HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

10th Report of Session 2016–17

Higher Education and Research Bill

Wales Bill: Government Response

Ordered to be printed 14 December 2016 and published 20 December 2016

Published by the Authority of the House of Lords

HL Paper 86

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake
Baroness Fookes *(Chairman)*
Lord Flight
Baroness Gould of Potternewton
Lord Jones
Lord Lisvane
Lord Moynihan
Lord Thomas of Gresford
Lord Thurlow
Lord Tyler

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at http://www.parliament.uk/business/lords/.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Tenth Report

HIGHER EDUCATION AND RESEARCH BILL

1. This Bill, which had its Second Reading on 6 December, is split into three substantive Parts:

   - Part 1 establishes the Office for Students (OfS). It will replace the Higher Education Funding Council for England (HEFCE), but it will have broader functions to regulate the higher education sector.
   - Part 2 makes provision about financial support for students.
   - Part 3 establishes United Kingdom Research and Innovation to carry out, promote and fund research into the arts, humanities, sciences, social sciences, technology and new ideas. It will be composed of the current seven Research Councils, Innovate UK and the research-funding aspect of the HEFCE.

2. The Bill includes a number of delegated powers and the Department for Education has provided a delegated powers memorandum to explain them.[1] We wish to draw those delegations mentioned in this report to the attention of the House.

Clause 2—Guidance on exercise of OfS's functions

3. The functions of the OfS will include:

   - Maintaining the register of higher education providers, including deciding whether to register providers and the conditions which are to apply to registration;
   - The power to impose financial penalties for breach of registration conditions;
   - The function of approving access and participation plans;
   - The function of assessing the quality of, and standards applied to, higher education, including the responsibility for developing the ratings scheme on which fee limits are to be based;
   - The power to make grants and loans to eligible higher education providers;
   - The power to authorise registered higher education providers to grant degrees, and the associated power to revoke such an authorisation, including that of an existing provider;
   - The power to enter into validation arrangements for the award of degrees etc.;
   - The power to authorise the use of the title "university" and to revoke a provider's authority to use that title.

1 Department for Education, *Higher Education and Research Bill: Delegated Powers Memorandum*: http://www.parliament.uk/documents/lords-committees/delegated-powers/Higher-Education-and-Research-Bill-DPM.pdf [accessed 20 December 2016]

4. Clause 2(2) requires the OfS, in performing its functions, to "have regard to" guidance given to it by the Secretary of State. Subsections (3) to (6) impose a number of requirements relating to the guidance: in particular, they require the Secretary of State to have regard to the need to protect academic freedom and impose restrictions on the extent to which the guidance may be framed by reference to particular courses and particular higher education providers.

5. There is no Parliamentary scrutiny of the guidance and there is no requirement for it to be published. The absence of any Parliamentary scrutiny is explained in the Department's memorandum by reference to the approach currently adopted in relation to the HEFCE where guidance is given by the Secretary of State by annual grant letter. The memorandum also refers to the fact that the duty imposed by clause 2(2) is limited to a duty to "have regard to" the guidance, and therefore that the OfS can depart from it if it has good reasons for doing so.

6. We are wholly unconvinced by the Department's reasons:

- In our view, the practice with respect to the HEFCE does not provide a good precedent. The range of functions carried out by the HEFCE is much narrower–as acknowledged by the Department in its memorandum. In addition, there is no *statutory* duty on the HEFCE to have regard to the guidance in carrying out its functions.

- It is of course correct that, since it is a duty to "have regard to" the guidance, the OfS may depart from the guidance. However, as noted in our report on the Housing and Planning Bill,[2] a person who is required by statute to "have regard to" guidance will normally be expected to follow the guidance, unless in particular circumstances he or she has cogent reasons for not doing so. In this case, it seems to us there are even stronger grounds for expecting the guidance to be followed because it is backed up by the Secretary of State's power under clause 71 to give the OfS general directions about the performance of its functions (see paragraphs 33 to 35 below).

