

## SCHOOLS BILL 2022

### Supplementary Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee

#### A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee (DPRRC) to assist with its scrutiny of the Schools Bill (“the Bill”). The Bill was introduced in the House of Lords on the 11 May 2022. This memorandum identifies the Government amendments being tabled to the Bill that confer or amend powers to make delegated legislation. It explains in each case why the power has been taken, the statutory safeguards that are provided, and explains the nature of, and the reason for, the procedure selected.
2. The Department’s original memorandum was published on 12 May 2022 and updated on 1 June 2022. On 26 May 2022, the DPRRC published a report drawing Clauses 1 and 3 to the attention of the House. This supplementary memorandum is accompanied by separate letters dated 30 June and 5 July 2022 explaining the Department’s intended approach to Clauses 1 to 18 and Schedules 1 and 2 of the Bill.
3. In summary, the Government’s amendments tabled on 5 July consist of the following:
  - **Academy Standards and intervention/termination powers** – removing Clause 2 and Schedules 1 and 2 and making a number of amendments which are consequential on the removal of Clauses 1 to 18.
  - **Academy schools with a religious character:** Changing the *power* to make regulations regarding governance of academies with a religious character to a *requirement* to make such regulations.
  - **Schools with a religious character: power to apply for an Academy order:** Adding a new power for key bodies involved in the governance of

maintained schools with a religious character (trustees, those who appoint foundation governors and appropriate religious bodies) to apply to the Secretary of State for an Academy order for one or more of the schools that it is responsible for. It is proposed that the identity of some of the “appropriate religious bodies” will be prescribed in regulations (as already set out in existing regulations).

- **Local authority power to apply for an Academy order:** Amending the list of bodies who must consent to a local authority’s application for an Academy order so that, for schools with a religious character, appropriate religious bodies are included as among those who must consent to the order. It is proposed that the identity of some of the “appropriate religious bodies” will be prescribed in regulations (as already set out in existing regulations).
- **Children not in school registers** – amending the Parliamentary procedure for certain regulation-making powers so that there is greater Parliamentary oversight of the regulations; narrowing the power of the Secretary of State to prescribe certain information that must be included in the registers; limiting the power by prohibiting the publication of any information from registers that allows eligible children or their parents to be identified.
- **Independent educational institutions** – amendments to the regulation-making power in Clause 60 to ensure that the legislation which can be applied under that power (a) covers legislation made up until the end of same session in which the Schools Bill is enacted and (b) includes Part 3 of the Bill.

## **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**

### **Part 1: Academies**

#### **Academy schools with a religious character: governance**

#### **Clause 20 – a requirement for the Secretary of State to make regulations regarding governance of Academy schools designated with a religious character**

6. The Government amendment to Clause 20 changes Clause 20 from being a power to make regulations to a duty to make regulations in relation to the governance of an Academy school with a religious character. Despite this amendment, the context, purpose and justifications set out in the Department's previous Delegated Powers Memorandum remains relevant to the clause as amended.

#### **Academy schools with a religious character: power to apply for an Academy order and obligation to consult religious body about a local authority Academy order:**

#### **Schedule 2A – Definition of 'appropriate religious body'**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary Procedure: Negative*

#### **Context and purpose**

7. The proposed amendment (addition of 3B to the Academies Act 2010) provides

a power for key bodies involved in the governance of maintained schools with a religious character (including an 'appropriate religious body') to apply to the Secretary of State for an Academy order for one or more of the maintained schools that it is responsible for. Clause 29 provides that appropriate religious bodies must give their consent to an Academy order made by a local authority.

