticeships, as well as responsibility for currently Welsh Government funded higher level research and innovation, together in one place.

The Draft Bill will require the Commission to publish a strategic plan for tertiary education and research, create a new registration model for tertiary education providers.

The Commission will also assure and promote improvement in the quality and standards of education and training in the tertiary education sector, creating a consistent quality based approach through shared principles and collaboration.

Stakeholder events on the Draft Bill are planned between September and November and I would encourage anyone with an interest in these reforms to engage with the range of opportunities I will make available to help the people of Wales respond to this consultation.

Whilst it will ultimately be a decision for the next Government, chosen by the people of Wales, as to whether these reforms are delivered, I am determined to do all I can to ensure a robust and comprehensive piece of legislation, informed by the results of this Draft Bill consultation, is ready for introduction into the Senedd early in the new term.

**Consultation  
Response Form**

David Blaney

Higher Education Funding Council for Wales (HEFCW)

[david.blaney@hefcw.ac.uk](mailto:david.blaney@hefcw.ac.uk)

Tŷ Afon, Bedwas Road, Bedwas, CF83 8WT

**Civic mission**

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

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

We support the policy intention that the Commission should promote the pursuit of civic mission. This will build upon the work that we have been developing and the work being delivered in the higher education sector.

However, the approach that has been taken in the draft Bill is problematic. Whilst the definition of civic mission given in the draft Bill is broad and captures some general civic mission themes, it also appears dated and does not capture the language currently adopted by the Welsh Government, as set out in the Minister for Education’s remit letter to HEFCW. In particular, the focus on ‘disseminating and sharing widely the knowledge, understanding and innovation that is produced in our institutions’ and the idea that civic engagement activity should be ‘recognised and visible to...communities...’ is not addressed by the draft Bill definition. This exemplifies the way that language in relation to civic mission continues to evolve, and serves as an example for not specifying in legislation a definition for terms such as civic mission (even the use of the term civic mission has evolved over time). It is our view that the Commission should be able to determine a definition for civic mission when discharging its duty. The safeguards built in for the Welsh Government to approve the Commission’s strategic plans would ensure that the Commission is taking into account the current accepted definition for civic mission. Providing a definition that appears appropriate now might increase the risk that the Commission may not be able to discharge its functions effectively in the future should the definition evolve further.

To note, it appears inconsistent that it is proposed that ‘civic mission’ should be defined in legislation but a term such as widening access has not been. This is not to advocate for the legislation to do that: it should be for the Commission to consult on and implement an appropriate relevant definition, but this serves as

an example of inconsistency across the legislation.

Indeed, it might be superfluous to include this requirement in primary legislation and allow for the expectation for promoting civic mission to be articulated through the government's strategic priorities and the Commission's resulting strategic plan. We note that the definition in the draft legislation would duplicate the requirements that will already be placed on the Commission with the Well-being of Future Generations (Wales) Act 2015. With the expectations in that legislation, the Equality Act 2010 and Welsh Language Standards the Commission will already be under a duty to evidence how it discharges its functions in a manner that aligns with and goes beyond the current definition of civic mission in the draft Bill.

It is important that the Commission has the appropriate legislative tools (as set out in section 7(2) and (3)) to ensure that it can discharge its functions when funding other providers, not just those in the Further and Higher Education sector. The legislation could be refined by removing specific reference to the Further and Higher Education sector, therefore, not distinguishing such providers from others the Commission might fund to support the consideration of the Tertiary Education sector as a whole.

## The needs of the learner

### Learner Protection

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

We support the proposal that the Commission will need to determine the format and contents of Learner Protection Plans in consultation with stakeholders. It is key that the Commission can determine arrangements in order that it can provide guidance, including revisions, to meet evolving circumstances and challenges. Consultation and buy-in to the format and contents of Learner Protection Plans from stakeholders is key and that will be enabled through consultation.

Currently, HEFCW requires a student protection statement from regulated institutions and providers that have courses specifically designated for Welsh domiciled students. This commits providers to take the necessary steps to protect students' interests in the manner the draft Bill intends. HEFCW requests a full student protection plan where we consider there is a risk that the student protection arrangements may need to be implemented. This allows providers to develop a plan that focuses on addressing the immediate challenge(s) to the student interest. Arrangements could build on that approach which has already been subject to consultation.

We would urge caution with specifying too much detail in legislation as to the contents of the Learner Protection Plans, as it is important that any such plan adds value to the student experience and meets the needs of students. Therefore, these plans should be sufficiently high-level to provide reassurance to students and stakeholders, but include enough detail to be of use to the Commission as the regulator. However, we recognise that any Learner Protection Plan will need sufficient detail so that it can be implemented at the earliest possible point to protect student interests. This further adds weight to allowing the Commission to determine with the sector the format and contents to ensure the balance is appropriate at the time the Learner Protection Plan is submitted or revised.

It is important that the Commission has the necessary powers to treat consistently all those of whom it has oversight. Whilst we recognise that there are already arrangements in place for local authorities to protect students, it remains important that the local authority assures the Commission it has considered all the guidance provided by the Commission. The Commission should have due consideration of arrangements already in place if discharging functions relating to local authorities.

It is our view that the term 'learners' is not the appropriate term for the legislation. The term 'students' in many cases provides a clearer representation of individual's active engagement with their education, research and training, as well as more closely reflecting the aims that both the protection plans and the engagement code are trying to achieve. The language used should also make it clear that students on

pathways, such as apprentices, see that these important documents apply to them. We recognise, there are different views on the use of this term, ultimately NUS Wales is best placed to reflect the most appropriate term, informed by the views of its membership base across FE, HE and work-based learning.

**Learner Engagement Code (Section 117)**

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

We support the proposal for the Commission to publish a code for student engagement in the governance and management of providers. This code should be inclusive of all students at all providers. This should build upon the work already being delivered in higher education institutions.

The Commission should be enabled to develop the code in such a way as to ensure that it is proportionate to the type of provision within the post-16 sector and promotes the needs of students appropriately, because the level of engagement will be different across sectors.

The legislation should not specify more detail than there is now already in the draft Bill as it could hinder the Commission’s ability to deliver in this area.

It is our view that the term ‘learners’ is not the appropriate term for the legislation. The term ‘students’ in many cases provides a clearer representation of individual’s active engagement with their education, research and training, as well as more closely reflecting the aims that both the protection plans and the engagement code are trying to achieve. The language used should also make it clear that students on pathways, such as apprentices, see that these important documents apply to them. We recognise, there are different views on the use of this term, ultimately NUS Wales is best placed to reflect the most appropriate term, informed by the views of its membership base across FE, HE and work-based learning.

**Information, Advice and Guidance**

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

It is crucial that the Commission is fully enabled to fund information, advice and guidance, which can support Tertiary Education providers in Wales to deliver the needs of Wales. Such information, advice and guidance is critical to supporting providers, enhancing education, research and training in Wales and meeting student needs. Currently HEFCW utilises functions in the Further and Higher Education Act 1992 (the 1992 Act) to fund bodies such as NUS Wales, the Higher Education Statistics Agency, Advance HE and UKRI. We also provide funding for UK wide information to be made available for students. Central to delivering that function is having access to good quality data and being able to share information freely with partners in Wales and the rest of the UK.

There is a significant risk, in our view, that the legislation, as drafted, will not enable the Commission to deliver similar duties, as HEFCW and others do now, regarding the collection, use and dissemination of data relating to tertiary education. The Bill needs to reflect the increasing appetite for information and analysis, and the UK-wide role the Commission will have. For example, the legislation is overly prescriptive about the organisations that can share data with the Commission. The organisations that can share data with the Commission or that the Commission will need to share data with will evolve over time and if those organisations are not listed in the legislation, there is a risk that the Commission will not be able to obtain the data it needs to deliver its functions in a timely manner. To future proof the legislation and enable the Commission to work quickly and effectively with appropriate organisations, this level of detail should be removed. It should be for the Commission, and its appointed members, to determine which organisations the Commission enters into a data sharing agreement with.

