THE LAW COMMISSION

(LAW COM No 240)

EDUCATION BILL
SCHOOL INSPECTIONS BILL

REPORT ON THE CONSOLIDATION OF
CERTAIN ENACTMENTS RELATING TO EDUCATION

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REPORT ON THE CONSOLIDATION OF CERTAIN ENACTMENTS RELATING TO EDUCATION

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

The Bills which are the subject of this Report consolidate certain enactments relating to education in England and Wales, and in particular the legislation relating to education in schools and school inspections. In order to produce a satisfactory consolidation it is necessary to make the recommendations which are set out in Appendix 1 to this Report.

The bodies listed in Appendix 2 to this Report have been consulted in connection with the recommendations and do not object to any of them.

MARY ARDEN
Chairman, Law Commission

22 April 1996

APPENDIX 1

RECOMMENDATIONS

Functions conferred on governing bodies

1. The general responsibility for the conduct of county, voluntary and maintained special schools is imposed on the governing bodies of those schools by section 16 of the Education (No. 2) Act 1986. Sections 3 and 4 of that Act provide for the constitution of such governing bodies, and section 238 of the Education Act 1993 provides for their incorporation.

Prior to the 1986 Act statutory functions that were to be exercised or performed by the governors of any such school collectively were expressed to be conferred on the governors of the school rather than on its governing body. However, that Act heralded a change of practice and since then all such functions have been expressed to be conferred on the governing body of all schools.

We recommend that, for the sake of consistency, all functions of this nature should be expressed to be conferred on the governing body of a school, whether the function derives from a pre-1986 Act, from the 1986 Act or from a later enactment. In view of the incorporation of governing bodies by the 1993 Act, this means that all such functions will fall to be exercised or performed by the body corporate which is the governing body.

The effect of this recommendation is incorporated throughout the Education Bill. It will not affect the re-enactment of references which are to be construed as references to individual governors or to governors of a particular category (eg foundation governors).

Section 298 of the Education Act 1993: pupil referral units

2. Section 298 of the Education Act 1993 provides for local education authorities to establish "pupil referral units", which are described as schools that are specially organised to provide education for children who require special arrangements to be made for their education on the grounds of illness, exclusion from school or otherwise and are not county or special schools.

Section 298(1) contemplates that the education provided at pupil referral units will be either full-time or part-time education. However, the basic definition of a "school", which is contained in section 14(5) of the Further and Higher Education Act 1992 and applies for the purposes of the Education Acts generally, requires a school to be an institution for providing *full-time* education (see section 14(1), (2) and (5) of the 1992 Act and sections 8(1) and 114(1) ("primary education") of the Education Act 1944).

The Education Act 1993 accordingly should have amended section 14(5) of the 1992 Act so as to ensure that a pupil referral unit providing *part-time* education could be regarded as a school for the purposes of the Education Acts. We recommend that this omission should be rectified.

Effect is given to this recommendation in clause 4(2) of the Education Bill.

Section 16(1A) of the Education Act 1980; section 100(6) of the Education Act 1993: exemption for certain transfers to new sites

3. Sections 12 and 13 of the Education Act 1980 require the publication and submission for approval by the Secretary of State of certain proposals affecting county schools and voluntary schools, including proposals to transfer such schools to new sites. Section 16(1) of that Act prohibits, until the necessary procedures have been followed and approvals given, the doing of anything for which proposals are required to be published and submitted under section 12 or 13.

(A) Section 16(1A) of the Education Act 1980, which was inserted by paragraph 78 of Schedule 19 to the Education Act 1993, provides that the prohibition contained in section 16(1) is not to apply to a transfer of a school to a new site if-

(a) the transfer is authorised by an order of the Secretary of State under section 16(1) of the Education Act 1944;

(b) it is intended that the school should return to its existing site within three years; or

(c) in the case of a county school, the LEA consider the transfer expedient for one of several specified reasons.

It appears, however, that this subsection was inserted in the wrong place: instead of qualifying the prohibition in section 16(1), it should have qualified the basic obligations in sections 12 and 13 to publish and submit for approval proposals for the transfer of schools to new sites. For example, where the governors of a voluntary school have already been authorised by an order of the Secretary of State under section 16 of the 1944 Act to transfer the school to a new site, they are nevertheless apparently still required by section 13 of the 1980 Act to publish their proposals and submit them for approval by the Secretary of State. On analysis, the exclusions referred to in (b) and (c) above appear to be similarly misplaced.

Accordingly we recommend that, in reproducing sections 12, 13 and 16 of the Education Act 1980, the disapplication effected by section 16(1A) should attach to the basic obligations in sections 12 and 13 to publish and submit for approval proposals for the transfer of schools to new sites, rather than to the prohibition contained in section 16(1).

Effect is given to this recommendation in clauses 35(1) and (2) and 41(2) and (3) of the Education Bill.

(B) Although certain kinds of proposals for transferring a school to a new site will thus not be required to be published in accordance with the provisions of the Education Bill reproducing sections 12 and 13 of the 1980 Act, there are circumstances where such proposals will, despite not requiring to be published, be relevant for the purpose of triggering certain statutory provisions. Thus we recommend that provision is made for some or all of these kinds of proposals to be included in the lists of provisions set out in the following provisions of the Education Bill-

(a) clause 82(3) (reproducing section 11(2) of the Education (No. 2) Act 1986: review of constitution of governing body);

(b) clause 179(1) (reproducing section 1(2) of the Education Act 1973: variation of trust deeds);

(c) clause 371(7) (reproducing section 18(7) of the 1986 Act: review of conclusions relating to curriculum); and

(d) paragraph 16(2) of Schedule 8 (reproducing section 8(12) of that Act: decisions requiring confirmation).

In the case of clauses 82(3) and 371(7) we are not recommending the inclusion of proposals for temporary transfers (ie those intended to last no more than three years). Furthermore, it is thought that it is not necessary to include in such lists in the Education Bill proposals for transfers already authorised by an order of the Secretary of State in contexts where proposals that such an order should be made are already covered.

Effect is given to this recommendation in clauses 82(3), 179(1) and 371(7) of, and paragraph 16(2) of Schedule 8 to, the Education Bill.

