

## **Explanatory Memorandum to The Education (Fees and Awards) (Wales) Regulations 2007**

### **Description**

1. These Regulations are intended to replace the existing Education (Fees and Awards) (Amendment) (Wales) Regulations 2006 No. 1795 (W.190). The Regulations are required to amalgamate existing and new functions into Welsh legislation, following a recent transfer of powers to the Welsh Assembly Government, and will also update the existing eligibility criteria.

A copy of the Instrument is submitted with this Memorandum.

### **Matter of special interest to the Secondary Legislation Committee**

2. These Regulations are of a routine nature and will be made by the relevant portfolio Welsh Minister within the required dates. The Regulations are of no special interest to the Secondary Legislation Committee.

### **Legislative Background**

3. The powers enabling this Instrument to be made are contained in sections 1 and 2 of the *Education (Fees and Awards) Act 1983*. The functions covered by Section 1 of the 1983 Act were devolved to the Assembly in June 2006 by the *Transfer of Functions Order 2006* No 1458. The functions covered by Section 2 of the 1983 Act were previously devolved to the Assembly in 1999 by the *Transfer of Functions Order 1999* No 672. These powers have been transferred to Welsh Ministers under paragraphs 30(1) and 30(2)(a) of the *Government of Wales Act 2006*. Responsibility for issues relating to the contents of the Regulations has been delegated to my portfolio as Deputy Minister for Education, Culture and the Welsh Language. This statutory instrument is subject to annulment by a resolution of the Assembly (the Negative Resolution procedure).

### **Purpose and intended effect of the legislation**

4. The purpose of the legislation is to provide institutions or bodies that make awards with a statutory defence against claims made under the *Race Relations Act 1976*, should they elect to charge different fees to different categories of students based on whether they can demonstrate a relevant connection with the UK.

5. These Regulations make provision in respect of the powers for further and higher education institutions to charge fees and they also authorise the adoption of rules of eligibility for the bodies mentioned in the Regulations to make discretionary awards.

## Amalgamation of Sections 1 and 2 of the Fees and Awards Act 1983

6. The new legislation will effectively amalgamate both functions covered by Sections 1 and 2 of the 1983 Act in regulations governing Wales.

7. Section 1 of the Education (Fees and Awards) Act 1983 makes provision for Welsh Ministers to put in place regulations to be made that require or authorise Higher and Further Education establishments to charge higher fees to students who cannot demonstrate a connection with the United Kingdom

8. Section 2 of the Education (Fees & Awards) Act 1983 makes provision for the Welsh Ministers to make regulations setting out the eligibility criteria for post compulsory education awards by LEAs or the Research Councils. It requires students to be able to demonstrate a connection with the United Kingdom in order for them to be eligible to be assessed to receive student support along with other UK nationals.

### Eligibility Criteria Changes

9. These Regulations will update the existing legislation which sets out the specific eligibility criteria to be used in assessing a student's entitlement to be granted home fee status or for the receipt of an award. Similar changes have been made by the Department of Education and Skills (DfES) in their corresponding legislation for 2007.

10. These Regulations will also update the existing eligibility criteria so that they follow, as far as possible, the policy principles in the main student support legislation – *The Assembly Learning Grants and Loans (Higher Education) Regulations 2007 No 1045 (W.104)* and forthcoming amendment regulations.

### *Children of Turkish Workers*

11. The new Regulations will reflect the European Court of Justice (ECJ) decision in the case of Gürol (Case number C-374/03), which concerned the application of article 9 of Decision No 1/80 of the Association Council (The Association Council was created by the agreement establishing an association between the EC and Turkey). It was held that article 9 has direct effect in the Member States of the EC and as such guarantees the children of Turkish workers a non-discriminatory right of access to vocational training and education grants provided in connection with such training.

12. Article 9 of Decision 1/80 of the Association Council of 19 September 1980 provides that Turkish children who are residing legally in a Member State with their parents who are or have been legally employed in that Member State are to be admitted to courses of general education, apprenticeship and vocational training under the same educational entry qualifications as the children of nationals of that Member State. Article 9 also provides that such children may also be eligible to benefit from advantages provided for under the national legislation in this area.

13. Article 9 guarantees a non-discriminatory right of access to education grants to Turkish children Wales (and the UK) already allows support (and home fee status) to children of economically active EEA and Swiss nationals (including UK nationals) who have been ordinarily resident in the EEA and Switzerland throughout the three years prior to the first day of the first academic year of the course. Following this ECJ decision, it is unjustified to deny home fee status or student support to children of economically active Turkish nationals in the UK, where the student has been resident in the EEA, Switzerland and Turkey throughout the three years prior to the start of the course. Not including Turkey as a place of qualifying residence would make it harder for Turkish children to comply with the residence criteria and this would arguably be discriminatory contrary to EC law.

*Family Members of refugees and those with leave to enter or remain in the UK*

14. The eligibility criteria will be updated to reflect changes to the circumstances in which family members of refugees and persons with leave to enter or remain in the UK and their family members will become potentially eligible under the Regulations.

