

DELEGATED POWERS MEMORANDUM

Institute for Apprenticeships and Technical Education (Transfer of Functions etc) Bill

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (“DPRRC”) to assist with its scrutiny of the Institute for Apprenticeships and Technical Education (Transfer of Functions etc) Bill (“the Bill”). The Bill was introduced in the House of Lords on 9 October. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been proposed, and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. The purpose of this Bill is to transfer to the Secretary of State post-16 technical education functions contained in the Apprenticeships, Skills, Children and Learning Act 2009 (c.22) (“the 2009 Act”). These are functions that are currently conferred on the Institute for Apprenticeships and Technical Education (“the Institute”) that relate to the availability, development, quality and approval of apprenticeships and technical education (Any reference in this memorandum to a section is a reference to a section of the 2009 Act).
3. The Bill also amends some of the functions that are being transferred including those related to the preparation of occupational standards and apprenticeship assessment plans and accreditation of technical education qualifications.
4. The Bill abolishes the Institute and removes functions relating to oversight and accountability of the Institute to the Secretary of State and Parliament. It makes provision to deal with the transfer of property, rights and liabilities of the Institute to the Secretary of State. It makes minor and consequential provision in connection with the transfer of functions from the Institute and consequential provision in connection with the abolition of the Institute.
5. This Bill forms part of the delivery of the Government’s wider manifesto commitment to transform the skills system. This includes the establishment of a new executive agency, Skills England, which will provide an assessment of national and regional skills needs, ensure that apprenticeships and technical qualifications are available and address employer need, and bring together employers and providers involved in skills to ensure national and regional systems are meeting skills needs. Skills England will exercise such functions that are transferred to the Secretary of State from the Institute that are needed for it to effectively fulfil its role.

C. DELEGATED POWERS

Powers created by the Bill

6. The Bill creates delegated powers, which are explained in paragraphs 9 to 30 of this memorandum. The Department is satisfied that these powers are necessary and justified, as set out below.
7. These are:
 - a. the power to make regulations in relation to fees charged in connection with the approval of certain technical education qualifications (clause 1 and paragraph 14(4) of Schedule 1);
 - b. the power to make transfer schemes (clause 2 and Schedule 2);
 - c. standard regulation-making powers to:
 1. make consequential provision (clause 9);
 2. commence provisions of the Bill (clause 11); and
 3. make transitional and savings provision (clause 12(5)).
8. This memorandum also refers to a further provision in the Bill which does not confer powers to make delegated legislation, but which may be of interest to the Committee, namely the power to enable Ofqual accreditation of technical education qualifications (clause 8).

Clause 1 and Schedule 1, paragraph 14(4): Approved technical education qualifications: power to determine fees

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Negative

Context and purpose

9. The Bill transfers the power to approve technical education qualifications in section A2D5 from the Institute to the Secretary of State (paragraph 12 of Schedule 1 to the Bill). Consequently, amendments are needed to section A2D7(3) because this section confers a power on the Secretary of State to authorise the Institute to charge fees in connection with such approvals. The Bill confers a power on the Secretary of State to charge fees for things done in connection with approval, or continued approval, of qualifications under section A2D5, in line with the transfer of those functions to the Secretary of State (paragraph 14 of Schedule 1 to the Bill). The purpose of this clause is to enable the Secretary of State to make regulations to determine the fees that the Secretary of State may charge.

Justification for the power

10. The Department has carefully tested whether there is a need to transfer powers to charge fees in the 2009 Act to the Secretary of State. We have determined that the powers can be more narrowly drawn and confined to the power in section A2D7(3) which, as amended, enables the Secretary of State to charge fees only in connection with the approval of technical education qualifications. (The power in section A2B(4) relating to fees for carrying out evaluations of the quality of apprenticeship assessments is being omitted).
11. The policy intention is that the regulations will provide the Secretary of State with scope to recoup the operational costs of approvals, which may include examination and assessment of evidence submitted by awarding organisations, who are seeking approval of their qualifications, and payments in connection with that process. An increase in the number of applications is anticipated as a result of the new growth and skills levy. The Secretary of State may also need to charge an annual fee in connection with ongoing reviews of qualifications. There is no current proposal for the Secretary of State to charge a fee for submitting applications. The regulation-making power allows the Secretary of State to retain control of the circumstances under which this will be exercised.
12. A regulation-making power that enables the fees to be determined from time to time will achieve the necessary flexibility in practice. The level of any fee may need to be changed frequently in the future, and more frequently than Parliament would be expected to legislate, for example to reflect changes to categories of qualification (including the introduction of new categories) in response to the changing skills needs of the labour market in England or to reflect increasing costs of approval. Further, fees relate to costs which will need to be taken into account at the point at which regulations are passed.
13. It is common practice for fees to be determined by regulations and there is similar provision in the 2009 Act. Section A3(3) provides that the Secretary of State may charge a fee for issuing or supplying a copy of an apprenticeship certificate when authorised to do so by regulations. The amendments made by paragraph 14 of Schedule 1 to the Bill are to an existing regulation-making power in section A2D7 relating to fees.

