



Draft Tertiary Education and Research (Wales) Bill

Statement of policy intent for secondary legislation

<i>Introduction</i>	3
<i>Overview of secondary legislation powers</i>	4
<i>Categories of registration</i>	6
<i>Conditions of registration</i>	8
<i>De-registration</i>	10
<i>Fees, qualifying courses, and qualifying persons</i>	11
<i>Access and opportunity plans and fee limits</i>	13
<i>Quality assurance in higher education</i>	16
<i>Inspection of further education and training</i>	18
<i>Regulation and decision reviews</i>	20
<i>Monitoring financial sustainability</i>	22
<i>Securing and funding tertiary education</i>	24
<i>Apprenticeships</i>	28
<i>Learner complaints</i>	28
<i>Data sharing</i>	32
<i>HE Governance – instruments and articles of government for Higher Education Corporations in Wales (HECs)</i>	33
<i>Open University</i>	35
<i>Miscellaneous and general</i>	36

Introduction

This paper summarises the powers for making secondary legislation outlined in the Draft Tertiary Education and Research (Wales) Bill, as introduced to the Senedd Cymru on X DATE 2020.

The paper explains why these powers have been chosen, the current government policy for use of these powers, and the justification for the Senedd procedure selected.

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 Draft Bill as set out below and are satisfied that they are necessary and justified.

Overview of the Draft Bill

The Draft 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 Civic Mission
- Part 2 outlines the Commission’s regulatory functions with regards to a register of Tertiary Education Providers, registration procedure for the Tertiary Education Providers, the Commission’s approval process for Access and Opportunity Plans, quality assurance frameworks
- Part 3 makes provision for the Welsh Ministers to fund the Commission and the Commission to fund tertiary education and research, it also places the Commission under duties to secure facilities for further education and training
- 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 the dissolution of higher education corporations in Wales.

Other documentation

This document should be read in conjunction with the following:

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

Overview of secondary legislation powers

The Draft Bill contains 46 individual provisions concerning regulation-making powers. This includes 18 powers largely inherited from existing legislation.

Powers inherited from existing legislation

Those powers which modify or are based upon existing regulation-making powers are primarily inherited from the Higher Education (Wales) Act 2015 and the Learning and Skills Act 2000.

Policy area	Section	Current legislation
Fees, qualifying courses and qualifying persons	18(6)	HE(W)A 2015 – 5(2)(b)
	18(10)(b)	HE(W)A 2015 – 5(5)(b)
	18(12)	HE(W)A 2015 – 5(9)
	34(4)	HE(W) A 2015 – 5(3)
	77	HE(W)A 2015 – 57(1)
Access and opportunity plans and fee limits	33(2)	HE(W)A 2015 – 4(3)
	35(1)	HE(W)A 2015 – 6(1)
	36(4)	HE(W)A 2015 – 7(3)
	40(7)	HE(W)A 2015 – 37(7)
Quality assurance in higher education	46(8)	HE(W)A 2015 - 17(4)(a)
Inspection of further education and training	49(1)(f)	LSA 2000 – 75(1)(e)
	49(4)	LSA 2000 – 77(2)
	53(1)	LSA 2000 – 76(4)
	55(9)	LSA 2000 – 83(7)
Regulation and decision reviews	71(3)	HE(W)A 2015 – 44(3)
Miscellaneous and general	76(4)	HE (W)A 2015- 3(4)
HE Governance	125(2)	ERA 1988- paragraphs 2 to 11 of Schedule 7A
	126(2)	ERA1988- 125(2) to (4)
Miscellaneous and general	132	n/a
	134	n/a

Acronyms refer to:

- HE(W)A 2015 – Higher Education (Wales) Act 2015
- LSA 2000 – Learning and Skills Act 2000
- ERA 1988- Education Reform Act 1988

New secondary legislation powers

The new delegated powers are essential to ensure a regulatory framework for tertiary education in Wales which is future-proof and can be amended to meet future needs such as changes in the sector or funding priorities. It is critical that rigorous and effective regulations are flexible to allow access to varying sources of public funds for tertiary education, including categories of registration, grant-in-aid and funding from the proposed Commission.

The tertiary education sector is expected to evolve and change in size and shape over time, and these powers are required to ensure that regulation of the sector can evolve in tandem.

