

**National Assembly for Wales Constitutional and Legislative Affairs Committee
Consultation on the Wales Bill 2016-17:
A response by Universities Wales**

1. About Universities Wales

- 1.1. Universities Wales represents the interests of universities in Wales and is a National Council of Universities UK. Universities Wales' Governing Council consists of the Vice-Chancellors of all the universities in Wales and the Director of the Open University in Wales.

2. Introduction

- 2.1. We offer the following comments in response to the consultation of the National Assembly for Wales Constitutional and Legislative Affairs Committee's consultation on the UK Government's Wales Bill 2016-17.¹ This confirms the initial comments we made at the Committee's stakeholder event on 11 July 2016. Unless otherwise stated, references are to the latest version of the Bill as introduced to the House of Lords on 13 September 2016.

3. Classification of universities as 'Wales public authorities'

- 3.1. Universities in Wales are independent organisations whose academic and institutional autonomy is widely regarded as fundamental to its provision of world-class education and research. Universities do not form part of the public sector for national accounting purposes, and universities are currently only treated for legal purposes as public bodies for a number of very specific purposes e.g. freedom of information provisions. Although higher education provision and fees are highly regulated, less than ten per cent of universities' income in Wales comes from direct public funding.² The charitable status of universities also requires them to act exclusively for their charitable purpose of providing education for the public benefit, independently from government.³
- 3.2. Clause 4 of the Wales Bill inserts a definition of 'Wales public authorities' into the Government of Wales Act 2006 ('GOWA 2006'), and expressly includes institutions within the further and higher education sectors in the list of public authorities.
- 3.3. Based on our initial reading, it appears that the proposed legislation increases the extent to which universities in Wales are treated as public authorities, and inadvertently in some instances this could potentially raise significant issues for universities. We include an appendix which sets out our research at this stage, in the hope that this may be of assistance in further investigation of this issue. For instance, it would appear to allow the potential extension of the Office of Budgetary Responsibility's right to access information to universities, inappropriately enable universities and the Welsh Government to carry out

¹ See <http://www.senedd.assembly.wales/mgConsultationDisplay.aspx?id=213&RPID=1507604415&cp=yes>

² See Universities Wales, A short guide to university funding and student finance in Wales, (2016), [here](#).

³ See e.g. Charity Commission, Policy Paper, Independence of charities from the state (RR7), (2009), [here](#).

each other's functions (s.83 GOWA 2006), and to extend the role and powers of the Auditor General to universities (Sched 8, GOWA 2006). Similar provisions would not apply to universities elsewhere in the UK, and in particular we are concerned that these could have a potential impact on the national accounting classification and charity status of our universities.

- 3.4. Irrespective of whether or not the current drafting has this unintended consequence, we are very concerned that it may encourage the inadvertent extension of their treatment as public authorities in future legislation. We regard it as very unhelpful for universities to be characterised as carrying out 'functions' of the Welsh Government in the light of their independent and charitable status. Further treating universities as public authorities, as we have highlighted in relation to other legislation relating to higher education in Wales, would increase the cumulative risk to national accounting classification and charitable status.
- 3.5. We would therefore welcome the Draft Bill being reviewed and amended as appropriate to address our concerns. In particular, we ask that universities (as variously defined in the Bill) are removed from the list of public authorities.

4. Further comments

- 4.1. Higher education is a devolved subject and has been the subject of a significant amount of legislation in the early years of devolution. As highlighted by the Law Commission's study on the Accessibility of the Law in Wales, to which Universities Wales contributed, higher education can be regarded as a key case study for legislative development in Wales. Any changes to the boundaries of legislative competence are likely to have direct impact on universities, and as a key stakeholder, we offer the following further brief comments:

- (a) Overlap of subject matters.

The Wales Bill is expressly intended to address the lack of clarity in the current law, highlighted e.g. by recent cases in relation to the agriculture sector and insurance, which has left considerable room for uncertainty, also potentially affecting higher education. Although the reserved powers model alters the approach it does not appear to have fully resolved the underlying issues at this stage. In the Bill, for instance, education and employment are not reserved matters, but 'the subject matter' of specified acts relating to employment (e.g. TUPE, minimum wage) are reserved. Employment law, in our view, should remain UK wide and further clarity to avoid potential issues in future would be welcomed.

