

Explanatory Memorandum to the Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) (Amendment) Regulations 2016

The Explanatory Memorandum has been prepared by the Department for Education and Skills of the Welsh Government and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) (Amendment) Regulations 2016. I am satisfied that the benefits outweigh any costs.

Huw Lewis
Minister for Education and Skills
March 2016

1. Description

This Instrument amends the definition of a qualifying course provided for by the Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015 (the “Extant Regulations”). A qualifying person undertaking a qualifying course may not be charged a fee higher than a specified amount. No amendments are being sought to the definition of a qualifying person.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

There are no matters of special interest in relation to these Regulations.

3. Legislative background

This Instrument is made in exercise of the powers conferred on the Welsh Ministers by sections 5(2)(b), 55(2) and 57(1) of the Higher Education (Wales) Act 2015.

This Instrument follows the Negative Resolution procedure.

4. Purpose & intended effect of the legislation

Background and current legislation

Higher Education tuition fees have been regulated for some time. The Higher Education (Wales) Act 2015 (“the 2015 Act”) makes provision for regulated institutions to specify (or provide for the determination of) the fees they intend to charge, subject to a maximum amount. The Higher Education (Amounts) (Wales) Regulations 2015 specify that maximum amount and make provision for fee limits to be applied to courses provided on behalf of regulated institutions under franchise arrangements. Such courses will also be subject to the Higher Education Funding Council for Wales’ (HEFCW’s) quality assessment duty under section 17 of the 2015 Act.

The Welsh Ministers have, via the Extant Regulations, ensured that certain classes of person (‘qualifying persons’) undertaking certain courses (‘qualifying courses’) may not be charged a fee in excess of the maximum amount, ensuring higher education remains affordable. This generally includes persons undertaking a course of study at first degree level.

The Extant Regulations require courses to which the fee limit applies be capable of being designated under regulations made under section 22 of the Teaching and Higher Education Act 1998, regardless of whether the institution providing the course is publicly-funded for the purpose of those regulations. Designation under those regulations means that students can apply for student

support in respect of undertaking a course. This approach ensures that institutions which are charities but which are not publicly-funded may apply to HEFCW for approval of a fee and access plan in line with the Welsh Government's policy intention for regulated institutions under the 2015 Act.

Proposed legislation

The Extant Regulations did not make specific provision for courses of higher education provided on behalf of a regulated institution by an external provider (usually referred to as franchised courses). We consider that amendments to the Extant Regulations are necessary to ensure that courses delivered on behalf of a regulated institution by an external provider will only be qualifying courses for the purpose of fee limits under the 2015 Act if they are provided by a franchisee which is a charity.

This Instrument prescribes the scope of courses provided on behalf of a regulated institution which are to be qualifying courses for the purpose of fee limits under the 2015 Act. Additionally, the instrument provides clarity as to which courses must be included in regulated institutions' fee and access plans.

If this Instrument is not made then the scope of courses subject to fee limits under the Extant Regulations would be wider than the scope of courses currently eligible for automatic course designation for the purpose of Welsh Government student support. We consider that the imposition of fee limits on courses which are not eligible for automatic course designation for Welsh Government student support is unfair and does not align with the Welsh Government's policy intention for the higher education regulatory system as provided for by the 2015 Act.

We propose making the following changes to the Extant Regulations:

1. The interpretation provisions are amended by the insertion of two new definitions – “the 1988 Act” and “publicly-funded”.
2. New regulations 3, 3A and 3B are substituted for regulation 3 of the Regulations as follows:
 - (a) New regulation 3 prescribes the description of a qualifying course in relation to a 2004 Act plan (a plan approved in relation to Wales under section 34 of the Higher Education Act 2004 before 1 August 2015) for the purposes of the transitional period under the 2015 Act. It provides (inter alia) that a course is not a qualifying course for these purposes if at the time the qualifying person received an offer of a place on that course the institution providing it was not publicly-funded.
 - (b) New regulation 3A prescribes the description of a qualifying course in relation to a fee and access plan under the Higher Education (Wales) Act 2015 which is not a 2004 Act plan. It provides (inter alia) that where a course is provided by a person on behalf of an institution (a

franchise arrangement), that course is not a qualifying course for these purposes if that person is not a charity.

