



Tertiary Education and Research (Wales) Bill

Statement of policy intent for secondary legislation, direction making powers and guidance

Introduction

This paper summarises the Welsh Ministers' powers for making secondary legislation, direction making powers and guidance outlined in the Tertiary Education and Research (Wales) Bill (the Bill), as introduced to the Senedd Cymru on 1 November 2021.

The paper explains why these powers have been chosen and the current government policy for use of these powers. The justification for the Senedd procedure selected is set out in table 5.1 and 5.2 of the Explanatory Memorandum.

Regulations made using these powers will be subject to consultation with key stakeholders in the tertiary education sector. This document is intended to provide stakeholders with an initial opportunity to provide feedback on the intended use of these powers so as to ensure robust and effective policy.

The Welsh Ministers have considered the use of powers in the Bill as set out below and are satisfied that they are necessary and justified.

Overview of the Bill

The Bill contains 7 Parts and 4 Schedules.

- Part 1 establishes a new arms-length Welsh public body, the Commission for Tertiary Education and Research (“the Commission”), dissolves the Higher Education Funding Council for Wales and outlines the strategic duties.
- Part 2 outlines the Commission’s regulatory functions with regards to a register of Tertiary Education Providers, registration procedure for the Tertiary Education Providers, quality assurance frameworks.
- Part 3 makes provision for the Welsh Ministers to fund the Commission and the Commission to fund tertiary education and research.
- Part 4 contains provisions in respect of Welsh Apprenticeships.
- Part 5 contains the learner protection, complaints procedures and learner engagement provisions.
- Part 6 contains the information and data-related duties and powers of the Commission.
- Part 7 contains miscellaneous provisions, including provisions relating to the dissolution of higher education corporations in Wales.

Powers inherited from existing legislation

The Bill includes 20 regulation-making powers largely inherited from existing legislation, these powers are primarily based upon, with some modification, provisions of the Higher Education (Wales) Act 2015 and the Learning and Skills Act 2000.

Policy area	Section of the Bill	Current legislation
Fees, qualifying courses and qualifying persons	30(6)	Section 5(2)(b) of the Higher Education (Wales) Act 2015
	30(8)(b)	Section 5(5)(b) of the Higher Education (Wales) Act 2015
	30(10)	Section 5(9) of the Higher Education (Wales) Act 2015
	44(6)	Section 5(3) of the Higher Education (Wales) Act 2015
	82	Section 57(1) of the Higher Education (Wales) Act 2015
Quality assurance in higher education	52(8)	Section 17(4)(a) of the Higher Education (Wales) Act 2015
Inspection of further education and training	55(1)(f)	Section 75(1)(e) of the Learning and Skills Act 2000
	55(4)	Section 77(2) of the Learning and Skills Act 2000
	59(1)	Section 76(3) of the Learning and Skills Act 2000
	61(9)	Section 83(7) of the Learning and Skills Act 2000
Regulation and decision reviews	77(3)	Section 44(3) of the Higher Education (Wales) Act 2015
Designation of other providers of tertiary education	81(4)	Section 3(4) of the Higher Education (Wales) Act 2015
HE Governance	133(2)	Paragraph 2-11 of Schedule 7A to the Education Reform Act 1988
	134(2)	Section 125(2) to (4) of the Education Reform Act 1988

Powers of the Commission for Tertiary Education and Research

The Bill also provides for direction and guidance provisions to be exercised by the Commission. The purpose and intended effect of these provisions are set out in the Explanatory Memorandum which accompanies the Bill, these powers are not included in this statement of policy intent as how they will be exercised is a matter for the Commission.

Other documentation

This document should be read in conjunction with the following:

- The Tertiary Education and Research Bill;
- The Explanatory Notes to the Bill;
- The Explanatory Memorandum to the Bill, in particular chapters 3 and 5.

Guidance and general directions to the Commission

Section	Form	Provision	Procedure
18	Guidance	In exercising its functions, the Commission must have regard to guidance given to it by the Welsh Ministers	No procedure
19	Direction	The Welsh Ministers may give the Commission general directions about the exercise of any of its functions	No procedure

Description of powers

Section 18 requires the Commission to have regard to guidance issued by the Welsh Ministers about the exercise of its functions (i.e. powers and duties) conferred by the Bill, or by Regulations made under it.

Section 19 enables the Welsh Ministers to issue directions to the Commission about the performance of any of its functions, subject to certain limitations to protect the institutional autonomy of tertiary education and research providers, the academic freedom of higher education providers and the ability of the Commission to determine funding allocations to individual providers. The limitations do not prevent any direction issued under this section from being framed by reference to a course of study, or parts of courses of study, being provided and assessed through the medium of Welsh.

The Welsh Ministers are required to consult the Commission before issuing a general direction under these powers. They are also required to keep any general direction given to the Commission under review. The Welsh Ministers must also publish any general direction given to the Commission under this section and report any such directions to the Senedd and lay a copy of the direction before the Senedd

This is a continuation of an existing power whereby the Welsh Ministers are able to give general directions to HEFCW about the exercise of its functions.

Policy purpose and intent

The guidance provision is a general power needed so that the Welsh Ministers are able to issue relevant guidance when the need requires.

The power to direct the Commission is necessary to ensure that the Welsh Ministers are able, should the need arise, to direct the Commission in the exercise of its functions.

For example, the Welsh Ministers might want to direct the Commission to plan for the provision of a particular type of education, such as part-time or distance learning provision, or in respect of a broad area of education, such as STEM subjects. In addition, the Covid-19 pandemic has highlighted the need to consider the circumstances under which the Welsh Ministers may require the Commission to take timely and specific action to deal with events that have significant implications for tertiary education and research in Wales.

Additional functions of the Commission

Section	Form	Provision	Procedure
20(1)	Regulations	Power for the Welsh Ministers to confer supplementary functions on the Commission.	Affirmative
20(4) & (5)	Direction	Power for the Welsh Ministers to direct that their functions in relation to the land or other property of a higher or further education institution in Wales, may be exercised by the Commission where the Welsh Ministers are entitled to a right or interest in respect of that property	No procedure

Description of powers

Section 20 enables the Welsh Ministers, by way of regulations, to confer supplementary functions on the Commission. A supplementary function conferred on the Commission under these powers must be a function that is exercisable by the Welsh Ministers and relate to the provision, or proposed provision of tertiary education, or to the carrying out, or proposed carrying out of research and innovation. The power to confer supplementary functions on the Commission is a continuation of current arrangements that are in place for the Welsh Ministers to confer supplementary functions on HEFCW under section 69(5) of the Further and Higher Education Act 1992.

This section also enables the Welsh Ministers to direct that their functions in relation to the land or other property of an institution in Wales within the higher or further education sector, may be exercised by the Commission, where the Welsh Ministers are entitled to a right or interest in respect of that property. The Commission is required to exercise these functions in accordance with directions given by the Welsh Ministers.

Policy purpose and intent

Regulations provide the Welsh Ministers with appropriate flexibility to ensure the Commission is enabled to exercise all relevant functions in relation to tertiary education, research and innovation should the sector evolve in the future.

