Delegated Powers and Regulatory Reform Committee

2nd Report of Session 2006-07

Consumers, Estate Agents and Redress Bill [HL]

European Union (Implications of Withdrawal) Bill [HL]

European Union (Information, etc.) Bill [HL]

Interception of Communications (Admissibility of Evidence) Bill [HL]

Mental Health Bill [HL]

Public Demonstrations (Repeals) Bill [HL]

Tribunals, Courts and Enforcement Bill [HL]

Ordered to be printed 29th November and published 30th November 2006
The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate level of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under the Regulatory Reform Act 2001; and to perform, in respect of such documents and orders and subordinate provisions orders laid under that Act, the functions performed in respect of other instruments by the Joint Committee on Statutory Instruments”.

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The members of the Delegated Powers and Regulatory Reform Committee are:

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- The Lord Armstrong of Ilminster GCB CVO
- The Lord Brett
- The Viscount Eccles CBE
- The Baroness Fritchie DBE
- The Baroness Gardner of Parkes
- The Lord Goodhart QC (Chairman)
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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of the Delegated Powers and Regulatory Reform Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020-7219 3103 and the fax number is 020-7219 2571. The Committee’s email address is dprr@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–1, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. Following the passage of the Deregulation and Contracting Out Act 1994, the Committee was given the additional role of scrutinising deregulation proposals under that Act and the Committee became the Select Committee on Delegated Powers and Deregulation. In April 2001, the Regulatory Reform Act 2001 expanded the order-making power to include regulatory reform and the Committee, renamed the Delegated Powers and Regulatory Reform Committee, took on the scrutiny of regulatory reform proposals under that Act. The Committee will scrutinise regulatory reform orders under the successor to the 2001 Act, the Legislative and Regulatory Reform Act 2006.
Introduction

1. Part 1 of this bill establishes a new National Consumer Council and confers functions on it in relation to consumers of gas and electricity supplies and postal services, with provision to add water and sewerage services later. Part 2 provides for suppliers of those services to be obliged to handle consumer complaints to a required standard, and to participate in approved redress schemes. Part 3 imposes new requirements on estate agents about record-keeping and the enforcement of that and other statutory obligations, and provides for redress schemes for dealing with complaints about them. Part 4 includes provision to enable a consumer to cancel a contract made during a visit by a trader at the consumer’s request.

2. The bill contains some 26 delegated powers (Henry VIII powers at clauses 3(2), 37, 58, 59 and 62), explained in a memorandum for the Committee from the Department of Trade and Industry (DTI), printed at Appendix 1. Other than the matters which we discuss below, there is no other issue which we wish to draw to the attention of the House.

Provision of information to the Council — Clause 23

3. Clause 23 enables the Council to require persons to supply it with information which it requires for the purposes of exercising its functions. Those persons are specified or described in subsection (3)(a)-(c); but the Secretary of State may by order prescribe further persons or descriptions of person for this purpose and specify whether clause 23(b) or clause 25 is to apply to such persons in the event of their non-compliance with the request for information. The kinds of persons who might be specified for this purpose is not confined in any way (for instance, to other persons carrying on a business) but is left at large, although the DTI suggests in paragraph 21 of its memorandum that the power might be used to specify “a person who does not supply goods or services in the course of a business”.

4. Non-compliance with the obligation may ultimately expose a person to court proceedings under clause 25. Moreover, the existence of such a statutory requirement to provide information will generally neutralise any legal obligation to protect from disclosure personal details about a third party (for instance under the Data Protection Act 1998). We draw the attention of the House to the scope of this power, in view of which we consider that its exercise should be subject to the affirmative procedure.

Contracts concluded away from business premises — Clause 58

5. Clause 58(1) enables the Secretary of State to make regulations entitling a consumer to cancel a contract with a trader who has visited him at his request, and subsection (4) allows for the regulations to contain any provision which could be made by regulations under section 2(2) of the European Communities Act 1972, including (by virtue of section 2(4))
provision amending an Act. In paragraph 66 of its memorandum, the DTI offers three reasons in support of the delegation of this power and the application of the negative procedure: that detailed provision will be required; that it should be contained in a single new set of regulations together with existing provision in (negative procedure) regulations about contracts made during unsolicited visits; and that flexibility for making future changes is desirable.

6. If this section were simply conferring a power to extend to contracts made during solicited visits the same provision as is presently made as respects unsolicited visits, the negative procedure might be appropriate. But this power is free-standing; and the reference to Directive 85/577/EEC (which gave rise to the existing provision about unsolicited visits) is included only for the purpose of defining the meanings of ‘consumer’ and ‘trader’ in clause 58. **We therefore consider that the exercise of this power, so as to amend an Act, should be subject to the affirmative procedure.**

**EUROPEAN UNION (IMPLICATIONS OF WITHDRAWAL) BILL [HL]**

7. This private member’s bill does not delegate legislative power.

**EUROPEAN UNION (INFORMATION, ETC.) BILL [HL]**

8. This private member’s bill does not delegate legislative power.

**INTERCEPTION OF COMMUNICATIONS (ADMISSIBILITY OF EVIDENCE) BILL [HL]**

9. This private member’s bill does not delegate legislative power.

**MENTAL HEALTH BILL [HL]**

Introduction

10. This bill amends the Mental Health Act 1983 and the Mental Capacity Act 2005. The Explanatory Notes summarise the main changes to those Acts at paragraphs 14 to 17.

11. There are delegated powers at clauses 16, 25 (new sections 17F(2) and 20A(4)(b)), 28 (new section 64H(2)), 30 (new section 68A(1) and (7)), 42 and 44, paragraph 4 of Schedule 3 and Schedule 6 (paragraphs 31, 33(4), 47, 122(3), 123, 130 (read with paragraphs 134 to 138), 139, 140, 142, 143,
153, 154, 155, 158(2)(a) and 174(6) of new Schedule A1). Of these, the powers at clauses 30 (new section 68A(1)) and 42 are Henry VIII powers. There is also a power to give directions of a legislative character at clause 17 (new section 114(4)) and an enlargement of rule-making powers and powers to issue codes of practice at clauses 18 and 19. All of these powers are explained in a memorandum for the Committee from the Department of Health and the Home Office, printed at Appendix 2.

Wales: arrangements following the Government of Wales Act 2006

12. In accordance with the structures set out in the Government of Wales Act 2006, Part 1 of the bill confers powers in relation to Wales on “the Welsh Ministers” (e.g. clause 16), rather than (in accordance with the structures in the Government of Wales Act 1998) on the National Assembly for Wales (NAW). Where this is done, the powers are made subject to an equivalent level of scrutiny before the NAW as that which applies at Westminster to the exercise of the power by the Secretary of State. There is however no scrutiny at Westminster. This is in line with the position for powers transferred to Welsh Ministers by or under the 2006 Act and the House should not be concerned by the absence of scrutiny at Westminster. (There is similarly no scrutiny now at Westminster for powers given to the NAW under the Government of Wales Act 1998.) We note this simply to remind the House of the new arrangements for such delegations.

Approved mental health professionals — Clause 17 (new section 114)

13. Under the Mental Health Act 1983 (“the 1983 Act”), “approved social workers” have important functions, including that of making an application for admission of a patient to treatment under Part 2 of that Act. An approved social worker is an officer of a local social services authority appointed to act as an approved social worker for the purposes of the Act. Under section 114 of the Act the authority cannot appoint someone unless he is approved by the authority as having appropriate competence in dealing with persons suffering from mental disorder. In approving someone, the authority must have regard to such matters as the Secretary of State may direct. This duty is additional to any duty the authority may have to act in accordance with directions under section 7A of the Local Authority Social Services Act 1920 (memorandum paragraph 61) with which there may be a potential overlap.

14. The bill replaces the “approved social worker” (ASW) with “approved mental health professional” (AMHP), as explained in paragraphs 67 and 68 of the Explanatory Notes and paragraphs 52 and 53 of the memorandum. The essential idea is that the AMHPs may be drawn from a wider pool than the ASWs.

15. Clause 17 sets out a new section 114 of the 1983 Act incorporating the new arrangements. In particular, the new section 114(4) states that in approving someone as an AMHP an authority shall comply with any directions given by the Secretary of State (as respects England) or the Welsh Ministers (as respects Wales). The directions will be of some significance, and may cover matters such as duration of approvals, training to be undertaken and factors to be taken into account (see new section 114(5) and paragraphs 56 to 59 of the memorandum). As with the current version of section 114, the directions are subject to no parliamentary scrutiny. The explanation given for this is at paragraph 61 of the memorandum. Such directions will set out general
compulsory rules binding on local social services authorities in respect of (a broader category of) people who have an important role in the system of compulsory admission to hospital under the 1983 Act. Accordingly, we consider that it would be preferable for such directions to be contained in regulations subject to negative procedure.

Deprivation of liberty — Part 2

16. Part 2 of the bill seeks to address what is known as the “Bournewood gap”, which is explained at paragraphs 12, 15 and 16 of the Explanatory Notes and paragraph 6 of the memorandum. There are several delegated powers in the new Schedule A1 inserted into the Mental Capacity Act 2005 by Schedule 6 (introduced by clause 38) and we consider that the memorandum has made out a case for each of them.

Commencement and transitional provision — Clauses 44 and 45

17. Clause 44 enables the Secretary of State or the Lord Chancellor to make commencement orders bringing provisions of the bill into force. As is well precedented, such orders are subject to no parliamentary procedure. The orders may include transitional or saving provision (clause 44(4)(b)) which may include modification of the application of a provision of the Act pending the commencement of other provisions of the Act (clause 44(5)). Clause 45 contains particular provision about what may be done when commencing clause 29 (repeal of provisions for after-care under supervision, i.e. care in the community), beyond what is usually specified for transitional provision. Clause 44(4)(b) is well precedented, though the procedural provision is in contrast to the other bills on which we report today. Given the provision in clause 45, we consider that transitional provision on this occasion could be both far reaching and significant and we accordingly consider that it would be more appropriate for orders making transitional or saving provision to be subject to the negative procedure.

PUBLIC DEMONSTRATIONS (REPEALS) BILL [HL]

18. This private member’s bill does not delegate legislative power.

TRIBUNALS, COURTS AND ENFORCEMENT BILL [HL]

19. This bill deals with a number of topics to do with tribunals, courts and enforcement, summarised at paragraph 5 of the Explanatory Notes. The large number of delegated powers in the bill are explained in a memorandum for the Committee from the Department for Constitutional Affairs, printed at Appendix 3. There are also delegated powers at paragraph 2(2) of Schedule 2, paragraph 2(2) of Schedule 3, paragraphs 2(3) and 32(4) of Schedule 10 and paragraphs 3 and 36(1)(a) of Schedule 12 and provisions in the bill (e.g. clauses 26(6) and 85(3)) which enlarge powers given elsewhere.
20. The bill contains many powers subject to affirmative procedure. Most of these are listed in the introduction to the memorandum but the number is greater than appears because the references to clauses 95 and 122 in fact cover each of the separate powers conferred by clauses 89(6) (where clause 95(5)(b) does not apply), 90, 93(6), 94(4) and (7), 103, 104, 105, 107, 108, 109, 110, 112, 117, 119 and 120; and because there are also powers subject to affirmative procedure at clauses 84 (new section 15B(5), (7) and (8)), 112(3) and 136 and paragraph 32(4) of Schedule 10. For the most part, however, each of these powers is appropriate and subject to an appropriate level of scrutiny.

Chambers: jurisdiction and Presidents – Clause 7

21. Clause 7(9) enables the Lord Chancellor and the Senior President of Tribunals, with the concurrence of the other, to make orders subject to negative procedure about the allocation of functions between the chambers of the First-tier and Upper Tribunals. In itself this is by no means inappropriate. Clause 8 however allows the Senior President to delegate any of his functions to a judge or member of either Tribunal or to a member of staff and the order-making power is not excluded. We draw this to the attention of the House.

22. Paragraph 15 of Schedule 4 gives the Lord Chancellor the significant power of providing, by order subject to negative procedure, for the number and type (i.e. whether a judge or other member of a tribunal) of members who are to decide matters. This is in contrast to much existing tribunal legislation where the size and composition of members to determine a matter is set out in the parent Act. The delegation here proposed is inevitable given the range of tribunals intended to fall under this regime and we do not find it inappropriate. We do however consider it significant and recommend that its exercise be subject to the affirmative procedure.

Appeals — Clauses 11 and 13

23. Clause 13 gives a right of appeal from the Upper Tribunal to the Court of Appeal (or other UK equivalent), but the right may be exercised only with permission of the Upper Tribunal or the appellate court. Clause 13(6) enables the Lord Chancellor, by order subject to affirmative procedure, to provide (for England and Wales and Northern Ireland appeals) that permission should not be given unless there is an important point of principle at stake or some other compelling reason. This power can therefore be used to limit a right of appeal otherwise given by the Act. Its exercise is intended (memorandum paragraph 25) to bring the position for appeals from the Upper Tribunal in line with the position for appeals from the High Court and the County Court under section 55(1) of the Access to Justice Act 1999, i.e. to limit second appeals on the same point. but the power applies equally to first appeals from the Upper Tribunal exercising an original jurisdiction. In view of the affirmative procedure provided, this delegation is not inappropriate. We recommend however that, in accordance with the memorandum’s statement of the intended use of this power, that the bill should limit the Lord Chancellor to making such orders in respect only of the Upper Tribunal’s appellate jurisdiction and not its original jurisdiction.
24. Clause 13(7)(f) enables the Lord Chancellor by order to specify descriptions of decisions of the First-tier and Upper Tribunals that are not appealable under clause 13(1). The power is subject to negative procedure, but we believe that the effect of clause 13(8) is that the power can be used only to provide wider rights of appeal than exist now or to specify a description of a decision from which there is currently no right of appeal. If our interpretation of this complex clause is correct, we accept this is generally reasonable in principle. But the power can be exercised at any time and we are concerned that it could be used to remove a (by then) established right to appeal long after a function had been transferred, simply because there had been no right of appeal at the time of the transfer. This power would be more appropriately delegated if the bill restricted the time within which the Lord Chancellor might make such an order to the time of the transfer of the function itself. Thus a right of appeal could be excluded by order at that time but not if the Lord Chancellor later considered the additional right inappropriate. The same considerations apply to clause 11(5)(f) in respect of the First-tier Tribunal.

25. Clause 22 enables rules to be made by the Tribunal Procedure Committee which govern the practice and procedure in the First-tier and the Upper Tribunals. The matters for which the rules may provide are set out in Part 1 of Schedule 5 and include the delegation of functions to staff (paragraph 3) and matters about evidence, witnesses and attendance. There is also an element of sub-delegation in the provision for referring to practice directions (paragraph 17). These are important matters, but not ones which it is unprecedented for procedural rules for courts or tribunals to cover.

26. The composition of the rule-making committee and the procedure for making rules are based on the provisions of the Civil Procedure Act 1997 (for the High Court and County Courts) and which were followed in the Courts Act 2003 for family proceedings. The Committee comprises the Senior President or his nominee, appointees of the Lord Chancellor, Lord Chief Justice and Lord President of the Court of Session, and any special appointee under paragraph 26 of Schedule 5. The rules are subject to approval by the Lord Chancellor and enshrined in a statutory instrument subject to negative procedure. Negative procedure is commonly used for procedural rules for tribunals. It is appropriate that the bill has adopted this model.

27. We note further the analogy to the Courts Act 2003, in that paragraph 25 of Schedule 5 contains a Henry VIII power, subject to negative procedure, whereby the Lord Chancellor (with the concurrence of the Lord Chief Justice) may amend the composition of the Tribunal Procedure Committee.

