

**Off payroll working in the public sector:  
Reform of the intermediaries legislation (IR35)**



**UNIVERSITIES & COLLEGES  
EMPLOYERS ASSOCIATION**

**Response from the Universities and Colleges Employers Association (UCEA)**

**1. Introduction:**

- 1.1. This document is the written response from the Universities and Colleges Employers Association (UCEA) to the HMRC consultation on the reform of the intermediaries legislation (IR35) to improve its effectiveness in the public sector.
- 1.2. UCEA's response is based on its own call for evidence to identify the possible impact of changes to the "IR35" legislation within the sector.

**2. About UCEA and its members:**

- 2.1. The Universities and Colleges Employers Association (UCEA) represents the views of higher education institutions (HEIs) across the UK in their capacity as employers.
- 2.2. UCEA is a membership body funded by subscriptions from 161 HEIs in the UK. As a membership organisation our mission is to represent, negotiate for, and promote the interests of UK HEIs as employers to all stakeholders.
- 2.3. Together HEIs employ some 395,780 people across 161 autonomous universities and higher education colleges in the UK. We have sought the views of our member HEIs in forming this response.

### **3. Summary of UCEA's views**

- 3.1. The proposed use of the Freedom of Information Act (FoIA) definition of the “public sector” ignores the very specific context under which HEIs were included in the Act and the changed landscape in which they now operate.
- 3.2. HEIs are autonomous private bodies, often with charitable status. They are solely responsible for the terms and conditions under which they employ their own staff or engage contractors. This has been recognised in much other legislation. The Office of National Statistics (ONS) does not recognise HEIs to be part of the public sector, nor does legislation such as the Public Sector Exit Regulations. HEIs are not “bodies governed by public law”.
- 3.3. It is inappropriate for the Government to seek to limit the business activities of HEIs when allowing other large private sector employers, including alternative HE providers, to engage services as they see fit. This puts HEIs at a competitive disadvantage in an increasingly competitive environment.
- 3.4. HEIs use off payroll workers in a variety of capacities to deliver highly specialist, highly skilled expertise at short notice where it would be inappropriate for an employment relationship to exist. Visiting specialist lecturers, which can include specialist experts from industry including some of the UK's best architects, engineers, artists and musicians, are often engaged off-payroll. This enriches the student experience and provides a vital link between industry and higher education. The ability to enter such arrangements easily and with minimal costs is essential for HEIs.
- 3.5. The proposals as they are currently drafted will limit such practices and reduce flexibility within the sector by increasing the costs and administrative burden of engaging off payroll workers. Contractors are likely to be discouraged from working in the HE sector. HEIs often need to compete with the private sector for contractors.
- 3.6. UCEA members are also concerned about the potential risks of contractors wrongly classified as “inside” the IR35 rules under the new ESI tool. These staff may seek employment rights, creating additional cost for those institutions challenged by staff who find themselves within scope of the new rules.
- 3.7. UCEA urges the Government to consider using a more appropriate definition of the public sector to that currently proposed. The regulations will have a lasting and damaging effect on the ability of HEIs to compete with the private sector for contractors, limiting their ability to deliver value for money for their students and to maintain a high quality teaching experience with the use of off-payroll experts with exceptional skills.
- 3.8. More appropriate definitions of the public sector have been used for the purposes of legislation relating to either taxation or the ability of a public body to enter into commercial contracts, unlike the FoIA which does not apply to these areas. The proposed off-payroll legislation relates to both of these areas and therefore these definitions are more consistent with the aims of the proposal.

#### 4. Answers to the specific questions posed by the consultation

##### Question 1: Are there other easily understood definitions that work better than the FOI Act and the FOI (Scotland) Act?

- 4.1. Higher education institutions (HEIs) operate in a highly competitive international environment. Funding to the sector has changed significantly since the FoIA was introduced. Just under a quarter of funding for HEIs comes directly from Government. Much of the funding (44%) HEIs receive comes from tuition fees collected by the Government<sup>1</sup>.
- 4.2. HEIs are now operating in a competitive market with alternative providers that are not treated as public bodies, and so are not considered to be within the scope of the FoIA. The Government has signalled its intention to encourage existing alternative providers to expand and new alternative providers to enter the market. It is important that institutions are operating subject to consistent rules. Including HEIs in the off-payroll proposals would be inconsistent with Government policy on HE and would create confusion in the sector.
- 4.3. The proposals ignore the very specific context under which universities are included in the FoIA and the changed environments in which universities are now operating. The use of the FoIA definition to inform the scope of this legislation is therefore inappropriate because it places additional burden on a subset of the higher education sector and reduces the competitiveness of these institutions. Other legislation aimed at the public sector pertaining to contracts or employment does not include HEIs.
- 4.4. HEIs are autonomous private bodies with charitable status. They are solely responsible for the terms and conditions under which they employ their own staff or enter into commercial contracts for services. This has been recognised in numerous other legislation including the “Fair Deal” provision for public sector pensions, which specifically **excludes** higher education:

*“...HE and FE institutions are private sector bodies [...] the Government is not involved in setting the terms of employment for staff in these bodies and is taking further steps to increase the level of autonomy they enjoy. It would not be consistent with this policy to seek to impose conditions on the terms of employment of staff”<sup>2</sup>*
- 4.5. In this case, it is not the ability of setting terms of employment being limited but the ability of HEIs to engage services on a business to business basis. It is inappropriate for the Government to seek to limit the business activities of HEIs when allowing other large private sector employers to engage services as they see fit.
- 4.6. We propose two alternative, well-tested definitions:

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<sup>1</sup> Universities UK, “University Funding Explained”, July 2016, <http://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2016/university-funding-explained.pdf>

<sup>2</sup> March 2014 Letter from Chief Secretary to the Treasury Danny Alexander to Frances O’Grady, Trades Union Congress

**Entities classified within the central and local government and non-financial public corporation sectors as determined by the Office for National Statistics for National Account purposes (ONS definition).**

- 4.7. This definition of the public sector is well used and understood. It is used within the “Fair Deal” provision for the transfer of public sector pension provision to the private sector under the Transfer of Undertakings (Protection of Employment) regulations (TUPE). It is also used by the proposed Public Sector Exit Regulations (2016). This definition is already used within legislation and codes of practice within the civil service.
- 4.8. The ONS is reviewing its classification of HEIs due to the increased tuition fees that students now pay. This is expected to clarify further that HEIs are not part of the public sector.

**“Bodies governed by public law” as defined by Article 13(1) of the VAT Directive as adopted into UK tax legislation.**

- 4.9. This definition also excludes Higher Education. It is well established and sets out characteristics which have already been tested under case law, which have definitively established that HEIs are not “bodies governed by public law”. A body will only satisfy this criterion if it is a public sector body which forms a part of the UK’s public administration, such as a government department, a local authority or a non-departmental public body.
- 4.10. Both of the above definitions have been used as the standard definitions of the public sector for the purposes of legislation relating to either taxation or the ability of a public body to enter into commercial contracts, unlike the FoIA which does not apply to these areas. The proposed off-payroll legislation relates to both of these areas and therefore these definitions are more consistent with the aims of the proposal.

**Question 2: Are there any public sector bodies which are not covered by the FOI acts which should be included in the definition for the proposed rules?**

- 4.11. See answer to question 3 below.

**Question 3: Should private companies carrying out public functions for the state be included in this definition? Why?**

- 4.12. No. We do not support the proposed use of the FoIA definition, nor any definition that seeks to apply the rules more widely than this. In seeking to apply the rules to a broader group of workers than this, it may be more appropriate to apply the rules to the entirety of the private sector instead to ensure a level playing field when engaging off-payroll workers. UCEA is doubtful whether such an approach is feasible or desirable, especially given recent research by HMRC which suggests a limited appetite for new legislation in this area. Instead we recommend a limited, well targeted definition of the public sector.

**Question 4: Are there any public bodies caught by this definition who would face particular impacts which should be considered?**

