

Higher Education and Research Bill: Memorandum on the application of Standing Order No. 83O of the Standing Orders of the House of Commons relating to Public Business in respect of certified motions or amendments relating to Lords amendments and other messages

For the purposes of the Commons consideration of Lords amendments, the following is the Department's assessment of the application of Standing Order No. 83O in respect of the amendments to the Higher Education and Research Bill ("the Bill") made during the Bill's passage through the Lords and of the Government amendments in lieu of Lords Amendments. The clause numbers referred to are those in the version of the Bill as it left the Commons and was first printed for the Lords on 22 November 2016 (Bill 76).

Summary

1. Before third reading in the Commons, the Speaker certified that:
 - a. clause 82 (then clause 81) relates exclusively to England and Wales and is within devolved legislative competence¹;
 - b. clause 56 and Schedule 5 relate exclusively to England and are within devolved legislative competence;
 - c. amendments made in public bill committee in the Commons to clause 82 (clause 80 in public bill committee) relate exclusively to England.
2. Lords Amendments Nos. 140 and 141 are Government amendments made in the Lords that further amend clause 82. In the Government's view, the amendments relate exclusively to England and Wales and would be within devolved legislative competence. They therefore do not alter the Department's assessment of the territorial application of the clause or the legislative competence of the devolved legislatures, as set out in the Memorandum in respect of the application of Standing Order No. 83L in respect of Government amendments tabled for Report stage in the Commons or the analysis at Annex A to the explanatory notes.
3. The Department's assessment of the other Government amendments made in the Lords and of non-Government amendments is set out below.

Territorial application

4. For the purposes of Standing Order No. 83O, the amendments made in the Lords can be divided into groups (set out in tabular form below):
 - a. Group 1 relate exclusively to England;
 - b. Groups 2 and 3 relate exclusively to England and Wales;
 - c. Group 4 are amendments to clause 77 (an interpretation provision) that apply to Wales, Scotland and Northern Ireland to the extent that clause 77 is needed to apply there for the purposes of clause 25;

¹ References in this statement to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

- d. Group 5 apply to the whole of the United Kingdom.

Government amendments to existing clauses

5. Lords Amendments Nos. 146, 150 and 151 to clause 83 (student complaints) are Government amendments which make some changes to the law which apply in Wales. In the Government's view, clause 83 now relates exclusively to England and Wales.
6. None of the other Government amendments to existing clauses or Schedules of the Bill alter the Government's assessment of the territorial application of the provision they amend as set out in the Memorandum in respect of the application of Standing Order No. 83L in respect of Government amendments tabled for Report stage in the Commons and the analysis at Annex A to the explanatory notes.

Government new clauses

7. Lords Amendment No. 38 is a Government amendment that inserts a new clause (Duty to monitor etc the provision of arrangements for student transfers) after clause 36 (Power of Secretary of State to require a report). The new clause requires the Office for Students to monitor the availability of student transfer schemes or other arrangements provided by registered higher education providers. One of the requirements for registration is that the institution is or intends to become an English higher education provider. An English higher education provider is one whose activities are carried on in England or principally in England (see subsection (1) of clause 77). In the Government's view, the provisions either have no effect outside England or, if they do because a provider carries on some of (but not principally) its activities outside England, those effects are minor and consequential².
8. Lords Amendment No. 71 is a Government amendment that inserts a new clause (Grant, variation or revocation of authorisation: advice on quality etc) after clause 43 (Variation or revocation of other authorisations to grant degrees etc). Sub-sections (12) and (13) of the new clause were inserted by a non-Government amendment in the Lords (see paragraph 15 below). This new clause requires the Office for Students to request specified advice before authorising a registered provider to grant degrees, or before varying or (on grounds of quality) revoking authorisations that enable English higher education providers (which may or may not be registered) to grant degrees. As outlined above, the Government's view is that the provisions which relate to English higher education providers (including those who are registered) either have no effect outside England or, if they do because a provider carries on some of (but not principally) its activities outside England, those effects are minor and consequential.
9. Lords Amendment No. 95 is a Government amendment that inserts a new clause (Saving for right to grant degrees under the Ecclesiastical Licences Act 1533) after clause 50 (Unrecognised degrees: supplementary). The new clause ensures that nothing in Part 1 of the Bill affects the right of the Archbishop of Canterbury to award a type of 'Lambeth degree' that does not require the recipient to complete a course of study or programme of supervised research, or to satisfy an examination, test or other assessment. The new clause is concerned with the application of Part 1 which, in the Government's view, relates exclusively to England (apart from clauses 25, 73,

