EXPLANATORY MEMORANDUM TO

THE TERTIARY EDUCATION AND RESEARCH (WALES) ACT 2022 (CONSEQUENTIAL AMENDMENTS) ORDER 2026

2026 No. 358

1. Introduction

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

2. Declaration

2.1 The Rt Hon Jo Stevens MP, Secretary of State at the Wales Office, confirms that this Explanatory Memorandum meets the required standard.

2.2 Huw Bryer, Deputy Director for the Constitution at the Wales Office, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 David Harries at the Wales Office Telephone: 07840 009179 or email: David.Harries@ukgovwales.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This Order is made under section 150 of the Government of Wales Act 2006 which, among other things, allows the Secretary of State to make provision in consequence of Acts of Senedd Cymru and any subordinate legislation made under those Acts. This Order makes provision in consequence of the Tertiary Education and Research (Wales) Act 2022 ("the 2022 Act"), and the Tertiary Education and Research (Wales) Act 2022 (Commencement No. 4 and Transitory and Transitional Provisions) Order 2024 ("the 2024 Order") made under section 148(2) and (3) of the 2022 Act.

Where does the legislation extend to, and apply?

4.2 The territorial extent of the amendments made by this Order (that is, the jurisdiction(s) which the amendments form part of the law of) in each case follows the territorial extent of the provisions they amend. Articles 2, 3, 4 and 6 extend to England and Wales, Scotland and Northern Ireland. Article 5 extends to England and Wales.

4.3 The application (that is, where the amendments produce a practical effect) of articles 2, 3 and 5 of this Order is largely confined to Wales. Article 4 and article 6 apply in the United Kingdom.

5. Policy Context

What is being done and why?

5.1 The 2022 Act creates a new statutory framework for publicly funded tertiary education and research in Wales, establishing the Commission for Tertiary Education and Research ("the Commission") and dissolving the Higher Education Funding

Council for Wales ("HEFCW"). The Commission is responsible for funding and regulating the tertiary education sector in Wales.

5.2 Tertiary education is defined in section 144 of the 2022 Act as:

- Higher education: meaning education provided by means of a course of any description mentioned in Schedule 6 to the Education Reform Act 1988,
- Further education: meaning education, other than higher education, suitable to the requirements of persons who are over compulsory school age and organised leisure-time occupation connected with such education, and including sixth form education provided at a school at which secondary education is also provided, or
- Training suitable to the requirements of persons who are over compulsory school age and organised leisure-time occupation connected with such training.

5.3 The 2022 Act repealed a number of provisions of existing education legislation including:

- Provisions within Part 2 of the Learning and Skills Act 2000 ("LSA 2000"), which required the Welsh Ministers to secure proper facilities for education and training for persons aged between 16 and 19 years old (section 31 of the LSA 2000) and reasonable facilities for education and training for persons aged 19 years old or over (section 32 of the LSA 2000), and conferred funding functions on the Welsh Ministers to assist with the discharge of those duties (sections 34 to 38 and 41 of the LSA 2000).

  Part 3 of the 2022 Act provides the Commission with equivalent functions to those that have been repealed. The relevant provisions of the 2022 Act require the Commission to secure facilities for education and training (sections 93 to 96 of the 2022 Act) and confer funding functions on the Commission to assist with the discharge of those duties (sections 97 (financial support for further education or training), 101 (school sixth-forms), 103 (financial support for other activities connected to tertiary education), and 104 (financial support for apprenticeships) of the 2022 Act). Some of these functions are also exercisable by the Welsh Ministers. Section 92 of the 2022 Act also confers a separate function on the Welsh Ministers which allows them to secure funding for the delivery of certain higher education courses.
- Section 86 of the Education Act 2005, which made provision in respect of the payment of grants, loans and other payments by HEFCW in relation to the funding of teacher training. HEFCW had not exercised section 86 of the Education Act 2005 for some time prior to its dissolution on 1 August 2024. The 2022 Act therefore does not make equivalent provision to section 86 of the Education Act 2005.
- Section 65 of the Further and Higher Education Act 1992 ("FHEA 1992"), under which HEFCW was responsible for providing funding to higher education institutions in Wales in respect of education and research. HEFCW was also responsible for providing funding to further education institutions in Wales, or institutions supported by local authorities, for the provision of higher education courses specified in regulations. The 2024 Order provides that these functions will be exercised by the Commission until the repeal of section 65 is bought into force by the Welsh Ministers at a later date.

5.4 The repealed provisions are referenced in a number of pieces of UK legislation. This Order therefore seeks to replace references to the repealed legislation, and to take

account of the new functions of the Welsh Ministers and the Commission as provided for by the 2022 Act.

