

CHILDREN AND SOCIAL WORK BILL

Memorandum concerning the Delegated Powers in the Bill

A. INTRODUCTION

1. This memorandum identifies the provisions of the Children and Social Work Bill that confer powers to make delegated legislation. The Bill completed passage through the House of Lords on 23 November 2016. The memorandum supersedes the memorandum produced for introduction in the House of Lords and the subsequent supplementary memoranda provided to the Delegated powers and Regulatory Reform Committee. It details each relevant provision of the Bill as introduced to the House of Commons on 24 November. It explains each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. SUMMARY OF THE BILL

2. The Bill has three principal themes: the welfare of vulnerable children; effective local authority discharge of children's social care; and the regulation of social workers.

Part 1, Chapter 1: Looked after children

3. The Bill sets out a framework of corporate parenting principles which overlays the existing responsibilities of local authorities for looked after children and care leavers, making clear what it means for the authority as a whole to act as a good parent. It also introduces requirements for local authorities to publish their offer of support to young people who cease to be looked after, and removes the requirement for certain care leavers under the age of 25 to be in education and training in order to be entitled to a personal adviser.

4. The Bill makes provision to extend the considerations of the courts when making decisions about the adoption or long term care placement of children to take fuller account of the ability of the placement to meet their current and future needs, and of any relationship with a prospective adopter. It also seeks to extend existing

duties of local authorities and schools to promote the educational attainment of looked after children so that these duties also cover children who have been adopted or placed in other long-term arrangements.

Part 1, Chapter 2: Other provision relating to children in England

5. The Bill extends the Government's current powers to intervene where local authorities are underperforming, to combined authority models.

6. Currently, multi-agency safeguarding is conducted at a local level by Local Safeguarding Children Boards. The Bill creates new, more flexible partnership arrangements to protect children locally, new arrangements for local reviews of serious incidents of child harm, and new arrangements for child death reviews.

7. Currently all reviews of serious incidents of child harm are conducted at a local level, commissioned by the Local Safeguarding Children Board. The Bill makes provision for the establishment of a national Child Safeguarding Practice Review Panel. Where cases raise issues that are complex or are of national importance the Panel would conduct these reviews and disseminate lessons learned to the sector at large with the aim of improving practice.

8. Finally, this part of the Bill contains a clause that amends the Employment Rights Act 1996, allowing for the Secretary of State to make secondary legislation extending the whistle-blower protection available to those applying for employment with specified bodies carrying out children's social care functions.

Part 2 Social Workers in England

9. Part 2 of the Bill establishes specialist regulatory arrangements for social workers in England to replace their current regulation alongside 15 other professions by the Health and Care Professions Council by establishing a new regulator known as Social Work England.

C. ANALYSIS OF DELEGATED POWERS BY CLAUSE

In this section we consider each of the delegated powers within the Bill in detail. The specific provisions for delegated legislation have been developed on the basis of the following considerations:

- That the legislative framework must be clearly presented on the face of the Bill with secondary legislation used to provide the detail;
- That within that framework, the provisions must also support effective implementation and contain sufficient flexibility to respond to changing circumstances;
- That the power to make secondary legislation must be narrowly drawn so that, although there are a number of regulation making powers, there is greater clarity of intention than would be the case with fewer but more general secondary legislation making powers; and
- That operational, administrative and technical details are not normally set out in primary legislation as too much detail on the face of primary legislation risks obscuring the principal duties and powers from Parliamentary scrutiny.

In deciding what procedure is appropriate for the exercise of the powers in the Bill, the Department has carefully considered the Guidance for Departments produced by the Committee, whether the provisions enable the amendment by delegated legislation of primary legislation and/or the importance of the matter to be addressed.

