

REVISED LEGISLATIVE CONSENT MEMORANDUM

HIGHER EDUCATION AND RESEARCH BILL

This Memorandum is a revision of the Memorandum laid on 17 November. In accordance with Standing Order 29.3(v), this revised memorandum sets out how and why the new Memorandum differs from the previous one. An additional paragraph (15A) has been included in the Memorandum to clarify the powers of the Welsh Ministers to commence certain provisions in Part 2 of the Bill which require the legislative consent of the Assembly. Paragraphs 8 and 9 of the Memorandum have been amended to correct a technical inaccuracy and clarify that clause 79 of the Bill makes amendments to section 22 of the Teaching and Higher Education Act 1998, whilst clause 80 makes consequential amendments to section 23 of that Act.

1. This Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before the National Assembly for Wales if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the National Assembly.
2. The Higher Education and Research Bill (the “Bill”) was introduced in the House of Commons on 19 May 2016 and completed Committee Stage on 18 October. The Bill can be found at:

<http://services.parliament.uk/bills/2016-17/highereducationandresearch.html>

Policy Objectives

3. The UK Government’s stated policy objectives are to increase competition and choice in the English higher education sector, raise standards and strengthen the United Kingdom's capabilities in research and innovation.

Summary of the Bill

4. The Bill is sponsored by the Department for Education. It makes provision for:
 - establishing a new regulatory and teaching funding body for the English HE sector - the Office for Students (OfS);
 - operation by the OfS of a register of HE providers in England and a quality and standards ratings scheme (the Teaching Excellence Framework (“TEF”));
 - the OfS to grant degree awarding powers and university title for HE providers in England (where providers apply for degree awarding powers or university title);
 - the Secretary of State to require application-to-acceptance data from organisations who offer a shared and centralised admissions service for HE providers in England for the purpose of research;

- arrangements for alternative student finance payments in England and Wales;
- deregulation of higher education corporations in England; and
- a new research and innovation body: United Kingdom Research and Innovation (UKRI).

Provisions in the Bill for which consent is required

5. Consent is required for the following provisions which were included in the Bill at introduction, and/or which have been added to the Bill by amendment at Committee Stage. The latest version of the Bill [Bill 78 2016-17 as amended in Public Bill committee] is available at the Bill documents link above. For ease of reference and consistency, all references to clause numbers are to that version of the Bill, regardless of whether they were included in the Bill at introduction or by amendment, except new paragraph 15A which refers to the new version of the Bill as introduced into the Lords.

Part 1 – The Office for Students (OfS)

(A) Rating the quality of, and the standards applied to, higher education

6. Clause 25 of the Bill gives the OfS a power to make arrangements for a scheme to give ratings to English higher education providers regarding the quality of, and standards applied to, the higher education provided by them (the TEF). Under that clause, and provided the Welsh Ministers give the appropriate consent, the OfS will also be able to assess TEF applications from higher education providers in Wales.
7. This will enable higher education providers in Wales to participate in TEF, should they wish to do so, where Welsh Ministers have first given their consent. The Bill also allows the Welsh Ministers to give that consent generally or in respect of specific higher education providers in Wales and to also revoke consent that they may have given.

Part 2 – Other Education Measures

(B) Financial Support for Students

8. Clause 79 of the Bill makes amendments to section 22 of the Teaching and Higher Education Act 1998 (“the 1998 Act”) which is the basis for the Secretary of State’s and Welsh Ministers’ powers to make student support and student loan repayment regulations. Clause 79 makes provision for an additional, alternative form of repayable student finance, which will avoid the payment of interest. The Bill modifies current legislation for both Wales and England so that regulations will be able to provide an alternative form of student finance alongside current student loans and grants. Full details on the type of alternative finance product offered will be set out in the regulations to be made by the Secretary of State in relation to England and by the Welsh Ministers in relation to Wales.

