CHILDREN'S WELLBEING AND SCHOOLS BILL

Memorandum from the Department for Education to the Delegated Powers and Regulatory Reform Committee (on moving to the House of Lords)

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A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee ("DPRRC") to assist with its scrutiny of the Children's Wellbeing and Schools Bill ("the Bill"). The Bill contains 59 provisions that include legislative delegated powers. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It has been updated upon introduction to the House of Lords to include delegated powers which were added or amended in the House of Commons. It explains in each case why the power has been proposed, and explains the nature of, and the reason for, the procedure selected. Each delegation is listed in Annex A. This memorandum also lists non-legislative administrative functions that may be of interest to the Committee in Annex B.

B. PURPOSE AND EFFECT OF THE BILL

2. The Bill will put children and their wellbeing at the centre of the children's social care and education systems and make changes so that they can achieve and thrive.

3. The Bill is structured in 3 parts – Part 1 Children's Social Care, Part 2 Schools and Part 3 General Provisions – and 4 Schedules.

<u>Summary of regulation making powers in the Bill</u>

4. The Bill intends to achieve the following seven things. Each of these areas contains clauses with legislative delegated powers.

   A. **Keep families together and children safe** by mandating local authorities to offer family group decision making so that all families with children on the edge of care have an opportunity to form a plan of family-led-care, improving information sharing across and within agencies, strengthening the role of education in multi-agency safeguarding arrangements and implementing new multi-agency child protection teams. In relation to this, the Bill includes four clauses under the Bill headings 'Family group decision-making' and 'Child protection and safeguarding' and one clause under the Bill heading 'Employment of children'. There are 8 delegated powers under these headings, 7 within 'Child protection and safeguarding', concerning the inclusion of

childcare and education agencies in safeguarding arrangements, information-sharing and consistent identifiers and multi-agency child protection teams, and 1 which gives the Secretary of State a power to make regulations in relation to child employment.

B. **Support children with care experience to thrive** by requiring local authorities to publish their local offer for children in kinship care and their carers, extending the virtual school head role to children in kinship care and those with a social worker, and requiring local authorities to provide staying close support to eligible care leavers up to the age of 25 where their welfare requires it (staying close support means support to help find and keep suitable accommodation and access services), ensuring eligible care leavers cannot be considered as intentionally homeless in relation to local housing duties, and establishing a corporate parenting duty for relevant authorities in relation to services, wellbeing and employment prospects for looked-after children. In relation to this the Bill includes five clauses under the Bill heading, 'Support for children in care, leaving care or in kinship care and carers' and five under the Bill heading, 'Corporate parenting'. There are 2 delegated powers under this heading.

C. **Make the care system child-centred.** In relation to this, the Bill includes:

   i. One of the two clauses under the heading, 'Accommodation of children'', which includes 1 delegated power. This concerns an extension of powers to provide a statutory framework to authorise the deprivation of liberty of children in accommodation provided for the purposes of care and treatment.

   ii. Two clauses under the heading, 'Care workers', concerning regulations about the use of agency workers for children's social work, ill-treatment or wilful neglect of children aged 16 and 17. There is 1 delegated power in these clauses concerning agency workers.

D. **Improve the children's social care placement market and tackle profiteering.** In relation to this, one of the two clauses under the heading 'Accommodation of children', contains 1 delegated power which concerns the strategic accommodation functions that can be exercised by two or more local authorities in regional co-operation arrangements (known as regional care cooperatives). It also includes seven clauses under the Bill heading, 'Regulation of children's homes, fostering agencies etc'. There are 8 delegated powers in these clauses, concerning provisions such as financial oversight of relevant providers and their parent undertakings and the power to limit profits of relevant providers.

E. **Remove barriers to opportunity in schools to support all children to achieve and thrive.** In relation to this, the Bill includes three clauses under the headings 'Breakfast clubs etc' and 'School uniforms'. There are 3 delegated powers within 'Breakfast Clubs', which include: conferring a new duty on the Secretary of State to issue statutory guidance; a power to designate a school as one to which the duty to secure free breakfast club provision does not apply (for exceptional cases only where running a breakfast club would not be feasible, given a school's circumstances); and a power to issue regulations on the application process for seeking an exemption to the new duty. There is also an amendment to an existing duty on the Secretary of State to issue guidance to relevant schools in England about the costs aspects of school uniform policies (1 delegated power).

F. **Create a safer and higher-quality education system for every child.** In relation to this the Bill includes sixteen clauses under the headings ‘Children Not in School’, ‘Independent educational institutions’, ‘Inspections of schools and colleges’, and ‘Teacher misconduct’. There are 18 delegated powers across these clauses. They include provisions for a duty for local authorities to have and maintain Children Not in School registers, changes connected to the regulation and inspection of independent education institutions, and provisions to improve the investigation of serious teacher misconduct. Many of these provisions were originally in the Schools Bill 2022, though changes and additions have been made. For example, additional Children Not in School measures which did not appear in the Schools Bill include a requirement for parents to obtain local authority consent before children are removed from school to be home educated if they are subject to ‘section 47’ enquiries, on a child protection plan, or attend a special school maintained by a local authority, special academy or non-maintained special school, or attend an independent special school under arrangements made by a local authority; and amendments to the School Attendance Order process. These changes will support the government’s commitment to ensure all children are safe and raise school standards for every child by supporting attendance and quality education across all institutions.

G. **Drive high and rising standards for every child**. In relation to this, the Bill includes one clause on ‘School teachers' qualifications and induction’, which contains 2 new delegated powers and 2 amendments of existing delegations. The next four clauses on ‘Academies’ contain 3 delegated powers, concerning following the National Curriculum, extending the power to direct pupils off-site to academies, issuing compliance directions to academy proprietors and converting the duty to issue academy orders to a power. The next two clauses under the Bill heading ‘Teachers’ pay and conditions’ contain 3 delegated powers. Lastly, there are 8 delegated powers across nine clauses concerning ‘School places and admissions’ and ‘Establishment of new schools’.

Henry VIII powers

5. The Bill contains 4 powers to amend primary legislation. These “Henry VIII powers” are all subject to the affirmative parliamentary procedure.

Abbreviations

6. This Memorandum contains the following abbreviations:

“AA 2010” means Academies Act 2010
“CA 1989” means Children Act 1989
“CA 2004” means Children Act 2004
“CIECSS” means Chief Inspector of Education, Children's Services and Skills
“CMA” means Competition and Markets Authority
“CSA 2000” means Care Standards Act 2000
“CSC” means children’s social care
“CSWA 2017” means Children and Social Work Act 2017
“CYPA 1933” means Children and Young Persons Act 1933
“the Department” means the Department for Education
“DPA” means Data Protection Act 2018
“EA 1996” means Education Act 1996
“EA 2002” means Education Act 2002

"ESA 2008" means Education and Skills Act 2008
"EIA 2006" means Education and Inspections Act 2006
"GDPR" means General Data Protection Regulation
"HRA" means Health Research Authority
"SSFA 1998" means School Standards and Framework Act 1998

C. DELEGATED POWERS

7. The Bill contains 59 provisions that include legislative delegated powers, which are set out in Annex A. The Department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

8. This memorandum refers to other powers in the Bill which do not confer powers to make delegated legislation, but which relate to non-legislative administrative functions that may be of interest to the Committee. These are listed and summarised separately in Annex B.

Part 1 – Children's Social Care Measures

Clause 2(4): Amendment of s.16E (new subsection (2A)(b)) of CA 2004 – Power to make regulations designating childcare or education relevant agencies

Power conferred on: the Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

9. This clause amends section 16E of the CA 2004 to strengthen multi-agency cooperation between the statutory safeguarding partners (comprised of the local authority, an integrated care board and the chief officer of police for a local authority area) and education and childcare relevant agencies.

10. Clause 2 amends section 16E of the CA 2004 to require the safeguarding partners to include "those relevant agencies which are designated childcare and education agencies" in their safeguarding arrangements. Existing section 16E(3) of the CA 2004 defines "relevant agency" as a person who is specified in regulations made by the Secretary of State and exercises functions in relation to children in a local authority area. New section 16E(2A) provides that the Secretary of State may designate a relevant agency as a "designated childcare or education agency" if that relevant agency has functions in relation to the provision of childcare or education (or both).

Justification for the power

11. The Department considers that it is appropriate to seek a delegated power to designate certain relevant agencies as childcare or education agencies for the purposes of the new provisions. Only childcare or education agencies that have already been specified as relevant agencies in accordance with s.16E(3) can be designated under the new power. The list of relevant agencies can be amended by regulations under existing powers and if childcare and education agencies were to be specified on the face of the Bill it would be necessary to amend the primary legislation to reflect any changes to those regulations.

Justification for the procedure

12. Any regulations made under this new provision will be subject to the affirmative resolution procedure.

13. This approach is consistent with the approach taken in relation to the existing regulation making power in section 16E(3) in respect of relevant agencies.

Clause 3(2): New section 16EA(2)(b) of CA 2004 – Power to make regulations in relation to the support provided by multi-agency child protection teams

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

14. This clause requires the safeguarding partners for any local area in England to establish a multi-agency child protection team (hereafter MACPT) for their area. MACPTs are a new type of multi-agency team which will work together to support local authorities to carry out their core child protection functions. This clause confers a power on the Secretary of State to make regulations prescribing the support the MACPT is to provide. The power is limited to setting out support in connection with the local authority's discharge of its duties set out in s47 of the CA 1989.

Justification for the power

15. Setting out the detailed operation of MACPTs on the face of the Bill would not allow for the flexibility required. MACPTs are a new type of multi-agency team, and so the way in which the support functions will operate will develop organically over time to take account of evidence gathered from the Families First for Children Pathfinder and feedback from the safeguarding partners running the existing multi-agency safeguarding arrangements pursuant to Children Act 2004 duties and statutory guidance, Working Together to Safeguard Children 2023 (Working Together). Different provision may be needed in different areas to be responsive to the differing harms children are facing and the clauses provide for consultation to be carried out so that those needs can be taken into account before making the regulations.

16. The power is expressly limited by the need for the support to be in connection with the local authority's discharge of its duties set out in s47 CA 1989. The support that might possibly be provided in future which will require specifying include specific details of how the MACPTs are expected to assist the local authority in its s47 duties, such as: delivery of the day-to-day details of child protection set out in the guidance, Working Together to Safeguard Children 2023; details of the provision of resources to the MACPT; and decision-making frameworks for the MACPT.

Justification for the procedure

17. Regulations made under these new provisions will be subject to consultation and the affirmative resolution procedure. The Department considers that this will ensure an appropriate level of scrutiny, given that MACPTs are a new form of multi-agency team with members drawn from different sectors.

Clause 3(2): New section 16EA(5) and (6) of CA 2004 – Power to make regulations prescribing the requirements for persons nominated as members of the multi-agency child protection team

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

18. The provisions set out the persons who should make up the multi-agency child protection teams. They must be persons nominated by the safeguarding partners. The persons must satisfy any requirements as may be prescribed by the Secretary of State in regulations. This will include such matters as their minimum qualifications or experience. This will ensure a consistent standard of expertise is applied to MACPTs nationally.

Justification for the power

19. Operational and detailed matters such as this are appropriate for delegation to regulations. A level of flexibility is required to accommodate developments in sector standards (for example if certain qualifications become obsolete) or developing evidence about what requirements give rise to the most effective teams, gathered from the Families First for Children Pathfinder, which is testing family help and multi-agency child protection reforms, including MACPTs.

Justification for the procedure

20. Regulations made under these new provisions will be subject to consultation and the affirmative resolution procedure. The Department considers that this will ensure an appropriate level of scrutiny, given that MACPTs are a new form of multi-agency team with members drawn from different sectors.

Clause 3(2): New section 16EB(2)(a) of CA 2004 – Power to designate the relevant agencies under a duty to enter into a co-operation memorandum

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

21. The provisions set out that, if notified to do so by the safeguarding partners, the relevant agencies must put a memorandum of co-operation in place. The memorandum will set out how the relevant agency and the safeguarding partners, through their MACPT, will work together for the purposes of supporting the local authority in the discharge of its duties under s47 CA 1989. The relevant agencies in scope will be designated from those already under a duty to act in accordance with the safeguarding partners' arrangements, pursuant to the current s16E(1) and s16G(4) of the CA 2004. Relevant agencies for the purposes of the CA 2004 are specified in the Child Safeguarding Practice Review and Relevant Agency (England) Regulations 2018.

Justification for the power

22. Relevant agencies which are considered key to child protection enquiries and activity will be specified. These will be selected as a focussed sub-set of relevant agencies more broadly. This will bring national consistency on the key relevant agencies, which can then be selected as appropriate by safeguarding partners at a local level for memorandums. It is possible that the range of agencies needed will vary over time as we understand more about how MACPTs operate and which agencies they need to engage with to deliver their day-to-day operations in supporting the local authority in discharging

its duties under delivering its section 47 CA1989 duty. Evidence from the Families First for Children Pathfinder will inform the development of the regulations.

Justification for the procedure

23. Regulations made under these new provisions will be subject to consultation and the affirmative resolution procedure. The Department considers that this will ensure an appropriate level of scrutiny and enable accurate decision making ensuring only those relevant agencies which are most likely to increase the impact of the MACPT on child protection are included.

Clause 4: New section 16LB(1) of CA 2004 – Power to specify a description of consistent identifier for children by regulations

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

Context and purpose

24. This clause enables the Secretary of State to specify a description of 'consistent identifier' for children by regulations. 'Consistent identifier' means any identifier (such as, for example, a number or code used for identification purposes) that (a) relates to an individual, and (b) forms part of a set of similar identifiers that is of general application.

Justification for the power

25. The Department considers that it is appropriate to seek a delegated power to specify the number or code to be used as a consistent identifier for children as it is not yet known which identifier will be most appropriate for these purposes. It is also possible that a new consistent identifier may need to be substituted at some point in the future, in particular if for any reason that which is specified (for example the NHS number) is one which falls out of general use, or does not work for the cohort of children to which it will apply. This is consistent with the approach taken in relation to the specification of a consistent identifier in relation to adult health and social care, which is also done by way of regulations subject to the negative procedure.

Justification for the procedure

26. Regulations under this new provision will be subject to the negative resolution procedure. The Department considers that this will ensure an appropriate level of scrutiny whilst also providing enough flexibility to enable changes to be made quickly where needed. This approach is consistent with the *Health and Social Care Act 2012 (Consistent Identifier) Regulations 2015*, which were made under s.251A(1) of the Health and Social Care Act 2012 and specify the NHS Number as a consistent identifier for adult health and social care.

Clause 4: New section 16LB(10) of CA 2004 – Power to make regulations designating persons required to include the consistent identifier when processing information about a child for the purposes of safeguarding or promoting welfare

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

Context and purpose

27. This clause enables the Secretary of State to designate the persons required to include the consistent identifier when processing information about a child. The Secretary of State may specify the persons to whom the requirement applies from a list set out on the face of the legislation. That list is the same as the list of relevant persons to whom the duty to share information in new section 16LA(2) applies. It is expected that only local authorities will be in scope of the requirement when the number is first specified, although it may be extended to other agencies in the future.

Justification for the power

28. The Department considers that it is appropriate to seek a narrow delegated power to specify the persons required to record the number, from a list which is on the face of the legislation. Those persons will be required to record the number when processing information about a child where the inclusion of the number is likely to facilitate the exercise by any person of a function that relates to safeguarding or promoting the welfare of children. The Department has committed to various pilots which will assess the extent to which various agencies involved in CSC are able to integrate a consistent child identifier into their data systems, and whether this would improve information sharing and interoperability. The power will provide the flexibility to specify certain agencies that will be required to use the number, for the purposes set out on the face of the legislation, as and when there is evidence that the use of the number by those agencies is likely to improve information sharing, and they are ready to begin to use it.

Justification for the procedure

29. Regulations made under this provision will be subject to the negative resolution procedure.

30. The Department considers that this will ensure an appropriate level of scrutiny whilst providing the flexibility for changes to be made quickly where needed. The power to designate the persons required to include the number when processing information about a child is limited to the list of bodies set out in new section 16LB(11), meaning that Parliament will have had the opportunity to scrutinise the list of persons who may be designated in regulations.

Clause 4: New section 16LA(6) and 16LB(12) of CA 2004 – Duty to have regard to guidance in relation to the duty to share information and use of consistent identifiers for children

Power conferred on: Secretary of State
Power exercisable by: Statutory Guidance
Parliamentary Procedure: None

Context and purpose

31. Relevant agencies must have regard to any guidance given by the Secretary of State in relation to the duty to share information and use the consistent identifier in relation to children.

Justification for the duty

32. This duty is necessary to ensure that relevant agencies are provided with clear and accessible information and guidance to support them to comply with the duty to share information and record the consistent identifier. The guidance will help ensure that all relevant agencies are aware of the type of information they may need to share and how to share information in a way that is consistent with the HRA, UKGDPR and the DPA.

This will require detailed practical guidance which would not be appropriate to include in legislation.

Justification for the procedure

33. The Department's view is that statutory guidance containing technical, operational or practical details does not require parliamentary oversight. The intention is to consult in relation to any guidance before it is issued, which will ensure that interested persons are given the opportunity to give their views on the proposed guidance. Such consultation will ensure a degree of stakeholder involvement and transparency short of parliamentary scrutiny. This procedure will also enable the guidance to be regularly updated to reflect experience gained as the new duties come into effect.

Clause 10(2): New section 22J(3)(f) of CA 1989 – Power to add to the strategic accommodation functions by regulations that can be exercised by two or more local authorities in regional co-operation arrangements

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

34. This measure will give the Secretary of State the power to direct two or more local authorities to make arrangements to carry out their 'strategic accommodation functions' jointly, to direct one authority to carry out those functions on behalf of the others or to set up a body corporate to support the local authorities in carrying out those functions. The direction making power is a non-legislative administrative power addressed separately in annex B. Sub-section (2) defines 'strategic accommodation functions' as:

    a. assessing current and future requirements for the accommodation of children being looked after by the local authority,

    b. developing and publishing strategies for meeting those requirements,

    c. commissioning the provision of accommodation for children being looked after by the local authority,

    d. recruiting prospective local authority foster parents and supporting local authority foster parents,

    e. developing, or facilitating the development of, new provision for the accommodation of children being looked after by the local authority,

    f. any other functions relating to a local authority's duties under section 22A, 22C or 22G that are specified in regulations made by the Secretary of State.

35. New section 22J(3)(f) gives the Secretary of State a power akin to a Henry VIII power to add to the above list of strategic accommodation functions by regulations.

Justification for the power

36. The Department has sought to achieve the right balance between confining the scope of the delegated powers through primary provisions and leaving necessary matters of detail to regulations. This is the first time the Secretary of State has sought to bring local authorities together to collaborate in the delivery of their strategic accommodation

functions. Regional co-operation arrangements (known as Regional Care Co-operatives) (RCCs) are currently being tested via pathfinders (pilots) in two local authority regions. When the pathfinders are evaluated, the Secretary of State may need to prescribe additional functions. There may also be a need for additional functions to be specified in the future depending on the needs of a particular area and to keep pace with the changing children's social care placements market. The power has been limited to one which enables additional functions to be added to the list in the future. It does not enable the Secretary of State to amend or remove any of the functions already listed in the clause and so it is not a Henry VIII power. The Secretary of State's power to specify functions is limited by the need for those functions to relate to the local authority's duties under sections 22A, 22C or 22G of the CA 1989 (which are the duty to provide accommodation for children in care, the duty to accommodate and maintain looked after children and the general duty to secure sufficient accommodation for looked after children).