- (c) New regulation 3B provides, for the purposes of new regulations 3 and 3A, for further criteria that will determine when a course is not a qualifying course.

The effect of the proposed amendments is that:

- (i) the scope of qualifying courses in relation to fee plans approved by HEFCW under the Higher Education Act 2004 is unaltered; and
- (ii) the scope of qualifying courses in relation to fee and access plans approved by HEFCW under the 2015 Act is reduced in so far as courses provided on behalf of a regulated institution by an external provider will only be qualifying courses where the external provider (franchisee) is a charity.

5. Consultation

Details of the consultation undertaken are included in the Regulatory Impact Assessment below.

PART 2 – REGULATORY IMPACT ASSESSMENT

The Welsh Ministers Code of Practice on carrying out regulatory impact assessments was considered in relation to the Regulations. A Regulatory Impact Assessment ('the Assessment') is required and follows.

The Explanatory Memorandum for the extant regulations incorporated a regulatory impact assessment, including an analysis of costs and benefits of making a suite of regulations necessary for intended operation of the higher education regulatory system provided for by the 2015 Act. Annex A of that Explanatory Memorandum explained the methodology used to arrive at cost estimates and was further elaborated in a letter from the Minister for Education and Skills to the Finance Committee of the National Assembly for Wales¹. The information in that assessment described the costs and benefits of the extant regulations and is not repeated here.

These regulations only seek to amend the scope of courses provided on behalf of regulated institutions by external providers under franchise arrangements to which fee limits are to apply. Two broad options have been considered:

- (1) do nothing; and
- (2) make amendments to the extant regulations in respect of courses delivered on behalf of regulated institutions under franchise arrangements.

Options

Option 1: Do nothing

In this option, no amendments would be made to the extant regulations.

If the existing regulations are not amended, then the scope of courses subject to fee limits would be wider than the scope of courses eligible for automatic designation for the purpose of Welsh Government statutory student support.

Costs and benefits

The direct financial costs of this option are zero, as there would be no change in the present arrangements. However, there could be potential costs to regulated institutions as fee limits would apply to certain higher education courses (i.e. those delivered on their behalf by external providers which are not charities) for which the Welsh Government does not intend to make provision for student support.

Other than not imposing any direct costs, there is no benefit to this option. Additionally, this option is considered to unfairly impact on the freedoms of regulated institutions as it would require compliance with fee limits in respect of

¹ <http://www.senedd.assembly.wales/documents/s28913/FIN4-14-14ptn1.pdf>

courses which will not, in future, be eligible for the purpose of automatic designation for Welsh Government student support.

Option 2: Make amendments to the extant regulations

The following amendments were considered in relation to courses delivered on behalf of regulated institutions by external providers (franchisees):

- (i) require the franchisee to be a publicly-funded institution
- (ii) require the franchisee to be a charity
- (iii) require the franchisee to be an institution in the further education (FE) sector in Wales

Costs and benefits

Each of the above potential amendments would have the effect of reducing the range of courses provided on behalf of a regulated institution which are required to be subject to fee limits as compared to the requirements of the extant regulations. All of the potential amendments would therefore minimise the impact on regulated institutions of fee limits applying to courses which the Welsh Government does not intend to automatically designate for student support.

The advantages and disadvantages of each of the above potential amendments have been considered.

Potential amendment (i) requires a continued distinction between publicly-funded and non-publicly funded institutions. This approach runs counter to the principles underpinning the new higher education regulatory system provided for by the 2015 Act.

Potential amendment (ii) does not rely on the funding status of the franchisee and aligns with the Welsh Government's policy intention communicated in the Higher Education (Wales) Bill Technical Consultation undertaken in May 2013.

