

DELEGATED POWERS AND REGULATORY REFORM COMMITTEE HIGHER EDUCATION AND RESEARCH BILL

Supplementary Memorandum by the Department for Education and the Department for Business, Energy and Industrial Strategy

Introduction

1. This Supplementary Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Education (the “**Department**”) and the Department for Business, Energy and Industrial Strategy in relation to the Higher Education and Research Bill (the “**Bill**”).
2. It follows the Delegated Powers Memorandum submitted to the Committee on 23 November 2016 and the Supplementary Memorandum submitted to the Committee on 6 January 2017. Government amendments to the Bill were tabled on 24 February 2017 for consideration at Report stage in the House of Lords. This Supplementary Memorandum identifies those amendments which introduce new powers to make delegated legislation, or make significant amendments to existing powers in the Bill.
3. Unless otherwise stated, the clause references in this Supplementary Memorandum are to clauses in HL Bill 97, the Bill as amended in Committee in the House of Lords.
4. The text of the relevant amendments can be found in the annex to this Supplementary Memorandum.

Overview of the Bill

5. The Bill contains 4 Parts and 12 Schedules.
6. Part 1 of the Bill (The Office for Students) establishes a new executive non-departmental public body, the Office for Students (“**OfS**”), which will replace the Higher Education Funding Council for England (“**HEFCE**”). The OfS will establish and administer a register of higher education providers, and set conditions of eligibility for inclusion on the register, and for receipt of student support and grant funding. Before determining the conditions, the OfS is under a duty to consult such representative bodies of higher education providers as are appropriate. The conditions will then be set administratively by the OfS. There are also some mandatory conditions which are set out in the Bill. The OfS will be empowered to provide funding to providers, and authorise them to award degrees and use university in their title.
7. Part 2 (Other Education Measures) contains clauses relating to the provision of financial support for students; the definition of “qualifying institutions” for the purposes of the student complaints regime under the Higher Education Act 2004 (“**HEA 2004**”); and the deregulation of existing governance requirements in relation to higher education corporations.
8. Part 3 (Research) establishes United Kingdom Research and Innovation (“**UKRI**”) to carry out, promote and fund research into the arts, humanities, sciences, social sciences, technology and new ideas. UKRI will be composed of the current seven Research Councils, Innovate UK, and the research-funding aspect of HEFCE.
9. Part 4 (General) contains general and supplemental provisions.

Part I: The Office for Students

Mandatory fee limit condition for certain providers

Amendments to Schedule 2, paragraphs 2(9) and 3(8): powers of the Secretary of State to prescribe by regulations the “floor amount” to the higher amount and the “floor amount” to the basic amount

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

*Parliamentary procedure: Negative resolution under Schedule 2, paragraph 4(4)(a) (see also clause 115(3)).
Affirmative resolution under Schedule 2, paragraph 4(1A) and 4(4)(b) (see also clause 115(4)).*

Context and purpose

10. Schedule 2 contains provision about determining the amount of “the fee limit” where a fee limit condition is an ongoing registration condition of a registered higher education provider under clause 11 (Mandatory fee limit condition for certain providers).
11. Under paragraph 2(1) and (2) of Schedule 2, where a provider has an approved access and participation plan and a “high level quality rating”, the fee limit is such limit, not exceeding the “higher amount”, as is provided by the plan for the relevant course and relevant academic year. The “higher amount” will be prescribed by regulations made by the Secretary of State.
12. Under paragraph 3(1) and (2) of Schedule 2, where a provider does not have an approved access and participation plan but has a “high level quality rating”, the fee limit is the “basic amount”. The “basic amount” will be prescribed by regulations made by the Secretary of State.
13. Under paragraphs 2(6) and 3(5) of Schedule 2, the Secretary of State also has the power to determine applicable sub-level amounts for providers that do not have a high-level quality rating. Different sub-level amounts may be set for different descriptions of provider, depending on whether a provider has a quality rating or not, and the level or type of such rating (paragraphs 2(7) and 3(6) of Schedule 2). In each case, the sub-level amount must be greater than or equal to a “floor amount” to the higher amount (for providers with an access and participation plan) or a “floor amount” to the basic amount (for providers without an access and participation plan). These floor amounts will be prescribed by regulations made by the Secretary of State under paragraphs 2(9) and 3(8) of Schedule 2.
14. The Bill allows for different higher and basic amounts to be prescribed for different cases or purposes by virtue of clause 115(5)(a). Notwithstanding this, the current drafting of paragraphs 2(9) and 3(8) of Schedule 2 could be read as implying that there can only be one floor amount in each case. The Department wishes to ensure that there can be different floor amounts in respect of different higher and basic amounts and has therefore tabled amendments to those paragraphs to clarify the position. These amendments provide that, where different amounts are prescribed as the higher or basic amount for different cases or purposes, the Secretary of State has a corresponding power to prescribe a different floor amount in each case. By way of example, if different higher amounts are set in relation to different courses, these amendments would allow the Secretary of State to prescribe a floor amount in respect of each of these higher amounts.

Justification for delegation

15. As set out in the original Delegated Powers Memorandum (at paragraphs 47 and 48), the power of the Secretary of State to prescribe the floor amount is considered necessary to provide essential flexibility, and has direct precedent in section 24(6) of the HEA 2004, which applies in relation to the higher and basic amounts under the current fee regime. The Department considers it likely that the fee limit amounts, including the floor amounts, will need to be kept under review and amended more frequently than Parliament can be expected to legislate for by primary legislation. Under the current regime, for example, the first regulations setting the higher and basic amounts were made in 2004, and increases above the rate of inflation to both the higher and basic amounts were made in 2010, and the statutory instruments which effected those increases have also since been amended.
16. The amendments to Schedule 2 described above ensure that the Secretary of State can set differentiated floor amounts in cases where different higher and basic amounts are prescribed for different cases or purposes. These amendments do not, in the Department's view, alter the underlying principle that the floor amounts should be set by way of delegated legislation, rather than being included on the face of the Bill. Indeed, these amendments clarify that there is the potential for there being a multitude of different floor amounts, which makes the setting of those amounts even more suited to delegated legislation.

