

## Welsh Government Consultation on The Public Services Workforce Code of Practice - 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 published its consultation on 26 September 2013, requesting responses by 20 December 2013. The proposals follow from the outcomes of the Public Services Workforce consultation to which HEW responded on 31 July 2013. It is also related to the parallel consultation on the Draft Public Services (Workforce) (Wales) Bill which was issued on 28 November 2013.

### 3. Response: general comments

3.1. We note in particular that it is not clear from this consultation whether universities will be covered by the proposed Code, how the Code will apply to higher education, or when the code would be implemented, which are contingent on further discussion. Also, since universities are not currently included, the impact assessments do not cover the proposals in relation to universities, despite being highlighted as 'important' (para 72). These are critical issues which limit our ability to respond to the consultation on the Code appropriately and give us concern at this stage about due process for further consultation and implementation of the proposals. The Welsh Government outlines its intention, subject to the outcome of discussions with the Office for National Statistics (ONS), to apply the Code to universities 'at time of issue' (para 47). We must stress, however, that we need to have clarity on the specific proposals for higher education followed by appropriate consultation and impact assessment before any attempt is made to implement the Code in respect of universities. There are 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.

3.2. 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 resulting in a much smaller proportion of income from public funding, 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 and we are not convinced that the impact of these proposals for universities or for Wales more generally has been fully considered.

- 3.3. Our submission focuses on key issues in relation to universities. However, we note at the outset that there are a number of major issues with the proposals which are common to all respondents. We understand, for instance, that there is 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. Another apparent major difficulty appears to be a general issue about how contractors could be expected to provide services to more than one body without conflict between different terms and arrangements. We also note that the Draft Code was issued before September 2013 so does not take into account the New Fair Deal which was issued by H M Treasury in October 2013.
  
- 3.4. Looking at the impact of the proposals more generally, we note that the implementation of these proposals can potentially involve very considerable costs for those bodies affected by them at a time of considerable fiscal pressure. As commented in our submission to the previous workforce consultation in July 2012, the UK Government abandoned the Two-tier Code and replaced it with Principles of Good Employment in response to concerns from industry about the impact for service providers, particularly for small organisations. The current proposals are likely to increase costs for service providers who would have to factor the cost of compliance with the Code into their pricing which, in turn, would make it more difficult for businesses to contract in their home markets in Wales. In general, we appreciate the reasons for wishing to introduce the Code. In further considering these proposals we would question, however, whether these proposals would have the impact intended and whether sufficient consideration has been given not only to the increased burden and difficulty that this places on bodies subject to the Code, but the wider impact for jobs and the Welsh economy.

#### 4. Question 1 - In addition to those set out above, should the Code be issued to any other public service organisations?

- 4.1. It is not appropriate for universities to be included in the statutory list of 'public bodies' or 'public service organisations'<sup>1</sup> 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.
- 4.2. We note the Welsh Government's intention to include universities subject to legal advice on the impact for their status in National Accounts as Non Profit Institutions Serving Households (NPISH), and we agree that the sector should not be included if there is any question that this would impact on NPISH status either on its own or in conjunction with other planned regulatory changes (and on this front we note in particular the Welsh Government's proposed HE (Wales) Bill). A reclassification would have significant consequences for the DfES budget, as detailed in the Explanatory Memorandum which accompanies these proposals, which in turn would have serious implications for the higher education sector.<sup>2</sup> 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.
- 4.3. 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. Loss of NPISH status would also threaten the charitable status of universities.
- 4.4. The actual or apparent erosion of the autonomous status of universities would have a very serious and detrimental impact not only on universities and their employees.

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<sup>1</sup> Elsewhere variously termed e.g. 'public service organisations' (para.34), or 'public bodies' (e.g. Annex para. 22)).

<sup>2</sup> Further and Higher Education (Governance and Information) Wales Bill, Explanatory Memorandum

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.

- 4.5. In addition to the above points, there is potential impact on contractual agreements with partners, collective agreements incorporated into the contracts of employment, or general statutory duties relating to higher education. In particular, the proposals could have serious implications for the charitable status 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.
- 4.6. The proposals are likely to adversely impact on their well-developed workforce arrangements across the UK-wide 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).
- 4.7. 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 students<sup>3</sup> and Universities play an extremely important role in leveraging additional resource into Wales - currently earning over £400m in much-needed export earnings through

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<sup>3</sup> See HEW's submission to the HE Funding Inquiry, 27 November 2013.

