

DELEGATED POWERS MEMORANDUM

Schools Bill 2022

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A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Schools Bill (“the Bill”). The Bill was introduced in the House of Lords on 11 May 2022. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been proposed, the statutory safeguards that are provided, and explains the nature of, and the reason for, the procedure selected.

2. The Bill follows the publication of the Government's 'Opportunity for all: strong schools with great teachers for your child' White Paper published 28 March 2022. The Bill takes forward commitments from the White Paper that require legislation. It also takes forward measures pertaining to child safeguarding, overall delivering a high-impact schools reform agenda.
3. References to 'the Secretary of State' refer to the Secretary of State for Education. References to 'the Department' refer to the Department for Education.

B. PURPOSE AND EFFECT OF THE BILL

4. The purpose of the Bill is to:
 - Achieve a stronger and fairer school system that works for every child.
 - Deliver essential safeguarding measures to ensure that more children receive a suitable and safe education.
5. The Bill is intended to deliver:
 - A stronger regulatory framework for academy trusts, to support the development of a strong trust-led system. The bill intends to establish new statutory standards to drive clarity and consistency of expectations for academy trusts, underpinned by intervention powers to ensure action can be taken to tackle serious failure if it occurs.
 - Support for more schools to become academies in strong trusts through the removal of barriers to conversion for faith schools and grammar schools and through bringing schools into the academy sector where this is requested by local authorities.
 - Funding allocations for state-funded schools to be made in accordance with a fair and consistent national formula.
 - Better, more targeted, and more consistent multi-agency support to the children and families who need it most across England by making necessary reforms to the attendance legal framework.
 - Enhanced ability for local authorities to undertake their responsibilities related to children who are not in school by establishing 'Children Not In School' Registers, as well as a duty on local authorities to provide support to home educating families.
 - Improved child safeguarding through the expansion of registration requirements for independent educational institutions, enhanced enforcement, and increasing Ofsted's investigatory powers.

- A stronger teacher misconduct regime with a wider scope to include more educational institutions, more robust powers to investigate individuals who commit misconduct and strengthened regulatory discipline procedures.

C. DELEGATED POWERS

Summary

Delegated powers are proposed in relation to 13 measures in the Bill. These are:

- Academy Trust Intervention
- Academy Trust Standards
- Academy schools with a religious character – governance
- Academy schools with a religious character – Religious Education and collective worship
- Grammar schools
- Schools Funding
- School Attendance
- Children not in School
- Independent Educational Institutions (IEI)
 - o Regulation
 - o Standards
 - o Material Change
- Teacher Misconduct

There are 3 Henry VIII powers, in relation to the Academy Trust Standards, Teacher Misconduct and Independent Educational Institutions: Registration. The purpose and justification for taking this approach is set out in full below. In relation to all Henry VIII powers, affirmative procedure is proposed and we have worked with Parliamentary Counsel to ensure the powers are necessary and drafted as tightly as possible to achieve the policy objective.

Part 1: Academies

Statutory Academy Trust Standards

Clause 1 - prescribing standards relating to Academy Trusts

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

The Government is embarking on a major set of changes to established education policy whereby in future, not only will all schools be academies, but all academies will sit in a family of strongly performing schools, within a Multi-Academy Trust.

The current regime for maintained schools is exclusively statutory. The regime for academies is primarily contractual (contained in funding agreements). The Government wishes to transfer the latter arrangements into a new statutory scheme, based on secondary legislation.

Clause 1 confers a power on the Secretary of State to make regulations prescribing “academy standards” in relation to academy trusts and their academies. These “standards regulations”, together with certain requirements in primary legislation, which will apply directly to academy proprietors (‘proprietor’ and ‘trust’ are to be read interchangeably in this section), and residual funding agreement provisions, will form a package of “academy standards” in the future.

The policy intention is to make academy trusts subject to a set of requirements/standards to which they can be held to account by parents and pupils. We wish to create a single statutory regime which is consistent, regardless of when an individual academy came into being (albeit which can facilitate differentiation where appropriate). Placing the regime in secondary legislation will also enable us to respond to the changing needs of schools and pupils.

The purpose of the regulation making power is to move and consolidate a wide variety of existing obligations (and a small number of new requirements outlined in the Schools White Paper) on academy trusts, which apply across over 9000 individual funding agreements with the Secretary of State (along with some disparate requirements which are currently in primary legislation) into a cohesive statutory framework of requirements on academy trusts. This will enable updates or amendments to the academy standards regulations to apply uniformly to academy trusts at the same time. The aim is to standardise the requirements that apply to academy trusts, subject to any necessary differentiation arising out of differences in type of school or proprietor, as well as providing greater clarity and transparency for them.

Justification for the power

Consolidating the academy standards in regulations provides much greater parliamentary and external scrutiny of the requirements on academy trusts than exists under the current system. At present, the majority of these requirements are set out in individual funding agreements which the Secretary of State enters into with the

academy trust; accordingly, Parliament has no role in scrutinising the arrangements. The proposed system will afford much greater clarity and transparency than is in play at present; it will be much easier for both academy trusts, and the public, to ascertain the requirements that academy trusts are subject to. Finally, placing the relevant requirements on a statutory rather than a contractual footing will allow other stakeholders to take action to hold schools to account, where this is necessary and appropriate.

We have considered whether the standards regime should be placed in primary legislation. However, we do not think that would be appropriate. Firstly, the standards regulations are likely to be lengthy, technical and detailed (reflecting the funding agreements from which they primarily derive).

Secondly, it is imperative that the standards regime enables the Government to respond swiftly and effectively to the changing needs of our education sector and our pupils. It is important to note in this context that the move towards statutory rather than contractual requirements forms part of a major reform to the school system, which we anticipate will take another 10 years to complete. As academy trusts adjust to the new approach and the policies set out in the Schools White Paper are implemented, the Government will gain a better idea of where more or less regulation is needed. It is likely that the Secretary of State will need to add to, amend or remove the standards contained in the regulations more frequently and quickly than would be practicable if the standards were contained in primary legislation.

Justification for the procedure

The placing of the standards regime into statute is a significant reform. However, it is one that operates to increase, rather than to reduce scrutiny. At present, the Secretary of State may introduce such requirements into new model funding agreements and require that academy trusts adopt them whenever they wish to take on a new school, without any scrutiny (Parliamentary or otherwise).

Adopting the affirmative procedure for amending the academy standards regulations will ensure Parliamentarians have a sufficient opportunity to debate the standards to which academy trusts are subject and any amendments to them.

Clause 4 - requiring Academy Proprietors to have regard to Guidance

Power conferred on: Secretary of State

Power exercised by: Statutory Guidance

Parliamentary Procedure: None

Context/Purpose

Clause 4 requires academy proprietors to have regard to guidance issued by the Secretary of State in relation to the academy standards.

The statutory guidance will provide a clear and accessible articulation and explanation of the overall standards package to academy trusts, and it will draw together the various elements of that package.

Justification for the Power

The guidance will provide a clear, accessible, user-friendly articulation of the various requirements imposed on academy trusts. It is important to note in this regard that although the great majority of requirements on academy trusts will in future be found in the standards regulations, there will remain some provisions in primary legislation which apply to trusts directly, and also some continuing obligations contained in funding agreements which are bespoke to particular schools. Accordingly, in addition to providing an accessible articulation of the relevant provisions, the guidance is where all such requirements will be brought together. This will enhance the ability of trusts, parents and pupils, as well as other stakeholders, to understand (and therefore to support appropriate enforcement of) the requirements on our schools.

It is necessary to require academy proprietors to have regard to guidance because the guidance will set out how and what they need to do to meet the requirements in the academy standards. In particular, it will cover managing public money and the main financial requirements for academy trusts. These matters are not otherwise contained within the legislative framework (they are currently enforced via contractual means) and therefore it is important that the guidance is statutory to support the enforcement of the rules managing public money. These requirements are currently updated on an annual cycle to make minor changes to ensure the financial requirements remain relevant and robust.

In the case of a substantial list of statutory standards, it is considered appropriate to support compliance with those requirements by providing guidance explaining how they should be met.

Justification for the Procedure

We do not consider that it would be necessary or appropriate for the statutory guidance to be subject to any parliamentary procedure. The guidance needs to be swiftly amendable to reflect changes to the standards and new expectations on the sector are introduced. The standards will be set out in regulations, subject to affirmative procedure.

Clause 3 - power to apply/ amend/remove education-related legislation (including primary legislation) in relation to academies by regulations

Power conferred on: Secretary of State

Power exercised by: Henry VIII regulations

Parliamentary Procedure: Affirmative

Context/Purpose

The Department is embarking on a major set of changes to established education policy whereby in future, not only will all schools be academies, but all academies will sit in a family of strongly performing schools, within a Multi-Academy Trust.

The current regime for maintained schools is exclusively statutory. As set out above, the regime for academies is primarily contractual (contained in funding agreements). The Department wishes to transfer the latter arrangements into a new statutory scheme, based on secondary legislation. This will involve a gradual process of replicating, amending or modifying the statutory regime which applies to maintained schools so that it extends to, and works for, academies.

Creating the future system, under which there will be no more maintained schools, is anticipated to take a number of years, with regular reconsiderations of which provisions of primary legislation need to apply directly to academies, which do not quite work, and which new duties may need to be added. This process will also involve consideration of where and when it is appropriate for such requirements to be contained in the statutory standards regime, rather than in primary legislation.

This power in clause 3 would allow the Secretary of State to apply existing provisions in primary legislation to academies or to disapply them where they already apply, subject to modifications where necessary. The power would only apply to those provisions of primary legislation which concern educational institutions including schools and providers of childcare or further education.

The power would be exercised by the affirmative procedure.

Justification for the power

The landscape of affected educational institutions is broad (single and multi-academy trusts, faith and non-faith academy trusts; mainstream academies, special academies, alternative provision academies 16-19 academies, secure academies, selective academies for example). There is a complex web of primary legislative provisions (in

addition to secondary legislation) which applies to each of the local authority-maintained equivalents of each type of institution, as well as to the system generally.

This will support the different types of institutions to transition to the academy standards smoothly, alongside other reforms to develop the future system. This approach will enable the Department to work with academy trusts on the implementation of the academy standards at a pace which is right for them and for pupils and parents.

The Department will be able to identify any improvements that would be brought about by the extension of additional primary duties to academies, the amendment, or even the removal of them, should they prove excessively onerous or unnecessary. The Department considers it necessary to have a power that will allow relevant primary legislation to be amended through secondary legislation as it will allow the Department to be responsive to supporting the needs of a strong academy trust system, ensuring that academy trusts are fully able to comply with the academy standards. Such ability to act swiftly and responsively to changing needs and demands is essential in order to protect the school system through a period of change.

Justification for the procedure

The Government recognises the broad scope of this power. The affirmative procedure would require Parliamentarians to debate, and vote on any proposed changes to primary legislation. We consider that to be appropriate in this context.

Schedule 1 Part 1 - power to apply Chapter 3 of Part 6 of the Education Act 1996 to 16-19 Academies by Regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context/Purpose

The Department is, through clause 3(4) and Part 1 of Schedule 1 to this Bill, applying certain provisions of the Education Act 1996 and other enactments to academies, which had previously only applied directly to maintained schools, and which had only applied to academies through obligations contained in their funding agreements with the Secretary of State. This includes the general prohibition on charging for education provided and some limited powers to charge for specified activities such as the provision of food, or school trips (see paragraph 15 of Part 1 of Schedule 1).

tThe Bill applies such charging prohibitions directly to academy schools and alternative provision academies, but not to 16-19 academies. Instead, the Bill takes a power for the Secretary of State to extend provisions of the relevant Chapter to 16-19 academies by regulations, with modifications if necessary.

Justification for the power

The reason for the difference in treatment between academy schools and alternative provision academies on the one side, and 16-19 academies on the other, is connected with the age range of those attending the institutions in question. Whereas 16-19 academies are state-funded educational institutions, and successive Governments' policy is that they should essentially form part of a free public education system, post-16 education is largely not compulsory. Whereas it may be a logical step to treat 16-19 academies in the same way as maintained academy schools so far as the power to charge for education provided in "school hours" is concerned, as would be the intention, as learners grow older, there is a larger number of activities which post-16 providers may wish to provide but may not do if they cannot charge for them. This could include things like protective clothing in relation to scientific, engineering or healthcare courses, or longer duration field trips than those which would normally be undertaken by compulsory school age pupils.

The Department is embarking on a journey, the end aim of which is for the standards "rule book" to be statutory rather than contractual. Further time is needed to consider which aspects of the charging prohibitions applicable to maintained and academy schools should be applicable to 16-19 academies, and what exceptions there should be.