Policy area	Section
Categories of registration	11(3)
	11(6)
	11(9)
Conditions of registration	13(3)
	18(1)
	20
De-registration	27(2)
	27(6)
	29(13)
Access and opportunity plans	34(4)
Quality assurance in higher education	46(5)
Monitoring financial sustainability	72(1)(c)
	72(2)
Securing and funding tertiary education	80(3)
	80(4)
	81(1)
	88(5)
	89(5)
	94(3)
	95(4)
Apprenticeships	98(4)
	99(1)(c)
	100(1)
	106(6)
	107(3)
	112(5)
Learner complaints	116(2)
Data sharing	120(1)(l)
HE Governance	125(2)
	126(2)
Open University	131

Categories of registration

Section	Provision	Procedure
11(3)	Requires the Welsh Ministers to specify categories of registration for which provision must be made in the register of tertiary education institutions.	Affirmative
11(6)	This allows the Welsh Ministers to prohibit the registration of an institution in one category of the register at the same time that it is registered in one or more of the other categories.	Negative
11(9)	Power to make provision about the information which must be contained in an institution's entry in the register.	Negative

Description of powers

These powers allow secondary legislation to set out different categories of registration, whether institutions 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 institutions will be a flexible mechanism for proportionate and accountable regulation of the tertiary education sector in Wales. In particular, the register will ensure appropriate regulation for tertiary education institutions in Wales whose courses are designated for the purposes of Welsh Government student support under the Teaching and Higher Education Act 1998.

Current government policy is to prescribe two categories of registration in regulations under section 11(3):

- Higher Education Providers (Basic) – Institutions 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 (see 'Student support'). Institutions in this category will be subject to registration conditions outlined below (see 'Conditions of registration').
- Higher Education Providers (Advanced) – Institutions 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 (see 'Student support'). Institutions 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 Draft Bill and in regulations (see 'Conditions of registration').

It is furthermore intended to prescribe under section 11(6) that providers can only register in one of the categories: Basic or Advanced.

It is not current government policy to create any categories for institutions 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. However, the Bill does allow new registration categories and associated conditions to be created in future. This may include registration categories for further education providers that are not providing higher education, apprenticeship and training providers, and other forms of tertiary education provider, in the event of future changes in funding and regulatory priorities in the sector.

The regulation-making power will enable new categories of registration to be created in order to be applicable to different types of tertiary education providers where such regulation is appropriate. It will also enable the existing categories to be amended or removed from time to time. This 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 Draft 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.

Conditions of registration

Section	Provision	Procedure
13(3)	Power to provide for further initial conditions of registration for any category of registration. These may include conditions listed in section 13(4) (b).	Affirmative
18(1)	Power to specify categories of registration in relation to which the Commission must impose on institutions an ongoing condition of registration in respect of having (and complying with) an access and opportunity plan.	Affirmative
20	Power to provide for further mandatory ongoing registration conditions.	Affirmative

Description of powers

These powers allow for secondary legislation to set out mandatory conditions of registration in addition to those conditions set out in the Draft Bill. These include both initial and ongoing conditions of registration, and a power to specify the categories of registration to which an access and opportunity plan condition should be applied.

Policy purpose and intent

In addition to the initial conditions of registration outlined in section 13(1), Welsh Government intends that the following initial conditions of registration should apply to the respective categories of registration.

Higher Education Providers (Basic) – further initial condition

- **Consumer law compliance** - Regulations will provide for an initial registration condition for this category that relates to the information provided to prospective students about an institution, 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.

Higher Education Providers (Advanced) further initial conditions

- **Consumer law compliance** – This regulatory condition will also apply to the Advanced category of registration.
- **Charitable status** - Regulations will provide for an initial registration condition for this category that requires institutions 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 institutions.

Welsh Government intends that regulations made under section 18(1) will specify that an Access and Opportunity Plan condition should apply as an ongoing

registration condition to institutions registered in the Higher Education Providers (Advanced) category.

By extension, under section 18(2), any such institutions which provide qualifying courses will be subject to a Fee Limit registration condition.

A further consequence of these regulations would be that institutions registered in the Higher Education Providers (Basic) category would be subject to an equality of opportunity statement condition as set out in section 19.

Whilst the Welsh Government does not currently intend to provide, under section 20, for any further mandatory ongoing registration conditions for any category of registration. The regulatory system created by the Draft 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.

Further detail on the registration conditions can be found in chapter 3 of the Explanatory Memorandum.