Justification for procedure selected

17. As set out in the original Delegated Powers Memorandum (at paragraph 49), the Department considers it is appropriate to follow the same levels of parliamentary scrutiny set out section 26(2) and section 47(2) and (3)(a) of the HEA 2004 to which the setting of the higher and basic amounts under that Act are currently subject.
18. The Committee was concerned, in its 10th report of the session 2016-17, that the negative resolution procedure does not provide an adequate level of parliamentary scrutiny in relation to the first set of regulations prescribing the higher, basic and floor amounts. The Department accepts that further scrutiny would be appropriate and has responded to the Committee's concern by tabling an amendment, inserting new paragraph 4(1A) of Schedule 2, which will require that the first set of regulations prescribing these amounts will be subject to the affirmative procedure. The procedure in respect of subsequent regulations prescribing floor amounts is as set out in paragraph 4(4) of Schedule 2. Where regulations are made to increase these amounts, and the Secretary of State is satisfied that the increase is no greater than is required to maintain their value in real terms, the negative procedure will apply. If the increase is greater than is required to maintain their value in real terms, the affirmative procedure will apply.
19. The Department considers that this level of scrutiny for subsequent regulations remains appropriate. The negative procedure will ensure that Parliament retains a degree of oversight over any proposal to amend the floor amounts to maintain their value in real terms. The affirmative procedure will ensure a greater level of scrutiny and debate if it is proposed that these amounts be increased by more than the rate of inflation. In the Department's view, this strikes the right balance between the need for flexibility to amend the floor amounts on the one hand, and the need for appropriate scrutiny and checks on the other.

Amendments to clause 31 and Schedule 2, paragraph 2(2), (5), (6), new (6A), (7) and (10), and paragraph 3(2), (4), (5), new (5A), (6) and (9): power of the Secretary of State to determine the “sub-level amount”

Power conferred on: Secretary of State

Power exercisable by: Secretary of State administratively

Parliamentary procedure: None

Context and purpose

20. The preceding paragraphs describe Government amendments to ensure that different floor amounts can be set in relation to different higher and basic amounts. The Department has also tabled amendments to achieve the same outcome in relation to the sub-level amounts determined by the Secretary of State under paragraphs 2(6) and 3(5) of Schedule 2.
21. Paragraph 2(2)(b) of Schedule 2 provides that, where a provider has an access and participation plan, and does not have a high level quality rating, the fee limit amount is such limit, not exceeding the sub-level amount, as is provided for by the plan for the relevant course and for the relevant academic year. Paragraph 3(3)(b) of Schedule 2 provides that, where a provider does not have an access and participation plan, and does not have a high quality rating, the fee limit is the sub-level amount.
22. In each case, the applicable sub-level amount will be set administratively by the Secretary of State, who will be able to determine different amounts for different descriptions of provider (paragraphs 2(6) and 3(5) of Schedule 2), depending on whether or not they have a quality rating, and the level and type of such rating. The Secretary of State must notify the OfS and publish any determination.
23. Under the current draft of the Bill, paragraphs 2(6) and (8) and 3(5) and (7) of Schedule 2 could be read as implying that it is only possible for there to be one sub-level amount in each case, even where there is more than one higher or basic amount prescribed for different cases or purposes by virtue of clause 115(5)(a).
24. The Department has tabled these amendments to ensure that, where different higher or basic amounts are prescribed for different cases or purposes, there is a corresponding power to set different sub-level amounts for each higher or basic amount, as applicable. The proposed amendment to paragraph 2(6) and new paragraph 2(6A) of Schedule 2 do this in relation to the applicable sub-level amounts in respect of different higher amounts; and the proposed amendment to paragraph 3(5) and new paragraph 3(5A) do this in relation to the applicable sub-level amounts in respect of different basic amounts.

Justification for delegation

25. The amendments to Schedule 2 described above ensure the intended flexibility in setting different sub-level amounts, however, they do not alter the arguments advanced previously in support of this delegated power. It remains the Department’s view that it is neither necessary nor desirable for the sub-level amounts to be set out in the Bill or prescribed by regulations.
26. The Secretary of State’s ability to determine the sub-level fee limits for individual providers is important in enabling the Government to maintain control over the overall affordability of the student finance system, subject to parameters set by Parliament.

27. The sub-level amounts will be set by reference to the higher, basic and floor amounts, each of which will be prescribed by regulations. Parliament will therefore have the opportunity to scrutinise the higher, basic and floor amounts and it will not be possible to set the sub-level amounts outside of those limits.
28. The Secretary of State's ability to set the sub-level amounts by reference to whether or not providers have a quality rating and the level and type of that rating (paragraphs 2(7) and 3(6) of Schedule 2), is also intended to provide flexibility and enable the Government to incentivise good quality teaching in higher education.
29. As a consequence of the amendments to Schedule 2 described above, there could also be many more sub-level amounts which, in the Department's view, strengthens the need for the Secretary of State to have the power to determine these amounts administratively.

Justification for procedure selected

30. As set out in the original Delegated Powers Memorandum (at paragraph 63), the Department considers that parliamentary scrutiny of the sub-level amounts by way of a parliamentary procedure is not necessary because such amounts must not exceed the relevant higher or basic amount, and must be greater than the relevant floor amount. The regulations prescribing these higher, basic and floor amounts will be subject to parliamentary scrutiny. This includes the affirmative procedure for the first set of regulations setting the higher, basic and floor amounts, and for any subsequent regulations which increase any of these amounts by more than is required to maintain their value in real terms (this includes a special procedure in relation to above inflation increases to higher amounts). Therefore the sub-level amounts must be set within strict parameters, which will themselves be subject to appropriate parliamentary scrutiny. Parliament may also consider the sub-level amounts when scrutinising any regulations prescribing the higher, basic or floor amounts.
31. The Department believes that this approach provides the necessary flexibility to determine different sub-level amounts and relate them to teaching excellence ratings, whilst ensuring that proportionate fee limits are set within clear and transparent parameters.