- 4.13. UCEA believes that applying these rules to the HE sector will have an impact on teaching and will also create significant cost issues for the sector at a challenging time.
- 4.14. HEIs use off-payroll workers in a number of contexts. These workers are often highly skilled specialists engaged in short term projects where it would not be appropriate or cost effective to hire an employee.
- 4.15. Most commonly, UCEA members reported that off-payroll workers were used in the following areas
- Highly specialist or highly skilled work for a short duration
  - Specialist project management
  - Teaching and visiting specialist lecturers, especially from industry
- 4.16. HEIs have to compete with the private sector for the best talent. The application of these rules to the HE sector will have the dual effect of increasing costs for the sector and making roles less attractive for potential contractors who can obtain less restrictive contracts in the private sector. Off-payroll workers and their agencies are likely to charge higher fees to cover the additional costs of the measure for them, and an increased administrative and tax burden for HEIs is likely in addition to this.
- 4.17. HEIs have an obligation to ensure that they are delivering the best value for money to their students. This proposal would put the ability of HEIs to do this in jeopardy, or worse, could prevent or discourage the use of flexible, specialist staff within HEIs.
- 4.18. This would be especially problematic in the case of visiting specialist lecturers, where they are engaged off payroll. These are usually temporary or occasional lecturers with specialist industry expertise, used to deliver a richer student experience in certain courses. HEIs are concerned that they may no longer be able to attract this expertise. Visiting specialist lecturers such as esteemed architects or engineers provide a vital link to industry for students. These lecturers do not want to be employed and engaging them via a limited company is entirely legal and appropriate. Their engagements with HEIs are typically not their primary employment or source of income.
- 4.19. The flexibility and agility of off-payroll workers is essential to the success of HEIs in the UK. The proposal, if implemented, will mean it will take much longer to engage off-payroll workers, be more expensive to do so and require significant development or outsourcing of payroll systems to ensure that tax is correctly deducted. All of these issues will put HEIs at a competitive disadvantage with the private sector.

**Question 5: Are rules needed to ensure that engagers have the information they need to make the decision? If so, what should they be?**

- 4.20. The proposal relies on engagers having accurate and verifiable information to make a decision on an individual's employment status. Such information will be difficult to acquire in advance of a contract and creates potential data protection issues for HEIs.

- 4.21. The nature of a role may change over time and it can be difficult to know what the working relationship will be like in practice. HEIs and other engagers can therefore rely solely on the contract to set expectations about employment status. Rules will be needed to limit the liability of engagers where inaccurate information has been provided, or where the nature of the contractual relationship has changed. We suggest that a review period, for example of six months, be included.

**Question 6: How would accounting for the 5% allowance work in practice?**

- 4.22. It is not clear how the 5% allowance will work in practice, or whether payroll systems providers will have software that can deal with this kind of payment.
- 4.23. The 5% allowance for business expenses is potentially complex to administer for payroll purposes. It also creates confusion as to whether the total earnings are taxable. An alternative approach is to allow individuals caught by the proposed regime to reclaim their tax expenses separately, rather than via the engager/employer. This would significantly reduce the complexity of the measure for engagers for payroll administration purposes.

**Question 7: Are there business costs specific to PSCs that are covered by the 5% that aren't covered under the usual business expense rules?**

- 4.24. It is unclear what issue this question is seeking to address. Either an individual is operating a business supplying services (or is self-employed), in which case they are able to claim for legitimate business expenses, or they are not.

**Question 8: Does the first part of the test work to quickly rule out engagements that are clearly out of scope?**

- 4.25. We suggest that a test is introduced for shorter term contracts with no prospect for renewal within a particular time period, ruling out short term contracts where it is unlikely the relationship is one of employment.
- 4.26. The level of detail which is likely to be required from PSCs being engaged by HEIs is considerable. Collecting, storing, and analysing these data is likely to create a significant cost and administrative burden. It will also raise data protection issues.

**Question 9: Are these the right questions in the right order of priority?**

- 4.27. UCEA is concerned about the emphasis being placed on “substitution”/ right to personal service in the second gateway as a suitable test for determining an individual’s employment status for tax purposes. Although a test of the genuine right to send a substitute can be relevant in some instances, this should be considered in the round alongside other factors. In the case of visiting specialist lecturers at HEIs, the ability to send a substitute would clearly not be appropriate as it is the specific expertise of that particular individual which is desired. However such an individual would clearly not be an employee. The rules and test should ensure that such examples do not fall within IR35.

**Question 10: Are the questions simple to understand and to use?**

- 4.28. The second gateway test asks about “control”. There is a risk that users of this test could interpret it too broadly.

- 4.29. We suggest that “*Does the engager decide or have the right to decide how the work should be done*” should become “*Does the engager decide or have the right to decide **substantively or significantly** how the work should be done*”. Such a change would rule out situations where *some* control is exercised over how the work is done.
- 4.30. For example, a visiting lecturer would be told where they could teach, may be told to use a particular template for slides or printed materials, and they may also be told how long sessions should run for and what key aspects of a course they should cover. All this could be interpreted as control to some degree but it is not substantive control – ultimately the lecturer is still responsible for how the work is done and for what content is delivered.