De-registration

Section	Provision	Procedure
27(2)	Power to set out further circumstances where the Commission must remove an institution from a category in the register or all categories of the register	Affirmative
27(6)	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
29(13)	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 Draft Bill, where an institution must be removed from the register or from a category of the register, and for transitional and savings provisions to be made when an institution is removed from the register, whether mandatorily or voluntarily.

Policy purpose and intent

The power under section 27(2) is intended to ensure that any emerging circumstances which might require that a registered institution be removed from the register or a particular category of the register can be specified in legislation.

The powers under sections 27(6) and 29(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 circumstance.

Fees, qualifying courses, and qualifying persons

Section	Provision	Procedure
18(6)	Power to specify what a qualifying course is.	Negative
18(10)(b)	Power to specify who is a qualifying person for the purposes of paying regulated course fees.	Negative
18(12)	Power to set out when fees payable to a provider in respect of a course it provides on behalf of a registered institution are to be treated as payable to the registered institution for the purposes of fee limits.	Negative
34(4)	Power to set the maximum amount that the fee limit specified in an access and opportunity plan may not exceed.	Affirmative
77	Power 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 on provided by, or behalf of registered institutions. They also enable regulations to specify circumstances where fees paid to a person providing a course on behalf of a registered institution are to be treated as paid to the registered institution 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 institutions charge fees in Wales, and also any changes in the form of student support offered by Welsh Government. While this will only be used in respect of higher education in the first instance, it may be extended to some further education courses in the future.

Qualifying courses are currently prescribed in the Higher Education (Qualifying Courses, Qualifying Persons and Supplementary Provision) (Wales) Regulations 2015.

Qualifying persons are those persons who, on the first day of the relevant academic year, fall within the Schedule to the 2015 regulations, save for those persons who are not eligible for support under the exceptions listed.

Section 18(12) of the Draft Bill ensures that when registered institutions 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.

Whilst there are no immediate plans to exclude further types of fee from the definition of “fees” using the power under section 77 at this time, the situation will be kept under review in line with changes to the way fees are charged to students by institutions.

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 18(12) will be only required in response to evolving forms of franchise and sub-contracting arrangements between tertiary education providers.

The types of fee, and the ways in which they are charged, are likely to change over time alongside changes to the higher education sector in Wales. The power under section 77 will provide the Welsh Ministers with the flexibility to respond to these changes to ensure that the regulatory framework established under the Draft Bill still operates effectively.

Access and opportunity plans and fee limits

Section	Provision	Procedure
33(2)	Power to specify the maximum period in respect of which an access and opportunity plan is to have effect.	Negative
35(1)	Power to specify required contents of access and opportunity plans relating to promotion of equality of opportunity or the promotion of tertiary education.	Affirmative
36(4)	Power to make provision about matters which the Commission will have to take into account when making decisions regarding the approval, rejection or variation of an access and opportunity plan.	Affirmative
40(7)	Power to make regulations about the period (specified in a refusal to approve notice) before the end of which the Commission will not approve a new access and opportunity plan; the matters which the Commission must take into account in deciding whether to give or withdraw a notice that it will not approve a plan; and procedures to be followed .	Negative

Description of powers

These powers enable Welsh Ministers to make regulations in respect of various matters related to access and opportunity plans and the maximum tuition fee limit.

- Section 33(2) enables regulations to specify the maximum period for which an access and opportunity plan can have effect.
- Section 34(4) provides the Welsh Ministers the power to specify the maximum fee that may be charged for all 'qualifying courses' (as specified by regulations made under section 18(6)) provided by registered institutions who are subject to a fee limit condition.
- Section 35(1) provides the Welsh Ministers the power to specify in regulations that an access and opportunity plan relating to an institution must include provisions relating to the promotion of equality of opportunity for people in Wales or the promotion of relevant tertiary education provided in Wales.
- Section 36(4) enables regulations to make provision about matters to be taken into account by the Commission in approving or rejecting an access and opportunity plan or a variation to a plan under this section.
- Section 40(7) enables regulations to specify the period that may be specified in a notice under this section; matters to be taken into account by the Commission in deciding whether to give or withdraw notice under this section; and the procedure to be followed in connection with the withdrawal of notice.

The Welsh Ministers currently hold similar regulation making powers in respect of Fee and Access Plans under sections 4(2), 5, 6, 7 and 37 of the Higher Education (Wales) Act 2015.

Policy purpose and intent

Maximum period for an access and opportunity plan

The 2015 Act requires that the maximum period to which a fee and access plan can apply is two years. HEFCW currently requires plans on an annual basis. Current Welsh Government policy for regulations to be made under section 33(2) is to specify an extended maximum period of five years. More information on the rationale for this change can be found in the explanatory memorandum.

