Supplementary memorandum by the Department for Children, Schools and Families

1. This supplementary memorandum is to accompany the tabling of a number of Government amendments to the Education and Skills Bill ahead of Lords Report stage.

Summary of relevant Government amendments

Part 1 – Raising the participation age


3. Further Amendments on the Marshalled List ensure that no young person can receive a custodial offence in relation to failing to pay a fine imposed for the offence of failing to comply with an attendance notice without reasonable excuse.

Part 4 – Independent Schools

4. Amendments 78 to 183 and 187 to 204 reverse the proposed transfer of the registration and regulation of independent educational institutions and the approval of non-maintained special schools to the Chief Inspector. Further, Amendments 184 to 186 introduce new transitional provisions into Part 4 of the Bill.

Part 5 – Miscellaneous and General

5. An amendment to clause 196, which provides a power for a Governing body to refer a pupil to educational provision for improving behaviour, to provide further reassurance that any direction would be a short-term measure only.

6. Amendments 208, 219, 220 and 238 remove the obligation on schools and Local Authorities to administer the National Curriculum tests at Key Stage 3 from 2009.

Details of the impact on the delegated powers within the Bill

PART 1, CHAPTER 3 – EMPLOYERS

7. Clause 22(2) provides for the amount of the financial penalty that a local education authority may require an employer to pay, where they have employed a young person who is subject to the duty to participate and who has not made appropriate arrangements for training or education, to be determined in accordance with regulations. Amendments 214 and 215 propose that these regulations be subject to the affirmative procedure, except if the effect is to reduce the amount of the penalty. This is also the case for regulations made under clause 28(3), which provide for the amount of financial penalty the local education authority may issue to an employer, where they have failed to comply with an enforcement notice or have failed to give effect to a required variation in the terms and conditions of employment. It is necessary to specify the amount of such financial penalties in secondary legislation in order to allow it to be altered in response to changing costs without having to amend primary legislation.
8. Amendments 21 to 43 and 63 make amendments to the provisions relating to employers that are contained in Chapter 3 of Part 1. These amendments set out a procedure for making objections to the local authority following the giving of a penalty notice pursuant to clause 22 or clause 28 of the Bill. They also set out a right of appeal to the First-tier Tribunal following the giving of a penalty notice. Amendments 23, 24, 63 and 37 insert new clauses after clause 22 and clause 29. Subsection (5) of these new clauses makes provision for the period of time in which a local education authority can consider and respond to a notice of objection by an employer to be prescribed in regulations subject to the negative procedure. This is administrative detail and allows for flexibility.

PART 1, CHAPTER 5 - ATTENDANCE NOTICES

9. Clause 47(4) provides the power for the Secretary of State to make regulations about penalty notices to be issued in the event that the young person fails to comply with an attendance order. The regulations relate to the form and content of penalty notices, their amount and the procedures for them to be issued and paid. The scope of these regulations, which are to be subject to the negative resolution procedure, is limited on the face of the Bill to the operation and administrative details of issuing a penalty notice. This is a model similar to that which is already in operation, also subject to the negative procedure, in the case of penalty notices issued in relation to the parents of children of compulsory school age under powers contained in sections 444A of the Education Act 1996 and section 105(1) of the Education and Inspections Act 2006.

10. Regulations made under clause 47(4) may also make provision for penalties of different amounts to be payable in different cases or circumstances – for example, if it is not the first penalty notice the young person has received. It is necessary to prescribe the amount of the penalty in regulations in order to provide the flexibility to increase the amount over time to respond to changing costs. Amendments 53 and 54 specify that the amount of the penalty may not exceed the maximum fine that the young person could receive in the Youth Court (a level 1 fine). The provisions relate to the operational arrangements and so are not specified on the face of the Bill. This is again similar to the model which is in operation in the case of penalty notices issued in relation to the parents of children of compulsory school age. We therefore consider the negative procedure to be appropriate.