**Question 11: Do the two parts of test give engagers certainty on day one of the hire?**

- 4.31. The second part of the test, which asks about “right to personal service”, is too broad. In particular right to personal service (a lack of a right to substitution) is not a definitive indicator of an individual’s status under IR35, nor is it a pointer one way or the other.
- 4.32. Some aspects of the relationship between the engager and the worker are likely to change throughout the contract, including the degree of control being exercised.

**Question 12: How can the organisation completing the tests ensure they have the information to answer the questions?**

- 4.33. HEIs are large employers. Information sharing strategies will need to be in place between payroll and HR teams. This will mean it is likely to take longer for an individual to start work as the tests are worked through. Often, individuals are engaged via PSC on short notice, with a requirement to start work in days rather than weeks as is more usual for employees.

**Question 13: How could the new online tool be designed to be simple and straightforward to use?**

- 4.34. Any online tool should be able definitively to exclude those to whom the legislation does not, or is highly unlikely to, apply. Both parties, the engager and the contractor, should be able to complete the process so that it is clear where liability would fall for false or inaccurate information.

**Question 14: Where should the liability for tax and National Insurance (and penalties and interest where appropriate) fall when the rules haven’t been applied correctly?**

- 4.35. As now, liability should fall on the PSC. Liability should only fall on engagers where reasonable care has not been taken to establish the facts of the relationship.
- 4.36. Alternatively, liability should be jointly held. If an individual is deemed to be “inside” IR35, the liability for the engager should be limited to unpaid Employer’s NICs and any associated penalties. The PSC should be liable for unpaid Employee’s NICs and Income tax payments, less any business related expenses. This would ensure that both parties have to work together to operate within the rules.

**Question 15: Should the liability move to the PSC where the PSC has given false information to the engager?**

4.37. Yes.

**Question 16: What one-off and ongoing costs and burdens do you anticipate will arise as a result of this reform?**

4.38. One-off costs will include costs associated with changes to payroll systems, costs for any legal advice to change existing contracts with suppliers and review of arrangements, and costs associated with any outsourcing of either of these processes.

4.39. Ongoing costs will include the additional time it will take to engage a PSC, the likely costs of any specialist recruitment solution to engage PSCs (we envisage an increase in the use of agencies to limit the HEI's exposure), the likely higher rates that PSCs and their agencies will charge, and the potential apprenticeship levy costs of the new measure. There is also the possibility of tribunal costs should a PSC challenge their employment status as a result of change to their deemed employment status.

## **5. Conclusion**

5.1. UCEA strongly urges the Government to reconsider the definition of the public sector that is proposed to be used in this legislation.

5.2. Applying these proposals to the HE sector will severely restrict the ability of HEIs to compete with other private sector businesses for the best talent in areas such as finance, IT and project management, where expertise may be needed at short notice.

5.3. It will also restrict the ability of institutions to engage visiting specialist lecturers, particularly from industry. These lecturers form a vital part of the student experience. They often need to be engaged on a flexible, short-term basis in response to course demand.

5.4. Higher Education Institutions are not part of the public sector:

**Funding:** HEIs receive increasingly limited funding from central Government, making up just over a quarter of the total funding mix, with most of this funding research projects.

**Competition:** HEIs increasingly have to compete with alternative HE providers. The introduction of the Higher Education Act will further decrease the amount of funding from Government and increase the amount of competition. HEIs therefore operate in an increasingly market driven environment, more so than when the FoIA definition was first developed.

**Autonomy:** HEIs are solely responsible for the terms and conditions under which they employ staff, and are free enter into commercial arrangements just like any other private sector body. No other legislation which applies to the public sector limits the ability of HEIs to operate freely in these areas.

**History:** There is limited precedent for considering HEIs to be part of the public sector. Most existing legislation explicitly excludes HE from the public sector, with the notable exception of the Freedom of Information Act. With the recent changes to the sector brought about by the Higher Education Act, there is more reason than ever for the HE sector to be seen as outside the public sector. The Government has previously acknowledged that HEIs are autonomous private sector bodies. HEIs are also exempt charities.

- 5.5. UCEA also has concerns about the considerable cost pressures and administrative burdens this proposal would create were it to include the HE sector.
- 5.6. We strongly urge the Government to reconsider the scope of these proposals and use a more appropriate definition of the public sector.

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