

*These notes refer to the Legal Services Bill [HL]
as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

LEGAL SERVICES BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Legal Services Bill [HL] as introduced in the House of Lords on 23rd November 2006. They have been prepared by the Department for Constitutional Affairs in order to assist the reader of the Bill and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

OVERVIEW OF THE BILL

3. This Bill has 204 clauses and 24 Schedules. The explanatory notes are divided into 9 Parts, reflecting the structure of the Bill.
4. An overview of the Bill is set out below. A detailed description of each Part is contained in the commentary. Terms used are defined in the text where they first appear, and Schedule 24 contains an index of defined expressions. An explanation to accompany each Schedule is contained within the clause that introduces the Schedule.

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5. **Part 1: The Regulatory Objectives** sets out the seven regulatory objectives, which guide the Legal Services Board (“the Board”), the approved regulators, and the Office for Legal Complaints in exercising their functions.

6. **Part 2: The Legal Services Board** sets out the structure and functions of the Board, including its duty to act compatibly with the regulatory objectives. It also sets out the requirements for both appointment to, and membership of, the Board and the powers that the Secretary of State has in relation to these processes.

7. **Part 3: Reserved Legal Activities** lists and defines the reserved legal activities. It explains who is entitled to carry out these activities, and the penalties for those who carry out, or seek to carry out, these activities where they are not entitled. It provides for transitional arrangements for those currently allowed to carry on reserved legal activities. It also explains the process for altering the scope of the reserved legal activities. Approved regulators are the bodies that authorise and regulate persons to carry on reserved legal activities. This Part of the Bill explains what an approved regulator is, lists those bodies designated by the Bill as approved regulators, and explains how other bodies can achieve this status in the future.

8. **Part 4: Regulation of Approved Regulators** prescribes the general duties of approved regulators, and the powers that the Board has to ensure that these are being properly carried out. It details how the Board can intervene when there is a problem, the procedures that it must follow, and the bodies that it must consult. The Board’s powers include target-setting, censure, financial penalties, direct intervention in the approved regulator’s regulation of its members, and ultimately, the power to recommend to the Secretary of State that an order be made cancelling the approved regulator’s designation.

9. **Part 5: Alternative Business Structures** (“ABS”) makes provision for new business structures in legal services. These will allow lawyers and non-lawyers to work together on an equal footing to deliver legal and other services. It also provides for external investment in law firms. This Part of the Bill sets out the arrangements for authorisation, by the Board, of licensing authorities and how, in the absence of an appropriate licensing authority, the Board can license ABS firms directly. It defines the methods for making rules and prescribes procedures for the regulation of alternative business structures.

10. **Part 6: Legal Complaints** establishes an independent complaints handling body called the Office for Legal Complaints (“OLC”). It removes the ability of approved regulators to provide redress to complainants and grants this power to the OLC. The OLC will handle complaints by way of an Ombudsman Scheme, the rules for which are to be determined by the OLC once it is established. This Part also makes provision for the appointment process and terms of office for members of the OLC Board, the chief ombudsman and the assistant ombudsmen. It also makes provision for the accountability of the OLC to the Board, the framework of rules by which the OLC will establish its operating procedures, and necessary changes to the regulatory arrangements of approved.

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11. **Part 7: Further Provisions Relating to the Board and the OLC** makes provision as to the guidance that the Board may give. It also requires the Board to make rules providing for the payment by approved regulators of a levy, by which the Board and OLC are to be funded, clarifying when the levy is to be made payable, the amount payable, as well as the circumstances in which the levy may be waived. This section also makes provision for voluntary arrangements, outlining how these arrangements may benefit the Board, for example, in terms of advice on best regulatory practice.

12. **Part 8: Miscellaneous Provisions about Lawyers** sets out arrangements for alteration of the rules of the Solicitors Disciplinary Tribunal by the Board and defines the Board's power to give directions to the tribunal. This Part also makes provision regarding the register of trade mark attorneys and the register of patent attorneys. It covers legal professional privilege and amendments to the Immigration and Asylum Act 1999. This Part also makes provision in relation to Claims Management Services and Pro Bono costs, as well as conferring competence on the Scottish Legal Complaints Commission in respect of certain reserved matters.

13. **Part 9: General** makes provision regarding offences committed by bodies corporate and unincorporated bodies. It states how notices issued pursuant to provision made in the Bill are to be given and makes provision governing the procedure for making orders under powers in the Bill. It allows for minor and consequential amendments to other legislation to be made by order, and makes provision regarding the extent, commencement and short title of the Bill.

SUMMARY

14. The Legal Services Bill establishes a new framework for the regulation of legal services in England and Wales.

15. The Bill makes provision for:

- A new regulatory framework that will replace the existing framework which comprises a number of oversight regulators with overlapping responsibilities and few clear objectives.
- **The establishment of the Legal Services Board:** a single oversight body, independent from both Government and approved regulators (for example, the Law Society and Bar Council). It will have a duty to promote the regulatory objectives set out in Part 1.

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- **The establishment of an independent Office for Legal Complaints (OLC):** a body with statutory power to handle complaints about services provided by persons subject to oversight regulation by the Board, and to award redress in appropriate circumstances. It is expected to address concerns about the quality, independence, and consistency of complaints handling by the legal professions.
- **Alternative Business Structures (ABS)** will enable lawyers and non-lawyers to work together on an equal footing to deliver legal and other services. External investment will be possible, and new business structures are expected to give legal providers greater flexibility to respond to market demands, within the UK and overseas. Licences will be conferred by licensing authorities and various safeguards will be in place.
- It will be for the Board to advise the Government on any areas where it identifies problems within the legal services market, or “regulatory gaps”.

BACKGROUND

16. In 2001 the Office of Fair Trading (“OFT”) published a report¹ recommending that rules governing the legal professions should be subject to competition law and that unjustified restrictions on competition be removed. Following this, the Government carried out a consultation, and published a report into competition and regulation in the legal services market.²

17. In 2004 Sir David Clementi was appointed by the Government to conduct an independent review of the regulation of legal services. He found that many areas were in

¹ Office of Fair Trading, 2001, *Competition in the Professions – A Report by the Director General of Fair Trading*

² Department for Constitutional Affairs, 2003, *Competition and Regulation in the Legal Services Market – A Report Following the Consultation “In the Public Interest?”*

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need of restructuring and development, and concluded that the current regulatory model was “inflexible, outdated and over-complex”.³ Sir David highlighted concerns about the current:

- regulatory framework,
- complaints systems, and
- restrictive nature of business structures.

18. In October 2005 the Government published a White Paper, *The Future of Legal Services: Putting Consumers First*.⁴ The White Paper set an agenda for reforming the delivery of legal services. It proposed a new regulatory framework that would direct regulation to those areas where it is needed:

“We will create a Legal Services Board, an Office for Legal Complaints and we will take steps to enable firms to provide services under alternative business structures to those presently available.”

19. The draft Legal Services Bill was published in May 2006 and was subject to pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. The Joint Committee reported in July 2006, and the Government published its response to this in September of the same year.

The legal services sector

20. Six existing forms of legal service or activity have been identified and are covered by the Bill. These are:

- the right of audience in the courts;
- the right to conduct litigation;
- reserved instrument activities;

³ Clementi, Sir David, 2004b, *Review of the Regulatory Framework for Legal Services in England and Wales – Final Report*

⁴ Department for Constitutional Affairs, 2005, *The Future of Legal Services: Putting Consumers First*

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- probate activities
- notarial services;
- the administration of oaths.

21. Provision of these services is currently regulated by legal professional bodies such as the Law Society or the Bar Council, as well as – to varying degrees – higher level regulators such as the Secretary of State for Constitutional Affairs, the Master of the Rolls and the OFT. In addition to these different regulators, there are also a range of major purchasers in the market who act as quasi-regulators, by setting their own contract terms and prices – for example, the Legal Services Commission, and commercial organisations who operate “panel” systems. This Bill will not directly affect these quasi-regulators.

22. There are a number of restrictions on the type of business structures through which legal services may be provided, mainly in regulators’ professional rules. Some existing regulators prohibit lawyers from entering into partnership with non-lawyers. They also place restrictions on unregulated persons being formally involved in the management of these businesses, and unregulated persons having any stake in the ownership of such businesses. In many cases, these restrictions are at least partly due to the fact that legal regulators do not have the powers they need to effectively regulate practices in which non-lawyers exercise some form of control. This generally means that lawyers are limited in the extent to which they can form businesses with non-lawyers or with different types of lawyer. The Bill seeks to facilitate a regulatory framework in which different types of lawyer and non-lawyer are able to form businesses together, and in which regulators can be given effective powers to regulate such businesses.

23. If consumers wish to complain about any of the legal services listed above, they need to take that complaint up, in the first instance, with the person they are complaining about. If the complaint is not resolved in-house, consumers can then make a complaint to the regulatory body responsible for regulating the person providing the service (for example, the Law Society, the Bar Council). In the event that a complainant is not satisfied with the way in which a complaint has been handled by a regulatory body, they are then able to refer the complaint to the Legal Services Ombudsman. The Ombudsman will investigate the way in which the complaint was handled and the response from the professional body. However, if the Ombudsman believes that a complaint has not been investigated properly, s/he can require that the professional body look at the matter again. The Ombudsman also has powers to

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investigate individual complaints. In 2005, the Ombudsman exercised this power in less than 1% of cases.⁵

SCHEDULES

24. Explanatory notes to accompany each Schedule are contained within the notes for the clause introducing the Schedule.

Schedule		Located in
1	The Legal Services Board	clause 2
2	The reserved legal activities	clause 12
3	Exempt persons	clause 18
4	Approved regulators (Parts 1 to 3)	clause 19
5	Authorised persons (Parts 1 to 3)	clause 21
6	Alteration of reserved legal activities	clauses 23 & 25
7	Directions: procedure	clause 32
8	Intervention directions: procedure (Part 1)	clause 40
	Intervention directions: procedure (Part 2)	clause 43
9	Cancellation of designation as approved regulator	clause 44
10	Designation of approved regulators as licensing authorities (Part 1)	clause 73

⁵ Legal Services Ombudsman, 2005, *Annual Report of the Legal Services Ombudsman for England and Wales 2004/2005*

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	Designation of approved regulators as licensing authorities (Part 2)	clause 75
11	Licensing rules (Parts 1 to 4)	clause 81
12	Entitlement to make an application for a licence to the Board	clause 82
13	Ownership of licensed bodies (Parts 1 to 5)	clause 87
14	Licensing authority's powers of intervention	clause 100
15	The Office for Legal Complaints	clause 111
16	The Law Society, solicitors, recognised bodies and foreign lawyers (Parts 1 to 3)	clause 170
17	Licensed conveyancing	clause 174
18	Immigration advice and immigration services (Parts 1 to 3)	clause 178
19	Claims management services	clause 179
20	Amendments in relation to the Legal Profession and Legal Aid (Scotland) Act 2006	clause 186
21	Minor and consequential amendments	clause 198
22	Transitional provision	clause 199
23	Repeals	clause 200
24	Index of defined expressions	clause 203

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COMMENTARY ON CLAUSES

PART 1: THE REGULATORY OBJECTIVES

Clause 1: The regulatory objectives

25. This clause sets out the seven regulatory objectives that the Legal Services Board, the approved regulators and the Office for Legal Complaints will be under a duty to observe when exercising their functions. It also sets out the professional principles of those authorised to carry on reserved legal activities (the promotion and maintenance of which is one of the regulatory objectives).

26. The Bill does not rank these objectives and principles in order of importance. The Board, the Office for Legal Complaints and the approved regulators will be best placed to consider which objectives and/or principles are the most important in a particular instance. Clause 3 sets out the Board's responsibilities in relation to the regulatory objectives. Clauses 27 and 110 do the same in respect of the approved regulators and the Office for Legal Complaints.

PART 2: THE LEGAL SERVICES BOARD

27. This Part of the Bill makes provision regarding the Board's constitution and its functions.

Background

28. Part 3 of the Bill identifies six forms of legal services or activities, which equate to the reserved legal activities specified in the Bill.

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29. Approved regulators, such as the Law Society and The Bar Council, currently regulate practitioners carrying on these services or activities. In addition to these approved regulators, the current system involves a number of higher level regulators, including:

- the Secretary of State for Constitutional Affairs,
- the Master of the Rolls,
- the higher judiciary,
- the Legal Services Ombudsman,
- the Legal Services Complaints Commissioner,
- the Immigration Services Commissioner,
- the Home Secretary,
- the Department for Trade and Industry,
- the Office of Fair Trading,
- the Financial Services Authority, and
- the Archbishop of Canterbury.

30. In his 2004 independent review of legal services⁶ Sir David Clementi referred to observations that the current regulatory arrangements resembled a “maze” and stated that he agreed with the Government’s earlier statement⁷ that the existing regulatory system for legal services was “outdated, inflexible, over-complex and not accountable or transparent enough”. In 2005, following Sir David’s report, the Department for Constitutional Affairs published a White Paper, *The Future of Legal Services: Putting Consumers First*.⁸ The White Paper

⁶ Clementi, 2004b

⁷ Department for Constitutional Affairs 2003

⁸ Department for Constitutional Affairs, 2005

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detailed proposals to reform the current system by implementing a new regulatory framework that would remove the “regulatory maze” of oversight regulators.

31. This Part of the Bill establishes a Legal Services Board that will act as an independent oversight regulator. It will sit at the head of the new regulatory framework. The Board will oversee the new approved regulators, and will seek to ensure that they carry out their regulatory functions to the required standards. Both the Board and the approved regulators must have regard to the regulatory objectives when exercising their functions.

32. This Part of the Bill sets out the structure and functions of the Board. It outlines the functions that the Board will have in relation to the regulatory objectives, and the ways that it will maintain these principles. It also sets out the requirements for both appointment to and membership of the Board and the powers that the Secretary of State will have in relation to these processes.

Clause 2: The Legal Services Board

33. This clause establishes a corporate body called the Legal Services Board to act as an independent oversight regulator.

34. **Schedule 1** is about the Board and includes:

- the membership of the Board,
- the terms of appointment and tenure of members,
- staffing,
- committees,
- the Board’s powers of delegation, and
- borrowing and accounts rules in relation to the Board.

35. Sub-paragraph (1) of paragraph 1 provides that the Board is to be constituted by a chairman, a Chief Executive and between seven and ten other persons. The Secretary of State will appoint all Board members other than the Chief Executive. The Board will appoint the Chief Executive.

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36. The Board must have a majority of lay persons as defined by sub-paragraph (4) of paragraph 2 of Schedule 1. “Lay persons” are persons who have never been authorised to conduct activities that are now defined as reserved legal activities under the Bill. Claims managers and Scottish and Northern Irish lawyers also fall outside the definition of “lay person.”

37. Paragraph 3 makes provision regarding criteria the Secretary of State must have regard to when appointing Board members.

38. It is expected that, as required by the Commissioner for Public Appointments, all Ministerial appointments to the Board will be made in accordance with the Commissioners’ Code of Practice. As part of the planning of the appointments process, it is expected that the Secretary of State will seek the views of all interested parties (including the Chair and other members of the Board) on issues such as selection criteria, and the diversity of skills and experience needed on the Board. In accordance with the Office of the Commissioner for Public Appointments Code of Practice, it is expected that a selection panel, including, amongst others, a representative from the public body itself and an Independent Assessor, will conduct the key stages of the appointments process. The outcome of the Panel’s deliberations will form a recommendation to be made to the Minister.

39. Terms of appointment are set out in paragraphs 4 to 9 of the Schedule. A member (other than the Chief Executive) must be appointed for a fixed period, which must not exceed five years. A person may only be re-appointed once for a further period not exceeding five years.

40. Paragraph 7 of Schedule 1 sets out the circumstances in which the Secretary of State may remove Board members. Where the Secretary of State wishes to remove a Board member other than the chairman or the Chief Executive, he must first consult with the chairman.

41. The chairman or other members may also resign by giving notice to the Secretary of State. These provisions do not apply to the Chief Executive, who is appointed by the Board.

42. Paragraphs 11 to 15 make provision regarding the appointment of staff members by the Board. The Board must appoint a Chief Executive, and may appoint any other staff that it considers appropriate to assist in the performance of its functions. The Bill also provides that a member of staff may also be a member of the Board, but may not be the chairman.

43. Paragraph 17 sets out the Board’s powers to form committees and sub-committees. Paragraphs 18 and 19 enable the Board to regulate its own proceedings and those of its committees.

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44. Paragraph 20 allows the Board to authorise individual Board members, committees and sub-committees of the Board and members of the Board's staff to carry out the Board's functions on its behalf. However, the Board will retain accountability for the exercise of its statutory functions, as it may not delegate its rule-making functions under the Bill, save for any rule – making functions it has in respect of its own procedures, the procedures of its committees and sub-committees and in its capacity as an approved regulator or a licensing authority.

45. Paragraph 21 allows the Board to borrow money, subject to the authorisation of the Secretary of State.

46. Paragraph 22 requires the Board to keep proper financial accounts. Requirements to produce an annual report are set out in clause 6.

47. Paragraph 23 states that the Board is not to be regarded as having the same status as the Crown. Accordingly, the Board's property is not to be regarded as property held on behalf of the Crown and staff are not to be regarded as servants or agents of the Crown or as enjoying the same status.

48. Paragraphs 27 to 29 make provision for amendments to the House of Commons Disqualification Act 1975, the Northern Ireland Assembly Disqualification Act 1975, the Freedom of Information Act 2000 and the Public Records Act 1958. These are standard provisions which apply to many public bodies.

49. Paragraph 30 provides that the Board, its members and its staff will not be held liable for any damages resulting from the exercise of the Board's functions, except in the cases where an act or omission is carried out in bad faith or was unlawful in accordance with section 6 subsection (1) of the Human Rights Act 1998.

Clause 3: Board's duty to promote regulatory objectives

50. The Board will have a duty to comply with the requirements set out in clause 1. This clause states that the Board must, so far as reasonably practicable, act in a way that is compatible with the regulatory objectives. It also requires the Board to have regard to the principles of best regulatory practice. Specifically, the clause refers to the importance of regulatory activities being transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

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Clause 4: Standards of regulation, education and training

51. This clause imposes a duty on the Board to assist in the maintenance and development of standards of the regulation by approved regulators of regulated persons and also the education and training of those persons. For example, the Board may issue guidance on, or disseminate examples of, good education and training practices or principles of professional conduct that have been developed for a reserved activity by an approved regulator across to all approved regulators.

Clause 5: Corporate Governance

52. This clause requires that the Board have regard to generally accepted principles of good corporate governance in managing its affairs.

Clause 6: Annual Report

53. This clause states that the Board must prepare an annual report on the discharge of its functions. This will be laid before Parliament. It will include the extent to which, in the Board's opinion, the Board has met the regulatory objectives.

54. Paragraph 22 of Schedule 1 sets out financial accountability in relation to the Board's accounts.

Clause 8: The Consumer Panel

Clause 9: Committees and the procedure of the Consumer Panel

Clause 10: Representations by the Consumer Panel

Clause 11: Advice and research functions of the Consumer Panel

55. Clause 8 requires the Board to set up and maintain a Consumer Panel – a panel of persons whose task will be to represent the interests of consumers (as defined by clause 196). Appointments to the panel will be made by the Board and one of the Panel members will be appointed as chairman by the Board. Clause 8 also sets out the categories of person who may not sit on the Panel.

56. Clause 9 enables the Panel to make arrangements for committees established by it to provide advice to it. Clause 10 provides that the Board must consider representations made to it by the Consumer Panel and must publish a notice where it disagrees with the Panel's

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advice. At the Board's request, the Panel may also carry out research for the Board and provide the Board with advice.

PART 3: RESERVED LEGAL ACTIVITIES

57. This Part of the Bill lists and defines the reserved legal activities. It explains who is entitled to carry out these activities, and the penalties for those who offer or carry out these activities when not entitled to do so. It sets out transitional arrangements for those currently allowed to carry on reserved legal activities. It also explains the process for altering the scope of the reserved legal services, and the roles of the different bodies involved in this.

58. This Part also defines what an approved regulator is, designates certain bodies as approved regulators, and makes provision allowing for other bodies to achieve this status in the future.

Background

59. The Bill identifies six forms of legal activity which are to be reserved. These are:

- the right of audience in the courts;
- the right to conduct litigation;
- reserved instrument activities;
- probate activities
- notarial services;
- the administration of oaths.

60. The existing regulators, which the Bill will recognise as approved regulators, are:

- the Law Society,

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- the General Council of the Bar,
- the Master of the Court of Faculties,
- the Institute of Legal Executives,
- the Council for Licensed Conveyancers,
- the Chartered Institute of Patent Attorneys, and
- the Institute of Trade Mark Attorneys.

Clause 12: Meaning of “reserved legal activities” and “legal activity”

61. This clause lists the legal activities that are to be regulated under the Bill (the “reserved legal activities”). **Schedule 2** sets out the meaning of each activity. The definition of legal activity is set out at *subsection (3)*, and these are activities that are not necessarily regulated under the Bill. However, under clause 23 the Secretary of State may, by order, amend clause 12 and Schedule 2 so as to add any legal activity to the list of reserved legal activities for the purposes of this Bill.

62. The “reserved legal activities” defined by clause 12 are all activities that are regulated under current legislation.

Clause 13: Entitlement to carry on a reserved legal activity

63. This clause provides that a person (including a body corporate or an unincorporated body) can carry on a reserved legal activity only if the person is:

- an authorised person (see clause 17), or
- an exempt person (see clause 18).

64. This is subject to transitional protection for non-commercial bodies, which is set out under clause 22.

Clause 14: Offence to carry on a reserved legal activity if not entitled

65. This clause makes it an offence for a person who is not entitled to carry out a reserved legal activity to carry out that activity. Persons guilty of the offence may be liable to a term of imprisonment of up to 2 years and/or a fine.

66. A person who commits an offence in relation to rights of audience or rights to conduct litigation in relation to any proceedings (or contemplated proceedings) is also guilty of contempt of the court involved, and may be punished accordingly.

Clause 15: Carrying on of a reserved activity: employers and employees

67. This clause makes further provision as to the carrying on of reserved activities by employers and employees. *Subsections (2) to (3)*, together with *subsection (8)*, require managers and employees to be entitled to carry on reserved legal activities if they are to carry out such activities on behalf of their employer, even if the employer is authorised and is formally a separate legal person (for example, a company). The effect of this is that if a body carries out a reserved legal activity through a non-entitled person, the non-entitled person commits an offence.

68. Clause 15 also enables employed lawyers to provide legal services that are incidental to their main job, or to provide pro bono services, without needing to obtain an ABS licence. It does this by defining services provided by such individuals to the public or a section of the public as outside the scope of “reserved legal activities”, so long as they are not part of the employer’s business. This is to enable businesses to continue to provide incidental services in these restricted circumstances, as they can at present where professional rules allow. Under *subsection (6)* the Secretary of State may by order amend the key definitions for this provision: “section of the public”, and “part of the employer’s business”. The former will allow this exception to be restricted to groups such as fellow employees, so that ABS protection would not be removed where services were provided to members of the public who had no prior connection with the employer. The latter will allow limitations to be placed upon the amount of such work an employer can do before it will be defined as a legal services firm. The objective is to prevent businesses offering services commercially to the general public without proper licensing.

Clause 16: Offence to pretend to be entitled

69. This clause makes it an offence for a person who is not entitled to carry on a reserved legal activity to pretend to be entitled to carry on that activity. The penalties for committing this offence are the same as those for carrying on a reserved legal activity when not entitled.

Clause 17: Authorised persons

70. An “authorised person” is:

- a person who is authorised to carry on a reserved legal activity by a relevant approved regulator (other than by the grant of an ABS licence), or
- a licensable body authorised to carry on a reserved legal activity by virtue of an ABS licence issued by the Board or a relevant approved regulator, regulator; or transitionally.

71. *Subsections (3) and (4)* (together with **Schedule 5** and **Schedule 22**) provide that certain existing bodies which would otherwise be required to obtain a licence under Part 5, are either deemed to be authorised or treated as exempt persons during a transitional period, after which point such bodies will need to become licensed.

Clause 18: Exempt persons

72. Clause 18 introduces **Schedule 3** which makes provision exempting certain persons from the requirement to be authorised to conduct each particular reserved legal activity. For example, an individual who carries on probate activities other than for fee, gain or reward is exempt. The Secretary of State may by order, add or remove exempt persons from the Schedule. This may only be done on the recommendation of the Board.