Amendments to Schedule 2, paragraph 4 and new paragraph 5: power of the Secretary of State to prescribe by regulations the higher, basic and floor amounts in relation to accelerated courses

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution under Schedule 2, new paragraph 5(1) and (2) (if the higher, basic or floor amount in the case of an accelerated course is greater than it would be if it were not an accelerated course) (see also clause 115(4)); otherwise negative resolution

Context and purpose

32. In certain circumstances, higher education providers may offer "accelerated courses". An accelerated course means a higher education course where the number of academic years applicable to the course is at least one fewer than would normally be the case for that course, or a course of equivalent content leading to the grant of the same or an equivalent academic award. A typical example is where a three year degree course is delivered over a two year

period instead, but with the equivalent amount of teaching and examination time as would be applicable to the three year course.

33. The Department wishes to encourage the development of accelerated courses, and would like them to be more widely available. A perceived impediment under the current system is that fee caps do not necessarily reflect the increased intensity of accelerated courses. The Department's aim, therefore, is to recognise that it may be appropriate for fee limits applied in respect of accelerated courses to be higher than they would be for a conventional course, to reflect the enhanced concentration of teaching and examination time.
34. In light of this, the Department has tabled a set of amendments to Schedule 2 which relate to the regulations setting the higher, basic and floor amounts for accelerated courses. The purpose of these amendments is to ensure that such amounts are subject to an appropriate level of parliamentary scrutiny. They provide that, where regulations prescribe higher, basic or floor amounts in respect of an accelerated course which are higher than they would be if the course was not an accelerated course, the affirmative procedure will apply. Where the amounts prescribed are not higher than they would be if the course was not an accelerated course, the negative procedure will apply. Once these amounts are set by regulations it will be possible for the Secretary of State to determine sub-level amounts to apply in the context of accelerated courses, as she can under Schedule 2 for any other qualifying course. The explanation and justification given in the Department's original memorandum and again in paragraphs 26 to 31 above apply equally here.

Justification for the delegation

35. The power for the Secretary of State to prescribe the various fee amounts by regulations is considered necessary to provide flexibility in setting such amounts and amending them over time. The Department's reasoning in this regard is the same as that set out in relation to paragraphs 2(5), 3(4), 2(9) and 3(8) of Schedule 2 in the original Delegated Powers Memorandum (at paragraphs 47 and 48), and paragraphs 15 and 16 above. The use of delegated powers in relation to the higher and basic amounts also has direct precedent in section 24(6) of the HEA 2004.

Justification for the procedure selected

36. The Department considers that the affirmative procedure is appropriate in circumstances where the applicable fee amounts being prescribed in relation to accelerated courses are higher than they would otherwise be in relation to conventional courses. This reflects the need to ensure that higher fee limits are subject to careful scrutiny, and considered and debated fully.

Quality and standards

Amendment to clauses 27 and 28 and Schedule 4, paragraph 10: power of the OfS to give directions to the designated body

Power conferred on: Office for Students

Power exercisable by: Directions

Parliamentary procedure: None

Context and purpose

37. Clause 27 and Schedule 4 permit the Secretary of State to designate a body to perform the assessment functions of the OfS under clause 24 (Assessing the quality of, and the standards applied to, higher education). Where designated, the body will be under a duty to perform assessment functions, which might include, for example, designing and operating the quality and standards assessment system. The designated body will report to and operate within parameters set by the OfS.
38. Paragraph 10 of Schedule 4 provides that the OfS may give general directions to the designated body about the performance of any of its assessment functions. These directions must relate to English or registered higher education providers generally, or a description of such providers and, in giving such directions, the OfS must have regard to the need to protect the expertise of the designated body.
39. This amendment will require the OfS, when giving directions to the designated body, to have regard to the need to protect the body's ability to carry out, or make arrangements for, an impartial assessment of the higher education provided by higher education providers. This amendment is intended to ensure that the OfS not only respects the expertise of the body, but also the need for it to carry out assessments on an impartial, objective basis.

Justification for delegation

40. The justification for this delegated power is as set out in the original Delegated Powers Memorandum (at paragraphs 88 and 89). This power is considered necessary to ensure that any designated body operates within the parameters set by the OfS, as set out in the White Paper (Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice (May 2016)). This is intended to ensure that the quality system has the flexibility to respond to the changing needs of a growing and diversifying sector, and the OfS can manage risks related to quality and standards responsively as and when they arise. By way of example, this power could be used by the OfS to establish when the assessment functions should be exercised, the circumstances when a site visit should take place, and issues that should be considered in assessing the suitability of providers to be awarded degree awarding powers.
41. The amendment to Schedule 4 described above does not alter the Department's reasoning in support of this delegation, since it imposes an additional check on the OfS' use of this power.

Justification for procedure selected

42. As set out in the original Delegated Powers Memorandum (at paragraph 90), the Department's view is that no parliamentary procedure is necessary in respect of directions given by the OfS to a designated body. Such directions would relate to arrangements as between the OfS and the designated body, ensuring that the designated body operates within the parameters set by the OfS. The OfS will be required to provide an annual report on the performance of its functions, including the assessment functions, which must be laid before Parliament (see paragraph 13 of Schedule 1). This will give Parliament an opportunity to look at how the OfS and the overall regulatory system are performing. If these directions had to be given by way of regulations or their content set out on the face of the Bill, the OfS would not be afforded the same level of flexibility, and the arrangements for assessing quality and standards, which are intended to ensure a co-regulatory approach, could become overly complex and less responsive.

Power to grant degrees etc. and powers in relation to “university” title

Amendments to clause 44 and new clause after clause 44: Grant, variation or revocation of authorisation: advice on quality etc.

