

## **Universities Wales response to consultation on the European Union (Withdrawal) Bill and its implications for 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. Summary**

2.1. Universities in Wales are internationally competitive and a major economic asset that bring widespread benefits to individuals, communities, the nation as a whole, and government in Wales.

2.2. The process of exiting the EU will bring challenges including issues around residency for EU nationals working in the university sector, the provision of European Structural and Investment Funds in higher education in Wales, and the UK's continued participation in Horizon 2020.

2.3. Universities Wales broadly accepts the need for and purpose of the European Union (Withdrawal) Bill.

2.4. Universities Wales has previously raised concerns about inter-governmental and inter-parliamentary working and scrutiny. We believe the proposals in the Bill may exacerbate these issues, for example as a result of the lack of a direct role for the National Assembly for Wales to scrutinise legislation relating to Wales that originates in the UK Parliament.

2.5. The Bill limits the powers of devolved institutions so that devolved institutions are unable to modify retained EU law, even in areas of devolved competence. This limitation is indefinite. UK Ministers are able to legislate in these areas, some of which could have a direct impact on higher education in Wales.

2.6. From a purely practical perspective, as a sector dealing with these changes, we would welcome an appropriate period of continuity and consistency of arrangements across the UK to deal with the transition.

2.7. The Bill provides UK Ministers with extensive powers to make regulations to address any failures of retained EU law to operate effectively following withdrawal and for the purposes of implementing the withdrawal agreement. These powers enable UK Ministers to make any provision that could be made by an Act of Parliament. Corresponding powers are provided to Welsh Ministers.

2.8. Universities Wales believes a structured approach is required to intergovernmental relations. This Bill empowers UK Ministers to amend and modify retained EU law in areas that would be considered of devolved competence and could have relevance to universities in Wales. In such cases, it would be important that sufficient time is available

and mechanisms in place for the National Assembly for Wales and stakeholders in Wales to contribute.

### 3. General response to the Bill

- 3.1. We welcome this opportunity to respond to the consultation of the External Affairs and Additional Legislation Committee and the Constitutional and Legislative Affairs Committee on the European Union (Withdrawal) Bill.<sup>1</sup> The Bill as introduced raises major issues about how exit from the European Union will be handled for Wales.
- 3.2. Whilst the process of exiting the EU will bring challenges, we are committed to maximising the opportunities it will present for Wales.
- 3.3. The challenges that face universities in Wales include:
  - 3.3.1. Residency rights for EU nationals working in the university sector
  - 3.3.2. Continued UK participation in the Horizon 2020 research and innovation programme to the end of the programme period
  - 3.3.3. Sustaining or replacing European Structural Funds at a devolved level following the UK's withdrawal from the European Union
  - 3.3.4. Mobility opportunities for UK staff and students
- 3.4. Universities can play a central role in driving inclusive economic growth locally, regionally and nationally. Our universities in Wales are internationally competitive and a major economic asset, that bring widespread benefits to individuals, communities, the nation as a whole, and government in Wales. The total combined impact of Welsh universities and their students on Wales' GVA came to nearly £2.4 billion in 2014 - equivalent to 4.6% of Wales GVA.<sup>2</sup>
- 3.5. Universities Wales broadly accepts the need for the European Union (Withdrawal) Bill and its stated purpose to provide a functioning statute book on the day the UK leaves the EU and that 'as a general rule, the same rules will apply on the day after exit as on the day before'<sup>3</sup>.
- 3.6. We have concerns regarding the effectiveness of inter-governmental and inter-parliamentary arrangements in light of the Bill. We believe that the proposed Bill may exacerbate existing issues with cross-border working and scrutiny, for example the lack of a direct role for the National Assembly for Wales to scrutinise legislation relating to Wales that originates in Parliament, and challenges around procedural and timing issues as previously identified in the Richard Commission Report<sup>4</sup>.

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<sup>1</sup> See [here](#) for details of the Committees' consultation.