² References in this statement to an effect of a provision being minor or consequential are to its being minor or consequential for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

74 and 77 which are not concerned with the power to award degrees, the subject matter of the saving in the new clause inserted by Lords Amendment No. 95). In the Government's view, therefore, the amendment relates exclusively to England.

10. Lord Amendment No. 109 is a Government amendment that inserts a new clause (Duty to compile and make available higher education information) before clause 59 (Duty to publish English higher education information). The new clause imposes a duty on the OfS or, where a body has been designated under Schedule 6, that body, to compile and make available information relating to registered higher education providers and the courses they provide. This amendment therefore relates to registered providers only and, for the reasons set out above, in the Government's view either has no effect outside England or effects that are minor and consequential.

Non-Government amendments

11. Lords Amendment No. 1 is a non-Government amendment that inserts a new clause (UK universities: functions) before clause 1. This clause appears to apply to the whole of the United Kingdom as it places positive duties not just on registered English higher education providers but on universities throughout the United Kingdom.
12. Lords Amendment No. 12 is a non-Government amendment that inserts a new clause (Regulated course fees etc: use in relation to section 25) after clause 10 (Mandatory fee limit condition for certain providers). This clause appears to relate exclusively to England because it serves to place a restriction on what the scheme to provide ratings regarding the quality of higher education can be used for in relation to English higher education providers.
13. Lords Amendment No. 15 is a non-Government amendment that amends clause 14 (Public interest governance condition). In the Department's view, clause 14 relates exclusively to England because it relates to the conditions that may be placed on registered English higher education providers and the amendment does not alter that position.
14. Lords Amendment No. 23 is a non-Government amendment that would leave out clause 25 (Rating the quality of, and the standards applied to, higher education) and insert a new clause (Scheme to provide information about the quality of higher education and higher education teaching). In the Department's view, this new clause applies to the whole of the United Kingdom because it applies both to English higher education providers and also to higher education providers in Wales, Scotland and Northern Ireland who apply to participate in the scheme. This new clause does not include the provisions in clause 25 which made the participation of Welsh, Scottish and Northern Irish Higher Education providers in the rating scheme subject to obtaining appropriate consent from the relevant devolved administration.
15. Lords Amendment No. 71 inserts a new clause (Grant, variation or revocation of authorisation: advice on quality etc) after clause 43 (Variation or revocation of other authorisations to grant degrees etc). Subsections (12) and (13) of the new clause were inserted by a non-Government amendment in the Lords. In the Department's view, the new clause relates exclusively to England because it relates to the assessment of quality and standards prior to the authorisation of degree awarding powers for English higher education providers (see paragraph 8 above for a fuller analysis of the new clause). The non-Government amendment to the new clause does not alter that position.

16. Lords Amendment No. 78 is a non-Government amendment that amends clause 45 (Appeals against variation or revocation of authorisation). In the Department's view, clause 45 relates exclusively to England because it deals with the appeals process when authorisation to grant degrees to registered higher education providers or English higher education providers are varied or revoked. These providers' activities will be carried on, or principally carried on, in England. The amendment does not alter that position.
17. Lords Amendment No. 106 is a non-Government amendment that amends clause 55 (Appeals against revocation of authorisation). In the Department's view, clause 55 relates exclusively to England and the amendment does not alter that position because it deals with the appeals process when authorisation for institutions in England to use "university" title is revoked.
18. Lords Amendment No. 156 is a non-Government amendment that inserts a new clause (Students and academic staff at higher education providers) after clause 83 (Qualifying institutions for purposes of student complaints scheme). This new clause requires the Secretary of State to encourage international students to attend "higher education providers covered by this Act" which would appear to include providers in Wales, Scotland and Northern Ireland, who are covered by clause 25. The clause also places a duty on UKRI to facilitate cooperation between British higher education and research establishments and those based outside the United Kingdom. It therefore appears to the Government to apply to the whole of the United Kingdom.

