

## SKILLS AND POST-16 EDUCATION BILL

### Supplementary 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 Government amendments being tabled to the Bill that confer or amend 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. The department’s original memorandum was published on 19 May 2021<sup>1</sup>. On 27 May 2021, the DPRRC reported at paragraph 40 of their 2<sup>nd</sup> report<sup>2</sup>, that *“there is nothing in this Bill which we would wish to draw to the attention of the House.”*
3. The Government amendments tabled on 5 October consist of:
  - a. A new clause to amend s42B Education Act 1997 on access to information about technical providers in schools. This amends the power in s42B to make secondary legislation;
  - b. An amendment to existing clause 18 (List of relevant providers). This amends the power in clause 18 to make secondary legislation;
  - c. A new clause to allow the Secretary of State to designate 16 to 19 Academies as having a religious character;
  - d. Additional government amendments to clauses 1 and 4 (Local Skills Improvement Plans), 15 (lifelong learning: amendment of the Higher Education and Research Act 2017, “HERA 2017”) and new Chapter A1 (Essay Mills), however these amendments do not create or amend any delegated powers.

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<sup>1</sup> Skills and Post-16 Education Bill, Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee dated 19 May 2021, [292 \(parliament.uk\)](#)

<sup>2</sup>Delegated Powers and Regulatory Reform Committee HL Paper 13, 2nd Report of Session 2021–22 [Second Report \(parliament.uk\)](#)

4. Further to our original memorandum, we provided a note for the DPRRC on the Government amendments tabled on 13 July ahead of Committee Stage in the House of Lords (the note is annexed to this supplementary memorandum). Those amendments were principally to clause 15, and contained no new or amended delegated powers. The amendments were moved, debated and then withdrawn by the Government, and a slightly smaller number of those amendments have now been tabled for Report Stage (the amendments to sections 11 and 65 of HERA 2017 are not included).
5. It was also anticipated at Committee Stage in the Lords that the Government would bring forward further amendments to HERA 2017, on fee limits, ahead of Report Stage and they were expected to include a new delegated power. However, the Government is not bringing forward those amendments and so there are no new or amended powers there to draw to the DPRRC's attention.

## **B. PURPOSE AND EFFECT OF THE BILL**

6. As set out in our Memorandum dated 19 May 2021, the Bill contains four Parts, repeated here for the DPRRC's convenience.
7. Part 1 of the Bill (Skills and Education for Work) contains three chapters.
8. 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 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 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.
9. 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.

10. 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.
11. Part 2 (Quality of Provision) contains two clauses.
12. 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.
13. Clause 17 (Quality assessments of higher education) amends the Higher Education and Research Act 2017 to clarify that the Office for Students can make decisions on regulatory intervention and registration by reference to minimum expectations of quality.
14. Part 3 (Protection for Learners) contains two chapters.
15. Chapter 1 (Regulation of post-16 education or training providers) enables the Secretary of State to make regulations to provide for a list of post-16 education or training providers, in particular Independent Training Providers 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.
16. 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.
17. 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**

18. The government amendments tabled on 5 October contain no powers to make secondary legislation that are capable of amending primary legislation.

19. In summary, the government amendments to the Bill contain three delegated legislative powers as follows:

- a. **New clause after clause 13: Information about Technical Education and Training: access to English schools** amends s42B Education Act 1997 by requiring school proprietors to ensure that pupils have mandatory encounters with technical education providers. This clause also extends the regulation making power to enable the Secretary of State to make provision specifying the numbers and types of providers to be given access at the mandatory encounters.
- b. **An amendment to clause 18**, relating to the list of post-16 providers, and the power it provides to make regulations.
- c. **New clause before clause 25: 16 to 19 Academies - designation as having a religious character** relates to designation of 16 to 19 Academies as having a religious character, which contains the power to designate institutions by statutory instrument with no parliamentary procedure. This clause also contains a power to make regulations concerning the procedure for designation by statutory instrument subject to negative parliamentary procedure.

#### **Part 1: Skills and Education for Work**

##### **Chapter 2**

##### ***New Clause after clause 13: Information about Technical Education and Training: access to English Schools***

*Power conferred on: Secretary of State*

*Power exercised by: Statutory Instrument*

*Parliamentary Procedure: Negative*

## Context and Purpose

20. New clause *Information about Technical Education and Training: access to English schools* inserts sub sections (1A), (2A), (2B) and (9A) into s42B Education Act 1997 and amends sub section (1), (5) and (8) in that section.
21. This clause amends s42B Education Act 1997 to require school proprietors to ensure that pupils have two mandatory encounters with providers of approved technical education qualifications or apprenticeships during each of the first and second key phases of their education. The proprietor of a school will also be required to offer a third encounter with providers but that will be optional for pupils to attend.
22. Clause 1(7) extends the Secretary of State's regulation making power in s42B(8) Education Act 1997. s42B(8) currently enables the Secretary of State to make provision supplementing s42B(1), for example provision about the types of providers to be given access to pupils, to which pupils they are to be given access and how and when. Clause 1(7) will extend this regulation making power so that it also applies to the newly inserted s42B(2A). s42B(2A) requires the proprietor of a school to ensure that registered pupils meet at least one provider (or any other number as may be specified by regulations) during each of the first and second key phases of their education.