(C) Section 100(6)(b) of the Education Act 1993 is the equivalent for grant-maintained schools of section 16(1A)(b) of the Education Act 1980 (which exempts transfers intended to last no more than 3 years). Again it would appear that section 100(6)(b) should have qualified the basic obligation to publish and submit for approval proposals relating to such a transfer (which arises under section 96 of the 1993 Act). On the basis that such a transfer would fall outside the scope of section 96, it would appear that such a transfer should also fall outside the scope of section 97 of the 1993 Act, which confers power on the funding authority to publish proposals relating to changes of character, size or site.

We recommend that these points should be addressed in the Education Bill.

Effect is given to this recommendation in clauses 259(2), 260(3) and 263(6)(b) of the Education Bill.

Sections 13 and 14 of the Education Act 1980: consultation in connection with proposals

4. As mentioned above, section 13 of the Education Act 1980 requires the publication and submission for approval by the Secretary of State of certain proposals affecting voluntary schools.

(A) Section 13(1)(a) deals with proposals that an existing or new school should be maintained by a local authority as a voluntary school. The proposals may be made either by persons who themselves have established, or propose to establish, the school in question or by persons representing those persons.

Section 13(4) provides for such proposals to be approved by the Secretary of State with modifications after consulting "the persons by whom they were made"; while section 13(5) requires the proposals, once approved, to be implemented by "the persons by whom they were made".

Where the proposals were made by persons acting in a representative capacity, it is not appropriate for the duty to implement the proposals to fall on those persons. We recommend therefore that, in reproducing section 13(5), the duty should in such a case fall instead on the persons whom those persons represent.

Effect is given to this recommendation in clause 45(1)(a) of the Education Bill.

(B) Section 13(1)(b) deals with various kinds of proposals relating to existing voluntary schools, including proposals to transfer such schools to new sites. It is clear from section 13(8) that the new site may be in the area of a local education authority other than the authority by whom the school is currently maintained.

Section 13(4) provides for such proposals to be approved by the Secretary of State with modifications after consulting "the local education authority by whom the school is, or is to be, maintained".

Section 14 of that Act provides for the approval by the Secretary of State of particulars of the proposed school premises where there is to be a transfer to a new site. Subsection (2) of that section requires "the local education authority" to be consulted before such particulars are submitted by the school's governing body.

In neither context is it clear whether, where it is proposed that a school should be transferred to a new site in the area of a different local education authority, consultation should be with the local education authority currently maintaining the school or with the one by whom it is to be maintained. We recommend that this obscurity should be removed by requiring, in both contexts, consultation with the authority by whom the school is to be maintained. In the case of consultation regarding modifications (ie under the existing section 13(4)), we recommend that such consultation should be in addition to consultation with the authority currently maintaining the school.

Effect is given to these recommendations in clauses 43(7) and 44(4) of the Education Bill.

Schedule 1 to the Education Act 1946: cost of school buildings on new site

5. Section 16(1) of the Education Act 1944 provides for the Secretary of State to authorise the transfer of a voluntary school to a new site. Paragraph 2(1) of Schedule 1 to the Education Act 1946 (as amended by the Education Act 1993) provides that, where such a transfer is authorised in the case of an aided or special agreement school, the expenses of providing any school buildings on the new site are to be defrayed by the governors with the assistance of any grant which may be made under section 281 of the 1993 Act. Paragraph 2(1) goes on to say that "accordingly ... the Secretary of State shall not direct that a school shall be an aided school or a special agreement school unless he is satisfied that the governors of the school will be able and willing to defray any such expenses" (para.(a)).

The practical application of paragraph 2(1)(a) is unclear. On the one hand, it might be thought that it was controlled by the opening words of paragraph 2(1) so that it only applied where a transfer had been authorised; but it is difficult to see when the Secretary of State *could* direct that a school which is ex hypothesi already an aided or special agreement school should be such a school. The only possible scenario would seem to be the very limited set of circumstances covered by section 15(5) of the 1944 Act (reproduced as clause 58(2) of the Education Bill) where a special agreement school becomes an aided school. Otherwise, on this approach, paragraph 2(1)(a) seems to beat the air.

If on the other hand one does not regard the opening words as controlling the application of paragraph 2(1)(a) in this way, it appears to impose a perfectly general bar on directing that a school should be an aided or special agreement school unless the Secretary of State is satisfied as mentioned above. But it cannot operate in this way, because it only makes sense to require the Secretary of State to be so satisfied where a *particular* transfer of a school to a new site is in contemplation and he can assess the likely actual expenditure on school buildings.

In the result it seems that the most appropriate way of giving effect to paragraph 2(1)(a) in the Education Bill would be by imposing a requirement that, before authorising the transfer of an aided or special agreement school to a new site under clause 47(1) (reproducing section

16(1) of the 1944 Act), the Secretary of State must be satisfied that the governing body are willing and able, with the assistance of any grant made under clause 65 (reproducing section 281 of the 1993 Act), to meet the cost of the school buildings. We therefore recommend that the Education Bill should contain such a requirement. (The reference to meeting such costs with the assistance of any grant made under clause 65 would reflect the opening words of paragraph 2(1) and the test imposed by clause 48(2) (reproducing section 15(2) of the 1944 Act) for determining whether a new voluntary school should be an aided school.)

Effect is given to this recommendation in clause 47(2) of the Education Bill.

Section 54 of the Education (No. 2) Act 1986: controlled school becoming an aided school

6. Section 54 of the Education (No. 2) Act 1986 enables the Secretary of State to direct that a controlled school is to be an aided school. Section 54(2) provides, however, that the Secretary of State is not to do so unless satisfied that the governing body will be able and willing, with the assistance of any maintenance contribution payable by him under the Education Act 1944, to defray the expenses of maintaining such a school that fall on its governing body under section 15(3)(a) of that Act.

The reference to a maintenance contribution is to the contribution formerly payable by the Secretary of State under section 102 of the 1944 Act. But section 102 has been repealed by the Education Act 1993, section 281 of which established a replacement procedure for the payment by the Secretary of State of grants to governing bodies of aided schools.

Although the 1993 Act made a number of amendments substituting references to grants under section 281 for references to maintenance contributions, this was not done in the case of section 54(2) of the 1986 Act. We recommend that this apparently inadvertent omission should be corrected.