Currently the Welsh Ministers are able to direct HEFCW where any property or land is, or was, held or used for the purposes of an institution in the higher education sector in Wales where the Welsh Ministers are entitled to any right or interest in respect of the property or land. The Bill makes provision for the Welsh Ministers to direct the Commission in relation to any of their interests in property or land of an institution in either the higher or further education sectors in Wales so that the Commission exercises the Welsh Ministers functions on

their behalf. This is appropriate as the Commission will in future have regulatory oversight of both further and higher education institutions in Wales.

For example if the Welsh Ministers provide funds to support investment in the further education estate under the 21st Century Schools and Colleges programme there could be legal charges arising from such investments. In future, the Welsh Ministers may wish the Commission to be able to manage such funding arrangements on their behalf.

Categories of registration

Section	Form	Provision	Procedure
23(2)	Regulations	Requires the Welsh Ministers to specify one or more categories of registration for which provision must be made in the register of tertiary education providers.	Affirmative
23(5)	Regulations	Allows the Welsh Ministers to prohibit the registration of a provider in one category of the register at the same time that it is registered in one or more of the other categories.	Negative
23(8)	Regulations	Power to make provision about the information which must be contained in a provider's entry in the register.	Negative

Description of powers

These powers allow secondary legislation to set out different categories of registration, whether providers are prohibited from registering in multiple categories of registration, and the information which must be contained on the register.

Policy purpose and intent

The register of tertiary education providers is intended to be a flexible mechanism for proportionate and accountable regulation of the tertiary education sector in Wales. In particular, the register is intended to enable appropriate regulation for tertiary education providers in Wales, whose courses are designated for the purposes of Welsh Government student support under the Teaching and Higher Education Act 1998.

The regulation making power in section 23(2) will enable categories of registration to be created, applicable to different types of tertiary education providers as appropriate. The specification of different categories of registration may become necessary if new forms of student support funding are introduced by Welsh Government to support expansion of post-compulsory education opportunities, such as in non-degree higher technical and vocational education and training.

Furthermore, the funding structure (and hence appropriate regulation) of tertiary education (particularly higher education) across the UK has changed frequently in recent years, with changes in other UK administrations often having an effect on funding policy in Wales.

These changes have occurred at a rate faster than is appropriate or practicable for the Welsh Government to respond with primary legislation regarding the details of regulation in each and every instance. The Bill enables details of the regulatory framework to be changed in response to any future changes in the structure or funding of the tertiary sector in Wales.

The categories of registration to be prescribed in regulations will be informed by engagement and consultation with stakeholders, the current government policy proposal is to prescribe two categories of registration:

- Higher Education Providers (Core) – Providers registered in this category will be eligible for automatic designation for Welsh Government student fee and maintenance support for higher education courses at the higher fee level, currently £9000 per year, provided under the Teaching and Higher Education Act 1998. Providers registered in this category will also be eligible for higher education grant funding from the Commission (see ‘Funding’). Providers in this category will be subject to registration conditions outlined in the Bill and in regulations (see ‘Conditions of registration’).
- Higher Education Providers (Alternative) – Providers registered in this category will be eligible for automatic designation for Welsh Government student fee and maintenance support for higher education courses at the lower fee level, currently £6165 per year, provided under the Teaching and Higher Education Act 1998. Providers in this category will be subject to registration conditions outlined below (see ‘Conditions of registration’).

It is not current government policy to create any categories for providers which do not provide higher education. These providers will continue to be primarily regulated through the terms and conditions attached to grant funding received from the Commission. The specification of registration categories, and associated conditions, in regulations provides the flexibility that categories for further education providers (that are not providing higher education), apprenticeship and training providers, and other forms of tertiary education provider, could be provided for in the event of future changes in funding and regulatory priorities in the sector.

It is also intended, subject to there being the two proposed categories of registration, to prescribe in regulations under section 23(6) that providers can only register in one of the categories.

Conditions of registration

Section	Form	Provision	Procedure
25(3)	Regulations	Power for the Welsh Ministers to provide for further initial conditions of registration	Affirmative
30(2)(b)	Regulations	Power for the Welsh Ministers to specify a category of registration in relation to which a fee limit condition is to apply	Affirmative
31(1)	Regulations	Power for the Welsh Ministers to specify categories of registration which are to be subject to mandatory ongoing registration conditions in respect of equal opportunities	Affirmative
32	Regulations	Power for the Welsh Ministers to provide for further mandatory ongoing registration conditions	Affirmative

Description of powers

Section 25(1) outlines initial conditions of registration which a tertiary education provider in Wales must satisfy to become registered. The Welsh Ministers may make regulations under section 25(3) providing for further initial conditions of registration which could apply to one or more categories of registration.

Section 29 outlines mandatory ongoing registration conditions which a provider must satisfy to remain registered. The Welsh Ministers may make regulations under section 32 providing for further mandatory ongoing registration conditions which may apply to one or more categories of registration.

The regulatory system created by the Bill is designed to be fit for the future and therefore must be allowed to adapt to changing circumstances. There may be a need to create new initial and ongoing registration conditions applying to different categories of registration in addition to those specified in primary legislation from time to time, in response to changing regulatory needs.

Section 30(2) enables the Welsh Ministers may also specify categories of registration in relation to which the Commission must impose an ongoing registration condition on fee limits, whilst section 31(1) allows the Welsh Ministers to specify the registration categories to be subject to the ongoing registration conditions on equal opportunity.

Policy purpose and intent

In addition to the initial conditions of registration outlined in section 25(1), Welsh Government intends that the following initial conditions of registration should apply to the respective categories of registration. These categories are provided for in regulations rather than on the face of the Bill in order to retain the flexibility to alter or amend these provisions.

Type of condition	Condition	Category
Initial	Consumer law compliance – It is intended that regulations will provide for an initial registration condition for these categories that relate to the information provided to prospective students about a provider, its courses, and its terms and conditions of contracts with students. This registration condition will enable the Commission to require that providers seeking to register demonstrate their compliance with their obligations under consumer law, and in particular with any guidance published for higher education providers by the Competition and Markets Authority.	Core and Alternative
Initial	Charitable status – It is intended that regulations will provide for an initial registration condition for this category that requires providers to be a charity. This would continue current policy established by the Higher Education (Wales) 2015 Act, which requires ‘regulated institutions’ in Wales to be charitable providers.	Core

It is also intended, subject to there being the two proposed categories of registration, to prescribe in regulations under section 31(1) that both categories are subject to the mandatory ongoing registration conditions in respect of equal opportunities.

It is not currently intended to specify any further mandatory ongoing registration conditions for any category of registration.