Justification for the procedure

14. The Department proposes that a statutory instrument under this power is subject to the negative procedure. This procedure would be consistent with the procedure to be followed under section A3(3) for charging for the issuing of apprenticeship certificates or supplying copies of them. Fees would need to be updated frequently, and this ensures fee levels can be updated relatively quickly, if necessary, in order for the Secretary of State to recover the true costs of approval.

Clause 2 and Schedule 2: Power to make transfer schemes

Power conferred on: Secretary of State

Power exercisable by: Transfer Scheme

Parliamentary Procedure: None

Context and purpose

15. This power will enable the Secretary of State to make one or more transfer schemes which will deal with the transfer of staff, property, rights and liabilities from the Institute to the Secretary of State.

Justification for the power

16. The Department considers that a transfer scheme is an appropriate vehicle for effecting transfers of staff, property, rights and liabilities. It is one which is used commonly for the transfer of assets following the transfer of functions between public bodies and one for which there is precedent in the context of dissolution of NDPBs¹. The Department does not consider that it is feasible to deal with the detail of the required transfers of property, rights and liabilities on the face of the Bill. The transfer scheme is likely to be very detailed and technical and will be prepared after sustained engagement between the Department and the Institute, alongside an agreed transition plan. It will include more administrative and operational details than could be appropriately included in primary legislation.

Justification for the procedure

17. As is generally the case with statutory transfer schemes, this power will not be subject to any Parliamentary procedure. The scheme will be concerned with administrative and operational matters and will contain detailed references to property, rights and liabilities (for example lists of contracts). The Department does not consider that Parliamentary procedure is required or that consideration of a transfer scheme would be an appropriate use of Parliamentary time. Schedule 2 to the Bill sets out detailed parameters for the transfer schemes, outlining technical provisions and detailing what the schemes can cover. It is appropriate to set out these further particulars to ensure that there is no ambiguity over what can be included. These detailed parameters render additional Parliamentary oversight unnecessary. Parliament will have the opportunity to consider the general principle behind the scheme and the power given to the Secretary of State to transfer property, rights and liabilities during the Bill's passage.

¹ For example, see section 124 and Schedule 7 to the 2009 Act, which enables the Secretary of State to make transfer schemes in connection with the dissolution of the Learning and Skills Council for England.

Clause 8: power to enable Ofqual accreditation of technical education qualifications

Power conferred on: Secretary of State

Power exercisable by: Notification

Parliamentary Procedure: Not applicable – non-legislative power

Context and purpose

18. Ofqual has the power in section 138(1) to determine that a qualification is subject to Ofqual accreditation. This power is subject to section 138(1A) which provides that Ofqual may not make such a determination in relation to a technical education qualification if any of the conditions specified in that section apply (including that it is a technical education qualification approved under section A2D3 or A2D5)). This clause modifies that section to enable the Secretary of State to authorise Ofqual, by way of notification, to make such a determination notwithstanding the provisions of section 138(1A).

Justification for the power

19. The power is needed to enable the Secretary of State to notify Ofqual that it may make a determination that a technical education qualification is subject to Ofqual accreditation where that qualification would otherwise fall within the exceptions in section 138(1A). The Department considers that the power to notify is appropriate in these circumstances. The 2009 Act currently prevents Ofqual from imposing an accreditation requirement across a very broad group of qualifications and awarding organisations, no matter the specific circumstances. There is currently no policy intention to reverse those general restrictions and the broad statutory controls on the qualifications that may be accredited by Ofqual will remain. But this power ensures that the Secretary of State has flexibility to determine whether Ofqual accreditation is appropriate for a particular technical qualification, in the interests of the education system. This is a fact-specific determination, made working closely with Ofqual, and based on a detailed consideration of each technical education qualification in question; the needs of the qualification market (which changes) and the need to ensure that qualifications funded by the Department are high-quality and effectively regulated. If this power were not taken Parliament would be required to pass legislation each time it was agreed which technical education qualifications Ofqual may be permitted to determine are subject to Ofqual accreditation and the Department does not consider that this would be an appropriate use of Parliamentary time.