28. Clause 47 is about a new “judicial-appointment eligibility condition”. it provides that, where a statutory provision refers to someone satisfying a condition for a given number of years, it means in particular that for that number of years the person has been a solicitor or barrister or the holder of a qualification which, in relation to the position concerned, is specified in an order made by the Lord Chancellor under clause 48(1).
29. Whether or not someone has such a qualification is significant. For example, under the County Courts Act 1984, as it will be amended by paragraph 18 of Schedule 10 to the bill, someone may be a district judge if he satisfies the eligibility condition for 5 years. The power in clause 48(1) thus enables the amendment by secondary legislation of the eligibility conditions for judicial appointments. The memorandum makes a substantial case for the power at paragraphs 124 to 129, including:

- the qualifications which may be specified are limited by clause 48(2) to those awarded by the Institute of Legal Executives or by a body authorised (by affirmative procedure order) under the Courts and Legal Services Act 1990 to confer rights of audience or rights to conduct litigation;
- the Lord Chief Justice and the Judicial Appointment Commission must each be consulted before the order is made (see clause 48(8));
- a qualification cannot be specified for all offices and positions, only for one or more particular offices or positions; and
- any order is subject to affirmative procedure.

**Without considering the delegation inappropriate, we draw to the attention of the House that, in granting such a delegation, Parliament will be enabling the Lord Chancellor to amend the eligible qualifications for judicial appointments.**

Enforcement by taking control of goods — Schedule 12

30. Clause 54 and Schedule 12 set out a new procedure for enforcement by taking control of goods which will apply where any enactment, writ or warrant confers power to use that procedure. Schedule 13 amends some existing enactments so as to attract the new procedure. Schedule 12 contains a number of delegated powers and we wish to comment on those in paragraphs 22, 24 and 31.

31. Paragraphs 17 to 19 set out the conditions in which an enforcement agent may use reasonable force and paragraph 20 deals with applications for power to use reasonable force. Paragraph 22 provides that a court may not issue a warrant authorising the use of reasonable force unless conditions prescribed in regulations are met. Paragraph 24 enables regulations to restrict a power to enter and use force and to make provision about the extent to which a power to use force includes a power to use force against persons. These powers are explained at paragraphs 151 to 153 of the memorandum. Paragraph 31 (about goods on a highway) is similar. Each power is currently subject to the negative procedure. This is not inappropriate for regulations under paragraph 22 but **we consider that regulations under paragraphs 24 and 31 should be subject to the affirmative procedure because the use of force against individuals is a sensitive issue, warranting a higher level of scrutiny.**

Debt management schemes — Clauses 103 to 122

32. Part 5 of the bill is about debt management and relief and is explained at paragraphs 205 to 214 of the memorandum. Paragraphs 208 to 214 and 287 to 309 cover debt management schemes. The Part contains a number of regulation-making powers, each of which (except for those under clause 112) is subject to negative procedure, except for the first regulations, which are
subject to affirmative procedure. This is a device used on occasion for a new scheme of regulation when it is expected that the first set of regulations will contain the main policy for a significant length of time, with subsequent regulations probably doing no more than making adjustments to the system. It enables a higher level of scrutiny to apply to what is expected to be the most significant exercise of the power. Without finding the proposal inappropriate, we note that each exercise of this power could be significant.

33. Clause 110(6) provides for regulations to allow for the supply of gas or electricity to non-business debtors to be stopped. Given that suppliers can resort to the court for permission to stop the supply under subsection (7), we were not persuaded by the memorandum’s justification for acquiring the power (paragraph 301) and the House may wish to seek further justification from the Government. In any event, we consider that this power should be subject to the affirmative procedure.

34. Clause 122 makes provision about regulations to do with debt management schemes and includes a Henry VIII power at clause 122(8) consequentially to amend the provision about rights of appeal in clauses 114 and 115. We consider that this power should be subject to the affirmative procedure.

Further powers

35. The powers to make orders subject to no parliamentary procedure include powers at clause 30(2) and (7) (where the order does not amend an Act), clause 30(9) (where the order does not amend an Act and makes provision in connection with clause 30(2) and (7)), paragraph 2(1) of Schedule 9, and the new section 109(4) of the London Building Acts (Amendment) Act 1939 inserted by paragraph 2 of Schedule 10 to the Bill.

36. Though the powers under clause 30 and para 2 of Schedule 9 might be considered transitional in nature, we consider they should be subject to negative procedure, as suggested by the Department in its memorandum (paragraphs 64 and 67). This is consistent with clause 136 under which orders containing transitional provision which do not amend Acts are subject (rightly, in our view) to negative procedure. The lack of parliamentary procedure for orders under section 109(4) of the 1939 Act may be an oversight and we consider they should be subject to affirmative procedure, by analogy with orders under clause 48.

37. New section 251U of the Insolvency Act, inserted by Schedule 17 to the bill, contains a power at subsection (4) for the Secretary of State to make regulations. The memorandum suggests that the negative procedure is appropriate. We agree, but believe that an amendment will be necessary to achieve this.
APPENDIX 1: CONSUMERS, ESTATE AGENTS AND REDRESS BILL [HL]

Memorandum by the Department of Trade and Industry.

1. This memorandum identifies provisions for delegated legislation in the Consumers, Estate Agents and Redress Bill. The purpose of this memorandum is to explain the purpose of the delegated powers proposed; describe why the matter is to be dealt with in delegated legislation; and explain the procedure proposed for each power and why it has been chosen.

Purpose of the Bill

2. The Bill will give consumers a stronger advocacy body to represent them, will create redress schemes in certain sectors and will improve regulation of estate agents and doorstep selling.

3. The three main elements are as follows. The Bill:

   • strengthens and streamlines consumer representation by bringing together the National Consumer Council, energywatch and Postwatch, giving consumers a stronger and more coherent voice and offering better value for money. The Bill will enable Ministers to require suppliers or service providers in the energy, postal services and water sectors to belong to redress schemes. Such redress schemes are intended to ensure resolution of complaints in those sectors and to award compensation where warranted. These provisions may be extended to the water sector in England and Wales in future, subject to consultation in 2008.

   • makes provision requiring estate agents to join a redress scheme and strengthens the regulation of estate agents through measures such as: requiring estate agents to keep records and allowing trading standards officers to inspect those records and expanding the circumstances in which OFT can take regulatory action against estate agents.

   • enables regulations to be made to give individuals similar cancellation and cooling-off rights in relation to a sale made during a solicited sales visit as they have now in relation to an unsolicited visit.

Structure of the Bill

4. The Bill itself contains sixty six clauses and eight schedules and is structured as follows:

Part One: ‘The National Consumer Council’

Part Two: ‘Complaints Handling and Redress Schemes’


Part Four: ‘Miscellaneous and General’ – including the provisions relating to Doorstep Selling
Summary of delegated powers

5. The table below describes the delegated powers contained in the Bill. Unless the contrary is indicated, the powers listed in the table are to be exercised by the Secretary of State.

<table>
<thead>
<tr>
<th>Clause</th>
<th>Summary of power</th>
<th>Parliamentary procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>3(2)(a)</td>
<td>A power to designate water consumers in England and Wales as “designated consumers”</td>
<td>Order, by affirmative resolution</td>
</tr>
<tr>
<td>3(2)(b)</td>
<td>A power to provide that any class of “designated consumers” cease to be “designated consumers”</td>
<td>Order, by affirmative resolution</td>
</tr>
<tr>
<td>8(c)</td>
<td>A power to make an order to prescribe types of information for the purposes of the Council’s “research function”</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>9(1)(c)</td>
<td>A power to make an order to prescribe types of information for the purposes of the Council’s “information function”</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>19(2)(e)</td>
<td>A power to designate additional persons to be required to enter into co-operation arrangements with the National Consumer Council</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>23(3)(d)</td>
<td>A power to designate additional persons or descriptions of bodies to be subject to the Council’s powers to require information</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>23(9)(d)</td>
<td>A power to prescribe additional persons as “designated regulators” for the purposes of the Council’s powers to require information</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>24(1)(a)</td>
<td>A power to prescribe persons to whom failure of a regulated supplier to provide information may be referred</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>Clause</td>
<td>Description</td>
<td>Parliamentary Procedure</td>
</tr>
<tr>
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</tr>
<tr>
<td>26(3)(c)</td>
<td>A power to prescribe additional persons as “authorised persons” who are to have the power to require information from the Council.</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>27(1)</td>
<td>A power to make regulations prescribing categories of person, information or circumstances in respect of which powers to require information under clauses 23 and 26 do not apply.</td>
<td>Regulations, by negative resolution</td>
</tr>
<tr>
<td>30(1)</td>
<td>A power to designate the Consumer Council for Water for abolition.</td>
<td>Order, by affirmative resolution</td>
</tr>
<tr>
<td>31(1)</td>
<td>A power to make a transfer order or an abolition order in respect of the Consumer Council for Water (if it is designated for abolition under clause 30 of the Bill).</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>36(1)</td>
<td>A power to confer new functions on the Council if the Secretary of State considers that it is in the interests of consumers to do so.</td>
<td>Order, by affirmative resolution</td>
</tr>
<tr>
<td>37(2)</td>
<td>A power to repeal specified parts of the Bill with the effect of removing the Council’s functions in relation to Northern Ireland.</td>
<td>Order, by affirmative resolution</td>
</tr>
<tr>
<td>42(1)</td>
<td>A power for the Gas and Electricity Markets Authority and the Postal Services Commission to prescribe complaint handling standards with the consent of the Secretary of State.</td>
<td>Regulations, no Parliamentary procedure</td>
</tr>
<tr>
<td>45(1)</td>
<td>A power for Gas and Electricity Markets Authority and the Postal Services Commission to require regulated suppliers to provide consumers with information about the complaint handling standards and their level of compliance.</td>
<td>Regulations, no Parliamentary procedure</td>
</tr>
<tr>
<td>46(1)</td>
<td>A power to require regulated suppliers to belong to an approved redress scheme.</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>52 - new</td>
<td>Power to require persons (except those</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>Type of Resolution</td>
</tr>
<tr>
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<tr>
<td>23A(1) to the Estate Agents Act 1979 set out in Schedule 6</td>
<td>specified by Order) engaging in estate agency work (except work excluded by the Order) in relation to residential property to join an OFT-approved redress scheme to deal with complaints in connection with that work (except complaints of a specified description excluded by Order).</td>
<td>resolution</td>
</tr>
<tr>
<td>52 - new section 23C(1)(b) to the Estate Agents Act 1979 set out in Schedule 6</td>
<td>Power to exclude certain types of properties from the definition of ‘residential property’ for the purposes of the requirement for persons engaging in estate agency work in relation to residential property to join an approved redress scheme</td>
<td>Order, by negative resolution</td>
</tr>
<tr>
<td>52 - paragraphs 2 and 10 of new Schedule 4 to the Estate Agents Act 1979, set out in paragraph 4 of Schedule 6</td>
<td>Power to specify in relation to penalty charges (that may be issued for breach of the duty to belong to an approved scheme): the amount of the penalty charge; such other supplementary or incidental provisions relating to penalty charge notices, such as the form of the notices, circumstances in which penalty charge notices may not be given and methods of payment of penalty charges.</td>
<td>Regulations, by negative resolution</td>
</tr>
</tbody>
</table>
| 53 - in new section 21A of the Estate Agents Act 1979 subsections (1), (4) and (6) | Power to specify, in relation to persons engaged in estate agency work:
- information that may be required to be kept relating to offers in connection with property transactions;
- other matters, connected with information referred to in the clause such as information required to be given under section 18(1) or (3) of the Estate Agents Act 1979 and information to be disclosed by section 21(1) or (2) of the 1979 Act, for which a record may be required to be created and kept; and
- the manner in which records of information must be created or kept and where they must be kept. | Regulations, by negative resolution |
| 58 (1) | Power to enable the Secretary of State to give consumers a right to cancel contracts entered into with a trader during a visit to the consumer’s home, where the consumer asked the trader to visit | Negative Resolution |
| 59 | This clause provides that any order or regulations under the Bill may do the following:
- a) make provision generally or subject to exceptions;
- b) make different provision for different cases;
- c) provide for a person to exercise a discretion;
- d) make incidental, supplementary, consequential, transitory and transitional provisions and savings.
Where the SoS makes an order or regulations under the Bill he may make amendments to “enactments” (i.e. Acts of Parliament, Acts of the Scottish Parliament, Assembly Acts and Measures and Northern Ireland legislation). However, the amendments are limited to incidental, supplementary, consequential, transitory and transitional provisions and savings. | Order or regulations. This is not a free-standing power. Rather this clause specifies what may be done when making orders under other powers in the Bill. The Parliamentary procedure will therefore be that which applies to the clause under which the order is made. However, where the order or regulations amend an Act of Parliament (relying on the power in clause 59), the order will be subject to the affirmative procedure. |
62 A power to make consequential, supplementary, incidental, transitory or transitional provision or savings in connection with the coming into force of any provisions made by or under the Act. This power may be used to make consequential supplementary, incidental, transitory or transitional (and savings) amendments to “enactments” (i.e. Acts of Parliament, Acts of the Scottish Parliament, Assembly Acts and Measures and Northern Ireland legislation).

65 A power to make commencement orders.

Classification of subordinate legislation
6. In deciding whether subordinate legislation was appropriate in any particular case the Department had in mind the following criteria:

   • Precedent, given that a number of powers are similar to those already available in existing legislation;
   • The need to ensure flexibility in responding to changing circumstances without requiring primary legislation;
   • The need to allow flexible timing to ensure that the drafting of technical details is right and affected parties can be consulted;
   • The desirability of putting detailed technical provisions in secondary legislation rather than on the face of the Bill.

Clause-by-clause analysis of delegated powers

Part 1 – The National Consumer Council

Clause 3 – Designated consumer

*Power conferred on: Secretary of State*

*Power exercised by: Order (Statutory instrument)*

*Parliamentary procedure: Affirmative resolution procedure*

7. This clause confers on the Secretary of State a power to designate persons who are consumers in England and Wales in relation to services provided by a water undertaker, a sewerage undertaker or a licensed water supplier. It also allows the Secretary of State to provide that any class of “designated consumers” cease to be “designated consumers”.

8. Whilst the Council will be able to exercise its core functions in relation to all consumers, it will be required to describe in its Forward Work Programme the activities it
plans to undertake in relation to “designated consumers” and an estimate of the costs it expects to incur in the exercise of its functions in relation to designated consumers. It must then have regard to the Forward Work Programme when exercising its functions. Initially, the only designated consumers will be those in the energy and postal services sectors. This is because the Council will replace the consumer bodies in those sectors and will be part funded by suppliers in those sectors. It is therefore important for the Council to make clear what work it intends to undertake in those sectors and how much that work will cost. Finally, the Council’s power to investigate complaints from vulnerable consumers is limited to designated consumers.

9. If the Consumer Council for Water is abolished (under clause 31) after consultation in 2008, it is expected that consumers in the water sector will also be designated. This is because the Council will replace the Consumer Council for Water and because suppliers in that sector will then be expected to contribute towards the costs of the Council.

10. In view of the fact that water consumers will not be designated until the Consumer Council for Water has been abolished, and that the decision whether to abolish the Consumer Council for Water is itself only to be taken after consultation in 2008, it is not appropriate to designate such consumers on the face of the Bill. Accordingly, it is necessary to provide a delegated power to allow such consumers to be delegated in future. The affirmative resolution procedure has been applied, due to the extent of the changes that exercising this power (alongside those in clauses 30 and 31) would mean for consumer representation in the water sector.