Justification of Procedure

37. The Department's view is that the inclusion of additional strategic accommodation functions to the list of functions covered by RCCs is likely to be of particular interest to Parliament, and, given that the power is akin to a Henry VIII power, the Department considers that the affirmative procedure is appropriate. In addition, the clause contains a requirement for the Secretary of State to consult with appropriate persons, including local authorities, before making any regulations as a means of ensuring stakeholder views are gathered.

Clause 11(6) and (7): Amendments to s.25 of CA 1989 – An extension of powers to relevant accommodation for deprivation of liberty

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

Context and purpose

38. This clause enables the family court under section 25 CA 1989 to authorise the deprivation of liberty of a child in accommodation where the primary purpose of the accommodation is to provide care and treatment and where restrictions that amount to a deprivation of liberty, if required to keep the child safe, can also be imposed. The current provision made by s.25 CA 1989 is to authorise deprivation of liberty of children for certain welfare reasons in secure accommodation which is designed for or has as its primary purpose deprivation of liberty. There are existing powers to enable the Secretary of State to set out in regulations the maximum period or a further period that a child can be kept in secure accommodation, provided that applications to the court may only be made by local authorities in England or Wales and make provision to apply s.25 CA 1989 with or without modifications or disapply s.25 CA 1989 to children of a description as prescribed in regulations. Additionally, the existing powers enable the Secretary of State to set out in regulations that a child may only be placed in secure accommodation that is of a description prescribed and this may include by reference to whether it has been approved by the Secretary of State. These existing powers as regards secure accommodation will be extended to also apply to relevant accommodation that is provided for care and treatment purposes.

Justification for the power

39. These powers are consistent with the existing powers in respect of secure accommodation and will allow for a more tailored and specific approach to the use of this new type of accommodation which is being facilitated through this new measure. It would not be practicable to include such requirements in the primary legislation as they will likely need to be changed once it is clearer what sort of accommodation is being brought on stream for this purpose and the cohorts of children that local authorities are looking to place in this alternative accommodation using these new powers.

Justification for the procedure

40. The procedure will allow sufficient oversight by Parliament and allow enough flexibility to make changes quickly where needed. The procedure is also consistent with the existing procedure for secure accommodation and therefore would be appropriate for this new type of accommodation to be provided for by this measure.

Clause 12(4): New subsection (2A) of section 22 of CSA 2000 – Extending the power to make regulations specifying when a person is not fit to carry on an establishment or agency

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

Context and purpose

41. Clause 12 provides powers to the CIECSS to require improvement action to be taken by a parent undertaking in relation to the parent undertaking's subsidiary or subsidiaries registered with the CIECSS to carry on an establishment or agency where the CIECSS has a reasonable suspicion that there are grounds to cancel its or their registration in respect of at least two establishments or agencies. Clause 14 introduces a financial oversight regime that will also apply to parent undertakings.

42. The existing power in section 22 CSA 2000 to make regulations in relation to the carrying on or management of establishments and agencies is amended by this measure. Section 22(2)(a) of the CSA 2000 already enables the Secretary of State to make provision by regulations as to the persons who are fit to carry on or manage an establishment or agency such as a children's home (see for example regulation 26 of the Children's Homes (England) Regulations 2015) or an independent fostering agency. The existing power could be used to prescribe that breaches of the provider oversight or financial oversight requirements by a registered provider go to a person's fitness for the purposes of carrying on or managing an establishment or agency. Clause 12(4) makes it explicit that a breach of a provider oversight or financial oversight requirement by a parent undertaking of a person carrying on an establishment or agency may also be included in regulations as grounds for the CICESS to conclude that the person is not fit to do so.

Justification for the power

43. This fits in with the broader powers in the CSA 2000 to regulate the carrying on and management of establishments and agencies by way of regulations rather than being set out in the primary legislation and will allow the Secretary of State discretion to include such provision as regards the impact of actions taken against a parent undertaking. Including this within existing powers also carries a duty on the Secretary of State to consult with persons he or she considers appropriate before making regulations where they are considered to effect a substantial change. Further, all provisions relating to the fitness of registered providers are contained in regulations. It would look out of place for

one particular aspect of fitness to be contained in primary legislation when all others are contained in secondary legislation.

Justification for the procedure

44. The procedure is already provided for in the CSA 2000 in respect of this existing power which is being amended. Again, it would look out of place if this addition were to apply a different procedure to one regulation of many and may lead to an assumption that any future requirements must adopt the affirmative resolution procedure. It provides sufficient parliamentary scrutiny opportunity and carries with it a duty to consult before the regulations are made, where the change is substantial.

Clause 13(2): New section 30ZD(1) of CSA 2000 – Power to make provision requiring the CIECSS to publish information about monetary penalties imposed

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

Context and purpose

45. This clause provides CIECSS with a power to apply monetary penalties, as an alternative to criminal prosecution, in respect of specific offence provisions under the CSA 2000 and in respect of breaches of requirements imposed on parent undertakings. The key principles of the monetary penalties powers will be set out in the primary legislation: the behaviour that will lead to a monetary penalty (specific offences already subject to criminal prosecutions under Part II CSA 2000), the standard of proof required, the maximum amount of the monetary penalty, the process for the issue of the monetary penalty and the applicable appeals process. Prosecutions can take a long time and are not being used by CIECSS. Non-compliance figures indicate criminal sanctions are not an effective deterrent. Monetary penalties are designed to be a more practical solution for Ofsted and are considered likely to have a better deterrent effect.

46. This delegated power allows the Secretary of State to set out by regulations provision requiring the CIECSS to publish information about monetary penalties imposed by the CIECSS which may include information identifying the persons on whom the monetary penalties have been imposed.

Justification for the power

47. We consider that it is appropriate to seek a delegated power to specify the detail of the information to be published by the CIECSS as this is new enforcement provision and at this stage it is not clear exactly what information it would be helpful to require the CIECSS to publish. It may also be the case that the information that is to be published changes as the power is used and therefore it is not feasible for the matters to be included in the primary legislation as that would not allow for changes to be made speedily.

Justification for the procedure

48. Regulations made under these new provisions will be subject to the negative resolution procedure, which the Department considers will ensure an appropriate level of scrutiny whilst also giving enough flexibility to enable changes to be made quickly where needed. This approach is consistent with other powers in the CSA 2000.

Clause 14(2): New section 30ZE(2) of CSA 2000 – Power to prescribe conditions as to the application of the Financial Oversight Scheme

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

49. The Secretary of State will have the power to prescribe in regulations a set of conditions which, if met, will subject a registered provider of children's homes or independent fostering agencies, or their corporate owners, to the Financial Oversight Scheme. While the conditions will be set out in affirmative regulations, the relevant clause provides that they may include certain characteristics such as the number of establishments owned by the relevant person, or market share. The Secretary of State will then determine in each case whether the conditions are met, and notify providers of her or his decision. The current policy intention is to apply the subsequent provisions of the oversight scheme to the largest or most "difficult to replace" children's social care providers and their corporate owners.

Justification for power

50. It is not possible to set the conditions which will render a relevant provider or its parent undertaking subject to the oversight scheme on the face of the Bill, because those conditions will be both variable and subject to change over time. Regulations will provide the Department with the requisite flexibility to enable us to respond quickly and sensitively to market changes (such as the percentage of market share providers have or their geographic concentration) in order to make the provision operate as intended. This is particularly necessary where a regime is new and we may need to calibrate the entry conditions. The current policy intention is to capture those providers and undertakings which are particularly "difficult to replace" by reference to their size (e.g. the number of establishments and agencies they run), the number of looked after children they accommodate or provide services for and their market share either nationally or by reference to a particular geographic area (with these being matters to which the conditions may relate, as set out in the Bill). However, the market is subject to constant fluctuation, with non-local authority providers entering and exiting it constantly, and with the picture of both needs and provision from local authority to local authority changing constantly. When it comes to prescribing particular conditions for the application of the scheme – such as the percentage of establishments operated, or children looked after in a particular area in comparison with total provision – we need to be able to adjust the precise conditions applicable to certain areas, so that we have the right ones in place in each part of the country.

51. The power is limited by an express requirement for the Secretary of State to have regard to the public interest in securing that providers, or the relevant provider group to which they belong, are subject to financial oversight if they occupy a position of strategic significance.

Justification for procedure

52. It is accepted that these regulations setting conditions for the scheme to apply are sufficiently important in nature for the affirmative procedure to apply in each case.

Clause 15(2): New section 30ZK(1) to CSA 2000 – Power to limit profits of relevant providers

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

53. The purpose of these measures is to bring some level of control to levels of profit arising from the accommodation or placement of our most vulnerable children, by enabling the Secretary of State to prescribe a cap to the levels of profit made by non-local authority providers of children's homes and independent fostering agencies. While the government acknowledges the important role of profit-making private provision within the market, it wants to bring an end to profiteering. This Bill provision confers on the Secretary of State a power to prescribe appropriate maximum levels of profit by way of regulations (although the present Secretary of State does not intend to do so until it is evident whether other market shaping measures, both legislative and non-legislative, have had an effect).

Justification for power

54. There are three principal reasons why a maximum profit level cannot be set out on the face of the Bill. The first is that the word "profit" is not necessarily a universally understood concept on its own. There are different possible measures of profit, all involving different complex methodologies, with some being accepted as more suitable for some businesses, and others for others. The CMA suggested eight possible different measures in its 2022 report. The Department would wish to consult widely (consultation with local authorities and representatives of providers is a Bill requirement), including with economic experts and the children's social care sector, as well as providers themselves, before arriving at one or more preferred models.

55. The second reason is that the power to prescribe a profit cap is intended to signal to providers that a cap will be introduced in the future, if their behaviour does not change now. The government has set out a clear strategy for how it intends to rebalance the children's social care placements market, which consists of other legislative and non-legislative measures. It is only if these other measures are unsuccessful in reining in profiteering that the Secretary of State would use the power to cap profits.

56. The third reason is that the children's social care market fluctuates greatly, with varying levels of supply and demand affecting the costs that providers are able to charge. Given that the Secretary of State does not intend to use the power to cap profits immediately, market conditions at the time of introduction will inevitably be different than they are now, including as a result of the other market intervention measures being implemented. The Secretary of State would need to consider market conditions, and the result of the consultation required before introduction of the cap, before determining the appropriate level at which to set the profit cap. It may also be necessary to adjust the prescribed cap over time.

57. The provisions include on the face of the Bill a "necessity test" acting as a threshold to the making of regulations, and matters to which the Secretary of State must have regard which indicate the scope of the power. The necessity test is that the Secretary of State may not make regulations prescribing a profit cap unless she or he is satisfied that it is

necessary to do so in the public interest of ensuring that children's social care placements are provided on terms which secure value for money. Furthermore, the Secretary of State is under a duty to consult before making regulations (local authorities in England, representatives of relevant providers and any other appropriate person). Then, when making any regulations prescribing a profit cap, the Secretary of State must have regard to (i) the interests of registered providers, including the opportunity to make a profit, (ii) the welfare of children being looked after by local authorities in England, and (iii) the interests of local authorities in England.

Justification for procedure

65. It is accepted that the affirmative procedure is appropriate for any regulations prescribing a profit cap.

Clause 15(2): New section 30ZK(4), (5) and (6)(b) to CSA 2000 – Power for regulations prescribing profit caps to make provision as to how profit is determined, including to specify adjustments for 'disguised profit arrangements'

Power exercisable by: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

66. As stated above, there are many possible methodologies which could be used to determine a profit figure which the Department will consult on. Further, the Department is aware that when undertaking relevant calculations, some entities may seek to adopt arrangements with the intention and effect of artificially reducing the level of their profits for the purposes of avoiding exceeding the profit cap. In order to ensure that entities are not able to circumvent the system in this way, the Secretary of State wishes to prescribe those elements of revenue which will or will not be considered to be profit for the purposes of the profit cap.

Justification for power

67. The Secretary of State needs to consider carefully which determination of profit is the most appropriate one for this market. The one selected may not always be appropriate and therefore we may need to be able to amend it or opt for a different one through amending regulations. As to "disguised profits", the Bill indicates at a high level what is meant by the term disguised in the Bill – arrangements which it would be reasonable to conclude have as their main purpose, or one of them, the reduction of profit. However, the Department wishes to be in a position to respond flexibly to changes in practice over time, in order to ensure that relevant behaviours are captured. The Department has sought to provide additional protection to providers by including a necessity test in subsection (7) (to the effect that the Secretary of State can only make regulations when satisfied that it is necessary to do so, having regard to the public interest in securing value for money). Finally, prior to making regulations, the Secretary of State must have regard to certain matters set out in subsection (8), including both the welfare of looked-after children and the interests of relevant providers.

Justification for procedure

68. It is accepted that the affirmative resolution procedure is appropriate for this power.

Clause 15(2): New section 30ZL (1) of CSA 2000 – Power to make provision about annual returns from relevant providers

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

Context and purpose

69. This power enables the Secretary of State to require, by regulations, each registered provider to provide an annual return to enable compliance with the profit cap to be assessed. Regulations may prescribe the content of the return and the time by which it must be submitted.

Justification for power

70. Before it is known which methodology will be used to measure profit, it is not possible to specify with precision either the information that will be required in the annual return and when precisely it will be needed. This will therefore be prescribed by regulations, in the event that it is decided that a profit cap is necessary and following consultation on which profit methodology is appropriate.

Justification for procedure

71. The Department considers that the negative procedure is sufficient for these regulations as the Secretary of State will be prescribing which technical information relating to revenue and costs should be recorded in an annual return. It is not considered that matters of this level of granular and technical detail are appropriate for more studied review by Parliament.

Clause 16: New section 30ZM(1) of CSA 2000 and clause 17: new section 30ZN introducing Schedule 1A, paragraph 4(2) of Schedule 1A CSA 2000 – Power to impose monetary penalties

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

72. The Secretary of State has the power on the face of the Bill to issue a monetary penalty to a registered provider which is in breach of the profit cap regime, or to a provider or parent undertaking which is in breach of the financial oversight scheme. Although the Bill establishes the default position that a monetary penalty is unlimited, a lower maximum level of penalty (that can be imposed by either the Secretary of State or by the CIECSS to a parent undertaking in breach of the provider oversight regime), may be prescribed in regulations.

Justification for power

73. The detailed processes and procedures applicable to any decision to impose a monetary penalty are set out on the face of the Bill – for example relating to a notice of intention to issue a penalty, a time period for representations from the provider or undertaking, notice of final decision to impose a penalty and time limits applicable to such a notice, and rights of appeal to the First-tier Tribunal. Only a maximum amount of penalty may be

prescribed in regulations. This is to ensure that if appropriate, the maximum is pitched at the right level and can be amended flexibly in response to changing market conditions. This may require swift action unsuitable for primary legislation but necessary in order to ensure the stability of continued provision for looked after children – for example, if it transpires that the maximum set is so high that it drives providers from the market.

Justification for procedure

74. It is accepted that the affirmative procedure is appropriate where a maximum financial penalty is prescribed.

Clause 19(1): New section 32A(1) of the CSWA 2017 – Power to make regulations regarding local authorities' use of agency workers to carry out their children's social care functions

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

75. New section 32A of the CSWA 2017, confers a power on the Secretary of State to make regulations prohibiting English local authorities from entering into arrangements for children's social care work to be carried out by individuals who are not workers of the local authority and imposing requirements in respect of those arrangements.

76. The policy intention is to alleviate significant affordability and stability challenges that have arisen within the CSC workforce. Historically, most staff carrying out CSC functions on behalf of local authorities were directly employed by those local authorities. However, they are increasingly supplied to local authorities by third party agents. This practice has had several adverse impacts, including a substantial increase in the cost to the public purse and reduced consistency of care for vulnerable children.

Justification for the power

77. The Bill creates a power to make regulations in respect of individuals who are 'agency workers'; that is, individuals who are not in the direct employment of the local authority, but are supplied by an intermediary, and are carrying out children's social care work (as defined) for the local authority. The regulations may require the local authority to ensure that these individuals meet certain requirements, may make provision about the management of such persons, and may make provision about the terms on which they may be supplied, including the amounts which may be paid.

78. The regulations are likely to include technical details for each of the different types of worker covered by the regulations. For example, minimum experience requirements will differ depending on whether the worker holds a professional registration. For these reasons, the regulations are likely to be detailed and lengthy, and to set out a level of technical information inappropriate for primary legislation. In addition, the requirements set out therein are likely to alter over time in response to changes both in, for example, sector qualification norms and changing pressures in the workforce.

79. It is anticipated that the regulations themselves will include:

    a. Governance arrangements for supply of workers via a project team or packaged model to ensure that local authorities retain oversight and clear accountability over the CSC practice of workers not in direct employment of the local authority

b. Minimum notice periods to reduce instability caused by abrupt departures
c. Minimum post-qualifying experience
d. Requirement to both seek and provide references for CSC staff

80. The CSC sector, and particularly the agency workforce within it, is an evolving area and it will be necessary for regulations to be updated and amended in the future. A regulation making power is needed in order that the legal framework can be quickly changed to take account of the fast-evolving nature of the roles, the range of CSC workers and the fluctuations in workforce pressures. It is imperative that the government can respond swiftly and effectively to changes in workforce cost pressures and to ensure the financial requirements relating to pay and labour costs remain relevant and robust.

Justification for the procedure

81. The Department considers that the affirmative procedure is appropriate given the significance of the power to the CSC policy landscape, ensuring Parliament can debate and approve the regulations to which local authorities are subject, and any later amendments made to them. A statutory requirement to consult is included in the clause. The Department also intends to consult extensively on draft regulations with local authorities, employment businesses and with those working in CSC, along with other interested parties to ensure that stakeholder views are taken into account and to avoid any potential unforeseen consequences.

Schedule 1 Part 2, paragraph 15: Corporate Parenting - Power to amend the list of Relevant Authorities

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

82. Clauses 21 to 25 and Schedule 1 to the Bill relate to the new corporate parenting duty. These provisions aim to improve outcomes for looked after children and care leavers by imposing new corporate parenting responsibilities on a wide range of public bodies. These bodies are called “relevant authorities” and are set out in Part 1 of the Schedule and include the Secretary of State, the Lord Chancellor, schools, FE colleges, His Majesty’s Chief Inspector of Education, Children’s Services and Skills , NHS England, Integrated Care Boards, NHS trusts, the Care Quality Commission and the Youth Justice Board for England and Wales.

83. Paragraph 15 of Schedule 1 provides a power for the Secretary of State to make regulations to amend Part 1of the Schedule to:
   - add an entry to the list,
   - remove an entry from the list, or
   - vary an entry on the list.

84. An entity may only be added to the list if the Secretary of State is satisfied that it exercises functions of a public nature.

85. The power may not be used to add an entity to the list if it:

- Exercises devolved functions only; or
- Exercises any devolved functions, unless they are a relevant authority only to the extent that they are exercising functions that are not devolved functions.
  NB: A devolved function means a function that could be conferred by provision that would be within the legislative competence of the Scottish Parliament, Senedd Cymru or Northern Ireland Assembly.

Justification for the power

86. The power is necessary to ensure that the list of relevant authorities can be amended in the future. This may be required if, for example, a body is abolished or changed or a new body is created. It may also be appropriate to add an existing body to the list if it becomes apparent that it exercises functions that have a significant impact on looked after children and/or care leavers and should therefore become a relevant authority. These changes may be required more often than could be achieved by primary legislation.

Justification for the procedure

87. Regulations made using this power will be subject to the affirmative parliamentary procedure as they will amend primary legislation. Therefore, Parliament will have the opportunity to scrutinise and approve any amendments to the list of relevant authorities.

Clauses 24: Power to issue guidance in relation to the corporate parenting responsibilities

Power conferred on: Secretary of State
Power exercisable by: Statutory guidance
Parliamentary Procedure: None

Context and purpose

88. Clause 24 provides a power for the Secretary of State to issue guidance about corporate parenting. Relevant authorities must have regard to any guidance given by the Secretary of State.