Maximum tuition fee

The Higher Education (Amounts) (Wales) Regulations 2015 determine the amount of fee support to be provided for qualifying courses by regulated institutions. Welsh Government policy regarding the maximum tuition fee for qualifying higher education courses remains unchanged.

Contents of access and opportunity plans

The Higher Education (Fee and Access Plans) (Wales) Regulations 2015 set out the current arrangements for fee and access plans by the Welsh Ministers for regulated institutions in Wales. These Regulations specify that a fee and access plan must set out the objectives of the institution relating to the promotion of equality of opportunity and the promotion of higher education, and also specify the proportion of qualifying fee income spent on these objectives.

Policy intent is for regulations made under section 35(1) of the new Draft Bill to build upon policy set by these existing Regulations. We will consult with the sector on how the content of access and opportunity plans can improve on the current content of fee and access plans. In particular, it is proposed that the requirement to specify the proportion of qualifying fee income spent on widening access objectives is removed, in line with the Welsh Government's objectives for the operation of access and opportunity plans as set out in more detail in chapter 3 of the Explanatory Memorandum.

Approval of access and opportunity plans

The Higher Education (Fee and Access Plans) (Wales) Regulations 2015 set out the current criteria which HEFCW must take into account when approving a fee and access plan.

The criteria stated in these Regulations includes a number of regulatory areas where the Commission will have a duty to monitor compliance with ongoing registration conditions, such as the financial sustainability of the institution, the management of financial affairs, and the quality of education it provides. It is therefore intended that these will cease to be criteria for consideration when the Commission is approving an access and opportunity plan.

It is further intended to remove any requirement for the Commission to consider the proportion of qualifying fee income spent on widening access objectives as a key factor to be considered when approving an access and opportunity plan.

Otherwise, it is intended that the criteria for approval of access and opportunity plans will build upon the criteria in the 2015 Regulations, with the addition of a requirement to take measures to reduce gaps in attainment in relevant tertiary education between persons from different groups (as specified in Section 35(3)(c)). This will be subject to further consultation with the sector to ensure that access and opportunity plans can operate as effectively as possible.

Access and opportunity plans are an evolving form of regulation and oversight of the higher education sector in Wales. The optimal length of time for an access and opportunity plan to apply may change over time as the Commission ensures that the plans are at their most effective. There is a need for flexibility in terms of the precise detail of Access and Opportunity Plans to reflect on future changes for example to the tertiary education sector or the student population. The power to set a maximum period enables the Welsh Ministers to respond to these changes.

Quality assurance in higher education

Section	Provision	Procedure
46(5)	Power to make regulations to require higher education assessments and reports at specified intervals.	Negative
46(8)	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 46 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 46(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 46(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 hold an equivalent power to that in section 46(8) under section 17(4) (a) of the Higher Education (Wales) Act 2015.

Policy purpose and intent

Higher education assessment intervals

Welsh Government intends for regulations to 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.

External providers

This power enables the Welsh Ministers to prescribe by way of regulations the circumstances in which a person is, or is not, to be treated as being responsible for providing a course of education on behalf of a regulated institution. Whilst there are no immediate intentions to make regulations concerning this matter it is considered that individual lecturers or tutors should not be treated as being responsible for providing a course of education on behalf of a regulated institution. No regulations have yet been made under the equivalent power in 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.

The power to specify the minimum interval between higher education quality assessments (section 46(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.

The power 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 will only be required in emergent or unforeseen circumstances if and when novel forms of partnership arrangements for the delivery of higher education courses develop in the future.

Inspection of further education and training

Section	Provision	Procedure
49(1)(f)	Power to specify education and training which the Chief Inspector of Education and Training must inspect (in addition to education and training set out on the face of the Draft Bill).	Negative
49(4)	Power to make provision about inspection and report interval periods.	Negative
53(1)	Power to confer further functions on the Chief Inspector in connection with the education and training described in section 49(1).	Negative
55(9)	Power to make further provision in relation to the obligations to provide the Chief Inspector with information in connection with an inspection; and to require inspection reports to be published before the end of a certain period.	Negative

Description of powers

Section 49 of the Draft Bill sets out the inspection remit of the Chief Inspector of Education and Training in Wales. Section 49(1)(f) enables the Welsh Ministers to specify additional forms of education and training to be added to that remit, in addition to those listed in section 49(1).