11. Amendments 21 to 31 insert new clauses after clause 48 and make amendments to clauses 149 and 151 and Schedule 1 to the Bill. The purpose of these amendments is to remove the theoretical possibility that a young person could receive a custodial sentence from the magistrates' court once they reach the age of 18. This is provided for by transferring the fine to the county court for enforcement.

12. Subsection (9) of the second new clause to be inserted by Amendment 22 after clause 48 contains a power for the Lord Chancellor to make an order amending subsections (4) or (7) of that clause. This provision is needed as it may emerge over time that there are further powers or provisions relating to enforcement action in the magistrates' court that need to be preserved or removed in addition to those already specified in subsections (4) and (7). As it contains a power to amend primary legislation it is subject to the affirmative procedure. There is a similar provision in subsection (3) of the fourth new clause to be inserted by Amendment 24 after clause 48. This is also subject to the affirmative procedure given that it contains a power to amend primary legislation.
13. The regulation making power that is in the fifth new clause to be inserted after clause 48 enables the Lord Chancellor to make regulations providing for the repayment of sums recovered by a local authority after enforcement action has taken place in the county court against a person over the age of 18. This is an administrative matter of detail which it is appropriate to deal with in regulations. These regulations are subject to the negative procedure given that what is at stake is administrative detail.

PART 1, CHAPTER 6 – MISCELLANEOUS

14. Clause 55 enables the Secretary of State, by order, to make provision for Wales corresponding to Clauses 19-30, the duties on employers, and related provisions in clauses 31, 32, 33, 49, 50 and 53. This power would only apply if the National Assembly of Wales made a Measure that appeared to the Secretary of State to correspond to clause 2 of the Bill. The National Assembly of Wales could not currently make such a Measure, but could potentially gain the competence to do so in future through a Legislative Competence Order. This power is necessary to ensure that if the participation age was raised in Wales in future, the duties on employers could be applied in Wales too, and would apply in the same way to employers on either side of the border. This is important in order to avoid confusion amongst employers about what is required, and to minimise the potential or perceived burdens on employers. An order made under this power would be subject to the affirmative resolution procedure, and the Welsh Ministers would have to be consulted.

PART 4 – INDEPENDENT SCHOOLS

15. Clause 95 allows the Secretary of State to prescribe the intervals at which independent educational institutions will be inspected on an ongoing basis. There is no substantive change to the delegated power – i.e. once Amendments 107 - 109 are accepted, the clause will continue to allow the Secretary of State to prescribe the intervals at which inspections of independent educational institutions must be conducted by the Chief Inspector. This power to prescribe intervals remains subject to the negative resolution procedure. However, these amendments will result in a change to the way the power operates. As currently drafted the clause requires the Chief Inspector to carry out inspections at the prescribed intervals unless an inspection has been carried out and a report provided to the Chief Inspector by an independent inspectorate. These amendments amend this power so that the Chief Inspector is required to carry out inspections at the prescribed intervals unless notified by the Secretary of State that an inspection is to be carried out by an independent inspectorate. This change reflects the fact that the Secretary of State retains the role of regulator of the independent sector. He will be responsible for commissioning inspections from the independent inspectorates (whom he approves) and hence will be in a position to inform the Chief Inspector when an inspection is to be conducted by an independent inspectorate.

16. Clause 99 is amended by Amendment 115. There is no change to the form of the delegated power contained in this clause. The clause will continue to enable the Secretary of State to make regulations which require fees to be paid to the Chief Inspector for inspections conducted by the Chief Inspector. The power to make regulations continues to be subject to the negative resolution procedure. The clause continues to carefully delineate what may or may not be included in the regulations. Amendment 115 substitutes a reference to the Secretary of State for the current reference to the Chief Inspector in subsection(3)(e). The result is that the regulations may confer a discretion on the Secretary of State rather than the Chief Inspector. This is consistent with the transfer of the regulatory functions
from the Chief Inspector to the Secretary of State. The purpose of the discretion is to allow the regulator / registration authority to determine which independent educational institutions are performing sufficiently well against the standards (see clause 81) so that a lighter touch and reduced tariff inspection can be conducted instead of a full inspection which will attract a full fee.