- The OfS is being given a very wide range of functions governing the funding, management and regulation of the higher education sector and the guidance can relate to *any* of them. It is liable therefore to have a significant effect on how the OfS carries out its functions and this point is acknowledged by the Department in its memorandum. The guidance is referred to by the Department in the context of:

    - the OfS's powers to confer degree awarding on higher education providers (see paragraph 132 of the memorandum (clause 40));

    - the OfS's powers to revoke a higher education provider's authorisation to award degrees (see paragraph 147 of the memorandum) (clauses 42 and 43);

    - the OfS's powers to revoke a higher education provider's authorisation to use the word "university" in its name (clause 53) (see paragraph 181 of the memorandum).

2 Delegated Powers and Regulatory Reform Committee, (20th Report, Session 2015–16, HL Paper 90)

7. **The wide range of functions which are being conferred on the OfS will give it the ability to bring change to the whole of the higher education sector. We consider that the guidance issued by the Secretary of State under clause 2 will act as a significant control over how the OfS exercises its functions. Therefore, far from having no Parliamentary scrutiny, we recommend that guidance issued under clause 2 should be subject to Parliamentary scrutiny and that the affirmative procedure should apply.**

Clause 9(3)—Mandatory transparency condition

8. Clause 9 requires the OfS to ensure that the "ongoing registration conditions"[3] of registered higher education providers include a transparency condition. A transparency condition will give the OfS a discretion to require the provider to publish such information about numbers of applications and offers of places as the OfS requests. The OfS may also ask for the information by reference to the gender, ethnicity and the socio-economic background of the individuals to whom it relates.

9. Clause 9 does not specify the registered higher education providers to whom the duty applies. Instead, that is to be set out in regulations subject to the negative procedure. The Department's reasons for providing for the negative rather than the affirmative procedure are that:

   - Changes to the kinds of provider who are subject to the transparency condition requirements are not of such inherent significance as to merit the affirmative procedure.

   - The transparency condition requirements only apply to *registered* higher education providers, and registration is voluntary not mandatory.

10. We are sceptical that the voluntary nature of registration justifies the use of the negative procedure. A higher education provider is only entitled to public funding if they are *registered*, and therefore registration is a necessity for those providers who rely on public funding.

11. **Regulations under clause 9 are fundamental to the scope of the clause because they define the registered higher education providers to whom the transparency condition applies. Also, the scope of the powers is very wide since there are no constraints or limits on the kinds of registered higher education provider who may or may not be made subject to a transparency condition. We consider that the negative procedure would be appropriate if the power were more narrowly constrained and those institutions to whom the transparency condition initially applied were set out on the face of the Bill. In the absence of such constraints, we recommend that the affirmative procedure should apply.**

---

3 Clause 5 requires the OfS to determine and publish the general ongoing registration conditions which are to apply to the registration of a higher education institution under the Bill. Once registered, an institution's registration is subject to satisfying the general ongoing registration conditions. Different conditions may be determined for different descriptions of provider.

Clause 10 and Schedule 2—Fee limits

12. Clause 10 and Schedule 2 contain the provisions which enable limits to be imposed on the fees which may be charged for courses provided by registered higher education providers.

Clause 10

13. Clause 10 requires the OfS to include a fee limit condition as part of the "ongoing registration conditions" imposed on registered higher education providers. The effect of a fee limit condition is to prevent the fees charged for courses from exceeding the applicable fee limit. Schedule 2 contains the provisions which determine what the fee limit is in each case, with different amounts applying to different providers.

14. Under clause 10:

- Regulations will prescribe the kinds of registered higher education providers who are to be subject to a fee limit condition.
- Regulations will also prescribe the kinds of course to which the fee limit applies.
- Also, the fee limit will only apply where the course is being undertaken by a "qualifying person". "Qualifying person" is defined as a person who is not an international student and who is within a description of persons prescribed in regulations (subsection (4)).

15. Each of the delegated powers conferred by clause 10 are subject to the negative procedure. The Department explains that this level of Parliamentary scrutiny reflects the level of scrutiny which applies to the equivalent powers under the existing legislation.

