DELEGATED POWERS AND REGULATORY REFORM COMMITTEE
HIGHER EDUCATION AND RESEARCH BILL

Memorandum by the Department for Education

Introduction

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Education (“the Department”) with input from the Department for Business, Energy and Industrial Strategy. It identifies the provisions of the Higher Education and Research Bill (“the Bill”) which confer powers to make delegated legislation and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

2. This Memorandum reflects the Bill as amended by the Commons, as at introduction to the Lords on 22 November 2016. The descriptions of the powers are arranged in the order in which they appear in the Bill.

3. The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

Overview of the Bill

4. The Bill contains 4 Parts and 12 Schedules.

5. 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 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.

6. 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.

7. 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.

8. Part 4 (General) contains general and supplemental provisions.

Overview of the delegated powers

9. The Bill contains 49 individual provisions concerning delegated powers. These powers fall into three broad categories. First, there are 28 provisions which modify, or are based upon, existing delegated powers; second, there are 17 provisions which create new delegated powers; and
third, there are 4 provisions which are boilerplate clauses that commonly appear in bills of this nature and size, and which are required by the subject matter of the Bill.

10. The new delegated powers are essential, subject to appropriate safeguards, in order to implement specific features of the new regulatory framework. Whilst this new framework is clearly prescribed by and set out in the Bill, certain aspects of it will need to be determined and amended as the OfS and register are developed and subsequently modified, to meet the changing needs of higher education providers, students, employers and others. The higher education sector is expected to evolve and become increasingly dynamic over time, and these powers are integral to ensuring that this can happen with appropriately targeted regulation.

11. Provisions falling into the first category modify or build on existing delegated powers, albeit some have a slightly different scope to take account of the reforms in the Bill. The existing regulatory framework for higher education is extensive and complex, with a multitude of bodies performing different functions, and a range of delegated powers embedded in the system. The Bill seeks to streamline the existing system by creating a single register for higher education providers, and consolidating certain regulatory and funding functions under the OfS and UKRI respectively. As part of that process, there a number of delegated powers which, in the Department’s view, have proved necessary in the past and should be retained in order to ensure the smooth operation of the new system and effective regulatory oversight by the OfS (in place of HEFCE and other pre-existing bodies). Examples include the Secretary of State’s powers relating to access and participation in the sector; to give directions to the OfS and UKRI; and to determine which providers are eligible for OfS funding.

12. There are other delegated powers in the Bill which do not mirror existing powers as closely but which nonetheless follow established precedents on comparable matters of substance contained elsewhere in existing higher education legislation. These include the power of the Secretary of State to make alternative payments to higher and further education students. This is a new power, but one which expands on a precedent in an existing power to make regulations in respect of loans and grants under the Teaching and Higher Education Act 1998 (“THEA 1998”).

13. Examples of new delegated powers in the Bill include powers enabling the Secretary of State to prescribe the information which must be contained in a provider’s entry in the register; the type of provider that will be subject to a transparency condition; the types of provider and courses that will be subject to a fee limit condition; the OfS’ registration and other fees; and the designation of providers for entry on to the register. The ability to achieve legislative clarity on these matters should be balanced against the need to ensure that the new regulatory framework can be developed, subject to appropriate scrutiny and safeguards. This is key to implementing the register and the new registration system successfully.

14. Provisions falling into the third category are boilerplate clauses, comprising standard powers to make transfer schemes; consequential provision; transitional, transitory and saving provision; and to bring the Bill into force.

15. The Bill contains 3 powers to amend primary legislation through secondary legislation. The Secretary of State will have the power to alter the names, number and areas of activity of the science and humanities Councils of UKRI (clauses 86(2) (The Councils of UKRI) and 89(5) (Exercise of functions by science and humanities Councils)). These powers are subject to the affirmative resolution procedure and will ensure that the structure of UKRI can be adapted to respond to changes in the research environment. Clause 110 (Power to make consequential provision etc) enables the Secretary of State to make consequential amendments to primary legislation and (subject to limitations) Royal Charters. Regulations which amend, repeal or
revoke any provision of primary legislation or a Royal Charter will be subject to the affirmative resolution procedure.

**Part 1: The Office for Students**

**Establishment of the Office for Students**

**Clause 2(2): Power for the Secretary of State to give guidance to the OfS in relation to its general duties**

*Power conferred on:* Secretary of State

*Power exercisable by:* Guidance

*Parliamentary procedure:* None

**Context and purpose**

16. Clause 2(2) requires the OfS to have regard to guidance given to it by the Secretary of State when exercising its functions. However, the Secretary of State is limited in what guidance he can provide by:

(i) the requirement in clause 2(3) to have regard to the need to protect academic freedom;

(ii) the express prohibition on the guidance relating to specific academic freedoms in clause 2(4);

(iii) where the guidance relates to English higher education providers, the requirement that it applies to providers generally or to a description of such providers (see clause 2(5)); and

(iv) the requirement that guidance framed by reference to a particular course of study must not guide the OfS to perform a function in a way which prohibits or requires the provision of particular courses of study.

17. The purpose of this power is to enable the Secretary of State to provide guidance to the OfS about the initial structure and operation of the register, its quality function, funding functions and other functions to ensure good governance, protect the public purse and identify the government’s priorities and vision. The Secretary of State is prevented from using it to interfere with academic freedoms. Since the majority of funding now comes to institutions via tuition fees supported by student loans provided by the Secretary of State, it is intended that the funding from the OfS will be able to focus on areas where the market will not deliver the optimal allocation, such as high costs subjects or support for students from disadvantaged backgrounds. The power to give guidance will be used to steer the OfS on the higher education priorities of the government of the day. For example, it could be used to ask the OfS to follow a particular approach to access and participation, in support of the government’s overall targets on social mobility.

**Justification for delegation**

18. The OfS is a new body which will have both new regulatory functions and functions that expand upon the narrower functions previously held by HEFCE. This means it will likely need, and benefit from, guidance from the Secretary of State at least as frequently as HEFCE, if not more
so. The guidance issued pursuant to this power is therefore likely to deal with a number of administrative matters about the running and operation of the OfS. It could, for example, require the OfS to have regard to the need for efficiency savings in its administration budgets. It is anticipated that the guidance will contain a level of detail which it would not be appropriate to include on the face of the Bill, and will also need to be updated more frequently than Parliament can be expected to legislate for. It is not expected that the principle of the Secretary of State giving guidance would be considered controversial. Accordingly, it is considered appropriate to use guidance for this purpose.

Justification for procedure selected

19. The Department believes that parliamentary scrutiny is not required for this guidance. This power reflects the arrangements which apply in relation to HEFCE, whereby Ministers send HEFCE an annual grant letter. That allows Ministers to give HEFCE very clear priorities and goals, in light of the significant budget that HEFCE is allocated. Given the OfS’ smaller budget, and the protections for academic freedoms in the Bill, we see no need for parliamentary scrutiny of Ministers’ guidance to the OfS.

20. Furthermore, although the OfS must have regard to the guidance, it can of course depart from it if it considers there are good reasons for doing so. Accordingly, it is considered appropriate in all the circumstances that no parliamentary procedure is required to oversee this guidance.

The register of English higher education providers

Clause 3(6): Power for the Secretary of State to make provision about the information which must be contained in a higher education provider’s entry in the register

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

21. Under clause 3(6) the Secretary of State may make provision about the information which must be contained in the register. The register includes institutions that have met the initial, ongoing and mandatory conditions of registration. The register is primarily a regulatory tool. It will describe how higher education providers in England are held to account and regulated, and set out any specific registration conditions that are in place. It will interest anyone involved in higher education: providers, public sector agencies, and organisations that represent students, staff and providers, as well as students, their advisers and the general public. Students and the wider public need to be sure that the fees they are paying and public investment in higher education is being spent wisely and well. This is a reserve power.

Justification for delegation

22. The Department considers that the information needs of prospective students, employers and the Department regarding institutions on the register are likely to change and increase over time as this new regulatory framework is developed. The information on the register will enable students and others with an interest in an institution to access reliable and essential information about that institution, for example, its locations and courses, whether it has its own degree
awarding powers, etc. Exactly what information should or should not be included could vary over time, and should be informed by the experience of the OfS and the feedback it receives from users. The need to make changes, therefore, may arise more frequently than Parliament can be expected to legislate for by way of primary legislation, and the changes may need to be made swiftly. It is not possible to anticipate or set out in primary legislation the changes that will need to be made to the register over time. It may, for example, be in the interests of those that use the register to be informed of other sources of funding, from other agencies and government departments, that might become available in the future.

Justification for procedure selected

23. As mentioned above, the information to be provided will potentially vary over time. While parliamentary scrutiny is believed to be appropriate, the Department considers it would not be appropriate to make this subject to the affirmative procedure every time the Secretary of State decides to add or remove, for example, a relatively insignificant information requirement. Entry on the register is voluntary and the regulatory framework is clearly prescribed by, and set out in, the Bill. In contrast, clause 3(6) is a narrower power regarding the specific information to be provided on the register and fulfils what is essentially an administrative function. In view of this, the Department considers that the negative procedure affords the appropriate level of scrutiny.

Mandatory registration conditions

Clause 9(3): Power for the Secretary of State to prescribe by regulations the type of higher education provider to which a transparency condition will apply

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

24. The transparency condition contained in clause 9 requires the OfS to ensure higher education providers provide information relating to applications, entry and retention broken down by gender, ethnicity and socio-economic background. The purpose of this requirement is to publicly identify those higher education providers where representation of ethnic minorities, certain genders and those from disadvantaged groups is low in order to spur them into taking steps to ensure their intake represents all groups in society.

25. Clause 9(1) requires the OfS to ensure that the transparency condition applies to registered higher education providers of a prescribed description. Clause 9(3) states that “prescribed” means prescribed by regulations made by the Secretary of State for the purposes of the transparency condition.

Justification for delegation

26. There are a number of different types of higher education provider providing a wide range of different higher education courses. The requirements contained in the transparency condition will be the first time that prescribed higher education providers will be obliged to provide this type of information. As such, the power to specify by regulations the definition of “prescribed”
will enable the Secretary of State to ensure that the definition can be kept under careful review. Seeking to include all of this detail in primary legislation would risk prescribing excessive detail and inhibit the ability of the system to respond quickly to what does and does not work in respect of this new requirement, and to changes in the sector. For example, it is feasible that we could seek to exclude certain categories of providers (such as those that do not access OfS grant funding) from having to comply with the condition, if it became clear that it was a regulatory barrier to entry, or such providers’ records demonstrated that they were consistently achieving diversity in their student intake such that the policy effect of this condition on these providers was of limited value.

Justification for procedure selected

27. The negative procedure is intended to give Parliament an opportunity to scrutinise which categories of providers will be subject to the transparency condition. Changing these categories would result in either the easing or increasing of a regulatory requirement on certain providers, as they are made subject to, or cease to be subject to, this condition. Changes of this nature, whilst requiring a degree of parliamentary scrutiny, would not in our view be of such inherent significance as to merit the affirmative procedure.

28. In addition, the power is limited to registered higher education providers that have applied to be placed on the register maintained by the OfS under clause 3 (The register). These providers will be aware of the conditions that they need to meet in order to be listed on the register. Accordingly, the transparency condition will only apply to those higher education providers that have voluntarily decided to apply to be placed on the register. As the power is limited in this way, and the wider regulatory framework is clearly set out in the Bill, the negative resolution procedure is considered to be appropriate.

Mandatory fee limit condition for certain providers

Background

29. The mechanism for imposing fee limits on course fees in the HEA 2004 is by way of grant condition. Section 23 of the HEA 2004 provides that when the Secretary of State makes a grant to HEFCE under section 68 of the Further and Higher Education Act 1992 (“FHEA 1992”), that grant must be made subject to a condition requiring HEFCE, in turn, to impose the funding conditions set out in section 24 of the HEA 2004 when it makes grants under section 65 of the FHEA 1992 to the governing bodies of relevant institutions. Those funding conditions essentially provide in respect of any “qualifying course”: where an approved access and participation plan is in force that the fees must not exceed the “higher amount”, and where an approved access and participation plan is not in force the fees must not exceed the “basic amount”.

30. The provisions described above apply to those relevant institutions which are grant funded by HEFCE or given financial assistance by the Secretary of State under section 14 of the Education Act 2002 (“EA 2002”). These provisions are replaced by the fee limit condition regime set out in the Bill and described below.

31. The fee limit condition (a condition that requires the governing body of a provider to secure that “regulated course fees” do not exceed the fee limit) under clause 10 and Schedule 2 applies through the mechanism of ongoing registration conditions. The OfS must ensure it imposes these conditions on registered higher education providers of a prescribed description. This means they can be applied to both publicly-funded and alternative providers alike. The “higher”
and “basic” fee limits, as under HEA 2004, are linked to whether or not a provider has an approved access and participation plan.

32. In addition to the fee limit of the “higher amount” where a provider has an access and participation plan, and the fee limit of the “basic amount” where a provider does not have an access and participation plan (which are both set by regulations), Schedule 2 permits the Secretary of State to set different fee limits at sub-levels beneath the higher amount and above a “floor amount” to the higher amount and sub-levels beneath the basic amount and above a “floor amount” to the basic amount. The “floor amount” to the “higher amount” and the “floor amount” to the “basic amount” will be set by regulations.

33. The Secretary of State is permitted to link these sub-levels to whether or not a provider has a rating under clause 25 (Rating the quality of, and the standards applied to, higher education) and the type or level of such rating. The ratings under clause 25 would be the awards under the Teaching Excellence Framework (“TEF”). The TEF scheme will provide higher education providers, that apply and are successful, ratings concerning the quality of teaching and related outcomes in respect of the higher education they provide.

Clause 10: Powers for the Secretary of State to prescribe the “description” of registered higher education provider; a “qualifying person”; and a “qualifying course” to which fee limit condition applies

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

34. Subsection (1) of clause 10 requires the OfS to ensure that the ongoing conditions of registration for each registered higher education provider of a “prescribed description” include a tuition fee limit condition. Subsection (2) explains that a “fee limit condition” means a condition that requires the governing body of a provider to secure that “regulated course fees” (fees payable by a “qualifying person” in connection with undertaking a qualifying course) do not exceed the fee limit.

35. The purpose of this delegated power is to enable the Secretary of State to make regulations (subsection (9)) which set out to whom and what tuition fee limits apply, in terms of the providers that are bound by them, the persons who pay them and the courses to which they apply, by virtue of prescribing:

(i) the “description” of “registered higher education provider” (in subsection (1)) to which the ongoing registration condition will apply;

(ii) a person who is a “qualifying person” (subsection (4)) who pays the fees; and

(iii) a “qualifying” course (subsection (6)).

36. Subsection (4) of clause 10 provides that a “qualifying person” does not include an international student. The term “international student” is further defined in subsection (5). Subsection (9) provides that a “course” does not include any postgraduate course other than a course of initial teacher training. Subsection (7) provides additional limitations on the power to prescribe
descriptions of “course”, that descriptions of “course” may not be exercised in such a way as to discriminate: (a) in relation to courses of initial teacher training, between different courses on the basis of the subjects in which such training is given, and (b) in relation to other courses, between different courses at the same or a comparable level on the basis of the areas of study or research to which they relate. This limitation replicates section 29(2) of the HEA 2004. Subsection (11) provides that “fees” are defined clause 79 (Other definitions).

37. The power of the Secretary of State to prescribe by regulations “qualifying courses” and the description of “registered higher education providers” enables the Secretary of State to determine which courses and providers are subject to fee limits and which are not and is subject to the limitations in subsections (7) and (9) in respect of courses. The position under section 24 of the HEA 2004 is that the power to prescribe “qualifying courses” is limited to courses at grant funded institutions, whereas the power of the Secretary of State in this clause to prescribe qualifying courses to which the fee limit applies is not limited to grant funded institutions and would extend to courses at registered higher education providers of a prescribed description (such providers are not limited to grant funded providers). All of a provider’s qualifying courses, if that provider is of a prescribed description, will be subject to the fee limit. Where a provider is not a registered higher education provider of a prescribed description, they would not be subject to fee limits.

