DELEGATED POWERS AND REGULATORY REFORM COMMITTEE
HIGHER EDUCATION AND RESEARCH BILL

Supplementary Memorandum by the Department for Education

Introduction

1. This Supplementary Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Education in relation to the Higher Education and Research Bill (the “Bill”).

2. It follows the Delegated Powers Memorandum submitted to the Committee on 23 November 2016. Government amendments to the Bill were tabled on 3 January 2017 for consideration at Lords Committee stage, and this Supplementary Memorandum identifies those amendments which make changes to existing delegated powers in the Bill. There are no new delegated powers at this stage.

3. The text of the relevant amendments can be found in the annex to this Supplementary Memorandum.

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 also some mandatory conditions which are set out in the Bill. The OfS will be empowered to provide funding to providers, and authorise them to award degrees and use university in their title.

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; 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.

Part 1: The Office for Students

Mandatory fee limit condition

Amendments to Schedule 2, paragraphs 2(8)(b) and 3(7)(b) in relation to power for the Secretary of State to determine “the sub-level amount”
Power conferred on: Secretary of State

Power exercised by: Secretary of State administratively

Parliamentary procedure: None

Context and purpose

9. Paragraph 2(2)(b) of Schedule 2 provides that, where a provider has an access and participation plan, and does not have a high level quality rating, the fee limit 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 3(2)(b) provides that, 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.

10. In each case, the applicable sub-level amount will be set administratively by the Secretary of State, and she will be able to determine different amounts for different descriptions of provider (paragraphs 2(6) and 3(5)). These descriptions may only be by reference to whether or not a provider has 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 (paragraphs 2(7) and 3(6)). In practice, a provider’s quality rating will be a rating determined in accordance with the Teaching Excellence Framework (the “TEF scheme”).

11. Under the current draft of the Bill, where a provider has an access and participation plan, these sub-level amounts must not exceed the higher amount and must be greater than the floor amount to the higher amount (paragraph 2(8)); and, where a provider does not have an access and participation plan, must not exceed the basic amount and must be greater than the floor amount (paragraph 3(7)).

12. The Government has tabled amendments to paragraphs 2(8)(b) and 3(7)(b) of Schedule 2 for consideration at Lords Committee stage. These amendments will provide that the applicable sub-level amount in each case must be equal to or greater than the floor amount. This is to ensure that providers that do not have a quality rating in accordance with arrangements under clause 25 may be made subject to a fee limit that is equal to the relevant floor amount, rather than potentially accessing a sub-level fee limit which must be greater than the floor amount. These amendments correct a drafting error and reflect the underlying policy intent as regards providers that do not have a quality rating.

Justification for delegation

13. As set out in the previous Memorandum, the Department considers that it is not necessary or desirable for the sub-level amounts to be set out in the Bill or prescribed by regulations. This is because these sub-level amounts will be set by reference to the higher, basic and floor amounts, each of which will be prescribed by regulations. Parliament will therefore have the opportunity to scrutinise the higher, basic and floor amounts (including by affirmative procedure, where they are increased by more than is required to maintain their value in real terms), and it will not be possible to set the sub-level amounts outside of those limits.

14. The Secretary of State’s ability to determine the sub-level fee limits for individual providers is also important in enabling the Government to maintain control over the overall affordability of the student finance system, subject to the parameters set by Parliament.
15. Further, Secretary of State’s ability to set the sub-level amounts by reference to whether or not providers have a quality rating and the level and type of that rating, will enable the Government to incentivise good quality teaching in higher education. Specifically, the amendments tabled in respect of Schedule 2 will allow the Secretary of State to apply a fee limit of the relevant floor amount in relation to providers that do not participate in the TEF scheme and do not have a quality rating.

Justification for procedure selected

16. The Department considers that parliamentary scrutiny of the sub-level amounts is not necessary because such amounts must not exceed the higher amount or basic amount (as applicable), and must be greater than the relevant floor amount. Those amounts are subject to the scrutiny of Parliament, which includes the affirmative procedure where they are proposed to be increased by more than is required to maintain their value in real terms. Therefore the sub-level amounts will only be set within strict parameters, which will themselves be 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 clear and transparent parameters.

Part 2: Other Education Measures

Financial support for students

Amendments to clause 82: Power for the Secretary of State to determine the maximum amount of loan and 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

17. Section 22 of the Teaching and Higher Education Act 1998 ("THEA 1998") enables the Secretary of State to offer student loans and grants. Clause 82 amends section 22 of the THEA 1998 by adding subsections (2A) and (2)(aa). Subsection (2A) will 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. Similarly, subsection (2)(aa) will 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.

18. The purpose of these provisions is to enable the relevant regulations to refer to the new regulatory regime created by the Bill. So, in relation to the maximum loan or loan amounts, we anticipate that the regulations may need 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); and, in relation to regulations providing for the designation of higher education courses, we anticipate that they may refer to matters such as the different parts of the OfS register, and information published by
the OfS which could be relevant to designation, for example, information relating to providers’ suspension or deregistration from the register under clauses 16 (Suspension of registration) or 18 (Deregistration by the OfS).

19. The Government has tabled amendments relating to these subsections to make it clear that the matters determined or published by the Secretary of State, OfS or other persons, as applicable, may arise before or after the relevant regulations are made. This is intended to ensure that the regulations accurately capture the content of the referenced material at the relevant time, rather than at the time the regulations were made.

Justification for delegation

20. As set out in the previous Memorandum, student loans and grants are currently operated through secondary legislation made under section 22 of the THEA 1998, and 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). In a similar vein, new subsection (2)(aa) of THEA 1998 is intended to enable the Government to connect the designation of courses with decisions of the OfS, including decisions relating to suspension or deregistration.

21. Pursuant to the Government amendments to clause 82 described above, references in the regulations may relate to matters determined or published by the Secretary of State, OfS or other persons, as applicable, after the regulations are made. This is to ensure that the regulations will be taken to refer to the most recent version of the referenced material, rather than the material as it stood when the regulations were made.

22. By way of example, in relation to regulations setting the maximum amount of loan, if the fee limit of a provider is increased after the regulations are made, these amendments will allow for this increase to be reflected in the regulations (and, by extension, in the maximum amount of loan available to the student); and, in relation to regulations providing for the designation of higher education courses, if a provider was on the register at the time the regulations were made but has since been de-registered, the amendments to clause 82 could allow for the provider to not be designated on the basis that it is no longer on the register (subject to any transitional provision made).

Justification for procedure selected

23. Our reasoning in relation to the procedure that applies to regulations made under clause 82 is the same as that set out in the previous Memorandum. 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 connection with the amendments described above.

Department for Education

January 2017
Annex – Amendments

Schedule 2

VISCOUNT YOUNGER OF LECKIE

Page 76, line 36, after “be” insert “equal to or”

Page 77, line 23, after “be” insert “equal to or”

Clause 82

VISCOUNT YOUNGER OF LECKIE

Page 52, line 34, after “persons” insert “(whether before or after the regulations are made)”

Page 52, line 46, after “persons” insert “(whether before or after the regulations are made)”