11. The power for the Secretary of State to provide that any class of “designated consumers” cease to be “designated consumers” is delegated in order to introduce some flexibility to allow for changing future circumstances. For example, market changes in a particular sector may mean that it is no longer necessary for the consumers in the gas, electricity or postal services (or, in future, water) sectors to be designated.

12. Both of these powers will be subject to the affirmative resolution procedure to allow Parliament the opportunity to debate both whether or not they consider that water consumers should be part of the new arrangements, and also whether circumstances in a particular sector have changed sufficiently such that it is no longer necessary to require the consumers in that sector to be “designated”.

Clause 8 – The research function

*Power conferred on: Secretary of State*

*Power exercised by: Order (Statutory instrument)*

*Parliamentary procedure: Negative resolution procedure*

13. The Council has the function of obtaining and keeping under review information about consumer matters (specifically information about the interests of consumers and about matters connected with those interests) and information about the views of consumers on consumer matters. Clause 8(c) enables the Secretary of State to prescribe additional categories of information for the purposes of this function. This power enables the Secretary of State to add additional descriptions of information into which the Council can undertake research. This is primarily to allow for changing circumstances in the future and the flexibility for the Council to adapt effectively to changing markets and consumer priorities.

14. The provision is essentially procedural. It is therefore appropriate that the power should be subject to the negative resolution procedure.
Clause 9 – The information function

*Power conferred on:* Secretary of State

*Power exercised by:* Order (Statutory instrument)

*Parliamentary procedure: Negative resolution procedure*

15. The Council has the power to facilitate the dissemination of advice and information to consumers about consumer matters (specifically information about the interests of consumers and about matters connected with those interests) and about itself and its functions. Clause 9(1)(c) enables the Secretary of State to prescribe additional categories of information for the purposes of this function. This power allows the Secretary of State to add to the list of descriptions of advice and information that the Council can disseminate to consumers. Again, this is needed primarily to allow for changing circumstances in the future and the flexibility for the Council to adapt effectively to changing markets and consumer priorities.

16. This provision is essentially procedural, and it is therefore considered appropriate that the power should be subject to the negative resolution procedure.

Clause 19 – Duty to enter into co-operation arrangements

*Power conferred on:* Secretary of State

*Power exercised by:* Order (Statutory instrument)

*Parliamentary procedure: Negative resolution procedure*

17. This clause requires the Council to enter into “co-operation arrangements” with the Office of Fair Trading, the Ofcom Consumer Panel and the Financial Services Consumer Panel. Clause 19(2)(e) enables the Secretary of State to designate additional persons to be subject to the requirement to enter into co-operation arrangements with the Council.

18. This power is delegated to allow for flexibility; either where it becomes apparent that it would be beneficial for the Council to enter into co-operation arrangements with a body not listed in clause 19, but also where a body with similar or complementary functions in relation to consumers is established in the future, and with which the Council should be required to enter into co-operation arrangements in order to facilitate effective joint working (and avoid duplication) where appropriate.

19. As this provision is essentially procedural, it is appropriate that the power should be subject to the negative resolution procedure.

Clause 23 – Provision of information to the Council

*Power conferred on:* Secretary of State

*Power exercised by:* Order (Statutory instrument)

*Parliamentary procedure: Negative resolution procedure*

20. This clause enables the Council to serve a notice on the persons listed in 23(3) requiring them to provide the Council with information. Those persons are:

a) the Office of Fair Trading (the OFT);
b) a designated regulator (defined in clause 23(9));
c) any person who supplies goods or services in the course of business;
d) any other person or description of person specified by the Secretary of State.

21. Clause 23 confers two designated powers. First, the Secretary of State is able to specify additional persons or descriptions of person from whom the Council may require information (clause 23(3)(c)). This power might be used to specify a person who does not supply goods or services in the course of business. Second, clause 23(9) enables the Secretary of State to prescribe additional persons as designated regulators. This power is needed because, at this stage, it is not appropriate to give the Council the power to obtain information from regulators other than those listed. However, it may be necessary to do so in future as the result of changing circumstances or a decision to confer additional functions on the Council under clause 36.

22. This provision is also essentially procedural, and it is therefore considered appropriate for the power to be subject to the negative resolution procedure.

Clause 24 – Enforcement by regulator of section 23 notice

*Power conferred on:* Secretary of State

*Power exercised by:* Order (Statutory instrument)

*Parliamentary procedure: Negative resolution procedure*

23. This power enables the Secretary of State to prescribe a person to whom the Council may refer a failure of a regulated supplier to provide it with information.

24. A delegated power is considered to be appropriate here in order to allow for greater flexibility in the enforcement of the requirements imposed by clause 23. The delegated power will enable the Secretary of State to prescribe a person other than the sectoral regulator for the purposes of the enforcement of notices served under clause 23.

25. Similar powers are contained in section 27(3) Utilities Act 2000 and section 27K(3) Water Industry Act 1991. Both of these are subject to the negative procedure.

26. The power is subject to the negative resolution procedure because it is procedural.

Clause 26 – Provision of Information by the Council

*Power conferred on:* Secretary of State

*Power exercised by:* Order (Statutory instrument)

*Parliamentary procedure: Negative resolution procedure*

27. This clause enables the OFT, a “designated regulator” (defined in clause 23(9)) and any other person specified by the Secretary of State to require information from the Council. It is not thought appropriate to confer a general power to enable any person to obtain information from the Council and the power to do so is therefore limited to the persons described in 26(3)(a) and (b). However, in view of the broad scope of the Council’s remit, it is possible that it might be necessary to extend that power to other persons not listed in clause 26. Accordingly, clause 26(3) confers a power to specify other persons for the purposes of that power.
28. The negative resolution procedure has been applied to this power as it is essentially procedural in nature.

Clause 27 – Exemptions from requirements to provide information

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary procedure: Negative resolution procedure*

29. This power enables the Secretary of State to make regulations prescribing descriptions of persons from whom the Council may not request information, as well as descriptions of information that a person may refuse to supply to the Council (and that the Council may refuse to supply to another person) and the circumstances in which a person (or the Council) may refuse to supply it.

30. This power is delegated to avoid prescribing detailed technical requirements on the face of the Bill. The use of a delegated power will also enable the Secretary of State to restrict the powers to require information in the light of changing circumstances. There is some precedent for such a power. In particular, a similar power is contained in the following provisions: section 27K(1) Water Industry Act 1991 and section 27(1) Utilities Act 2000. The powers under both of these provisions are subject to the negative procedure.

31. The negative resolution procedure has been used because this power is technical and procedural in nature.

Clause 30 – Designation of the Consumer Council for Water for abolition

*Power conferred on: Secretary of State*

*Power exercised by: Order (Statutory instrument)*

*Parliamentary procedure: Affirmative resolution procedure*

32. This clause provides a power for the Secretary of State to make an order to designate the Consumer Council for Water for abolition. Such an order must be made before the Secretary of State exercises his power under clause 31 to abolish that body.

33. The decision whether to abolish the Consumer Council for Water will not be taken until after consultation in 2008. In view of this, it is not appropriate to provide for its abolition in the Bill. Instead, it is necessary to provide a delegated power to abolish that body if this is agreed as the outcome of the 2008 consultation.

34. The designation order is subject to the affirmative procedure and the Secretary of State is required to consult before making such an order. The power is subject to affirmative resolution in order to give Parliament the opportunity to debate the inclusion of the Consumer Council for Water in the arrangements due to the extent of the changes that this power (and that conferred by clause 31) would have on consumer representation in this sector.
Clause 31 – Transfer orders and abolition orders

*Power conferred on:* Secretary of State

*Power exercised by:* Order (Statutory instrument)

*Parliamentary procedure:* Negative resolution procedure

35. This power enables the Secretary of State to make a transfer or an abolition order in respect of the Consumer Council for Water if it is designated for abolition under clause 30 of the Bill. The abolition order would provide for the abolition of the Consumer Council for Water, and the transfer order would provide for the functions of the Consumer Council for Water to be transferred to the new National Consumer Council.

36. As discussed above, this power is delegated because the decision on whether to abolish the Consumer Council for Water will not be taken until after consultation in 2008. The negative resolution procedure is considered appropriate in view of the fact that a transfer or abolition order may only be made after a designation order has been made in relation to the Consumer Council for Water (under clause 30). Designation orders are subject to the affirmative procedure. The requirement to make a designation order before exercising the powers under this clause is intended to ensure Parliament is able to consider any decision to abolish the Consumer Council for Water.

37. A similar power is contained in section 36 of the Equality Act 2006 (power to dissolve the “former Commission”). The power under that section is subject to the affirmative procedure, however the Equality Act 2006 does not require the Secretary of State to designate the former Commissions before abolishing them under section 36 of that Act.

Clause 36 – Extension of the Council’s functions: Great Britain

*Power conferred on:* Secretary of State

*Power exercised by:* Order (Statutory instrument)

*Parliamentary procedure:* Affirmative resolution procedure

38. This power allows the Secretary of State to extend the functions of the Council if he considers that it is in the interest of consumers to do so, and only if the additional function appears to the Secretary of State to be connected to the Council’s existing (or former) functions.

39. This power is delegated in order to provide flexibility to respond to the future development of markets and the needs for consumer representation and advocacy. A similar power is contained in section 89 of the Clean Neighbourhoods and Environment Act 2005.

40. The affirmative resolution procedure is applied to ensure Parliamentary scrutiny of any additional functions proposed for the National Consumer Council. Although any proposed extension of the functions is limited to those which the Secretary of State considers to be connected to the pre-existing functions of the Council, the affirmative resolution procedure provides a level of scrutiny commensurate with the addition of functions to a statutory body with important powers.
Clause 37 – Removal of the Council’s functions in relation to Northern Ireland

*Power conferred on: Secretary of State*

*Power exercised by: Order (Statutory instrument)*

*Parliamentary procedure: Affirmative resolution procedure*

41. This clause confers a power on the Secretary of State to repeal the relevant parts of this Bill which give the Council functions in respect of the interests of consumers in relation to postal services in Northern Ireland. The Secretary of State may only exercise this power if he is satisfied that there are satisfactory arrangements in place for a body other than the Council to exercise those functions in Northern Ireland.

42. The General Consumer Council for Northern Ireland currently represents the interests of consumers there. However, it does not exercise functions in relation to consumers in the postal services sector. In view of this, the Council will represent the interests of consumers in the postal services sector only in Northern Ireland. It is possible that the General Consumer Council (or another body) will in future take on the functions of representing consumers in Northern Ireland in the postal services sector. If this happens, it would not be appropriate for the Council to continue to exercise its functions in relation to such consumers there (as this would lead to a duplication of work). In view of this, the Bill contains a power to remove the Council’s functions in Northern Ireland. A delegated power is required because there are not currently arrangements in place in Northern Ireland for another body to exercise these functions in relation to postal services. The power would only be used if arrangements were put in place for another body to exercise those functions. The affirmative resolution procedure is considered appropriate because an Order under this clause would reflect a change to the territorial scope of the new Council.

43. There is some precedent for this. In particular, section 89 of the Clean Neighbourhoods and Environment Act 2005 confers a power to enable the Secretary of State to confer and remove functions on the Commission for Architecture and the Built Environment.

Part 2 – Complaints Handling and Redress Schemes

Clause 42 – Standards for handling complaints

*Power conferred on: The Gas and Electricity Markets Authority and the Postal Services Commission.*

*Power exercised by: Regulations*

*Parliamentary procedure: No Parliamentary procedure*

44. This clause allows the sectoral regulators in the gas and electricity and the postal services sectors to make regulations prescribing standards for the handling by its regulated suppliers of consumer complaints made to them.

45. It is not appropriate to prescribe such standards on the face of the Bill as this would involve setting out very detailed and technical requirements on the face of the Bill. In addition to this, complaint handling standards may need to be varied over time in the light of changing circumstances. It is therefore considered appropriate to provide a delegated power to prescribe such standards. This power has been delegated to the sectoral
regulators as opposed to the Secretary of State because the extent of their sectoral expertise means the regulators are best placed to determine the complaint handling standards that should most appropriately be prescribed for their sector. Sectoral regulators also have responsibility for monitoring the effective operation of their market sector.

46. The Gas and Electricity Markets Authority (“GEMA”) already has the power to make regulations to prescribe performance standards under section 33A Gas Act 1986 and section 39A Electricity Act 1989. These sections enable GEMA to make regulations with the approval of the Secretary of State. They are not subject to any Parliamentary procedure. The power conferred by clause 42 is very similar to those in the Electricity and Gas Acts above.

47. It is not considered appropriate to provide for any Parliamentary procedure in relation to this power because regulations made under this power will contain technical requirements which will be limited to a small number of sectors. In addition to this, the power to make regulations are subject to two safeguards. First, such regulations may only be made with the consent of the Secretary of State. Second, the regulators are required to follow the consultation procedure set out in clause 43 before making any regulations to prescribe complaint handling standards. It is considered that this will ensure an adequate level of scrutiny of any proposed requirements. As explained above, this approach is consistent with the approach taken under the Gas Act 1986 and Electricity Act 1989.

Clause 45 – Supply of information to consumers

Power conferred on: The Gas and Electricity Markets Authority and the Postal Services Commission.

Power exercised by: Regulations

Parliamentary procedure: No Parliamentary procedure

48. This clause permits the sectoral regulators that have exercised the power conferred by clause 42 (to make regulations requiring each of its regulated suppliers to adhere to prescribed complaint handling standards) to require the suppliers to provide to their own consumers such information as the regulator may specify about the standards, and the suppliers level of compliance with those standards.

49. The power is delegated to the sectoral regulator as the extent of their sectoral expertise puts them in the best position to exercise this power. The GEMA has a similar power to make regulations under section 33D Gas Act 1986 and section 42A Electricity Act 1989. These powers are not subject to any Parliamentary procedure. The power conferred by clause 45 is similar in scope to the existing powers in the Gas and Electricity Acts. In view of this precedent, it is not thought appropriate to provide for any Parliamentary procedure in this case.

Clause 46 – Membership of redress scheme

Power conferred on: Secretary of State

Power exercised by: Order (Statutory instrument)

Parliamentary procedure: Negative resolution procedure

50. This power enables the Secretary of State to require regulated suppliers to belong to a redress scheme that has been approved by the sectoral regulator (or administered by the
Secretary of State). The power is delegated for two reasons. First, a delegated power ensures flexibility in relation to timing. Second, a delegated power enables the Secretary of State to adjust the requirement to take account of the needs of a particular sector or changing market conditions. In particular, the power permits the Secretary of State to limit the requirement to specific types of complaint. There is some precedent for this approach. For example, section 172 Housing Act 2004 confers a power to enable the Secretary of State to make an order to require estate agents to belong to a redress scheme to deal with complaints in relation to Home Information Packs under Part 5 of that Act. Such orders are subject to the negative procedure. Similarly, section 52 Communications Act 2003 enables Ofcom to impose “general conditions” on public communications providers to require them to belong to a redress scheme. Section 55 enables Ofcom to make orders (with the consent of the Secretary of State) imposing the above requirements (in default of imposing conditions).

51. The Secretary of State is required to consult before making an order under this clause.

52. This power is subject to the negative resolution procedure. This procedure is considered appropriate because the key features of any redress scheme are prescribed on the face of the Bill.

Part 3 – Amendment of the Estate Agents Act 1979 (the 1979 Act)

Clause 52, Schedule 6, new section 23A (1) to the 1979 Act – Duty to belong to an approved redress scheme

*Power conferred on: Secretary of State*

*Power exercised by: Order (Statutory instrument)*

*Parliamentary procedure: Negative resolution procedure*

53. This power allows the Secretary of State to make an Order requiring persons who engage in estate agency work in relation to residential property to join an approved redress scheme. This Order may apply to all who engage in estate agency work, or only to specified descriptions of them, and may exclude certain types of estate agency work. An Order may also limit the types of complaint that may be made under a redress scheme.