Justification for delegation

38. The power of the Secretary of State to prescribe by regulations the “registered higher education provider”, “qualifying person” and “qualifying course” to which the fee limit condition applies, is considered necessary to provide flexibility for such delegation more frequently than Parliament can be expected to legislate by primary legislation.

39. The use of delegated powers for the purpose of setting out “qualifying course” and “qualifying person” has strong precedent in section 24(6) of the HEA 2004. In addition, the equivalent of a “registered higher education provider”, i.e. that of “relevant institution” in section 23(5) of the HEA 2004 (although this only applies to publicly funded institutions) was provided for under section 23(5) of the HEA 2004 by way of grant condition in the case of funding from the Secretary of State to HEFCE, and in the case of financial assistance under section 14 of the EA 2002 by order made by the Secretary of State. By way of example, concerning the flexibility required, regulations concerning qualifying courses and persons were made in 2006 by Statutory Instrument 2006 / 482 and replaced by Statutory Instrument 2007 / 778 and amended by Statutory Instrument 2008 / 1640.

Justification for procedure selected

40. The Department considers that the negative procedure is sufficient and will ensure that the prescription of “registered higher education provider”, “qualifying person” and “qualifying course” is appropriately scrutinised. The Bill sets out the relevant parameters within which the Secretary of State can legislate, for example, that a qualifying person cannot include an international student. There is strong precedent for the procedure used in respect of the comparable regime under section 24 of the HEA 2004 where the negative procedure is used (section 47(2) of the HEA 2004).

Schedule 2, paragraphs 2(5), 3(4), 2(9) and 3(8): Powers for the Secretary of State to prescribe by regulation the “higher amount”, the “basic amount” and the “floor amount” to the higher amount and the “floor amount” to the basic amount

Power conferred on: Secretary of State
Context and purpose

41. The preceding paragraphs provide the general context in respect of fee limits, and describe the provisions of clause 10 (Mandatory fee limit condition for certain providers). 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 10. The amount of “the fee limit” for the purposes of applying that condition to fees in connection with a “qualifying course” in clause 10(6) and in respect of an academic year is determined as per the Schedule (references below to “the relevant course” and “the relevant academic year” are to that course and year).

42. Under paragraphs 2(1) and (2) of Schedule 2, where an access and participation plan approved by the OfS under clause 28 (Power to approve an access and participation plan) in relation to a provider is in force, or comes into force, when the relevant academic year begins – and the provider has a “high level quality rating” at the relevant time; the fee limit is such limit, not exceeding the “higher amount”, as is provided by the plan for the relevant course and for the relevant academic year. The “higher amount” is such amount as may be prescribed by regulations made by the Secretary of State.

43. Under paragraph 3(1) and (2) of Schedule 2, where an access and participation plan approved by the OfS under clause 28 in relation to a provider is not in force, and does not come into force, when the relevant academic year begins – and the provider has a “high level quality rating” at the relevant time, the fee limit is the basic amount. The “basic amount” is such amount as may be prescribed by regulations made by the Secretary of State.

44. “A high level quality rating” under paragraph 2(3) means such rating or ratings given in accordance with arrangements under clause 25 (Rating the quality of, and the standards applied to, higher education), in effect such rating under the TEF scheme as the Secretary of State determines to be a “high level quality rating”. Thus the Secretary of State determines administratively (not by regulation) what constitutes a “high level quality rating” and consequently who gets the benefit of the higher amount and basic amount limits.

45. A sub-level amount can be set administratively by the Secretary of State and he may determine different amounts for different descriptions of provider (paragraphs 2(6) and 3(5)). Such descriptions may be by reference only to whether a provider has or does not have a rating given to it in accordance with arrangements under clause 25 and the level or type of such rating (paragraphs 2(7) and 3(6)). Where a provider has an access and participation plan, such sub-level should not exceed the higher amount and must be greater than the floor amount to the higher amount (paragraph 2(8)). Where a provider does not have an access and participation plan, such sub-level should not exceed the basic amount and must be greater than the floor amount to the basic amount (paragraph 3(7)). Sub-levels are discussed in more detail below. They are included here for context for the floor amount.

46. The Secretary of State can prescribe by regulations the “floor amount” fee limit (paragraph 2(9)) to the “higher amount” i.e. where a provider has an access and participation plan. The Secretary of State can prescribe by regulations the “floor amount” fee limit (paragraph 3(8)) to the “basic
amount” i.e. where a provider does not have an access and participation plan. Both floor limits must be lower than “the sub-level amount” which fall above it (paragraphs 2(8)(b)) and 3(7)(b)).

Justification for delegation

47. The power of the Secretary of State to prescribe by regulations “the higher amount”, “the basic amount” and the “floor amount” to each i.e. particular amounts in respect of which the fee limit condition in clause 10(1) relates, is considered necessary to provide flexibility for such delegation more frequently than Parliament can be expected to legislate by primary legislation.

48. The use of delegated powers in these circumstances has a direct precedent in section 24(6) of the HEA 2004 for prescribing the higher amount and basic amount in respect of publicly-funded institutions. By way of example, concerning the flexibility required, the first regulations setting the higher and basic amounts were made in 2004 SI 2004/1932 (as amended), and increases above the rate of inflation to both the higher amount and basic amount were made in 2010 by Statutory Instruments 2010/3020 and 2010/3021 (which have also since been amended).

Justification for procedure selected

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.

50. The procedures are set out in paragraphs 4(2) to (4) of Schedule 2. Where the increase in the basic amount, higher amount and floor amount is no greater than is required to maintain the value of the amount in real terms, the negative procedure applies under paragraph 4(2)(a), (3)(a) and (4)(a) and clause 113(3) (Regulations). Where the increase is greater than is required to maintain the value of the amount in real terms, the affirmative procedure applies under paragraph 4(2)(b), (3)(b) and 4(b) and clause 113(4) (Regulations). In respect of the higher amount, when the affirmative procedure applies, it does not follow the typical affirmative procedure. Instead, each House of Parliament has to pass a resolution that, with effect from a date specified in the resolution, the higher amount should be increased to an amount specified in the resolution, and the increase is an increase to the specified amount with effect from the specified date.

51. The Department considers that these levels of scrutiny remain appropriate in that, under the negative procedure, Parliament retains a degree of oversight over any proposal to amend the higher, basic and floor amounts. A greater level of scrutiny then applies if it is proposed that any of these amounts are increased by an amount greater than is required to maintain their value in real terms. The Department considers that this strikes the right balance between the need for flexibility on the one hand and the need for appropriate scrutiny and checks on the other.

Schedule 2, paragraph 4(5): Power for the Secretary of State to make regulations specifying or determining an index of prices

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose
52. Paragraph 4(5) of Schedule 2 enables, for the purposes of increasing the basic amount, the higher amount and the floor amount to amounts no greater than are required to maintain their value in real terms, the Secretary of State to specify or determine an index of prices. The Secretary of State is to have regard to such index of prices when satisfying herself for the purposes of paragraphs 4(2)(a), (3)(a) and (4)(a) that the regulations increasing the basic amount, the higher amount and the floor amount are no greater than is required to maintain the value of those amounts in real terms.

Justification for delegation

53. The use of delegated powers in this area has a strong precedent. The power is a replication of a provision in section 26(3) of the HEA 2004. Whilst that previous power has only been exercised once, it is necessary to retain this flexibility to amend what constitutes “such index of prices” in the event that it becomes necessary to specify a different prices index, for example, if a different index was considered to be a more appropriate inflationary measure at a future time.

Justification for procedure selected

54. The Department considers that the negative procedure is sufficient. It allows for a degree of parliamentary oversight over the choice of index, whilst reflecting the fact that the indices which the Secretary of State has at her disposal are limited and are not expected to be controversial. The procedure replicates the procedure for section 26(3) of the HEA 2004, which is the negative procedure.

Schedule 2, paragraphs 2(6) and 3(5): Power for the Secretary of State to determine “the sub-level amount” and the rating given to a provider in accordance with arrangements under clause 25 which attach to that “sub-level amount”

Power conferred on: Secretary of State

Power exercised by: Secretary of State administratively

Parliamentary procedure: None

Context and purpose

55. Where a provider has an access and participation plan, and does not have a “high level quality rating”, the fee limit is such limit, not exceeding the applicable “sub-level amount”, as is provided by the plan for the relevant course and for the relevant academic year (paragraph 2(2)(b)). Where a provider does not have an access and participation plan, and does not have a “high level quality rating”, the fee limit is the applicable “sub-level amount” (paragraph 3(2)(b)).

56. The purpose of this delegated power under paragraphs 2(6) and 3(5) is to enable the Secretary of State, to set out administratively, “sub-level amounts” which must:

(a) not exceed the higher amount, where a provider has an access and participation plan and must be greater than the floor amount (paragraph 2(8)); and

(b) not exceed the basic amount, where a provider has no access and participation plan and must be greater than the floor amount (paragraph 2(7)).
57. In respect of the “sub-level amount” under the “higher amount” and the “sub-level amount” under the “basic amount”, the Secretary of State can determine that sub-level amount and can determine different amounts for different descriptions of provider (paragraphs 2(6) and 3(5)). These descriptions may be by reference only to whether a provider has or does not have a rating given to it in accordance with arrangements under clause 25 (Rating the quality of, and the standards applied to, higher education), and where it has such a rating, the level, type or other description of the rating (see paragraphs 2(7) and 3(6)). This means that the Secretary of State will administratively determine what amount of fee limit should attach to each sub-level and to whom they will apply.

58. Under paragraph 2(3), a “high level quality rating” means such rating or ratings given in accordance with arrangements under clause 25, in effect a rating under the TEF scheme as the Secretary of State determines to be a “high level quality rating”. Thus the Secretary of State determines administratively (not by regulation) what constitutes a “high level quality rating” for the purposes of the higher and basic amount – and consequently who gets the benefit of the higher amount and basic amount limits under paragraphs 2(2)(a) and 3(2)(a).

Justification for delegation

59. Taking into account paragraph 27 of Appendix 4 to the DPRRC 7th Report of Session 2014 – 2015, the Department has included paragraphs 2(6) and 3(5) of Schedule 2 as a delegated power in the event that the Committee takes the view that it is legislative in character for the purposes of this memorandum - because it sets fee limits where other fee limits, namely the “higher” and “basic” and “floor” amounts are prescribed by regulations.

60. The Department considers that it is not necessary or desirable for these sub-level limits to be set out in the Bill or prescribed by regulations as per the higher, basic and floor amounts, precisely because those other amounts are prescribed by regulations. Since the sub-levels must not be set outside these amounts, and Parliament has the opportunity to scrutinise those parameters, including by the affirmative procedure (where those parameters are increased by more than is required to maintain their value in real terms). It is therefore considered appropriate for these sub-level amounts to be determined administratively by the Secretary of State and that he should determine what rating given under arrangements under clause 25 should attach to each sub-level amount. It allows the Secretary of State to incentivise good quality higher education provision as well as monitoring the overall cost of the student finance regime by having some control of the amounts between those set by Parliament in secondary legislation.

61. The justification for the fact that the Secretary of State administratively sets what rating levels under clause 25 (i.e. TEF levels) apply to which sub-level or what constitutes a “high level quality assessment” which attaches to the higher amount and basic amount, is that Parliament will have set the parameters to which the Secretary of State can refer by virtue of clause 25, which provides that rating will be given to higher education providers regarding the quality and standards of the higher education that they provide.

62. Furthermore, the Secretary of State’s ability to exercise discretion or to determine the fee cap for individual providers will be highly circumscribed as it is limited to determining it on the basis of what quality rating a provider has (or does not have). These ratings, essentially ratings under the TEF scheme, will be determined by the OfS, an independent body without reference to the Secretary of State or Ministers. This in turn means that the Secretary of State will not be able to determine the number of providers receiving each quality award, and the ability to have some discretion in determining each sub-level is therefore important to maintain control over the overall affordability of the student finance system. This administrative ability is, however,
rightly limited by both the boundaries set by Parliament and the determination of an independent body.

Justification for procedure selected

63. The Department considers that parliamentary scrutiny of “sub-level amounts” is not necessary because such amounts must not exceed the “higher amount” or “basic amount” as relevant, and must be greater than the “floor amount”. Those amounts are subject to the scrutiny of Parliament, which includes the affirmative procedure where the amounts are proposed to be increased by more than is required to maintain their value in real terms. Therefore the sub-level amounts are only set within strict parameters, which are themselves subject to appropriate parliamentary scrutiny. Ultimately, the Department believes that this approach provides the necessary flexibility to adapt to the distribution of teaching excellence ratings and set proportionate fee limits within these clear and transparent parameters.

Clause 11(4): Power for the Secretary of State to prescribe the day on which a list must be published by the OfS regarding the fee limit condition

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

64. Clause 11(1) requires the OfS to publish in each year a list of the registered higher education providers that have a fee limit condition as an ongoing registration condition, and the fee limits as determined under Schedule 2 (The fee limit) in relation to each of those providers for fees in connection with each qualifying course provided by the provider in respect of each relevant academic year. What is meant by a “relevant academic year” is set out in clause 11(2). Subsection (3) requires the OfS to send a copy of each published list to the Secretary of State who must lay it before Parliament.

65. It is in relation to this list, that the Secretary of State may by regulations prescribe the day by which the list must be published by the OfS.

Justification for delegation

66. The power of the Secretary of State to prescribe the date by which the list must be published by the OfS is considered necessary to provide flexibility in relation to the date on which the list must be published. This may change more frequently than Parliament can be expected to legislate for by primary legislation.

Justification for procedure selected

67. The Department considers that the negative procedure is sufficient because the date to be prescribed is not considered to be controversial, nor sufficiently significant to warrant a greater degree of scrutiny.

Enforcement of ongoing registration conditions
Clause 15(2): Power for the Secretary of State to determine amount of monetary penalty for failure to comply with registration conditions

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

68. Clause 15 confers power on the OfS to impose monetary penalties on registered higher education providers where it appears to the OfS that there is or has been a failure to comply with one of its ongoing registration conditions. Clause 15(2) provides that a monetary penalty is an amount determined by the OfS in accordance with regulations made by the Secretary of State.

69. These provisions are required to support the OfS’ role in ensuring compliance with the registration conditions and to protect public funds. Funding for higher education has moved away from direct grant funding to indirect funding by way of tuition fees backed by the Department’s student loans. So, whereas HEFCE could claw back or reduce funding, the OfS requires a different mechanism to ensure compliance with the ongoing registration conditions and protect the public purse. This is an important measure that sits within a suite of other compliance measures available to the OfS that go further than, for example, issuing a formal direction to a provider, but stop short of suspending or removing a provider from the register. A decision by the OfS to impose a monetary penalty can be appealed by the provider to the First Tier Tribunal that may decide to set aside or vary the penalty imposed, affording the necessary protection to providers.

Justification for delegation

70. The Department considers that a delegated power is necessary to enable the government to continue to protect the public purse and adapt the penalties to changes in public funding for higher education. The use of regulations will enable the legislative penalty limits to be updated when needed. It is anticipated that these limits will need to be updated more frequently than Parliament can be expected to legislate for by way of primary legislation. There are no restrictions over the types of providers that can be on the register and in receipt of student support funding. Over time we expect to see a wide range of institutions and operating models develop. There are also no restrictions over which providers can teach post-secondary education. Charities and companies can all run higher education programmes. These providers may be for-profit and not-for-profit organisations. As the sector develops, it will be necessary to consider what constitutes an appropriate monetary penalty, and under what circumstances, and in relation to which providers, and these may need to vary over time.

71. It is important that the setting of monetary penalties is transparent and subject to appropriate safeguards, hence the application of the affirmative procedure. By enacting a power to fix penalties in secondary legislation, the Department will be able to keep the penalties under review, see if they are working effectively and amend them if needed, subject to parliamentary scrutiny.

