

# TERTIARY EDUCATION AND RESEARCH (WALES) ACT 2022

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1: Strategic Framework for Tertiary Education and Research**

##### **The Commission**

##### ***Section 1: Establishment of the Commission for Tertiary Education and Research & Schedule 1: Commission for Tertiary Education and Research***

35. This section provides for the establishment of the Commission. The Commission will be a body corporate with its own legal personality and specific powers and duties.
36. This section also introduces Schedule 1, which makes provision about the Commission's membership, committees and operational arrangements.
37. The Commission's members will comprise of a chair, deputy chair and between four and fourteen ordinary members, appointed by the Welsh Ministers. The chief executive is also a member. The Welsh Ministers will appoint the first chief executive for a period of up to 4 years, with future appointments being made by the Commission, subject to approval of the Welsh Ministers.
38. The Commission will also have associate members who will represent the tertiary education workforce (both academic and non-academic), the Commission's staff and learners in tertiary education.
39. [Paragraph 5](#) sets out the appointments process for the associate workforce members. This includes a requirement for the Welsh Ministers to publish lists of trade unions who will nominate representatives of the academic tertiary education workforce and non-academic tertiary education workforce. To be eligible to be an associate workforce member, a person must be employed by a provider of tertiary education in Wales and be a member of a trade union on the most recently published relevant list. It is expected that the consultation process for compiling the list of trade unions will lead to a position where the trade unions listed will be recognised by the tertiary education providers.
40. [Paragraph 6](#) sets out the process for the appointment of an associate Commission staff member. A staff member appointment committee (established under paragraph 11(5)) must appoint a person from candidates nominated by each trade union recognised by the Commission. To be eligible to be an associate Commission staff member, a person must be employed by the Commission and be a member of a trade union recognised by the Commission.
41. [Paragraph 7](#) sets out the appointment process for the associate learner member. This includes a requirement for the Welsh Ministers to publish a list of bodies representing the interests of learners undertaking tertiary education in Wales. The associate learner member will be appointed by the Welsh Ministers from nominations made by bodies on

the list. It is anticipated this list will include the National Union of Students Wales along with other representative bodies. To be eligible to be an associate learner member, a person must have been a learner undertaking tertiary education in the 3 years before being appointed and must hold an office or membership of a body on the published list.

42. The Commission will have a committee called the Research and Innovation Committee for the purpose of advising it about matters relating to research and innovation. The chair of the Research and Innovation Committee is appointed by the Welsh Ministers and will also be the deputy chair of the Commission (and a person who ceases to hold one position or who is suspended from that position will also cease to hold the other position or be suspended from it). The Commission must also establish a committee called the Quality Committee to advise it on the quality of tertiary education funded or secured by it, and a staff member appointment committee. It can establish other committees and joint committees and can delegate functions to its committees.
43. [Schedule 1](#) also contains provision about the Commission's audit and accounts, annual reports, procedures, register of interests and supplementary powers.

### **The Commission's strategic duties**

44. [Sections 2 to 12](#) are broadly framed strategic duties of an aspirational nature, which require the Commission to promote or encourage outcomes specified in the sections. The provisions do not specify the extent or nature of the activity the Commission must undertake in any detail and the open-ended nature of the outcomes specified gives the Commission wide discretion as to the nature and extent of the action it takes to achieve them.

### ***Section 2: Promoting life-long learning***

45. This section requires the Commission to promote life-long learning for the people of Wales. Life-long learning is not a defined term in the section, but is encapsulated by its provisions, which describe tertiary education that—
- provides opportunities for people to participate throughout their lives from the age of 16,
  - includes variety of levels and qualifications,
  - includes a variety of settings and modes of study,
  - is organised coherently to facilitate movement through different stages of education and into employment or business,
  - otherwise meets the different requirements of those who wish to undertake tertiary education.

### ***Section 3: Promoting equality of opportunity***

46. This section requires the Commission to promote increased participation by, and retention of, members of under-represented groups in Welsh tertiary education and increased participation in the carrying out of research and innovation by under-represented groups in Wales.

### ***Section 4: Encouraging participation in tertiary education***

47. This section requires the Commission to encourage individuals, including those who have additional learning needs (as defined by section 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018), and employers in Wales to participate in the provision of tertiary education.

***Section 5: Promoting continuous improvement in tertiary education***

48. This section requires the Commission to promote continuous improvement in the quality of Welsh tertiary education. The section also specifies matters to which the Commission must have regard when discharging the duty.

