

SKILLS AND POST-16 EDUCATION BILL

Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (DPRRC) to assist with its scrutiny of the Skills and Post-16 Education Bill (“the Bill”). The Bill was introduced in the House of Lords on the 18 May 2021. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken, the statutory safeguards that are provided, and explains the nature of, and the reason for, the procedure selected.
2. In January 2021 the Government set out its intention to reform the skills and further education system through the Skills for Jobs White Paper¹. The aim of the reform is to ensure that further education supports people to get the skills the economy needs throughout their lives, wherever they live in the country.
3. Focusing post-16 skills on this core mission seeks to increase productivity, support growth industries, and give individuals opportunities to progress in their careers. This forms part of the Lifetime Skills Guarantee which was outlined by the Prime Minister in September 2020², which aims to help everyone to get the skills they need at each stage of their life. The Bill forms the legislative underpinning for the reforms set out in the White Paper and improves the functioning of the post-16 skills system.
4. This memorandum has been drafted taking into account the conclusions and recommendations set out in the DPRRC’s report on *The Legislative Process: The Delegation of Powers*, and subsequent correspondence between the Leader of the House of Commons and the Chairs of the House of Lords committees principally concerned with the scrutiny of legislation. In accordance with the Committee’s *Guidance to Departments on the role and requirements of the Committee*, the Department has included non-legislative powers in this memorandum, such as the powers to issue notices or make determinations, and the justifications for the use of such powers are included below.

B. PURPOSE AND EFFECT OF THE BILL

5. The Bill contains four Parts.
6. Part 1 of the Bill (Skills and Education for Work) contains three chapters.

¹ Skills for Jobs: Lifelong Learning for Opportunity and Growth, January 2021

² [PM’s skills speech: 29 September 2020 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/speeches/pm-s-skills-speech-29-september-2020)

- a. Chapter 1 (Education and Training for Local Needs) provides a statutory underpinning for local skills improvement plans, introducing a power for the Secretary of State for Education to designate employer representative bodies (**ERBs**) to develop local skills improvement plans, a power to specify further providers of post-16 technical education and training required to participate in the preparation of and to have due regard to the local skills improvement plan, and a power to issue statutory guidance to which ERBs and post-16 education or training providers should have due regard when preparing a local skills improvement plan. Chapter 1 also amends the Further and Higher Education Act 1992 so that all further education corporations, sixth form college corporations and designated institutions are under a duty to keep their provision and structure under review to ensure that they are best placed to meet the needs of the local area.
 - b. Chapter 2 (Technical Education Qualifications etc.) introduces additional functions to enable the Institute for Apprenticeships and Technical Education (**the Institute**) to define and approve new categories of technical education qualifications, and to have an oversight role for technical education provision, including mechanisms to manage the proliferation of qualifications. The legislation will also embed cooperation and consultation between the Institute and Office of Qualifications and Examinations Regulation (**Ofqual**) for the approval and regulation of technical education qualifications. It will create a single approval gateway for technical education qualifications by taking them out of scope of separate statutory accreditation by Ofqual.
 - c. Chapter 3 (Lifelong Learning) modifies the Secretary of State's regulation-making powers to make provision for student loans or grants to include specific provision for student support funding of modules of higher education and further education courses, and the setting of an overall limit to funding that learners can access over their lifetime, and to make clear that maximum amounts for funding can be set other than in relation to an academic year. It also amends the definition of "higher education course" in the Higher Education Research Act (HERA) 2017 to include a module of a course. This is part of the government's wider lifelong loan entitlement (**LLE**) reforms.
7. Part 2 (Quality of Provision) contains two clauses.
- a. Clause 16 (Initial teacher training for further education) enables the Secretary of State to take steps (by making regulations) to improve the quality of Initial Teacher Training in Further Education (**ITT(FE)**).
 - b. Clause 17 (Quality assessments of higher education) amends the Higher Education and Research Act 2017 to clarify that the Office for Students (**OfS**) can make decisions on regulatory intervention and registration by reference to minimum expectations of quality.
8. Part 3 (Protection for Learners) contains two chapters.

- a. Chapter 1 (Regulation of post-16 education or training providers) enables the Secretary of State for Education to make regulations to provide for a list of post-16 education or training providers, in particular Independent Training Providers (**ITPs**) and others, and sets out funding restrictions for providers not on the list. Chapter 1 also extends the existing statutory intervention powers applicable to further education corporations, sixth form college corporations and designated institutions under the Further and Higher Education Act 1992. This measure will allow the Secretary of State for Education to intervene in circumstances where an institution is failing to adequately meet local needs.
- b. Chapter 2 (Education administration and administration of further education bodies) makes amendments to clarify and improve the operation of the further education insolvency regime for further education bodies, relating to the use of company voluntary arrangements and transfer schemes.
- c. Part 4 (Miscellaneous and General) contains general and supplemental provisions. Chapter 1 (Institutions within the further education sector: procedure for designation) makes provision to improve and simplify the process of designating institutions as being within the statutory further education sector related to the Part 3 Chapter 2 improvements to the further education insolvency regime. Chapter 2 (general provisions) contains provisions as to extent, commencement and short title.

C. DELEGATED POWERS SUMMARY

9. The Bill contains three provisions that are related to powers to make secondary legislation that are capable of amending primary legislation.
 - a. **Clause 18(4)** relates to the power to keep a list of post-16 education or training providers. This power, which has the effect of amending primary legislation, allows the Secretary of State to expand, vary, or remove the types of education and training the provision of which will require a provider to be on the list. This will follow the affirmative procedure. This is a limited power, to ensure that the scheme can be altered to capture providers of new types of education and training not covered by the current definition.
 - b. Also relating to the list of post-16 education or training providers; **clause 21(1) and (2)** contain a power to make consequential, supplemental, incidental, transitional or saving amendments to primary legislation, in order to ensure proper functioning of the statute book. The creation of the list of post-16 education or training providers and its effect on funding arrangements could have impacts on wider legislation in relation to (in particular) funding education or training and those impacts may not be apparent until after regulations are made. This will follow the affirmative procedure.

- c. **Clause 23** relates to company voluntary arrangements (CVAs) under the education administration special administration regime. The power is a limited, technical amendment to an existing power to amend primary legislation.