- (b) Territorial application

In particular, we query the extent of competence in relation to activities of Welsh institutions/bodies in other parts of the UK or overseas. This issue was recently highlighted in the Assembly in the context of discussions of section 17 of the HE (Wales) Bill. This established a new duty of the Higher Education Funding Council for Wales (HEFCW) to assess the quality of education of a regulated institution. In contrast to the UK legislation which it replaced,⁴ however, HEFCW's new duty and powers only extended to provision in Wales on grounds that the Welsh Government

⁴ Further and Higher Education Act 1992, s.70.

lacked competence to extend them to other parts of the UK or beyond.⁵ The issue was partially resolved by the Secretary of State making an order under s.150 of Government of Wales Act 2006 which allowed a regulated institution's provision in England to be treated as if it was in Wales.⁶ The apparent lack of legislative competence, however, appears to have prevented provision elsewhere in the UK or beyond it being similarly covered.

We assume that this issue could potentially have significant implications for other devolved sectors too, and for the future transfer of UK statutory provisions onto the Welsh statute book (e.g. consolidation/codification) more generally.

(c) The test of necessity and interpretation of ancillary.

Discussions at the stakeholder debate in July highlighted in particular that it is not clear how narrowly these could be interpreted.

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⁵ See for instance, the evidence of Minister for Education and Skills to the Children, Young People and Education Committee, 5 November 2014 (Transcript para 209, 11:15).

⁶ The Higher Education (Wales) Act 2015 (Consequential Provision) Order 2015, 2015 No.1353 (see [here](#)),

Appendix - Treating universities as public authorities

1. Introduction

- 1.1. The following paragraphs attempt to identify the potential issues with the current inclusion of universities in the new definition of 'Wales public authorities' which may require further research to avoid unintended consequences in the drafting of the Wales Bill. It is stressed that the comments below are provisional and simply set out our own research at this stage, and have not benefited from professional legal advice.
- 1.2. Further work/professional advice would be required to confirm these issues. We fully expect that in some instances, these issues will be clarified or addressed through a closer reading of the Bill and related legislation. We hope, however, that they may be useful in identifying matters that warrant further investigation.

2. The definition of Wales public authorities

- 2.1. Clause 4 of the Wales Bill inserts a definition of 'Wales public authorities' into the Government of Wales Act 2006 ('GOWA 2006'). The proposed s.157A of GOWA 2006 specifies that for purposes of that Act a 'Wales public authority' is:
 - (a) a public authority whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters. A public authority is defined in this clause as a body, office or holder of an office that has functions of a public nature.
 - (b) a body specified in Schedule 9A as a Wales public authority. The list in Schedule 9A can be amended by statutory instrument, if a draft has been approved by both Parliament and the Assembly.
- 2.2. Schedule 9A, as inserted by the Bill, adds HEFCW and institutions within the further and higher education sectors to the list of public authorities.

Institutions falling within the definition

- 2.3. It is further noted that precise definition of 'institutions in the higher education sector' covers all universities in Wales at the moment, but it does not cater for all institutions that could potentially in future be considered to be part of the higher education sector. Specifically, Schedule 9A includes:
 - A regulated institution within the meaning of the Higher Education (Wales) Act 2015 (ignoring section 26 of that Act) other than the Open University.
 - The governing body of an institution in Wales within the higher education sector within the meaning of section 91(5) of Further and Higher Education Act 1992.
- 2.4. The FHEA 1992 in turn provides that 'institutions within the higher education sector' are:
 - universities receiving financial support under FHEA 1992 (i.e. HEFCW grant funding),

- Higher education corporations (i.e. currently in Wales, all universities that are not incorporated by Royal Charter), and
- ‘designated institutions’ as defined by the Act (this doesn’t apply to any at the moment).

2.5. From September 2017 (subject to commencement), this definition will be amended by the Higher Education (Wales) Act 2015, to also include ‘universities that are regulated institutions i.e. those who have a fee and access plan approved by HEFCW under the HE(W)A 2016.

2.6. We note that Wales public authorities will accordingly include universities only if they are regulated institutions or funded by HEFCW - which may not remain the case in future. HE providers who are not universities or Higher Education Corporations, but receive funding from HEFCW would also not be included in this definition.