Justification for procedure selected
72. The Department considers that the affirmative procedure is suitable for this measure because this level of scrutiny will provide a significant safeguard in setting the limits of penalties that could be introduced, and will allow extensive consideration and debate in both Houses.

Clause 15(3): Power for the Secretary of State to provide for matters to which the OfS must, or must not, have regard in exercising power to impose monetary penalties

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

73. Clause 15 confers power on the OfS to impose monetary penalties on registered higher education providers where it appears to the OfS that there is or has been a failure to comply with one of its ongoing registration conditions. Clause 15(3) enables the Secretary of State by regulations to set out matters to which the OfS must, or must not, have regard when exercising the power to impose monetary penalties.

74. These provisions are required to support the OfS’ role in ensuring compliance with the registration conditions and to protect public funds. The Department’s reasoning in this regard is the same as that set out above in relation to clause 15(2) setting the limits of monetary penalties.

Justification for delegation

75. The Department considers that this power is necessary to enable the government to continue to protect the public purse and adapt to changes in public funding for higher education. This power enables the Secretary of State to set out the matters to be considered by the OfS when determining whether to impose a penalty, and we expect that these will need to be updated more frequently than Parliament can be expected to legislate for by way of primary legislation. We expect that over time the matters to which the OfS should have regard, and the circumstances in which it is appropriate for the OfS to decide to, for example, impose a monetary penalty rather than suspend or remove a provider from the register, may change as the regulatory system evolves and providers adapt to the new regulatory environment. This flexibility sits within the parameters set by the overall limit to the monetary penalties, which will be prescribed by regulations subject to the affirmative resolution procedure.

76. The ability to set out in regulations the matters to which the OfS must have regard (or not have regard) is also necessary because the imposition of a monetary penalty is only one of the measures available to the OfS – other compliance measures that might be imposed on providers that consistently do not meet registration requirements include the issuance of directions, the imposition of a student number control, or ultimately removal from the register and the loss of designation for student support funding. Accordingly, the matters included in regulations may well provide a valuable degree of transparency about when it might be appropriate for the OfS to impose monetary penalties and when other forms of sanction might be more apposite.

Justification for procedure selected

77. The Department believes that the negative resolution procedure guarantees an appropriate level of scrutiny. It reflects the need for transparency regarding the operation of the monetary
penalties on the one hand, whilst ensuring necessary flexibility and avoiding the need for affirmative parliamentary approval for each and every change made to the factors to be considered by the OfS in imposing such penalties. These matters are unlikely to prove controversial since they relate to protecting the public purse but they do nonetheless warrant a degree of parliamentary scrutiny, which the negative procedure provides. The overall limits of the monetary penalties will be prescribed by regulations subject to the affirmative procedure (see the analysis in relation to clause 15(2) above).

Cl
ause 21(3) and (4): Power for the Secretary of State to make provision about matters to consider and procedure to follow for OfS refusal to renew access and participation plans

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

78. Clause 21 confers power on the OfS to notify the governing body of a registered higher education provider that, on the expiry of an existing access and participation plan, it will refuse to agree a new plan during such period as the OfS may specify. The power applies where it appears to the OfS that a provider has breached a condition of registration by failing to comply with either (i) the general provisions of its access and participation plan (imposed under clause 12 (Mandatory access and participation plan condition for certain institutions) or (ii) its fee limit condition (imposed under clause 10 (Mandatory fee limit condition for certain providers)). This is one of the enforcement powers available to the OfS in circumstances where it appears to the OfS that a registered higher education provider is in breach of any of its ongoing conditions of registration (although this power applies only in relation to the specific breaches identified above).

79. Refusing to renew an access and participation plan could potentially have a significant impact on a provider, because without an access and participation plan in subsequent academic years, a provider’s fee limit for qualifying courses will be capped at a lower level (by virtue of paragraph 3 of Schedule 2 (The fee limit)). This power is considered an appropriate deterrent to encourage providers to comply with their fee limits and to make realistic commitments in their access and participation plans and comply with them. However, in view of the potentially significant impact, the Department considers it important to ensure that a fair procedure will be followed when this enforcement power is threatened or imposed, and that providers are given the opportunity to have decisions reviewed by a third party.

80. The Secretary of State will be able to set out in regulations matters to which the OfS must, or must not, have regard when exercising its enforcement power; the procedure to be undertaken; and the effect of giving a notification under the power. In addition the Secretary of State will be required, in such regulations, to provide for any decision of the OfS under clause 21 to have effect in the first instance as a provisional decision and to enable the governing body of the provider to apply for a review of such a decision.

81. Clause 21 replicates a power currently conferred on the Director of Fair Access to Higher Education (“DFA”) under section 37(1) of the HEA 2004. Sections 37(3) and 39 of the HEA 2004 together give the Secretary of State a delegated power with the same effect as the one proposed in clause 21(3) and (4). There is therefore a strong precedent for the power proposed here. Under the existing power, the Student Fees (Approved Plans) (England) Regulations 2004
(SI 2004/2473) (the “Approved Plans Regulations”) make provision regarding the procedure to be followed when the DFA is minded to exercise his enforcement powers and the procedure (including grounds) for an institution to apply to have a decision of the DFA reviewed by a person or panel of persons appointed by the Secretary of State.

Justification for delegation

82. The Department considers that delegated legislation is appropriate for setting out detailed, procedural provisions for this OfS enforcement power. By way of example only, regulations might require reasonable notice where the OfS is minded to exercise its enforcement power. It is important that providers are given a clear indication of what will happen when the OfS proposes to use its enforcement power, as well as assurance that the process will be fair and transparent.

83. The Department also considers that the detailed provisions on procedure may need adjusting more often than Parliament can be expected to legislate for by primary legislation, for example, to be responsive to changes in the way the OfS operates on a practical level and its developing relationship with the sector. The question of what procedure is fair and reasonable in the context of this enforcement power may also change over time. The Department considers that setting out these detailed provisions on the face of the Bill could be detrimental to the future proofing of the OfS’ powers, but the wording of the delegated power gives sufficient certainty as to what the regulations may be expected to contain, particularly in relation to the review process for which clause 21(4) gives considerable detail.

Justification for procedure selected

84. The Department believes that a negative resolution procedure is appropriate in relation to a power to set out procedural details. It is important that a procedure be set out so that the OfS can be seen to operate in a transparent way, but the procedural details, while appropriate for parliamentary scrutiny, are not so inherently significant as to justify the affirmative resolution procedure. The actual impact of the OfS enforcement power on providers will be mitigated both by the procedure and also by the right to have decisions reviewed, which is enshrined in the Bill by virtue of clause 21(4).

Quality and standards

Clause 26 and Schedule 4: Power for the Secretary of State to designate a body to perform quality assessment functions

Power conferred on: Secretary of State

Power exerisible by: Designation

Parliamentary procedure: None

85. Taking into account paragraph 27 of Appendix 4 to the DPRRC 7th Report of Session 2014 – 2015 – that where a power is considered not to be legislative in character, the memorandum should explain fully why this is thought to be the case. In this regard, the Department does not consider clause 26 and Schedule 4 to be legislative in character. The reason for this view is that, by virtue of these provisions, the Bill sets out every detail of the designation process. As a result, where the Secretary of State follows this process and comes to a view that he should designate a body, he is exercising an administrative discretion rather than exercising a power that is legislative in character.
Clause 26 and Schedule 4, paragraph 10: Power for the OfS to give directions to the designated quality body

Power conferred on: The Office for Students

Power exercisable by: Directions

Parliamentary procedure: None

Context and purpose

86. As described above, clause 26 and Schedule 4 permit the Secretary of State to designate a body to perform the assessment functions of the OfS under clause 23 (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 the parameters set by the OfS.

87. 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. This is to ensure that the expertise of the body is respected and a co-regulatory approach between the sector and the OfS is maintained.

Justification for delegation

88. The power of the OfS to give general directions to the designated body is considered necessary to ensure that such 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)). The ability to set parameters in this way exists in the current higher education system through the contracting arrangements between HEFCE and the Quality Assurance Agency, arrangements which have been in place for a number of years.

89. This delegated power 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 of 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. The OfS will retain ultimate responsibility for quality and standards and, without this power, there is a risk that it would not be able to set the broad parameters in which the designated body is to operate, nor direct the body to undertake this type of activity. The requirement for the directions to be general in nature means that the OfS could not use this power to set out detailed specifics, for example, the form a visit should take, or detailed requirements relating to course structure, content or processes.

Justification for procedure selected

90. It is not considered necessary that a parliamentary procedure is required in respect of directions given by the OfS to a designated body. Such directions and 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 itself will retain ultimate responsibility for quality and
standards and 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, including in relation to the assessment functions. 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 more complex and less responsive.

Access and participation

Clause 28(5) to (7): Power for the Secretary of State to make provision regarding matters to consider and procedure for OfS power to approve access and participation plans

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

91. Clause 28 confers power on the OfS to approve, if it thinks fit, access and participation plans prepared by providers for the purposes of satisfying an access and participation plan condition (which is a pre-requisite for providers which are subject to a fee limit condition and wish to charge qualifying fees above the basic level – see clause 10 (Mandatory fee limit condition for certain providers)). The clause allows the OfS to issue guidance indicating the matters to which the OfS should have regard in deciding whether to approve access and participation plans.

92. Clause 28 also empowers the Secretary of State to make provision about the procedure to be followed in connection with the giving of approval for access and participation plans, including specifying matters that the OfS is or is not to have regard to in making a decision, and power to require providers to publish approved plans.

93. Clause 28 is based on section 34 of the HEA 2004, which confers an equivalent power on the DFA to approve “plans” required by providers that receive funding from HEFCE and wish to charge qualifying fees up to the currently applicable higher amount. Section 34(4) to (6) of the HEA 2004 confers power on the Secretary of State equivalent to the power proposed in clause 28(5) to (7) of the Bill, so there is a clear precedent in existing legislation for this power.

Justification for delegation

94. The Department considers that delegated legislation is appropriate for provisions regarding the procedure for approval of access and participation plans, matters to take into account and suitable arrangements for publication. This will enable arrangements to be adapted to suit, for example, changing needs in the sector or practical changes in the way the OfS operates and carries out its functions.

95. The power to specify matters to which the OfS is, or is not, to have regard in making determinations relating to approval will also, alongside the power to specify required contents of access and participation plans (see below regarding clause 31 (Content of a plan: equality of opportunity)), allow some flexibility for changing and developing priorities in connection with fee limit policy and access and participation policy. This flexibility would, however, be firmly set within the context of the explicit Bill provisions regarding the fee limit condition and the
equality of opportunity purposes of access and participation plans, framed by the definition of “equality of opportunity” in clause 31(5).

Justification for procedure selected

96. The Department considers that the affirmative procedure is appropriate for this power. Together with the duty on the OfS in clause 35 (Duty to protect academic freedom) to protect academic freedom in performing its access and participation functions, the affirmative procedure in this context will help to mitigate any concerns about disproportionate administrative burdens or interference with provider autonomy, particularly with regard to student admissions. This is also consistent with the parliamentary procedure which applies to the equivalent power in the HEA 2004.

Clause 29(2): Power for the Secretary of State to prescribe maximum length of period during which an access and participation plan is to be in force

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

97. Clause 29(2) enables the Secretary of State to prescribe the maximum period an access and participation plan can be in force. This power replicates that in section 35(2) of the HEA 2004 in relation to plans approved by the DFA.

98. There has been variation in the duration of plans under the HEA 2004. At present, in practice, plans are renewed with the DFA on an annual basis, following guidance given to the DFA by the Secretary of State in 2011 that plans should agree a programme of defined progress on a yearly basis.

Justification for delegation

99. This power is necessary to enable the Department to vary the amount of time that plans cover. Without this power plans would not be responsive to changing circumstances. The power ensures that the Department can be responsive to changes in the way the OfS and the sector operate. For example a balance can be struck between, on the one hand, ensuring providers are satisfied that burdens placed on them in terms of equality of opportunity commitments will not be excessively long term, and on the other hand, ensuring providers are encouraged to make commitments which are focused and measurable over the shorter term.

Justification for procedure selected

100. The Department believes that the negative resolution procedure is appropriate for this power which relates to a practical detail and which, in itself, has a relatively low impact on the sector. This matter warrants a degree of scrutiny, but not necessarily prior parliamentary debate and affirmative approval. This approach is consistent with the procedure for the equivalent provision in the HEA 2004.

Clause 31: Power for the Secretary of State to prescribe required provisions of an access and participation plan relating to promotion of equality of opportunity

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Affirmative resolution

Context and purpose

101. Access and participation plans will require providers that are subject to a fee limit condition, and that wish to charge qualifying fees above the basic level, to set out their intentions and commitments relating to the promotion of equality of opportunity in connection with access to and participation in higher education. The objective of these plans is to ensure providers take action to encourage applications from, and support, students from disadvantaged backgrounds.

102. Pursuant to clause 31(1), access and participation plans must include such provisions relating to equality of opportunity as are required by regulations, and may also include further provisions relating to equality of opportunity. The power for the Secretary of State to prescribe the required contents of plans replicates the power in section 32(2) of the HEA 2004 in relation to the DFA’s functions, so there is a clear and firm precedent for the proposed power.

103. The power would enable the Secretary of State to ensure that certain types of activity are required by all providers subject to an access and participation plan condition. For example, providers may be required to secure the provision of financial assistance to students.

104. Clause 31(4) imposes restrictions on the types of requirement the Secretary of State can stipulate, in order to protect the academic freedom of institutions. Clause 31(5) defines “equality of opportunity” for the purposes of access and participation plans, and serves to signal the scope of access and participation activity that providers will be expected to undertake for the purposes of their plans, making clear that plans are not expected to consider postgraduate courses other than courses of initial teacher training.

Justification for delegation

105. The Department considers that the listing of specific types of requirements is appropriate for delegated legislation because of the need to be able to adjust the core expectations of the activities included in access and participation plans over time. For example, changes might be necessary in response to changes in government policy; or developments in available evidence showing what types of financial or other support available to students are more or less important in encouraging and supporting their application to, and full participation in, higher education. This flexibility will allow access and participation plans to adapt to ensure that the support available to students from disadvantaged backgrounds remains appropriately targeted, responsive and evidence-based. This type of change may need to take place more often than Parliament can be expected to legislate for through primary legislation.

Justification for procedure selected

106. The Department considers the affirmative resolution procedure is an appropriate safeguard for this power, bearing in mind that it is a power to prescribe access and participation requirements which will be mandatory for certain providers. Together with the duty on the OfS in clause 35 (Duty to protect academic freedom) to protect academic freedom in performing its access and participation functions, the affirmative procedure in this context will help to mitigate any concerns about disproportionate regulatory burden or interference with provider autonomy, particularly with regard to student admissions. This approach is consistent with the provision for the equivalent power in the HEA 2004.

Clause 32: Power for the Secretary of State to make provision enabling an access and participation plan to be varied

Power conferred on: Secretary of State
Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

107. This clause empowers the Secretary of State to make regulations enabling an access and participation plan to be varied. Any variation must be approved by the OfS. There is an equivalent provision in section 36 of the HEA 2004 relating to the DFA.

108. This power will allow the Secretary of State to set out a procedure to be followed where a provider wishes to change its access and participation plan before it is due to expire. This opportunity introduces a degree of flexibility for providers, for example if circumstances mean access and participation commitments originally made are no longer appropriate or feasible.

Justification for delegation

109. The Department considers that delegated legislation is appropriate for provisions regarding the procedure for approval of a variation to an access and participation plan. This is consistent with the approach proposed in relation to initial approval of access and participation plans (see clause 28 (Power to approve an access and participation plan)) and will enable procedural arrangements to be adapted to suit, for example, changing needs in the sector or practical changes in the way the OfS operates.

Justification for procedure selected

110. The Department considers the negative resolution procedure is appropriate for this power to make provision which is essentially procedural. This matter warrants a degree of parliamentary oversight and it is important that the OfS is seen to operate in a transparent way. However, since the implications are merely procedural, this does not in the Department’s view require the affirmative resolution procedure. Any actual variation to an access and participation plan in an individual case would be subject to approval by the OfS in any event.