Clause 19: Approved regulators and relevant approved regulators

73. This clause defines “approved regulator” and “relevant approved regulator”, and sets out how bodies can become approved regulators.

74. **Part 1** of **Schedule 4** lists the bodies which will automatically become approved regulators when the Bill comes into force. The regulatory arrangements for these bodies are to be treated as having been approved by the Board. Paragraph 2 sub-paragraph (3) provides that the Board may exercise its power to direct a regulator to alter its regulatory arrangements even where the regulator is treated as having been approved.

75. **Part 2** of the Schedule makes provision regarding the procedure to be followed by bodies applying for designation as an “approved regulator” in respect of a reserved legal activity.

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76. The Schedule details the material that must accompany an application and provides that the application must be accompanied by a “prescribed fee” which will be set by the Board with the consent of the Secretary of State.

77. The Board is required to make rules setting out the criteria by which it may refuse to consider an application. Where the Board decides to refuse to consider the application further, it must give notice to the applicant of its decision and the reasons behind it.

78. Where the Board proceeds to consider the application, it has a duty to seek advice before granting the application. Paragraph 5 requires that the Board must give a copy of the application and accompanying material to:

- the OFT,
- the Consumer Panel,
- the Lord Chief Justice, and
- such other persons as the Board considers it reasonable to consult regarding the application.

79. Paragraphs 6 to 9 set out the duties of the consultees:

- The OFT must give advice to the Board in respect of the application, as the OFT thinks fit.
- The OFT must, in particular, consider whether granting an application would, or would be likely to, restrict, distort or prevent competition within the market for reserved legal services. The Consumer Panel must have regard to the likely impact that granting an application would have on consumers.
- The Consumer Panel must have regard to the likely impact that granting an application would have on consumers.
- Those other persons whom the Board considers it reasonable to consult may give advice in respect of the application.
- The Lord Chief Justice must then consider this advice, and give advice to the Board regarding whether the application should be granted, as each sees fit. The Lord Chief

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Justice must, in particular, have regard to the likely impact of granting an application on the courts in England and Wales.

80. Paragraph 10 allows the consultees, for the purpose of giving advice, to request that the applicant, or any other person, provide additional specified information.

81. The Board (which must make rules governing the making of representations) must give the applicant copies of any of the advice given by consultees. The applicant may make representations to the Board within the time period specified in paragraph 11.

82. Paragraph 12 of the Schedule explains that once the period for representations has passed, the Board must publish any advice provided by the consultees and any representations made. This does not prevent anyone who has given advice under paragraphs 6 to 10, or made a representation under paragraph 12, from publishing that material. Any publisher must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual whose interests might be affected, seriously and prejudicially, by publication.

83. The Board must make rules specifying how it will determine applications. Paragraph 13 sets out the criteria that the Board must apply when determining an application.

84. Paragraph 14 sets out the procedure that the Board must follow in considering its decision. It must consider the advice and representations referred to in paragraph 83 above, as well as any other information that it considers relevant, and then decide whether to grant the application. The Board may grant the application in whole or in part, and must give notice in writing of its decision to the applicant, and publish this notice.

85. Paragraph 15 states that the Board must give its decision within twelve months, beginning with the day on which the application is made to the Board. The Board may extend this decision period by issuing and publishing a notice, only after consultation with the OFT, the Consumer Panel, and the Lord Chief Justice.

86. Under paragraph 16, where an application is granted, the Board must recommend to the Secretary of State that an order be made designating the body as an approved regulator in relation to the appropriate reserved legal activity or activities. Where the application relates to more than one reserved legal activity, the Board may grant it in relation to all or some of those activities. The Board must publish its recommendation.

87. The Secretary of State may then make an order in accordance with the recommendation (or a part of it), or refuse to make such an order. Paragraph 17 sets out the procedure for doing this. If the Secretary of State decides not to make an order, he must give

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the applicant and the Board notice of that decision and of the reasons for it, and publish this notice.

88. **Part 3** of the Schedule sets out how alterations to the regulatory arrangements of an approved regulator must be approved. If an approved regulator alters its regulatory arrangements, the alteration will not have effect until it is approved for the purposes of this Bill. An alteration can include an addition to the arrangements, or a revocation of any part. Paragraph 19 particularises the circumstances in which an alteration will be approved.

89. Paragraph 20 provides that the Board may make rules specifying the way in which an application by an approved regulator to alter its regulatory arrangements must be made and makes certain requirements as to the material that must accompany the application. Paragraph 21 sets out what the Board must do on receipt of an application. It may grant the application, or it may issue and publish a notice stating that it is considering whether to refuse the application.

90. Under paragraph 22, where the Board has given the approved regulator a notice, the Board may invite such persons as it considers appropriate to give it advice regarding whether the application should be granted. The consultees may, for the purpose of giving advice, request that the approved regulator, or any other person, provides additional information.

91. The Board must give the approved regulator copies of any of the advice given above. The approved regulator may make representations to the Board within 28 days, or such longer period as the Board allows, as specified in paragraph 23 of the Schedule. The Board must make rules governing the making of representations.

92. Paragraph 24 of the Schedule requires that once the period for representations has passed, the Board must publish the advice and representations. This does not prevent anyone who has given advice under paragraph 22, or made a representation under paragraph 23, from publishing that material. Any publisher must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual whose interests might be seriously and prejudicially affected by publication.

93. Paragraph 25 sets out the material that the Board is required to consider before deciding whether to grant the application. The Board may grant the application in whole or in part, and must give notice in writing of its decision to the applicant, and publish this notice. The Board may refuse the application only if it is satisfied that one of the conditions set out in sub-paragraph (3) is met. If the Board decides to refuse the application, it must specify the reasons in its published notice.

94. Paragraph 26 provides that if the Board does not give the approved regulator notice of its decision within the decision period (twelve months), then the application is deemed to

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have been granted. The Board may extend the decision period with the consent of the Secretary of State. The total decision period must not exceed eighteen months.

Clause 20: Regulatory arrangements

95. This clause defines the “regulatory arrangements” of bodies. These include the arrangements made for the body to authorise persons to carry on reserved legal activities, the body’s conduct rules, and disciplinary arrangements etc. The regulatory arrangements do not include arrangements which are made in connection with any role the body may have to represent or promote the interests of persons regulated by it. This clause also provides that regulatory arrangements include compensation and indemnification arrangements (and defines such arrangements).

Clause 21: Continuity of existing rights to carry on reserved legal activities

96. **Part 1 of Schedule 5**, which is introduced by this clause, provides that it is immaterial whether a person’s authorisation to exercise a right of audience or conduct litigation was granted by an approved regulator before or after the day upon which it is designated. **Part 2** makes provision deeming certain categories of person to be authorised to conduct certain reserved legal activities by various approved regulators for the duration of a transitional period, the duration of which is to be determined by the Secretary of State. At the conclusion of the transitional period, unless under clause 14 a person is in fact authorised or exempt under the Bill, he will commit an offence if he conducts a reserved activity.

97. It ensures that rights granted to persons under the existing arrangements will be protected during the transitional period, which is determined by the Secretary of State. Every barrister, solicitor, legal executive, licensed conveyancer, notary public, patent attorney, and trade mark attorney is deemed to have been authorised to carry on certain reserved legal activities by their professional body, as listed in Part 2 of the Schedule.

Clause 22: Transitional protection for non-commercial bodies

98. Clause 22 backs up the provisions for non-commercial bodies (the first three in the list above) by ensuring that, during a transitional period, the existing bodies are entitled to carry on reserved activities without committing an offence. Without this, they would be unable to operate before the ABS licensing regime came into effect, with the undesirable consequence that the not for profit sector would be seriously reduced.

Clause 23: Extension of the reserved legal activities

99. This clause allows the Secretary of State, by order, to extend the activities within the scope of the definition of “relevant legal activities”, by amending clause 12 or Schedule 2. He can make this order only on the recommendation of the Board. This will enable legal services to be regulated where it would be in consumers’ interests to do so.

100. **Schedule 6**, introduced by this clause, sets out the procedure for adding new activities to the list of reserved legal activities. It also sets out the procedure for determining whether a recommendation should be made under clause 25 (recommendations that activities should cease to be reserved legal activities).

101. The following individuals/bodies may request that the Board investigate whether the reserved legal activities should be extended, or if an activity should cease to be a reserved legal activity:

- the Secretary of State,
- the OFT,
- the Consumer Panel, or
- the Lord Chief Justice.

102. Where such a request is made, preliminary inquiries for an investigation by the Board may take up to three months, although this can be extended by agreement with the Secretary of State. Anybody else may make a request of this kind, although in such cases the Board will not be obliged to make preliminary enquiries. The Board can also instigate investigations even if no request has been made.

103. Paragraph 5 enables the Board to seek advice from the OFT, and/or the Consumer Panel before determining whether it is appropriate to hold an investigation. If asked for advice, the OFT and the Consumer Panel must each give the Board such advice as it sees fit. The OFT must, in particular, consider whether making a change would, or would be likely to, restrict, distort or prevent competition in the market for reserved legal services. The Consumer Panel must have regard to the likely impact that making a change would have on consumers. Each may, for the purpose of giving advice, ask any person to provide additional specified information.

104. Paragraph 6 states that, if the Board seeks the advice of the Lord Chief Justice, The Lord Chief Justice must consider any advice provided to the Board by the OFT and/or the

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Consumer Panel, and then give such advice to the Board as he sees fit. In deciding what advice to give, the Lord Chief Justice must, in particular, have regard to the likely impact on the courts in England and Wales of the proposed change. The Board must consider, and publish, any advice given by those persons.

105. Under paragraph 8, if the Board has been asked to investigate by the Secretary of State, OFT, Consumer Panel or the Lord Chief Justice, it can refuse to hold a full investigation only if it has consulted the OFT, the Consumer Panel, and the Lord Chief Justice, and the Board has received advice (or the periods within which that advice is required to be given have expired). But unless the request for the investigation was made by the Secretary of State, the Board can refuse only with the Secretary of State's consent.

106. If the request proceeds to a full investigation, the Board must give notice of this to the Secretary of State, the OFT, the Consumer Panel, and the Lord Chief Justice. The Board must publish this notice.

107. Within twelve months the Board must produce and publish a report with its provisional recommendation and reasons, as stated in paragraphs 10 and 11. The Board may extend this investigation period by issuing and publishing a notice, only after consultation with the OFT, the Consumer Panel, and the Lord Chief Justice.

108. The Board may make rules governing the making of representations and the giving of evidence. Paragraphs 12 to 14 set out what the Board must consider in making these rules. Paragraph 18 permits the Board to pay such costs of a person, as the Board considers reasonable, for the purpose of facilitating the giving of oral evidence or representations.

109. Paragraph 16 sets out the process that the Board must follow in making its final report. It must decide:

- whether or not to make a recommendation to extend the reserved legal activities, or
- whether or not to make a recommendation that an activity should cease to be a reserved legal activity.

110. The Board must make its report within the "final reporting period", as set out in paragraph 17. Paragraph 16 requires the report to:

- set out the Board's decision and reasons for it, and
- where applicable, its recommendation, and any statement of further statutory changes that may be needed if an order is made in accordance with the recommendation.

111. The Board must give a copy of this report to the Secretary of State, and publish the report.

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112. Clause 24 provides that the Secretary of State must consider the report and publish a decision. Where he decides not to make an order that the Board has recommended, he must state his reasons. He will not be able to make an order otherwise than on the Board's recommendation, nor will he be able to amend an order that the Board has recommended. This Bill does not give the Secretary of State the power to make changes on his own initiative (including amending Board recommendations as they are implemented).

Clause 24: Provisional designation as approved regulators and licensing authorities

113. This provision enables the Secretary of State to determine applications by bodies for designation as an approved regulator or a licensing authority in respect of an activity which is a "provisional reserved activity", that is, activity may become a reserved legal activity in the future.

Clause 25: Recommendations that activities should cease to be reserved legal activities

114. This clause enables the Board to recommend to the Secretary of State that an activity should cease to be a reserved legal activity. The applicable procedure is set out in Schedule 6. Where the Secretary of State agrees with a recommendation by the Board that an activity should cease to be a reserved legal activity, it will be necessary to enact primary legislation to effect the change.

PART 4: REGULATION OF APPROVED REGULATORS

115. This Part of the Bill sets out the duties of approved regulators, makes provision to ensure that approved regulators maintain an appropriate separation of their regulatory and representative functions, and confers powers on the Board to ensure that the approved regulators' duties are being carried out appropriately. It details how the Board can intervene when there is a problem, the procedures that it must follow, and the bodies that it must consult before exercising its powers. The Board's powers include target-setting, censure, financial penalties, a power of direction, and direct intervention in the approved regulator's regulation of its members, and in extreme cases removal of a body's authorisation.

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as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

Background

116. In his 2004 independent review of legal services⁹ Sir David Clementi referred to observations that the current regulatory arrangements resembled a “maze” and stated that he agreed with the Government’s earlier statement¹⁰ that the existing regulatory system for legal services was “outdated, inflexible, over-complex and not accountable or transparent enough”. He proposed that an independent oversight regulator be established to simplify regulation and ensure that the system was clear to consumers. The Government’s White Paper, *The Future of Legal Services: Putting Consumers First*¹¹ set out how it was envisaged that this oversight regulator should operate: it should authorise approved regulators to carry out day-to-day regulation, and it would also need to be able to act if these approved regulators fail.

117. The White Paper stated that in most cases, the Board would want to work alongside regulators to help them improve where areas of weakness have been identified. However, where a regulator continued to fail, the Board would be able to remove authorisation in a particular area or areas of regulation, and either identify an alternative regulator, or carry out the regulatory functions itself.

This means that the oversight regulator will need to be able to exercise powers to:

- require regulators to provide it with information (subject to privacy/confidence) to carry out its duties, where, for example, it wishes to determine whether a regulator has performed its regulatory duties;
- issue regulatory guidance to regulators;
- set regulatory targets for regulators and to monitor compliance;
- direct a regulator to take specific regulatory action;
- direct a regulator to change its regulatory arrangements;
- publish a statement censuring the approved regulator for an act or omission;
- impose financial penalties;
- intervene in the regulator’s exercise of its duties; or

⁹ Clementi, 2004b

¹⁰ Department for Constitutional Affairs 2003

¹¹ Department for Constitutional Affairs, 2005

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- remove the designation of an approved regulator.

118. The Board's power to issue guidance is to be found in clause 150. This Part of the Bill provides for these other powers.

Clause 26: Regulatory and representative functions of approved regulators

119. This clause defines what is meant by the regulatory and representative functions of an approved regulator under the Act.

Clause 27: Approved regulator's duty to promote the regulatory objectives

120. When discharging its regulatory functions, an approved regulator will be under a duty to act in a way that is compatible with the regulatory objectives so far as it is reasonably practicable to do so. In addition, the approved regulator must have regard to principles of better regulation.

Clause 28: Prohibition on the Board interfering with representative functions

121. This clause provides that the Board is not authorised to exercise its functions in relation to any representative function of an approved regulator. However, the Board is authorised to take action for the purpose of ensuring that the exercise of an approved regulator's regulatory functions are not prejudiced by its representative functions, and that that decisions are taken independently of each other in relation to the regulatory and the representative functions.

Clause 29: Rules relating to the exercise of regulatory functions

122. This clause requires the Board to make rules setting out requirements to be met by approved regulators for the purpose of ensuring that their regulatory and representative functions are appropriately separated ("internal governance rules"). The rules must include provision which ensures that persons exercising regulatory functions can, independently from any representative functions, make representations to the Board, OLC and other approved

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regulators (including notifying the Board if they feel that their independence or effectiveness is being compromised), and that they are appropriately resourced to carry out their functions.

Clause 30: Performance targets and monitoring

123. The Board may set, or direct an approved regulator to set, performance targets relating to the performance of the approved regulator's regulatory functions, as defined in clause 26. For example, where an approved regulator is failing to deal with misconduct cases quickly, the Board may set targets in relation to how long consideration of a misconduct case should take. *Subsection (2)* sets out the thresholds that must be met before the Board can exercise this power.

Clause 31: Directions

Clause 32: Directions: procedure

Clause 33: Enforcement of directions

124. Under clause 31 the Board may use its power of direction where any of the threshold conditions in *subsection (1)* is satisfied.

125. In such circumstances, the Board may direct the approved regulator in question to take steps to remedy any failure or counter any adverse impact, mitigate its effect, or prevent its recurrence. It must publish any direction that it issues to a regulator.

126. *Subsection (3)* of clause 31 sets out the scope for a direction. A direction may only require an approved regulator to take steps which it has power to take, and it may require the regulator to take steps with a view to the modification of any part of its regulatory arrangements in order to achieve the desired effect.

127. The Board can monitor compliance with a direction, and it may revoke a direction by giving notice to the regulator, and publishing the notice.

128. Under clause 32, when the Board gives a direction to a regulator to take specific steps, the procedure set out in **Schedule 7** will apply. Schedule 7 includes requirements for giving notice to the approved regulator, for consulting with the Secretary of State, the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.

129. Under clause 33, where an approved regulator has failed to comply with a direction, the Board may make an application to the High Court. Upon such an application, if the High Court agrees that the approved regulator has failed to comply with the direction, it may make

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an order requiring the approved regulator to take such steps as it considers appropriate in order to ensure that direction is complied with.

Clause 34: Public censure

Clause 35: Public censure: procedure

130. Clause 34 sets out the threshold conditions which must be met before the Board can exercise this power. Clause 35 sets out the procedure that must be complied with before a statement of censure can be issued, and requires the Board to give prior notice of the terms of the proposed statement and other matters and to consider any representations which are duly made before publishing the statement.

Clause 36: Financial penalties

Clause 37: Financial penalties: procedure

131. *Subsection (1)* of clause 36 sets out the threshold conditions that must be met before the Board can exercise its power to issue financial penalties. The Board is required to make rules prescribing the maximum amount of the penalty that may be imposed and the Secretary of State's consent to these rules is required. Clause 37 sets out the procedure that applies to the imposition of financial penalties.

Clause 38: Appeals against financial penalties

132. This clause makes provision for an approved regulator to appeal against a financial penalty on the grounds as set out at *subsection (2)*:

- that the penalty was not within the power of the Board, that the amount of the penalty is unreasonable,
- that the Board has not complied with the applicable procedure, or
- that it was unreasonable for the Board to require that the penalty be paid within the specified time.

133. The appeal is by way of application to the High Court (to be made within 42 days of notification of the decision appealed against, which can quash the penalty, substitute a different amount or, where the penalty is payable by instalments, vary the time by which the

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penalty must be paid (*subsection (3)*), and may make an order as to interest on any substituted penalty (*subsections (5) and (6)*).

Clause 39: Recovery of financial penalties

134. Where an approved regulator has not paid a financial penalty, the Board has the power to recover the penalty, and any interest, as a debt payable to the Board (*subsections (3) and (4)*). If all or part of a penalty is not paid by the time specified, the unpaid balance carries interest (*subsection (1)*). Where an appeal is made by an approved regulator against a financial penalty, the penalty does not have to be paid until the appeal has been determined or withdrawn.

Clause 40: Intervention directions

135. This clause defines an intervention direction, and provides for the scope of such directions and the conditions under which the Board can impose such directions on an approved regulator in relation to its regulatory functions. An intervention direction (*subsection (2)*) is a direction that the Board will exercise one or more of the approved regulator's regulatory functions and that the approved regulator must comply with any instructions of the Board in the exercise of these functions. Where the Board exercises its powers under an intervention direction, it will be able to nominate a person or persons to carry out the regulatory function. The Board may also require the approved regulator to comply with any instructions set by the Board or the nominated person.

136. *Subsection (1)* sets out the threshold conditions which must be met before the Board can issue an intervention direction, which mirror those in clause 30. *Subsection (3)* additionally provides that the Board must not give an intervention direction unless it is satisfied that the approved regulator's act or omission cannot be adequately addressed by the exercise of the powers available under clauses 30 to 39.

137. *Subsection (4)* refers to **Part 1 of Schedule 8**, which sets out the procedure for giving an intervention direction. This includes procedures for giving notice to the approved regulator, for consulting with the Secretary of State, the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.

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Clause 41: Intervention directions: further provision

138. Where an intervention direction has been made and is in effect in relation to a function of an approved regulator, the approved regulator must give the Board, or a person nominated by the Board, all such assistance as it is reasonably able to give, to allow the Board, or nominated person, to pursue the direction through the exercise of the function to which the direction relates. Under *subsection (3)*, the Board, a person nominated by the Board or any such person's appointee may apply to certain specified judges for a warrant authorising them to enter and search the approved regulator's premises and to seize the records it finds. *Subsection (6)* requires the Secretary of State to make regulations prescribing the criteria that judges will apply when deciding whether to issue a warrant.

Clause 42: Intervention directions: enforcement

139. This clause makes provision for enforcement of intervention directions by way of application to the High Court.

Clause 43: Revocation of an intervention direction

140. An intervention direction has effect until such time as it is revoked by the Board as set out at *subsection (1)*. *Subsection (2)* refers to **Part 2 of Schedule 8**, which contains the procedure for revocation of an intervention direction. This includes procedures for giving notice to the approved regulator, for consulting with the Secretary of State, the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.

141. Paragraph 13 of the Schedule provides that where an intervention direction has effect in respect of a regulatory function of an approved regulator, as defined under clause 26, the regulator can apply to the Board for the Board to revoke the direction, or the Board can give notice to the regulator that it intends to revoke the direction.

Clause 44: Cancellation of designation as approved regulator

142. Only if the Board so recommends, the Secretary of State may, by making an order, cancel a body's designation as an approved regulator in relation to one or more of the reserved legal activities for which it is designated (*subsections (1) and (2)*).

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143. Under *subsection (3)*, if a body applies to the Board to have its designation as an approved regulator cancelled, and the Board is satisfied that the rules that it has set for this process have been met, then the Board must make such a recommendation to the Secretary of State.

144. The Board may only recommend that a cancellation order be made if it is satisfied that the conditions listed in *subsection (5)* (which mirror those in clause 30) have been met and that the matter cannot be adequately addressed by the Board exercising its powers under clauses 30 to 42. The Board must specify the reasons for suggesting cancellation when making its recommendation.

145. **Schedule 9**, introduced by this clause, applies where the Board considers that it may be appropriate for it to make a recommendation under *subsection (5)*. It requires the Board to notify the body of the proposed recommendation, and to seek advice in respect of the recommendation. This Schedule sets out the procedures for giving notice to the approved regulator, for consulting with the Secretary of State, the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.

Clause 45: Cancellation of a designation: further provision

Clause 46: The Board's power to recommend orders made under section 45

146. Clause 45 allows the Secretary of State to make transfer arrangements by order when a body has its designation in relation to one or more reserved legal activities cancelled. The Secretary of State may make such an order only on the recommendation of the Board, and only in substantially the same form as recommended by the Board, so that the Secretary of State has no power to act of his own motion in this regard (*subsection (7)*). Clause 46 sets out the procedure that the Board must follow when making a recommendation for the cancellation of an approved regulator's designation. This procedure provides for the publication of a draft recommendation and order, a requirement that the Board take account of any representations made, and for re-publication of the recommendation and order if the Board makes any amendments which it considers material after the initial publication.

147. The purpose of clause 45 is to minimise disruption to the regulation of authorised persons following the cancellation of an approved regulator's designation. It allows for regulatory responsibility for the authorised persons concerned to be transferred to another approved regulator (assuming that the regulator in question consents to assuming such responsibility) or, where no suitable alternative approved regulator has been identified, the Board, in its capacity as an approved regulator.

148. Where such a transfer takes place, the relevant regulated persons will be subject to the regulatory arrangements of the new regulator or Board as appropriate.

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149. This clause also allows money raised from practising fees and held by the old regulator (or a part of the money so held) to be paid to the new regulator and treated in the same way as if the money had been raised by the new regulator by way of practising fees.

Clause 47: Cancellation of designation: powers of entry etc

150. This clause applies where an approved regulator has had its designation removed. The old regulator must give reasonable assistance to the new regulator and Board for the continuation of regulation.

151. A person nominated by the Board may apply to a judge of the High Court, Circuit judge or justice of the peace who may issue a warrant authorising that person to enter and search the premises of the old regulator, and take possession of written or electronic documents found. The Board must make rules as to the persons appointed, who may take copies of documents found.