Section 49(4) enables the Welsh Ministers to specify the minimum interval between inspections and the time period during which reports of inspections must be published, and to prescribe the period within which inspection reports must be published.

Section 53 enables the Welsh Ministers to specify any other functions of the Chief Inspector in respect of education and training listed in section 49(1).

Section 55 sets out provision for area inspections, including the requirements for bodies listed in section 55(7) to provide information to the Chief Inspector. Section 55(9) enables the Welsh Ministers to specify additional obligations to provide information to the Chief Inspector in regards to area inspections, as well as the time period during which reports of area inspections must be published.

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

Remit and further functions of the Chief Inspector

The regulation making powers under section 49(1) (f) and section 53(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. Welsh Government does not currently intend to use these powers upon commencement of the Act. This power is necessary for future-proofing, and may be required for Estyn to inspect initial teacher education and training for post-compulsory providers, in a similar way to Estyn's current duties in inspecting youth and community worker training or initial teacher education for schools. For example, the option of professional learning for post-

compulsory sectors following the [scoping study report](#) in December 2019 which recommended adjusting arrangements for the approval of teaching qualifications and the quality assurance of the courses to bring them into line with those for schools.

Inspection intervals and reports

The Education (Amendments Relating to the Intervals for Inspection of Education and Training) (Wales) Regulations 2020, due to come into force on 1st September 2020, require that following the conclusion of the inspection period ending on 31st August 2024, inspections will be conducted once every six years. Welsh Government policy on inspection intervals remains unchanged.

The Inspection of Education and Training (Wales) Regulations 2001 require inspection reports to be made within the period of 55 working days from the date on which the inspection or area inspection is completed or, where it is necessary to provide a translation into Welsh or English, the period of 65 working days from that date. Welsh Government policy on inspection reports remains unchanged.

Obligations to provide the Chief Inspector with information

The regulation making power under section 55(9) is intended to ensure that the Chief Inspector is able to obtain all the information they require in the process of an area inspection. This may include requiring information from persons or bodies that are not normally subject to inspections of education and training. Welsh Government intends only to use this power in instances where the Chief Inspector identifies a need for information in the course of an area inspection which they might not be able to obtain through their powers as specified in the Bill.

These powers cover largely technical and detailed matters related to inspection of further education and training.

The powers to specify the minimum interval between inspections and time period to publish reports may need to be changed from time to time in response to changing resource availability or assessments of risk regarding quality in the education and training sector.

The powers to amend or clarify the remit of the Chief Inspector, and to make provision related to the provision of information in the case of area inspections, may be required in response to unforeseen changes in the organisation, structure, or funding of education and training in Wales concerning the quality assurance and inspection of higher apprenticeships, including degree apprenticeships.

Regulation and decision reviews

Section	Provision	Procedure
71(3)	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 71 sets out the Welsh Ministers' functions in respect of appointing a person or panel to conduct decision reviews. An institution may request a review where the Commission makes use of the following powers:

- Refusing to register a provider (section 11).
- Imposing or varying a specific ongoing registration condition (section 15).
- Directing an institution in respect of failure to comply with ongoing registration conditions (section 25).
- Removing an institution from a category of the register (section 27).
- Specifying the date on which an institution is to be removed from a category of the register (sections 28 and 29).
- Giving a notice rejecting a proposed access and opportunity plan (section 36).
- Giving a notice rejecting a proposed variation to an access and opportunity plan (section 36).
- Giving a notice refusing to approve a new access and opportunity plan (section 40).
- Directing an institution in respect of failing to co-operate with the Commission or a designated body as required under section 65.

Section 71(3) requires the Welsh Ministers to make provision through regulations in connection with the form, content and process of carrying out reviews.

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 71(4) sets out the matters that regulations made under section 71(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

Welsh Government intends to consult on all of the above matters when developing these regulations.

The details of the decision review process are largely technical and procedural, and may need to be amended from time to time as good practice is developed by the Commission in respect of decision reviews.

Monitoring financial sustainability

Section	Provision	Procedure
72(1)(c)	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
72(2)	Power to provide for exceptions to the duty to monitor the financial sustainability of registered institutions and institutions in Wales within the FE sector funded by the Commission.	Negative

Description of powers

Section 72 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 institutions in Wales in the further education sector that are not registered but are funded by the Commission.

The powers under section 72(2) enable the Welsh Ministers to make exceptions in the application of the monitoring duty for institutions or types of institutions in these categories.

