

## **DELEGATED POWERS AND REGULATORY REFORM COMMITTEE**

### **ENTERPRISE BILL**

#### **Supplementary Memorandum by the Department for Business, Innovation and Skills**

##### **Introduction**

1. This Supplementary Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee by the Department for Business, Innovation and Skills with input from the Department for Communities and Local Government and the Treasury.
2. It follows the Memorandum to the Committee of 15 September 2016 and the letter to the Committee of 23 November 2016. Government amendments were tabled on 2, 3, 4, 11 and 18 February 2016 for consideration at Commons Committee stage and Government amendments were tabled for consideration at Commons Report stage of the Enterprise Bill (“the Bill”) on 1 and 2 March. This Supplementary Memorandum identifies the amended provisions of the Enterprise Bill (“the Bill”) which introduce new powers to make delegated legislation or makes significant amendments to such powers, and explains why the power has been taken and the nature of, and reason for, the procedure selected. Unless otherwise stated, the clause references are to Bill 112, published on 17 December 2015, the bill as first printed for the Commons. The amendment references are to the references are to the amendments to be published on 11 March 2016.
3. The descriptions of the powers are arranged in the order that they appear in the Bill (Schedules are addressed in order of the clauses giving effect to them).
4. There are thirteen individual provisions concerning new or amended delegated powers, one of which is a “Henry VIII” power.
5. The Delegated Powers Memorandum on introduction to House of Lords has not been reproduced. This Memorandum contains only amendments which introduce a significant delegated power or which significantly amend an existing one.

6. The Department for Business, Innovation and Skills has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

### **Overview of the Bill, as amended by the Commons**

7. The Bill as amended by the Commons contains 9 Parts and 4 Schedules. This supplementary memorandum deals with the amended provisions for delegated legislation in each of the relevant policy themes in turn.
8. Part 2 (Regulators) contains provisions requiring regulators to report on their compliance with the Regulators Code and the Growth Duty, and extending the Business Impact Target.
9. Part 3 (Extension of Primary Authority) makes provision for the extension of the Primary Authority scheme under Part 2 of the Regulatory Enforcement and Sanctions Act 2009 (co-ordination of regulatory enforcement).
10. Part 4 (Apprenticeships) contains provisions that are intended to promote and support the Government's policy of expanding approved apprenticeships to improve the skills of the workforce and provide vocational training attracting the same high regard as a university education.
11. Part 6 (Non-domestic rating) makes changes to the non-domestic rating system that enable the Valuation Office Agency to share HMRC data with local authorities who operate the rating system, their contractors, the Secretary of State and other prescribed persons, and to appeals relating to non-domestic rating.
12. Part 7 (Sunday working) makes changes to employment rights of shop workers who are or may be required under their employment contract to work on Sunday.
13. Part 9 (Public sector employment: restrictions on exit payments) provides a power to make regulations capping the total costs of "exit payments" made to public sector employees or post holders as a consequence of them leaving that employment or post.

## **Part 2: Regulators**

***Amendment 1: New Clause [After Clause 16]: Power to make orders relating to the Regulators Code: giving power to the Welsh Ministers (instead of a Minister of the Crown) to make orders applying the regulators' principles and code of practice in relation to functions relating to matters within the legislative competence of the National Assembly for Wales, or in respect of which functions are exercisable by the Welsh Ministers***

*Power conferred on: Welsh Ministers*

*Power exercised by: Order made by Statutory Instrument*

*Parliamentary procedure: Affirmative procedure*

Context and purpose

14. This clause amends section 24 of the Legislative and Regulatory Reform Act 2006. Section 24 concerns the application of the regulators' principles and code of practice to functions specified by order. The purpose of the amendment to section 24 is to ensure that the power to make orders relating to the Regulators Code is divided between Welsh Ministers and the Ministers of the Crown along the lines of legislative competence and reflects the devolution settlement.
15. The new clause has the effect of giving power to the Welsh Ministers (instead of a Minister of the Crown) to make orders applying the regulators' principles and code of practice in relation to functions relating to matters within the legislative competence of the National Assembly for Wales, or in respect of which functions are exercisable by the Welsh Ministers.

Justification

16. It is considered that the amendment is necessary to ensure that the boundary between the power of Welsh Ministers and the Minister of the Crown is along the lines of the devolution settlement. The amendment replaces wording which relates to where the functions are exercised with wording which reflects where those functions are devolved.

Justification for the procedure used

17. The procedure to apply to orders made using the power modified by the amendment to section 24 will be the equivalent Welsh procedure to that required in Westminster when a Minister of the Crown makes an order under section 24. As such, orders made under section 24 are subject to the affirmative procedure.

### **Part 3: Primary Authority**

#### **Amendment 11: new Clause [after Clause 19]: Altering existing powers of the Secretary of State and Welsh Ministers to include all devolved matters under the Regulatory Enforcement and Sanctions Act 2008.**

*Power conferred on: Secretary of State, Welsh Ministers*

*Power exercisable by: Order*

*Parliamentary Procedure: Affirmative procedure*

#### **Context and purpose**

18. The Regulatory Enforcement and Sanctions Act 2008 confers powers on the Secretary of State to extend the regulatory functions covered by the Primary Authority scheme and the alternative civil sanctions regime. Under section 36, Welsh Ministers have the specific power to make orders providing for civil sanctions in relation to regulatory offence relating to Wales.
19. The Bill amends these powers by replacing references to “Welsh ministerial” matters with “devolved Welsh” matters. It also replaces references to functions exercisable “in Wales” to functions exercisable “in relation to Wales”. The purpose of these amendments is to ensure that the powers also cover matters within the legislative competence of the National Assembly for Wales, in addition to Welsh Ministerial matters. This better reflects the current devolution settlement.