Justification for the procedure

20. Given that this power is exercised by notification, no Parliamentary procedure is required. Any notification by the Secretary of State to Ofqual that it may make a determination under section 138 would simply be an extension of its existing statutory functions relating to accreditation of qualifications to another qualification. It would not impose any statutory duty on Ofqual to accredit that qualification as it retains its discretion to do so under section 138. The decision

over whether Ofqual ought to consider a relevant technical education qualification for accreditation will be informed by the Secretary of State's operational expertise relating to technical education qualifications and the role of Ofqual. The Secretary of State and Ofqual have a common interest in relation to technical qualifications and already have an effective working relationship, underpinned by a Memorandum of Understanding.

Clause 9: Power to make regulations to make consequential provision

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative procedure, where regulations amend primary legislation; otherwise, negative procedure.

Context and purpose

21. This is a standard power that enables the Secretary of State to make provision that is consequential upon this Bill. Regulations made using this power may amend or repeal provision made by any Act passed before the end of the Parliamentary session in which the Bill is passed. They may also make transitional or saving provision. This is a 'Henry VIII' power as it will enable the Secretary of State to make secondary legislation that can amend primary legislation.

Justification for the power

22. The Bill includes amendments to other enactments in Schedule 1 (paragraphs 32 to 35) and Schedule 3 to the Bill that are required as a consequence of the substantive provisions in the Bill, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Department therefore considers it prudent for the Bill to contain the power to deal with these in secondary legislation so that full effect can be given to the Bill. The Department has made every effort to identify and make necessary amendments to primary legislation on the face of the Bill rather than relying on this power.

23. The power will be limited by the fact that any amendments made under the regulation-making power must be consequential on provisions made by or under the Bill.

Justification for the procedure

24. In line with usual practice, regulations made under this power which amend or repeal any provision in primary legislation will be subject to the affirmative procedure. In all other cases, the power will be subject to the negative resolution procedure, as the limited and uncontroversial nature of such changes mean that this procedure provides sufficient Parliamentary oversight while enabling changes to be made without unduly taking up Parliamentary time.

Clause 11: power to commence provisions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and purpose

25. Clause 11(2) brings certain provisions of the Bill into force on the day on which the Act is passed. Clause 11(1) gives the Secretary of State power to bring the remaining provisions of the Bill into force on such day as the Secretary of State may appoint by regulations. Clause 11(3) enables regulations under this section to make different provision for different purposes.

Justification for taking the power

26. This power will enable the Secretary of State to commence the main provisions of the Bill at an appropriate time and to ensure the orderly transfer of functions from the Institute and the associated steps such as the transfer of property and staff to the Secretary of State and the abolition of the Institute. This will give time for the Secretary of State to prepare for the Institute's functions to be carried out by the Secretary of State and to enact transfer schemes.

Justification for the procedure

27. As is usual with commencement powers, regulations made under this clause are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

Clause 12(5): power to make transitional and saving provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

Context and purpose

28. Clause 12(1) to (4) contains transitional and saving provision. Clause 12(5) provides that regulations in connection with the coming into force of any provision of the Act may make further transitional or saving provision.

Justification for taking the power

29. This is a standard power to make transitional or saving provision in connection with the coming into force of any provision of this Bill in order to ensure effective and orderly implementation and to ensure a smooth commencement of new legislation and transition between existing legislation. It would enable the Secretary of State to make such further transitional and saving provision that

may become necessary in relation to the transfer of functions from the Institute to the Secretary of State.

Justification for the procedure

30. The procedure for this power is consistent with the power for commencement regulations and no Parliamentary procedure is considered to be necessary.