***Section 6: Promotion of research and innovation***

49. This section requires the Commission to promote the carrying out of research and innovation in Wales, and the carrying out of research and innovation, and related activities, through the medium of Welsh by relevant persons.
50. The Commission must promote collaboration on research and innovation, both in Wales and elsewhere in the world, between relevant persons, and between relevant persons and others. The Commission must also promote continuous improvement in the quality of research and innovation carried out by relevant persons, and the competitiveness of that research and innovation compared to research and innovation carried out by other persons.
51. Subsection (2) defines a relevant person for the purpose of this section.

***Section 7: Promoting collaboration and coherence in tertiary education and research***

52. This section requires the Commission to promote collaboration between providers of tertiary education in Wales, schools in Wales, and employers, as well as coherence in the provision of tertiary education by providers in Wales and the alignment of this provision with research and innovation.

***Section 8: Contributing to a sustainable and innovative economy***

53. This section requires the Commission to promote tertiary education and research in Wales that contributes to the development of a sustainable and innovative economy. The section also specifies matters to which the Commission must have regard when discharging the duty and defines sustainable economy.

***Section 9: Promoting tertiary education through the medium of Welsh***

54. This section imposes a duty on the Commission to encourage demand for and participation in Welsh medium tertiary education. The Commission must also take all reasonable steps to ensure there is sufficient Welsh medium tertiary education provided in Wales to meet demand.
55. The Welsh Ministers must designate a person to provide advice to the Commission for the purpose of assisting it in the discharge of its duties under this section. The Commission must have regard to any relevant advice given to it by that person.
56. A person may only be designated if the Welsh Ministers consider them to be suitable to give advice on the matters listed in subsection (4). The duty to designate a person does not apply if the Welsh Ministers consider there is no person suitable to give advice on the listed matters, or if no one agrees to be designated.

***Section 10: Promoting a civic mission***

57. This section places a duty on the Commission to promote the pursuit of a civic mission by institutions in Wales within the further education sector and higher education sector. The Commission is also given the power to promote the pursuit of a civic mission by other persons who are funded by the Commission. “Civic mission” is defined in subsection (3) as, “action for the purpose of promoting or improving the economic, social, environmental or cultural well-being of Wales (including action

aimed at achieving any of the well-being goals in section 4 of the Well-being of Future Generations (Wales) Act 2015 (anaw 2))”.

### ***Section 11: Promoting a global outlook***

58. This section requires the Commission to promote opportunities for people in Wales to teach and study tertiary education elsewhere in the world and for people outside Wales to study or teach in Wales. The Commission must promote opportunities for the benefits of such exchanges to be used for the well-being of Wales. It must also promote collaboration between providers of tertiary education in Wales and those elsewhere in the world.

### ***Section 12: Promoting collaboration between providers of tertiary education and trade unions***

59. This section requires the Commission to promote collaboration between providers of tertiary education in Wales and trade unions, where the Commission considers the collaboration would likely help in the discharge of the Commission’s strategic duties (sections 2 to 11 of the Act).
60. A trade union must either be represented by Wales TUC Cymru, or the Commission must consider that it represents members of the tertiary education workforce, that is:
- teachers providing tertiary education,
  - people providing support to those teachers, and
  - people providing support to learners to participate in tertiary education.

## **Strategy for tertiary education and research**

### ***Section 13: Statement of strategic priorities***

61. This section places the Welsh Ministers under a duty to publish a statement setting out their strategic priorities for tertiary education and research and innovation. The statement may be amended or replaced by the Welsh Ministers. Any amendments must be published.

### ***Section 14: Strategic plan for the Commission***

62. This section places the Commission under a duty to prepare a strategic plan setting out how it intends to discharge its strategic duties and to address the priorities in the statement of strategic priorities published by the Welsh Ministers (subsection (1)). In preparing the plan, the Commission must consult such persons it considers appropriate (subsection (2)).

### ***Section 15: Approval, publication and implementation of strategic plan***

63. A strategic plan prepared under section 14 must be sent to the Welsh Ministers for approval within six months of the publication of the Welsh Ministers’ statement of priorities under section 13 (subsection (1)).
64. The Welsh Ministers have the power to approve the plan with or without modifications, although they must seek the agreement of the Commission for each modification they propose making to the plan before they modify the plan (subsections (2) and (3)).
65. The Welsh Ministers may approve a plan with modifications that have not been agreed by the Commission, however they must provide the Commission with the reasons for the modifications and the Commission must publish those reasons when it publishes the plan as required by subsection (5).

66. Subsection (6) provides that the Commission may discharge its duty to publish its statement about well-being objectives under section 7 of the Well-being of Future Generations (Wales) Act 2015 (anaw 2) by including the statement in its approved strategic plan.
67. Subsection (7) places a duty on the Commission to take all reasonable steps to implement the strategic plan.