#### **Justification**

20. The powers in the Regulatory Enforcement and Sanctions Act 2008 are regularly used to update the Primary Authority scheme and to introduce alternative civil sanctions as the regulatory landscape is often changing. These powers will be exercised more frequently than Parliament can be expected to legislate by primary authority. The existing powers are exercisable by affirmative procedure and the amendments made do not change this.

## **Part 4: Apprenticeships**

### **The Institute for Apprenticeships**

*Paragraphs 21 to 23 contain background and context for the powers relating to the Institute for Apprenticeships. Delegated powers begin at paragraph 24.*

21. The Institute for Apprenticeships provisions establish the Institute for Apprenticeships (“IfA”) and make provisions about its functions. It does this by introducing a new Schedule [after Schedule 3] which amends the Apprenticeships, Skills, Children and Learning Act 2009 (“the 2009 Act”) principally by: inserting Chapter ZA1; substituting section A2 with new sections A2 – A2I and adding Schedule A1.
22. The Deregulation Act 2015 amended the 2009 Act by adding Chapter A1 “Apprenticeships: England”. Chapter A1 relates only to “English Apprenticeships” and introduced a new simplified regime for them, replacing the complex provisions which governed English Apprenticeships with new concepts of an approved English apprenticeship and approved apprenticeship standards based on recognised industry standards and outcomes. Under Chapter A1 Apprenticeship standards are prepared, and may be amended, by the Secretary of State or other persons. Where a standard is prepared or amended by another person it is subject to the approval of the Secretary of State.

23. The Enterprise Bill builds upon the simplified apprenticeship regime in England introduced by the Deregulation Act 2015, through the establishment of the IfA, which will operate in England only by overseeing the quality of apprenticeships by approving apprenticeships standards and assessment plans and carrying out related functions. It is considered appropriate that these functions of the IfA's work set out in the Bill of such individual decisions to approve standards and assessment plans are made by the IfA independently of Ministers.

***Amendment 12 and 52: New Clause [Before Clause 20] and paragraph 2 of new Schedule [after Schedule 3]: The Institute for Apprenticeships: new section ZA2(2) enables the Secretary of State to set out matters to which the IfA must have regard when performing its functions***

*Power conferred on: Secretary of State*

*Power exercised by: Notice*

*Parliamentary procedure: Lay before Parliament*

Context and purpose

24. Paragraphs 21 to 23 above provide the general context for the IfA. Paragraph 2 of Schedule [after Schedule 3] inserts new Chapter ZA1 (The Institute for Apprenticeships) into the Apprenticeships, Skills, Children and Learning Act 2009. Chapter ZA1 includes new section ZA2 (General duties). The purpose of ZA2(2) is to enable the Secretary of State by notice to require the IfA to have regard to certain matters when the IfA is performing its functions.
25. New section ZA2(1) sets out the matters that the IfA must have regard to in performing its functions, so far as relevant and subject to any notice given by the Secretary of State under subsection (2). Under new ZA2(2) the Secretary of State may give a notice in writing to the IfA setting out other matters to which the IfA must have regard when performing its functions.
26. Whilst the core matters to which the IfA must have regard are stated on the face of the Bill in new section ZA2(1), it is anticipated that the notice procedure will be used to give policy steers to the IfA, for example, to set out matters concerning the wider

government policy context. In this regard, it should be noted that the IfA has a duty to ‘have regard’ to the matters set out in such a notice when performing their functions.

27. Subsection (3) provides that the Secretary of State may not give a notice under subsection (2) more than once in any financial year, except, where a notice is given and after the giving of the notice a new Parliament meets for the first time, then the Secretary of State may give one further notice under subsection (2) in that year. Subsection (7) provides that a notice does not apply in relation to functions that are delegated by directions under new section ZA4 or conferred by regulations under new section ZA5, unless the regulations or directions provide for them to apply in relation to the functions. Where such directions or regulations so provide, subsection (8) sets out matters which the directions or regulations may provide, namely: provision for any education or training to which the functions relate to be treated as within the IfA’s remit for the purposes of ZA2 and provision for subsection (1) and any notice under subsection (2) to apply in relation to functions with such modification as the Secretary of State thinks fit.
28. Subsection (9) provides that the Secretary of State must publish a notice under subsection (2) in such manner as the Secretary of State thinks fit and lay a copy of it before Parliament.

#### Justification

29. The power of the Secretary of State to give a notice to the IfA setting out other matters to which the IfA must have regard when performing its functions is additional to those core matters explicitly set out in subsection (1) to which the IfA must already have regard when performing its functions. It is considered necessary to enable the Secretary of State to provide policy steers to the IfA on additional matters to which it must have regard, it is the Department’s view that this provides flexibility for such delegation more frequently than Parliament can be expected to legislate by primary legislation.

