

EXPLANATORY MEMORANDUM TO
THE HIGHER EDUCATION (WALES) ACT 2015 (CONSEQUENTIAL PROVISION)
ORDER 2015

2015 No. 1353

1. This Explanatory Memorandum has been prepared by the Wales Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1. The instrument (“the Order”) makes provision in consequence of the Higher Education (Wales) Act 2015 (“the 2015 Act”).
- 2.2. The purpose of the Order is to extend certain provisions of the 2015 Act so that they apply to courses of education provided in England by institutions that are regulated under the 2015 Act and whose activities are carried on wholly or principally in Wales (“regulated Welsh institutions”). In particular, it will apply fee limits agreed and approved under the 2015 Act to courses provided in England by regulated Welsh institutions and enable the Higher Education Funding Council for Wales (“HEFCW”) to assess, and take action in respect of, the quality of education provided on these courses.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1. This is the fourth Order to be made under section 150 of the Government of Wales Act 2006. The others, unrelated to this Order are: the Local Government (Wales) Measure 2009 (Consequential Modifications) Order 2010 (SI 2010/212); the Natural Resources Body for Wales (Consequential Provision) Order 2013 (SI 2013/1821); and the Human Transplantation (Wales) Act 2013 (Consequential Provision) Order 2015 (SI 2015/865).

4. Legislative Context

- 4.1. Under Part 4 of the Government of Wales Act 2006, the National Assembly for Wales may make laws known as Acts of the Assembly. The National Assembly for Wales passed the 2015 Act on 27 January 2015 and it was given Royal Assent on 12 March 2015. Only sections 1, 55, 56, 58(3) and (4), 59 and 60 of the Act were commenced on Royal Assent. The remaining provisions will be fully commenced by the start of the academic year 2017/18.
- 4.2. The 2015 Act amends certain provisions of the Further and Higher Education Act 1992 (“the 1992 Act”) and the Higher Education Act 2004 (“the 2004 Act”) in relation to the regulation of higher education in Wales. The regulatory system established under those two Acts relies on the provision of financial support from HEFCW to institutions which, broadly speaking, provide higher education in Wales. For example, under section 70 of the 1992 Act, HEFCW are required to make provision for the assessment of the quality of education provided in institutions which

they fund. Similarly, under Part 2 of the 2004 Act, the ‘relevant authority’ (HEFCW), may approve and enforce fee plans and associated fee limits in relation to certain courses provided by institutions which they fund. This monitoring, enforcement and assessment, as well as the monitoring of the organisation and management of an institution’s financial affairs is achieved through the application of terms and conditions of recurrent funding paid out by HEFCW under section 65 of the 1992 Act as well as section 86 of the Education Act 2005 (“the 2005 Act”).

- 4.3. Following changes to the system of higher education funding which started from September 2012, the amount of funding paid out by HEFCW to institutions in Wales has gradually reduced. As a consequence, the effectiveness of the existing system for higher education regulation (as explained above) has also reduced.
- 4.4. As a result, the purpose of the 2015 Act is to establish a new regulatory framework for higher education institutions and other providers of higher education in Wales. The new regulatory framework will not rely on HEFCW providing financial support to those institutions and providers under Part 2 of the 1992 Act or Part 3 of the 2005 Act. Instead it will apply to those institutions or providers who have a fee and access plan in place which has been approved by HEFCW under the provisions of the 2015 Act.
- 4.5. The 2015 Act provides HEFCW with new functions to assure the quality of higher education provision, enforce tuition fee controls and fee plan requirements and establish a framework for the organisation and management of the financial affairs of providers of higher education in Wales with an approved fee and access plan in place.
- 4.6. The 2015 Act restricts the functions of HEFCW relating to fee and access plans, fee limits and quality assessment to courses of education provided in Wales by institutions or providers whose activities are carried on wholly or principally in Wales and which have an approved fee and access plan in place. The Order extends these functions to courses of education provided in England by those institutions or providers.
- 4.7. The Order will have effect from 1 September 2015.

5. Territorial extent and application

- 5.1. This instrument applies in England and Wales.

6. European Convention on Human Rights

- 6.1. The Rt. Honourable Stephen Crabb MP, Secretary of State for Wales, has made the following statement:

“In my view the provisions of the Higher Education (Wales) Act 2015 (Consequential Provision) Order 2015 are compatible with Convention rights.”