Transfer of existing delegated powers in the 2009 Act

31. The Department also brings to the attention of the Committee existing delegated powers contained in the 2009 Act that the Bill transfers from the Institute to the Secretary of State (clause 1 and Schedule 1). These do not confer powers to make delegated legislation but may be of interest to the Committee. These are routine operational functions that have been exercised frequently by the Institute since 2017 in relation to apprenticeships and 2019 and 2022 in relation to technical education qualifications.

a. The power in A2D2 to specify categories of technical education qualifications that may be approved under sections A2D3 and A2D5 (clause 1 and paragraph 9 of Schedule 1).

b. The duties in sections ZA11(7), A2(10) and A2D6(4) to publish information (clause 1 and paragraphs 4, 5, 13 of Schedule 1).

c. The power under section A2D3(4) to determine the documents relating to a technical education qualification to which section A21A (transfer of copyright) should apply (clause 1 and paragraph 10 of Schedule 1).

32. The Department is satisfied that these powers are an appropriate use of delegated powers for the purposes of the 2009 Act and continue to be necessary and justified in the context of the transfer of functions to the Secretary of State. In making this assessment, the Department has also taken note of the Committee's reports on the Skills and Post-16 Education Bill 2022² and the Technical and Further Education Bill³ (The Skills and Post-16 Education Act 2022 c. 21 amends the 2009 Act to incorporate functions related to technical education that are being transferred to the Secretary of State under this Bill. The Technical and Further Education Act 2017 c. 19 amends section A2D3 of the 2009 Act). To the extent that those reports related to functions now being transferred by this Bill, the Committee reported that there was nothing that they would wish to draw to the attention of the House. The Department also notes that the Bill does not make any further modifications to the transferred functions detailed below except to make necessary consequential amendments to ensure the statute book is coherent.

² 2nd Report, Session 2021-2022 (HL Paper 13).

³ 16th Report of session 2016-17 (HL Paper 107).

Clause 1 and Schedule 1, paragraph 9: Categories of technical education qualification

Power conferred on: Secretary of State

Power exercised by: Determination

Parliamentary Procedure: Not applicable - non-legislative power

Context and Purpose

33. This clause transfers to the Secretary of State the power of the Institute in section A2D2 to specify categories of technical education qualification that may be approved under sections A2D3 and A2D5. The Secretary of State will be required under section A2D2(6) to publish information about the categories, including which approval test will apply to each category (and therefore explain how each category will relate to the occupational standards). As now, the purpose of this categorisation function is to allow the Secretary of State to explain the broad types of technical education qualifications that the Secretary of State will approve alongside T Levels and Higher Technical Qualifications.

Justification for taking the power

34. As now, setting out categories for approval will allow the Secretary of State to respond to the needs of the qualifications market, including those of employers and learners. This flexibility would be limited if the categories of qualification were set out in the legislation. If this power were not taken, then Parliament would be required to pass legislation on a frequent basis to determine all the categories of qualifications in England that the Secretary of State might need to approve. These will change over time in response to employer need and so will require adjustment often. The Secretary of State's powers to approve qualifications and the matters of which the Secretary of State must be satisfied before doing so are set out in the 2009 Act itself.

35. As now, the way in which the qualifications will relate to the occupational standards is set out on the face of the legislation (in the approval tests) and so circumscribe the exercise of the Secretary of State's approvals power in this way, rather than leaving all the relevant criteria to be determined by the Secretary of State.

36. It is appropriate for the Secretary of State to have the categorisation function as it will now be the Secretary of State that is responsible for the approval and oversight of technical education.

Justification for the procedure

37. Given that this power is exercised by determination of the Secretary of State, no Parliamentary procedure is required. Any determination is circumscribed by the 2009 Act, which sets out the parameters for categorisation and the statutory tests that apply to categories of technical education qualification approved under sections A2D3 and A2D5. The existing duty on the Institute in section A2D2(7) to consult such other persons as it considers appropriate prior to specifying the

categories is transferred to the Secretary of State by virtue of clause 1 and paragraph 9 of Schedule 1 (such persons could include, for example, employers or industry representatives with expertise to assess whether a category of qualification will enable a student to progress into employment).

