

# HIGHER EDUCATION ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS AND SCHEDULES

#### Part 3 – Student Fees and Fair Access

##### Imposition of conditions as to fees

39. [Sections 23](#) and [24](#) replace section 26 of the Teaching and Higher Education Act 1998 in relation to England (for provision relating to Wales see sections 27 and 28). They require the Secretary of State, when making grants to the Higher Education Funding Council for England (HEFCE) or the Teacher Training Agency (TTA), to impose a condition that the body to which the grant is made, when making a grant to an institution, in turn imposes the following condition:
- For institutions with an approved plan, the condition is that the fees payable do not exceed the amounts specified in the plan, and also that the institution complies with the rest of the plan. The fees set out in the plan may not exceed the fee cap set by regulations, referred to in the legislation as ‘the higher amount’.
  - For institutions without an approved plan, the condition is that fees do not exceed the ‘basic amount’ (equivalent to the present standard fee) which will also be specified in regulations.
40. The condition must set out that, for institutions with an approved plan, if the fee limit in the plan is exceeded, HEFCE or TTA are to impose financial sanctions at the direction of the Director of Fair Access to Higher Education relating to the institution’s grant, unless fees exceed the higher amount. In that case, in addition to any sanction imposed by the Director, HEFCE may impose sanctions, the principles governing which will be set out by the Secretary of State. In addition, where the conditions of the plan other than those relating to fee levels are breached, the Director may direct HEFCE or TTA to impose financial requirements.
41. Similarly, HEFCE may impose sanctions on any institution without an approved plan which charges fees higher than the basic amount.
42. [Section 24\(6\)](#) provides that the basic and higher amounts are to be prescribed by regulations made by the Secretary of State.
43. [Section 25](#) makes a transitional provision which prevents fees above the basic amount being charged for students receiving offers of a place in 2005, whether for immediate entry or for deferred entry in 2006, or for students unable to accept a place in sufficient time because of the delay caused by a successful appeal against A-level results affecting entry to higher education.
44. [Section 26](#) provides that the first regulations under section 24(6) setting the basic and higher amounts must be laid in draft and approved by a resolution of each House of Parliament. The same procedure will apply to any further regulations increasing the basic amount by more than is needed to keep up with inflation. Section 26 also provides that once the first set of regulations setting a higher amount have been made, that amount

cannot be raised in real terms until 2<sup>nd</sup> January 2010 at the earliest. After that date, regulations raising the higher amount in real terms can only be made once a resolution has been passed in both Houses that the amount should be raised to a specified level.

45. [Sections 27](#) and [28](#) provide for an equivalent system in Wales, where the National Assembly may impose an equivalent condition on the Higher Education Funding Council for Wales, and in place of the Director, a plan must be approved by the relevant authority, a body which the National Assembly may designate as set out in section 30. The power to designate the relevant authority in Wales includes power to modify any enactment as necessary or expedient in connection with the designation. This is to ensure that whatever body the Assembly may choose to designate is able to carry out its functions effectively.
46. [Section 29](#) re-enacts provisions in section 26 of the Teaching and Higher Education Act 1998 covering the exclusion of international students from the provisions limiting fees, restrictions on the Secretary of State's power to discriminate between certain classes of courses in prescribing descriptions of courses covered by these sections, and disappling some elements of previous Acts with respect to these sections.

### **Plans authorising fees of more than the basic amount**

47. Before higher fees can be charged, a plan will have to be approved by either the Director of Fair Access to Higher Education (in England), or the body specified by the National Assembly for Wales. The Director and any body specified by the National Assembly are referred to in Part 3 of the Act as the "relevant authority" (see section 30). The Secretary of State (or the National Assembly) has the power to make regulations setting out what must be contained in these plans. The plan will have to make clear what the maximum fee charged for each course will be. Section 31 creates the Director of Fair Access to Higher Education, who will be appointed by the Secretary of State, to operate this system in England. It also makes clear that his role is to include identifying and promoting good practice in relation to the promotion of equality of opportunity in access to higher education.
48. [Section 32](#) requires the Director to perform his duties in such a way as to promote and safeguard fair access to higher education. The section provides that in performing his functions, the Director must protect academic freedom, including the freedom of institutions to determine the contents and manner of teaching of their courses, and to determine their own admissions criteria.
49. [Section 33](#) makes provision about the contents of plans. It sets out that plans must specify, or provide for the determination of, a fee limit for each qualifying course. For England, plans must also include any provisions relating to the promotion of equality of opportunity which are required by regulations. In Wales, a plan must also include provisions related to the equality of opportunity or the promotion of higher education, as required by regulations.
50. [Section 33\(5\)\(a\)](#) allows regulations to require institutions to include in their plans provision for outreach measures. These are measures, such as the provision of summer schools or work with schools and colleges, which are designed to widen participation by attracting students who might otherwise not consider entering higher education at all or not consider applying to particular institutions. The reference to under-represented groups in the provision is not intended to have a strict statistical interpretation.
51. Examples are given in section 33(5) of other matters which regulations may require to be included in the plans, such as requiring financial assistance to be provided to students or requiring the institution to set out its own objectives. Section 33(6) makes clear that regulations may not require plans to contain measures referring to particular courses or the manner in which they are taught or relating to admissions criteria.

52. [Section 34](#) provides that the relevant authority must exercise its functions in accordance with regulations which may, in particular, specify what the relevant authority must, or may not, have regard to in approving a plan. Regulations under this section may also require institutions to publish their plans. The relevant authority may issue guidance to institutions.
53. [Sections 35](#) and [36](#) enable regulations to set out the maximum period a plan can be in force, and enable plans to be varied with the approval of the relevant authority. Plans must specify the period during which they are to be in force.
54. [Section 37](#) provides that the Director may, if an institution breaches the conditions of its plan, direct HEFCE or TTA to impose financial sanctions relating to their grant on the institution, or refuse to renew the plan for a specified length of time. The Director may not apply such a sanction if an institution can demonstrate that it has done all it reasonably could to comply with the provisions of its plan.
55. The Secretary of State may make regulations setting out the nature of the financial penalties the Director may apply, and the procedures for using these sanctions.
56. [Section 38](#) provides that, in Wales, the relevant authority may refuse to renew a plan for a specified length of time if the conditions of the plan are breached. This is in addition to any financial requirements that may be imposed by HEFCW under section 28.
57. [Section 39](#) provides that regulations about the approval of plans, variation of plans, or imposing sanctions, in both England and Wales, must include provision for a mechanism for review of the relevant authority's decisions on those matters.

### **Supplementary**

58. [Section 40](#) provides that HEFCE or TTA will be required to provide information to the Director if requested, and likewise the Director will have to provide information to HEFCE and TTA at their request.
59. [Schedule 5](#) sets out detailed arrangements regarding the Director of Fair Access. It contains detailed provisions regarding the arrangements for his appointment and dismissal. These include provision that the appointment is to be for no more than three years at a time, and provision conferring on him the power to appoint staff. It also gives the Secretary of State power to fund the Director, and requires the Director to keep proper accounts.
60. The Schedule also requires the Director to provide the Secretary of State with an annual report on how the Director has performed his functions. The Secretary of State must lay a copy of the report before Parliament. The Director must then publish the report. Special reports can also be required from the Director by the Secretary of State, dealing with matters related to access to higher education. For instance, a report could be requested asking for an overview of the effect of plans on widening participation over a specified period.