10. The Bill contains further delegated legislative powers as follows:

- a. **Clause 4(1)** relates to local skills improvement plans. The definition of “relevant provider” may be broadened (within specified limits) by secondary legislation. It contains a power to be exercised by the Secretary of State to make regulations to identify specific post-16 technical education and training providers, other than those specified in primary legislation, to be subject to duties in the legislation.
- b. **Clause 7(2)** relates to technical education qualifications. The clause, in new section A2D2(1) provides for the Institute to specify categories of technical education qualifications that it will approve using the approval tests in section A2D3(as renumbered) and new section A2D5 of the Apprenticeships, Skills, Children and Learning Act 2009.
- c. **Clause 7(4)** relates to technical education qualifications. This clause, in the inserted section A2D6(4) of the Apprenticeships, Skills, Children and Learning Act 2009, requires the Institute to publish information about the matters which it will take into account when approving a qualification or withdrawing approval from it.
- d. **Clause 7(4)** relates to technical education qualifications. This clause, in the inserted section A2D7(3) of the Apprenticeships, Skills, Children and Learning Act 2009, allows the Secretary of State to make regulations to allow the Institute to charge an application fee for considering qualifications that are to be approved.
- e. **Clause 11(2)** relates to technical education qualifications. This clause allows Ofqual to disclose information to the Secretary of State, the Office for Students (**OfS**) and the Office for Standards in Education, Children’s Services and Skills, and Her Majesty’s Chief Inspector of Education, Children’s Services and Skills (together, **Ofsted**) in relation to its functions relating to technical education qualifications. It also allows those bodies to disclose information to Ofqual for their functions in relation to technical education qualifications.
- f. **Clause 12(4)** relates to technical education qualifications. This clause makes minor amendments to the Apprenticeships, Skills, Children and Learning Act 2009 consequential to the additional functions conferred on the Institute in the Bill. The clause amends section A2D10 (as renumbered by the Bill) so that the Secretary of State’s current power to issue directions to the Institute (about the exercise of its functions in relation to technical education qualifications) applies to its new functions.
- g. **Clause 14(1)** relates to the funding of further and higher education courses and makes modifications to existing powers to make specific provision for funding modules of such courses, including as to an overall maximum limit applicable to funding for learners and as to amendments of that limit.
- h. **Clause 16(1)** relates to FE Initial Teacher Training, and introduces a power to make regulations to improve and secure the quality of “initial FE teacher

training” provision by any institution that offers FE initial teacher training courses.

- i. **Clauses 18 and 19**, relating to the list of Post-16 providers, contains the following powers to make regulations.
 - i. Clause 18(1)(a): a power to enable the Secretary of State to include conditions for inclusion on the list, for the purpose of regulating relevant providers, in order to prevent or mitigate adverse effects of a disorderly exit of a provider from the provision of education and training.
 - ii. Clause 18(1)(b): a power to allow the Secretary of State to set out other matters in connection with the keeping of the list of post-16 education or training providers.
 - iii. Clause 19(9)(b) and (10)(b): two powers to allow the Secretary of State to specify the nature of i) relevant funding arrangements; ii) relevant sub-contracts affected by the prohibitions on funding arrangements set out in clause 17.
- j. **Clause 22(2) and (3)** relates to intervention in the further education sector, extends the Secretary of State’s direction making powers, enabling him to direct a governing body to transfer property, rights or liabilities to another body.

11. The Bill also contains non-legislative delegated powers explained in this memorandum, such as powers to issue notices, make designations and publish information.

12. The Government intends to bring forward amendments in respect of clause 15 of the Bill (lifelong learning: amendment of the Higher Education and Research Act 2017) ahead of Committee Stage in the House of Lords. We anticipate that we may need a new delegated power as part of those amendments. In that event, the Department will prepare in good time a Supplementary Memorandum for the Committee to consider.

Part 1: Skills and Education for work

Chapter 1

Education and training for local needs

Clause 1(5) and clause 3(1)(d): Statutory guidance to Employer Representative Bodies and relevant providers

Power conferred on: Secretary of State

Power exercised by: Statutory guidance

Parliamentary Procedure: None

Context and Purpose

13. This power relates to the issuing of guidance by the Secretary of State to which

Employer Representative Bodies and relevant providers are required to have due regard. The Secretary of State may issue guidance pursuant to their common law powers. As per clause 1(5)(a) and (b), such guidance may relate to the manner in which the duty to co-operate is complied with, as well as the matter to which the Secretary of State might have regard to when deciding whether to approve and publish a plan or other matter in connection with clause 1 on Local Skills Improvement Plans. Clause 1(5) provides that relevant providers must have due regard to such guidance when co-operating with a designated Employer Representative Body. The prescriptions of the duty to co-operate are not specified in clauses except that co-operation is for the purposes of assisting an Employer Representative Body to develop or review a Local Skills Improvement Plan. Clause 3(1)(d) provides for the removal of the designation of the Employer Representative Body in circumstances where the Employer Representative Body does not have regard to any relevant guidance published under clause 1(5) by the Secretary of State or departs from any such guidance without good cause.

Justification for the power

14. The duty on relevant providers and the condition on Employer Representative Bodies to have due regard to guidance is necessary because the prescriptions of the duty to “co-operate” relating to how relevant providers assist the Employer Representative Body will be outlined in guidance and are not outlined in the legislation. Flexibility is required based on observations of the Secretary of State regarding those co-operation processes. Further, the requirement to have due regard to guidance is necessary to ensure that the Local Skills Improvement Plans produced by various Employer Representative Bodies in co-operation with relevant providers is consistent across the education system, and that each Local Skills Improvement Plan conforms in respect of the matters which the Secretary of State will have regard to when deciding whether to approve the plan.

Justification for the procedure

15. Absence of parliamentary procedure is justified as the guidance supports and clarifies the duty on relevant providers to “co-operate” under clause 1(3) and (4) but does not add any additional weight to this duty. As per clause 1(3) and (4), the duty to “co-operate” relates to the development or review of a Local Skills Improvement Plan in an area. The guidance will outline the processes by which the relevant provider is to “co-operate” with the Employer Representative Body. “Co-operate” is contextualised also by description of Local Skills Improvement Plan at clause 1(6) as being a plan which identifies actions which relevant providers can take with regard to any post-16 technical education or training to address skills, capabilities or expertise needs of employers in the area. Accordingly, co-operation by relevant providers, as further specified in guidance, will relate to processes to develop a Local Skills Improvement Plan of this description. The guidance will also inform the manner in which the Employer Representative Body is to perform its designated role. The Secretary of State has a role in approving the Local Skills Improvement Plan as per clause 1(5)(b) and 1(7) and guidance may set out matters to which the Secretary of State will have regard when deciding whether to approve which will usefully inform the process of developing the Local Skills

Improvement Plan.