152. A warrant may not be issued unless it is necessary or desirable for the continuation of regulation. The Secretary of State must make regulations specifying any further matters that the judge or justice of the peace must be satisfied of or have regard to before issuing a warrant, and regulating the exercise of a power conferred by the warrant. The regulations must be made on recommendation of, or consultation by, the Board and must make provision as to the circumstances in which documents may be copied or must be returned.

Clause 48: The Board's policy statements

Clause 49: Policy statements: procedure

153. Clause 48 requires the Board to prepare and issue a policy statement concerning its functions as set out in *subsection (1)*. The Board may also issue a statement of policy with respect to any other matter, where it considers it appropriate. Any policy statement may be amended or replaced from time to time, and the Board must publish the new or amended statement. The Board must have regard to any relevant policy statement in exercising, or deciding whether to exercise, any of its functions (*see subsection (6)*).

154. Before the Board issues a policy statement (which it must then take into account) as above, it must publish a proposed statement in draft, and allow representations to be made concerning it. Clause 49 outlines the procedure for making policy statements.

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Clause 50: Control of practising fees charged by approved regulators

155. This clause requires the Board to make rules setting out the purposes for which practising fees payable under the regulatory arrangements of approved regulators may be applied. These rules must allow for practising fees to be applied for the purposes set out at *subsection (4)*. This provision further provides that a practising fee charged by an approved regulator to the persons it authorises will only be payable if the Board has approved the level of the fee. The Board must also make rules setting out the how it will deal with applications for the approval of practising fees.

Clause 51: Regulatory conflict with approved regulators

156. This clause deals with the possibility that conflicts between regulatory arrangements may arise where an approved regulator regulates entities comprising persons authorised by different approved regulators – for example, solicitors and barristers. Regulators of such entities will be required to take steps to prevent conflicts of this type in their rules as set out at *subsection (1)*. In the event that a conflict does arise between the regulator of the entity, and another approved regulator who authorises persons practising within the entity, the entity rules are to prevail as set out at *subsection (4)*.

Clause 52: Modification of provision made about regulatory conflict

157. To counter any imbalance arising from the outcome of the provision in *subsection (4)* of clause 51, clause 52 provides that approved regulators whose members are affected by the rules of another approved regulator may request that the Board exercise its powers under clause 31 to direct that the approved regulator take steps to address the offending provision in its regulatory arrangements. *Subsection (3)* requires approved regulators to consider any request from persons authorised by them or a manager or employee of such persons to make such an application to the Board. The Board must consider representations from both regulators, and may consult others as appropriate, before making a decision over whether or not to modify the rules (see *subsections (5) to (8)*).

Clause 53: Regulatory conflict with other regulatory regimes

158. This clause places approved regulators under an obligation to make provision in their regulatory arrangements dealing with the possibility of regulatory conflicts with external regulators. This applies to approved regulators who regulate entities involving persons regulated by an external, non-legal services regulator, for example, the Financial Services Authority. In such cases, approved regulators must make provision to prevent regulatory

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conflict from arising, as well as to avoid unnecessary duplication of regulation. The Board must provide guidance to approved regulators on dealing with external regulatory conflicts, but may only exercise a conflict resolution function, as under 51, where it gives its consent to do so. With the Board's consent, such provision made in the approved regulator's regulatory arrangements may provide for the Board to settle disputes between the approved regulator and relevant external regulators.

Clause 54: Provision of information to the Board

Clause 55: Enforcement of notices under section 54

159. Clause 54 confers power on the Board to require an approved regulator, by notice, to provide such information or produce such documents, in such form, within such period and to such person nominated by the Board, as the Board specifies in the notice. Clause 55 provides for enforcement in the event of an approved regulator failing to comply with such a notice. Enforcement is by way of application to the High Court for an order requiring the approved regulator to comply with the original notice that was issued by the Board.

Clause 56: Reports by the OFT

Clause 57: The Board's response to OFT report

Clause 58: Referral of report by the Secretary of State to the Competition Commission

Clause 59: Duties of the Competition Commission

Clause 60: Secretary of State's power to give directions

160. These clauses make provision conferring investigation powers and duties on the OFT and the Competition Commission where they have as their object or effect the prevention, restriction or distortion of competition on the market for reserved legal services. Under clause 56, the OFT may investigate if it believes that an approved regulator's regulatory arrangements (or any part of them) restrict, distort, or prevent competition within the reserved legal services market to a significant extent, or are likely to do so. The clause also makes provision for the OFT to report if it investigates, and sets out the matters which the OFT's report should cover. It further provides that such reports attract absolute privilege for the purposes of the law of defamation.

161. Clause 57 details how the Board should respond to a report from the OFT. It provides that the Board shall allow at least 28 days for the approved regulator to make representations to the Board regarding the OFT's report. Clause 57 further allows for the Consumer Panel to give such advice to the Board as it considers appropriate and requires the Board to have regard to any such representations and advice before informing the OFT what action (if any) it proposes to take.

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162. Clause 58 and clause 59 provides that in the event that the OFT believes that the Board has not given the OFT's report full and proper consideration, the OFT may give a copy of the report to the Secretary of State, who must, in turn, give a copy of the report to the Competition Commission. The Competition Commission must then make its own report (unless it judges that this would serve no useful purpose).

163. Following the OFT's report (and the Competition Commission's report, where applicable), the Secretary of State may under powers conferred by clause 60 direct the Board to take such action as the Secretary of State considers appropriate.

Clause 61: The Board as an approved regulator

Clause 62: The Board's designation under section 61(1)(a)

Clause 63: Modification of the Board's functions under section 61(1)(b)

Clause 64: Cancellation of the Board's designation under section 61(1)(c)

Clause 65: The Board's power to recommend orders made under section 61

164. This group of clauses make provision for the Board to be able to act as an approved regulator in relation to any one or more reserved legal activities. Clause 61 provides that the Secretary of State may, by order:

- designate the Board as an approved regulator in relation to one or more reserved legal activities,
- modify the functions of the Board, with a view to enabling the Board to discharge its functions as an approved regulator effectively and efficiently, and/or
- cancel the Board's designation as an approved regulator in relation to one or more reserved legal activity.

165. Such an order may also modify other legislation as appears necessary or expedient to the Secretary of State (*see subsection (5)*). If the Board is designated by such an order, it must take the necessary action to ensure an appropriate financial and organisational separation between its functions as approved regulator and its other activities.

166. The Secretary of State's power to make such an order is exercisable only if the Board has made a recommendation for such an order; and may not be used so as make an order which differs materially from that recommended (*subsection 2*). The Secretary of State is not bound to accept a recommendation; but must provide the Board with a notice stating his reasons for refusal and must publish that notice (*subsection (3)*).

*These notes refer to the Legal Services Bill [HL]
as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

167. Clause 62 provides that the Board may be designated as an approved regulator only in instances where an approved regulator's designation has been cancelled, or where the activity in question is a new reserved legal activity. By virtue of *subsection (3)*, the Board may be designated as an approved regulator in advance of either of these eventualities. The order designating the Board must also ensure that the Board acting as approved regulator is separate from the Board acting in its "general" capacity such that the Board as approved regulator may only make or modify its regulatory arrangements with the approval of the Board in its "general" capacity.

168. Clause 63 specifies some of the powers that may be conferred on the Board by an order made under clause 61 *subsection (1)(b)* modifying the Board's functions in order to enable it to fulfil its role as an approved regulator more effectively.

169. Clause 64 makes provision regarding the cancellation of the Board's designation as an approved regulator. In such cases, the provisions of the Bill regarding "transfer arrangements" will apply in relation to the Board and relevant authorised persons as they do to an approved regulator whose designation is cancelled and to persons authorised by that regulator.

170. Clause 65 provides that the Board may recommend to the Secretary of State that they make an order cancelling the Board's designation as an approved regulator, and sets out the procedure that the Board must follow before making such a recommendation.

Clause 67: Regulatory conflict and the Board as approved regulator

171. This clause sets out how regulatory conflict will be resolved in instances where the Board acts as an approved regulator. It provides for a variety of ways in which an "affected person" may apply to an approved regulator, including the Board in its capacity as an approved regulator, requesting that the approved regulator reconsider the provision made in its regulatory arrangements for the resolution of regulatory conflict. It further provides that an "affected person" in relation to the Board in its capacity as an approved regulator, may apply to the Board in its capacity as an oversight regulator, requesting that it exercise its powers under clause 32 to direct the approved regulator to take the appropriate action in respect of regulatory arrangements to resolve a regulatory conflict.

*These notes refer to the Legal Services Bill [HL]
as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

Clause 68: Modification of the functions of approved regulators etc

Clause 69: Procedural requirements relating to recommendations under section 68

172. Clause 68 confers the power on the Secretary of State to make an order modifying or making other provision in relation to the functions of an approved regulator or other body (other than the Board). Such orders may only be made to achieve the purposes specified in clause 68 namely in order:

- to enable a body to become an approved regulator or licensing authority in relation to one or more reserved legal activities,
- to enable a body to regulate different categories of legal persons,
- to enable a body to carry out its role as an approved regulator/licensing authority more effectively,
- to enable a body to become a qualifying regulator for immigration services, or
- (where the body is already a qualifying regulator) to enable it to authorise persons to provide any additional advice or services which amount to immigration advice or services.

173. The Secretary of State's power to make such an order may only be exercised on the recommendation of the Board, and in the same form, or in a form not materially different from that recommended by the Board. Furthermore, the Board may only make a recommendation that such an order be made with the consent of the approved regulator to which the recommendation relates. Clause 69 sets out the procedural requirements relating to the making of such recommendations.

PART 5: ALTERNATIVE BUSINESS STRUCTURES

174. This Part of the Bill makes provision for new alternative business structures as a vehicle for providing legal and other advice and services. This means that lawyers and non-lawyers will be able to form legal partnerships and companies as vehicles for the provision of reserved legal services. Where non-lawyers act as partners, directors, or owners of such a firm, the firm will have become a licensed body in accordance with the provisions described here. This Part also sets out how, in the absence of other appropriate licensing authorities, the Board can operate as a licensing authority for alternative business structures, and how other

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licensing authorities can be established. It defines the methods for constructing rules and procedures for the regulation of alternative business structures.

175. The term “alternative business structure” or “ABS firm” refers to any structure that could potentially deliver a reserved legal service, other than the structures currently allowed to do so in private practice. Examples (some of which are already permitted) include: multi-disciplinary partnerships, limited liability partnerships, unlimited liability incorporated practices, private limited companies, public limited companies and mutual societies.

Background

176. Historically, there have been a number of statutory restrictions on the type of business structures through which legal services may be provided. Some existing regulators prohibit lawyers from entering into partnership with non-lawyers. They also place restrictions on unregulated persons being formally involved as directors or controlling these businesses by other means and prevent unregulated persons having any stake in the ownership of such businesses.

177. In March 2001, the OFT identified a number of rules of the legal profession that were potentially unduly restrictive, and that might have negative implications for consumers.¹² The OFT recommended that rules governing the legal professions should be fully subject to competition law and that unjustified restrictions on competition should be removed. In his 2004 Review,¹³ Sir David Clementi recommended the “facilitation of legal disciplinary practices, to allow different kinds of lawyers and non-lawyers to work together”.

178. In 2005 the Government published a White Paper, *The Future of Legal Services: Putting Consumers First*.¹⁴ It proposed ABS, which would allow different types of lawyers (for example, solicitors and barristers), and lawyers and non-lawyers, to work together on an equal footing in an ABS firm. It identified potential benefits for consumers and legal services providers:

“Potential benefits for consumers:

- more choice: consumers will have greater flexibility in deciding from where to obtain legal and some non-legal services.

¹² OFT, 2001

¹³ Clementi, 2004b

¹⁴ Department for Constitutional Affairs, 2005

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- reduced prices: consumers should be able to purchase some legal services more cheaply. This should arise where ABS firms realise savings through economies of scale and reduce transaction costs where different types of legal professionals are part of the same firm.
- better access to justice: ABS firms might find it easier to provide services in rural areas or to less mobile consumers.
- improved consumer service: consumers may benefit from a better service where ABS firms are able to access external finance and specialist non-legal expertise.
- greater convenience: ABS firms can provide one-stop-shopping for related services, for example car insurance and legal services for accident claims.
- increased consumer confidence: higher consumer protection levels and an increase in the quality of legal services could flow from ABS firms which have a good reputation in providing non-legal services. These firms will have a strong incentive to keep that reputation when providing legal services.

“Potential benefits for legal service providers:

- increased access to finance: at present, providers can face constraints on the amount of equity, mainly debt equity, they can raise. Allowing alternative business structures will facilitate expansion by firms (including into international markets) and investment in large-scale capital projects that increase efficiency.
- better spread of risk: a firm could spread its risk more effectively among shareholders. This will lower the required rate of return on any investment, facilitate investment and could deliver lower prices.
- increased flexibility: non-legal firms such as insurance companies, banks and estate agents will have the freedom to realise synergies with legal firms by forming ABS firms and offering integrated legal and associated services.
- easier to hire and retain high-quality non-legal staff: ABS firms will be able to reward non-legal staff in the same way as lawyers.
- more choice for new legal professionals: ABS firms could contribute to greater diversity by offering those who are currently under-represented more opportunities to enter and remain within the profession.”

179. Prospective ABS firms (referred to in the Bill as “licensed bodies”) will have to be licensed by a “licensing authority” (either an approved regulator that has been authorised as a licensing authority, or the Board itself where there is no appropriate licensing authority in place). Existing regulators of legal services will be able to apply to the Board for permission to be licensing authorities. Consumers will be able to complain about matters relating to the services provided by ABS firms: first through the firm’s in-house complaints arrangements, and if necessary, to the new OLC.

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180. The not for profit sector will fall within the regulatory scope of the ABS licensing scheme. Licensing authorities will have the power to adopt different rules for not for profit organisations and trades unions, and to waive or modify the rules in specific cases where it is appropriate to do so.

Clause 70: Carrying on activities by licensed bodies

181. This clause introduces **Part 5**. *Subsection (2)* defines “licensed body” as a body holding a licence under Part 5.

Clause 71: “Licensable body”

182. This clause defines licensable bodies. They are bodies that have at least one manager who is not an authorised person (as defined in clause 17) or at least one person who has an interest in shares in the body who is not an authorised person. Clause 197 defines a manager as: a member, in relation to a body corporate whose affairs are managed by its members; a director, in relation to a body corporate if its affairs are not managed by its members; a partner, if the body is a partnership; and a member of its governing body, if it is an unincorporated body other than a partnership.

183. By *subsection (2)* an interest in shares is determined in accordance with section 820 of the Companies Act 2006 which provides that a reference to an interest in shares includes an interest of any kind whatsoever. Any restrictions on the shares are disregarded. Further, section 820 provides that a person has an interest in shares where: the interest is comprised in property held on trust and that person is a beneficiary of the trust; that person has entered into a contract to acquire shares; that person is entitled to exercise or control the exercise of any rights in the shares; that person may call for delivery of the shares; or that person may call for or is obliged to take delivery of the shares. Holders of joint interest are each treated as having the relevant interest.

184. *Subsection (3)* defines “shares”. It provides that shares, in relation to a body with share capital, allotted shares as defined in the Companies Acts. That includes shares taken on the formation of the company by the subscribers to the company’s memorandum. In relation to a body that has capital, but no share capital, shares are rights to share in that capital. Shares in relation to a body without capital are either: interests conferring the right to share in profits or contribute to losses; or interests that give rise to obligations to contribute to debts or expenses on the winding up of the body.

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Clause 72: Licensing authorities and relevant licensing authorities

185. This clause provides that a licensing authority is either the Board or an approved regulator who is designated as such. Under *subsection (2)* an approved regulator may only be a licensing authority in relation to matters for which the approved regulator is designated under Part 1 of **Schedule 10**. By *subsection (3)* the Board may delegate its functions as licensing authority and must ensure that where it acts as licensing authority it appropriately separates its functions.

Clause 73: Designation of approved regulator as licensing authority

186. **Part 1 of Schedule 10**, introduced by this clause, sets out the procedure to be followed when an approved regulator seeks designation as a licensing authority.

187. Paragraph 1 of the Schedule sets out the conditions that must be satisfied where a body wishes to become a licensing authority. The body must be an approved regulator or an applicant for that status in relation to any reserved legal activity for which it wishes to be a licensing authority. Any application must include proposed licensing rules. The requirements for the contents of licensing rules are set out later in the Schedule. All applications must include a statement of the legal activities that the body intends to license, the proposed licensing rules, any explanatory material as is needed and the prescribed fee. The fee must be specified in rules made by the Board as may any additional requirements about the manner and form of applications. An application can be withdrawn by giving the Board notice.

188. Under paragraph 2 the Board may dismiss an application before it has considered it completely, but it must make rules about the procedures and criteria that will apply to such decisions. It must give the applicant notice of a dismissal and its reasons, and publish that notice.

189. Paragraph 3 requires the Board to seek advice from the people and bodies listed in sub-paragraph (2) in considering applications. The process in relation to each is described in more detail in paragraphs 4 to 8. Paragraph 9 sets out some of the process in relation to representations by the applicant about that advice and paragraph 10 describes the publication requirements in relation to the advice and representations.

190. Paragraph 11 obliges the Board to make rules governing the way it determines applications. Sub-paragraphs (2) and (3) sets out conditions that must be met (and must be reflected in the rules) before the Board can grant an application.

191. Paragraph 12 sets out the matters the Board must consider before deciding whether to grant the application in whole or (where it relates to more than one reserved legal activity) in

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respect of any of the activities in the application. The Board's decision notice give reasons for any refusal must be published.

192. Paragraph 13 provides that the deadline for deciding applications is 12 months from the day of the application. That period can be extended any number of times up to a maximum of 16 months after consulting the OFT, the Consumer Panel and the Lord Chief Justice and obtaining the Secretary of State's approval.

193. Where the Board grants an application, paragraph 14 sets out the process by which the Board must make a recommendation to the Secretary of State to make an order designating the applicant as a licensing authority.

194. Paragraph 15 provides that when the Secretary of State receives a recommendation from the Board he may either make the recommended order or refuse to make it. If the applicant has also applied to be designated as an approved regulator, the Secretary of State must first make the appropriate order. If the Secretary of State makes a modified order or declines to make an order the reasons for that decision must be published. Paragraph 16 provides that the making of the order has the effect that the proposed licensing rules are treated as approved by the Board, to the extent that they only relate to matters that were approved and remain subject to the power of the Board to make directions under clause 31.

Clause 74: Automatic cancellation of designation as licensing authority

195. This clause provides that if a licensing authority loses its status as an approved regulator, it automatically loses its licensing authority status.

Clause 75: Cancellation of designation as licensing authority by order

196. This clause sets out how the designation of a licensing authority may be cancelled in whole or in part. Cancellation is by the Secretary of State on the recommendation of the Board. The Board must make a recommendation where the licensing authority requests it and on payment of a fee prescribed in Board rules. Under *subsection (5)* the Board may make a recommendation where an act or omission or series of such acts or omissions has had, or is likely to have, an adverse impact on the regulatory objectives, and in all the circumstances of the case it is appropriate to cancel the designation. By *subsection (6)* the Board may not exercise this power unless it is satisfied that the use of any of the powers set out in clauses 30 to 43 (performance targets, directions and public censure) would not adequately deal with the situation. *Subsection (7)* introduces Part 2 of Schedule 10, which makes provision about recommendations under subsection (5).

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197. The Secretary of State may decide not to make an order, but he must give reasons and publish them.

198. **Part 2 of Schedule 10** sets out the details of the procedure to be used when the Board is considering cancellation under *subsection (5)*. Paragraph 18 provides that the Board must give the licensing authority a warning notice, setting out its reasons for cancellation, which it must publish. The licensing authority may then make written representations (or oral representations, if authorised by the Board) within 28 days or a longer period specified by the Board. The Board must publish a report about those representations after having regard to comments made about that report.

199. Paragraphs 19 to 24 set out the process whereby the Board consults the OFT, the Consumer Panel, the Lord Chief Justice and other persons that the Board considers reasonable to consult.

200. Paragraph 25 sets out the obligation on the Board to provide any advice from those persons to the licensing authority and the process by which it does so and takes account of any representations made. Under paragraph 27 the Board must give a decision notice to the Secretary of State and publish it.

Clause 76: Cancellation of designation: further provision

201. This clause allows consequential provision to be made by the Secretary of State where the designation of a licensing authority is cancelled. Two types of order are possible. The first, under *subsection (2)* enables legislation to be modified to take account of the cancellation. The second under *subsection (3)* allows arrangements to be made allowing the licensing arrangements of the authority to be transferred to a new authority. Under *subsections (4) and (5)*, these are arrangements for transferring licensed bodies from the regulation of the original licensing authority to another that consents to act as their licensing authority. They must include provision for placing the transferred bodies under the “new” licensing authority’s rules, described in *subsection (6)(a)*, and may include provisions for transferring licensing fees to the new authority which can be found at *subsection 6 (b)*. A body that does not consent to the transfer will lose its licence. *Subsections (8) to (10)* clarify the meaning of phrases used in this clause and provide that the Secretary of State may only make an order under this section on the recommendation of the Board that is materially the same as the order drafted by the Board.

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Clause 77: The Board's power to recommend orders made under section 76

202. This clause provides for the process that must be followed by the Board if it wishes to make a recommendation that the Secretary of State exercise the powers under clause 76. The Board must publish a draft recommendation and order and invite representations about them within a specified period. After considering the representations, it may either send its recommendation and draft order to the Secretary of State as originally drafted, or send amended versions. If it does the latter, and if the amendments are materially different from the proposal, it must publish the new draft and explain the differences and its reasons for them.

Clause 78: Cancellation of designation: powers of entry etc

203. Where an approved regulator has its designation cancelled this clause provides for that old authority to give assistance to the Board to enable regulation to continue. *Subsections (3) to (10)* make provision for the Board to obtain a warrant to enter and search the premises of the old authority to take possession of written or electronic records where necessary to enable the regulatory regime to continue. The Secretary of State must make regulations, either on the Board's recommendation or after consulting it, specifying further matters that the judge must take into account before issuing a warrant, regulating the exercise of the power and setting out the circumstances in which records can be copied.

Clause 79: Functions of appellate bodies

Clause 80: Procedural requirements relating to recommendations under section 79

204. Clause 79 allows the Secretary of State, on the Board's recommendation, to establish separate appellate bodies by order. It enables the Secretary of State to modify the operation of existing bodies including the Solicitors Disciplinary Tribunal and the Discipline and Appeals Committee of the CLC to achieve this. The order may also make provision about fees and costs and may make modifications to any enactment. The order must be in a form that is not materially different from the draft attached to the recommendation by the Board under clause 80.

205. Clause 80 sets out procedural requirements about recommendations by the Board for an order under clause 79. The most important are that: the Board can make a recommendation only with the consent of the relevant body (the licensing authority and/or the existing appellate body) (*subsection (1)*); it must publish its recommendation in draft and accept representations (*subsections (2) to (4)*); and it must publish the reasons for any material changes in the light of representations (*subsection (5)*).

Clause 81: Licensing rules

206. This clause provides for licensing rules to be made by the Board acting in its capacity as a licensing authority within a period of 12 months from a date set by order by the Secretary of State. Those rules must be made or modified by the Board acting as oversight regulator rather than as licensing authority or approved regulator. *Subsection (2)* provides that licensing rules made by an approved regulator only have effect while that regulator is also a licensing authority. *Subsection (3)* defines licensing rules. They are rules that prescribe the circumstances when a licensing authority may license a body, the conditions for being licensed, and regulate the conduct of licensed bodies' affairs. *Subsection (4)* details the provisions that include provision that must be made by licensing rules, which include the regulatory conflict provisions of clauses 51 and 53 and the complaint handling provisions of clauses 109 and 142. *Subsection (6)* introduces **Schedule 11**, which makes further provision as to obligatory rules. *Subsections (7) and (8)* highlight the provision of clauses 103 and 104, which make special provision in relation to trade unions and other special bodies.

207. **Schedule 11** describes licensing rules in detail. It has four Parts, dealing with licensing procedure, the structural requirements of licensed bodies, the practice requirements of those bodies, and their regulation. Decisions about individual licences are taken by licensing authorities without reference to the Board or the Secretary of State.

208. **Part 1** of this Schedule outlines licensing procedures.