#### Justification for the procedure used

30. The Department considers that it is sufficient that the Secretary of State must lay a copy of a notice under subsection (2) before Parliament. In addition to this, new section ZA6 provides that the IfA must prepare an annual report, which the Secretary of State must lay before Parliament. Further, ZA6(2) provides that that annual report is a report which includes a description of what the IfA has done as a result of any notice given by the Secretary of State under new section ZA2(2). As a result, Parliament has the opportunity to see not only the notice, but also what the IfA has done as a consequence of that notice.

***Amendment 12 and 52: New Clause [Before 20] and paragraph 2 of Schedule [after Schedule 3]: The Institute for Apprenticeships: new section ZA4(1) enables the Secretary of State to delegate functions to the Institute for Apprenticeships***

*Power conferred on: Secretary of State*

*Power exercised by: Direction*

*Parliamentary procedure: None*

Context and purpose

31. Paragraphs 21 to 23 above provide the general context for the IfA. Paragraph 2 of Schedule [after Schedule 3] inserts new Chapter ZA1 (The Institute for Apprenticeships) into the Apprenticeships, Skills, Children and Learning Act 2009. Chapter ZA1 includes new section ZA4 (Delegation of functions to the IfA by the Secretary of State). The purpose of section ZA4 is to enable the IfA to exercise apprenticeship functions of the Secretary of State delegated to it by the Secretary of State.
32. New section ZA4(1) provides a power for the Secretary of State by direction to delegate to the IfA any of the Secretary of State's functions relating to apprenticeships in relation to England. Section ZA4(2) provides that the functions can be delegated to any extent and subject to any conditions that the Secretary of State specifies in the direction.
33. The purpose of this power to delegate is to ensure that when the Secretary of State considers that the IfA is ready to take on any of the Secretary of State's functions and it



is considered appropriate to delegate them, the Secretary of State can do so. Given that the IfA has yet to be set up, it is not possible at this stage to say what further functions of the Secretary of State might be delegated to the IfA, however it is important to acknowledge that it is considered that the core functions to be exercised by the IfA have been set out in the Bill. For example, its duties are set out in new section ZA2(1) as are the functions in section A2 and A2A of approval and publication of apprenticeship standards and assessment plans, and review of the same under section A2E and under section A2B of securing that evaluations are carried out of the quality of apprenticeship assessments.

34. Section ZA4(3) states that these functions include those under existing section 100(1A) of the 2009 Act or otherwise relating to the funding of apprenticeships in relation to England. Subsection (1A) was inserted into section 100 of the 2009 Act by the Deregulation Act to ensure that the Secretary of State could make payments or otherwise to secure the provision of financial resources in connection with approved English apprenticeships.
35. Paragraph 9 of Schedule [after Schedule 3] inserts new Schedule A1 (The Institute for Apprenticeships). Paragraph 9(3) of Schedule A1 permits the IfA to authorise the exercise on its behalf of functions that have been delegated to the IfA by directions under section ZA4, only if and to the extent that the directions provide. Such authorisation is subject to the restrictions in paragraph 9(2) of Schedule A1.
36. New ZA2(7) provides that ZA2(1) and a notice given under ZA2(2) do not apply in relation to functions that are delegated by directions under new section ZA4, unless the directions provide for them to apply in relation to the functions. Where such directions so provide, subsection (8) sets out matters which the directions may provide.
37. New section ZA8 states that the IfA must comply with such a direction and the direction must be in writing.

### Justification

38. It is considered that the core functions of the IfA have been explicitly set out in the Bill, see paragraph 38 above. The power of the Secretary of State by direction to delegate to the IfA any of the Secretary of State's functions relating to apprenticeships is necessary to provide flexibility, so it can be used when it is needed to ensure that where the Secretary of State considers the IfA can undertake additional functions, such functions can be readily delegated to the IfA. This provides flexibility for such delegation more frequently than Parliament can be expected to legislate by primary legislation.

#### Justification for the procedure used

39. The Department considers that no parliamentary procedure is required, given this is a delegation of functions of the Secretary of State, it is not a conferral as is the case with section ZA5(1) and is limited to a delegation of the Secretary of State's functions. As a delegation the IfA acts on behalf of the Secretary of State.

40. Precedent for there being no parliamentary procedure exists in a similar provision in section A4 (Chapter A1 Apprenticeships: England) introduced by the Deregulation Act 2015. This provides that any function of the Secretary of State (other than a power to make regulations) under that Chapter may be carried out by a person designated by the Secretary of State, that such a person designated must comply with directions given by the Secretary of State and that such a designation is not subject to any parliamentary procedure.