Power conferred on: Office for Students

Power exercisable by: Order by Statutory Instrument

Parliamentary procedure: None

Context and purpose

43. Institutions can currently obtain degree awarding powers by or under Acts (i.e. via an order of Council made by the Privy Council under section 76 of the Further and Higher Education Act 1992 (“**FHEA 1992**”)) or by Royal Charter. Powers to vary or revoke degree awarding powers may, depending on how the powers were granted, be express or implied.
44. Clause 41 transfers the Privy Council’s role, as it relates to English institutions, to the OfS. The OfS will be able to authorise, by order, registered providers of higher education to award taught and research awards. Clauses 43 and 44 confer on the OfS express powers to vary or revoke the degree awarding powers it has granted under clause 41, and those authorisations bestowed upon English providers by or under other Acts or by Royal Charter.
45. The Bill enables the OfS to have regard to expert advice before granting, varying or revoking degree awarding powers. During the passage of the Bill, concerns were raised about what advice the OfS would take and from whom. New clause 44 responds to those concerns. It requires the OfS to request advice from the body designated under Schedule 4 (or, if a body has not been designated, an OfS committee) on the quality of, or standards applied to, higher education before granting or varying degree awarding powers or revoking such powers on grounds of quality or standards.
46. The advice provided must be informed by the views of UKRI if the grant, variation or revocation relates to powers to grant research awards.
47. Further, the advice must be informed by the views of persons who (between them) have a range of relevant experience, including experience of: the education provided by institutions without degree awarding powers (i.e. ‘challenger institutions’); the education provided by further education providers; employing graduates; research into science, technology, humanities or new ideas; encouraging competition in industry; and representing the interests of students.
48. The OfS will still be able to take into account advice from other persons when making a decision to grant, vary or revoke degree awarding powers.

Justification for delegation

49. As set out in the original Delegated Powers Memorandum (at paragraph 131), the granting, variation or revocation of degree awarding powers needs to be a clear, transparent and impartial process. Degree awarding powers are valuable, and should only be granted, varied or revoked on a case-by case basis. Given the high level of scrutiny that is necessary, we consider it right that grants, variations and revocations of degree awarding powers are made by an independent body, the OfS, acting on expert advice.

50. The Committee was concerned, in its 10th report of the session 2016-17, with the lack of controls on the manner in which the OfS can exercise these functions. However, the criteria for degree awarding powers are currently set out in guidance and we intend to mirror this approach under the new regime. We intend to consult on, and issue, guidance to the OfS under clause 3(2), and to further consult on changes to the guidance as and when appropriate. The Bill also ensures that providers can appeal OfS decisions to vary or revoke degree awarding powers to the first-tier tribunal. Providers may look to appeal decisions to higher courts.
51. Whilst the Bill already enables the OfS to take advice when granting, varying or revoking degree awarding powers, the Department recognises the value of ensuring that the OfS must take advice from the body designated under Schedule 4 or, where no body is designated, a committee of the OfS and that is what these amendments require. In the Department's view, these amendments strengthen the case for delegation set out in the original Delegated Powers Memorandum as they ensure that the OfS will act on expert advice when awarding, varying or revoking degree awarding powers.

Justification for procedure selected

52. As set out in the original Delegated Powers Memorandum, OfS authorisations granting, varying and revoking degree awarding powers will be made via orders, being statutory instruments to which the Statutory Instruments Act 1947 ("**SIA 1947**") shall apply. This reflects that the provision of degree awarding powers is of a legislative character (the Privy Council currently authorises providers to grant degrees via order of Council); ensures legal certainty which is an important feature in light of the "unrecognised degree offence" in section 214 of the Education Reform Act 1988 ("**ERA 1988**"); and enables the orders to be published so that it is clear to the public - and the local weights and measures authorities that enforce section 214 of the ERA 1988 - what awards higher education providers are authorised to grant.
53. Privy Council orders granting degree awarding powers are not currently subject to a parliamentary procedure. The Bill maintains this approach for OfS orders granting, varying or revoking degree awarding powers. The Department considers that this is appropriate due to the nature of the decisions which will require detailed and technical scrutiny of each provider's eligibility. The provisions in the Bill contain other non-parliamentary procedural safeguards which ensure the appropriate exercise of these powers. In particular, the general duties of the OfS (clause 3 (General duties)) require the OfS to have regard to the principles of best regulatory practice, and to have regard to guidance issued by the Secretary of State, with said guidance being subject to restrictions protecting academic freedoms. As a public body, the OfS will have to ensure it exercises its functions in a manner which complies with public law and variations and revocations of degree awarding powers are subject to appeal to the first-tier tribunal. Having an independent yet transparent process, subject to procedural controls, is an appropriate safeguard on the use of these powers.
54. The procedural controls in the Bill are enhanced by the amendments the Department has tabled which now require the OfS to have regard to advice from the designated body or, where there is no designated body, a committee of the OfS, when making these important decisions.

Amendments to clauses 43, 44 and 54: powers of the OfS to revoke degree awarding powers and university title

Power conferred on: Office for Students

Power exercisable by: Order by Statutory Instrument

Parliamentary procedure: None

Context and purpose

55. As referred to in paragraph 44 above, clauses 43 and 44 confer on the OfS express powers to revoke the degree awarding powers it has granted under clause 41, and those authorisations bestowed upon English providers by or under any Act and by Royal Charters. As set out in the original Delegated Powers Memorandum, the power contained in clause 54 enables the OfS to revoke consent to the use of university title. This applies to any consent given by, or by virtue of, a Royal Charter or any Act (save for Companies Act 2006 purposes).
56. As a public body that has to have regard to best regulatory practice (clause 3(1)(f)), the OfS is fully expected to exercise its powers to revoke degree awarding powers and university title in a manner which is fair and proportionate, having considered all the relevant circumstances in any given case. We would, therefore, only expect degree awarding powers and university title to be revoked in very serious circumstances.
57. Having listened to the concerns raised during the passage of the Bill, and having regard to the comments made by the Committee in its 10th report of the session 2016-17, the Department has tabled amendments setting out when the OfS can exercise these functions. As a result of these amendments, the OfS can only revoke degree awarding powers if:
- (i) the provider does not register or ceases to be a registered higher education provider;
 - (ii) the OfS has concerns regarding the quality of, or the standards applied to, the higher education that has been, or is being, provided. It must appear to the OfS that the concerns are so serious that its powers to vary the authorisation are insufficient and that it is appropriate to revoke the authorisation; or
 - (iii) due to a change in circumstances the OfS has concerns regarding the quality of, or the standards applied to, higher education which will be provided by the provider. It must appear to the OfS that the concerns are so serious that its powers to vary the authorisation are insufficient and that it is appropriate to revoke the authorisation. This might be the case, for example, if there was a sale or merger of the provider.
58. As a result of these amendments the OfS can only revoke university title if:
- (i) the provider does not register or ceases to be a registered higher education provider;
 - (ii) all but the provider's foundation degree awarding powers have been revoked; or
 - (iii) due to a change in circumstances, it no longer appears appropriate for the institution to include the word "university" in its name, for example, if they no longer meet the criteria for using university title.