Value Added Tax Act 1994

5.5 Part 2 of Schedule 9 to the Value Added Tax Act 1994 sets out descriptions of categories of goods and services that are exempt from specific provisions of that Act. Part 2 of Schedule 9 comprises a number of groups relating to different matters, with group 6 listing descriptions relating to education. Group 6 currently provides an exemption for supplies where funds are provided by the Welsh Ministers under Part 2 of the LSA 2000.

5.6 As a consequence of the repeal of the Welsh Ministers' funding functions within Part 2 of the LSA 2000, the existing exemption in Schedule 9 to the Value Added Tax Act 1994 needs to be amended. Article 2 of this Order therefore amends the existing exemption to instead refer to the relevant funding functions within the 2022 Act.

Income Tax (Earnings and Pensions) Act 2003

5.7 Section 457 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") defines research institutions for the purpose of determining the tax treatment of income derived from shares in research institution spin-out companies. A research institution is currently defined as a university or other institution receiving a grant, loan, financial support, financial assistance, financial resources or payment under section 65 of the FHEA 1992, section 34 of the LSA 2000 or section 86 of the Education Act 2005 (amongst other funding powers).

5.8 As a consequence of the repeal of section 34 of the LSA 2000 and section 86 of the Education Act 2005, the definition of 'research institution' in section 457 of the ITEPA 2003 needs to be amended. Article 3 of this Order amends this definition to ensure that institutions receiving funding under sections 92, 97, 103 or 104(1)(a) of the 2022 Act are included in the definition, other than where bodies are receiving such funding solely as a 'collaborating body' under the 2022 Act. A 'collaborating body' is generally a person who works with education providers which have received funding under section 92(1), 97(1) or 104(1)(a) of the 2022 Act. As part of this, collaborating bodies can receive funding from education providers. This would however require the consent of the person who originally provided the funding to the education provider (i.e. either the Commission or the Welsh Ministers).

Higher Education and Research Act 2017

5.9 Section 113(3)(f) of the Higher Education and Research Act 2017 ("HERA 2017") enables the Welsh Ministers to exercise their functions under Part 2 of the LSA 2000 jointly with other public authorities listed in section 113(3), where exercising the function jointly would be more efficient or effective.

5.10 As a consequence of the repeal of the Welsh Ministers' functions under Part 2 of the LSA 2000, article 4 of this Order amends section 113(3)(f) of the HERA 2017 to enable the Welsh Ministers to exercise specific functions under the 2022 Act jointly with another relevant authority.

Charities Act 2011 (Principal Regulators of Exempt Charities) Regulations 2013

5.11 Section 26 of the Charities Act 2011 sets out the general duty held by 'principal regulators' in relation to charities which are exempt from the requirement to register with the Charity Commission. The principal regulator must do all it reasonably can to promote compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the exempt charities.

5.12 Regulation 4 of the Charities Act 2011 (Principal Regulators of Exempt Charities) Regulations 2013 ("the 2013 Regulations") designates the Welsh Ministers as the principal regulator for further education corporations in Wales and the governing body of St David's Catholic College. The Welsh Ministers are also the principal regulator for institutions which are administered by or on behalf of, and are established for the purposes of, further education corporations in Wales and the governing body of St David's Catholic College.

5.13 A principal regulator tends to be a body which regulates the charity in question for other purposes. Whilst the Welsh Ministers previously held relevant functions in the LSA 2000, the Commission will now be responsible for regulating further education and training in Wales. Article 5(3) of this Order therefore amends regulation 4 of the 2013 Regulations, designating the Commission as the principal regulator for the exempt charities mentioned in paragraph 5.12.

5.14 The Charities Act 2011 also deals with the disclosure of information between the Charity Commission and other bodies, including the principal regulators of exempt charities. Section 57 of the Charities Act 2011 specifies that His Majesty's Revenue and Customs (HMRC) information that the Charity Commission has received cannot be shared further without HMRC's consent and makes it an offence for a 'responsible person' to contravene that consent requirement.

5.15 As the Welsh Ministers are currently designated as a principal regulator (as explained in paragraph 5.12 above), the 2013 Regulations also include them in the definition of 'responsible person' for the purposes of the sharing of HMRC information. The definition of 'responsible person' also includes a person acting on behalf of the Welsh Ministers, or a member of a committee established by the Welsh Ministers. As the Commission will now be the principal regulator for the exempt charities mentioned in paragraph 5.12, article 5(4) of this Order amends the definition of "responsible person" to reflect the composition of the Commission.

Seafarers' Wages Regulations 2024

5.16 The Seafarers' Wages Regulations 2024 implement the Seafarers' Wages Act 2023, which makes provision in respect of the remuneration of seafarers who do not qualify for the national minimum wage. Regulation 16 provides that the apprenticeship rate can apply to those carrying out apprenticeships under arrangements made by the Welsh Ministers under sections 31 to 33 of the LSA 2000.

