

# HIGHER EDUCATION ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS AND SCHEDULES

#### **Part 1 – Research in Arts and Humanities**

23. Research in the arts and humanities is at the time of enactment partly funded by the Arts and Humanities Research Board (AHRB). This is a company limited by guarantee which has charitable status, and receives its funding through the Higher Education Funding Council for England, the Higher Education Funding Council for Wales, the Scottish Higher Education Funding Council, and the Department for Employment and Learning in Northern Ireland.
24. Research in the sciences and social sciences is at the time of enactment partly funded by seven research councils established by Royal Charter. These research councils receive money from the Office of Science and Technology under the Science and Technology Act 1965. That Act also contains various other provisions relating to the existing research councils, including requirements to keep accounts and records, and to provide reports to the Secretary of State.
25. The intention of the Act is to put arts and humanities research on the same footing as research in the sciences and social sciences, and so a new Arts and Humanities Research Council (AHRC) is to be established by Royal Charter. This Council will take over the funding of research in the arts and humanities that is currently carried out by the AHRB. Part 1 of the Act contains provisions relating to the AHRC which are similar to those in the Science and Technology Act 1965 relating to the existing research councils.
26. [Section 2](#) provides for the transfer of the property, rights, and liabilities of the AHRB to the AHRC.
27. [Section 3](#) authorises the Secretary of State to fund the AHRC. This funding will be provided through the Office of Science and Technology, as is the case for the existing research councils.
28. [Section 7](#) makes the AHRC a reserved matter in respect of Northern Ireland. It is intended that the AHRC should be a reserved matter in respect of Scotland as well. This is to be achieved by an Order in Council under section 30 of the Scotland Act 1998. As regards Wales, functions in respect of the AHRC are not to be exercisable by the National Assembly. As a result, the United Kingdom government will remain exclusively responsible for the AHRC.
29. [Section 10](#) gives the Secretary of State the power directly to fund arts and humanities research, in addition to that which may be funded by the AHRC itself. Corresponding power is provided for the National Assembly for Wales, the Scottish Ministers, and the relevant department in Northern Ireland, in relation to Wales, Scotland, and Northern Ireland respectively.

## **Part 2 - Review of student complaints**

30. Those universities and colleges which were originally established by Royal Charter have Visitors who exercise a supervisory role over an institution's domestic affairs, including ruling on complaints by students which cannot be resolved through an institution's internal procedures. The Visitor of most universities is the Crown acting through the Lord Chancellor or the Lord President of the Privy Council. Other Visitors are eminent people who are either specified in the Charter or appointed by the governing body. Rulings of the Visitor are binding on institutions and courts will only intervene in such matters in very limited circumstances. New universities and higher education colleges do not have Visitors and unresolved complaints by students can be taken to the courts.
31. **Section 20** provides that Visitors of qualifying institutions will no longer have any jurisdiction over student complaints, including complaints about admissions to qualifying institutions as a student. Section 46 also removes the jurisdiction of the Visitor over staff disputes.
32. **Section 13** gives the Secretary of State and the National Assembly for Wales the power to designate a body corporate that operates a student complaints scheme for England or Wales respectively. The scheme must provide for the review of qualifying complaints as defined by section 12. These are complaints against qualifying institutions which are made by individuals as students or former students at those institutions (or students studying towards an award from a qualifying institution), except those which relate to matters of academic judgement. The complaint must relate to the acts or omissions of the qualifying institution. Section 11 sets out the qualifying institutions that will be subject to the scheme, which include all universities in England and Wales, constituent colleges of universities such as the colleges of the Universities of Oxford and Cambridge, higher education corporations and institutions designated by the Secretary of State or the National Assembly for Wales as eligible to receive funds administered by a higher education funding council.
33. **Section 13** sets out certain conditions that must be met before the Secretary of State, or the National Assembly, may designate a body that operates a student complaints scheme. These conditions include a requirement for the body in question to comply with Schedule 1 and for the provisions of the scheme that it operates to comply with Schedule 2. The reviewer of student complaints under the scheme may make recommendations to an institution, which are non-binding. Paragraph 12 of Schedule 2 enables the Secretary of State, or the National Assembly for Wales, to amend the Schedule by regulations. These powers will enable the Schedule to be modified (for example, in order to respond to changing circumstances or to make the scheme more effective). In this Part of the Act a body that is designated under section 13 is referred to as the "designated operator" (see subsection (5)(b) of that section). A scheme may relate to institutions other than qualifying institutions. Where this is the case, the provisions of the scheme that apply to complaints against other institutions do not need to meet the requirements of Schedule 2.
34. **Section 15** requires the governing bodies of qualifying institutions to participate in a scheme provided by the designated operator. This means complying with any obligation placed on them by the scheme (including any obligation in respect of payments to the operator).
35. **Section 14** provides that as long as a body remains the designated operator it must comply with the duties set out in Schedule 3.
36. **Section 16** and Schedule 4 give the Secretary of State and the National Assembly for Wales the power to terminate the designation of a body as the designated operator in certain circumstances. Schedule 4 provides that the Secretary of State or the National Assembly for Wales can give notice of termination if the operator no longer meets the conditions for designation. The designated operator may also give notice of its intention

to cease operating the scheme. Where an agreement or notice to terminate an operator's designation has been made or given, or the operator has ceased to exist, the Secretary of State, or the National Assembly for Wales, can make alternative transitional provision, including provision as to payments, by regulations under section 18.