Additionally, the draft Bill sets out that the Commission must share all information with Ministers. This appears to be a strengthening of provision included in the 1992 Act, with powers to determine what information will be shared and how that will be shared sitting firmly with the Minister. This could have significant implications for the Commission delivering its role and sets the wrong tone for the collaborative relationship the Commission and Welsh Government require to deliver the PCET reform agenda. Given the sensitive level of information that will be shared with the Commission, this may prevent organisations from signing a data sharing agreement with the Commission, if they do not have the confidence

that the agreement will not be breached. Additionally, it also prevents or makes it difficult for the Commission to gather critical sensitive information that it requires from providers, including information that is not covered through data protection legislation. We would urge any future legislation to further consider whether strengthening expectations in this manner is appropriate and provides safeguards to the Commission to both enable it to deliver on its functions but also allow the Commission to share information with the Welsh Government where it is relevant to Welsh Government's functions. Should legislation be set up to allow the Commission to have complete oversight of the Tertiary Education sector then the Commission would be less likely to find itself in receipt of information that did not relate to its area of interest. Additionally, in the spirit of the Well-being of Future Generations' Ways of Working, we would not expect the Welsh Government to require such powers, particularly given that it would fund the Commission and appoint/re-appoint the members of the Commission.

The situations described in the two paragraphs above will increase the risk that the Commission will not be able to deliver its functions to deliver the PCET reform aims. This is an essential aspect of the proper operation of a body, which is at arm's length from Government.

**School sixth form reorganisation proposals**

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

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

It is important that the Commission is enabled to ensure that students at all providers in the Tertiary Education sector in Wales have a comparable experience, and that it can regulate and fund those providers consistently. This is essential to achieve the greater coherence outlined in the Minister’s introduction to this consultation.

Therefore, it would appear contradictory for the School Standards and Organisation Code to be the appropriate vehicle for setting out systems and processes, when the Commission does not have the functions to develop that Code. The Commission should be enabled to develop the appropriate vehicle for setting out the systems and processes, taking account of the Code, to ensure that Welsh Government safeguards are built in.

All students in tertiary education in Wales should have access to proper facilities to meet their reasonable needs. . The draft Bill provides an opportunity to address the inconsistencies around the duty to secure proper facilities for 16-19 year olds, and only reasonable facilities for persons over 19. Ensuring that the duty only applies to certain elements of the system, but not others, creates the potential for a two-tiered system. Without further amendments in the future, or indeed additional primary legislation, the Commission will not be able to address this inconsistency, which risks undermining the creation of cohesion in the tertiary education sector.

## Strengthening collaboration

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

We fully support attempts for new legislation to be developed to enable greater collaboration across the tertiary education sector in Wales. There is a significant risk, in our view, that the legislation will not enable this as currently drafted.

In briefing sessions, officials have stated that the Bill has been drafted to enable a transition from current arrangements in the short term and potentially enable a more consolidated approach in the medium to long term through requiring all providers to register with the Commission. However, it is our view that the draft Bill has missed an opportunity to consolidate some of the different pieces of legislation, including addressing inconsistencies between the different pieces of legislation, and enable students to get comparable experiences. It is our view that there is a considerable risk that simply transferring elements of current legislation into new legislation will just replicate the current ways of working and not enable the Commission to deliver the cohesive system that Wales will benefit from in the medium-term.

For example, new legislation provides an opportunity to address the inconsistencies around the duty to secure proper facilities for 16-19 year olds and only reasonable facilities for persons over 19. All students in tertiary education in Wales should have access to proper facilities to meet their reasonable needs. Ensuring that the duty only applies to elements of the system creates the potential for a two-tiered system. Without further amendments in the future or indeed additional primary legislation, the Commission will not be able to address this inconsistency, which risks undermining the creation of cohesion in the tertiary education sector.

Additionally, section 87 of the draft legislation places the responsibility on the Commission to encourage individuals in Wales to participate in further education and training, whereas the emphasis on participation is on providers in the higher education sector. It is our view that the emphasis and responsibilities to encourage participation should be placed on all providers in the tertiary education sector and the Commission should have regulatory powers to achieve that. The Wales Institute of Social and Economic Research, Data and Methods previously recommended that the Welsh Government “should establish a national strategic framework for widening access to higher education that incorporates all sectors of the education system in Wales (not

just the universities).”

It is our view that the legislation should focus funding functions in the context of a system of registration, to be determined by the Commission, for all tertiary education providers, not selected providers. This would enable the Commission to apply its conditions of registration equally and proportionately to all providers and develop greater collaboration and cohesion.

Additionally, in order for the Commission to be able to strengthen collaboration, the Commission needs to be able to link data and be able to get data from other organisations, including UK organisations. Currently the draft Bill is overly prescriptive about the organisations that can share data with the Commission, this list is not comprehensive and will evolve over time. As such, there is a risk the Commission will not be able to obtain data from the organisations it needs to deliver its functions in a timely manner. To future proof the legislation and enable the Commission to work quickly and effectively with appropriate organisations this level of detail should be removed. Additionally, the draft legislation sets out that the Commission must share all information with Ministers. Given the sensitive level of information that will be shared this may prevent organisations from signing a data sharing agreement with the Commission and also prevent, or make it difficult for the Commission to gather critical information that it requires from providers. Both situations will increase the risk that the Commission will not be able to deliver on its functions to ensure that all learners receive advice or guidance to: support student pathways, transition, and progression. Such support is critical to enable students to make a contribution to, and succeed, in a fair and inclusive society and a thriving economy.

HEFCW has already enabled greater collaboration between higher education and further education institutions through its ‘Enhancing HE-FE Collaboration in Innovation and Engagement 2017-18’ fund. Ongoing partnerships were created through a relatively small amount of funding (£3.5m across 9 universities and 12 FE colleges) and this sort of model should be straightforward to replicate through the Commission, if the Commission were enabled appropriately.

## Welsh Language/Welsh-medium

We would like to know your views on the effects that the establishment of the Commission (Section 8) would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English.

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

### Please add any comments in the box below:

There is a significant risk that the draft legislation will create a challenge for the Commission to deliver a cohesive tertiary education system and, as such, it will not deliver a positive impact on the Welsh language. It is our view, that these challenges will emerge because the draft Bill replicates current legislation, which is, subsequently, likely to dictate that the Commission operates in a manner that creates the conditions for the current system to operate as it does.

Introducing new legislation provides an opportunity to recast the oversight of tertiary education in a new way that enables a new Commission to apply requirements to all tertiary education providers in Wales in a consistent and proportionate manner. This could be achieved by focusing new legislation, on developing a comprehensive registration system applicable to all providers. The proposals for a registration system in the draft Bill, and accompanying documentation, are currently only limited to providers that require higher education courses to be designated for student support.

Given that the Commission would have a duty to adhere to the Welsh language standards, it would have to discharge its functions to promote the Welsh language consistently to providers and across all policy areas in the manner in which we currently are able to. It seems superfluous, therefore, to include additional expectations in any other legislation.

The supporting documentation recognises that further consideration of the funding model and independence of the Coleg Cymraeg Cenedlaethol (the Coleg) is required. There is the potential for the Commission's duty to conflict with the role of the Coleg, which would be counterproductive. It should be clearer in the policy intention what the role of the Coleg should be. The Commission should build upon the positive relationship between HEFCW and the Coleg to work collaboratively to achieve the shared aims of increasing the number of individuals studying higher education through the medium of Welsh.

We believe that Part 6, as currently drafted, does not fully realise the Commission's intentions regarding the collection, use and dissemination of data relating to post-compulsory education and does not reflect the increased appetite for information and analysis, and the UK-wide role the Commission will have. Additionally, the draft Bill does not currently specify a data body, for example, to specifically allow a third party to collect and disseminate data on the Commission's behalf as the Higher Education Statistics Agency (HESA) currently does for higher education. Without addressing these issues, there is a

risk that the Commission will not have the data it needs to be able to deliver on its duties to monitor Welsh medium in higher education.