Clause 2(1) and 3(1): Power to designate Employer Representative Bodies and power to remove designation of Employer Representative Bodies

Power conferred on: Secretary of State

Power exercised by: Non-legislative instrument (via Notice)

Parliamentary Procedure: None

Context and Purpose

16. Clause 2(1) gives the Secretary of State a power to designate an Employer Representative Body in relation to a specified area if certain criteria set out at clause 2(1) and (2) are met. The Secretary of State must be satisfied that such Employer Representative Bodies can perform the role effectively and impartially; that the body is reasonably representative of local employers; and that the body has consented in writing to the designation and any associated terms and conditions. The notice of designation will include details such as the specified area and the effective date of the designation.
17. Clause 3 provides for the power of the Secretary of State to remove a designation in circumstances if the conditions set out at clause 3(1)(a)-(e) are met. These conditions relate to: the body no longer meeting the requirements of clause 2 or no longer being an eligible body; compliance of the Employer Representative Body with conditions specified in the designation notice and any guidance published; and a residual discretion for the Secretary of State to remove a designation where otherwise necessary or expedient. Under clause 3(2), Employer Representative Bodies may also request to be undesignated. As with the exercise of power to designation, exercise of the power to remove is via Notice. These powers are considered together because the power to remove designation is incidental to the power to designate.

Justification for the power

18. The power to designate is required in order to identify the entity responsible for the developing the Local Skills Improvement Plan in co-operation with relevant providers and employers in the specified area. The exercise of the power is non-legislative in nature in that the power to designate and the terms and conditions are expressed via published Notice. The related power to remove designation is required in order to remove designation of Employer Representative Body in circumstances where the Employer Representative Body is not performing its role to develop a Local Skills Improvement Plan in relation to a specified area.

Justification for the procedure

19. The Department considers that a non-legislative procedure to designate is justified, firstly, because the power is constrained by the criteria in the Bill

which outlines the characteristics of a body suitable for designation. Secondly, in respect of the removal of conditions, the exercise of the designation power is limited to the specified conditions for removal, which relate to the performance by the Employer Representative Body of its role to develop a Local Skills Improvement Plan. Conditions for removal do allow residual discretion to exercise the power in circumstances where the Secretary of State considers removal to be necessary or expedient. Any exercise of discretion under that condition is subject to the prescriptions of public law and reviewable under judicial review.

20. Another reason why the Department considers that a non-legislative procedure is justified is that designation and or removal of designation via statutory instrument would require a disproportionate amount of Parliamentary time. To illustrate the time required: (i) there may be up to approximately 36 areas in respect of which a Local Skills Improvement Plan will be prepared and as such, potentially up to 36 Employer Representative Bodies subject to designation or removal (or fewer where a single Employer Representative Body is designated in respect of multiple specified areas); (ii) each designation is to be made subject to its own specific terms and conditions to be specified in the Notice and that Notice must set out, as per clause 2(4), the name of the body, the specified area in relation to which the body is designated and the effective date of designation and (iii) each removal is to be made under the condition appropriate to the circumstances and the reasons for removal and effective date of removal must be specified via Notice.

Clause 4(1): Power to specify further post 16 technical education and training providers subject to duties relating to Local Skills Improvement Plans

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

21. This power enables the Secretary of State to make specified post-16 technical education and training providers, other than those already specified in primary legislation, to be subject to duties relating to Local Skills Improvement Plans. By exercise of this statutory instrument making power, relevant providers specified will be subject to the following duties: (i) to co-operate with the Employer Representative Body in the development or review of Local Skills Improvement Plan, (ii) to have due regard to guidance relating to the process by which to develop Local Skills Improvement Plans and (iii) have due regard to the published Local Skills Improvement Plan in its area.

Justification for the power

22. This power is required in order to deliver the Local Skills Improvement Plans system in the most flexible way. There are numerous and varied different

providers of post-16 technical education and training which can contribute to the total provision delivered in any specified area. It should be noted that the exercise of the power to specify further providers is circumscribed by the Bill, in that further providers may only be specified if: (i) they are delivering post-16 technical education and training, (ii) subject to inspections by HM Chief Inspector (Ofsted) under Chapter 3, Part 8 of the Education and Inspections Act 2006 and (iii) in receipt of public funding provided by Secretary of State, local authority or combined authority. The policy justification for circumscribing the power in this manner is that providers who are in receipt of public funding should be required to contribute to the overview of provision in the area delivered and be required to have regard to skills needs when deciding the provision offered by them. The providers which may presently fall within that definition and which are explicitly excluded are: (i) 16 to 19 Academies, (ii) schools in respect of sixth form schools and (iii) providers funded by local authorities in England.

23. The objective of this delegated power is to ensure that as wide a range of providers as appropriate are required to co-operate with the Employer Representative Body in the preparation of the Local Skills Improvement Plan, such that that any Local Skills Improvement Plan generated will be a complete and accurate view of provision in an area. Insofar as appropriate, all relevant providers are specified in primary legislation. Specifying further providers via secondary legislation after the coming into force of the Bill facilitates that any further relevant providers also contribute and have due regard to the Local Skills Improvement Plan. This also facilitates Secretary of State taking an informed view at the time as to whether, in view of the nature and quantity of provision delivered by providers other than those specified in the legislation, it is appropriate to subject these providers to the duties at clauses 1(3), (4) and (5). By allowing for flexibility, the Secretary of State can balance the burdens of placing duties on these other providers if and when future providers deliver relevant provision. Specifying further providers via secondary legislation on an incremental basis after the coming into force of the Bill contributes to legal certainty.

Justification for the procedure

24. The negative resolution procedure is considered appropriate as the exercise of the power is sufficiently circumscribed by conditions set out in the Bill. The Department considers that specification of further providers via the affirmative resolution procedure would require a disproportionate amount of Parliamentary time.

Clause 5: new section 52B(2) of the Further and Higher Education Act 1992, including a provision that governing bodies must have regard to any guidance issued under this section by the Secretary of State.