16. **These are significant delegations which allow the Minister by means of subordinate legislation to determine both the registered higher education providers to whom a fee limit condition is to apply and the courses and students to which the condition will apply. There is nothing in clause 10 to limit the way in which these powers are to be exercised apart from the international student limitation identified in paragraph 14 above. Given the political importance and sensitivity attached to fee limits, we take the view that, despite the position under the existing legislation, the negative procedure does not provide an adequate level of Parliamentary scrutiny. We recommend therefore that the powers conferred by clause 10 should be subject to the affirmative procedure.**

Schedule 2

17. Schedule 2 is concerned with establishing the fee limit which applies to particular providers:

- Where the provider has an "access and participation plan",[4] the maximum level for the fee limit is the "higher amount" which is to be set out in regulations. This level is only available where the provider has achieved "a high level quality rating".

4 Clauses 28 to 33 make provision for access and participation plans. The plan sets out the measures to be taken by the governing body of the institution for the purpose of promoting equality of opportunity.

- Where the provider does not have an access and participation plan, the maximum level for the fee limit is the "basic amount" which is to be set out in regulations. Again, this level is only available where the provider has achieved a high level quality rating.

- What constitutes a high level quality rating is to be decided by the Secretary of State. The OfS is responsible under clause 25 for devising a ratings scheme with different levels of ratings. But it is for the Secretary of State to decide which of those ratings is a high level quality rating. That decision is made without any Parliamentary scrutiny.

- Where the provider does not achieve a high level quality rating, the fee limit is to be a "sub-level amount". Sub-level amounts are also to be decided by the Secretary of State by reference to the level of rating that a provider has achieved.

- A sub-level amount must be greater than the "floor amount". The floor amount is to be set out in regulations. A different floor amount may be prescribed for those providers with access and participation plans and those without such a plan.

18. Regulations under Schedule 2 are subject to the negative procedure unless the effect will be to increase the amount in real terms. In those circumstances, the affirmative procedure applies. This largely follows the position under section 26 of the Higher Education Act 2004 ("the 2004 Act"), the existing legislation concerned with specifying the higher and basic amounts. We note, however, that whereas under the 2004 Act the affirmative procedure applied to the *first* regulations setting the higher and basic amounts, the Bill includes no equivalent provision. No reasons are given in the memorandum for this difference in approach.

19. We can see no logic in, on the one hand, requiring the affirmative procedure for increases which go beyond maintaining an amount's value in real terms and, on the other hand, providing for the negative procedure to apply when the amount is first set. **Accordingly, we recommend that the affirmative procedure should apply to the first regulations setting the higher, basic and floor amounts.**

20. The power delegated to the Secretary of State under Schedule 2 to decide which level of the ratings scheme devised by the OfS constitutes a "high level quality rating" is a significant one. It will set the level which must be reached by a higher education provider for the fee limit to be set at its highest amount, and below which the entitlement is only to have a sub-level amount. Yet this power is subject to no Parliamentary procedure! **We recommend that the power to determine what constitutes a high level quality rating for the purposes of Schedule 2 should be subject to Parliamentary scrutiny and that the negative procedure should apply.**

Clause 37—Financial support for registered higher education providers

21. Clause 37 confers a power on the OfS to provide funding in the form of grants, loans or other payments to the governing body of an higher education provider. This is a key provision in that it enables providers of higher education to receive public funding from the OfS. Grants and loans etc. may, however, be paid only to *eligible* higher education providers, to be defined in regulations made by the Secretary of State (subsection (3)), subject to the negative procedure.

22. In explaining the need for the power, the Department states that: "Since the register has yet to be set up and the various parts [of the register] identified, it is not possible to specify in primary legislation which providers are eligible at this stage" (paragraph 123 of the memorandum). This suggests that it is the OfS which will decide who will receive public funding because they are responsible for the structure of the register. But this is at odds with the regulation-making power in clause 37(3) conferring power on the Secretary of State to define eligibility.