89. The guidance may include guidance about:
    - how the duty applies in relation to a particular relevant authority or description of relevant authorities
    - outcomes which a relevant authority should seek to achieve in performing the duty

Justification for the power

90. A power to issue statutory guidance is necessary to ensure that all relevant authorities are provided with clear and accessible information and guidance to support them to discharge this duty. The guidance will help to ensure that all relevant authorities are aware of their corporate parenting responsibilities and know what they need to do to meet them. This will require detailed practical guidance which it would not be appropriate to include in the legislation.

Justification for the procedure

91. The Department does not consider that it is necessary or appropriate for the statutory guidance to be subject to any parliamentary procedure. The guidance will cover practical and operational detail that does not require parliamentary oversight. It will also need to be regularly updated to take into account experience gained as this new duty comes into effect.

92. The guidance will not create any new legal obligations, it will only describe the law and offer non-binding advice to relevant authorities to support compliance with their corporate parenting responsibilities.

Clause 26(2): New sections 17A and 17B of CYPA 1933 – Power to make regulations in relation to child employment in England

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

Context and purpose

93. Part II of the CYPA 1933 makes provision for the employment of children. Section 18(1) of the CYPA 1933 sets out age limits and restrictions on the hours that children can work and the type of work they can do.

94. Local authorities currently have the power to make byelaws under s.18(2) of the CYPA 1933. Local authority byelaws may, to a limited extent, relax some of the restrictions in s18(1), prohibit the employment of a child in any specified occupation and make provision in relation to child employment permits.

95. This clause inserts sections 17A and 17B into the CYPA 1933 which will replace section 18 so far as the CYPA 1933 applies to children who are employed to work in England. It includes a power for the Secretary of State to make regulations in relation to children who are employed to work in England. This will replace the power currently conferred on local authorities in England to make byelaws and is in substantially similar terms.

96. Regulations made under the new power may:

    a. Prohibit the employment of a child to do work of a specified description (17A (1)(c)).
    b. Make provision in relation to child employment permits, including providing exceptions, making provision in relation to the application process, granting, suspending or revoking permits, appeals against a decision to reject an application or revoke a permit and record keeping (17A (3), (4) and (5)).
    c. Authorise the employment of 13-year-old children in specified descriptions of light work (17A (2)).
    d. Specify the number of hours in each day, or in each week, and the times of a day at which a child may be employed (subject to the restrictions in the CYPA 1933) (17A(6)).
    e. Specify the intervals to be allowed to children for meals and breaks when in employment (subject to the restrictions in the CYPA 1933) (17A(6)).
    f. Make provision about entitlement to leave (17A(6)).
    g. Specify other conditions to be met in relation to the employment of children (17A(6)).

97. New section 17B makes further provision in relation to regulations made under section 17A.

Justification for the power

98. The power is necessary to ensure that the regulation of child employment keeps pace with social change, and to make detailed provision in relation to a permit scheme which the Department considers would be more appropriately dealt with in secondary legislation.

99. A power to prohibit the employment of a child to do work of a specified description is needed to ensure that the legislation keeps pace with social change. As the types of work people do changes, it may be necessary to add new types of work to the list of prohibited employment if that work is unsuitable for children. Conversely if the way in which work is carried out changes such that new processes mean certain types of work become suitable for children, previous restrictions may need to be removed. This will ensure that children can take up suitable employment, whilst ensuring that their health, development and education are not adversely affected. Any changes to the list of prohibited employment will be subject to the overall safeguards in the CYPA 1933, including that children are only permitted to do light work, as defined in that Act.

100. The power to further restrict the hours that children may work and to prescribe any other conditions that must be observed in relation to their employment is limited in scope as it is subject to the overarching safeguards in the CYPA 1933. It is intended to mirror the current arrangements and to ensure that additional safeguards can be put in place to safeguard children if needed.

101. The power for the Secretary of State to make regulations in relation to child employment will replace a power which is currently conferred on local authorities in England to make byelaws. It will therefore ensure greater consistency as it will ensure that the same regulations apply across England, rather than having an approach which can lead to variation across different local authorities.

102. A power to make provision in relation to a permit scheme is necessary to ensure that the detailed arrangements for the scheme can be set out in secondary legislation. The regulations will deal with the technical implementation of the policy and will make detailed provision in relation to matters such as the application process, the information that must be contained in the application and the form and content of the permit, which are more suited to secondary legislation. It is also necessary to have enough flexibility to make minor changes to the application process in light of practical experience once the policy is implemented.

Justification for the procedure

103. Any regulations made under this new provision will be subject to the negative resolution procedure.

104. The Department considers that this will ensure an appropriate level of scrutiny whilst also giving enough flexibility to enable changes to be made quickly where needed. For example, it may be necessary to add a new type of work or job to the list of prohibited employment where evidence comes to light that it may be detrimental to a child’s welfare to do that type of work.

105. This approach is also consistent with the approach taken in relation to the licensing of children who take part in public performances and paid sport and modelling. The Children (Performances and Activities) (England) Regulations 2014 (“the 2014 Regulations”) set out the licensing requirements which apply to children taking part in these activities. They also set restrictions in relation to the time a child may spend

rehearsing or performing and the breaks they should receive etc. The power under which the 2014 Regulations were made provides for a negative resolution procedure.

Part 2 – Schools Measures

Clause 27: New section 551C of EA 1996 – Power to designate a school as one to which the duty to secure free breakfast club provision does not apply

Power conferred on: Secretary of State
Power exercisable by: Notice
Parliamentary Procedure: None

Context and purpose

106. This clause gives the Secretary of State the power to designate a school as one in which the duty to secure breakfast club provision does not apply, if satisfied that i) operating a breakfast club at the relevant school would seriously prejudice the efficient use of resources; or ii) operating the breakfast club at the relevant school would be contrary to the best interests of the children registered at the school, having regard to the particular circumstances of the school or of qualifying pupils at the school or any other relevant factor.

Justification for the power

107. Through early engagement with stakeholders, the Department has identified that there may be exceptional cases where the feasibility of running a breakfast club would be totally disproportionate to the aims of the policy due to lack of parental demand or practicalities which could not be overcome without significant expense and resources. To ensure breakfast clubs remain viable and meet the intended policy aims, the Department believes an exemption to the duty is required. The power will allow the Secretary of State to designate a school as one which is exempt from the duty, only where it can satisfy that operating a breakfast club at the relevant school would seriously prejudice the efficient use of resources; or would be contrary to the best interests of the children registered at the school – which represents a high bar to exemption. This threshold test is on the face of the Bill along with the requirement on the appropriate authority of the relevant school to consult with parents of children registered at the school and the local authority before making an application. This is an administrative function, and arguably non-legislative, but this is included in this part of the memorandum because the exercise of this power has the effect of disapplying the legislative provision. Any such designations must be published.

Justification for the procedure

108. We consider the lack of parliamentary procedure is appropriate because the Secretary of State will be exercising an administrative function which does not normally require parliamentary oversight. The decision will involve the weighing up of various factors against the threshold test and will need to be made swiftly which may be problematic if parliamentary oversight is required. The scope of the power is limited, and the threshold must be met before the Secretary of State can exercise the power. Parliament will have the opportunity to scrutinise the threshold test as the Bill passes through Parliament. Additional restrictions and safeguards on the power include the requirement for the appropriate authority of the relevant school applying for a designation to consult parents and the local authority before applying; and the requirement on the Secretary of State to keep a list of relevant schools in relation to which a designation has been made and ensure the list is publicly available.

Clause 27: New section 551D of EA 1996 – Requirement on Secretary of State to issue, and schools to have regard to, guidance on running breakfast clubs and designation

Power conferred on: Secretary of State
Power exercisable by: Statutory Guidance
Parliamentary Procedure: None

Context and purpose

109. This clause confers a new duty on the Secretary of State to issue statutory guidance to the appropriate authorities of relevant schools in England with respect to — (a) the discharge of the duty to secure breakfast club provision; (b) applications to be designated as a school to which the duty to secure breakfast club provision does not apply; and (c) the exercise by the Secretary of State of the power to designate a school as one in which the duty to secure breakfast club provision does not apply. The appropriate authority of a school must have regard to the guidance in connection with (a) and (b).

110. The content of this guidance is still being determined, however it is likely to include key principles the school should follow in designing the breakfast club; how schools should go about meeting the School Food Standards; minimum childcare standards; and SEND and allergies advice. It will also include guidance on how to make an application for designation, such as details on the type of evidence needed to support an application and the appropriate authority of the relevant school's duty to take into consideration the parent's views before seeking designation. Lastly the guidance will also set out how the Secretary of State will exercise the power to designate a school including guidance on the threshold.

Justification for the power

111. The duty on schools to have regard to guidance on the breakfast club duty is necessary to support schools in the implementation and maintenance of the minimum provision breakfast club and to set out how schools may wish to discharge their breakfast club duty. The diversity of school settings that will be subject to the duty (in relation to size, delivery feasibility, building structure, etc.) means that flexibility is essential to the successful implementation of this duty. Statutory guidance will help support the accuracy and consistency of approach between schools. It will also allow for regular and routine updates to the administration of the new duties based on schools' experiences in implementing them, to ensure that schools are able to operate breakfast clubs as efficiently as possible. The guidance will be limited to the execution of the statutory duty, although schools will be able, as they currently are, to offer breakfast clubs which go beyond the statutory minimum.

112. It is necessary to have guidance on the process schools should follow when applying to the Secretary of State to designate the school as one in which the breakfast club duty does not apply, to ensure an efficient and effective administrative process. Providing guidance on the procedure will allow the Secretary of State to provide detailed guidance and maintain the ability to adapt swiftly if required. The prescribed procedure will be set out in regulations and with some key information on the face of the Bill. Any failure of a school to follow the guidance will not bar it from making an application nor will its application be automatically refused.

113. It is necessary to provide guidance on how the Secretary of State will exercise the power to designate a school to ensure that the process is transparent, fair and accessible to schools. The aim of the guidance is to ensure schools and parents understand the high threshold and the issues which may give rise to a designation notice. It is our intention to engage in non-statutory consultation with schools and other interested parties prior to issuing this guidance and thereafter consult as needed on any substantive changes.

Justification for the procedure

114. The Department does not consider it necessary or appropriate for the statutory guidance to be subject to any parliamentary procedure as this would prevent regular and routine updates in response to feedback from schools. The guidance will not create any new duties on schools, rather it will support and explain the duty to secure breakfast club provision and the operational process of seeking a designation.

115. The threshold to designate a school as one in which the breakfast club duty does not apply will be set out in the Bill and subject to parliamentary scrutiny. The purpose of the guidance is to ensure that the administrative process of considering any application and decision making is fair, transparent and easily accessible to school leaders, local authorities and parents.

Clause 27: New clause 551C(3) EA 1996 – Regulations prescribing the application process for seeking an exemption to the breakfast club duty

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

Context and purpose

116. This clause will grant the Secretary of State the power to issue regulations prescribing the application process a school must adhere to when applying for an exemption to the breakfast club duty.

117. The details of the application process are likely to include the prescribed form and timeframe for making an application; any required evidence supporting the application; and timeframes for challenging a decision.

Justification for the power

118. The power is required in order for the Secretary of State to prescribe certain procedural elements to the application process to ensure the procedure is fair, transparent and efficient. Failure to comply with the process will enable the Secretary of State to refuse applications and will be an important procedural safeguard to ensure that only exceptional cases which are fully evidenced meet the threshold test.

Justification for the procedure

119. The process to be prescribed is technical in nature and will not impose any burdensome new duties on schools. The threshold for the exemption and the requirement on the appropriate authority of the schools to consult with parents and the local authority before applying for an exemption is set out on the face of the Bill and subject to parliamentary scrutiny. Given the technical nature of the regulations we think that the negative procedure gives Parliament the appropriate level of scrutiny for procedural matters such as this.

Clause 29(4): Amendments to section 551A (5) and (6) of EA1996 – Requirement on Secretary of State to issue, and relevant schools to have regard to, guidance on the costs of school uniform

Power conferred on: Secretary of State
Power exercisable by: Statutory Guidance

Parliamentary Procedure: None

Context and purpose

120. Section 551A Education Act 1996 creates a duty for the Secretary of State to issue guidance on costs aspects of school uniform policies, and requires the appropriate authorities of relevant schools in England to have regard to that guidance. Clause 29 amends the definitions of "relevant school" and "the appropriate authority" in section 551A(5) and (6). It replaces the existing definitions with a cross-reference to the definitions of "relevant school" and "the appropriate authority" in new section 551ZA Education Act 1996. These new definitions will clarify that the proprietors of city technology colleges and city colleges for the technology of the arts will be required to have regard to the guidance. Further, the new definitions will mean that the appropriate authority of any "relevant school" established in a hospital will not be required to have regard to that guidance.

Justification for the power

121. This amendment does not alter the existing duty on the Secretary of State to issue guidance on the costs aspects of school uniforms or the scope of what she may give guidance on, but it does amend who must have regard to it. This amendment will ensure that both provisions on school uniform in the Education Act 1996 apply to the same cohorts of schools.

122. The Department understands that schools established in a hospital operate in a specialised medical environment, and typically do not require any form of uniform, so should not be required to have regard to this guidance on the costs aspects of school uniform. The Department considers that this was the original policy intent of section 551A, so this amendment corrects an omission in the existing legislation. Further, the Department considers that it should be made clear that proprietors of the remaining city technology colleges and city colleges for the technology of the arts must have regard to this guidance.

Justification for the procedure

123. This amendment does not propose a new or different procedure to that which was previously agreed by parliament during the passage of the Education (Guidance about Costs of School Uniforms) Act 2021. The Department's view is that statutory guidance containing practical and operational details does not require parliamentary oversight. Appropriate authorities of relevant schools are to 'have regard' to the guidance, and the guidance itself will describe the law and offer non-binding advice about related matters, such as provision of second-hand uniforms. The guidance will not be imposing new legal obligations and will be drafted with engagement from schools, parents and key stakeholders.

Clause 31(2): New section 436B(6) of EA 1996 – Power to make regulations on when a child is to be regarded as falling or not falling within eligibility for registration relating to children not in school

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative first time and Negative thereafter

Context and purpose

124. This clause requires each local authority in England and Wales to keep a register of certain eligible children in their area. The following types of children of compulsory school age will be eligible: firstly those who are not registered as pupils or as students at ‘relevant schools’, secondly children who are registered as a pupil at a relevant school but do not attend full time and it has been agreed that they can receive some or all of their education otherwise than at a school (for example, they are flexi-schooled or the local authority has placed them in an alternative provision setting), and thirdly children who are a student registered at a further education setting that provides education for children aged 14 and above but they attend that setting on a part-time basis and do not also attend another relevant school. Subsection (6) of new section 436B of the EA 1996 gives the Secretary of State and Welsh Ministers the power to make regulations clarifying whether certain cases fall within or outside the second and third categories of eligibility and specifying circumstances where a child is not eligible despite falling within the category.

Justification for the power

125. The second and third categories of eligibility are intended mainly to cover children who are flexi-schooled and those who are in certain kinds of alternative provision or only attend further education part time. However, it could, without further provision, also capture children who have relatively short or minor absences, such as visits to museums or for pupils to receive lessons off-site. This could cause children to move into and out of eligibility rapidly and unpredictably, having the adverse effect of creating unnecessary administrative work for parents and local authorities.

126. Cases of this kind are likely to be varied and fact-specific, potentially requiring 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

127. The Department has determined that the situations to be removed from scope using this power will be technical and should only impact a low number of parents whose children may have flexi-schooling arrangements or are placed in particular 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.

128. It is expected that there could be some interest in the groups of children to be initially ruled out of scope of the registers and so the Department’s view is that there would be benefit in having full parliamentary scrutiny of the first exercise of this power. Thereafter, we expect public interest to be minimal as any further changes to narrow the scope of those eligible for registration are likely to be minor technical adjustments. The use of the affirmative procedure the first time the powers are used, and use of the negative procedure thereafter is 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 31(2): New section 436C(2) of EA 1996 – Regulations prescribing specific details to be included in registers

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations

Parliamentary Procedure: Affirmative

Context and purpose

129. This clause inserts a new section 436C into the EA 1996. Subsection (1) sets out the information that a local authority must include in their register in relation to a registered child. Subsection (2) confers on the Secretary of State and Welsh Ministers the power to make regulations specifying other information about the child's education that must be included in the register if the local authority has or can reasonably obtain that information.

Justification for the power

130. This power will allow for the provision of additional useful information which may be pertinent to a child's background and characteristics, enabling their needs to be better met by a local authority. While the inclusion of the existing section 436C(1) information about the 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 and linked current or historic local authority action. This would assist local authorities in targeting support to those families who need it most, as well as support the Department's evaluation of the impact of the registration system and wider education and children's social care reform priorities. For Wales this would assist local authorities in targeting support and resources to those who need it most, support the Welsh Government's children missing education policy agenda, and support local authorities to undertake their safeguarding and education duties.

131. The data collected 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 aligned 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.

Justification for the procedure

132. The regulations will be subject to the affirmative resolution procedure to allow Parliament the opportunity to debate the specific additional information that local authorities will be required to record in their children not in school registers. While other regulations outlining the data requirements to be included are typically subject to the negative procedure, given that this will be the first time that local authorities will be legally required to collect information on electively home educated children, and potential stakeholder concerns about what data the register might hold, it is the Department's view that Parliament should be afforded greater parliamentary scrutiny when this power is used.

Clause 31(2): New section 436C(4) of EA 1996 – Regulations about the keeping of registers and how time is to be recorded by a parent or carer

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative first time and Negative thereafter

Context and purpose

133. Subsection (4) of new section 436C of the EA 1996 confers on the Secretary of State and Welsh Ministers the power to make regulations about various administrative matters concerning the keeping of registers. This enables the Secretary of State and Welsh Ministers, if necessary, to provide for consistency among local authorities in areas such as how, and how often, they check whether the information in the registers 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 form of registers (for example whether they should be kept electronically), how time spent receiving education is to be recorded, whether and how registers should be published, and whether a standard registration form should be used.

Justification for the power

134. Many local authorities already voluntarily maintain a register of children not in school or electively home educated, 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 considers that the option needs to be available for the Secretary of State and Welsh Ministers 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.

135. There is 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.

136. There is similar 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

137. The regulations would largely cover operational processes and procedures for local authorities, which may be subject to further adjustment and minor changes over time. The Department considers that the first time the power is used will be the point of potential greatest impact to local authorities, and of interest to the parents of children eligible for registration. Similar to the previous clauses, the Department considers there would be benefit in full parliamentary scrutiny the first time the power is used, and that it would be appropriate for the exercise of this power to be subject to the negative procedure thereafter.

138. As any subsequent changes to the regulations will largely be operational and technical in nature and likely follow engagement with local authorities and other interested stakeholders, the Department considers that this will ensure an appropriate level of scrutiny whilst also giving enough flexibility to enable changes to be made quickly where needed.

Clause 31(2): New clause section 436E(1)(a) of EA 1996 – Regulations setting a threshold for providers of out-of-school education to provide information

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

139. This clause inserts new section 436E of the EA 1996, which enables local authorities to require certain persons to provide information. This applies only where a local authority reasonably believes that the person is providing out-of-school education for more than a prescribed amount of time to an eligible child without any parent of the child being actively involved in the tuition or supervision of the child. The time threshold will be set in regulations.

Justification for the power

140. This duty on out of school providers is necessary 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. It is also needed so that local authorities can ensure the accuracy of their registers. The Department considers 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.

141. 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. Observation of the system will likely be required on an ongoing basis to ensure this threshold is set at an appropriate level, and to monitor potential impact on providers.