Section 72(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 institutions or institutions 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 institutions or types of institutions 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 72 of the Draft Bill and ensure that there are no gaps in the application of the duty.

Securing and funding tertiary education

Section	Provision	Procedure
80(3)	Power to specify categories of registered institution to which the Commission may provide financial support in respect of expenditure incurred for the purposes of provision of higher education and facilities or activities connected with the provision of higher education.	Affirmative
80(4)	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
81(1)	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
88(5)	Power to provide that financial support for further education and training can only be secured for institutions registered in specified categories. Regulations may provide for exceptions to the requirement to be registered.	Affirmative
89(5)	Power to provide exceptions to the duty of the Commission to impose a condition of funding prohibiting the charging of fees by providers to persons under the age of 19 in respect of the provision of FE and training.	Affirmative
94(3)	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 institutions registered in categories specified in the regulations.	Affirmative
95(4)	Power to specify categories of registration which an institution must be registered in before the Commission can provide financial resource to the institution in respect of expenditure for the purpose of (or in connection with) research or innovation.	Affirmative

Description of powers

The powers under sections 80(3), 88(5), 94(3) and 95(4) enable the Welsh Ministers to specify categories of registered institutions eligible for receipt of funding from the Commission for supporting:

- higher education and related activities (80(3))
- further education and training and related activities (88(5))
- approved Welsh apprenticeships and related activities (94(3))
- research and innovation and related activities (95(4)).

The power under section 80(4) enables the Welsh Ministers to specify the circumstances in which funding must not be provided by the Commission in respect of courses of initial teacher training.

The power under section 81(1) enables the Welsh Ministers to specify particular courses of higher education or descriptions of such courses which may be funded by the Commission (i.e. higher education courses eligible for funding).

The power under section 89(5) enables the Welsh Ministers to specify exceptions to the prohibition on fees being charged to learners under the age of 19 in respect of further education and training provision.

Policy purpose and intent

Higher education and initial teacher training funding

Section 80 allows the Commission to fund certain categories of registered institutions, for the purpose of supporting higher education provided by or on behalf of such institutions. Section 80(3) enables the Welsh Ministers to specify the categories of registered institutions eligible to receive funding from the Commission under this section (the “specified institutions”). The policy intention is that higher education providers will need to register with the Commission in the proposed “Advanced” registration category in order to be eligible for receipt of funding from the Commission.

Courses for the initial training of teachers provided by specified institutions may be funded by the Commission under section 80 of the Bill. Section 80(4) enables the Welsh Ministers to specify certain requirements to be met by a course of initial teacher training before the Commission can provide a specified institution with financial support in respect of the provision of that course. The policy intention is that initial teacher training courses must not be funded by the Commission unless they are accredited by the Education Workforce Council (ECW).

Section 81 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 81(1) enables the Welsh Ministers to specify such courses 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. The 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 institutions (as defined in section 80(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 institutions to deliver. These powers should be considered as contingency powers.

Further education and training funding

Section 88(5) enables the Welsh Ministers by way of regulations to provide that financial support for further education and training can only be secured to institutions registered in specified categories.

In the short term the policy intention is not to operate a registration system for further education and training providers (see 'Categories of registration'). However, regulatory arrangements may change over time and in future a registration system applicable to further education and training providers may operate. Should the need arise the Welsh Ministers will be able to specify the categories of registered institutions eligible to receive funding from the Commission under this section.

Regulations under section 89(5) will enable the Welsh Ministers to provide exceptions to the duty of the Commission to impose a condition of funding prohibiting the charging of fees by providers to persons under the age of 19 in respect of the provision of further education and training. This power will enable the Welsh Ministers to set out the circumstances in which a further education provider may be able to charge a fee for learners aged 16-19 in the future. The Welsh Government will consider circumstances in which there is a justification for further education and training providers to charge fees in connection with the provision of further education and training to 16-19 year olds; for example, to cover the costs of optional field trips or overseas visits. Government will consult on such matters before making regulations under this section.

Apprenticeship funding

Section 94 allows the Commission to fund the provision of approved Welsh apprenticeships or connected matters. Section 94(3) enables the Welsh Ministers to require that the Commission can only provide financial resources in respect of expenditure incurred in connection with the provision of an approved Welsh apprenticeship to institutions registered in categories specified in the regulations. As registration arrangements may change over time the policy intention is to ensure that the Commission's ability to fund apprenticeship providers reflects any future changes to the categories of registered providers eligible to access such funding.