54. This power follows section 172 (4) of the Housing Act 2004, which allows estate agents of a prescribed description and relevant complaints of a prescribed description to be excluded. At present, there is no intention to use the Order to exclude certain types of complaint or to limit who the duty applies to, but the power is a precaution to future proof the legislation.

55. This power is delegated, as it would be inappropriate for this level of detail to be included on the face of the Bill. It also allows the Secretary of State to review the requirements at such intervals as appear to him/her to be appropriate.
Clause 52, Schedule 6, New 23C (1) (b) to the 1979 Act – Meaning of residential property

*Power conferred on: Secretary of State*

*Power exercised by: Order (statutory instrument)*

*Parliamentary procedure: Negative resolution procedure*

56. This power allows the Secretary of State to make an Order limiting the definition of ‘residential property’. This power is delegated as it allows the Secretary of State to review the definition at such intervals as appear to him/her to be appropriate.

57. As the Order will be of a procedural, technical nature, the use of the negative resolution procedure has been applied.

Clause 52, Schedule 6, New Schedule 4 to the 1979 Act, paragraphs 2 and 10

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary procedure: Negative resolution procedure*

58. This power allows the Secretary of State to make regulations in relation to penalty charge notices on matters such as the level of the penalty charge, the form of the penalty charge notices, circumstances in which penalty charge notices may not be given and methods of payment of penalty charges.

59. Since any Regulations would be of a technical nature, the use of the negative resolution procedure has been applied.

Clause 53 New section 21A of the 1979 Act, subsections (1), (4) and (6) – Maintenance of records

*Power conferred on: Secretary of State*

*Power exercised by: Regulations*

*Parliamentary procedure: Negative resolution procedure*

60. This power allows the Secretary of State to make Regulations specifying the type of information that may be required to be kept by estate agents relating to offers in connection with property transactions; prescribing other matters, connected with the information referred to in the clause such as information required to be given under section 18(1) or (3) of the 1979 Act (relating to giving information to clients of prospective liabilities) and information to be disclosed by section 21(1) or (2) of the 1979 Act (relating to transactions in which an estate agent has a personal interest, for which records may also be required to be created and kept; and specifying the manner in which records are to be created or kept, and where they are to be kept.

61. Formal record keeping requirements will provide enforcers with audit trails, making it easier to prove wrongdoing and take enforcement action.

62. The intention is to require the following details in respect of the offer to be recorded: the amount of the offer and any conditions attaching to it (e.g. on timing); the date and
time the offer was made; the identity of the person making the offer and how (i.e. by letter, phone or in person) it was made; the status of the offeror i.e. his financial standing and ability to exchange quickly; and when and how the offer was communicated to the agent’s client. We have taken a power here in case enforcement authorities make the case in future for other details about offers to be recorded.

63. Since any Regulations would be of a technical nature, the use of the negative resolution procedure has been applied.

Part 4 – Miscellaneous and General

Clause 58 – Contracts concluded away from business premises

*Power conferred on: Secretary of State*

*Power exercised by: Regulations (statutory instrument)*

*Parliamentary procedure: negative resolution*

64. This power enables the Secretary of State to give consumers a right to cancel contracts entered into with a trader during a visit to the consumer’s home, where the consumer asked the trader to visit. Consumers currently enjoy such cancellation rights where the trader’s visit is unsolicited.

65. The existing rights derive from European Council Directive 85/577/ECC, implemented in the UK by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (SI 1987/2117) (as amended). These Regulations were made under section 2(2) of the European Communities Act 1972. It is intended to make new regulations under both section 2(2) and the new powers in this clause that will give consumers cancellation rights in respect of contracts entered into at a consumer’s home whether the trader’s visit was solicited or unsolicited.

66. There are three reasons for leaving the matter to delegated legislation. The first is that detailed provisions are required including as to the content of cancellation notices, exceptions from the right to cancel, the effects of cancellation and the enforcement of the requirement to provide consumers with information about their rights. The second reason is to enable the provisions about “unsolicited” contracts and “solicited” contracts to be combined into a single set of regulations covering contracts entered into at home. A single set of unified regulations will be easier for consumers, businesses and enforcers to understand. The final reason is to allow flexibility in the future in relation to solicited contracts; for example if there are changes to the Directive that should be reflected for solicited contracts.

67. As the policy on extending these rights to solicited contracts will be approved in the clause we consider it is appropriate for the detailed provisions to be subject to negative resolution. The existing Regulations were also made subject to negative resolution.
Subordinate legislation

Clause 59 – Orders and regulations

*Power conferred on: Secretary of State*

*Power exercised by: Order (Statutory instrument)*

*Parliamentary procedure: This clause makes general provision in relation to orders and regulations made under this Bill.*

68. This clause enables the Secretary of State to make orders or regulations which make provision generally, or subject to exceptions, or different provision for different cases, circumstances, or for different purposes; it provides for a person to exercise discretion in dealing with any matter.

69. This clause also provides that any order or regulations made under the Bill may make incidental, supplementary, consequential, transitory and transitional provision and savings. Where an order or regulations under the Bill are made by the Secretary of State, the power to make consequential etc amendments extends to amendments to an enactment (that is, Acts of Parliament, Acts of the Scottish Parliament, Assembly Acts or Measures and Northern Ireland legislation).

70. These powers are subject to affirmative resolution procedure insofar as they permit the Secretary of State to amend Acts of Parliament. The affirmative procedure does not apply to the power to amend Acts of the Scottish Parliament, Assembly Acts or Measures and Northern Ireland legislation.

71. In relation to Scottish legislation, the Bill provides that the Secretary of State may not amend legislation for devolved purposes. This limits the amendments which may be made to Scottish legislation. Any other amendments to Acts of the Scottish Parliament (that is, ones for reserved purposes) are likely to be quite minor and as such, the affirmative procedure is not considered to be appropriate.

72. In relation to Wales, it is not considered likely that any significant amendments to Assembly Acts or Measures would be made except under clauses 30 and 31 which are in any case subject to the consent of Welsh Ministers. Any other amendments would be likely to make only minor or technical changes and as such the affirmative procedure would not be appropriate.

73. In relation to Northern Ireland, it is anticipated that the power to amend Northern Ireland legislation would only be used when exercising the power to remove the Council’s functions in relation to Northern Ireland under clause 37. That power is subject to the affirmative procedure.

Clause 62 – Minor, consequential and transitional provisions

*Power conferred on: Secretary of State*

*Power exercised by: Order (Statutory instrument)*

*Parliamentary procedure: Negative resolution procedure (unless changes are proposed to Acts of Parliament, in which case an affirmative resolution procedure is applied).*

74. This clause confers on the Secretary of State the power to make consequential, supplementary, incidental, transitory or transitional provision or savings in connection
with the coming into force of any provisions made by or under this Act. This order making power is delegated in order to enable orderly and timely implementation of the provisions of this Bill.

75. This power may be used to amend Acts of the Scottish Parliament, Assembly Acts or Measures or Northern Ireland legislation. The affirmative procedure applies where the power is used to amend an Act of Parliament. It does not apply to amendments to Acts of the Scottish Parliament, Assembly Acts or Measures or Northern Ireland legislation.

76. The negative resolution procedure is considered appropriate because it is likely that any amendments to Acts of the Scottish Parliament, Assembly Acts or Measures or Northern Ireland legislation made under this power would be minor and technical. Further, this power may not be used to make any provision which would be within the legislative competence of that Parliament. In view of this, it may only be used to make amendments for reserved purposes.

Clause 65 – Commencement

Power conferred on: Secretary of State

Power exercised by: Order (Statutory instrument)

Parliamentary procedure: None

77. This is a standard power to enable the Secretary of State to commence the provisions in the Act, other than those in sections 59 to 61, 64 and 66 (which come into force on the day the Act is passed). All other provisions are commenced by the delegated power conferred by this clause in order to allow flexibility in the timing of the commencement of the provisions.
APPENDIX 2: MENTAL HEALTH BILL [HL]

Memorandum by the Department of Health

Introduction, describing the purpose of the Bill.

1. This memorandum identifies the provisions in the Mental Health Bill that confer powers in the Mental Health Act 1983 (“the 1983 Act”) and the Mental Capacity Act 2005 to make subordinate legislation. It seeks to explain in each case the purpose of the power, the reason why it is thought suitable for delegated legislation and the nature of and explanation for any Parliamentary procedures that apply. It also outlines instances where new provisions will require new secondary legislation which we propose to make under existing powers, either already contained in the 1983 Act or in other legislation.

2. The legislation governing the compulsory treatment of certain people who have a mental disorder is the 1983 Act. This Act is largely concerned with setting out the circumstances in which a person with a mental disorder can be treated for that disorder without their consent. It also sets out the processes that must be followed and the safeguards for patients, to ensure that they are not inappropriately treated without their consent. Its main purpose is to ensure that people with serious mental disorders which threaten their health or safety or the safety of the public and who do not agree to treatment for their mental disorder can be treated to prevent them from harming themselves or others.

3. The majority of people with a mental disorder will not require treatment under mental health legislation. At any point in time, one in six of the population has a common mental health problem. At the 31 March 2005, about 15,200 patients were being detained and treated in hospital for a mental disorder in England and Wales.

4. The prime aim of the Bill is to amend the 1983 Act. It also introduces new “Bournewood” safeguards (through an amendment to the Mental Capacity Act 2005) for certain people who need to be deprived of their liberty in their own best interests otherwise than under the 1983 Act. The changes are needed in order to:

• **Help ensure that people with serious mental disorders can be required, where necessary, to receive the treatment they need to protect them and the public from harm** – this will be achieved through amending the 1983 Act to: simplify and modernise the definition of mental disorder and the criteria for detention; to introduce supervised community treatment; and to abolish finite restriction orders.

• **Bring mental health legislation into line with modern service provision** – by allowing a broader range of professionals to carry out functions within the 1983 Act and by enabling people to be treated in the community where appropriate.

• **Strengthen patient safeguards and tackle human rights incompatibilities** – by introducing safeguards, through the Mental Capacity Act, for people who lack capacity to decide about their care, are deprived of their liberty to protect them from harm and are not covered by the 1983 Act safeguards; by introducing, in the 1983 Act, new grounds for the displacement of nearest relatives and allowing for the first time patients to make applications for displacements; and by speeding up access to the Mental Health Review Tribunal (MHRT) for those cases which have not otherwise been referred to the MHRT.

• Work began on reforming mental health legislation in 1998, and there have been many stages to the development of this Bill. A draft Bill was published for
consultation in June 2002. At the time of the Queen’s Speech for the 3rd session of the last Parliament, the Government announced that a revised Bill would be subject to pre-legislative scrutiny (PLS). A draft Bill was published for PLS in September 2004; the PLS report was published in March 2005; and the Government’s response to that report was published in July 2005.

5. The Government subsequently decided to introduce a Bill to amend the 1983 Act, rather than to replace it, because:

- the long Bill was very long and complex.
- the Government considered further the views of the pre-legislative scrutiny committee and stakeholders on the long Bill, and decided that its objectives could be largely achieved through a shorter amending Bill, which would be more in line with the committee’s and stakeholders’ views.
- in particular, concerns had been expressed about the workforce requirements of the proposed new Tribunal system, under the long Bill, and the new approach will be much less resource intensive, while still reinforcing this important safeguard.

6. The Government has also decided to use the Bill to address an incompatibility with the European Convention on Human Rights (ECHR) which arose out of the judgement of the European Court of Human Rights in the case of HL v UK (no. 45508/99 (05.10.2004)) (“the Bournewood judgement”). In that case, HL, a profoundly autistic man, complained that his admission to hospital for treatment for a mental disorder as an informal patient under the common law doctrine of necessity did not contain any of the procedural safeguards required by Article five of the ECHR. The European Court of Human Rights found that admission to and retention in hospital of HL under the common law of necessity amounted to a breach of Article 5(1) ECHR (deprivation of liberty) and of Article 5(4) (right to have lawfulness of detention reviewed by a court). In relation to Article 5(1), the court held that the common law doctrine of necessity could provide a legal basis for detention but that it lacked the sort of safeguards against arbitrary deprivations of liberty which would be necessary for detention under it to be in accordance with a procedure prescribed by law.

7. A consultation document on the Bournewood judgement was issued in March 2005 and the consultation period ended in June 2005. The policy has been developed in the light of the consultation responses, and further discussions and consideration in the light of those responses. On 29 June 2006, the Government announced its proposals for introducing new safeguards in response to the Bournewood judgement.

An outline of the main provisions of the Bill.

8. The Bill introduces a number of changes to the 1983 Act and inserts the Bournewood provisions into the Mental Capacity Act 2005.

9. The major changes to the 1983 Act are:

- **Definition of mental disorder**: it changes the way the Act defines mental disorder, so that the same, simplified definition applies throughout the Act. It abolishes separate categories of disorder. It also removes the exclusions for promiscuity and other immoral conduct and sexual deviancy while retaining an exclusion for dependence on alcohol or drugs. This is designed to make the Act easier to use and to help ensure that no one who needs to be subject to the Act is arbitrarily excluded. These amendments complement the changes to the criteria for detention.

- **Criteria for detention**: it introduces a new “appropriate treatment test” which will apply to all the longer-term powers of detention. This is designed to ensure
that detention under these powers cannot be used or continued unless medical treatment which is appropriate to the patient’s mental disorder and all other circumstances of the case is available. At the same time, the so-called “treatability test” will be abolished. This is because the Government believes that the test is often misunderstood and has contributed to a culture where some patients in great need are labelled “untreatable” and therefore denied the services that they need.

- **Supervised community treatment**: it introduces supervised community treatment (SCT) for patients following a period of detention in hospital. It will mean some patients with mental disorder can live in the community while remaining subject to the powers under the 1983 Act, to ensure they continue to receive the medical treatment that they need. SCT is designed to address the specific problem where patients leave hospital and do not continue with their treatment, their health deteriorates and they require detention again – the so-called “revolving door”.

- **Mental Health Review Tribunal (MHRT)**: it introduces an order-making power to reduce the time at which hospital managers have a statutory duty to make an automatic referral to the MHRT in the case of any patient whose case has not otherwise come before the MHRT. The aim of this is to improve patient safeguards by allowing for earlier automatic referrals to the Tribunal as and when resources allow.

- **Nearest relative**: it extends to patients the right to make an application to displace their nearest relative and enables county courts to displace an unsuitable nearest relative. The provisions for determining the nearest relative will be amended to include civil partners amongst the list of relatives.

- **Professional roles**: it is broadening the group of practitioners who can take on the role of the approved social worker (ASW) and responsible medical officer (RMO). This is to allow people with the right skills and experience to carry out key tasks rather than restricting them to a particular profession. The roles will be renamed approved mental health professional (AMHP) and responsible clinician (RC) respectively.

- **Ending finite restriction orders**: it removes the power of the Crown Court to make restriction orders which expire after a specified period. All restriction orders made by the Court will be without limit of time.

10. The Bill also amends the Mental Capacity Act 2005 to provide for a procedure, subject to particular requirements and safeguards, for the authorisation of the deprivation of liberty of persons resident in a hospital or care home who lack capacity in relation to the question of whether they should be a patient in the relevant hospital or care home and who are not subject to mental health legislation safeguards.

An Indication of the Parts of the Mental Health Act 1983 and the Mental Capacity Act 2005 that will be affected by the proposed changes in the Bill.

