

Welsh Government Consultation on The Public Services Workforce (Wales) Bill Submission from Higher Education Wales

1. About Higher Education Wales

1.1. Higher Education Wales (HEW) represents the university sector in Wales and is a National Council of Universities UK. HEW's Governing Council consists of the Vice-Chancellors of all the universities in Wales and the Director of the Open University in Wales.

2. The consultation

2.1. The Welsh Government's consultation 'Supporting our Public Service Workforce through Collective Leadership and Legislation' including the Draft Public Services (Workforce) (Wales) Bill (referred to collectively as the 'Bill' consultation in this paper)¹ was issued on 28 November 2013 requesting responses by 21 February 2014. It follows two Welsh Government consultations on related matters which followed the publication of the Welsh Government 'Strategic Framework'² document in May 2012:

- 'Consultation on Working Together for Wales: The Public Service Workforce' consultation which ended on 31 July 2012 (the 'Working Together' consultation).³ HEW's response to this was published by the Welsh Government in part 5 of the individual responses⁴ published by the Welsh Government, and is also available from the HEW website⁵.
- 'Public Service Workforce: Consultation on draft guidance and directions which include a Code of Practice on Workforce Matters' which ended on 20 December 2013 (the 'Code of Practice' consultation).⁶ The Welsh Government has not yet published the responses to this consultation, but a copy of HEW's response can be found on HEW's website⁷.

¹ <http://wales.gov.uk/consultations/improving/supporting-public-service-workforce/?lang=en>

² Welsh Government, 'Working Together - A Strategic Framework for the Public Workforce in Wales', May 2012 (see [here](#) for link).

³ <http://wales.gov.uk/consultations/improving/workingtogether/?lang=en>

⁴ <http://wales.gov.uk/docs/dpsp/consultation/130501publicservworkforceindivresppart5.pdf>

⁵ <http://www.hew.ac.uk/wp/media/2012-July-Welsh-Government-Green-Paper-Consultation-on-Working-Together-for-Wales-The-Public-Service-Workforce.pdf>

⁶ <http://wales.gov.uk/consultations/improving/public-service-workforce/?lang=en>

⁷ <http://www.hew.ac.uk/wp/media/Public-Service-Workforce-Code-of-Practice-consultation.pdf>

3. Response: general comments

- 3.1. In HEW's response to both the Working Together and Code of Practice consultations, HEW identified a number of significant concerns with the public service workforce proposals as they currently relate to universities in Wales. Our initial comments on the Bill consultation were included in the Code of Practice consultation, which ended after the publication of the Bill proposals. This response sets out our concerns relating to the Bill in more detail and reflects our previous comments. In brief, we do not believe that the proposed legislation in its current form best serves the interests of Wales, and the proposals have implications for universities which are potentially very damaging.
- 3.2. We are pleased that the Welsh Government has accepted the majority view of respondents that it is unhelpful to place either the Code of Practice or the role of the Workforce Partnership Council on a statutory footing (Bill consultation, p.8, paras 23 & 24). However, we are very concerned at the current proposal to give the Welsh Ministers powers to issue specific statutory guidance (Bill consultation, p.8 para 26) and to amend both the list of bodies subject to the guidance (Draft Bill, s.3(4)) and the matters covered (Draft Bill, s.2(2)) by statutory instrument following a negative resolution process (Draft Bill, s.5). The legislative process proposed for including bodies not already subject to the guidance is, in particular, insufficient for the gravity of the consequences that could follow. We believe that it is essential that the list of bodies covered can only be extended through primary legislation which assures full consideration of the issues and potential impact in an appropriate timescale and requires a majority vote in Assembly before being passed.
- 3.3. Paragraphs 35 and 36 confirm that higher education institutions are not in the list of the 'public service organisations' (termed as 'public bodies' in the Draft Bill itself) to be covered by the Bill in the first instance, but may be added at a subsequent stage 'if it is confirmed that being subject to such guidance is consistent with their intended classification under the National Accounts as Non Profit Institutions Serving Households (NPISH)' (Bill consultation,p.10, para. 36). We further note that the Code of Practice Consultation Document states that the Code would apply 'at the time of issue' for universities if they are subsequently included, which we take to be the general intention.
- 3.4. Universities are autonomous charitable organisations which exist for the promotion of public benefit through the delivery of education and advancement of knowledge. At a time of major change for Welsh universities, when the proportion of income from direct grant from the Funding Council is set to become less than 10% of universities' income over the next few years, it is a concern that the Welsh Government should be seeking to increasingly treat universities akin to organisations classified by the National Accounts as central government with the serious legal, financial and reputational consequences which may flow from this.