Clause 1 and paragraphs 4, 5 and 13 of Schedule 1: Publication of information

Power conferred on: Secretary of State

Power exercised by: Publication

Parliamentary Procedure: Not applicable- non-legislative power

Context and Purpose

38. *Clause 1, paragraph 4 of Schedule 1.* This clause transfers to the Secretary of State the duty under section ZA11(7) to publish information about the matters taken into account when approving standards for occupations for the purpose of section ZA11(3) or approving groups of persons to prepare such standards for the purposes of section ZA11(4). This includes publication of the detailed criteria for approving groups of persons to prepare a standard and detailed criteria for approving standards and how this will be assessed, including what evidence may be required.
39. *Clause 1, paragraph 5 of Schedule 1.* This clause transfers to the Secretary of State the duty under section A2(10) to publish information about the matters taken into account when approving apprenticeship assessment plans for the purpose of section A2(6) or approving groups of persons to prepare such plans for the purpose of section A2(7). This includes publication of the detailed criteria for approving groups of persons to prepare an apprenticeship assessment plan and detailed criteria for approving assessment plans and how this will be assessed, including what evidence may be required.
40. *Clause 1 and paragraph 13 of Schedule 1.* This clause transfers to the Secretary of State the duty under section A2D6(4) to publish information about the matters taken into account when approving, or withdrawing approval for, a technical education qualification. This includes publication of the detailed criteria for the approval of qualifications of awarding organisations and awarding bodies and detailed criteria that a qualification must evidence to meet the statutory test for approval.

Justification for taking the powers

41. The Secretary of State will need to set out detailed criteria for the approval of standards and apprenticeship assessment plans; groups of persons to prepare these; and approval (and withdrawal) of technical education qualifications. These are all matters which require expert knowledge of the occupational standards and other matters which are important for employers and others (for example requirements of a relevant regulator or professional body). The Secretary of State will be able to ensure that there is consistency in how these products are developed. The specific criteria and evidence required may differ in relation to different occupations. If this power were not taken, then Parliament

would need to set out details of which group of persons should be approved; what the content of each standard or assessment plan should contain; and the criteria against which technical education qualifications will be assessed for approval which would take a significant amount of parliamentary time.

42. The Department considers that it is appropriate for the Secretary of State to set out criteria in this manner, to facilitate a clear and high-quality process for the preparation and approval of standards, assessment plans and technical education qualifications and that these powers are uncontroversial.

Justification for procedure

43. Given that these are powers exercised by publication, no Parliamentary procedure is required. This is because the criteria will be informed by the Secretary of State's assessment of employer and learner needs, alongside the assessment of national and regional skills needs and the insights gathered by other key stakeholders, and its experience in relation to occupational standards and alignment to apprenticeships and qualifications.

Clause 1 and Schedule 1, paragraph 10: Technical education certificate: approval of technical education functions.

Power conferred on: Secretary of State

Power exercised by: Determination

Parliamentary Procedure: Not applicable- non-legislative power

Context and purpose

44. This clause transfers to the Secretary of State the power of the Institute in section A2D3(4)(a) to determine the 'relevant course documents' relating to a technical education qualification to which section A21A (transfer of copyright) should apply. Under section A21A the right or interest in any copyright in those documents transfers to the Secretary of State at the time the qualification is approved.

Justification for taking the power

45. The power is necessary to facilitate the process for the approval of a qualification under section A2D3. Under subsection (4)(b), the Secretary of State may only approve a qualification if satisfied that each person the Secretary of State thinks is entitled to a right or interest in any copyright in documents relating to the qualification agrees to the transfer. This power enables the Secretary of State to determine exactly what those documents are. Importantly, if the Secretary of State fails to obtain the relevant consent, the approval of the qualification is not invalidated but the Secretary of State must pay appropriate compensation (see subsection (5)(a) and (b)).
46. The documents relevant to each technical education qualification may vary in each case and this power provides flexibility for the Secretary of State to agree them having regard to the particular arrangements entered into, including any

contractual agreements. This flexibility is also necessary to ensure that the appropriate consents are secured and that the rights of third parties are respected. Under section A2D3(6) and (7) the Secretary of State may take into account the likelihood of a person being willing to agree to the right or interest in copyright being transferred and the Secretary of State may revise a determination before approving a qualification. The Secretary of State may need to have regard to different documents at different times due to the potential number of qualifications required. For example, several technical education qualifications will be approved and arrangements entered into with organisations to deliver these qualifications throughout the year.

Justification for the procedure

47. The Department considers that it is sufficient that the Secretary of State determines the documents and is satisfied that each person who the Secretary of State thinks is entitled to a right or interest in the documents agrees to the approval, but that no specific procedural provisions are needed. The Secretary of State may need to move quickly to revise determinations having regard to changes in contractual arrangements and to ensure that the approvals are made within a reasonable time. In addition, the person who the Secretary of State thinks is entitled to a right or interest in the copyright should be aware of the consequences of approval because it is set out in the 2009 Act.