209. Clause 82 (described below) sets out the basic conditions for the way licensing authorities must deal with applications for licences. Part 1 of the Schedule makes detailed provision about licensing decisions. Under paragraphs 1 to 6 licensing rules must include provision about how an application or an application to modify a licence should be made and any fees. Three types of decision can be taken: determining applications for licences (paragraph 2), renewing licences periodically (paragraph 4), and modifying licences (paragraph 6). Rules *must* include provisions about:

- the timetable for determining of initial applications, including extensions of the 6 month decision period provided for in paragraph 2 up to a maximum of 9 months
- reviews of decisions to refuse applications under paragraph 3, and refusing applications for modifications, or granting them subject to terms, under paragraph 6, sub-paragraph (3); and
- the way applications for modifications are made, and fees, under paragraph 6, sub-paragraph (1).

210. In addition, rules *may* include provisions about:

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- the duration of licences, and their renewal, as provided for in paragraph 4, sub-paragraph (1), and
- the effect of changes in the membership of partnerships or other unincorporated bodies on the licence under paragraph 5, sub-paragraph (2).

211. Paragraphs 7 and 8 make provision in similar terms to that described above in relation to applications under clause 106, which deals with the power to modify the application of licensing rules to the special bodies detailed in clause 104. In particular, licensing rules must make provision obliging a special body to notify the licensing authority where it becomes a different kind of special body or ceases to be a special body, within 30 days or a longer period provided for in the licensing rules.

212. **Part 2** of the Schedule outlines the three basic structural requirements that *must* be covered in the licensing rules. Paragraphs 9 and 10 require all licensed bodies to have at least one manager who is an authorised to carry out one of the legal activities for which the body is licensed, prohibit a licensed body having a manager who is disqualified (provision about disqualification can be found in clause 98), permit licensing rules to be made about managers and prohibits licensing rules from specifying that *all* the managers must be authorised persons. Paragraphs 11 and 12 provide that licensing rules must provide that licensed bodies must also have a designated Head of Legal Practice (“HoLP”) who is approved by the licensing authority, is an authorised person and not disqualified. Under paragraph 11, sub-paragraph (4) a HoLP may be approved only if the person is fit and proper to undertake the duties set out in clause 89. Paragraph 12 requires provision in the rules about the procedures and criteria that the licensing authority will apply in determining whether a person is fit and proper and allows the rules to suspend the requirement to have a HoLP for a specified period, so long as the licensed body complies with other requirements set out in the rules. Paragraphs 13 and 14 provide that licensing rules must provide that licensed bodies must have a designated Head of Finance & Administration (“HoFA”) who is approved by the licensing authority. Such a person must not be disqualified under clause 96 and must be a fit and proper person to carry out the duties imposed by clause 90. Paragraph 14 makes similar provision in relation to HoFAs to that made in paragraph 12 about HoLPs.

213. **Part 3** of the Schedule outlines practice requirements.

214. Licensing rules must cover four basic practice requirements:

- under paragraph 15 a licensed body that is a company or limited liability partnership and has its registered office in England or Wales must have a practising address which is a place in England & Wales where the body carries out some or all of the reserved legal activities for which it is licensed,

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- under paragraph 16 licensed activities may be carried on only by or under the supervision of entitled persons,
- under paragraph 18 disqualified persons may not work in licensed bodies as employees or officers; and
- under paragraph 20 it must account for clients' money.

215. The licensed activity requirement in paragraph 16 is backed up by a further requirement in paragraph 17 that all its employees and managers comply with the duties in clause 169 and. A licensed body must have arrangements for ensuring that authorised persons who are employees or managers maintain the professional principles set out in clause 1. It must also have arrangements for ensuring that non-authorised persons subject to the duty in clause 88 comply with it. Under paragraph 17 sub-paragraph (5) licensing rules may set out what arrangements would be suitable for these purposes.

216. In addition, paragraph 19 makes provision about indemnity and compensation arrangements. Licensing rules may enable those arrangements by authorising or requiring funds maintained by the licensing authority, authorising or requiring insurance to be taken out by the licensing authority, or requiring insurance to be taken out by licensed bodies.

217. Paragraph 20 requires licensing rules to cover the treatment of client money, including money in trusts and money that the licensed body or its managers or employees hold as a stakeholder.

218. Under paragraph 21 of the Schedule, all licensed bodies must pay periodic licensing fees, although different fees can be set for different kinds of body.

219. **Part 4** of the Schedule covers a number of areas that are described under the relevant sections of these Notes.

Clause 82: Application for licence

220. This clause sets out the way licensing authorities must deal with applications for licences. Licensing authorities must determine applications that come from licensable bodies with the required fee and may not grant an application unless they are satisfied that the body will comply with licensing rules. Under *subsection (5)* licensing authorities must issue the licence as soon as reasonably practicable after the application has been granted and under *subsection (6)* the licence has effect from that date. Where the Board is the licensing authority **Schedule 12** makes provision about the entitlement of applicants and the process.

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221. The Schedule deals with the limited circumstances in which licensable bodies can apply to the Board for a licence. The Board is designated as a licensing authority under clause 72, but under paragraph 1 will act only in that capacity in limited circumstances. Schedule 12 applies to two classes of bodies: the special bodies defined in clause 104, and other licensable bodies. Certain provisions in the Schedule differentiate between the two classes of body. Paragraph 4 of the Schedule makes clear that, for these applications, the Board is not acting in its capacity as a licensing authority:

- that there is no competent licensing authority, and none intending to become competent (paragraph 1, sub-paragraph (3)) – “competent” and “potentially competent” are defined in paragraphs 5 and 6 as an approved licensing authority that is designated in relation to the reserved legal activities that the body proposes to do and an applicant for that status,
- that no licensing authority or potential licensing authority has or plans to have suitable regulatory arrangements (paragraph 1, sub-paragraph (4)). Licensable bodies can apply to licensed bodies for determinations of this ground under paragraph 3, and paragraph 7 defines the factors to be taken into account in considering whether arrangements are suitable, or
- that, for special bodies under clause 104, no licensing authority has terms that are appropriate to them (paragraph 1, sub-paragraph (5)).

222. Paragraph 2 then specifies that the Board must determine whether the licensable body is entitled to apply to it for a licence, and give reasons for its decision. Different timescales apply to each of the grounds (sub-paragraph (2)). The Board is obliged to make rules for this process (sub-paragraph (4)) and may include in them rules for cases where the reason for making the application no longer applies (sub-paragraph (5)).

Clause 83: Terms of licence

223. This clause prescribes the terms of licences when they are granted. Every licence must specify the reserved legal activities that the licensed body is licensed to carry on, and any conditions attached to the licence, as shown in *subsection (1)*. Under *subsections (4) and (5)* one condition is obligatory: that the licensed body or any employee, manager or (part-)owner, must comply with any obligations imposed on them by the licensing rules or in legislation. The licensing authority may impose such other conditions as it considers appropriate (*subsection (6)*), including conditions as to the non-reserved activities that a licensed body may carry out (*subsection (7)*). If the body is one for which an order has been

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made under clause 104, *subsection (2)* requires the licence also to set out the terms of the order.

Clause 84: Modification of licence

224. This clause provides for modification of licences where an application is made in accordance with licensing rules or where licensing rules allow modifications to be made in other circumstances (*subsection (1)*). Where a body to which section 103 applies for a modification of its licence, the licensing authority must apply the considerations in clauses 104 and 105 anew. Under *subsection (3)* modifications are made by notice in writing and have effect from the giving of the notice. Under *subsection (4)* licensing authorities' powers are subject to the constraints as to conditions set out in clause 83 and licensing rules about modification of licences.

Clause 85: Registers of licensed bodies

225. This clause sets out requirements for registers of licensed bodies. Each licensing authority must keep a register of the names and places of business of all the bodies that it licenses or has licensed (*subsection (1)*) and must make a note of any suspensions in that register (*subsection (2)*). The register must be available for inspection free of charge, during office hours (*subsection (3)*). The Board may make other rules about its own and licensing authorities' registers, in particular about other information that registers should contain (*subsections (4) and (5)*).

Clause 86: Evidence of status

226. Under this clause a signed certificate stating whether a person does or does not, or did or did not, hold a licence that it granted, is evidence of those facts unless proved otherwise.

Clause 87: Ownership of licensed bodies

227. **Schedule 13**, introduced by clause 87, deals with the ownership of licensed bodies. Clause 103 provides that this Schedule does not apply to trade unions.

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as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

228. The Bill deals with the types of interest (“restricted interests”) detailed in Part 1 of Schedule 13:

- an interest in a licensed body arises when a person owns shares in it, has the right to share in its capital, is a partner in it, or is in some other way entitled to share in its profits or obliged to contribute to its losses;
- a material interest in a licensed body (Schedule 13, paragraph 3) arises when a person:
- owns 10% or more of the shares in it or in its parent company;
- can exercise or control the exercise of 10% of the voting power in it or in its parent company (this covers situations where some shares have enhanced voting rights); or
- can exercise significant influence over the management of the company or its parent company by virtue of his or her shareholding or voting power in it (this covers situations where, for example, interest holders have agreements over voting that link one holder’s votes inextricably to another’s).

229. Licensing rules can specify lower proportions than 10% for defining material interest (paragraph 3, sub-paragraph (2)). Where a lower proportion is specified, the notification requirements and divestiture conditions under the Schedule will have effect in relation to the modified threshold.

- a *controlled interest* (in a body that is a company with shares) is any proportion of the shares specified in the licensing rules that is greater than the material interest level, (paragraph 4);
- both material interests and controlled interest (where specified) are types of *restricted interest* (paragraph 2). Any non-authorized persons holding, or seeking to hold, restricted interests, must be approved by the licensing authority before the body can be licensed, as specified in paragraph 1. Once the body is licensed, any further acquisition or holding of restricted interests by non-authorized persons must also be approved.

230. In addition, licensing rules can specify an upper ‘ceiling’ limit for the holding of interests in licensed bodies by non-authorized persons, which no non-authorized person may exceed, regardless of whether or not they meet the approval requirements at paragraph 6 (the provisions about that limit are found in **Part 4** – paragraphs 38 to 40).

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as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

231. A person's interest in a licensed body includes the interests of associates, who are defined in paragraph 5. The Secretary of State has power in paragraph 9 to change the definitions of "material interest" and "associate", on the Board's recommendation.

232. Paragraph 6 sets out the approval requirements. A non-authorised person's holding of a restricted interest will be approved if the licensing authority is satisfied that it would not compromise the adherence by the licensed body or its authorised staff to the regulatory objectives in clause 1 or their compliance with the duties in clause 169. The licensing authority must also be satisfied that the person is a fit and proper person to hold the interest. Licensing rules must include criteria and procedure for making this decision.

233. Paragraph 7 provides that if a person holds a material interest under paragraph 3, sub-paragraph (1), by virtue of holding a certain percentage of a body's shares or controlling a certain percentage of the voting power in a body, any lesser percentage of shares (where the approved interest is in the form of shares) or voting power (where the approved interest is in the form of (voting power) which the person subsequently holds is treated as being approved by the licensing authority.

234. **Part 2** covers the identification to licensing authorities of non-authorised persons, and the approval of those persons. At the initial licensing stage, a body seeking a licence must identify any person that it knows holds a restricted interest or expects to hold one when the licence is issued, (paragraph 10, sub-paragraphs (1) and (2)). This includes telling the licensing authority if the identities of such people change after the application has been made (paragraph 10, sub-paragraph (2)). Failing to do so is an offence, punishable on summary conviction by a fine up to level 5.

235. Under paragraph 13 the applicant body must also notify the non-authorised persons whom it has identified to the licensing authority. Failure to do this is also an offence, punishable in the same way. The notification must explain the effect of paragraph 14, which enables the licensing authority to seek more information from non-authorised persons who have been identified. The deliberate provision of false or misleading information is an offence, punishable by a fine not exceeding the statutory maximum on summary conviction or by a fine and/or two years in prison on conviction on indictment.

236. Under paragraph 13 the applicant body must also notify the non-authorised persons whom it has identified to the licensing authority. Failure to do this is also an offence, punishable in the same way. The notification must explain the effect of paragraph 14, which enables the licensing authority to seek more information from non-authorised persons who have been identified. The deliberate provision of false or misleading information is an offence, punishable by a maximum-level fine on summary conviction or by a fine and/or two years in prison on conviction on indictment.

237. If the licensing authority is satisfied that the non-authorised person meets the approval requirements in paragraph 6, and that the person has not been disqualified, it may grant the

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application. Part 2 of the Schedule also sets out the criteria and procedure where the licensing authority decides to approve the interest subject to conditions (paragraphs 17 and 18) or to object to the holding of the interest (paragraphs 19 and 20).

238. After a licence has been granted, the acquisition of interests by non-authorised persons is still regulated in the manner set out in **Part 3** of the Schedule. Under paragraph 21, if an investor intends to take steps to acquire an interest in a licensed body that would give him or her a restricted interest in it, he or she must notify both the licensed body and the licensing authority. Acquiring an interest short of a restricted interest does not trigger this requirement. Where the investor acquires an interest without taking steps to do so – for instance, by inheriting it – he or she must give the notifications within a time limit set by the Secretary of State on the Board's recommendation. Under paragraphs 22 and 23, failure to give notification is an offence, punishable on summary conviction by a level 5 fine. Taking a proposed acquisition step without obtaining approval from a licensing authority is also an offence, punishable by a fine not exceeding the statutory maximum on summary conviction or by an unlimited fine and/or two years in prison on conviction on indictment (paragraph 24).

239. Paragraph 25 sets out what the licensing authority must do once it has received a notification under paragraph 21, or once it has become aware that an investor has not notified it as he or she should. It must either:

- approve the interest unconditionally,
- warn the investor that it intends to approve it with conditions,
- approve it with conditions,
- warn the investor that it intends to object, or
- object to the holding of the interest.

240. As with the application stage, a licensing authority may approve an interest unconditionally only if it is satisfied that the non-authorised person meets the approval requirements in paragraph 6, and that the person has not been disqualified.

241. A licensing authority may apply conditions to an interest only if it is satisfied that, if the conditions are observed, it will be appropriate for the investor to hold the notifiable interest without the approval requirements being met.

242. A licensing authority may object (under paragraph 31, sub-paragraph (1)) if it is not satisfied that the investor meets the approval requirements in paragraph 6.

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243. Once it has made a decision, the licensing authority must notify the investor and the licensed body of its decision in writing as soon as soon as reasonably practicable. It must give its reasons for imposing conditions or objecting and, where the investor has acquired the interest without taking steps, must explain the divestiture provisions (described below) so that the investor understands the possible effect of the legislation.

244. If a licensing authority intends to warn an investor that it intends to impose conditions or object, it must give him or her, and the licensed body, a warning notice (paragraphs 28, sub-paragraph (3) and paragraph 31 sub-paragraph (2)). That notice must set out the licensing authority's reasons and, where appropriate, the conditions it intends to impose, and give the investor a deadline within which he or she can make representations (paragraphs 28 sub-paragraph (5) and paragraph 31 sub-paragraph (5)). The licensing authority must consider those representations.

245. The process will usually be commenced with a warning notice because although proceeding straight to imposing conditions or objecting is possible, that is likely to happen where the licensing authority considers immediate action necessary or desirable for the protection of the regulatory objectives (paragraph 28 sub-paragraph (4) and paragraph 31 sub-paragraph (3)). Conditions and objection are still possible outcomes after the licensing authority has considered an investor's representations against its proposals.

246. Where the licensing authority approves a proposed interest (with or without conditions) it may specify a period within which the investor must acquire it. If it does not, the period is automatically one year from the date of the approval notice. If the investor does not acquire the interest by the deadline, the approval lapses, as specified in paragraph 30.

247. The licensing authority has discretion to impose conditions or object to the holding of interests after the interest has been acquired, as well as at the point of acquisition or initial notification. The terms on which it can impose conditions are similar to those on which it can impose conditions at the point of acquisition – including warnings – and are set out in paragraphs 33 and 34.

248. The terms on which a licensing authority can object to an interest are, again, similar to those on which it can object at the point of acquisition. In addition, it may object if the investor has not complied or is not complying with a condition. This is set out in paragraphs 36 and 37.

249. Conditions imposed under either paragraph 28 or paragraph 33 may be varied or waived on application by the investor, as set out in paragraph 35, sub-paragraph (1). In addition, the licensing authority may cancel a condition on its own initiative, as laid out in (paragraph 35, sub-paragraph (2)).

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250. **Part 5** of the Schedule deals with enforcement of ownership decisions, beginning with divestiture. The purpose of the divestiture provisions is to ensure that, where a licensing authority has determined that an investor should not own an interest in a licensed body, he or she does not continue to do so.

251. Paragraph 42 sets out the circumstances in which the divestiture condition is met – i.e. where divestiture is possible:

- where an investor has taken steps to obtain an interest without the licensing authority's approval – this can lead to divestiture even if the investor has not been charged with or convicted of the offence under paragraph 24,
- where an investor holds a restricted interest in breach of conditions imposed under paragraphs 17, 28 or 33, and
- where an investor holds an interest to which the licensing authority has objected under paragraphs 31 or 36.

252. Divestiture is limited by paragraph 41 to licensed bodies that are companies with shares, and the divestiture provisions apply only to the investor's excess shares – that is, his or her shares over the restricted interest limit (paragraph 46 sub-paragraphs (1) and (2)). Where an investor holds more than one type of restricted interest, divestiture applies only to the shares greater than the restricted interest in respect of which the divestiture condition is satisfied, set out in paragraph 42.

253. Under paragraph 45, if the licensing authority is satisfied that an investor's holding meets the divestiture condition, it may give him or her a restriction notice, which makes the shares subject to one or more restrictions:

- any transfer of the shares or agreement to transfer them is void (including transfer of the right to receive unissued shares),
- the shares' voting rights cannot be exercised,
- no further shares can be issued to the investor, or
- the investor cannot be paid any sums due on the shares (dividends etc), unless the company goes into liquidation.

254. This notice must be copied to the licensed body in question; (paragraph 45, sub-paragraph (3)). It is expected that a restriction notice will be applied when the licensing

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authority believes that it must act as a matter of urgency before an application for divestiture to the High Court. A restriction notice ceases on a High Court order, the expiry of a period prescribed in rules or when the licensed body ceases to be licensed.

255. Paragraph 46 provides for the High Court to order the sale of the shares or order the investor to comply with the conditions that the licensing authority imposed. The High Court may make the order immediately where the holding exceeds the share limit. If the licensing authority has proposed to make the shares subject to conditions or to object to their being held, it may also apply for an order under this paragraph, but the court cannot make the order until the appeal period has expired and any appeal has been determined, as set out in paragraph 46, sub-paragraph (5).

256. If the court orders the shares to be sold, it may also (if the licensing authority applies for it) make whatever other orders it sees fit as to the sale or transfer of the shares, as laid out in paragraph 46, sub-paragraph (6).

257. Under paragraph 46, sub-paragraph (7), the proceeds of sale have to be paid into court for the benefit of whoever is beneficially interested in them – usually the investor – and any such person may apply for part or all of the proceeds. The cost of conducting the sale is first deducted from the proceeds.

258. The court may also remove any restrictions imposed under paragraph 45, set out in paragraph 46 sub-paragraph (4).

259. Paragraph 47 provides for the High Court to make orders enforcing conditions.

260. Paragraphs 48 to 51 provide for decisions under this Schedule to be notified to the Board and procedural matters about those notifications in order that the lists required by paragraph 52 can be maintained. These lists will enable informed regulatory decisions to be made by other regulators.

Clause 88: Duties of non-authorised persons

Clause 169: Duties of regulated persons

261. These clauses set out the duties that non-authorised and regulated persons have when engaged in the provision of legal services. Regulated persons are defined in clause 169 as authorised persons and managers or employees of bodies that are authorised. These duties are referred to in a number of other clauses, for instance in clause 89 which sets out the duties of the HoLP. In essence, a non-authorised person who is an employee, manager or owner of a firm must not do anything that would cause or substantially contribute to a breach by the licensed body or an authorised person within it of the duties in clause 169.

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Clause 89: Duties of Head of Legal Practice

Clause 90: Duties of Head of Finance and Administration

262. Clauses 89 and 90 describe the duties of the HoLP and HoFA respectively (roles that are obligatory under Part 5 and described in more detail in Schedule 11). The HoLP must take all reasonable steps to ensure that the licensed body complies with the terms of its licence, that employees or managers of the body who are subject to the duties under clause 169 comply with them, and to ensure that non-authorised persons comply with the duty under clause 88. The HoLP must report any failures to do so as soon as reasonably practicable to the licensing authority save in relation to accounts which are the responsibility of the HoFA.

263. The HoFA's duty under clause 90 is to ensure that the licensed body complies with the accounts rules in the licensing rules; he or she must, like the HoLP, report failures to do as soon as practicable. *Subsection (2)* of clause 89 therefore excludes accounts rules from the HoLP's responsibilities.

Clause 91: Information

Clause 92: Enforcement of notices under section 91

264. These clauses deal with the information that a licensing authority may require from a licensed body to determine whether it is complying with its licence. The licensing authority may require information or documents (clause 91, *subsection (1)*) from the body itself and any manager, officer or employee, and from any non-authorised person who holds a restricted interest in the body, (*subsection (2)*). Requests for information are made by notice, which can specify the form in which the information is to be provided and set a deadline for doing so, and also inform the provider of the information to whom it must be provided, as set out in *subsection (3)*.

265. The licensing authority can require those persons, or a representative, to give an explanation of that material (*subsection (4)*). It may pay reasonable expenses to cover the cost of providing information and of attending to provide an explanation, set out in *subsection (5)*. It may also copy or take extracts from any documents it receives, described in *subsections (6)*.

266. If someone who has been asked for information under clause 91 cannot provide it, he or she must give the licensing authority an explanation (clause 92, *subsection (1)*). If a person fails to comply with a request, the licensing authority may apply to the High Court for an order compelling him or her to comply (*subsection (2)*).

Clause 93: Financial penalties

267. This clause allows licensing authorities to impose financial penalties for breaches of licences, up to a maximum set by the Board in rules made with the Secretary of State's consent. Penalties are payable to the licensing authority, which must then pass them on to the Consolidated Fund. Under paragraph 22 of Schedule 11, licensing rules require the licensing authority to take into account the seriousness of breaches of the rules and the degree to which they were deliberate or reckless.

Clause 94: Appeals against financial penalties

268. Licensed bodies may appeal to the relevant appellate body (established under clause 79) against financial penalties. Appeals have to be made within a deadline set by the Board in rules. There are limited grounds for appeal, in *subsection (2)*:

- that the imposition of the penalty was unreasonable in the circumstances;
- that the amount of the penalty was unreasonable; and
- that the payment timetable was unreasonable.

269. The appellate body can quash the penalty, reduce it, or change the payment timetable, set out in *subsection (3)*. If it reduces the penalty or changes the timetable, it may add interest to the whole of the penalty or part of it, set out in *subsections (4) and (5)*. Further appeals to the High Court on a point of law are possible under *subsection (6)*, and the High Court can then make any order it thinks fit (*subsection (7)*). *Subsection (8)* prevents penalties being challenged by any other means.

Clause 95: Recovery of financial penalties

270. This clause describes the process for recovering sums that have not been paid on time. In general, if a payment is late, and so long as no appeal is pending, it is recoverable as a civil debt under *subsection (42)*. Interest is added automatically under *subsection (1)* and can be recovered alongside the basic penalty. As with the basic penalty provision, all recovered penalties have to be paid into the Consolidated Fund (*subsection (3)*). However, a penalty does not have to be paid while an appeal by the licensed body under clause 94 is under consideration, as shown in *subsection (2)*.

Clause 96: Referral of employees etc to appropriate regulator

271. Employees, officers and managers of a licensed body (including the HoLP and HoFA – though the HoLP must be an authorised person) may be a combination of the following:

- Persons authorised by the licensing authority in its capacity as an approved regulator,
- Persons authorised by other approved regulators, or
- Members of another profession under the supervision of another external regulator.

272. This clause allows licensing authorities to refer the conduct of licensed bodies' employees, officers and managers to the appropriate regulators – any relevant approved regulators for authorised persons, and any other regulator for persons who are not – and to the Board.

Clause 97: Disqualification

273. This clause provides that people can be disqualified from being employees, or managers of licensed bodies, or from holding the HoLP or HoFA posts, if they breach the duties that the Bill places on them or cause or contribute to breaches of the body's licence.

274. Under paragraph 23 of **Schedule 11**, licensing authorities must have rules about the criteria and procedure to be used when considering whether to disqualify someone under clause 97 as HoLP, HoFA, employee, or manager. This includes rules for reviewing disqualifications and how to determine whether they should cease to have effect.