### ***Section 16: Review of strategic plan***

68. This section outlines the process to be followed by the Commission in reviewing and revising its strategic plan.
69. The Commission must review its strategic plan if the Welsh Ministers publish amendments to its statement of strategic priorities under section 13 after the Commission has published its approved strategic plan. The Commission also has the power to review its strategic plan at any other time.
70. Where any review of the strategic plan leads to the plan being revised, section 14 applies to any revision of the plan as it applies to preparation of the plan.
71. A revised strategic plan must be sent to the Welsh Ministers for approval within six months where the revision is in consequence of the Welsh Ministers publishing amendments to their statement under section 14(2); or where the revision is in consequence of the Commission reviewing its strategic plan at any other time, as soon as reasonably practicable. The provisions of section 15(2) to (6) apply to a revised plan.

## **Academic freedom and institutional autonomy**

### ***Section 17: Academic freedom of higher education providers and staff***

72. This section requires the Welsh Ministers and the Commission to have regard to the need to protect the academic freedom of tertiary education providers in Wales that provide higher education or research and innovation and of academic staff at those providers (subsection (1)).
73. “Academic freedom” in relation to tertiary education providers is defined in subsection (2) as the freedom to determine the content, teaching, supervision and assessment of higher education courses, the criteria for admission to higher education courses, and the criteria for selecting and appointing academic staff (subsection (2)).
74. “Academic freedom” in relation to academic staff is defined in subsection (2) as their freedom within the law to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions, without jeopardising their employment or privileges at the provider.

### ***Section 18: Institutional autonomy of tertiary education providers***

75. This section requires the Welsh Ministers and the Commission when exercising their functions under this Act to have regard to protecting the freedom of tertiary education providers in Wales within the law to conduct their day to day management in an effective and competent manner.

## **Compatibility with charity law**

### ***Section 19: Compatibility with charity law and governing documents of tertiary education providers***

76. The effect of this section is that any requirements that the Commission or the Welsh Ministers may impose on the governing bodies of tertiary education providers under this Act (e.g. registration conditions or directions) cannot require those governing bodies to

act in breach of their obligations as charity trustees, nor require governing bodies to act in a manner incompatible with their governing documents.

77. For these purposes, the governing documents of tertiary education providers are defined in subsection (2) in relation to providers established by Royal Charter, providers conducted by higher education corporations or further education corporations, providers that are institutions designated under section 129 of the Education Reform Act 1988 or section 28 of the Further and Higher Education Act 1992, schools and providers conducted by companies.

## **Welsh Ministers' guidance and directions**

### ***Section 20: Guidance***

78. This section provides that the Commission must have regard to guidance given to it by Welsh Ministers.

### ***Section 21: The Welsh Ministers' power to give general directions***

79. Subsection (1) enables the Welsh Ministers to issue general directions to the Commission about the exercise of any of its functions. A direction issued by the Welsh Ministers under this section is subject to the limitations that are set out in subsections (2), (3) and (5).
80. The limitations set out under subsections (2) and (3) do not prevent any direction issued under this section from being framed by reference to a course of study, or parts of courses of study, being provided and assessed through the medium of Welsh (subsection (4)). The purpose of the limitations is to protect the institutional autonomy of tertiary education and research providers, the academic freedom of higher education providers and the ability of the Commission to determine funding allocations to individual providers.
81. Subsection (6) requires the Welsh Ministers to consult the Commission before issuing a general direction. Subsection (7) requires the Welsh Ministers to keep any general direction given to the Commission under review. The Welsh Ministers must also publish any general direction given to the Commission under this section and report any such directions to the Senedd.
82. Subsection (8) requires the Commission to comply with a general direction given by the Welsh Ministers.

## **Additional functions**

### ***Section 22: Additional functions of the Commission***

83. Subsection (1) enables the Welsh Ministers to confer supplementary functions on the Commission by way of regulations. A supplementary function conferred on the Commission under these powers must relate to tertiary education, or research and innovation, and be exercisable by the Welsh Ministers (subsection (2)).
84. Subsections (3) and (4) enable the Welsh Ministers to direct that their functions in relation to the land or other property of an institution in Wales within the higher or further education sector, may be exercised by the Commission. The Welsh Ministers' functions arise where they are entitled to a right or interest in respect of that property. The Commission is required to exercise these functions in accordance with directions given by the Welsh Ministers (subsection (5)).

**Dissolution of Higher Education Funding Council for Wales**

***Section 23: Dissolution of the Higher Education and Funding Council for Wales***

85. This section dissolves HEFCW.

***Section 24 and Schedule 2: Transfer schemes***

86. This section introduces Schedule 2 which makes provision about schemes for the transfer of staff, property, rights and liabilities as a result of establishing the Commission and dissolving HEFCW.