Part 1 – Children

Clause 5: Maintained Schools: staff member for previously looked after pupils

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and purpose: Currently maintained schools are required to designate a member of staff to promote the educational achievement of looked after children. In many cases the specific educational needs of children do not change at the point of a permanent care placement. Clause 5 of the Bill, therefore, extends the existing provision for children who were previously looked after, and who are subject to certain long term placement orders. Clause 5 gives the Secretary of State the power to prescribe the qualifications and/or experience of the designated member of staff for children in maintained schools who were formerly looked after by the local authority, and to require the governing body to ensure that the designated person has those qualifications and/or experience. This power mirrors the existing power under section 20(3) of the Children and Young Persons Act 2008 which applies to the designated teacher for looked after children in maintained schools.¹

Justification for taking the power: As well as ensuring consistency with the existing power relating to looked after children, taking the power to set required qualifications through regulations will take account of the evolving landscape of professional qualifications in both social care and education. The designated person is likely to be the same person as the one appointed under section 20, and it is therefore essential that the regulatory requirements are identical.

Justification for the procedure: The negative procedure mirrors the procedure for the existing power relating to looked after children. Adopted children, like looked after children, are vulnerable and often have additional educational needs. The principle

¹ The Designated Teacher (Looked After Pupils etc.)(England) Regulations 2009/1538 were made under section 20(3) of the Children and Young Persons Act 2008.

that it is appropriate for the Secretary of State to determine appropriate expertise and experience in their support was accepted when the existing power was agreed and that was in turn considered appropriate by analogy with the power to prescribe the qualifications and experience of persons appointed as Special Educational Needs Coordinators under section 173 of the Education and Inspections Act 2006. In both cases it was accepted that qualifications can be detailed in nature, and that flexibility was required to amend regulations as qualifications change over time. The negative procedure was therefore considered appropriate.

Clause 6: Academies: staff member for looked after and previously looked after pupils

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and purpose: Clause 6 replicates the aims of clause 5 above but in respect of academies. In addition, it extends the duty to appoint a designated teacher for looked after children to the small number of early academies whose funding agreements do not already include this requirement, and extends the new duty towards formerly looked after children to all academies.

Justification for taking the power: The power brings consistency both as regards the existing requirements relating to looked after children in maintained schools, and the new extension by clause 5 to formerly looked after children.

There is a slight difference between the way academies and maintained schools are treated, in that existing academies are required to ensure they have a designated teacher for looked after children and that that teacher has appropriate qualifications through their funding agreements rather than by regulations. Rather than negotiating an amendment to all funding agreements individually, taking a regulation making power to achieve the same end is more appropriate and less burdensome for the schools concerned.

Justification for the procedure: Given that the use of these powers will retrospectively affect funding agreements for academies, the affirmative procedure with associated debate is considered appropriate.

Clause 13: Functions of the Panel

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and purpose: Under clause 12 the Secretary of State must establish a Child Safeguarding Practice Review Panel. Clause 13 sets out its functions as identifying and reviewing child safeguarding cases which raise issues that are complex or of national importance. Clause 13 also confers a power to make regulations regarding the discharge of those functions.

Justification for taking the power: The power allows the Secretary of State to make regulations providing for the detailed operation of the discharge of The Panel's functions including, inter alia, setting out the criteria for determining complex issues or issues of national importance, appointment of reviewers, and procedure and publication of reviews. We would expect these detailed arrangements to be subject to regular review and updating, meaning it is appropriate to provide for these matters in secondary regulation.

Justification for the procedure: The core activity and effectiveness of the Regulator will be determined by the arrangements for the discharge of its functions. As such we believe the active scrutiny of Parliament is appropriate.

Clause 16: Local arrangements for safeguarding and promoting welfare of children

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and purpose: This clause replaces current arrangements for multi-agency safeguarding of children with a new set of arrangements to be made by the key “safeguarding partners” (local authority, health, police) with which other “relevant agencies” who exercise functions in relation to children must comply. The clause provides a power to specify in regulations who the relevant agencies are.

Justification for taking the power: The power allows the Secretary of State to take account of the changing architecture in the provision of services for children so that the list of “relevant agencies” can be reviewed and revised regularly.

Justification for the procedure: Affirmative scrutiny will allow Parliament to consider the appropriateness of placing duties to cooperate on the range of organisations that work with children.