## Welsh Language/Welsh-medium

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

### Please add any comments in the box below:

There is a significant risk that the draft legislation will create a challenge for the Commission to deliver a cohesive tertiary education system and, as such, it will not deliver a positive impact on the Welsh language. It is our view, that these challenges will emerge because the draft Bill replicates current legislation, which is, subsequently, likely to dictate that the Commission operates in a manner that creates the conditions for the current system to operate as it does.

Introducing new legislation provides an opportunity to recast the oversight of tertiary education in a new way that enables a new Commission to apply requirements to all tertiary education providers in Wales in a consistent and proportionate manner. This could be achieved by focusing new legislation, on developing a comprehensive registration system applicable to all providers. The proposals for a registration system in the draft Bill, and accompanying documentation, are currently only limited to providers that require higher education courses to be designated for student support.

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The Commission cannot perform its duties without good quality data and information. The draft Bill needs to enable the Commission to continue its relationship with the Higher Education Statistics Agency. However, the draft Bill, and accompanying documentation, does not reflect this role or the role the Commission would play in the provision of UK-wide information about education, research and training. We have further concerns that the power for Welsh Government to receive data submitted to the Commission will increase the likelihood that organisations will not sign data sharing agreements with the Commission. This will make it harder for the Commission to assess whether individual opportunities to use the Welsh language are increasing.

## Welsh Language/Welsh-medium

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

**Please add any comments in the box below:**

There is a significant risk that the draft legislation will create a challenge for the Commission to deliver a cohesive tertiary education system and, as such, it will not deliver a positive impact on the Welsh language. It is our view, that these challenges will emerge because the draft Bill replicates current legislation, which is, subsequently, likely to dictate that the Commission operates in a manner that creates the conditions for the current system to operate as it does.

Introducing new legislation provides an opportunity to recast the oversight of tertiary education in a new way that enables a new Commission to apply requirements to all tertiary education providers in Wales in a consistent and proportionate manner. This could be achieved by focusing new legislation, on developing a comprehensive registration system applicable to all providers. The proposals for a registration system in the draft Bill, and accompanying documentation, are currently only limited to providers that require higher education courses to be designated for student support.

Given that the Commission would have a duty to adhere to the Welsh language standards, it would have to discharge its functions to promote the Welsh language consistently to providers and across all policy areas in the manner in which we currently are able to. It seems superfluous, therefore, to include additional expectations in any other legislation.

The supporting documentation recognises that further consideration of the funding model and independence of the Coleg Cymraeg Cenedlaethol (the Coleg) is required. There is the potential for the Commission's duty to conflict with the role of the Coleg, which would be counter-productive. It should be clearer in the policy intention what the role of the Coleg should be. The Commission should build upon the positive relationship between HEFCW and the Coleg to work collaboratively to achieve the shared aims of increasing the number of individuals studying higher education through the medium of Welsh.

## Registration

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

We support the view that a focus on outcomes is the appropriate approach to drive transformative change in all of tertiary education, not just in higher education. It is not clear, however, what the evidence base is for Access and Opportunity Plans being the definitive mechanism now and in the future for delivering that transformative change. In our view, prescribing the manner in which Fee and Access Plans should be constructed is a significant cause of the excessive bureaucracy of the current system. The proposals set out for Access and Opportunity Plans are also too prescriptive and there is a significant risk that the excessive bureaucracy will continue. This in turn increases the risk that providers' abilities to consider and support the intersectional experiences of individuals with protected characteristics and those under-represented in higher education will not improve.

Likewise, it is not clear in the draft Bill's accompanying documentation, what the evidence base is that outcome agreements will deliver transformative outcomes. We note that the Scottish Funding Council has recently conducted a [review of its processes including a focus on outcome agreements](#). This review should be considered alongside consultation responses (paragraph 162 refers).

It is our view that it would be preferable to empower the Commission to work with stakeholders to develop an appropriate process to drive transformative change in widening access in Wales and deliver on a Government's statement of strategic priorities. The Commission would provide assurance to Government that it is driving transformative change with the development and implementation of its strategic plan. Should the Commission, with members appointed by, and accountable to the Minister, assess through evaluation and research that there are better mechanisms to achieving transformative outcomes, then they should be enabled to do so without the need for further legislation. Should the Bill be enacted as drafted, it is likely that the Commission will be prevented from making such amendments to these mechanisms without either new legislation or amendments to existing legislation. This will prevent the Commission from being responsive to the needs of Wales. The Scottish Funding Council review referred to above demonstrates the need to have flexibility and allow mechanisms to be amended following review and evaluation.

Additionally, it will not be helpful to specify in regulations the particular subject areas and courses where a greater focus on fair access and equality of opportunity is required. Where providers should be focusing on improving outcomes for students fits more neatly into remit and strategic priorities rather than legislation. This would provide the Commission with the flexibility to respond to emerging trends and data as well as individual institutions who are best placed to respond to different outcome

deficits in Wales, particularly those created by unforeseen circumstances such as the current pandemic.

For the Commission to enable a cohesive system then it should be able to apply conditions of registration or funding equally to tertiary education providers. We note that the draft Bill currently places the responsibility for participation in the further education sector with the Commission, not the provider. This contrasts with the responsibilities in higher education where the provider is responsible. It is our view that all tertiary education providers should have these same responsibilities and the Commission should regulate them to achieve these responsibilities in a consistent manner across the whole tertiary sector in Wales.

We note that the draft Bill still uses the term 'equality of opportunity'. Adopting the term 'equity of outcome' would further strengthen the policy intention to focus on outcomes.

**Registration**

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

The proposed powers for registration are proportionate and are set out at an appropriate level of detail to allow the Commission to monitor, review, and ensure compliance in a manner that is appropriate to the registration condition. It also allows the Commission to review those processes and amend them as lessons are learnt, as well as recognising that different providers operate in different contexts with different types of students.

There is a risk to the Commission, however, that it will not be able to use this vital regulatory lever to help secure a cohesive tertiary education system. The legislation, as drafted, creates mechanisms, which will underpin the monitoring and review process, which is likely to hinder creating that cohesive system. Additionally, there is not a clear evidence base that the mechanisms, which drive the activity that providers will have to be monitored and reviewed against, are the appropriate mechanisms for the short, medium and long-term future of the legislation.

As we set out in response to question 10, prescribing the manner in which Fee and Access Plans should be constructed is a significant cause of the excessive bureaucracy of the current system. This legislation only replicates those systemic issues. There is also a lesson to be learnt from the [Scottish Funding Council](#), which has reviewed outcome agreements and it has been recognised that the current structure needs to be amended.

An important opportunity has been missed to consolidate current legislation and move more quickly to using the register as the basis for engaging with all tertiary education providers in Wales. Legislation consolidating powers in the context of a registration system would enable the Commission to deliver a more coherent tertiary education sector that enables students to receive comparable experiences.

In developing registration categories, it would be important not to over-specify the exact types of funding available to each category of registration. It should be left to the Commission to determine what funding is allocated to each provider and what outcomes each provider should be delivering. For example, all institutions that require student support for higher education provision do not all need funding to support high quality research. It is paramount that the Commission can determine which institutions receive funding designed to strengthen the research base in Wales i.e. through Quality-related Research (QR) funding which

underpins the breadth of the research base, from curiosity-driven to applied activity. Expanding the number of providers that could receive QR funding by over-specifying how funding should be allocated, based on registration, would likely weaken the research base in Wales and, consequently, weaken the Welsh university sector's ability to compete at a UK and global level. The rationale for specifying that all providers in a particular registration category should receive the same type of funding is not clearly evidenced. We note, from engagement with Welsh Government officials, that the policy intention for the Research and Innovation elements of the legislation is still being considered.