## Justification for the power

23. Extending the regulation making power so that it also applies to s42B(2A) will enable the Secretary of State to by regulation set out the types and number of providers to be given access to pupils during the encounters.
24. This is necessary to enable the Secretary of State to ensure that pupils have sufficient exposure to different technical education courses and training providers to enable them to make informed choices about their future.
25. The department considers that delegated legislation is the appropriate means of setting this out. This is because the requirements may be detailed and may also need to be amended periodically as the department monitors school's compliance and the impact the new duties are having on pupils. If the Secretary of State was unable to make these changes through delegated legislation, that would restrict his ability to implement changes in policy in line with these developments.

## Justification for the procedure

26. The department seeks to maintain the same procedure (the negative resolution procedure) for regulations made under these delegated powers as Parliament determined in 2017 was appropriate for the existing delegated power.

### **Part 3: Protection for Learners**

#### **Chapter 1**

##### **Amendment to regulation of post-16 education or training providers**

##### ***Clause 18(1) and 18(6): list of relevant providers***

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations

*Parliamentary Procedure:* Affirmative

##### **Context and Purpose**

27. By way of background to the amendment proposed, and as set out in the department's memorandum dated 19 May 2021, the existing power contained in clause 18(1)(a) 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. The existing power contained in clause 18(1)(b) allows the Secretary of State to set out other matters in connection with the keeping of the list. By operation of the existing 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. The purpose of this existing 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. Further detail on the context and purpose of the existing powers in clause 18(1) is set out in the department's memorandum dated 19 May 2021.
28. The relevant amendment is proposed to clause 18(6) and expressly enables the regulations made under clause 18(1) to include discretionary elements. The purpose of this amendment is to ensure that the regulations can contain a legally certain and also practically workable set of conditions, where appropriate

judgements can be made by the Secretary of State or other suitable person about whether a relevant provider has satisfied those conditions.

29. For example, if the regulations set out that a provider must have a student support plan as a condition to being on the list, this amendment expressly provides that it will be permissible for the regulations also to allow the Secretary of State or other suitable person to determine whether that student support plan is of reasonable quality. This sort of discretion may also be necessary in making workable decisions about conditions which relate to ensuring that persons having control and management of, or legal responsibility and accountability for, the relevant provider are fit and proper persons to be involved in that activity; or in relation to relevant providers taking action specified in directions issued by the Secretary of State.

#### Justification for taking the power

30. The amendment proposed is needed to ensure a practically workable set of conditions to be prescribed under the relevant regulations made under clause 18(1). The nature of some of the conditions will likely require judgements to be made about whether a provider has met relevant criteria or a certain specified standard in order for them to be useful for the purpose intended. The amendment means that the Secretary of State or other suitable person can be allocated a discretionary function in the regulations to make these sort of judgements (the exact scope of this function would be set out in the regulations). For example, a relevant provider may be required to have a student support plan (see the example condition set out in clause 18(7)(a)). However, that plan may not be of sufficient quality to prevent or mitigate the adverse effects of a disorderly cessation in the provision of education or training unless it is permissible for the Secretary of State or other suitable person to evaluate the quality of that plan and this amendment expressly allows for that to be the case. The ability or requirement to confer an exercise of a discretion of this nature is fairly commonly seen in other primary legislation. For example, section 13(1)(c) of HERA 2017 sets out that the Office for Students may approve a student protection plan produced by a higher education provider. Indeed, the proposals in relation to student support plans for relevant providers under this measure have similarities to student protection plans produced by higher education providers under this power. The discretion sought by this amendment is needed and justifiable for similar reasons as for this function that already exists for the Office for Students.
31. The conferral of this discretionary function will remain limited by the scope of this power (and the scheme associated with being on the list), given that it is limited overall 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 (see clause 19(5)). As set out in clause 21(3), before making the first regulations under clause 18(1), the Secretary of State must consult before deciding upon the detail of the scheme, which could include taking views on whether it is suitable for a discretionary element to be included within any proposed condition.

#### Justification for the procedure

32. The regulations made under the existing clause 18(1) 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). This procedure is not altered by the amendment proposed; any discretionary function conferred on the Secretary of State or other person in regulations by virtue of the amendment to clause 18(6) will, likewise, be included in the consultation obligation and additional Parliamentary scrutiny through the affirmative procedure.