Justification for delegation

59. As set out in the original Delegated Powers Memorandum (at paragraphs 142 to 147), the revocation of degree awarding powers and university title needs to be subject to a clear, transparent and impartial process. Degree awarding powers and university title are valuable, and should only be revoked on a case-by case basis. Given the high level of scrutiny that is

necessary, we consider it right that revocations are made by an independent body, the OfS, whose role as a regulator will ensure that it is best placed to make these decisions. It is right, in the Department's view, that this power is delegated to the OfS, so long as the power is subject to the correct safeguards.

60. As noted in paragraph 53 above, the Bill provides for these safeguards. The Department intends to consult on and issue guidance to the OfS under clause 3(2) on the exercise of these functions, and to further consult on changes to the guidance as and when is appropriate. Further, the amendments described at paragraphs 45 to 48 above require the OfS to take advice before revoking degree awarding powers on grounds of quality or standards. The Bill enables providers to appeal against decisions of the OfS to revoke degree awarding powers or university title to the first-tier tribunal. Providers may look to appeal decisions to higher courts.
61. The amendments the Department has tabled set clear limits for when the power to revoke degree awarding powers and university title can be used. These amendments ensure degree awarding powers and university title can only be revoked when it is necessary and appropriate to do so. The Department considers that they strengthen the case for delegation set out in the original Delegated Powers Memorandum.

Justification for procedure selected

62. As set out in the original Delegated Powers Memorandum, revocations of degree awarding powers (clauses 43 and 44) and revocations of university title (clause 54) will be by orders which are statutory instruments to which the SIA 1947 shall apply. As noted at paragraph 52 above, the adopted procedure ensures legal certainty, which is an important feature in light of the "unrecognised degree offence" in section 214 of the ERA 1988 (it is an offence to grant degrees without authorisation). Under the adopted procedure, the orders can be published so that it is clear to the public - and the local weights and measures authorities that enforce section 214 of the ERA 1988 - what awards higher education providers are authorised to grant and whether university title has been revoked.
63. Privy Council orders for degree awarding powers, and Privy Council consents to university title, are not currently subject to a parliamentary procedure. The Bill maintains this approach for OfS orders revoking degree awarding powers and OfS orders revoking university title. As discussed at paragraph 53 above, the Department considers that the provisions in the Bill contain other important procedural safeguards which ensure the appropriate exercise of these powers. As a result of these amendments, the OfS will only be able to revoke degree awarding powers or university title in clear, limited circumstances. The Department considers that they strengthen the case set out in the original Delegated Powers Memorandum for not requiring a parliamentary procedure.

Part 3: Research

Establishment of UKRI

Amendments to clause 88, new subsections (4) to (6), and clause 91, new subsections (6) to (8): power of the Secretary of State to alter the names, number and areas of activity of the science and humanities committees of UKRI

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

64. Clause 88 establishes UKRI's nine committees, collectively referred to as the "Councils". Clause 89 (UK research and innovation functions) sets out UKRI's overarching functions:
- (i) seven science and humanities committees which, by virtue of clause 91, exercise the functions conferred on UKRI in clause 89.
 - (ii) Innovate UK which, by virtue of clause 92, exercises the functions conferred on UKRI in clause 89.
 - (iii) Research England which, by virtue of clause 93, exercises the functions conferred on UKRI in clause 89.
65. Clause 91 lists the science and humanities committees and their respective areas of activity. These committees will perform many of the functions currently carried out by the UK Research Councils. However, unlike the Research Councils, the committees will not be separate legal entities; they will be constituent parts of UKRI.
66. Clauses 88(2) and 91(5) give the Secretary of State the power to make changes to the number, names and areas of activity of the science and humanities committees through the affirmative resolution procedure. This power does not enable the Secretary of State to alter the names or functions of Innovate UK and Research England, or to create new committees to carry out their functions. This power is a "Henry VIII" power providing that regulations may amend primary legislation (defined in clause 117 (General interpretation)).
67. New clauses 88(4) and 91(6) will place a duty on the Secretary of State, before exercising this delegated power, to consult such persons as he considers appropriate. New clauses 88(5) and (6) and 91(7) and (8) will further place a duty on UKRI, if so requested by the Secretary of State, to carry out the consultation as directed by the Secretary of State.

Justification for delegation

68. As set out in the original Delegated Powers Memorandum (at paragraph 270), this delegated power ensures that the structure of UKRI can be adapted to respond to changes in the research environment. This could occur, for example, through the creation of an additional committee focused on an emerging area of research or through extending the areas of activity of one or more of the existing science and humanities committees.
69. Alterations to the structure of the Research Councils have historically been made whenever funding and organisational structures have needed to evolve in response to new developments. For example, the Science Research Council was established in 1965, was renamed the Science and Engineering Council in 1981, and divided into three separate Councils in 1994. The most recent change occurred in 2007 when two Councils merged to form the Science and Technology Facilities Council.
70. In accordance with section 1 of the Science and Technology Act 1965 ("**STA 1965**") these changes to the Research Councils were made through an Order in Council via the affirmative resolution procedure. This Order was then presented to Her Majesty for her consent.

71. This power allows UKRI to be modified to react to the evolving needs of the research landscape, while ensuring that the science and humanities committees cannot be altered without legislative scrutiny and the agreement of Parliament.
72. The new consultation requirement ensures that the Secretary of State seeks the views of relevant persons before any legislation is proposed, thus promoting input from those who may be affected by the use of this power.