In order for the Commission to deliver any review or monitoring functions, it must be able to have access to good quality data that can facilitate comparisons with other parts of the UK. There is a risk that this could be compromised. The draft Bill does not currently specify a data body, for example, to specifically allow a third party to collect and disseminate data on the Commission's behalf as the Higher Education Statistics Agency (HESA) currently does for higher education. There is also no acknowledgement, in the draft Bill's accompanying documentation, of the role the Commission would play in the provision of UK-wide information about education and research, including through HESA and JISC, and the importance of information about provision taking place outside Wales being available to the Commission. There is also nothing in place to ensure that reciprocal arrangements for sharing of higher education data across the UK that are currently in place are maintained. The purpose of omitting this level of detail may be to maintain the status quo in relation to the role that HESA currently perform, however, there is a real risk here of disruption. Any legislation needs to balance enabling the continuation of service and the operation of HESA on a UK-wide basis, as well as enabling the Commission to be considered the primary and trusted source of high quality data and information with not over-specifying detail and constraining the Commission.

Related to this, it is not clear where the decision lies about who can collect information from providers and what is appropriate to collect. There should be something at a very broad non-descriptive level, to enable this in the draft Bill. In not doing this, there is a risk of duplication of effort on the part of providers and increased burden. For example, we would expect the quality body to ask the Commission for data and information in the first instance and not collect its own. The Commission should also be the main source of information for Welsh Government.

**Quality**

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

We do not think the proposed arrangements work towards a more aligned and coordinated approach to quality across the tertiary education sector. Indeed, they appear to hard wire into legislation the current arrangements and not allow the Commission to build an aligned and coordinated approach. For example, the parameters for specific areas such as transnational education, part-time provision and degree apprenticeships have not been sufficiently considered, in order to enable the Commission to have effective oversight of these areas.

In relation to transnational education, we recognise that it is proposed that the Commission would have a power in relation to quality provided on behalf of a registered provider, and this would provide some scope for the Commission to have oversight of arrangements for overseas provision delivered under sub-contractual / franchise agreements. However, in many cases, education delivered by a provider (overseas or otherwise) under validation arrangements would not be deemed to be provided on behalf of a registered provider that is also an awarding organisation because the control of the courses would be with the delivering provider. As such, there is a risk that the Commission will not have full oversight of all provision leading to an award made by a registered provider. Given that this type of provision can be risky, an opportunity to strengthen the Commission’s ability to protect the reputation of higher education in Wales appears to have been missed.

Given the policy intent for qualifications to be central to apprenticeships and the appetite for increasing the number of higher and degree apprenticeships, this will increasingly see qualifications being part of apprenticeships that are outside of Estyn’s ordinary duty and expertise. As such, the rationale for Estyn having a greater role in the inspection of apprenticeships when it currently does not have the duty in higher education (recognised on p31 of the explanatory memorandum that accompanies the draft Bill), is not clear.

Additionally, the legislation allows for quality to be assessed by the Commission, allows for the Commission to make arrangements for the assessment of quality, strengthens the role of Estyn (particularly in apprenticeships) and allows for a quality body to be designated. Setting out the legislation in this way embeds in legislation the some of the current complexities. It will be important for the Commission to have sufficient flexibility more generally to be able to test different approaches as required across the post-16 sector. Allowing for the Commission to make arrangements for

quality means that it, informed by a Quality Committee, can determine the appropriate arrangements for the types of provision being delivered. This might be from a single quality body or a range of quality bodies. Currently HEFCW works collaboratively with Estyn and the QAA through a memorandum of understanding to enable joint working. This working relationship should be built on at the same time as looking for solutions to simplify how that legislation could enable that relationship to be more effective.

It is also not clear through the explanatory documentation that the reasonable needs of students across the post-16 sector have been considered or evidenced, these evidenced needs would provide a stable foundation to build the proposals on.

It is important for the Commission to be enabled to develop mechanisms for student complaints, not just oversight of provider complaints processes.

There is a risk that the way part 6 is currently drafted could prevent the continuation of data collections across the UK in the way HEFCW currently operates with HESA for higher education. This increases the risk that the Commission is unable to effectively assess or make arrangements for the assessment of the quality of higher education.

## Research and Innovation

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

There is limited evidence set out in the explanatory memorandum that supports a rationale for changing the current approaches to funding research and innovation. Particularly it is not clear why the Commission's functions should be broadened beyond just registered tertiary education providers. Indeed, the key advantages for the preferred approach for Research and Innovation, referred to in p197 of the Explanatory Memorandum, are not reflected in the draft Bill. For example, the explanatory memorandum sets out that: the Commission would be "the national strategic delivery mechanism for R&I funding in Wales", "the 'face of R&I' in Wales, especially for national and international promotion and engagement on R&I activities", and "the 'go-to' body for R&I support in Wales". Yet the draft Bill only provides for the Commission to fund registered providers that require course designation for higher education student support and the Welsh Government retains powers to fund research and innovation, including research and innovation delivered by providers registered with the Commission.

Furthermore, it is important to stress that the research and innovation landscape at a UK level has changed since the Hazelkorn review was published in March 2016. This provides an example of how external factors can change and it is therefore important to draft legislation that enables the Commission to respond to the changing circumstances. In that context it is important not to over-specify what the Commission should fund and at which type of provider.

For example, all institutions that require student support for higher education provision do not all need funding to support high quality research. It is paramount that the Commission can determine which institutions receive funding designed to strengthen the research base in Wales i.e. through Quality-related Research (QR) funding which underpins the breadth of the research base, from curiosity-driven to applied activity. Expanding the number of providers that could receive QR funding by over-specifying how funding should be allocated based on registration would likely weaken the research base in Wales and, consequently, weaken the Welsh university sector's ability to compete at a UK and global level.

The advantages of the approach outlined by Welsh Government, a central point for research and innovation in Wales, will not be achieved if Ministers also fund research and innovation outside of the Commission. In the previous technical consultation, it was proposed that the Commission's functions would cover all Welsh Government research and innovation funding and therefore include others such as businesses. HEFCW's response was that extending the scope of funding beyond just registered tertiary education providers would mean that the remit of Research and Innovation Wales would be extremely wide. The responsibilities of

the rest of the Commission would already be very broad, covering higher education, further education, work-based learning providers, life-long learning, apprenticeships and sixth forms. The regulatory and funding framework would need to cover all, so expanding the scope of the research and innovation function to include the range of organisations proposed, risks creating an organisation which is over-complex and unwieldy. More fundamentally, it seems illogical that a sub-unit of an organisation which has a (post-compulsory) education focus should be responsible for providing funding to organisations which are far removed from the education sector.

We suggest that funding programmes that provide incentives for enhanced collaboration between universities and businesses in Wales might be included in the Commission's remit; funding programmes, that fund business activity (currently the remit of the Welsh Government) should not.

There is already a complex mix within Welsh Government in terms of where research and innovation funding sits (i.e. different Ministers and departments). There is a need for a clearer vision statement that describes what benefit will be achieved through the decision to fund around the Commission.

Whilst we agree it is correct to monitor and report as stated for project funding, detailed annual reporting for the unhypothecated research and innovation funding that underpins universities' ability to carry out vital projects would be inconsistent with the stated ambition of the Commission to be strategic and responsive. For unhypothecated research funding in particular, QR funding, the UK higher education funding bodies allocate their respective QR funding streams on the outcomes of a UK wide research excellence framework (REF), thus ensuring funding is supporting research that has previously achieved successful results. However, the REF exercise is only carried out every 7 years, not annually.

We do not disagree with the Commission providing hypothecated funding framed around areas. However, we would strongly suggest that this must be introduced without reducing or putting hypothecation on existing unhypothecated funding, currently determined by HEFCW, which underpins the research and innovation base in Wales. The recommendations in both the Diamond and the Reid reviews recognise the need to protect unhypothecated funding, and we would echo this as a key priority. The draft legislation does not protect it and therefore seriously undermines the research base, which will not meet the ambition of the Commission to build a more prosperous Wales. We would strongly argue for greater protections around unhypothecated funding. Asking for alignment to short-term priorities risks damaging universities' capacity to engage with new fields of research which will produce the discoveries of the future. It also suggests that there are areas of research excellence, which the government may deem unfundable, particularly the Arts and Humanities, which could have a serious detrimental impact on cultural heritage in Wales, particularly the Welsh language, as well as on the economy.