Power conferred on: Secretary of State

Power exercised by: Statutory guidance

Parliamentary Procedure: None

Context and Purpose

25. Clause 5 imposes a duty on the governing body of an institution that is within the further education statutory sector to review how well the education or training provided by it meets local needs, and in light of the review, to consider what action it might take to better meet those needs. The provision stipulates that in carrying out the review, the governing body must have regard to any guidance that is issued by the Secretary of State under this provision.

Justification for taking the power

26. The new duty is intended to strengthen the way that all colleges plan their provision, and to ensure that where there are structural barriers to meeting local needs these are also identified and addressed. Guidance from the Secretary of State, and a statutory duty to have regard to it, are needed to ensure that all governing bodies are provided with clarity about the scope of keeping provision and structure under review, how to conduct a review and key considerations in reviewing provision and structure. The guidance will set out advice and information to support governing bodies.

Justification for the procedure

27. No parliamentary procedure as this is a non-legislative common law power to issue guidance. The Department considers that it is justified because the guidance does not impose or alter any obligations. Its role is to support governing bodies in carrying out their review function.

Chapter 2

Technical education qualifications ETC

Clause 7, subsection (2): Additional powers to approve technical education qualifications

Power conferred on: Institute for Apprenticeships and Technical Education

Power exercised by: Determination

Parliamentary Procedure: Not applicable – non-legislative power

Context and Purpose

28. This clause allows the Institute for Apprenticeships and Technical Education (**Institute**) to specify categories of qualifications in relation to England that it may approve using one of the new approval tests in clause 7(4). The Institute is required under new section A2D2(6) of the Apprenticeships, Skills, Children and Learning Act 2009 to publish information about the categories. This information must include which new approval test will apply to each category

(and therefore explain how each category will relate to the occupational standards). The purpose of this categorisation function is to allow the Institute to explain the broad types of technical education qualifications that the Institute will approve alongside T Levels and Higher Technical Qualifications. The Institute will be required to consult the Secretary of State for Education and other relevant persons before specifying the categories.

Justification for taking the power

29. Setting out categories for approval will allow the Institute to respond to the needs of the qualifications market, including those of employers and learners. This flexibility would be limited if the categories of qualification were set out in the legislation. If this power were not taken, then Parliament would be required to pass legislation on a frequent basis to determine all the categories of qualifications in England that the Institute might need to approve to assist the government to achieve its reforms to technical education. These will change over time in response to employer need and so will require adjustment often. The Institute's powers to approve qualifications and the matters of which it must be satisfied before doing so are set out in the Bill itself.
30. The way in which the qualifications will relate to the occupational standards is set out on the face of the legislation (in the approval tests) and so the legislation proposed would circumscribe the exercise of the Institute's approvals power in this way, rather than leaving all the relevant criteria to be determined by the Institute.
31. It is appropriate for the Institute to have the categorisation function rather than the Secretary of State as it is the body which reflects the views of employers and is responsible for the approval and oversight of technical education.

Justification for the procedure

32. Given this power is exercised by determination of the Institute, no Parliamentary procedure is required. Specifications will be informed by employers or industry representatives with the expertise required to make an assessment of whether a category of qualification will enable a student to progress into employment. The Institute is required under section ZA2(1) of the Apprenticeships, Skills, Children and Learning Act 2009 to have regard to the reasonable requirements of industry, employers and persons who may wish to undertake education and training. The Institute is also required to consult on the categories of qualifications as appropriate. Decisions made will be circumscribed within the primary legislation.

Clause 7, subsection (4): Additional powers to approve technical education qualifications

Power conferred on: Institute for Apprenticeships and Technical Education

Power exercised by: Publication

Parliamentary Procedure: Not applicable – non-legislative power

Context and Purpose

33. New section A2D6(4), introduced by clause 7(4) requires the Institute to publish information about the matters it will take into account when approving or withdrawing approval from a technical education qualification. It allows the Institute to set out the detailed criteria that awarding organisations and awarding bodies will be required to demonstrate for their qualifications to be approved. The information will include details that the qualification must evidence in order to meet the statutory test for approval (depending on the category it is part of) and details on evidence of demand for the qualification.

Justification for taking the power

34. The Institute will need to set out detailed criteria for the approval which require its expert knowledge of the occupational standards and other matters which are important for employers and others' interests to which the Institute must have regard. The criteria will also differ between qualifications in various combinations of categories and occupational routes. If this power were not taken, then Parliament would need to set out the details of approval for every type of qualification that the Institute will approve, which would take a significant portion of parliamentary time. The Institute already publishes criteria for the approval of qualifications under its current approval power, and the power in this Bill sets out that this will be the case under the new approval scheme.

35. The Department considers this power uncontroversial, and that it is appropriate for the Institute to set out criteria for approval in this manner, to facilitate a clear and high quality approvals process.

Justification for procedure

36. Given that this is a power exercised by publication, no Parliamentary procedure is required. This is because the criteria will be informed by the Institute's assessment of employer and learner need (among others' interests to which the Institute must have regard), and its experience of qualification approval.

Clause 7, subsection (4): Additional powers to approve technical education qualifications

Power conferred on: Secretary of State for Education

Power exercised by: Regulations

Procedure: Negative

Context and Purpose

37. Section A2D7(3), which is inserted into the Apprenticeships, Skills, Children and Learning Act 2009 by this provision, allows the Secretary of State for Education to make regulations that set out the circumstances under which the Institute may charge an application fee for approval and continued approval of technical education qualifications. The policy intention is that the regulations will allow scope for the Institute to recoup the operational costs of a more resource intensive approach to approvals, which may be required in relation to qualifications approved under the new tests.
38. The reason for this is that qualifications approved under new section A2D5 may require an awarding organisation to submit evidence that its qualification meets the approval test, and whatever additional criteria the Institute sets out for approval. This evidence will need to be examined and assessed by the Institute. The Institute may need to make payments in connection with this process. It may also need to charge an annual fee in connection with ongoing reviews of qualifications.
39. During the initial stages of qualifications reform awarding organisations will not be charged a fee for submitting applications. The regulation-making power allows the Secretary of State to retain control of the circumstances under which this will be exercised.