Clause 17: Local child safeguarding practice reviews

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative (with provision to make under affirmative procedure by virtue of clause 29)

Context and purpose: This clause provides for local reviews of serious child safeguarding cases to complement the national reviews described above. There is a similar regulation making power to that at clause 13.

Justification for taking the power: The power allows the Secretary of State to make regulations providing for the detailed operation of local reviews including, inter alia, setting out the criteria for determining issues of local importance, appointment of reviewers, and procedure and publication of reviews. We would expect these detailed arrangements to be subject to regular review and updating, meaning it is appropriate to provide for these matters in secondary regulation.

Justification for the procedure: Local reviews will not be addressing matters of national importance, unlike national reviews. As such we consider it appropriate that they be

subject to the lower degree of scrutiny. However, it may be desirable to make regulations governing local and national reviews within a single instrument. Clause 29 provides that regulations under this clause can also be made by the affirmative procedure if made within the same instrument as the regulations under 16B.

Clause 18: Further provision about arrangements

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and purpose: This clause places a duty on the safeguarding partners and relevant agencies to act in accordance with the local safeguarding arrangements described above (clause 16). It also provides that regulations may include provision for enforcement of that duty.

Justification for taking the power: There are a range of existing enforcement powers that capture the safeguarding partners and may capture relevant agencies. The “relevant agencies” are currently listed in indicative regulations. The power anticipates both the list being ‘finalised’ in the regulations and the future possibility of amendment to that list, by making provision for enforcement where the Secretary of State considers none exists. The clause clarifies that this does not include the creation of criminal offences.

Justification for the procedure: As for the designation of “relevant agencies” described above (clause 17) it is appropriate that Parliament should actively consider the duties and enforcement arrangements for those duties applied to safeguarding partners and relevant agencies working with children.

Clause 31: Pre-employment protection of whistle-blowers

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and purpose: This clause enables the Secretary of State to make regulations (under the affirmative procedure) which will prohibit a “relevant employer” carrying out children’s social care functions from discriminating against a person who applies for a children’s social care position because it appears to the employer that the applicant has made a “protected disclosure” within the meaning given at section 43A of the Employment Rights Act 1996 (‘the ERA’). The clause defines relevant employers.

Justification for the power: The clause is relatively limited in scope in that it relates to local authorities in England, Wales and Scotland in respect of their children’s social care functions, and to other bodies (where they exist) which exercise such functions on behalf, or instead of, the local authority. The government wishes to ensure that the power is exercised with a view to ensuring consistency of approach so far as possible. We consider this to be suitable for secondary legislation under the affirmative procedure, as providing for an appropriate level of Parliamentary scrutiny whilst giving sufficient flexibility to ensure that detailed and technical matters can be updated regularly in consultation with the devolved governments. We also note that this amendment follows a similar approach to that taken in section 49B of the ERA 1996, relating to the protection from detriment of job applicants in the health sector, which includes a delegated power providing for detailed provision to be made by regulations.

Justification for the procedure: The choice of procedure is consistent with the procedure applicable to an instrument made under section 43K(4) of the ERA 1996, which also forms part of the whistleblowing legislative framework, and to regulations made under section 49B of the ERA 1996, as mentioned above.

Part 2 – Social workers etc. in England

Regulation making powers subject to the negative procedure

Clause 33: Social Work England

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose: This clause establishes and names the regulator on the face of the Bill. It also allows for the Secretary of State to make regulations in order to rename the regulator and make consequential amendments in relation to any change of name.

Justification for taking the power: This power is intended to ensure that it would be possible to change the name of the regulator should this be desired in the future, without needing further primary legislation. It should be noted that this power would not extend beyond a change of the name by which the regulator is known. There would be no impact on the regulator's objective, scope or functions.

Justification for the procedure: The regulations will be subject to the negative procedure and will not be subject to the statutory consultation requirement in clause 52. As these regulations will provide for a technical change only, the negative procedure ensures appropriate level of parliamentary scrutiny without taking up undue amounts of Parliamentary time.

Clause 50 and schedule: Oversight by Professional Standards Authority for Health and Social Care

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and purpose: The Schedule which is inserted by this clause provides for oversight of Social Work England by the Professional Standards Authority (the "PSA").