De-registration

Section	Form	Provision	Procedure
39(2)	Regulations	Power to set out further circumstances where the Commission must remove an institution from one or more categories in the register or all categories of the register	Affirmative
39(6)	Regulations	Power for Welsh Ministers to make transitional or saving provisions in connection with the removal of an institution from a category of the register.	No procedure
41(13)	Regulations	Power to make transitional or saving provisions in connection with the voluntary or consensual removal of an institution from a category of the register.	No procedure

Description of powers

These powers enable secondary legislation to provide for specific circumstances, additional to those set out in the Bill, where an institution is removed from the register or from a category of the register, and for transitional and savings provisions to be made when a provider is removed from the register, whether mandatorily or voluntarily.

Policy purpose and intent

The power under section 39(2) is intended to ensure that any emerging circumstances which might require that a registered provider be removed from the register or a particular category of the register can be specified in subordinate legislation.

The powers under sections 39(6) and 41(13) are intended to ensure that public funds and students' interests are protected in the event that a provider ceases to be on the register. This may include ensuring that the Commission retains certain regulatory powers in respect of a de-registered provider, or that certain funding streams remain temporarily available to students at a de-registered provider in order to ensure course continuation and completion.

These powers should be considered as contingency powers and are only expected to be used in rare and exceptional circumstances.

Fees, qualifying courses, and qualifying persons

Section	Form	Provision	Procedure
30(4)	Regulations	Power for the Welsh Ministers to specify a qualifying course.	Negative
30(8)(b)	Regulations	Power for the Welsh Ministers to specify who is a qualifying person for the purposes of paying regulated course fees.	Negative
30(10)	Regulations	Power for the Welsh Ministers to set out when fees payable to a provider in respect of a course it provides on behalf of a registered provider are to be treated as payable to the registered provider for the purposes of fee limits.	Negative
44(6)	Regulations	Power for the Welsh Ministers to set the maximum amount that the fee limit specified in a fee limit statement may not exceed.	Affirmative
82	Regulations	Power for the Welsh Ministers to specify further exceptions to the definition of 'fees' for the purposes of Part 2.	Negative

Description of powers

These powers enable the Welsh Ministers to specify a description of 'qualifying courses' and 'qualifying persons' for the purposes of regulating the maximum tuition fee limit of qualifying courses provided by, or behalf of registered providers.

They also enable regulations to specify circumstances where fees paid to a person providing a course on behalf of a registered provider are to be treated as paid to the registered provider for the purposes of fee limits.

The Welsh Ministers currently hold similar powers under sections 5 and 57 of the Higher Education (Wales) Act 2015.

Policy purpose and intent

These regulations enable the Welsh Ministers to provide for fee limits to apply to different courses or different groups of students in response to any future changes to the ways in which higher education providers charge fees in Wales, and also any changes in the form of student support offered by Welsh Government.

Qualifying courses are currently prescribed in the Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015. These Regulations provide that qualifying persons are those persons who, on the first day of the relevant academic year, fall within the Schedule to the Regulations, save for those persons who are not eligible for support under the exceptions listed.

Section 30(10) of the Bill ensures that when registered providers have courses delivered on their behalf, through a sub-contracting or franchise arrangement, providers are not able to circumvent the statutory tuition fee limit. Regulations will be made under this section to ensure that the variety of complicated franchise arrangements which may exist in the higher education sector do not create any circumstances where the fee limit may be circumvented.

Prescribing descriptions of 'qualifying courses' and 'qualifying persons' is a technical matter which will likely require updating from time-to-time. Any regulations made under section 30(10) will be only required in response to evolving forms of franchise and sub-contracting arrangements between tertiary education providers.

Maximum tuition fee

The Higher Education (Amounts) (Wales) Regulations 2015 currently set out the maximum amount of fees that may be payable for qualifying courses by providers regulated under the Higher Education (Wales) Act 2015. Welsh Government policy regarding the maximum tuition fee for qualifying higher education courses remains unchanged.

Quality assurance in higher education

Section	Form	Provision	Procedure
52(5)	Regulations	Power to make regulations to require higher education assessments and reports at specified intervals.	Negative
52(8)	Regulations	Power to make provision about the circumstances in which a person is to be treated as responsible for providing a course.	Negative

Description of powers

Section 52 places a duty on the Commission to assess, or make arrangements to assess, the quality of education provided by registered higher education providers. This duty includes the quality of education provided on behalf of a registered higher education provider, such as under a franchise or sub-contracting arrangement.

Section 52(5) enables the Welsh Ministers to determine the minimum intervals at which registered higher education providers should be required to undergo a quality assessment, and to prescribe the period within which assessment reports must be published.

Section 52(8) allows the Welsh Ministers to specify circumstances where an external provider should or should not be treated as providing all or part of a course on behalf of a registered institution. The Welsh Ministers have an equivalent power to that in section 52(8) under section 17(4) (a) of the Higher Education (Wales) Act 2015.

These powers cover largely technical and detailed matters related to quality assurance in higher education.

Policy purpose and intent

Higher education assessment intervals

It is currently anticipated that regulations made using these powers shall specify that higher education assessments should take place at least once every six years. This is consistent with HEFCW's current Quality Assurance Framework, and also with Estyn's usual cycle of inspections in other parts of the post-compulsory education sector.

The minimum interval between higher education quality assessments (section 52(5)) may need to be changed from time to time in response to changing resource availability or assessments of risk regarding quality in the higher education sector.

External providers

Whilst there is no immediate intention to make such regulations, section 52(8) provides the Welsh Ministers with appropriate flexibility to make the necessary provision should any novel forms of partnership arrangements for the delivery of higher education courses develop in the future.

Inspection of further education and training

Section	Form	Provision	Procedure
55(1)(f)	Regulations	Power to specify education and training which the Chief Inspector of Education and Training (the “Chief Inspector”) must inspect, in addition to education and training set out on the face of the Bill.	Negative
55(4)	Regulations	Power to make provision about inspection and report interval periods.	Negative
59(1)	Regulations	Power to confer further functions on the Chief Inspector in connection with the education and training described in section 55(1).	Negative
61(9)	Regulations	Power to make further provision in relation to the obligations to provide the Chief Inspector with information in connection with an area inspection; and to require area inspection reports to be published before the end of a certain period.	Negative

Description of powers

Section 55 of the Bill sets out the inspection remit of the Chief Inspector of Education and Training in Wales. The regulation making powers under section 55(1)(f) and section 59(1) are intended to extend or clarify the remit of the Chief Inspector in response to changing forms of provision in the education and training sector.

Section 55(4) enables the Welsh Ministers to:

- specify the minimum interval between inspections, and
- prescribe the period within which inspection reports must be published.

Section 59 enables the Welsh Ministers to specify any other functions of the Chief Inspector in respect of education and training listed in section 55(1).

Section 61 sets out provision for area inspections, including the requirements for bodies listed in section 61(7) to provide information to the Chief Inspector. Section 61(9) enables the Welsh Ministers to make:

- further provision with respect of the duty to provide information ,
- provision as to the time period before the end of which reports of area inspections must be published.

The Welsh Ministers currently hold similar regulation making powers to all of the above listed powers under Part 4 of the Learning and Skills Act 2000.

Policy purpose and intent

Sections 55(1)(f) and section 59(1) - Remit and further functions of the Chief Inspector

The Welsh Government does not currently intend to use the powers in section 55(1)(f) and 59(1) of the Bill..