It is considered appropriate to take the power proposed because the scope of the provisions which could be applied to 16-19 academies is limited and the nature of the provisions is uncontroversial. Parliament will be able to assess and debate exactly which provisions could be extended to 16-19 academies and which not during the passage of this Bill and will have a further opportunity to debate any regulations laid.

Justification for procedure

Given that the power sought is one to apply the provisions of primary legislation to a type of educational institution by regulations, albeit that the scope of those provisions is narrow, the Department considers that the affirmative resolution procedure is appropriate.

Academy Trust Intervention

Clause 5 - power to give compliance directions

Power conferred on: Secretary of State

Power exercised by: Direction

Parliamentary Procedure: None

Context and Purpose

The Government is seeking a new set of provisions to strengthen the Secretary of State's ability to tackle failings wherever they are identified, including at trust level, and extending the range of ways in which this can be done.

The current intervention framework facilitates intervention mainly at individual academy, rather than trust level. It relies on a limited menu of powers, mostly contractual, which rely on terminating Funding Agreements, which may not be a proportionate response.

Clause 5 confers a power on the Secretary of State to issue directions to an academy proprietor if they are satisfied that the academy proprietor has failed or is likely to fail to discharge certain statutory duties or is discharging or is likely to discharge such duties in a way which is considered by the Secretary of State to be unreasonable. The Bill proposes to provide the Secretary of State with a regulation making power to prescribe the duties to which this power will apply. The duties to be covered by this power will primarily include existing statutory duties in education law which already apply to academy trusts via the funding agreement and directly enforceable contractual requirements under the funding agreement. The purpose of the power is to ensure that the Secretary of State continues to have the ability to directly enforce existing obligations which are currently enforced via the funding agreement.

Justification for the power

The policy aim is to ensure academy proprietors' compliance with their duties under education law and the funding agreement in order to maintain a high standard of education, protect the interests of pupils and staff and ensure the stability of the academy sector.

The power will allow the Secretary of State to intervene in a proportionate and targeted manner in the event of non-compliance with a statutory duty or a funding agreement requirement. The power offers a more proportionate and appropriate means of intervention than is available under the current contractual regime, which is limited to

the issuing of a Termination Warning Notice in the event of non-compliance. The Secretary of State has similar powers in relation to maintained schools and local authority functions under the Education Act 1996¹

The power to direct for an unreasonable exercise of a duty will be limited to circumstances of “Wednesbury” unreasonableness. The Secretary of State will not, therefore, be able to issue a direction simply because he disagrees with the action or inaction of the academy proprietor. This power is considered necessary because there may be circumstances where strict compliance with a duty nevertheless leads to an outcome which is clearly unsatisfactory for parents or pupils of a particular academy. For example, an academy proprietor may comply with the statutory duties in relation to complaints but, when reaching a decision on a particular complaint, may come to an unreasonable conclusion based on the information available. The Department considers it appropriate for the Secretary of State to be able to direct the academy proprietor to re-take the decision in such circumstances.

Justification for the procedure

The Department takes the view that this is a non-legislative delegated power which does not require Parliamentary scrutiny. It is not creating new obligations on academy trusts but is providing an enforcement mechanism to be used by the Secretary of State on a case-by-case basis to ensure that duties imposed on academy trusts are discharged in a reasonable manner. The Department takes the view that the targeted nature of this power to be used in relation to individual academy trusts is clearly administrative in nature rather than legislative, as evidenced by the fact that the powers under the 1996 Act in relation to maintained schools are subject to the same procedure.

Clause 5 - prescribing the duties that are subject to the compliance direction power

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

This power in clause 5 will allow the Secretary of State to prescribe the statutory duties that will be in scope of the compliance direction power.

Justification for the power

¹ Sections 496 and 497 of the Education Act 1996

Most of the key duties for Academy proprietors will be imposed via the academy standards regulations and the first set of regulations made under this power will prescribe those duties to ensure they fall within the scope of the compliance direction power. Other duties will also be extended to academy proprietors over time under the regulation-making powers set out in clauses 4 and 5 of the Bill. The Department considers that the appropriate time for considering whether to place a duty within the scope of the compliance direction power is at the point at which the legislation is being extended to academies which this power will permit. The Department may also wish to extend the scope of the power to other existing duties as it gains experience of using the power under the new statutory regime.

Justification for the procedure

The Department recognises that the scope of the power is potentially broad and therefore considers it would be appropriate for regulations to follow the affirmative procedure. In addition, as the power is likely to be utilised in conjunction with the regulation making power under clause 3 of the Bill the Department considers that it would be sensible for this power to follow the same procedure as regulations made under clause 3.

Clause 6 – power to give Notice to improve

Power conferred on: Secretary of State

Power exercised by: Notice

Parliamentary Procedure: None

Context and Purpose

This power in clause 6 will allow the Secretary of State to issue a Notice to Improve (a Notice) if the Secretary of State is satisfied that there are significant weaknesses in the management or governance of an academy proprietor. An academy proprietor's compliance or otherwise with the new Academy Trust Standards will be a key factor when considering whether there are such weaknesses.

The Notice will identify the weaknesses and specify a date by which those weaknesses must be addressed. The issuing of a Notice will automatically apply certain restrictions on the academy proprietor's ability to make financial decisions without first obtaining the Secretary of State's consent (such automatic restrictions to be set out in regulations). The Secretary of State may also impose additional restrictions on financial decision-making on a case-by-case basis.

A failure to adhere to such restrictions will permit the Secretary of State to terminate the academy proprietor's funding agreement(s).

The purpose of the power is to ensure the effective stewardship of public and charitable funds in order to maintain high standards of education, protect the interests of pupils and staff and ensure the stability of the academy sector.

Justification for the power

The power offers the Secretary of State the ability to take proportionate and targeted intervention action that can be tailored to the circumstances of an individual case. The power is required so as to provide the Secretary of State with a degree of control over the use of public and charitable funds once an academy proprietor has been identified as having significant weaknesses. The power is largely replicating the existing contractual arrangement which allows the Secretary of State to issue a contractual Notice to Improve and automatically impose restrictions on the academy proprietor's financial decision-making.

The interference with the academy proprietor's autonomy is appropriately limited because the restrictions only require the academy proprietor to seek the Secretary of State's consent before entering into certain transactions. The Secretary of State's decision-making in this regard will be subject to the usual public law principles.

Justification for the procedure

The Department considers this to be a non-legislative delegated power of a purely administrative nature which does not require Parliamentary scrutiny. Notices will be issued to individual academy proprietors based on their compliance or otherwise with existing legal requirements.

Clause 6 - defining financial restrictions following a Notice to Improve

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and purpose

The power will enable the Secretary of State to prescribe in regulations the financial decisions for which an academy proprietor must seek the Secretary of State's consent as a result of being issued with a Notice to Improve.

Justification for the Power

The power in clause 6 is required in order to allow the Secretary of State to specify which financial restrictions will automatically be applied when an academy proprietor is issued with a Notice to Improve. Setting this out in regulations will provide clarity and certainty to the academy sector. The requirements will replicate the existing provisions under the current contractual regime which are moving onto a statutory footing. Under the current contractual regime, the Secretary of State is able to amend the terms of the Academy Trust Handbook (which academy proprietors are required to comply with under the terms of their funding agreement) so as to add to or change the financial restrictions to be applied following the issuing of a Notice to Improve. Putting the requirements in regulations will therefore provide greater clarity and legal certainty than the current contractual regime.

Whilst it would be possible to stipulate the existing financial restrictions on the face of the Bill, the Secretary of State considers it important to have the ability to adjust the list of restrictions to adapt to any new requirements which may be imposed on academy proprietors in the future under the new legislative framework. The Secretary of State also considers it appropriate to have the ability to adjust the list of restrictions once the Secretary of State has had some experience of administering the new statutory framework in order to ensure the enforcement powers keep up-to-date with policy developments.

Justification for the procedure

The Department considers it would be appropriate for regulations to follow the negative resolution procedure not least since they will largely be reflecting requirements which are already imposed under the Academies Trust Handbook and the funding agreements and which the Department can unilaterally amend without any formal scrutiny, Parliamentary or otherwise. Whilst the regulations will potentially impact all academy trusts, in practice, the number will be a small percentage of trusts which are issued with a Notice to Improve. The impact on those affected will also be limited as the restrictions imposed on academy trusts is to seek the Secretary of State's approval for the relevant transactions rather than a prohibition.

Clause 7 - power to appoint directors

Power conferred on: Secretary of State

Power exercised by: Notice

Parliamentary procedure: None

Context and purpose

Clause 7 is a power for the Secretary of State to issue a notice to an academy trust proprietor directing it to appoint specified directors or directors with particular skills or expertise. The power will also permit the Secretary of State to notify the proprietor that the existing board of trustees is to be replaced by an interim trust board from the date specified in the notice. The Secretary of State may use this power if the academy trust proprietor has failed to address weaknesses identified in a notice to improve under clause 6, if there has been a serious breakdown in the academy trust's governance or in the management of its academies or if there is a threat to the safety of pupils or staff in its academies. The purpose of the power is to provide the Secretary of State with the tools to act swiftly to strengthen or replace the academy trust board in order to secure the necessary improvements at the academy trust.

Justification for the power

At present, the powers that are available to the Secretary of State to tackle entrenched trust-level weaknesses or breakdowns are limited to the termination provisions in the funding agreement. Termination of the funding agreement isn't always a desirable outcome as it can be a lengthy process and may not provide the immediate remedy required in the event of a serious breakdown. This power will allow the Secretary of State to act swiftly to address immediate concerns and help the academy trust to improve its management and governance without the academies necessarily having to move to another trust. Where the Secretary of State appoints an interim trust board, he is required to keep the need for it under review and it is limited to 1 year, with the possibility of it being extended by a further year (2 years maximum in total).

Justification for the procedure

The Department considers this to be a non-legislative delegated power of a purely administrative nature which does not require Parliamentary scrutiny. Notices will be issued to individual academy proprietors based on their compliance or otherwise with earlier intervention action and/or evidence of serious breakdown in governance or management or a threat to the safety of pupils or staff.

Clause 10 - termination on grounds of insolvency

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and purpose

Under the current contractual regime, an academy trust may seek to terminate the funding agreement if it is of the opinion that running the academy in question would

cause the academy trust to become insolvent. The Bill intends to provide the termination power on the face of the Bill in clause 10 but to set out the procedure for termination on these grounds in regulations under the power provided in that clause.

Justification for the power

The power is necessary to ensure the smooth transition of the termination power from contract to statute. The procedure for termination under this provision is lengthy and technical. It sets out a process for the appointment of experts and representations which the Department does not consider to be appropriate for primary legislation. In addition, the procedure may require updating over time as the Department and the academy sector become more familiar with the statutory process.

Justification for the procedure

The Department considers it would be appropriate for regulations to follow the negative resolution procedure – in part because they will largely be reflecting clauses in the funding agreements which can be updated by the Department without any parliamentary scrutiny.

Academy Schools with religious character: governance

Clauses 19 and 20 - requirement and power for the Secretary of State to make regulations regarding governance of Academy schools designated with a religious character

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Clauses 19 and 20 relate to regulations regarding governance of academy schools designated with a religious character. The purpose of the regulations is to help ensure that the character of the Academy school reflects the tenets of its religion or religious denomination.

Clause 19 is a duty for the Secretary of State to make regulations requiring the articles of association of certain academy trusts (defined in clauses 19(2) and (3)) to contain particular requirements regarding members and directors. The requirements are set out at clause 19(4).

Clause 20 is a power for the Secretary of State to make regulations which specify provision that must be contained in the articles of association and/or the scheme of

delegation of the proprietor of an academy school with a religious character. The power does not relate to *all* academy trusts, but only those trusts that have at least one academy school formally designated with a religious character. The provision that may be specified in the regulations includes, for example, those set out at clause 21(3).

Justification for the power

The Department considers that delegated legislation is the appropriate means to set out these requirements. This is because the regulations will provide detail regarding the provisions indicated at clauses 19 and 20 and, importantly, various requirements in the regulations will need to work differently for different types of academy / trust.

There is also precedent on the maintained school side for governance regulations (i.e. many governance requirements are set out in regulations for maintained schools).

In addition, aspects of the regulations may need adjusting more often than Parliament can be expected to legislate for by primary legislation. For example, there may need to be small policy tweaks to specific requirements for certain types of academy / trust.

It is appropriate that the detail of the regulations is finalised after consultation with stakeholders (especially faith groups). The obligation for the Secretary of State to consult before making the first set of regulations is stated at clause 20(5).