Paragraph 4 of the Schedule inserts a new section 25AA into the NHS Reform and Health Care Professions Act 2002 (“the 2002 Act”). Section 25AA (1) provides that the Secretary of State by regulations must require Social Work England to pay the PSA periodic fees of such amount as the Secretary of State determines in respect of such of the PSA’s functions in relation to Social Work England as are specified in the regulations. Regulations must provide for the method of determining the amount of any fee and may make provision for the payment of the fee and the recovery of unpaid fees or interest. The regulations may enable the Secretary of State to re-determine the amount of the fee. Before making regulations under this section the Secretary of State must consult the PSA, Social Work England and such other persons as the Secretary of State considers appropriate.

Justification for taking the power: The Professional Standards Authority oversees the operation of nine health and care regulators in the UK. Ensuring it will oversee the operations of Social Work England will provide an important independent assessment of whether the new regulator is meeting its core objective of protecting the public. This will improve transparency over the regulator’s operations and improve accountability. The PSA receives funding through in fees from those that it oversees and the respective arrangements are dealt with under the existing regulation making power specified at section 25A of the 2002 Act. This power will ensure that the PSA is funded for the additional work it will undertake as a result of its taking on a role in relation to Social Work England.

Justification for the procedure: The regulation making power is intended to broadly mirror the existing legislative provision, so that there is consistency of approach with fee paying arrangements for other regulators – this includes use of the negative procedure.

Regulation making powers which are subject to the affirmative procedure

The remaining regulation making powers in part 2 of the Bill are all subject to the affirmative procedure. The powers deal with the following areas:

- detailed operation of the regulator's various functions including professional registration and the appointment of a registrar (clause 36 (2) and (3)); restrictions on practice and protected titles (clause 37); assessment against a professional standard (clause 38 (4)); operating a scheme for the approval of courses of education and training for people who are or who wish to become social workers (clause 39 (3)) and taking over from the Health and Care Professions Council the function of approving courses for approved mental health practitioners (clause 42(1)); arrangements for protecting the public in relation to discipline and fitness to practise of social workers and registered students (clause 40 (2) and (3)); the creation of offences (clause 41(1)); and power to charge fees (clause 46);
- oversight of the regulator and its functions through power to permit or require the regulator to appoint advisers (clause 35(1)); power to require the regulator to publish or disclose information or give advice (clause 46 (2)); power to add to the list of those with whom the regulator must cooperate (clause 47(1)(d)); default powers (clause 49 (2)); and, through taking a power to specify the steps or decisions taken by Social Work England in connection with fitness to practise or discipline which are to be 'relevant decisions' for the purposes of section 29(3) of the 2002 Act, and therefore including certain decisions made by Social Work England within the power of the PSA to refer a case to the High Court if it considers that the decision is insufficient for the protection of the public (new section 29(2A) inserted into the 2002 Act by clause 50 and associated schedule 3, paragraph 15(2)).

Regulations made under powers in Part 2 will be subject to consultation in accordance with clause 52, which will allow for participation and contribution of interested members of the public and the sector. There is also a requirement for the Secretary of State to provide a report about the consultation when laying a draft of a

statutory instrument containing regulations under Part 2 before Parliament in clause 52 (2).

Justification for the procedure: The importance of a robust and effective regulatory framework impacts on both the lives of registered and aspiring professionals and those who use their services. As well as setting out the detailed and technical workings of the processes and procedures that support the discharge of the regulator's functions, the regulations deal with such matters as the creation of offences and the making of consequential amendments to other legislation in meeting its overarching objective to protect the public.

It is therefore the Department's view that the affirmative procedure is most appropriate to ensure that both Houses are able to actively consider, debate and scrutinise the practical interaction between the regulator, those whose professional practice it seeks to regulate, and those it seeks to protect.