Effect is given to this recommendation in clause 54(2) of the Education Bill.

Section 11 of the Education (No. 2) Act 1986: events requiring review of constitution of governing body of county, controlled or maintained special school

7. Section 11 of the Education (No. 2) Act 1986 requires the constitution of the governing body of a county, controlled or maintained special school to be reviewed in certain circumstances, which include the implementation of any proposal under section 16(1) of the Education Act 1944 (transfers to new sites) that provides for an increase in the number of pupils at the school (see section 11(2)(a)(i) of the 1986 Act). Section 11(3) provides for a review triggered by such a proposal to be carried out by the local education authority rather than the governing body; and section 11(6) provides for the local education authority to determine when the implementation of the proposal is to be taken to have occurred and to notify this to the governing body.

Whereas the operation of these particular provisions of section 11 in relation to any such proposal may have been appropriate when the 1986 Act was passed in so far as section 16(1) of the 1944 Act then authorised transfers to new sites of county schools, it is thought that it is not appropriate now that section 16(1), as amended by the Education Act 1993, applies no longer to such schools but only to voluntary schools. The reason for taking this view is that section 16(1) now applies to exactly the same kinds of schools as section 13(1)(b) of the Education Act 1980; and the implementation of a proposal to transfer a voluntary school to

a new site to which section 13(1)(b) of the 1980 Act applies (where the proposal provides for an increase in pupils) is *not* one to which section 11(3) and (6) of the 1986 Act apply (since they do not apply to proposals falling within section 11(2)(a)(iii)). There is no reason for a different procedure to apply to the same sort of school according to whether the transfer to a new site is authorised under section 16 of the 1944 Act or section 13 of the 1980 Act.

We therefore recommend that, in reproducing section 11(3), the obligation to carry out a review should fall on the governing body and not the local education authority, and that the provision of the Education Bill reproducing section 11(6) should not apply in relation to the implementation of a proposal under the provision of the Bill reproducing section 16(1) of the 1944 Act.

Effect is given to this recommendation in clause 82(4) and (7) of the Education Bill, which omit any reference to clause 82(3)(c).

Section 9 of the Education (No. 2) Act 1986: review of grouping

8. Section 9 of the Education (No. 2) Act 1986 provides for two or more LEA-maintained schools to be grouped under a single governing body. Section 9(4) requires the local education authority to review any grouping where a proposal or alteration of a kind mentioned in section 9(5) relates to one of the grouped schools.

The proposals and alterations that will at present, by virtue of section 9(5), trigger a review in this way include proposals to establish, alter or discontinue a school under section 12 or 13 of the Education Act 1980; proposals to change the status of a controlled school to that of an aided school under section 54 of the 1986 Act; and any change of status from aided or special agreement school to controlled school by virtue of an order under section 15(4) of the Education Act 1944. They do not, however, include any change of status from special agreement school to controlled or aided school by virtue of an order under section 15(5) of the 1944 Act or the division of a county, controlled or aided school into two or more schools by virtue of an order under section 2 of the Education Act 1946.

It is thought that in the context of section 9(4) there is no good reason for distinguishing between the proposals and alterations at present specified in section 9(5) and changes effected by orders under section 15(5) of the 1944 Act or under section 2 of the 1946 Act. We therefore recommend that such changes should also trigger a review under the provision of the Education Bill reproducing section 9(4).

Effect is given to this recommendation in clause 94(2)(c) of the Education Bill.

References to "the promoters" in the Education (No. 2) Act 1986

9. A number of the provisions of the Education (No. 2) Act 1986 reproduced in the Education Bill refer to "the promoters". This expression is defined in section 65(1) of the Act, in relation to an intended new voluntary school or an existing school which it is proposed should be maintained by an LEA, as meaning either the persons who intend to establish the new school or (as the case may be) who established the existing school, or their representatives.

On the face of it, this definition appears to mean that wherever a reference to "the promoters" occurs in connection with, for example, an obligation to consult in relation to an

intended new voluntary school, there is a choice between consulting the proposed founders of the school and consulting their representatives: see for example section 12(5) of the Act (consultation in connection with the constitution of a temporary governing body). It is thought, however, that it was never intended that there should be a choice of this nature, and that instead the reason for section 65(1) referring (in relation to an intended new school) to both the persons intending to establish it and to their representatives was that the procedure for establishing a new voluntary school may (as mentioned in paragraph 4 above) be initiated under section 13 of the Education Act 1980 by proposals made either by the proposed founders of the school or by persons representing those persons. Thus section 65(1) was designed, it is thought, to reflect both of these possibilities. Similar reasoning applies in the case of proposals that an existing school should be maintained by an LEA.

We accordingly recommend that, in reproducing these references to "the promoters" in the Education Bill, any suggestion that, in the contexts in which they occur, there is a choice between the proposed founders (or the founders) of the school and their representatives should be removed, and effect should be given to what is thought to be the true intention of section 65(1), namely that in every case it is the persons who made the relevant proposals under section 13 of the 1980 Act (whether acting on their own behalf or as representatives) who are meant.

Effect is given to this recommendation in clauses 97(3), (4) and (5) and 422(1), (5) and (7) of, and paragraph 1 of Schedule 9 and paragraph 15 of Schedule 19 to, the Education Bill.

Section 9 of the Education (No. 2) Act 1986: grouping of new schools

10. As mentioned above, section 9 of the Education (No. 2) Act 1986 provides for two or more LEA-maintained schools to be grouped under a single governing body. Paragraph 3(6) of Schedule 2 to that Act deals with the case where a new school is to form part of such a group. However, although it deals with the way in which the requirements as to consent and consultation under section 10(5) and (6) of the Act are to operate in such a case, it does not deal with the difficulty that a number of provisions of sections 9 and 10 are drafted by reference to the *existing* circumstances of the schools to be grouped, and are thus not apt to deal with new schools (whose circumstances can only really be judged after the time when they have begun to operate in accordance with a normal instrument of government).

We accordingly recommend that, in re-enacting sections 9 and 10, it should be made clear that, so far as necessary for the purposes of grouping a new school with effect from that time, any provision which operates by reference to the existence or absence of any particular circumstances in the case of a school, or to the status of a school, is to be treated as operating by reference to the position as it will be as at that time.