Potential amendment (iii) would encompass higher education courses delivered by FE institutions on behalf of regulated institutions whether or not those FE institutions are in receipt of funding from the Welsh Ministers. Relying on the definition of an institution in the FE sector in Wales would potentially expand the scope of courses subject to fee limits as it would allow non-charitable bodies which are interested in providing courses on behalf of regulated institutions to apply to become designated institutions in the FE sector in Wales. The Welsh Ministers would need to have an objective test as to why such applications would not be granted. Currently no such test exists.

Potential amendment (ii) is the preferred option.

Our assessment of the impacts arising from the preferred option follows.

We have not been able to quantify the number of institutions or courses likely to be affected by the proposed amendment but on the basis of current patterns of provision we consider the impact on institutions to be low for the reasons set out below.

The institutions that are likely to be affected by the amendments are those which will elect to apply to HEFCW for approval of a fee and access plan in May 2016 in respect of courses to be delivered in the 2017/18 academic year.

The new regulatory system provided for by the 2015 Act is being implemented in a phased manner. The 2015 Act makes provision for a transitional period (namely the 2015/16 and 2016/17 academic years) ahead of full implementation in 2017/18. During the transitional period only certain of HEFCW's regulatory functions under the 2015 Act are in force, including, amongst other things, the regulation of fee limits and the determination of fee and access plan applications. Additionally, the transitional period allows institutions whose courses have been subject to fee limits under the previous regime to transition into the new regulatory system if they are subject to fee plan approved by HEFCW under the Higher Education Act 2004 ("the 2004 Act"). The institutions which applied to HEFCW for approval of a 2004 Act plan were those in receipt of recurrent grant support from HEFCW, namely all HE institutions and some FE institutions in Wales. The arrangements under the 2015 Act are different and an institution in Wales providing higher education, which is a charity, may apply to HEFCW for approval of a fee and access plan.

The Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015 ("the 2015 Regulations") were made in July 2015 and replaced regulations made under the Higher Education Act 2004, which were revoked as a consequence of the 2015 Act. As things currently stand, the 2015 Regulations **have not yet affected institutions' approved plans**. This is because the scope of courses included in institutions' fee plans approved by HEFCW under the 2004 Act were subject to the requirements of the Student Fees (Qualifying Courses and Persons) (Wales) Regulations 2011 (as amended) ("the 2011 Regulations"). The final round of 2004 Act fee plans were approved by HEFCW prior to the regulations made under the 2015 Act coming into force on 31 July 2015. The courses included in the 2004 Act plans were subject to the definition of a qualifying course as prescribed by the 2011 Regulations. The amending regulations will maintain the status quo as regards the courses included in plans approved by HEFCW under the 2004 Act during the transitional period.

The 2015 Regulations did not make specific provision for courses delivered on behalf of institutions with fee plans approved by HEFCW under the 2004 Act or fee and access plans approved by HEFCW under the 2015 Act. The changes proposed by the amendments to the 2015 Regulations deal with the arrangements for such courses. The amendments preserve, for the purpose of the transitional period, the scope of courses which are qualifying courses for 2004 Act plans and limit the scope of qualifying courses provided on behalf of

regulated institutions for 2015 Act plans to those which are provided by charities.

The effect of the amendments to the 2015 Regulations on institutions with 2004 Act approved plans is likely to be minimal. Currently the overwhelming majority of Welsh HE institutions' franchise arrangements are with FE institutions in Wales – generally such courses would fall within the scope of the 2011 Regulations and be included in HE institutions' 2004 Act fee plans. Under the amended regulations such courses would still be required to be included in HE institutions fee and access plans as all FE institutions in Wales are charities. Data obtained from the SLC for 2014/15 indicates that some HE institutions do have some courses delivered under franchise arrangements with non-publicly funded providers in England which are not charities. Such courses would not fall within the scope of the 2011 Regulations and would not be included in HE institutions' 2004 Act plans, and nor will they fall within the scope of the amended regulations. Data supplied by HEFCW for 2013/14 indicates that the majority of students on such courses were either undertaking postgraduate study or were students from the rest of the UK or overseas students who are not entitled to Welsh Government student support. Consequently there should be relatively little impact on institutions with 2004 Act approved fee plans arising from the proposed amendments to the 2015 Regulations

Institutions will need to consider the courses to be included in their fee and access plan applications and HEFCW proposes to issue guidance to institutions on the preparation of those plans in spring 2016. We anticipate that HEFCW's guidance will include reference to the amended regulations so that institutions are clear about the scope of courses which are subject to fee limits and are to be included in their plans.