Clause 35: Advisers

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: This clause enables the Secretary of State to make regulations which may permit or require the regulator to appoint people or panels of people to advise the regulator on matters relating to its functions and to make provision about the functions of those appointed. The regulations may make further provision in connection with the appointment of a person or panel, for example, under sub-section (3) regulations may make provision about payments to those appointed and about staff, facilities or other assistance that might be provided to advisers.

Justification for taking the power: Having access to expert advice on social work and other matters related to the regulation of social work will be crucial to ensure that the regulator is able to effectively deliver its core regulatory functions in line with its overarching objective to protect the public.

While the core functions of holding a register, determining and publishing standards and making arrangements for fitness to practise and disciplinary action are now conferred on the regulator on the face of the Bill, the detail of the procedures that support these processes are to be set out in regulations, as specified above. The approach for these provisions in relation to the appointment and role of advisers is consistent with that approach and will allow the Secretary of State to periodically revise the arrangements that are most appropriate to support the discharge of the regulator's functions.

Clause 36: Registration

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: The clause confers, on the regulator, the core regulatory duty of keeping a register of social workers in England. The clause also enables the Secretary of State to make regulations requiring or allowing the regulator to take certain steps in respect of registration, including, but not limited to:

- keeping a register of people who are undertaking education or training in England to become social workers;
- holding a combined register in the future;
- appointing a registrar and, where a registrar is appointed, to make provision about the functions of the registrar; and
- making any other provision in connection with the keeping of a register.

Justification for taking the power: The registration of professionals requires the ability to set out detailed requirements; much of this is technical and administrative in nature and subject to regular review and updating. It is therefore appropriate that regulations provide the detail and, potentially, rules, underpinning the registration regime for registration will be made in regulations.

Flexibility is required to enable the Secretary of State, through regulations, or the regulator through rules to respond to emerging evidence about effective practice in

relation to registration. For example, if a particular specialism grew in importance, it may be appropriate to reflect that on the register. Therefore, we have provided that regulations may make provision about the content of the register.

The power to establish registers of student social workers reflects recommendation 27 of the Law Commission report², which recommended that the government should have regulation-making powers to enable the introduction of compulsory student registration for any regulated profession.

Clause 37: Restrictions on practice and protected titles

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: This clause enables the Secretary of State to make regulations to impose prohibitions or restrictions in connection with the carrying out of social work in England; the use, in relation to social work in England, of titles or descriptions set out in the regulations; or the holding out of a person as qualified to carry out social work in England.

Justification for taking the power: Due to the nature of the social work role, it is necessary to ensure that only those who are qualified and registered are able to practise. Under the current system, 'social worker' is a protected title; it is an offence for someone to present themselves as a social worker if they are not registered. This current framework will be maintained through the regulations. Setting out prohibitions and restrictions in regulations enables flexibility to amend these where this is necessary to ensure safe and effective practice and to reflect developments within the profession. This is in line with current arrangements for protection of titles.

² Regulation of Health Care Professionals, Regulation of Social Care Professionals in England, Law Com 345/Scot Law Com 237/NILC 18 (2014)

Clause 38: Professional Standards

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: This clause confers a duty on the regulator to determine and publish professional standards for social workers in England. The clause requires that the regulator consult on these standards and obtain the Secretary of State's approval for the standards. It is intended that meeting these professional standards will be a condition of initial and continued registration.

The clause also enables the Secretary of State to make regulations in relation to arrangements for assessing whether a person meets a professional standard for social workers in England relating to proficiency.

Over time Social Work England may play a role in developing post-qualifying specialisms for accredited child and family practitioners.

For example, in January 2014 the Secretary of State for Education set out an ambition for a system of accrediting all children and family social workers against specialist statements of post qualifying practice published by the Chief Social Worker for Children and Families. The intention is to ensure that practitioners are focused on excellence and to support a national practice-focused career pathway.

Consultation with the sector on proposals in relation to assessment and accreditation is planned later this year and final decisions on the implementation of these plans are subject to this consultation.

Justification for taking the power: This power ensures that the Secretary of State has the necessary power to make provision for the assessment of proficiency against a professional standard determined by the regulator. Where it is appropriate to assess an individual against a standard of proficiency this will require a procedure, outlining the approach and the detail about how the assessment will be carried out. It is therefore appropriate for detailed provision and technical detail to be set out using regulations.