Government amendments in lieu of Lords Amendments

19. The Government amendments in lieu of Lords Amendment No. 1 amend clauses 51 and 52 of the Bill (Use of "university" in title of institution), which amend section 77 of the Further and Higher Education Act 1992 and section 39 of the Teaching and Higher Education act 1998, to ensure that, before the Office for Students (OfS) allows a higher education provider to call itself a university, it must have regard to factors in guidance from the Secretary of State and, before giving such guidance, the Secretary of State must consult relevant bodies.
20. In the Government's view, the amendments relate exclusively to England because the OfS may only grant "university" title to an English higher education provider. As set out above, these are providers whose activities are carried on in England or principally in England and the amendments therefore have no effect outside England or effects that are minor and consequential.
21. The Government amendments in lieu of Lords Amendment No. 12 amend clause 113 of the Bill (Regulations) and Schedule 2 to the Bill (The fee limit). The amendments:
 - a. delay the differentiation of fee limits determined by reference to ratings given under a scheme established under clause 25 (Rating the quality of, and the standards applied to, higher education) until academic year 2020/21;
 - b. amend the Parliamentary procedure which applies to regulations to alter fee limit amounts; and
 - c. put beyond doubt that the general power to make different provision for different cases in regulations under the Bill includes a power to prescribe different fee caps for accelerated courses.
22. In the Government's view, the amendments relate exclusively to England because they concern fee limits that may be imposed on registered higher education providers. One of the requirements for registration is that the institution is or intends

to become an English higher education provider. As set out above, these are providers whose activities are carried on in England or principally in England. In the Government's view, therefore, the amendment either has no effect outside England or those effects are minor and consequential.

23. The Government amendments in lieu of Lords Amendment No. 15 amend clause 13 of the Bill (Other initial and ongoing registration conditions). The amendments introduce a further example of an initial and ongoing condition of registration as a higher education provider that the Office for Students may require. The example is a condition requiring the provider to take such steps as the Office for Students considers appropriate for facilitating cooperation between the provider and one or more electoral registration officers in England for the purpose of enabling the electoral registration of students at that provider. In the Government's view, the amendments relate exclusively to England because they concern cooperation between registered providers, whose activities, as set out above, are carried on in England or principally in England, and Electoral Registration Officers in England.
24. The Government amendments in lieu of Lords Amendment No. 23 include the insertion of a new clause after clause 25 of the Bill (Rating the quality of, and the standards applied to, higher education). This new clause requires the Secretary of State to appoint a suitable independent person to prepare a report on the operation of the Teaching Excellence Framework (TEF) within one year of clause 25 coming into force. The report must cover specified matters and be laid before Parliament. Assuming providers across the United Kingdom opt to participate in the TEF (which will be subject to the relevant devolved administrations giving their consent under clause 25), the report could consider the operation of TEF across the United Kingdom. However, given the amendments only impose a duty on the Secretary of State and the person appointed to produce the report, the effects, if any, outside England are likely to be minor and consequential. In the Government's view, therefore, the amendments relate exclusively to England. The amendments also make minor and technical amendments consequential on a Government amendment deleting the definition of "standards" from clause 13.
25. The Government amendments in lieu of Lords Amendment No. 71 replace the clause inserted after clause 43 of the Bill (Grant, variation or revocation of authorisation: advice on quality etc) with two clauses that largely replicate the previous clause but deletes two subsections, (12) and (13), that were inserted by a non-Government amendment, and makes further amendments to the clause.
26. The clause concerns the advice that the OfS must seek before it can grant, vary or, on grounds of quality, revoke degree awarding powers (DAPs). As previously tabled, the amendment requires the OfS to take advice from the designated quality body or, if no body is designated, to establish a specific committee. The amendment makes further provision to require the OfS to appoint a majority of members to the specific committee who are not members of the OfS. In appointing the committee, the OfS must consider the need for the advice to be informed by the interests listed in the amendment. The clause as further amended also makes clear that any advice must include a view on whether the higher education provider seeking DAPs can provide and maintain the provision of higher education of an appropriate quality and standard. The second clause now also requires the OfS to notify the Secretary of State as soon as possible after it makes an order authorising a registered higher education provider to grant taught awards if that provider has not previously operated under a validation arrangement.

