

EXPLANATORY MEMORANDUM TO

THE HIGHER EDUCATION AND RESEARCH ACT 2017 (FURTHER IMPLEMENTATION ETC.) REGULATIONS 2019

2019 No. 1027

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 The Higher Education and Research Act 2017 (the “Act”), among other things, created the Office for Students (“OfS”), abolished the Higher Education Funding Council for England (“HEFCE”) and the Director of Fair Access to Higher Education (“the Director”), required the OfS to establish a register of English higher education providers¹, and replaced the old HEFCE funding regime with a new funding and regulatory regime for higher education. Further, the Act brought all of the varying research funding councils under one umbrella organisation, the United Kingdom Research and Innovation (“UKRI”), and gave UKRI the power to make research grants to eligible higher education providers.

The main purpose of this instrument is to make the legislative amendments that are needed as a consequence of the reforms made by the Act, in particular to amend those statutory provisions that refer to repealed provisions or obsolete concepts and to replace references to HEFCE or the Director and research funding councils with references to the OfS or UKRI, as appropriate; this instrument also makes savings provision, amends the Charities Act 2011 (c. 25) and applies the Regulators’ Code to the regulatory functions of the OfS.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.3 The powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is not limited either by the Act or by the instrument (see section 123(4) of the Act).

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the entirety of the United Kingdom.

¹ The OfS’s register of English higher education providers is available at:
<https://www.officeforstudents.org.uk/advice-and-guidance/the-register/the-ofs-register/>

5. European Convention on Human Rights

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

“In my view the provisions of the Higher Education and Research Act 2017 (Further Implementation etc.) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 These Regulations amend primary and subordinate legislation to take account of the higher education reforms set out in the Act, and make a number of savings provisions in consequence of these reforms.

6.2 Prior to the Act, HEFCE, under powers in the Further and Higher Education Act 1992 (c. 13), administered grants for higher education and research and regulated institutions in receipt of that funding through the terms and conditions of those grants. The Director administered a system under the Higher Education Act 2004 that allowed higher education institutions to charge course fees at a fixed higher rate and for student loans to be available for these course fees but only if the institution had an access plan in place. Statutory definitions in the Further and Higher Education Act 1992 such as “higher education institution” and “institution within the higher education sector” referred to funding eligibility or receipt of funding of those institutions. These definitions were used in other enactments relating to education and more widely.

6.3 The Act introduced a new system of regulation for higher education based on registration rather than terms and conditions of grant funding. Whilst HEFCE administered teaching and research grants, the OfS only administers teaching grant. UKRI has taken over the HEFCE functions in relation to grant funding for research. OfS functions in relation to the regulation of higher education are much broader than those of HEFCE and statutory definitions that relate only to funding status no longer work. These definitions have been amended to be consistent with the new system of registration and the HERA definitions of “registered higher education providers”, and “eligible higher education providers”.

6.4 In addition, the Act repealed a number of provisions of other enactments and has introduced similar provisions; therefore these Regulations make provision to replace the old references with the new references.

6.5 These Regulations amend the list of exempt charities in Schedule 3 to the Charities Act 2011 to both require that an exempt charity remains registered with the OFS and to enable registered higher education providers to become exempt. Any such provider that applies successfully for this exempt status will be regulated by the OfS rather than the Charity Commission in relation to charities law obligations.

6.6 Savings provisions have been included in the Regulations to ensure continuity of eligibility for membership of the Teachers’ and Local Government Pension Schemes.

6.7 These Regulations also amend the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 (the “Regulatory Functions Order”) to make the Regulators’ Code applicable to the OfS’s regulatory functions.

7. Policy background

What is being done and why?

