

*These notes refer to the Lords Amendments to the Education Bill,
as brought from the House of Lords on 10 November 2011.*

EDUCATION BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

INTRODUCTION

1. These Explanatory Notes relate to the Lords Amendments to the Education Bill, as brought from the House of Lords on 10 November 2011. The notes have been prepared by the Department for Education (DfE) and the Department for Business, Innovation and Skills (BIS) in order to assist the reader of the Bill and the Lords Amendments and to help inform debate on the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. These Notes, like the Lords Amendments themselves, refer to HL Bill 67, the Bill as first printed for the Lords.
3. These Notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not and are not meant to be a comprehensive description of the effect of the Lords Amendments.
4. All the Lords Amendments were in the name of the Minister.

COMMENTARY ON LORDS AMENDMENTS

Lords Amendments 1 to 4

5. Amendment 3 would insert a new paragraph into Schedule 11A to the Education Act 2002 (EA 2002), as inserted by *clause 8*, that specifies provisions that must be included in regulations about interim prohibition orders. The regulations would have to provide that the Secretary of State may only make an interim prohibition order where he or she considers it necessary in the public interest to do so, and that the Secretary of State must review the order every six months if the teacher concerned applies for such a review. An interim prohibition order is an order that may be imposed quickly to prevent a teacher from undertaking teaching work while their case is being considered prior to a final decision by the Secretary of State. Amendments 1, 2 and 4 are all consequential on amendment 3.

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Lords Amendment 5

6. Lords Amendment 5 would insert the words “or may be” into section 141F (2)(a) of EA 2002, inserted by *clause 13*. Subsection (2) identifies the allegations that count for the purpose of section 141F and Lords Amendment 5 would amend subsection (2)(a) to read “an allegation that the person is *or may be* guilty of a relevant criminal offence” with the result that tentative allegations that a teacher *may* be guilty of an offence should be treated in the same way as firmer allegations that they are guilty.

Lords Amendments 6, 8, 9 and 12

7. Lords Amendments 6, 8 and 9 would amend subsections (4), (6) and (7) of section 141F to provide that it would be a magistrates’ court that would have the jurisdiction to hear an application to lift reporting restrictions. Lords Amendment 12 is a consequential amendment that would remove the definition of “appropriate criminal court” in section 141F (12).

Lords Amendment 7

8. Lords Amendment 7 would insert into section 141F(5) the words “the victim of the offence to which the allegation relates”. This would mean that when a court was deciding whether to lift reporting restrictions it would have to have regard to the welfare of both the person against whom the allegation is made and the alleged victim.

Lords Amendments 10 and 13

9. Lords Amendment 10 would amend section 141F(10) to provide that the restrictions in section 141F(3) would cease to apply once “proceedings for the offence have been instituted”. This expression is defined in the new subsection that would be inserted by Lords Amendment 13. The circumstances in which proceedings are instituted include where the teacher in question is charged with the offence to which the allegation relates.

Lords Amendments 11, 14 and 15

10. Lords Amendment 11 would insert new subsections into section 141F which would provide that reporting restrictions should lift if the individual to whom the restrictions apply publicly puts forward their side of the story or gives their written consent for another to do so. Lords Amendments 14 and 15 are consequential amendments that would remove what would become a redundant defence at section 141H (2)(c).

Lords Amendments 16 and 17

11. Lords Amendment 16 would insert into the Bill a new clause that would amend Part 7 of the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA 2009) which is concerned with the Office of Qualifications and Examinations Regulation (Ofqual), the regulator of qualifications, examinations and assessments (other than degrees) in England, and of vocational qualifications in

Northern Ireland.

12. Subsection (2) of the new clause would amend section 151 of ASCLA 2009 (under which Ofqual can give a direction to a recognised body to secure compliance with a condition of recognition) by removing the prejudice test that Ofqual has to apply in determining whether to give a direction. Under section 151(1) as substituted, Ofqual would be able to give a direction if it appeared to Ofqual that the body had failed, or was likely to fail, to comply with a condition.

13. Subsection (3) of the new clause would insert into ASCLA 2009 new sections 151A to 151D to confer on Ofqual the power to impose a monetary penalty on an awarding body recognised by it if it appeared to Ofqual that the body had failed to comply with a condition to which the recognition was subject. Ofqual would have to give notice of its intention to impose a penalty and have regard to any representations received in response. If Ofqual decided to impose a penalty then it would have to send a notice to the body setting out the information listed in section 151A(8).