A cornerstone of the success of the UK in providing a world-class higher education system has been its legal and academic autonomy. The position adopted in relation to higher education ignores the other implications for universities in Wales and is wholly unsatisfactory.

- 3.5. According to the legal advice we have received, it seems that the Public Service Workforce proposals either on their own or in conjunction with other planned regulatory changes as envisaged for instance in the HE (Wales) Bill consultation, would jeopardise the **NPISH status** of universities. The Welsh Government has identified the significant consequences for the DfES budget, which would result from the loss of NPISH status and reclassification of universities as central government,⁸ which in turn would have serious implications for the higher education sector. This would include the potentially negative impact on the Welsh Government capital budget in particular and requirement for additional accounting and annual return arrangements. Any surpluses or deficits would become Welsh Government funds and would need to be managed within the overall Main Expenditure Group (MEG), and the ability of institutions to carry forward surpluses and build reserves for future capital projects would be lost. We also understand that, more generally, the reclassification of the sector as central government would impact in particular on the Public Sector Net Debt (PSND) and to a lesser extent the Public Sector Current Budget (PSCB) and Public Sector Net Investment. If universities lost NPISH status and became part of the public sector then it would be necessary for the universities affected to conduct a comprehensive review of all their contracts and legal agreements with third parties. Particular areas of concern include: employment arrangements and collective employment agreements; banking covenants to ensure there is no breach of covenant; and representations and warranties as to a university's legal status in commercial agreements, joint ventures etc.
- 3.6. Based on the legal advice we have received we understand that the proposals in this Bill, taken in isolation or cumulatively with other regulatory proposals, threaten not only the NPISH status of universities but also their **charitable status**. This would have major implications for universities. The charitable status of universities is dependent on carrying out their charitable purposes independently from external bodies including government authorities, and being required to implement the policy or carry out the directions of government would, as we currently understand, conflict with that status. The loss of charitable status would not only have major tax implications it would lead under the new regulatory provisions currently proposed by the Welsh Government in the HE (Wales) Bill to loss of 'regulated' provider status, removing eligibility for Funding Council grant funding and taking them outside current quality assurance arrangements – a disastrous situation for the sector. No proposal to include higher education in the proposals for this Bill should proceed

⁸ Further and Higher Education (Governance and Information) Wales Bill, Explanatory Memorandum

without first referring to the Charity Commission for a ruling on the impact for charity status.

3.7. As exemplified in our response to the Code of Practice consultation, making universities subject to public service workforce arrangements in Wales is likely to adversely impact on the well-developed **UK-wide workforce arrangements** across the university sector. In the development of workforce policy in Higher Education there continues to be a need to balance regional and cross-sector approaches with developments in UK higher education context. The sector has already engaged extensively with national policy development on workforce development issues through organisations as the Universities Human Resource Directors (UHR), Association of University Administrators (AUA) and many others. It works closely with the Trade Unions recognised by individual institutions through various local and national collective bargaining arrangements. In particular, universities in Wales are party to the Collective Agreements at UK level through the Universities and Colleges Employer's Association (UCEA).