Justification for the procedure

142. The regulations will be subject to the affirmative resolution procedure to allow Parliament the opportunity to debate the threshold before the regulations initially come into force and prior to any subsequent changes. The Department considers that changes to the threshold could have a substantial impact on providers of out-of-school education, for example by bringing many in or out of scope, and the exercise of powers would therefore benefit from the parliamentary scrutiny afforded by the affirmative resolution procedure.

Clause 31(2): New section 436E(7) of EA 1996 – Regulations making exceptions to duty to provide information

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

143. Subsection (7) of new section 436E confers on the Secretary of State and Welsh Ministers the power to create exceptions to the duty to provide information when required by a local authority to provide it.

Justification for the power

144. This power is to some extent consequential on the power in new section 436E(1), 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 challenging and inappropriate for exceptions to be set out in the Act itself as those exceptions are dependent on the threshold. Moreover, as the threshold may be adjusted from time to time, exceptions may also need to be adjusted as a result.

145. 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, potentially unreasonable requirements could be placed on such providers that might serve to discourage the provision of these activities.

Justification for the procedure

146. Although the power will likely 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 to allow Parliament the opportunity to debate which providers of out-of-school education would be exempt from the duty.

147. In line with the justification offered for the regulations setting a threshold for providers of out-of-school education to provide information, the Department considers that, together with amendments to the threshold, any changes to those subsequently excluded from scope of the duty could have a significant impact on out-of-school education providers, and potentially the effectiveness of the duty in terms of supporting the identification of children eligible for registration.

148. For example, if exceptions from the duty were to be substantially reduced it could result in large swathes of providers of out-of-school education being required to supply information to the local authority, or conversely significantly increase those out of scope of the duty, potentially reducing the effectiveness of the duty as a tool to support local authorities to identify children missing education. The Department considers that use of the power would therefore benefit from the parliamentary scrutiny afforded by the affirmative procedure.

Clause 31(2): New section 436E(9) of EA 1996 – Regulations to set a monetary penalty for failure to provide information – and inserting Schedule 31A paragraph 5 to provide regulations setting the increase in the penalty if provided late

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative first time and Negative thereafter

Context and purpose

149. 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 (7), the local authority may require that person to pay a monetary penalty. This clause, via subsection (9), provides for the amount of the penalty to be set in regulations.

150. This clause also inserts Schedule 31A among the Schedules to the EA 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

151. The level of monetary penalties needs to be adjusted periodically to account for economic factors, such as 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. The Department considers that setting these amounts in regulations is appropriate. In an education context, existing monetary penalties are set in regulations in relation to, for example, school attendance (sections 444A and 444B of the EA 1996) and allowing an excluded pupil to be in a public place (sections 105 and 106 of the EIA 2006).

Justification for the procedure

152. This power will set 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; therefore the affirmative procedure would be disproportionate to use on every occasion. However, the first time the power is used is also likely to be the point of most significance and potential impact on providers of out-of-school education, being the first time that a monetary penalty is set (with there never having been such a monetary penalty on these providers previously).

153. We would also expect the initial use of the power to set the tone for the level of penalty, and while significant amendments could be possible, we believe these to be unlikely. We would expect any subsequent changes to be in response to stakeholder feedback and experience of the system, or otherwise in response to economic factors (such as inflation); and as already highlighted only likely to impact a very small number of providers. For this reason, the Department considers that there would be benefit in greater parliamentary scrutiny the first time the power is exercised, and that any subsequent use thereafter be subject to the negative procedure. The negative procedure would afford the appropriate level of scrutiny in subsequent usage of the power, and there is already precedent for the negative procedure in line with other regulations that set monetary amounts (e.g. (Fixed Penalties) (England) Regulations 2017 (legislation.gov.uk)), and the Environmental Offences (Fixed Penalties) (England) Regulations 2017 (legislation.gov.uk)).

Clause 31(2): New section 436F(1) of EA 1996 – Regulations prescribing information local authorities must provide to the Secretary of State and Welsh Ministers

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative first time and Negative thereafter

Context and purpose

154. This clause inserts section 436F into the EA 1996. Section 436F(1) provides that if the Secretary of State and Welsh Ministers directs a local authority to provide her or him with information from their register, then they must do so. The types of information the Secretary of State and Welsh Ministers can direct them to provide are to be set out in regulations.

Justification for the power

155. As discussed above, regulations under new section 436C(2) may prescribe some of the information to be included in registers. It is therefore also necessary for the Secretary of State and Welsh Ministers to have power to prescribe the information from registers that must be provided, 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.

156. This power will 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

157. Although there is precedent for data collection regulations to be subject to the negative procedure – for example, in the case of similar Department for Education 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 it would be beneficial to give Parliament a greater level of scrutiny the first time this power is used.

158. Similarly to the regulations prescribing certain details to be included in registers (at the new section 436C(2), the Department considers that the first time of use is likely to be the point at which there is the most public interest in the information to be provided to the Department, particularly from parents of children eligible for registration and by local authorities who will be directly impacted by the power. However, the Department would expect less interest thereafter, where any subsequent changes would likely be technical in nature, or otherwise in response to learning from implementation of the system and engagement with stakeholders.

159. The power to require local authorities to share information also 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. Therefore, beyond the first use of the power, the Department considers that the detail of what data the Secretary of State and Welsh Ministers require local authorities to share does not need greater parliamentary oversight than the negative procedure affords.

Clause 31(2): New section 436F(2) of EA 1996 – Regulations prescribing persons to whom Secretary of State and Welsh Ministers may provide information

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

160. New section 436F(2) confers on the Secretary of State and Welsh Ministers the power to provide information received from a local authority register under s436 F(1) to other persons in certain circumstances. Regulations will prescribe the persons to whom the Secretary of State and Welsh Ministers may provide this information.

Justification for the power

161. Under these clauses, the Secretary of State and Welsh Ministers will receive information from local authorities' Children Not in School registers – at both an individual and aggregate level. The Department intends to collate this information and share it with relevant persons to fulfil the following objectives:

- Match information on individual children from local authority Children Not in School registers to help local authorities to identify children that have gone "missing" from their registers – for instance, due to moving to another local authority in England or Wales or even out of the country without notifying their original local authority.
- Create a consistent view of a child's education – particularly where a child has moved across different education settings, so that children could benefit from more tailored support from the local authority or other professionals.

162. The Secretary of State and Welsh Ministers will therefore need to share certain information with relevant persons – for example, relevant local authorities, education providers, or other organisations connected with promoting the education or wellbeing of children in England and Wales. In order to determine who the Secretary of State and Welsh Ministers should be able to share information with, the Department plans to engage with stakeholders, such as local authority Children Missing Education teams, to fully understand which organisations need to see the information in order to achieve these objectives.

163. However, as these endeavours have not been attempted before on a national scale, it is likely that post-implementation it will be necessary to update the list of people from time to time as new situations come to light that demonstrate that additional organisations concerned with promoting or safeguarding the welfare or education of children need to see relevant information. There is also the possibility that new organisations will be created, with whom it would be useful to share information in the future. Given that this information sharing can be about safeguarding, it may be necessary to make changes particularly quickly and it would be inappropriate to have to rely on finding an opportunity to amend primary legislation.

Justification for the procedure

164. The regulations will be subject to the affirmative resolution procedure to allow Parliament the opportunity to debate the proposed persons with whom the Secretary of State and Welsh Ministers will be able to share information. Sharing details from the registers is likely to be contentious and particularly important to the impacted families. It is therefore the Department's view that greater parliamentary scrutiny is necessary when this power is used.

Clause 32(2): New section 436I(5)(b) of EA 1996 (regulations made under section 550ZA(3)(f) of EA 1996) – Prescribed form of school attendance order

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Negative

Context and purpose

165. This clause inserts new section 436I into the EA 1996. This is one of a series of new sections dealing with school attendance orders in England and Wales, which reproduces existing sections 437 to 443 with certain changes. New section 436I(5)(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

166. The Department assesses that 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 436I itself, therefore 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

167. The negative procedure applies to the current power in section 437(3) and the Department considers this an appropriate level of scrutiny given the minor impact of the regulations and is in line with equivalent power in Wales. The administrative power is very narrow, as the key information is already in primary legislation (437B) and therefore is focused on the form of the order.

Clause 34: New section 436U of EA 1996 (regulations made under section 550ZC(7) of EA 1996) – Guidance on registration

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: Statutory Guidance
Parliamentary Procedure: None

Context and purpose

168. This clause inserts Section 436U into the EA 1996 and confers on the Secretary of State and Welsh Ministers the power to give guidance to local authorities about the exercise of their functions related to the registration of children under new sections 436B to 436P.

Justification for the power

169. This power 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 also help support the accuracy and consistency of approach between local authorities, including in relation to local authorities' implementation of the school attendance order process, 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

170. The Department considers that 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.

It will similarly support and explain operational practicalities in relation to the school attendance order process, including myth-busting in response to any frequently asked questions.

171. The guidance will not create any new legal obligations and will only describe the law and offer 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*". The Department's 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. This is a well-established precedent that the Department, and other government departments, follows for changes to existing statutory and non-statutory guidance and we would therefore not expect any deviation from such a consultation process being followed in future.

Clause 36(2): New section 92(3) of ESA 2008 – Regulation-making powers to prescribe what is to be treated as full-time education, to prescribe what factors are to be taken into account when deciding whether full-time education is being provided and to make interpretative provision about these factors

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

172. The regulation-making powers here include Henry VIII powers. The clause in which the regulation-making powers appear amends the definition of "independent educational institution" in section 92 of the ESA 2008 and therefore changes what institutions will be subject to the regime in Chapter 1 of Part 4 of that Act. In addition to independent schools, other institutions will be caught if, amongst other things, they provide full-time education to children of compulsory school age. This is a novel approach (see the analysis below about the next delegated power). New section 92(4) contains a non-exhaustive list of factors which are to be taken into account in determining, in the case of these new institutions, whether education is full-time. New section 92(3) contains a regulation-making power to amend or add factors to, or remove factors from, section 92(4). In addition, it allows for regulations to amend section 92 so as to add, remove or amend provision about the interpretation of the factors in subsection (4). An additional regulation-making power is provided in subsection (3) to specify what amount of time is or is not to be treated as full-time and what activities are to be treated, or not treated, as time in which education is being provided – for the purposes of determining whether full-time education is being provided in the case of these other institutions. For instance, to specify in regulations that 18 hours per week of education for 30 weeks a year is to be treated as full-time education. Or, if needed, to provide in regulations that the activity of attending, for example, at a breakfast club can be ignored for the purposes of deciding whether full-time education is provided.

Justification for the power

173. The purpose of clause 36 is to bring more types of educational setting into the regulatory regime found in Chapter 1 of Part 4 of the ESA 2008. The aim is for this regime to apply to both independent schools and to other institutions providing full-time education to children of compulsory school age. Whether or not full-time education is being provided will, therefore, be an essential test is deciding whether a setting is caught by the regime.

174. However, the Department has very significant experience of persons seeking to avoid regulation under Chapter 1 of Part 4 of the ESA 2008 by, for example, claiming that insufficient hours of education are being provided for there to be full-time education, or that part of the school day set aside for a homework club is separate to the provision made by the setting and should, therefore, be discounted.. The Department has no good reason to believe that attempts to avoid regulation will cease, and the powers in section 92(3), which (for example) include being able to define what is to be treated as "full-time" by reference to units of time and to specify that specified activities are to be treated as constituent elements of the provision of education, seem to the Department to be a pragmatic response to anticipated attempts to avoid regulation.

175. In addition, this approach will allow the Secretary of State power to respond to new models of delivering full-time education within the sector, models that are not yet commonplace but which the independent education sector – as a very diverse sector - is expected to develop.

176. An illustrative example of how the regulation-making powers might be used is as follows. Proprietors of some settings operate what are called "tapestry" arrangements. Under these arrangements, education is provided by one setting at different premises. The education is provided to the same group of children but not for a sufficient amount of time at each premises to constitute "full-time" education – whereas collectively the time spent constitutes "full-time" education. It has been contended with the Department that such arrangements do not constitute "full-time" education regime (though the Department does not accept this). Were it considered necessary, the regulation-making powers in section 92(3) could be used to provide clarity on this point.

177. How settings may deliver education to children in the future is difficult to fully foresee and the powers ensure flexibility to respond to changing circumstances – ensuring overall that the regime operates in line with the public interest.

178. Finally, there is provision in this power (see subsection (3)(d) in new section 92) specifically addressed at the interpretation of the factors listed in subsection (4). There is already a provision in new section 92 on interpretation that relates to one of the factors – see new section 92(5), which defines "academic year" for the purposes of section 92(4)(b). This is the only term in the factors that needs, in the Department's view, an express definition in section 92. However, should factors be amended or added, it is in the nature of legislation that it may be appropriate to provide definitions of any terms used. Subsection (3)(d) expressly allows for this and for that to be done by amendment to section 92 – rather than, more cumbersomely, it being necessary to incorporate the definitional element into the wording of the new or amended factor.

179. The powers here are broadly analogous to powers which are currently in section 92(3)(b) and (c) of the ESA 2008 since these permit regulations to be made changing what constitutes a part-time institution for the purposes of the current section 92(1)(b). There is also a further broadly analogous power 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

180. The Department considers that the affirmative resolution procedure is appropriate for these regulation-making powers since, first, they consist of Henry VIII powers. In addition, they will, effectively, enable the Secretary of State to specify in regulations in

what circumstances an institution must (or must not) be treated as providing full-time education for the purposes of new section 92(1)(b) of the ESA 2008. Therefore, a higher degree of Parliamentary scrutiny is appropriate.

Clause 36(2): New section 92(8)(g) of ESA 2008 – Regulation-making power to except institutions from the definition of 'independent educational institution'

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

181. As explained above, this clause amends section 92 of the ESA 2008, redefining what constitutes an "independent educational institution" for the purposes of Chapter 1 of Part 4 of that Act. The new definition of "independent educational institution" will cover not only independent schools (as it currently does) but also other institutions In England that provide full-time education to children of compulsory school age unless they are an "excepted institution" (see new section 92(1)(b)). The definition of "excepted institution" is found in new subsection (8) and includes both a list of institutions and a power to specify additional institutions of a description specified in regulations. "Regulations" in the ESA 2008 means regulations made by the Secretary of State (see section 168(1)). Therefore, a regulation-making power is provided to the Secretary of State to exclude descriptions of institutions from being "independent educational institutions" under new section 92(1)(b).

Justification for the power

182. In redefining what is an "independent educational institution" the legislation will be doing something novel. Chapter 1 of Part 4 will apply not only to independent schools (as it currently does) but also to other institutions providing full-time education which are neither independent schools nor "excepted institutions".

183. To be caught, an institution will need to provide full-time education to children of compulsory school age but it will no longer necessary for it to be a "school". Specifically, "schools" are defined as "educational institutions" in section 4(1) of the EA 1996 and the qualification of "educational" is not adopted in the new definition, in new section 92(1)(b). In addition, the effect of the EA1996 Act is that in order for an institution to be a "school", it needs to have as its purpose the provision of education suitable to the requirements of children of compulsory school age. This element of what a school constitutes is also lost in new section 92(1)(b) (so as to capture institutions irrespective of the breadth and nature of their curriculum).

184. This is a more expansive approach to regulation than at present. Therefore, already in new section 92(8) certain institutions are excluded – which in the main are subject to other regulatory regimes.

185. Given both the novelty and scope of what the legislation is doing, the regulation-making power is considered by the Department appropriate in order to exclude of institutions it would be inappropriate to regulate under Chapter 1 of Part 4 of the ESA 2008, both in terms of current forms of settings and to cover future developments to education provision. The independent education sector is diverse and therefore, there is an inherent difficulty in identifying or anticipating all those full-time settings which it would be inappropriate to regulate under the ESA 2008. An example of how the power could be

used could relate to alternative provision-type settings, where it may be decided in the future to regulate certain categories of these setting differently. This regulation-making power could then be used to give clarity to proprietors, parents, commissioners and others, by avoiding overlapping systems of regulation. Or, instead, other examples might be institutions that teach English as a foreign language but have a minority of foreign pupils of compulsory school age. Or specialist education provision that needs to be put in place at short notice, for a limited period, which is provided to foreign born children entering the UK on humanitarian grounds. Here it may be desirable to avoid the lengthy process of registering an institution necessitating, amongst other things, inspection against certain regulatory standards.

186. 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 institution.

Justification for the procedure

187. 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 scrutinise and approve any regulations that bring institutions outside the regulatory regime in Chapter 1 of Part 4 of the ESA 2008.

Clause 37(2): New section 94(1A) and (3A) of ESA 2008 – Extending the regulation-making powers to make independent educational institution standards

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

Context and purpose

188. Under section 94 of the ESA 2008, 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 ESA 2008.

189. This clause makes two amendments to the regulation-making powers in section 94 of the ESA 2008. Firstly, the insertion of a new subsection (1A) 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 ("the first amendment").

190. Secondly, a new subsection (3A) is inserted which permits 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 ("the second amendment").

Justification for the power

191. The first amendment 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.

192. The second amendment will 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 EA 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.

Justification for the procedure

193. 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 37(6)(b): New section 125(10) of ESA 2008 – Tribunal rules about stays of suspensions of registration and stop-boarding requirements

Power conferred on: The Tribunal Procedure Committee
Power exercisable by: Rules
Parliamentary Procedure: Negative

Context and purpose

194. Clause 37 amends the ESA 2008, amongst other things, to confer powers on the Secretary of State to temporarily suspend the registration of an independent educational institution, and to impose “a stop boarding requirement” (where the institution’s registration is suspended). 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 or supervised activity is provided at an institution when its registration is suspended or where a stop boarding requirement is breached.

195. 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. This clause amends section 125 of the ESA 2008 to enable Tribunal Procedure Rules to be made (see section 22 of the Tribunals, Courts and Enforcement Act 2007 – “the 2007 Act”) which will allow for affected proprietors to apply for a stay of any suspension or a stop boarding requirement.

Justification for the power

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

197. 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. This can include case management powers, striking out a party's case and the time within which proceedings must be brought.

Justification for the procedure

198. The Department considers a negative procedure to be appropriate because 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. Furthermore, before making rules, the Tribunal Procedure Committee must consult such persons as it considers appropriate.

Clause 39(2): Amendments to s.98(3), and a new section 98(3A), of ESA 2008 – Duties to make regulations related to accommodation provided by third parties and the buildings that will be occupied and regulation-making powers to prescribe types of special educational need

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

Context and purpose

199. Section 98(2) and (3) of the ESA 2008 provide regulation-making powers to prescribe the content of applications for the registration of independent educational institutions. They include duties for regulations to require an application to provide information about whether the institution provides boarding and, 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.

200. Clause 39(2) changes section 98 in a number of ways. First, it amends section 98(3) to impose an obligation on the Secretary of State to make regulations that require applications to include information not only about whether accommodation is provided by the institution itself but also whether it is to be provided under arrangements with third parties ("third party accommodation"). Secondly, it amends the same subsection to impose a duty on the Secretary of State to make regulations requiring an application to contain the address and a description of the buildings occupied by an institution and made available for student use. Thirdly, clause 39(2)(b) provides a power, in a new section 98(3A), which would enable regulations to be made by the Secretary of State which can require an application for registering a special institution to set out, according to how they are categorised in regulations, the types of special education need that the institution will cater for. A special institution (see section 101(4) of the ESA 2008) is an institution that is specially organised to make special education provision for students with such needs (and for the definitions of relevant terms here see sections 20 and 21 of the Children and Families Act 2014). Finally, the same provision in the Bill provides a regulation-making power connected to the material change of a special institution changing the type(s) of special educational needs for which it makes make special educational provision (see new section 101(2)(i) in clause 39(5)). Under this power the

Secretary of State may prescribe the type(s) of special educational needs that are pertinent for such a material change to take place.