These powers are necessary for future-proofing. For example, regulations may be required to provide for the inspection of initial teacher education for post-compulsory providers, in a similar way to current duties to inspect youth and community worker training or initial teacher education for schools.

Section 55(4) and section 61(9)(b) - Inspection intervals and reports

The Inspection of Education and Training (Wales) Regulations 2001 (“the 2001 Regulations”), as amended (most recently by the Education (Amendments Relating to the Intervals for Inspection of Education and Training) (Wales) Regulations 2020) require that:

- following the conclusion of the inspection period ending on 31st August 2024, inspections will be conducted once every six years,
- inspection reports be made within the period of 70 working days from the date on which the inspection or area inspection is completed . Welsh Government policy on inspection reports remains unchanged.

Welsh Government policy in respect of inspection intervals and the timing of reports, in respect of both inspections under section 55(1) of the Bill and area inspections under section 61 of the Bill remains unchanged, and regulations will be made under section 55(4) and 69(9)(b) restating existing provision as set out in the 2001 Regulations.

Section 69(9)(a) - Obligation to provide the Chief Inspector with information

It is not currently intended to make regulations under section 69(9)(a), the power provides the Welsh Ministers with the necessary flexibility to make provision in respect of practical matters such as the way in which the duty in 61(7) may be satisfied.

Intervention in the conduct of further education institutions

Section	Form	Provision	Procedure
68(1)	Direction	Power for the Welsh Ministers to intervene in the conduct of a further education institution if they are satisfied that one or more grounds for intervention exist.	No procedure

Description of powers

If the Welsh Ministers are satisfied that one or more of the grounds for intervention (as set out in section 67 of the Bill) exist, they may, pursuant to section 68 of the Bill, give a direction to the governing body of a further education institution, requiring the governing body to, amongst other things:

- collaborate with such persons and on such terms as may be specified in the direction;
- make a resolution for the body to be dissolved on a date specified in the direction.

Further detail on these intervention powers are provided in paragraphs 3.196 – 3.204 of the Explanatory Memorandum.

Policy purpose and intent

The intervention functions serve an important role in effecting the policy to protect the provision of further education in Wales. However, it is intended that in most cases the functions will be used only when the Commission has exhausted its intervention functions or where the issue is so serious that more urgent action is required.

Regulation and decision reviews

Section	Form	Provision	Procedure
77(3)	Regulations	A duty on the Welsh Ministers to make provision in connection with decision reviews. For example, details regarding the role of the decision reviewer and procedure to be followed (see subsection (4)).	Negative

Description of powers

Section 77 sets out the Welsh Ministers' functions in respect of appointing a person or panel to conduct decision reviews under sections 43 and 76 of the Bill.

A provider may request a review where the Commission makes use of the following powers:

- Refusing to register a provider (section 23).
- Imposing or varying a specific ongoing registration condition (section 27).
- Directing a provider in respect of failure to comply with ongoing registration conditions (section 37).
- Removing a provider from a category of the register (section 39).
- Specifying the date on which a provider is to be removed from a category of the register (sections 40 and 41).
- Giving a notice rejecting a fee limit statement (section 45).
- Directing a provider in respect of failing to co-operate with the Commission or a designated body as required under section 71.

Section 77(3) requires the Welsh Ministers to make provision through regulations in connection with the form, content and process of carrying out reviews. The Welsh Ministers currently hold a similar duty to make such provision in respect of reviews of HEFCW decisions under section 44 of the Higher Education (Wales) Act 2015.

Policy purpose and intent

Section 77(4) sets out the matters that regulations made under section 77(3) may, among other things, provide for:

- the grounds upon which a decision reviewer may make recommendations
- the kinds of recommendations that might be made
- the period within which an application for review might be made

- the procedure to be followed by the reviewer(s)
- the steps to be taken by the Commission and/or the Welsh Ministers following a review

The regulations would adopt an approach broadly similar to the arrangements currently provided for in the Higher Education (Fee and Access Plans)(Notices and Directions)(Wales) Regulations 2015, in respect of decision reviews under the Higher Education (Wales) Act 2015.

Subject to consultation with stakeholders, the current policy intention about the detail to be prescribed in these regulations is summarised below:

Topic Area	Description
Grounds on which decision reviewer(s) may make recommendations to the Commission	<ul style="list-style-type: none"> • that the governing body of a provider provides evidence in support of the matter for which it is seeking a review that has not previously been presented to the Commission; • that the reviewer considers the Commission has disregarded a material factor which it should have considered in the process of informing its decision; or • that the reviewer considers the Commission’s decision to be disproportionate in light of the evidence submitted to it.
Kinds of recommendations that might be made	<ul style="list-style-type: none"> • that the Commission should reassess its original decision taking into account - <ul style="list-style-type: none"> ○ any additional evidence provided to the decision reviewer(s) by the governing body of the institution requesting a review; ○ any material factors which the decision review considers it has not previously considered; or ○ any reasons the decision reviewer may have for considering the decision previously reached to be disproportionate.
Period within which an application for review might be made	<ul style="list-style-type: none"> • Within 40 days of the provider being notified by the Commission of its intended course of action.
Procedure to be followed	<ul style="list-style-type: none"> • The reviewer(s) should be required to provide the Commission with (i) details of the decision to be reviewed; (ii) details of the grounds on which the application for review has been made; and (iii) a copy of the information provided by the provider in support of the application for review. • The reviewer(s) should be required to provide both the provider and the Commission with an anticipated timetable for completing the decision review;

Topic Area	Description
	<ul style="list-style-type: none"> • The reviewer(s) may request additional information from both the Commission and the provider and if doing so they should be required to inform both the Commission and the provider about such a request; • To ensure that decision reviews are conducted in a timely manner a cut-off point of 28 days should apply in respect of the provision of further information to the decision reviewer(s) from either the Commission or the provider; • To ensure that all parties are updated about the progress with the review the decision reviewer(s) should be required to supply any additional information provided by the provider to the Commission and vice versa; • The reviewer(s) should be required to consider whether it is appropriate in the context of a specified review to accept representations from the Commission in response to additional information received from the provider in and from the provider in response to additional information received from the Commission and to notify both parties accordingly; • The reviewer(s) should be required to take account of any additional information provided by either the provider or the Commission; • The reviewer(s) should be required to prepare a report of their findings, setting out recommendations which should be sent to both the provider and the Commission.
Steps to be taken by the Commission and/or the Welsh Ministers following a review	<ul style="list-style-type: none"> • The Commission should be required to take account of the decision reviewer(s)' report and reconsider their decision to take the specified action which forms the subject of the decision review; • The Commission should be required to notify the provider about whether the proposed notice or direction has effect within a period of 40 days from the issue of the decision reviewer(s)' report and set out reasons for their confirmed course of action.