Justification for the procedure

The Department considers that the regulation making power is not especially significant in its scope or effects (noting that it is not a Henry VIII power, nor does it relate to a criminal offence) and does not delegate significant policy.

The scope of the power has been narrowed by setting out a list of matters that must be included in the regulations (clause 19(4)), may be included in the regulations (clause 20(3)), and through the commitment to undertake formal consultation before the first set of regulations (clause 20(5)). Furthermore, clause 20(5) also requires consultation before making other regulations, unless the Secretary of State considers that the changes made by the regulations are minor and technical.

There is precedent for using the negative procedure for governance regulations, as negative procedure is used for maintained school governance regulations².

Academy schools with religious character: worship and religious education

Clause 26 - inspection arrangements

² Sections 19 and 210 of the Education Act 2002.

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Clause 26 sets out requirements regarding the inspection arrangements for collective worship and religious education in Academy schools with a designated religious character.

It makes provision for aspects to be “prescribed”. Pursuant to clause 31(1), “prescribed” means prescribed by regulations made by the Secretary of State.

The areas of clause 26 that may be prescribed in regulations are limited. It includes the intervals at which inspections must be carried out, the period for carrying out an inspection, and the period before which a written report of the inspection must be prepared.

Justification for the power

Clause 26, including allowing limited matters to be “prescribed” in regulations, has precedent as it reflects similar legislation for maintained schools with a religious designation³.

For both academies and maintained schools with a religious designation, the substance of the provisions is in primary legislation, with some detail reserved for regulations. The Department considers that this regulation making power is needed because the detail (such as regarding the timings of inspections) may need adjusting more often than Parliament can be expected to legislate for by primary legislation.

Justification for the procedure

The Department considers that negative parliamentary procedure is appropriate because it is consistent with the maintained school provisions and procedure.

Grammar Schools

Clause 28 - designation of Grammar Schools

Power conferred on: Secretary of State

Power exercised by: Order

³ Sections 48 and 49 of the Education Act 2005 (which applies to maintained schools with a religious designation) allow further detail to be ‘prescribed’ in regulations.

Parliamentary Procedure: None

Context and Purpose

The Bill seeks to set out in statute certain provisions relating to those academies which have converted from maintained grammar schools and retain selective admission arrangements. There is a general restriction on admission arrangements that select pupils by ability. One exception to this rule is for those maintained schools or academies formed when such schools converted, which selected all, or substantially all, pupils by reference to general ability with a view to admitting only pupils with high ability at the beginning of the 1997-98 school year.¹ Such schools are generally known as grammar schools.

Section 104(1) of the School Standards and Framework Act 1998 confers a power to designate by order maintained schools as grammar schools where they fulfil the criteria. There is currently no statutory designation mechanism for selective academies which have been established by the conversion of maintained grammar schools. Clause 28(2) therefore confers a duty on the Secretary of State to designate academies as grammar schools where, immediately before conversion to an academy school, the school was a designated maintained grammar school. For consistency, the power is also amended so that any maintained school who has selective admission arrangements that meet the relevant criteria also *must* be designated as grammar schools under this power. All relevant maintained schools are already designated and so this will not lead to practical changes for any maintained schools.

Justification for the power

Only those schools which currently select all or substantially all pupils on the basis of high ability are permitted to continue operating such arrangements, to which specific legislative provisions apply. Designation of academy grammar schools, following the precedent of maintained grammar schools, provides clarity and certainty in defining those schools to which these provisions apply. The application of the criteria to numerous individual academies is considered to be most appropriately performed by the Secretary of State given the administrative nature of the power. Additionally, this provision replicates the effect of the power already available for designating maintained schools as grammar schools. The department therefore considers that it is both sensible and uncontroversial to strengthen and extend this power so that the Secretary of State is also required to designate academy schools as grammar schools.

Justification for the procedure

There is clear precedent for the Secretary of State's designation power to be by statutory instrument without parliamentary procedure, as this is the process currently used for the designation of maintained schools as grammar schools. This creates legal consistency with these designation processes. The exercise of this power by statutory instrument without parliamentary procedure should also be uncontroversial, as the

power requires the Secretary of State to apply clear criteria set out in primary legislation.

Clause 28 - Grammar Schools: Ballot Regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Clause 28 contains provisions to extend the regime applicable to maintained schools under sections 105-108 of the School Standards and Framework Act 1998 for the ending of selective admission arrangements by parental petition and ballot to academy grammar schools. Sections 105 and 106 of that Act contain detailed provision for the creation of regulations (“ballot regulations”) providing for the ballot procedure to allow eligible parents to decide whether to retain selective admission arrangements for maintained grammar schools. This provision confers on the Secretary of State an equivalent power to make such regulations in relation to academy grammar schools. This is primarily achieved by the designation power set out in the section above. The intention is for the requirements of the ballot regulations for maintained grammar schools (currently *the Education (Grammar School Ballots) Regulations 1998/2876*) to be applied to academy grammar schools (with necessary modifications).

The extension of this regime to academy grammar schools will not have meaningful operational effects, insofar as academy trusts are already subject to contractual obligations to follow a process designed to mirror the requirements of the ballot regulations in relation to removing selective admission arrangements through their funding agreements with the Secretary of State.

Justification for the power

As for maintained schools, the primary legislation sets out in significant detail the provisions the regulations may and shall include. This includes the substantive requirements: which parents are eligible to request and vote in a ballot, and the proportion of parents’ signatures required to trigger a ballot. The regulations will also enable the Secretary of State in prescribed circumstances to declare a ballot void and require a fresh ballot to be held. The regulations, in setting out the procedure for such petitions and ballots, will require significantly more detail than is appropriate for primary legislation, largely relating to technical aspects of the process. Given that this power replicates a power that already applies to maintained schools in legislation and to academy schools through their funding agreements, the taking of this power sensibly aligns the framework and should be uncontroversial.

Justification for the procedure

The first equivalent regulations in relation to maintained schools were subject to the affirmative procedure (with subsequent regulations subject to the negative procedure). As the intention is to use this power to apply the same regulations to academy schools as to maintained schools (with necessary modifications) and given that academy trusts are already subject to a very similar procedure in relation to ending selection by parental ballot, this enhanced first-time scrutiny is not considered necessary.

Clause 28 - revocation of Designation of an Academy Grammar School

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary Procedure: None

Context and Purpose

This provision requires that where the decision has been made, following the parental petition and ballot procedure, that an academy should cease to have selective admission arrangements, the Secretary of State shall revoke any order designating it as an academy grammar school (or revoke such order insofar as it relates to that academy, as the case may be).

Justification for the power

The removal of an individual academy school from a designation order to implement a decision made following the statutory procedure is straightforward and suitable for an order making power. Given that this power replicates the process that already applies to maintained schools, the taking of this power sensibly aligns the framework and should be uncontroversial.

Justification for the procedure

There is clear precedent for the Secretary of State's power to revoke a designation order to be exercised by statutory instrument without parliamentary procedure, as this is the process currently used for maintained schools. This creates legal consistency for the revocation processes. The exercise of this power by statutory instrument without parliamentary procedure should also be uncontroversial, as any revocation will merely implement a decision made following the mandatory procedure set out in statute.

Clause 28 - prescription of timing of implementation of a decision to end selective admission arrangements

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

The provision will set out that regulations will prescribe in which school year an academy school which has been the subject of a ballot in favour of removing selective admission arrangements needs to cease having those selective admission arrangements. This is in line with the existing power and process relating to maintained schools.

Justification for the power

This is a matter of detail, which requires technical provision to account for ballots held at different stages in the school year and admission arrangements cycle. Given that this power replicates a process that already applies to maintained schools, the taking of this power sensibly aligns the frameworks and should be uncontroversial.

Justification for the procedure

This provision provides for regulations to prescribe a specific and technical detail in relation to the ballot process and it is therefore appropriate to follow the same procedure as for the regulations providing for other aspects of the process. It also mirrors the procedure for the equivalent power already used in relation to maintained schools, and so it should be sensible and uncontroversial to align this.

Part 2: Schools Funding

National Formula Allocations

Clause 33 (1) and (6): Duty on the Secretary of State to determine a formula for calculating national formula allocations and for that formula to be published

Power conferred on: Secretary of State

Power exercised by: Publication

Parliamentary Procedure: None

Context and Purpose

Clause 33(1) confers a duty upon the Secretary State to determine “the national formula allocation”, for each funding period for each school to which the clause applies (“funding period” means the year ending with 31 March or such other period as may be prescribed, clause 46(1)). The “national formula allocation” is defined in subsection (2) as the amount calculated for a school in accordance with the formula determined by the Secretary of State, for the purposes of the clause, for the funding period in question. In effect, the allocation is the core revenue funding each school receives for the period. The Secretary of State will be required to publish the formula in advance of the funding period to which it relates (subsection (6)).

Justification for the power

The national formula will be set out in an annual policy document which will be published by the Secretary of State in advance of the funding period. This will be a technical and operational document on funding and will be aimed at providing transparency as to how the Secretary of State makes the formula calculations. The Secretary of State will also need the ability to be able to change the formula on a yearly basis to adapt to shifting circumstances and new policies. Potential changes include changes to factors which are included in the formula, changes in the type and availability of data underpinning the formula, and changes to the mechanics and structure of the formula.

Publication of the formula is consistent with the approach under the existing funding framework whereby the schools’ National Funding Formula (NFF), used by the Secretary of State to allocate funding to local authorities under the Dedicated Schools Grant, is published in an online annual policy document on GOV.UK. Further details about the current National Funding Formula can be found here: –

<https://www.gov.uk/government/publications/national-funding-formula-tables-for-schools-and-high-needs-2022-to-2023> .

The Department has already conducted an extensive consultation process on the NFF in advance of the introduction in April 2018, and the Department will continue to consult on any proposed changes to the structure or factors within the NFF.

Justification for the procedure

The Department considers that publication is the appropriate approach as this will provide a suitable level of transparency and scrutiny, and that as such no parliamentary procedure is required. The formula is highly technical and will need to be adjusted each year so that it remains accurate and up to date. This is in line with the long-established Departmental practice under the existing funding system of publishing the annual National Funding Formula online. This approach is also consistent with the funding arrangements for sixth-form colleges, further education

colleges and sixth-forms in schools through the Department's 16 to 19 funding formula [\[link\]](#).

Clause 33(3)(c), (d) and (e) Power to prescribe in regulations other kinds of academies and maintained schools to which clause 33 applies

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: affirmative

Context and Purpose

Clause 33 (nationally-determined funding for schools in England) applies to schools listed in subsection (3) of that clause. These are Academy schools (subsection (3)(a)), community, voluntary and foundations schools in England (subsection (3)(b)), Academies and maintained schools in England of a prescribed kind (subsection (3)(c) and (d)), and if regulations so provide, non-maintained special schools (subsection (3)(e)). For schools falling within subsection (3)(c), (d) and (e), the Secretary of State may determine different formulae for different descriptions of schools and for different funding periods.

Justification for the power

The new duty on the Secretary of State to determine national formula allocations in accordance with a national formula will apply from the outset to mainstream Academy schools and maintained schools by virtue of subsection (3)(a) and (b). This is in line with overarching policy intent of the reforms to achieve a fair and consistent distribution of funding for both mainstream Academy schools and community, voluntary and foundation schools in England. The powers for other schools to be included in the scope of clause 33 contained in subsection (3)(c), (d) and (e) are limited to other types of Academies and maintained schools and to non-maintained special schools. The Department considers that these delegated powers are necessary to future-proof the new funding framework by ensuring that the clause can be applied in respect of a wider range of state-funded schools in the future, as prescribed in regulations. This could include non-maintained special schools and special academies and would require the Secretary of State to provide (at least) some of the revenue funding for these schools directly by way of a central formula.

The Department intends to consult extensively with local authorities, special school proprietors and other interested parties prior to introducing a direct funding mechanism for other types of school, and thereafter consult as needed on any substantive changes. In addition, the Department will continue to follow its practice of conducting full public consultations on any significant changes to funding policy.

Justification for the procedure

The addition of a new category of school to the NFF is a matter that Parliament will have an interest in and warrants a greater level of parliamentary scrutiny, particularly if the Secretary of State has not previously determined the funding allocations for the type of school in question. The Department, therefore, considers that regulations made under these powers should be subject to the affirmative resolution procedure.

Clause 33(8) - power to make regulations authorising the Secretary of State to substitute a different basis for determining the national formula allocation for a prescribed school where there are exceptional circumstances

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative

Context and Purpose

Clause 33(8) provides a power to make regulations authorising the Secretary of State to calculate the national formula allocation for a prescribed school, for a funding period, on a different basis determined by the Secretary of State. This power can only be exercised where the Secretary of State considers there are exceptional circumstances which make it appropriate to do so.