37. **Section 17** provides privilege in relation to defamation in connection with the review of student complaints.
38. **Section 19** provides that the time limit of six months for bringing certain discrimination proceedings under the Sex Discrimination Act 1975, the Race Relations Act 1976, or the Disability Discrimination Act 1995 shall be extended by two months in cases where the complaint is referred under the student complaints scheme before the end of the six month period.

### **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.

## **Part 4 - Student Support**

### **Effect of bankruptcy**

61. In England and Wales, student loans are currently provided under regulations made under section 22 of the Teaching and Higher Education Act 1998. Previously, student loans were provided under arrangements made under the Education (Student Loans) Act 1990. Although loans can no longer be provided under the 1990 Act, some loans made under it are still outstanding.
62. In section 42, subsection (1) inserts a new paragraph (f) into section 22(3) of the 1998 Act. With this new paragraph, it will be possible for regulations under section 22 to include provision relating to the effect of bankruptcy on the liability to repay student loans provided under the 1998 Act. It is intended to use this power to ensure that the liability to repay student loans is not cancelled by the bankruptcy of the



borrower. Regulations under section 22(3)(e) of the Teaching and Higher Education Act 1998 already provide that funds advanced under student loans cannot be taken by a student's trustee in bankruptcy to pay off other debts. By virtue of section 42(2), the new paragraph (f) will extend to Northern Ireland, as well as to England and Wales. Subsections (3) and (4) of section 42 make amendments of the Education (Student Loans) Act 1990 relating to the effect of bankruptcy.

63. The changes made by section 42 will not affect the position of any borrower whose bankruptcy commences before the section comes into effect.
64. By virtue of section 281 of the Insolvency Act 1986, when a bankrupt is discharged, he is released from all his bankruptcy debts. The amendment to section 22 of the 1998 Act, together with the regulations proposed to be made under section 22 as amended, and the amendment of the Education (Student Loans) Act 1990, will have the effect of excluding student loans from bankruptcy debt. It follows that student debt in relation to both types of loan will not be written off on discharge from bankruptcy.

### **Other amendments of Teaching and Higher Education Act 1998**

65. [Section 43](#) makes two further amendments to section 22 of the Teaching and Higher Education Act 1998. Subsection (2) amends subsection (2)(i) of section 22. It provides that a loan payable to a student may be paid direct to the institution at which the student is studying. Where the loan is being provided to cover fees, rather than living costs etc., it may be desirable to pay it direct to the institution concerned. This is a key part of the machinery for students to defer payment of their fees by taking out income contingent loans on which no interest will be charged in real terms.
66. Subsection (3) amends section 22 of the Teaching and Higher Education Act 1998 by omitting subsection (7) of that section, thereby removing the requirement for affirmative resolution procedure in the case of regulations raising any grant in respect of fees by more than the rate of inflation. In the 1998 Act, the maximum amount of the grant actually sets the fee itself, so this requirement was intended to prevent the fee being raised by more than inflation without an affirmative resolution. In this Act, the basic and higher amounts are set independently of the grant for fees, and affirmative resolution procedure is required for any above inflation increases of the fees. This means that it is no longer necessary to apply the affirmative resolution procedure to any grant in respect of fees in order to preserve the original intent. This change will mean that the level of grant for fees is treated in the same way as other amounts in the student support regulations.

### **Transfer of certain functions to National Assembly for Wales**

67. [Section 44](#) transfers to the National Assembly for Wales the majority of regulation-making powers in respect of student support contained in the 1998 Act. Certain functions are not transferred, for example those powers whose use is connected with taxation and bankruptcy, which are UK-wide matters. The Assembly intends in practice to make regulations affecting students who have a prescribed connection with Wales when they start their course, regardless of the location of the institution at which they are studying and of their place of residence after graduation.

### **Supply of information held by student support authority**

68. [Section 45](#) permits the Secretary of State to make regulations allowing student support authorities to supply information collected in connection with the operation of the student support scheme to prescribed persons, with the consent of the individuals in relation to whom information is to be supplied. The intention is to be able to simplify the interactions of citizens with other government or higher education organisations. The regulations will specify the conditions under which information may be supplied including what information may be supplied and the organisation to which it may be

*These notes refer to the Higher Education Act 2004  
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supplied. They may also specify further constraints such as restrictions on passing on information received and the manner in which consent must be obtained.

69. The effect of the provisions in relation to Wales is that the regulation-making powers can be effectively exercised by the Assembly only after the student support functions have been transferred to it. Prior to this, the Assembly will have no functions relating to the operation of the student support scheme and, accordingly, can hold no student support information (as defined in the section).

**Part 5 – Miscellaneous and General**

70. This Part contains general provisions including those relating to the exercise of powers to make orders and regulations; commencement; extent; and short title.
71. These include provision at section 46 which excludes from the visitor's jurisdiction all staff disputes related to employment and such other staff disputes as could be brought before a court or tribunal (including by an application for judicial review). The matters excluded cover the substance of such disputes and the application to them of the internal laws of the institution concerned (including the application and interpretation of its statutes). This provision supersedes the more limited exclusion in section 206 of the Education Reform Act 1988.