Justification for procedure selected

73. The affirmative resolution procedure is currently mandated in the STA 1965 for changing the structure and remit of the Research Councils (however, as UKRI will not be a Royal Charter body, there is no requirement to seek the consent of Her Majesty). Therefore the Department considers the continued use of the affirmative procedure to be appropriate and justified.

Part 4: General

Power to make consequential provision etc.

Amendments to clause 112: power of the Secretary of State to make consequential provision

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative or negative resolution

Context and purpose

74. Clause 112(1) confers a power on the Secretary of State to make consequential provision by regulations. Clause 112(2)(b) provides that this power includes the power to amend, revoke or otherwise modify a Royal Charter granted before the Bill is enacted or in the same Session as the Bill is enacted. This power is limited to amendments etc. which appear to the Secretary of State to be appropriate in consequence of any provision made by or under clauses 41 (Authorisation to grant degrees etc.) to 56 (Appeals against revocation or authorisation) in relation to degree awarding powers and university title.
75. The Department has tabled an amendment to ensure that the Secretary of State cannot, under clause 112(2)(b), revoke a Royal Charter in its entirety. So, for example, the Secretary of State could not use clause 112(2)(b) to revoke the entire Charter which established a provider. Such revocations were never the Department's intention.

Justification for delegation

76. The power in clause 112(2)(b) is included in the Bill to ensure that consequential amendments, which may be appropriate to ensure that a Charter reflects changes made by the OfS to a provider's degree awarding powers or university title, can be made. Provisions within Charters may also require consequential amendments so that the Charters operate smoothly and effectively under the new regime. The intention was not to use clause 112(2)(b) to revoke entire Charters. The amendment ensures that this cannot be done and, in the Department's view, strengthens the case for delegation made in the original Delegated Powers Memorandum.

Justification for procedure selected

77. As stated in the original Delegated Powers Memorandum (at paragraphs 299 to 301), the parliamentary procedure to be followed depends on the content of the regulations. If the regulations amend or revoke any provision of a Royal Charter, they would be subject to the affirmative resolution procedure (and the effect of the amendment is that clause 112(2)(b) cannot be used to revoke entire Charters). As the Department has acknowledged, under clause 115(2)(f) the negative resolution procedure would apply to regulations which make non-textual modifications to Royal Charters. It is rare for non-textual modifications to be made instead of textual amendments; where textual amendment is the appropriate method for effecting a change, that is what the government would normally expect to be used as textual changes are likely to be of greater consequence than non-textual amendments. Where non-textual modifications are appropriate, the government continues to believe that the negative resolution procedure is appropriate.

Department for Education
Department for Business, Energy and Industrial Strategy

February 2017

Annex – Amendments

Clause 27

VISCOUNT YOUNGER OF LECKIE

Page 17, line 14, after “are” insert “—
(a)”

Page 17, line 14, at end insert “, and
(b) the functions of the relevant body under section (*Grant, variation or revocation of authorisation: advice on quality etc*) (advice on quality etc to the OfS when granting degree awarding powers etc).”

Page 17, line 16, after “the functions” insert “under section 24”

Page 17, line 16, leave out “do not cease to be exercisable by the OfS” and insert “—
(a) so far as they relate to the assessment of the standards applied to higher education provided by a provider, cease to be exercisable by the OfS, and
(b) otherwise do not cease to be exercisable by the OfS.”

Page 17, line 19, after “performance of” insert “any of”

Clause 28

VISCOUNT YOUNGER OF LECKIE

Page 17, line 34, leave out from “body” to “may” in line 35

Page 17, line 38, after “standards)” insert “, or section (*Grant, variation or revocation of authorisation: advice on quality etc*) (advice on quality etc to the OfS when granting degree awarding powers etc),”

Page 18, line 8, after “section 24(1)” insert “or (*Grant, variation or revocation of authorisation: advice on quality etc*)”

Page 18, line 12, leave out “section 24(1)” and insert “sections 24(1) and (*Grant, variation or revocation of authorisation: advice on quality etc*)”

Clause 31

VISCOUNT YOUNGER OF LECKIE

Page 19, line 26, leave out “applicable”

Page 19, line 28, leave out “applicable”

Page 19, line 28, leave out “in relation to an institution”

Page 19, line 30, leave out “applicable to that institution”

Clause 41

VISCOUNT YOUNGER OF LECKIE

Page 25, line 2, at end insert—

“() See sections 42, 43 and (Grant, variation or revocation of authorisation: advice on quality etc) which make further provision about orders under subsection (1).”

Clause 43

VISCOUNT YOUNGER OF LECKIE

Page 25, line 31, leave out from beginning to “if” and insert “Condition A is satisfied”

Page 25, line 32, at end insert—

“(4) Condition B is satisfied if—

- (a) the OfS has concerns regarding the quality of, or the standards applied to, higher education which has been or is being provided by the provider, and
- (b) it appears to the OfS that those concerns are so serious that—
 - (i) its powers by a further order under section 41(1) to vary the authorisation are insufficient to deal with the concerns (whether or not they have been exercised in relation to the provider), and
 - (ii) it is appropriate to revoke the authorisation.

(5) Condition C is satisfied if—

- (a) due to a change in circumstances since the authorisation was given, the OfS has concerns regarding the quality of, or the standards applied to, higher education which will be provided by the provider, and
- (b) it appears to the OfS that those concerns are so serious that—
 - (i) its powers by a further order under section 41(1) to vary the authorisation are insufficient to deal with the concerns (whether or not they have been exercised in relation to the provider), and
 - (ii) it is appropriate to revoke the authorisation.

(6) Where there are one or more sector-recognised standards, for the purposes of subsections (4)(a) and (5)(a)—

- (a) the OfS’s concerns regarding the standards applied must be concerns regarding the standards applied in respect of matters for which there are sector-recognised standards, and
- (b) those concerns must be regarding those standards as assessed against sector-recognised standards.”

Page 25, line 32, at end insert—

“() See sections (Grant, variation or revocation of authorisation: advice on quality etc) and 45 which make further provision about further orders under section 41(1).”