Monitoring financial sustainability

Section	Form	Provision	Procedure
78(1)(c)	Regulations	Power to specify education providers (in addition to those set out on the face of the Bill) in respect of which the Commission must monitor financial sustainability.	Negative
78(2)	Regulations	Power to provide for exceptions to the duty to monitor the financial sustainability of registered providers and providers in Wales within the FE sector funded by the Commission.	Negative

Description of powers

Section 78 places a duty on the Commission to monitor and report on the financial sustainability of certain tertiary education providers. Under the duty, the Commission must monitor the financial sustainability of registered providers and providers in Wales in the further education sector that are not registered but are funded by the Commission.

The powers under section 78(2) enable the Welsh Ministers to make exceptions in the application of the monitoring duty for providers or types of providers in these categories.

Section 78(1) (c) enables the Welsh Ministers to extend the monitoring duty to other kinds of tertiary education provider not specified on the face of the Bill.

Policy purpose and intent

These powers will ensure that the Commission's duty to monitor and report on the financial sustainability can be extended, if considered necessary, to tertiary education providers other than registered providers or providers in Wales within the further education sector that are not registered but are funded by the Commission. This would allow any providers or groups of providers that may be in receipt of significant amounts of funding from the Commission but fall outside of these categories to be brought within the scope of the duty.

The powers also allow the Welsh Ministers to make exceptions in the application of the duty for providers or types of providers within the categories specified on the face of the Bill. This might, for example, allow the duty to be dis-applied to the Open University who would, should they register with the Commission, be subject to equivalent monitoring by the Office for Students by virtue of its status as a

registered higher education provider in England. This would avoid unnecessary duplication and potential conflicts in monitoring arrangements.

These regulation powers provide a means to future proof the provisions set out under section 78 of the Bill and ensure that there are no gaps in the application of the duty.

Designation of other providers of tertiary education

Section	Form	Provision	Procedure
81(4)	Regulations	Power to make provision about the designation of providers which would not be regarded as an institution for the purposes of the Bill. This includes provision about applications for designation, the making of designations, withdrawal of a designation and the effect of withdrawals.	Affirmative

Description of powers

Section 81 enables the Welsh Ministers to designate a provider of higher education in Wales as an ‘institution’ for the purposes of the Bill and any subordinate legislation made under it. Such a provider would not normally be regarded as an ‘institution’ under the Bill.

A designation may be made on an application by the provider concerned. Section 81(4) enables the Welsh Ministers to make regulations about applications for designation, the making and withdrawal of designations, including matters to be taking into account when considering whether to make or withdraw a designation, and the effect of a withdrawal of designation.

Policy purpose and intent

The power under section 81 may be exercised to designate an organisation which provides courses of higher education, but might not regard itself as an “institution” for the purposes of the Bill, and may nevertheless wish to be registered. These regulations will require providers applying to the Welsh Ministers for such a designation to provide certain information or documentation alongside their application. The regulations may also specify how an application is to be made (for example in writing).

Securing and funding tertiary education

Section	Form	Provision	Procedure
85(3)	Regulations	Power to specify categories of registered provider to which the Commission may provide financial support in respect of expenditure incurred for the purposes of the provision of higher education and facilities or activities connected with the provision of higher education.	Affirmative
85(4)	Regulations	Power to specify the requirements to be met by a course of initial teacher training before the Commission can provide an institution with financial support in respect of the provision of that course.	Negative
86(1)	Regulations	Power to specify a particular course of higher education or description of course of higher education in respect of which the Commission can provide financial resources.	Negative
91(3)	Regulations	Duty to specify a description of relevant education and training for the purposes of the Commission's duty to secure proper facilities for person aged 19 and over.	Affirmative
91(7)(b)	Regulations	Power to specify a description of an eligible person in relation to the Commission's duty to secure proper facilities for persons aged 19 and over.	Affirmative
95(2)	Regulations	Power to provide that financial support for specified purposes for further education and training can only be secured under section 94(1)(a) or (b) to providers registered in specified categories. Regulations may provide for exceptions for specified courses or specified descriptions of courses. to the requirement to be registered.	Affirmative
96(6)	Regulations	Power to provide exceptions to the prohibition on providers of further education and training from charging (i) persons over compulsory school age and under the age of 19 who are receiving the further education and training; and (ii) eligible persons who are receiving relevant education and training.	Affirmative

Section	Form	Provision	Procedure
101(3)	Regulations	Power to provide that the Commission can only provide financial resources in respect of expenditure incurred in connection with the provision of an approved Welsh apprenticeship to providers registered in categories specified in the regulations.	Affirmative
102(4)	Regulations	Power to specify categories of registration which a provider must be registered in before the Commission can provide financial resource to the provider in respect of expenditure for the purpose of (or in connection with) research or innovation.	Affirmative

Description of powers

Section 85 allows the Commission to fund certain categories of registered providers (the “specified providers”), for the purpose of supporting higher education provided by or on behalf of such providers. Section 85(3) enables the Welsh Ministers to specify these categories, whilst section 85(4) enables the Welsh Ministers to specify that funding must not be provided by the Commission under this section in respect of expenditure incurred in relation to the provision of courses of initial teacher training unless the course satisfies requirements set out in regulations.

Section 86 allows the Commission to fund the provision of specified higher education courses wholly or mainly in Wales or to persons who are ordinarily resident in Wales. Section 86(1) enables the Welsh Ministers to specify such courses in regulations. Regulations may describe a course by way of reference to, amongst other matters, the requirements to be met by the course; the description of the person providing the course; and the qualification to which the course leads.

Section 91(3) requires the Welsh Ministers to specify relevant further education and training for the purposes of the Commission’s duty to secure proper facilities for such education and training in section 91(1). Section 91(7)(b) enables the Welsh Ministers to specify eligible persons for whom such facilities must be secured.

Section 95(2) enables the Welsh Ministers to make regulations requiring providers to be registered in a specified category in order to be eligible to receive funding from the Commission under section 94(1)(a) (provision of further education or training wholly or mainly in Wales) or section 94(1)(b) (provision of further education and training to learners ordinarily resident in Wales).

Where the Welsh Ministers or the Commission provide funding under section 94, section 96 allows them to impose terms and conditions. Section 96(4) and (5) provide that those terms and conditions must prohibit:

- a provider of further education or training suitable to the requirements of learners who are over compulsory school age but have not attained the age of 19 from charging those learners who are receiving the further education or training ; and
- a provider of relevant education and training suitable to the requirements of eligible persons from charging those eligible persons who are receiving that education or training. “Relevant education and training” and “eligible persons” are defined in regulations made under section 91 of the Bill.

Section 101(1)(a) allows the Commission to provide funding to providers of approved Welsh apprenticeships, under section 101(3) the Welsh Ministers can make regulations requiring the recipient of such funding be registered in a specified category on the register..

Section 102 allows the Commission to fund certain categories of registered provider, for the purpose of supporting research or innovation. Section 102(4) enables the Welsh Ministers to specify these categories.