Effect is given to this recommendation in clause 100(2) and (4) of the Education Bill.

Section 16(3) of the Education (No. 2) Act 1986: separate departments to be treated as separate schools

11. Section 16(3) of the Education (No. 2) Act 1986 provides that where a county, voluntary or maintained special school is organised in two or more separate departments, each with a head teacher, any provision made by or under that Act which confers functions on or in relation to the head teacher of the school is to have effect as if each department were a separate school (except where the articles of government for the school provide otherwise).

The scope of this provision is limited to provisions made by or under the 1986 Act. However, it is thought that the same rule should apply to provisions of the Education Bill which are not derived from the 1986 Act. Accordingly we recommend that, in reproducing section 16(3), it should be expressed to apply to any provision made by or under the Education Bill which confers functions on or in relation to the head teacher of a school organised in two or more separate departments with their own head teachers.

Effect is given to this recommendation in clause 132 of the Education Bill.

Section 44 of the Education Reform Act 1988: appointment and dismissal of staff during financial delegation

12. Chapter III of Part I of the Education Reform Act 1988 provides for LEA-maintained schools to manage their own "delegated" budgets. Section 44 of that Act makes provision for the staffing of schools with delegated budgets. Subsection (2) of that section disapplies certain provisions as to staffing that would otherwise apply under or by virtue of the Education (No. 2) Act 1986; subsection (3) provides for the application of Schedule 3 to the 1988 Act instead; and subsection (4) imposes a duty on the local education authority to amend a school's articles of government so as to include a statement indicating that certain of the articles are superseded by Schedule 3.

Two difficulties have emerged in connection with section 44(2). In the first place, paragraph (a) disapplies section 35(2) of the 1986 Act, which requires duties as to consultation to be imposed by the articles of government, but apparently leaves any provision of the articles made in pursuance of section 35(2) still capable of operating. Secondly, paragraph (c) is clearly intended to save the power to make articles under section 40(5) of the 1986 Act about the non-attendance of the clerk to the governors, but this is inconsistent with the wording of paragraph (b) which purports to disapply (among other things) any provision of the articles made in pursuance of section 40(5).

Corresponding difficulties arise in connection with section 44(4) in that (a) it does not contain any reference to articles made in pursuance of section 35(2) of the 1986 Act being superseded; and (b) it suggests that articles made in pursuance of section 40(5) of that Act will be superseded. In both respects section 44(4) is inconsistent with what is thought to be the true intention of section 44(2).

We recommend that the difficulties mentioned above should be resolved by ensuring that any articles made under the equivalent of section 35(2) (ie paragraph 10 of Schedule 13 to the Education Bill) will be superseded during financial delegation; that any articles made under the equivalent of section 40(5) (ie clause 135(8)) will not be so superseded; and that both of these propositions are reflected in the equivalent of section 44(4).

Effect is given to this recommendation in clauses 136(2) and 141(2) of the Education Bill.

It is not proposed, however, that any local education authority who have already complied with their duty under section 44(4) to amend a school's articles should be required to make any further amendments as a result of the changes recommended above. See paragraph 18 of Schedule 39 to the Education Bill.

Section 23 of the Education (No. 2) Act 1986: exclusion of pupils on disciplinary grounds

13. Section 23 of the Education (No. 2) Act 1986 requires the articles of government of a county, voluntary or maintained special school to impose certain duties on head teachers as to the giving of information to parents and others in connection with the exclusion of pupils from the school on disciplinary grounds.

It appears that there are a number of gaps in the protection which section 23 is designed to afford:

(a) neither paragraph (a)(i) (duty to inform parent) nor paragraph (b) (duty to inform governing body and local education authority) is in terms apt to apply in the case of a permanent exclusion (ie expulsion);

(b) there is no duty to inform a pupil of 18 or over of the period of his exclusion (or, if he is being permanently excluded, that he is being so excluded) or of the reasons for the exclusion;

(c) where the exclusion of such a pupil for a fixed period is made permanent, there is no duty to inform him of the decision or the reasons for it; and

(d) there is no provision for a parent (or the pupil himself if 18 or over) to be informed that he may make further representations to the governing body and the local education authority where a fixed-period exclusion is made permanent.

We recommend that each of these omissions should be corrected in the Education Bill.

As mentioned above, the existing duties as to the giving of information are at present required to be contained in a school's articles of government. If these recommendations were to follow suit by extending the provisions which are required to be so contained, there would be a legal obligation to change the articles of every school to which the recommendations applied (that is, every LEA-maintained school) once the Bill had come into force. It is considered that this would not be desirable, and we therefore recommend that, in reproducing the provisions of section 23 of the 1986 Act, these provisions should operate as free-standing propositions of law, rather than as provisions to be contained in a school's articles.

Effect is given to these recommendations in clause 157 of the Education Bill.

Section 29 of the Education Act 1993: eligibility to vote in ballot

14. Sections 25 and 26 of the Education Act 1993 deal with the procedures for holding a ballot of parents on the question whether grant-maintained status should be sought for a school. The procedures under section 25 are initiated by a resolution of the governing body, while those under section 26 are initiated by a request from the parents of at least 20 per cent. of the registered pupils at the school. Neither set of procedures is, however, to apply where a ballot has been held within the preceding 12 months, unless the Secretary of State consents.

Section 29 of the 1993 Act at present provides that a person is eligible to vote in a ballot if he is a registered parent of a registered pupil at the school as at the end of the period of 14 days beginning with the date of the relevant resolution or request. However, this time limit may be inappropriate in a case where a ballot has already been held within the preceding 12 months and the Secretary of State's consent to a further ballot has been obtained. The administrative procedures involved in obtaining consent are such that by the time the consent is obtained the identity of the registered parents of registered pupils at the school may have changed as a result of the arrival or departure of such pupils in the interim.

We therefore recommend that, in a case where the Secretary of State's consent has been obtained, the date as at which a parent's entitlement to vote in a ballot is determined should be that immediately following the period of 14 days beginning with the date of the giving of the Secretary of State's consent (rather than with the date of the relevant resolution or request).

Effect is given to this recommendation in clause 190(2)(b) of the Education Bill.