The regulations may also confer rule making powers on the regulator in relation to this provision (under clause 51). Using delegated legislation to make provision for the assessment also ensures that it can be updated to respond to emerging evidence in regulatory practice and be responsive to changes in post qualification education and specialisms, and the way in which proficiency against a particular standard is effectively assessed.

Clause 39: Education and Training

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: This clause confers the function on the regulator of determining and publishing standards of education and training in relation to people who are or who wish to become social workers in England. The clause requires that the regulator consult on these standards and obtain the Secretary of State's approval for the standards.

Sub-section (2) provides the Secretary of State with a regulation making power to make provision for the regulator to operate a scheme for the approval of courses of education or training and qualifications for people who are or wish to become social workers in England.

Sub-section (4) states that regulations may make provision in connection with the approval scheme and sub-section (5) provides an illustration of the type of provision that may be made in regulations including (among other provisions) the criteria for approval, the procedure for approval, and any appeals against decisions.

Justification for taking the power: Improving initial education for social workers is central to the social work reform programme. The intention is to provide for a rigorous approval process specific to social work education, so as to ensure that students graduating and entering social work are ready to practise on the frontline. Initial education and entry to the profession is fundamental for ensuring social

workers are appropriately trained to do their job effectively. An approval scheme will ensure that prospective students can have confidence in the courses they apply to, as well as ensuring public confidence that the appropriate standards are being applied for the protection of the public. The specifications for the approval of courses will be necessarily detailed and administrative in nature requiring periodic updating, consequently regulation making powers are necessary to ensure a flexible and responsive framework.

Clause 40: Discipline and Fitness to Practise

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: This clause requires the regulator to make arrangements for protecting the public from social workers in England whose fitness to practise is impaired and for taking other disciplinary action against social workers in England.

The regulation making powers in this clause are two-fold:

- to enable the Secretary of State to require the regulator to make arrangements for taking disciplinary action against registered students (this would be linked to making a provision in regulations, under clause 36, to require the regulator to hold a student or combined register); and
- to make further provision about fitness to practise and discipline in relation to both registered social workers and (where appropriate, see previous bullet point) registered students.

Sub-section (4) provides an illustration of the type of provision that may be made in regulations including in relation to procedural detail, decision-making and the power to obtain information. Sub-section (5) provides that provisions in the regulations that may be made about persons appointed under the regulations may include provision about payment and assistance to persons so appointed.

Justification for taking the power: Questions of fitness to practise are at the core of any professional regulator's functions. This clause links directly to the regulator

meeting its overarching objective set out on the face of the Bill to protect the public. The effective running of this system is crucial for ensuring the procedure is effective, fair and transparent in protecting the public and in ensuring that individuals are confident and able to understand the thresholds for investigation, the procedure and their right to appeal.

Such a high level of procedural detail will be most appropriately set out in regulations. This is an area where the regulator will have power, conferred through regulations, to make detailed rules for the operation of the procedure.

Clause 41: Offences

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: This clause enables the Secretary of State to make regulations to create offences in connection with the matters specified in clause 41 (1). Such offences must be triable summarily only and regulations may not provide for the offence to be punishable with imprisonment.

Justification for taking the power: The power to create offences in this clause relates to the safe and effective operation of the system of regulation and the furtherance of the regulator's overarching objective of the protection of the public. Such offences would potentially cover situations where, for example, a person falsely describes themselves as a registered social worker or where a person fails to comply with a requirement to provide documents or attend and give evidence under the regulations made under clauses 36 or 40. They are, therefore, important in ensuring that the regulatory system is able to function effectively and to protect service users from the risk of harm. Protecting the title of a social worker in respect of registration is not new and does not represent a major shift in social work regulation. There are already a number of existing offences and conferring a regulation making power in this regard will allow for them to be periodically reviewed and updated with an appropriate level of Parliamentary scrutiny.