Policy purpose and intent

Section 85(3) and section 102(4)

It is intended, subject to the proposed regulations under section 23(2) (see Categories of Registration) being made and specifying the proposed two categories of registration, to prescribe in regulations:

- under section 85(3) specifying that higher education providers must be registered in the “core” category in order to be eligible to receive funding from the Commission under section 85 (financial support to specified providers for higher education), and
- under section 102(4) specifying that higher education providers must be registered in the “core” category in order to be eligible to receive funding from the Commission under section 102 (financial support for research and innovation).

Section 85(4)

It is intended to make regulations under section 85(4) of the Bill providing that initial teacher training courses must not be funded by the Commission unless they are accredited by the Education Workforce Council (ECW).

Section 86(6)

It is not currently intended to make regulations under section 86(6). This power is intended to ensure that gaps in provision could be addressed should the need arise. Gaps in provision may arise due to a lack of specified higher education providers (as defined in regulations made under section 85(3)) being able to fulfil an identified need. For example, a need for a specialist course to be delivered in

Wales or to be undertaken by small numbers of students ordinarily resident in Wales, which may not be cost effective for specified providers to deliver. These powers should be considered as contingency powers.

Section 91

Section 91(3) and 91(7)(b) enable the Welsh Ministers to determine the scope of, and eligibility for, a new duty to fund further education for adults, and are intended to ensure that the Welsh Government's commitment to providing lifelong learning opportunities, particularly for those who stand most to benefit from them. The use of secondary legislation to determine the scope of relevant education and eligibility for the purpose of the funding duty is intended to enable a progressive expansion of the funded adult further education and training offer over time to address evolving patterns of need.

The policy for these regulations will take account of the following forthcoming considerations:

- Recommendations of a report due to be published by the Wales Centre for Public Policy regarding lifelong learning.
- Outcomes of a planned review of adult education as promised in the Programme for Government.
- The views and representations of relevant stakeholders.

Section 95(2) and section 101(3)

As set out in Categories of Registration above, it is not current government policy to create any categories for providers which do not provide higher education. However, regulatory arrangements may change over time and the register may, in the future, include categories, in respect of providers of further education, training or approved Welsh apprenticeship. .

Should the need arise the Welsh Ministers will be able to make regulations:

- under section 95(2) to specify the categories of registered providers eligible to receive funding from the Commission under section 94, or
- under section 101(3) to specify the categories of registered providers eligible to receive funding from the Commission under section 101.

Section 96(6)

The development of any policy in respect of regulations under section 96(6) will be subject to engagement and consultation with stakeholders.

Consent for payments to collaborating bodies

Section	Form	Provision	Procedure
105(1)	Regulations	Power to specify the matters to be taken into account by the Commission in deciding whether to give to consent for the passage of funds from directly funded persons to collaborating bodies under sections 85, 86, 94, 101 or 102.	Negative

Description of powers

The Bill provides for a person in receipt of financial resources from the Commission under sections 85(3)(a), 86(4)(a), 94(3)(a), 101(2)(a) or 102(4) to be able to pass all, or some, of this funding to a collaborating body. For a person to be a collaborating body the Commission must have given its consent for financial resources to be paid to it by the person receiving funds directly from the Commission.

The power under section 105(1) allows the Welsh Ministers, by way of regulations, to specify matters to be taken into account by the Commission when determining whether to give consent for a directly funded person to pass funding to a collaborating body under the specified powers.

Purpose, Policy and Intent

This regulation making power will allow the Welsh Ministers to set out those matters that the Commission must take into account when deciding to consent to a directly funded person passing resources to a collaborating body. Subject to consultation, it is anticipated that such matters might initially include

- The reasons for and the appropriateness of the collaboration arrangement;
- How the collaboration arrangement fits with the Commission's strategic plan;
- The effectiveness of the governance and financial management arrangements of the collaborating body;
- That the funded body's learner protection plan has adequate provision should the collaboration cease for any reason;
- The adequacy of the assurance arrangements between the funded provider and the collaborating body;
- Financial position of a proposed collaborating body;
- The ability of the proposed collaborating body to deliver what is proposed; and
- Adequacy of facilities or education provision available at the proposed collaborating body.

It is likely that the nature of matters to be taken into account by the Commission in giving its consent will need to be revised over time as new collaborative arrangements develop or in light of any issues that may have arisen with existing consent arrangements. This regulation power will provide flexibility for the Welsh Ministers to amend the specified matters should this be necessary.

Financial support directions

Section	Form	Provision	Procedure
106(1)	Direction	The Welsh Ministers may give the Commission financial support directions in relation to a relevant person.	No procedure

Description of powers

Section 106 enables the Welsh Ministers to direct the Commission in respect of the provision of financial support provided to a relevant person under section 85, 86, 94, 98, 100, 101 or 102, where it appears to the Welsh Ministers that the financial affairs of the relevant person have been, or are being mismanaged. The Commission is required to comply with a financial support direction given by the Welsh Ministers.

A relevant person is a registered provider or a person (other than a registered provider or the governing body of a maintained school) funded by the Commission under section 85(2), 86, 94, 98, 100, 101 or 102(2).

Before issuing a financial support direction to the Commission, subsection (5) requires the Welsh Ministers to consult the Commission and the relevant person to which the direction relates unless the Welsh Ministers are satisfied that it is not practical to do so because of the urgency with which the direction needs to be given, or the specific circumstances mean that consultation would defeat the object of the direction.

Any financial support direction given to the Commission under this section must be kept under review. Additionally, the Welsh Ministers must publish a financial support direction given to the Commission and report any such directions to the Senedd.

Policy purpose and intent

The Welsh Ministers are currently able to give directions to HEFCW in relation to the provision of financial support to a provider of higher education if it appears that the financial affairs of that provider have been, or are being mismanaged. Section 106 builds on existing arrangements and ensure that the Welsh Ministers can take appropriate action in circumstances where it might be necessary to protect the interests of students, safeguard public funds or prevent reputational damage to the tertiary education sector in Wales.

This power should be considered as contingency powers and are only expected to be used in rare and exceptional circumstances.

Apprenticeships

Section	Form	Provision	Procedure
107(4)	Regulations	Power of the Welsh Ministers to specify the conditions that an apprenticeship must satisfy to be an approved Welsh apprenticeship.	Affirmative
108(1)(c)	Regulations	Power of the Welsh Ministers to specify further conditions that an apprenticeship agreement must satisfy to be an approved Welsh apprenticeship agreement.	Affirmative
109(1)	Regulations	Power of the Welsh Ministers to specify the description of what is categorised as an alternative Welsh apprenticeship.	Affirmative
114(6)	Regulations	Power of the Welsh Ministers to require the Commission to include further information in the register of apprenticeship frameworks.	Negative
115(4)	Regulations	Power for the Welsh Ministers to authorise the Commission to charge a fee for issuing an apprenticeship certificate.	Negative
120 (5)	Regulations	Power to make provision applying any provision of Part 4 (apprenticeships) with modifications to an apprenticeship agreement where a person undertakes Crown employment or to a person working (or proposing to work) under such an agreement.	Negative

Description of powers

The powers above enable the Welsh Ministers to determine the parameters necessary for the operation of the new apprenticeship system. They confer an ability on the Welsh Ministers to specify and amend:

- the conditions that an apprenticeship must satisfy to be an *approved Welsh apprenticeship*;
- the further conditions than an apprenticeship agreement must satisfy to be an *approved Welsh apprenticeship agreement*; and
- the description of an *alternative Welsh apprenticeship*.