***Amendment 12 and 52: new Clause [before Clause 20] and paragraph 2 of Schedule [after Schedule 3]: The Institute for Apprenticeships: new section ZA5(1) enables the Secretary of State to confer functions on the Institute for Apprenticeships***

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative resolution*

#### Context and purpose

41. Paragraphs 21 to 23 above provide the general context for the IfA. Paragraph 2 of Schedule [after Schedule 3] inserts new Chapter ZA1 (The Institute for Apprenticeships) into the Apprenticeships, Skills, Children and Learning Act 2009. Chapter ZA1 includes new section ZA5 (Conferral of further functions on the IfA by regulations). The purpose of new section ZA5 is to enable the IfA to exercise apprenticeship functions conferred on it by the Secretary of State.
42. New section ZA5(1) provides powers for the Secretary of State by regulation to confer on the IfA such functions relating to apprenticeships in relation to England as the Secretary of State considers appropriate. As such, this power is wider than the delegation power in new section ZA4 since it is not limited to functions which the Secretary of State holds and, by virtue of being a conferral, it has the effect that the IfA exercises conferred functions on their own account and does not exercise them on behalf of the Secretary of State as would be the case if they were delegated.
43. Such conferral will ensure that when the Secretary of State considers the IfA is ready to take on such functions relating to apprenticeships and it is considered appropriate to confer them, the Secretary of State can do so. Given that the IfA has yet to be set up, it is not possible at this stage to say what further functions might be given to the IfA, however it is important to acknowledge that it is considered that the core functions to be exercised by the IfA have been set out in the Bill. For example, its duties are set out in new section ZA2(1) as are the functions in sections A2 and A2A of approval and publication of apprenticeship standards and assessment plans, and review of the same under section A2E and under section A2B of securing that evaluations are carried out of the quality of apprenticeship assessments.
44. Paragraph 9 of Schedule [after Schedule 3] inserts new Schedule A1 (The Institute for Apprenticeships). Paragraph 9(3) of Schedule A1 permits the IfA to authorise the exercise on its behalf of functions that have been conferred on the IfA by regulations under section ZA5, only if and to the extent that the regulations provide. Such authorisation is subject to the restrictions in paragraph 9(2) of Schedule A1.

45. New ZA2(7) provides that ZA2(1) and a notice given under ZA2(2) do not apply in relation to functions that are conferred by regulations under new section ZA5, unless the regulations provide for them to apply in relation to the functions. Where such regulations so provide, subsection (8) sets out matters for which the regulations may provide.
46. Section ZA5(2) states that a function conferred by such regulations may include the exercise of a discretion by the IfA.

### Justification

47. It is considered that the core functions of the IfA have been explicitly set out in the Bill, see paragraph 33 above. The power of the Secretary of State to confer on the IfA functions relating to apprenticeships is necessary to provide flexibility, so it can be used when it is needed to ensure where the Secretary of State considers the IfA can undertake such a function, such an additional function can be conferred by regulations on the IfA. This provides the flexibility for such Regulations to be made more frequently than Parliament can be expected to legislate by primary legislation.

### Justification for the procedure used

48. The Department considers that the affirmative procedure is appropriate given the functions which can be conferred on the IfA are not limited to those the Secretary of State holds (which is the case in respect of ZA4(10), and are conferred, rather than delegated, so that the IfA exercises those conferred function on their own account. Given this, the affirmative procedure is provided for in paragraph 8 to Schedule xx, which amends section 262(6) of the Apprenticeships, Skills, Children and Learning Act 2009), and will provide Parliament with the appropriate opportunity for scrutiny.

***Amendment 12 and 52: new Clause [before Clause 20] and paragraph 2 of new Schedule [after Schedule 3]: The Institute for Apprenticeships: new section ZA6(2)(c) and (5) enables the Secretary of State to give directions to the IfA on matters to be included in annual and other reports***

*Power conferred on: Secretary of State*

*Power exercised by: Direction*

*Parliamentary procedure: None*

### Context and purpose

49. Paragraphs 21 to 23 above provide the general context for the IfA. Paragraph 2 of Schedule [after Schedule 3] inserts new Chapter ZA1 (The Institute for Apprenticeships) into the Apprenticeships, Skills, Children and Learning Act 2009. Chapter ZA1 includes new section ZA6 (Annual and other reports).
50. New section ZA6(1) sets out that the IfA must prepare an annual report. Subsection (2)(c) provides that an annual report is a report which includes such other provision as the Secretary of State may direct. The Secretary of State must lay a copy of this report before Parliament.
51. In addition, under subsection (5), the Secretary of State may direct the IfA to send to the Secretary of State a report on any matter relating to its functions.
52. The powers to direct are considered necessary to enable the Secretary of State and Parliament to see how the IfA is carrying out, for example, the functions which are already provided in the Bill and those which are subsequently given to it. Such information will assist the Secretary of State, for example in forming views as to whether it is appropriate to delegate further matters to the IfA and whether there are matters on which a notice should be given under new section ZA2(2).
53. New section ZA8 provides that the IfA must comply with such a direction and the direction must be in writing.

### Justification

54. The power of the Secretary of State to require the IfA to include such other provision as the Secretary of State may direct in the IfA's annual report (which must be laid before Parliament) and the power to direct the IfA to report to the Secretary of State on any matter relating to its functions, are both necessary to provide flexibility, so that they can be used when they are needed. For example, on at least an annual basis to ensure that the information required in annual reports is responsive to current needs. This provides flexibility for such delegation more frequently than Parliament can be expected to legislate by primary legislation. Where it is already clear what an annual report should contain, this is explicitly stated in the Bill at ZA6(2)(a) and (b).