## Apprenticeships

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

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

In HEFCW's response to Welsh Government's consultation [Issuing Authority Consultation](#), and the [Structure Welsh Apprenticeship Frameworks](#), we agreed that Welsh Government oversight of apprenticeship provision would provide coherence and continuity in the preparation and issuing of apprenticeship frameworks. We do, however, acknowledge that expertise within Sector Skills Councils may be at risk to the detriment of framework development under a similar arrangement, such as those set out in the draft Bill.

Responsibility for the preparation and issuing of apprenticeship frameworks, as set out in the draft Bill, lacks flexibility, and whilst, a national approach is helpful, regional nuances and institutional autonomy must be considered within these arrangements.

Additionally, the level of detail afforded to the treatment of apprenticeships is overly complex, and might inadvertently constrain future development in this area. This further serves as an example, repeated throughout our consultation response, that the draft legislation is overly prescriptive. This increases the risk that the legislation will have to be amended as external circumstances change and different approaches emerge. Indeed, the necessity for change in apprenticeship legislation is partly because of over-specifying mechanisms and roles of organisations in previous legislation.

An opportunity has been missed to address the nugatory competition in higher and degree apprenticeships. Requiring all tertiary education providers to register with the Commission, in a structure to be determined by the Commission, would provide the opportunity for that. We note that the recently published Economic, Infrastructure and Skills Committee report on Degree Apprenticeships highlights some of these issues and recommendations, which should be taken account of when reviewing the suitability of the legislation to create a cohesive system.

HEFCW also notes that stakeholders have not yet had the opportunity to respond to [report](#) recommendations from the Economic, Infrastructure and Skills Committee consultation on [Degree Apprenticeships](#). This report identified 12 recommendations that include industry engagement, quality and funding arrangements.

HEFCW welcomes the opportunity to align apprenticeship provision across all levels and providers, but acknowledges the unique contribution that Higher Education Institutions are able to contribute in this area. On this basis we recognise that distinctive differences in the treatment of quality and funding arrangements for degree apprenticeships, from the broader provision, may be required.

Welsh Government might also want to consider the outcome of its ongoing evaluation of Degree Apprenticeships due to report in September 2021, and the Quality Assurance Agencies (QAA) developmental review of degree apprenticeship provision commissioned by HEFCW. The QAA review is expected to report in June 2021 and the outcomes will inform our future approach to this provision as well as provide assurance of the quality of existing provision for stakeholders in Wales and identify good practice for learning opportunities. The published [handbook](#) sets out full details of the review.

## Apprenticeships

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

The draft Bill sets out the mechanisms of apprenticeship development and maintenance, but does not take account of strategic drivers for framework development. This would include the identification of skills needs, (for example the role of Regional Skills Partnerships & economic action plans or other intelligence), and collaboration as an aid to employer focussed progression pathways through the levels. There is limited evidence to suggest that the mechanisms set out in legislation are the appropriate ones and, learning from past experiences, ensure that they are future proofed against unforeseen circumstances.

As we have advocated throughout the consultation, the legislation should not over-specify the mechanisms that the Commission has to deliver and instead should allow the Commission, informed by industry and providers, to develop the appropriate mechanisms.

Further evidence that adequate strategic drivers have not been provided is the different approaches the Commission will have in its relationship with different tertiary education providers. Areas of provision where a cohesive system will benefit Wales, such as in the overlapping and competing space of higher and degree apprenticeships, will remain, as the solutions to this challenge have not been provided. Only by basing the draft legislation around a registration system applicable to all tertiary education providers could the Commission be enabled to develop collaboration and cohesion.

The draft Bill does not provide sufficient clarity for the oversight of quality arrangements of degree apprenticeships. . Estyn does not inspect higher education, yet it appears it will have the remit for apprenticeships at a time when more apprenticeships will include higher education qualifications. It is not clear how Estyn will deliver such a function outside of its current remit and expertise.

## The needs of the economy and employers

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

Yes

No

Neither Yes or No

Please add any additional comments in the box below:

We broadly support the Commission to have regard to the reasonable requirements of industry, commerce, finance, the professions and other employers but question the need for it to be specified in legislation in this way. Over-specifying detail in this way leaves out other key considerations, which the Commission would have to have, such as the requirements of public services. Additionally, the Commission will also want to “ensure that the needs of industry etc.” are met. It is not clear why this detail would be required, given the remit of the Commission, the duties placed on it through the Well-being of Future Generations (Wales) Act, and having to respond to the Welsh Government’s strategic priorities.

This type of over-specifying detail in legislation will also reduce the flexibility of the Commission to achieve those requirements. For example, proposals to enable providers other than universities to receive research funding and hypothecation of research by area will weaken the research base in Wales and hinder the capacity to engage with business and transfer research into innovation that will meet the needs of the economy.

The intention that Welsh Ministers appoints members to the Research and Innovation Wales Committee undermines the concept of an arms-length body and is inconsistent with proposals for the other statutory committee, the Quality Assessment Committee which, appropriately, does not require Welsh Minister appointment. Currently our Committees are not subject to Ministerial appointments. Not being bound by this allows flexibility to ensure that we can go through our own process to ensure that the Committee memberships represent the diverse views we require. These processes are fair, open and transparent and, where appropriate, representation is broader than the higher education sector. For example, we currently have two employer representatives on our Research Wales Committee. The Commission should be well placed to ensure that it secures the diverse views it needs to deliver on its agreed strategic plan. We note on p103 of the Welsh Government’s summary of responses to the technical consultation, [Public Good and a Prosperous Wales](#), it states that the predominant view was that “The composition and appointment of members should be determined by the Commission”. We also note that this view was shared by both the HE (p107) sector and NUS Wales (p108), and that the FE sector supported the Commission to determine the number of committee members (p104).

We are concerned that the duty section out in section 2 (1) (b) does not sufficiently

take into account the requirements of graduate skills and employability. The Commission should be enabled to include a stronger and more coherent focus on skills and employability provision in higher education for students. This is to ensure sector confidence in graduate employability, and to provide graduates with industry focused skills to meet the requirements of a changing economic landscape.

The Commission cannot perform its duties without good quality data and information. The role of data and information should be embedded in the draft Bill. The draft Bill should be an opportunity to improve data sharing and use of data across Wales, to better inform stakeholders and to further develop evidenced based policymaking. We believe that Part 6, as currently drafted, does not fully realise the Commission's intentions regarding the collection, use and dissemination of data relating to post-compulsory education and does not reflect the increased appetite for information and analysis, and the UK-wide role the Commission will have. Having good quality data available about education and research is essential for the Commission's general duties to have regard to 'the reasonable requirements of industry, commerce, finance, the professions and other employers, as well as 'the reasonable requirements of persons who may wish to undertake tertiary education or carry out research or innovation. /

**Funding**

**A focus on outcomes:**

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

Yes                       No                       Neither Yes or No

**Please add any additional comments in the box below:**

We support the view that a focus on outcomes is the appropriate approach to drive transformative change in all of tertiary education, not just in higher education. It is not clear in the draft Bill’s accompanying documentation what the evidence base is that outcome agreements will deliver transformative outcomes. We note that the Scottish Funding Council has recently conducted a [review of its processes including a focus on outcome agreements](#). This review should be considered alongside consultation responses (paragraph 162 refers).

It is also our view that it would be preferable to empower the Commission to work with stakeholders to develop an appropriate process to deliver those outcomes. Over-specifying in legislation the mechanisms that the Commission, with members appointed by and accountable to the Minister, must implement, binds it to a process that it will struggle to amend following review and evaluation without changes in primary legislation. The Scottish Funding Council review cited above demonstrates the need to have flexibility and allow mechanisms to be reviewed and amended.

To support the Commission, it is critical not to over-specify the registration conditions or the types of funding that different types of providers can receive. As such, the legislation needs further revision and streamlining so that the safeguards for Welsh Ministers are balanced with the ability of the Commission to deliver its remit most effectively.