8. The definition of 'appropriate religious body' for both these clauses is at Schedule 2A. The clause explicitly sets out the religious body for a Church of England school or a Roman Catholic school. For schools of any other religion, the clause states that the body is as prescribed under section 88F(3)(e) of the School Standards and Framework Act 1998 ("SSFA"). Section 88F(3)(e) of the SSFA is a power to prescribe in regulations the religious body for certain admissions purposes. The religious bodies are currently set out in schedules 3 and 4 of the School Admissions (Admission Arrangements and Coordination of Admission Arrangements) (England) Regulations 2012 ("the admission regulations").
9. This means that references in the Bill to 'appropriate religious body' for certain faiths will mean as already set out in the admission regulations.

#### Justification for the power

10. The Department considers that using delegated legislation is the appropriate means to list the appropriate religious bodies for certain schools with a religious character.
11. The identity of the named religious bodies is likely in many cases to be a technical detail suitable for regulations. For example, it is likely to be necessary for some schools with a religious character to set out the appropriate religious body on a school by school basis, namely where the structure of the organisations involved do not lend themselves to a general definition. The named religious body can also change, particularly for individual schools, and the Department requires the ability to update this list as needed. As a result, the list of religious bodies is likely to need adjusting more often than Parliament

can be expected to legislate in primary legislation.

12. As noted above, Schedule 2A cross refers to the existing power under s88F of the SSFA. The clause therefore seeks to utilise the list of religious bodies prescribed for purposes connected to school admissions for wider purposes. This is suitable because the identity of the religious bodies prescribed for school admissions purposes will overlap suitably with the religious bodies that the Department intends to be able to make an application for an Academy order and who must consent to a local authority application for an Academy order. There is also precedent for using this definition in legislation for purposes outside of functions relating to school admissions, as existing sections in the Academies Act 2010 relating to Academy orders use this definition<sup>1</sup>.

#### Justification for the procedure

13. The admissions regulations have already been made (and recently updated in 2022) under the power in section 88F SSFA, which uses the negative procedure. This clause does not dictate nor affect the existing parliamentary procedure. The negative procedure remains appropriate. This clause uses the religious bodies named in regulations made under section 88F SSFA for the purposes of identifying religious bodies that can apply for an Academy order or who must consent to a local authority Academy order. This is not especially significant in its scope or effects, nor does it delegate significant policy.

#### **Schools with a religious character: power to apply for an Academy order:**

##### **Schedule 2A - Surplus regulations**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

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<sup>1</sup> See section 4(8) and 5A(3) of the Academies Act 2010.

## *Parliamentary Procedure: Negative*

### Context and purpose

14. Section 7(1)(b) of the Academies Act 2010 includes that the section applies if an Academy order was made following an application by the governing body of the school. Section 7 of the Academies Act 2010 relates to the transfer of school surpluses in relation to Academy orders. It includes a regulation making power regarding the determination and payment of a surplus. The regulations already exist (the Academy Conversions (Transfer of School Surpluses) Regulations 2013) (the “academy conversion surplus regulations”).
15. Schedule 2A makes an amendment to section 7(1)(b) so that section 7 also applies following an application in the two new circumstances set out in the Bill (i.e. by a local authority, or by a certain body for schools with a religious character).
16. Therefore, this is not a new regulation making power. Instead, by extending the application of the clause to the two new ways that bodies can apply for an Academy order, there is an extension of the existing regulation making power.

### Justification for the power

17. Section 7 of the Academies Act 2010 already provides for the delegated power, and regulations under this power have been made. It currently relates to an application for an Academy order in one circumstance. As Clause 29 and the proposed amendment (the addition of 3B to the Academies Act 2010) add two new circumstances where an application for an Academy order can be made, those circumstances also needed to be captured within section 7. This ensures that the position regarding school surpluses is clear and consistent.

### Justification for the procedure

18. The delegated power already exists, and this clause does not dictate nor affect the existing parliamentary procedure (which is the negative procedure).
19. The academy conversion surplus regulations have already been made under this power. The negative procedure remains suitable for the widened scope of

this power because the application of the academy conversion surplus regulations (or similar) in the event of the different bodies making an Academy order is not especially significant in its scope or effects, nor does it delegate significant policy.