- 7.1 The Act received Royal Assent on 27 April 2017. It reforms the regulation of the English higher education sector and the provision of research funding through the creation of two new bodies: the OfS and UKRI and the abolition of the previous regulatory bodies, HEFCE and the Director.
- 7.2 The OfS was created on 1 January 2018 and HEFCE and the Director were abolished on 1 April 2018. The OfS currently regulates higher education providers in England under transitional arrangements which allow it to exercise powers previously exercised by HEFCE and the Director, as well as the functions of the Act that have been commenced. When the new regulatory system becomes fully operational on 1 August 2019, the OfS will regulate using only its powers under the Act. These extend beyond the administration of grant funding and include powers to register higher education providers and to regulate through the imposition and enforcement of registration conditions.
- 7.3 These Regulations will amend primary and secondary legislation that applies across the United Kingdom so that references to the OfS replace references to HEFCE and the Director, and references to the UKRI replace references to the individual research councils (and HEFCE in relation to research funding). In addition, these regulations amend or replace references to definitions from the Further and Higher Education Act 1992 and the Higher Education Act 2004 used in other legislation, so that the revised or new definitions work consistently with definitions used in the Act. These consequential amendments reflect the broader scope of institutions registered with the OfS and therefore in some cases references are made to all registered higher education providers and are not limited to those which are eligible for government funding. The amendments also reflect that registered higher education providers can now be both higher and further education providers and therefore ensure that provisions that are intended to apply to further education providers continue to do so.
- 7.4 These consequential amendments enable the new regime introduced by the Act to operate without interruption when the transitional period ends on 31 July 2019, and to ensure that existing legislation functions as intended in the new regulatory environment.
- 7.5 These Regulations will also apply the Regulators' Code to all of the OfS's regulatory functions. During the passage of the Higher Education and Research Bill the then Minister for Universities, Science, Research and Innovation and Viscount Younger wrote² to confirm that they would work with the Department for Business Energy and Industrial Strategy to bring the OfS formally into scope as a listed regulator subject to the Regulators' Code at the first practical opportunity, via statutory instrument. These Regulations fulfil this commitment.
- 7.6 In addition, these Regulations will amend the list of exempt charities to permit only those higher education providers that are regulated by the OfS (through registration) to continue to be exempt, and allow new registered higher education providers to become exempt and so be regulated by the OfS rather than the Charity Commission in relation to charities law obligations, if they choose to apply for this status. This is to

² http://data.parliament.uk/DepositedPapers/Files/DEP2017-0201/Younger_letter_to_Peers_on_the_Reg_Code_and_CMA.pdf

ensure effective and proportionate regulation, in this case by allowing charities to make a single set of returns, to the OfS, rather than to both the OfS and the Charity Commission.

- 7.7 Savings provisions have been included to ensure continuity of eligibility for membership of the Teachers' and Local Government Pension Schemes. Without these savings provisions, some institutions that are required to offer their teaching and other staff access to these schemes would not be required to offer such access for new staff after 31 July 2019.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 These amendments make consequential changes to a number of enactments, including to primary legislation. Consolidation is not being considered at this time.

10. Consultation outcome

- 10.1 Other than as set out in paragraph 10.2 below, legislation does not require consultation on the Regulations.
- 10.2 Legislation requires consultation of the person whose regulatory functions are specified in an Order made under section 24(2) of the Legislative and Regulatory Reform Act 2006. The Department has consulted the OfS in relation to Part 5 of these Regulations. The OfS has made a commitment to voluntarily comply with the Code before it becomes compulsory.³

11. Guidance

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

12. Impact

- 12.1 No, or no significant, impact on business, charities or voluntary bodies is foreseen.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An impact assessment has not been prepared for this instrument because these Regulations do not introduce further burdens that would have an impact on businesses, charities or voluntary bodies.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small business. This is because, other than as set out in paragraph 13.3 below, no impact on small businesses is anticipated.
- 13.3 The amendments to Schedule 3 to the Charities Act 2011 provide an opportunity for registered higher education providers that are charities to become exempt charities,

³ As set out in its regulatory framework, paragraph 13, available at: https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf

should they choose to do so. This is voluntary, and exempt charity status is expected to reduce the regulatory burden on a registered higher education provider that is a charity.

14. Monitoring & review

- 14.1 The regulations do not include a statutory review and in line with the requirements of the Small Business, Enterprise and Employment Act 2015 regarding the inclusion of a review provision in secondary legislation that regulates business. Chris Skidmore has made the following statement:

“This instrument makes consequential amendments to primary and secondary legislation to replace references that have become obsolete as a consequence of the Act. It includes savings provisions to ensure a smooth transition to the new regulatory regime for higher education. These provisions have minimal additional impact on business. This instrument also allows registered higher education providers that are charities to become exempt charities, should they choose to do so. This is voluntary, and is expected to reduce the regulatory burden on such providers. As such, the Department has concluded that a review clause would be disproportionate on costs grounds.”

15. Contact

- 15.1 Sophie Breach at the Department for Education Telephone: 07990 082849 or email: Sophie.Breach@education.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Jenny Bradley, Deputy Director for HE – Regulatory & Provider Policy, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Chris Skidmore at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.