Clause 42: Approval of courses for approved mental health professionals

Power conferred on: Secretary of State

Power exercised by: Secretary of State

Parliamentary Procedure: Affirmative

Context and Purpose: The vast majority of AMHPs are social workers and it is therefore logical that Social Work England should have oversight of this important role.

This clause gives power to the Secretary of State to use regulations to amend the Mental Health Act 1983 to:

- allow the transfer of functions in relation to approval of AMHP courses from HCPC to Social Work England,
- to give the regulator the power to charge fees in that respect, and
- make further provision for the approval of courses and the charging of fees by the regulator.

Justification for taking the power: This power allows for the transfer of the function of approving courses for AMHPs from the HCPC to the new regulator once it has been established. These changes also permit a comprehensive approach to the professional development of social workers who are AMHPs by allowing the new body to coordinate criteria for training, both pre- and post-qualification of AMHPs, and for that approach to be periodically reviewed and updated.

Clause 44: Fees

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: Sub-section (1) enables the Secretary of State to make regulations that confer power on the regulator to charge fees in connection with registration or continued registration; and where relevant in connection with assessing whether a person meets a professional standard relating to proficiency;

approval or continued approval in accordance with a scheme mentioned in clause 39.

The regulator will be responsible for setting the level of fees in accordance with any provision made by the regulations. The clause also requires that before determining the level of any fee, the regulator must consult any persons they consider appropriate and obtain the approval of the Secretary of State (sub-section (3)).

Sub-section (4) and (5) allow for specific provision to be made in regulations in relation to the level that fees are set at and limitations. Sub-sections (6) and (7) enable regulations to make provision about collection and recovery of fees and stipulate that regulations must require the regulator to pay any fee income to the Secretary of State unless the Secretary of State, with the consent of the Treasury, directs otherwise.

Justification for taking the power: Fees will ensure that the new regulator can operate and function effectively. It is normal practice for professional regulation fees to be subject to review, and a regulation making power will allow for detailed provision to be made with an appropriate level of Parliamentary scrutiny.

Clause 46: Information and advice

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: Sub-section (1) enables the regulator to publish or disclose information about any matter relating to its functions or give advice on any matter relating to its functions.

Sub-section (2) confers a regulation making power on the Secretary of State to make provision requiring the regulator to publish or disclose information or to give advice under sub-section (1). Regulations may also make provision supplementing this.

Justification for taking the power: How the regulator makes information and advice

available will be important for ensuring there is clarity and transparency about the regulator and the discharge of its functions. On the face of the Bill this is a permissive power for the regulator, enabling it to publish or disclose information where it sees fit, in relation to the discharge of its functions.

The power to make regulations in relation to information and advice that the regulator must publish or disclose will enable provision to be made to ensure that registrants, employers and the public have access to relevant information about the way in which the regulator discharges its functions and the detailed procedures associated with this.

Providing for the detail of information and advice giving provisions to be set out in regulations will ensure that these can be reviewed and amended as practice and the way in which the regulator discharges its functions changes over time.

Clause 47: Duty to co-operate

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and purpose: The clause requires the regulator to cooperate with the professional regulators for social workers in Scotland, Wales and Northern Ireland and any other person specified in regulations made by the Secretary of State.

Justification for taking the power: The power allows for account to be taken of changes of name or new regulatory regimes introduced in the devolved administrations without the need for further primary legislation.

Clause 49: Default Powers

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose: The clause confers power on the Secretary of State to

exercise default powers where the regulator has defaulted in performing any of its functions and has not remedied the default, or where the regulator is likely to default in performing its functions.

The clause enables the Secretary of State to make regulations to set out further provision about remedial directions and their enforcement. For example, the procedure for determining whether the regulator has defaulted or is likely to default, the procedure for giving directions and the payment by the regulator of expenses incurred.

Justification for taking the power: Default powers provide a critical safeguard to ensure that regulatory functions can continue to be exercised in the unlikely event that the regulator is incapable of performing its functions. The powers here provide for the detailed framework to manage such an eventuality to be set out in regulations that can be regularly reviewed and updated without the need for further primary legislation.