Clause 98: Lists of disqualified persons

275. This clause provides for the Board to keep lists of persons who are disqualified and that a person is disqualified for so long as his or her disqualification remains in force; while clause 97 *subsection (3)* adds that a disqualification will no longer be in force if the appropriate licensing authority determines that it should not be, whether after a review or otherwise. If a person was disqualified by a regulator that is no longer a licensing authority, a successor authority can decide that the disqualification is no longer in force (*subsection (5)*). This is either the licensing authority that currently licenses the body where the disqualified person was working, or (if that is impossible) another authority designated for the purpose by the Board on the disqualified person's application. *Subsection (6)* requires the Board to publish the lists.

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Clause 99: Suspension and revocation of license

276. This clause provides that a licensing authority can suspend or revoke any licensed body's licence. Paragraph 24 of **Schedule 11** sets out the circumstances in which it can do this. A choice of suspending or revoking a licence is available, but not obligatory, in seven circumstances:

- paragraph 24, sub-paragraph (3): if a body changes its organisation so that it is no longer a licensable body,
- paragraph 24, sub-paragraph (4): where the licensed body fails to comply with licensing rules,
- paragraph 24, sub-paragraph (5): where a non-authorized person holds an interest in circumstances that could lead to their being divested of it, as determined under Schedule 13,
- paragraph 24, sub-paragraph (6): where a non-authorized person breaches the duties in clause 88,
- paragraph 24, sub-paragraph (7): where an employee or manager who is an authorised person fails to comply with the duties under clause 169,
- paragraph 24, sub-paragraph (8): where a licensed body allows someone to work in it who has been disqualified as employee, officer or manager, and
- paragraph 24, sub-paragraph (9): where a licensed body is unable to comply with the licensing rules about the Head of Legal Practice (HoLP) or Head of Finance & Administration (HoFA) (under paragraphs 12 and 14, an alternative is to suspend the requirement to have a HoLP or HoFA).

277. A licensing authority must give notice of its intention to suspend or revoke a licence and must give notice of at least 28 days of its intentions, in accordance with paragraph 24 sub-paragraphs (10) and (11).

278. Paragraph 25 allows licensing authorities to make rules about other circumstances in which it may suspend or revoke a licence.

279. Under paragraph 26 licensing rules must also include provisions about the criteria and procedure to be used when deciding on any suspension or revocation under paragraphs 24 or 25, including reviews of decisions.

Clause 100: Intervention

280. This clause introduces **Schedule 14** which makes provision about the circumstances in which a licensing authority may intervene in the practice of a licensed body, and the powers exercisable upon intervention. The intervention grounds and powers are consistent with those of the Law Society and the Council for Licensed Conveyancers (“CLC”) to intervene in practices under the Solicitors Act 1974 and Administration of Justice Act 1985 as amended by **Schedules 16 and 17** of this Act.

281. Paragraph 1 of the Schedule provides that the Schedule applies where any one or more of the following grounds conditions are satisfied:

- The licensed body has breached the terms of its licence;
- A person has been appointed receiver or manager of property of the body;
- a relevant insolvency event has occurred in relation to the licensed body (as defined in sub-paragraph 3)
- The licensing authority has reason to suspect dishonesty on the part of a current or former manager or employee of the body, in connection with the body’s business, or a business in which he used to be a manager or employee, or his former practice, or in connection with any trust of which the body, or that manager or employee of the body is or was a trustee;
- There has been undue delay by the body, or a manager or employee of the body, when acting for a client or in connection with any trust of which it/he/she is or was a trustee (this ground is only exercisable where the licensing authority has given the body notice and the body has failed to provide a satisfactory explanation within the time stated);
- The body’s licence has expired without being replaced;
- It is necessary for the licensing authority to intervene to protect the interests of clients (including former or potential clients) or the beneficiaries of any trusts connected to the body.

282. The powers in the Schedule are still effective in relation to a licensed body whose licence has been suspended or revoked.

283. Paragraph 2 provides that a licensing authority can apply to the High Court for an order to prohibit a person who is holding money on behalf of a licensed body from making any payment of that money, unless he has the leave of the High Court to do so.

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as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

284. Under paragraph 3, a licensing authority can decide that certain sums of money held by or on behalf of the licensed body, to recover or receive them, will vest in it for people who are beneficially entitled to them, and for use in exercising its intervention powers. The licensing authority must give the licensed body, and anyone else who has money that is subject to the decision, a copy of the decision and a notice prohibiting any payments out of the money. Sub-paragraph (6) allows the body and anyone else who receives the notice apply to the High Court to contest the licensing authority's decision. If the licensed body or other person breaches the notice, he/she/it commits an offence and is liable, on summary conviction, to a fine not exceeding level 3 on the standard scale (currently £1,000).

285. Under paragraph 4, a licensing authority may decide that the right to recover debts of the licensed body should vest in it. The licensing authority can then seek payment of such debts through ordinary debt recovery procedures, and the debtor retains all ordinary rights to challenge the debt.

286. Paragraph 5 requires the licensing authority to put any money that it receives by virtue of these vesting powers into a special account in either its name or the name of a nominated person. The money is held on trust for persons beneficially entitled, and for use in exercising the intervention powers. Paragraph 6 enables the licensing authority to make rules governing the treatment of such money, particularly where beneficiaries cannot be traced.

287. Paragraph 7 allows a licensing authority to apply to the High Court for an order requiring a person to give the licensing authority information about any money held by that person on behalf of a licensed body, and the accounts in which it is held. Licensing authorities may also require information that is relevant for tracing purposes.

288. A licensing authority may also give notice to a licensed body requiring it to produce all the documents in its possession or under its control relating to its activities as a licensed body, or to certain trusts. Paragraph 8 sets out what the notice may require and clause 191 sets out what constitutes production of documents. Sub-paragraph (4) makes it an offence to refuse, neglect or otherwise fail to comply with the notice. Under sub-paragraph (6), a person found guilty is liable, on summary conviction, to a fine not exceeding level 3 on the standard scale (currently £1,000). However, it is not an offence if the licensing authority has made an application to the High Court for the production or delivery of documents. Paragraph 9 sets out the procedure to be followed by the High Court in considering and implementing an order. Paragraph 10 sets out the procedure that a licensing authority must follow if it takes possession of documents under notice or order, as detailed in paragraph 8 and 9.

289. Under Paragraph 11, a licensing authority may apply to the High Court for a communications redirection order for a period not exceeding 18 months, which causes mail, telephone, facsimile and electronic communications to be directed to the licensing authority, or to a person appointed by the licensing authority, who may take possession or receipt of the communications. Sub-paragraph (8) allows the licensing authority to apply to the High Court to take such action as the Court may specify in relation to a licensed body's website, for the

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purpose of protecting the public interest and/or the interests of any current, former or potential clients of the body. Sub-paragraph 10 prevents licensing authorities from applying for these powers where they have intervened on the grounds of undue delay.

290. Paragraph 12 allows a licensing authority in possession of documents acquired through notices, orders, or communications redirection (paragraphs 7,8 or 9) to apply to the High Court for an order to dispose of, or destroy, the documents. The High Court may make any order it thinks fit. Under paragraph 13 a licensing authority may take copies of, or extracts from, documents acquired through notices, orders or communications redirection.

291. Where a licensed body, or one of its managers or employees, is the sole trustee of any trust, Paragraph 14 allows the licensing authority to apply to the High Court to order the appointment of a new trustee in substitution for that person.

292. Paragraph 15 allows the powers conferred by this Schedule in relation to sums of money and documents to be exercised despite any lien on them or right to their possession. Paragraph 16 allows the licensing authority to do all things that are reasonably necessary to facilitate the exercise of its powers under this Schedule.

293. Paragraphs 17 and 18 set out how the licensing authority may recover its intervention costs from the licensed body. Under paragraph 18, the licensing authority can apply to the High Court to recover costs from certain persons where the Court is satisfied that the conduct that led to the intervention was carried on with the consent or connivance of, or was attributable to any neglect on the part of those persons.

Clause 101: Regulatory conflict and the Board as licensing authority

294. This clause provides that the rules about regulatory conflict in clauses 51, 53 and 67 apply to the Board in its capacity as a licensing authority.

Clause 102: Prevention of regulatory conflict: accounts rules

295. This clause ensures that a licensing authority's accounts rules (made under Schedule 11) apply to licensed bodies that are carrying on business through solicitors or licensed conveyancers. It does this by replacing the rules that would otherwise apply because of the Administration of Justice Act 1985. However, licensing rules may be based on those provisions if they are appropriate.

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Clause 103: Trade union exemptions

Clause 104: Power to modify application of licensing rules etc to special bodies

Clause 105: Modifications under section 104: supplementary

Clause 106: “Low risk body”

296. These clauses provide that certain types of body are eligible to apply for special licences in which certain statutory requirements and/or licensing rules are waived or otherwise modified. Modifications are given effect by orders made by licensing authorities. The bodies in question are:

- trade unions – from which clause 103 removes the HoLP and HoFA requirements and the ownership provisions in Schedule 13;
- not for profit bodies, defined in clause 197 by reference to their charitable or public purpose and prohibitions on distributing income or assets to members;
- community interest companies;
- low-risk bodies – commercial bodies in which levels of non-authorised control falls under a *de minimis* threshold, defined in clause 106 as bodies where fewer than 10% of the managers and the owners are non-authorised persons; and
- other bodies of types set out in an order made by the Secretary of State on the Board’s recommendation.

297. In considering whether modifications are appropriate, the licensing authority must consider the legal activities the body aims to carry on, the people to whom it plans to offer services, any non-authorised persons who part-own or manage the body, and any other factors set out in the authority’s licensing rules, as laid out in clause 104, *subsection (5)*. Under *subsection (7)*, the basic requirements of licensing rules under clause 81(4) cannot be modified (including those to do with complaint handling). *Subsection (8)* lists a number of other rules that cannot be modified, including those to do with disqualification, suspension and revocation of licences, and management. *Subsection (9)* adds a number of rules that cannot be removed altogether, including provisions for modifying licences and the accounts provisions. Otherwise, licensing authorities have discretion to modify requirements in licensing rules and the application of Schedule 13 (clause 104 *subsection (3)*), and can make whatever modifications are appropriate, whether or not they were what the body asked for (*subsection (4)*). Clause 104 then sets out the circumstances in which a licensing authority can change modifications. Where the licensed body is no longer one to which clause 104 applies, the licensing authority must revoke the modification order. Otherwise, it may revoke or modify an order if the licensed body requests it or on its own motion, in a similar way to the modification of licences under Schedule 11.

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Clause 107: Foreign bodies

298. In certain circumstances foreign lawyers can form ABS firms with lawyers in England & Wales.. This clause allows the Secretary of State to modify this Part of the Bill so that it can take account of that, should the circumstances require different treatment.

Clause 108: Interpretation of Part 5

299. This clause defines some provisions for the purposes of Part 5.

PART 6: LEGAL COMPLAINTS

300. This Part of the Bill establishes an independent complaints handling body called the Office for Legal Complaints (OLC). It removes the ability of approved regulators to provide redress to complainants and grants this power to the OLC. The OLC will operate an ombudsman scheme, the rules for which are to be determined by the OLC once it is established. This section also sets out the appointment process for members of the OLC Board, the Chief Ombudsman and any assistant ombudsmen.

301. It also makes provision for the accountability of the OLC through the Board, the framework of rules under which the OLC will establish its operating procedures, and the changes to the regulatory arrangements of approved regulators which will be necessary in consequence.

302. For the purpose of these notes all references to the body that is to be set up will be to the OLC.

303. The OLC's membership is to be such as to bring together a wide range of expertise and backgrounds. The OLC will have (not including staff or assistant ombudsmen) between six and eight members, reflecting a narrower remit when compared with the Board with between nine and 12 members. It will be chaired by a lay person and the majority of its members will also be lay persons. The OLC will set policy and rules in relation to complaints handling with a view to ensuring that best practice is promoted and that high standards are maintained.

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304. The OLC will be accountable to the Board in respect of its targets and funding. OLC members will be appointed by the Board (with the Secretary of State's consent to appoint the chairman, and following consultation with the chairman in the case of the other members), and in order to establish the ombudsman scheme the OLC will be required to draw up draft scheme rules to be approved by the Board. The OLC itself will appoint the Chief Ombudsman, and will appoint assistant ombudsmen as necessary with the Chief Ombudsman's consent.

Complaints Handling – present position

305. At present each of the approved regulators maintains their own complaints handling and disciplinary arrangements. A complainant who is dissatisfied with the way in which a complaint has been handled can refer the complaint to the Legal Services Ombudsman ("LSO"), who can ask an approved regulator to reconsider a complaint.

306. The following bodies are subject to the jurisdiction of the LSO:

- the Law Society (also subject to the jurisdiction of Legal Services Complaints Commissioner),
- the Bar Council,
- the Council for Licensed Conveyancers,
- the Institute of Legal Executives,
- the Institute of Trade Mark Attorneys, and
- the Chartered Institute of Patent Attorneys.

307. Under the current system, anyone wishing to complain about a person regulated by any of the organisations listed must in the first instance pursue "in-house" procedures up with the person complained about. If the complaint is not resolved satisfactorily in-house, the complainant can then contact the appropriate regulatory body. In the event that a complainant is not satisfied with the way in which a complaint has been handled by the appropriate regulatory body they can refer their complaint to the LSO. The LSO will investigate the way in which the complaint was handled and the response from the professional body. If the LSO believes that a complaint has not been investigated properly, they may recommend that the professional body look at the matter again. The LSO also has the power to re-investigate a

*These notes refer to the Legal Services Bill [HL]
as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

complaint themselves – last year the LSO widened her investigation to look at the original complaint in less than 1% of cases.¹⁵

308. Sir David Clementi's *Review of the Regulatory Framework for Legal Services in England and Wales*, published in 2004,¹⁶ observed that there were a number of issues which arise from the manner in which complaints are dealt with under the existing arrangements:

- the record of complaints handling by the approved bodies – substantial delays and questionable quality in terms of outcome,
- the low level of consumer confidence in the independence of the current system,
- the inconsistency and lack of clarity for redress arrangements for consumers in respect of regulatory bodies with overlapping activities, and
- the overlaps in the current oversight regime.

309. Sir David concluded:

“There is a considerable concern about how complaints are dealt with. The concern arises at a number of levels: at an operating level there is an issue about the efficiency with which the systems are run; at an oversight level there is a concern about the overlapping powers of the oversight bodies; and at a level of principle, there is an issue about whether systems for complaints against lawyers, run by lawyers themselves, can achieve consumer confidence.”

310. The Government's 2005 White Paper, *The Future of Legal Services: Putting Consumers First*¹⁷ proposed the creation of an independent Office for Legal Complaints (OLC), a single complaints handling body that would provide redress for consumers, and enhance consumer confidence in the process.

Complaints Handling – the new system

311. The OLC will have clearly defined powers. Under its ombudsman scheme it will deal with consumer complaints about advice or services provided by persons or organisations

¹⁵ Legal Services Ombudsman, 2005

¹⁶ Clementi, 2004

¹⁷ Department for Constitutional Affairs, 2005

*These notes refer to the Legal Services Bill [HL]
as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

regulated by authorised regulators. The ombudsman will investigate complaints, and may refer any indication or allegation of misconduct to the relevant approved regulator (which will retain power to take disciplinary action). The OLC will monitor the decisions that are made in respect of the alleged misconduct but it will not be able to take any disciplinary action itself. If necessary, the OLC will report any concerns to the Board for its consideration.

312. All reserved legal service providers will still be required to maintain in-house complaints handling arrangements. These will continue to be the first port of call for a consumer, and the OLC will not consider complaints that have not been considered in-house in the first instance, except in very limited circumstances. If the complaint is not resolved satisfactorily in-house, the consumer will be able to bring complaints to the OLC free of charge.

313. The handling of complaints will be the responsibility of the ombudsmen (headed by the Chief Ombudsman), although the Bill enables functions of investigation, etc. short of determination of complaints to be delegated to members of staff who are not ombudsmen. The OLC will be responsible for making rules (“scheme rules”) by which the complaints handling scheme is to operate, but the Bill generally envisages a model similar to that established for the Financial Ombudsman Service under powers in the Financial Services and Markets Act 2000, so that in the first instance, a complaint will be allocated to a case worker who will investigate and attempt to mediate the complaint.

314. The Chief Ombudsman and assistant ombudsmen would become involved where mediation by a caseworker has not been successful, in which case an ombudsman will be responsible for making a final determination which, if accepted by the complainant, would become binding on all parties to the complaint.

315. The Bill also provides that should any indication or allegation of misconduct be revealed at any stage in the process of considering a complaint, the matter should be referred to the relevant approved regulator for consideration of possible disciplinary action.

316. When determining a complaint, the ombudsman may direct the respondent to do one or more of the following:

- pay the complainant a determined amount to compensate for any loss, inconvenience or distress;
- correct or redo any work responsible for any error, omission or deficiency at their own response (with no change to the complainant); or
- at their own expense do whatever is set out by the Chief Ombudsman or assistant ombudsman, in determining a complaint, deemed necessary in the interests of the complainant.

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317. The “total value” of the orders together cannot exceed more than £20,000 (not including interest, the rates for which will be set out in scheme rules).

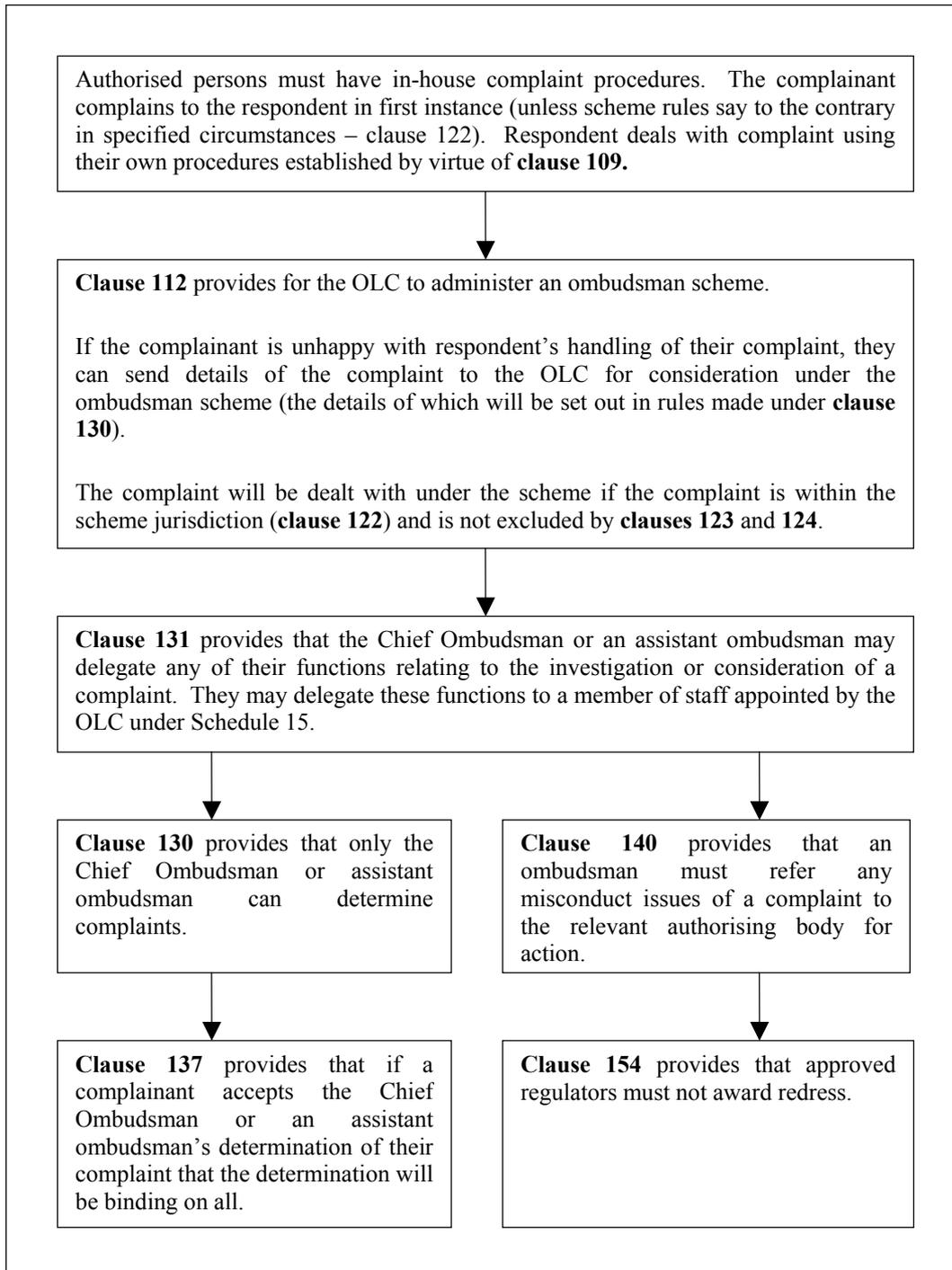
318. It is envisaged that the ombudsman scheme rules (to be approved by the Board) will apply a combination of periodic (annual) fees for approved regulators and a “polluter pays” mechanism to fund legal complaints handling. The “polluter pays” mechanism will mean that the respondent of a complaint, whether the complaint is upheld or not so long as it is not firstly excluded from the scheme, is charged for the handling of the complaint. This is similar to the Financial Ombudsman Service scheme.

319. The way in which complaints will be dealt with under the ombudsman scheme will be set out in scheme rules (provided for under clause 130). The OLC must obtain the consent of the Board before making rules.

320. The diagram below shows the key stages of the complaints handling process.

*These notes refer to the Legal Services Bill [HL]
as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

Complaints handling process



*These notes refer to the Legal Services Bill [HL]
as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

Clause 109: Complaints procedures of authorised persons

321. This clause provides that each approved regulator must require each authorised person subject to its regulation to maintain in-house complaints procedures, and must make provision for the enforcement of this requirement. The provisions made by the approved regulator must satisfy any requirements specified by the Board.

Clause 110: Overview of the scheme

323. *Subsection (1)* of this clause describes the purpose of the ombudsman scheme which is to be established; namely the resolution, by an independent person, of complaints which relate to an act or omission of a person in carrying out an activity and which are within the jurisdiction of the scheme (as defined by clause 122).

324. *Subsections (2) to (4)* define the boundary between the ombudsman scheme and the regulatory arrangements of an approved regulator or the Board (in its capacity as a licensing authority): awarding redress to a complainant is reserved to the ombudsman scheme (and clause 154 prevents provision relating to redress being included in the regulatory arrangements of an approved regulator or of the Board in its capacity as a licensing authority), and the taking of disciplinary action to the approved regulators (or the Board when acting in that capacity).

Clause 111: The Office for Legal Complaints

325. This clause provides for the establishment of the Office for Legal Complaints (OLC).

326. **Schedule 15** makes provision for such structural matters as the membership of the OLC, the terms of appointment and tenure of members, staffing, committees, and the delegation of functions, the OLC's status, budget and accounting requirements, and the initial location of its principal office.

327. Paragraph 1, sub-paragraph (1) of the Schedule states that the OLC is to consist of a chairman appointed by the Board, and between six and eight other persons appointed by the Board following consultation with the chairman.

328. Paragraph 2 provides for the OLC to have a lay chairman and a lay majority (a lay person being defined as someone who has never been an authorised person, and "authorised person" for this purpose including, by virtue of clause 157, a person authorised by the Claims

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Management Regulator under Part 2 of the Compensation Act 2006 to provide regulated claims management services).

329. Terms of appointment for OLC members are set out in paragraphs 5 to 9. Members must be appointed for a fixed period, which must not exceed five years. A person can be re-appointed once only. A lay member of the OLC who becomes an authorised person will for that reason cease to be a member of the OLC. The chairman may only be removed from his position by the Board (with the approval of the Secretary of State), and the Board may also remove OLC members after consultation with the chairman. Sub-paragraph (2) of paragraph 8 limits the circumstances in which the Board can remove OLC members, essentially to those indicating unfitness or inability to discharge the functions of office.

330. Paragraphs 11 to 14 enable the OLC to appoint staff to assist in the performance of its functions, and makes provision for their terms and conditions. Paragraph 15 allows for the OLC additionally to pay for *ad hoc* assistance to be provided to it or to the ombudsmen.

331. Paragraph 15 allows the OLC to make arrangements with those it considers appropriate to provide assistance to it or to the ombudsman. In doing so it may make pay those persons providing assistance.