201. A connected change would be made by clause 39(11) to section 166(6)(a) of the ESA 2008 - which is a provision about supplementary regulation or order making powers under the ESA 2008. The amendment allows for different provisions to be made for different purposes in regulations or orders under the ESA 2008. This is a standard provision in Acts of Parliament where powers are conferred to make secondary legislation (and thus it is contained in the current Bill – see, for example, clause 63(5)). In this specific case, the amendment is made to section 166(6)(a), as this provision in the ESA 2008 is directed at supplementary regulation-making powers, to ensure that it is possible for regulations to, for example, provide that "X" is a type of special educational need for the purposes of applications to register but not for the purposes of new section 101(2)(i).

Justification for the power

202. The Department considers that the information which an application should contain is the type of administrative matter commonly dealt with by means of a power to make delegated legislation, rather than being put on the face of an Act of Parliament.

203. The first amendment to section 98 of the ESA 2008 requires the Secretary of State to make regulations that make it mandatory for applicants to provide information about whether boarding provision is to be provided via someone other than the institution (and not just by the institution). This is something which the Department already considers that there is the regulation-making power to require. However, an obligation is being imposed on the Secretary of State to make such regulations because an amendment is made elsewhere in the same clause to the effect that it will be a material change where an institution provides boarding itself or under arrangements with someone else. The second amendment to section 98 similarly imposes a duty for regulations under section 98(2) to relate to a specific matter which the Department already considers the Secretary of State has power to cover in section 98(2) regulations. However, the duty is similarly being imposed to ensure that regulations cover the provision of information about this specific matter since it will become a material change, under other provisions in the same clause, for there to be a change of the buildings occupied by an institution and made available for student use.

204. To have effective oversight of this new sort of material change (as well as over third-party accommodation), the Department will need to have information about the buildings an institution occupies and uses for student when first registered (and whether or not boarding is third party accommodation).

205. The final amendment to section 98, in one respect, constitutes a slight extension to the powers currently in section 98(2) and (3) and will enable greater certainty to be provided to applicants for registration about precisely what special educational needs they need to provide information on.

206. However, the final amendment is also connected to amendments made to the material change regime under clause 39(5) – where it will become a material change for a special institution to change the type or types of special educational needs it caters for. It is connected because it will enable regulations to prescribe what type(s) of special educational needs are relevant for the purposes of this sort of material change.

207. The rationale behind this latter regulation-making power is as follows. It enables for clarity to be provided, if needed, about what is a material change for the purposes of new

section 101(2)(i). That provision is effectively drawn from what is currently in section 101(3)(c) and section 98(3)(g) of the ESA 2008 – which also make it a material change for a special institution to change the special educational needs it caters for. Those provisions, however, do not specify in the terms of the regulatory regime what types of special educational needs are significant. For example, it is not clear how one type of special educational need will be distinguished from another type. Technical detail of that sort would in the Department's view be better placed in subordinate legislation.

208. Further, as the ESA 2008 (and the relevant Bill provisions) currently stand, a material change application would be required when an institution wishes to change from catering for **any** type of special educational needs to **any** other type, or to add or remove **any** type of special educational need for which it caters. This has the potential to be burdensome for institutions and with the regulation-making power it will be possible to, for example, address the sector's potential concerns in this respect. In addition, the regulation-making power would enable potential adjustments to be made to this particular aspect of the material change regime in the light of possible SEND reforms that the department is currently considering.

Justification for the procedure

209. Acts of Parliament commonly provide for the negative resolution procedure for subordinate legislation prescribing the contents of applications and the regulation making powers in section 98(2) and (3) of the ESA 2008 are currently subject to the negative resolution procedure. The Department, therefore, considers that it is appropriate to continue with the same level of parliamentary scrutiny. so far as the new regulation-making powers or duties relate to prescribing the contents of applications to register an independent educational institution. In the Department's view, adopting the affirmative resolution procedure would involve a disproportionate use of parliamentary time. In addition, whilst one of the new regulation-making powers may be used to define the boundaries of the material change regime in so far as it relates to changes by the special institutions, the Department considers that the negative resolution procedure provides an appropriate degree of Parliamentary scrutiny. This is because the regulation-making power is intended to be a vehicle to provide certainty to proprietors and may be used to limit the circumstances in which they need to apply for a material change approval.

Clause 39(6): Amendment of s.102 – new subsection (3) of ESA 2008 – Regulation-making power to prescribe form and content of applications for material change approval

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

Context and purpose

210. Some changes ("material changes") in how a registered independent educational institution operates, including where there is a change of proprietor or whether or not boarding is provided, will require the prior approval of the Secretary of State (see sections 101 and 102 of the ESA 2008 as amended by clause 39(5) of the Bill).

211. An application needs to be made for that approval. This clause inserts a new power into section 102 of the ESA 2008 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

212. Unlike applications for registration of an independent educational institution, applications for material change approval are not currently subject to any statutory requirements, except 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).

213. 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 minimising delays caused by missing information.

214. The Department considers that the form which applications need to take and what information they should contain fall within the type of technical, administrative matters that are commonly dealt with by means of delegated legislation.

Justification for the procedure

215. 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 ESA 2008 which is subject to the negative resolution procedure. The Department therefore considers that this will ensure an appropriate level of scrutiny.

Clause 43(2): New section 137A of ESA 2008 – Regulation-making power to apply enactments, that apply in relation to independent schools, in relation to independent educational institutions

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

216. 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 ESA 2008 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 of the ESA 2008 intend 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 ESA 2008 and the Secretary of State will be able to take regulatory action against such registered institutions which fail to meet these standards

217. This clause provides a regulation-making power to the Secretary of State, in a new section 137A of the ESA 2008, to apply to independent educational institutions 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 ESA 2008, the regulation-making power allows for other legislation which applies in England in relation to independent schools to be applied in relation to these institutions.

218. 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

219. As set out above, the changes to section 92 of the ESA 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. As a result, 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.

220. However, there is 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 CA 1989 and section 547 of the EA 1996.

221. 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, the Department considers that it is important for other legislation that applies in England in relation to independent schools to be considered for application in relation to these institutions.

222. This approach 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, whilst permitting detailed debate on the practical impact of this principle in relation to other individual pieces of legislation through the affirmative resolution procedure.

223. The Department considers the powers to be analogous to those found in paragraph 3 of Schedule 1 to the EA 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

224. The Department considers that the affirmative resolution procedure is appropriate for this regulation-making power since, although not a Henry VIIII power, it is a power that allows for primary legislation to be modified when it is applied. It will give Parliament the opportunity to scrutinise and approve any regulations that amend the effect of primary legislation.

Clause 45(3): New section 141AA of EA 2002 – Power to amend the definition of online education provider

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative

Context and purpose

225. This provision extends the jurisdiction of the Teaching Regulation Agency (TRA) to allow it to regulate those teaching in online schools. A power is conferred on the Secretary of State to amend, by regulations, the definition of online education provider set out on the face of the bill and as such is a narrow Henry VIII power.

Justification for the power

226. Online education has changed hugely in the last few years and continues to evolve. How it will change in the next few years is unknown and unforeseeable. The Department therefore anticipates that the definition of online education providers will need to be updated in the future to keep pace with technological changes and that the power to amend the definition by way of secondary legislation is appropriate.

Justification for the procedure

227. The Department considers it appropriate for this power to be subject to the affirmative parliamentary procedure because it is a Henry VIII power and Parliament will likely have a strong interest in who and what is to be regulated by England's Teaching Regulation Agency.

Clause 46(2): Amendment to s.133(6) EA 2002 – power allowing to set out in regulations the type of academy settings the requirement to be qualified will apply to

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

Context and purpose

228. Section 133(1) of the EA 2002 enables the Secretary of State to make regulations which may provide that specified work may not be carried out by a person in a school unless they are a qualified teacher or satisfy specified requirements. Section 133(6) of the 2002 Act sets out that these regulations will only apply to maintained primary, secondary and special schools in England (where funding is provided through local authorities).

229. This clause amends s.133(6) to confer on the Secretary of State the power to set out in regulations the type of academy settings the QTS requirement will apply to.

230. Regulations may currently be made under section 133 to provide that "specified work" may not be carried out by a person in a maintained school in England, or a special school, unless they are a qualified teacher or satisfy specified requirements (section 133 (1)). The Regulations specifying work may make provision by reference to specified activities or the circumstances in which activities are carried out (section 133 (2)). The schools to which section 133 applies are listed in subsection (6). There is no power to amend the list of schools in subsection (6).

231. The effect of this clause is to extend the existing delegated power in section 133(1) so that the same power will allow for regulations to be made in respect of specified primary and secondary academies. This will bring academies in line with local authority-maintained schools and will standardise the approach across state-funded schools in relation to the requirement that new teachers to the classroom either have, or are working towards, QTS, subject to specified exemptions.

Justification for the power

232. The requirement to be qualified is already dealt with by delegated legislation in relation to local authority maintained schools, and so it is appropriate to extend the power to enable the Secretary of State to require that new teachers to the classroom in primary and secondary academies will either have, or be working towards, QTS,

meaning that the QTS requirement will operate in the same way in relation to academies as it does for maintained schools. The Department thinks the proposed approach is the only sensible approach in order to fit with the existing legislative framework. It is appropriate to deal with the detail of the QTS requirement in regulations, as requirements and exemptions in relation to this may be subject to change in the future.

Justification for the procedure

233. The current procedure for making regulations under section 133 is the negative resolution procedure and the Department does not consider the extension made by these proposed provisions to require a different approach. This is because the expanded powers will remain broadly similar in nature to the existing power. The Department considers that this will ensure an appropriate level of scrutiny. The new power contained at section 133(6)(c) is inspired by section 1D of the Academies Act 2010 (which allows regulations to be made that provide for statutory provisions relating to maintained schools and Academies, Academy schools and 16 to 19 academies to apply in relation to alternative provision academies or a description of alternative provision academy, with or without modifications). Section 1D of the Academies Act 2010 is subject to the negative procedure. The Department does not think that the new power inspired by this provision requires a different approach.

Clause 46(3): Amendment to s.135A (4) EA 2002 – a power to set out in regulations the type of academy settings the requirement to undertake statutory induction will apply to

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

Context and purpose

234. Section 135A(1) enables the Secretary of State to make regulations which provide that qualified teachers are required to have satisfactorily completed an induction period in order to be employed as a qualified teacher in a “relevant school” (a maintained school; a non-maintained special school; a maintained nursery school; a nursery school that forms part of a maintained school; a local authority maintained children’s centre; or a pupil referral unit, subject to specified exceptions set out in regulations) “the Induction requirement”.

235. There is no power to amend the definition of “relevant school” at s.135A(4). This clause extends the existing delegated power in section 135A to allow for regulations to be made in respect of specified primary and secondary academies and so confers on the Secretary of State the power to set out in regulations the type of academy settings the Induction requirement will apply to. This will bring academies in line with local authority-maintained schools and will standardise the approach across state-funded schools in relation to the requirement for teachers that have satisfactorily completed an induction period.

Justification for the power

236. The requirement to have satisfactorily completed an induction period is already dealt with by delegated legislation in relation to relevant schools, and so the Department considers it appropriate to extend the power to enable the Secretary of State to require qualified teachers in specified primary and secondary academies to have satisfactorily

completed an induction period to work as a teacher there (as is required in a relevant school). The expanded power will remain broadly similar in nature to the existing power.

237. The Department thinks the proposed approach is the only sensible approach in order to fit with the existing legislative framework in respect of the detail of the induction requirement. It is equally appropriate to specify primary and secondary academies in relation to this induction requirement as this may be subject to change in the future given the evolving nature of academies.

Justification for the procedure

238. The Department seeks to maintain the same level of parliamentary scrutiny that Parliament deemed appropriate for the existing power and considers that the negative procedure remains appropriate for the extension of these powers. The expanded power will remain broadly similar in nature to the existing power.

239. The new power also contained at section 135A is inspired by section 1D of the Academies Act 2010 (which allows regulations to be made that provide for statutory provisions relating to maintained schools and academies, academy schools and 16 to 19 academies to apply in relation to alternative provision Academies or a description of alternative provision Academy, with or without modifications). Section 1D of the Academies Act 2010 is subject to the negative procedure. The Department does not consider that the new power requires a different approach.

Clause 47(2) and (3): Amendments to s.1A and s.13 of AA 2010 – Curriculum: Consequential amendment to section 87(7) of EA 2002

Power conferred on: Secretary of State
Power exercisable by: Regulations
Parliamentary Procedure: None

Context and purpose

240. This clause consequentially amends section 87(7) of the EA 2002 to expand the bodies upon which the Secretary of State may confer or impose functions in respect of key stage assessment arrangements to include academy proprietors. This existing regulation-making power at section 87(3)(c) of the 2002 Act allows for the Secretary of State to make assessment arrangements for national curriculum foundation subjects in respect of Key Stages 1-3.

Justification for the power

241. This existing regulation-making power at section 87(3)(c) of the EA 2002 allows for the Secretary of State to make assessment arrangements for national curriculum foundation subjects in respect of Key Stages 1-3.

242. By expanding this power to include academy proprietors, this clause will ensure the national curriculum assessment arrangements operate in the same way for academies as they do for maintained schools. The delivery, method, monitoring and moderation of assessment arrangements changes regularly so this is appropriate detail to include by way of delegation rather than on the face of the legislation.

243. The Department considers that the changing nature of the curriculum and assessments are the sort of detailed technical, administrative matters that are appropriate for delegated legislation, particularly given that the evidence for what works

in relation to the focus of assessment arrangements for different key stages is likely to change over time.

Justification for the procedure

244. Part VI of the EA 2002 provides for the negative resolution procedure for subordinate legislation prescribing the contents and form of national curriculum assessment arrangements, attainment targets and programmes of study so that changes can be made as and when the curriculum or assessment practice changes. If it was not possible to frequently update the subordinate legislation, schools would have to adhere to outdated practices. The Department considers that the same procedure is appropriate for the amendment to the power.

Clause 47(2): New subsection to section 1A inserted after subsection (3) of AA 2010 – Consequential amendment to sections 90(1) and 91 of EA 2002

Power conferred on: Secretary of State
Power exercisable by: Directions (90(1)) and Regulations (91)
Parliamentary Procedure: No procedure (90(1)) Negative (91)

Context and purpose

245. This clause consequentially amends section 90(1) and 91 of the EA 2002 so that the requirement for academy schools to teach the national curriculum does not apply to the extent that (a) a direction under section 90(1) (development work and experiments), or (b) regulations under section 91 of that Act (exceptions), provide that the national curriculum does not apply in relation to that educational institution.

Justification for the power

246. These existing direction- and regulation-making powers allow for the Secretary of State to make directions or regulations: in the case of directions under section 90(1), to exempt maintained schools from the national curriculum in respect of development work and experiments or to exempt them with modifications for the period of time specified in the direction. Regulations under section 91 permit the Secretary of State to exempt maintained schools from the national curriculum or that it should apply with modifications.

247. These are existing delegated powers which need to also apply to academy proprietors in order for the national curriculum to operate in the same way in relation to academies as it does for maintained schools.

248. In the Department's view, the changing nature of the curriculum and the short-term needs of pupils are the sort of technical, administrative matters that are commonly dealt with by means of delegated legislation.

Justification for the procedure

249. The Department considers that requiring regulations to be made by the affirmative resolution procedure would necessitate a disproportionate use of parliamentary time and hinder the intention of the power, which is to make directions amending the application of the national curriculum for a limited period of time and allow flexibility as to the revocation and variation of such a direction.

Clause 48(1): New subsection 29A(5) of EA 2002 – Off-site direction (information and reviews etc.)

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

Context and purpose

250. Section 29A(1) of the EA 2002 confers on the governing body of a maintained school the power to require a pupil to attend a place outside the school premises to receive education intended to improve their behaviour. Section 29A(3) and (4) confers on the Secretary of State the power (and, in the case of subsection (3), the duty) to make regulations about the information that has to be provided when a pupil is required to attend off-site, how the requirement must be kept under review, and other matters. The current regulations are the Education (Educational Provision for Improving Behaviour) Regulations 2010 and they are subject to negative procedure.

251. This clause gives the Secretary of State the power to make regulations extending this power of off-site direction, and the associated regulations, to cover academy trusts as well as maintained schools. The subject-matter to be covered by the regulations in relation to academy trusts will be the same as for maintained schools.

Justification for the power

252. The approach of using regulations to extend this provision to academies is consistent with how similar matters are handled elsewhere in Part 3 of the EA 2002. That Part is concerned with various powers and duties of governing bodies of maintained schools, so it would be inappropriate to amend it to apply some provisions to academies directly. The proposed approach is already taken in section 51A of the 2002 Act, which directly confers a power to exclude a pupil from a maintained school, but leaves it to regulations to extend that power to academies. It is the creation of the delegated power itself that decides the principle that academy trusts should have the same power of off-site direction as maintained school governing bodies, and that decision is appropriately made by Parliament. The exact application of section 29A to academies is a minor technical matter that can appropriately be delegated.

253. The intention is that it will be applied with minimal modification, and the procedural safeguards for academies will be substantially the same as for maintained schools. They may need to be varied from time to time, in light of experience and wider changes. For example, a number of amendments were made in 2012 following a review of current practice by the government's expert advisor on behaviour at that time, and subsequent consultation. The review had found, among other things, that the previous requirements about reviewing off-site directions were disproportionately onerous in practice and were not meeting pupils' needs. Another example is that requirements about what information must be provided may need to change as methods and norms of communication change, while evidence of best practice may prompt adjustments to the frequency of reviews.

Justification for the procedure

254. The Department considers the negative procedure to be appropriate because the existing power to make regulations in relation to maintained schools is subject to the negative procedure, consistent with many other regulation-making powers that deal with procedural issues. The power is relatively narrow and future uses are likely to be uncontroversial and analogous to existing regulations. Comparable regulations made under section 51A of the EA 2002 (mentioned above) are subject to the negative procedure.

Schedule 3 Paragraph 5: New subsection 122A(1) of EA 2002 – Pay and conditions of academy teachers: New power to set minimum level of remuneration by order for Academy teachers.

Power conferred on: Secretary of State
Power exercisable by: Order
Parliamentary Procedure: Negative

Context and purpose

255. Section 122A of the EA 2002 confers on the Secretary of State the power to determine a minimum level of remuneration for school teachers in academy schools and alternative provision academies. This power can only be exercised by way of an order, following a 2-stage statutory consultation process, part of which includes the School Teachers Review Body.

256. The effect of this is that these teachers will now be bound by decisions made by the Secretary of State in respect of minimum levels of remuneration. The purpose of this power is to create a floor on remuneration. This minimum level of remuneration will be created by way of an order and imported into contracts of employment or contracts of service for teachers in academy schools and in alternative provision academies if their existing contract does not already provide for them to be remunerated at a level at least equal to the minimum level of remuneration

Justification for the power

257. This order-making power will enable the Secretary of State to determine minimum level of remuneration for teachers in academy schools and alternative provision schools. The Department's intention is for a new minimum level of remuneration to be determined each year following the statutory consultation process and therefore secondary legislation is needed to be able to implement these changes annually – which would not be possible if amendments could only be made by way of primary legislation as there is not a guaranteed legislative vehicle each year. Annual reviews of the minimum level of remuneration are appropriate in order to be able to respond to recommendations on this from industry experts who consider evidence from a range of stakeholders, including unions and employer representatives on economic considerations including school budgets and inflation, and recruitment and retention of school teachers.

Justification for the procedure

258. The Department considers a negative procedure to be appropriate. The existing s.122 power to determine the pay and conditions of teachers in maintained schools is also subject to the negative procedure and the Department is of the view that this provision does not require additional scrutiny as compared to the section 122 power. An affirmative resolution procedure would necessitate a disproportionate use of parliamentary time for this relatively narrow power to determine minimum level of remuneration for teachers in academy schools and alternative provision academies, in circumstances in which the statutory consultation processes already ensure that the views of those affected are properly taken into account.