## Regulatory Impact Assessment

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

**Please add any comments in the box below:**

It is noted that the impact assessment references the indirect transition costs for other bodies. Experience from the implementation of the 2015 Higher Education (Wales) Act suggests that these costs will not be trivial and represent significant opportunity costs at a time of expected increasing pressure on public funds. The draft Bill should not be introduced without a robust assessment of these costs and setting out evidence and a vision for how investment in bringing in new legislation will deliver an exemplar cohesive tertiary education system in Wales.

Currently it is not clear in the explanatory memorandum that what is being proposed in the draft Bill will bring about transformative change that benefits Wales. There is limited reference to how the legislation in other parts of the world allows for similar systems to be developed and operate effectively. The draft Bill appears to be simply pulling together the current architecture into one piece of legislation, and one organisation, without a vision for how the legislation could be designed to deliver a cohesive system. It is our view that the proposed registration system could provide the basis for that. However, with the additional contradictory funding requirements related to different elements of the tertiary education system built into the draft legislation, the ability for the Commission to effectively build on that registration system would be limited.

Furthermore, the explanatory memorandum does not draw upon lessons learnt from previous experiences to evidence how this approach and investment will bring about the change that we and other stakeholders see value in.

Given the current financial climate and the absence of a clear rationale for the draft Bill, it is not clear why alternative approaches have not been considered, such as expanding HEFCW's role. HEFCW, made up of Council members appointed by the Minister, accountable to Welsh Government, potentially subject to judicial review and duty bound to consult with relevant stakeholders could develop greater cohesion with an enhanced role in the short term whilst more time is taken to develop legislation for a new organisation.

## Regulatory Impact Assessment

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

### Please add any comments in the box below:

There is no clear vision for what the Commission, created through this legislation, seeks to achieve over and above the current tertiary education system. Therefore, it is difficult to assess what the benefits will be for providers or students in Wales or indeed a return on the public investment into the legislation.

The explanatory memorandum asserts (on page 119) that a number of benefits will be associated with the introduction of the Bill, including:

- 'consistency of approach to the regulation of institutions across the PCET sector...'
- 'Increase in learner participation rates',
- 'reduction in attainment and outcomes gaps...'
- 'a more coherent and consistent funding model across the PCET sector',
- 'better alignment between funding and cost of the same provision delivered across the PCET system'.

It is not evidenced in the explanatory memorandum how it is expected that the introduction of the Bill will achieve any of these benefits and the fact that many of the current regulatory and funding arrangements are to be hard-wired into the new legislation will prevent benefits, arising from greater consistency and coherence, from being achieved. Given that these benefits are among the key aspirations for introducing these changes, it is impossible to justify an additional estimated cost of nearly £50m over the 10-year period.

As we have set out in response to previous questions, over-specifying the detail of processes and mechanisms will limit the ability of the Commission to respond to changing circumstances and prevent it from reviewing and evaluating its processes to bring about transformative change without the need for future legislation. Any evidence that is submitted alongside a draft Bill must articulate that the processes and mechanisms that are in the legislation will be enduring in the long term. If these processes and mechanisms are not enduring then they may not be appropriate for primary legislation. As noted elsewhere in our consultation response, the Scottish Funding Council on review of its outcome agreement process is amending its processes. This serves as a warning that if such processes are specified in legislation, as they are in the draft Bill, the Commission would not be able to respond in the same way to improve the effectiveness of its processes.

We would welcome the opportunity to work with Welsh Government to further consider how draft legislation could be developed and implemented to bring about a more cohesive tertiary education system in Wales. In the short term, we would be prepared to take on an enhanced role to develop greater cohesion, building on arrangements already in place. It is our view that there are already suitable safeguards to Welsh Government in place to do this such as our members being appointed by Council, requirements to have our

Corporate Strategy and Business Plan approved by the Minister, potential for being subject to judicial review, a duty to consult, being subject to Ministerial remit and being accountable for the public funds provided to us by Welsh Government.

**New Normal**

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

**Yes**

**No**

**Neither Yes or No**

**Please add any additional comments in the box below:**

It is too early to determine the full impact of the pandemic but it is clear that HEFCW having flexibility in its funding powers has been critical. This is largely due to the manner in which the Further and Higher Education Act 1992 has been drafted and should serve as an example for not over-specifying great detail in legislation. For example, HEFCW’s unhypothecated funding for Research and Innovation has been essential in allowing universities to rapidly change their Research and Innovation priorities, associated resources and expertise. This has enabled universities to not only cope with their own issues caused by the pandemic but make a significant and invaluable contribution to Wales’ response to the pandemic. As we move into the “new normal”, which is an unpredictable, fast-moving environment, it is more important than ever that universities and other tertiary education providers remain able to contribute.

The pandemic also highlights that in a country the size of Wales, greater collaboration and a more cohesive tertiary education system would enable Wales to respond more effectively to similar seismic events. As we have articulated throughout this consultation response, it is our view that there is a significant risk that the Commission will not be able to deliver greater collaboration from a more cohesive tertiary education system. The risk has been identified because the current legislative architecture, which enables the current lack of cohesion, will just be replicated in new legislation. Furthermore, there is no clear evidence base or vision for how this legislation will enable the Commission to deliver such collaboration in a cohesive system without further primary legislation replacing the legislation being replicated.

As we have set out in our response to other questions in this consultation, the over-specification in legislation of the mechanisms and processes that the Commission will have to implement, will prevent the Commission and tertiary education providers from responding to future challenges similar to those created by this pandemic. We would welcome the opportunity to work with Welsh Government to consider how this draft legislation could be developed and implemented to bring about a more cohesive tertiary education system in Wales and be future proofed to respond to such unforeseen tumultuous challenges.

**PCET Reform**

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

Yes

No

Neither Yes or No

**Please add any additional comments in the box below:**

There are additional levers that can be utilised, not just in legislation but also in the manner in which tertiary education providers, the Commission and the Welsh Government work together, than can establish the required cultural change. The Well-being of Future Generations (Wales) Act ways of working provides the basis for an approach to achieving that.

Cultural change should be enabled by allowing the Commission to develop a coherent sector by enabling the Commission to deliver on its strategic plan without over-specifying the detail of how the Commission should go about delivering its functions in legislation. Over-specifying legislation, as this draft Bill does, will restrict the Commission and not allow it to be flexible to emerging challenges and detract it from being able to focus on improving the performance of diverse institutions to meet student needs and the social, economic, cultural and environmental needs of Wales. A key example of this is, is specifying who the Commission can enter into a data sharing agreement with, thus potentially preventing it from developing the relationships its members and committee members advise it to in a timely fashion.

Furthermore, a key lever that the Commission will have, will be to influence stakeholders and providers to act in a certain way, to complement its regulatory and funding functions. However, more specification of how a process should be delivered will draw more resource away from that key influencing role.

As we have set out in our response to the consultation, the current provisions in the draft Bill have missed the opportunity to establish a harmonised regulatory and funding regime for the tertiary education sector. It hardwires in the pre-existing arrangements making the delivery of key anticipated benefits of greater cohesion and consistency unattainable. In this respect, the draft Bill offers nothing beyond the current arrangements. It is not sufficient just to establish a new body: the legislation needs to enable that body to address the cultural challenges without the impediment of retaining current discrete regulatory, funding and quality assurance arrangements with all their complexities.

Welsh Government itself has an important role in changing its cultural approach. Given the broad remit of the Commission, consideration should be given to whether the responsibility for sponsorship of the Commission should rest with multiple Ministers. This could help enable Welsh Government to integrate its internal processes to ensure that the Commission is empowered to deliver a more

joined up tertiary education system. Additionally, there is also an underlying theme in the legislation that Welsh Government is reluctant to embrace the concept of an arms-length body.

For example:

- Over-specifying the processes that the Commission would have to deliver,
- Welsh Government retaining powers in further education,
- The ability for Welsh Government to amend the Commission's strategic plan with only a consultation of the Commission,
- The ability to fund providers around the back of the Commission, and
- Significantly, the Minister being able to request any form of information from the Commission.