Justification for the power

The Department considers that this exceptional power is necessary as school funding is a complex area and there are likely to be a small number of schools that do not fit into the national formula and where it is, therefore, necessary to calculate their funding allocation on an alternative basis given the particular circumstances and/or characteristics of the school.

The Department has only identified three mainstream schools where it is likely to be necessary to substitute the formula (albeit it is possible there will be further schools in the future) due to exceptional circumstances. These schools are currently funded outside the national funding formula under the existing funding framework. For example, Five Island Academy is an all-through school based in the Scilly Isles which has boarding provision for pupils who live on different islands and so whose costs cannot be accommodated within the national formula. In addition, were the Department to apply a formula to special schools or alternative provision, there may

be other schools with exceptional circumstances for which those formulae would be inappropriate. The Department may require the ability to disapply the funding formula for different descriptions of schools.

Significantly, this delegated power will not be used by the Department to reduce the level of funding the impacted schools receive, so these schools will receive more funding than they would have done had they been allocated funding under the national formula. Currently, it is standard practice to consult impacted schools. Under the new framework, this will become a statutory requirement by virtue of subsection (9), which requires the Secretary of State to consult with any schools affected and, where relevant, the local authority before making regulations.

Justification for the procedure

The Department considers that the negative resolution is the appropriate procedure for regulations made under this power and that requiring regulations to be made by the affirmative resolution procedure would necessitate a disproportionate use of Parliamentary time given the justifications for using the power will be so specific to the particular circumstances of the individual school(s) in question. The justifications may also be highly technical in nature. Additional checks on the use of the power are also provided by the statutory duty on the Secretary of State contained in subsection (9) to consult the impacted school and, where relevant, the local authority before making regulations.

Locally-determined education budgets in England

Clause 36(1), (2), (3) and (4) - power for regulations to provide that a local authority must determine the locally determined supplementary allocation for their local schools

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative

Context and Purpose

Clause 36(1) enables the Secretary of State, by way of regulations, to provide that each local authority must determine the locally determined supplementary allocation (if any) for each of their local schools for each funding period. Subsection (2) provides that such allocations are to be calculated in accordance with regulations and

subsection (3) gives a non-exhaustive list of what may be specified in those regulations. This list includes making provision enabling any limit or condition to be varied or excluded, on the application by the authority, by the schools forum (local authorities are required to establish a schools forum under section 47A of the School Standards and Framework Act 1998 (“SSFA 1998”). 1998; the purpose of the forum is to advise on prescribed matters relating to school financing) or the Secretary of State or another prescribed person (subsection (3)(i)).

Regulations may also require local authorities to notify the Secretary of State and relevant schools of any determinations made under this clause as well as make provision about the manner and timing of such notifications (subsection (4)).

This power enables the Secretary of State to require local authorities to calculate certain allocations for local schools on top of their national formula allocation, where the Secretary of State judges those decisions are most efficiently and effectively taken at a local level. For example, it may be that local authorities have access to better local information or data on the appropriate funding levels for that factor than the Department.

Justification for the powers

The Department considers that it is appropriate to allow for local authorities to continue to allocate some aspects of schools’ funding where the Secretary of State judges that it is necessary because local authorities have the most detailed knowledge about the needs of their schools. The Department expects this supplementary funding to be limited to use where schools see significant growth or falls in pupils on their rolls, and where schools incur additional costs due circumstances on their estate or premises, such as additional costs from a PFI contract.

Regulations are also required to impose necessary and proportionate limits and conditions about how the supplementary funding is determined in order to meet the policy objective of consistent funding for schools. The non-exhaustive list of what may be specified in regulations contained in subsection (3) is based on similar provisions in sections 45A and 47 of the SSFA 1998. The regulations will allow local authorities to determine supplementary allocations in a similar way to which local authorities currently adjust funding to schools, by exercising their discretion to do so within prescribed limits. By enabling this practice to continue within the context of the new funding framework, the Department is seeking not to depart needlessly from previous policy where there is insufficient rationale to do so and to keep similar processes in place where this makes sense.

Justification for the procedure

The Department considers that the negative resolution procedure is suitable for this power as regulations made under this power will be detailed, operational and technical in nature.

There is a precedent for the Secretary of State to make secondary legislation for equivalent purposes under the existing maintained school funding framework in the SSFA 1998 and the Department proposes, retaining a similar level of parliamentary scrutiny for regulations made under these delegated powers (negative, other than the first set).

Clause 37(4) - administration of locally determined supplementary funding

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: negative

Context and purpose

Clause 37 provides that the locally determined supplementary allocation must be administered by the local authority. Subsection (4) provides that regulations can enable the local authority, in accordance with the regulations, make this funding available to be spent by the proprietor of an academy or the school's governing body or subject to such terms and conditions (including repayment conditions) as the local authority considers appropriate.

This power is required to ensure that local authorities impose suitable conditions on schools in respect of any locally determined supplementary funding provided to schools in their area.

As above, it is likely that regulations under clause 36 will provide that the locally determined supplementary allocation includes funding for schools that have unavoidable additional costs resulting from their PFI agreement. Regulations under clause 37(4) would then prescribe the conditions that local authorities must apply to this funding, for example, they may specify that the funding is spent by schools on the specific purpose intended or have terms relating to the assurance over how this funding is spent provided by the accounting officer.

Justification for the power

This power is required to enable the Secretary of State (and local authority in setting the conditions in accordance with the regulations) to have sufficient control over how this public money is spent by schools. It is appropriate that the technical details in respect of these local arrangements are outlined in regulations. This also provide the ability for the Secretary of State and local authorities to impose different terms and conditions for different types of funding.

Justification for the procedure

The Department considers that the negative resolution procedure is suitable for this power as regulations made under this power will be operational and technical in nature.

Clause 38(1), (2) and (3) - local authority to determine and administer other education expenditure of a prescribed class or description in accordance with regulations

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: negative

Context and Purpose

Clause 38(2) enables the Secretary of State to make regulations that place a duty on local authorities to determine and administer other locally determined education expenditure (this is funding in addition to the locally determined supplement under clause 34 that will also be determined by the local authority), subject to any constraints set out in regulations. Subsection (3) provides a non-exhaustive list of what may be included in the regulations.

These powers are required to enable the Secretary of State to make provision for local authorities to determine and administer expenditure of a prescribed class or description. This will continue to cover funding provided to local authorities for high needs funding, early years provision which includes funding for free entitlement childcare and for central services that local authorities provide in relation to schools, for example, admissions.

As is currently the case, these provisions will enable a local authority's schools forum or the Secretary of State to disapply any limits or conditions that would otherwise apply under the relevant regulations (subsection (3)(i)). This will enable the current 'disapplications' process to continue and ensure that the system can take local circumstances into account. For example, in the current School and Early Years Finance (England) Regulations growth funding can only be provided to schools with Good or Outstanding Ofsted ratings (paragraph 5 of Schedule 2 to those Regulations). However, local authorities can apply to the Department to 'disapply' this restriction in relation to a particular school, where, for instance, the local authority judges the school has shown an improvement since that inspection, or the need for school places cannot

be met elsewhere. This allows the Secretary of State to set a framework for local authorities to allocate funding within which they can respond to specific local circumstances as necessary.

Justification for the power

These powers are required in order to prescribe education expenditure that will continue to be determined and administered locally by local authorities, subject to appropriate constraints. The function of high needs, early years and central services funding is not changing substantially under these reforms and the delegated powers in this clause enable the Secretary of State to continue to provide funding regimes that meet the particular needs of these sectors.

There is precedent for making regulations that place requirements on the local authority in respect of these areas of education funding (the School and Early Years (Finance) Regulations made annually under chapter IV of Part II of the SSFA 1998. It is appropriate that the technical details in respect of funding for these complex regimes continue to be provided for in regulations.

Justification for the procedure

The delegated powers correspond to the current powers contained in sections 45A and 47 of the SSFA1998 which allow local authorities to exercise their discretion only within prescribed limits. The regulations will provide similar detail to that contained in annual regulations made under these existing provisions and are unlikely to be controversial. The affirmative resolution procedure would require a disproportionate amount of Parliamentary time given the technical and operational nature of these regulations.

In addition, the Department will continue to follow its practice of conducting full public consultations on any significant changes to funding policy.

Budget adjustments

Clause 40(1) and (4) - power to make regulations enabling the Secretary of State to make a national to local budget reallocation

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: affirmative first, then negative thereafter

Context and Purpose

This power enables the Secretary of State to make regulations that make provision for the Secretary of State, on the application of a local authority, to make a national to local budget reallocation. Subsection (2) sets out that this reallocation occurs when the Secretary of State adds a reallocated amount to the local authority's locally-determined education budget (as defined in clause 35) for a relevant period and in accordance with regulations makes a corresponding reduction to the national formula allocation applicable to one or more of the schools in its local area.

This corresponding reduction to the national formula allocation can be in respect of one or more of the local authority's local schools.

Subsection (4) provides a non-exhaustive list of what may be included in the regulations and this includes provision requiring a local authority to consult their schools forum before making an application (paragraph (d)).

Justification for the power

This power is necessary as whilst local authorities will have a different role under the new school funding framework, there will still need to be the ability within that framework for authorities to respond effectively to local high needs funding pressures. There is a strong precedent for these types of budget reallocations as under the existing school funding system the local authority can transfer funding in a similar way under conditions of grant for the Dedicated Schools Grant.

In their responses to the Department's consultation on 'Fair School Funding for All; Completing our Reforms to the National Funding Formula' which ran from 8 July 2021 to 30 September 2021, key stakeholders, including all of the relevant teaching unions, pressed for such a mechanism in the new system to help local authorities meet high needs cost pressure.

Justification for the procedure

The Department considers it appropriate that the affirmative resolution procedure is used the first time that regulations under this power are made given it is intended to replace the mechanism of block-transfers currently provided for by way of the conditions of grant for the Dedicated Schools Grant. It is appropriate that Parliament is able to debate this new approach, especially as it relates to high needs funding.

Subsequent iterations of these regulations are likely to be made on an annual basis with minor changes required to take account of technical and operational requirements

for the next funding year. Once the new procedure has bedded in, the Department does not consider this will require the expenditure of additional Parliamentary time.

The Department will continue to abide by the policy of conducting full public consultations on significant changes to funding methodology.

Clause 41 (1) (4) and (8) - power to make regulations in respect of budget adjustments for excluded pupils

Power conferred on: Secretary of State

Power exercised by: regulations

Parliamentary Procedure: negative

Context and Purpose

This clause provides that regulations may require adjustments to be made by a local authority to the national formula allocation under clause 34 in respect of pupils who have been excluded:

Clause 41(1) enables regulations to make provision for a budget deduction to be made in respect of a pupil who is permanently excluded from an academy or maintained school to which section 33 (national formula allocation) applies. A budget deduction is defined in subsection (2): for an academy it is the amount paid by the local authority out of the academy's national formula allocation for the funding period in which the exclusion takes effect. In the case of maintained school, it is the amount deducted by the local authority from the national formula allocation for the school for that funding period.

Clause 41(4) provides that regulations may make provision for a "budget addition" to be made in respect of a pupil who was previously permanently excluded from a maintained school or academy, who is then admitted into a local school or otherwise provided with education by a local authority. A "budget addition" is defined in subsection (5) and covers the amount paid by the local authority to the institution.

Clause 41(8) provides that regulations may prescribe the time when permanent exclusion of the pupil is to be regarded as taking effect for the purposes of this section.

Justification for the power

Regulations made under this power will ensure that where a pupil is permanently excluded in-year funding will flow to the school that takes responsibility for the pupil. This is line with the overarching policy intent to ensure that there is a fair distribution of funding to schools.

The delegated powers are similar to the power in the SSFA 1998 (section 47(2)(c)) which enables the Secretary of State to regulate how local authorities exercise their discretion to adjust funding to maintained schools to reflect excluded pupils. The Department considers that it continues to be appropriate for technical details about

these adjustments to be in secondary legislation. These powers will apply to readjustments for both maintained schools and academies, ensuring that the position is consistent and transparent across the sector.