7. Policy background

- 7.1. The UK Government commissioned the Browne Review in November 2009 to consider the future direction of higher education funding in England. The Welsh Government responded to the Browne Review by allowing institutions in Wales, who were in receipt of HEFCW funding, to charge tuition fees of up to £9,000 per annum. Such institutions were only able to charge fees above £4,000 per annum if they were able to demonstrate a commitment to widening access to higher education and other related policy objectives.
- 7.2. In addition, students from Wales were provided with access to a non means tested tuition fee grant, to cover the cost of the increase in tuition fees across the United Kingdom. Entitlement to this new tuition fee grant, along with an accompanying tuition fee loan, was set out in the annual set of student support regulations made by the Welsh Ministers. Responsibility for student finance and support was transferred to the Welsh Ministers under provisions of the 2004 Act.
- 7.3. Prior to the changes outlined above, the principal source of public funding of the higher education sector in Wales had taken the form of recurrent grants (for teaching or other activities) payable from HEFCW to institutions under the 1992 Act and the 2005 Act. HEFCW administers funds made available by the Welsh Ministers and others, by providing financial support to institutions throughout Wales. HEFCW attaches terms and conditions to this financial support, which relate to, amongst other things, the level of fees charged by institutions, the quality of education delivered by institutions and the financial management of institutions. The administration and enforcement of terms and conditions of HEFCW funding is therefore the principal method of regulating the higher education sector in Wales.
- 7.4. Following the introduction of the non-means tested tuition fee grant, funding which was previously provided by the Welsh Government to HEFCW and then allocated by HEFCW to institutions in Wales, was re-directed to the Welsh Government's student support budget. The amount of financial support paid by HEFCW to institutions in Wales has reduced and consequently the ability of HEFCW to attach terms and conditions to that support has also reduced. Therefore the HE regulatory regime, which relies on HEFCW imposing terms and conditions of funding relating to fee controls, quality of education and financial management, will no longer operate effectively.
- 7.5. The Welsh Government wishes to ensure that higher education in Wales is delivered by or on behalf of institutions which are in sound financial health, are committed to maintaining fair access and which provide quality education. The 2015 Act therefore provides that the new higher education regulatory framework for Wales will not be reliant on terms and conditions of HEFCW recurrent funding.
- 7.6. The Order has been put in place to extend certain provisions of the 2015 Act to courses of education provided in England by regulated Welsh institutions. In particular, the Order will require HEFCW to assess, or make arrangements for the assessment of, the quality of education provided in England by regulated Welsh institutions. It will also apply the provisions of Part 2 of the 2015 Act, which deals with fee and access plans, to courses provided in England by these regulated Welsh institutions. This will include the monitoring and enforcement of tuition fee limits on these courses.

- 7.7. The aim of the Order is to maintain the current cross border arrangements for higher education regulation which exist between HEFCW and the equivalent body in England, the Higher Education Funding Council for England (“HEFCE”). Currently each funding council monitors and regulates education provided by institutions and providers which they fund, regardless of whether that education is delivered in England or Wales. For example, HEFCW monitors the provision of education by Welsh funded institutions, even when that education is provided in England. The Order will enable HEFCW to continue to regulate and monitor education provided by regulated Welsh institutions in England and will ensure that there are no new gaps in regulatory oversight of higher education across England and Wales.

8. Consultation outcome

- 8.1. In drafting the Order, the Wales Office has consulted key UK Government Departments. Those departments’ comments were taken into account in the drafting of the Order. There has been no public consultation on the Order because it is in consequence of the National Assembly for Wales’s decision to legislate to make provision for a revised regulatory framework for higher education in Wales. A number of public consultations have already taken place on the primary legislation, as described below.
- 8.2. There has been a significant amount of engagement and consultation with the public and stakeholders in Wales. A White Paper of 2 July 2012 set out the proposals for the Further and Higher Education (Wales) Bill. The White Paper was published for a twelve week public consultation and the summary of responses was published on the Welsh Government website on 6 March 2013. As a result, the then Minister for Education and Skills concluded that further analysis and development on the higher education proposals was required. On 20 May 2013, a technical consultation was issued. This included a series of stakeholders’ workshops in Wales. A summary of responses to the technical consultation has been published and is available on the Welsh Government’s website.
- 8.3. As a result, the Higher Education (Wales) Bill was introduced into the National Assembly for Wales on 19 May 2014.

9. Guidance

- 9.1. No guidance will be issued on the terms of the Order. This memorandum explains the purpose and context of the Order. The 2015 Act and accompanying secondary legislation and guidance explains the how the new legislation will operate in Wales.

10. Impact

- 10.1. A Regulatory Impact Assessment has not been prepared for this instrument. A full impact assessment was carried out on the primary legislation at the time of its introduction to the National Assembly for Wales and was revised following Stage 2 and Stage 3 scrutiny of the Bill.

11. Regulating small business

- 11.1. The Order does not alter the regulatory regime established under the 2015 Act in any material way. As such, it will have no material impact on small businesses.

12. Monitoring and review

- 12.1. The Order makes consequential changes in connection with the implementation of the 2015 Act, the impact of which will be reviewed by the Welsh Government. There are no plans for a separate review of the effects of the Order.

13. Contact

- 13.1. Queries about the content of the instrument or this memorandum should be addressed to Alison Rees, Wales Office, (Tel: 029 2092 4208, email: Alison.Rees@walesoffice.gsi.gov.uk).
- 13.2. Owen Robinson, Wales Office, can answer legal queries about the instrument (Tel: 0207 270 0400, email: Owen.Robinson@walesoffice.gsi.gov.uk).