Use of the definition

2.7. The definition of a ‘Wales public authority’ or ‘public authority’ will be used in a number of instances as discussed in more detail below. The Bill operates by amending the GOWA 2006 rather than setting out provisions of its own. It provides that the definition of ‘Wales public authorities’ applies to the whole Act. However, it appears that other definitions of ‘public authorities’ will continue to be used in GOWA 2006 as amended by the Bill. We would have expected the drafting, for instance, to have included the proviso ‘unless otherwise specified in this Act’ or similar, to ensure clarity about which definition is applicable.

2.8. The full set of amendments to GOWA 2006 have to be traced carefully to see the effect of this new provision. In addition, to appreciate their full impact, the use of GOWA 2006 in other legislation needs to be investigated. Our initial comments on each of these in so far as we have been able to investigate them at this stage, is set out under sections 3 (new provisions), 4 (existing provisions) and 5 (external references to GOWA) respectively below.

3. New provisions inserted by the Bill relating to public authorities

3.1. The definitions of ‘public authorities’ and ‘Wales public authorities’ are used in a number of the new provisions inserted into GOWA 2006 by the Bill.

3.2. In the main part of the Act, this includes the following new provision in particular:

Provision of information to the Office for Budget Responsibility (Clause 47).

3.3. Clause 47 enables the Secretary of State to pass regulations which would give the Office for Budget Responsibility a right to access information held by Wales public authorities. Section 9 of the Budget Responsibility and National Audit Act 2011 sets out the Office’s right to access information and this only extends to government information held by a Minister of the Crown or a Government department. If the Secretary of State chooses to exercise this power, it could mean that the OBR has a right to access information held by universities.

Issue: Not only does this extend the legislative treatment of universities as public authorities but the same right to information would not apply to universities in England.

Schedule 1 (the new Schedule 7A of GOWA 2006)

- 3.4. The term ‘public authority’ is also used in Schedule 1 (the new Schedule 7A of GOWA 2006) in the specification of ‘reserved matters’ which will fall outside the legislative competence of the Assembly, and the ‘exceptions’ to reserved matters which will fall within its competence. This includes air transport (E4), public access to information (L7), and equal opportunities (N1):

E4 - Air Transport (para 124).

- 3.5. The Act in general reserves matters relating to air transport. The listed exceptions include ‘strategies by the Welsh Ministers or local or other public authorities about the provision of air services’.

Issue: Universities are unlikely to have strategies about the provision of air services, but if they do the current definition would mean that they fall within the Assembly’s legislative competence. This issue is technical/unlikely to be an issue in practice.

L7 - Information rights (para 170).

- 3.6. The Act reserves matters relating to the public access to information held by a public authority. However, it excepts information held by a Welsh public authority, unless supplied by a Minister of the Crown and held in confidence.
- 3.7. It appears that for this paragraph, the definitions of ‘public authority’ and ‘Welsh public authority’ are taken from the Freedom of Information Act 2000 and not the new definitions inserted by Clause 4 of the Bill (but see our comments above and the need for greater clarity).
- 3.8. The result is similar to the current position for universities under the ‘delegated powers’ model. The GOWA 2016 devolves ‘access to information held by open access public authorities’ under the subject of ‘public administration’ (Schedule 7, para 14). Open access public authorities are defined to include authorities which are Welsh public authorities, within the meaning of the Freedom of Information Act 2000.
- 3.9. The FOI 2000 (s.83) expressly provides that a “Welsh public authority” includes a university receiving financial support under the provisions of the FHEA 1992, an institution conducted by a higher education corporation, and designated institutions. The Higher Education and Research Bill currently proposes to extend this to include registered higher education providers (in England) but there is no equivalent for regulated institutions (in Wales) which may be an issue in future.

Issue: Minor issue only. It would be helpful to clarify that the Clause 4 definitions do not apply in this context.

N1 - Equal opportunities (para 188).