Other impacts

These Regulations have no impact on the statutory duties of sections 78 (Welsh language) and 79 (sustainable development) of the Government of Wales Act 2006.

Impact assessments were carried out for the Higher Education (Wales) Bill during its passage through the National Assembly for Wales in relation to: sustainable development; Rights of the Child; equality; Welsh language; privacy; and rural proofing. A short summary of each assessment is included in the Regulatory Impact Assessment for undertaken for the Bill and a copy of the individual assessments can be provided separately if required. The Equality Impact Assessment for the Bill was published on the Welsh Government website and is available at:

<http://gov.wales/legislation/programme/assemblybills/higher-education-bill/?lang=en>

The amendments sought to the extant regulations are not considered to have any specific impacts on the above matters as they only alter the scope of

courses provided on behalf of regulated institutions which are to be subject to fee limits. The amendments do not prevent regulated institutions offering courses delivered on their behalf under franchise arrangements with providers which are not charities.

Consultation

A formal consultation exercise on the extant regulations took place between 17 March 2015 and 12 May 2015. The outcome was included in the Regulatory Impact Assessment for the extant regulations which may be accessed via web link below:

<http://www.senedd.assembly.wales/documents/s42667/CLA560%20-%20EM%20The%20Higher%20Education%20Qualifying%20Courses%20Qualifying%20Persons%20and%20Supplementary%20Provision.pdf>

The Higher Education (Wales) Bill Technical Consultation was undertaken for a period of 10 weeks from 20 in May – 29 July 2013 and proposed, amongst other things, that where a regulated institution franchises some of its HE courses to a provider which is not a charity that those courses would **not** be qualifying courses for the purpose of fee limits and should **not** automatically be designated for the purposes of statutory student support from the Welsh Government.

The Technical Consultation sought stakeholders' views on the merits of these proposals and / or any difficulties that might arise from them. Respondents to the consultation did not identify any specific difficulties but did note that requiring the franchisee of a regulated institution to have charitable status as well as the franchisor would help to ensure that the financial subsidy derived from the Welsh Government's tuition fee grants and loans are not used to benefit shareholders.

The Technical Consultation additionally included a question about the future arrangements for franchised courses as follows:

Question 2: We recognise that a variety of franchising arrangements currently exist in Wales and that these have been developed under the funding system which operated prior to the introduction of the new fees and student support arrangements. We are particularly interested in your views as to how franchised provision should be dealt with under the new regulatory framework:

- (a) Will the proposal for the institution or provider which franchises the course to be the body which is responsible for either applying for a fee plan or requesting case by case designation of its courses work in practice?*
- (b) Could this proposal result in any delivery issues? If so please identify those issues.*
- (c) Are there any alternative approaches which you wish to put forward for consideration?*

The majority of HE institutions that responded to this question considered the proposal for the franchisor to be responsible for either applying for a fee plan or requesting cases-by-case designation of its courses to be in line with current practice. However some concern was expressed about the ability of the franchising institution to directly influence the delivery arrangements of the franchisee. Additionally the FE sector response supported the proposed approach in respect of full-time HE courses.

The consultation was open to all and the Welsh Government ensured that all higher education institutions and other key stakeholders that may be affected by the proposed legislation were notified of the consultation. 21 written responses were received. The consultation summary report has been published and may be accessed via: <http://gov.wales/consultations/education/higher-education-wales-bill-technical-consultation/?lang=en>

No further consultation has been undertaken on the proposed amendments to the extant regulations as they are in line with the Technical Consultation policy proposals.

Competition Assessment

The competition filter indicates that these Regulations are not likely to have a significant impact on competition. Other than a restriction on price (by applying maximum fee limits to qualifying courses), no issues were identified.

Post implementation review

The regulations will be kept under review to ensure that original intent and the policy requirements remain valid.