

EXPLANATORY MEMORANDUM TO
THE HIGHER EDUCATION (ACCESS AND PARTICIPATION PLANS)
(ENGLAND) REGULATIONS 2018

2018 No. 470

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument makes provision under the Higher Education and Research Act 2017 (“HERA”) in relation to access and participation plans. In particular, it sets out the mandatory content requirements and the procedures for the approval and variation of access and participation plans. Under HERA, higher education providers that are on the register to be maintained by the Office for Students (“OfS”), and are subject to a fee limit and charging tuition fees above the basic amount, must have an access and participation plan approved by the OfS. Access and participation plans will need to set out how the provider will ensure that disadvantaged students and those from under-represented groups in higher education can enter, participate and succeed in higher education.

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 This entire instrument applies only in relation to England. This is because its provisions relate to an aspect of the regulation by the OfS of institutions that are, or are applying to become, registered higher education providers within the meaning of section 3(10) of HERA. Section 3(3)(b) provides that an institution can only be registered on the OfS register (and thereby become a registered higher education provider) if it is, or intends to become, an English higher education provider. An English higher education provider is defined in section 83(1) of HERA as a higher education provider whose activities are carried on, or principally carried on, in England.
- 3.3 In the view of the Department, this instrument either has no effect outside of England, or may have such effects which are minor or consequential. This is because, as explained above, English higher education providers as defined in HERA may include providers of higher education that carry on some activities outside England, provided that their activities are principally carried on in England. The Department considers that any effects outside England resulting from this would be minor or consequential.
- 3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P, the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly

as a transferred matter and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament and the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.

- 3.5 The Department has reached this view because this instrument makes provision relating to education – specifically, the regulation of providers of higher education. Education is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). By virtue of it not being included in the list of reserved matters in Schedule 5 to the Scotland Act 1998, education is within devolved legislative competence in Scotland. Education is within paragraph 5 of Schedule 7 to the Government of Wales Act 2006 and is not within one of the exceptions listed there, nor is it otherwise outside the legislative competence of the National Assembly for Wales (see section 108 of that Act).

4. Legislative Context

- 4.1 HERA establishes the OfS as the new regulator for higher education. Section 3 of HERA requires the OfS to establish and maintain a register of English higher education providers and the OfS can apply registration conditions to them in accordance with sections 4 to 14.
- 4.2 One of the registration conditions concerns those registered providers that are subject to a mandatory fee limit condition imposed under section 10 of HERA. Where those providers want to charge fees above the basic amount (determined in accordance with Schedule 2 of HERA), section 12 of HERA requires that they must have in place an access and participation plan approved by the OfS and comply with it on an ongoing basis. Through these plans, higher education providers will be expected to set out their proposed activities, targets and expenditure to support students from disadvantaged backgrounds and under-represented groups in higher education to access, participate and succeed in higher education.
- 4.3 The specific provisions in HERA relating to access and participation plans carry forward the effect of the regime in Part 3 of the Higher Education Act 2004 relating to the functions of the Director of Fair Access to Higher Education (“DFA”), for providers that are funded by the Higher Education Funding Council for England (“HEFCE”). Under the 2004 regime, the requirement to have an access agreement in order to charge higher level fees is imposed on HEFCE funded institutions as a condition of their grant funding. Under HERA, it will be a requirement by virtue of Schedule 2, which governs the determination of fee limits, and section 12 which creates a mandatory registration condition. HERA also abolishes HEFCE and the DFA and repeals the relevant provisions of the 2004 Act.
- 4.4 These regulations are the first ones made under the powers in sections 29, 30, 32, 33 and 34 of HERA relating to the content, approval and variation of access and participation plans. They give full effect to those sections of HERA by establishing arrangements allowing providers to prepare suitable access and participation plans and apply to the OfS to have them approved or subsequently varied.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

6. European Convention on Human Rights

6.1 The Minister for Universities and Science, Research and Innovation has made the following statement regarding Human Rights:

“In my view the provisions of The Higher Education (Access and Participation Plans) (England) Regulations 2018 are compatible with the Convention rights.”