Clause 50 and Schedule 3: Oversight by Professional Standards Authority for Health and Social Care

Power conferred on: Secretary of State

Power exercised by: Professional Standards Authority

Parliamentary Procedure: Affirmative

Context and purpose: This clause provides for oversight of Social Work England by the Professional Standards Authority as set out in Schedule 3.

Paragraph 15 of Schedule 3 inserts a new sub-section (2A) into section 29 of the 2002 Act. Section 29 provides for references by the Professional Standards Authority of disciplinary cases to the court. New sub-section (2A) extends those powers to make such references to cases where relevant decisions are made, i.e. steps or decisions taken by Social Work England which are of a description specified in regulations made by the Secretary of State. This will mean that the Authority will have a power to refer fitness to practise cases of Social Work England to the High Court where it considers that the relevant decision was not sufficient for the

protection of the public. The regulation making power provided for at paragraph 15(2) will be used to specify decisions that may be relevant decisions for the purposes of section 29(3) of the 2002 Act and which may be the subject of a referral.

Justification for taking the power: The Professional Standards Authority oversees the operations of several health and care regulators. Ensuring it will oversee the operations of Social Work England will provide an important independent assessment of whether the new regulator is meeting its core objective of protecting the public. One of the key functions it will provide will be to review fitness to practise decisions made by Social Work England. It currently carries out this function with respect to fitness to practise decisions made by the current regulator of social workers, the Health and Social Care Professions Council. This power will ensure that similar protections will exist in the future. Regulations will be used to specify the particular decisions which may be subject to the power, with reference to the decision making structures and procedures to be established under clause 40 of this Bill.

Part 3 – General

Clause 58: Power to make transitional provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: No parliamentary procedure

Context and purpose: This power allows the Secretary of State to make transitional, transitory or saving provision in support of the wider contents of the Bill taking effect.

Justification for taking the power: The power is necessary to make technical transitional provisions which would be too detailed to appear on the face of the Bill in connection with the commencement of any of the Bill's provisions. It will be needed in connection with the bringing into force of the removal of various functions from the HCPC and the conferral of functions relating to the regulation of social workers in England on the Secretary of State or Social Work England. For example, the power may be used to provide that cases which are subject to the HCPC conduct processes at the time of the coming into force of the new regulatory regime would continue under the same processes.

Justification for the procedure: The power would be used to make the technical provisions needed for transition, and no parliamentary procedure is considered to be necessary.

Clause 59: Power to make consequential provision

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Where regulations relate to primary legislation the procedure is affirmative, where they relate to secondary legislation the procedure is negative.

Context and purpose: This power allows the Secretary of State by regulations to make consequential changes to other legislation so that it takes account of new framework created by the wider contents of this Bill. Regulations under this section may amend,

repeal or revoke any provision made by or under an Act passed before this Act or in the same Session.

Justification for taking the power: This power is necessary to ensure that the changes made to the law by the Bill are reflected in other legislation which refers to or is dependent on provisions repealed or amended by the Bill.

Justification for the procedure: The Parliamentary procedure to be followed depends on the content of the regulations. If the regulations amend or repeal any provision of an Act of Parliament, it may not be made unless a draft has been laid before and approved by each House of Parliament. In any other case, the negative resolution procedure applies. This combination of procedures seems to the Department to ensure the appropriate degree of Parliamentary involvement and scrutiny.

The interaction between the power to make consequential provision under clause 59 and the power to include consequential and other provision in regulations made under Part 2 by virtue of clause 60 (read with clause 51) is as follows. Clause 59 provides a power to make provision that is consequential on the Bill. In the context regulations made under Part 2 the Secretary of State may want to make consequential amendments to existing powers contained in primary or secondary legislation that overlap in whole or in part with regulations made under Part 2. Such provision may amend, repeal or revoke provisions in Acts, instruments or documents whenever passed or made.

Clause 63: Commencement

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: None

This clause deals with the commencement of the provisions in the Bill. It provides that the provisions in the Bill come into force on such day as the Secretary of State may by regulations appoint. Different days may be appointed for different purposes.

Department for Education, November 2016