Schedule 3 Paragraph 5: New subsection 122A(5)(d) of EA 2002: Pay and conditions of academy teachers: power to exclude prescribed persons from scope

Power conferred on: Secretary of State
Power exercisable by: Regulations made by statutory instrument
Parliamentary Procedure: Negative

Context and purpose

259. Schedule 3 paragraph 5 inserts new subsection 122A(5) of the EA 2002. This subsection determines the first case (of three cases) of who is an academy teacher for the purposes of section 122A so that it includes school teachers in academy schools and alternative provision academies who are permitted by the Education (Specified Work) (England) Regulations 2012 to carry out "specified work" (which is, broadly, teaching work).

260. The discretionary power in new section 122A(5)(d)(ii) will allow the Secretary of State to make regulations to exclude particular categories of prescribed persons in academy schools and alternative provision academies from the scope of this first case of academy teacher, so the employers of excluded persons are not bound by decisions made by the Secretary of State in respect of minimum level of academy teacher remuneration. New subsection 122A(8) makes it clear that regulations under new section 122(5)(d) may, in particular, describe excluded persons by reference to their duties or by any provisions for a person's remuneration and conditions of employment to be determined other than pursuant to new section 122A of the EA 2002.

Justification for the power

261. This power will provide flexibility to exclude specific groups of workers who are carrying out specified work in academies for the purposes of new section 122A. This provision ensures that the included groups do not have to mirror exactly the persons permitted to carry out prescribed work, which may be more broadly defined than those which are intended to fall within the remit of the School Teachers Review Body and this power. Any changes to those subsequently excluded from scope of this power will be a response to the expected evolving nature of academy trusts and those they employ. This will future proof the provision to reflect future changes to the academies workforce.

Justification for the procedure

262. The regulation making power will be used to narrow the scope of application rather than to expand it. The Department considers that the negative resolution is appropriate due to the discrete issue covered by these regulations. An affirmative resolution procedure would necessitate a disproportionate use of parliamentary time.

263. The use of the power in the context of academy schools and alternative provision academies is unlikely to require additional scrutiny.

Schedule 3 Paragraph 11: New subsection 127(2A) of EA 2002 – issue of guidance on minimum levels of pay for teachers in academy schools and alternative provision academies

Power conferred on: Secretary of State
Power exercisable by: Statutory Guidance:
Parliamentary Procedure: None

Context and purpose

264. Section 127 of the EA 2002 allows the Secretary of State to issue guidance in relation to the implementation of the teacher pay and conditions orders under s.122 to which local authorities and governing bodies of schools must have regard. Schedule 3, Paragraph 11 inserts new subsection 127(2A) and enables the Secretary of State to issue guidance about the determination of whether, for the purposes of section 122A of the Education Act 2002, a teacher in an academy school or alternative provision academy's remuneration is at least equal to the amount specified in an order under section 122A of the Act. Proprietors of Academies will be required to have regard to this guidance by new section 127(2B).

Justification for the power

265. For the sake of consistency in respect of guidance which maintained schools must have regard to, it is necessary for the Secretary of State to have the power to give equivalent guidance in respect of section 122A to academy trusts in scope. As the Department intends to make a new order under section 122A each year, following an annual consultation process, guidance may also change annually. Central government guidance can help academy trusts in scope in implementing their obligations in respect of orders under section 122A and the list of statutory consultees will include representative bodies for academy trusts in scope and the teachers they employ which may change over time.

Justification for the procedure

266. The Department does 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 the annual changes to section 122A pay orders. The requirements will be set out in the order which is subject to the negative procedure. Guidance will expand upon technical detail to enable operational logistics for academy trusts to comply with the annual pay order. The existing guidance will follow a statutory consultation process and does not require any parliamentary procedure. This new guidance will also follow a statutory consultation process (thus ensuring that relevant persons are consulted and negating the need for parliamentary procedure).

Clause 55(2): New section 96(1A) of SSFA 1998 – Power to specify in School Admissions Code circumstances in which a local authority can direct a school to admit a child

Power conferred on: Secretary of State
Power exercisable by: Statutory School Admissions Code
Parliamentary Procedure: Negative

Context and purpose

267. This clause confers on the Secretary of State the power to specify in the statutory School Admissions Code additional circumstances in which a local authority (LA) can initiate a direction to a school to admit a child in their area. These circumstances are limited to two:

a) where a "relevant procedure has been invoked" – this is a reference to the current fair access protocols (FAPs) – the mechanism for securing school places for those struggling to secure one via the usual admissions processes – or any equivalent procedure the School Admissions Code may set out. The School Admissions Code requires LAs to agree a FAP with schools in their area which aims to ensure such children are allocated a school place as soon as possible. Where the FAP or equivalent procedure fails to secure a place, this measure extends the power of LAs to direct a school to admit them.
b) in relation to previously looked after children.

Justification for the power

268. The requirement for LAs to have a FAP is set out in the School Admissions Code. It includes steps for consulting on and participating in the protocol, such as schools making representatives available for discussions and local authorities giving notice of those discussions. These practical arrangements are more suitable for the statutory code rather than legislation. The Code also sets out the categories of children to which the

FAP applies, for example children in refuges or children from the criminal justice system. These categories may need to be changed to reflect changing need amongst vulnerable children or to reflect changes in the way other legislation categorises or describes them.

269. This measure also extends LAs' powers of direction in relation to previously looked after children. The Code currently sets out the practical steps that must be taken before a direction can be made in relation to previously looked after children, such as consultation by the LA and steps the school should take to appeal a direction decision. Similar arrangements will be made in relation to previously looked after children, and such practical steps are best detailed in the statutory code, rather than primary legislation.

Justification for the procedure

270. Section 85 of the SSFA 1998 contains a power to issue or revise the School Admission Code subject to a duty to consult on the draft and the negative procedure. The Department therefore considers the negative procedure to be appropriate to define these circumstances in the Code.

Clause 56(2): New section 88IA(6) of SSFA 1998 – Power to make regulations about the adjudicator's exercise of power to set a Published Admission Number

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

Context and purpose

271. School admission authorities are required to decide and publish the intended number of pupils to be admitted to each main year of entry into a school, known as a published admission number (PAN). In certain circumstances, a school's determined PAN can be appealed to the independent Schools Adjudicator. Clause 56 gives the adjudicator the power to decide the PAN where they uphold such objections.

272. This clause confers on the Secretary of State the power to make regulations setting out matters the adjudicator must and must not take into account when deciding a PAN and preventing the adjudicator from making a determination where it would have an effect specified in the regulations. For example, not setting a PAN that causes a school to breach the infant class size limit and requiring the adjudicator to consult the admission authority about the impact of the PAN on the school.

Justification for the power

273. The power to set a PAN transfers powers away from admission authorities to the adjudicator in certain circumstances, enabling an independent body to take a decision which the school will then need to accommodate. This clause allows the Secretary of State to ensure, by regulations, that operationally important matters are taken into account by the adjudicator when making their determination. These may change over time to account for pupil demographics, or more rapidly if we encounter specific events that need to be addressed like major migration events. We would also want the adjudicator's PAN determinations to align with up-to-date guidance or requirements in the School Admissions Code on how schools should set their PAN, and other relevant regulations like infant class size limits. Finally, the adjudicator may be asked to consider

non-statutory information or resources, like the Net Capacity Assessment, that may change in name or form over time.

Justification for the procedure

274. Schedule 5 to the SSFA 1998 at paragraph (5) sub paragraphs (1)-(2) contains a power subject to the negative procedure to make regulations relating to the adjudicator's decision-making procedure but is confined to measures set out in that Act. The Department therefore considers the negative procedure to be appropriate because the clause deals with similar matters relating to the new power to set a PAN.

Clause 57(3)(e): Amendment to s.7 of EIA 2006 – Power to prescribe information that must be included in proposals for new state schools published by a local authority as part of an invitation process

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

Context and purpose

275. This clause amends a process for a local authority to invite others to propose the establishment of new schools. This is done by amendments to section 7 of the EIA 2006. Section 7(4)(a) already enables regulations to prescribe the content of proposals submitted by other proposers in response to a local authority's invitation. Clause 57(3)(d) of the Bill enables the local authority to publish their own proposals alongside those submitted by others. Clause 57(3)(e) therefore confers on the Secretary of State the power to prescribe information by regulations that must be contained in such proposals.

Justification for the power

276. The information needed to assess a proposal may change from time to time with changes to various aspects of school life. For example, a change to school admissions law or practice might make it necessary for different information about the proposed admission arrangements of a school to be stated in a proposal. The level of detail that it is appropriate to mandate may change, for example if a trend emerges of proposals being too detailed or not detailed enough. These relatively minor procedural matters are appropriate to deal with in secondary legislation. For example, the current regulation under section 7(4)(a) of the EIA 2006 is regulation 6 of the School Organisation (Establishment and Discontinuance of Schools) Regulations 2013. Further, since provision about the required content of proposals submitted by other proposers is already made in regulations, making a similar delegation of power in relation to local authorities' own proposals enables provision about the content of both types of proposals to be made in the same instrument, which will be helpful to the reader.

Justification for the procedure

277. The Department considers the negative procedure to be appropriate because the existing power to make regulations under section 7(4)(a) of the EIA 2006 is subject to the negative procedure, consistent with many other regulation-making powers that deal with procedural issues. The power deals with a narrow procedural matter of the information to be included in a proposal for a new school, which is likely to be of interest largely to local authorities.

Clause 58(2)(c): Amendment to s.10 of the EIA 2006 – Power to prescribe steps towards publicising certain proposals under section 10 of the EIA 2006

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

Context and purpose

278. Clause 58 revises the processes set out in section 10 of the EIA 2006 for local authorities and others to publish their own proposals for the establishment of new schools in certain circumstances without going through the process set out in section 7 of the EIA 2006. Section 10(5) requires that when a proposer (other than a local authority) publishes certain proposals they submit those proposals to the local authority in accordance with regulations. Clause 58(2)(c) of the Bill amends section 10(5) of the EIA 2006 to add a requirement for the local authority to take prescribed steps to publicise the proposals. This is to help ensure that members of the public and relevant organisations have the opportunity to find out about such proposals. In particular, regulations under this power are likely to require the local authority to publish information on their website, drawing attention to the proposals and stating where they can be found.

Justification for the power

279. The precise details of how a proposal should be publicised by a local authority are appropriate matters to be dealt with in secondary legislation as they are merely procedural. Such details may need to be changed from time to time to reflect changes in communication methods, local authority workloads, and other circumstances. For example, regulations have previously required proposers to publish information in newspapers but feedback from stakeholders indicate that this is no longer effective. In the current technological environment, a more practical requirement would be for the proposers to publish their proposals on a website and for the local authority to be required to sign-post that website on their own website (which is where most people and organisations are likely to look for information of this kind). But this may change again in the future.

Justification for the procedure

280. The Department considers the negative procedure to be appropriate because the existing power to make regulations under section 10(5) is subject to the negative procedure, consistent with many other regulation-making powers that deal with procedural issues. The power deals with narrow procedural matters, which are likely to be of interest largely to local authorities and potential proposers.

Clause 60 and Schedule 4 paragraph 12: Amendment to paragraph 10(3) Schedule 2 of EIA 2006 – Power to make provision relating to referral of proposals to Secretary of State or adjudicator

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

Context and purpose

281. Clauses 57 and 58 amend a process for a local authority to invite others to propose the establishment of new schools, and for the local authority to put forward their own proposals. They also revise the processes for local authorities and others to publish their own proposals for the establishment of new schools in certain circumstances without going through the process set out in section 7 of the EIA 2006. Schedule 2 paragraphs 10 to 15 to the 2006 Act requires a local authority, in certain cases, to refer proposals to

the adjudicator to be determined, and confers on the Secretary of State the power to make provision, by regulations, for persons to object to such proposals. Schedule 4 to this Bill, introduced by clause 60, amends those provisions so that in some cases proposals are to be referred to the Secretary of State rather than to the adjudicator. Paragraph 12(3) and (4) of that Schedule therefore amends the existing power in paragraph 10(3) of Schedule 2 to the EIA 2006 and adds a new sub-paragraph (4) to paragraph 10 so that provision can be made for objections to the Secretary of State as well as the adjudicator, depending on the case.

Justification for the power

282. This is another power to make provision for procedural matters. Such provision is appropriately made in secondary legislation because of its nature and to accommodate the possibility of its needing to be changed from time to time. By way of illustration, the current provision made under paragraph 10(3) of Schedule 2 to the EIA 2006 is for regulation 13 of the School Organisation (Establishment and Discontinuance of Schools) Regulations 2013. It is also appropriate for the new provision in relation to objections to the Secretary of State to be made in regulations alongside provision in relation to objections to the adjudicator so that both are found in the same place for the convenience of the reader.

Justification for the procedure

283. The Department considers the negative procedure to be appropriate because the existing power to make regulations under paragraph 10 of Schedule 2 to the EIA 2006 is subject to the negative procedure, consistent with many other regulation-making powers that deal with procedural issues. Exercise of the power is unlikely to be sufficiently contentious to justify requiring Parliament to vote every time it is used.

Clause 60 and Schedule 4 paragraph 16: Amendment to paragraph 13 Schedule 2 of EIA 2006 – Power to make provision regarding referral of proposals to adjudicator where determination delayed

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

Context and purpose

284. Schedule 2 paragraph 13 to the EIA 2006 currently requires local authorities to refer certain proposals to the adjudicator if they fail to approve or reject them within a certain time. The paragraph confers a power to make regulations setting the time after which the proposals must be referred, and the deadline for referring them. Clause 60 of and Schedule 4 paragraph 16 to this Bill make consequential amendments to that paragraph but preserve the existing delegated powers to set the point after which undecided proposals must be referred, and how quickly after that point they must be referred.

Justification for the power

285. The power replicates an existing power. It deals with procedural practicalities that are appropriate to be handled through delegated legislation. Provision made using this power may need to be changed from time to time: for example, changes in local authorities' workloads and pressures, or the development of new and more efficient processes or technologies, may make it appropriate from time to time to allow authorities more or less time to decide proposals and to refer them to the adjudicator. The current

provision made using the power that is being replicated here is found in regulations 14 and 17 of the School Organisation (Establishment and Discontinuance of Schools) Regulations 2013.

Justification for the procedure

286. The Department considers the negative procedure to be appropriate because the existing power to make regulations under paragraph 13 of Schedule 2 to the EIA 2006 is subject to the negative procedure, consistent with many other regulation-making powers that deal with procedural issues. Exercise of the power is unlikely to be sufficiently contentious to justify requiring Parliament to vote every time it is used.

Clause 60 and Schedule 4 paragraph 22: New paragraph 17A of Schedule 2 to the EIA 2006 – Proposals to establish Academy: power to make provision regarding consultation and notification

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

Context and purpose

287. Clause 57 of the Bill enables local authorities to invite proposals for new schools, which may include proposals for new academy schools or alternative provision academies. Such proposals are to be approved or rejected by the local authority, except in certain cases. Since the establishment of a new academy requires the proposer to enter into a funding agreement with the Secretary of State, clause 60 and Schedule 4 paragraph 22 make provision to ensure that such decisions are co-ordinated with the Secretary of State. They insert a new paragraph 17A into Schedule 2 to the EIA 2006. One of the provisions of the new paragraph 17A, in sub-paragraph (3), is that regulations may impose requirements about how, including how quickly, a local authority must carry out their duty to consult the Secretary of State before approving an academy proposal. Sub-paragraph (4) then provides that the authority may not approve an academy proposal unless the Secretary of State has notified them that she would be willing to commence negotiations for the required funding agreement, in accordance with regulations.

Justification for the power

288. These are procedural matters that can be appropriately provided for in subordinate legislation. The deadline for consulting the Secretary of State, for example, may need to be varied from time to time to respond to changes in local authorities' workloads and capacities, and changes in the internal organisation and processes of the Department for Education may necessitate changes in the means by which local authorities consult, or are notified by, the Secretary of State.

Justification for the procedure

289. The negative procedure is appropriate for procedural matters such as these, which are likely to be of interest mainly to officials in local and central government. This is consistent with similar powers already set out in Schedule 2 to the 2006 Act.

Clause 60 and Schedule 4 paragraph 24: Amendment of paragraph 21(6) Schedule 2 EIA 2006 – Power to make provision regarding referral of implementation decisions to Secretary of State

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

Context and purpose

290. Where proposals for a new school have been approved and must then be implemented, paragraph 21 of Schedule 2 to the EIA 2006 provides for the local authority to make certain changes to the proposals or their implementation in light of subsequent events (for example where the timetable has to be adjusted because of unavoidable delays in construction work). The paragraph also provides, at sub-paragraph (6), for regulations to prescribe a time after which, if the local authority has not already made such a decision that falls to be made, they must refer the decision to the adjudicator within a prescribed time. As part of changes made by clauses 57 to 60 of the Bill which, among other things, give the Secretary of State a decision-making role in relation to some kinds of proposals for new schools (those under section 7 of the EIA 2006), paragraph 4 of Schedule 2 to the Bill amends paragraph 21 of Schedule 2 to the EIA 2006 limiting the adjudicator's role to proposals that are not made under section 7. Specifically, the sub-paragraph (6) power described above is amended so that it does not apply to section 7 proposals.

Justification for the power

291. This is a narrowing of an existing delegated power to reflect the fact that clauses 57 to 60 give the Secretary of State, in some cases, a similar decision-making role to that currently given to the adjudicator, and therefore confine the adjudicator's role to other cases. These are procedural matters that can appropriately be delegated to subordinate legislation, especially as they may need to change from time to time as the practical realities of planning and building new schools may change over time.

Justification for the procedure

292. This is an existing regulation-making power that is subject to the negative procedure, and this Bill makes no change to that position. It appropriately reflects the procedural and administrative nature of the matters dealt with by the regulations.

Part 3 – General Provisions

Clause 63(1): Consequential provision

Power conferred on: Secretary of State
Power exercised by: Regulations made by Statutory Instrument
Parliamentary Procedure: Negative Resolution Procedure, unless the power is exercised to modify primary legislation etc, then Affirmative Resolution Procedure

Context and Purpose

293. This provides the Secretary of State with a power to make consequential provision in connection with this Bill. Regulations made using this power may modify primary legislation. In consequence, this is a Henry VIII power.

Justification for taking the power

294. This power may only be exercised to make provision which is consequential on the Bill. It is not possible to establish in advance all of the consequential provision that may be required; a power is needed to avoid any legal uncertainty or legal lacunas after the Act comes into force.

Justification for the procedure

295. The Department considers that the affirmative resolution procedure should apply where the power is exercised to modify primary legislation. The Department considers that the negative resolution procedure is appropriate in all other cases.