14. By new section 151B the amount of the penalty may be whatever Ofqual decides would be appropriate subject to a limit of 10% of the body's turnover, to be determined in accordance with an order made by the Secretary of State. Such an order would be subject to affirmative resolution procedure provided for by subsection (7) of the new clause.

15. New section 151C would make provision for appeals to the First-tier Tribunal against a decision to impose a penalty or as to the amount of the penalty. When an appeal is made the requirement to pay the penalty would be suspended. Section 151C(4) sets out the powers the Tribunal would have on an appeal. The procedure for the conduct of appeals would be set out in the relevant procedure rules of the Tribunal.

16. New section 151D would provide for interest to accrue on the unpaid balance of the penalty once the time for appealing has passed, or once an appeal has been withdrawn or determined. The total amount of interest must not be more than the amount of the penalty. Ofqual would be able to recover the money owed as a civil debt owed to it.

17. Subsection (4) of the new clause would remove the prejudice test from section 152 of ASCLA 2009 (power to withdraw recognition).

18. Subsection (5) of the new clause would insert into ASCLA 2009 new sections 152A to 152C which confer on Ofqual the power to require a recognised body on which a sanction has been imposed to pay the costs incurred by Ofqual in relation to imposing the sanction. The costs concerned would include the costs of carrying out an investigation, relevant administration costs and the costs of obtaining expert advice.

19. New section 152B would make provision for appeals against decisions to

require a body to pay costs. The provision is similar to provisions in new section 151C for appeals against a penalty; and provisions in new section 152C on interest and recovery for costs are similar to those in section 151D in relation to monetary penalties. Ofqual would have to pay money it received under these new powers into the Consolidated Fund.

20. Subsection (6) of the new clause would amend section 153 of ASCLA 2009 so that Ofqual would have to consult and set out in its published qualifications regulatory framework how it intended to exercise its new powers to impose a monetary penalty and recover costs.

21. Lords Amendment 17 would insert a new clause into the Bill that would amend Chapter 2 of Part 5 of the Education Act 1997 which is concerned with functions of the Welsh Ministers in relation to qualifications. The amendments to sections in that Chapter, and the new sections inserted there, would make the same alteration of and addition to the powers of the Welsh Ministers (as the regulator of qualifications in Wales) as are made to the powers of Ofqual by Lords Amendment 16.

Lords Amendments 18, 19 and 42

22. Lords Amendments 18 and 19 would remove *clauses 30 and 31* from the Bill. Lords Amendment 42 would remove reference to those clauses from *clause 78* which details arrangements for commencement.

Lords Amendments 20, 21, 22 and 46

23. Lords Amendments 21 and 22 would mean that local authorities' annual reports on school admissions in their area would continue to have to be sent to the schools adjudicator. They would remove the parts of *clause 34* of this Bill that would otherwise have removed from section 88P of the School Standards and Framework Act 1998 (SSFA 1998) the requirement to send those reports to the adjudicator.

24. There is currently a duty on the adjudicator to decide, on receiving such a report from a local authority, whether the admission arrangements described conform to the relevant legal requirements. Consequent on the removal of the requirement for the adjudicator to receive those reports, *Schedule 10* to the Bill (which sets out the amendments that are consequential on the changes made to school admissions) removes this duty. However, as Lords Amendments 21 and 22 would lead to the adjudicator receiving these reports, removing this duty would become a substantive change rather than a consequence of other amendments, and so Lords Amendment 46 would remove it from *Schedule 10* and Lords Amendment 20 would place it in *clause 34*. The adjudicator's discretionary power under section 88I(5) of SSFA 1998 to consider arrangements that appear not to conform to legal requirements, regardless of how they come to the adjudicator's attention, is not affected by this change and the adjudicator can investigate matters in these reports under that power.

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Lords Amendments 23, 35 and 45

25. Lords Amendment 23 would insert a new clause that would amend sections 88H and 88K of SSFA 1998 to allow any body or person to refer an objection concerning the admission arrangements of any state-funded school to the schools adjudicator.