332. Paragraphs 16 to 18 allow the OLC Board to establish committees and sub-committees to carry out any of its functions, and provide that a vacancy in any office or a defect in the appointment, or disqualification, of the chairman or any member is not to affect the validity of any act of the OLC.

333. Under paragraph 19 the OLC may delegate specified functions to any member of the OLC, any staff member of the OLC or any committee or sub-committee. However, the OLC will retain accountability for the exercise of its statutory functions.

334. Paragraph 20 sets out the arrangements for the OLC's budget, which must be approved in advance by the Board. Paragraph 22 confers restricted borrowing powers on the OLC, which is not to borrow money, except with the consent of the Board in accordance with general authorisation given by the Board, in either case requiring the consent of the Secretary of State as well.

335. By virtue of paragraph 21 the OLC must not acquire or dispose of an interest in land without the consent of the Secretary of State. Paragraph 21 applies for five years beginning with the day on which the first Interim Chief Executive of the OLC is appointed under Schedule 22, paragraph 4, or the first member of the OLC is appointed, whichever is first.

336. Paragraph 23 sets out the requirements for the OLC's accounts. The OLC must keep proper accounts and proper records, and prepare an annual financial statement of accounts, with oversight by the Comptroller and Auditor General and ultimately Parliament.

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337. Paragraph 24 sets out the OLC's status. As an independent body, it is not to be regarded as having the same status as the Crown, and the staff appointed under paragraph 11 are not to be regarded as servants or agents of the Crown or as enjoying the same status.

338. Paragraphs 28 to 30 make provision (standard for such a body) for amendments to the House of Commons Disqualification Act 1975, the Northern Ireland Assembly Disqualification Act 1975, the Freedom of Information Act 2000 and the Public Records Act 1958 to provide for the OLC to be a body whose records are public records, a public authority for freedom of information purposes, and body membership of which disqualifies the member from Parliament or the devolved Parliaments and Assemblies.

339. Paragraph 31 exempts the OLC, members of the OLC, an ombudsman and a member of the OLC's staff from being liable for damages for anything done in the exercise of their functions. This exemption would not apply to anything done in bad faith.

Clause 113: General obligations

340. The OLC will have a duty to act compatibly with the regulatory objectives in clause 1, and to act in a way, which it considers most appropriate to meet those objectives. It will also have to have regard to principles of best practice in relation to the administration of ombudsman schemes.

Clause 114: Corporate governance

341. This clause requires the OLC to have regard to generally accepted principles of good corporate governance in managing its affairs.

Clause 115: Annual report

342. This clause places a duty on the OLC to produce an annual report to be sent to the Board, reporting the extent to which, in the OLC's opinion, it has met the regulatory objectives. The report must include a copy of the annual report prepared by the Chief Ombudsman under clause 119. This report will be laid before Parliament by the Secretary of State.

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Clause 116: Supplementary powers

343. This clause makes standard provision empowering the OLC to do anything necessary for carrying out its functions.

Clause 117: Reporting to the Board

344. This clause empowers the Board to require a report from the OLC, separately from the annual report. This may be to enable the Board to monitor the OLC's performance or to seek its views on a particular issue. The Board has a duty to publish any report made by the OLC under this clause.

Clause 118: Performance targets and monitoring

345. This clause empowers the Board to set performance targets for the OLC in relation to any of its functions, or to direct it to set its own targets relating to its functions *Subsections (3) and (4)* state that any targets must be published. *Subsection (5)* allows the Board to monitor the extent to which the OLC has met these targets.

Clause 119: Appointment of Chief Ombudsman and assistant ombudsmen

346. This clause sets out the appointment process whereby the OLC must appoint a person (who must be a lay person, and who will cease to hold office if s/he ceases to be a lay person) to act as Chief Ombudsman. The OLC may also appoint assistant ombudsmen with the consent of the Chief Ombudsman. Any person appointed must (by virtue of *subsection (4)*) have appropriate qualifications and experience. Although assistant ombudsmen, unlike the Chief Ombudsman, are not required to be lay persons, *subsection (3)* specifies that assistant ombudsmen must not carry out any reserved legal activity for reward during their period of appointment and *subsection (7)* requires the assistant ombudsman's terms and conditions to set out what consequences may ensue on breach of this condition. *Subsection (8)* makes provision for the terms and conditions of any ombudsman's appointment to be such as will ensure his or her independence, and *subsection (9)* (related to paragraph 24 of Schedule 15) makes it clear that an ombudsman is not a Crown servant.

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Clause 120: Annual report of Chief Ombudsman

347. This clause requires the Chief Ombudsman to prepare a report each financial year on the discharge of the functions of the ombudsmen. The report is to comply with any requirements specified by the OLC (which the OLC must publish), and is to be included in the annual report which the OLC is required by clause 115 to produce.

Clause 122: Jurisdiction of the ombudsman scheme

348. This clause broadly defines what types of person are eligible to bring complaints to the OLC and who may be the subject of a complaint. A complaint will fall within the jurisdiction of the ombudsman scheme if:

- it is not excluded under clauses 123 or 124 (i.e. because the respondent's "in-house" complaints procedures have not been used, or the complaint is otherwise excluded by provision made in the scheme rules),
- if the respondent falls within clause 125 (i.e. the respondent was an authorised person at the relevant time), and
- the complainant falls within clause 125 and wishes to have the complaint dealt with under the scheme.

349. *Subsection (3)* prevents an authorised or other person from restricting in any contract or notice the right of a person to bring a complaint.

Clause 123: Complaints excluded because respondent's complaints procedures not used

350. *Subsection (1)* of this clause provides that a complaint does not fall within the jurisdiction of the ombudsman scheme unless the complainant has first used the respondent's in-house complaints procedure (defined in *subsection (2)*). *Subsection (3)* allows for the scheme rules to disapply *subsection (1)* in certain circumstances.

Clause 124: Complaints excluded by scheme rules

351. *Subsection (1)* provides that the scheme rules by which the complaints procedures apply may exclude certain described complaints from the jurisdiction of the scheme.

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as introduced in the House of Lords on 23rd November 2006 [HL Bill 9]*

Subsection (2) states that complaints cannot be excluded on the ground that they relate to any matter which could be dealt with under an authorised body's disciplinary arrangements; so that the OLC is able to consider all complaints with a view to the provision of redress (although it cannot order disciplinary sanctions).

Clause 125: Parties

352. This clause sets out further conditions as to the parties to a complaint to be handled by the ombudsman scheme. *Subsection (1)* defines the respondent as an authorised person in relation to a reserved legal activity; but it does not matter if the matter being complained about relates to a reserved legal activity or not. *Subsections (2) to (4)* set out the conditions for a complainant to be eligible. The first condition is that the complainant is not excluded (as to which, see *subsection (5)*) and is either:

- an individual, or
- a person (other than an individual) described in an order made by the Secretary of State, pursuant to a recommendation under clause 127.

353. In addition to these two conditions, a complainant must also show that:

- the respondent provided the services being complained about to the complainant directly;
- the respondent provided the services being complained about to an authorised person who procured them on the complainant's behalf (for example, where a solicitor instructs counsel);
- the respondent provided the services being complained about in certain capacities in relation to trusts and the administration of a deceased person's estate; or
- the complainant meets such other conditions as may set out in an order made by the Secretary of State pursuant to a recommendation under clause 127.

354. Under *subsection (5)*, a complainant is excluded from the ombudsman scheme if:

- the complainant is an authorised person in relation to a reserved legal activity and procured the services to which the complaint relates on behalf of another person (so that,

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for example, a solicitor who instructs counsel on behalf of a client may not complain about counsel),

- the complainant is a public body (defined in *subsection (7)*), or
- the complainant falls within an order made by the Secretary of State pursuant to a recommendation made under clause 127.

Clause 126: Pre-commencement acts and omissions

355. This clause makes transitional provision to cover cases where the act or omission complained of took place before commencement of the ombudsman scheme, so that the respondent will not have been an authorised person within the terms of the Bill. Its effect is that the complaint will be within the jurisdiction of the scheme as long as the respondent was at that time a person who, after commencement, comes within the definition of “authorised person”.

Clause 127: Orders under section 125

356. The Secretary of State is empowered to act on recommendations (and not of his own motion) from an “interested body” (the OLC, the Board or Consumer Panel) for any new categories of complainants or complaints to be included in or excluded from the scope of the ombudsman scheme’s jurisdiction, but the Secretary of State may require those bodies to consider making a recommendation. These recommendations, if accepted, will be implemented by order by way of statutory instrument by the Secretary of State; and if the Secretary of State declines to accept a recommendation, he must publish his reasons for doing so.

Clause 128: Acts and omissions by employees

357. This clause establishes vicarious responsibility in respect of matters which are the subject of complaints. Any act or omission by an employee which is in the course of his or her employment will be treated by the OLC as an act or omission on the part of the employer as well as the employee. Similarly, an act or omission by a partner in a partnership in the course of carrying on the partnership’s normal business in the usual way will be treated as an act or omission of the partnership, unless the partner had no authority to act for the partnership and this was known to the person seeking to rely on the partnership’s liability.

Clause 129: Continuity of complaints

358. This clause makes provision to ensure that a complaint does not fail simply because of a change in membership of the partnership or body against which the complaint is made. This clause also confers on the OLC power to make rules to ensure the continuity of complaints where a legal person ceases to exist (for example, where a partnership is dissolved) but another person succeeds to the business, and for the continuation of a complaint where a complainant dies or becomes unable to act.

Clause 130: Operation of the ombudsman scheme

359. This clause provides for the detailed framework for the ombudsman scheme to be determined by the OLC in scheme rules. It allows the OLC the flexibility to adapt its procedures in line with changing notions of best practice. The rules made by the OLC under this clause will determine how complaints are to be made and how they are investigated, considered and determined by the ombudsman. Procedures for making scheme rules, including requirements as to prior consultation and consent of the Board, are set out in clauses 152 and 195.

360. *Subsection (1)* provides a broad duty to make scheme rules. *Subsection (2)* requires scheme rules to establish time limits for the making of complaints, and allows for the possibility of extension in circumstances specified in the rules. *Subsection (3)* lists areas in which the OLC may wish to make rules. This list is intended purely as an indicative one, and not to limit the breadth of the OLC's power to make rules in other areas. *Subsection (4)* provides further detail about the circumstances in which rules may provide for complaints to be summarily dismissed (one of the matters listed in subsection (3)). *Subsection (5)* prevents the power to make scheme rules from being used to compel disclosure where a person could not be so compelled in civil proceedings before the High Court, while *subsection (6)* enables scheme rules to provide for awards to bear interest at such rate as specified in or determined in accordance with the rules.

Clause 131: Delegation of an ombudsman's functions

361. This clause enables the delegation of the ombudsman's functions to a member of the OLC's staff, with one important exception: staff to whom these powers are delegated may investigate or consider a complaint, but they may not make a determination. This follows the model of the Financial Ombudsman Service established under powers contained in the Financial Services and Markets Act 2000, and will enable OLC caseworkers to carry out initial handling and work directed to mediation of complaints, with the Chief Ombudsman

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and assistant ombudsmen becoming directly involved with a complaint if the parties do not accept the caseworker's solution. In this instance the caseworker would submit the complaint to an ombudsman for binding determination. The Chief Ombudsman's powers of delegation are further restricted, in that he may not delegate his powers of consent to the appointment of an assistant ombudsman, or the duties imposed on him to produce an annual report.

Clause 132: Notification requirements

362. This clause makes provision to the effect that if a complaint is excluded, dismissed, referred to another scheme or settled, withdrawn or abandoned, then the ombudsman must inform the complainant, the respondent and any relevant authorising body in relation to the respondent. If a complaint is dismissed, referred to another body or excluded, the ombudsman must give his reasons for doing so.

Clause 133: Charges payable by respondents

363. The OLC will be partly funded through a "polluter pays" mechanism by which charges are placed on those legal professionals who are subject to complaints (respondents). This clause requires the OLC to make rules determining how these charges are determined. *Subsection (2)* allows the OLC flexibility to make provision for different charges in different circumstances. The OLC will also be obliged to consult before making these rules, as with any of its other rules; and rules under this clause will (by virtue of clause 152) require the consent of the Secretary of State (unlike other rules made by the OLC, for which the consent of the Board will be required).

Clause 134: Determination of complaints

364. This clause makes provision for the ombudsman's powers in making a determination. The governing principle, set out in *subsection (1)*, is that the ombudsman must determine a complaint according to what is fair and reasonable in all the circumstances of the case. *Subsections (2) and (3)* set out the directions which the ombudsman may make in a determination, namely:

- that the respondent make an apology to the complainant;

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- that the respondent's fees for the services under complaint are limited to a specified amount (and any other action be taken, such as a refund, which may be necessary to give effect to this);
- that the respondent pay compensation for loss, inconvenience or distress;
- that the respondent at his own expense secure rectification of any specified error, omission or other deficiency in connection with the matter under complaint; or
- that the respondent at his own expense take such other action in the interests of the complainant as the direction may specify.

365. *Subsection (4)* allows for any amount payable pursuant to a determination to bear interest; and *subsection (5)* provides that the powers of the ombudsman in making a determination are not confined to cases where the complainant may have a cause of action in negligence (and so may be available in cases of "simple" inadequate professional service).

Clause 135: Limitation on value of directions under the ombudsman scheme

366. This clause ensures the total value of the directions made under subsections (2)(c) to (e) of clause 134 on the determination of a complaint under the ombudsman scheme does not exceed £20,000 (excluding interest – see *subsection (3)*). Currently the highest level of compensation in the legal sector is £15,000.

367. *Subsection (2)* explains "total value" as the aggregate of the amount of any compensation payable, plus the amount of expenses reasonably incurred by the respondent in rectifying any specified error, omission or deficiency: it does not include any reduction in the level of fees payable, or associated refund etc, by virtue of a direction under subsection(2)(c) of clause 133.

Clause 136: Alteration of limit

368. This clause empowers the Secretary of State by order to amend the limit on the total value of directions imposed by clause 134, on the recommendation of an "interested body" (the OLC, the Board or the Consumer Panel). The body recommending alteration of the limit must first publish its proposed recommendation and consider representations made in respect of it.

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Clause 137: Acceptance or rejection of determination

369. In determining a complaint the ombudsman is required to prepare a written statement of the determination (*subsection (1)*). *Subsection (2)* sets out the detail of what should be included in this statement, and *subsection (3)* lists the people and bodies to whom the statement must be supplied. If the determination is accepted by the complainant, it is binding on both parties (*subsection (4)*), and no further legal proceedings can be instituted with regard to the matter that was the subject of the complaint (*subsection (11)*); but if the complainant does not notify acceptance within the time specified for this purpose, he or she is to be taken as having rejected the determination (*subsection (5) and (8)*). However, there may be circumstances where a person is unable to reply to the determination within the time specified and *subsections (6) and (8)* provide for this. On acceptance or rejection by the complainant, the ombudsman must give notice to those set out in *subsection (7)*, and the ombudsman's certificate of determination is evidence that the determination was duly made under the scheme (*subsection (9) and (10)*).

Clause 138: Enforcement by complainant of directions under section 134

370. This clause makes provision for enforcement of directions made by an ombudsman, on application to the High Court or a county court by the complainant. Any direction to refund fees or pay compensation, including interest, is recoverable, if a court so orders on the complainant's application, as if it were an order of that court; and if the respondent fails to comply with any other direction pursuant to a determination, the court may, on the complainant's application and if satisfied that the respondent has failed to comply with the direction, order the respondent to take such steps as the court directs to comply with it.

Clause 139: Reporting court orders made against authorised persons

371. This clause makes provision governing reporting of any order for enforcement of directions made by a court under clause 138. The court must give the OLC notice of any order made against a person, and the OLC (in the person of an ombudsman) will in turn inform any relevant approved regulators, and may require the approved regulator to report on what action it has taken. If, in such a case, the OLC is not satisfied with the action taken, then it may inform the Board.

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Clause 140: Reporting possible misconduct to approved regulators

372. In the course of consideration of a complaint, it may become apparent that there is a possibility that a respondent, or other person in relation to the matter concerned, has breached their regulator's rules of conduct. Where the ombudsman is of such an opinion this clause allows him to notify that person's regulator. The regulator can be required to report to the ombudsman on the actions it takes. If the ombudsman, on studying the report, is of the opinion that the approved regulator is seriously or persistently failing to enforce its rules of conduct, he may report this to the Board.

Clause 141: Duties to share information

373. *Subsection (1)* requires scheme rules to set out that the OLC, an ombudsman or a member of the OLC's staff must disclose information to an approved regulator. The information to be disclosed must be specified in the rules, as must the circumstances in which it must be disclosed. Each approved regulator must for its part provide in its regulatory arrangements for the provision of information to the OLC, an ombudsman or members of the OLC's staff, of such description and in such circumstances as may be specified in the arrangements (*subsection (2)*). The Board may specify requirements which arrangements under *subsection (2)* or rules under *subsection (1)* must fulfil (and must publish any such requirements), and must in so doing take into account the need to avoid duplication of investigations and the desirability of the OLC assisting approved regulators and *vice versa* (*subsections (4) to (6)*).

Clause 142: Duties of authorised persons to co-operate with investigations

374. *Subsection (1)* requires each approved regulator to make provision in its regulatory arrangements that all authorised persons regulated by it must provide co-operation and assistance to the ombudsman in relation to an investigation, consideration or determination of a complaint; and this must include provision for enforcing that requirement. The Board may specify requirements which such provision must satisfy (*subsection (2)*), and must publish any such requirements (*subsection (3)*).

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Clause 143: Reporting failures to co-operate with an investigation to approved regulators

375. Where an authorised person fails to co-operate with an ombudsman as stated in clause 142 the ombudsman can notify that person's approved regulator. The regulator may be required to report to the ombudsman on the action it takes; and if the ombudsman is of the opinion that the approved regulator is seriously or persistently failing to enforce its rules of conduct, he may report this to the Board (and may do so even if the complaint is subsequently withdrawn).

Clause 144: Information and documents

376. This clause empowers an ombudsman to require such information and/or documents from parties to a complaint as the ombudsman may specify, before the end of such period (which must be a reasonable period) as the ombudsman may specify, and in such manner or form as the ombudsman may specify (*subsections (1) and (2)*); provided that the ombudsman considers that the information necessary to determine the complaint (*subsection (3)*). The ombudsman may take copies of or extracts from a document, and in the absence of a document, may require the person asked to produce it to state to the best of his knowledge and belief where it is (*subsections (4) and (5)*). None of these powers may be used to compel disclosure which could not be compelled in civil proceedings before the High Court (*subsection (6)*).

Clause 145: Reporting failures to provide information or produce documents

377. This clause follows the approach and structure of clauses 139 and clause 143. Where the ombudsman considers that an authorised person has failed to co-operate with an ombudsman as required by clause 144, the ombudsman can notify that person's authorising body, which can be required to report to the ombudsman on the actions it takes. If the ombudsman is of the opinion that the authorising body is seriously or persistently failing to enforce its rules of conduct, he may report this to the Board (and may do so even if the complaint is subsequently withdrawn).

Clause 146: Enforcement of requirements to provide information or produce documents

378. This clause applies if a party, other than the authorised person (the defaulter), has failed to co-operate with an ombudsman as required by clause 144. In such a case, the

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ombudsman may inform the court (which in this case means the High Court – *subsection (7)*) of the person's failure to comply with the request for information. However (by virtue of *subsections (5) and (6)*), where the defaulter is an authorised person in relation to a reserved legal activity, the ombudsman must first be satisfied that each relevant authorising body to which a report was made under clause 145 has been given a reasonable opportunity to take action, and that the defaulter has continued to be in default. The High Court may thereupon enquire into the case, and if satisfied that the defaulter has failed without reasonable excuse to comply with the requirement, it may deal with the defaulter (and, in the case of bodies corporate and other legal persons, any directors or similar persons) as if he or she were in contempt (*subsection (4)*).

Clause 147: Reports of investigations

379. The OLC may publish a report about the investigation, consideration and determination of any particular case if it considers it appropriate. The report may not contain the complainant's name or any other identifying information, unless the complainant consents to the inclusion of that information.

Clause 148: Restricted information

380. Under this clause, "restricted information" is any information that has been collected during an investigation of a complaint. This clause protects the complainant in that all such information is classed as confidential and, except as listed under clause 149, must not be disclosed except to the extent that it is excluded information, namely information which was obtained more than 70 years before the date of disclosure, or which is already available to the public, or which is an appropriately "anonymised" form so that information relating to a particular individual cannot be ascertained from it.

Clause 149: Disclosure of restricted information

381. This clause makes exceptions to clause 148. First and foremost, one restricted person (i.e. the OLC, an ombudsman or a member of the OLC's staff – see *subsection (2)* of clause 149) may disclose restricted information to another restricted person (*subsection (1)*). Second, restricted information may be disclosed for the purposes of the investigation in the course of which, or for the purposes of which, it was obtained (*subsection (2)*); and third, restricted information may be disclosed for a variety of specific and limited purposes listed in

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subsection (3), with the possibility (*subsection (3)(g)*) of additional purposes being added, should changing circumstances so warrant, by order made by the Secretary of State.

382. The clause also provides a power to the Secretary of State to prescribe types of material that cannot be disclosed under subsections (2) and (3). The Secretary of State may prevent the disclosure of restricted information under this clause by order in circumstances or for purposes prescribed in that order.

Clause 150: Data protection

383. This clause makes provision amending the Data Protection Act 1998 to ensure that Part 6 of the Legal Services Bill is able to operate compatibly with it.

Clause 151: Protection from defamation claims

384. This clause makes provision placing OLC proceedings and publications on a par with court proceedings for the purposes of the law of defamation.

Clause 152: Consent requirements for rules

385. This clause requires the consent of the Board prior to any scheme rules being made or modified by the OLC. It also specifically requires the consent of the Secretary of State to rules regarding the setting of charges on respondents in complaints under section 133. The OLC is required to consult on its proposed rules before seeking the necessary consent: the consultation requirements are in clause 195.

Clause 153: The Board's powers in respect of rules

386. Under this clause the Board will have the power to direct the OLC to amend any of its rules. The direction may be in general terms or it may require a specific modification. Before making a direction under *subsection (1)(b)* to make a specific modification, the Board must give the OLC a formal notice that gives details of the proposed modifications, and must publish that notice and take account of any representations made (*subsection (2)*). In such a case the consultation procedure under clause 195 is disapplied, as is the requirement to obtain the Board's consent (*subsection (3)*).

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Clause 154: Approved regulators not to make provision for redress

387. Under the new arrangements, the OLC is to be the single point of entry for all complaints, subject to the requirement in clause 123 that complaints (except in specified circumstances) must firstly be considered by the respondent's complaints procedures. The OLC will investigate and provide redress for complaints, but it will report any possible misconduct to the relevant approved regulator, which will take any necessary disciplinary action. There is therefore a clear split between consideration of redress (OLC) and regulatory action (approved regulators). As part of the provision for this split, this clause prohibits approved regulators from including in their regulatory arrangements any provision relating to redress (defined in *subsection (4)*). This is subject to transitional arrangements covering proceedings in respect of complaints which are under way at the date of commencement of the OLC's operations, which are to be made by order under clause 201 (*subsections (2) and (3)* of this clause); and the clause also states (*subsection (5)*) that the prohibition on provision relating to redress does not prevent provision for certain types of arrangements (compensation fund, indemnification arrangements, etc.).

Clause 157: Extension of Part 6 to claims management services

388. This clause extends Part 6 of the Bill to bring claims management services within the OLC's complaints handling jurisdiction. Although the provision of regulated claims management services is not designated as a reserved legal activity, this clause brings those persons authorised under Part 2 of the Compensation Act 2006 within the OLC's jurisdiction on the same basis as authorised persons in relation to an activity which is a reserved activity.

389. For the purposes of Part 6, the Claims Management Regulator is treated as an approved regulator, and regulated claims management services are treated as a reserved legal activity. This affects, among other things, the definition of a lay person in **Schedule 15**, which is to be read as excluding a person authorised under Part 2 of the 2006 Act (so that a person who is or has been authorised under Part 2 of the 2006 Act may not be appointed as Chief Ombudsman).

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PART 7: FURTHER PROVISIONS RELATING TO THE BOARD AND THE OLC

390. This Part of the Bill makes provision for the funding of the Board and OLC by way of levy on the approved regulators, including requirements for rules to be made by the Board clarifying when the levy is to be made payable, and the amount payable as well as the circumstances in which the levy may be waived.

