

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

TER 27

Ymateb gan: **Comisiwn Elusennau Cymru a Lloegr**

Response from: **Charity Commission for England and Wales**

1. This document sets out comments on behalf of the Charity Commission for England and Wales (“the Commission”) in response to a consultation issued by the Children, Young People and Education Committee of the Welsh Parliament (“the Committee”) regarding the Tertiary Education and Research (Wales) Bill (“the Bill”).
2. The Commission is a non-ministerial government department and is the registrar and regulator of charities in England and Wales. As of 31 March 2021, there were more than 169,000 charities on the register.
3. Under the Charities Act 2011, the Commission has statutory objectives against which we must deliver. These are: to increase public trust and confidence in charities; to promote awareness and understanding of the operation of the public benefit requirement; to promote compliance by charity trustees with their legal obligations; to promote the effective use of charitable resources and to enhance the accountability of charities to donors, beneficiaries and the general public.
4. The Committee has asked specifically for the Commission’s views on the compatibility of the Bill with charity law. The Commission’s response focusses on this and does not comment on the underlying framework, existing law, or any policy or operational issues. The Commission may wish to consider these areas separately.

General comments

5. Under the terms of the Bill, higher education in Wales will be an area of joint interest between the Commission, the Commission for Tertiary Education and Research (“the CTER”), and the Welsh Ministers. Areas of joint regulatory interest are not problematic and are in fact common in England and Wales, including in the Welsh education sector currently.
6. Many providers of higher education are charities and must comply with charity law – this applies irrespective of whether they are required to be registered with the Commission.
7. Trustees of charities are subject to legal duties and are responsible for ensuring that their charity complies with its obligations under charity law. The core duties of charity trustees are described in the Commission’s Guidance ‘The Essential Trustee’ (CC3). As set out in that guidance, trustees have duties to:
 - Ensure that their charity is carrying out its purposes for the public benefit
 - Comply with their charity’s governing document and the law (this includes complying with charity law requirements and other laws that apply to the charity)
 - Act in their charity’s best interests to carry out its purposes

- Manage their charity’s resources responsibly, including avoiding exposing the charity’s assets, beneficiaries or reputation to undue risk
 - Act with reasonable care and skill, making use of their skills and experience and taking appropriate advice when necessary
 - Ensure their charity is accountable.
8. Therefore, although CTER will have powers of intervention and direction under the Bill, trustees of providers of higher education which are charities will continue to have legal duties to act in the best interests of their charities and to further its purposes.

Specific comments

Academic Freedom

9. Clauses 15 and 16 of the Bill require the Welsh Ministers and the CTER to have regard to the need to protect the academic freedom of tertiary education providers and the staff at tertiary education providers in Wales.
10. As previously stated, many providers of higher education are charities and must comply with charity law.
11. Charitable status, and the charity law duties on trustees are entirely compatible with academic freedom. It should be noted that charity trustees must always have regard to their responsibility to use charitable funds and assets wisely, and only in furtherance or support of the charity’s purposes. The Commission Guidance ‘Campaigning and Political Activity’ (CC9) outlines these duties in more detail. Trustees also have duties to avoid exposing their charity’s assets, beneficiaries or reputation from undue risk. These considerations will be relevant for charitable higher education providers in relation to issues of freedom of speech.

Compatibility with charity law and governing documents

12. Clause 17(1) of the Bill provides that CTER will have no power under the provisions of the Bill to require the governing body of a provider to do anything that is incompatible with any legal obligation or restriction that applies to the governing body by virtue of the provider being a charity, or with the provider’s governing document.
13. The scope of what is considered “incompatible with any legal obligation or ... restriction” by virtue of the provider being a charity may be open to interpretation in any given case. As such, it could be helpful to develop guidance on this point to better understand which actions would be considered incompatible with charity law obligations or restrictions. This would need to be considered separately, and the Commission would welcome the opportunity to be involved in the development of any such guidance.

Technical definition of “governing documents”

14. Clause 17(2) of the Bill defines the “governing documents” of tertiary education providers for the purposes of clause 17(1). This defines this term in relation to

four specific categories of provider in paragraphs (a) to (d), and provides that in the case of a tertiary education provider not falling within paragraphs (a) to (d) that is conducted by a company, the company's memorandum and articles of association would constitute a governing document.

15. This definition of governing document is narrower than the definition of "trusts" in s353 of the Charities Act 2011, which defines trusts, in relation to a charity, as "the provisions establishing [...] a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not"; in relation to other institutions, trusts has a 'corresponding meaning'. Limiting the definition in this way may inadvertently fail to capture all providers of tertiary education.

Registration conditions

16. Under clause 25(4)(b)(i) of the Bill, the Welsh Ministers may, by regulation, specify further initial registration conditions relating to the charitable or other status of tertiary education providers. It would be helpful to have clarity as to what conditions may be imposed in practice, as there is currently no further explanation set out on this point in the Explanatory Memorandum to the Bill. The Commission would welcome the opportunity to consider any such conditions separately.

Powers to intervene

17. According to clause 68(9) of the Bill, an appointment of a member of a governing body under this clause has effect as if made in accordance with the instrument of government and articles of government of the provider concerned. The term 'instrument of government' is also used in section 17(2), but only in respect of sections 17(2)(b), 17(2)(c) and 17(2)(d). We question whether the terminology in clause 68(9) ought to be expanded.

Designation of other providers of tertiary education

18. Clause 81 of the Bill enables the Welsh Ministers to designate a provider of tertiary education who would not otherwise be regarded as an institution to be treated as such. Tertiary education providers in Wales must be 'institutions' (i.e. any training provider (whether or not the training provider would otherwise be regarded as an institution)).
19. In connection to clause 17(2) of the Bill, as previously mentioned, since the definition of governing document in that section is limited, the Committee may wish to satisfy itself that clause 17(2) will be wide enough to capture any provider of tertiary education that the Welsh Ministers may designate under clause 81.

Higher Education Corporations in Wales

20. We note that clauses 133 and 134 of the Bill make amendments to the Education Reform Act 1988 in relation to the governing documents of higher

education corporations, following from a recommendation made by the Law Commission in its 2017 report 'Technical Issues in Charity Law'.

21. We note that the changes proposed in relation to higher education corporations in Wales do not fully implement the Law Commission's recommendation in this respect, but are intended to facilitate a revisit of the Law Commission's recommendation in the future, once the CTER is established and operational; such a review would be welcome at the appropriate time.

22. The Committee will be aware that the UK Parliament is currently considering a Bill which proposes to implement many of the other recommendations from the Law Commission's 2017 report, and we are closely engaged with the UK Government regarding the passage of that legislation.

Charity Commission for England and Wales

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