7. Policy background

What is being done and why

7.1 Currently the DFA is responsible for approving access agreements from HEFCE funded institutions and further education colleges enabling them to charge fees up to the higher amount, whilst HEFCE has responsibility for regulating and distributing funding to eligible providers for higher education activities. The OfS will have functions replacing those of both of these bodies.

7.2 Access agreements were originally introduced in 2004 in response to concerns that the introduction of higher variable fees might deter students from disadvantaged backgrounds and under-represented groups in higher education from applying to higher education. These agreements have become a key mechanism for widening access to higher education.

7.3 HERA replaces the existing system for the contents, approval and variation of access agreements with new arrangements which largely replicate the existing position. The main changes are to ensure that plans should cover not only access to higher education but also participation activities (ensuring that students are supported to participate, succeed and progress to good outcomes). Under the regime established by HERA, additional providers (not just further education colleges and those that receive grant funding from HEFCE as is currently the case) will be able to register within the part of the OfS register to which a mandatory fee limit applies and so seek approval from the OfS for an access and participation plan in order to charge higher level fees.

7.4 Following the enactment of HERA, the OfS brings together the responsibilities for access and participation into one body to bring a more strategic focus to these activities. The OfS will operate a single register (a public list of English higher education providers that are regulated by the OfS), creating a level playing field and avoiding – wherever possible – different providers being regulated by different bodies. The OfS will be established in January 2018.

7.5 The intention is that, alongside receiving initial applications from providers to register with the OfS, the OfS will invite providers to submit their access and participation plans for the 2019/20 academic year for approval in summer 2018. This timing is designed to ensure that those students planning to start a higher education course in the 2019/20 academic year can be clear about the cost of course when they begin to apply in autumn 2018.

7.6 Since 2004, the content of and arrangements for managing access agreements have been governed by The Student Fees (Approved Plans) (England) Regulations 2004 (SI No. 2004/2473) (“the 2004 regulations”), made under the Higher Education Act 2004. The policy intent is to carry forward the substance of these arrangements for

access and participation plans under HERA, with some important changes and updates. The substantive policy changes are:

- 7.7 **Ensuring that plans cover not only access to higher education but also activities to ensure that students are supported to participate, succeed and progress to good outcomes from higher education.** The policy intent is that students from disadvantaged backgrounds and under-represented groups in higher education should be supported throughout their higher education experience including support towards successful outcomes at the end of their course. This also includes making progress to close the gap on the differing outcomes that some students achieve. Analysis in the “National Strategy for Access and Student Success in Higher Education” (2014) showed that for all minority ethnic groups, apart from students of Chinese ethnicity, retention rates are lower than for their white peers with non-continuation rates for black entrants the highest, with 11.3% of 2010-11 entrants no longer in higher education after one year. Regulation 2(2)(b) together with 2(3) and 2(4) addresses this.
- 7.8 **Requiring monitoring and evaluation to be included in plans.** The introduction of this requirement should, over time, ensure that providers invest in those activities that are shown to have the most effect in supporting disadvantaged students and those from under-represented groups in higher education. Regulation 2(2)(f) addresses this.
- 7.9 **Encouraging Student Involvement in access and participation plans.** The regulations require that when considering a provider’s access and participation plan for approval, the OfS should have regard to whether the views of the student body have been considered by the provider when developing the plan. This particular issue was raised during the passage of HERA. Student involvement in access and participation plans has previously been recommended in guidance from the DFA to the higher education sector. Given feedback from students can provide important indicators of the support mechanisms that might be most appropriate for disadvantaged students and those from under-represented groups in higher education; this provision has been included in these regulations to emphasise its importance. Regulation 3(1) addresses this.
- 7.10 **Adjusting Time Limits on review of Provisional Decisions related to access and participation plans.** The time allowed for a governing body to apply for a review of a provisional decision of the OfS relating to approval or variation of a plan has been changed to 28 days, from 20 days. This creates consistency with time frames in relation to applications for registration on the OfS register. Regulation 6(3)(b) addresses this.
- 7.11 As has been the case under the 2004 regulations, the Secretary of State is required to appoint a person or panel to carry out reviews of provisional decisions of the OfS, and in doing so must act in accordance with the principles set out in the Governance Code on Public Appointments issued by the Government in December 2016. The intention is not that this should constitute a public appointment within the remit of the Commissioner for Public Appointments, but that the Secretary of State should apply the principles set out in the Governance Code when making the appointment.
- 7.12 The 2004 regulations covered the enforcement of access agreements. Separate regulations are planned under powers in HERA relating to some of the enforcement powers that the OfS will have at its disposal where it appears to the OfS that a provider may be in breach of any registration conditions, including in relation to its