3.8. We are concerned about the way in which higher education is loosely described as 'public service organisations' or 'public bodies'. Universities across the UK are classed as public bodies or similar only for a limited number of very specific purposes (including for instance freedom of information and Welsh language requirements). Terminology and perceptions can be very important, and these terms are misleading for higher education. The **actual or apparent erosion of the autonomous status** of universities would have a very serious and detrimental impact not only on universities but also their employees. Universities across the UK compete in a global market that is highly sensitive to reputation. The Further and Higher Education Act 1992 is widely regarded as preserving the necessary public safeguards against autonomy of corporate policy and academic independence, which have been a cornerstone of the UK's international reputation for having the best system of higher education in the world. The treatment of universities in Wales as akin to bodies classified by the ONS as central government could give rise to perceptions of a fundamental divergence of higher education in the UK and have a very damaging impact on the international reputation of the Welsh sector in this respect.

3.9. It should also be stressed that the impact on Welsh universities would also be extremely damaging for Wales more generally. Universities in Wales are currently among the most successful in the world at attracting international students⁹ and Universities play an extremely important role in leveraging additional resource into Wales - currently earning over £400m in much-needed export earnings through overseas revenue and international students coming to study in Wales. With a total turnover of over £1.3bn, universities have an estimated impact of almost £2.6bn on

⁹ See HEW's submission to the HE Funding Inquiry, 27 November 2013.

Wales' economy, with this figure reaching £3.6bn once total off-campus spending by students is included. Particularly when the high 'multiplier effect' is taken into account,¹⁰ any damage in reputation to universities in Wales would also have serious **wider consequences for the Welsh economy**.

4. Question 1 – Are the workforce matters in respect of the proposed guidance powers in the Draft Bill appropriate?

- 4.1. No, not for higher education. The range of matters set out in the Draft Bill, which the Welsh Ministers could issue statutory guidance to universities encompasses the size, composition, training and development of its workforce, collaborative workforce arrangements, and information provision. According to the legal advice we have received, the extensive scope of proposed powers in such matters would be sufficient to place the NPISH and charity status of universities at risk if they are included in the list of bodies subject to the statutory guidance.
- 4.2. Under the Further and Higher Education Act 1992 (FHEA 1992) the Welsh Government's powers to set terms and conditions to funding it gives to the Higher Education Funding Council for Wales to administer to universities have a number of important limitations, which ensure that hitherto the Welsh Government has acted at arms-length in accordance with Parliamentary intention. The Welsh Government, for instance, may not specify terms and conditions in relation to any particular institution – it must only make stipulations as to classes of institution. The Draft PSW Bill, however, would allow the Welsh Government to apply its powers to a particular public body (Draft Bill, s.1(3)).
- 4.3. Under the FHEA 1992, the Welsh Government's terms and conditions may not relate to the selection or appointment of academic staff – under the current proposal the workforce matters on which the Welsh Government may exercise cover workforce planning generally including the size, composition, training and development of the workforce (Draft Bill, s.2).
- 4.4. The Welsh Government (and HEFCW's) powers under the FHEA1992 are proportionate to the level of public investment in universities: their terms and conditions may not relate to funding other than from the Welsh Government/Funding Council. The current proposals imply no such limitations, and increase the powers of Welsh Government to regulate higher education workforce matters at a time when the funding grant has diminished by three-quarters in real terms since 2010/11 and is likely to comprise less than 10% of universities income in 2014/15 – a fraction of the workforce cost.

¹⁰ Kelly, McNicoll et al., as above.

4.5. Notwithstanding the Welsh Government's powers under GOWA 2006 to legislate on education, the workforce proposals, if applied to universities, would fundamentally conflict with the intention of the UK legislation and undermine the position of the sector in Wales in relation to the rest of the UK.

5. Question 2 – Are there any other workforce matters which might be included in respect of the proposed guidance powers?

5.1. No. We have argued that the Welsh Government's approach, to issue statutory guidance is unhelpful and potentially damaging for universities. Further matters should not be included in the legislation.

5.2. More generally, in our response to the Working Together consultation, we highlighted a number of potential issues with the proposed general approach of issuing statutory guidance arguing that *“Our view is that placing a general legal duty on services to collaborate would add to existing regulatory complexity without necessarily being the most effective means of achieving the Welsh Government's objectives. It would be difficult to define its scope precisely or to rely on it for implementing specific policy proposals. There would also be potential for conflict between different legal obligations which could create uncertainty and lead to a complicated legal process to determine which one was paramount (both further education and higher education have a range of statutory duties in this context)”*.