27. In the Government's view, the amendment relates exclusively to England because the OfS may only grant degree awarding powers to registered providers and may vary or revoke the degree awarding powers of English higher education providers. As set out above, registered providers and English higher education providers are those providers whose activities are carried on in England or principally in England and any effects outside England are minor and consequential.
28. The Government amendments in lieu of Lords Amendments Nos. 78 and 106 amend clauses 45 and 55. These clauses concern appeals against decisions of the OfS to vary or revoke DAPs (clause 45) or revoke "university title" (clause 55). In the Government's view, the amendments and the clauses which they amend relate exclusively to England because the OfS may only vary or revoke the DAPs or revoke the "university" title of English higher education providers. As set out above, English higher education providers' activities are carried on in England or principally in England and any effects outside England are minor and consequential.
29. The Government amendments in lieu of Lords Amendment No. 156 amend clause 59 (Duty to publish higher education information). The amendments require the OfS to consider what information would be helpful to international students, as defined by the amendments, and to consider whether information about international student numbers would be appropriate information. Clause 59 concerns information relating to registered higher education providers and the higher education courses that they provide. As set out above, in the Government's view provisions which relate only to registered providers relate exclusively to England and any effects outside England are minor and consequential.

Subject matter and legislative competence of devolved legislatures³

30. By virtue of it not being included in the list of reserved matters in Schedule 5 to the Scotland Act 1998, higher education is within devolved legislative competence in Scotland. Education is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). Education is within paragraph 5 of Schedule 7 to the Government of Wales Act 2006 and is not within one of the exceptions listed therein, nor is it otherwise outside the legislative competence of the National Assembly for Wales (see section 108 of that Act).
31. Accordingly, in the Department's view, provisions corresponding to each clause that relates exclusively to England or exclusively to England and Wales would be within the legislative competence of the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly. The amendments set out in Groups 1 and 3 would therefore all be within the legislative competence of the devolved legislatures. The amendments in Group 2 amend clause 80 (Power to make alternative payments) which makes provision in relation to functions of HM Revenue & Customs which are not within devolved legislative competence.

Government new clauses

32. Lords Amendment No. 38 is a Government amendment that inserts a new clause (Duty to monitor etc the provision of arrangements for student transfers) after clause

³ References in this statement to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

36 (Power of Secretary of State to require a report). In the Department's view, the subject matter of the new clause is higher education and, as set out above, within devolved legislative competence.

33. Lords Amendment No. 71 is a Government amendment that inserts a new clause (Grant, variation or revocation of authorisation: advice on quality etc) after clause 43 (Variation or revocation of other authorisations to grant degrees etc). In the Department's view, the subject matter of the new clause is higher education and, as set out above, within devolved legislative competence.

34. Lords Amendment No. 95 is a Government amendment that inserts a new clause (Saving for right to grant degrees under the Ecclesiastical Licences Act 1533) after clause 50 (Unrecognised degrees: supplementary). The new clause is concerned with the application of Part 1, the subject matter of which is higher education and, as set out above, within devolved legislative competence.

35. Lords Amendment No. 109 is a Government amendment that inserts a new clause (Duty to compile and make available higher education information) before clause 59 (Duty to publish English higher education information). In the Department's view, the subject matter of the new clause is higher education and, as set out above, within devolved legislative competence.