Clause 33: Power for the Secretary of State to make provision enabling decisions regarding approval or variation of access and participation plans to be reviewed

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

111. Clause 33 provides for decisions of the OfS regarding initial approval or subsequent variation of access and participation plans to be subject to independent review, by a person or panel of persons appointed by the Secretary of State. The Secretary of State is empowered to provide for decisions to take effect in the first instance as provisional decisions; to enable providers to apply for such provisional decisions to be reviewed by a person or panel appointed by the Secretary of State; to make provision enabling the Secretary of State to pay remuneration and allowances to any person so appointed; to prescribe the grounds on which an application for review may be made; and to require the OfS to reconsider its provisional decision having regard to any recommendation of the person or panel.
112. There is an equivalent provision in section 39 of the HEA 2004, under which the Approved Plans Regulations set out the procedure for decisions of the DFA to be reviewed. There is therefore a strong precedent for this power.

113. Access and participation plans represent a significant commitment on the part of higher education providers. By way of illustration, considerable expenditure is currently made through “access agreements” under the HEA 2004 (which will be replaced by access and participation plans) – expenditure in 2016/17 is expected to reach £745 million. Furthermore, as noted above in relation to clause 21 (Refusal to renew an access and participation plan), failure to secure OfS approval for a plan or a variation could potentially have a significant impact on a provider because of the implications for the provider’s fee limit. Accordingly, the Department considers that it is important to provide for a review process in order to offer assurance that the procedure for getting access and participation plans and variations approved will be fair and transparent.

Justification for delegation

114. The Department considers that delegated legislation is appropriate for setting out detailed provisions regarding procedure. By way of example only, regulations might provide for a time limit within which a provider can apply to challenge a provisional decision, before it automatically becomes final. The Department also considers that the detailed provisions on process may need adjusting more often than Parliament can be expected to legislate for by primary legislation.

115. The Department considers that it is appropriate for the Secretary of State to be empowered to appoint a person or panel of persons to act as reviewer for decisions of the OfS. This allows for flexibility to determine, as the sector develops, whether a single individual or a panel is more appropriate (for example having regard to the volume of decisions being challenged). It also enables the Secretary of State to respond where appointees need to be replaced for any reason.

Justification for procedure selected

116. The Department considers that the negative resolution procedure is appropriate for these regulations. The wording of the power gives considerable certainty as to what the regulations may contain with regard to procedure and what the appointed reviewer will be expected to do. This matter requires a degree of parliamentary scrutiny and it is important that the OfS is seen to operate in a transparent way. However, the procedural detail of the review arrangements is not considered to be so inherently significant that the affirmative procedure is necessary.

Clause 36: Power for the Secretary of State to direct the OfS to report on matters relating to equality of opportunity

Power conferred on: Secretary of State

Power exercised by: Direction

Parliamentary procedure: None

Context and purpose

117. Clause 36 enables the Secretary of State to request reports on matters relating to equality of opportunity. Reports can be given in the OfS’ annual report, or in a special report. Any reports given under this power must be laid before each House of Parliament.

118. The Secretary of State has a similar power in relation to the DFA (set out in Schedule 5, paragraph 7(2) and (3) to the HEA 2004).
Justification for delegation

119. By virtue of its functions relating to access and participation, the OfS may be expected to gather useful data and evidence and develop considerable expertise in relation to matters relating to equality of opportunity for students from disadvantaged backgrounds in higher education. The Department considers that the Secretary of State could stand to benefit from drawing on the OfS’ expertise in order to understand developments in the sector and formulate government policy in this area.

120. As a statutory body, the OfS draws its power from legislation. The Department therefore considers that it is helpful to ensure the Bill makes it clear that the OfS is empowered to give advice to the Secretary of State in this area, consistent with the power currently conferred on the DFA.

Justification for procedure selected

121. The power to give a report to the Secretary of State does not have a direct impact on providers regulated by the OfS, or on students, and does not strictly constitute a power to make secondary legislation. Accordingly the Department considers that no parliamentary procedure is required. Reports provided to the Secretary of State pursuant to this power will be laid before both Houses of Parliament in any event.

Power to give financial support

Clause 37: Power for the Secretary of State to prescribe descriptions of registered higher education provider as eligible for financial support

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

122. Clause 37 confers power on the OfS to provide grants, loans or other payments to eligible higher education providers. Clause 91 (Exercise of functions by Research England) requires UKRI to arrange for Research England to exercise its functions for the purpose of giving financial support to eligible higher education providers for research purposes. This reflects a similar provision in section 65 of the FHEA 1992 which HEFCE currently uses to provide funding for teaching and research. However, because the OfS has not yet been established and has not created the different parts of the register representing different categories of higher education provider, it is not possible at this stage to identify which part of the register will entail eligibility for funding from the OfS. Therefore, the power in clause 37(3) enables the Secretary of State to determine which providers are eligible for funding, by setting out which part or parts of the register entail such eligibility. These providers would then also be eligible for funding from Research England by virtue of clause 91(5).

Justification for delegation

123. The OfS register is intended to be flexible to take account of the changing needs of the sector, to adapt to different types of providers as they emerge, and to reflect any changes to the types and amounts of the Department’s support for higher education. Since the register has yet to be set up and the various parts identified, it is not possible to specify in primary legislation which
providers are eligible at this stage. The Department also considers that the categories of eligible higher education providers may need adjusting more often than Parliament can be expected to legislate for by primary legislation, to reflect changes in the sector and the government’s priorities in higher education and research.

Justification for procedure selected

124. The Department believes that the negative resolution procedure guarantees an appropriate level of scrutiny, which is important given the regulations will relate to eligibility for receipt of public funding. However, these matters are unlikely to prove controversial since they relate to the procedural step of identifying the correct part of the OfS register to make providers eligible for support. In relation to OfS funding, this will build upon the established practice that different providers are eligible for the receipt of financial support based upon the type of provision they offer and the level of regulatory oversight they are subject to (e.g. fee limits).

Clause 38: Power for the Secretary of State to prescribe higher education courses provided by institutions in England maintained or assisted by local authorities or institutions in England in the further education sector as eligible for financial support

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

125. Clause 38 confers power on the OfS to provide grants, loans or other payments in relation to prescribed higher education courses provided by institutions in England maintained or assisted by local authorities, or institutions in England in the further education sector. This reflects a similar provision in section 65 of the FHEA 1992, which HEFCE currently uses to provide funding.

126. The OfS is not yet established, and the Secretary of State intends for the OfS to carry out an assessment and provide advice on what courses should be eligible under the provision in clause 38(2). In view of this, this power is needed to enable the Secretary of State to specify eligible courses by way of regulations pursuant to the advice the received.

Justification for delegation

127. The Department considers that, because the OfS is not yet established and the Secretary of State intends for the OfS to carry out an assessment and provide advice on this matter, it is not possible at this stage to specify in primary legislation which courses should be eligible. The Department also considers that the categories of higher education courses eligible for funding may need adjusting more often than Parliament can be expected to legislate for by primary legislation. Further, the OfS may need to alter its funding methodology and may, for example, need to start providing some funding for new courses. This power will provide the flexibility to do this, subject to the oversight which the negative resolution procedure provides.

Justification for procedure selected
128. The Department believes that the negative resolution procedure allows for an appropriate level of scrutiny. We expect the OfS to consult affected bodies before making changes to its funding methodology. To protect academic freedom and institutional autonomy, the OfS will take independent decisions about which courses are eligible for funding. The Department believes that the negative resolution procedure will provide an appropriate level of parliamentary scrutiny by providing oversight of the OfS’s decisions, whilst ensuring that the details of those decisions are transparently independent, being taken by an independent regulator.

Power to grant degrees etc

Clause 40: Power for the OfS by order to grant degree awarding powers

Power conferred on: Office for Students

Power exercisable by: Order by Statutory Instrument

Parliamentary procedure: None

Context and purpose

129. The FHEA 1992 enables the Privy Council to bestow, via an order of Council, taught and research degree awarding powers upon institutions which provide higher education, and foundation degree awarding powers upon institutions within the further education sector.

130. Clause 40 transfers the Privy Council’s role, as it relates to English institutions, to the OfS. The power will enable the OfS to authorise, via order, registered providers of higher education to award taught and research awards - including degrees - and registered providers of further education to award foundation degrees. The power specifies that authorisations may be granted on a specified basis. This will enable the OfS to authorise specialised degree awarding powers, i.e. powers which relate to one or more subjects or “levels” (such as Bachelor degrees). Orders of the OfS may make incidental, supplementary, transitional or saving provision. Clause 41 (Supplementary powers with authorisation) contains supplemental provisions.

Justification for delegation

131. The granting of degree awarding powers needs to be a clear, transparent and impartial process. Degree awarding powers are valuable, and should only be granted on a case-by-case basis, once a provider can demonstrate its quality. Given the high level of academic scrutiny that is necessary, we consider it right that awards are made by an independent body, the OfS, acting on expert advice. This independence provides important safeguards both for quality and academic freedom.

132. Individual higher education providers will have to satisfy various conditions in order to become eligible for degree awarding powers. The criteria which a provider needs to meet in order to become eligible are, for Privy Council awards, currently set out in guidance. We intend the same approach to be taken for OfS authorisations. The intention is for the Department to consult on the detailed criteria and processes and then issue guidance to the OfS under clause 2 (General duties) to which the OfS must have regard.

133. The precise criteria are detailed and subject to change more often than Parliament can be expected to legislate for. In the Department’s view, it would not be practicable or appropriate to specify all potential scenarios under which a provider could obtain different forms of degree awarding powers in primary legislation, and to do so could run the risk of unduly limiting the
options available and hinder the OfS’ ability to take into account all of the circumstances which are relevant to an individual application, and to adapt to changes in the higher education landscape. The Department considers it better and more appropriate to mirror current arrangements, which have worked well in the sector thus far not least because the consultation process enables the sector to buy into the guidance – including the criteria that are applicable. The Department believes that having an independent, but clear and transparent process, subject to appropriate procedural controls, is the best way to safeguard quality and protect the value of degrees.

Justification for procedure selected

134. OfS authorisations for degree awarding powers under clause 40 will be via an order; this largely mirrors current arrangements where the Privy Council authorises degree awarding powers via orders of Council, and reflects that the provision of degree awarding powers is of a legislative character.

135. The Department considers that, under the new system, there are distinct advantages in having a non-departmental public body, rather than the Privy Council, discharging these functions; the OfS will have a direct working relationship with higher education providers meaning that it will be best placed to assess a provider’s application for degree awarding powers and to carry out these functions in an effective manner which respects academic freedom and institutional autonomy.

136. The adopted procedure also ensures legal certainty, which is an important feature in light of the “unrecognised degree offence” – an offence for granting awards without authorisation - in section 214 of the Education Reform Act 1988 (“ERA 1988”). Under this procedure, OfS awards will be statutory instruments (the status of which are unlikely to come into doubt) to which the Statutory Instruments Act 1947 (“SIA 1947”) shall apply. The SIA 1947 will require OfS orders to be published so it will be clear, and readily available to the public and the local weights and measures authorities which enforce section 214 of the ERA 1988, what awards higher education providers are authorised to grant.

137. As with current arrangements, orders made by the OfS will not be subject to a parliamentary procedure; this is appropriate due to the nature of the awards which will require detailed and technical scrutiny of each provider’s eligibility.

138. It is the Department’s view that such eligibility should be determined by compliance with conditions which are derived from consultation with the sector as and when such consultation is appropriate. Further, the Department considers that the provisions in the Bill contain the procedural safeguards which ensure the appropriate exercise of these powers. In particular, the general duties of the OfS (clause 2 (General duties)) require it to apply 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. Having an independent yet transparent process – subject to procedural controls - is therefore most appropriate to safeguard the value of degree awarding powers. As a public body, the OfS will have to ensure it exercises its functions in a manner which complies with public law. The requirement that OfS orders be published will also foster transparency about what awards the OfS makes and when, further ensuring that the OfS remains accountable for its decisions.

Clauses 42 and 43: Power for the OfS to amend or revoke degree awarding powers authorised by the OfS or Royal Charter or by or under Acts of Parliament (including previous authorisations granted by the Privy Council)
Power conferred on: Office for Students

Power exercisable by: Order by Statutory Instrument

Parliamentary procedure: None

Context and purpose

139. Higher and further education providers may currently obtain degree awarding powers by an order of Council of the Privy Council under section 76 of the FHEA 1992, by or under Private Acts or via Royal Charter. Current powers to amend or revoke degree awarding powers are prescribed in Royal Charters, Private Acts or are implied.

140. Clauses 42 and 43 confer on the OfS express powers to vary or revoke the degree awarding powers it has granted under clause 40 (Authorisation to grant degrees etc), and those authorisations bestowed upon English higher and further education providers provided by or under any Act including Private Acts and by Royal Charters, including in circumstances where institutions do not register or cease to be registered.

141. The OfS can amend or revoke said degree awarding powers, irrespective of how and when they were obtained, and regardless of whether they were granted indefinitely or on a renewable basis. As with orders authorising degree awarding powers, the OfS’ orders amending or revoking degree awarding powers may make incidental, supplementary, transitional or saving provision.

Justification for delegation

142. The OfS will be regulating the higher education sector in the future. Powers to revoke or vary degree awarding powers are an important tool in this respect, and support the OfS’ core functions. Regulatory oversight over the provision of degrees, including the assurance of quality and the maintenance of academic standards are in the student and wider public interest. The department considers that the OfS, as the operationally independent regulator, is best placed and qualified to take these decisions. Further, the OfS’ status as a public body will require it to exercise its powers in a manner which is compliant with public law.

143. The OfS will have a direct working relationship with higher education providers and, we intend, those bodies which will have a role in promoting the quality and health of the sector, such as UKRI and the designated quality body. As a result, it is the Department’s view that the OfS will be best placed to assess whether a provider’s degree awarding powers should be amended or revoked.

144. The Department considers that it is right that, under the new system, one independent non-departmental public body discharges these functions. This helps to ensure fairness and consistency across decisions and, importantly, respect for academic freedom and institutional autonomy.

145. The Department also considers it right that powers to amend and revoke degree awarding powers are refined and made express. The OfS requires nuanced, express powers to amend and revoke degree awarding powers, including in circumstances where institutions do not register or cease to be registered, in order to ensure quality and maintain academic standards in a sector which is expected to become increasingly dynamic.

146. These powers are necessary to ensure that the OfS has appropriate regulatory oversight over the provision of degrees and cases where there are serious causes of concern. The exact
circumstances giving rise to the exercise of these powers may vary depending on the situation of the provider in question. In light of this, it would not be practicable or appropriate to prescribe, in primary legislation, all of the circumstances in which the OfS can exercise these powers. Such regulatory powers need to be used in a nuanced way, based on specific circumstances.

147. In addition, the Department intends to provide detailed guidance to the OfS in this regard. Accordingly, whilst the Bill will set out the OfS’ powers to amend or revoke degree awarding powers, the exercise of these powers will be supported by government guidance. It is anticipated that this guidance will form part of a wider suite of degree awarding powers guidance (similar to that underpinning the current system) covering eligibility criteria and the assessment process. This guidance is expected to contain a level of detail which it would not be appropriate to include on the face of the Bill. It may also need updating more frequently than Parliament can be expected to legislate for in primary legislation.

Justification for procedure selected

148. It is appropriate, given the legislative nature of the amendments and revocations, that they be made by an order which is a statutory instrument, to which the SIA 1947 shall apply. This procedure enables a transparent, comprehensive, consistent and proportionate approach to be taken to degree awarding powers going forward, and ensures legal certainty, an important feature in light of the “unrecognised degree offence” in section 214 of the ERA 1988.