23. **We consider the power conferred by clause 37(3) to be significant because it will have the effect of determining the kinds of registered higher education providers who are to be entitled to public funding. There is nothing on the face of the Bill to condition or limit how the power is exercised; instead the Secretary of State is given an unfettered discretion. In these circumstances, we recommend that the exercise of the power should be subject to the affirmative procedure.**

Clause 43—variation or revocation of authorisations to grant degrees etc.

24. Clauses 40 to 45 are concerned with the powers of the OfS to grant degree awarding powers and to vary or revoke such powers. The powers conferred on the OfS to grant degree awarding powers will replace those conferred on the Privy Council by section 76 of the Further and Higher Education Act 1992 ("the 1992 Act").

25. The powers of the OfS are to be exercised by order made by statutory instrument. The Department's memorandum explains that this reflects the legislative character of provisions which grant (or vary or revoke) degree awarding powers. It will also provide legal certainty because of the requirement for statutory instruments to be published. While it is not unprecedented for the power to make statutory instruments to be conferred on bodies or persons other than Ministers, it is unusual and the House will wish to reassure itself that the reasons in this case make it appropriate.

26. Clause 43 enables the OfS by order to vary or revoke degree awarding powers where the authorisation has been conferred on the provider:

- by or under an Act of Parliament (other than clause 40(1)), or
- by Royal Charter.

This is an entirely new power; the existing power conferred on the Privy Council by section 76 of the 1992 Act is limited to conferring new degree awarding powers, and does not extend to revoking existing ones. The Department explains the need for these powers by reference to the role of the OfS as the regulator of the higher education sector and the need for the OfS to have power to revoke degree awarding powers in cases "where there are serious causes of concern" (paragraph 146 of the memorandum).

27. The powers, although exercised by statutory instrument, will not be subject to Parliamentary scrutiny. The reasons given for this are as follows:

- Parliamentary scrutiny is not appropriate because the amendment or revocation of degree awarding powers needs to be the subject of a detailed assessment of the provider and the circumstances in question.
- The process of making an order under clause 43 will be supported by a detailed statutory procedure which will require the OfS to seek and take account of representations made the governing body of the provider and will give a right of appeal to the First-tier Tribunal.

28. **We are not in the least convinced by the Department's reasons. We do not believe that the requirement for detailed consideration by the OfS, and the existence of a detailed procedure including rights of appeal, are incompatible with an order under clause 43 being subject to Parliamentary scrutiny. These are significant and important new legislative powers affecting higher education providers, which include what are in effect Henry VIII powers to amend Acts of Parliament. There is nothing on the face of clause 43 which limits the way in which the OfS is able to exercise the powers, leaving it wholly to the discretion of the OfS when and in what circumstances the powers should be exercised. We therefore recommend that the powers should be subject to Parliamentary scrutiny and that the affirmative procedure should apply.**

Clause 53—Revocation of authorisation to use "university" title

29. A similar issue is raised by clause 53 which confers power on the OfS to make an order revoking any authorisation, consent or approval given by an Act of Parliament or a Royal Charter for an institution in England to include the word "university" in its name. As with clause 43, an order under clause 53 is required to be exercised by statutory instrument, but without any requirement for Parliamentary scrutiny. As acknowledged by the Department, the likelihood is that these powers would be exercised where an order is made under clause 43 removing a provider's degree awarding powers.

30. **As with orders under clause 43, we take the view that these are significant new legislative powers which are not subject to any limits on their exercise, and that they should accordingly be subject to Parliamentary scrutiny with the affirmative procedure applying.**

Clauses 64 and 65—Registration and other fees

31. Clauses 64 and 65 make provision for OfS to charge fees. Clause 64 is concerned with registration fees, both for a provider's initial registration and its ongoing registration. Clause 65 allows the OfS to charge fees for any other activity undertaken or service provided by it in the performance of its functions. In both cases fees are to be charged in accordance with regulations made by the Secretary of State, subject to the negative procedure.