Clause 44

VISCOUNT YOUNGER OF LECKIE

Page 25, line 35, leave out “or an English further education provider”

Page 26, line 8, at end insert—

“() The OfS may make an order under subsection (1) revoking an authorisation given to a provider only if condition A, B or C is satisfied.”

Page 26, line 9, leave out from beginning to “if” in line 10 and insert “Condition A is satisfied”

Page 26, line 10, at end insert—

“(5A) Condition B is satisfied if—

- (a) the OfS has concerns regarding the quality of, or the standards applied to, higher education which has been or is being provided by the provider, and
- (b) it appears to the OfS that those concerns are so serious that—
 - (i) its powers by an order under subsection (1) to vary the authorisation are insufficient to deal with the concerns (whether or not they have been exercised in relation to the provider), and
 - (ii) it is appropriate to revoke the authorisation.

(5B) Condition C is satisfied if—

- (a) due to a change in circumstances since the authorisation was given, the OfS has concerns regarding the quality of, or the standards applied to, higher education which will be provided by the provider, and
- (b) it appears to the OfS that those concerns are so serious that—
 - (i) its powers by an order under subsection (1) to vary the authorisation are insufficient to deal with the concerns (whether or not they have been exercised in relation to the provider), and
 - (ii) it is appropriate to revoke the authorisation.

(5C) Where there are one or more sector-recognised standards, for the purposes of subsections (5A)(a) and (5B)(a)—

- (a) the OfS’s concerns regarding the standards applied must be concerns regarding the standards applied in respect of matters for which there are sector-recognised standards, and
- (b) those concerns must be regarding those standards as assessed against sector-recognised standards.”

Page 26, line 18, at end insert—

“() See sections *(Grant, variation or revocation of authorisation: advice on quality etc)* and 45 which make further provision about orders under subsection (1).”

After Clause 44

VISCOUNT YOUNGER OF LECKIE

Insert the following new Clause—

“Grant, variation or revocation of authorisation: advice on quality etc

- (1) The OfS must request advice from the relevant body regarding the quality of, or the standards applied to, higher education provided by a provider before making—
- (a) an order under section 41(1) authorising the provider to grant taught awards or research awards,
 - (b) a further order under section 41(1)—
 - (i) varying an authorisation given to the provider by a previous order under section 41(1), or
 - (ii) revoking such an authorisation on the ground that condition B in section 43(4) is satisfied, or
 - (c) an order under section 44(1)—
 - (i) varying an authorisation given to the provider, as described in that provision, to grant taught awards or research awards, or
 - (ii) revoking such an authorisation on the ground that condition B in section 44(5A) is satisfied.
- (2) In this section “the relevant body” means—
- (a) the designated assessment body, or
 - (b) if there is no such body, a committee which the OfS must establish under paragraph 8 of Schedule 1 for the purpose of performing the functions of the relevant body under this section.
- (3) Where the OfS requests advice under subsection (1), the relevant body must provide it.
- (4) The advice provided by the relevant body must be informed by the views of persons who (between them) have experience of—
- (a) providing higher education on behalf of, or being responsible for the provision of higher education by—
 - (i) an English higher education provider which is neither authorised to grant taught awards nor authorised to grant research awards,
 - (ii) an English further education provider, and
 - (iii) an English higher education provider which is within neither sub-paragraph (i) nor sub-paragraph (ii),
 - (b) representing or promoting the interests of individual students, or students generally, on higher education courses provided by higher education providers,
 - (c) employing graduates of higher education courses provided by higher education providers,
 - (d) research into science, technology, humanities or new ideas, and
 - (e) encouraging competition in industry or another sector of society.
- (5) Where the order authorises the provider to grant research awards or varies or revokes such an authorisation, the advice provided by the relevant body must also be informed by the views of UKRI.
- (6) Subsections (4) and (5) do not prevent the advice given by the relevant body also being informed by the views of others.
- (7) The OfS must have regard to advice provided to it by the relevant body under subsection (3) in deciding whether to make the order.
- (8) But that does not prevent the OfS having regard to advice from others regarding quality or standards.

(9) Where the order varies or revokes an authorisation, the advice under subsection (1) may be requested before or after the governing body of the provider is notified under section 45 of the OfS's intention to make the order.

(10) Where there are one or more sector-recognised standards, for the purposes subsections (1) and (8)—

- (a) the advice regarding the standards applied must be advice regarding the standards applied in respect of matters for which there are sector-recognised standards, and
- (b) that advice must be regarding those standards as assessed against sector-recognised standards.

(11) In this section—

“designated assessment body” means a body for the time being designated under Schedule 4;

“humanities” and “science” have the same meaning as in Part 3 (see section 107).”

Clause 54

VISCOUNT YOUNGER OF LECKIE

Page 34, line 34, at end insert—

“() The OfS may make an order under subsection (1) only if condition A, B or C is satisfied.”

Page 34, leave out line 35 and insert—

“() Condition A is satisfied if—”

Page 34, line 41, at end insert—

“() Condition B is satisfied if, disregarding any transitional or saving provision made by an order under section 41(1) or 44(1)—

- (a) the institution is neither authorised to grant taught awards nor authorised to grant research awards, or
- (b) foundation degrees are the only degrees which the institution is authorised to grant.

() Condition C is satisfied if, due to a change in circumstances since the authorisation, consent or other approval was given, it appears to the OfS to be no longer appropriate for the institution to include the word “university” in its name.”

Clause 88

LORD PRIOR OF BRAMPTON

Page 58, line 12, at end insert—

“(4) Before making regulations under subsection (2), the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(5) UKRI must, if requested to do so by the Secretary of State, carry out such a consultation, on behalf of the Secretary of State, of such persons.

(6) In such a case, UKRI must carry out the consultation in accordance with such directions as the Secretary of State may give.”

Clause 91

LORD PRIOR OF BRAMPTON

Page 60, line 24, at end insert—

“(6) Before making regulations under subsection (5), the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(7) UKRI must, if requested to do so by the Secretary of State, carry out such a consultation, on behalf of the Secretary of State, of such persons.

(8) In such a case, UKRI must carry out the consultation in accordance with such directions as the Secretary of State may give.”