26. Lords Amendments 35 and 45 are consequential on this. Lords Amendment 45 would remove *paragraph 1(4) of Schedule 10* to the Bill. That paragraph will remove admission forums from the list of persons that may refer objections. As amendment 23 would remove the entire list, this narrower repeal is unnecessary. *Clause 62* provides for objections about Academies' admission arrangements to be sent to the adjudicator and sets out a list of those who may make these objections. Lords Amendment 23 would make this list unnecessary so it would be removed by Lords Amendment 35.

Lords Amendments 24 and 25

27. Lords Amendment 24 to *clause 37* would require a maintained school governing body to include a staff governor (in addition to the head teacher) and a local authority governor. Lords Amendment 25 would provide that regulations made under section 19 of EA 2002 in relation to a maintained school in England could enable the governing body to specify eligibility criteria for the local authority governor.

Lords Amendments 26 to 29, 38 and 39

28. Lords Amendments 26 and 27 relate to the parliamentary control of regulations made under the new power inserted into section 5 of the Education Act 2005 (EA 2005) by *clause 39* to exempt schools from regular inspection. These Lords Amendments would amend section 121 of EA 2005 (parliamentary control of subordinate legislation) to provide that, with the exception of the first set of regulations made under section 5 of EA 2005, regulations under section 5 would be subject to the affirmative procedure. Lords Amendments 28 and 29 would require the same type of parliamentary control in respect of regulations made under the new power inserted by *clause 41* into section 125 of the Education and Inspections Act 2006 (EIA 2006) to exempt further education institutions from routine inspection.

29. Lords Amendments 38 and 39 would make consequential changes to the commencement clause, *clause 78*.

Lords Amendments 30 and 31

30. Lords Amendments 30 and 31 would provide that an alternative provision Academy cannot also be an Academy school. This would make it clear which legislation applies to which type of Academy.

Lords Amendments 32 and 33

31. Lords Amendment 32 would amend new section 1D(2) (inserted into AA 2010 by *clause 52*) which allows the Secretary of State to make regulations to provide for

legislation which applies to Academies, Academy schools or 16 to 19 Academies, to apply to alternative provision Academies with modifications. Lords Amendment 32 would also allow the regulations to apply such legislation without modifications.

32. Lords Amendment 33 would amend new section 1D(3) of AA 2010 which allows the Secretary of State to make regulations providing for legislation which applies to all alternative provision Academies to apply or not to apply in relation to a specific type (description) of alternative provision Academy. Lords Amendment 33 would allow the regulations to provide for a statutory provision relating just to a description of alternative provision Academy to apply or not to apply in relation to another description of alternative provision Academy. In practice, this amendment could, for example, allow provisions which relate to a secondary alternative provision Academy to be applied with changes to a part-time alternative provision Academy or another description of alternative provision Academy.

Lords Amendments 34 and 40

33. Lords Amendment 34 would insert a new clause which would insert a new subsection (2A) into section 6 of the Academies Act 2010 (AA 2010). This would make clear that section 6(2) of AA 2010, which prohibits a local authority from maintaining a school once it has converted into an Academy, does not prohibit a local authority from doing any of the things set out in paragraphs (a) to (c) (which do not amount to “maintaining” a school). The Lords Amendment would put beyond doubt, for example, that a local authority would have the power to assist Academies by making payments to a private finance initiative (PFI) contractor in respect of Academies.

34. Lords Amendment 40 would add the new clause inserted by Lords Amendment 34 to the list of provisions in *clause 78* that commence on Royal Assent.

Lords Amendments 36, 43 and 100

35. Lords Amendment 36 would amend the duty on the Chief Executive of Skills Funding (“the Chief Executive”) in section 85 of ASCLA 2009 so that the Chief Executive is under a duty to make reasonable efforts to secure employers’ participation in apprenticeship training for all young people within the specified groups which are covered by the re-defined apprenticeship offer set out in *clause 67*. These groups are young people aged 16 to 18; young people aged 19 to 24 with a disability and/or learning difficulty assessment; and young care leavers. (Other persons may be prescribed through regulations). This replaces the existing duty on the Chief Executive in section 85(1)(a) of ASCLA 2009 to promote apprenticeships for young people to employers and encourage them to employ young people as apprentices.

36. Lords Amendment 36 would also amend section 118 of ASCLA 2009 to specify that any guidance issued by the Secretary of State to the Chief Executive under this section must include guidance about this duty.