32. Clauses 64(2) and 65(2) set out the matters which may be included in the fees regulations. They go beyond setting the level of the fee and include provision about the imposition of financial penalties for late payment of fees. No maximum penalty is specified on the face of the Bill. **The negative procedure seems unobjectionable in principle for fees regulations. However, in this case, unless a maximum penalty is specified on the face of the Bill, we recommend that regulations dealing with financial penalties should be subject to the affirmative procedure.**

Clause 71(1)—Power to give directions relating to the OfS's functions

33. Clause 71(1) confers power on the Secretary of State by regulations to give general directions to the OfS about the performance of its functions. The OfS is under a legal duty to comply with any directions given by the Secretary of State. The only limits on the Secretary of State's powers are concerned with protecting academic freedom (subsections (2) to (4)). Regulations under clause 71(1) are subject to the negative procedure.

34. The Department takes the view that directions are likely to be uncontroversial because they can only be general in nature and they are subject to limitations. The Department also relies on the fact that that a similar direction making power already exists in relation to the exercise of functions by the HEFCE, where the negative procedure also applies. But, as we have already noted, the functions of the OfS go far wider than those of the HEFCE. We have listed the functions of the OfS in paragraph 3 above.

35. **The OfS has a wide range of functions, and directions under clause 71(1) may relate to any of them. Even though the directions are required to be general (and therefore cannot relate to a particular case), we consider the power will allow the Secretary of State a significant degree of control over the way in which the OfS exercises its functions. Nor does it seem to us that the power to direct the HEFCE provides a strong precedent because the range of the OfS's functions is so much greater. In these circumstances, we recommend that exercise of the power to give directions under clause 71(1) should be subject to the affirmative procedure.**

Clause 110—Power to make consequential provision

36. Clause 110 allows the Secretary of State to use regulations to make such provision as appears to the Secretary of State to be appropriate in consequence of any provision made by or under the Bill. By virtue of subsection (2), the power includes a power to amend, repeal, revoke or otherwise modify:

- primary or secondary legislation passed or made before the Bill or in the same Session as the Bill;
- a Royal Charter granted before the Bill is passed or in the same Session.[5]

37. The procedure which applies to regulations under clause 110 depends on whether or not the regulations amend, repeal or revoke a provision of primary legislation or a Royal Charter. In those circumstances, the power is subject to the affirmative procedure. In all other cases, including where the regulations "otherwise modify" a provision of primary legislation or a Royal Charter, the regulations are subject to the negative procedure.

38. We have in a series of reports expressed concern about Henry VIII powers such as this which allow regulations to make consequential amendments by amending, repealing or otherwise modifying a provision of primary legislation, but require the affirmative procedure only where the regulations amend or repeal a provision of primary legislation.

39. **Despite the Government's negative response to those reports, we remain firmly of the view that:**

- **a Bill should not as a matter of routine confer a Henry VIII power such as that in Clause 110;**
- **where a Henry VIII power is included in a Bill, it must be fully explained and justified in the delegated powers memorandum;**
- **the affirmative procedure should apply to the exercise of a power to authorise any interference with the meaning of an Act–even if it is dressed up as a power to "otherwise modify"–save in very exceptional circumstances which again must be convincingly justified in the memorandum.**

40. Clause 110 is unusual in that it allows provision to be made not only in consequence of provisions of the Bill itself, but also in consequence of any subordinate legislation made under the Bill. Nothing is said in the delegated powers memorandum to explain this, despite a requirement on all departments that *every* delegation of power should be fully explained in its memorandum. **In our view, this will significantly extend the scope of the Henry VIII powers conferred by clause 110. In the absence of any explanation, we consider the extension of the power to subordinate legislation to be inappropriate.**

5 The power to amend etc. Royal Charters is expressly limited to those cases where provision is made in consequence of clauses 40 to 55 (which relate to degree awarding powers and the use of "university" in a higher education provider's name).