Annex A – Summary of Delegated Powers

Clause/Schedule	Power conferred	Parliamentary procedure
Part 1 – Children's social care provisions		
Clause 2(4): Amendment of s.16E (new subsection (2A)(b)) of CA 2004	Power to make regulations designating childcare or education relevant agencies	Affirmative
Clause 3(2): New section 16EA(2)(b) of CA 2004	Power to make regulations in relation to the support provided by multi-agency child protection teams	Affirmative
Clause 3(2): New section 16EA(5) and (6) of CA 2004	Power to make regulations prescribing the requirements for persons nominated as members of the multi-agency child protection team	Affirmative
Clause 3(2): New section 16EB(2)(a) of CA 2004	Power to designate the relevant agencies under a duty to enter into a co-operation memorandum	Affirmative
Clause 4: New section 16LB(1) of CA 2004	Power to specify a description of consistent identifier for children by regulations	Negative
Clause 4: New section 16LB(10) of CA 2004	Power to make regulations designating persons required to include the consistent identifier when processing information about a child for the purposes of safeguarding or promoting welfare	Negative
Clause 4: New section 16LA(6) and 16LB(12) of CA 2004	Duty to have regard to guidance in relation to the duty to share information and use of consistent identifiers for children	None
Clause 10(2): New section 22J(3)(f) of CA 1989	Power to add to the strategic accommodation functions by regulations that can be exercised by two or more local authorities in regional co-operation arrangements	Affirmative
Clause 11(6) and (7): Amendments to s.25 of CA 1989	An extension of powers to relevant accommodation for deprivation of liberty	Negative
Clause 12(4): New subsection (2A) of section 22 of CSA 2000	Extending the power to make regulations specifying when a person is not fit to carry on an establishment or agency	Negative
Clause 13(2): New section 30ZD(1) of CSA 2000	Power to make provision requiring the CIECSS to publish information about monetary penalties imposed	Negative

Clause 14(2): New section 30ZE(2) of CSA 2000	Power to prescribe conditions as to the application of the Financial Oversight Scheme	Affirmative
Clause 15(2): New section 30ZK(1) to CSA 2000	Power to limit profits of relevant providers	Affirmative
Clause 15(2): New section 30ZK(4),(5) and (6)(b) to CSA 2000	Power for regulations prescribing profit caps to make provision as to how profit is determined, including to specify adjustments for 'disguised profit arrangements'	Affirmative
Clause 15(2): New section 30ZL (1) of CSA 2000	Power to make provision about annual returns from relevant providers	Negative
Clause 16: New section 30ZM(1) of CSA 2000 and clause 17: new section 30ZN introducing Schedule 1A, paragraph 4(2) of CSA 2000	Power to impose monetary penalties	Affirmative
Clause 19(1): New section 32A(1) of CSWA 2017	Power to make regulations regarding local authorities' use of agency workers to carry out their children's social care functions	Affirmative
Schedule 1 Part 2 Paragraph 15	Corporate Parenting - Power to amend the list of Relevant Authorities	Affirmative
Clause 24	Power to issue guidance in relation to the corporate parenting responsibilities	None
Clause 26(2): New sections 17A and 17B of CYPA 1933	Power to make regulations in relation to child employment in England	Negative
Part 2: Schools provisions		
Clause 27: New section 551C of EA 1996	Power to designate a school as one to which the duty to secure free breakfast club provision does not apply	None
Clause 27: New section 551D of EA 1996	Requirement on Secretary of State to issue, and schools to have regard to, guidance on running breakfast clubs and designation	None
Clause 27: New clause 551C(3) of EA 1996	Regulations prescribing the application process for seeking an exemption to the breakfast club duty	Negative
Clause 29: Amendments to section 551A (5) and (6) of EA 1996	Requirement on Secretary of State to issue, and relevant schools to have regard to, guidance on the costs of school uniform	None
Clause 31(2): New section 436B(6) of EA 1996	Power to make regulations on when a child is to be regarded as falling or not falling within eligibility for registration relating to children not in school	Affirmative first time and Negative thereafter
Clause 31(2): New section	Regulations prescribing specific details to be included in registers	Affirmative

436C(2) of EA 1996		
Clause 31(2): New section 436C(4) of EA 1996	Regulations about the keeping of registers and how time is to be recorded by a parent or carer	Affirmative first time and Negative thereafter
Clause 31(2): New clause section 436E(1)(a) of EA 1996	Regulations setting a threshold for providers of out-of-school education to provide information	Affirmative
Clause 31(2): New section 436E(7) of EA 1996	Regulations making exceptions to duty to provide information	Affirmative
Clause 31(2): New section 436E(9) of EA 1996	Regulations to set a monetary penalty for failure to provide information – and inserting Schedule 31A paragraph 5 to provide regulations setting the increase in the penalty if provided late	Affirmative first time and Negative thereafter
Clause 31(2): New section 436F(1) of EA 1996	Regulations prescribing information local authorities must provide to the Secretary of State and Welsh Ministers	Affirmative first time and Negative thereafter
Clause 31(2): New section 436F(2) of EA 1996	Regulations prescribing persons to whom Secretary of State and Welsh Ministers may provide information	Affirmative
Clause 32(2): New section 436I(5)(b) of EA 1996 (regulations made under section 550ZA(3)(f) of EA 1996)	Prescribed form of school attendance order.	Negative
Clause 34: New section 436U of EA 1996 (regulations made under section 550ZC(7) of EA 1996)	Guidance on registration	None
Clause 36(2): New section 92(3) of ESA 2008	Regulation-making powers to prescribe what is to be treated as full-time education, to prescribe what factors are to be taken into account when deciding whether full-time education is being provided and to make interpretative provision about these factors	Affirmative
Clause 36(2): New section 92(8)(g) of ESA 2008	Regulation-making power to except institutions from the definition of 'independent educational institution'	Affirmative
Clause 37(2): New section 94(1A) and (3A) of ESA 2008	Extending the regulation-making powers to make independent educational institution standards	Negative
Clause 37(6)(b): New section 125(10) of ESA 2008	Tribunal rules about stays of suspensions of registration and stop-boarding requirements	Negative

Clause 39(2): Amendments to s.98(3), and a new section 98(3A), of ESA 2008	Duties to make regulations related to accommodation provided by third parties and the buildings that will be occupied and regulation-making powers to prescribe types of special educational need	Negative
Clause 39(6): Amendment of s.102 – new subsection (3) of ESA 2008	Regulation-making power to prescribe form and content of applications for material change approval	Negative
Clause 43(2): New section 137A of ESA 2008	Regulation-making power to apply enactments, that apply in relation to independent schools, in relation to independent educational institutions	Affirmative
Clause 45(3): New section 141AA of EA 2002	Power to amend the definition of online education provider	Affirmative
Clause 46(2): Amendment to s.133(6) EA 2002	Power allowing the Secretary of State to set out in regulations the type of academy settings the requirement to be qualified will apply to	Negative
Clause 46(3): Amendment to s.135A (4) EA 2002	Power allowing the Secretary of State set out in regulations the type of academy settings the requirement to undertake statutory induction will apply to	Negative
Clause 47(2) and (3): Amendments to s.1A and s.13 of AA 2010	Curriculum: Consequential amendment to s.87(7) of EA 2002	None
Clause 47(2): New subsection to section 1A inserted after subsection (3) of AA 2010	Consequential amendment to sections 90(1) and 91 of EA 2002	No procedure (90(1)) Negative (91)
Clause 48(1): New subsection 29A(5) of EA 2002	Off-site direction (information and reviews etc.)	Negative
Schedule 3 Paragraph 5: New subsection 122A(1) of EA 2002	Pay and conditions of academy teachers: New power allowing the Secretary of State to set minimum level of remuneration by order for Academy teachers.	Negative
Schedule 3 Paragraph 5: New subsection 122A(5)(d) of EA 2002	Pay and conditions of academy teachers: power to exclude prescribed persons from scope	Negative
Schedule 3 Paragraph 11: New subsection 127(2A) of EA 2002	Issue of guidance on minimum levels of pay for teachers in academy schools and alternative provision academies	None
Clause 55(2): New subsection 96(1A) of SSFA 1998	Power to specify in School Admissions Code circumstances in which a local authority can direct a school to admit a child	Negative
Clause 56(2): New section 88IA(6) of SSFA 1998	Power to make regulations about the adjudicator's exercise of power to set a Published Admission Number	Negative
Clause 57(3)(e): Amendment to	Power to prescribe information that must be included in proposals for new state	Negative

s.7 of EIA 2006	schools published by a local authority as part of an invitation process	
Clause 58(2)(c): Amendment to s.10 of EIA 2006	Power to prescribe steps towards publicising certain proposals under section 10 of the EIA 2006	Negative
Clause 60 and Schedule 4 paragraph 12: Amendment to paragraph 10(3) Schedule 2 of EIA 2006	Power to make provision relating to referral of proposals to Secretary of State or adjudicator	Negative
Clause 60 and Schedule 4 paragraph 16: Amendment to paragraph 13 Schedule 2 of EIA 2006	Power to make provision regarding referral of proposals to adjudicator where determination delayed	Negative
Clause 60 and Schedule 4 paragraph 22: New paragraph 17A of Schedule 2 to the EIA 2006	Proposals to establish Academy: power to make provision regarding consultation and notification	Negative
Clause 60 and Schedule 4 paragraph 24: Amendment of paragraph 21(6) Schedule 2 EIA 2006	Power to make provision regarding referral of implementation decisions to Secretary of State	Negative
Part 3 – General provisions		
Clause 63(1)	Consequential provision	Negative Resolution Procedure, unless the power is exercised to modify primary legislation etc, then Affirmative Resolution Procedure

ANNEX B: Non-legislative powers

The below table lists powers which are considered not to be legislative with an explanation of why this is thought to be the case.

Clause	Power
Clause 10	Power to direct two or more local authorities to make Regional Co-operation Arrangements and the form in which they should be set up, as well as to terminate such arrangements if necessary
Clause 14	Power to determine whether a person or undertaking meets the prescribed conditions of the financial oversight scheme and to require the appointment of a person with a significant management role
Clause 14	Power to require provision of a Financial Sustainability, Recovery and Resolution Plan
Clause 14	Power to require Information
Clause 31	Power to decide what to add to the register of children not in school
Clause 31	Power to direct a local authority to provide the Secretary of State and Welsh Ministers with information of a prescribed description from the register
Clause 32	Powers to make administrative decisions relating to preliminary notices and school attendance orders
Clauses 37(3) and 39(7)	Powers to direct inspections by the Chief Inspector in connection to appeals against refusals to register or to grant approval for a material change
Clause 37(4)	Powers to suspend registration of an independent educational institution and to impose a stop-boarding requirement
Clause 41(2)	Power to impose a relevant restriction where there is an unapproved material change
Clause 44	Reports from the Chief Inspector about the quality of independent inspectorates and other inspectors
Clause 47	Academy schools: duty to follow National Curriculum
Clause 49	Academies: power to secure performance of proprietor's duties etc
Clause 50	Repeal of the duty to make Academy order in relation to a school causing concern
Clause 54	Power for local authorities to direct the admission authority of an Academy school to admit a child
Clause 56	Power for the adjudicator to determine a revised admission number in a school's admission arrangements
Clause 57 and Schedule 4 paragraph 14	Power to direct a local authority to refer proposals under section 7 to the Secretary of State for decision
Clause 57 and Schedule 4 paragraph 24	Power to direct a local authority to refer a decision about the implementation of proposals under section 7 to the Secretary of State

Clause 10: New Section 22J inserted into Children Act 1989 – Power to direct two or more local authorities to make Regional Co-operation Arrangements and the form in which they should be set up, as well as to terminate such arrangements if necessary

Power conferred on: Secretary of State
Power exercisable by: Direction
Parliamentary Procedure: None

Context and purpose

1. The regionalisation of the commissioning and quality assurance of places for looked after children to be accommodated in, and of certain fostering functions, is considered an effective mechanism for driving down the increasing costs for local authorities meeting their statutory duties to looked after children. Benefits will be realised through economies of scale, as well as making it easier for neighbouring authorities to manage the availability of places across a broader regional area.

2. Local authorities already have powers to work together to exercise their statutory functions, but they are not obliged to. The Secretary of State wishes to be able to require local authorities to make regional co-operation arrangements where it is appropriate.

3. Regional co-operation arrangements are currently being tested through pathfinders (pilots). The pathfinders are currently in the setup phase and are due to begin next year in Greater Manchester and the South East. We want to prescribe the local authority strategic accommodation functions that will be carried out regionally in the Bill. The local authorities participating in the pathfinders will be exercising these functions via their regional co-operation arrangements. The outcome of the pathfinders will provide valuable evidence to inform the exercise of the direction making power. Regional circumstances differ greatly in terms of demand and supply of places and what may be right for one area may not be right for another.

4. These measures will give the Secretary of State power to direct two or more local authorities to make arrangements to carry out their 'strategic accommodation functions' jointly, to direct one authority to carry out those functions on behalf of the others or direct local authorities to establish a body corporate to support them to carry out those functions. If a direction is made requiring or permitting local authorities to make arrangements with a body corporate the direction may require a body corporate of a specified kind be established. These measures will allow the Secretary of State to direct which of the arrangements the local authorities should make or specify more than one of the arrangements and permit the local authorities to determine which arrangements to make. The Secretary of State may also direct which local authority is to carry out the functions or require that the local authorities themselves determine which of them is to carry out the functions. In addition, the Secretary of State may make a direction requiring the local authority to terminate a direction made in accordance with a direction.

5. Sub-section (2) defines 'strategic accommodation functions' as:

    a) assessing current and future requirements for the accommodation of children being looked after by the local authority,

    b) developing and publishing strategies for meeting those requirements,

    c) commissioning the provision of accommodation for children being looked after by the local authority,

d) recruiting prospective local authority foster parents and supporting local authority foster parents,

e) developing, or facilitating the development of, new provision for the accommodation of children being looked after by the local authority.

6. The direction making power will give the Secretary of State the ability to compel local authorities to work together to deliver certain prescribed functions. Currently, local authorities can work together to deliver their functions but can't be compelled to do so. This is a power to make directions to compel local authorities to work together which will have a local effect, in specific cases and areas only. The facts which give rise to the need to issue a direction will be different in each case, depending on local factors. The Secretary of State is therefore much better placed to make a decision on the need for such a direction than Parliament. The power limits the direction to certain prescribed functions (strategic accommodation functions) and sets out broad criteria as to what directions made under the power may cover.

7. Administrative procedures, such as directions, are more suitable and appropriate to manage situations where different provision will be made for different local authority areas.

8. The issuing of directions is an administrative act and, as is normal, the power is not subject to parliamentary control. When the power is used it will be in relation to specific cases and specific local authority areas. It will need to be issued in a timely way following engagement with the local authorities involved. Directions are also intended to be published. The Department's view is that an administrative procedure is better suited to decisions such as these than a parliamentary procedure.

Clause 14: New section 30ZE of the CSA 2000 – Power to determine whether a person or undertaking meets the prescribed conditions of the financial oversight scheme and to require the appointment of a person with a significant management role

Power conferred on: Secretary of State
Power exercisable by: Determination
Parliamentary Procedure: N/A

Context and purpose

9. Once the Secretary of State has made regulations setting conditions for the application of the financial oversight, the Secretary of State may then determine that a provider or undertaking meets them or not as the case may be.

10. The conditions for the application of the oversight scheme are likely to be based in the main on measurable criteria such as number of establishments and agencies, but they could also be based on more subjective assessments of value such as degree of specialism in looking after children with particular vulnerabilities, or the availability of specialist facilities, hence the need for some discretion in determining whether a person or undertaking meets the conditions or not.

11. As it would be very difficult to prescribe degrees of specialism in regulations, we consider a power to determine whether the conditions are met to be appropriate.

Clause 14: New section 30ZG of the CSA 2000 – Power to require provision of a Financial Sustainability, Recovery and Resolution Plan

Power conferred on: Secretary of State
Power exercisable by: Notice
Parliamentary Procedure: N/A

12. Upon the Secretary of State determining that the conditions of the Financial Oversight Scheme apply to a person or undertaking, then that person is required on notice from the Secretary of State to submit a Financial Sustainability, Recovery and Resolution Plan to the Secretary of State. The Bill sets out the matters about which such a plan contains information and therefore the Secretary of State does not have any powers to prescribe or otherwise control the content of the plan. The Secretary of State will also have the power to require the submission of a new plan, upon the request. That might be the case where the Secretary of State considers that the existing plan is inadequate, or where changes to an undertaking's financial position has rendered it outdated. We consider such a power to require a new plan by notice to be justifiable as it still does not give the Secretary of State any powers to dictate the content of the plan, but it will give the Secretary of State some control over ensuring that plans are up to date, which is essential if the Secretary of State is to be able to assess the risks to a local authority resulting from the business failure of a particular provider or undertaking. The Secretary of State will also be able to require the provision of a plan by a particular date, by notice. We do not consider this a particularly controversial power, as it just means that providers or undertakings will not be able to be dilatory in the preparation and submission of their plans.

<u>Justification for procedure</u>

13. As the power is not for the Secretary of State to impose requirements as to what a plan must contain, or to give the Secretary of State any power of approval of a plan – it merely confers a power to notify when a plan must initially be submitted by and when a new plan must be provided – we consider the notice procedure to be sufficient.

Clause 14(2): New section 30ZH of the CSA 2000 – Power to require information

Power conferred on: Secretary of State
Power exercisable by: Notice
Parliamentary Procedure: N/A

<u>Context and purpose</u>

14. If the conditions of the Financial Oversight Scheme are determined to apply to a person or undertaking, that person will become subject to an obligation to provide such financial information as the Secretary of State may require by notice. The purposes for which such information may be required are set out on the face of the Bill (for example for ascertaining the true ownership structure of a corporate group, or for assessing the risks to the financial sustainability of a person or undertaking). However, the precise types of financial information which the Secretary of State may need to assess financial sustainability and other matters will be many and varied and will differ from undertaking to undertaking, depending on their nature and size. It would not be possible to set these out in any complete sense in primary or secondary legislation.

15. Given the above, the power to require the provision of information by notice is considered appropriate.

Clause 31: New section 436C(3) – Power to decide what to add to the register of children not in school

Power conferred on: local authority
Power exercisable by: No method prescribed by statute
Parliamentary Procedure: None

Context and Purpose

16. Local authorities in England and Wales must maintain Children not in School registers which must contain certain specified information described in new section 436C(1). The register must also contain certain other specified information listed in new section 436C(2) but only if the local authority has or can reasonably obtain it.

17. New clause 436C(3) adds to these duties a power which enables a local authority to include any additional information that they hold which is not already contained in the register but which the local authority considers to be appropriate to be included. This does not place a new obligation on parents to provide further information because the power relates only to information already collected by the local authority.

Clause 31: New section 436F(1) – Power to direct a local authority to provide the Secretary of State and Welsh Ministers with information of a prescribed description from the register

Power conferred on: Secretary of State and Welsh Ministers
Power exercisable by: No method prescribed by statute
Parliamentary Procedure: None

Context and Purpose

18. Local authorities must maintain a children not in school register of eligible children which contains certain prescribed information relating to the child and the organisations which are providing education to the child without active involvement or supervision by a parent.

19. New clause 436F(1) provides a power for the Secretary of State *and Welsh Ministers* to direct a local authority to provide her or him with certain information contained in a local authority's register. This will be limited to information from the register which is described in regulations.

Clause 32: New sections 436H-436O – Powers to make administrative decisions relating to preliminary notices and school attendance orders

Power conferred on: Local authority
Power exercisable by: No method prescribed by statute
Parliamentary Procedure: None

Context and Purpose

20. Under existing section 437 Education Act 1996 local authorities already have powers to issue school attendance orders where it appears that a child of compulsory school age is not receiving suitable education. The new clauses enhance the scheme and improve its efficiency. The powers will be used in a case specific and child specific context and would not be appropriate for parliamentary scrutiny.

Clauses 37(3) and 39(7): Powers to direct inspections by the Chief Inspector in connection to appeals against refusals to register or to grant approval for a material change

Powers conferred on: Secretary of State
Powers exercisable by: Direction
Parliamentary Procedure: None

Context and Purpose

21. Clauses 317(3) and 39(7) amend the ESA 2008 to, amongst other things, provide the Secretary of State with new direction-making powers to require His Majesty's Chief Inspector of Education, Children's Service and Skills ("the Chief Inspector") to inspect an independent educational institution in connection with two types of appeals to the First-tier Tribunal. These are appeals under section 125(1)(a), against a refusal to register an institution and appeals, and under section 125(1)(b), against a refusal to grant approval for a material change.