### **Part 3: Attendance and Children not in School**

#### ***Children not in school registers: information to be included in registers***

*Power conferred on: Secretary of State Power*

*Power exercised by: regulations*

*Parliamentary Procedure: negative but being amended to affirmative on first use, negative thereafter*

#### Context and purpose:

20. Clause 49 inserts new provisions into the Education Act 1996 to create a system of registration of children of compulsory school age who are not, or are only partly, educated at schools. In particular it inserts a new section 436C setting out various matters about the content and keeping of such registers. Subsection (1)(c) and (d) enable the Secretary of State to make regulations prescribing certain information that must be included in registers, namely (respectively) the details of the means by which a registered child is being educated and any other information. Three government amendments affect these powers. One applies the affirmative procedure to the first set of regulations made under paragraphs (c) and (d). Another deletes paragraph (d) and the third replaces it with a more specific list of types of information that can be prescribed.

#### Justification for the power:

21. 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 in the original memorandum for the Bill), they may not be appropriate for primary legislation.

22. 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).
23. One of the amendments has the effect of narrowing the scope of the power to prescribe additional information, and therefore makes the use of the power more certain and predictable and more proportionate.

## Justification for the procedure

24. 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 normally 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.
  
25. Having said that, the Department recognises that the first regulations made using these powers will set the tone and example for what kinds of information will be required, which has important consequences for children, parents, and local authorities. This amendment therefore alters the procedure so that the first regulations made using these powers will be subject to the affirmative procedure, changing to the negative procedure for subsequent uses of the powers. We believe this level of scrutiny is appropriate where any subsequent changes will likely be in response to operational needs or feedback from local authorities on information requirements to support the discharge of their duties in relation to ensuring the education and welfare of children in their area; and to otherwise make adjustments to terminology, where these can be subject to change from time to time.

### ***Children not in school registers: non-publication of individual information***

*Power conferred on: Secretary of State Power*

*Power exercised by: regulations*

*Parliamentary Procedure: negative but being amended to affirmative on first use, negative thereafter*

Context and purpose:

26. Clause 49 inserts new provisions into the Education Act 1996 to create a system of registration of children of compulsory school age who are not, or are only partly, educated at schools. In particular it inserts a new section 436C setting out various matters about the content and keeping of such registers. Subsection (3)(c) enables the Secretary of State to make regulations about, among other things, publication of registers. This amendment, however, limits that power by prohibiting the publication of any information from registers that allows an eligible child or their parent(s) to be identified.

Justification for the power:

27. 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 cavass must be conducted, and how invitations to register on the electoral register must be given.
28. 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.
29. The amendment limits the impact of the power on children and parents by ensuring that they cannot be identified from the publication of information from registers, thus making the power more proportionate.

### Justification for the procedure:

30. 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. As set out below, however, the Bill is being amended so that the first set of regulations made using this power will be subject to the affirmative procedure to ensure Parliamentary oversight of the basic elements of the regulations. We believe this is a proportionate approach as there is likely to be a heightened interest the first-time processes and procedures are prescribed in terms of the potential impact they could have for families. Negative procedure for subsequent use of this power will, however, offer appropriate scrutiny where any changes will be in response to operational needs, and through consultation as needed.

### ***Children not in school registers: regulations about the keeping of registers, access to registers, &c.***

*Power conferred on: Secretary of State Power*

*Power exercised by: regulations*

*Parliamentary Procedure: negative but being amended to affirmative on first use, negative thereafter*

### Context and Purpose

31. 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

32. 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

33. As explained above, 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. As set out above, however, the Bill is being amended so that the first set of regulations made using this power will be subject to the affirmative procedure to ensure Parliamentarians have a sufficient opportunity to debate the basic elements of the regulations. Similar to the above, we believe this is a proportionate approach where there is likely to

be a heightened interest the first-time processes and procedures are prescribed in terms of the potential impact they could have for families and out-of-school education providers. The negative procedure for subsequent use of this power will, however, offer appropriate scrutiny as any changes will be in response to operational needs, and through consultation as necessary.