#### Justification for the procedure used

55. The Department considers that no parliamentary procedure is required given that, in relation to a direction under subsection (2)(c), Parliament will see the resulting annual report, given the requirement in subsection (4) for the Secretary of State to lay a copy of the annual report before Parliament. In respect of the power of the Secretary of State to direct the IfA to send to the Secretary of State a report on any matter relating to its functions under subsection (5), it is not considered necessary that a parliamentary procedure is required in respect of that direction, given that, whilst a report under subsection (5) does not have to be laid before Parliament, the annual report which must be laid before Parliament must include a description of what the IfA has done during the year and where subsection (2)(c) is exercised will include such other provisions as the Secretary of State may direct.

***Amendment 12 and 52: new Clause [before Clause 20] and paragraph 2 of Schedule [after Schedule 3]: The Institute for Apprenticeships: new section ZA7(1) enables the Secretary of State to give directions to the IfA where the IfA fails to discharge duties***

*Power conferred on: Secretary of State*

*Power exercised by: Direction*

*Parliamentary procedure: None*

#### Context and purpose

56. Paragraphs 21 to 23 above provide the general context for the IfA. Paragraph 2 of Schedule [after Schedule 3] inserts new Chapter ZA1 (The Institute for Apprenticeships) into the Apprenticeships, Skills, Children and Learning Act 2009. Chapter ZA1 includes new section ZA7 (Secretary of State directions where the IfA fails to discharge duties etc).
57. New section ZA7(1) sets out where the Secretary of State is satisfied that the IfA has failed to discharge a duty imposed on it by or under the 2009 Act or has acted or is proposing to act in an unreasonable way in exercising any function, the Secretary of State can give the IfA such directions as the Secretary of State considers appropriate.
58. New section ZA8 provides that the IfA must comply with such a direction and the direction must be in writing.

#### Justification

59. The power of the Secretary of State to direct the IfA under new section ZA7 is necessary to provide flexibility, so it can be used when it is needed to remedy, mitigate, prevent or minimise any of the effects of, amongst other things, a failure to discharge a duty. This provides the flexibility for such direction more frequently and more immediately than Parliament could be expected to legislate by primary legislation.

#### Justification for the procedure used

60. The Department considers that no parliamentary procedure is required in respect of this power to direct, given its nature for dealing with specific issues, for example, where the IfA has acted in an unreasonable way.
61. However, new section ZA6 (Annual and other reports), provides in subsection (1) that the IfA must prepare an annual report and under (2)(c) it must contain such other provisions as the Secretary of State may direct. ZA6(4) provides that the Secretary of State must lay a copy of that report before Parliament. This provides scope for matters

in ZA7 which are the subject of directions to be included in the annual report laid before Parliament.

62. The following powers of direction are considered not to be legislative in character. They come from Paragraph 9 of new Schedule [after Schedule 3] which inserts new Schedule A1 (The Institute for Apprenticeships):

(a) Paragraph 4 of new Schedule A1 covers remuneration of non-executive members of the IfA. In particular, 4(6) provides that the IfA must pay to the Minister for the Civil Service, at such times as the Minister may direct, such sums as the Minister may determine in respect of any increase attributable to the provision of pensions, allowances or gratuities under section 1 of the Superannuation Act 1972 payable to or in respect of non-executive member in the sums payable out of money provided by Parliament under the 1972 Act.

(b) Paragraph 7(6) (Committees) of new Schedule A1 enables the Secretary of State can direct the IfA to review the structure of IfA Committees and the scope of the activities of each IfA committee.

(c) Paragraph 11(2) of new Schedule A1 enables the Secretary of State to provide directions regarding statements of accounts that the IfA must comply with, concerning the information to be contained in it, the manner in which such information is to be presented or the methods and principles according to which the statement is to be prepared.

63. Taking into account paragraph 27 of Appendix 4 to the DPRRC 7<sup>th</sup> Report of Session 2014 – 2015, whilst the powers outlined in paragraph 61 above are powers of direction, the Department does not consider them to be legislative in character for the purposes of the Delegated Powers Memorandum. This is because paragraphs 4(6) and 11(2) of new Schedule A1 deal with financial arrangements which are administrative in nature and, for example, do not deal with matters such as delegating functions on the IfA or imposing requirements on how the IfA should exercise or report on the nature of the



exercise of those functions. Paragraph 7(6) is not considered to be legislative in character since it deals with the individual administrative workings of the IfA, it does not for example, require any change to or addition to the functions that are exercisable by the IfA or the way in which such functions are exercised.

## **Information Sharing**

***Amendment 16: new Clause [after Clause 21] which inserts new Part 1A to the Apprenticeships, Skills, Children and Learning Act 2009, sections 40B(3) and 40B(4): Sharing of information by HMRC and devolved authorities***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Affirmative procedure*

### **Context and purpose**

64. The Government announced in July 2015 that it would be introducing an apprenticeship levy for employers, with the aim of improving the quality and number of apprenticeships. The levy will apply to employers across the UK and is due to be introduced in the Finance Bill 2016. The provisions on data sharing have been introduced to ensure that appropriate data sharing gateways are in place to allow data to be shared on the levy and for other purposes relating to apprenticeships. For example, data sharing will allow the devolved administrations (if they wish to do so) to develop systems which enable employers to ascertain the amount of public funds that is available to them for spending on apprenticeship training.
65. Section 40B creates data sharing gateways between HMRC and the devolved authorities. Such data sharing is for the purpose of facilitating devolved administrations in the development and administration of apprenticeship schemes in their territories. The type of data that may be passed under this gateway will include, in relation to each employer: PAYE scheme reference number; employer name; amount of levy due per PAYE scheme; date; tax year; and information to link an employer claim for public funds to a PAYE scheme; in addition to certain details relating to employees (such as National Insurance number and date of birth).