**Mental Health Act 1983**

11. The changes proposed in the Bill require amendments to a large proportion of the sections in the 1983 Act. Most of these changes are minor and follow automatically from, for example, the revised definition of mental disorder, or the changes from approved social workers to approved mental health professionals and responsible medical officers to responsible clinicians.
12. The amendments to the definition of mental disorder, the exclusions from it and the abolition of categories of mental disorder all bear directly on section 1 of the Act. The abolition of categories of mental disorder also requires amendments to various other provisions, primarily those relating to detention and guardianship under Parts II and III of the Act and the related criteria for discharge by the Mental Health Review Tribunal in section 72.

13. The amendments to the criteria for detention (including a special provision to preserve the effect of the Act in relation to learning disability) apply to applications for admission for treatment under section 3 of Part II, its renewal under section 20 and to various provisions of Part III enabling courts and the Home Secretary to order the detention in hospital of accused persons, offenders and other detainees. They also amend section 72 in Part V.

14. Several new sections - sections 17A to 17F and sections 20A and 20B - are required for the introduction of SCT. A new Part 4A is also introduced to regulate the treatment of patients subject to SCT while they are in the community. (i.e. when they are not recalled to hospital). The introduction of SCT also requires a number of consequential amendments to other sections throughout the Act.

15. The abolition of after-care under supervision will result in the repeal of sections 25A to 25J as well as a small number of amendments to other sections which will no longer refer to it.

16. The new provision to allow the patient to apply to the county court for the displacement of their nearest relative is achieved by amendments to section 29. Amendments to section 29 also enable the county courts to displace a nearest relative on the new grounds that they are unsuitable to act as such. The county courts, as a result of amendments to section 30, will be able to make indefinite orders appointing an acting nearest relative where the nearest relative was displaced under the new grounds. Civil partners are placed on an equal footing with spouses in the list of nearest relatives by amendments to sections 26 and 27.

17. Part V of the Act (sections 65 to 79) covers MHRTs. The Bill revises section 68, which places a duty of hospital managers to refer cases which have not otherwise been considered by the MHRT. The Bill introduces a new section 68A which provides a power, by order, to reduce the period which must elapse before the duty to refer, either after the patient is initially detained under the Act or subsequently, arises, replacing the existing power which allowed for a variation in subsequent referral period only. Other amendments made to this Part take account of the revised organisational arrangements for MHRTs (in future there will be only one MHRT covering England and one for Wales, rather than the current regional arrangements). Changes to this Part of the Act are also being introduced as a result of the introduction of SCT.

18. The definition of medical treatment, which is to be amended, is in the general interpretation provision in section 145, but the concept of medical treatment is used throughout the Act. Section 145 also defines an approved clinician and points to the definition of an approved mental health professional in section 114.

Mental Capacity Act 2005

19. New sections 4A, 4B and 16A will be inserted into the Mental Capacity Act 2005. These will provide that a person may lawfully be deprived of their liberty if they are in a care home or hospital and a standard or urgent authorisation is in force, or as a consequence of giving effect to an order of the Court of Protection on a personal welfare matter. If authorisation has been requested to enable life-sustaining treatment or treatment believed necessary to prevent a serious deterioration in the person’s condition,
and there is a question about whether an authorisation may lawfully be granted, deprivation of liberty would be lawful whilst a decision is sought from the Court of Protection. Section 64 is amended to define deprivation of liberty as having the same meaning as in Article 5(1) of the Human Rights Convention and specifies that there is no distinction between a public and any other authority depriving a person of their liberty in terms of the application of the provisions.

20. New section 21A establishes the powers of the Court of Protection to determine questions regarding an authorisation and to vary or terminate the authorisation. Section 50 is amended to extend the exemption from the permission requirement to the Court of Protection to the relevant person’s representative.

21. Sections 35, 38, 39 and 40 of the Mental Capacity Act, 2005 are amended to provide for the appointment of an Independent Mental Capacity Advocate for a person who is being assessed for a Bournewood authorisation, or who is subject to an authorisation and for any reason does not have an appointed representative, and who has no-one to represent them who is not paid to provide their care. Section 42 is amended to provide that the Mental Capacity Act Code of Practice must provide guidance on the Bournewood safeguards and that persons exercising functions or acting as a representative under a Bournewood authorisation will have a duty to have regard to the Code.

22. New schedule A1 (Schedule 6 in the Bill) sets out the detailed procedures and requirements relating to standard and urgent authorisations of deprivation of liberty in hospitals or care homes. New schedule 1A (Schedule 7 in the Bill) also sets out the grounds for deciding whether a person is ineligible for the Bournewood safeguards on the grounds that the person is or might be subject to the Mental Health Act.

A general statement about delegated powers

Delegated Powers

23. Neither the 1983 Act nor the Mental Capacity Act 2005 relies heavily on delegated legislation. As this Bill primarily amends those two Acts it has deliberately sought to maintain that approach.

24. Our broad aim in drawing up the Bill has been to ensure that all substantive policy changes should be clearly spelt out in the primary legislation. This includes a number of consequential changes to other legislation that we might otherwise have sought to deal with under clause 42 (the order making power for consequential amendments).

25. Proposals to take new delegated powers or to make additional or different use of existing powers are only made where the degree of scrutiny that is given to primary legislation seems inappropriate given the nature of the exercise in question. For example, for one-off or occasional events an order making power would be proposed. Where flexibility to adapt quickly to changing circumstances is needed, directions would be the preferred option. We propose that where straightforward administrative procedures follow logically from measures which are clearly described on the face of the Bill, regulation making powers are appropriate.

26. Where new orders or regulations are likely to attract significant Parliamentary interest or would be capable of making significant changes to the operation of the relevant Act, we are proposing that they should be subject to affirmative resolution in both Houses, thus giving Parliamentarians every opportunity to debate the issues at stake. This of course includes the Henry VIII powers taken in clause 42.

27. The only new delegated powers in either the 1983 Act or the Mental Capacity Act 2005 which will not be subject to any further formal Parliamentary scrutiny following
Royal Assent are the directions relating to AMHPs and approved clinicians. The proposals for AMHPs closely mirror the current arrangements for approved social workers set out in section 114(3) of the current 1983 Act. These are issues where there is a strong argument for allowing maximum flexibility to respond to developments in good professional practice. We intend to consult closely with the relevant stakeholders, in particular bodies representing the professions concerned, in agreeing the detailed arrangements to be made under these powers.

28. We believe this approach will make the best use of valuable Parliamentary time in considering these important and sensitive issues.

29. The statutory instrument making powers exercised by Welsh Ministers in respect of Wales will be subject to the relevant procedures of the National Assembly for Wales. The procedure for scrutiny by the Assembly will correspond to the Parliamentary procedure adopted in relation to England. Therefore, for example, where scrutiny by Parliament is subject to the negative procedure, similarly scrutiny by the Assembly will be subject to its negative procedure. Unless specifically stated otherwise the use of the powers set out below will refer to the position in England.

30. The changes proposed will require a large number of amendments to the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983 (No. 893) as well as bringing in a number of new regulations. For England we are carefully considering the following options for the overall shape of future regulations:

- Introducing a new set of regulations for SCT and the cross border arrangements for approved clinicians and section 12 doctors (as was done in 1996 when after-care under supervision was introduced) and continuing with separate 1983 regulations in an amended form;

- Introducing the new regulations for SCT and the cross border arrangements for approved clinicians and section 12 doctors as additions to the current regulations (which would also require some amendments to them); or

- Producing a new set of regulations encompassing all the regulations made under the Act - those introduced under this Bill, as well as those amended or unaffected by it.

31. In Wales, we are advised by the Welsh Assembly Government that Welsh Ministers intend to issue a full set of regulations that will replace the existing Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983 as well as including further regulations identified within this Memorandum. They intend this to represent a consolidation of new, amended and existing regulations rather than a full revision. These regulations will be published in Welsh and English.

32. The new powers to be taken under the Bill are:

- To make regulations relating to the operation of SCT (clauses 25(2), 28(4) and paragraph 4 of Schedule 3) – see from paragraph 34;

- To give directions on the approval of approved mental health professionals (clause 17) – see from paragraph 52

- To make regulations governing the arrangements for cross border recognition of approved clinicians and section 12 doctors (clause 16) – see from paragraph 77;

- By order, to shorten the period at which hospital managers must refer a patient to an MHRT; and a second power to ensure patients’ rights are not compromised were the power to be used differently in England and Wales (clause 30) – see from paragraph 84;
• By order, to make transitional arrangements for patients currently subject to after-care under supervision (clause 45) – see from paragraph 94;
• By order to make consequential amendments (clause 42) – see from paragraph 112;
• Bournewood regulations governing the assessment process, the appointment of personal representatives, monitoring, information and other essential administrative functions (Schedule 6) – see from paragraph 132; and
• To make a commencement order (clause 44) – see from paragraph 219.

33. Other delegated legislation which is mentioned in this document will be introduced under existing powers and is included to complete the picture.

An analysis of sections where the Bill includes new powers for delegated legislation.

**Supervised Community Treatment (SCT)**

**The policy intention**

**Mental Health Act amendments: Clauses 25-29 - supervised community treatment (SCT) - overview**

34. The supervised community treatment (SCT) provisions will allow some patients with a mental disorder to live in the community while still remaining subject to the powers under the 1983 Act. Patients subject to SCT remain under compulsion and liable to recall to hospital for treatment. Only patients who have been detained in hospital for treatment will be eligible for SCT. They will be subject to conditions, the nature of which will depend on their individual circumstances, while living in the community. Patients on SCT (“community patients”) may be recalled to hospital for treatment if this becomes necessary for their own protection or that of others. Afterwards they may then resume living in the community or, if they need to be treated as an in-patient again, their responsible clinician may revoke the community treatment order and the patient remains in hospital for the time being. Similar safeguards exist for patients on SCT as patients detained under the Act such as patient and nearest relative rights to apply to the MHRT for discharge from SCT.

**What the primary legislation says**

**Mental Health Act amendments: SCT – community treatment orders**

35. **Clause 25** introduces new sections 17A-17G which set out how community treatment orders (CTOs) are to be made and how they will work. With the agreement of an AMHP, the responsible clinician may make a CTO under section 17A for a patient detained under section 3 or Part III (without restrictions) of the 1983 Act, if satisfied that the relevant criteria (set out in the new section 17A) are met.

36. CTOs must specify conditions, to which a community patient will be subject. For example a condition may be that the patient resides at a particular place. The responsible clinician and an AMHP must agree the conditions. The responsible clinician may vary the conditions, or suspend any of them.

37. A community patient may be recalled to hospital (by notice in writing under 17E(5)) if the responsible clinician decides that the patient needs to receive treatment for their mental disorder in a hospital and that, without this, there would be a risk of harm to the patient’s health or safety, or to other people.
38. If the responsible clinician decides that the patient requires longer-term detention in hospital that clinician may, subject to an AMHP’s agreement that it is appropriate, revoke the patient’s CTO under 17F(4) (and the patient’s detention under section 3 will be reinstated). The responsible clinician can only recall a patient for a maximum of 72 hours without revoking the CTO. The responsible clinician may release a recalled patient from detention at any time within the first 72 hours, provided the CTO has not been revoked.

39. Clause 25 also inserts a new section 20A which sets out how long CTOs will last and the circumstances in which can be extended. It also inserts a new section 20B which makes provision in respect of the effect of the expiry of a CTO.

Mental Health Act amendments: treatment of patients while on SCT

40. Clause 27 replaces section 56 of the 1983 Act, which sets out the patients to which Part IV of the Act applies. Part IV of the Act deals with consent to treatment. A community patient will not be subject to Part IV unless the patient is recalled to hospital. This clause also amends section 61 and inserts a new section 62A. 62A concerns the treatment of community patients recalled to hospital or where a CTO has been revoked.

41. Clause 28 introduces a new Part 4A to regulate the treatment of community patients who are residing in the community (i.e. when they are not recalled to hospital). Community patients aged 16 and over with capacity can only be treated in the community if they consent to that treatment.

42. Community patients aged 16 and over who lack the capacity to consent to treatment can be treated in the community if an attorney, deputy or the Court of Protection consents to treatment on the patient’s behalf and there is authority to give treatment under section 64D (e.g. where the patient does not object to treatment or the use of force is not necessary). Children aged under 16 can also be made subject to a CTO. As for adults who have capacity, treatment cannot be given to a child in the community who is competent to consent and does not consent to it. Section 64F provides the authority to treat a child who lacks competence in the community.

43. In emergencies, force can be used to give treatment to adult community patients who lack capacity or to child community patients who lack competence. Section 64G sets out how and when treatment can be given in these situations.

44. All community patients receiving the type of treatment which would fall under section 58 of the 1983 Act if they were detained patients (i.e. medication or, by virtue of regulations, ECT) must have that treatment certified by a Second Opinion Appointed Doctor (SOAD) (via a Part 4A certificate) under sections 64B and 64E. The Part 4A certificate does not have to be in place immediately, but must be in place to give medication after a certain period.

45. On recall to hospital, a patient may be treated on the basis of the Part 4A certificate if that certificate specifies treatment that is appropriate in the particular circumstances.

What the delegated powers will cover

46. For SCT, the delegated powers will make provision that certain procedures (written orders, certificates and notices) are to be specified in statutory forms. The regulations are technical - in each case the regulations are likely to say little more than that the procedure in question will be authorised on the particular form. The intention is that regulations will specify that the following procedures will be set out in statutory forms:

- A CTO made under section 17A
- Notice of recall to hospital made under section 17E
• Order revoking a community treatment order under section 17F
• Extension of the community treatment period under 20A
• Part 4A certificate required for the purposes of section 64B (treatment of adult community patients not recalled to hospital) and 64E (treatment of child community patients not recalled to hospital)

47. The delegated powers will also enable provision to be made in respect of the process of transferring community patients from one hospital to another. The intention is that the regulations will provide the administrative procedure for:

• The transfer of a community patient from one responsible hospital to another, while that patient is in the community under section 19A; and
• The transfer of a community patient from one responsible hospital to another, while the patient is recalled to hospital under section 17F(2).

How they will complete the legislative contribution to delivery of the policy intention

48. As discussed above, the intention is that the regulations will primarily enable statutory forms to be specified which will provide the legal documentation clinicians must complete as part of the SCT process. For example, the regulations will specify that the CTO will be set out in statutory form X and that the notice for recalling a patient will be set out in statutory form Y. The intention is that the statutory form will cover the legal requirements, already set out in the primary legislation, which the clinician must comply with. The forms themselves cannot impose any requirements outside that which has been defined in primary legislation. The intention is that this set of regulations will be similar in principle to Regulation 4 of the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983 (“Procedure for and record of hospital admissions”) which sets out that certain applications and recommendations must be made on certain statutory forms. As with Regulation 4, this set of SCT regulations covering the SCT procedure are important to deliver the policy intention in the primary legislation so that the Act’s requirements can be effectively administered.

49. The transfer regulations outlined in 5.1.3.2 will provide detail of the administrative process by which a patient may be transferred from one responsible hospital to another when a patient is in the community or recalled to hospital. They will be similar in nature to the current regulations for transferring a detained patient from hospital to hospital under regulation 7 except that there will be no need for a regulation enabling the transfer of a patient into guardianship. They will for example provide that the authority for transfer and for receipt of transfer must be in a specified form.

Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing (for example) directions over regulations

50. The above issues are not suitable for the face of the Bill as they provide administrative detail and procedure.

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

51. Specific powers to make regulations in respect of the transfer of recalled patients and the assignment of responsibility for patients between England and Wales are to be found in new sections 17F(2) and 19A(1) of the 1983 Act (to be read with the existing section 32), inserted by Clauses 25(2) and paragraph 4 of Schedule 3 respectively. The form of community treatment orders and the various notices described above will be prescribed under the existing power in section 32. The power to prescribe the form of the certificate
to be given by a SOAD under Part 4A is in the new section 64H(2) inserted by Clause 28(4). All these powers are subject to the negative resolution procedure.