Clause 112

VISCOUNT YOUNGER OF LECKIE

Page 69, line 9, leave out “subsection (3)” and insert “subsections (3) and (4)”

Page 69, line 14, at end insert—

“(4) Provision made under subsection (1) by virtue of subsection (2)(b) may not revoke a Royal Charter in its entirety.”

Clause 115

VISCOUNT YOUNGER OF LECKIE

Page 70, line 11, at end insert—

“() regulations under section 10(1) (prescribed description of providers for whom a transparency condition is mandatory);”

Page 70, line 16, at end insert—

“() regulations under section 38(3) (prescribed description of providers eligible for financial support);”

Page 70, line 24, after “or” insert “of”

Page 70, line 27, at end insert “any of the following provisions of that Schedule applies—

- (a) paragraph 4(1A) (first regulations prescribing the higher, basic and floor amounts);
- (b)”

Page 70, line 29, leave out “applies”

Page 70, line 29, at end insert—
“() paragraph 5 (accelerated courses).”

Schedule 2

VISCOUNT YOUNGER OF LECKIE

Page 80, line 14, after “in” insert “the case of each provider and each qualifying course”

Page 80, line 26, leave out “applicable”

Page 80, line 36, leave out “this paragraph” and insert “sub-paragraph (2)(a)”

Page 80, line 37, leave out sub-paragraph (6) and insert—

“(6) “The sub-level amount” means such amount as may be determined by the Secretary of State for the purposes of sub-paragraph (2)(b)—

- (a) as the sub-level amount in respect of the higher amount, or
- (b) where different amounts are prescribed as the higher amount for different cases or purposes by virtue of section 115(5)(a), as the sub-level amount in respect of each higher amount.

(6A) Different amounts may be determined under sub-paragraph (6) for different descriptions of provider.”

Page 80, line 40, after “descriptions” insert “of provider”

Page 81, line 9, leave out “as the floor amount” and insert “—

- (a) as the floor amount in respect of the higher amount, or
- (b) where different amounts are prescribed as the higher amount for different cases or purposes by virtue of section 115(5)(a), as the floor amount in respect of each higher amount.

() Where different amounts are prescribed as the higher amount for different cases or purposes by virtue of section 115(5)(a)—

- (a) the reference in sub-paragraph (8)(a) to the higher amount is to the higher amount in respect of which the sub-level amount is determined, and
- (b) the reference in sub-paragraph (8)(b) to the floor amount is to the floor amount prescribed under sub-paragraph (9) in respect of that higher amount.”

Page 81, line 10, leave out sub-paragraph (10)

Page 81, line 21, leave out “applicable”

Page 81, line 25, leave out “this paragraph” and insert “sub-paragraph (2)(a)”

Page 81, line 26, leave out sub-paragraph (5) and insert—

“(5) “The sub-level amount” means such amount as may be determined by the Secretary of State for the purposes of sub-paragraph (2)(b)—

- (a) as the sub-level amount in respect of the basic amount, or
- (b) where different amounts are prescribed as the basic amount for different cases or purposes by virtue of section 115(5)(a), as the sub-level amount in respect of each basic amount.

(5A) Different amounts may be determined under sub-paragraph (5) for different descriptions of provider.”

Page 81, line 29, after “descriptions” insert “of provider”

Page 81, line 38, leave out “as the floor amount” and insert “—

- (a) as the floor amount in respect of the basic amount, or
- (b) where different amounts are prescribed as the basic amount for different cases or purposes by virtue of section 115(5)(a), as the floor amount in respect of each basic amount.

() Where different amounts are prescribed as the basic amount for different cases or purposes by virtue of section 115(5)(a)—

- (a) the reference in sub-paragraph (7)(a) to the basic amount is to the basic amount in respect of which the sub-level amount is determined, and
- (b) the reference in sub-paragraph (7)(b) to the floor amount is to the floor amount prescribed under sub-paragraph (8) in respect of that basic amount.”

Page 81, line 39, leave out sub-paragraph (9)

Page 82, line 11, at end insert—

“(1A) The Secretary of State may not make any of the following—

- (a) the first regulations under paragraph 2 prescribing the higher amount;
 - (b) the first regulations under that paragraph prescribing the floor amount;
 - (c) the first regulations under paragraph 3 prescribing the basic amount;
 - (d) the first regulations under that paragraph prescribing the floor amount,
- unless a draft of the regulations has been laid before, and approved by a resolution of, each House of Parliament.”

Page 82, line 36, at end insert—

“(6) Sub-paragraphs (2) to (4) do not apply to regulations where—

- (a) the higher amount, basic amount or floor amount in question is in the case of an accelerated course, and
- (b) paragraph 5 applies to the regulations.

(7) “Accelerated course” in sub-paragraph (6)(a) has the same meaning as in paragraph 5.

5 (1) No regulations may be made under paragraph 2 prescribing—

- (a) the higher amount in the case of an accelerated course at a level which is higher than what would be the higher amount in the case of that course if it were not an accelerated course, or

(b) the floor amount in the case of an accelerated course at a level which is higher than what would be the floor amount in the case of that course if it were not an accelerated course,
unless a draft of the regulations has been laid before, and approved by a resolution of, each House of Parliament.

(2) No regulations may be made under paragraph 3 prescribing—
(a) the basic amount in the case of an accelerated course at a level which is higher than what would be the basic amount in the case of that course if it were not an accelerated course, or
(b) the floor amount in the case of an accelerated course at a level which is higher than what would be the floor amount in the case of that course if it were not an accelerated course,
unless a draft of the regulations has been laid before, and approved by a resolution of, each House of Parliament.

(3) An “accelerated course” means a higher education course where the number of academic years applicable to the course is at least one fewer than would normally be the case for that course or a course of equivalent content leading to the grant of the same or an equivalent academic award.”

Schedule 4

VISCOUNT YOUNGER OF LECKIE

Page 88, line 13, after “protect” insert “—
(a) ”

Page 88, line 14, at end insert “, and
(b) the designated body’s ability to make, or make arrangements for, an impartial assessment of the quality of, and the standards applied to, higher education provided by a provider.”

Page 88, leave out line 37