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37. Lords Amendment 43 would ensure that the new duty and the amendment to section 118 of ASCLA 2009 come into force no later than the 2013 school leaving date. Lords Amendment 100 would be consequential on Lords Amendment 36.

Lords Amendments 37 and 41

38. Lords Amendment 37 would insert a new clause into the Bill regarding direct payments for persons with special educational needs (SEN) or subject to learning difficulty assessment. Subsection (1) of the new clause inserts new sections 532A to 532C into Chapter 2 of Part 9 (ancillary functions of local authorities) of the Education Act 1996 (EA 1996).

39. New section 532A would create a power for the local authorities to make a direct payment for the purposes of securing goods and services in respect of a person for whom they maintain a statement of SEN; or a young person who is subject to a learning difficulty assessment by the authority. New section 532A(3) would provide that direct payments could only be made in accordance with a pilot scheme made under section 532B(1).

40. New section 532B would give the Secretary of State the power to make pilot schemes by order, and stipulates certain matters that must be included in any pilot scheme. A pilot scheme may include such provision as the Secretary of State thinks appropriate, subject to the provisions in the rest of the section. Subsections (3) to (6) set out what the pilot scheme must make provision about. Subsections (7) to (10) provide that a pilot scheme may stipulate that goods and services purchased by a direct payment can be treated as provided or arranged by a local authority in pursuance of their relevant statutory duties, which are listed in subsection (9).

41. New section 532C requires that an order creating a pilot scheme must set out the local authorities that will take part in the scheme and how long it will last. The duration of an initial scheme is limited to two years, but a scheme can be extended up to a maximum of four years, starting from the day on which the Bill is passed.

42. Subsection (2) of the new clause would amend EA 1996 to provide that an order to create or amend a pilot scheme would be subject to approval by each House of Parliament under the affirmative resolution procedure.

43. Subsection (3) of the new clause would provide that the new provisions inserted into EA 1996 by the new clause would automatically be repealed four years after the date on which the Bill is passed.

44. Lords Amendment 41 would amend *clause 78* of the Bill to provide that the new clause inserted by Lords Amendment 37 would come into force on Royal Assent.

Lords Amendment 44

45. Lords Amendment 44 would add a further consequential amendment to *Schedule 1* (review of exclusions from schools in England: consequential

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amendments). It would amend section 31A of the Local Government Act 1974 consequential upon the replacement of exclusion appeal panels by exclusion review panels.

Lords Amendments 47 to 71

46. Lords Amendments 47 to 71 would amend *Schedule 12* to the Bill.

47. Lords Amendment 47 would insert a new paragraph into *Schedule 12* that would insert a new section 16A into the Further and Higher Education Act 1992 (FHEA 1992) which would specify that the Secretary of State must publish draft proposals in the prescribed form, before he makes an order to establish a further education (FE) corporation. This would retain the current legislative provision in relation to the establishment of FE corporations as set out in section 51 of FHEA 1992, which would be repealed by Lords Amendment 60.

48. Lords Amendment 49 would insert a new paragraph that would amend section 20 of FHEA 1992 to make new provision about the content of instruments and articles of government of FE corporations in England. It would also substitute a new section 22 of FHEA 1992, while Lords Amendment 58 would substitute section 33L. These new sections would remove the Secretary of State's power to modify, revoke or replace the instrument and articles of FE colleges in England, and remove the Young People's Learning Agency's similar power in relation to sixth form colleges. They would give FE colleges in England the power to modify or replace their instrument and articles. New section 22ZA maintains the current position for FE colleges in Wales.

49. Lords Amendments 50 and 58 would replace sections 27 and 33N of FHEA 1992 with new sections 27, 27A, 27B, 33N, 33O and 33P. These new sections would remove the Secretary of State's power to dissolve a FE college or sixth form college, and to transfer their property, rights and liabilities to another educational provider. They would give colleges the power to dissolve themselves, provided they have conducted a full consultation and taken account of the views of those consulted, in accordance with regulations. They would also give colleges the responsibility for transferring their property, rights or liabilities to a body or institution with their consent. The body or institution would be specified in regulations. In addition, new section 27C would retain the current position for FE colleges in Wales.

50. Lords Amendment 51 would replace section 29 of FHEA 1992 with new sections 29, 29A, 29B and 29C, to give designated institutions in England the power to modify or replace their instrument and articles.