3.10. The Act provides that, in general, equal opportunities are a reserved matter i.e. fall outside the Assembly's legislative competence. The exceptions to this include:

- Imposing duties on any Wales public authority to ensure that its functions are carried out with due regard to the need to meet the equal opportunity requirements.
- Equal opportunities relating to the inclusion of persons with particular protected characteristics in non-executive posts on boards of Wales public authorities.
- Equal opportunities in relation to the functions of any Wales public authority, other than a function that relates to the inclusion of persons in non-executive posts on boards of Wales public authorities. The provision falling within this exception does not include any modification of the Equality Act 2010, or of any subordinate legislation made under that Act, but does include provision that supplements or is otherwise additional to provision made by that Act (e.g. a requirement to take action that the Act does not prohibit).

3.11. The interpretation section of this paragraph did not define public authorities, i.e. we assume that the definition inserted by Clause 4 of the Bill would apply.

3.12. By contrast, the current provisions of the GOWA 2016 only devolve 'equal opportunities in relation to equal opportunity public authorities' under the subject of 'public administration' (Schedule 7, para 14). 'Equal opportunity public authorities' include in particular (a) persons who exercise functions of a public nature and in respect of whom the Welsh Ministers exercise functions, and (b) persons who exercise functions of a public nature and at least half of the cost of whose functions in relation to Wales are funded (directly or indirectly) by the Welsh Ministers. These definitions are far from straightforward and would require further research to confirm how they have been interpreted in the past. However, it appears that for universities this could potentially depend on whether the majority of their costs are met by public funding (which could differ between institutions) and what is considered to be indirect funding e.g. student loans/student grants.

Issue: From an initial reading, this appears to extend the Assembly's power to legislate in respect of equal opportunities relating to higher education providers in Wales where public funding only meets a minority of their costs.

3.13. We note that UK legislation on equal opportunities currently applies to universities in Wales, but the precise definition/coverage is different in its detail again. The Equality Act 2010, for instance, imposes a public sector equality duty on public authorities and any person who is not a public authority but who exercises public functions (s.149). A public authority is a person specified in Schedule 19 of the Act, and includes the governing body of an institution in Wales within the higher education sector within the meaning of section 91(5) of FHEA 1992. At the moment this only covers higher education institutions with university title who receive funding from HEFCW (see comments on this above for the coverage of this), but from September 2017 this will include universities who are regulated institutions as well (see comments above on the coverage of this definition). Higher Education providers who do not fall within this precise definition of the Schedule could still be treated as public authorities. A 'public function' is defined as a function of a public

nature for the purposes of the Human Rights Act 1998 (s.150) and this has been interpreted very broadly in the past.⁷

General Provisions – Wales public authorities (Paras 197-8)

- 3.14. The reservations relating to public authorities have to be read as subject to the ‘provisions’ in Schedule 7A. Paras 196-7 specifically provides that certain matters concerning Wales public authorities are not reserved (i.e. will fall within the Assembly’s legislative competence), including e.g. the constitution of a public authority, imposing accounting or public procurement functions on a public authority.

Issue: We would welcome the interpretation/effect of this being clarified to ensure that this cannot be interpreted to expressly allow the Welsh Government/the Assembly to legislate on the constitution of universities, or to impose accounting or public procurement functions on them, by virtue of including them in the definition of ‘public authority’. On an initial/provisional reading, this change to the legislation, if used, could place the charity status/ONS classification of universities at risk.

Schedule 2 (the new Schedule 7B to GOWA 2006)

Reserved authorities (paras 7-10)

- 3.15. The new Schedule 7B to GOWA 2006 (paras 8-10) also provides (in summary) that the Assembly cannot alter the functions or constitution of a reserved authority. This includes any public authority other than a Wales public authority.

Issue: We would welcome the interpretation/effect of this being clarified to ensure that this cannot be interpreted to expressly allow the Welsh Government/the Assembly to legislate to alter the functions of constitution of a university, by virtue of including them in the definition of ‘public authority’. On an initial/provisional reading, this change to the legislation, if used, could place the charity status/ONS classification of universities at risk.