66. Section 40B(3) provides definitions of the following: ‘Northern Irish authority’ (a Northern Ireland department); ‘Scottish authority’ (the Scottish Ministers); and ‘Welsh authority’ (the Welsh Ministers) – these authorities are responsible for exercising functions relating to apprenticeships in their respective countries and may share data with HMRC. A regulation making power can be exercised so that each of these definitions of an authority can be amended to also include any body or other person that is prescribed or of a prescribed description (for example, if a new body exercising functions relating to apprenticeships was established in a devolved territory then the power would be exercised to include such new body, thereby ensuring that the body could share data with HMRC).
67. Section 40B(3) also sets out definitions of: ‘Northern Irish apprenticeships’; ‘Scottish apprenticeships’ and ‘Welsh apprenticeships’ – data can be shared between the various authorities and HMRC for the purpose of the respective authority’s functions in relation to apprenticeships in its country. Each of the apprenticeships in section 40B is defined by reference to relevant legislation under which arrangements for apprenticeships can be made in Northern Ireland, Scotland and Wales. At section 40B(4), it is provided that regulations may amend the definition of ‘Northern Irish apprenticeship’; ‘Scottish apprenticeship’ or ‘Welsh apprenticeship’ to ensure that information on the correct apprenticeship schemes in each of the devolved authorities can be shared.

### Justification

68. The creation of new data sharing gateways between HMRC and the devolved authorities is considered necessary to enable the latter to develop their own apprenticeship policy and, if they so wish, construct a system of funding apprenticeship schemes (which may resemble or differ to that which is intended to operate in England). In order for the successful operation of the new data sharing gateways, it is essential that the legislative framework correctly identifies who HMRC can share data with in Northern Ireland, Scotland and Wales. In each devolved territory, it may be the case that apprenticeship functions are exercised by other persons or bodies (such as executive agencies or local authorities), in addition to the Northern Ireland department, Scottish Ministers or Welsh Ministers (as the case may be). Such bodies may vary from time to time as

apprenticeship policy in the devolved authorities develops. If apprenticeship functions are exercised by other such bodies or persons, then the data sharing gateway should permit that body or person to also pass data to HMRC and, hence, the desire to create a regulation making power to identify appropriate bodies.

69. The definitions of ‘Northern Irish apprenticeships’; ‘Scottish apprenticeships’ and ‘Welsh apprenticeships’ are intended to capture apprenticeship arrangements in each country. However, it is expected that apprenticeships arrangements in the devolved authorities may change over time. For that reason, the definitions of ‘Northern Ireland apprenticeships’; ‘Scottish apprenticeships’ and ‘Welsh apprenticeships’ should be able to be revised so that the data sharing gateways keep pace with changes in apprenticeship policy as it develops in the devolved authorities.
  
70. Amending the definitions of apprenticeships in the devolved administrations is limited to purposes of data sharing under section 40B: the power does not determine what is or is not an apprenticeship in the devolved territories in any wider sense. Rather, the power is intended to ensure that data relating to relevant apprenticeships is able to be shared under the gateways (if apprenticeship schemes are changed in Scotland, Wales or Northern Ireland).

#### Justification for procedure selected

71. The Department considers the affirmative resolution procedure appropriate for this measure.
  
72. The power to amend the definition of an authority and / or apprenticeships in the devolved territories is, to some respects, a technical provision to ensure that the gateway shares data between relevant persons and in relation to the correct apprenticeship schemes. The power to amend the definitions of Northern Irish apprenticeships; Scottish apprenticeships and Welsh apprenticeships is intended to be exercised in line with current section 40B(3), which refers to specific legislation under which arrangements for apprenticeships are made in the devolved territories.

73. The level of parliamentary scrutiny under the affirmative resolution procedure will provide a sufficient safeguard in relation to amending definitions in primary legislation (which are key to the operation of the data sharing gateway under section 40B).

## **Part 6: Non-Domestic Rating**

### ***Amendments 18 to 26: Clause 26: alteration of non-domestic rating lists)***

*Power conferred on: Extension to Welsh Ministers in relation to Wales (previously Secretary of State in relation to England only)*

*Power exercisable by: Regulations*

*Parliamentary procedure: Negative resolution, affirmative resolution for civil penalty provisions provision.*

### **Context and purpose**

74. These amendments extend the powers in the original clause to make provision in relation to proposals to alter local or central non-domestic rating lists for Wales. The clause as currently drafted applies to England only. Whilst Business Rates is a devolved matter, the amendments have been included in the Bill on the request of the Welsh Government.

### **Justification**

75. The amendments will provide the same powers to Welsh Ministers in relation to proposals to alter local or central non-domestic rating lists for Wales as the Secretary of State has in relation to the equivalent English lists.

### **Justification for procedure selected**

76. The procedure to apply to regulations made using the powers contained in the amendments will be the equivalent Welsh procedure to that required in Westminster for regulations made in relation to English lists. As such, regulations, other than those making provision as to the civil penalties, made under section 55 are subject to the

negative resolution procedure. Those which make provision about civil penalties will be affirmative.