Justification for the procedure

The Department considers that the negative resolution procedure is the most appropriate as there is a strong precedent for the use of delegated powers in this area and they are unlikely to be contentious at either a national or local level. Regulations on funding related to the exclusion of pupils will also be operational and technical in nature. The affirmative resolution procedure would require a disproportionate amount of Parliamentary time given the nature of these regulations. In addition, the Department will follow its practice of conducting full public consultations on any significant changes to funding policy and this would apply should any substantial change to exclusion policy and funding be considered. The Department therefore seeks to maintain the same level of parliamentary scrutiny (the negative resolution procedure) for regulations made under these delegated powers as Parliament decided was appropriate for (all but the first) annual School and Early Years Finance (England) Regulations, made under the SSFA 1998.

Clause 42(1) and (3) - power for regulations to authorise the deduction of prescribed education expenditure from maintained school's core budgets

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: negative

Context and purpose

Clause 42(1) enables regulations to authorise local authorities in England, in prescribed case, to deduct such prescribed education expenditure as the authority determine in accordance with regulations from the total core budgets of its maintained schools. The "core budget" is defined in subsection (2).

Under subsection (3)(a), regulations can provide that those deductions can only be made if authorised by the local authority's schools forum, the Secretary of State or another prescribed person. Further subsection (3)(c) enables limits and condition in the regulations to be varied or excluded (where the regulations allow for this) subject to the approval of the schools forum, the Secretary of State or another prescribed person.

This power is required as it enables local authorities to continue to be able to deduct funding from mainstream schools' core budgets to pay for certain services for those maintained schools such as behaviour support services.

Justification for the power

This power is necessary as it enables governing bodies of maintained schools and local authorities to manage their resources more effectively. As is currently the case, where the local authority provides services on behalf of schools they can achieve economies of scale and thereby reduce costs and lower the administrative burden on schools. It can therefore be cost effective for a local authority to have a strategic approach to a select number of services. There are also benefits from a risk management and organisational perspective. It is appropriate that the details as to how this technical budget readjustment process operates is detailed in regulations.

There is a strong precedent for the use of delegated powers for this purposes and the power is analogous to section 47(2)(dd) of the SSFA 1998. The types of services that the local authority can currently deduct from schools' core budgets are outlined in Schedule 2 to the School and Early Years Finance (England) Regulations 2022. These include school improvement, behaviour support services and the provisions of free school meals.

Justification for the procedure

The Department considers that it is appropriate for regulations made under this power to be subject to the negative resolution procedure as regulations will be uncontroversial, operational and technical in nature. These powers closely correspond to the existing powers contained in section 47 (2)(dd) of the SSFA 1998 which allow local authorities to exercise their discretion only within prescribed limits. Regulations made under this power will effectively reproduce existing provisions from the current regulations. The Department, therefore, takes the view that the affirmative resolution procedure would require a disproportionate amount of Parliamentary time given the nature of these regulations.

In addition, the Department will follow its long-standing practice of conducting full public consultations on any significant changes to funding policy.

Clause 44 and Schedule 3: amendment to section 494 of the Education Act 1996: regulations dealing with inter LA recoupment of funding for excluded pupils

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and purpose

Section 494 of the Education Act 1996 enables the Secretary of State to make regulations to deal with the transfer of funding between maintained schools, in relation to pupils who are permanently excluded from one school and then placed in another school in a different local authority. This consequential amendment will enable the

regulations to also apply where one of these schools is an academy (as opposed to a local authority maintained school). The current arrangements for such funding transfers cover both England and Wales, and so the corrective amendment does so too.

The effect of this amendment is to enable funding to follow excluded pupils where they leave an academy or enter into an academy in a different local authority, in the same way as where they leave or enter a maintained school.

Justification for power

This consequential amendment is needed because the current legislation only applies to maintained schools. This amendment ensures that these provisions are consistent with clause 41, which provides for budget adjustments for excluded pupils, and applies both in relation to maintained schools and academies.

Justification for Parliamentary procedure

This amendment merely extends an existing delegated power so as that it applies to academies. The Department considers that the negative resolution procedure continues to be appropriate given that these are technical and operational matters.

Clause 46(1) - Interpretation – “funding period” and “relevant period”

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and purpose

Clause 46 defines key terms for the purposes of the school and local authority funding provisions. Subsection (1) includes a definition of “funding period” in relation to a school. Funding period means the year ending with 31 March or such other period as may be prescribed in regulations. Further, “relevant period” means the year ending with 31 March or such other period as may be prescribed.

Clause 33 places a duty on the Secretary of State to determine the national formula allocation for each school in respect of the “funding period” in question. Subsection (4) of that clause means that the Secretary of State will apply the same national formula to determine funding for mainstream academies and maintained schools for the corresponding funding period of each. The “locally determined education budget” of a local authority applies for a relevant period (clause 35).

Justification for power

These powers to prescribe “other periods” for these terms are required in order to ensure the smooth operation of the new funding framework given different types of schools are funded according to different periods - maintained schools are funded on a financial year basis (April to March), while academies are funded on an academic year basis (September to August). They also “future-proof” the school funding framework should there be reason to adopt a different funding period for a type of school and/or the local authority in the future.

The powers correspond to similar definitions in sections 45(1B) and 45A(1A) of the SSFA 1998.

Justification for Parliamentary procedure

The Department considers that the negative resolution procedure is appropriate as the prescription of such periods is operational and technical. The powers correspond to equivalent definitions provided in the SSFA 1998.

In addition, the Department would conduct a full public consultation on any future proposals to change these periods.

Part 3: School attendance and Children Not in School

Children Not in School Registration

Clause 48 - regulations making exceptions to eligibility for registration

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Clause 48 requires each local authority in England to keep a register of certain eligible children in their area. Two types of children of compulsory school age will be eligible: those who are not registered as pupils at ‘relevant schools’ and those for whom their school has arranged or agreed for them to be absent from the school some or all of the time and receive education otherwise than at the school. Subsection (6) of new section 436B of the Education Act 1996 gives the Secretary of State the power to make regulations clarifying whether certain cases fall within or outside that second category of eligibility and specifying circumstances where a child is not eligible despite falling within the category.

Justification for the power

The second category of eligibility is intended mainly to cover children who are flexi-schooled and those who are in certain kinds of alternative provision. But it could, without further provision, also capture children who have quite short or minor absences such as visits to museums. This could cause children to move into and out of eligibility rapidly and unpredictably, creating unnecessary administrative work for parents and local authorities. Cases of this kind are likely to be varied and fact-specific, potentially requiring quite detailed exceptions not appropriate for primary legislation. They may also need to be adjusted from time to time as different situations come to light, as flexi-schooling and alternative provision can take many forms and it may not be possible to identify and describe them all without observation of the system operating in practice.

Justification for the procedure

The situations to be removed from scope using this power will be quite technical and should only impact a low number of parents whose children may have flexi-schooling arrangements or are placed in certain kinds of alternative provision. The intention is to use this power to ensure children are not unintentionally brought in scope, when they should not be, for example where a school has made arrangements for pupils to receive swimming lessons at their local leisure centre. The negative procedure is therefore considered to offer Parliament an appropriate level of scrutiny, as this provision will be used to narrow the scope of application rather than to expand it.

Clause 48 - regulations prescribing certain details to be included in registers

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Subsection (1) of new section 436C of the Education Act 1996 sets out the information that a local authority must include in their register in relation to a registered child. Paragraph (c) enables the Secretary of State to make regulations specifying the information about the child's education that must be included in the register and paragraph (d) enables regulations to specify other information to be included.

Justification for the power

The power to specify the information about the child's education that must be included in registers is largely intended to cover the details of those persons or institutions that

may be providing some or all of the education under any arrangement with the parent or local authority, for example in the case of those children placed in alternative provision by the local authority. However, following implementation of the registration system there may be other situations related to the education of the child that may need to be captured on registers, for instance the type of setting offering the education, amount of education being offered / length of time a child is attending the setting, etc. As these could be detailed, case specific, and depend on the threshold for out-of-school education prescribed under the new section 436E(2)(b), which could be subject to variation from time to time in regulations (discussed below), they may not be appropriate for primary legislation.

Similarly while the inclusion of a child's name, date of birth, home address and the name and home of address of each parent, should be sufficient to support the existing duties of a local authority to try to identify those children not in school and ensure they are receiving an efficient and suitable education, there may be other types of data that it would be helpful to capture in registers – for example a child's ethnicity and other key demographics, whether they have special educational needs or have an education, health and care plan, reasons behind their parent's decision to home educate, or whether there are any safeguarding concerns or ongoing action – to assist local authorities in targeting support to those families who need it most, as well as to support the department to evaluate the impact of the registration system. These may need to be adjusted as factors come to light, and more frequently than would be appropriate for primary legislation. The ability to specify additional information in regulations is also in line with other legislation stipulating what information is required to be collected in a register, such as section 434 of Education Act 1996 which delegates power to prescribe the particulars to be included in schools' registers of pupils (the current regulations are The Education (Pupil Registration) (England) Regulations 2006 .

Justification for the procedure

In line with other regulations that outline what data needs to be included in registers (e.g. The Education (Pupil Registration) (England) Regulations 2006), the Department considers that the negative procedure would give Parliament the appropriate level of scrutiny for operational detail. Information collected by the local authority would only be information needed to support the accuracy of the registers and help local authorities meet their existing duties, such as ensuring education is suitable. The data that will likely be collected as part of the registers is to be much narrower in scope compared to information that is already collected on school pupils. Detail of what information is to be included in registers by local authorities does not necessarily need greater parliamentary oversight than the negative procedure affords.

Clause 48 - regulations about the keeping of registers, access to registers, &c.

Power conferred on: Secretary of State
Power exercised by: Regulations
Parliamentary Procedure: Negative

Context and Purpose

Subsection (3) of new section 436C of the Education Act 1996 enables the Secretary of State to make regulations about various administrative matters concerning the keeping of registers. This enables the Secretary of State, if necessary, to provide for consistency among local authorities in areas such as how, and how often, they check whether the registered information is still correct, how amendments are to be made (for example whether any record should be made of the date of the amendment or the reason for it), the forms of registers (for example whether they should be kept electronically), whether and how registers should be made available to certain persons or published, and whether a standard registration form should be used.

Justification for the power

Many local authorities already voluntarily maintain a register of children not in school or electively home educated children, developed based on local needs. Therefore, initially, there may only be a need to issue guidelines to local authorities on how registers should be maintained. However, to ensure the accuracy of data, the department believes the option needs to be available for the Secretary of State to be able to prescribe processes in relation to the maintenance and upkeep of registers. Such matters may also require adjustment over time, for example to account for differences in local authority structure or internal processes, so regulations are appropriate. There is also some precedent for such matters to be prescribed in regulations, for example in the case of sections 9D(3) and 9E(2) of the Representation of the People Act 1983, which allow for regulations to make provision about the manner and format in which the annual electoral canvass must be conducted, and how invitations to register on the electoral register must be given.

There is similarly precedent for how registers should be made available to certain persons or published to be set out regulations, in sections 10A and 10B of Schedule 2 of the Representation of the People Act 1983.

Justification for the procedure

The regulations would largely cover operational processes and procedures for local authorities, which may be subject to further adjustment and minor changes over time. It is for this reason that the department is of the view that the negative procedure would be more appropriate and is in line with similar regulations as outlined above. The use

of the affirmative procedure could require a disproportionate amount of Parliamentary time.

Clause 48 - regulations setting threshold for provider of out-of-school education to provide information

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative first time and Negative thereafter

Context and Purpose

New section 436E of the Education Act 1996, to be inserted by clause 48, enables local authorities to require certain persons to provide information. This applies only where a local authority reasonably believe that the person is providing out-of-school education above a certain threshold representing a quantity or proportion of a child's time or education. The threshold is to be set in regulations.

Justification for the power

To ensure the registration system is as effective as possible in safeguarding children from harm and ensuring children are not missing education or attending illegal schools, there is a need for a duty on providers of certain out-of-school education to be required to supply information on request to the local authority, so that local authorities can ensure the accuracy of their registers. The view of the department is that there should be a threshold at which this duty should apply, to ensure that it only targets those providers most likely to be used by parents for a substantial proportion of their elective home education. Where this threshold is set may vary depending on the types of arrangements parents are using and could be subject to change from time to time because the individual parent arrangements can vary and because current data on how parents are using such provision is limited. Further observation of the system will likely be required to ensure this threshold is set at an appropriate level, and to monitor potential impact on providers.

Justification for the procedure

The regulations will be subject to the affirmative resolution procedure the first time they are made to allow Parliament the opportunity to debate the threshold and before the regulations come into force. The department's view is that the first time the threshold is set will be the point at which there could be the most substantial impact on providers of out-of-school education, and it would therefore benefit from full parliamentary scrutiny of the exercise of the powers. Thereafter, any changes would be to account for operational adjustments or changes over time, in response to further observation

and consultation on the impact of the system. Therefore, any potential further impact to providers, beyond the first time the regulations are made, is expected to be minimal, where it is expected to be for largely operational purposes only and would otherwise likely follow consultation with the sector. It is for this reason that the negative procedure is considered appropriate when the power is used subsequently.