9. Clause 80 makes further, consequential, amendments to section 23 of the 1998 Act and to the Commissioners for Revenue and Customs Act 2005.
10. Clauses 79 and 81 (clause 81 also amends section 22 of the 1998 Act) also provide that regulations made by the Welsh Ministers under that section may make provision for entitlement to student support payments which are suspended under the regulations to be subsequently cancelled. Welsh Ministers will be able to make regulations in relation to Wales which provide, where the payment of a grant, loan or alternative payment has been suspended, for the cancellation of any entitlement to the payment in such circumstances as may be prescribed in or under the regulations. So where student support payments are investigated and suspended, the regulations will be able to provide for the circumstances in which backdated suspended payments can be permanently withheld.
11. Clause 81 also enables the Secretary of State to set the maximum amount of financial support available to students who are ordinarily resident in England by reference to TEF ratings which, in relation to England, will determine the tuition fees that the relevant HE provide may charge. Provision for fee limits in England is set out in Schedule 2 of the Bill.
12. The Secretary of State when making higher education student support regulations in relation to England will be able to prescribe the maximum amount of student support either on the face of the regulations or by reference to matters determined or published by the Secretary of State or other persons (including the OfS). This increased flexibility would, for example, permit the English student support regulations to refer to matters such as the list of fee limits applicable to providers in England, to be published by the OfS and as determined under the Bill and in light of TEF assessments undertaken in relation to those English HE providers. Clause 81 will also allow the Welsh Ministers to prescribe the maximum amount of loan, grant or alternative payment offered to Welsh students undertaking courses at English providers by reference to matters published outside of the regulations, for example the TEF ratings list produced by the OfS in relation to English HE providers under clause 11 of the Bill.
13. Additionally, clause 81 will allow regulations made by the Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) under section 22 of the 1998 Act to designate higher education courses for the purposes of student support in the relevant administration by reference to matters determined or published by the OfS or other persons
14. The effect of this will be to enable the Welsh Ministers (should the need arise) to make the higher education student support regulations for Wales in such a way that they designate higher education courses provided in England by reference to matters determined or published by the OfS. This could include, for example, the ability to designate / de-designate courses for the purpose of Welsh Government student support for Welsh students

if a provider in England is included on / removed from certain categories on the register of providers to be prepared by the OfS.

15. Regulations made by the Welsh Ministers under section 22 of the 1998 Act in relation to Wales are currently subject to the negative resolution procedure. They will continue to be subject to that procedure when that section is amended by clauses 79 and 81 of the Bill.

15A Clause numbers in this new paragraph refer to the Bill as introduced into the House of Lords [HL Bill 76]. Clause 118 confers powers upon the Welsh Ministers to commence certain provisions in respect of clauses 80 - 82 by way of regulations as follows:

- The Welsh Ministers will be able to commence clause 80 in so far as that clause:
 - amends section 22(1); 22(2)(b); 22(2)(g) and 22(2)(i) of the 1998 Act in relation to Wales; and
 - inserts the following new provisions into section 22 of the 1998 Act in relation to Wales, namely, section 22(4A); 22(4B)(a) to 22(4B)(d) and 22(4B)(i); and 22(11);
- The Welsh Ministers will be able to commence clause 81(2) in so far as that clause amends section 23(7)(a)(i) of the 1998 Act in relation to Wales; and
- The Welsh Ministers will be able to commence clause 82 in so far as that clause inserts new section 22(2)(aa); 22(2)(fa); 22(2A); and 22(3)(da) into the 1998 Act in relation to Wales.

There is no Assembly procedure applicable in relation to the above powers of the Welsh Ministers to make commencement regulations.

Part 3 - Research

(C) Amendments to powers to support research

16. Clause 103 amends section 5 of the Science and Technology Act 1965 and section 10 of the Higher Education Act 2004 such that the Secretary of State's and the Welsh Ministers' powers to provide support for the purposes of research are clarified. The amendments provide that powers to give financial support under those sections includes power to make grants, loans or other payment on such terms and conditions as is considered appropriate.

Summary

17. Consent is required for all of the above listed provisions because they fall within the legislative competence of the National Assembly for Wales in so

far as they relate to education and training under paragraph 5 of Part 1, Schedule 7 to the Government of Wales Act 2006.