#### **Part 4: Miscellaneous and General**

##### 16 to 19 academies: Designation as having a religious character

##### ***New Clause before clause 25: 16 to 19 academies: designation as having a religious character***

*Power conferred on: Secretary of State*

*Power exercised by: Statutory instrument*

*Parliamentary Procedure: None*

##### Context and purpose

33. New clause “16 to 19 academies: designation as having a religious character” inserts sections 8A and 8B into the Academies Act 2010.

34. This clause provides for the Secretary of State to designate a 16 to 19 academy as having a religious character. Section 8A(3) provides that the Secretary of State must specify the religion or religious denomination in relation to which the academy is designated. Section 8A(5) provides for designation to be made by statutory instrument without parliamentary procedure.

35. The purpose of the clause is to allow sixth form colleges designated as having a religious character under section 33J(2) of the Further and Higher Education



Act 1992 to become 16 to 19 academies, but retain the protections of a designated faith institution, as well as providing for existing or new 16-19 academies to obtain designation has having a religious character. Section 8B effectively replicates sections 33J(2), 44 and 45 of the Further and Higher Education Act 1992. The process for designation set out in new section 8A is equivalent to that applicable to independent schools under section 69(3) read with section 124B of the School Standards and Framework Act 1998.

#### Justification for taking the power

36. Designation of a 16 to 19 academy as having a religious character facilitates exemption from section 91(2) of the Equality Act 2010, therefore it is necessary that the Secretary of State has a degree of oversight over which institutions are designated. It would, however, be inappropriate for Parliament to do so, because the establishment or restructure of an academy is in any event confirmed by administrative order. In addition, the decision to designate a 16 to 19 academy as having a religious character will involve the exercise of discretion in each case. This will be guided by an administrative procedure to be set out in regulations which may involve the consideration of evidence, including the results of consultation, better suited to the Secretary of State than Parliament.

37. Under current legislation, independent schools are designated as having a religious character by order made by statutory instrument without parliamentary procedure (this is under section 69(3) read together with sections 124B and 138 of the School Standards and Framework Act 1998). Section 8A replicates this but in respect of 16-19 academies. The department considers that it is both sensible and uncontroversial to extend the power of the Secretary of State to be able to designate 16 to 19 academies as having a religious character.

#### Justification for the procedure

38. There is precedent for the Secretary of State's designation power to be by statutory instrument without parliamentary procedure, as this is the process currently used for foundation schools, voluntary schools and independent schools. This creates legal consistency with these designation processes. The department also proposes that to exercise this power by statutory instrument without parliamentary procedure would be uncontroversial, as designation decisions will be made according to a procedure set out in regulations, as is currently the case for other types of institutions.

#### ***New Clause before clause 25: 16 to 19 academies: designation as having a religious character***

*Power conferred on: Secretary of State*

*Power exercised by: Statutory Instrument*

*Parliamentary Procedure: Negative*

### Context and Purpose

39. This clause also provides for the Secretary of State to specify in regulations the procedure to be followed in connection with the designation of a 16 to 19 academy as having a religious character. It is similar to the existing power of the Secretary of State to make such regulations in respect of Independent Schools under section 69(5) read together with section 124B of the School Standards and Framework Act 1998. It is necessary to have separate regulations for 16 to 19 academies because section 4(1B) of the Education Act 1996 provides expressly that a 16 to 19 academy is not a school.

40. The regulations that the Secretary of State will make under this power will be similar in form and content to the Religious Character of Schools (Designation Procedure) (Independent Schools) (England) Regulations 2003 (SI 2003/2314).

### Justification for the power

41. This power is required to provide a legislative framework for the process by which a 16 to 19 academy could apply to be designated as having a religious character. Regulations will inform the proprietor of an academy about how they can apply and what factors will be considered before they can acquire religious character designation.

42. As currently provided for independent schools, it is appropriate that this detail be provided via regulations rather than included in primary legislation because the procedural requirements for the application process will need to be aligned with the processes for other types of institutions, which are set out in regulations. It is also possible that the application process and associated requirements will be adjusted for different circumstances, such as where the predecessor institution to a 16-19 academy was designated as having a religious character, and this power will allow the flexibility to do so.

### Justification for the procedure

43. The regulations would be procedural in nature and set out an administrative application process in respect of religious character designation. The department considers that it would not be a good use of Parliament's time to be

required to review these administrative details. These regulations will merely outline what should be done when applying and what factors will be considered in respect of the religious character designation procedure. The department considers the same level of parliamentary procedure as was deemed appropriate for the making of regulations under the School Standards and Framework Act 1998 to be appropriate here.

**Department for Education**  
**5 October 2021**