

EXPLANATORY MEMORANDUM (SUPPLEMENTARY) TO

THE HIGHER EDUCATION AND RESEARCH ACT 2017 (CONSEQUENTIAL, TRANSITIONAL, TRANSITORY AND SAVING PROVISIONS) REGULATIONS 2018

2018 No. 245

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education (the “Department”) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument makes certain consequential, transitional, transitory and saving provisions in relation to the commencement of the Higher Education and Research Act 2017 (the “Act”). The main purpose of these provisions is for the Office for Students (OfS) and UK Research and Innovation (UKRI) (as applicable) to take on the statutory functions of the Higher Education Funding Council for England (HEFCE) and the Director of Fair Access to Higher Education (the “Director”) between 1 April 2018 and 31 July 2019 i.e. during the rest of academic year 2017/18 and the whole of academic year 2018/19. Through the Higher Education and Research Act 2017 (Commencement No. 3) Regulations 2018 (the “Commencement No. 3 Regulations”) HEFCE and the Director will cease to exist, albeit it is considered necessary to keep their functions alive and for the OfS to operate those functions for the above period. That is in order to ensure a smooth transition to the new regime of registration of higher education providers, administered by the OfS.
- 2.2 This instrument also includes: (i) provisions so that any specified consultations, authorisations, appointments, information or notices made or provided by certain research councils are deemed to have been made or provided by or to UKRI; (ii) provision to construe references to “registered higher education providers” in sections 64 and 65 of the Act as references to “English higher education providers”, (iii) provision so that final accounts for HEFCE and the Director can be prepared; (iv) provision to ensure the Parliamentary Commissioner for Administration can investigate complaints in relation to the Director and HEFCE as if they were complains against the OfS or UKRI (as applicable); and (v) amendments to confer on the OfS HEFCE’s principal regulator function under the Charities Act 2006.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland and is not a financial instrument that relates exclusively to England, Wales or Northern Ireland.

4. Legislative Context

- 4.1 The Act establishes the OfS as the regulator for English higher education providers. Primarily it will perform this role by establishing and maintaining a register of higher education providers. In doing so the OfS will impose conditions of registration to ensure that providers satisfy minimum requirements in the provision of higher education. In performing the registration functions and its other functions the OfS is required by section 2 of the Act to have regard to the need to promote greater choice and opportunities for students, equality of opportunity, competition for the benefit of students, quality and value for money. Additionally, the OfS must have regard to the need to protect the institutional autonomy of English higher education providers.
- 4.2 The Commencement No. 3 Regulations will be laid at the same time as this instrument. These commencement regulations will commence further provisions of the Act, such as various parts of schedule 11 on 1 April 2018, after which HEFCE and the Director will cease to exist. Other provisions will allow the OfS to: (i) impose initial and ongoing registration conditions, (ii) register providers, (iii) approve access and participation plans, (iv) grant and revoke degree awarding powers, and (v) suspend or deregister a provider where they breach an ongoing registration condition (all subject to the transitory provisions in this instrument). These regulations will also commence provisions that establish UKRI in Part 3 of the Act.
- 4.3 Section 116 of the Act provides that the Secretary of State may make such provision as appears to the Secretary of State to be appropriate in consequence of any provision made by or under this Act to amend, repeal, revoke or otherwise modify primary or secondary legislation. This instrument does not amend, repeal or revoke a provision of primary legislation or of a Royal Charter. As described in more detail below the OfS will replace HEFCE as the principal regulator of English higher education exempt charities.
- 4.4 Section 117 of the Act provides that the Secretary of State may make such transitional, transitory or saving provision, as the Secretary of State considers appropriate in connection with the coming into force of any provision of the Act. As described in more detail below, extensive transitional arrangements will cover the period from 1 April 2018 to 31 July 2019. During this transition period, the OfS will continue to operate the existing regulatory framework by exercising the functions of HEFCE, and the Director. Where relevant, regarding HEFCE's research funding and knowledge exchange functions will be exercised by UKRI during the transitional period.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 The Role of the Office for Students: The higher education sector in England has undergone significant change over the last thirty years. The regulatory architecture was designed in the early 1990s for an era of limited university competition, student number controls and majority public grant funding that has now passed. That is why a new regulator, the OfS, is being set up. The OfS will regulate English higher education providers, replacing HEFCE and the Director. The OfS will under the new regime regulate both current HEFCE funded providers as well as Alternative Providers, which are currently regulated by the Department for Education, and undergo specific course designation to enable their students to access student support.
- 7.2 OfS's regulatory powers and the regulatory framework: Under the Act, the OfS must establish and maintain a register of English higher education providers, and may divide that register into different parts, representing different categories of registration. Registration is not compulsory for those who provide higher education in England. However, those who apply to register will, if successful, be able to enjoy certain benefits that will not be available to non-registered providers (for example, certain registered providers' students will be able to access publicly funded student loans). Once initial registration conditions have been met and a provider is added to the register, the OfS may attach general and specific ongoing conditions to categories of registration (or to different descriptions of providers).
- 7.3 The Role of UK Research and Innovation
- UKRI is the UK's new research and innovation funding body that will bring together the seven research councils, Innovate UK, and a new organisation, Research England. Research England will work closely with its partner organisations in the devolved administrations. UKRI will help to ensure that the UK maintains its world-leading position in research and innovation, building on the successful elements from the current funding system: dual support (block grants through Research England and competitive grants through research councils), funding based on peer review, Innovate UK's business focus, the UK's world class institutes, and industrial research and development.
- 7.4 Background to the consequential and transitory provisions in these regulations:
- The Commencement No. 3 Regulations commence sections 81 and 82 of the Act along with various parts of Schedule 11, meaning HEFCE and the Director will cease to exist from April 2018. The OfS will take on the majority of their statutory functions during the rest of academic year 2017/18 and the whole of academic year 2018/19 i.e. until 31 July 2019. UKRI will exercise those functions of HEFCE relating to research funding and knowledge exchange. This will have the effect of preserving the existing system under the auspices of the OfS and UKRI, where relevant, for a time limited transitional period during which all providers will also be entitled to apply to register with the OfS from 1 April 2018. This timescale should give providers sufficient time to apply and for the OfS to register them before autumn 2018 in time for providers to make clear their registration status when they start to recruit students for the academic year 2019/20 (the first academic year in which the new system will operate). This transitional period will come to an end on 31 July 2019 at which point the existing functions of HEFCE and the Director will fully cease to exist to be replaced entirely for the academic year 2019/20 by the new OfS regulatory framework. Pursuant to