<sup>2</sup> <http://www.uniswales.ac.uk/wp/media/The-Economic-Impact-of-Higher-Education-in-Wales.pdf>

<sup>3</sup> [Explanatory Memorandum for the European Union \(Withdrawal\) Bill](#)

<sup>4</sup> <http://webarchive.nationalarchives.gov.uk/20100404200945/http://www.richardcommission.gov.uk/content/finalreport/report-e.pdf>

#### 4. The treatment of devolution

- 4.1. As we understand it, existing EU law would be retained, but the power to amend directly-applicable EU law would be retained solely by the UK. The Bill will give the UK Government the power to deal with changes to EU law through regulations, without needing to go through the full process of scrutiny for primary legislation. The Bill also proposes corresponding powers to be vested in the Welsh Ministers, but these would be more limited.
- 4.2. Universities have a strong interest in ensuring that the process of legislative withdrawal from the EU is handled appropriately and effectively and that there is certainty not only in terms of what is retained but who can change it. Universities are subject to a significant body of EU law and in some respects their position is unique.
- 4.3. The Bill identifies two kinds of retained EU law – ‘preserved legislation’ that relates to EU law that has already been incorporated into UK domestic law and ‘converted legislation’ that incorporates EU legislation that at the moment applies to the UK directly.
- 4.4. Although universities are independent charitable bodies in the UK, they are treated as public authorities in certain instances for purposes of EU law which means that as well as being affected by changes in ‘preserved legislation’ they are also significantly affected by changes in ‘converted legislation’ in a number of important areas, including employment and equality legislation.
- 4.5. For the most part, EU law applies in the same way to all universities across the UK. EU law affecting universities which will be reserved is extensive and includes e.g. competition law, intellectual property, employment law, data protection and freedom of information, free movement, consumer law, health and safety etc. However, a number of powers relating to EU law are delegated to Wales and are additional to the powers under the general devolution settlement. Many of these affect universities, such as procurement law, and there are differences between nations in how these are implemented.
- 4.6. What makes the position particularly uncertain for Wales is that it coincides with major changes to devolution settlement. Once the reserved powers model is in force, it will be difficult to say with confidence precisely what the new boundaries of legislative competence of the National Assembly will be. We assume at this stage that the Wales Act 2017 will be fully implemented at the exit date, but presumably the timing of its implementation could be important.
- 4.7. There is much work to be done to understand the implications of the Bill fully for universities. For instance, current questions for us to consider more fully include:
  - Student support arrangements are specifically devolved to Wales. However, they are subject to EU law including the requirement that EU students must receive the same support for tuition as home students. The Explanatory Memorandum is clear that this requirement, which falls under Article 18 of the Treaty on the

Functioning of the European Union, would form part of retained EU law<sup>5</sup> and so fall outside the competence of devolved institutions.

- There is similarly a question on maximum fee legislation. Currently, for instance, the maximum fees apply to both UK and EU students. Regulations brought under section 1 of the Education (Fees and Awards) Act 1983 provided that in both England and Wales discrimination on grounds of domicile between UK/EU students and international students is lawful, but not discrimination between UK and EU students. Since 2006 the Welsh Ministers have prescribed such persons in relation to Wales.<sup>6</sup>
- The application of procurement law to universities, during transition in particular, may also be difficult to ascertain with confidence. Welsh Ministers recently had powers delegated to implement EU procurement law in Wales. At this stage we welcome that after exit, in the case of delegated powers, Wales will have the ability to modify retained EU law in ways that remain consistent with the underlying directive, rather than being constrained by their existing implementing legislation.

4.8. Clause 11 of the Bill is arguably the most contentious and limits the powers of devolved institutions by amending the Government of Wales Act 2006 so that an Act of the Assembly cannot modify retained EU law, even in areas that are not reserved under the Wales Act 2017. This 'freeze' on legislative competence is indefinite. UK Ministers, however, are able to amend or modify retained EU law including when it relates to areas of devolved competence. The explanatory memorandum argues that the policy intention of this is to provide time to identify which areas of retained EU law necessitate a pan-UK approach.

4.9. From a purely practical perspective, as a sector dealing with these changes, we would welcome an appropriate period of continuity and consistency of arrangements across the UK in order to deal with the transition. It is unclear, however, why the UK's reservation of EU retained law in areas of competence that are otherwise devolved to Wales could not be time-limited, for instance, or a simple moratorium agreed between the UK and devolved governments.

## 5. The delegation of powers and their control

5.1. As we understand it, the Bill would provide UK Ministers with the ability to make regulations to address three areas:

5.1.1. The need to prevent, remedy, or mitigate any failure of EU law to operate effectively following withdrawal.

5.1.2. Prevent or remedy any breach of international obligations arising from withdrawal

5.1.3. Regulations for the purposes of implementing the withdrawal agreement.

5.2. These powers would enable UK Ministers to make, with some caveats, any provision by

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<sup>5</sup> [Explanatory Memorandum for the European Union \(Withdrawal\) Bill](#)

<sup>6</sup> See The National Assembly for Wales (Transfer of Functions) Order 2006 [here](#).

regulations that could be made by an Act of Parliament (so-called ‘Henry VIII powers’).