access and participation activities. To ensure there is a consistent approach to the OfS's enforcement powers, this will include regulations under section 21 of HERA regarding the OfS power to refuse to agree a new access and participation plan after a current one expires.

8. Consultation outcome

- 8.1 The former Department for Business, Innovation and Skills published a consultation as part of the Green Paper on higher education "Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice" in November 2015. The responses to the consultation were published alongside the White Paper "Success as a Knowledge Economy: Teaching Excellence, Social Mobility & Student Choice" which summarised the decisions made by Government. The consultation responses are available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523420/bis-16-261-he-green-paper-fulfilling-our-potential-summary-of-responses.pdf
- 8.2 Plans for access and participation activities were covered extensively in these documents and the responses were taken into account during the preparation of HERA. There was general support for the incorporation of the role of the DFA within the OfS. Respondents did however, stress the continuing need for the role to maintain a level of autonomy. As a result of such concerns, the role of the new Director for Fair Access and Participation within the Office for Students was further clarified during the passage of HERA to indicate more clearly the expectation that they would have delegated responsibility for OfS functions relating to access and participation plans.
- 8.3 There is no statutory requirement for consultation on this set of regulations and sufficient input from the sector was received during the above engagement to guide policy.
- 8.4 As part of the quality review process the draft regulations were sent to key stakeholders in higher education such as HEFCE and the Office for Fair Access ("OFFA") to advise on the extent to which the regulations can be effectively implemented.

9. Guidance

- 9.1 Since 2005, when the DFA was established, the Secretary of State has issued three sets of guidance to the DFA setting out the Government's priorities for widening access to higher education. Section 2(3) of HERA requires the OfS to have regard to any guidance given to it by the Secretary of State when performing its functions including access and participation functions. It is the intention that guidance will be issued to the OfS in due course after it has been established, including in relation to its access and participation activities.
- 9.2 Previously, the DFA himself has issued annual guidance to higher education providers on the arrangements for approving access agreements. This annual guidance is expected to continue and the OfS (under s29(4) HERA) is expected to publish guidance in early 2018 on the approval of plans which would come into force in the academic year 2019/20. This is the first year in which the OfS regulatory system under HERA is expected to operate.

10. Impact

- 10.1 These regulations do not introduce further burdens that would have an impact on businesses, charities or voluntary bodies. Moving from access agreements to access and participation plans is deemed to impose no additional cost on providers. Those able to charge the higher fee limit currently must have an access agreement in place. This is to be replaced by an access and participation plan, however, in line with existing OFFA guidance, the process for developing and agreeing plans should be the same as an access agreement, so the policy change is assumed to impose no extra burden.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 The policy change of moving from access agreements to access and participation plans is not considered to have a disproportionate impact on small and micro business because there is no additional cost for all providers.

12. Monitoring & review

- 12.1 We have considered the requirement under Section 28 of the Small Business, Enterprise and Employment Act 2015 regarding the inclusion of a review provision in secondary legislation that regulates business. The requirements for access and participation plans under HERA and these regulations have been estimated to have minimal additional impact on business compared with the current regime for access agreements. As such the Department has concluded that it would be disproportionate on cost grounds to include a review provision within the instrument.
- 12.2 The Department for Education will however, ask the OfS to monitor the effectiveness of the regulations in delivering the policy aims to widen participation in higher education and identify whether changes should be considered.

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.