149. The Department considers it is appropriate that the orders are not subject to any parliamentary procedure as the amendments and revocations should be subject to a detailed assessment of the provider and circumstances in question. We note that the Privy Council’s powers with respect to degree awarding powers are not subject to parliamentary scrutiny, and consider that – like the Privy Council previously – the OfS will be best placed to take into account all of the circumstances which are relevant to an individual case, prior to making a decision as to whether to amend or revoke degree awarding powers. The operational independence of the OfS would be a vital safeguard in protecting the independence of the sector and academic freedom.

150. Ultimately, this process will be supported by a detailed statutory procedure ensuring that any affected providers are given adequate notice and have the ability to make effective representations as to their case (clause 44 (Variation or revocation of authorisation: procedure)). Institutions will also have the right to appeal to the First Tier Tribunal (clause 45 (Appeals against variation or revocation of authorisation)) and any decisions to vary or revoke an institution’s degree awarding powers will not take effect at any time when an appeal could be brought against the decision to vary or revoke, unless the provider tells the OfS it does not intend to appeal, or when such an appeal is pending. In the Department’s view, it is appropriate that the courts have ultimate oversight of the OfS’ use of these powers.

Clause 47: Power for the Secretary of State to authorise the OfS to enter into validation arrangements or require the OfS to offer to do so with registered higher education providers

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

151. Higher education providers with degree awarding powers may, subject to the limitations placed on those powers, award degrees to students enrolled at other providers and/or authorise other institutions to issue awards on their behalf. This is commonly done under “validation agreements”, where an institution with degree awarding powers “validates” the awards of
Clause 47 enables the Secretary of State to make regulations authorising the OfS to enter into validation arrangements in respect of taught awards (but not research awards) and foundation degrees, and require it to offer to do so with registered higher education providers (or such registered higher education providers as are specified or of a specified description). The Secretary of State may only make these regulations if he considers it necessary or expedient, having had regard to advice from the OfS.

Justification for delegation

This power is intended to assist in strengthening the validation sector and opening up the wider higher education sector. There is evidence which suggests that providers find it difficult to find an appropriate validation partner, and that validation agreements can be one-sided, as the power to enter into a validation agreement lies with the validating body. This gives rise to the possibility of restricting access to the sector.

It is therefore appropriate that the OfS should have the ability to validate awards, subject to the Secretary of State considering it necessary or expedient for the OfS to do so. This approach is not without precedent. As many respondents to the Green Paper consultation observed, the Council for National Academic Awards ran a centralised validation service for many years, before it was dissolved by The Education (Dissolution of the Council for National Academic Awards) Order 1993 (SI 1993 No. 924) under section 80 of the FHEA 1992.

Regulations made pursuant to this clause will enable the Secretary of State to specify in greater detail the nature and scope of the validation arrangements which the OfS may enter into, including what types of awards can be validated for different types of providers, what conditions as to quality need to be imposed, and whether the OfS can authorise registered higher education providers to enter into arrangements on its behalf. The use of delegated legislation will enable the OfS to assess the needs of the sector and respond accordingly. In all cases, the OfS can only authorise registered higher education providers who already have the power to grant, and validate, the awards in question to act on its behalf. This is to ensure that quality and standards are protected.

Justification for procedure selected

Regulations made by the Secretary of State will be subject to the negative resolution procedure which, in the Department’s view, ensures that Parliament has an appropriate opportunity to review them. The Secretary of State will only be able to make these regulations if he considers it necessary and expedient, having had regard to the advice of the OfS, a body which, through its regulatory functions, will be best placed to assess the needs of the sector. As a consequence of an exercise of this power, the OfS can be authorised to enter into validation arrangements and required to offer to do so. There would not be any requirement for higher education providers to take up the offer or enter into validation arrangements. Further, the Bill places restrictions on what the regulations can provide for. As such, the Department does not consider that the regulations would warrant further scrutiny pursuant to the affirmative resolution procedure.

Clauses 49 and 50: Power for the OfS to identify recognised awards or bodies and duty to identify listed bodies under sections 214(2)(c) and 216(1) and (2) of the Education Reform Act 1988

Power conferred on: Office for Students

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None
Section 214(2)(c) of the ERA 1988 gives the Secretary of State the power to designate, by order, “recognised awards”. “Recognised awards” are those awards which are to be granted by bodies which do not possess degree awarding powers granted by or under another Act or Royal Charter, or which are not granted on behalf of a body with such degree awarding powers but which the body should nonetheless be authorised to award so as not to fall foul of the “unrecognised degree offence” in section 214(1) of the ERA 1988.

Section 216(1) of the ERA 1988 gives the Secretary of State the power to designate by order any body as appearing to him to be a recognised body (these being degree awarding bodies and bodies that are authorised to award degrees on their behalf). Any such body shall conclusively be presumed to be such a recognised body for the purposes of section 214(2)(a) or (b) of that Act, again so as not to fall foul of the “unrecognised degree offence”.

Section 216(2) of the ERA 1988 places a duty on the Secretary of State to compile, maintain and publish by order a list including the name of every body which appears to him to fall for the time being within section 216(3) of that Act, i.e. a list of those bodies which provide degree courses where the awards are made by recognised bodies, such bodies being, for example, the constituent colleges, schools or halls of institutions which are recognised bodies.

These clauses transfer to the OfS the Secretary of State’s power to designate, by order, recognised awards under section 214(2)(c) of the ERA 1988, recognised bodies under section 216(1) of the ERA 1988, and the duty on the Secretary of State to compile, maintain and publish a list of bodies under section 216(2) of the ERA 1988. In the case of bodies authorised under the Bill to grant awards (i.e. English higher or further education providers or the OfS) or bodies permitted to act on behalf of such bodies to grant awards, designation under section 216(1) of the ERA 1988 does not result in a conclusive presumption that they have power to grant awards. Whether an award granted by such a designated body is a “recognised award” and so exempt from the offence under section 214 of the 1988 Act will depend upon whether the body is authorised to grant the award in question.

Justification for delegation

Given the OfS’ regulatory role, it is appropriate that the OfS, and not the Secretary of State, exercises the powers in section 214(2)(c) and section 216(1) of the ERA 1988, and is made subject to the duty in section 216(2) of the ERA 1988. Recognised awards recognise that certain institutions can offer their own unique type of award; recognised bodies generally refers to those institutions that hold degree awarding powers and listed bodies refers to those institutions that deliver degree courses that are awarded by a recognised body.

The types of recognised awards and the identity of recognised and listed bodies will vary over time and it is therefore appropriate for this to be delegated under secondary legislation. Orders made in relation to recognised awards and bodies are factual in nature and the Department considers this information is better suited to inclusion in secondary rather than primary legislation. Orders denoting recognised and listed bodies are typically made every two to three years, while orders concerning recognised awards are made less frequently. Under the new regime, it is anticipated that providers may obtain degree awarding powers to a faster timetable, and that the powers may be varied or revoked, whilst validation arrangements may also become more common, which means that orders may be made more frequently.

Justification for procedure selected
163. Given the nature of the powers and the duty imposed on the OfS, it is appropriate that OfS orders under sections 214 and 216 of the ERA 1988 are made by statutory instrument, to which the SIA 1947 applies. Under this procedure the status of the OfS orders are unlikely to come into doubt. Further the SIA 1947 will require the orders to be published so it will be clear and readily available to the public and the local weights and measures authorities which enforce section 214 of the ERA 1988, what bodies and awards are recognised, and who is conclusively presumed to be recognised. These orders go towards ensuring legal certainty, in terms of which providers can lawfully offer UK recognised degrees and other recognised awards, which is important for the operation of the “unrecognised degree offence” in section 214(1) of the ERA 1988.

164. It is important that these orders are not subject to any parliamentary procedure, as the OfS is the independent regulator and therefore best placed to determine which institutions should be listed in these orders as part of its wider regulatory functions. This maintains the current position whereby orders made by the Secretary of State under sections 214 and 216 of the ERA 1988 are not subject to any parliamentary procedure (see section 232 of the ERA 1988).

Powers in relation to university title

Clauses 51 and 52: Power for the OfS to consent to higher education providers using university title

Power conferred on: Office for Students

Power exercisable by: None – consent only

Parliamentary procedure: None

Context and purpose

165. The power in these clauses enables the OfS (instead of the Privy Council) to consent to an English higher education provider’s use of university title under section 77 of the FHEA 1992 or section 39 of the THEA 1998. The OfS will only be able to provide consent in the event that the provider registers with the OfS, and should have regard to the need to avoid names which are or may be confusing. The detailed conditions for eligibility will not be prescribed by legislation. The intention is that they be provided for in guidance.

166. The OfS will be able, under the THEA 1998, to consent to any registered higher education provider’s use of university title, except where authorisation is available by any other Act or Royal Charter but including where providers can obtain consent under the Companies Act 2006 (“CA 2006”). In these circumstances, the OfS consent does not replace the need for the Secretary of State to consent for CA 2006 purposes; the intention is to enable such providers to obtain the consent of the OfS alongside the consent of the Secretary of State.

Justification for delegation

167. A university title is a valuable and reputable asset, and misuse can easily reflect negatively on the English higher education system as a whole. It is therefore important that it is only granted through a clear, transparent and impartial process.

168. The Department considers that, under the new system, there are distinct advantages in having a non-departmental public body, rather than the Privy Council, consenting to the use of university title. In particular, the OfS will have a direct working relationship with higher education
providers, and is expected to work directly with bodies with quality assurance roles such as UKRI and the designated quality body, meaning that it will be best placed under the new system to assess a provider’s application for university title and to carry out this function in an effective manner which respects academic freedom and institutional autonomy.

169. It is also appropriate that the OfS authorises university title for companies, alongside and in support of, but not in substitution for, the Secretary of State’s ability to approve university title for CA 2006 purposes. This approach enables registered providers to brand themselves as universities if approved by the OfS, regardless of their composition, and ensures a streamlined, robust approach to approvals. It therefore protects quality, and serves students.

170. The OfS will need to exercise this power on a case by case basis, in specific circumstances and relatively frequently. As providers’ situations can differ widely, it would not be practicable to try and cover all potential scenarios in primary legislation.

171. The consent process at the moment is underpinned by a provider having to meet certain criteria, as set out in guidance, before the Privy Council provides its consent to the use of university title. It is anticipated that the criteria for obtaining university title will continue to be set out in guidance similar to that underpinning the current system. The guidance will be detailed and will need updating more frequently that Parliament can be expected to legislate for by primary legislation. It is expected that any substantive changes to the guidance going forward would also be subject to consultation.

Justification for procedure selected

172. The OfS’ consent will not be subject to any parliamentary procedure. This is because, given the OfS’ independence and regulatory capacity, the Department considers that it is best placed to determine whether an institution meets the conditions for university title.

173. We intend these conditions to be set out in guidance, which we want to be subject to consultation as and when appropriate. This, in the Department’s view, will provide the support that the OfS will require in order to determine whether consent should be granted.

174. The Department believes that having an independent, but clear and transparent process, subject to appropriate procedural controls, is the best way to safeguard quality and protect the value of university title. This is similar to the current position whereby the Privy Council’s consent is not subject to any parliamentary scrutiny.

Clause 53: Power for the OfS to revoke its consent to institutions using university title

Power conferred on: Office for Students

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None

Context and purpose

175. The power contained in this clause enables the OfS to revoke consent to the use of university title. This applies to consent given under clauses 51 (Use of “university” in title of institution) and 52 (Unauthorised use of “university” in title of institution) of the Bill, as well as any previous consent given to an institution under any other Act or Royal Charter (save for the Secretary of State’s approval for CA 2006 purposes).

176. Our view is that the full, detailed conditions of when university title should be removed should
be set out in guidance. It is envisaged that this power would be exercised, for example, in circumstances where a provider loses its degree awarding powers. As with orders amending or revoking degree awarding powers, the OfS’ orders revoking university title may make incidental, supplementary, transitional or saving provision.

Justification for delegation

177. The OfS will be regulating the higher education sector in the future. Powers to revoke university title are an important tool in this respect, and support the OfS’ core functions. The OfS requires express powers to revoke consent to the use of university title in order to ensure quality and maintain academic standards and, in so doing, protect students and the reputation of English universities. The assurance of quality and the maintenance of academic standards are in the student and wider public interest. The department considers that the OfS, as the operationally independent regulator, will be best placed and qualified to take these decisions. Further, the OfS’ status as a public body will require it to exercise all of its powers in a manner which is compliant with public law.

178. The OfS will have a direct working relationship with higher education providers and we expect it to work directly with those bodies which will have a role in promoting the quality and health of the sector, such as UKRI and the designated quality body. As a result, it is the Department’s view that the OfS will be best placed to assess whether a provider’s university title should be revoked.

179. The Department considers that it is right that, under the new system, an independent non-departmental public body discharges these functions. This helps to ensure fairness and consistency across decisions and, importantly, respect for academic freedom and institutional autonomy.

180. As with the power to amend or revoke degree awarding powers, the exact circumstances affecting the use of this power may vary, depending on the situation of the provider in question. As a result, it would not be practicable or appropriate to set out, in primary legislation, all of the circumstances in which the OfS can exercise this power.

181. The Department also intends to provide detailed guidance to the OfS on the circumstances in which this power should be used. We expect that these circumstances might include, for example, the loss of degree awarding powers. This guidance is expected to contain a level of detail which it would not be appropriate to include on the face of the Bill.

Justification for procedure selected

182. The OfS’ power to revoke consent to use university title is exercisable by statutory instrument, to which the SIA 1947 shall apply. The Department’s view is that it is appropriate that revocations be made by an order which is not to subject to any parliamentary procedure. This is because the OfS, as an independent regulator, is best placed to make an assessment as to whether university title should be revoked, and the system is being designed so that the OfS acts having had regard to guidance which has been subject to consultation as and when appropriate. This ensures a transparent and independent process, which the Department considers to be an essential safeguard.

183. Ultimately, this process will be supported by a detailed statutory procedure ensuring that any affected providers are given adequate notice and have the ability to make effective representations as to their case (clause 54 (Revocation of authorisation: procedure)). Institutions will also have the right to appeal to the First Tier Tribunal (clause 55 (Appeals against revocation of authorisation)) and any decisions to revoke an institution’s university title will not
take effect at any time when an appeal could be brought against the decision – unless the provider tells the OfS it does not intend to appeal - or when such an appeal is pending. In the Department’s view, it is appropriate that the courts have ultimate oversight of the OfS’ use of these powers.

Information powers

Clause 58: Power for the Secretary of State to prescribe in regulations bodies with which OfS may cooperate and share information

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

184. Clause 58 makes provision for the OfS to cooperate with any person where it considers it appropriate to do so for the efficient performance of its functions. The clause also allows the OfS to share information with a body for the purpose of that body’s functions, where that body is the Privy Council, or where the person and its functions are prescribed in regulations.

185. This is necessary as the Privy Council will retain oversight over the governing documents of some providers, such as those incorporated by Royal Charter or those having their governance amendment arrangements set out in Private Act.

186. There are a number of areas where it may be appropriate for the OfS to advise and assist other prescribed bodies to assist with the exercise of their functions. For example, the OfS may consider it appropriate to provide advice and information to the Department of Health and Health Education England about the recruitment of medical students by higher education providers, to inform policy and planning in relation to future NHS workforce needs. Similarly, the OfS may consider it appropriate to provide the Department of Education and the National College for Teaching and Leadership with advice and information about recruitment to, and the provision of, teacher training in the higher education sector to help policy formation in this area. In rare cases, the OfS may obtain information under a power of entry, upon a reasonable suspicion of a sufficiently serious breach of conditions such as a registration condition. Should relevant information about quality assurance or the award of qualifications at a provider be obtained in these circumstances, it may be appropriate for this information to be shared with the appropriate higher education awarding body.

187. The bodies expected to be prescribed in regulations are certain central government departments as outlined above, higher education awarding bodies and the data body to be designated under clause 60 (Designated body) and Schedule 6 (English higher education information: designated body) to the Bill.

Justification for delegation

188. The power to specify by regulations the public bodies with which the OfS can share information will enable account to be taken of changes over time to the landscape of relevant higher education-related bodies. These changes are expected to happen more often than Parliament can be expected to legislate for in primary legislation. The power to specify the functions in respect of which information can be shared will also allow account to be taken of functions which are
transferred from one body to another. This flexibility is balanced by the explicit protection in this clause that the provision of information must comply with the Data Protection Act 1998 ("DPA 1998"), and the proposed level of Parliamentary scrutiny.