391. It also defines the type of guidance that the Board may give, and makes provision allowing the Board to enter into voluntary arrangements for the purpose of improving standards in the provision of legal services. This Part also provides that information obtained by the Board (whether in its capacity as an approved regulator or licensing authority or otherwise) may be used by the Board for any purpose connected to the exercise of its functions.

Clause 158: Guidance

392. This provision sets out a non-exhaustive list of matters about which the Board may give guidance. The Board will be able to publish its guidance and offer copies for sale. Following any guidance being issued, the Board may consider the extent to which an approved regulator has complied with such guidance when exercising its regulatory functions.

Clause 159: Voluntary arrangements

393. This clause allows the Board to enter into voluntary arrangements with any person for the purposes of improving standards and promoting best practice in the legal services sector.

Clause 160: Restricted Information

394. Under this clause, “restricted information” is any information obtained by the Board in the exercise of its functions. A restricted person is the Board (including in its capacity as approved regulator or licensing authority) or a person authorised by the Board to carry out its functions. Restricted persons or any person who has received information from a restricted person must not disclose restricted information. Except as listed under clause 161, restricted information must not be disclosed except to the extent that it is excluded information, namely information which was obtained more than 70 years before the date of disclosure, or which is

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already available to the public, or which is in appropriately “anonymised” form so that information relating to a particular individual cannot be ascertained from it.

Clause 161: Disclosure of restricted information

395. This clause makes exceptions to clause 160. The first is that a restricted person may disclose restricted information to another restricted person. The second is that restricted information may be disclosed for the purposes of enabling the Board to exercise its functions. *Subsection (3)* sets out a list of further specific and limited circumstances in which restricted information may be disclosed with the possibility (*subsection (3)(g)*) of additional purposes being added, should changing circumstances so warrant, by order made by the Secretary of State. It also allows the Secretary of State to prevent the disclosure of restricted information under clause 161 by order for the purposes prescribed in that order.

Clause 162: Disclosure of information to the Board

396. This clause sets out a list of permitted persons and allows for the disclosure of information by them to the Board to enable or assist it in exercising its functions. The clause prohibits the disclosure of information where it contravenes the Data Protection Act 1988, where it is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000 or where it is being disclosed on behalf of the Commissioners for Her Majesty’s Revenue and Customs unless the Commissioners have authorised the disclosure. The clause allows the Secretary of State to designate other persons as permitted persons where their functions are of a public nature.

Clause 163: Data protection

397. This clause makes provision amending the Data Protection Act 1998 to ensure that the Legal Services Bill is able to operate compatibly with it.

Clause 165: Funding

398. This clause sets out the mechanism by which the Board receives monies to meet expenditure incurred in carrying out its regulatory functions. The Secretary of State may pay sums to the Board to cover the expenditure it incurs for this purpose, but the Secretary of

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State may determine the manner and times at which the sums are to be paid and conditions on them.

Clause 166: The levy

399. This clause sets out how a levy will be raised from approved regulators. The purpose of the levy is to cover the expenditure incurred in establishment of the Board and the Office for Legal Complaints (OLC) and thereafter the expenditure of these bodies, which is met in the first instance by sums paid by the Secretary of State's grant under clause 165. The Board must make rules providing for a levy to be paid by approved regulators which corresponds to the expenditure incurred by the Board and OLC in carrying out their functions. This is defined as the leviable expenditure. The Board must be satisfied that the rules concerning the apportionment of the levy are fair and proportionate. The leviable expenditure is the difference between the total expenditure of the Board, OLC and Secretary of State (for the establishment of the Board and OLC) and any sums received by the Board and OLC for:

- application fees;
- charges for providing statements, guidance, rules;
- sums received in the Board's capacity as oversight regulator;
- sums received in the Board's capacity as licensing authority;
- amounts received by the Board from charges paid by respondents;
- costs paid to the OLC in relation to complaints; and
- amounts paid to the Board in respect of voluntary arrangements.

400. The levy rules are made with the consent of the Secretary of State.

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Clause 167: The levy: supplementary provisions

401. This clause sets out the supplementary provisions relating to the levy. This includes such provisions as the rate and times that the levy must be paid, that estimated and actual expenditure may be taken into account, and that a levy may be recovered as a debt.

402. In addition, the levy rules require the Board to calculate the apportionment of the levy among approved regulators and to notify approved regulators of their liability to pay the levy within the specified times.

Clause 168: Amounts payable into the Consolidated Fund

403. All monies (with some minor exceptions) received by the Board must be paid into the Consolidated Fund. This clause lists the different sources of income of the Board and OLC that must be paid into the Consolidated Fund.

PART 8: MISCELLANEOUS AND GENERAL PROVISIONS ABOUT LAWYERS

404. This Part makes provision regarding the Board's relationship with the Solicitors Disciplinary Tribunal. This Part also explains makes provision regarding the register of trade mark attorneys and the register of patent attorneys. It covers legal professional privilege and makes amendments to the Immigration and Asylum Act 1999. It furthermore provides for the amendment of legislation relating to the Law Society and the Council for Licensed Conveyancers.

Clause 169: Duties of regulated persons

405. Under this clause all authorised persons and all non-authorised persons have a statutory duty to comply with the regulatory arrangements applicable to them. *Subsection (3)* confirms that regulatory arrangements include those that the Board makes in its capacity as licensing authority.

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Clause 170: The Law Society, solicitors, recognised bodies and foreign lawyers

406. This clause introduces **Schedule 16** which amends the Solicitors Act 1974, the Administration of Justice Act 1985 and the Courts and Legal Services Act 1990.

407. **Part 1** of Schedule 16 amends the 1974 Act so as to remove the Master of the Rolls' function in respect of the approval of rules made by the Law Society. As the relevant rules will fall within the definition of regulatory arrangements, as set out at clause 20 of the Bill, they will have to be approved by the Board under the provision made in Schedule 4.

408. Paragraph 3 removes the requirement in section 2 of the 1974 Act that the Secretary of State and the Master of the Rolls must approve the training regulations made by the Law Society. It also removes references to training "articles" from section 2.

409. Paragraph 4 amends section 3 of the 1974 Act so as to transfer the Master of the Rolls's functions in respect of the admission of solicitors to the Law Society. Paragraph 7 amends section 8 of the 1974 Act so as to transfer the Master of the Rolls's appellate functions in respect of Law Society decisions concerning the restoration of a solicitor's name to the roll to the High Court.

410. Paragraphs 8 and 9 substitute new provisions for the existing sections 9 and 10 of the 1974 Act, which deal with the applications for and the issuing of practising certificates. The new provisions provide that certificates will only be issued in accordance with regulations made by the Law Society under section 28.

411. Paragraph 13 replaces section 13 of the 1974 Act with a new provision that provides that the High Court will have jurisdiction in respect of appeals in connection with the issue of practising certificates. Paragraphs 14 and 15 amend sections 13A and 13B of the 1974 Act so as to transfer responsibility for handling appeals against the imposition of conditions on practising certificates and the suspension of practising certificates from the Master of the Rolls to the High Court.

412. Paragraph 20 amends section 18 of the 1974 Act so as to remove the requirement that the Law Society publish details of the termination of the suspension of a solicitor's practising certificate in the London Gazette on the application of the solicitor in question. Paragraph 28 amends section 28 of the 1974 Act so as to allow the Law Society to make regulations covering a broad range of matters relating to practising certificates.

413. Paragraph 29 amends section 32 of the 1974 Act so as to allow the Law Society to make rules regarding the fitness to practise of solicitors and to remove the requirement that rules made regarding the professional practice, conduct and discipline of solicitors be approved by the Master of the Rolls in order to have effect. The Board will take over the Master of the Rolls' function in this regard.

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414. Paragraphs 30 to 33 cover sections 33, 33A and 34 and 36 of the 1974 Act which deal with matters relating to solicitors' accounts. These provisions have been amended in order to transfer certain rule making powers from the Law Society Council to the Law Society itself and to broaden the scope of these powers.

415. Paragraph 38 amends section 43 of the 1974 Act so as to transfer the Master of the Rolls's functions in respect of appeals against decisions of the Law Society prohibiting a solicitor from employing certain persons to the High Court. Paragraph 38 also widens the range of sanctions that can be imposed where a solicitor acts in contravention of section 41.

416. Paragraph 39 extends the order-making powers of the Law Society and the Solicitors Disciplinary Tribunal under section 44 of the 1974 Act. The new order-making powers are consequent on the new forms of bodies that the Law Society may recognise under amendments to section 9 of the 1985 Act, found at paragraph 74 of this Schedule. The Law Society and SDT can now order not only that non-solicitors are prohibited from being employed or remunerated by solicitors, registered European lawyers and recognised bodies, but also that they are prohibited from being managers of or from having an interest in recognised bodies. The grounds on which such orders can be made remain the same.

417. Section 44(1) of the Solicitors Act makes it an offence for any person in respect of whom a section 43 order is made, to seek employment or remuneration from a solicitor, registered European lawyer or recognised body. Section 44(2), together with paragraph 16(1)(d) and new paragraph 16(1A)(d) (see amendment below) of Schedule 2 of the 1985 Act, and together with new paragraph 15(3A) of the 1990 Act, allow complaints to be made to the Solicitors Disciplinary Tribunal where a solicitor, registered European lawyer, registered foreign lawyer, recognised body, or manager or employee of a recognised body breaches the section 43(2) order. A new section 44C provides that the Law Society may charge for the costs of disciplinary investigations.

418. Paragraph 49 amends section 57 of the 1974 Act so as to require that the committee established under subsection (1) of that provision include member of the Board. Paragraph 49 also makes provision amending the purposes for which orders may be made under section 57.

419. Paragraph 66 replaces the current section 80 of the 1974 Act with a new provision regarding the ability of the Council of the Law Society to delegate its functions. Under the present section 80, the Council is prohibited from delegating certain functions. The new provision removes these restrictions so as to ensure that the Council will be able to delegate its functions as necessary in order to comply with any internal governance rules made by the Board under clause 29.

420. Paragraph 71 amends Schedule 2 to the 1974 Act so as to provide the Law Society with the power to make rules prescribing the circumstances in which solicitors will be required to contribute to the Law Society's compensation fund and the amount of such contribution. Paragraph 84 makes similar amendments to paragraph 6 of Schedule 2 to the

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Administration of Justice Act 1985, a provision regarding contributions to the compensation fund payable by recognised bodies.

421. Paragraph 113 makes similar amendments to paragraph 6 of Schedule 14 to the Courts and Legal Services Act 1990 which covers the same ground in respect of registered foreign lawyers.

422. Paragraph 38 extends the order-making powers of the Law Society and the Solicitors Disciplinary Tribunal under section 43 of the 1974 Act. The new order-making powers are consequent on the new forms of bodies that the Law Society may recognise under amendments to section 9 of the 1985 Act, found at paragraph 74 of this Schedule. The Law Society and SDT can now order not only that non-solicitors are prohibited from being employed or remunerated by solicitors, registered European lawyers and recognised bodies, but also that they are prohibited from being managers of or from having an interest in recognised bodies. The grounds on which such orders can be made remain the same.

423. Section 44(1) of the Solicitors Act makes it an offence for any person in respect of whom a section 43 order is made, to seek employment or remuneration from a solicitor, registered European lawyer or recognised body. Section 44(2), together with paragraph 16(1)(d) and new paragraph 16(1A)(d) (see amendment below) of Schedule 2 of the 1985 Act, and together with new paragraph 15(3A) of the 1990 Act, allow complaints to be made to the Solicitors Disciplinary Tribunal where a solicitor, registered European lawyer, registered foreign lawyer, recognised body, or manager or employee of a recognised body breaches the section 43(2) order. A new section 44C provides that the Law Society may charge for the costs of disciplinary investigations.

424. Paragraph 49 amends section 56 of the 1974 Act so as to require that the committee established under subsection (1) of that provision include member of the Board. Paragraph 49 also makes provision amending the purposes for which orders may be made under section 56.

425. Paragraph 66 replaces the current section 79 of the 1974 Act with a new provision regarding the ability of the Council of the Law Society to delegate its functions. Under the present section 79, the Council is prohibited from delegating certain functions. The new provision removes these restrictions so as to ensure that the Council will be able to delegate its functions as necessary in order to comply with any internal governance rules made by the Board under clause 29.

426. Paragraph 71 amends Schedule 2 to the 1974 Act so as to provide the Law Society with the power to make rules prescribing the circumstances in which solicitors will be required to contribute to the Law Society's compensation fund and the amount of such contribution. Paragraph 84 makes similar amendments to paragraph 6 of Schedule 2 to the Administration of Justice Act 1985, a provision regarding contributions to the compensation fund payable by recognised bodies. Paragraph 113 makes similar amendments to paragraph 6

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of Schedule 14 to the Courts and Legal Services Act 1990 which covers the same ground in respect of registered foreign lawyers.

427. Paragraphs 69 and 110 to 112 amend Schedule 1 of the 1974 Act and paragraphs 32 to 35 of Schedule 2 of the 1985 Act, in order to modify certain intervention powers of the Law Society. These amendments add to the grounds upon which the Law Society may intervene in solicitors' and recognised bodies' practices: where it is necessary to protect the interests of current, former or potential clients or the beneficiaries of trusts of which the solicitor, the recognised body or one of its managers or employees is or was a trustee. The Law Society's intervention powers have also been extended in certain respects. For example, the Law Society can decide to have not only sums of money vest in it, but also the right to recover the solicitor's or the recognised body's debts. It can also now make rules about what to do with any money received under these powers when beneficiaries cannot be traced. The Law Society's power to compel production and take possession of documents, upon High Court authorisation in certain circumstances, has been extended to include electronic documents and to allow it to take possession of property, including computers, in order to access information. The Law Society's power, also upon High Court authorisation, to have mail redirected has also been extended to include electronic documents and other communications. The Law Society can also apply to the High Court in order to take steps with respect to solicitors' and recognised bodies' websites. The amendments also enable the Law Society to recover their costs of intervention from certain persons where the conduct that led to the intervention was carried on with the consent or connivance of, or was attributable to the neglect of those persons. These amendments also allow for the exercise of certain powers against the managers and employees of recognised bodies, to reflect the fact that these individuals sometimes hold client money, or are trustees in their capacity of managers and employees of recognised bodies. The amendments made to the Council for Licensed Conveyancers' intervention powers (see Schedule 17, paragraphs 1 to 6) are consistent with these changes; and the intervention powers given to licensing authorities in Schedule 14 are also consistent with these powers.

428. Paragraphs 72 to 105 amend the 1985 Act to extend the Law Society's power to regulate entities. Under section 9 of the 1985 Act, the Law Society has had the power to regulate bodies corporate, including LLPs, that it "recognises" as suitable to carry on certain services. This power has now been extended to include other entities through which solicitors practice, such as partnerships and unincorporated bodies. Section 9 has also been amended, and new section 9A added, to allow the Law Society to regulate legal disciplinary practices i.e. firms or companies that include solicitors and other legal practitioners that are "authorised persons" under the Legal Services Act 2007. The definition of 'authorised person' is qualified to ensure that these amendments do not include the power to regulate bodies that would be "licensable bodies" under the Legal Services Act 2007, nor the power to regulate bodies that would have licensable bodies as interest-holders. These amendments also allow the Law Society to apply rules to managers (as defined in this Act) and employees within them. Amendments are then made to Schedule 2 of the 1985 Act, and to sections 43 to 44 of the 1974 Act (as described above) to reflect the fact that individuals within recognised bodies –

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whether solicitors or not – are subject to rules and also to sanctions for breach of rules. These include new order-making powers for the Solicitors Disciplinary Tribunal, consequential amendments and amendments to intervention powers in Schedule 2 of the 1985 Act as described above.

429. Paragraph 75 amends section 10 of the 1985 Act, which relates to the offence of pretending to be a recognised body, to cover the different forms of entity which may now be recognised bodies.

430. Paragraphs 108-118 make amendments to Schedule 14 of the 1990 Act in order to achieve consistency with provision made elsewhere.

Clause 171: The Solicitors Disciplinary Tribunal: approval of rules

431. This clause is the first of three which make provision in respect of the Solicitors Disciplinary Tribunal, so that the Tribunal's position, as a body statutorily separate from the Law Society but performing functions which are part of the Law Society's regulatory arrangements, may be properly reflected. The approach is in essence to apply to or mirror for the Tribunal certain provisions which apply to approved regulators, with modifications and/or exclusions to reflect the Tribunal's particular role and position. This clause makes provision bringing the Tribunal's rules within the structure of consent requirements for regulatory arrangements, so that there is a degree of monitoring by the Board but this is kept to the minimum necessary. Accordingly, *subsection (1)* provides for any alteration of the Tribunal's rules under section 46(9)(b) of the Solicitors Act 1974 to require approval by the Board, unless it is exempt; and *subsections (2) to (6)* set out the procedures for approval, should an alteration be made.

Clause 172: Board's power to give directions to the Tribunal

432. This clause applies the Board's power to give directions to an approved regulator under clauses 32 to 34 to the Tribunal, but with considerable limitations reflecting the fact that the Tribunal is not itself an approved regulator but is a statutorily independent body which performs functions which form a part of the regulatory arrangements of the Law Society. The circumstances in which the Board can direct the Tribunal are limited to those in which the Tribunal has failed to perform any of its functions to an adequate standard (or at all). As is the case for directions to approved regulators, under subsection (4) of clause 31 the Board will not have the power to direct the Tribunal in respect of specific disciplinary cases or proceedings.

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Clause 173: Functions of the Tribunal

433. This clause applies clauses 68 and 69 to the Tribunal with limitations to reflect the Tribunal's particular position and so enables the Secretary of State to modify the functions of the Tribunal for certain limited purposes on the recommendation of the Board and with the consent of the Tribunal (and in particular enables amendment of the statutory provisions governing the Tribunal at the Tribunal's request).

Clause 174: Licensed conveyancers

434. This clause introduces **Schedule 17** which makes a number of amendments to provisions relating to licensed conveyancers, conveyancing services, and the CLC, which will be an approved regulator and is listed in part 1 of Schedule 5. Schedule 17 amends the Administration of Justice Act 1985 and the Courts and Legal Services Act 1990.

435. Paragraphs 1 to 7 deal with the issuing of conveyancing licences. Paragraph 2 amends the definition of conveyancing services to ensure that it includes all the activities contained in the definition of "reserved instrument activities" in the Act. The CLC is an approved regulator in the Act in relation to reserved instrument activities. Paragraph 3 amends section 15 of the 1985 Act so as to allow the CLC a discretion as to the duration of a conveyancing licence. Paragraph 3 further amends section 15 of the 1985 Act so as to allow the CLC 42 days in which to determine applications for licences (the present period is 21 days).

436. Paragraphs 4 to 6 deal with the imposition of conditions on a licence and allow the Council to require an accountants report to be delivered within a specified time-frame and for the CLC to recover any costs incurred as a result of a licensed conveyancer's failure to do so. In addition amendments made here allow for a condition to be put on a licence as a result of an order made by the Investigating Committee under their new powers. Paragraph 7 amends section 17(2)(a) of the 1985 Act with respect to the suspension or termination of licences and provides for an appeal from a decision made under this section to be heard in the High Court.

437. Paragraphs 8 to 12 operate to amend the provisions that provide for the CLC's current disciplinary arrangements. The effect of these paragraphs is to allow the Investigating Committee, that currently has only an investigatory role, to make a determination on minor infractions of the Council's rules and to fine a licensed conveyancer an amount to be specified in the Council's rules (not to exceed the sum of £1,000.) Paragraph 24 makes similar amendments to the equivalent provisions relating to recognised bodies.

438. Paragraph 10, sub-paragraph (2) amends section 24 of the 1985 Act which makes provision regarding the fining power of the CLC. Presently, the CLC may fine a licensed conveyancer no more than £3,000. The amendment to section 26 will allow the CLC to make

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rules setting their own limit (subject to the approval of the Board). At paragraph 24, subparagraph (5) of Schedule 17 to the Bill, an amendment is made to the equivalent provision relating to recognised bodies (paragraph 4 of Schedule 6 to the 1985 Act).

439. Paragraphs 13-16 make amendments to the CLC's powers that are similar to the amendments to the Law Society's powers under section 9 and new section 9A of the 1985 Act. These paragraphs amend section 32 of the 1985 Act and add new section 32A to allow the CLC may "recognise" and regulate new forms of bodies, including partnerships and unincorporated bodies, and including bodies that carry out not just conveyancing services but also other legal services carried out by "authorised persons" under the Legal Services Act 2007. These amendments also allow the CLC to make rules applicable to managers and employees of the bodies that it recognises, and make consequential changes to a number of related provisions in Schedule 6 (see Paragraph 26 of the Schedule). Amendments to Schedule 6 also give the Discipline and Appeals Committee additional order-making powers to reflect the fact that managers and employees may be found in breach of rules applicable to them.

440. Paragraph 16 inserts a new section 33A into the 1985 Act to confer on the CLC the power to make arrangements for authorising licensed conveyancers to administer oaths. In the Act, the CLC is an approved regulator in relation to authorising persons to administer oaths.

441. Paragraph 17 adds new section 33A to the 1985 Act to ensure that the legal professional privilege of clients of recognised bodies that are actually "licensable bodies" (and that will therefore need to be licensed under Part 5 of the Act), is governed by the same provision as that for other licensed bodies: section 177 of the Act.

442. Paragraph 18 amends section 33 of the 1985 Act, which relates to the offence of pretending to be a recognised body, to cover the different forms of entity which may now be recognised bodies.

443. Paragraph 21 amends Schedule 3 of the 1985 Act to allow CLC members to be appointed as opposed to "elected or nominated". Paragraph 22 amends paragraph 1 of Schedule 4 to the 1985 Act so as to remove the requirement that the rules made by the CLC regarding the procedure and practice of the Discipline and Appeals Committee shall not come into force until approved by the Secretary of State.

444. Paragraph 23 amends Schedule 5 of the 1985 Act, which provides the CLC with intervention powers, to achieve similar outcomes for the CLC as those made to the Law Society's intervention powers by virtue of amendments to Schedule 1 of the 1974 Act and Schedule 2 of the 1985 Act.

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445. Paragraphs 8, sub-paragraph (5); 9, sub-paragraph (2); 10, sub-paragraph (3); 11; 12; 24, sub-paragraph (5)(c); 24, sub-paragraph (8); 25, sub-paragraph (3); 25, sub-paragraph (4); and 25, sub-paragraph (5) amend the 1985 Act and the 1990 Act, in order to enable the Investigating Committee and the Discipline and Appeals Committee to make such orders for the payment of costs to any party as it considers appropriate in any proceedings before it. The order may relate to all or part of the costs. A successful party would not be entitled to costs as of right: the award will be at the discretion of the committees.

Clause 175: Commissioners for oaths

446. This clause provides that legislative references to “commissioners for oaths” include persons authorised under the Bill to conduct the reserved legal activity of administering oaths. It also confers upon such persons the right to use the title “Commissioner for Oaths.”

447. It further sets out the prescribed circumstances in which an authorised person’s right to administer oaths is proscribed and makes certain requirements relating to the way in which the oath or affidavit is taken, and makes provision as to their admissibility. The clause also sets out the mechanism by which the fees charged by authorised persons for the administration of oaths and taking of affidavits shall be determined by the Secretary of State.

Clause 176: Trade mark attorneys

Clause 177: Patent attorneys

448. These clauses provide for amendments to the Trade Marks Act 1994 and the Copyright, Designs and Patents Act 1998. These amendments transfer the Secretary of State’s functions in respect of the registers of trade mark attorneys and patent attorneys to ITMA and CIPA respectively, and allow for both bodies to make regulations in respect of the registration of trade mark attorneys and patent attorneys. These regulations may provide for the payment of registration fees and the removal of names from the register. The Secretary of State may make an order, subject to the negative resolution procedure, which may require the responsibility of the register to be transferred to a new person. For example, should ITMA and CIPA merge, their responsibilities in respect of the registers would need to be transferred to the new approved regulator.

449. These amendments furthermore expand ITMA and CIPA’s statutory powers as they allow ITMA to make regulations governing the carrying on of trade mark attorney work by registered trade mark attorneys and CIPA to make regulations governing the carrying on of registered patent attorney work by registered patent attorneys.

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450. This represents a significant expansion of CIPA and ITMA's statutory powers. All regulations made under these new provisions will be subject to the Board's oversight whether or not they are "regulatory arrangements" as defined by clause 20.