Approval of approved mental health professionals

The policy intention

52. The policy intention is to open up the approved social worker (ASW) role to professionals in addition to social workers with the right experience, competencies and training that have been approved by a local social services authority (LSSA). This reflects the evolution of good multi-disciplinary working, which has developed over the last 20 years since the 1983 Act came into force. It also provides the opportunity to ease the pressure on the ASW workforce. To be approved as an Approved Mental Health Professional (AMHP), it is intended that a professional must meet minimum criteria set out in directions from the Secretary of State or Welsh Ministers.

53. The functions of the AMHP will be the same as those of approved social workers (ASWs) as set out in the 1983 Act (save for the addition of new functions relating to supervised community treatment).

What the primary legislation says

54. Clause 17 gives local social services authorities (LSSAs) the power to approve persons to act as AMHPs for the purpose of the Act. Before approving a person, the LSSA must be satisfied that they have appropriate competence in dealing with persons suffering from mental disorder. They must also comply with minimum criteria for approval set out in directions issued by the Secretary of State (in England) or Welsh Ministers (in Wales). They cannot be registered medical practitioners.

55. Subsection (5) of the clause sets out particular matters which may be included in these directions. These include the length of time for which approval of an AMHP has effect, the courses to be undertaken by a person before they can be approved as an AMHP and whilst approved, the conditions linked to that approval and the factors to be taken into account in determining whether a person has appropriate competence in dealing with persons suffering from mental disorder. This replaces the Secretary of State and National Assembly’s current direction making power in section 114 (in relation to approved social workers) with a new power in relation to AMHPs, which sets out the kind of matters it is likely to cover. The power to give these directions includes the power to vary or revoke them.

What the delegated powers will cover

56. The purpose of the directions is to set out to LSSAs minimum criteria for approval of a person as an AMHP. In relation to England, the Secretary of State will be carrying out further consultation with relevant stakeholders before finalising the content of the directions but it is anticipated that the approval criteria to be set out in the directions will include the following:

- The professional groups that can be approved - these will be those suitably regulated professions that are key to the mental health team - social workers, mental health and learning disability nurses, occupational therapists and chartered psychologists exclusively. Doctors will not be able to be AMHPs, to ensure a balance of professional perspectives when the decision about initial detention is made.

- The training to be undertaken - a person will be required to have undertaken a specific training course approved by the General Social Care Council (GSCC, the
regulator for the social care workforce). The GSCC are working with the other professional regulators (the Nursing and Midwifery Council, the Health Professions Council and the British Psychological Society) to draw up training requirements. The course will be based on the current ASW course, will be around 600 hours and have practical and teaching elements.

- Reference to the competencies required – the competencies will be drawn up in consultation with key stakeholders, including the professional regulators, services users and carers and persons representing black and minority ethnic mental health issues.

57. The directions will also set out the length of time for which approval should last.

58. In addition, we are considering whether the directions may set out factors such as a requirement for local authorities to make a record of the persons they approve, to seek references prior to approval and to pass information to other local authorities on whose behalf an AMHP should be acting if they have reason to believe that the information is pertinent to those other LSSAs’ decision to allow an AMHP to act on their behalf.

59. In respect of Wales, we are informed by the Welsh Assembly Government that Welsh Ministers intend to continue to consult with relevant stakeholders on directions which will include the following approval criteria:

- Training to be undertaken;
- Professional groups that can be approved;
- The competencies required;
- The length of time for which approval will last; and
- Such other procedural matters considered to be appropriate following consultation

How they will complete the legislative contribution to delivery of the policy intention

60. The primary legislation gives LSSAs the power to approve persons as AMHPs, subject to directions from the Secretary of State and Welsh Ministers setting out the minimum criteria for approval. The directions provide more specific detail about the professions that can carry out the role of an AMHP and the training and competencies they need to have. The directions provide a safeguard by setting minimum standards for those professions who will act as an AMHP.

Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing (for example) directions over regulations

61. The fundamental requirements for approval as an AMHP are set out in primary legislation, namely appropriate competence in dealing with persons who are suffering from mental disorder. The directions will set out what are currently considered to be essential criteria for approval as an AMHP. These may vary over time. For example, the key professionals in the mental health team (in addition to doctors, who may not be approved as AMHPs) are currently social workers, mental health and learning disability nurses, occupational therapists and chartered psychologists. In the future other professions may broaden their field of expertise and acquire the competencies and experience that would enable them to act as an AMHP. The Secretary of State and Welsh Ministers’ direction making power provides the flexibility to amend the competencies and requirements of the AMHP role to fit with new ways of working. Directions under s114 of the current Act set out the minimum approval criteria for ASWs, so there is a precedent. Directions are a normal way of setting rules for local social services authorities and the NHS. Section 7A of
the Local Social Services Act 1970 provides a general power to give directions on how LSSAs carry out their functions. Likewise, there are various direction making powers in the NHS Act 1977 (which is shortly to be replaced by the NHS Act 2006 and the NHS (Wales) Act 2006).

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

62. There is no Parliamentary procedure associated with these direction making powers. Directions have been chosen for the reasons set out above.

Approval of approved clinicians

The policy intention

63. A responsible medical officer (RMO) is the registered medical practitioner in charge of a patient’s treatment. RMOs have various designated functions, including deciding if a patient’s detention should be renewed, if the patient should be discharged or allowed out on leave. The policy intention is to open up the RMO role to professionals who are approved as having the right experience, competencies and training, rather than restricting the role to doctors. This reflects the evolution of good multi-disciplinary working, which has developed over the last 20 years since the 1983 Act came into force. It also provides the opportunity to ease the pressure on the psychiatry workforce.

64. An approved clinician is a person approved by the Secretary of State (in relation to England) or by the Welsh Ministers (in relation to Wales) to act as an approved clinician for the purposes of the Act.

65. In order to be approved, professionals will need to meet minimum criteria determined by the Secretary of State or Welsh Ministers. The function of approving approved clinicians is likely to be delegated to appropriate NHS bodies.

66. The role of the RMO will be replaced, for the most part, with the new role of ‘responsible clinician’, a name which reflects the wider range of professions that can undertake it. To be appointed as a patient’s responsible clinician, a person must first be approved as an approved clinician. A patient’s responsible clinician will be the approved clinician with overall responsibility for their case. The functions of the responsible clinician will be similar to those of the RMO under the 1983 Act (with the addition of functions arising from the Bill, such as those relating to supervised community treatment). They include recommending whether a patient’s detention should be renewed, whether the patient should go on supervised community treatment (SCT), be recalled from SCT or have their SCT revoked, whether the patient should go on leave and if they should be discharged.

What the primary legislation says

67. **Clause 8** subsection (10) defines a responsible clinician as the approved clinician with overall responsibility for the patient’s case, or, with respect to patient’s on guardianship, the approved clinician authorised by the responsible local social services authority to act.

68. **Clause 13** subsection (5) defines an approved clinician as a person approved by the Secretary of State (in relation to England) or by the Welsh Ministers (in relation to Wales) to act as an approved clinician for the purposes of the Act.

What the delegated powers will cover

69. The primary legislation places the power to approve approved clinicians with the Secretary of State and Welsh Ministers. In practice, it is intended that this function will be
delegated under the provisions of the National Health Service Act 1977 (the “1977 Act”, shortly to be replaced by the NHS Act 2006 and the NHS (Wales) Act 2006). Section 16D of the 1977 Act allows the Secretary of State to direct Strategic Health Authorities, Special Health Authorities and Primary Care Trusts to exercise her functions relating to the health service, including functions under enactments relating to mental health. Consideration is being given to which particular health body this responsibility should rest with. Section 16BB of the 1977 Act allows the Welsh Ministers (as a result of the transfer of functions formerly vested in the National Assembly for Wales under the Government of Wales Act 2006) to direct Local Health Boards in a similar manner.

70. It is proposed that the Secretary of State and Welsh Ministers should set out minimum approval criteria in directions.

71. In relation to England, the Secretary of State is working with stakeholders to determine the essential requirements that should be included in the directions but it is anticipated that the approval criteria to be set out in the directions will include the following:

- The professional groups that can be approved - these will be those suitably regulated professions that are key to the mental health team – registered medical practitioners, social workers, mental health and learning disability nurses, occupational therapists and chartered psychologists.

- The training to be undertaken - a person will be required to have undertaken a training course. The course curriculum has been drawn up in consultation with key stakeholders. It will be a course focused on the functions of the responsible clinician role.

- Reference to the competencies required - these have been drawn up in consultation with key stakeholders, including the professional regulators, services users and carers and persons representing black and minority ethnic mental health issues.

- The body with the power to approve a person as an approved clinician.

72. The directions will also set out the length of time for which approval should last. In addition, the directions may set out factors, such as a requirement for the approving body to make a record of the persons they approve.

73. In respect of Wales, we are informed by the Welsh Assembly Government that Welsh Ministers intend to continue to consult with relevant stakeholders on directions which will include the following approval criteria:

- Training to be undertaken;

- Professional groups that can be approved;

- The competencies required;

- The length of time for which approval will last; and

- Such other procedural matters considered to be appropriate following consultation.

How they will complete the legislative contribution to delivery of the policy intention

74. The primary legislation places the power to approve persons as approved clinicians with the Secretary of State and Welsh Ministers. It is intended that the power will be delegated, in accordance with the provisions of the 1977 Act, subject to minimum approval criteria to be specified by the Secretary of State and Welsh Ministers. The directions will set out the criteria.
Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing (for example) directions over regulations

75. The directions will set out what are currently considered to be essential requirements for approval as an approved clinician. These may change over time to adapt to changes in practice. For example, the key professionals in the mental health team are currently doctors, social workers, mental health and learning disability nurses, occupational therapists and chartered psychologists. In the future other professions may gain the required experience and competencies to fulfil the role of a responsible clinician. Directions provide the flexibility to be able to vary both the professions who can undertake the role and the competencies they are required to exhibit. This will enable the requirements to evolve with new ways of working.

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

76. There is no Parliamentary procedure associated with the Direction making power. Directions have been chosen for the reasons set out above. As Parliament will scrutinise the clause allowing the Secretary of State and the Welsh Ministers to approve approved clinicians, and as the sections of the 1977 Act currently allow the Secretary of State and Welsh Ministers to direct the carrying out of their functions, we see no need for further Parliamentary scrutiny of the specific details setting out the requirements for approval in such directions.

Cross border arrangements for approved clinicians and section 12 doctors

The policy intention

77. Registered medical practitioners can be approved under section 12 of the 1983 Act if they have special experience in the diagnosis or treatment of mental disorder. Minimum approval criteria are set out in directions from the Secretary of State (Circular HSG(96)3). One of the two doctors who decide if a patient meets the conditions for detention under the Act must be section 12 approved. The provisions relating to section 12 doctors have not changed from the current Act.

78. The power to approve doctors under section 12 of the Act and the power to approve practitioners as approved clinicians vests in the Secretary of State in relation to England and in the Welsh Ministers in relation to Wales. At present, the criteria for approval as a section 12 doctor in England and Wales are the same and so the policy intention is that a person approved in one country may be accepted as approved in the other. However, the criteria for approval as an approved clinician may differ between the two countries. The circumstances in which a person approved under section 12 or as an approved clinician in England shall be considered to be approved in Wales and vice versa is to be set out in regulations to be made by the Secretary of State jointly with the Welsh Ministers.

What the primary legislation says

79. Clause 16 provides a new power for the Secretary of State, jointly with Welsh Ministers, to make regulations setting out the circumstances in which a person approved under section 12 of the Act, or as an approved clinician, in England can be treated as approved in Wales and vice versa.

What the delegated powers will cover

80. The regulations will cover approved clinicians and section 12 doctors approved in England and in Wales and will set out the circumstances in which approval in one country is valid in the other.
How they will complete the legislative contribution to delivery of the policy intention

81. The primary legislation requires approval as an approved clinician in order to undertake various statutory functions under the Act. The same is true of approval under section 12. Approval will be made in relation to England on the one hand and in relation to Wales on the other. The regulations will set out the circumstances in which approval in relation to England will extend to Wales and vice versa. This will enable the competencies, training and professional groups who are able to be approved as approved clinicians to vary between Wales and England.

Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing (for example) directions over regulations

82. Regulations have been chosen over primary legislation as the approach taken will depend on the differences in the criteria for approval in England as compared to Wales, and such criteria may change from time to time.

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

83. Negative resolution will allow Parliament and the National Assembly for Wales to consider any changes to the cross border approval arrangements. These arrangements will usually be technical, they will not substantially change the operation of the Act, nor do they directly impact on patient’s rights or freedom, and so affirmative resolution is not appropriate.

References to Mental Health Review Tribunal

The policy intention

84. The Mental Health Bill will introduce a safeguard for patients, whereby all Part II patients and unrestricted Part III patients transferred from guardianship to hospital, will be referred to the MHRT at six months from initial detention if they, or their nearest relative, have not used their right to apply to the MHRT or if their case has not otherwise been referred to the MHRT. At present under the Act, the referral period is six months from admission for treatment, which means patients admitted under section 2 for assessment must wait longer than a maximum of six months, if their case does not otherwise come before the Tribunal via an application or referral. At clause 30 the Bill will introduce an order making power which will enable the Secretary of State and the Welsh Ministers to reduce this six month period. Reducing the period will enable this safeguard to be initiated earlier. This is likely to result in more patients being referred to the MHRT, as the earlier the required referral time is, the greater will be the number of patients who are still detained and whose cases have not otherwise come before the Tribunal.

85. Using the order making power is likely to result in more tribunals and this has a resource implication for the Tribunal Service, the NHS and the Local Authorities. Both the Secretary of State and Welsh Ministers intend to wait to use the order making power only when they are certain that the resources and workforce are in place, so that any change will not adversely impact on the services and clinical care of mental health patients.

What the primary legislation says

86. Clause 30 inserts new section 68A in the Act to provide a new order making power for the appropriate national authority (being the Secretary of State in relation to hospital managers in England and the Welsh Ministers in relation to those in Wales) to amend
from time to time the period at which the hospital managers shall refer a patient’s case to the MHRT under section 68(2) by substituting a shorter period. The duty to refer under section 68(2) relates to the referral of the patient to the MHRT after they have been initially detained under the Act where they or their nearest relative have not applied for an MHRT hearing or the patient’s case has not otherwise been referred to the MHRT.

87. Another order making power for the Secretary of State (and in relation to Wales, the National Assembly for Wales) to amend the period for subsequent referrals by the hospital managers to the MHRT already exists in section 68(4) of the 1983 Act. This power is to be amended by the Bill so that any order made by the appropriate national authority can only specify a shorter period, rather than vary it either way.

What the delegated powers will cover

88. When the order making power is used, the order will specify a new period after which the patient must be referred by the hospital managers to the MHRT.

89. If the Secretary of State or the Welsh Ministers use their power to create a different referral time in each territory (England and Wales respectively) the order will also need to contain transitional arrangements to ensure that patients who are transferred between England and Wales before the time for a referral is reached in the transferring territory, but after it is reached in the receiving territory, will still be referred to the MHRT.

90. The provision at section 68A also contains a second order making power to allow the territory that is not reducing the referral periods to make any necessary consequential arrangements to safeguard patients who are being transferred to or from the territory. For example if one territory (territory A) reduced the initial referral period to three months, the other territory (territory B) may wish to use the second order making power to allow patients transferred from territory A before three months to receive a tribunal referral at three months in territory B, therefore not disadvantaging them by their transfer.