Justification for procedure selected

189. The effect of the legislation will be to enable the higher education regulator, the OfS, to cooperate and share information with other bodies in the exercise of the OfS’ functions and those other bodies’ functions. The effect of a body’s inclusion in regulations is such that the OfS would be able to cooperate and share information with them, subject to the data sharing being compliant with the DPA 1998 and any other relevant legal provisions. Given that it is not a duty imposed on the OfS, but a choice that may be made if appropriate, and given that any sharing of information would still need to comply with the DPA 1998, it is considered that the negative resolution procedure is sufficient.

190. The policy will be subject to debate in both Houses when first introduced. Any revisions which may be made to regulations over time to add to and subtract from the list of bodies, as and when relevant bodies in the higher education landscape may change, are not anticipated to be of such significance as to need prior debate, although Parliament will of course still be able to subject the changes to scrutiny. Further, we consider the negative procedure to be necessary in order to be able to respond promptly to changes to the landscape of bodies.

Publication of information

Clauses 59 and 60 and Schedule 6: Power for the Secretary of State to designate a data publication body

Power conferred on: Secretary of State

Power exercisable by: Designation

Parliamentary procedure: None

191. Taking into account paragraph 27 of Appendix 4 to the DPRRC 7th Report of Session 2014 – 2015 – that where a power is considered not to be legislative in character, the memorandum should explain fully why this is thought to be the case. In this regard, the Department does not consider clauses 59 and 60 and Schedule 6 to be legislative in character. The reason for this view is that, by virtue of these provisions, the Bill sets out every detail of the designation process. As a result, where the Secretary of State follows this process and comes to a view that he should designate a body, he is exercising an administrative discretion rather than exercising a power that is legislative in character.

Funding of the OfS

Clause 64: Power for the Secretary of State to prescribe fees to be paid by higher education providers in respect of initial or ongoing registration

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution
Context and purpose

192. Clause 64 gives the OfS a power to charge a higher education provider a fee for its initial registration on the register or its ongoing registration for each subsequent 12 month period. Clause 64(1) makes the exercise of this power subject to provision made by the Secretary of State and included in regulations.

193. The power to charge, paired with regulations detailing how charges are to be levied and administered, will help ensure that the OfS can be funded, partly, largely or solely by the higher education institutions that it is responsible for regulating in the performance of its core regulatory functions. That will help ensure that the OfS is adequately funded while ensuring that the taxpayer does not necessarily have to foot the entire cost of a robustly monitored sector.

194. Regulations made using this power may make varied provision, including about: the level of fee; when it is to be paid; the consequences of non-payment; giving notice about fees; financial penalties for non-payment; interest on late payment; and the waiving or refunding of fees. They may also authorise the level of fees to be calculated by reference to any costs incurred by the OfS in the performance of any of its functions.

Justification for delegation

195. It is considered that creating a power to fix the detail in regulations provides the correct balance between providing sensible flexibility regarding the level of initial and ongoing registration fees (and the procedures which apply) and the need to ensure that an appropriate level of control can be exerted over what would otherwise be a wide and relatively unconstrained power to charge a fee.

196. Fixing the level of fee or procedures in the Bill or, at the other extreme, failing to provide for some form of secondary legislative control would create different, but equally unacceptable risks in delivering the policy. Being too prescriptive on the face of the Bill will prevent the Secretary of State and ultimately the OfS from allowing the registration fee regime to respond at relatively short notice to the needs of the regulator, regulated bodies and the wider interests (students, the public, the Treasury) that the new regulatory system is designed to further.

197. By contrast, enabling potentially substantial fees to be fixed without appropriate scrutiny of those fees, and associated procedures in relation to how those charges are levied and collected, would provide an undue degree of freedom to the OfS in how it conducts its business. It is important to bear in mind here in particular that payment of a registration fee is a condition of registration. Accordingly, breach of such a condition through non-payment of a registration fee can attract potentially serious sanctions over and above the consequences set out in the regulations, including monetary penalties and, ultimately, removal from the register.

198. Consequently, the department believes that providing the ability by regulations to vary fee levels and procedures in a clear and transparent way, subject to appropriate parliamentary control, is a justified and proportionate way of ensuring that the government achieves its policy objectives.

Justification for procedure selected

199. Given the largely administrative and procedural nature of the provisions that can be made under regulations made using this power, it is considered that the negative resolution procedure guarantees the correct level of parliamentary scrutiny.
200. Regulations may be required to be varied on a regular basis to reflect relatively small increases or decreases to fee levels. Similarly, relatively minor changes to the surrounding procedure may be required. In such cases, requiring Parliament’s express approval for every change would, in the Department’s view, be excessive. On the other hand, significant changes to fees and associated procedures using this power can be made and it is right that Parliament should be given the opportunity to scrutinise and debate those if it considers that it should. On that basis it does not seem appropriate to provide that no parliamentary procedure at all should apply.

201. As a further safeguard regulations under this power can only be made with the consent of the Treasury.

Clause 65: Power for the Secretary of State to prescribe fees to be paid in respect of its activities or services

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

202. Clause 65 gives the OfS a power to charge a higher education provider a fee for costs incurred in respect of any activity it undertakes or service it provides in the performance of its functions. Clause 65(1) makes the exercise of this power subject to provision made by the Secretary of State and included in regulations.

203. The intention is that fees will be charged, in contrast with a registration fee under clause 64 (Registration fees), for costs incurred in respect of the performance of certain functions that will not necessarily be accessed by the full range of registered higher education providers. In respect of those services it is anticipated that the OfS might more directly target costs recovery so the particular institutions which directly benefit from OfS activity or services pay a fee calculated to cover the specific costs of that activity or service. That will help ensure that the OfS is adequately funded while limiting financial contributions made by registered providers in respect of OfS activities or services from which they receive no direct or indirect benefit.

204. Regulations made using this power may make varied provision, including about: the level of fee; when it is to be paid; the consequences of non-payment; giving notice about fees; financial penalties for non-payment; interest on late payment; and the waiving or refunding of fees. They may also authorise the level of fees to be calculated by reference to any costs incurred by the OfS in the performance of any of its functions.

Justification for delegation

205. It is considered that broadly similar arguments set out above which justify the creation of the power in clause 64 will apply equally here. Fixing the detail in regulations provides the correct balance between providing necessary flexibility to vary fees to reflect broad overall costs on, for example, an annual basis and the need for desirable checks and balances.

206. An unchecked power to prescribe fees for other services and to recover the costs of services incurred by other providers would omit important central oversight of how the OfS’ uses its ability to recover its costs. It is also considered appropriate that regulations allow flexible but clear and fully scrutinised provision about matters relating to the notification and collection of
charges. However, as many of these matters are procedural in nature, and may sensibly be varied in light of the experience of the OfS and higher education providers, it would be excessive to provide for these matters on the face of the Bill.

Justification for procedure selected

207. The Department considers that the arguments set out above which it considers justify adopting the negative resolution procedure in respect of clause 64 apply equally to justify adopting the same procedure here.

Supplementary functions

Clause 70(1): Power for the Secretary of State to confer supplementary functions on the OfS

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

208. Clause 70 enables the Secretary of State to confer supplementary functions on the OfS. This power will enable additional functions of the Secretary of State to be delegated to the OfS in relation to providers of higher education or those looking to provide higher education. This reflects a similar power in section 69(4) and (5) of the FHEA 1992, which allows the Secretary of State to delegate similar functions to HEFCE.

Justification for delegation

209. The Department considers that it is necessary to use a delegated power because the OfS has yet to be established, and it is not possible at this stage to determine what functions of the Secretary of State it might be suitable to delegate to the OfS.

210. The Department further considers that it is necessary to have a power to delegate functions to the OfS because future legislation may place further duties on the Secretary of State in relation to higher education, and there are advantages in having a non-departmental public body, rather than the Secretary of State, discharging these functions. The OfS will stand between the government of the day and autonomous higher education providers. This arrangement helps protect academic freedom and institutional autonomy. The OfS will also have a direct working relationship with higher education providers, so allowing it, rather than the Secretary of State, to carry out functions protects academic freedom and institutional autonomy, as well as being likely to be more effective.

211. In addition, the functions of the Secretary of State which she may want to delegate may well change more often than Parliament can be expected to legislate for by primary legislation. For example, the Secretary of State may need to delegate functions relating to the implementation of new duties or standards in the field of equal opportunities or environmental sustainability.

Justification for procedure selected
212. The Department believes that the negative resolution procedure is appropriate for transferring supplementary functions to the OfS since the OfS’ discharge of these functions is likely to be uncontroversial. The negative resolution procedure will still allow for the supplementary functions and delegation to be effectively scrutinised by Parliament, and it is noted that this reflects the procedure for the similar provision in section 69(5) of the FHEA 1992. For specific directions in relation to land or property which was used or held for the purposes of an institution, the Secretary of State may direct without any procedure (see subsections (3) and (4) of clause 70, which replicate section 69(4) of the FHEA 1992).

Directions

Clause 71: Power for the Secretary of State to give directions to the OfS

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

213. Clause 71(1) enables the Secretary of State to provide the OfS with general directions about the performance of its functions. However, this is limited because the Secretary of State is required to have regard to the need to protect academic freedoms and in particular the items set out in clause 71(2). While the Secretary of State may make directions framed by reference to particular courses of study, those directions must not relate to the other matters set out in clause 71(3)(a) to (e), and must not require the OfS to perform any of its functions in a way which prohibits or requires the provision of particular courses of study.

214. The Secretary of State may also provide specific directions to the OfS regarding the financial support of a higher education provider, where it appears to the Secretary of State that the financial affairs of the provider have been or are being mismanaged, and the Secretary of State has consulted the OfS and the provider before giving the directions.

215. These powers to provide directions mirror those in section 81 of the FHEA 1992 in relation to HEFCE and are reserve powers. The rationale for these powers is that, since it is proposed that the OfS will have responsibility for public funds, the Secretary of State must be able to deal swiftly with any financial issues arising, for example, mismanagement. This provision ensures the most effective safeguard to public finances.

Justification for delegation

216. The Department considers that this power is necessary because it will not be possible to anticipate all the situations in which the Secretary of State might need to intervene with general directions. It is also essential to have a power to issue provider-specific directions, in the event of financial mismanagement, to protect public finances where, again, it is not possible to anticipate all the situations in which this power may need to be used. The urgency of any such intervention could also mean that Parliament could not be expected to be able to legislate to respond swiftly to the situation, especially if a number of directions were required in quick succession, for example, to protect public finances from a complex fraud.

Justification for procedure selected
217. The Department believes that regulations subject to the negative resolution procedure are appropriate for providing directions to the OfS. These are likely to prove uncontroversial because clause 71(1) provides that they can only be general in nature and would be subject to the need to protect academic freedom. In relation specifically to clause 71(4), the Secretary of State will only intervene to protect public finances in instances of financial mismanagement at a provider. The negative resolution procedure will still allow for a degree of parliamentary scrutiny which will provide a safeguard in relation to the exercise of this power. This scrutiny must be balanced against the need to ensure that the OfS can act independently. It is also noted that this reflects the procedure for the similar provision in section 81 of the FHEA 1992.

Powers of Secretary of State to obtain information or advice

Clause 74(5): Power requiring the Secretary of State to publish guidance regarding the factors that will be taken into account in deciding whether to approve an individual or body for research purposes

Power conferred on: Secretary of State

Power exercisable by: Guidance

Parliamentary procedure: None

Context and purpose

218. Clause 73 (Power to require application-to-acceptance information) gives the Secretary of State a power to require application-to-acceptance data from a body that provides services to English higher education providers relating to applications for admission on to higher education courses for use in qualifying research. The purpose of clause 74 is to enable the Secretary of State to provide the information obtained under clause 73 to an approved person for a qualifying research purpose.

219. The purpose of the power in clause 74(5) is to require the Secretary of State to publish guidance regarding the factors that will be taken into account in deciding whether to approve an individual or body in the context of clauses 73 and 74.

Justification for delegation

220. The information that will be obtained under clause 73 by the Secretary of State will primarily include personal data. It is therefore important that robust safeguards are in place to ensure this information is protected and used appropriately. As such, the Secretary of State may only obtain information for a qualifying purpose which is defined under clause 73(4). The Secretary of State or an approved researcher, be they an individual or body, may only publish the product of research if it is for a statistical purpose and no individual may be identified from the publication. Further, it cannot be published if it includes information that may be regarded as commercially sensitive.

221. The Secretary of State may approve a body that is a trusted third party intermediary which possesses the ability to anonymise the data and store it securely. Such bodies have rigorous vetting procedures for researchers. As such, clause 74(4) enables an approved body to provide information obtained under clause 73 to an approved researcher but specifically prohibits an approved researcher from providing information to another researcher or body.
222. It is considered that these provisions, together with existing law such as the DPA 1998, will ensure that there are adequate safeguards in place to protect the information and ensure it is used appropriately. However, it is considered that guidance is also necessary to provide further detail on the factors that will be taken into account in deciding whether the Secretary of State will approve an individual or body. It is envisaged that this guidance will provide further detail on the nature of qualifying research given the Secretary of State may only provide information to an approved person for use for this purpose.

223. It is anticipated that the guidance will be detailed in a way which would be inappropriate for primary legislation, in that it will largely be of an administrative and operational nature. For example, it might provide detail on what is expected of researchers regarding their ability to handle and store data, matters which are likely to be technical in nature and change with time due to technological advances. Accordingly, we expect that this guidance may need updating more frequently than Parliament can be expected to legislate for. It is not expected that the guidance would be considered controversial and, in the circumstances, it is considered appropriate to use guidance for this purpose.

**Justification for procedure selected**

224. The information to be provided in the guidance will have the aim of assisting potential researchers, be they individuals or bodies, in understanding the factors that will be taken into account by the Secretary of State when he decides whether to approve an individual or body for a qualifying research purpose. The guidance will contain details on the process and procedure relevant to potential researchers which will largely be of an administrative and operational nature, for example, details relating to data storage and capacity to de-identify data. Accordingly, it is considered that no parliamentary procedure is required in relation to this guidance.

**Interpretation**

*Clause 78: Power for the Secretary of State to designate other providers of higher education and make provision about the designation process and requirements*

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by Statutory Instrument

*Parliamentary procedure:* Negative resolution

**Context and purpose**

225. Subsection (1) of clause 78 enables the Secretary of State to designate providers of higher education that do not meet all of the conditions described at clause 77 (Meaning of “English higher education provider” etc), but that provide higher education and whose activities are carried on, or principally carried on, in England.

226. Clause 77 sets out that an “English higher education provider” must be an “institution”. As the reforms in the Bill start to take effect, we expect many different types of higher education provider to be registered by the OfS. The Department does not want to exclude those providers that are small in size, and may not meet any commonly understood definition of “institution”, from the OfS register. Clause 78 enables the Secretary of State to designate such providers, by means of inviting applications, and setting out the matters that should be considered when assessing any such application.
Justification for delegation

227. The use of delegated powers in this area enables the Secretary of State to set out how and when applications will be invited, and the criteria against which applications will be assessed. Those will be determined by reference to evidence that shows that certain providers are being prevented from applying to be on the OfS register. It cannot therefore be determined in advance, and is likely to change over time.

Justification for procedure selected

228. The Department considers that the negative procedure is sufficient because this is an administrative function, and one that is primarily involved in setting and amending appropriate criteria.

Clause 79(2): Power for the Secretary of State to prescribe such other fees that are to be excluded from the definition of “fees”

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

229. As outlined in relation to clause 10 (Mandatory fee limit condition for certain providers) above, subsection (11) of clause 10 provides that, for the purposes of the fee limit condition, “fees” are defined in clause 79. The definition of fees in clause 79 provides that, in relation to undertaking a course, it means fees in respect of or otherwise in connection with undertaking the course, including admission, registration, tuition and graduation fees, and fees payable for awarding or accrediting a qualification in respect of the course. It excludes fees payable for board or lodging, field trips, and fees payable for attending any graduation or other ceremony.