4. The existing GOWA 2006 provisions

- 4.1. The existing GOWA 2006 contains a number of provisions relating to ‘public authorities’.
- 4.2. Most of these, however, are contained in Schedule 5 (setting out the devolved ‘matters’ for purposes of Assembly Measures) which is no longer in force, or Schedule 7 (setting out the devolved ‘subjects’ for purposes of Assembly Acts) which will be replaced by the Bill. Notably, these currently do not attempt to set out their own definition of ‘public authority’ but instead adopt the definition contained either in the Human Rights Act 1998, or the Freedom of Information Act 2000.
- 4.3. The following instances, however, will remain in force in the GOWA 2016:

⁷ See for instance, the *Equality and Human Rights Commission interpretation in its Equality Act 2010 Technical Guidance* (e.g. 1.7, 1.15, 3.3) [here](#) and Code guidance [here](#) (e.g. paras 11.3-11.6).

s.83 (agency arrangements and provision of services).

- 4.4. Making universities public authorities would appear to mean that arrangements may be made between the Welsh Ministers and universities for any functions of one of them to be exercised by the other, any functions of the Welsh Ministers to be exercised by university staff, any functions of the university to be exercised by Welsh Government staff, or for provision of administrative, professional or technical services by one of them for the other.
- 4.5. It is not entirely clear on an initial/provisional reading whether this would enable an arrangement to be imposed on public authorities (including universities) or would be interpreted as implying that there must be agreement. If this power is extended to universities as a result of the Bill, this would clearly be objectionable and could affect charity status/ONS classification for purposes of national accounting, both of which would have serious consequences for the sector (and government).
- 4.6. We note that the power to make arrangements for universities to exercise Welsh Government functions (or the other way round) is likely to be inappropriate even where arrangements are voluntary. Charity law, for instance, requires universities to act independently from the Government in pursuit of their charitable objectives (see the Charity Commission's guidance RR7, for instance).

Issue: This appears to extend current legislation in relation to universities. At best it appears that this provision is inappropriate for universities; if it allows arrangements to be imposed on universities it would potentially cause serious issues for charity status/ONS classification.

Sch.8 (Auditor General for Wales), para 20 (certification of claims, returns etc).

- 4.7. This provides that the Auditor General must, if required by a relevant body, make arrangements for (a) certifying any claim or return in respect of a grant made or subsidy paid to that body by ... any public authority, (b) certifying any account submitted by that body to ... any public authority with a view to obtaining payment under a contract between that body and ... the public authority.
- 4.8. The term 'public authority' for these purposes means 'a body established by or under the Community treaties or any enactment'. This would presumably include HECs, for instance, but it is not immediately clear whether this includes, for instance, universities established by Royal Charter, and would not apply to private providers in general (even if they are regulated institutions).
- 4.9. At the moment, public audit arrangements/the Auditor General's powers relate primarily to public bodies specified in the GOWA 1998, Schedule 17. This includes HEFCW, for instance, but not universities.

Issue: This appears to extend the role and powers of Auditor General to universities, and effectively now treat them as public bodies for purposes of the public accounting arrangements.

Sch.8 (Auditor General for Wales), para 21 (Ancillary powers).

- 4.10. This allows arrangements to be made between the Auditor General and a 'relevant authority' for the function of the authority to be exercised by the Auditor General, or for the Auditor General to provide services to the relevant authority. Relevant authorities include public authorities. However, 'public authorities' does not appear to be specifically defined in this context (in contrast to paragraph 20 – see above).
- 4.11. The application of the definition provided by Clause 4 of the Bill in this context would mean that universities are included. However, before the insertion of Clause 4, it would probably have been interpreted in line with paragraph 20 of the Schedule (see above).

Issue: Making universities public authorities in this context would extend the current scope of this provision. The applicable definition of 'public authorities' also needs to be clarified in this context.

5. Other legislation using the GOWA 2006 provisions

- 5.1. Potentially, the change of definition could have wider impact than is clear from the Bill and GOWA 2006 themselves. This depends on how far the relevant provisions or definitions in GOWA 2006 are adopted or cross-referenced by other legislation. From the limited resources and tools at our disposal it has been hard to verify this.
- 5.2. From an initial survey, however, GOWA doesn't appear to have been used in this way.
- 5.3. However, a significant issue remains that, if the Bill inserts a new definition of public authorities in GOWA 2006, that this could be adopted by future legislation, encouraging the further treatment of universities as public authorities in future legislation.

Issue: Further research may be required to identify the impact of the changes for other legislation. However, the key issue is that the Bill inserts a new definition of public authorities in GOWA 2006, that this could be adopted by future legislation, encouraging the further treatment of universities as public authorities in future legislation.