Section 19 of the Education Reform Act 1988 : exemption from National Curriculum

15. Section 19 of the 1988 Act provides for head teachers to exclude or modify the operation of the National Curriculum in the case of particular pupils and to give certain information where they do so.

We recommend that, in reproducing section 19, the Education Bill should contain a provision ensuring that, where the information given under the provision of the Bill reproducing section 19(3) or (5) contains an indication that the head teacher is of the opinion that the pupil has (or probably has) special educational needs as mentioned at present in section 19(4)(c)(ii), the information is given to, and considered by, the local authority responsible for the pupil in accordance with clause 321(3) of the Bill (reproducing section 165(3) of the Education Act 1993: duty to identify children with special educational needs). As a result, where the pupil's school is maintained by a local education authority who are not responsible for the pupil in this way, the information would be required to be given both to that authority and to the responsible authority mentioned above.

Effect is given to this recommendation in clause 366(3) to (7) of the Education Bill.

Section 6 of the Education Reform Act 1988: arrangements for collective worship

16. Section 6(1) of the Education Reform Act 1988 establishes the general rule that all pupils at an LEA-maintained or grant-maintained school should take part in an act of collective worship on each school day.

(A) Section 6(3) provides that the arrangements for such collective worship are to be made (in the case of a county school) by the head teacher after consultation with the governing body or (in the case of a voluntary school) by the governing body after consultation with the head teacher. In the case of a grant-maintained school that was formerly a county school section 138(8) of the Education Act 1993 provides for such arrangements to be made by the head teacher after consultation with the governing body.

There is, however, no provision directing by whom such arrangements are to be made in the case of a grant-maintained school that was formerly a voluntary school. We recommend that this omission should be rectified by requiring, by analogy with section 138(8) of the 1993 Act (which reflects the position as it was before the school became grant-maintained), that such arrangements are made by the governing body after consultation with the head teacher.

Effect is given to this recommendation in clause 385(4)(b) of the Education Bill.

(B) Section 6(5) of the 1988 Act makes provision for the governing body of an aided or special agreement school or of a grant-maintained school to make arrangements for the required act of collective worship to take place, on special occasions, elsewhere than on school premises. By contrast with the position that applies under section 6(3) as regards the normal

arrangements for collective worship (which, as mentioned above, are made by a governing body after consultation with the head teacher), there is no requirement for consultation with the head teacher where special arrangements are made by a governing body under section 6(5). We recommend that this omission should be rectified.

Effect is given to this recommendation in clause 385(6) of the Education Bill.

Sections 22 and 25(2) of the Education Reform Act 1988: extension of certain provisions relating to the curriculum for maintained schools

17. (A) Section 22(1) of the Education Reform Act 1988 enables the Secretary of State to make regulations requiring local education authorities, governing bodies and head teachers of LEA-maintained and grant-maintained schools to make available information prescribed by the regulations which is relevant for the purposes of Chapter I of Part I of that Act (which relates to the curriculum for, and religious worship in, such schools).

Chapter I includes, among other things, section 14 of the Act, which (as amended by the Education Act 1993) deals with the constitution and functions of the Curriculum and Assessment Authority for Wales (Awdurdod Cwricwlwm ac Asesu Cymru). It does not, however, include the corresponding provisions relating to the equivalent English body, the School Curriculum and Assessment Authority: these provisions appear in sections 244 and 245 of the Education Act 1993.

We recommend that, in reproducing section 22(1) of the 1988 Act, the scope of that provision should be widened so that information may be required which is relevant for the purposes of the provisions re-enacting sections 244 and 245 of the 1993 Act.

Effect is given to this recommendation in clause 408(4) of the Education Bill, so far as that provision extends to clauses 358 and 359.

(B) Section 25(2) of the 1988 Act provides that nothing in Chapter I of Part I of that Act applies in relation to a nursery school or a nursery class in a primary school.

In re-enacting section 25(2) as a provision of Part V of the Education Bill, which includes a considerable number of provisions not at present contained in Chapter I of Part I of the 1988 Act, the question arises whether any of those extra provisions could apply to a nursery school and, if so, whether the provision reproducing section 25(2) ought to apply in relation to them so as to exclude their application in relation to nursery schools. No difficulty arises so far as those extra provisions in terms apply to county or voluntary schools (because such schools do not include nursery schools: see section 9(2) of the Education Act 1944).

On the other hand it is possible for a nursery school to be a maintained special school, with the result that, unless the position is made clear, it might be thought that any of the extra provisions relating to maintained special schools were potentially capable of applying in relation to a nursery school which is a maintained special school. In fact it is considered that it would not be appropriate for any of these extra provisions to apply in relation to such a nursery school. For example, it is not thought appropriate to place on an LEA the duty to make a written statement about the secular curriculum in relation to a special nursery school (under clause 370(1) of the Education Bill, reproducing section 17(1) of the Education (No. 2) Act 1986) when such a duty does not apply to a nursery school which is not a special school.

The question also arises whether any of the extra provisions deriving otherwise than from Chapter I of Part I of the 1988 Act ought to apply in relation to a nursery class in a primary school. Again it is thought that none of these extra provisions should so apply.

Accordingly we recommend that, in reproducing in Part V of the Education Bill any provision not deriving from Chapter I of Part I of the 1988 Act, such a provision should not (if it could otherwise so apply) apply in relation to a nursery school or in relation to a nursery school in a primary school.

Effect is given to this recommendation in clause 410 of the Education Bill.

Powers to make subordinate legislation: incidental and supplemental provisions etc (Education Bill)

18. The Education Bill consolidates a number of provisions conferring power on the Secretary of State to make orders or regulations. These provisions are not, however, consistent as regards whether they authorise the making of incidental, supplemental, saving or transitional provisions; whether different provision may be made for different cases, circumstances or areas; and whether the making of different provision in relation to England and Wales respectively is expressly authorised.