Justification for taking the power

40. It is common practice for fees to be prescribed via regulations. For example, the same principle was applied in section A3 of the Apprenticeships, Children, Skills and Learning Act 2009. Fees relate to costs which will need to be taken into account at the point at which regulations are passed.
41. In addition, the fees are very likely to be updated in future to reflect, among other things, changes to categories of qualification (including the introduction of new categories) in response to the changing skills needs of the labour market in England. The cost of approving qualifications may vary between categories and in relation to other characteristics, including the occupational area. The Institute has yet to develop approval processes for the new categories of qualification that will be set out by the forthcoming government response to the post-16 qualifications review at level 3. In light of this, it is not yet known what the operational costs of approval will be, and therefore what the appropriate fee range should be, but the Department anticipates that these will be levied on a cost-recovery basis.
42. The intention is for the introduction of fees only to be considered following the implementation of reforms to technical education qualifications at level 3. The Institute will use the implementation of reforms as an evidence base to support the development of an approach to charging that is proportionate and will ensure the availability of a suitable range of qualifications, including those in niche areas.

Justification for the procedure

43. The Department proposes that a statutory instrument proposed under this power is subject to the negative procedure. This procedure would be consistent with the procedure to be followed under section A3 of the ASCLA 2009 for charging for the issuing of apprenticeships certificates or supplying copies of them. There will likely be a high frequency with which the fees will need to be updated, and to ensure fee levels can be updated relatively quickly if necessary, in order for the Institute to recover the true costs of approval.

Clause 11, subsection (2): Sharing of information relating to technical education qualifications

Power conferred on: Secretary of State

Power exercised by: Regulations

Procedure: Affirmative

Context and Purpose

44. New section 40AB of the Apprenticeships, Skills, Children and Learning Act 2009 is inserted by this provision and allows the Secretary of State to make regulations that prescribe persons to whom Ofqual can disclose information in relation to technical education qualifications.

45. Section 40AB allows Ofqual to disclose information relating to technical education qualifications to the Secretary of State, the OfS and Ofsted. Each of these is a defined “relevant person” in the legislation. Relevant persons are also able to share information with Ofqual. The Secretary of State may prescribe persons to add to the list of persons who are able to disclose information to Ofqual in relation to technical education qualifications.

46. The purpose of the delegated power is to allow the Secretary of State to expand the list of persons who can share information with Ofqual in a manner as this becomes necessary for the effective regulation of technical education qualifications.

Justification for taking the power

47. There is precedent for persons to be prescribed via regulations for the purpose of sharing information with the Institute, in section 40AA of ASCLA 2009. New section 40AB is very similar to that provision. As the reformed regulatory landscape develops there may be additional bodies with a role in relation to regulating technical education qualifications, with whom it would be sensible for Ofqual to share information for the efficient performance of its (and the other body’s) functions.

Justification for the procedure

48. The regulations will be passed using the affirmative procedure. This will give parliament the opportunity to scrutinise the bodies with whom the Department proposes Ofqual should be able to share information.

Clause 12, subsection (4): Technical education qualifications: minor and consequential amendments

Power conferred on: Secretary of State

Power exercised by: Direction

Parliamentary Procedure: None

Context and Purpose

49. Clause 12(4) extends the Secretary of State's direction-making power in section A2D10 (as renumbered) of the Apprenticeships, Skills, Children and Learning Act 2009 to apply to the Institute's new functions relating to technical education qualifications. These include the determination of categories of qualifications, and approval of qualifications using the tests set out in new section A2D5.

Justification for taking the power

50. The power extends the function that that the Secretary of State currently holds in relation to the Institute's functions of approving technical education qualifications in sections A2DA and A2DB (renumbered as sections A2D3 and A2D5) of the Apprenticeships, Skills, Children and Learning Act 2009. This is necessary to enable the Secretary of State to retain strategic control of technical education that is publicly funded.

Justification for the procedure

51. Given that this is a power exercised by direction, no Parliamentary procedure is required in respect of this power to direct, because it is a limited extension of an existing power. At present there is no procedure as regard to the exercise by the Secretary of State of equivalent policy responsibilities, and it is considered that any new restriction may undermine the Secretary of State's policy-making function, ability to react quickly to the needs of students and employers, and oversight of the Institute.

Chapter 3

Lifelong learning

Clause 14: Support for lifelong learning

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative procedure

Context and Purpose

52. Clause 14 inserts new section 28A into the Teaching and Higher Education Act 1998 (THEA 1998) to make modifications to Part II, Chapter 1 of THEA 1998. It modifies the existing Secretary of State regulation-making powers in sections 22 and 28, and the powers in section 23, to include specific references to the funding of modules of further and higher education courses. It inserts a new subsection (2ZA) into section 22 to give the Secretary of State the power to prescribe the meaning of “module” in relation to such courses. It makes specific provision, in newly inserted section 22(2)(ba), for regulations to prescribe, or provide for the determination of, an overall maximum limit (a “lifetime limit”) in relation to loans for a borrower, and in new subsection (2B) to amend any lifetime limit which has effect in relation to a person. Finally, it makes clear, in newly inserted subsection (2ZB), that the Secretary of State’s powers to prescribe maxima in relation to loans or grants can be set other than in relation to an academic year.
53. Section 22(1) of THEA 1998 provides the Secretary of State with a wide regulation-making power to make regulations authorising or requiring him to make grants or loans for any prescribed purposes to eligible students in connection with their undertaking further or higher education courses designated by or under regulations. Section 22(2)(a) to (k) then provides a non-exhaustive list of the matters which regulations made under section 22 may in particular provide.
54. Section 28 provides that “higher education course” and “further education course” have the meaning given by regulations made under section 22.
55. This is not a new delegated power; it is an amendment, by non-textual modification in the terms described above, to an existing delegated power.

Justification for taking the power

56. The powers in section 22 have provided the necessary flexibility to develop the complex student finance systems for both higher and further education courses since 1998, via secondary legislation. The new, amended, powers sought in this Bill are necessary to ensure that student loan/grant funding can be provided for, whether a student studies a module or a course. The Department considers that delegated legislation is the appropriate means of setting out the complex framework for the student support system and any changes to it. This is because existing student support regulations, and the proposed regulations to be made under these newly modified powers, are detailed and lengthy and not practical for inclusion on the face of the Bill. The Education (Student Support) Regulations 2011 run to several hundred pages.