## **Part 7: Sunday Working**

***Amendment 27 and 53: New Clause [after Clause 26] and paragraph 3 of new Schedule: New section 41A of the Employment Rights Act 1996: Meaning of “normal Sunday working hours”***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution, save for regulations that include provision under [section 41A(4)(c)] which are subject to the affirmative resolution procedure*

### **Context and purpose**

77. This clause and Schedule confer a power on the Secretary of State to make provision in regulations as to how the “normal Sunday working hours” of a shop worker are to be calculated.
78. New section 41A(1) of the Employment Rights Act 1996 (“ERA 1996”) provides Sunday shop workers with a right to object to doing shop work for additional hours on Sunday. New Section 41A(2) defines additional hours as any number of hours of shop work which a shop worker does (or could be required to do) on Sunday that are (or would be) in excess of the shop worker’s “normal Sunday working hours”.
79. New Section 41A(3) confers a power on the Secretary of State to make regulations as to the meaning of a shop worker’s normal Sunday working hours. New section 41A(4)(a) provides that those regulations may include provision for the calculation to be determined by reference to the average number of hours worked on Sundays during a period specified or described in regulations. Section 41A(4)(b) and (c) provides that regulations may in special cases provide for the calculation to be varied or for the right to give an objection notice not to be exercisable.
80. New Section 41A(5)(a) provides that provision under new section 41A(4)(b) may include provision as to how the normal Sunday working hours are to be calculated in the

case of a shop worker who has not been employed for a sufficient period to enable a calculation to be made as otherwise provided under regulations. New section 41A(5)(b) provides that provision under section 41A(4)(c) may include provision for the right to give an objection notice not to be exercisable in the case of such shop workers until they have completed a period of employment specified or described in regulations.

81. New section 41A(6) makes clear that the power may not be used to prevent a shop worker from giving to the employer an objection notice where the shop worker has been continuously employed for at least a year.

### Justification

82. The power in new section 41A(3) is to enable the Secretary of State to make provision in regulations as to how a shop worker's normal Sunday working hours are to be calculated.
83. The Government's intended approach is that a shop worker's normal Sunday hours would be calculated by taking a shop worker's average Sunday hours during a reference period (see new section 41A(4)(a)). Provision would also be made to deal with special cases such as those who have not been employed for sufficient time to enable a calculation to be made by reference to the average number of hours worked on Sundays during a specific period (see new section 41A(4)(b) and (c) and (5)). The Government has therefore ensured that there are, on the face of the power, clear indications of what the regulations would be likely to cover.
84. The Government believes that the use of a delegated power to deal with the meaning of normal Sunday working hours is justified. The Government is mindful that shop workers may be engaged in a wide variety of working arrangements and that individual circumstances may vary significantly.
85. In addition, these working arrangements are constantly changing and evolving and the Government therefore believes that aspects of the meaning of normal Sunday working hours may need to be adjusted more frequently than Parliament can be expected to

legislate. We think that a delegated power is therefore justified to ensure that the meaning of normal Sunday working hours can be adjusted in light of experience. New section 41A(6) does, however, ensure that the power may not be used in the future to prevent a shop worker who has been continuously employed for at least a year from giving an objection notice.

#### Justification for procedure selected

86. We consider that the negative resolution procedure (which applies by virtue of s.236(2) ERA 1996) generally provides the appropriate level of Parliamentary scrutiny given that these regulations will be used to make detailed and technical provision as to the way a shop worker's normal working hours should be calculated, for example, by taking an average over Sundays during a specific period.
87. We do however consider that the affirmative resolution procedure should apply in the case of regulations which include provision for the right to object to additional hours to not be exercisable in special cases (see paragraph 9 of the new Schedule which amends section 236(3) ERA 1996). It is considered that the affirmative resolution procedure provides the appropriate level of Parliamentary scrutiny in relation to regulations which include such provision because the effect will be to prevent certain shop workers from being able to exercise the right to object to additional hours.

***Amendment 27 and 53: New Clause [after Clause 26] and paragraph 3 of new Schedule: New section 41B of the Employment Rights Act 1996: Explanatory statement: persons who become shop workers***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by Statutory Instrument*

*Parliamentary procedure: Negative resolution*

#### Context and purpose

88. This clause and Schedule provide a power to prescribe the content and form of the written statement which an employer must give to a person who becomes a Sunday shop worker informing them of: (a) the right to object to working on Sundays by giving the

employer an opting-out notice (if section 40 ERA 1996 applies to the shop worker); and (b) the right to object to doing shop work for additional hours on Sundays by giving the employer an objection notice. This will replace the power under section 42(6) ERA 1996 (insofar as it relates to shop workers) to amend the form of the written statement which is prescribed in section 42(4) and which must be given to a person who becomes a shop worker to whom section 40 applies. The purpose is to ensure that employers provide clear and helpful information to persons who become shop workers about their relevant statutory rights.