5.17 Following the repeal of these provisions of the LSA 2000 and the commencement of equivalent provision in Part 3 of the 2022 Act, the Commission will be required to secure the provision of reasonable and proper facilities for education and training. As explained above in paragraph 5.3, the Commission can currently exercise funding powers held within section 65 of the FHEA 1992. Among other things, this enables the Commission to fund apprenticeships which involve higher education. Article 6 of this Order therefore amends the Seafarers' Wages Regulations 2024. The amendment ensures that the apprenticeship rate can apply to seafarers carrying out apprenticeships that are provided or funded by the Commission under its functions in the 2022 Act and section 65 of the FHEA 1992.

What was the previous policy, how is this different?

5.18 As explained above, the legislation being amended by this Order currently includes references to funding powers and provisions that have been repealed and replaced by the 2022 Act. The amendments outlined above ensure that the legislation is up to date

in the context of the new system introduced by the 2022 Act and the transitional provisions that have been made in bringing the Act into force.

6. Legislative and Legal Context

How has the law changed?

Value Added Tax Act 1994

6.1 The amendment to item 5A of group 6 of Schedule 9 will ensure that education and vocational training provision and the supply of any goods or services essential to that provision will be an exempt supply for the purposes of Value Added Tax, to the extent that the consideration payable is ultimately a charge to funds provided by the Welsh Ministers or the Commission under the relevant funding functions of the 2022 Act.

Income Tax (Earnings and Pensions) Act 2003

6.2 The amendment to section 457 of the ITEPA 2003 will ensure that any university or other institution receiving financial assistance under sections 92, 97, 103 or 104(1)(a) of the 2022 Act, except any university or other institution classed as a collaborating body within the meaning given by those provisions, will fall within the definition of "research institution" for the purposes of the ITEPA 2003.

Higher Education and Research Act 2017

6.3 The amendment to section 113(3)(f) of the HERA 2017 will enable the Welsh Ministers to exercise their functions under sections 92, 97, 100 and 103(1) of the 2022 Act jointly with another relevant authority, where exercising the function jointly would be more efficient or effective.

Charities Act 2011 (Principal Regulators of Exempt Charities) Regulations 2013

6.4 The amendments to the 2013 Regulations provide for the Commission to be designated as the principal charity regulator for further education corporations in Wales and the governing body of St David's Catholic College. The Commission will also be the principal regulator for institutions which are administered by or on behalf of, and are established for the purposes of, further education corporations in Wales and the governing body of St David's Catholic College.

6.5 The amendments also set out those within the Commission who will be a "responsible person" for the purposes of section 57 of the Charities Act 2011.

Seafarers' Wages Regulations 2024

6.6 The amendment to regulation 16(4)(b) of the Seafarers' Wages Regulations 2024 provides that contracts of apprenticeship made by the Commission under sections 89(3), 93, 95 or 97 of the 2022 Act or section 65 of the FHEA 1992 will be captured under the definition of 'Government arrangements' in Wales. This will enable seafarers employed under those contracts to qualify for the apprenticeship rate.

Why was this approach taken to change the law?

6.7 These amendments extend otherwise than only to England and Wales or relate to matters which are reserved to the UK Parliament and cannot be made by an Act of the Senedd, due to the restrictions on the legislative competence of the Senedd set out in section 108A(2)(a) and (c) of the Government of Wales Act 2006.

6.8 For this reason, and because the amendments are consequential on provisions in a Senedd Act, an Order under section 150 of the Government of Wales Act 2006 was identified as the most suitable vehicle for making the necessary amendments.

7. Consultation

Summary of consultation outcome and methodology

7.1 As this Order makes consequential amendments and makes no further substantive changes to UK or Welsh Government policy, a formal public consultation did not take place for this instrument. However, consultation was undertaken by the Welsh Government prior to the introduction of the 2022 Act and during scrutiny by the Senedd.

7.2 The Welsh Government has undertaken a series of public consultations to put in place the legal framework which underpins the creation of the Commission. This has included working closely with the post-compulsory education sector in Wales.

8. Applicable Guidance

8.1 As this Order makes only consequential amendments to legislation, no guidance is thought to be necessary.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument. The Welsh Government produced a regulatory impact assessment[1] to accompany the 2022 Act which assessed the potential costs and benefits associated with establishing the Commission.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because this instrument only makes consequential amendments to primary and secondary legislation.

9.3 The legislation does not impact small or micro businesses. The instrument makes only consequential amendments to primary and secondary legislation, none of which will result in a change of policy.

9.4 There is no, or no significant, impact on the public sector because this instrument only makes consequential amendments to primary and secondary legislation.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 This instrument does not include a statutory review clause.

[1] https://www.gov.wales/sites/default/files/publications/2022-12/tera-2022-explanatory-memorandum_0.pdf

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Secretary of State for Wales has made the following statement regarding Human Rights:

"In my view the provisions of the Tertiary Education and Research (Wales) Act 2022 (Consequential Amendments) Order 2026 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").