(A) *Orders.* No difficulty is thought to arise in connection with the provisions of the Education Acts 1944 and 1946 conferring order-making powers (which authorise the making of local orders rather than statutory instruments). For the most part these make no provision at all for any of the matters referred to above; and it is relatively straightforward to reproduce the few existing powers under these Acts that authorise the making of provision for any of these matters. The difficulty arises in relation to the later Acts reproduced in the Bill (which all confer power to make orders by statutory instrument). Section 63(3) of the Education (No. 2) Act 1986 authorises, in relation to orders under that Act, the making of different provision for different cases, circumstances or areas and the inclusion of incidental, supplemental or transitional provisions. Section 232(5) of the Education Reform Act 1988 makes similar provision in relation to orders under that Act, except that it does not authorise the making of different provision for different areas; but it also authorises the making of different provision in relation to England and Wales respectively. Section 301(6) of the Education Act 1993, which applies to orders under that Act, is similar to section 63(3) of the 1986 Act except that it authorises in addition the making of saving provisions.

It is thought that little purpose would be served by attempting to reproduce all these variations in connection with the powers to which they at present attach, and therefore we recommend that a standard set of provisions, dealing with all the matters mentioned in the previous paragraph, should be adopted in relation to all the order-making powers under the 1986, 1988 and 1993 Acts. It is not thought that any extension effected thereby would result in a significant widening of any of the powers involved.

Effect is given to this recommendation in clause 568(5) and (6) of the Education Bill.

We recommend adopting a similar approach in relation to orders made by the funding authorities under the 1993 Act, except that, because each authority operates for England or for Wales, there is no need to enable a funding authority to make different provision in relation to England and Wales respectively.

Clause 568(5) and (6) of the Education Bill also give effect to this recommendation.

(B) *Regulations.* A similar variety of ancillary provisions occurs in connection with the regulation-making powers consolidated in the Education Bill. In addition to the provisions of the 1986, 1988 and 1993 Acts referred to above (which also apply to regulations under those Acts), section 35(4) of the Education Act 1980 authorises regulations under that Act to make different provision for different cases or circumstances, and to include incidental, supplemental or transitional provisions; section 3(4) of the Education (Grants and Awards) Act 1984 makes similar provision in relation to regulations under that Act; and a more limited range of provisions is authorised by section 19(3) of the Education (Schools) Act 1992.

We recommend adopting in relation to the regulation-making powers under the Bill a similar approach to that mentioned above in connection with orders (although there is no need to deal with funding authorities since they do not make regulations).

Effect is given to this recommendation in clause 569(4) and (5) of the Education Bill.

However, we recommend that the restriction at present imposed by section 35(5) of the Education Act 1980, which prevents different provision being made in relation to England and Wales respectively by regulations made under section 38(5) of that Act, should be reproduced.

Effect is given to this recommendation in clause 569(6) of the Education Bill.

(C) *Statutory instruments.* (i) Section 1 of the Education Act 1964 (which deals with middle schools) was amended by the Education Act 1980 so as to confer on the Secretary of State a power to make regulations. Although section 35(1) of the 1980 Act provided that regulations made by the Secretary of State under that Act are to be made by statutory instrument, the 1980 Act did not expressly provide for the new power under section 1 of the 1964 Act to be exercisable by statutory instrument. It is thought that there can be no doubt that it was intended that this power should be so exercisable, and we recommend that this omission should be corrected.

Effect is given to this recommendation in clause 569(1) of the Education Bill, so far as that provision applies to the power conferred by clause 5(4).

(ii) Section 63(1) of the Education (No. 2) Act 1986 has the effect that regulations under section 54(3) of that Act, which prescribe the manner in which proposals under section 54 are to be published, are *not* to be made by statutory instrument. It is thought that this was due to an oversight since all other powers to prescribe the manner in which proposals are to be published are exercisable by statutory instrument (see, for example, sections 12(1) and 13(1) of the Education Act 1980 taken with section 35(1) of that Act). We recommend that this oversight should be corrected.

Effect is given to this recommendation in clause 569(1) of the Education Bill, so far as that provision applies to the power conferred by clause 52(1)(a).

Section 118 of the Education Act 1944: application to the Isles of Scilly

19. Section 118 of the Education Act 1944 requires the Secretary of State to make an order applying that Act to the Isles of Scilly as if the Isles were a separate non-metropolitan county, and authorises such an order to provide for the Act to apply to them subject to modifications specified in the order. The power was exercised by the Isles of Scilly (Local Education Authority) Order 1945, SR & O 1945/360, which, as amended by the Local Authorities etc. (Miscellaneous Provisions) Order 1977, SI 1977/293, applies the 1944 Act to

the Isles as if they were a separate non-metropolitan county, but with the omission of section 88 of that Act (duty to appoint a chief education officer).

None of the subsequent Education Acts has made special provision for the Isles. A similar problem of inconsistency of treatment was considered in connection with the consolidation of the Rent Acts in 1977 and the Housing Acts in 1985. The solution adopted on those occasions was to dispense with the need for an order to extend provisions to the Isles but to preserve and extend the power to make exceptions, adaptations and modifications (see Law Commission recommendations No. 13 in Cmnd 6751 and No. 29 in Cmnd 9515 and sections 153 of the Rent Act 1977 (c. 42) and 620 of the Housing Act 1985 (c. 68)).

We recommend that the same general solution should be adopted on the present occasion, although it is thought that it will be sufficient to follow section 118 of the 1944 Act by authorising the prescribing of modifications only, rather than exceptions, adaptations and modifications. At the same time the specific modification already provided for by section 118 (namely that the Isles are to be treated as a separate non-metropolitan county) should be reproduced.

Effect is given to this recommendation in clause 581 of the Education Bill.

Although orders made under section 118 are at present not made by statutory instrument, we recommend that any orders made under clause 581 should be so made in order that they will receive the wider publicity accorded to such instruments.

Effect is given to this recommendation in clause 568(1) of the Education Bill, so far as that provision applies to orders under clause 581.

Section 8 of the Education (No. 2) Act 1986: confirmation of decisions

20. Section 8 of the Education (No. 2) Act 1986 deals with the proceedings of the governing body of an LEA-maintained school. Section 8(11) requires certain decisions taken at a meeting of the governing body of an aided or special agreement school to be of no effect unless confirmed by a second meeting of the governing body.