57. The Student Support Regulations need to be updated annually, sometimes several times a year, for example to account for changes required for new cohorts of students each academic year, or to uprate loan amounts. If the Department was unable to make these changes through delegated legislation, that would restrict its ability to control its expenditure, implement key changes in policy and ensure it was meeting its legal obligations, for example, in line with developments in case law.
58. The new power to define “module” is additional to the existing similar duty for the Secretary of State to define “further education course” and “higher education course” under section 28(1). The Department considers that having a power to define module, coupled with the express wording included in this clause, is appropriate, given that the term has no single ordinary meaning.
59. Section 22(2) of THEA 1998 sets clear parameters and give clear indicators of what regulations are likely to provide for. In the light of these considerations, 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 the procedure

60. The Department seeks to maintain the same level of parliamentary procedure (the negative resolution procedure) for regulations made under these delegated powers as Parliament determined was appropriate for student support arrangements in 1998. Section 42 of THEA already contains flexibility in terms of the procedure, as it 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. These provisions make amendments to existing powers, and follow the same procedure which applies to them.

Part 2: Quality of provision

Clause 16(1): Initial teacher training for further education

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: affirmative the first-time regulations are made, and negative thereafter

Context and Purpose

61. This is a power to make regulations to improve and secure the quality of initial teacher training in further education (FE ITT) provision by any institution in England that offers further education initial teacher training courses. The

power will enable the Secretary of State to (among other things), accredit providers to offer FE ITT courses, accredit specified FE ITT courses; prohibit the provision of specified FE ITT courses; set conditions that must be complied with by providers of FE ITT courses; require providers to give the Secretary of State for Education specified information relating to FE ITT courses or the students who undertake them; and require the governing body of an institution providing FE ITT courses (or other specified person) to have regard to guidance issued by the Secretary of State.

Justification for taking the power

62. It is not essential for the measures (for which regulations may make provision) to be in place as soon as the primary legislation begins to operate. This is because the Department wants to drive as much reform as possible through non-legislative means. However, given the risk that certain providers of FE initial teacher training which most need to improve will not do so through the non-legislative approach, the Department requires these powers to ensure that necessary change can take place. Therefore, the Department proposes these powers in order to require providers of FE initial teacher training to revise and improve their practice. This power will give the Secretary of State the flexibility to make secondary legislation to strengthen the system and protect trainees if the non-legislative approaches to managing the FE ITT system do not yield the required results.

63. The scope of the power will be constrained. It will be limited to the provision of further education initial teacher training courses, rather than regulating individual further education teachers, and will be clearly set out with reference to the purpose of securing or improving the quality of FE ITT courses that are provided by educational institutions in England.

Justification for the procedure

64. There is precedent for making regulations using the negative procedure in relation to school teacher initial teacher training, under the Education (School Teachers' Qualifications) (England) Regulations 2003 (S.I. 2003/1662), relying on powers under section 132, 145 and 210 of the Education Act 2002.

65. The above regulations enable the Secretary of State for Education to accredit institutions as providers of courses or programmes of initial school teacher training; section 145 of the Education Act 2002 enables regulations that are made under sections 132 to 140 of the Education Act 2002 (which make provision by reference to the possession of a specified qualification or experience or a specified course of education) to include power to make provision which confers discretion on the Secretary of State for Education to approve or accredit a qualification, course, programme or institution. This is akin to action the Department may decide to take under this new power, in accrediting or regulating a provider of FE ITT courses or the courses themselves.

66. It is the Department's intention that the substantive aspects of the policy that amount to a policy shift would be covered in the first set of regulations made

(if this power is exercised), which would be under the affirmative procedure. Thereafter, regulations would amend the existing legal framework in order to account for operational adjustments or changes over time within the defined approach. It is for this reason that the negative procedure is considered appropriate when the power is exercised subsequently (to amend the existing regulations and framework).

Part 3: Protection for Learners

Chapter 1

Regulation of post-16 education or training providers

Clause 18(1)(a): list of post-16 education or training providers - specifying conditions for being on the list

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

67. This power allows the Secretary of State to make regulations to set up a scheme to list certain post-16 education or training providers – who meet conditions specified in the regulations for being on the list.
68. By operation of clause 19 a relevant funding arrangement (or sub-contract) for the provision of certain categories of education or training can only be entered into if the provider of that education or training is on the list. That funding arrangement must also include provision allowing the funding authority to terminate the arrangements if the provider ceases to be on the list.
69. The purpose of this power is to enable the Secretary of State to specify conditions for being on the list where he considers that specifying that condition may assist in preventing or mitigating the adverse effects of a disorderly cessation in the provision of education or training by the provider. The power to specify conditions is limited by operation of clause 18(5) which provides that only conditions that the Secretary of State considers address this purpose may be imposed. A disorderly cessation in the provision of education can be very disruptive for students and is a particular issue where independent training providers are concerned. A breach of a condition will result in a provider being removed from the list and, if appropriate, action being taken by the funding body under its funding arrangement, including termination.
70. Providers of education or training are funded for the relevant provision by the Secretary of State for Education, Mayoral Combined Authorities or Local Authorities. They may also be funded through sub-contracted arrangements.

Where a provider is not directly funded by the Secretary of State, the existing levers for the Secretary of State to ensure that learners are protected in the event of a disorderly exit of a provider from the provision education or training, are not as strong compared to where the Secretary of State is funding. Conditions of funding to prevent disorderly exits from provision may also not be consistent. These clauses also allow the regulations to permit or require the disclosure of certain personal information about, for example, a student's attainment by providers which will assist with the smooth transition of students.

71. The conditions for being on the list will apply to all relevant providers, even where they are not directly funded by the Secretary of State. This will ensure commonality across funding streams to mitigate the risks described above.
72. Examples of the types of conditions which may be imposed are provided at subsection (7) and may vary depending on the type of provider and the type of education or training being provided as set out in subsection (3).

Justification for taking the power

73. The nature of, and therefore issues with, the providers of education or training that are in scope are likely to change over time. Therefore, the Department proposes for the Secretary of State to retain some degree of flexibility in identifying the conditions for being on the list. This will allow the Secretary of State to ensure conditions are imposed which are likely to be most effective to prevent or mitigate the adverse effects associated with a disorderly cessation in provision. The alternative would be for the Department to propose new primary legislation each time the conditions are adjusted – however, the Department believes this would likely be at a more frequent basis than Parliament might expect to pass primary legislation. Before making the first regulations, the Secretary of State must consult before deciding upon the detail of the scheme. This will allow him to establish the most appropriate conditions to impose.
74. This is not a scheme for wholesale regulation of the quality of relevant providers; the scope of this power (and the scheme associated with being on the list) is limited only to the imposition of conditions which are considered to prevent or to mitigate the adverse effects of a disorderly cessation in provision by the provider. The conditions are further indicated by a list of the types of condition which might be imposed.