230. In addition, at subsection (2)(d), the Secretary of State may also prescribe by regulations such other fees which should also be excluded from the definition of “fees”.

Justification for delegation

231. The power of the Secretary of State to prescribe by regulations fees which are to be excluded from the definition of fees, is considered necessary to provide flexibility for such delegation more frequently than Parliament can be expected to legislate by primary legislation.

232. The definition of “fees” in section 41(1) of the HEA 2004 includes this same regulation making power. Given that fee limits under clause 10 could potentially apply in relation to a wider range of providers (including alternative providers), it is necessary to retain this regulation making power in the event that, in particular, this necessitates the exclusion of specific fees from the definition.

Justification for procedure selected

233. Regulations regarding the definition of fees and the costs which can and cannot be included in this definition are likely to be highly technical, and the Department considers that the negative
procedure will provide a sufficient level of scrutiny. There is precedent for the use of the negative procedure for the directly comparable provision in section 41(1)(e) of HEA 2004 in the definition of “fees” at (e), where the negative procedure is provided for at section 47(2) of that Act.

Part 2: Other Education Measures

Financial support for students

Clause 80: Power for the Secretary of State to make alternative payments to higher and further education students (amending section 22 of the Teaching and Higher Education Act 1998)

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative or affirmative resolution

Context and purpose

234. Clause 80 amends section 22 of the THEA 1998. Section 22 of the THEA 1998 currently enables the Secretary of State to offer student loans and grants. As amended, section 22 would also enable the Secretary of State to make regulations which provide for the Secretary of State to be authorised or required to offer financial support to students via an “alternative payment” that is a financial product other than a grant or loan. This clause therefore widens the options for the provision of further and higher education student support. This is intended to help prospective students to access financial support for their education, particularly those who might be deterred for religious reasons from accessing student loans because they bear interest.

235. Section 22 of the THEA 1998 currently sets out in detail what regulations may provide for: for instance, regulations can make provision to determine whether a person is eligible for support, to determine how much support they are entitled to, to prescribe terms of repayment, to set out the effect of bankruptcy on student support, to place obligations on employers to make deductions from pay, and to require students to provide certain prescribed information on request. All of these provisions will also apply to alternative payments under section 22 of the THEA 1998 as the amended by clause 80.

236. This clause will enable the Secretary of State to make more detailed and technical legislative provisions relating to alternative payments in secondary legislation.

Justification for delegation

237. As stated, student loans and grants are currently operated through secondary legislation made under section 22 of the THEA 1998. The Department therefore considers that delegated legislation is the appropriate means of setting out the framework for alternative student finance as an extension to the current student support system. In practice, student support through loan or alternative payment will be available side by side for students; the products will be financially equivalent and administered, to a large extent, in parallel.

238. Existing student support regulations and the proposed alternative payments regulations are detailed and lengthy and not practical for inclusion on the face of the Bill. The Education (Student Support) Regulations 2011 and the Education (Student Loans) (Repayment) Regulations 2009 together run to several hundred pages.

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239. These regulations need to be updated annually, sometimes several times a year, for instance to update key figures in line with inflation, to account for changes required for new cohorts of students each academic year, and to take into account changes to HMRC practices in tax collection and self-assessment (this is relevant to the repayment of student loans). It will be necessary to make any changes in parallel to student loans and to the new alternative student finance product. If the Department was unable to make these changes through delegated legislation, it would restrict its ability to control its expenditure, implement key changes in policy and ensure that it was meeting its legal obligations, for example, in line with developments in case law.

240. The subsections under section 22 of the THEA 1998, amended in part by the present clause, set clear parameters and give clear indications of what the regulations are likely to provide for. In the light of these considerations, and given the need for consistency with traditional student loans, the Department considers that much of the detail of the proposed regulations is more suited to secondary legislation than to primary. The Department considers that it has struck the right balance.

Justification for procedure selected

241. Parliament determined which parliamentary procedure was appropriate for student support arrangements in 1998, and this is reflected in the THEA 1998. The THEA 1998 already contains flexibility in terms of the procedure, as section 42 provides that the first set of regulations under section 22 must be affirmative while subsequent regulations may be negative, and there is a further option under section 42(5) to use the affirmative procedure for any subsequent set of regulations under section 22.

242. The Department does not consider there are good reasons for applying a different parliamentary procedure to alternative payment regulations from the procedure that applies to traditional student loans. The Department considers that it is appropriate for the primary legislation to allow for both the negative and the affirmative resolution procedure to be used for student support.

Clause 80 and clause 82: Power for the Secretary of State to cancel suspended student support payments

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

243. As described above, section 22(1) of the THEA 1998 enables the Secretary of State to offer student loans and grants in connection with higher and further education courses which are designated by or under regulations. From time to time, it may be necessary for the Secretary of State to suspend these payments. This might be the case, for example, where there are concerns over fraud or other financial irregularities.

244. Clauses 80 and 82 amend section 22 of the THEA 1998 to give the Secretary of State (in relation to England), and the Welsh Ministers (in relation to Wales), powers to make regulations...
which prescribe the circumstances in which entitlement to suspended student support in relation to higher education courses can be cancelled, or for the person making the regulations to determine these circumstances under the regulations. This would be the case, for example, if investigations had found that student support payments were not properly due. Clause 80 gives the Secretary of State power to make provision to cancel entitlement to suspended alternative payments, and clause 82 does the same in relation to suspended loan and grant payments.

**Justification for delegation**

245. The Department considers that delegated legislation is the appropriate means of setting out the framework for student support. As explained above in relation to alternative payments, secondary legislation already makes detailed provision for a range of matters, such as students’ eligibility, the amounts of student support that can be paid, how entitlement depends on a student’s circumstances, the terms and conditions under which grants can be made available, the suspension of payments and so on. It is important that any provision for cancellation is consistent with the regulations and terms and conditions under which the payments are made. This means that it is also important that the Department has the flexibility to amend the circumstances in which entitlement can be cancelled, in line with any relevant amendments to student support legislation.

246. Some examples of rare circumstances where it may be appropriate to cancel entitlement to suspended student support payments are where investigations have established that no tuition has been provided; attendance notifications have been inaccurate; or other cases of fraud or misrepresentation. These may change over time should the regulations or terms and conditions change.

**Justification for procedure selected**

247. The points made in relation to alternative payments, above, regarding the parliamentary procedure applicable to student support arrangements apply equally to these provisions. The Department believes that the negative resolution procedure provides an appropriate level of scrutiny in this instance. It will allow for transparency regarding the circumstances in which entitlement to student support may be cancelled, while also ensuring necessary flexibility in avoiding the need for affirmative approval every time it may be appropriate to make a change in relation to these circumstances in the regulations. These provisions are designed to protect the public purse from abuse and as such it is important that the regulations can be amended flexibly.

**Clause 82: Power for the Secretary of State to determine the maximum amount of loan (amending section 22 of the Teaching and Higher Education Act 1998)**

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

**Context and purpose**

248. Clause 82 amends section 22 of the THEA 1998 by adding subsection (2A). Section 22 of the THEA 1998 currently enables the Secretary of State to offer student loans and grants. In particular, subsection (2)(b) provides for regulations which may make provision prescribing in relation to a grant or loan and an academic year, the maximum amount available to any person
for any prescribed purpose for that year. In addition, section 42(6) of the THEA 1998 permits the regulations to make different provision for different cases or circumstances. The regulation making function under section 22(2)(b) of the THEA 1998 is also exercisable by the Welsh Ministers in relation to Wales, having been transferred to the Welsh Assembly (now the Welsh Ministers) pursuant to section 44 of the HEA 2004.

249. As amended by clause 82, section 22(2A) of the THEA 1998 would enable the Secretary of State, when making regulations prescribing the maximum loan or loan amounts under subsection (2)(b) in relation to England, and the Welsh Ministers when making such regulations in relation to Wales, to make provision by reference to matters determined or published by the Secretary of State or other persons. The purpose of this provision is to enable regulations under section 22(2)(b) to refer to matters such as the list published by the OfS under clause 11 (Duty to publish a list regarding the fee limit condition) and the sub-level amounts determined by the Secretary of State under Schedule 2 (The fee limit).

250. This is not a new delegated power; it is an amendment in the terms described above, to an existing delegated power, also described above.

Justification for delegation

251. As stated above, student loans and grants are currently operated through secondary legislation made under section 22 of the THEA 1998. The amendment described above is an amendment to the existing power in section 22(2)(b) to make delegated legislation prescribing the maximum loan or loan amounts. It is not considered practical, given that these amounts can change from year to year, for them to be included in primary legislation. If the Department was unable to make these changes through delegated legislation, it would restrict its ability to set the levels of loans available to students in accordance with the tuition fee limits under clause 10 (Mandatory fee limit condition for certain providers).

Justification for procedure selected

252. Parliament determined which parliamentary procedure was appropriate for student support arrangements in 1998, and this is reflected in the THEA 1998. The THEA 1998 already contains flexibility in terms of the procedure, as section 42 provides that the first set of regulations under section 22 must be affirmative while subsequent regulations may be negative and there is a further option under section 42(5) to use the affirmative procedure for any subsequent set of regulations under section 22. The Department does not consider there are good reasons for applying a different parliamentary procedure in respect of this amendment to section 22 of the THEA 1998. Our reasoning in this regard is the same as that for clause 80 above.

Clause 82: Power of the Secretary of State to make regulations designating higher education courses (amending section 22 of the Teaching and Higher Education Act 1998)

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose
253. In addition to inserting a new subsection (2A) in to section 22 of the THEA 1998, clause 82 also adds a further subsection, subsection (2)(aa). As amended, new section 22(2)(aa) of the THEA 1998 would enable the Secretary of State, when making regulations under subsection (1) in respect of higher education courses, to make provision designating courses by reference to matters determined or published by the OfS or other persons. The purpose of this provision is to enable regulations made under section 22(1) to refer to matters such as the different parts of the OfS register, and information published by the OfS, for example, information relating to providers’ suspension or deregistration from the register under clauses 16 (Suspension of registration) or 18 (Deregistration by the OfS).

Justification for delegation

254. Designation for student support in connection with higher education courses can currently be effected by or under secondary legislation made under section 22 of the THEA 1998. The provision described above is an amendment to the existing delegated power in section 22(1) to enable regulations providing for designation of higher education courses to make reference to matters published or determined by the OfS or other persons. This will enable the Secretary of State to adopt a policy whereby, if providers are registered in certain categories of the OfS register, they will benefit from designation for student support purposes without needing to undergo a separate assessment. This will, in the Department’s view, improve administrative efficiency and minimise burdens on providers. If the Department was unable to implement this policy through delegated legislation, it would restrict its ability to link designation to decisions of the OfS, including decisions relating to suspension or deregistration. These are matters which could be relevant to the designation of courses for student support purposes, so it is appropriate that regulations relating to designation can refer to them. This will also help to avoid duplication of decision making and processes.

Justification for procedure selected

255. Parliament determined which parliamentary procedure was appropriate for designation arrangements in 1998, and this is reflected in the THEA 1998. The Department does not consider that there are good reasons for applying a different parliamentary procedure in relation to this existing delegated power, as modified by clause 82. The Department considers that the negative resolution procedure will provide an appropriate level of scrutiny. It reflects the need for transparency regarding regulations providing for designation, whilst also ensuring the necessary flexibility to enable the Secretary of State to modify the policy as regards designation in the future, for example, by changing the categories of provider which benefit from “automatic” designation, by laying amending regulations.

Deregulation of higher education corporations

Clause 84 and Schedule 8, paragraphs 2 to 4: Power for the Secretary of State to provide for higher education institutions maintained by local authorities and further education corporations to become higher education corporations (amending sections 122 and 122A of the Education Reform Act 1988)

Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose
256. The Bill deregulates the statutory requirements governing higher education corporations ("HECs") in England with a view to placing them on a more equitable footing with other higher education providers. The arrangements in relation to the incorporation of HECs are set out in the ERA 1988 as amended by the FHEA 1992. Section 122 of the ERA 1988 empowers the Secretary of State by order to provide for the incorporation of higher education institutions maintained by local authorities to become HECs. Section 122A of the ERA 1988 empowers the Secretary of State by order to provide for the transfer of further education corporations ("FECs") to the higher education sector.

257. The Department wishes to close down the route available for higher education institutions maintained by local authorities in England to reincorporate as HECs, and to modify the legislative criterion in relation to the transfer of FECs in England to the higher education sector.

258. Accordingly, clause 84 and paragraph 3 of Schedule 8 amend the ERA 1988 to include a new section 122ZA. This section gives the Secretary of State the power to make orders for FECs in England to become HECs. The powers of the Secretary of State to make orders under sections 122 and 122A of the ERA 1988 are also amended so that they will continue to apply in relation to institutions maintained by local authorities in Wales and FECs in Wales, but not to such institutions in England.

Justification for delegation

259. Higher education corporations are statutory corporations that are brought into existence by order. It is therefore necessary to have this legal mechanism to enable such orders to be made. New section 122ZA of the ERA 1988 is based on the Secretary of State’s existing power under that Act to make orders providing for FECs to reincorporate as HECs, but amends certain statutory requirements regarding the resulting HEC’s governance and constitution (for example, requirements relating to the appointment, size and composition of its membership). This power will enable FECs in England to continue to reincorporate as HECs subject to the amended requirements. FECs are not able to reincorporate into certain other corporate forms (for example, as companies limited by guarantee) without dissolving first, so reincorporation as a HEC is their principal means of entering the higher education sector.

260. The Department considers that the use of delegated legislation is appropriate here because it allows the Secretary of State to respond to applications for reincorporation on a case by case basis, as and when they arise. It is not possible to pre-empt this process by including further detail on the face of the Bill, since it is not possible to anticipate applications by individual FECs wishing to become HECs. This represents a continuation of the current position.

Justification for procedure selected

261. The use of the negative resolution procedure is set by the ERA 1988 in relation to orders made under sections 122 and 122A. There is no reason, in the Department’s view, why a different procedure should apply in relation to orders made under sections 122 and 122A as amended by the Bill, or under new section 122ZA. Any such orders would be factual and administrative in nature, incorporating and identifying the new HEC. We consider that the negative resolution procedure is appropriate because it rightly allows for overall parliamentary oversight of FECs becoming HECs, without giving rise to the need for affirmative approval of what is essentially an administrative function.
Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

262. Under section 128 of the ERA 1988 the Secretary of State has the power to make an order providing for the dissolution of a HEC and the transfer of its property, rights and liabilities to specified persons or bodies. In connection with the deregulation of the legislative requirements governing HECs in England, the Bill inserts a new provision into the ERA 1988 (new section 127A) enabling the Secretary of State to make such an order in relation to an English HEC if requested by the HEC itself. Section 128 of the ERA 1988 is also amended so that it will continue to apply in relation to HECs in Wales.

Justification for delegation

263. Higher education corporations are statutory corporations, and it is therefore necessary to have a delegated power to provide a legal mechanism for their dissolution. The new power in relation to the dissolution of HECs in England is based on the existing power under section 128 of the ERA 1988, with modifications to make it clear that the dissolution must be requested by the HEC itself. This power is intended to ensure that the property, rights and liabilities of dissolved HECs in England are transferred to persons or bodies engaged in the provision of educational facilities or services, or to the OfS. If the transferee is not established for charitable purposes which are exclusively educational, the clause further provides that any property transferred must be transferred on trust to be used for such purposes.

264. This power will enable the Secretary of State to make appropriate and more detailed arrangements for dissolution, and the transfer of specific property, rights and liabilities to the OfS or specified persons or bodies on a case by case basis, as and when the need arises. This flexibility will allow the Secretary of State to make provision which is suitably tailored to the circumstances of the HEC in question. It is not possible to ascertain in advance, or detail on the face of the Bill, what dissolution and transfer arrangements will be required. The exercise of this power is limited in so far as it will be instigated by a request from a HEC, not by the Secretary of State, and the Secretary of State must consult the OfS before making an order. The order cannot provide for the transfer of property, rights or liabilities to any person or body without that person or body’s consent. Paragraph 16 of Schedule 8 sets clear parameters as to the contents of any order made pursuant to this power.