Additionally, the Welsh Ministers are enabled to:

- add new information requirements to the register of approved Welsh Apprenticeships maintained by the Commission;
- authorise the Commission to charge a fee for issuing of apprenticeship certificates; and

- apply any provision of Part 4 of the Bill with modifications to an apprenticeship agreement where a person undertakes Crown employment or to a person working or proposing to work under such an agreement.

Policy purpose and intent

Section 107 of the Bill provides for the definition of an approved Welsh Apprenticeship. The power under section 107(4) allows the Welsh Ministers to make regulations providing further requirements that must be met in order that an apprenticeship is an approved Welsh apprenticeship. The purpose of this power is to ensure that what constitutes an approved Welsh Apprenticeship can be revised over time and remains appropriate in light of changes in the delivery of Welsh apprenticeships. It could for instance be used to respond to changes to the economy or delivery of apprenticeships.

Section 108 provides for the definition of an approved Welsh apprenticeship agreement. Section 108(1)(c) enables the Welsh Ministers to specify further conditions that an approved Welsh apprenticeship agreement must satisfy beyond those specified on the face of the Bill. This power is intended to ensure that the definition of what constitutes an approved Welsh apprenticeship agreement remains up to date, it could for example be used to specify that such an agreement include or refer to a statement of employment particulars issued under section 1 of the Employment Rights Act 1996.

Section 109 provides for the meaning of an alternative Welsh apprenticeship. The power under section 109(1) enables the Welsh Ministers to make regulations that provide for what is meant by an alternative Welsh apprenticeship. This power could be used, to specify alternative working arrangements to take account of self-employment or to deal with situations where individuals working under an apprenticeship agreement have been made redundant during the course of their apprenticeship replicating (in part) equivalent provisions underpinning the operation of the current apprenticeship system.

Section 114 requires that the Commission must maintain a register of the apprenticeship frameworks published under section 113 of the Bill. The power under section 114(6) will enable the Welsh Ministers to add new information requirements to the register of published apprenticeship frameworks this enables the register maintained by the Commission to be adapted over time to respond to economic or social changes.

Section 115 of the Bill enables the Commission to issue a certificate if a person has completed an approved Welsh apprenticeship, and applies to the Commission for a certificate. It also provides that the Commission may charge a fee for issuing an apprenticeship certificate or copy of a certificate but only if regulations made by the Welsh Ministers allow for a fee to be charged. The power under section 115(3) will enable the Welsh Ministers to authorise the charging of fees by the Commission for issue of apprenticeship certificates or copy certificates and to specify the fee that may be charged. The Welsh Ministers are currently able to charge a fee to issue an apprenticeship certificate or copy certificates, and this power enables the Commission to continue to do likewise.

Section 120 of the Bill provides that a person who is employed as a Crown servant may undertake an approved Welsh apprenticeship agreement. The power under section 120(5) enables the Welsh Ministers to make regulations in relation to an approved Welsh apprenticeship agreement and Crown servants. This power allows for regulations to make provision in light of the differing employment status of Crown servants and allows for elements of Part 4 of the Bill to apply to Crown servants with modifications.

Apprenticeships need to be able to respond flexibly to changing technology and market needs. The regulation making powers under sections 107(4), 108(1)(c) and 109(1) are necessary to allow the Welsh Ministers to maintain a strategic oversight of what constitutes an approved Welsh apprenticeship, an approved Welsh apprenticeship agreement and an alternative Welsh apprenticeship. These powers will ensure that the quality and robustness of the Welsh apprenticeship system is maintained in future by specifying any further requirements that might be necessary for apprenticeships and apprenticeship agreements to satisfy in order to be approved Welsh apprenticeships and approved Welsh apprenticeship agreements. These requirements could change over time. Section 120(5) is necessary to enable elements of Part 4 to apply with any modifications necessary to Crown servants in light of their atypical employment status. A number of the regulation making powers contained in Part 4 of the Bill build upon, or re-enact, existing regulation making powers in the Apprenticeship, Skills, Children and Learning Act 2009 which are used to operate the current Welsh apprenticeship system.

Elements of the regulatory system underpinning approved Welsh apprenticeships may need to change over time as apprenticeship frameworks evolve to meet the changing needs of the Welsh economy. The regulation making powers under sections 114(6) and 115(4) allow the Welsh Ministers to make adjustments to the information requirements of the register of apprenticeships and the fees that the Commission may charge for the issuing of apprenticeship certificates both of which may change over time.

Learner complaints

Section	Form	Provision	Procedure
124(2)	Regulations	Amends section 11 of the Higher Education Act 2004, inserting a power to specify 'qualifying institutions' in addition to those set out on the face of the Act, in respect of which complaints can be made by students and former students and considered under the student complaints scheme under that Act.	Negative

Description of powers

Section 13 of the Higher Education Act 2004 ("the 2004 Act") allows for the designation of a body to operate a student complaints scheme. The Office of the Independent Adjudicator is the designated operator body for handling unresolved student complaints in England and Wales, having been appointed by both the Secretary of State and the Welsh Ministers respectively. The Office of the Independent Adjudicator's role currently extends to 'qualifying institutions' as defined in section 11 of the 2004 Act.

Section 124(2) of the Bill amends section 11 of the 2004 Act inserting, at subsection (2), a regulation making power which enables the Welsh Ministers to specify additional 'qualifying institutions' for the purposes of the student complaints scheme.

The Welsh Ministers may specify in regulations:

- a registered provider or
- a tertiary education provider in Wales (other than a registered provider) in receipt of financial resources from the Commission under the following sections of the Bill:
 - 86(3)(a) (higher education courses),
 - 95(1)(a) (further education or training), or
 - 101(1)(a) (apprenticeships) of the Bill.

The Welsh Ministers will not be able to specify local authorities in relation to school sixth form provision as they are not funded under the specified provisions

Policy purpose and intent

The policy aim is to extend the remit of the Office of the Independent Adjudicator and the breadth of access to the complaints scheme to learners undertaking all courses funded by the Commission as specified. Consultation will be undertaken with stakeholders on the detail and practicalities of extending the scheme prior to the regulations being made.

This will enable providers to be brought into the student complaints scheme gradually, allowing time for the Office of the Independent Adjudicator and individual providers to build their capacity.

Data sharing

Section	Form	Provision	Procedure
128(1)(l)	Regulations	Power to specify persons other than those set out on the face of the Bill as persons who are able to share information with the Commission.	Negative
130(5)	Guidance	The Welsh Ministers must publish guidance regarding factors to be taken into account in deciding whether to approve a body or individual for the purposes of section 130 of the Bill	No procedure

Description of powers

Section 128 includes a list of persons, statutory bodies and persons exercising statutory functions that may share information with the Commission, for the purposes of the exercise of any of the Commission's functions. The Commission may also give information, about any matter in relation to its functions, to those listed in this section and any other person it considers appropriate. The Welsh Ministers may by regulations specify other persons that are allowed to share information with the Commission under this section.