5.3. It is noted that in our response to the Code of Practice consultation, HEW has identified a number of issues which appear to exemplify these concerns (see Code of Practice Response, para 3.3 in particular): uncertainty about how the statutory guidance could provide the intended protection or be implemented without potential conflict with equal pay legislation, particularly for bodies required to take the Code into account rather than apply it directly; issues about how contractors could be expected to provide services to more than one body without conflict between different terms and arrangements; and a lack of clarity about the extent and precise nature of the statutory duty, particularly as it would apply to universities.

6. Question 3 - Are the consultation arrangements for issuing, revising and revoking the statutory guidance appropriate?

6.1. No. The list of matters covered by the guidance and the list of bodies subject to it, should not be amended by statutory instrument following the negative resolution process. The gravity of the issues for any sector not currently subject to the scope of the Welsh Government's workforce arrangements is such that, for adding new bodies in particular, full legislative process including full consultation and impact assessment and majority vote in the Assembly should apply.

- 6.2. A concern for universities is that the proposed legislation allows for additional bodies to be included subsequent to determining guidance. In response to the Code of Practice consultation, we noted in particular that it was not clear whether universities would be covered by the proposed Bill in future, how the Code would apply to higher education, or when the code would be implemented. These were critical issues which limited our ability to respond to the consultation on the Code appropriately and gave us concern about due process for further consultation and implementation of the proposals. The impact assessments did not cover the proposals in relation to universities, despite being highlighted as ‘important’ (Code of Practice consultation, para 72). We identified a range of fundamental issues in addition to the issue of the ONS classification which could have an impact for the sector, the Welsh Government and for Wales more generally if implemented.
- 6.3. More generally any sector would regard it as unacceptable practice for the Welsh Government to consult first on the content of the proposals, and then to determine which bodies would be covered with the relative freedom that the process for passing secondary legislation passed by negative resolution allows. We are concerned that the current proposals may facilitate this in respect of future guidance including the Code of Practice consultation. We believe that it is essential that the list of bodies covered is only extended through primary legislation which assures full consideration of the issues and potential impact in an appropriate timescale and requires a majority vote in the Assembly before being passed.

7. Question 4 – Is the list of bodies which may be subject to guidance appropriate?

- 7.1. No. In so far as the provisions of the PSW (Wales) Bill provide that universities may subsequently be subject to the guidance, this is not appropriate. The gravity of the issues for any sector not currently subject to the scope of the Welsh Government’s workforce arrangements, is such that full legislative process including full consultation and impact assessment should be followed.
- 7.2. For the reasons outlined above, it is not appropriate for universities to be included in the statutory list of ‘public bodies’ or ‘public service organisations’¹¹ to which this Code would apply. We would wish to continue to engage with the public sector constructively on a voluntary basis and have a strong track record of doing so as evidenced in our previous submission.
- 7.3. We additionally note that we have raised concerns in our response to the Code of Practice consultation about the lack of clarity of the nature of the legal obligation for those bodies subject to the guidance. Paragraph 35 of the Code of Practice consultation distinguishes between public service organisations required ‘to apply it

¹¹ Elsewhere variously termed e.g. ‘public service organisations’ (para.34), or ‘public bodies’ (e.g. Annex para. 22)).

appropriately' and those required 'to apply' it. Annex A states that those institutions made subject through 'general statutory authority' (i.e. section 60 of the Government of Wales Act 2006) 'should take the guidance into account' (Annex A, para.13). We understand that a statutory obligation would make listed bodies potentially subject to judicial review under public law – a further indicator of the loss of autonomy.

8. Question 5 – Are there any other issues which should be covered in the Draft Bill?

8.1. No. In line with our responses to previous consultations on PSW proposals, we view the power to issue statutory guidance as unhelpful and, as far as universities are concerned, as potentially very damaging.