Justification for the procedure

75. The Department proposes that the regulations will be subject to the affirmative resolution procedure so that Parliament has the opportunity to debate the detail of the scheme after consultation has taken place (which is required for the first set of regulations made under this power) and before the regulations are brought into force.

Clause 18(1)(b): list of post-16 education or training providers: other provision in connection with the keeping of the list

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

76. This is a power allowing the Secretary of State to set out other matters in connection with the keeping of the list of post-16 education or training providers. Subsection (10) sets out the matters which may, among other things, be provided for under this power such as the charging of fees, procedure for applications and appeals, and provision relating to requirements to disclose information.

Justification for taking the power

77. Such matters will need to be set out in the regulations in order to ensure that a fair scheme is established and that the procedural requirements that must be complied with are clear. The Secretary of State intends to consult widely before deciding upon the detail of the way in which the scheme will operate and he is required to do so before making the regulations for the first time. The Department proposes for this delegation so that the procedural requirements can be aligned over time with those required for other administrative registers which may be run concurrently alongside this list such as the Register of Apprenticeship Training Providers. The requirements are very likely to need adjustment over time.

Justification for the procedure

78. The Department proposes that the regulations will be subject to the affirmative resolution procedure. This will provide Parliament with the opportunity to debate the detail of the scheme after consultation has taken place (which is required for the first set of regulations made under this power) and before the regulations are brought into force, to ensure full parliamentary scrutiny of the exercise of the powers.

Clause 18(4): list of post-16 education or training providers: power to add, vary or remove categories of education or training within scope of the list

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

79. This power allows the Secretary of State to expand, vary, or remove the types of education and training that fall within scope of the list if there are changes in the future to the types of funded education and training which would currently fall outside the categories listed in subsection (3). This may be considered to be a limited Henry VIII power as it alters the scope of that which is in the primary legislation.

Justification for taking the power

80. Should it become apparent that a new type of education and training not falling within the definitions in subsection (3) is to be funded for those over compulsory school age, then the Secretary of State may wish quickly to ensure that providers of that education and training (except those which are excluded) will need to be registered for the protection of learners and public money. Taking this power would allow the Secretary of State to take action more promptly than would be possible if it were to instead require new primary legislation. For example, it is not yet clear what types of education or training may be funded under the new UK Skills and Productivity Fund which will replace the European Social Fund and so it may be necessary to ensure that it is covered at a later date. A recent example of a change in funding scope is the introduction of National Skills Fund 'bootcamps' provision. It should be noted that the funding prohibitions only apply in relation to providers of education for those over compulsory school age, and therefore the Secretary of State would only exercise the power to add further categories of education or training suitable for those over that age.

Justification for the procedure

81. Although this power does not allow amendment to primary legislation in the same way as a classic Henry VIII power, given it has a similar effect of narrowing or expanding the scope of the primary legislation by regulations, the Department proposes that this should be subject to Parliamentary scrutiny via the affirmative procedure.

Clause 19(10)(b) & (11)(b): list of post-16 education or training providers: power to specify the requirements of a relevant funding arrangement and/or sub-contract within scope of the list

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

82. By operation of clause 19 a relevant funding arrangement (or sub-contract) for the provision of certain categories of education or training can only be entered into by a funding authority if the provider of that education or training is on the

list. That funding arrangement must also include provision allowing the funding authority to terminate the arrangements if the provider ceases to be on the list.

83. Clause 19 gives the relevant descriptors of those funding arrangements and subcontracts and allows for any other characteristics of those arrangements to be specified in regulations.

Justification for the power

84. The Department proposes that this power is provided to ensure that the scheme does not inappropriately limit the ability of funding bodies to be able to fund providers, nor providers to sub-contract. For example, if a provider wished to enter into a small scale contract with a free-lancer for the provision of a few days of teaching, it is not the intention that the sub-contractor ought to be on the list. So, for example, the regulations are likely to set de minimis requirements and any other requirements that are necessary to ensure that the correct type of sub-contracted provision is being captured. In the course of running the scheme it may become apparent that alterations are needed to this aspect of the policy as the nature of funding arrangements and sub-contracted provision alters. If this power were not taken, this would instead require the Department to propose primary legislation each time adjustments are needed. This would likely be at more frequent intervals than is generally expected for primary legislation, particularly for issues such as de minimis requirements, which are likely to need adjusting upwards over time. It also allows the Secretary of State accurately to identify the funding arrangements that are intended to be covered within the broad categories identified, if such specification is required.

Justification for the procedure

85. Given that this provision will be used to narrow the scope of the scheme rather than to expand it, a negative resolution procedure is proposed.

Clause 21(1) and (2): list of post-16 education or training providers: power to make consequential, supplemental, incidental, transitional or saving provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

86. Clause 21 provides that the powers to make regulations in clauses 18 or 19 include power to make supplementary, incidental, transitional or saving provision (subsection (1)) (“consequential etc”). The power may be used to amend any provision made by, or under, primary legislation passed before, and including, this Bill.

87. By way of example, once regulations have been made under clause 18, the Department may consider it necessary to amend statutory powers to provide financial assistance for relevant education or training, so that they signpost the prohibitions that will apply and which effectively constrain those financial assistance power. Such a power would be in section 2 of the Education and Training Act 1973. There may also be other types of consequential and supplementary etc provision which are required to be made by secondary legislation which may become apparent at a later stage, including following engagement and consultation with stakeholders.

Justification for taking the power

88. The regulations that will be made under the powers set out above will impact upon the arrangements that may be made by relevant funding bodies under various powers in the statute book to fund education or training. It is therefore proposed that the Bill contain a power wide enough to deal with consequential etc. amendments, including consequential amendments to primary legislation, by secondary legislation to ensure the proper functioning of the statute book. This will be done only if Parliament approves the principle of the list under clause 18 and its effect on the funding arrangements as set out in clause 19. It will only involve making amendments which are consequential etc on these provisions and on the secondary legislation made under them.

89. There are precedents for this approach to such consequential etc provision, including section 115 of the Protection of Freedoms Act 2012, section 59 of the Crime and Courts Act 2013, section 73 of the Immigration Act 2014 and section 92 of the Immigration Act 2016.