Clause 48 regulations making exceptions to duty to provide information

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative first time and Negative thereafter

Context and Purpose

Subsection (6) of new section 436E gives the Secretary of State power to create exceptions to the duty to provide information when required by a local authority to provide it.

Justification for the power

This power is to some extent consequential on the power in new section 436E(2) to set the threshold for a local authority to be able to require persons to provide information. Since the threshold is to be set in regulations, it would be difficult and inappropriate for exceptions to be set out in the Act itself as those exceptions may or may not be needed depending on what the threshold is. Moreover, as the threshold may be adjusted from time to time, exceptions may also need to be adjusted as a result.

As an example, if the threshold were set as 9 hours per week, this might capture informal groups of home educating parents who may come together and take it in turns to teach their own and their friends' children collaboratively, or a museum that offers an extensive educational programme for children, which is open to all members of the public. Without being able to exclude such cases from scope, we could place potentially unreasonable requirements on such providers, that might serve to discourage the provision of these activities.

Justification for the procedure

Although the power will be used to narrow the scope of application rather than to expand it, the Department considers that the regulations should be subject to the affirmative resolution procedure the first time they are made to allow Parliament the opportunity to debate which providers of out-of-school education would be exempt from the duty. In line with the justification offered for the regulations setting a threshold

for provider of out-of-school education to provide information, the Department's view is that the first time the exemption is set will be the point at which there could be the most substantial impact on providers of out-of-school education, and as a result the most interest. The Department is therefore of the view that the first time regulations are made, they would benefit from full parliamentary scrutiny of the exercise of the powers. Thereafter, the impact to providers is expected to be minimal and any changes would largely be to account for operational adjustments or changes over time, in response to further observation and consultation on the impact of the system. It is for this reason that the negative procedure is considered appropriate when the power is used subsequently.

Clause 48 - regulations setting monetary penalty for failure to provide information – and inserting Schedule 31A paragraph 5 – regulations setting the increase in the penalty if paid late

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

When a person does not provide the required information (or provides incorrect information) under new section 436E(1) to (3), and is not within the exceptions prescribed under subsection (6), the local authority may require that person to pay a monetary penalty. Subsection (8) provides for the amount of the penalty to be set in regulations.

Clause 48 also inserts Schedule 31A among the Schedules to the Education Act 1996, making provision about penalties and appeals. Paragraph 5 of Schedule 31A provides that if a person does not pay the penalty within the deadline, the amount of the penalty increases by a percentage set out in regulations.

Justification for the power

The level of monetary penalties often needs to be adjusted from time to time to account for economic factors like inflation, to keep them in step with other comparable penalties. It may also be necessary to adjust the level of the penalty in light of experience of the system in operation, as the out-of-school education sector is very varied and it is not easy to predict what level of penalty will be most effective. It is therefore appropriate to set these amounts in regulations. In an education context, existing monetary penalties are set in regulations in relation to, for example, school attendance (sections 444A and 444B of the Education Act 1996) and allowing an

excluded pupil to be in a public place (sections 105 and 106 of the Education and Inspections Act 2006).

Justification for the procedure

This power is setting the level of one penalty, which will impact a very small number of providers of out-of-school education that do not comply with a local authority request for information on eligible children, and so the affirmative procedure would be disproportionate. There is also already precedent for the negative procedure in line with other regulations that set monetary amounts (e.g. The Environmental Offences (Fixed Penalties) (England) Regulations 2017 (legislation.gov.uk)).

Clause 48 - regulations prescribing information local authority must provide to Secretary of State

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

The clause inserts section 436F into the Education Act 1996. Section 436F(1) provides that if the Secretary of State directs a local authority to provide him with information from their register then they must do so. The types of information he can direct them to provide are to be set out in regulations.

Justification for the power

As discussed above, regulations under new section 436C(1)(c) and (d) may prescribe some of the information to be included in registers. It is therefore also necessary for the Secretary of State to have power to prescribe the information from registers that must be provided to him, so that it can be set and adjusted in light of the prescription of information that must be included in registers in the first place.

This power would also provide the ability to amend data collection requirements to respond to unforeseen situations or circumstances, which could be influencing an increase or decrease in those children being registered. For example, allowing for data collection to measure the impact of situations, such as the COVID-19 pandemic.

Justification for the procedure

In line with similar data collection regulations (see Education (Information About Individual Pupils) (England) Regulations 2013 and the Education (Information About

Children in Alternative Provision) (England) Regulations 2007), the Department considers that the negative procedure would give Parliament the appropriate level of scrutiny. The power to require local authorities to share information has a narrow scope, as only information included within a local authority register can be shared. Furthermore, the information collected will be used for straightforward reasons: for the department to analyse, identify trends and feed this into policy development; maintain integrity of the register; and support safeguarding, so any information held by a local authority can be provided when needed and permitted. Detail of what data the Secretary of State requires local authorities to share does not need greater parliamentary oversight than the negative procedure affords.

Clause 48 regulations prescribing persons to whom local authorities may provide information

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

New section 436F(2) allows a local authority to provide information from their register to other persons in certain circumstances. Regulations may prescribe the persons to whom local authorities may provide this information.

Justification for the power

The register will include important information on a child or children that may aid another professional's work for the purposes of promoting or safeguarding the education, safety or welfare of the child. It therefore must be necessary that relevant information can be shared with other persons external to a local authority. However, it is necessary that this does not overextend so that any external person is able to access the information, for any reason. The primary legislation outlines that information sharing must be done for a relevant reason (i.e. the purposes of promoting or safeguarding the education, safety or welfare of the child), and a further power is required to outline what persons would be in scope. It may be necessary to adjust the persons in scope more often than Parliament can be expected to legislate for by primary legislation as local authorities get more experience over time of maintaining the register, and using it for purposes related to education, safeguarding and welfare. For instance, should a new and relevant safeguarding/education body be created that would benefit from having access to register information.

Justification for the procedure

In line with other regulations that prescribe persons (such as The Education (Individual Pupil Information) (Prescribed Persons) (England) Regulations 2009) the negative procedure is considered appropriate and the affirmative procedure would be considered disproportionate. Those persons included are unlikely to be an extensive list on account of the narrow safeguarding/welfare/safety scope. Instead regulations would only include significant bodies that would also need to be able to evidence that they would be using the information to promote or safeguard the education, safety or welfare of a child (such as the police, NHS and Ofsted).

Clause 49 - prescribed form of school attendance order

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

New section 436J is one of a series of new sections inserted into the Education Act 1996 dealing with school attendance orders in England, which reproduce existing sections 437 to 443 with certain changes. New section 436J(3)(b) replicates part of current section 437(3) by requiring the form of a school attendance order to be prescribed in regulations. The current regulations are the Education (School Attendance Order) Regulations 1995. Prescribing a form for school attendance orders ensures that such orders contain the right information for their recipients.

Justification for the power

The exact form of an administrative order is a matter of detail not appropriate for primary legislation and would not be a good use of Parliamentary time. It may also be necessary to adjust the form of school attendance orders from time to time to ensure they remain easily intelligible and accessible for recipients. The essential contents of a school attendance order are set out in new section 436J itself, so the regulations will deal only with the precise wording, the order in which the required information is presented, and the inclusion of any less crucial information. A delegated power to do this enables an appropriate level of Parliamentary scrutiny.

Justification for the procedure

The negative procedure applies to the current power in section 437(3) and is appropriate given the minor impact of the regulations. The power is very narrow, as the most important information is already in primary (437B) and therefore is focused

on the form of the order. Therefore, regulations made are likely to be uncontroversial and administrative.

Clause 49 - guidance on registration of children not in school and use of school attendance orders

Power conferred on: Secretary of State

Power exercised by: Statutory Guidance

Parliamentary Procedure: None

Context and Purpose

Section 436H, inserted into the Education Act 1996 by clause 48, enables the Secretary of State to give guidance to local authorities about the exercise of their functions related to the registration of children under new sections 436B to 436G. Similarly new section 436I(7) provides for the Secretary of State to give guidance to local authorities about their functions under that section.

Justification for the power

The duty on local authorities to have regard to guidance is necessary to support local authorities in the implementation and maintenance of the registration system, and to set out how they may wish to discharge their duty of support. The provision of statutory guidance will help support the accuracy and consistency of approach between local authorities and provide scope to give guidance on the management of day-to-day operations. This will allow for regular and routine updates to consider experiences of administering the new duties, to ensure that they are able to be operated as efficiently as possible.

Justification for the procedure

Absence of parliamentary scrutiny is justified as the guidance will support and explain the duties on local authorities with regard to the practicalities of keeping their registers, including the types of support they may wish to consider offering to parents who electively home educate, and how they may wish to work together with other persons or bodies for the purpose of maintaining their registers. The guidance will not create any new legal obligations, it will only describe the law and offer non-binding advice about related matters. This is in keeping with the arrangements for other statutory guidance documents, such as “*Keeping Children Safe in Education*” and “*Working Together to Safeguard Children*”. Our intention is to consult with local authorities and other interested parties prior to issuing the first edition of this guidance, and thereafter consult as needed on any substantive changes.

School Attendance

Clause 52 - guidance on local authorities' general attendance duty and other attendance functions

Power conferred on: Secretary of State

Power exercised by: Statutory Guidance

Parliamentary Procedure: None

Context and Purpose

Clause 52 imposes a duty on local authorities to exercise their functions with a view to promoting attendance at schools in their area and to reducing the number and duration of absences from schools. In the exercise of their functions, they must have regard to any guidance issued by the Secretary of State under this provision.

The purpose of the power is to allow for guidance which will assist local authorities with how to best comply with their legal obligations. Guidance will also help ensure that they understand fully what they must do to meet those obligations and comply with the law. This is designed to improve the consistency of support available to pupils and parents who are struggling with attendance. The guidance will set out expectations of how existing local authority responsibilities and powers are used to improve attendance (for example, this will include the way local authority officers work with school staff on attendance, and how powers and parental responsibility measures should be utilised). The guidance will also include details of a set of minimum components of attendance support that local authorities will be expected to deliver to schools in their area (regardless of school type). These will include expectations on providing advice, sharing best practice and meeting regularly to put support in place for pupils who need it.

Justification for the power

The Department considers that the power to issue statutory guidance is necessary to ensure that local authorities promote attendance and reduce school absences in a consistent and proportionate way. It will help to ensure schools and families receive a consistent standard of support no matter where in the country they live. Achieving this will require detailed practical guidance and it would therefore be inappropriate to have the considerable level of detail necessary to achieve this aim in legislation. Moreover, the drivers to attendance are wide and evolve rapidly, so it is important to be able to update the guidance, in consultation with schools and local authorities, to reflect current best practice which changes over time. This could mean that

adjustments are needed more often than Parliament can be expected to legislate for by primary legislation.

Justification for the procedure

The Department's view is that statutory guidance containing technical, practical and operational details does not require parliamentary oversight. The guidance is to be had regard to by local authorities rather than imposing legal obligations and is likely to need to be updated regularly over time, particularly to reflect the changes in the causes of absence.

Clause 53 - guidance on schools' attendance policies

Power conferred on: Secretary of State

Power exercised by: Statutory Guidance

Parliamentary Procedure: None

Context and Purpose

Clause 53 inserts into the Education Act 1996 a new section 443B which will require every school in England to have an attendance policy. Subsection (1) requires the proprietor of a school to ensure that policies to promote regular attendance are pursued and set out in a written document (an "attendance policy"). Subsection (2) sets out matters which the attendance policy must contain. Subsection (3) requires the proprietor to make sure their policy is known within the school and to parents of registered pupils, bringing it to their attention at least once in every school year. Subsection (4) provides that the proprietor must have regard to any guidance issued from time to time by the Secretary of State in relation to school attendance.

The purpose of the power is to allow for guidance which will assist proprietors with how to best comply with their legal obligations. Guidance will also help ensure that they understand fully what they must do to meet those obligations and comply with the law.

Justification for the power

The intention is that the guidance will be used to assist proprietors in setting out the content and nature of the policies pursued at the school to promote regular attendance. The intention is that the guidance is likely to cover matters such as what proprietors must do to meet their obligations under clause 53 as well as, for example, the regulations made under sections 434 and 551 of the Education Act 1996. It will also include guidance on how proprietors should develop a culture of good attendance and the way they should work with families, local authorities and other partners. The

Department considers that statutory guidance is appropriate for practical details such as these, where additional detail is required and where best practice is likely to evolve over time. This could mean that adjustments are needed more often than Parliament can be expected to legislate for by primary legislation.