How they will complete the legislative contribution to delivery of the policy intention

91. The order making power will enable the reduction of time before a patient is automatically referred to the MHRT which will ensure more patients have a tribunal earlier. It will also enable the territories to make any transitional arrangements to safeguard the right to a referral that might otherwise be lost if a patient is transferred between territories around the point in time the duty to refer would arise.

Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing (for example) directions over regulations

92. An order making power will enable the time period in section 68(2) and (6) to be reduced at a rate which is appropriate given the circumstances of the NHS and Tribunal Service at the time. Reducing the time period for referrals will depend on the availability of resources in the future and may require the gradual reduction of the period as resources allow. Because the reduction in the referral period is dependent on resources, we have chosen not to reduce the period in the Bill itself. Using an Order making power allows us to make the change as and when the required resources are available.

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

93. No order shall be made to reduce the time period for referral under section 68A(1) unless a draft of it has been approved by a resolution of each House of Parliament. As explained above, an order allows the referral period to be reduced in line with increases in resources and workforce. However the decision to make this change will affect the NHS,
Local Authorities, patients, their carers and their families so we believe it is appropriate that the order should be considered in both Houses of Parliament.

94. However for the second order at section 68A, which enables the territory that is not reducing the referral period to make arrangements to safeguard the referral rights of patients that might be transferred between England and Wales, we believe a negative resolution is sufficient. The order will only be used to ensure patients do not miss out on an opportunity to be referred to the tribunal, and will not have significant additional resource implications.

After-care under supervision and other transitional arrangements

After-care under supervision: transitional arrangements

The policy intention

95. The new system of supervised community treatment (SCT) being introduced by the Bill will enable the patients who are subject to it to be managed in the community after a period of detention in hospital. As a result, it will no longer be necessary to continue with After-care Under Supervision (ACUS) which is to be abolished by the Bill.

96. It would not be appropriate to discharge from a regime of formal supervision in the community every person who is subject to ACUS when it is abolished. There are likely to be some ACUS patients who will continue to require supervision. Some may even need to be considered for detention in hospital. For this reason we wish to retain ACUS for those patients who are already subject to it for a brief period after its abolition so that a decision can be made about what should happen to a person who is subject to it at that time.

97. The intention is therefore that a registered medical practitioner will examine each ACUS patient with a view to deciding whether:

- To end the ACUS and discharge the patient;
- The patient appears to satisfy the criteria for detention under the Act;
- The patient appears to satisfy the criteria for guardianship; or
- The patient appears to satisfy the criteria for SCT.

98. If the second, third or fourth bullet above applies, further action (in line with the normal procedures for instigating detention, guardianship or SCT) will be required. For example, the registered medical practitioner will be required to make a recommendation that the patient be detained in hospital, or be received into guardianship. Or the registered practitioner may make a community treatment order in respect of the patient (subject to obtaining the agreement of an approved mental health professional). We therefore seek to introduce transitional procedures to provide for these options by means of the order making power in clause 45.

What the primary legislation says

99. Clause 45 allows the Secretary of State to make provision by order under clause 44 for transitional arrangements of the sort described above for all persons subject to ACUS at the time of its abolition. Clause 29 and Part 5 of Schedule 10 to the Bill repeal the primary legislation governing ACUS –sections 25A to 25J of the 1983 Act.

What the delegated powers will cover

100. The delegated power will make provision for:
• Keeping ACUS in place for those already on it for a transitional period, the
duration of which will be specified in the order; and

• Requiring PCT’s (Local Health Boards in Wales) to arrange for an existing
ACUS patient to be examined by a registered medical practitioner with a view to
making a decision on what should happen to the patient (i.e. discharge, detention,
guardianship or SCT).

How they will complete the legislative contribution to delivery of the policy intention

101. The order making power providing for a transitional ACUS regime will be vital to
ensure that existing ACUS patients are dealt with according to the policy intention.

Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for
choosing one kind rather than another (for example directions rather than regulations)

102. The intention is to consult further on various aspects of the proposed arrangements -
e.g. how long the transitional period should last. An order making power provides the
flexibility needed to enable such consultation to take place.

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

103. The order providing for the commencement of clause 29 will provide for the
transitional arrangements for patients subject to ACUS. This order will not be subject to a
Parliamentary procedure as no procedure normally attaches to a commencement order. However, clause 45,
which sets out in detail the scope of the proposed order as regards
the repeal of after-care under supervision, will, of course, receive full Parliamentary
scrutiny.

Repeal of the Mental Health (After-care under Supervision Regulations) 1996

104. The policy outlined in 5.6.1.1 above means that the Mental Health (After-Care
Under Supervision) Regulations 1996 (SI 1996/294) (“Regulations”) need to be retained
during the transitional period, pending the phasing out of after-care under supervision. As
a tidying up exercise, these Regulations will be repealed at the end of the transitional
period.

Transitory provision in relation to the Armed Forces Act 2006 and the
Constitutional Reform Act 2005

The policy intention

105. Schedule 4 to the Bill contains a number of amendments to primary legislation that
are necessary as a result of the introduction of supervised community treatment (SCT). It
includes consequential amendments to the Courts-Martial (Appeals) Act 1968, the
Administration of Justice Act 1960 and the Criminal Appeal Act 1968. The drafting of
these amendments anticipates changes to the definition of “relevant time” in section 20 of
the Courts-Martial (Appeals) Act that are in Schedule 8 to the Armed Forces Act 2006;
the replacement of the role of the Defence Council in the Courts-Martial (Appeals) Act by
the Director of Service Prosecutions (for which the Armed Forces Act 2006 provides);
and the replacement of the House of Lords - to which there are references in all three Acts
- by the Supreme Court (for which the Constitutional Reform Act 2005 provides).

106. As the amendments in Schedule 4 to the Mental Health Bill will come into force
before those in the Armed Forces Act 2006 and the Constitutional Reform Act 2005, so
we need to make transitional provision in respect of them in order to:
• Reflect the current definition of “relevant time” in section 20 of the Courts-Martial (Appeals) Act 1968 pending its repeal and replacement by the new definition;
• Provide for the use of the term “Defence Council” pending its replacement by the term “Director of Service Prosecutions”; and
• Provide for the use of the term “House of Lords” pending its replacement by the term “Supreme Court”.

What the primary legislation says

107. The primary legislation in Schedule 4 introduces the changes described above to the Courts-Martial (Appeals) Act, the Administration of Justice Act and the Criminal Appeal Act. Subsections 4(b) and (5) of clause 44 (commencement) provides the power to make the necessary transitional provision, including provision for modifying the application of a provision of the Bill pending the commencement of a provision of another enactment.

What the delegated powers will cover

108. We wish to use the order-making power (in clause 44) to make transitional provision which will have the effect of:

• Replacing the term “Supreme Court” with “House of Lords” in the following provisions
• New section 5A(6) of the Administration of Justice Act 1960, as inserted by paragraph one of Schedule 4 to the Bill;
• New section 37A(1), (4) and (7) of the Criminal Appeal Act 1968, as inserted by paragraph 2(3) of Schedule 4 to the Bill;
• Amend new section 43A of the Courts-Martial (Appeals) Act 1968, as inserted by paragraph 3(4) of Schedule 4 to the Bill, to replace the term “Supreme Court” in section 43A(3) and (6) with “House of Lords”; until the provision of the Constitutional Reform Act 2005 replacing the “House of Lords” with the “Supreme Court” comes into force.
• Replacing the term “Director of Service Prosecutions” with “Defence Council” in new section 43A of the Courts-Martial (Appeals) Act 1968, as inserted by paragraph 3(4) of Schedule 4 to the Bill, until the provision of the Armed Forces Act 2006 replacing that latter term comes into force; and
• Providing that “relevant time” in the new section 20(4A) of the Courts-Martial (Appeals) Act, as inserted by paragraph 3(2) of Schedule 4 to the Bill, is to have the same meaning as it has until the new definition of “relevant time” to be inserted by the Armed Forces act 2006 comes into force.

How they will complete the legislative contribution to delivery of the policy intention

109. The amendments in the Bill to the Administration of Justice Act, the Courts-Martial (Appeals) Act and the Criminal Appeal Act anticipate the changes described in 5.6.3.1 above because the latter are intended to be long-term. The order-making power will enable the straightforward temporary (or transitory) changes described above to be made. They will need to last only for a short period, perhaps no more than two years.
Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing one kind rather than another (for example directions rather than regulations)

110. The transitional provision being made will be straightforward. It is technical in nature and will not in itself represent a change of policy. It can therefore reasonably be made as part of the order commencing the relevant provisions to which transitional provision relates.

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

111. The power to make transitional provision under subsection (4)(b) and (5) of clause 44 as part of an order to commence provisions of the Bill will not be subject to a Parliamentary procedure. No such procedure normally attaches to commencement orders. This is the usual practice.

Consequential amendments

The policy intention

112. Some of the changes introduced in the Bill have implications for other primary and secondary legislation which will need to be changed to ensure it remains consistent with the 1983 Act, as amended by this Bill. Some of these changes are of a policy nature and therefore appear on the face of the Bill. Schedule 1, Part II contains changes consequent upon the revised definition of mental disorder and Schedule 4 contains changes consequent upon the introduction of SCT. Also section 19 amends section 62 of the Care Standards Act 2000 and paragraph 20 in Part II of Schedule 5 amends the Mental Health (Care and Treatment) (Scotland) Act 2003 Consequential Provisions Order of 2005.

113. We wish to have the power to make any necessary minor supplementary, incidental or consequential amendments to relevant provisions of other Acts and subordinate legislation by means of an order making power. This is to ensure that provisions in other Acts and subordinate legislation are consistent with the changes contained in the 1983 Act, as amended by this Bill. The power allowing the Secretary of State to make these consequential amendments is contained at clause 42.

What the primary legislation says

114. Clause 42 allows the Secretary of State by order made by statutory instrument to “make such supplementary, incidental or consequential amendments as he thinks fit for the purposes of, or in consequence of, or for giving full effect to, a provision of this Act”. This power allows the Secretary of State to amend primary legislation or secondary legislation, subject to the parliamentary procedure described in section 5.7.6 below.

115. Clause 42 allows Welsh Ministers, with respect to functions which they may exercise, to amend or revoke any provision of subordinate legislation made before the passing of the Bill. It does not allow them to amend or revoke primary legislation with respect to functions that they may exercise, except with the agreement of the Secretary of State; but equally, the Secretary of State may not amend or revoke provisions which relate to any such functions without the agreement of the Welsh Ministers.

What the delegated powers will cover

116. We wish to use the Henry VIII power to amend the following Acts under the order-making power:
• Local Authority Social Services Act 1970 (to change “approved social worker” to “approved mental health professional”);

• Disability Discrimination Act 1995 (to delete a reference to this Act’s meaning of mental impairment being different from the one in the Mental Health Act – this becomes redundant because the Mental Health Act will in future no longer use the term “mental impairment”);

• Judicial Pensions and Retirement Act 1993 (to reflect changes in the definition of the Mental Health Review Tribunal president and chairman); and

• Criminal Procedure (Insanity) Act 1964 (to change the phrase “responsible medical officer” to “responsible clinician”).

117. The order making power contained in clause 42 will extend to the United Kingdom. This is because it will be used to amend the Disability Discrimination Act 1995 (which is not devolved legislation, and which extends to Scotland and Northern Ireland) as well as Schedules five and seven of the Judicial Pensions and Retirement Act (which extends to Northern Ireland).

118. The order making power does not allow us to amend missed consequential amendments in related legislation. For example, it appears that not all references to the Mental Health Act 1959 in other Acts were amended by the Mental Health Act 1983. We are not taking the power to amend these references as such amendments would not be consequential upon the changes being introduced by this Bill.

How they will complete the legislative contribution to delivery of the policy intention

119. The order making power will enable a small number of very straightforward amendments to be made to other primary legislation and secondary legislation which follow as a consequence of the changes we are making in the Bill.

Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing one kind rather than another (for example directions rather than regulations)

120. The changes to be made under clause 42 do not reflect any major change of policy. They can therefore reasonably be made by order. An order making power also gives flexibility in the event that any other legislation should prove to require consequential amendment. All the changes envisaged are of a one-off nature and an order is the appropriate form of delegated power for this purpose.

The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

121. Amendments made to primary legislation under the order making power contained in clause 42(2)(a) will be subject to affirmative resolution. This is the usual procedure. Amendments made to secondary legislation under the order making power contained in clause 42(2)(b) will be subject to negative resolution in both Houses. This is because Parliament has already approved the powers that give rise to anything already contained in secondary legislation; any minor or technical changes to secondary legislation that are directly consequential upon new primary legislation need not be subject to the same level of scrutiny.

Areas requiring minor amendments to current regulations

122. As they all relate to existing secondary legislation, the changes described in section 5.8 will all be made under existing powers.
Definition of mental disorder and criteria for detention

123. **Clause 1** (removal of categories of mental disorder) and the related **Schedule 1** do not contain any new power to make secondary legislation. However, existing regulations under the following provisions will need to be amended as a result of the abolition of forms of mental disorder:

- Section 3(3) (admission for treatment) and section 7(3) (application for guardianship), the prescribed form for and the particulars to be included in medical recommendations
- Section 20(4) & (6) (duration of authority), prescribed forms for authorising renewal of authority to detain or keep a person subject to guardianship
- Section 21B(2) (patients who are taken into custody or return after more than 28 days), the prescribed forms for stating that the relevant conditions for continued detention or guardianship appear still to be met
- Section 32 (regulations for the purposes of Part II), various other statutory forms relating to detention and guardianship under Part II and, by virtue of section 90 (regulations for the purposes of Part VI) patients transferred into England and Wales from elsewhere in Great Britain.
- Forms relating to the reclassification of mental disorders under section 16 will no longer be required.

124. **Clause 4** (replacement of “treatability” and “care” tests with appropriate treatment test) contains no new power to make secondary legislation. However, many of the forms specified in the regulations mentioned under **clause 1** above will also need to be amended to reflect the amendments made by this clause.

125. The regulations referred to above are contained in the Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983 (No. 893).

**Code of Practice**

126. The Code of Practice provides guidance to practitioners on how they should proceed when undertaking functions under the Act. The Memorandum describes the main provisions of the Act for the guidance of all those who work with it. Both the Code and the Memorandum will need to be updated to reflect changes in the Bill.

127. Following the Bill’s introduction into Parliament the Secretary of State (in relation to England) will take the opportunity to review the content and format of both the Code of Practice and the Memorandum in consultation with stakeholders. Following redrafting to reflect any amendments to the Bill in Parliament and to reflect MPs’ and stakeholder views we will conduct a full twelve-week consultation on a final draft. We are informed by the Welsh Assembly government that in Wales, the Welsh Ministers intend to draft a separate Code of Practice applicable in relation to Wales. Welsh Ministers will then engage in full consultation on the draft and subsequently issue the Code in line with procedures applicable to them and the National Assembly for Wales.

128. Once the Code of Practice for England has been amended to take on board any relevant comments it will be laid before both Houses of Parliament for forty days, during which period both Houses will have an opportunity to pass a resolution requiring the code or any amendment to it to be withdrawn.

**Mental Health Review Tribunal Rules**

129. The Mental Health Review Tribunal Rules 1983 (No. 942) will need to be updated to reflect changes made in the Bill. In particular the Rules will need to reflect how the
Tribunal should conduct itself in relation to patients on SCT. The abolition of categories of disorder will also require a small number of amendments to these rules- which are made by the Lord Chancellor under section 78 of the 1983 Act.

130. We will be taking this opportunity to review the entirety of the Rules thoroughly using a working group made up of Tribunal members. Following an initial redrafting we will conduct a full twelve-week consultation. Once the draft rules have been recast to take on board any relevant comments which arise from the consultation the Rules will be laid for approval by a resolution of each House of Parliament.