17. Clause 101 provides for the Secretary of State to retain the power to prescribe the manner in which the Chief Inspector’s inspection reports are published. Amendment 119 means that the Chief Inspector must publish inspection reports as directed by the Secretary of State. Reports are likely to be published in respect of inspections carried out:
   - following the regular three yearly inspections;
   - for the purposes of determining the institution’s application for registration;
   - for the purposes of determining applications to approve changes to the institution’s registered details;
   - at the Secretary of State’s discretion;
   - as a follow-up to the regular cycle of inspections, where standards were not being fully met.

18. The regulations will set out the timescale for publication and the method by which the reports should be published, which will include electronic access. As set out previously, this power will be subject to the negative resolution procedure. This is consistent with the current position under the Education Act 2002 framework.

19. Clause 111 provides for regulations to require information to be provided by proprietors. There is no change to the nature of the delegated power – the Secretary of State will continue to be able to make regulations (subject to the negative resolution procedure) which require proprietors to provide information. However, clause 111 is amended by Amendment 158 to limit the persons to whom proprietors are required to provide the information. As currently drafted, proprietors could have been required to provide information to the Secretary of State or the Chief Inspector. The amendment will remove the reference to the Chief Inspector. As a consequence of the changes in the regulator / registration authority, Amendments 159 to 161 also amend clause 111 to provide for the Secretary of State (instead of the Chief Inspector) being able to remove an institution from the register for non-compliance with the regulations. Similarly, the Secretary of State is required to notify a proprietor of such a decision and a right of appeal will lie against the Secretary of State’s decision.

20. Amendment 165 amends the identity of the Tribunal to which appeals under Part 4 of this Bill will lie. In accordance with the Tribunals, Courts and Enforcement Act 2007, appeals will now lie to the First Tier Tribunal. Clause 117 provides a power to make regulations concerning the Tribunal’s jurisdiction when hearing appeal against directions made under clause 116 (restriction or prohibition of persons participating in the management of independent educational institutions). The nature of the power remains unchanged. However, these amendments will mean that any regulations relate to the jurisdiction of the First Tier Tribunal established under the Tribunals, Courts and Enforcement Act 2007 rather than the Tribunal established under section 9 of the Protection of Children Act 1999.

21. Amendments 184 to 186 insert new clauses which create transitional provisions. The New Clause on the register and fees extends the scope of the existing power contained in clause 99(3)(d), which provides for regulations (made by the Secretary of State subject to the negative resolution procedure) requiring inspection fees to be paid to the Chief Inspector to include a provision for waiving
a fee. Amendment 185 clarifies that the regulations may also waive any fee which is payable by virtue of section 162B(6) of the Education Act 2002. Section 162B currently provides the power for charging inspection fees for inspections of independent schools in England. Amendment 133 will allow the Secretary of State to create a new annual fees regime going forward without penalizing proprietors by making them pay twice in any one year (fees under the 2002 Act regime being payable in arrears).

22. The New Clause inserted by Amendment 186 allows for transitional provisions to be made in relation to the prohibition or restriction on persons participating in the management of independent educational institutions. The New Clause contains powers for Regulations to provide that a person who meets certain conditions (largely related to existing barring regime under section 142 of the Education Act 2002) to be treated as being subject to a direction under clause 116 of this Bill. Likewise, regulations may provide that any appeal under the 2002 Act regime is treated as an appeal under the provisions of this Bill. The regulations will be subject to the negative resolution procedure. The purpose of the clauses is to allow for the administrative transition from one protection regime to another and it is appropriate for the details to be set out in secondary rather than primary legislation. These powers and the procedure attached reflect the will of Parliament who legislated to identical effect when passing section 171 of the Education and Inspections Act 2006.

