

EXPLANATORY MEMORANDUM TO
THE HIGHER EDUCATION AND RESEARCH ACT 2017 (TRANSITORY AND
TRANSITIONAL PROVISION) REGULATIONS 2017

2017 No. 1145

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 transitional and transitory provision in relation to the commencement of the Higher Education and Research Act 2017 (the “Act”). The purposes of these provisions are primarily (i) to allow the Office for Students (the “OfS) to publish guidance about the ongoing registration conditions for the purposes of publishing its regulatory framework under section 75 of the Act , and (ii) to construe references to “registered higher education providers” in Part 1 of Schedules 4 and 6 as references to “English higher education providers” until 31 July 2019.

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 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

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 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 the existing Higher Education Funding Council for England (“HEFCE”), and the Office of the Director of Fair Access to Higher Education (“OFFA”).

- 4.3 To this end the Department intends to separately lay a further set of regulations, which give full effect to this transition period, to come into force in April 2018. These will abolish HEFCE and OFFA, subject to further transitional provision, which will vest the functions of those bodies in the OfS, and commence further provisions of the Act.

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 England.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to 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 OFFA. The OfS will regulate current HEFCE funded providers as well as Alternative Providers, which are currently regulated by the Department for Education.
- 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 In order to operate this system in an orderly and proportionate way the Act requires the OfS to publish a regulatory framework, consisting of a statement of how it intends to perform its functions and guidance for registered higher education providers on what behaviour the OfS considers will be required to demonstrate compliance with the general ongoing registration conditions.
- 7.4 This is a highly significant regulatory change and, in order to avoid disruption to the sector, the Department intends to shortly lay a further instrument before Parliament, with the effect that, from 1 April 2018, HEFCE and OFFA will cease to exist, and the OfS will take on their statutory functions during the rest of academic year 2017/18 and the whole of academic year 2018/19. This will have the effect of preserving the existing system under the auspices of the OfS 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 the start to recruit students for the academic year 2019/20 (the first academic year in which the new system will operate).

- 7.5 This transitional period will come to an end in August 2019 at which point the existing functions cease fully to exist to be replaced entirely for the academic year 2019/20 by the new OfS registration system. Consequently, until August 2019 while applications for registration in the new system can be made and considered, current HEFCE funded providers will continue to be regulated primarily under the Further and Higher Education Act 1992 and the Higher Education Act 2004 (albeit by the OfS instead of HEFCE and OFFA). However, again 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 Background to transitional and transitory provisions in these regulations: A key activity for the OfS before April 2018 will be for it to publish its regulatory framework and guidance for providers (including guidance on access and participation) following consultation. Without these in place before the intended April 2018 registration window opens, providers will be unable to make an assessment of whether they will be able to comply with the registration regime (to be operated by the OfS) at the very point that they need to decide whether or not to apply for registration and/or in which part of the register they may wish to be registered.
- 7.7 Other important activities for the OfS before April 2018 are the statutory designation by the OfS of the quality and data bodies to perform certain specified functions set out in the Act. The quality body will be the body that carries out the teaching quality and academic standards assessment functions described in the Act, including the assessment of providers' quality and academic standards and providing advice to the OfS on the granting, variation or revocation of degree awarding powers. The data body will perform data functions on behalf of the OfS, including data collection, data processing, data storage, data publication and provision. The OfS will be designating these bodies before April to give clarity to providers on who these bodies are, and to enable these bodies to start preparations for carrying out their functions.
- 7.8 This instrument makes transitional and transitory provision to enable the OfS to publish the regulatory framework and designate the quality body and data bodies before April 2018. Separate commencement regulations (The Higher Education and Research Act 2017 Commencement No. 2 Regulations 2017) will bring into force section 75 of the Act (which obliges and enables the OfS to publish its regulatory framework). Section 75 refers to guidance on the ongoing registration conditions. That guidance is prospective until these conditions are determined by the OfS. The latter will only occur at the point when the register itself is brought into fore i.e. on 1 April 2018. Accordingly, the transitory provision in regulation 2 makes clear that guidance published before that date to assist providers considering whether to apply for registration (as above), refers to such conditions as the OfS reasonably expects to determine. After that date the guidance is then to be treated as referring to the conditions as they have been determined. Transitory provision allows the OfS to issue this guidance in anticipation of the determination.
- 7.9 The designation procedure for the data and quality bodies is contained primarily in Schedules 4 and 6 of the Act. Certain steps, including consultation of various bodies, have to be taken before designation. One of the class to be consulted included registered providers or those who represent them. Given there will be no registered

higher education providers at the time at which the first designation will occur, references to “registered higher education providers” in Part 1 of Schedules 4 and 6 respectively need to be construed as references to English higher education providers – a more general term that captures institutions that have not yet been registered. Regulation 3 achieves this.

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 is consulting 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 These Regulations commence certain provisions set out in HERA. The impact on business, charities or voluntary bodies has previously been assessed as part of the HERA 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 HERA enactment stage impact assessments.

12. Monitoring & review

- 12.1 These are transitional regulations, where the transitional provision ends on 31 July 2019. 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.