Reasons for making these provisions for Wales in the Higher Education and Research Bill

(A) Rating the quality of, and the standards applied to, higher education

18. HE providers in Wales will be able to participate in TEF if they so wish, provided that the Welsh Ministers provide the required consent. This will ensure that Welsh HE providers will not be disadvantaged in comparison with providers in the rest of the UK. (Scottish Ministers and the relevant Northern Ireland Department will similarly be able to provide consent to allow the OfS to consider TEF applications from providers in their administrations).

(B) Financial Support for Students

19. Most students ordinarily resident in Wales pay for their tuition fees and maintenance costs by claiming tuition fee and maintenance grants and loans, subject to their personal eligibility. Loans are repaid by graduates when they are earning over a threshold amount. Since 2012 these loans have been subject to a real positive rate of interest. Some students feel unable to use interest-bearing loans for religious reasons, particularly some Muslim students, and this may deter some prospective students from participation in higher education.

20. The Welsh Government considers that providing an alternative repayment system will improve take up of student support and its understanding of student behaviour. The UK Government's legislative proposals fit with the Welsh Government's policy aim of ensuring equality of access to statutory student support to encourage participation in higher education. The amendments to the Welsh Ministers' powers to make higher education student support regulations in relation to Wales will be of benefit to students in Wales and allow the Welsh Government to respond to the concerns raised by individuals about the compliance of the current loan repayment system with their religious faiths' teachings on interest bearing loans.

21. The Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) will be able to cancel any entitlement to payments of student support which have been suspended thereby preventing providers or students having a call on those suspended payments in situations where, for example, suspicion of fraud or misrepresentations have subsequently been confirmed. The payments in question would include alternative student finance, tuition fee loans and maintenance grants and loans.

22. Introduction of the new regulatory system in England including the operation of the TEF will have an impact on the Welsh Government's

arrangements for statutory student support regardless of whether Welsh providers participate in the TEF arrangements. This is because students who are ordinarily resident in Wales (“Welsh students”) and who undertake HE courses at English providers will, in future, be subject to the tuition fees charged by those providers and which will be linked to TEF outcomes and which fall into different categories on the OfS register of providers.

23. Currently the Welsh Government’s HE student support regulations (in relation to Welsh students) provide for the automatic designation of HE courses of providers in England which are maintained or assisted by recurrent grants from the Higher Education Funding Council for England (“HEFCE”). Under the Bill, HEFCE will cease to exist and the UK Government’s policy is that HE courses provided by HE providers in England will be designated for student support for English students if the provider is on certain categories of the OfS register.
24. Although the approach that the Welsh Government may take in respect of Welsh students undertaking courses in England in future years has yet to be determined, seeking additional powers for the Welsh Ministers which would enable them to make annual HE student support regulations by way of reference to matters determined or published by the OfS would be beneficial for the reasons set out below:
- around 40% of Welsh students elect to study at providers in England;
 - due to the porosity of the border between England and Wales, it is important that the Welsh Government’s student support system is able to reflect and react to changes in the regulatory regime in England;
 - the powers to be conferred by the Bill are enabling and could be used to simplify the approach taken to preparing the main student support regulations in relation to Wales when HEFCE no longer exists; and
 - if provisions are included in the Bill for England only which allow the UK Government’s regulations to refer to OfS determinations or publications then that would cast doubt on the Welsh Ministers’ ability to do so in Wales.

(C) Amendments to powers to support research

25. The Welsh Government considers the clarification of the extent of the Welsh Ministers’ powers to fund research to be beneficial. If the clarification of these provisions does not equally apply to the powers of the Welsh Ministers in relation to Wales then there is a risk of the Welsh Ministers’ position regarding funding of research being disadvantaged as compared with the Secretary of State.

Financial implications

26. There are no financial implications for the Welsh Government if the National Assembly for Wales consents to the provisions applying to Wales.

Conclusion

27. It is the view of the Welsh Government that it is appropriate to deal with these provisions in this UK Bill as it represents the most timely, efficient and coherent means of achieving the powers necessary for the purposes set out above.

28. A delay in seeking provision at the same time as provisions are taken forward for the rest of the UK could result in Welsh providers and students studying at Welsh providers being disadvantaged.

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Cabinet Secretary for Education
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