For the Commission to be able to deliver the aims of the PCET reform agenda it requires the trust of Welsh Government to have all the powers and develop the necessary processes to achieve those aims itself.

22. We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them.

**Please add any comments in the box below:**

Set out below are some overarching comments that we wish to address as well as some detailed comments on specific areas of the draft Bill, and associated documentation. Our comments below are set out in the context of our unique experience in implementing legislation in the same manner that the Commission will have to, primarily the Further and Higher Education Act 1992 and the Higher Education (Wales) Act 2015.

Overarching Comments

Throughout this response, we have identified areas where we see potential implementation challenges arising from the draft legislation, some of which are significant. The overarching sense we have, though, is one of an opportunity missed. The thrust of the Hazelkorn report, accepted by the Welsh Government, was first to establish a clear vision for the PCET sector in Wales, with a clear intention that the sector should be cohesive and integrated, with administrative arrangements which facilitated better the meeting of employer and student needs, and removed the tensions around current interfaces between the sectors.

The establishment of the new Commission was the second recommendation which, we would argue, was subordinate to the first. Any assessment of whether the proposed legislative arrangements are fit for purpose should be informed by an agreed vision; indeed, the task of developing the legislation should have been informed by the vision. We remain of the view that the absence of an agreed vision, up to this point in the developments, is a major failing.

Some sense of the potential benefits of the new legislative arrangements can be found in the Explanatory Memorandum but, as we have identified above, it is far from clear how most of these will be delivered by the new arrangement and, for a number of them, the draft legislation actually impedes their achievement. Currently, the draft Bill transfers over responsibilities of HEFCW and Welsh Government to the new Commission without any integration and overarching approach. It could be that each education sector could carry on with its current approach albeit with a different funder but almost acting as silos. It is difficult to see how the current proposals could not have been achieved by adopting Option 2 of the options evaluated. We acknowledge that this option was discounted on the basis of scoring against criteria internally within Welsh Government. Our views were not sought in that process, and the published documentation does not make clear the underlying assumptions, or presumptions, which pertained, but we consider that the scores given might merit further consideration.

Much of the draft legislation appears to have been constrained by current legislative arrangements. Given that this is primary legislation, and that nearly five years have elapsed since the Hazelkorn report was written, we consider that the draft Bill could, and should, have gone much further in harmonising

regulatory, funding and quality arrangements for the new PCET sector. We have consistently taken the view that a single arm's length body, funding and regulating a single PCET sector, would be appropriate for Wales. We made that case to Professor Hazelkorn, notwithstanding the likely consequences for the Council. We remain firmly of that view, but regret that the current draft legislation fails to deliver the benefits to which such an arrangement should give rise.

Given that the draft Bill requires further consideration and it this current uncertain time, we are prepared to deliver an enhanced role in the short term to enable some of the collaboration and cohesion required. We are also committed to working with Welsh Government, and other stakeholders, to develop legislation that will deliver the changes required.

### Detailed comments

#### Committees

We assume that the Commission will have an audit committee of some description. However, not specifying this in legislation when the staff appointment committee has been included seems illogical.

The intention that Welsh Ministers appoints members to the Research and Innovation Wales Committee undermines the concept of an arms-length body and is inconsistent with proposals for the other statutory committee, the Quality Assessment Committee, which does not require Welsh Minister appointment. Currently our Committees are not subject to Ministerial appointments. Not being bound by this allows flexibility to ensure that we can go through our own process to ensure that the Committee memberships represent the diverse views we require. These processes are fair, open and transparent and, where appropriate, representation is broader than the higher education sector. For example, we currently have two employer representatives on our Research Wales Committee. The Commission should be well placed to ensure that it secures the diverse views it needs to deliver on its agreed strategic plan.

We note on p103 of the Welsh Government's summary of responses to the technical consultation, [Public Good and a Prosperous Wales](#), it states that the predominant view was that "The composition and appointment of members should be determined by the Commission". We also note that this view was shared by both the HE (p107) sector and NUS Wales (p108), and that the FE sector supported the Commission to determine the number of committee members (p104).

#### Research and Innovation

There is no evidence provided for how structural changes to coordinate funding will increase research capacity over the current system without additional funding being provided. Proposals that over-specify which providers should receive research and innovation funding increase the risk that funding will be diluted, in turn reducing Wales' research capacity. This would contradict the proposals in the Reid Review, which were accepted by Welsh Government.

Quality-related Research (QR) gives universities the flexibility to respond to external events (e.g. Covid-19) and funding opportunities strategically and dynamically. There is no evidence provided for how the draft legislation will achieve funding in a more strategic and dynamic way.

The case for change in the Research and Innovation section of the Welsh Government's explanatory memorandum sets out that "*Commission will provide the strategic oversight to engage with the UKRI and enable one body to bid for UK funding on behalf of Welsh institutions*". UKRI does not currently accept bids for funding from other funding bodies so this would not be a benefit of establishing the Commission. Furthermore, there is no provision given for this in the draft Bill – the Commission's only remit is to allocate Welsh Government funding. UKRI does not fund or engage with further education or sixth forms. There is, therefore, no evidence for why setting up the Commission will provide a strategic oversight for engaging with UKRI that is not achievable through current structures.

#### Data, Information, Advice and Guidance

The draft Bill does not currently include the intentions and overarching purpose for data and information or what the public duties of the Commission are regarding data and information and how it will fulfil them. This includes what the expectations and duties are of the Commission to provide information about post-compulsory education to users, such as employers, students, prospective students and civil society organisations, as well as to Welsh and UK citizens more generally. It also includes the reasons why data are being collected and shared, such as to inform and monitor policy relating to widening access and retention, to inform work on quality monitoring and to ensure a fair funding system. This should be covered in Part 6 of the draft Bill, with provision for the Commission to deliver that role as it determines, taking account of consultation.

In paragraph 118(1), it states that the Commission must give Welsh Ministers the information and advice outlined in 118(1)(a) and 118(1)(b). However, some information is provided in confidence or is sensitive, and the Commission should not be obliged to share it. Taking examples from data currently held by HEFCW, this might be commercially sensitive forecast student and financial information or other confidential information relating to individual providers, such as in-year UCAS data. In particular, for some data that the Commission will hold, it will be via a data sharing agreement with an organisation such as UCAS which has conditions attached, including that the data are not shared more widely. The Commission will also hold personal data and it may also not be appropriate or legal to share that with ministers.

We understand that the wording as it stands is not meant to over-ride data protection legislation. However, not all the sensitive information the Commission would hold would be covered by data protection legislation, for example, commercially sensitive financial information. Providers and others who provide data to the Commission must have confidence that we will not breach agreements or break their trust. Not having a caveat in this section to confirm that any requests will not over-ride data protection legislation or any agreements

made by the Commission could lead to mistrust and the possibility of an unwillingness to share full data with the Commission, for example, in respect of a provider's financial position. In addition, if the Commission is to become a producer of Official Statistics, we note that as with data protection legislation, although it could be assumed to be the case, there is no explicit caveat to confirm that any requests will not over-ride Official Statistics legislation. We would therefore ask that this section be reworded to ensure that providers and data subjects can be confident that the regulations do not require inappropriate sharing of data. Any rewording should also reflect that the Commission and Welsh Government should be working in a manner that does not require Welsh Government to determine information that is submitted to the Commission and the manner in which that information is submitted. The Welsh Government by funding the Commission, appointing its members and approving its strategic plan should have enough safeguards in place to ensure the Commission receives what it reasonably needs to fulfil its duties. Additionally, should legislation be set up to allow the Commission to have complete oversight of the Tertiary Education sector then the Commission would be less likely to find itself in receipt of information that did not relate to its area of interest.

In paragraph 118(2), it states that information must be given in a form and manner determined by Welsh Ministers. Should this section also provide for reasonableness and timeliness of any request?