15. The new legislation will also clarify the definition of family members in refugee cases, which specifies those who can be deemed to be eligible for home fees when they are the child, step-child, spouse or civil partner of a refugee.

16. Changes are also being made with regards to the treatment of those who lose their immigration or EEA/Swiss family member status during their higher education course. For new students whose immigration status expires within the life of their course, support may cease at the end of the academic year in which the relevant status expires.

17. The changes set in paragraphs 14 to 16 above, apply to new students from September 2007 and mirror Home Office policy rules and similar changes which have been made by the DfES to their corresponding legislation.

*British Overseas Territories Students (BOTS)*

18. The Regulations will amend the existing legislation to ensure British Overseas Territories Students (BOTS) are charged the same fees for higher education as UK nationals. In November 2006 the then Minister for Education, Lifelong Learning and Skills decided that BOTS students studying in Wales would enjoy parity with those studying in other parts of the UK and would be eligible for home fee status. These territories do not have tertiary education provision and were being charged full course fee along with other overseas students. This was an anomaly as students from territories of other EU partner states were being treated as EU nationals and paying home fees when studying in the UK. By making this amendment, BOTS students will not be disadvantaged when studying in Wales.

## *New Provisions*

19. The Regulations will introduce new provisions so that the eligibility criteria set out in the Regulations can also be used for the assessment of awards by the Higher Education Funding Council for Wales (HEFCW). The Training and Development Agency for Schools (TDA), in relation to those functions of the TDA which relate to Wales and the Welsh Ministers or any institutions funded by them.

## **Implementation**

20. These Regulations were made on 4 August 2007 and it is intended will come into force on 31 August 2007. The Regulations need to be in force before the start of the 2007/08 academic year as they will enable the revisions to the eligibility criteria to be used in assessing a student's entitlement to be granted home fee status or for the receipt of an award in the 2007/08 academic year.

21. The Regulations provide the Welsh Ministers with legal protection against a claim for race discrimination being brought by an overseas student under the Race Relations Act 1976.

22. The Regulations will also ensure that Wales complies with the requirements of the European legislation (European Court of Justice (ECJ) decision in the case of Gürol) in relation to this function. The Regulations contain eligibility criteria which comply with article 9 of Decision No1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Community and Turkey.

23. The changes made to the eligibility criteria within these Regulations will ensure alignment across the suite of legislation supporting the student finance system in Wales.

24. Broadly similar Regulations come into force in England on 1 September 2007.

## **Consultation**

25. There is no legal requirement to consult prior to making the Education (Fees and Awards) (Wales) Regulations 2007. However, representatives from UKCOSA and the Planning and Funding Division within the Welsh Assembly Government have advised on the drafting of the Regulations. Stakeholders and the delivery partners have been advised that new regulations will be made.

## **Regulatory Impact Assessment**

### **Options**

26. Details of the proposed changes are set out in the *purpose and intended effect of the legislation* section. The options of making or not making the Regulations are:

27. **Do nothing** – If these Regulations are not made, it could open the Welsh Ministers to possible legal challenge and raise the potential for a claim for race discrimination in the charging of fees being brought by an overseas student. The Assembly would not be able to meet its obligations under the terms set by the European Association Council Decision.1/80 article 9. There would also be disparity in the eligibility criteria used by the legislation which governs the student support system.

28. **Make the legislation** –Implementing these Regulations will provide statutory defence against claims made under the Race Relations Act 1976. The Regulations will also enable the revised eligibility criteria can be taken into account during the assessment of a student's entitlement to be treated for home fee status or for the receipt of an award in the 2007/08 academic year.

### **Benefits**

29. By the making of the Regulations the Welsh Ministers will benefit by the assurance that it has incorporated the changes resulting from the European Community decision and lessens the potential for successful legal challenge.

30. Students will benefit from the amendments to the eligibility criteria which specifies who can be granted home fee status or deemed eligible to receive an award. The new legislation will also ensure greater alignment of the eligibility criteria used across the suite of legislation supporting the student support system in Wales.

### **Costs**

31. There are no additional financial implications as a result of these Regulations as they do not directly impact on the Welsh Assembly Government's budgets. Costs that do arise from the changes to the eligibility criteria impact directly on the main student support legislation.

### **Competition Assessment**

32. The making of these Regulations have no impact on businesses, charities and/or the voluntary sector.

## **Consultation**

33. There is no legal requirement to consult on the Education (Fees and Awards) (Wales) Regulations 2007. However, representatives from UKCOSA and the Planning and Funding Division within the Welsh Assembly Government have advised on the drafting of the Regulations. Stakeholders and the delivery partners have been advised that new regulations will be made.

## **Post implementation review**

34. There is an ongoing process of continual review of the Regulations to ensure they reflect future policy developments and any new European requirements.

## **Summary and Recommendation**

35. The making of this instrument is cost neutral to the Welsh Assembly Government and officials recommend that these Regulations are put in place to support the 2007/08 academic year. They will provide legal coverage for the Welsh Ministers against a race relations claim and will ensure that fee eligibility criteria align across the student support system in Wales.