### Justification

89. The matters which are essential for inclusion in the statement, namely the rights which must be communicated to new shop workers, are set out in the primary legislation at new sections 41B(2) ERA 1996. The Government considers that further provision as to the content and form of the written statement will require detail that is more suitable for secondary legislation (for example, information as to where other sources of guidance can be found). The Government also considers that provision as to the content of the written statement may need to be adjusted from time to time, for example, to refer to new sources of guidance which are subsequently published and which it would be useful to make reference to in the written statement.
90. New section 41B(6) provides that regulations may make different provision for different purposes. This is to enable the Secretary of State to prescribe a different type of statement to be given to shop workers working in or around large shops. The rights to object to Sunday working which apply to persons working at such shops are different (*i.e.* the notice periods which apply are shorter) and it may be appropriate to reflect this in the content and form of the statement which is given to such shop workers.

### Justification for procedure selected

91. We consider that the negative resolution procedure (which applies by virtue of s.236(2) ERA 1996) provides the appropriate level of Parliamentary scrutiny. This mirrors the approach to the delegated power under s.42(6) ERA 1996 which enables the explanatory



statement for persons who become shop workers prescribed under section 42(4) to be amended by Order and which is being replaced by this new delegated power.

***Amendment 27 and 53: New Clause [after Clause 26] and paragraph 3 of new Schedule : New section 41C of the Employment Rights Act 1996: Explanatory statement: shop workers at commencement date***

*Power conferred on: Secretary of State*

*Power exercisable by: Regulations made by statutory instrument*

*Parliamentary procedure: negative resolution*

#### Context and purpose

92. This clause and Schedule provide a power to prescribe the content and form of the written statement which an employer must give to persons who are Sunday shop workers on the day before the commencement date informing them of: (a) the right to object to working on Sundays by giving the employer an opting-out notice (if section 40 ERA 1996 applies to the shop worker); and (b) the right to object to doing shop work for additional hours on Sundays by giving the employer an objection notice. The purpose is to ensure that employers provide clear and helpful information to existing shop workers about their relevant statutory rights.

#### Justification

93. The matters which are essential for inclusion in the statement, namely the rights which must be communicated to new shop workers, are set out in the primary legislation at new section 41B(2) ERA 1996. The Government considers that further provision as to the content and form of the written statement will require detail that is more suitable for secondary legislation. The Government also considers that provision as to the content of the written statement may need to be adjusted from time to time, for example, to refer to guidance which is subsequently published and which it would be useful to make reference to in the written statement.

94. New section 41C(6) provides that regulations may make different provision for different purposes. This is to enable the Secretary of State to prescribe a different type of

statement to be given to shop workers working in or around large shops. The rights to object to Sunday working which apply to persons working at such shops are different (*i.e.* the notice periods which apply are shorter) and it may be appropriate to reflect this in the content and form of the statement which is given to such shop workers.

#### Justification for procedure selected

95. We consider that the negative resolution procedure (which applies by virtue of s.236(2) ERA 1996) provides the appropriate level of Parliamentary scrutiny. This mirrors the approach to the delegated power under s.42(6) ERA 1996 which enables the explanatory statement prescribed under section 42(4) to be amended by Order.

#### **Part 9 (Public sector employment: restrictions on exit payments)**

*Amendments 33 to 39: Clause 35: Powers for the Welsh Ministers to relax restrictions on exit payments in section 153A(1) and section 153C(6) of the Small Business, Enterprise and Employment Act 2015.*

*Power conferred on: Welsh Ministers*

*Power exercisable by: Regulations*

*Parliamentary procedure: affirmative procedure before National Assembly for Wales*

96. In the clause as brought from the Lords, Welsh public sector authorities were within scope of regulations to be made by the Treasury under new section 153A(1) of the Small Business, Enterprise and Employment Act 2015 (the “2015 Act”). New section 153C(6) of the 2015 Act also provided that regulations made by the Treasury under new section 153A(1) could make provision for Welsh Ministers to relax restrictions imposed by those regulations on a body that wholly or mainly exercises functions in which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in s108 of the Government of Wales Act 2006). This reflected the position in respect of the recovery provisions introduced in the 2015 Act.

97. Following Government amendments, the clause now provides that Welsh Ministers may make regulations under s153A of the 2015 Act in respect of ‘relevant Welsh exit payments’. These are defined in the Bill as exit payments made to:
- (a) member of the National Assembly for Wales;
  - (b) the First Minister for Wales;
  - (c) Welsh Minister appointed under section 48 of the Government of Wales Act 2006;
  - (d) Counsel General to the Welsh Government;
  - (e) Deputy Welsh Minister;
  - (f) member of a county council or a county borough council in Wales;
  - (g) member of a National Park Authority in Wales;
  - (h) member of a Fire and Rescue Authority in Wales.
98. The list of relevant bodies is derived from the Government of Wales Act 2006 and are the bodies where the Welsh Assembly has legislative competence in respect of exit payments.
99. Any regulations made by the Welsh Ministers under s153A(1) may not be made unless a draft of the statutory instrument containing them has been laid before, and approved by a resolution of, the National Assembly for Wales. This reflects the use of the affirmative resolution procedure and the affirmative procedure for any regulations made under new s153A(1) by the Treasury and Scottish Ministers respectively.
100. Further, the clause now provides that the previous discretion to confer the power to relax restrictions on Welsh Ministers is a duty, and a further discretionary power is added such that that regulations made by the Treasury may also confer the power to relax restrictions imposed on a body that wholly or mainly exercises functions in relation to Wales on Welsh Ministers.

**BIS**

**10 March 2016**