The decisions which, by virtue of section 8(12), are at present subject to section 8(11) include a decision that would result in the submission of proposals to establish or alter the school under section 13 of the Education Act 1980; a decision to serve a notice relating to the discontinuance of the school under section 14(1) of the Education Act 1944; and a decision that would result in an application for a change of status from aided or special agreement school to controlled school by virtue of an order under section 15(4) of the Education Act 1944. They do not, however, include a decision that would result in an application for a change of status from special agreement school to controlled or aided school by virtue of an order under section 15(5) of the 1944 Act, or in the submission of proposals for the division of an aided school into two or more schools by virtue of an order under section 2 of the Education Act 1946.

Furthermore, although these decisions at present include a decision as to the submissions to be made to the Secretary of State in consultation carried out under section 16(3) of the 1944 Act in connection with a proposed transfer of the school to a new site under section 16(1) of that Act, they do not include a decision that would result in an application for an order authorising such a transfer.

It is thought that, in the context of section 8(11), there is no good reason for distinguishing between the decisions already specified in section 8(12) and the decisions omitted as mentioned in the last two paragraphs. We therefore recommend that, in reproducing section 8(12), decisions corresponding to those so omitted should also require confirmation under the provision of the Education Bill reproducing section 8(11).

Effect is given to this recommendation in paragraph 16(2)(a) to (c) of Schedule 8 to the Education Bill so far as those provisions relate to a decision to request the making of an order under clause 47 or a decision that would result in an application under clause 58(1) or in the submission of proposals for the division of an aided school into two or more schools by virtue of an order under clause 51.

Sections 1 and 3 of the Education Act 1944: former Secretary of State for Education

21. As originally enacted, section 1(2) of the Education Act 1944 established the Minister for Education as a corporation sole, and the administrative functions under that Act were conferred on that Minister. Section 3 of that Act contained certain connected provisions as regards documents issued by that Minister. In 1964 the Minister for Education was replaced by the Secretary of State for Education and Science (by the Secretary of State for Education and Science Order 1964, SI 1964/490) and sections 1(2) and 3 were accordingly amended to provide for the incorporation of that Secretary of State and to make provision as to documents issued by him; other statutory references to the Minister for Education were also replaced by references to the Secretary of State for Education and Science.

As a result of a further transfer of functions order in 1992 (the Transfer of Functions (Science) Order 1992, SI 1992/1296) the Secretary of State for Education and Science was restyled the Secretary of State for Education, and statutory references to the Secretary of State for Education and Science (including those in section 1(2) and 3 of the 1944 Act) were replaced, non-textually, by references to the Secretary of State for Education.

In 1995 the Transfer of Functions (Education and Employment) Order 1995 (SI 1995/2986) transferred all the functions of the Secretary of State for Education either to the Secretary of State at large or to a new Secretary of State, the Secretary of State for Education and Employment. The Order also provided for the incorporation of the new Secretary of State as a corporation sole (see Article 10 of the Order), and for the transfer to that Secretary of State of all the property, rights and liabilities of the Secretary of State for Education.

Given that, as a result of the 1995 Order, the Secretary of State for Education now has no functions and no property, rights or liabilities, the question arises on consolidation whether any useful purpose would be served by re-enacting sections 1(2) and 3 of the 1944 Act. It is thought that, in these circumstances, the re-enactment of these provisions would in fact serve no useful purpose; and we accordingly recommend that they should be repealed by the Education Bill without re-enactment.

Powers of entry of members of the Inspectorate

22. Section 2(2)(b) of the Education (Schools) Act 1992 provides for school inspections to be carried out by the Chief Inspector for England, and section 6(2)(b) of the Act makes corresponding provision in relation to the Chief Inspector for Wales. However, whereas under sections 3(3) and (4) and 7(3) and (4) of the Act HM Inspectors of Schools in England or in Wales are given rights of entry and inspection in connection with inspections carried out under

those sections and the wilful obstruction of such rights attracts a criminal penalty, no equivalent rights are given to either of the Chief Inspectors in connection with inspections carried out under section 2(2)(b) or 6(2)(b). It is thought that this omission was not intended and we therefore recommend that it should be corrected.

Effect is given to this recommendation in clauses 2(8) to (10) and 5(8) to (10) of the School Inspections Bill.

Since paragraph 6 of Schedule 1 to the Act enables the functions of a Chief Inspector to be delegated to any Inspector, to any other member of his staff or to any additional inspector assisting him under paragraph 2 of the Schedule, it is necessary to ensure that the same rights of entry and inspection (and the same criminal penalty) should apply in connection with inspections under the provisions of the School Inspections Bill reproducing sections 2(2)(b) and 6(2)(b) of the Act where they are carried out by persons authorised to act on the Chief Inspector's behalf. We therefore recommend that provision to this effect should be made in the Bill.

Effect is given to this recommendation in paragraph 5(3) of Schedule 1 to the School Inspections Bill.

Section 9 inspections by members of the Inspectorate

23. Section 9 of the Education (Schools) Act 1992 provides for schools to be regularly inspected by inspectors registered under section 10 of the Act. As a result of the Education Act 1993 two separate régimes now govern such inspections: sections 205 to 212 of the 1993 Act apply to inspections of county, voluntary, maintained special, grant-maintained and grant-maintained special schools, while paragraphs 9 to 12 of Schedule 2 to the 1992 Act (as amended by the 1993 Act) apply to inspections of other schools.

A. Both régimes allow the Chief Inspector for England or for Wales to require a section 9 inspection to be carried out by a member of the Inspectorate (that is, by himself, any HM Inspector of Schools in England or in Wales or any additional inspector) instead of by a registered inspector: see paragraph 12(1) of Schedule 2 to the 1992 Act and section 205(1) of the 1993 Act. However, although in relation to inspections under paragraphs 9 to 12 of the Schedule paragraph 12(2) is apt to apply (among other things) the requirement in paragraph 9(1) to make a written report and summary of the report, section 205(2) does not apply the corresponding requirement in section 206(1) of the Act in relation to inspections under sections 205 to 212. It is thought that this omission was not intended and we therefore recommend that it should be rectified.

Effect is given to this recommendation in clause 12(2) of the School Inspections Bill.