Non-Government amendments

36. Lords Amendment No. 15 is a non-Government amendment that amends clause 14 (Public interest governance condition). In the Department's view, the subject matter of clause 14 is higher education and, as set out above, within devolved legislative competence. The amendment does not change that position.

37. Lords Amendment No. 71 inserts a new clause (Grant, variation or revocation of authorisation: advice on quality etc) after clause 43 (Variation or revocation of other authorisations to grant degrees etc). Subsections (12) and (13) of the new clause were inserted by a non-Government amendment in the Lords. In the Department's view, the subject matter of the new clause is higher education and, as set out above, within devolved legislative competence. The non-Government amendment to the new clause does not alter that position.

38. Lords Amendment No. 78 is a non-Government amendment that amends clause 45 (Appeals against variation or revocation of authorisation). In the Department's view, the subject matter of the new clause is higher education and, as set out above, within devolved legislative competence. The amendment does not alter that position.

39. Lords Amendment No. 106 is a non-Government amendment that amends clause 55 (Appeals against revocation of authorisation). In the Department's view, the subject matter of the new clause is higher education and, as set out above, within devolved legislative competence. The amendment does not alter that position.

Government amendments in lieu of Lords Amendments

40. In the Department's view, the subject matter of the Government amendments in lieu of Lords Amendment No. 1 is higher education because the amendments concern the granting of "university" title to registered higher education providers. As set out above, higher education is within devolved legislative competence.

41. In the Department's view, the subject matter of the Government amendments in lieu of Lords Amendment No. 12, and of Schedule 2 to the Bill which they amend, is higher education because these provisions concern the fee limits that may be imposed on registered higher education providers. As set out above, higher education is within devolved legislative competence.
42. In the Department's view, the subject matter of the new clause inserted by the Government amendments in lieu of Lords Amendment No. 23 is higher education because it concerns the rating of the quality of higher education. As set out above, higher education is within devolved legislative competence.
43. In the Department's view, the subject matter of the two clauses inserted by the Government amendment in lieu of Lords Amendment No. 71 is higher education because they concern degree awarding powers granted to registered higher education providers. As set out above, higher education is within devolved legislative competence.
44. In the Department's view, the subject matter of the Government amendments in lieu of Lords Amendments Nos. 78 and 106, and of clauses 45 and 55 which the amendments amend, is higher education because the amendments concern the revocation of degree awarding powers or "university" title. As set out above, higher education is within devolved legislative competence.
45. In the Department's view, the subject matter of the Government amendments in lieu of Lords Amendment No. 156, and of clause 59 which the amendments amend, is higher education because they concern the publication of information relating to registered higher education providers and the higher education courses that they provide. As set out above, higher education is within devolved legislative competence.

The above assessment is presented in tabular form below.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Group 1 (Lords Amendment Nos. 2-22, 24-130, 134-137, 142-145, 147-149, 152-155, 166-168, 189-228)	Yes	No	No	No	Yes	Yes	Yes	No
Group 2 (Lords Amendments Nos. 138-139)	Yes	Yes	No	No	No	No	No	Yes (Wales only)
Group 3 (Lords Amendments Nos. 140-141, 146, 150-151, 188, 242-244)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales only)
Group 4 (Lords Amendments Nos. 131-133)	Yes	Extend to E&W but apply in part to Wales	Extend to E&W but apply in part to Scotland	Extend to E&W but apply in part to Northern Ireland	N/A	N/A	N/A	No (except to the extent covered by the LCMs required for clause 25)
Group 5 (Lords Amendments Nos. 1, 23, 156-165, 169-187, 229-241)	Yes	Yes	Yes (1, 23, 156 extend to E&W but apply to Scotland)	Yes (1, 23, 156 extend to E&W but apply to Northern Ireland)	N/A	N/A	N/A	No (except amendments 1, 23)
Government amendments in lieu of Lords Amendments Nos. 1, 12, 23, 71, 78, 106 and 156	Yes	No	No	No	Yes	Yes	Yes	No
Government amendments in lieu of Lords Amendment No. 15	Yes	No	No	No	No	No	No	No