Justification for procedure selected

265. The use of the negative resolution procedure was established by the ERA 1988 in relation to orders made under section 128 of the ERA 1988. The Department does not consider that there is any reason to deviate from the existing procedure in connection with the amendments to the ERA 1988 described above. Orders made in relation to the dissolution of a HEC, and the transfer of its property, rights and liabilities, are likely to be administrative in nature, for example, identifying the person or body to whom the dissolved HEC’s assets and liabilities are to be transferred. It is right that Parliament should have an opportunity to scrutinise any provision made but, in the Department’s view, the detail of the relevant dissolution and transfer arrangements is not so inherently and widely significant as to warrant the affirmative resolution procedure.
Part 3: Research

Establishment of UKRI

Clauses 86(2) and 89(5): Power for 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

266. Clause 86 establishes UKRI’s nine committees, collectively referred to as the “Councils”. Clause 87 (UK research and innovation functions) sets out UKRI’s overarching functions:

(a) Seven science and humanities committees which, by virtue of clause 89, exercise the functions conferred on UKRI in clause 87.

(b) Innovate UK which, by virtue of clause 90, exercises the functions conferred on UKRI in clause 87.

(c) Research England which, by virtue of clause 91, exercises the functions conferred on UKRI in clause 87.

267. Clause 89 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.

268. Clauses 86(2) and 89(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.

269. This power is a “Henry VIII” power providing that regulations may amend primary legislation (defined in clause 115 (General interpretation)).

Justification for delegation

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.

271. 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.

272. 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.

273. 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.

Justification for procedure selected

274. 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.

Funding and directions

*Clause 96: Power for the Secretary of State to give directions to UKRI relating to funds provided to it*

*Power conferred on: Secretary of State*

*Power exercisable by: Directions*

*Parliamentary procedure: None*

Context and purpose

275. In clause 95 (Grants to UKRI from the Secretary of State) the Secretary of State may make grants to UKRI which that body then allocates to other persons and entities. Clause 96 states that the Secretary of State may give directions to UKRI regarding the allocation of this money.

Justification for delegation

276. This direction power is similar to that in section 3(7) of the STA 1965. The rationale for this power is that the amount of money which is given to UKRI (upwards of £6 billion per annum) means that the Secretary of State must be able to deal swiftly with any financial issues arising, for example, mismanagement. This ensures the most effective safeguard to public finances. The power of direction is limited to financial matters, and there are specific safeguards in respect of the functions of Research England that mean that this power cannot be framed by reference to particular courses, programmes of research, appointment of staff or admissions.

Justification for procedure selected

277. This approach was established in the STA 1965 and has the merit of providing timely protection to large sums of public money if and when required. UKRI will have a £6 billion budget. In the event of financial mismanagement and to protect public finances this power may need to be used quickly and in circumstances that cannot be fully anticipated. The urgency of any such intervention may also mean that Parliament could not be expected to be able to legislate to
respond swiftly to the situation. Therefore the Department considers the continued use of this procedure to be appropriate and justified.

**General functions**

*Clause 98(2): Power for the Secretary of State to give guidance to UKRI in relation to its general duties*

*Power conferred on:* Secretary of State  
*Power exercisable by:* Guidance  
*Parliamentary procedure:* None

**Context and purpose**

278. Clause 98(2) requires UKRI to have regard to guidance given to it by the Secretary of State when exercising its functions, including in relation to UKRI’s duty under clause 96(1) to have regard to the need to use its resources in the most efficient, effective and economic way.

279. This power enables the Secretary of State to provide guidance to UKRI to ensure good governance, to protect the public purse and to determine the general allocation of funding between different fields of activity.

**Justification for delegation**

280. Guidance which the Secretary of State may give to UKRI under this power may be regarded as operational; it deals with the need which may arise for the Secretary of State, for example, to suggest how efficiency savings may be made once identified or regarding an area of research, which falls under UKRI’s functions, to be explored. The Secretary of State currently issues such guidance through budget allocation and annual grant letters.

281. This power will help ensure the most effective use of the public funding which is given to UKRI (as set out above, upwards of £6 billion per annum).

**Justification for procedure selected**

282. The Department considers that this power is necessary to ensure good governance and value-for-money. Such guidance is likely to be non-controversial since it reflects stakeholders’ expectations and replicates the arrangements which currently apply in relation to the Research Councils, Innovate UK and HEFCE, whereby Ministers write annually setting out funding allocations, conditions and priorities – the “grant letter”. The grant letter is not subject to parliamentary procedure.

283. Such guidance will not interfere with key principles enshrined in the legislation. For example, the Secretary of State will not in practice provide advice about particular courses of study or individual research programmes or the balanced funding principle.

284. The Department considers its use to be appropriate and justified.

**Part 4: General**
Clause 109 and Schedule 10: Power for the Secretary of State to make schemes for the transfer of staff and property

Power conferred on: Secretary of State

Power exercisable by: No method specified

Parliamentary procedure: None

Context and purpose

285. Schedule 10 gives the Secretary of State the power to make transfer schemes providing for the transfer of staff and property from the HEFCE, the office of the DFA or any Research Council listed in clause 103(1) (Predecessor bodies and preservation of symbolic property), in connection with those bodies ceasing to exist pursuant to the Bill, and also the Secretary of State. Permitted transferees include the OfS and UKRI, both bodies established by the Bill with functions corresponding to certain HEFCE, DFA and Research Council functions, as well as such other person as may be specified by the Secretary of State in the scheme. Within these schemes, the Secretary of State can also make provision to transfer liabilities.

286. By way of example, HEFCE holds various assets and liabilities including physical office and IT equipment; rights in relation to a tenancy for office accommodation; and intellectual property rights. These include assets held by HEFCE on behalf of itself and others, such as the UK element of the cross-European Dante IT network which is held by HEFCE on behalf of all the devolved territories in the UK. Each of the organisations to be abolished also has liabilities under contracts of employment, as well as pension liabilities.

287. The power to make transfer schemes will enable the Secretary of State to make detailed provision setting out transfer arrangements and destinations for each individual asset, liability and staff member that will need to transfer to a new organisation as a result of the Bill.

Justification for delegation

288. The Department considers that a power to make transfer schemes is the most appropriate way to handle the extensive detail that will be involved in ensuring appropriate handling of staff transfers, as well as assets and liabilities. It is not possible to ascertain, at this stage, precisely which staff and what property and liabilities need to be transferred where. The Department will conduct a full analysis, mapping existing roles to the functions of the new organisations and assessing property and liabilities issues. This analysis will start after the introduction of the Bill and is unlikely to be concluded before it completes its passage through Parliament.

289. The transfer scheme powers will enable the Secretary of State to make appropriate arrangements for staff, property and liabilities to transfer when he has the evidence necessary to ensure the arrangements are effective and comprehensive.

290. There are a number of precedents in other primary legislation conferring powers to make transfer schemes, and some recent ones have been taken into account when drafting the powers in the Bill. By way of example, section 23 of the Public Bodies Act 2011 gives power to Ministers and Welsh Ministers to make schemes for the transfer of property, rights and liabilities in connection with orders abolishing, merging or modifying certain public bodies.

Justification for procedure selected

291. In line with recent precedents which have been examined, the Department considers that staff and property transfer schemes do not require the application of any parliamentary procedure.
Indeed, the sensitive nature of certain provisions, for example, regarding individual employees may mean the ability to make schemes privately is likely to be preferable.

292. The Cabinet Office has issued a Statement of Practice on Staff Transfers in the Public Sector, which sets out a framework to be followed by public sector organisations to implement the government’s policy on transfers of staff where the public sector is the employer. The Statement of Practice expects staff transfers in the public sector to be implemented in accordance with the principles of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), even in circumstances where TUPE does not apply in strict legal terms (for example, if the public administration exception in Regulation 3(5) applies). Departments implementing staff transfers are expected to “ensure that legislation effecting transfers of functions between public sector bodies makes provision for staff to transfer and on a basis that follows the principles of “TUPE”.”

293. Taking into account the requirements of the Statement of Practice, the Department considers that there are sufficient protections for staff rights in the Bill. By virtue of Schedule 10, paragraph 2(4) of the Bill a staff transfer scheme may make provision which is the same as or similar to the TUPE provisions.

**Clause 110: Power for 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**

294. Clause 110(1) confers a power on the Secretary of State to make consequential amendments. Clause 110(2) provides that this power includes the power to amend, repeal, revoke or otherwise modify any primary or secondary legislation, or (subject to limitations in clause 110(3)), a Royal Charter, passed, made or granted before the Bill or in the same Session as the Bill.

295. The power, as it relates to Royal Charters, is limited to provisions which appear to the Secretary of State to be appropriate in consequence of any provision made by or under clauses 40 (Authorisation to grant degrees etc) to 55 (Appeals against revocation or authorisation) in relation to degree awarding powers and university title.

296. The power is a “Henry VIII” power to the extent that the regulations are concerned with amendment to primary legislation (defined in clause 115 (General interpretation)).

**Justification for delegation**

297. The power in clause 110 to make amendments is included in the Bill in order to ensure that any consequential amendment which has not yet been identified as being required or which is difficult to include within the Bill may be made as necessary. This power is confined to amendments that are consequential on provisions made by or under the Bill. For example, there will be numerous consequential amendments needed to a range of enactments in connection with HEFCE and other bodies ceasing to exist pursuant to the Bill, including amendments to both primary and secondary legislation. This power will enable the Secretary of State to ensure that all enactments affected by provisions of the Bill can be appropriately updated, ensuring a smooth transition between legislative provisions.
298. There are numerous examples of a power to amend primary legislation for this type of purpose. A recent example is section 159 of the Small Business, Enterprise and Employment Act 2015.

Justification for procedure selected

299. The parliamentary procedure to be followed depends on the content of the regulations. If the regulations amend, repeal or revoke any provision of primary legislation or a Royal Charter, they may not be made unless a draft has been laid before and approved by each House of Parliament, as is fitting for a power which amends primary legislation. This is the default procedure for amendments of primary legislation and there is no reason to diverge from it as the general rule on this Bill.

300. If the regulations do not amend, repeal or revoke primary legislation or a Royal Charter, the negative resolution procedure applies. This is considered appropriate for amendments or other modifications of secondary legislation given that the changes to secondary legislation would be consequential on provisions of the Bill and this does not constitute a “Henry VIII” power.

301. We acknowledge that clause 110 includes power to “amend, repeal, revoke or otherwise modify” primary legislation and Royal Charters. Pursuant to clause 113(2)(f), the requirement for affirmative resolution procedure would not apply to regulations which make non-textual modifications to primary legislation or Royal Charters. These regulations would be subject to the negative resolution procedure. The government’s starting point is that regulations which make textual changes to primary legislation should be subject to the affirmative procedure, and this covers both textual amendments and repeals. 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. Where non-textual modifications are appropriate, the government continues to believe that the negative procedure is appropriate. In coming to this view, we have considered carefully the views of the Committee as expressed in a number of its reports and this reflects the government’s position in response to the Committee’s reports on previous Bills (including the Counter Terrorism and Security Bill and the Small Business, Enterprise and Employment Bill and, most recently, the Bus Services Bill).

Clause 111: Power for the Secretary of State to make transitional, transitory and saving provision

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative procedure

Context and purpose

302. Clause 111 provides that the Secretary of State may by regulations make necessary transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill.

Justification for delegation

303. Clause 111 ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a
power, for example, section 100 of the Enterprise and Regulatory Reform Act 2013 and section 160 of the Small Business, Enterprise and Employment Act 2015.

Justification for procedure selected

304. This power is only intended to ensure a smooth transition between existing law and the Bill, and the substance of the provisions will be considered during the passage of the Bill through Parliament. If a parliamentary procedure is required, the Department considers that the negative resolution procedure would be sufficient.

Clause 118: Power for the Secretary of State to bring the Bill into force

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: None

Context and purpose

305. Clause 118 gives the Secretary of State power to bring the Bill into force. Clause 118(1) provides that Part 4 (General) of the Bill, apart from clauses 106 (Cooperation and information sharing between the OfS and UKRI), 107 (Joint working), 108 (Advice to Northern Ireland departments) and 112 (Pre-commencement consultation), will come into force on Royal Assent. Clause 118(2) further provides that the clauses relating to student financial support will come into force on such day as the Secretary of State or Welsh Ministers, as applicable, may specify in regulations, and sets out whether a requirement to consult the Welsh Ministers applies. Clause 118(3) provides that clause 104 (Amendments to powers to support research) will come into force two months after Royal Assent. The remaining provisions of the Bill will come into force on such day as the Secretary of State may appoint by regulations.

Justification for delegation

306. This commencement power will enable the Secretary of State or Welsh Ministers, as applicable, to commence the principal provisions of the Bill at an appropriate time. This will allow the Secretary of State or Welsh Ministers to take account of, for example, the period of time between Royal Assent and the next common commencement date, and whether this would provide sufficient time for higher education providers and other stakeholders to prepare for the Bill’s commencement, and to allow for appropriate transition arrangements.

307. There are numerous examples of powers to make commencement regulations for the substantive provisions of the Bill, without a parliamentary procedure applying. A recent example would be section 44 of the Enterprise Act 2016.

Justification for procedure selected

308. The Department considers that the power to make commencement regulations does not need to be subject to any parliamentary procedure as the power only sets the date on which the new provisions will come into force. The substance of those provisions will be considered during the passage of the Bill through Parliament.

Schedule 1, paragraph 12(2): Power for the Secretary of State to give directions with the approval of the Treasury in relation to the OfS’ statement of accounts

Power conferred on: Secretary of State
Power exercised by: Directions given with the approval of the Treasury

Parliamentary procedure: None

Context and purpose

309. Under paragraph 12(1) of Schedule 1, the OfS must keep proper accounts and prepare a statement in relation to each financial year. Such a statement must comply with any directions given by the Secretary of State with the approval of the Treasury. The directions can relate to the content and form of the statement, the methods and principles to be applied in preparing it and additional information which should be provided for the information of Parliament. Each statement must be sent to the Secretary of State and the Comptroller and Auditor General before the end of August. They must examine the accounts, certify them and report on each statement. That report must be laid before Parliament by the Secretary of State.

Justification for delegation

310. It is considered sensible and appropriate that the Secretary of State has a power to direct the OfS to produce its accounts in a consistent manner and form to ensure proper scrutiny of its use of public funds. That power is sensibly constrained by a requirement that the Treasury must consent to use of the directions.

Justification for procedure selected

311. Given that this is a directions-making power as to the form and content of the OfS accounting obligations it is not considered necessary or appropriate that the exercise of this power of the Secretary of State be subject to a parliamentary procedure.

Schedule 9, paragraph 13(2): Power for the Secretary of State to give directions with the approval of the Treasury in relation to UKRI’s statement of accounts

Power conferred on: Secretary of State

Power exercisable by: Directions

Parliamentary procedure: None

Context and purpose

312. UKRI is required under paragraph 13(1) of Schedule 9 to prepare a statement of accounts in respect of each financial year. The Secretary of State may direct UKRI (with the approval of the Treasury) as to the content and form of that statement, and the methods and principles to be adopted in preparing it. He can also direct UKRI to give additional information to be provided to Parliament.

Justification for delegation

313. This provision ensures that the statement of accounts is presented in a consistent format, can be easily compared to previous statements or to other research funding related documents, and meets the changing requirements for the accounting of public money. It also ensures that Parliament is provided with the information it requires in relation to UKRI.

Justification for procedure selected
314. There is no need for a parliamentary procedure in respect of this direction power as it relates to the form and content of UKRI’s accounting obligations, and the statement of accounts will be laid before Parliament.

Department for Education

November 2016