Justification for the procedure

90. Regulations made in reliance on this provision will be subject to the affirmative procedure if they amend or repeal primary legislation, in order to ensure appropriate Parliamentary scrutiny over the use of this power. This is consistent with the approach of similar powers on the statute book. The power here will be strictly limited to that which is absolutely necessary as a consequence to ensure the proper functioning of the statute book.

Clause 22(2)(c)(ii) and (3)(c): Further education in England: intervention

Power conferred on: Secretary of State

Power exercised by: Directions

Parliamentary Procedure: None

Context and Purpose

91. Sections 56A and 56E of the Further and Higher Education Act 1992 enable the Secretary of State to issue directions to an institution within the further

education sector where the Secretary of State is satisfied as to one of the matters set out in the section, for example that the institution's affairs are being mismanaged. New sections 56A(7)(c) and 56E(7)(c) are inserted into the Further and Higher Education Act 1992. They extend the Secretary of State's direction-making powers in section 56A and section 56E of that Act in respect of governing bodies, where the triggers under sections 56A(2) and 56E(2) are met. These new provisions enable the Secretary of State to direct a governing body to transfer property, rights or liabilities to another body.

Justification for taking the power

92. The power extends the existing direction-making powers that the Secretary of State currently holds under sections 56A and 56E of the Further and Higher Education Act 1992. This is necessary to ensure that the Secretary of State can effectively intervene where considered necessary, as a last resort, in weak or failing colleges to ensure that the required changes can be made, including structural change such as mergers or disaggregation (which is currently not provided for under these legislative provisions).

Justification for the procedure

93. This is a limited extension to an existing power. The Department therefore proposes to follow the precedent of the current arrangements, whereby no parliamentary procedure is required in respect of this power to direct.

Chapter 2

Education Administration and Administration of Further Education Bodies

Clause 23: Further education insolvency: application of other insolvency procedures (Company Voluntary arrangements)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative and Negative (see below)

Context and purpose

94. The Department proposes an amendment of section 33 of the Technical and Further Education Act 2017 (TFEA) in order to extend an existing power. This would be a power to make regulations providing for insolvency legislation to apply in relation to a further education body. The power conferred by section 33 is being extended so that regulations under that section may make the company voluntary arrangement procedure set out in Part 1 of the Insolvency Act 1986 available to further education bodies that are in education administration. This clause will contain a power to amend primary legislation by secondary legislation, and is based on an existing Henry VIII power.

Justification for taking the power

95. The application of Part 1 of the Insolvency Act 1986 to further education bodies that are in education administration will rely, and interact with, provision that already exists in the form of secondary legislation made under the Technical and Further Education Act 2017 which applies Part 1 of the Insolvency Act 1986 to further education bodies that are in "normal administration." In order to avoid having primary legislation that depends for its operation on provision that is in secondary legislation, the Department proposes that the provision needs to apply (with modifications) Part 1 of the Insolvency Act 1986 to further education bodies that are in education administration, and that should be included in regulations under the Technical and Further Education Act 2017 rather than in the Act itself. It is common for provision that applies legislation with modifications to be made by secondary legislation. The amendment of section 33 will enable these regulations to be made.
96. The amendments to section 33 include inserting a power to make regulations that amend Schedules 3 and 4 to the 2017 Act. Those Schedules make provision about the procedure for an education administration by applying the provisions for a normal administration set out in the Insolvency Act 1986 with modifications. One of those modifications disapplies a reference to the company voluntary arrangement procedure in Schedule B1 of the Insolvency Act 1986. Regulations made under section 33 that apply Part 1 of the Insolvency Act 1986 to further education bodies that are in education administration, will need to be able to remove the disapplication of this reference.

Justification for the procedure

97. Section 33 currently provides a power to apply insolvency legislation to further education bodies with amendments to primary legislation. Clause 23 therefore extends an existing power. The Department proposes to retain the current parliamentary procedure, whereby amendments under section 33 are currently subject to the affirmative resolution procedure if the regulations amend an Act. Otherwise the regulations are subject to the negative procedure.

Part 4: Miscellaneous and General

Chapter 1

Institutions within the further education sector: procedure for designation

Clause 25(3): Institutions within the further education sector: Procedure for designation

Power conferred on: Secretary of State

Power exercised by: Administrative Order

Parliamentary Procedure: None

Context and purpose

98. This clause amends the Secretary of State's existing power (in relation to England) to designate institutions under section 28 of the Further and Higher Education Act 1992, as being within the statutory further education sector. The clause allows designation by means of an administrative order, rather than by statutory instrument as is currently required. The clause also makes the same provision regarding the existing power under section 29(1)(b) to exempt certain institutions from the requirements of section 29. This is because any exemption under section 29(1)(b) must be included in the designation order under section 28.

Justification for taking the power

99. The Further and Higher Education Act 1992 ('FHEA') provides the legislative framework for institutions within the statutory further education ('FE') sector (as defined in section 91(3) of FHEA). One of the three types of institutions are Designated Institutions.

100. The Department's non-statutory intervention regime can involve the FE Commissioner making recommendations for governing bodies of institutions within the statutory FE sector which are in financial difficulties. The recommendations can include merger with another institution or transfer of assets, staff and students to a new legal entity. Both recommendations can involve the designation of an institution. A Designated Institution is within the scope of intervention by the Secretary of State and the FE bodies insolvency regime under the Technical and Further Education Act 2017 (TFEA). This provides protection for learners and other benefits.

101. The TFEA also created a special administration regime, 'education administration.' If an FE body has an education administrator appointed the education administrator may seek to transfer its assets, students and staff to another entity to protect student provision. This may involve a merger or establishing a new entity, which would be outside of the statutory FE sector and therefore require the institution to be designated post-transfer. Accordingly improving the method of designating institutions will improve operation of the FE insolvency regime. The first use of education administration was by two FE Corporations in 2019. Whilst the designation power was not used, from the experience, the Department believes that this amendment allowing faster designation of institutions may assist in improving outcomes, including reducing costs of the process which are borne by public funding. An effective insolvency regime will also support DfE's reform programme by assisting FE providers in financial difficulty reach a stronger financial footing.

Justification for the procedure

102. The Department proposes the change from designation by statutory instrument to administrative order for what is considered an uncontroversial administrative procedure. This supports an insolvency regime legislated for 15 years after passage of the FHEA. Other safeguards remain including Ministerial accountability to Parliament and the possibility of judicial review. An obligation to publish future administrative orders in an appropriate manner in the interests of transparency will be included in the clause.

Department for Education
May 2021