22. The direction-making powers simply build on pre-existing provisions in the ESA 2008 – namely (i) the duty imposed on the Chief Inspector, in section 99(1), to inspect an institution in connection with the determination of an application to register it, and (ii). the power, currently in section 103(1), to direct the Chief Inspector to inspect an institution in connection with an application for material change approval. The new powers enable an inspection to be carried out, where one of the appeals in question takes place, in order to give the Tribunal an up-to-date picture at an institution so as to better inform its decision-making.

23. The issuing of directions is an administrative act and, as is usual, the new powers here are not subject to parliamentary controls. This is the case with another power in the ESA 2008 to direct the Chief Inspector to carry out an inspection (that in section 109) and which is commonly used to direct an inspection for the purposes of different types of appeals; namely, appeals to the First-tier Tribunal, under section 124(1)(d) or section 125(1)(c), against enforcement action.

Clause 37(4): New sections 118A to 118F ESA 2008 – Powers to suspend registration of an independent educational institution and to impose a stop-boarding requirement

Power conferred on: Secretary of State
Power exercisable by: Other
Parliamentary Procedure: None

Context and Purpose

24. Under the ESA 2008, 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).

25. This clause adds to these powers by giving the Secretary of State the power to temporarily suspend the registration of an institution where there are breaches of the standards and as a result of the breaches, the Secretary of State considers that there is

a risk of harm to students at the institution. In addition, it confers a power on 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). This is called a "stop boarding requirement". The proprietor of an affected institution will be criminally liable where education or supervised activity is provided to students at an institution whilst its registration is suspended or where a stop boarding requirement is breached.

26. 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 students. In the Department's view, it is essential that the Secretary of State has the flexibility to be able to take action to quickly to address such situations – to seek to put students out of harm's way.

27. 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 – effectively, to first give an opportunity to the proprietor to rectify failings against the standards. This will not be a requirement in the case of the new powers and therefore, the Secretary of State will be able to move quickly to suspending registration or imposing a stop boarding requirement without the delay that requiring an action plan would involve.

28. In addition, where there is a perceived risk of harm to pupils the Secretary of State may apply to the Magistrates' Court for an order under section 120 of the ESA 2008. 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.

29. A power to suspend registration, or impose a stop boarding requirement, will 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.

30. The Department's view is that the new powers here are administrative in nature, because they are powers to make decisions in respect of individual institutions (where there are breaches of the standards, that in the specific circumstances risk student safety).

31. In addition, other administrative decisions made by the Secretary of State under the ESA 2008 are not subject to a parliamentary procedure, including the current power to deregister in section 105 and the powers to de-register or impose relevant restrictions under sections 115 and 116. Further, other amendments made by this clause will enable proprietors affected by a suspended registration or a stop boarding requirement to appeal against them to the First-tier Tribunal.

Clause 41(2): New section 105(1A) of the ESA 2008 – Power to impose a relevant restriction where there is an unapproved material change

Power conferred on: Secretary of State
Power exercisable by: Other

Parliamentary Procedure: None

Context and purpose

32. Clause 39 of the Bill makes various amendments to the material change regime in the ESA 2008 – 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 clause 41 would add to those powers and enable 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 ESA 2008). It would be an offence for a proprietor to breach a relevant restriction imposed under the new power (as it is the case where a relevant restriction is imposed under other powers currently in the ESA 2008).

33. Mechanisms need to be in place to enforce the material change regime, to allow for the Secretary of State (as the regulator 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 ESA 2008. Without such mechanisms, the regime will fall into disrepute.

34. 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.

35. The Department considers 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.

36. Other administrative decisions, made by the Secretary of State under the ESA 2008, are not subject to a parliamentary procedure. For example, the current power to deregister 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 the clause, a proprietor affected by a relevant restriction under the new power may appeal to the First-tier Tribunal against it.

Clauses 44: New section 87BA(1) of the CA 1989 and section 107(1) of the ESA 2008 – Reports from the Chief Inspector about the quality of independent inspectorates and other inspectors

Power conferred on: Secretary of State
Power exercisable by: Requirement
Parliamentary Procedure: None

Context and Purpose

37. Under section 107 of the ESA 2008, the Chief Inspector (His Majesty's Inspector of Education, Children's Services and Skills) is currently obliged to provide, at least annually, to the Secretary of State a report about each independent inspectorate – for the purposes of quality assurance. These are bodies appointed under section 106 of the ESA 2008 to inspect independent educational institutions, instead of the Chief Inspector. There is a similar obligation imposed on the Chief Inspector under section 87BA of CA 1989 to report on inspectors appointed (instead of the Chief Inspectors) to consider whether schools and colleges in England are complying with their duty under section 87(1) of the CA 1989 to safeguard and promote the welfare of their boarders.

38. Amendments made by clause 44 removes this duty, of at least annual reporting, by instead imposing a duty on the Chief Inspector to report as and when required by the Secretary of State. They also allow for additional flexibility in permitting the Secretary of State to require reports on one or all inspectorates (or inspectors) or about a class of them.

39. Currently, there is only one independent inspectorate (the Independent Schools Inspectorate – "ISI") and it is also appointed under the CA 1989 to inspect independent schools against the duty in section 87(1). With ISI being a long established and experienced inspectorate, it now appears unnecessary that the Chief Inspector should have to report at least annually on it. Instead, more flexibility within the system is desirable to be able to require reports as and when appropriate – and even more so should further less experienced inspectorates be appointed in the future.

40. The Department considers that the power is not in the nature of a legislative power. It is in the nature of an administrative power, akin to a direction-making power, and, therefore, not one that would ordinarily be expected to be either in a statutory instrument or conditional on an opportunity for parliamentary debate.

Clause 47: Academy schools: duty to follow National Curriculum

Power conferred on: Secretary of State
Power exercisable by: Direction of Secretary of State
Parliamentary Procedure: None

Context and purpose

41. This clause consequentially amends s.90(1) of the 2002 Act to expand the list of bodies who may be subject to a direction by the Secretary of State modifying the application of the national curriculum, in order to enable development work or experiments be carried out, to include academy schools.

Justification for the power

42. This existing direction-making power allows for the Secretary of State to make directions (upon application by a maintained school's governing body), modifying the application of the national curriculum in respect of maintained schools for a period of time to enable the school to carry out curriculum development work or experiments.

43. These are existing direction making powers which need to also apply to academy schools in order for the national curriculum (and powers to modify application of the national curriculum) to operate in the same way in relation to academies as it does for maintained schools. The Department considers that given the changing nature of the curriculum, applications for a direction to disapply the national curriculum in order for the school to pursue short term curricula development work and experiments are the sort of

technical, administrative matters that are commonly dealt with by means of a direction making power.

44. The Department considers no procedure to be appropriate for a non-legislative administrative power of this nature. This clause represents a consequential amendment to an existing power to make directions. If it was not possible for directions to be made in line with new developmental work or experiments this would frustrate the intention of the power.

Clause 49: Academies: power to secure performance of proprietor's duties etc

Power conferred on: Secretary of State
Power exercisable by: Direction
Parliamentary Procedure: None

Context and purpose

45. The measure confers on the Secretary of State the power to issue a direction to an academy proprietor when the academy proprietor is not complying with a legal duty or complying with a duty in an unreasonable way or exercising a power in an unreasonable way. The Secretary of State may give directions as she or he considers appropriate to secure the proper performance of the relevant duty or as to the exercise of the relevant power. Compliance with the direction can be enforced by application for a mandatory order. The compliance direction is intended to achieve an equivalent effect with respect to an academy, to direction making powers relating to maintained schools in section 496 and section 497 of the Education Act 1996. An academy proprietor includes the proprietor of a city technology college and a city college for the technology of the arts.

46. The purpose of the power is to enforce compliance by academy proprietors with legal requirements and prevent the unreasonable use of their powers. It is a stand-alone power (relative to other enforcement measures), enforceable by mandatory order.

47. The power will improve the Secretary of State's ability to intervene in academies. It is intended to achieve an equivalent effect with respect to an academy, to a power to issue directions to governing bodies and local authorities responsible for maintained schools, who the Secretary of State assesses to be failing to comply with their legal obligations, or complying with their duties in an unreasonable way, or exercising powers in an unreasonable way. Currently, when an academy is not complying with their legal obligations the only option available to the Secretary of State is to issue a termination warning notice to the relevant academy proprietor, threatening to terminate the funding agreement for the academy (and thereby remove the academy from the academy proprietor). This is not proportionate for all breaches, many of which are minor and easily remedied. A compliance direction is an effective alternative to the termination warning notice procedure, requiring the trust to remedy the breach without the threat of removing the school from their care.

48. This is a power to make an administrative direction that has local effect in a specific case only. The facts which give rise to the need to issue a direction will be different in each case. The Secretary of State is therefore much better placed to make the decision on whether to issue a compliance direction in a particular case than Parliament, and the power sets out the broad circumstances where a direction will be appropriate, so limiting the discretion so it may only be exercised where legal duties are not being met or the behaviour is unreasonable. Administrative procedures are more suitable and appropriate to manage specific cases, such as this.

49. The issuing of directions is an administrative act and, as is normal, the power is not subject to parliamentary control. When the power is used it will be in relation to specific cases and will need to be issued in a timely way following engagement with those involved. Directions are also intended to be published. In the event the conditions arise where a compliance direction could be issued, the information required to make a decision on whether to issue a direction will be fact based, local and specific. The Department's view is that an administrative procedure is better suited to make these decisions than parliamentary procedure.

50. A compliance direction may also need to be made urgently, to remedy an action taken by an academy proprietor that risks harm to pupils or other persons. Waiting for parliamentary approval would be problematic in such cases.

Clause 50: Repeal of duty to make Academy order in relation to school causing concern

Power conferred on: Secretary of State
Power exercisable by: Order
Parliamentary Procedure: None

Context and purpose

51. An academy order has the effect of converting a maintained school into an academy. Currently, the Secretary of State is under a duty in section 4(A1) of the Academies Act 2010 to issue an academy order to maintained schools that are assessed to be in a statutory category causing concern ('requires significant improvement' or requires 'special measures' per section 44 of the Education Act 2005). An academy order is not a statutory instrument (section 4(6) Academies Act 2010). This clause converts that duty into a power.

52. Converting a maintained school into an academy under the sponsorship of a high performing multi-academy trust is one way of seeking to improve the performance of a maintained school. These clauses allow for a more flexible approach to school intervention based on the needs of the school and range of intervention options available. Accordingly, this clause removes the duty to make an academy order in relation to schools in categories causing concern and instead gives the Secretary of State the discretion to do so.

53. The Secretary of State already has a discretionary power to make an academy order in respect of schools that are 'eligible for intervention'. This measure effectively just expands that power to include schools in a 'category causing concern'.

54. This power will improve the Secretary of State's ability to flexibly intervene in the worst performing schools. Currently the only intervention option available to the Secretary of State in those schools is to academise them. However, there may not be an appropriate trust, or one who is performing well enough locally, to take on the maintained school. The maintained school may have special characteristics (e.g. a religious character) that make it difficult to find an appropriate trust to take on the school. Converting the duty to a power gives the Secretary of State the option of using the range of other intervention options available to improve the school, such as requiring the school to seek external assistance.

55. The decision on whether to academise a school in a category causing concern is a fact specific, local decision that depends on the application of a policy which is likely to change from time to time, to a particular set of facts. These decisions are likely to fall to

be made frequently; every time a maintained school is assessed as being in a category causing concern and they relate only to one school. There is provision in the legislation for copies to be provided to those affected. Such decisions are more appropriately made by the Secretary of State based on factors which may alter over time and are not legislative in nature.

56. These decisions are already made with respect to the existing discretionary power above and in relation to whether to revoke academy orders made under the existing duty. The administrative procedures therefore exist to make these decisions effectively and fairly and that the decisions under this power are taken in the same manner.

57. We note that, in relation to the existing power to make an academy order located in section 4 of the Academies Bill 2010, the House of Lords Delegated Powers and Regulatory Reform Committee report concluded that academy orders are not legislative in nature and there is no reason that Parliament would wish to have control over them. The Committee did not report on the relevant provision of the Education and Adoption Bill 2016 which amended the power to make academy orders to a duty in respect of schools causing concern.

58. An academy order is an administrative measure which will be used in relation to specific cases. A large number of academy orders may be issued and the information required to make a decision whether to issue an academy order will be local and specific. The Department's view is that an administrative procedure is better suited to determine these decisions than parliamentary procedure.

Clause 54: Power for local authorities to direct the admission authority of an Academy school to admit a child

Power conferred on: Local authorities
Power exercised by: s97 School Standards and Framework Act 1998
Parliamentary Procedure: None

Context and purpose

59. The vast majority of pupils secure school places through the usual admissions processes, by way of the standard school admissions procedure administered by the local authority, with applications made by a cut-off date before the school year starts, or else by way of in-year applications. However, where that is not the case a small number of pupils are unable to secure a school place in this way and the statutory School Admissions Code (the Code) sets out the requirement for each local authority to have a Fair Access Protocol (FAP) in place. This is to ensure that unplaced and vulnerable children, and those who are having difficulty in securing a school place in-year, are allocated a school place within 20 days. The Code also requires schools to participate in their local FAP, which includes admitting children referred to their school via the FAP.

60. Sections 96 and 97A of the School Standards and Framework Act 1998 (SSFA 1998) give local authorities the power to direct a maintained school, for which they are not themselves responsible for admissions, to admit a child in their area. Section 97A enables local authorities to direct the admission of a child they look after to any maintained school in the country. Section 96 enables local authorities to direct the admission of all other children who are not looked after into a maintained school within its own area, where the child has been refused admission to or excluded from every suitable school within a reasonable distance of their home and which provides suitable education.

61. Local authorities' powers to direct cannot be used to direct admission to a school which has excluded that child. The effect of the direction is that the governing body must admit the child. Section 97 and 97B of the SSFA 1998 set out the statutory process for making a direction, including consultation and the opportunity for the governing body to refer the matter to the Schools Adjudicator.

62. This measure extends sections 96 and 97A so that local authorities can direct academy schools (except special schools) to admit a child in the relevant circumstances, as well as maintained schools. It means where a local authority seeks to place a child into an academy, it can do so via a more direct route, minimising the time the child is out of school.

63. Currently local authorities cannot direct academy schools to admit a child and must ask the Secretary of State to exercise separate powers of direction set out in the academy's funding agreement. This process involves local authorities submitting a request and the Secretary of State taking the advice of the Schools Adjudicator before coming to a decision on whether to direct the school, which can delay getting the child into school. Data currently suggests that there is an average delay of 38 days between a request being made and a child being admitted to school, not including time the child is out of school while the local authority attempts to resolve the matter itself and then compiles the paperwork necessary for a request.

Clause 56: New section 88IA School Standards and Framework Act 1998 – power for the adjudicator to determine a revised admission number in a school's admission arrangements

Power conferred on: Adjudicator
Power exercised by: No method prescribed by statute
Parliamentary procedure: None

Context and purpose

64. *S*chools' admission authorities are required to determine the admission arrangements that will apply to the school for the coming year. This includes setting a Published Admission Number (PAN): the number of pupils it is intended to admit that year for each of the main points of entry to the school, e.g. reception or Year 7. Objections to admission arrangements can be made to the schools adjudicator who must decide whether to uphold the objection, and where they do, to publish reasons. Those decisions are binding, but it is up to admission authorities to decide how best to give effect to the adjudicator's determination that a PAN is unlawful.

65. This clause gives the adjudicator the power to determine a PAN when they uphold an objection wholly or partly about a PAN. Admission authorities will then need to amend their admissions arrangements to reflect the PAN specified by the adjudicator, meaning admission authorities will no longer have discretion over how to give effect to this aspect of the adjudicator's determination. The broader measure also includes a power for regulations to specify which matters the adjudicator must or must not take into account when determining a PAN (clause 56(2)).

66. Any person or body can object to a PAN reduction but the government also intends to give local authorities, through changes to The School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012, the power to object where a PAN is being maintained or increased. This clause therefore gives local authorities greater influence over place planning in their area, helping them to meet their duty to provide sufficient suitable school places for their area

and respond to the needs of the local community, including tackling issues like surplus places.

67. Schools' admission authorities will continue to be able to vary their PAN in light of a major change in circumstances, subject to any restrictions set out in regulations provided for by section 88E of the Schools Standards and Framework Act 1998 and the statutory School Admissions Code.

Clause 57 and Schedule 4 paragraph 14 – Power to direct a local authority to refer proposals under section 7 to the Secretary of State for decision

Power conferred on: Secretary of State
Power exercised by: Direction
Parliamentary procedure: None

Context and purpose

68. Clauses 57 to 60 make changes to the processes for establishing certain new state schools in Part 2 of and Schedule 2 to the Education and Inspections Act 2006 ("the 2006 Act"). Currently section 7 of and Schedule 2 to the 2006 Act provide for local authorities to invite proposals for certain types of new schools and for those proposals to be decided by the local authority or, in some cases, the adjudicator. Paragraph 12 of Schedule 2 to the 2006 Act gives the Secretary of State the power to direct a local authority to refer to the adjudicator any proposals for new schools that have been published under section 7 of the Act but have not yet been decided. Clauses 57 and 60 of this Bill, and other paragraphs of Schedule 4 to the Bill, have the effect that it is to be the Secretary of State, rather than the adjudicator, who decides section 7 proposals in cases where the local authority themselves are not the decision-maker. Consequently paragraph 14 of Schedule 4 to this Bill amends paragraph 12 of Schedule 2 to the 2006 Act so that the Secretary of State's power of direction becomes a power to direct referral of proposals to herself or himself and not to the adjudicator.

69. This is a power to make an administrative direction that has local effect in a specific case only. The facts which give rise to the need to issue a direction will be different in each case. It is an existing power that has been in place since 2006. As is normal, the power is not subject to parliamentary control. All that is being changed is the person to whom the Secretary of State may direct proposals to be referred. A direction does not change the law or create any general or ongoing legal effect.

Clause 57 and Schedule 4 paragraph 24 – Power to direct a local authority to refer a decision about the implementation of proposals under section 7 to the Secretary of State

Power conferred on: Secretary of State
Power exercised by: Direction
Parliamentary procedure: None

Context and purpose

70. Clauses 57 to 60 make changes to the processes for establishing certain new state schools in Part 2 of and Schedule 2 to the Education and Inspections Act 2006 ("the 2006 Act"). Currently section 7 of and Schedule 2 to the 2006 Act provide for local authorities to invite proposals for certain types of new schools and for those proposals to be decided by the local authority or, in some cases, the adjudicator. Paragraph 21 of Schedule 2 to the 2006 Act makes provision for various decisions to be made about the

implementation of proposals that have been approved, and paragraph 21(6) provides for a local authority who have not made such a decision by a prescribed time to be required to refer the decision to the adjudicator.

71. Clauses 57 and 60 of this Bill, and other paragraphs of Schedule 4 to the Bill, have the effect that it is to be the Secretary of State, rather than the adjudicator, who decides section 7 proposals in cases where the local authority themselves are not the decision-maker. Consequently it would no longer be appropriate for decisions about the implementation of such proposals to be referred to the adjudicator. Paragraph 24 of Schedule 4 to this Bill therefore amends paragraph 21 of Schedule 2 to the 2006 Act. Rather than creating a new delegated legislative power requiring referral in a general class of cases, it provides that the Secretary of State may direct referral to herself or himself on a case-by-case basis. This enables the Secretary of State to make a fact-sensitive decision about whether, for example, a local authority is taking too long to make a decision about a given case.

72. This is a power to make an administrative direction that has local effect in a specific case only. The facts which give rise to the need to issue a direction will be different in each case. As is normal, the power is not subject to parliamentary control. A direction does not change the law or create any general or ongoing legal effect.