In paragraph 120(1), bodies that may give the Commission information are listed. This list is not exhaustive, and as it is not, general descriptions should be given instead, or as well as the list, to avoid doubt over whether those that are not listed can share information with the Commission (this paragraph would not appear to stop that, but absence of certain organisations might generate some doubt). For example, the Office for Students appears while the Scottish Funding Council and the Department for Education in Northern Ireland do not (these are HEFCW's equivalent funding bodies in the other three nations). If there is a specific list, there needs to be acknowledgement that the successor bodies of these organisations are also included in the list. Organisations frequently change names, merge with other bodies or change in some other way. Including successor bodies negates the need to have secondary legislation to amend the list in order just to carry on as before. In addition, requiring secondary legislation is time consuming and could lead to delays in analysis, whether this is to include a new body, which could have been in a general category, or amend the name of an existing body. HESA, Research England, Scottish Funding Council, DfE Northern Ireland, the Education and Skills Funding Agency, Welsh Government, Office for National Statistics and Health Education and Improvement Wales should be there, and there may be others that need to be added. Generic groupings used could be, for example, government bodies responsible for funding and/or regulating higher education, further education and schools in the UK; bodies holding data about higher education or further education in the UK, etc. Indeed, it may be preferable to just leave the Commission to determine who it should sign data sharing agreements with.

We have read paragraph 120(2) to imply that the Commission can share information as they see fit, with those listed in (1) plus any other appropriate

body. This is good as it helps with data sharing and being open and transparent with data, where the Commission is legally allowed to share it. However, it could also be made clear here that the Commission's duties include sharing information with the general public and other interested parties.

Paragraph 121(1) – should this be giving powers to Ministers, or should it relate only to the Commission? If it only relates to the Commission, the Commission can then share information with Ministers as set out in paragraph 118

In paragraph 121(2), this would seem to exclude any organisation that deals with providers elsewhere in the UK that recruit Welsh domiciled students. It is currently UCAS for the whole UK, but this could change. Additionally, some applications and acceptances go directly through providers (all part-time and postgraduate and some full-time undergraduate), is it intended that (2) includes them? There needs to be some recognition that not all applications come through the UCAS route.

Paragraph 121(2) also references 'the higher education sector' which is defined in 130(6)(b). According to the Further and Higher Education Act 1992 regulations, the higher education sector wouldn't include any further education colleges. Applications and acceptances for higher education courses are also made to further education colleges, so how are they covered in this section? Are there also similar processes for further education courses that need to be covered here?

Paragraph 121(1) refers to 'qualifying research' which is then defined in 121(4). The current use of application and acceptance data by HEFCW is broader than the definition given in 121(4)(a) and (b) and this therefore potentially imposes a restriction on the use and analysis of such data when there currently isn't one. Other research would then need to be approved by the Welsh Ministers. It is not clear why this would need approval when research relating to (a) and (b) would not. For example, HEFCW might use the data to inform the assessment of future financial sustainability which may not strictly be considered research, and would also not be covered by (a) or (b). Currently HEFCW use UCAS data for analysis and if there is a new policy which would be aided by looking at UCAS data, we would not seek approval to carry out that analysis, nor do we think it would be appropriate to do so.

Should the wording in paragraph 121(6) be required, it should also reference the Commission.

For paragraph 122(1)(b), any sharing of information obtained is likely to be subject to a data sharing agreement which prohibits onward sharing, so this clause would be subject to any conditions of agreements that are in place or any licensing restrictions on information provided by other organisations.

Does paragraph 122(2), also need to say that any agreement by which the data was obtained and used should be abided by when publishing (as this may prevent publication either at all by an approved person, or, for example, limit publication to being by the Commission, in the case where the Commission has

commissioned work through a consultant who is an approved person)?

In paragraph 122(3), an approved person is a body or individual approved by Welsh Ministers. Should it also include a body or individual approved by the Commission? Otherwise, does this imply that permission would have to be sought from Ministers by the Commission to count a person as approved? This could mean that permission would need to be sought on occasions where it would not be necessary or proportionate. For example, if HEFCW were to commission some analysis relating to applications and acceptances, it would not currently ask for approval from Welsh Ministers. This would be onerous for Ministers, delay processes and be out of proportion to the work being undertaken.

What is the purpose of paragraph 122(4)? Does this stop an approved body and an approved researcher working together on a piece of commissioned research? Is the word 'another' required in 122(4)(b)? Does 'another' mean a second approved body (i.e. an approved body gave the information to an approved researcher who then cannot give the information to a second approved body) or any approved body (i.e. an approved researcher cannot give information to any approved body).

Paragraph 122(5) relates to Ministers. Should the Commission also be included, or is this intended to cover the Commission as well? There is an implication that the Commission only gets this information through the Ministers. This is not the case currently with HEFCW, and there is no reason to change this.

Paragraph 124 refers to 'research' (as do other sections). Should this be research and analysis? Information is used in funding allocations, policy monitoring etc, as well as for research and perhaps research is too narrow a term to use if it is meant to include regular analysis of data (and is not defined anywhere – see paragraph 23 below).

In paragraph 124(4), should the terms and conditions also be fair and proportionate? Under what circumstances would the Welsh Ministers be providing financial resources that wouldn't be going through the Commission?

Definition of qualifying research is quite narrow in 121(4)(a) and 121(4)(b) but 121(4)(c) includes anything – is that anything to do with applications and acceptances or anything at all? The definition is also used in 122, but in 124 research seems to be something different, is not defined for paragraph 124, and also doesn't relate to the 'Research' in the title of the draft Bill.

#### Protection of the arm's length body

Proposals that the Welsh Government could modify the Commission's strategic plan could undermine the arms-length relationship between the Commission and the Government. Rather than just consult the Commission on modifications to the strategic plan the draft Bill should be strengthened so that the Welsh Government has regard to the basis on which the strategic plan has been developed i.e. the views of the Commission informed by the consultation

with relevant stakeholders including student representatives. This would indicate the appropriate relationship between the two organisations.

There are a number of sections of the draft Bill that will enable Ministers to fund providers in Wales directly. Safeguards should be built into the legislation to ensure that Ministers have regard to the views of the Commission when doing so to ensure a strategic approach to Tertiary Education.

Should Welsh Ministers retain a power to allow courses to either be designated for student support or funded by a provider not registered or funded by the Commission then there should be safeguards built into ensure that Ministers have regard to the Commissions views when doing so. Funding such providers presents a risk to student interests.

### Intervention

The rationale for why the Commission will not be empowered to intervene into a matter at all tertiary education providers is not clear, including the policy intention for the Commission's relationship would be with the proposed National Body for adult learning. A cohesive system will only be achieved if the Commission can discharge its functions equally, but proportionately, to all providers in the Tertiary Education sector. Greater cohesion will benefit this element of the tertiary education sector and bring about greater impact to groups under-represented in tertiary education in Wales.

Paragraph 61 – in paragraph 61(a), 'being mismanaged' is not defined and it is not clear why it has not been.

### Miscellaneous

It is not clear where adult and community learning fits into the scope of the draft Bill. It is not explicitly referenced in the definition of Tertiary Education.

There should be wording under Schedule 2 section 15 (3) to reflect that in some exceptional circumstances there will be a reasonable case for why accounts could not be submitted by 31 August.

The rationale for why changes to a Higher Education Corporation, as well as powers related to issuing degree awarding powers and university title have not been brought into scope of this legislation is not evidenced. Developing new overarching legislation appears the prime opportunity to align these powers with other higher education quality powers.

Further recognition that whilst the Open University is a unique institution it is treated, for regulatory purposes, as an English institution. The Commission will need to be appropriately empowered to be assured that the Open University meet the regulatory and funding conditions. It cannot be assumed that the current or any future regulatory body in England will share the information the Commission would require to deliver on this function.

We welcome the brevity of detail in the legislation relating to the Commission's role in the oversight of financial and governance matters of Tertiary Education providers. This will allow for the Commission to determine appropriate and proportionate processes, subject to consultation, to deliver those functions reflecting the circumstances and different situations in the future.

We recognise and support the policy intention to provide greater focus on outcomes. However, the draft Bill still uses the term 'equality of opportunity'. Adopting the term 'equity of outcome' would further strengthen the policy intention to focus on outcomes.

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