9. Question 6 – Would amending the Local Government Scheme help to reinforce the role of the Workforce Partnership Council and the model of social partnership in Wales?

9.1. In our view, the proposed powers to issue statutory guidance are at odds with the principles of social partnership as advocated by the majority of respondents to the Working Together consultation.

9.2. The Local Government Scheme (the 'Scheme') does not apply to universities, who do not form part of that group of organisations listed in s72 of the Government for Wales Act 2006. Universities are likewise not members of the statutory Partnership Council for Wales (PCfW), whose advice Welsh Ministers must have regard to in determining the provisions of the Scheme. The Consultation Document (para 44) claims that the Scheme 'would have wide relevance across the devolved public service' and we note with concern that the proposed wording of the Scheme (p.15, in box following para.48) that 'public service employers represented directly or indirectly at the Workforce Partnership Council are committed to adhering to agreement reached at the WPC...' (our underlining). The Scheme applies and should continue to apply specifically to local government. It is clear that the issues and statutory position of organisations who are not local government are fundamentally different. The current suggested amendments appear to obscure the purpose and scope of the Scheme in so far as they are aimed at organisations which are not local government.

10. Question 7 – Would issuing an accompanying policy statement help to clarify and reinforce the role of the Workforce Partnership Council?

10.1. The extent to which this could clarify the role of the WPC would depend on the drafting of the statement. The role of the WPC in respect of the Scheme should be clear from the Scheme itself and particular care would need to be taken to ensure

that the status of any accompanying statement was clear and that it was consistent with the Scheme itself.

10.2. As argued in our submission to the Working Together consultation in 2012, there is a need to clarify the role of the Workforce Partnership Council (WPC) and increase its visibility. Public information on its constitution, composition and proceedings including its relationship with the Partnership Council for Wales, for instance, remain very limited and unclear for external stakeholders.

11. Question 8 – Would any other changes help to support the role of the Workforce Partnership Council?

11.1. Universities have so far engaged with the Workforce Partnership Council (WPC) and successfully collaborated with local government on a voluntary basis, and value the continuation of this approach. As previously argued in our submission to the Working Together consultation, we see the role of the Workforce Partnership Council will most effectively support the model of social partnership if it continues to operate on a non-statutory basis with voluntary participation from the university sector in Wales.

12. Question 9 – Do you have any comments on the draft impact assessments?

12.1. The impact assessment does not cover the impact in relation to universities. This is a serious omission, if universities may subsequently be included in the list of bodies subject to the code by means of statutory instrument. As stated in the Code of Practice Consultation Document, an impact assessment is 'important for any legislation'. If the Welsh Government wishes at some future date to propose the application of the Code to universities, a proper impact assessment should take place as part of a consultation on measures specifically relating to higher education.

12.2. We believe this is best served by ensuring that any amendments to the list of bodies subject to workforce matters is subject to primary legislative process passed only by majority vote in the Assembly.

13. Supplementary - We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please report them.

13.1. In response to the previous questions we have highlighted serious concerns with the proposals in relation to universities. Nevertheless, as previously emphasised, universities have a strong record of engaging constructively with public service workforce proposals on a voluntary basis and are keen to continue to do so. Through HEW's engagement with the Workforce Partnership Council (WPC) and in other contexts (e.g. Public Service (HR) Network in Wales) we have contributed to a

range of voluntarily agreed joint guidance on workforce matters, and benefited from a forum for sharing best practice.

13.2. We believe that there are significant gains to be made from further working together as part of a shared collaborative process for delivering the vision set out in the Welsh Government's Strategic Framework. We look forward to the further clarification of the Welsh Government's intentions in respect of universities following the outcome of their discussions with the ONS. We remain very concerned, however, that the inclusion of universities in the list of bodies subject to these proposals would be extremely damaging for the sector and for Wales more generally. These proposals should be amended to ensure that this does not happen without primary legislation, with full impact assessment and consultation process, requiring a majority vote in the Assembly.

HIGHER EDUCATION WALES
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