51. Lords Amendments 53 and 56 would provide statutory safeguards relating to the specific governance and constitutional arrangements of voluntary sixth form colleges, which were afforded by previous legislation relating to FE colleges or Secretary of State directions. These amendments give voluntary sixth form colleges the express power to conduct their institution in accordance with their trust deeds and

established character.

52. Lords Amendment 57 would require the Secretary of State to gain the consent of the trustees of voluntary sixth form colleges when providing the initial instrument and articles of government.

53. Lords Amendments 59 and 71 would make technical corrections to the amendments made by *Schedule 12* to the Bill to section 49A of FHEA 1992. The effect is to repeal the duty on colleges in England to have regard to guidance on consultation with students and employers, whilst retaining this in Wales.

54. Lords Amendments 61 and 64 would amend sections 56A and 56E of FHEA 1992 to enable the Secretary of State, when using the intervention powers provided under these sections, to direct the college's governing body to use its new powers to pass a resolution to dissolve itself. If this happens, colleges will be treated as if they had followed the consultation procedures set out in sections 27 and 33N.

55. Lords Amendment 62 would require the Secretary of State to consult the trustees and each person or body with power to appoint or nominate the foundation governors prior to exercising his power of intervention in respect of voluntary sixth form colleges.

56. Lords Amendment 69 would replace Schedule 4 to FHEA 1992 with a new Schedule 4 that would set out the essential elements that all colleges are required to include in their instrument and articles. These essential elements will require colleges to set out, for example, the composition, the roles and responsibilities for key personnel, and procedures for the conduct of the corporation, and how a college will change its instrument and articles. Governing bodies will have to include staff, student, and, in the case of sixth form colleges, parent governors.

57. Lords Amendments 48, 52, 54, 55, 60, 63, 65, 66, 67, 68, and 70 would be consequential on the Lords Amendments amending or replacing sections 16, 22, 27, 33L, 33N and 51 of FHEA 1992.

Lords Amendments 72 to 81

58. Lords Amendments 72 to 81 would amend *Schedule 13* by adding amendments to other legislation consequential upon the creation of alternative provision and 16 to 19 Academies in *clause 52*.

Lords Amendments 82 to 88

59. Lords Amendments 82 to 88 would apply certain provisions of *Schedule 14* to 16 to 19 Academies following the creation by the Bill of a wider range of Academies.

Lords Amendments 89 to 91

60. In circumstances where privately owned land is leased to a new Academy, Lords Amendments 89 to 91 would disapply the powers of the local authority and the

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Secretary of State in paragraph 14 of Schedule 1 to AA 2010, as substituted by *Schedule 14* to this Bill, to issue a notice that the land is publicly funded land for the purposes of Schedule 1 to AA 2010. In practice, this would mean that private land leased to a new Academy that was enhanced in value by public funding could not become “publicly funded” for the purposes of the Schedule and therefore would not be subject to the Secretary of State’s direction powers if the Academy closed or the land was proposed to be disposed of.

Lords Amendments 92 and 93

61. Lords Amendments 92 and 93 would provide that any notice served under paragraph 14 of Schedule 1 to AA 2010, as substituted by *Schedule 14* to this Bill, in respect of land held on trust and vested in the official custodian for charities, should be served on the charity, where the charity is a corporate charity, or otherwise on the persons having control and management of the trust.

Lords Amendments 94 and 95

62. Lords Amendments 94 and 95 would amend the application of paragraph 15 of Schedule 1 to AA 2010, as substituted by *Schedule 14* to the Bill, which is concerned with the power of the Secretary of State to make a direction on the closure of an Academy. It will now apply when an educational institution ceases to be an Academy and immediately before it does so publicly funded land is held by a person for the purposes of the Academy.

Lords Amendments 96 and 97

63. Lords Amendments 96 and 97 are technical amendments which would remove legally redundant provisions.

Lords Amendment 98

64. Lords Amendment 98 would insert into *Schedule 14* to the Bill a new paragraph that would amend section 12 of AA 2010 to provide that an Academy proprietor is a “trust corporation” for the purposes of relevant legislation (and thus able to discharge the full range of necessary functions in relation to its land).

Lords Amendment 99

65. Lords Amendment 99 would add to *Schedule 16* a further amendment consequential on the abolition of the Young People’s Learning Agency.

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