Justification for the procedure

The Department's view is that statutory guidance containing technical, practical and operational details does not require parliamentary oversight. The guidance is to be had regard to by proprietors rather than imposing legal obligations.

Clause 54 - regulations on penalty notices

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Clause 54 amends the existing regulation-making powers in sections 444B of the Education Act 1996 and 106(1) Education and Inspections Act 2006 relating to penalty notices. This will enable the Secretary of State to make provision as to the circumstances in which consideration must be given to issuing a penalty notice and provision for or in connection with co-ordination arrangements between local authorities, neighbouring local authorities, the police and authorised officers.

Justification for the power

The overall policy intent is to ensure greater consistency nationally as to the circumstances in which consideration is given to the issuing of penalty notices and for the making of co-ordination arrangements, as currently these are matters determined by individual local authorities. The Department's view is that it is appropriate for this provision to be made in delegated legislation given that provision about the wider delivery of the penalty notices system is already made in regulations. Furthermore, the circumstances in which the Secretary of State deems consideration must be given to the issuing of penalty notices will likely be subject to frequent change over time given that the causes of poor attendance evolve and can be unpredictable, as demonstrated recently by the impact of the COVID-19 pandemic on attendance. It is not thought appropriate to require the Department to propose primary legislation and take up Parliamentary time each time a change is necessary. The level of operational detail relating to the making of co-ordination arrangements is not appropriate for primary legislation as detail will need to be provided on the types of things that should

be included in arrangements, the processes for making such arrangements and what happens where arrangements have not, or cannot, be agreed.

Justification for the procedure

The Department seeks to maintain the same level of parliamentary scrutiny that Parliament deemed appropriate for the existing regulation-making powers relating to penalty notices under the Education Act 1996 and the Education and Inspections Act 2006. It considers that the negative procedure remains appropriate for the extension of these powers.

Clause 55 - regulations on leave of absence from some academies

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Section 551 of the Education Act 1996 enables the SoS to make provision in regulations with respect to the duration of the school day and year at and granting of leave of absence from schools maintained by local authorities and special schools not maintained by local authorities. The intention of clause 55 is to extend to certain Academies the power to make provision for the granting of leave of absence in regulations. The purpose of making this change is to improve consistency and fairness of approach in relation to leaves of absence across school types.

Justification for the power

Section 551 already confers a regulation-making power on the Secretary of State in relation to granting of leave of absence and the Department's view is that it continues to be appropriate for this to be set out in delegated legislation, due to the technical detail that is needed on how leave for absences should be granted in schools. The Department also considers that it is helpful to those who are required to comply with the legislation for the provisions to be set out in a single place.

Justification for the procedure

The Department considers that the negative procedure would give Parliament the appropriate level of scrutiny. Regulations made under the current section are subject to the negative procedure and that is considered to be appropriate for the amendments to this power.

Part 4: Independent Educational Institutions

Regulation of Independent Educational Institutions

Clause 56 - expanding the scope of regulation

Power conferred on: Secretary of State

Power exercised by: Henry VIII Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

This is a Henry VIII power.

Clause 56 amends the definition of “independent educational institution” in section 92 of the Education and Skills Act 2008 (“the 2008 Act”) and therefore, changes what institutions will be subject to the regime in Chapter 1 of Part 4 of that Act. Amongst other things, to be such an institution under the new definition, an institution must provide full-time education to children of compulsory school age. The new section provides a test for deciding what is “full-time education”. An institution is taken to provide “full-time education” for a child if the child could be expected to get all, or a majority of its, education there (see new section 92(1A)). New section 92(1B) lists the factors which are to be taken into account in determining whether that test is met. New section 92(1C) contains a regulation-making power to add additional factors to, or remove factors from, section 92(1B) - as well as to make provision about how the factors in section 92(1B) are to be taken into account.

Justification for the power

The power will enable the government to respond to changing circumstances in order to ensure that the regulatory arrangements remain effective to protect children in full-time education and to capture modes of ‘full-time’ education provision which it is not currently intended should be captured by the regime in Chapter 1 of Part 4 of the 2008 Act. This power will enable the definition of full-time to reflect changes to how institutions operate in practice. This will be necessary to ensure that additional modes of full-time education provision may be catered for, including innovative modes of education provision which are not yet commonplace, or to respond to institutions which deliberately structure their provision in such a way as to avoid registration.

An illustrative example is provided below of where this regulation-making power may be used to bring into the purview of Chapter 1 of Part 4 modes of full-time education which it is not currently the intention to capture but which may, in the future, be in the public interest to regulate. However, it is to be emphasized that the main anticipated

need for this power is to respond to the development of alternative forms of full-time education provision which are not yet foreseen.

The factors to be taken into account which are currently in the Bill are focused on attendance by children at an institution – which points towards an interpretation that “independent educational institutions” do not include providers that educate children entirely remotely on-line or with a mix of such teaching and in-person teaching at, for example, a child’s home – away from an institution. To provide for further clarity on this point an exclusion may be made under the power described elsewhere in this memo to create ‘excepted institutions”. However, as new models of such provision develop (and the number of children who make use of such provision as their sole source of education increases), it may become appropriate to regulate some of them under Chapter 1 of Part 4. Being able to amend the factors, or prescribing how they are to be taken into account, would enable for this to occur and provide clarity to proprietors, parents, commissioners and others about what settings are caught and what are not. How settings of this sort may deliver education to children in the future is difficult to fully foresee and the powers here provide the scope to address the inventiveness of providers.

The powers are analogous to powers which are currently in section 92(3)(b) and (c) of the 2008 Act since these permit regulations to be made changing what constitutes a part-time institution for the purposes of section 92(1)(b). There is also a further analogous power to be found in section 132(5)(b) and (c) of that Act – which permits changes to be made to alter the definition of an “independent post-16 college”.

Justification for the procedure

The Department considers that the affirmative resolution procedure is appropriate for this regulation-making power since it is a Henry VIIIth power. It will give Parliament the opportunity to scrutinize and approve any change in the factors that are used to determine whether an institution is providing “full-time” education, and in how the factors are to be taken into account.

Clause 56 - expanding the scope of regulation

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

As explained above, clause 56 amends section 92 of the 2008 Act, redefining what constitutes an independent educational institution for the purposes of Chapter 1 of

Part 4 of that Act. The proposed new section 92(1)(b) has the effect that despite an institution falling within section 92(1)(a), it is not to be treated as an independent educational institution if it is an “excepted institution”. The definition of “excepted institution” will be found in subsection (4) and includes both a list of institutions and a power to specify additional institutions of a description specified in regulations. “Regulations” in the 2008 Act means regulations made by the Secretary of State (see section 168(1)).

Justification for the power

This regulation-making power will ensure that changes can be made to add to the list of exceptions, to the institutions that would otherwise be caught by Chapter 1 of Part 4 of the 2008 Act, without the need for further primary legislation. This is where either current forms of settings are identified which it would not be appropriate to regulate or where future developments to education provision take place and it is considered inappropriate that the new types of settings ought to be regulated by the regime in Chapter 1 of Part 4.

This is appropriate in light of the diverse and changing nature of institutions which provide education and the difficulty in identifying or anticipating all those which might need, consistently with the overall policy of the Act (as amended by the Bill), to be regulated. The power can only be used to exclude institutions from regulation and therefore, could not be used to expand the purview of Chapter 1 of Part 4, in order to regulate more institutions.

Justification for the procedure

The Department considers that the affirmative resolution procedure is appropriate for this regulation-making power since it is akin to a Henry VIII power. It will give Parliament the opportunity to scrutinize and approve any regulations that bring institutions outside the regulatory regime in Chapter 1 of Part 4 of the 2008 Act.

Clause 58 application of provisions applying to schools to independent educational institutions

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

Some institutions that provide full-time education to children of compulsory school age do not fall within the definition of “independent school”. They therefore fall outside the

regulatory regime in Chapter 1 of Part 4 of the 2008 Act which means that the children that attend them are not, for example, protected under this regime in terms of safeguarding or the quality of education that they receive. They are not “independent schools” and fall outside of the regulatory regime because the curriculum that they teach is too narrow. However, in other respects, these institutions are school-like and children spend the ‘normal school day’ in these institutions receiving education.

The amendments to section 92 are intended to remedy this. For instance, it will become possible to subject these institutions, where registered, to regular inspection against standards prescribed under section 94 of the 2008 Act and the Secretary of State will be able to take regulatory action against such registered institutions which fail to meet these standards.

Clause 58 provides a regulation-making power to the Secretary of State, in a new section 137A of the Education and Skills Act 2008, to apply (with or without modifications) to independent educational institutions (or independent educational institutions of a prescribed description), enactments that apply in England in relation to independent schools. Just as the amendments to section 92 mean that independent educational institutions that are not independent schools are to be subject to Chapter 1 of Part 4 of the 2008 Act, the regulation-making power will allow for other legislation which applies in England in relation to independent schools to be applied in relation to these institutions.

The enactments which may be applied are enactments made before or in the same session that this Bill becomes an Act of Parliament. Later legislation cannot be applied.

Justification for the power

As set out above, the changes to section 92 of the Education and Skills Act 2008 will bring into the scope of Chapter 1 of Part 4 of that Act more independent institutions that provide full-time education to children of compulsory school age. The result will be that the affected settings will be treated in the same way as independent schools, since Chapter 1 of Part 4 is the principal piece of primary legislation that regulates independent schools in England.

There is, however, other legislation which already applies in England in relation to independent schools, which won't apply in relation to independent educational institutions that are not independent schools without further legislation. See, for instance, sections 87 to 87D of the Children Act 1989 and section 547 of the Education Act 1996.

The Department considers that, once it is established that the institutions in question should be treated as equivalent to independent schools in England under the principal piece of legislation relating to such schools, it is important that other legislation that applies in England in relation to independent schools should be considered for application in relation to these institutions and applied in appropriate cases (with, if needed, appropriate modifications).

This approach is preferred because it allows for parliamentary scrutiny of the current Bill to focus on the *principle* of bringing under regulation more settings which provide full-time education in the same way as already-regulated independent schools while, in addition, permitting detailed debate on the *practical impact* of this principle in relation to other individual pieces of legislation through the affirmative resolution procedure.

The Department considers the powers to be analogous to those found in paragraph 3 of Schedule 1 to the Education Act 1996 – which relate to pupil referral units and allow for legislation, relating to maintained schools, to be applied in relation to such units with or without modifications.

Justification for the procedure

The Department considers that the affirmative resolution procedure is appropriate for this regulation-making power since the power enables primary legislation relating to independent schools to be applied in relation to independent educational institutions where it does not already apply and, in doing so, apply such legislation with modifications. It will give Parliament the opportunity to scrutinize and approve any regulations that amend primary legislation.

Independent Educational Institution Standards

Clause 59 - Independent educational institution standards

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Under section 94 of the 2008 Act, the Secretary of State is required to make standards, by regulations, for the purposes of Chapter 1 of Part 4 of that Act. These are standards that the proprietors of independent educational institutions are required to comply with and if they do not, then they face the possibility of regulatory or enforcement action under sections 114 to 116 of the 2008 Act.

A number of amendments are made by clause 59 to the regulation-making powers in section 94 of the 2008 Act:

- a) an amendment to section 94(1)(c) so that standards may be made relating to the attendance of students at independent educational institutions;
- b) the insertion of a new subsection (1A) which expands on the power to make standards relating to the suitability of proprietors of independent educational institutions. In particular, with this new provision, standards will be able to be made which require that an individual proprietor, or an individual who has the general management and control of a proprietor body or is legally responsible and accountable for such a body, must be a person who is, in the opinion of the Secretary of State, a fit and proper person to be involved in the running of an independent educational institution; and
- c) a new subsection (3A) is inserted which will permit standards to be made (which fall within the subject-matter of section 94(1)(a) to (h)), by reference to whether or not the proprietor of an independent educational institution has regard to guidance issued, or a document published, by the Secretary of State from time to time.

Justification for the power

A new section 443B –of the Education Act 1996, which would be inserted by the Bill, would require proprietors of schools to produce attendance policies. Amendments (a) and (c) above will put beyond doubt that the Secretary of State has power to transpose into standards made under section 94 obligations similar to those proposed in this new section, and to impose those obligations on proprietors of all types of independent educational institutions. Having this regulation-making power will also ensure that requirements in new section 443B are enforceable against proprietors of independent educational institutions. The Secretary of State has power to take action against breaches of these standards under sections 114 to 116 of the 2008 Act. This is consistent with the current position under the 2008 Act which provides for all enforceable standards to be set out in secondary legislation.