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 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,<sup>4</sup> any damage in reputation to universities in Wales would also have serious consequences for the Welsh economy.

**5. Question 2 - Is it clear which organisations are covered by the Code and when the terms of the Code would apply?**

- 5.1. No. It is not clear whether the Code would apply to universities or when. According to the Consultation Document these decisions are all contingent on further discussion. It is a source of concern, however, that the Consultation Document states that the Code would apply 'at the time of issue' for universities if they are subsequently included.
- 5.2. The Consultation Document and draft Code do not state how the Code would be applied to higher education institutions. There is no indication of what statutory authority would be relied on - paragraph 35 distinguishes between public service organisations required 'to apply it appropriately' and those required 'to apply' it. It is not clear whether the Welsh Government would intend to rely on general statutory authority to cover universities, or whether a specific authority would be used and if so which. We are also mindful of the parallel consultation on the Draft Public Services Workforce Bill which proposes to make the list of bodies subject to guidance on workforce matters (and the list of workforce matters itself) subject to amendment through statutory instrument following a negative resolution process. There is also a lack of clarity over the precise nature of the obligation for institutions made subject to the Code – the wording in Annex A for instance is different to the formulation in paragraph 35 and 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). Without further clarity on these matters it is very difficult to engage in meaningful consultation on these proposals in relation to universities.
- 5.3. It is important that due consultation process is followed for all bodies to be covered by the Code including those who are included at a later stage. We must stress the need to have clarity on the specific proposals for higher education followed by appropriate consultation and impact assessment before any attempt is made to implement the Code in respect of universities.

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<sup>4</sup> Kelly, McNicoll et al., as above.

## **6. Question 3 - Are the enforcement arrangements clear and appropriate?**

6.1. No, not for universities. Until the nature of the potential and extent of any statutory duty in respect of universities is clarified, it is difficult to comment on the appropriateness of the arrangements. In particular, it is not clear how far this would make universities subject to judicial review – which in itself may have an impact on NPISH status.

## **7. Question 4 – Is the alternative dispute resolution process clear and appropriate?**

7.1. Until the nature of the potential and extent of any statutory duty in respect of universities is clarified, it is difficult to comment on the appropriateness of the arrangements. Universities have well developed contractual arrangements, which typically include dispute resolution processes. A statutory duty which creates complications with existing contracts and fetters universities own discretion to determine what was appropriate would not be welcomed (and may impact on NPISH status).

7.2. More generally, we would welcome further clarity about who and in what circumstances the ADR procedure could be invoked. The Consultation Document (para 61) states that the service provider, public sector organisation and recognised trade unions or other staff representatives 'shall have access' to the ADR process. The Draft Code at Annex A, however, refers more narrowly to 'the parties'. We also note only that the guidance does not stipulate who would be expected to bear the costs of the process.

## **8. Question 5 - Are the monitoring arrangements reasonable and appropriate?**

8.1. The monitoring arrangements add to the information burden for institutions, and we would like greater clarity on how the monitoring reports could serve a genuinely useful purpose, particularly for bodies only required to take the code into account. The degree to which this is an onerous responsibility in practice would depend upon the number of outsourcing contracts, the number of staff involved and the level of co-operation of the service providers. The fact that this introduces direct accountability to the Ministers for reporting requirements, however, remains a concern in the context of its impact for NPISH status.

## **9. Question 6 - Do you have any comments on the content of the impact assessments at Annex D?**

9.1. The impact assessment does not cover the impact in relation to applying the Code to universities. This is a serious omission. As stated in the 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.

9.2. The impact assessments do, however, suggest that there are significant cost implications for those made subject to the Code.

**10. Question 7 - Is there any other information that you are aware of that could be used to consider the equality impacts of the Code?**

10.1. See answer to Question 6.

**11. Question 8 - Are there any additional matters that you would like to bring to our attention**

11.1. In addition to our responses to the specific questions listed, please see in particular our comments above on the need for clarity on the specific proposals for higher education followed by appropriate consultation and impact assessment before any attempt is made to implement the Code in respect of universities (3.1). We have made a number of additional comments on the impact of the proposals and potential difficulties (3.3-3.4) which are potentially of broader relevance to all respondents. We also outline the way we would like to see these proposals taken forward in relation to the university sector below (12.1).

**12. Question 9 - 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:**

12.1. 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.

12.2. 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. On the face of it, however, the potential application of this Code to universities under statute could be extremely damaging for the sector and for Wales more generally.