Research and innovation funding

Section 95 allows the Commission to fund certain categories of institutions who are registered with the Commission, for the purpose of supporting research or innovation. Section 95(4) enables the Welsh Ministers to specify the categories of registered institutions eligible to receive funding from the Commission under this section. Government intends that institutions who register in the "Advanced" category will be eligible for receipt of funding.

The powers under sections 80(3), 88(5), 94(3) and 95(4) will enable the Welsh Ministers to make decisions on the eligibility of different categories of registered institutions for receipt of funding from the Commission in respect of higher education, further education and training, approved Welsh apprenticeships and research and innovation respectively. The ability to modify the specified institutions will ensure that eligibility for funding can adapt to changing circumstances and align with the regulatory arrangements applied to providers of tertiary education who register with the Commission.

The regulation-making power under section 80(4) provides flexibility for Welsh Ministers to make decisions about the eligibility of initial teacher training courses for funding by the Commission and enables accreditation of courses for initial teacher education to be modified from time to time.

The regulation making power under section 81(1) provides flexibility for the Welsh Ministers to make decisions about the eligibility of specified courses of higher education for funding by the Commission. The courses which may need to be funded are likely to change over time depending on external factors such as the availability of courses delivered by providers registered in the Advanced category and the changing needs of learners, Welsh society and the economy of Wales.

The regulation-making power under section 89(5) provides flexibility for the Welsh Ministers to make decisions about the circumstances under which it may be appropriate for providers of further education and training to charge fees to learners aged 16-19. In light of the general prohibition on charging such learners fees this power recognises that under some circumstances costs beyond those immediately associated with course provision may be incurred by providers e.g. the costs of optional field trips and overseas visits.

Apprenticeships

Section	Provision	Procedure
98 (4)	Power of the Welsh Ministers to specify the conditions that an apprenticeship must satisfy to be an approved Welsh apprenticeship.	Affirmative
99(1)(c)	Power of the Welsh Ministers to specify further conditions that an apprenticeship agreement must satisfy to be an approved Welsh apprenticeship agreement.	Affirmative
100(1)	Power of the Welsh Ministers to specify the description of what is categorised as an alternative Welsh apprenticeship.	Affirmative
106(6)	Power of the Welsh Ministers to require the Commission to include further information in the register of apprenticeship frameworks.	Negative
107(3)	Power for the Welsh Ministers to authorise the Commission to charge a fee for issuing an apprenticeship certificate.	Negative
112(5)	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 Draft 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 98 of the Bill provides for the definition of an approved Welsh Apprenticeship. The power under section 98(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 employment environment. It could for instance be used to respond to changes to the economy or delivery of apprenticeships.

Section 99 provides for the definition of an approved Welsh apprenticeship agreement. Section 99(1) 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 100 provides for the definition of an alternative Welsh apprenticeship. The power under section 100(1) enables the Welsh Ministers to make regulations that specify and amend the description of 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 equivalent provisions underpinning the operation of the current apprenticeship system.

Section 106 requires that the Commission must maintain a register of the apprenticeship frameworks published under section 105 of the Draft Bill. The power under section 106(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 107 of the Draft 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 107(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 112 of the Draft Bill provides that a person who is employed as a Crown servant may undertake an approved Welsh apprenticeship agreement. The power under section 112(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 Draft 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 98(4), 99(1)(c) and 100(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 112(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 Draft 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 106(6) and 107(3) 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	Provision	Procedure
116(2)	Power to specify institutions other than those set out on the face of the Higher Education Act 2004 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 116(2) makes amendments to the Higher Education Act 2004 in relation to the student complaints scheme. It amends and inserts new text into sections 11 (qualifying institutions) and 12 (qualifying complaints) of the 2004 Act. Sections 11(2)-(5) and 12(2A) are inserted. Section 11(2) affords the Welsh Ministers with a regulation making power to specify a qualifying institution for the purposes of the student complaints scheme, Section 12(2A) extends the definition of qualifying complaints.

Policy purpose and intent

Section 13 of the Higher Education Act 2004 allows for the designation of a body to operate a student complaints scheme. The Office of the Independent Adjudicator (OIA) 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 OIA's role currently extends to 'qualifying institutions' defined under the 2004 Act.