Clause 178: Immigration advisers and immigration service providers

451. This clause introduces **Schedule 18**, which amends the Immigration and Asylum Act 1999. Under the 1999 Act, two categories of person may provide immigration services: persons registered with Immigration Services Commissioner and persons authorised by a designated professional body. The amendments to the 1999 Act effected by Schedule 18 introduce a third category of person that may provide immigration services: persons authorised by a designated qualifying regulator. The Law Society, the Institute of Legal Executives and the General Council of the Bar will all become designated qualifying regulators when the provision made in Schedule 18 takes effect. At present, these bodies are designated professional bodies. Designated professional bodies are subject to the oversight of the Immigration Services Commissioner whereas designated qualifying regulators will be subject to the oversight of the Board. Where the Board is of the view that a designated qualifying regulator is failing to regulate the provision of immigration services effectively, the Board may report its view to the Secretary of State. The Secretary of State will have powers to appoint bodies as designated qualifying regulators (on the recommendation of the Board) and to remove designated qualifying regulator status in certain circumstances.

452. **Part 1** of **Schedule 18** sets out the procedure by which a body may apply to the Board to become a "qualifying regulator". Only "qualifying regulators" may become designated qualifying regulators. **Part 2** of the Schedule sets out the amendments to Part 5 of the 1999 Act that are required in order to establish the new framework. **Part 3** of the Schedule makes transitional provision protecting persons presently authorised to provide immigration services by the designated professional bodies that are to become designated qualifying regulators under the new framework.

Clause 179: Claims management services

453. **Schedule 19** makes amendment to Part 2 of the Compensation Act, 2006. The amendments provide for the regulatory oversight function of the Claims Management regulator to transfer from the Secretary of State to the Board. This includes ensuring that a regulator can only be designated by the Secretary of State on the recommendation of the Board, and that any regulations made by the Secretary of State are on the recommendation, or in consultation with, the Board. Clause 172 provides for complaints handling to come under the jurisdiction of the Office for legal complaints (OLC).

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Clause 180: Duties of advocates and litigators

454. This clause reproduces sections 27(2A) and 28(2A) of the 1990 Act, which have been repealed. Persons who exercise rights of audience or rights to conduct litigation have a duty to the court to act with independence in the interests of justice, and a duty to comply with conduct rules applicable to them. These duties override any other obligation that the persons may have (otherwise than under the criminal law) if it is inconsistent with them.

Clause 181: Employed advocates

455. This clause replicates provision at section 31A of the Courts and Legal Services Act 1990. It ensures that qualification regulations and conduct rules which apply to the exercise of a right of audience by a person employed as a Crown Prosecutor or in any other employment are not more restrictive than those regulations and rules applying to other persons exercising that right.

Clause 182: Legal professional privilege

456. This clause states that legal professional privilege applies to any communication made to or by an individual who is not a barrister or solicitor at any time when the individual is providing advocacy services, litigation services, conveyancing or probate services in their capacity as an authorised person. Such a communication is to be treated as were made by a solicitor for the purposes of disclosure. This clause reproduces the effect of section 63 of the Courts and Legal Services Act 1990.

457. *Subsections (3) to (5)* provide that communications made by a licensed body in legal proceedings will be privileged to the same extent that they would be privileged had they been made by a “relevant lawyer”, provided that the communications in question are made through, or under the supervision of, a “relevant lawyer”. ‘Relevant lawyer’ means a barrister, solicitor, or person otherwise entitled to conduct reserved legal activities.

Clause 183: Powers of court in respect of rights of audience and conduct litigation

458. This clause preserves the rights of courts to refuse to hear persons who would otherwise have a right of audience before them. It replicates similar provision to the same effect contained in sections 27 and 28 of the Courts and Legal Services Act 1990.

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Clause 179: Savings for solicitors to public departments and the City of London

459. This clause provides that nothing in the Bill shall prejudice or affect the rights or privileges of the Treasury Solicitor and certain other office holders. It also provides that such officers and their employees will not be required to hold a practising certificate in order to conduct a reserved legal activity if they would have been able to have conducted that activity without a practising certificate by virtue of section 88 of the Solicitors Act 1974 had the provision in the Bill not been made.

460. This clause also preserves the rights and privileges enjoyed by the Solicitor of the City of London and makes provision regarding the duties of persons exercising rights of audience or the right to conduct litigation by virtue of its provision.

Clause 185: Payments in respect of pro bono representation

461. This clause gives a power to the court to make a costs order in civil cases in favour of a party whose legal representation has been provided 'pro bono' (i.e. free of charge). Under the current cost law, an unsuccessful party will not be required to pay costs in such cases. Under the new scheme, awards will be at the discretion of the court and will be paid directly to a designated charitable body, established to administer and distribute the monies to organisations who conduct pro bono work.

Clause 186: Application of the Legal Profession and Legal Aid (Scotland) Act 2006

462. This clause confers competence in areas reserved to the UK Parliament in respect of measures promoted in the above bill in the Scottish Parliament. The Legal Profession and Legal Aid (Scotland) Bill, which was introduced in the Scottish Parliament on 1 March 2006, establishes a Scottish Legal Complaints Commission, and provides for the Commission's main functions to be to handle consumer complaints about the service provided by legal practitioners and to oversee the handling of conduct complaints by the legal professional bodies in Scotland.

463. Regulation of the legal profession in Scotland is devolved by the Scotland Act 1999 (Schedule 5, head C3), but there are a few areas where the Scottish legal professional bodies are the regulatory body or co-regulatory body in terms of a UK statute, the subject matter of which is reserved. The areas in question are consumer credit, insolvency, immigration and financial services.

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464. To ensure that the Legal Profession and Legal Aid (Scotland) Bill falls within devolved competence, it has been necessary to exclude these reserved areas, which is achieved by section 47 of the Scottish Bill. The Legal Services Bill provides competence in the reserved areas listed in *subsection (2)*.

465. *Subsection (1)* applies the provisions of the Legal Profession and Legal Aid (Scotland) Bill to (a) any element of a complaint relating to advice, services or activities in the reserved areas specified in subsection 2, and (b) the provision by a practitioner of such advice, services or activities. The advice, services or activities in question fall within areas reserved to the UK Parliament and also the competence of the Scottish Parliament.

466. *Subsection (2)* defines such advice, services and activities to be:

- **Consumer credit services:** activities carried out by virtue of a group licence under section 22(1)(b) of the Consumer Credit Act 1974. The Law Society of Scotland holds such a licence which is granted by the Office of Fair Trading (OFT). The licence enables members of the Society to provide services in the areas of consumer credit, credit brokerage, debt-adjusting and debt-counselling and debt-collecting.
- Insolvency services: activities of an insolvency practitioner within the meaning of Part 13 of the Insolvency Act 1986. The Law Society of Scotland is a recognised professional body under the 1986 Act and issues licences to Scottish solicitors who wish to be appointed as insolvency practitioners.
- Immigration advice or immigration services: the Law Society of Scotland and the Faculty of Advocates are designated professional bodies under the Immigration and Asylum Act 1999. Designation under the Act removes the need for Scottish solicitors and advocates to be individually registered with the Immigration Services Commissioner. The Commissioner has the power to receive complaints against Scottish solicitors, giving immigration advice and is required to monitor how any complaints which are passed to the Law Society of Scotland or the Faculty of Advocates are handled (Schedule 5, paragraph 10 of the 1999 Act). The Commissioner is required to review the list of designated professional bodies and report to Scottish Ministers if a designated professional body in Scotland is failing to provide effective regulation of its members.
- Financial services:
 - Activities mentioned in paragraph 5(1)(a) of Schedule 3 to the Financial Services Act 1986. The Law Society of Scotland was a recognised professional body under the 1986 Act and still retains the function of dealing with complaints against Scottish solicitors in relation to investment business

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carried on under the 1986 Act. This function of recognised professional bodies was saved, on the repeal of the 1986 Act.

- Regulated activity within the meaning of section 22 of the Financial Services and Markets Act 2000, other than activities falling within paragraph (f) of subsection (2), in respect of which the Financial Services Authority has by virtue of Part 20 of that Act arranged for its regulatory role to be carried out by the Law Society of Scotland.
- Exempt regulated activities within the meaning of section 325(2) of the Financial Services and Markets Act 2000. Since 30 November 2001 the Law Society of Scotland has been a designated professional body under the Financial Services and Markets Act 2000 and responsible for the licensing and regulating of solicitor firms which conduct incidental investment business (i.e. investment work which is incidental and complementary to the provision of legal services). The Financial Services Authority has been responsible since that date for the authorisation and direct regulation of solicitor firms in Scotland which wish to conduct mainstream investment business under the 2000 Act.

477. *Subsection (3)* provides for references to “complaint” and “practitioner” to have the same meaning as in Part 1 of the Scottish Bill. (“Complaint” is defined by that Bill to include any expression of dissatisfaction. “Practitioner” is defined to cover (a) an advocate; (b) a conveyancing practitioner; (c) an executry practitioner; (d) a firm of solicitors; (e) an incorporated practice; (f) a person exercising a right to conduct litigation or a right of audience acquired by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990; and (g) a solicitor.

478. *Subsection (4)* repeals section 47 of the 2006 Act which will no longer be required once the Legal Services Bill provides full competence for the Scottish Legal Complaints Commission in relation to both reserved and devolved areas.

479. *Subsection (5)* introduces Schedule 20 to the Bill which sets out minor and consequential amendments.

Clause 187: Scottish legal services ombudsman: functions

480. *Subsection (1)* disapplies the functions of the Scottish Legal Services Ombudsman in relation to advice, services and activities which fall within the reserved areas mentioned in clause 175 subsection (2). The Legal Profession and Legal Aid (Scotland) Bill will effect the repeal of those functions of the Ombudsman which fall within devolved competence. It

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provides a power for Scottish Ministers to modify the functions of the Scottish Legal Services Ombudsman by order; and to abolish that office by order when the Ombudsman has no remaining functions. It is envisaged that such an order will be undertaken once the Legal Services Bill has removed the functions of the Ombudsman which fall within the reserved areas.

481. *Subsection (2)* makes consequential amendments to the Immigration and Asylum Act 1999. The Office of the Immigration Services Commissioner is to retain its oversight function in relation to the Law Society of Scotland and the Faculty of Advocates which are “designated professional bodies” in terms of section 86(1)(c) of the Immigration and Asylum Act 1999.

482. Where the Secretary of State is proposing to de-designate a professional body in terms of section 86(2) of the 1999 Act, he must consult the Scottish Legal Services Ombudsman, if the proposed order would affect a designated professional body in Scotland. Subsection (2) amends the reference in section 86(4)(c) of the Immigration and Asylum Act 1999 to require that consultation to be with the Scottish Legal Complaints Commission instead of the Scottish Legal Services Ombudsman.

483. Where the Secretary of State proposes to apply the code of conduct for immigration advisers to members of a designated professional body in Scotland, he is required by paragraph 4(2)(c) of Schedule 5 to the 1999 Act to consult the Scottish Legal Services Ombudsman. Subsection 2 substitutes a reference to the Scottish Legal Complaints Commission for the existing reference to the Scottish Legal Services Ombudsman.

PART 9: GENERAL

484. This Part makes provision regarding offences committed by bodies corporate and unincorporated bodies. It makes provision setting out how notices issued pursuant to provision in the Bill are to be given. It sets out the procedure for making orders under the Bill. It specifies the extent of the Bill and makes provision regarding the interpretation of terms used in the Bill.

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Clause 188: Offences committed by bodies corporate and unincorporated bodies

485. This clause provides that where an offence is committed by a body corporate or an unincorporated body, it will be possible, in certain circumstances, to prosecute both the body and the relevant officers.

Clause 189: Local weights and measures authorities

486. This clause replicates the provision made in section 22A of the Solicitors Act 1974. It provides local weights and measures authorities with powers to investigate and prosecute persons who carry on reserved instrument activities when not entitled to do so.

Clause 190: Notices and Directions

487. This clause makes provision requiring notices and directions given under provision made in the Bill to be given in writing.

Clause 191: Documents

488. This clause defines the term “document” for the purposes of the Bill. By virtue of this provision, “document” includes information recorded in any form. If the information is not in a legible form, then the information required must be made in a legible form.

Clause 192: The giving of notices, directions and other documents

489. This clause provides that where the Bill requires notices, directions and other documents to be given to a person, how they may be given. It further provides that where the notice, direction or document is to be given to a body corporate, a partnership, or some other form of unincorporated body, to whom within that body it may be given.

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Clause 193: The giving of notices, directions and other documents in electronic form

490. This clause provides that where a notice, direction or other document is to be given pursuant to provision made in the Bill, it may be given in an electronic format providing that certain conditions are met.

491. *Subsection (3)* provides that where the Board, the OLC or an ombudsman is the recipient of a notice, direction or other document, they must agree to the manner of its transmission and the form the document will take if it is to be sent electronically. *Subsection (5)* provides that where the Board, the OLC or an ombudsman propose to transmit a notice, direction or other document to another person electronically, then the recipient must agree to the manner of transmission and the form the document will take. *Subsection (7)* provides that where the Board, the OLC or an ombudsman imposes any requirement regarding the electronic transmission of documents, it must publish that requirement.

Clause 195: Consultation requirements for rules

492. This clause requires the Board and the OLC to comply with certain consultation requirements before making rules under the Bill. The rule-making body must publish a draft of any rules it proposes. The rule-making body must then consider any representations made. If, following representations, the rules differ from the original draft, the rule-making body must publish the details of the difference. The rule-making body must publish any rules it makes and can charge a fee to provide either the draft or final rules.

Clause 197: Interpretation

493. This clause defines the meaning of various words and phrases used in the Bill.

Clause 198: Minor and consequential provision etc

494. This clause states that the Secretary of State may by order make any supplementary, incidental or consequential provision and any transitory, transitional or saving provision when necessary.

495. **Schedule 21** contains minor and consequential amendments to the:

- Race Relations Act 1976,

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- Patents Act 1977,
- Copyright, Designs and Patents Act 1988,
- Trade Marks Act 1994,
- Access to Justice Act 1999 and
- Income Tax (Earnings and Pensions) Act 2001.

Clause 199: Transitional provision

496. This clause refers to Schedule 22, which sets out the provision made to avoid regulatory gaps during the transitional period between the current and new regulatory systems.

497. Paragraph 1 empowers the Secretary of State to make orders adding bodies to the list of approved regulators in Schedule 4 or removing bodies from that list if, before Schedule 4 comes into force, the body in question gains or loses a right to conduct a reserved legal activity under the provisions of the Courts and Legal Services Act 1990.

498. Under the provision made in Schedule 17, the membership of the CLC is to be appointed, where at present it is “elected or nominated”. Paragraph 2 makes transitional provision to ensure that the Council’s membership as “elected or nominated” under the present arrangements will continue to exercise the Council’s functions until such time as a new Council is appointed under the new arrangements. Schedule 17 to the Bill repeals the provision in the Administration of Justice Act 1985 that provides for the endorsement of conveyancing licences. Paragraph 3 provides that endorsements of licences made under that provision will continue to have force until the expiry of the licences in question, notwithstanding the repeal of the enabling provision.

499. Paragraph 4 makes provision for the appointment of an Interim Chief Executive of the OLC by the Secretary of State. Sub-paragraph (2) states that the Secretary of State will determine the terms and conditions of the appointment. Sub-paragraphs (5) and (6) provide for the Interim Chief Executive to incur expenditure and do other things in the name of and on behalf of the OLC including appointing staff and making arrangements for assistance. Sub-paragraphs (7) and (8) require the Interim Chief Executive to comply with supervisory directions made by the Secretary of State and subsequently by the Board.

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Clause 201: Commencement

500. This clause specifies that certain clauses in the Bill will come in to force on the day that the Bill is passed. The remaining clauses will come into force on such day as the Secretary of State appoints by order.

Clause 202: Extent

501. *Subsection (2)* provides for clause 186 subsections (1) to (3), clause 187 subsection (1) to extend to Scotland only. The repeals of and amendments to provisions of enactments contained in clause 186 subsections (4) to (5) and clause 187 subsection(2) have the same extent as the relevant enactments.

502. Schedule 4 to the Legal Profession and Legal Aid (Scotland) Bill makes a number of minor amendments and repeals, consequential on its provisions to the Solicitors (Scotland) Act 1980 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. These are mainly concerned with the adjustment of statutory references, and the removal of unnecessary references, as a result of the introduction of the new arrangements for the handling of complaints against lawyers in Scotland involving the creation of a Scottish Legal Complaints Commission.

503. Modifications made to the 1980 and 1990 Acts by Schedule 4 of the Scottish Bill apply only to the devolved aspects of such provisions and it has been necessary to preserve certain provisions to deal with reserved activities. Schedule 20 repeals such provisions and ensures that these modifications are comprehensive in nature, and extend to reserved aspects of both service and conduct complaints.

Effects of the Bill on Public Service Manpower

504. The Government will be closing down two of the Department's associated offices. The Office of the Legal Services Ombudsman (OLSO) has approximately 30 members of staff and the Office of the Legal Services Complaints Commissioner (OLSCC) has approximately 20 members of staff. Other than the closure of the OLSO and the OLSCC the Government does not anticipate any changes to the Department's staffing requirements.

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Effects of the Bill on Public Expenditure

505. As calculated by PricewaterhouseCoopers (“PwC) in their financial analysis to support the draft Legal Services Bill the cost of regulating the legal services sector in 2005-06 is estimated to be around £97.4m.¹⁸

506. Again, as calculated by PwC, of this, approximately £12m was spent by Government or its agencies:

- the Department for Constitutional Affairs,
- the Office of the Legal Services Ombudsman,
- the Office of the Legal Services Complaints Commissioner,
- the Legal Services Commission,
- the Office of the Immigration Services Commissioner,
- the Master of the Rolls, and
- the Office of Fair Trading.

507. The remainder, of around £85.4m, was spent by the professional bodies who directly regulate providers of reserved legal services (with roughly 88% of this figure, or £75m incurred by the Law Society).

508. PwC have estimated that the reforms will reduce the cost of public expenditure by around £3m per annum. This is largely due to the closure of the OLSCC and the OLSO.

509. Under their base-case scenarios, PwC calculated annual running costs under the new regulatory framework of around £87.8m, £9.6m less than at present. Within this total, the annual running costs of the Board account for £3.6m and those of the Office for Legal Complaints (OLC) account for £16.8m.

510. PwC also estimated costs for scenarios that required an incremental level of activity from the new bodies (refer to the PwC report for more details). For the Board, annual running

¹⁸ The PwC report can be viewed at http://www.dca.gov.uk/legalsys/pwc_finanalysis_060524.pdf.

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costs were estimated at £4.5m and for the OLC annual running costs were estimated at £21m. If both scenarios occurred simultaneously, annual running costs under the new regulatory framework would be around £92.9m, £1.5m less than at present.

511. PwC also estimated transition costs for legal services reform at £26.8m. Under the incremental scenarios, transition costs were estimated at £33.9m.

512. Government policy remains that those being regulated should bear the cost of regulation and the overall impact on public expenditure should, therefore, be negligible.

Regulatory Impact

513. The Regulatory Impact Assessment (RIA) sets out the rationale for reform of the regulation of legal services and also analyses the likely impact of the options considered for implementing these reforms.

514. It states that the creation of the Board will provide independent, streamlined oversight regulation to the legal services profession. The annual running costs for the Board are estimated by PwC at £67.2m.

515. The facilitation of Alternative Business Structures (ABS) will permit lawyers and providers of associated non-legal services to work together with external financing. The Small Firms Impact Test also stated that the proposed options would provide greater opportunities for small firms to access equity, diversify, expand and effectively compete in the market.

516. The establishment of the Office for Legal Complaints (OLC) will provide an independent complaint handling system with powers to deal with complaints made against providers, which cannot be resolved through in-house measures. It is envisaged that consumer confidence in the complaints handling system will increase and will therefore encourage consumers to file legitimate complaints against inefficient providers. The annual running costs for OLC are estimated at £20.6m. The estimated total regulatory reform cost is £26.8m to implement including transition costs.

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Compatibility with the European Convention on Human Rights

517. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act).

518. The Lord Falconer of Thoroton has made the following statement:

“In my view the provisions of the Legal Services Bill [HL] are compatible with the Convention rights.”

519. The Bill raises issues under Article 6 (fair trial), Article 8 (respect for family and private life), Article 10 (freedom of expression), and Article 1 of the First Protocol (protection of property).

520. The Bill is compatible with the Convention rights. The compatibility of the regulatory framework which it establishes in practice will be reliant in some respects on appropriate safeguards being provided in regulations; but the restrictions on the exercise of the principal delegated powers provide an adequate level of Parliamentary scrutiny to ensure that those safeguards are provided. Articles 6 (fair trial), 8 (respect for family and private life), and 10 (freedom of expression), and Article 1 of the First Protocol (protection of property) are likely to be engaged. The following summarises the considerations in relation to each of these.

Article 6

521. In relation to Article 6, the Board, a Regulator or a Licensing Authority may make a determination which affects a person's civil rights. It would therefore need to be sufficiently independent and impartial. The jurisprudence is summarised in *Whitfield and others v UK*. The nature and extent to which the Article is engaged, and the procedural and other provisions necessary to ensure compliance with it, will differ according to the matter in issue, and in particular whether this involves investigation of an alleged breach of professional rules with potential disciplinary sanctions, investigation of a complaint of poor professional service, investigation of breach of individuals' duties related to ABS licences and potential sanctions or prohibitions on shareholding in ABS firms, divestiture of such shareholdings or similar matters. The preconditions for the exercise of powers and parliamentary scrutiny, the separation of the regulatory functions from the functions of the Secretary of State and the involvement of the High Court in relation to the shareholding provisions provide sufficient

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safeguards when combined with the duties of the Board to comply with section 6 of the Human Rights Act.

522. As regards the Office for Legal Complaints and its ombudsmen, the separation of, and independence of complaints investigation is secured by provision in relation to appointments, tenure, and conditions of office which compare to existing procedures which have either not been criticised in terms of Article 6 or upheld as complying with it. The availability (to be provided for under scheme rules) of a form of internal review, together with the availability of judicial review, is consistent with a line of authority to the effect that it is not necessary for an appeal to lie to a court where judicial review is possible.

Article 8

523. In relation to Article 8, the Bill provides powers necessary for the Regulators to investigate whether any of the offences have been committed. These include powers of entry and search (and the power to take copies of records found during a search) in clauses 40 to 43 and various powers to apply to the High Court for an order to comply with a direction (see, for example, clauses 42 and 55). The Bill also gives Licensing Authorities powers to intervene in an ABS practice, including in its accounts and files, where it has suspended or revoked its licence (see Schedule 14). These powers in principle engage Article 8, which protects the right to respect for a person's private and family life, home and correspondence. Interferences with Article 8 rights are justified if they pursue legitimate aims and are necessary. In this case it is felt that the powers are necessary to enable the Regulators and Licensing Authorities to properly carry out their functions. Procedural safeguards have been included.

524. In relation to Article 10, the Bill creates a number of criminal offences (for example, see clauses 14 and 16 and paragraphs 22 and 24 of Schedule 13). The offences are triable in the criminal courts and so in a manner which accords with the rights guaranteed in Article 6. A potential issue was considered in relation to clause 16 which makes it an offence to pretend to be entitled to provide reserved legal activities. Among other things this might affect the right to advertise and as such fall within Article 10, but the objectives behind the creation of the offence are consistent with the limitations on Article 10.

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Article 1

525. In relation to Article 1 of the First Protocol, the right to the peaceful enjoyment of possessions established therein is explicitly subject to the power of the State to interfere with the right in the public interest, subject to the conditions provided by law. The Board's powers of direction and intervention are needed to ensure that the regulatory objectives are upheld and in particular are subject to the requirement in clause 3 that they have regard to the public interest and to the requirement that they must be satisfied that the objective cannot be achieved by less intrusive powers. Similarly, the powers of licensing authorities to prevent persons becoming owners of ABS firms or to obtain orders requiring divestiture of parts of, or all of their shares in ABS firms, or disqualifying such persons, are subject to the approval requirements set out in paragraph 6 of Schedule 13 which require consideration of the regulatory objectives, the duties under clause 169 and whether the person under consideration is otherwise fit and proper to hold that interest. Such decisions will be subject to a right of appeal, with a further appeal possible to the High Court and additionally divestiture of shares will only be possible on application to the High Court.

LEGAL SERVICES BILL [HL]

EXPLANATORY NOTES

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