**PART 5, CHAPTER 2 - MISCELLANEOUS**

23. Clause 140(3) inserts a new section 29A into the Education Act 2002, subsection (3) of which requires the Secretary of State to make regulations requiring prescribed persons to be given prescribed specific information relating to the imposition of any requirement for a pupil to attend educational provision out of school to improve his or her behaviour, and requiring the governing body of the school to keep this requirement under review. The prescribed persons will be the pupil’s parents, or the pupil if aged 18 or over.

24. It is the intention that notices will be sent to them giving details of the provision such as: the name of the provider; the full address; when they should attend; the person to whom the pupil should report; and the hours. The notice will also outline the review mechanism. Notice will be modelled on notices sent to parents of excluded pupils (or pupils themselves) setting out what educational provision will be made under section 100 of the Education and Inspections Act 2006.

25. Regulations under this section may also make provision requiring the governing body to request prescribed persons to participate in the review; about the time within which the first review must be held and the intervals at which subsequent reviews must be held, and in relation to any other matter relating to the exercise of the power. It is anticipated that reviews will occur every 30 days and would take the form of a meeting between the head teacher, the governing body and the parents of the pupil, or in the case of a pupil who has attained the age of 18, the pupil to the exclusion of his or her parents. In a case where the pupil had a statement of special educational needs, the local education authority that maintains the statement would also attend.

26. The Department does not wish the invitation to a review meeting to be the first time the parent hears of the exercise of the power, which is why the Department intends that the regulations made under new section 29A of the Education Act 2002 will include a requirement that the parent (or pupil if aged 18 or over) is informed of the practical arrangements by written notice in advance. Such a notice will also be a “notice in writing” for the purpose of section
44ZA(1B)(b) of the 1996 Act (inserted by clause 139) which has to be given to the parent of a child of compulsory school age before an offence of failing to secure regular attendance can be committed.

27. These matters have been left to secondary legislation as they relate to administrative details of the proposal. A similar approach exists currently where schools make educational provision for pupils who have been excluded for a fixed period of more than five days: the Education (Provision of Full-time Education for Excluded Pupils) (England) Regulations 2007 (SI 2007/1870) set out the information to be contained within the notice when this provision is made. Following this model, it is considered that the negative resolution procedure will provide the appropriate level of scrutiny.

28. The regulations may prohibit a governing body from requiring a pupil to attend off-site provision for a greater number of days in a school year than is specified in the regulations. It is anticipated that regulations will provide that any period of off-site provision must not exceed the number of days remaining in the school year in which the requirement is imposed. The regulations may also oblige the governing body to have regard to any guidance issued by the Secretary of State.

PART 5 – KEY STAGE 3 TESTS

29. Amendment 151 will change section 88 of the Education Act 2002. Section 88 applies in relation to maintained schools and requires head teachers, governing bodies and local authorities to implement during any school year the National Curriculum which subsists at the start of that school year. For these purposes, “the National Curriculum” includes assessment arrangements specified within the National Curriculum. The amendment will alter the duty on schools to implement the assessment arrangements so that they are required to implement assessment arrangements specified for the time being. This will allow the Secretary of State to specify assessment arrangements which take effect for a school year after the start of that school year.

30. In specifying the assessment arrangements, the Secretary of State will continue to exercise his existing powers to make orders as set out section 87(3)(c) of the Education Act 2002, subject to the existing provisions set out for the making of Orders and regulations in Section 210 of the 2002 Act. Section 87 also contains authorisation for provisions to be made outside of any order but which nevertheless have legal effect. These amendments will make no changes to these existing delegated powers.

31. The Secretary of State proposes to exercise his powers to make an Order under section 87(3)(c) of the 2002 Act which will abolish external National Curriculum tests at Key Stage 3 once the amendment to section 88 comes into force on Royal Assent.

Department for Children, Schools and Families
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