section 97 of the Act, UKRI through Research England, will then be able to provide research funding to registered providers.

- 7.5 The transitional provision within this instrument enables the OfS and, where relevant, UKRI to continue the functions that HEFCE and the Director would normally carry out, which includes the regulation of current HEFCE funded providers (which is separate to the OfS's regulatory functions). These functions are set out in the Further and Higher Education Act 1992 and the Higher Education Act 2004. Things done by HEFCE or the Director will be treated as if done by the OfS or UKRI (as applicable). While registration with the OfS can be applied for, Alternative Providers will continue to be regulated until the same date by the Department, using the Secretary of State's powers to designate institutions for student support (as they are at present) during this period.
- 7.6 This instrument also makes provisions that enable the OfS to prepare HEFCE and the Director's accounts for their last financial year of operation (the financial year ending on 31 March 2018) as these accounts can only be prepared after that date, at which point HEFCE will cease to exist. It also enables the Parliamentary Commissioner for Administration to investigate complaints in relation to the Director and HEFCE, when the OfS and UKRI (as applicable) take over their functions.
- 7.7 Transitory provisions construe references to "registered higher education providers" in sections 64 and 65 of the Act as references to "English higher education providers". This means that English higher education providers, which are not yet registered, can still be taken into consideration when information is compiled and published for the transitional period.
- 7.8 This instrument also makes consequential amendments to the Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2010 in order to confer HEFCE's principal regulator function on the OfS. This provision will mean that higher education providers that are also exempt charities will be principally regulated by the OfS in relation to their charitable status, instead of the Charity Commission.

8. Consultation outcome

- 8.1 Legislation does not require consultation on this set of regulations and we do not consider the information requirements laid out in this regulation to be controversial.
- 8.2 However, the Department has recently consulted on the OfS' regulatory framework, as is required in section 75 of the Act. The title of this consultation is: 'Securing student success: risk based regulation for teaching excellence, social mobility and informed choice in higher education'. The outcome of this consultation is not linked to policy decisions made in relation to these regulations.

9. Guidance

- 9.1 These regulations do not require further guidance being issued.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies has previously been assessed as part of the Act's enactment stage impact assessments.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses. The impacts on small businesses have been assessed in the small and micro business assessment as part of the Act's enactment stage impact assessments.

12. Monitoring & review

- 12.1 This instrument ensures a smooth transition to the new regulatory regime for higher education. A review is therefore not appropriate.

13. Contact

- 13.1 Tom Worthington at the Department for Education, telephone: 07388 372223 or email: Thomas.worthington@education.gov.uk , can answer any queries regarding the instrument.