This power will enable the Welsh Ministers to specify by regulations a registered institution or institution in Wales (other than a registered institution) in receipt of financial resources from the Commission pursuant to sections 81(3) (a) (higher education courses), 88(1) (a) (further education or training), or 94(1) (a) (apprenticeships) of the TER Bill, as a qualifying institution for the purposes of the student complaint scheme. 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

The policy aim is to extend the remit of the OIA 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 OIA and individual providers to build their capacity.

Data sharing

Section	Provision	Procedure
120(1)(l)	Power to specify persons other than those set out on the face of the Draft Bill as persons who are able to share information with the Commission.	Negative

Description of powers

Section 120 includes a list of the other government departments, bodies and organisations 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 bodies or organisations that are allowed to share information with the Commission under this section.

Policy purpose and intent

This section allows the Welsh Ministers to make regulations to specify other bodies or organisations that are not mentioned on the face of the Draft Bill which will be able to share information with the Commission. It would also allow for the creation of new authorities or the re-naming or re-organisation of existing ones.

The power enables the Welsh Ministers to modify categories of persons to share information as may be required. The power is relatively small in that it does not affect the data being shared, only the ability to add to the list of those who can share it.

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

Section	Provision	Procedure
125(2)	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
126(2)	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 125(2) makes provision for the Welsh Ministers' existing order making powers under section 124A (9) 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 ERA 1988, the Welsh Ministers are 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, the size, constitution and appointment of members of the corporation. 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 126(2) introduces a new power 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.

Policy purpose and intent

These provisions allow current statutory prescriptions placed on the governing documents of HECs to be reviewed, and if necessary amended or repealed. This will ensure that a consistent approach to the amendment and simplification of governing documents can be applied to all HEIs regardless of their constitutional underpinnings. The current approach to the amendment and simplification of HEI governing documents is based on guidance issued in 2006. The 2006 guidance was heavily focused on the arrangements of chartered universities who are not subject to equivalent statutory requirements on their governing documents.

These order making powers ensure that current statutory requirements placed on the governing documents of HECs can be reviewed and, where necessary amended to ensure they remain appropriate and fit for purpose. They will also allow current statutory requirements to be reviewed at a time when fuller details of the Commission's regulatory requirements in relation to the governance of HEIs are known. This will ensure that the existing oversight of governance arrangements at HEIs is not weakened and that the interests of learners and other stakeholders are protected.

Open University

Section	Provision	Procedure
131	Power to provide for the Open University to be treated as an institution in Wales for the purpose of specific provisions under this Draft Bill	Affirmative

Description of powers

The power enables the Welsh Ministers to make regulations which provide for the Open University to be treated as an institution in Wales for the purpose of any provision in, or made under, the Draft Bill. Under the regulations, the Welsh Ministers are able to modify the effect of any specified provision insofar as it applies to the Open University whether as an institution in Wales or as a registered institution, should it become one.

Policy purpose and intent

This section allows the Welsh Ministers to make regulations to apply the provisions under this Draft Bill to the Open University. This will allow the Welsh Ministers to treat the Open University as an institution in Wales. 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.

The Welsh Government is presently in discussions with the Open University to determine the most appropriate use of this power in respect of the application of different provisions under the Draft Bill to the Open University.

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 an institution in Wales for the purposes of section 130 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.

It is therefore more appropriate to use secondary legislation to apply provisions in this Draft 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."

Miscellaneous and general

Section	Provision	Procedure
76(4)	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 76 enables the Welsh Ministers to designate a provider of higher education in Wales as an ‘institution’ for the purposes of the Draft Bill and any subordinate legislation made under it. Such a provider would not normally be regarded as an ‘institution’ under the Draft Bill. A designation may be made on an application by the provider concerned. Section 76(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.

Section 132 creates the power to make consequential or transitional provision.

Section 134 creates the power to bring into force provisions which are not brought into force by the Bill.

Policy purpose and intent

The power under section 76 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 this Draft 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).

Section 132 creates the power to make consequential or transitional provision as and when required.

Section 134 is suitable for commencement by order in order to ensure that the provisions of the Draft Bill are brought into force at an appropriate time following the establishment of the Commission. This may involve a ‘phased’ approach to commencement to enable for a smoother transition for the wider tertiary education sector.

Justification for delegation

The procedures and processes associated with making or withdrawing designations under section 76 may change over time as different providers seek to enter the tertiary education sector in Wales. This regulation making power will allow the Welsh Ministers to respond to the changes.

The powers under sections 132 and 134 reflect common practice for making consequential or transitional provision and commencement orders.