- 5.3. There will be corresponding powers for Welsh Ministers but these will be more limited. Schedule 7 sets out what scrutiny the powers to deal with deficiencies will be subject to. The arrangements for scrutiny of provision made by Welsh Ministers corresponds to the process for UK Ministers.
- 5.4. We welcome the proposal in the Bill to give the Welsh Ministers powers which correspond to the UK Government’s powers to deal with legislation in areas that would otherwise fall within their competence.
- 5.5. However, it is unclear to us at the moment, what the power to implement withdrawal agreements would mean for Wales and whether it would be effective, given the limited extent to which Wales is involved in the negotiation of them.
- 5.6. Most regulations made using these powers will be subject to the negative procedure, requiring that regulations will take effect unless annulled by one of the Houses of Parliament, or the National Assembly for Wales in the case of regulations made by Welsh Ministers. Some specific areas, such as provision which establishes a public authority or that creates or amends a power to legislate, are listed as requiring the affirmative procedure. At this stage, we would need to be clearer about how this could apply to regulations relating or applying to universities.
- 5.7. As outlined above, the Bill imposes a ‘freeze’ on legislative competence in Wales in areas of retained EU law. However, UK Ministers would be able to legislate in these areas and the Bill does not stipulate that this would be subject to the agreement of the Welsh Government or the National Assembly for Wales.

## **6. The scrutiny processes and the role of the devolved legislatures**

- 6.1. We have significant concerns about the scrutiny process, particularly for Wales. We have previously submitted evidence to CLAC describing the difficulties faced by universities in Wales in engaging with the legislative process for changes to UK legislation which are relevant to Wales<sup>7</sup>. The Bill proposes the use of Henry VIII clauses for dealing with the exceptional workload in dealing with the retention of EU law. We share the concerns about the use of such clauses, which mean that legislation is subject to a lesser degree of scrutiny than normal.
- 6.2. The UK Government outlines in the explanatory memorandum the areas of the Bill which the UK Government believes require legislative consent from the National Assembly for Wales including:
  - 6.2.1. the preservation of EU law
  - 6.2.2. limits placed on devolved institutions
  - 6.2.3. the conferral of Henry VIII powers on devolved administrations.
- 6.3. For Wales, there is a particular issue that the constitutional convention of seeking the Assembly’s approval does not apply to secondary legislation, unlike for primary

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<sup>7</sup> <http://www.uniswales.ac.uk/wp/media/Unis-Wales-response-to-CLAC-Engaging-with-Westminster-consultation.pdf>

legislation. From an initial reading, we are not clear at this stage on the National Assembly's role in scrutinising any changes made by the UK Government that relate to devolved matters. In particular, it would be helpful to clarify for an external audience how the Sewel convention would operate in Wales given that the Wales Act 2017 gave statutory recognition that the Parliament will not normally 'legislate' with regard to devolved matters without the consent of the Assembly.

- 6.4. The National Assembly for Wales does not play a direct role in the scrutiny of UK Government legislation or regulations. This could mean that changes could be made to retained EU legislation by the UK Parliament in areas of devolved competence without scrutiny from the National Assembly for Wales.
- 6.5. Universities Wales has previously expressed concerns that the National Assembly for Wales does not play a direct role in the scrutiny of legislation relating to higher education in Wales that originates in Parliament. For examples, Universities Wales noted in relation to the Higher Education and Research Bill that the proposals for Wales could not be clear in the UK Government's White Paper and were not identifiable until the Bill itself was laid<sup>8</sup>. This made it very difficult for Wales to comment on or contribute to developments for Wales.
- 6.6. We believe it would be beneficial to have more clarity on the role of devolved legislatures in relation to the powers this Bill provides and the policy decisions that will be taken using these powers. There are areas of retained EU law that are not otherwise in reserved areas that could be particularly relevant to universities in Wales, for example, procurement law and equal opportunities.
- 6.7. A structured approach is required to intergovernmental relations with regular meetings between ministers from the UK Government and devolved Government meetings. This Bill empowers UK Ministers to amend and modify retained EU law in areas that would be considered of devolved competence and could have relevance to universities in Wales. In such cases, it would be important that sufficient time is available and mechanisms in place for the National Assembly for Wales and stakeholders in Wales to contribute.

**Universities Wales**  
**September 2017**

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<sup>8</sup> <http://www.uniswales.ac.uk/wp/media/Unis-Wales-response-to-CLAC-Engaging-with-Westminster-consultation.pdf>