WALES BILL: GOVERNMENT RESPONSE

41. We considered this Bill in our 5th Report of this Session.[6] The Government have now responded by way of a letter from Lord Bourne of Aberystwyth, Parliamentary Under Secretary of State for Wales, printed at Appendix 1.

6 Delegated Powers and Regulatory Reform Committee, (5th Report, Session 2016–17, HL Paper 54)

APPENDIX 1: WALES BILL: GOVERNMENT RESPONSE

Letter from Lord Bourne of Aberystwyth, Parliamentary Under Secretary of State for Wales, to Baroness Fookes, Chairman to the Delegated Powers and Regulatory Reform Committee

I would like to thank the Committee for its diligent consideration of the Wales Bill, and I hope the memoranda provided by the department proved useful in your considerations. I have carefully considered the Committee's report, and its conclusions, and I respond to each in turn below.

14. Nonetheless, we draw to the attention of the House:

- *the absence of an obvious rationale for the inclusion of certain reservations;*
- *the difficult questions that may arise about how exceptions from reservations are intended to operate;*
- *the uncertainty about the application of the "relates to" test under the new "reserved powers" model;*
- *the lack of any analysis in the Bill's explanatory material as to whether new section 108A and Schedules 7A and 7B are expected to result in the expansion or the contraction of the Assembly's legislative competence.*

15. In light of these points, the House may wish to press the Minister on whether the Bill will fulfil the objectives referred to in the Explanatory Notes of achieving "a clearer separation of powers between what is devolved and what is reserved" and of creating "a clearer and stronger settlement in Wales which is durable and long-lasting".

16. It is also a matter of concern that the failure to spell out more clearly in the Bill the boundaries of the Assembly's legislative competence could lead to repeated future references to the Supreme Court; and that this could sow the seeds of future discord between the Assembly and Welsh Ministers on the one hand and the UK Parliament and Government on the other.

The Government is committed to putting in place a clearer, more stable and long-term devolution settlement for Wales. We believe that implementing a reserved powers model is crucial to achieving this. A reservation model for Welsh devolution was the underpinning recommendation in the Silk Commission's second report, and the St David's Day process found a strong political consensus to implement the recommendation.

The new model is inserted into the Government of Wales Act 2006 by clause 3 of and Schedules 1 and 2 to, the Bill. They insert new section 108A and new Schedules 7A and 7B into the 2006 Act respectively. New section 108A sets out the tests for legislative competence which a provision of an Assembly Act must meet to be within the Assembly's legislative competence. Schedule 7A lists the subjects reserved to Parliament, and exceptions to those subjects that will be within the Assembly's competence. Schedule 7B lists the restrictions to the Assembly's legislative competence.

The Government contends that this model provides clarity and precision in terms of subjects that are devolved and those that are reserved. The current *conferred* powers model of Welsh devolution lacks the certainty the new model provides and is silent on a wide range of subjects as to whether they are devolved or reserved.

The list of reservations in new Schedule 7A in most part reflect the current devolution boundary, supplemented by the significant further devolution of powers on which there is political consensus under the St David's Day Agreement. Amendments made to the Schedule to date, and the further modifications that will be debated at Report stage, reflect the detailed discussions the Government has had with the Welsh Government, the Assembly Commission and other interested parties about how the reservation model will work in practice. The Government has been open to consider changes to the list where effective arguments have been made that certain subjects should be devolved; for example, teachers' pay and conditions and the Community Infrastructure Levy.

The rationale for each reservation included in the list is set out in the accompanying Explanatory Notes, and these have been supplemented and improved during the Bill's parliamentary passage. I am confident that the list, as I hope will be amended at Report stage, reflects a broad consensus on where the Welsh devolution boundary should lie.

The Government considers the boundaries of the Assembly's legislative competence to be very clearly defined under the new reservation model. We simply do not agree with the Committee's conclusion that it will lead to repeated future references to the Supreme Court. Indeed, we believe the very opposite to be the case.