***Children not in school registers: regulations prescribing information local authority must provide to Secretary of State***

*Power conferred on: Secretary of State Power*

*Power exercised by: regulations*

*Parliamentary Procedure: negative but being amended to affirmative on first use, negative thereafter*

Context and Purpose

34. Clause 49 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

35. As discussed above, regulations under new section 436C(1)(c) and (1A) 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

36. 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 normally 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.

37. Having said that, the Department recognises that the first regulations made using these powers will set the tone and example for what kinds of information will be required, which has important consequences for children, parents, and local authorities. This amendment therefore alters the procedure so that the first regulations made using these powers will be subject to the affirmative procedure, changing to the negative procedure for subsequent uses of the powers. We believe this level of scrutiny is appropriate as any subsequent changes will likely be in response to operational needs and to otherwise make adjustments to terminology, where these can be subject to change from time to time.

### ***Children not in school registers: regulations prescribing persons to whom local authorities may provide information***

*Power conferred on: Secretary of State Power*

*Power exercised by: regulations*

*Parliamentary Procedure: negative but being amended to affirmative*

Context and purpose

38. 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 this power

39. 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

40. This amendment will ensure that regulations made under this power will be subject to the affirmative resolution procedure. This is because Parliament will have an interest in the persons with whom local authorities may share information, given the potential implications with regard to data sharing protections for individuals named in the registers, even though those persons included are unlikely to be an extensive list on account of the narrow safeguarding/welfare/safety scope.



## **Part 4: Independent Educational Institutions**

### ***Clause 60 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**

41. As explained in the Department's original memorandum, Clause 60 provides a regulation-making power to the Secretary of State, in a new section 137A of the Education and Skills Act 2008 ("the 2008 Act"), 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.
  
42. Two amendments have been tabled to Clause 60. The first is a technical drafting amendment, to ensure consistency in the terminology used in new section 137A when compared with the rest of the Bill and the 2008 Act. The second is substantive in that it slightly expands on the regulation-making power in Clause 60 in two respects.

#### **Justification for the power**

43. First, this second amendment corrects an error in new section 137A(2) of 2008 Act. As currently worded, it would only permit enactments to be applied, under the regulation-making power in new section 137A(1), which had been made before or in the same session in which the Education and Skills Act 2008 was passed. This would leave many years of legislation unaccounted for. Therefore, section 137A(2) (and consistently with how the power was described in our original memorandum) would be amended to allow for later enactments to be

applied – i.e. provision in Acts passed before, or in, the same session in which the Schools Bill is enacted and provision in subordinate legislation made before, or in, that same session.

44. Secondly, the second amendment ensures that Part 3 of the Schools Bill is covered by the regulation-making power in section 137A. Part 3 of the Bill relates to school attendance. Other Parts of the Bill are not covered. . The amendment, in this respect, would enable regulations under new section 137A to be a single piece of legislation containing provisions applying pre-existing primary legislation in relation to independent educational institutions (that are not independent schools), including the Education Act 1996 (“the 1996 Act”) as it would be amended by Part 3 of the Bill. The 1996 Act in places is changed by Part 3 of the Schools Bill by, for example, substituting new England-only provisions on school attendance orders. Indeed, policy on how the pre-existing (but unchanged) sections 444 to 447 of the 1996 Act should be applied in relation to independent educational institutions that are not independent schools is likely to be closely linked to the policy about how new provisions in the 1996 Act inserted by the Bill (sections 443A and 443B) should be so applied.

#### Justification for the procedure

45. The procedure remains unchanged – the affirmative resolution procedure. This degree of Parliamentary scrutiny is considered appropriate given the nature of the powers in question.

Department for Education

5 July 2022