Section 130 makes provision for how the Welsh Ministers may use the application-to-acceptance information obtained under section 129 and provides that the information may be shared with an "approved person". An approved person is:

- a body approved by the Welsh Ministers for the purposes of section 130 of the Bill, that uses or disseminates information for the purpose of research, or
- an individual approved by the Welsh Ministers or an approved body for the purposes of section 130 of the Bill.

The Welsh Ministers are subject to a duty to publish guidance setting out the factors to be considered when deciding whether to approve a body, or individual researcher, to become an "approved person" in relation to the use of application to acceptance information for research purposes.

Policy purpose and intent

This section allows the Welsh Ministers to make regulations to specify other persons that are not mentioned on the face of the Bill which will be able to share information with the Commission. It would also allow for new authorities to be specified.

Examples of the type of factors which may be included in guidance under section 130(5) in respect of a body being an approved person could include:

- Whether the body is a recognised academic institution, public sector organisation or a research organisation on the Research Councils UK list of eligible independent research organisations (noting that research would not be for commercial purposes);
- Whether the body complies with relevant data protection and related legislation, guidance and best practice to ensure that data is accessed, handled, transmitted and stored securely including the use of encryption where necessary;
- Whether the body operates under appropriate governance.

Examples of the type of factors which may be included in this guidance under section 130(5) in respect of an individual being an approved person could include:

- Whether the individual is affiliated with a recognized academic institution, public sector organization or a research organization on the Research Councils UK list of eligible independent research organizations for non-commercial research purposes;
- Whether the individual has relevant expertise in conducting research with secure/administrative data and in a secure environment or is willing to undergo training.

HE Governance – instruments and articles of government for Higher Education Corporations in Wales (HECs)

Section	Form	Provision	Procedure
133(2)	Regulations	Power to amend or repeal, by order, paragraphs 2 to 11 of Schedule 7A of the Education Reform Act 1988 that relates to the contents of the instruments of government for a HEC	Affirmative
134(2)	Regulations	Power to amend or repeal, by order, section 125(2) to (4) of the Education Reform Act 1988 that relate to the contents of the articles of government for a HEC	Affirmative

Description of powers

Section 133(1) makes provision for the Welsh Ministers' existing order making powers under section 124A (9) of the Education Reform Act ("the 1988 Act") to be extended to cover the whole of Schedule 7A with the exception of paragraph 1. Schedule 7A sets out statutory requirements for the content of instruments of government of HECs made by the Privy Council.

Under Section 124A (9) of the 1988 Act, the Welsh Ministers are currently able to amend or repeal any of paragraphs 3 to 5 and 11 of Schedule 7A by order. These paragraphs relate to membership of the HEC and in particular, its size, constitution and the appointment of its members. Paragraph 1 enables a HEC's instrument of government to empower the corporation to change its name with the consent of the Privy Council.

Section 134(2) introduces amendments that will enable the Welsh Ministers, by order, to amend or repeal section 125(2) to (4) of the 1988 Act which relate to the content of articles of government of HECs. Broadly the articles determine the distribution of functions between the board of governors, the Principal and the Academic Board and regulate the constitution and functions of committees of the corporation.

Policy purpose and intent

These provisions amend ERA 1988 and make revisions in respect of the Welsh Minister's powers to amend or repeal current statutory requirements placed on the contents of a HECs instrument of government. The overriding policy aim behind these provisions is to address the findings and recommendations of the Law Commission's report on *Technical issues in Charity Law* that relate to the amendment of governing documents for higher education institutions in Wales. In particular, the Law Commission's report recommends the removal of

existing statutory requirements placed on the governing documents of HECs so that they are able to respond to good governance and best practice guidance in the same way as other types of higher education institution that are not subject to equivalent legislative requirements.

Under current arrangements, the Welsh Ministers are able to amend, by order, only a limited number of the requirements placed on HEC governing documents under Schedule 7A of the 1988 Act. These are the requirements under paragraphs 3 to 5 and paragraph 11 of the Schedule. This means that any future changes to those requirements that are outside the scope of the current powers could not be made in the same way or to the same timeframe as they would require separate primary legislation to take them forward. These provisions will address this issue by extending the Welsh Ministers current order making powers so that they apply to all of the statutory requirements placed on HEC governing documents under Schedule 7A (with the exception of paragraph 1) and to the requirements under section 125(2) to (4) of ERA 1988.

This is intended to create a more flexible and responsive approach that will:

- allow future changes to any or all of the statutory requirements within the scope of the new extended powers to be considered in the same way and be taken forward via statutory order made by the Welsh Ministers;
- remove the need for separate primary legislation to change those requirements that are not within scope of the current powers as is currently the case; and
- allow any future changes that are considered necessary to be made more quickly than if separate primary legislation were to be required for changes to those requirements that are currently out of scope.

An order brought forward by the Welsh Ministers to amend or repeal prescribed provisions in Schedule 7A or sections 125(2) to (4) using these new powers will be subject to the affirmative procedure. The Welsh Ministers will also be required to consult with the Commission and any other persons they consider appropriate before making an order. Currently, an order under section 124A(9) of ERA 1988 is subject to the negative procedure. The change in procedure reflects the widening scope of the powers which affect provisions in an Act of Parliament.

Open University

Section	Form	Provision	Procedure
140(1)	Regulations	Power to provide for the Open University to be treated as an institution in Wales for the purpose of specific provisions under this Bill	Affirmative

Description of powers

The Open University does not fall within the definition of “tertiary education provider in Wales” because its activities are not carried on “wholly or mainly in Wales”. This power enables the Welsh Ministers to make regulations which provide for the Open University to be treated as a tertiary education provider in Wales for the purpose of any provision in, or made under, the Bill. Under the regulations, the Welsh Ministers are able to modify the effect of any provision, specified in those Regulations, insofar as it applies to the Open University (whether as a tertiary education provider in Wales or as a registered provider, should it become one).

Policy purpose and intent

The Open University is the largest higher education provider in the UK, and the only large higher education provider which operates across all four of the UK administrations. Although the Open University has a significant presence in Wales it is not a tertiary education provider in Wales for the purposes of the Bill. Changes in funding and regulation of the Open University in other UK nations may have knock on implications for the way in which the Open University is funded and regulated in Wales.

The Welsh Government is presently in discussions with the Open University to determine the most appropriate application of different provisions of the Bill to the Open University. This may be to apply the registration conditions, learner protection plans and other provisions to the Open University in order to ensure funding and protection for learners in Wales undertaking courses of study with the Open University.

It is therefore more appropriate to use secondary legislation to apply provisions in this Bill to the Open University in respect of the University’s provision in Wales, and for the way in which the Bill applies to the Open University to be amended in response to any wider changing circumstances across the UK.