Our debates have also helped clarify how the Government sees the wider architecture of the model working in practice. One important example has been the debate about the purpose test (the "relates to" test). I enclose the Hansard *[not printed]* on that debate which enabled me to clarify, in particular, that an Assembly Act provision could touch on reserved matters, so long as the purpose of the provision does not relate to a reserved matter.

Finally, we consider that the new model will expand the Assembly's legislative competence significantly, with new powers being devolved to the Assembly in areas such as transport, energy, education, planning and elections. It also allows the Assembly to take control of its own affairs.

23. Nonetheless, we draw this Henry VIII power [in paragraph 3 of Schedule 6] *to the attention of the House, and express our surprise that such an important provision is paraded as a "minor" or "consequential" amendment in a Schedule to the Bill and not mentioned in the delegated powers memorandum.*

Section 109 of the Government of Wales Act 2006 currently provides that Her Majesty may by Order in Council amend Schedule 7 of that Act to change, enhance or restrict the Assembly's legislative competence. The purpose of paragraph 3 of Schedule 6 to the Bill is simply to update the reference to Schedule 7 to refer to new Schedules 7A and 7B, inserted by clause 3(2) of the Bill, which replace the existing Schedule 7. The Government considers this to be a minor amendment of an existing power, and so did not consider it necessary to specifically refer to it in the memorandum provided to the Committee.

However, I am pleased that the Committee does not consider this power to be inappropriate, and recognises that no order can be made under section 109 without the approval by both Houses of Parliament and the Assembly under the affirmative procedure.

28. The House may wish to ask the Minister why no comparable limitation is included in the power to be conferred on Welsh Ministers by clause 6(3).

In line with the St David's Day Agreement the Bill devolves powers over the timing of Assembly elections to the National Assembly for Wales. This is subject to the provision that Assembly elections may not be held on the same day as ordinary general elections to the UK Parliament or elections to the European Parliament.

I note the Committee's concern that the power at clause 6(3), for Welsh Ministers to move the ordinary date of an Assembly election should it coincide with a non-devolved poll, does not limit the timeframe in which an alternative date could be set. In raising this concern the Committee makes a comparison with the power transferred to the Presiding Officer at clause 6(7) of the Bill.

Clause 6(7) transfers the existing power of the Secretary of State in section 4 of the Government of Wales Act 2006, to vary the date of an ordinary Assembly election by up to one month either side of the poll, to the Presiding Officer. This aligns the position in Wales with that in Scotland, where the equivalent power has always resided with Presiding Officer.

As the Committee notes, the new order making power for Welsh Ministers to move the date of an Assembly election is in line with that provided for Scottish Ministers in the Scotland Act 2016. Any Order brought forward by Welsh Ministers would be subject to the affirmative procedure in the Assembly. It would therefore be a matter for the Assembly to scrutinise any alternative date that Welsh Ministers may propose. We believe that the requirement for the Assembly to agree the new date of the poll provides the appropriate safeguards against such a situation as the Committee envisages, in which Welsh Ministers could use the power to significantly extend the term of the Assembly.

37. In our view, neither the original nor the supplementary memorandum explains adequately why the new power is needed apart from in relation to the specific issue of water catchment area boundaries. We consider that the power as drafted is inappropriately wide, and recommend that it be redrawn so that it reflects the narrow policy intention referred to in the supplementary memorandum.

I am grateful to the Committee for bringing this to the Government's attention. We have now brought forward an amendment to be debated at Report stage in the House of Lords to provide that the power in new section 58(2A) relates solely to water and sewerage functions. We provided a supplementary memorandum to the Committee on 7 December which provided further detail on the amendments.