B. Both régimes allow the Chief Inspector for England or for Wales to elect that an inspection carried out by a member of the Inspectorate under section 2(2)(b), 3(1), 5(2)(b) or 6(1) of the 1992 Act shall be treated for certain purposes as an inspection carried out under section 9 of that Act by a registered inspector (a "section 9 inspection"): see paragraph 12(3) of Schedule 2 to the 1992 Act and section 205(3) of the 1993 Act. It appears that this provision was intended to enable the Chief Inspector to sidestep the requirement to conduct an inspection under section 9 of the 1992 Act where an inspection by a member of the Inspectorate has recently been carried out under section 2(2)(b), 3(1), 5(2)(b) or 6(1).

By virtue of paragraph 9A(1) and (2) of Schedule 2 to the 1992 Act and section 207(1) and (2) of the 1993 Act, a written report of an inspection under section 2(2)(b), 3(1), 5(2)(b), or 6(1) is only produced where the member of the Inspectorate is, or a previous inspector was, of the opinion that special measures are required to be taken in relation to the school. By contrast, paragraph 9(1) of Schedule 2 to the 1992 Act and section 206(1) of the 1993 Act require a report to be produced in every case where a section 9 inspection is carried out. Where an election is made in respect of an inspection under paragraph 12(3) of Schedule 2 to the 1992 Act, paragraph 9(1) of that Schedule is applied to the inspection so as to require a report to be produced even where the member of the Inspectorate (as a registered inspector) is not of the opinion that special measures are required. Section 205(3) of the 1993 Act, however, does not make any equivalent provision. It is thought that this omission was not intended and we therefore recommend that it should be rectified.

Effect is given to this recommendation in clause 12(3) and (4) of the School Inspections Bill.

Paragraph 12(3) of the 1992 Act and section 205(3) of the 1993 Act both provide that, where an election is made in respect of an inspection, the provisions which govern the distribution of the report, and the action to be taken in response to it, are to apply as if the inspection were a section 9 inspection. Paragraph 12(3) of the 1992 Act also *appears* to apply sub-paragraphs (2) to (8) of paragraph 9 of that Schedule which give the Chief Inspector a supervisory role in relation to the preparation of reports made by registered inspectors. It is thought that it was not intended that these provisions should apply to inspections carried out by members of the Inspectorate and we therefore recommend that this should be rectified.

Effect is given to this recommendation in clause 12(3) and (4) of the School Inspections Bill.

Section 205(3) of the 1993 Act gives rise to a further difficulty. This subsection provides that sections 209 to 212 of that Act are to apply to the inspection as if the inspector were a *registered inspector*. The main provisions of sections 209 to 212 only apply in the case of a registered inspector where his report contains a statement that the Chief Inspector agrees with his opinion. The report made by the member of the Inspectorate under section 207 will not contain such a statement. It is thought that it was not intended that the member of the Inspectorate should be treated as a registered inspector for these purposes, but rather that he should continue to be treated as a member of the Inspectorate. Similarly, paragraph 12(3) of the 1992 Act applies the equivalent provisions of the 1992 Act as if the member of the Inspectorate were a registered inspector. Accordingly we recommend that paragraph 12(3) of Schedule 2 to the 1992 Act and section 205(3) of the 1993 Act should be reproduced in such a way as to ensure that, so far as necessary, a member of the Inspectorate continues to retain his status as such and is not treated as a registered inspector.

Effect is given to this recommendation in clause 12(3) of the School Inspections Bill.

Power to make subordinate legislation: incidental and supplemental provisions etc (School Inspections Bill)

24. As with the Education Bill, the School Inspections Bill consolidates provisions empowering the Secretary of State to make subordinate legislation which are not consistent as to the ancillary provisions which they authorise. Section 19(3) of the 1992 Act authorises the making of different provision with respect to different cases or classes of case (including provision enabling particular provisions of the regulations to be applied to schools or classes

of school designated by the Secretary of State) and different provision in relation to different areas. Incidental and supplementary provisions etc are not expressly authorised. By contrast, section 301(6) of the 1993 Act authorises the making of different provision for different cases, circumstances or areas as well as the making of incidental, supplemental, saving or transitional provisions. It does not expressly authorise provision enabling particular provisions of the regulations to be applied only to designated schools or classes of school.

Again it is thought that little purpose would be served by attempting to reproduce these variations in connection with the powers to which they at present attach, and therefore we recommend that subordinate legislation made under any of the powers should be capable of making provision for any of the matters mentioned in the previous paragraph (except that it seems unnecessary to refer to different classes of case as well as different cases). It is not thought that any extension effected thereby would result in a significant widening of any of the powers involved.

Effect is given to this recommendation in clause 45(3) and (4) of the School Inspections Bill.

APPENDIX 2

CONSULTEES

Assembly of Welsh Councils
Association for Colleges
Association of County Councils
Association of Directors of Education in Wales
Association of District Councils
Association of Heads of Grant-Maintained Schools
Association of London Government
Association of Metropolitan Authorities
Association of Principals of Colleges
Association of Teachers and Lecturers
Board of Deputies of British Jews
Board of Mission Provincial Schools Consultant
Catholic Education Service
Charity Commission
Church in Wales Provincial Council for Education
City Technology Colleges Trust
Colleges Employers Forum
COSGAW
Council of Local Education Authorities
Council of Welsh Districts
Curriculum and Assessment Authority for Wales (ACAC)
Education Law Association
Free Church Federal Council
Funding Agency for Schools
Further Education Funding Council for England
Further Education Funding Council for Wales
General Synod of the Church of England Board of Education
Grant-Maintained Schools Advisory Committee
Independent Schools Joint Council
Interdiocesan Schools Commission
Jewish Secondary Schools Movement
Local Government Management Board
Methodist Church Division of Education and Youth
Muslim Educational Trust
National Association of Governors and Managers
National Association of Headteachers
National Association of Schoolmasters and Union of Women Teachers
National Association of Teachers in Further and Higher Education
National Governors' Council
National Union of Teachers
North West Association of GM Heads
Presbyterian Church in Wales Assembly Education Committee
Professional Association of Teachers
School Curriculum and Assessment Authority
Secondary Heads Association
Sixth Form Colleges Association
Sixth Form Colleges' Employers' Forum

Society of Education Officers
Undeb Cenedlaethol Athrawon Cymru (UCAC)
United Synagogue Board of Education
Welsh Grant-Maintained Schools Association
Welsh Joint Education Committee
Welsh Secondary Schools Association

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