Amendment (c) will also put beyond doubt that standards can be made requiring proprietors to have regard to other guidance, and documents published, by the Secretary of State (from time to time). There is, for example, the obligation in section 175 of the Education Act 2002 imposed on governing bodies of maintained schools, in their duty to make arrangements to safeguard and promote the welfare of children, to have regard to guidance issued by the Secretary of State. This has been transposed in relation to independent schools in the current Education (Independent Schools) Standards Regulations 2014. Without more, there is the potential for a power limited to guidance on attendance policies, to put in doubt the use of powers under section 94 in such a way.

Amendment (b) is an extension of the existing power to make provision about the suitability of proprietors (see section 94(1)(d)). In particular, it allows for a discretion to be conferred on the Secretary of State to decide whether someone is fit and proper to participate in the management of an independent educational institution. This will allow for workable decisions to be made, and on a legally certain basis, to exclude from their running, those who are unsuitable to be involved in the running of independent educational institutions.

Justification for the procedure

The current procedure for making regulations under section 94 is the negative resolution procedure and the Department does not think the extension made by these proposed provisions requires a different approach. This is since the expanded powers will remain broadly similar in nature and impact to the existing regulation-making powers.

Clause 60 - failure to meet standards: suspension of registration

Power conferred on: Secretary of State

Power exercised by: Other

Parliamentary Procedure: None

Context and Purpose

Under the 2008 Act, there are enforcement powers available to the Secretary of State for the purposes of enforcing the independent educational institution standards (see section 94 regarding these standards – “the standards”). These powers are limited to either the Secretary of State imposing a relevant restriction or removing the institution from the register of independent educational institutions (see sections 115 to 117).

Clause 60 adds to these powers in the 2008 Act, to give the Secretary of State the power to temporarily suspend the registration of an institution where there are breaches of the standards and the Secretary of State considers that, because of those breaches, there is a risk of harm to students at the institution. In addition, a power is also provided to the Secretary of State to impose a requirement on the proprietor of an institution that provides boarding to its students, to cease to do so (where its registration is also suspended) – to impose what is called a “stop boarding requirement”. The proprietor of an affected institution will be criminally liable where education is provided to students at an institution whilst its registration is suspended or where a stop boarding requirement is breached.

Justification for the power

The powers are intended to add to the remedies which are available to the Secretary of State, to enable swifter and more appropriate action to be taken where there are breaches of the standards that give rise to a risk of harm to children.

For instance, currently, before enforcement action may be taken under sections 115 and 116, the Secretary of State must have first required a proprietor to produce an action plan. This will not be a requirement in the case of the new power. In addition, where there is a perceived risk of harm to students, the Secretary of State may apply to the Magistrates' Court for an order under section 120 of the 2008 Act. However, a court here can order de-registration which would mean permanent closure of an institution. That may be considered inappropriate where changes would be made relatively quickly at the institution to rectify the situation. Alternatively, the court might impose a relevant restriction – but that may not be a suitable remedy where there are widespread failings at an institution.

A power to suspend registration, or impose a stop boarding requirement, would enable the Secretary of State to respond appropriately to breaches of the standards that put children at risk. Analogous powers are available under other regimes, in similar circumstances – for example, see regulations 8 and 9 of the Childcare (Early Years and General Childcare Registers) (Common Provisions) Regulations 2008 and section 31 of the Health and Social Care Act 2008.

Justification for the procedure

Other administrative decisions made by the Secretary of State under the 2008 Act are not subject to a Parliamentary procedure – such as under the current power to de-register in section 105 and the powers to de-register or impose relevant restrictions under sections 115 and 116. In addition, because of other amendments made by clause 60, proprietors affected by a suspended registration or a stop boarding requirement will be able to appeal against them to the First-tier Tribunal.

In addition, it is the Department's view that power is not a legislative power but rather administrative in nature because it is a power to make decisions in respect of individual institutions.

Clause 60 - failure to meet standards: enforcement

Power conferred on: The Tribunal Procedure Committee

Power exercised by: Rules

Parliamentary Procedure: Negative

Context and Purpose

Clause 60 of the Bill, by amendments to the Education and Skills Act 2008, confers powers on the Secretary of State to temporarily suspend the registration of an independent educational institution, as well as powers (where the registration is suspended of an institution) to also impose a requirement on the proprietor of the institution to temporarily cease providing boarding accommodation to students – “a stop boarding requirement”. It will be possible for the Secretary of State to extend the period of a suspension of registration and to extend the period in which boarding must cease. In addition, there will be connected criminal liability for a proprietor where education is provided at an institution when its registration is suspended or where a stop boarding requirement is breached.

Proprietors of affected institutions will have rights of appeal to the First-tier Tribunal against decisions to suspend registration, to impose stop boarding requirements and to extend the duration of a suspension or a stop boarding requirement. The clause, by amendments to section 125 of the 2008 Act, enables Tribunal Procedure Rules to be made (see section 22 of the Tribunals, Courts and Enforcement Act 2007 - the 2007 Act) to allow for affected proprietors to apply for a stay of any suspension or a stop boarding requirement, including conferring the necessary powers on the First-tier Tribunal and the procedure to be followed in making such applications.

Justification for the power

The approach follows that to be found in section 87(3B) of the Immigration and Asylum Act 1999 and section 146(1)(b) of the Gambling Act 2005 – under which provision on stays is to be covered by the Tribunal Procedure Rules. See further rules 19A(1) and (2) and 20 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

The Rules are, therefore, an established vehicle for conferring powers to grant stays of decisions and the connected procedures for making applications for a stay.

Tribunal Procedure Rules can cover a wide range of matters relating to the practice and procedure in the First-tier Tribunal – see Schedule 5 to the 2007 Act. For example, case management powers, striking out a party’s case, and the time within which proceedings must be brought.

Justification for the procedure

This is the established procedure for making Tribunal Procedure Rules. In addition, the exercise of the power to make Tribunal Procedure Rules is informed by certain principles – including securing that in proceedings before the First-tier Tribunal that justice is done, and that the tribunal system is fair. Finally, before making rules, the Tribunal Procedure Committee must consult such persons as it considers appropriate.

Material Change

Paragraph 2 of Schedule 5 - applications for approval of material change and for initial registration: power to prescribe types of special educational need

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Section 98(2) and (3) of the 2008 Act provide regulation-making powers to prescribe the content of applications for the registration of independent educational institutions. They include a duty for regulations to require an applicant, in the case of a special institution, to specify the type or types of special educational needs for which the institution is specially organised to make special educational provision. Paragraph 2 of Schedule 5 amends sections 98 to make it clear that regulations can require the applicant, in such cases, to supply information about the type or types of special education needs according to how these are categorised in regulations.

Justification for the power

In the Department's view, what information an application should contain is the sort of technical, administrative matter that is commonly dealt with by means of a delegated power – rather than on the face of an Act of Parliament.

The amendment constitutes a slight extension to pre-existing delegated powers, to clarify what is permitted under them, and will enable greater certainty to be provided to applicants about precisely what information they need to provide.

Justification for the procedure

Acts of Parliament commonly provide for the negative resolution procedure for subordinate legislation prescribing the contents of applications. In fact, the regulation-making powers in section 98(2) of the 2008 Act are subject to the negative resolution procedure. The Department considers that requiring regulations, under this refinement of those powers, to be made by the affirmative resolution procedure would necessitate a disproportionate use of Parliamentary time.

Paragraph 3 and 5 of Schedule 5 - applications for approval for material change: power to prescribe information etc

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

Some changes (“material changes”) in how a registered independent educational institution operates, including where there is a change of proprietor, will require the prior approval of the Secretary of State (see sections 101 and 102 of the 2008 Act as amended by paragraphs 3 and 4 of Schedule 5 to the Bill).

An application needs to be made for that approval. Paragraph 4 of Schedule 5 inserts a new power into section 102 of the 2008 Act for the Secretary of State to be able to make regulations as to the form applications for material change approval must take, and what information they must contain.

Justification for the power

Currently, unlike applications for registration of an independent educational institution, applications for material change approval are not subject to any statutory requirements (save that they need to be in writing and must be made by a proprietor or by the proposed new proprietor (where there is to be a change of proprietor)).

The power enables requirements to be imposed on applicants as to the contents of applications and the method for making them. This will improve the efficiency of the administration and consideration of material change applications including enabling improved administrative processes and minimizing delays caused by missing information.

In the Department’s view, the form which applications need to take and what information they should contain, are the sort of technical, administrative matters that are commonly dealt with by means of delegated legislation.

Justification for the procedure

Acts of Parliament commonly provide for the negative resolution procedure for subordinate legislation prescribing the contents and form of applications – for example, there is a similar power in section 98(2) of the 2008 Act which is subject to the negative resolution procedure. The Department considers that requiring regulations to be made by the affirmative resolution procedure would necessitate a disproportionate use of Parliamentary time.

Schedule 5 - amendments allowing for the imposition of relevant restrictions

Power conferred on: Secretary of State

Power exercised by: other

Parliamentary Procedure: None

Context and Purpose

Schedule 5 to the Bill would make various amendments to the material regime in the 2008 Act – a regime that requires the prior approval of the Secretary of State before certain changes are made in how an independent educational institution operates or where it has a change of proprietor. Section 105 of that Act already provides the Secretary of State with a power to de-register an institution where there is an unapproved material change. Amendments made by paragraph 7 of Schedule 5 would add to those powers, enabling the Secretary of State to impose a “relevant restriction” where there has been an unapproved material change. In broad terms, a relevant restriction is a restriction imposed on the proprietor of an independent educational institution, restricting how the institution may operate (see section 117 of the 2008 Act). It would be an offence for a proprietor to breach a relevant restriction imposed under the new power.

Justification for the power

Mechanisms need to be in place to enforce the material change regime, to allow for the Secretary of State (as the regulatory of independent educational institutions in England) to take action in appropriate cases where there are unapproved material changes; for example, to require proprietors to correct unapproved material changes where there are connected breaches of the independent educational institution standards under section 94 of the 2008 Act. Otherwise, the regime will fall into disrepute.

Currently, under section 105, the Secretary of State is limited to de-registering an institution, which would require its closure (since it is a criminal offence to conduct an unregistered independent educational institution). That is likely to be a disproportionate response in many cases. Therefore, the new power to impose a relevant restriction is proposed to enable the Secretary of State to more appropriately respond to unapproved material changes.

Justification for the procedure

Other administrative decisions made by the Secretary of State, under the 2008 Act, are not subject to a Parliamentary procedure – such as under the current power to de-register in section 105 and the powers to de-register or impose relevant restrictions under sections 115 and 116. In addition, because of other amendments in Schedule

5, a proprietor affected by a relevant restriction under the new power, may appeal to the First-tier Tribunal against it.

Furthermore, the Department is of the view that the power is not in the nature of a legislative power. It is an administrative power to make decisions in respect of individual institutions – as opposed to one, for example, to make rules of general application to independent educational institutions.

Part 5: Miscellaneous

Teacher Misconduct

Clause 65 - amending the definition of online education providers

Power conferred on: Secretary of State

Power exercised by: (Henry VIII) Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

Clause 65(2)(b) inserts s. 141A(1)(bd) "an online education provider" as a setting in which s.141B to 141E of the Education Act 2002 apply. Clause 141AA provides a definition of online education providers.

Subsection (6) of new clause 141AA gives the Secretary of State the power to make regulations amending the definition of online education providers.

Justification for the power

Online education providers are a relatively new concept in education and one which is evolving. The pandemic has accelerated this evolution and there is now a plethora of online education providers in various structures and forms.

The pace of change is such that what the online education landscape will look like, how it will be structured and how its market share will look going forward is unforeseeable. Therefore, although the definition of online education providers given in s141AA is an accurate assessment of which online education providers can and should be regulated *at the moment*, it may become outdated and unfit for purpose relatively quickly.

As this area is evolving so quickly, the objective of ensuring that those who are in the (online) classroom teaching our children are fit to do so can best be achieved by the relative swiftness of regulation as opposed to primary legislation.

The power to amend the definition by regulation enables the Secretary of State to update the definition if and when necessary.

Justification for the procedure

There are two interlinked reasons for the affirmative procedure: (1) this is felt to be appropriate given that we are seeking a Henry VIII power; and (2) as online education is changing and evolving at pace, the characteristics of what it is in the public interest to regulate may look quite different in the future to what it does now. As such, it is felt to be appropriate to allow the government to fully scrutinise any changes to how the online education space is regulated.