41. Despite the Government's negative response to those and earlier reports, we remain firmly of the view that:

- *a Bill should not as a matter of routine confer a Henry VIII power such as that in clause [60];*
- *where a Henry VIII power is included in a Bill, it must be fully explained and justified in the delegated powers memorandum;*
- *the affirmative procedure should apply to the exercise of a power to authorise any interference with the meaning of an Act–even if it is dressed up as a power to "otherwise modify"–save in very exceptional circumstances which again must be convincingly justified in the memorandum.*

43. Regulations which amend or repeal "primary legislation" as so defined are subject to the affirmative procedure in both Houses of the UK Parliament. However, there is no requirement in clause [60] for the Secretary of State to consult or seek the approval of the Assembly or Welsh Ministers before making regulations which amend a Measure or Act of the Assembly. We note with disappointment that no *explanation is given in the memorandum.*

44. We draw this to the attention of the House.

The power in clause 60 enables the Secretary of State to make regulations amending primary or secondary legislation which the Secretary of State considers appropriate in consequence of any provision in the Bill.

The Government believes that the power is proportional and appropriate in order to implement Wales Bill provisions, in particular those relating to the reserved powers model. It reflects an equivalent power for the Secretary of State in the Scotland Act 2016. The power can be exercised only in the context of making consequential provision in relation to the Bill itself to ensure the wider statute book reflects the changes this Bill makes. In practice, the vast majority of such provision will be minor.

In regard to modifying parliamentary legislation, regulations laid under subsection 60(2) that includes provision amending or repealing any provision of primary legislation (made by Parliament or the Assembly) would be subject to the affirmative procedure in both Houses of Parliament. Other regulations made under subsection 60(2) would be subject to the negative procedure in both Houses. The Government considers this to be an appropriate level of scrutiny for consequential provision of this kind.

In regard to modifying primary or secondary legislation made by the Assembly or the Welsh Ministers, the power reflects well-established reciprocal arrangements. These enable the Welsh Ministers to modify parliamentary legislation in consequence of Assembly legislation. Two-thirds of Acts passed by the Assembly in 2015 and 2016 include a power for Welsh Ministers to make consequential amendments to Acts of Parliament without any role for Parliament to scrutinise such secondary legislation.

To give an example, the Assembly has recently passed the Renting Homes (Wales) Act 2016. Section 255 of that Act includes a power for Welsh Ministers to make consequential amendments to *any enactment*. "Enactment" is defined in section 252 of the Renting Homes (Wales) Act, to include Acts of Parliament and secondary legislation made under Acts of Parliament. There is no requirement for Parliamentary approval of such consequential amendments, so it seems inconsistent for there to be a role for the Assembly in an equivalent power in the Wales Bill.

These reciprocal arrangements allow minor and consequential amendments to be made to other enactments. This ensures that the legislative programmes of both the Welsh Government and the UK Government run smoothly.

The Government understands the concerns expressed by the Committee in respect to the modification of legislation made by Assembly and Welsh Ministers. The Secretary of State for Wales has therefore written to the First Minister of Wales and the Presiding Officer of the National Assembly for Wales committing to early discussions between officials well in advance of regulations being laid which affect legislation made by either the Assembly or the Welsh Ministers. He

has further committed to write formally to inform them of any intention to make regulations which affect legislation made by the Assembly or Welsh Ministers, again doing so at the earliest opportunity before regulations are laid.

An equivalent power to clause 60 was passed by Parliament in section 71 of the Scotland Act 2016, which included no role for the Scottish Ministers or the Scottish Parliament. In relation to Scotland, the Government intends to use the power to make consequential changes that are required as a result of the further devolution of elections in Scotland in the 2016 Act. We expect clause 60 to be needed for similar purposes given the devolution of Assembly elections and local government elections in Wales in this Bill.

13 December 2016

APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 14 December 2016 Members declared the following interests:

Higher Education and Research Bill

Baroness Fookes

Honorary Degree, University of Plymouth

Honorary Fellow, Royal Holloway, University of London

Baroness Gould of Potternewton

Honorary Degree, Birmingham City University

Honorary Degree, University of Bradford

Honorary Degree, University of Greenwich

Lord Lisvane

A Founder, the New Model in Technology and Engineering (new University to be established in Herefordshire)

Honorary Fellow, Lincoln College, Oxford

Attendance

The meeting on the 14 December 2016 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.