Nearest relatives

131. We have made contact with the Secretary to the Civil Procedure Rules Committee to take forward changes to the Civil Procedures Rules which will be required as a result of our amendments to the provisions for the displacement of the nearest relative.

Bournewood Safeguards - Analysis of Regulation Making Powers in Schedule 6 to be introduced into the Mental Capacity Act 2005 through the Mental Health Bill.

132. Please note that all paragraph numbers referred to in section 6 of this Memorandum refer to paragraphs in Schedule 6 of the Bill.

Information to be provided with request for authorisation

The policy intention

133. To ensure that appropriate information is included in requests for standard authorisations of deprivation of liberty.

What the primary legislation says

134. Paragraph 31 says that a request for a standard authorisation must include the information (if any) required by regulations.

What the delegated powers will cover

135. The regulations will specify the information that must be included in requests made by managing authorities to supervisory bodies for standard authorisations of deprivation of liberty. In both England and Wales there will be consultation on the details of the information that will be required, but the intention is to cover information about the person, including their ethnicity, to enable the supervisory body to appoint a suitable assessor, information about the purpose of the proposed deprivation of liberty, information from the person’s care plan and whether an urgent authorisation has been issued because the care home or hospital consider that the deprivation of liberty needs to begin immediately.

How they will complete the legislative contribution to delivery of the policy intention

136. Specifying the information to be included in requests for standard authorisations will ensure a consistent approach and will provide clarification for managing authorities, in terms of what they need to include in applications for deprivation of liberty authorisations, and for supervisory bodies, in terms of what information they should expect to receive with applications. Standardisation of the information to be supplied will make the task of applying for an authorisation more straightforward for the managing authority and will assist the supervisory body in the selection of assessors.
Why delegated powers are appropriate and the reason for choosing one kind rather than another

137. The regulations will cover procedural matters which require a statutory status to ensure consistency but do not need to be in primary legislation because they are not central to the structure of the Bournewood safeguards.

The proposed choice of parliamentary scrutiny procedure

138. Negative: this is a non-controversial procedural matter.

Timescales for completion of assessments

The policy intention

139. To ensure that the deprivation of liberty assessment process is completed within an appropriate timescale.

What the primary legislation says

140. Paragraph 33(4) says that six assessments (age, mental health, mental capacity, best interests, eligibility and no refusals) must be obtained by the supervisory body in respect of any person for whom a standard authorisation of deprivation of liberty is requested by a managing authority. The regulation-making power enables provision to be made for the period (or periods) within which assessors must carry out these assessments.

What the delegated powers will cover

141. The regulations in England will say that the supervisory body must ensure that all the assessments are completed within the period of 21 days starting on the date they receive a request for a standard authorisation of deprivation of liberty from a managing authority. In Wales, the timescales will be a matter for further consultation, but it is not intended that these would exceed the periods in England.

How they will complete the legislative contribution to delivery of the policy intention

142. The regulations will provide a statutory maximum timescale within which the assessment process must be completed, thus removing the danger that it will drag on inappropriately, which may delay provision of an appropriate care package for the person.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

143. Setting the timescale by regulations will facilitate the amendment of the timescale should it prove necessary in the light of experience of the operation of the deprivation of liberty procedures.

The proposed choice of parliamentary scrutiny procedure

144. Negative: this is a procedural issue which does not affect the nature of the safeguards and we do not have reason to believe that the timescale we propose to set would be controversial.

Information to be made available to the eligibility assessor

The policy intention

145. The eligibility assessor needs to consider whether or not, for people in hospital settings, detention under the Mental Health Act 1983 might be more appropriate than the
use of the deprivation of liberty procedures. To arrive at a decision properly in this respect, the eligibility assessor may need to obtain relevant information from the best interests assessor.

*What the primary legislation says*

146. Paragraph 47 says that regulations may require an eligibility assessor to request a best interests assessor to provide relevant eligibility information, and that the best interests assessor must provide it.

*What the delegated powers will cover*

147. The regulations will, where the eligibility assessor and best interests assessor are different people, enable the eligibility assessor to obtain from the best interests assessor information to indicate whether or not the person being assessed for deprivation of liberty in a hospital setting can be said to be objecting to the arrangements being made for his care or treatment. If the person is objecting to being in hospital or to treatment, they are not eligible to be deprived of liberty under the Bournewood safeguards and detention under the Mental Health Act 1983 may need to be considered instead.

*How they will complete the legislative contribution to delivery of the policy intention*

148. The eligibility assessor will be enabled to obtain information that will assist him in completing his assessment on a properly informed basis.

*Why delegated powers are appropriate and the reason for choosing one kind rather than another*

149. The regulations will cover a procedural matter ancillary to the primary legislation which, whilst it requires a statutory status, does not need to be in primary legislation.

*The proposed choice of parliamentary scrutiny procedure*

150. Negative: this is a procedural matter about how the assessment process will operate and is not controversial.

*Supervisory body to select assessors*

*The policy intention*

151. To ensure that assessments for standard authorisations of deprivation of liberty are only carried out by people who are properly equipped to undertake the assessments.

*What the primary legislation says*

152. Paragraphs 122 and 123 say that regulations may make provision about the selection and eligibility of people who may carry out assessments, including with regard to qualifications, experience and relationships or connections that the assessor might have with other people or establishments. There will be a minimum of two assessors and the best interests and mental health assessments are required to be carried out by different people. The regulations may also require a person to be insured in respect of liabilities that might arise in connection with the carrying out of any assessment and, in relation to where two or more assessments are to be obtained, may limit the number, kind or combination of assessments that a particular person may carry out.
What the delegated powers will cover

153. The regulations will state the type of person who is eligible to carry out each kind of assessment, the qualifications, competences and experience they will need to have, the training they will need to have undertaken and the need to ensure that the work of the assessors is covered by liability insurance. It is proposed that regulations in England should provide that:

- All assessors will need to have undertaken appropriate training in the Mental Capacity Act and the Bournewood provisions for the assessment they are to undertake.
- All assessors will have to demonstrate the published required competences for the assessment they are to undertake.
- Mental health assessment will be completed by a doctor who is approved under section 12 of the 1983 Act, or who meets the minimum criteria for such approval as set out in paragraph 12 of HSG(96)3. We will consult with professional bodies and other stakeholders on whether the role should be widened to other professions when an application is for renewal of an existing authorisation.
- Best Interests assessment will be completed by an Approved Mental Health Practitioner (AMHP) or a professional who meets the entry requirements to train as an AMHP.
- The Best Interests assessor must not be involved in the care of the person they are assessing, or work at the care home or hospital in question, or in decisions about their care. (This will mean that the best interests assessor is bringing a fresh objective view and not effectively reviewing their own decision.)
- If the proposed detention is in hospital for mental health treatment the eligibility assessor will be required to consult the best interests assessor on the question of whether the person objects.
- None of the assessors may have a personal financial interest in the care of the person they are assessing.
- The assessor may not be related to the person being assessed.
- The assessor may not be related to a person with a personal financial interest in the person’s care.

In Wales, this will be a matter for further consultation but the regulations will cover similar issues to those in England.

How will they complete the legislative contribution to delivery of the policy intention

154. The regulations will ensure that deprivation of liberty assessments are only undertaken by appropriately qualified people.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

155. The regulations cover aspects that may need to be reviewed, and possibly amended, as professional roles develop. Amendment will be more straightforward if the provisions are contained in secondary legislation.

The proposed choice of parliamentary scrutiny procedure

156. Affirmative: These regulations cover matters which are regarded as important to the nature of the safeguards being provided. While there are good reasons for covering them in secondary legislation, they merit the more stringent scrutiny provided by the affirmative
procedure in Parliament and the equivalent procedure in the National Assembly for Wales in particular because the Bournewood assessor is a new role.

**Supervisory body to appoint representative**

*The policy intention*

157. To ensure that people who are deprived of their liberty have an appropriate person to represent their interests.

*What the primary legislation says*

158. Paragraphs 130 and 134 to 138 say that appointment regulations will make provision about the selection and appointment of representatives. A “relevant person’s representative” must be appointed by the supervisory body for each person in respect of whom it grants a standard authorisation for deprivation of liberty. The supervisory body must comply with the appointment regulations, and the selection of a person as a relevant person’s representative must be made in accordance with the appointment regulations.

*What the delegated powers will cover*

159. The appointment regulations will cover the following issues

- That the procedure for appointing a representative may begin at a time after a request for a standard authorisation is made (including a time before the request has been decided).

- Who is empowered to select a representative. But the regulations may only provide that the following can select a representative:
  
  - The person to be deprived of their liberty, if having the capacity to make such a decision.
  
  - A donee of lasting power of attorney or deputy appointed by the court, if it is within the scope of their authority.
  
  - A Best Interests assessor.
  
  - The supervisory body.

- That any selection by a donee of lasting power of attorney, or by a deputy appointed by the court, will be subject to approval by a best interests assessor or the supervisory body.

- That if more than one selection is necessary, the same person may make more than one selection, or different people may make different selections.

- Who may, or may not, be selected for appointment, or appointed, as a representative (based on the potential representative’s age, suitability in that they are able to fulfil the role, independence of the care depriving the person of liberty, willingness to act and qualifications).

- The formalities of appointing a representative.

- That there may be a variation in the duties of the best interests assessor relevant to selecting a representative.
How they will complete the legislative contribution to delivery of the policy intention

160. The regulations will ensure that a person who is deprived of liberty is appropriately represented by somebody independent of the care being provided and independent of the decision to authorise deprivation of liberty.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

161. The parameters for the appointment of a relevant person’s representative are set out in the primary legislation but the regulations cover matters of detail that would not appropriately be placed in primary legislation.

The proposed choice of parliamentary scrutiny procedure

162. Negative: these are matters of procedure about how a representative will be appointed. The proposed use of the powers is what would be considered reasonable to ensure that a representative is selected and appointed in a timely manner, giving priority to the wishes of the person concerned as far as possible and ensuring that the person appointed is someone who can be expected to represent the person effectively. We would not expect our proposals to be controversial.

Monitoring of representatives

The policy intention

163. One of the expectations of a relevant person’s representative is that they will maintain contact with the relevant person in order that they can appropriately represent their interests and offer them support. The policy intention is to introduce a mechanism for identifying whether a relevant person’s representative does maintain contact with the relevant person so that, if not, consideration can be given to replacing the representative with somebody more suitable. This is to avoid a situation developing in which a person who is deprived of their liberty is in practice not being represented and may as a result not be able to request a review or appeal to the Court of Protection.

What the primary legislation says

164. Paragraph 139 says that regulations may require the managing authority to monitor the extent of a relevant person’s representative’s contact with the relevant person.

What the delegated powers will cover

165. The regulations will require the managing authority to monitor the extent of a relevant person’s representative’s contact with the relevant person and to report to the supervisory body should the managing authority have concerns about the degree of contact.

How they will complete the legislative contribution to delivery of the policy intention

166. The regulations will support the implementation of monitoring arrangements whereby concerns about the level of support being offered to the relevant person by the relevant person’s representative can be identified, and reported to the supervisory body, with a view to the matter being reviewed, and consideration being given as to whether or not there is a case for replacing the relevant person’s representative.
Why delegated powers are appropriate and the reason for choosing one kind rather than another

167. The regulations will cover a procedural matter ancillary to the primary legislation which, whilst it requires a statutory status, does not need to be in primary legislation.

The proposed choice of parliamentary scrutiny procedure

168. Negative: this is a procedural matter which is not controversial.

Termination of a relevant person’s representative’s appointment

The policy intention

169. To provide for the appointment of a relevant person’s representative to be terminated if there is reason to believe that they are no longer an effective safeguard for the rights of the person deprived of their liberty, or if there is some other appropriate reason for their appointment to be discontinued.

What the primary legislation says

170. Paragraphs 140 and 141 say that regulations may make provision about the circumstances in which the appointment of a relevant person’s representative ends, or may be ended, and for the formalities of ending the appointment.

What the delegated powers will cover

171. The regulations will say that the appointment of a relevant person’s representative must/may be terminated if:

• They die.
• The deprivation of liberty authorisation comes to an end and a new authorisation is not applied for or, if applied for, is not granted.
• The representative informs the supervisory body in writing that they are no longer willing or eligible to continue in the role.
• The relevant person, if they have capacity to do so, chooses a different person to be their representative, and that person is eligible.
• A donee or deputy, if it is within their authority to do so, chooses a different person to be the representative, and that person is eligible.
• It appears to the supervisory body that the relevant person’s representative is not keeping in touch with the person.
• It appears to the supervisory body that the relevant person’s representative is no longer eligible according to the criteria set out in regulations for selecting the representative. This is intended to cover a situation where for example the representative becomes ill and can no longer fulfil the role. Because the criteria for eligibility will be defined in regulations (see 6.5.3.1) it would not be possible for the supervisory body to say that a person was ineligible to continue as the representative because the supervisory body did not agree with the way in which they were carrying out the role.

172. The regulations will also provide for:-

• The relevant person’s representative to be informed in writing that their appointment is ended, the reason it is ended and the date on which it ends.
• Notification to the relevant person, the managing authority of the hospital or care home, any donee or deputy, any Independent Mental Capacity Advocate involved and all persons with an interest consulted by the best interests assessor.

How they will complete the legislative contribution to delivery of the policy intention

173. The regulations will enable the appointment of a relevant person’s representative to be terminated in appropriate circumstances, allowing a fresh appointment to be made where necessary to safeguard the rights of the person deprived of liberty.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

174. The regulations cover procedural matters peripheral to the primary legislation which, whilst they require a statutory status, do not need to be in primary legislation.

The proposed choice of parliamentary scrutiny procedure

175. Negative: the regulations cover procedural matters necessary to ensure that if necessary the appointment of the person’s representative can be terminated to allow a fresh appointment to be made to safeguard the interests of the person concerned. By specifying the circumstances in which this can happen the regulations will prevent inappropriate termination of appointment of a representative who is an effective champion of the rights of the person deprived of liberty. We do not have reason to consider this controversial.

Suspension of a representative’s functions

The policy intention

176. To provide for the suspension of a relevant person’s representative’s functions in circumstances in which a person in respect of whom a deprivation of liberty authorisation is in force has the capacity to decide that they do not want the representative to perform such functions. This is based on the premise that a person who has such capacity should have the right to make such a decision.

What the primary legislation says

177. Paragraph 142 says that regulations may make provision about the circumstances in which functions exercisable by, or in relation to, the relevant person’s representative may be suspended or revived. The regulations may also make provision about the formalities for implementing the suspension or revival of a function, and about the effect of the suspension or revival.

What the delegated powers will cover

178. The regulations may allow a person who is deprived of liberty, where they have the capacity to do so, to place limitations on their relevant person’s representative’s functions, and to remove any such limitations should they wish to do so.

How they will complete the legislative contribution to delivery of the policy intention

179. The regulations give the person deprived of liberty, where they have the necessary capacity, the power to determine the extent of the relevant person’s representative’s functions under the deprivation of liberty procedures.
Why delegated powers are appropriate and the reason for choosing one kind rather than another
180. They cover matters of detail that would not appropriately be placed in primary legislation.

The proposed choice of parliamentary scrutiny procedure
181. Negative: these are procedural matters which are not controversial.

Payment to, or in respect of, representatives

The policy intention
182. To enable the funding of relevant person’s representatives’ services where it is necessary to do so in order to ensure that every person who is subject to the deprivation of liberty provisions has some independent support.

What the primary legislation says
183. Paragraph 143 says that regulations may make provision for payments to be made to, or in relation to, persons exercising functions as the relevant person’s representative.

What the delegated powers will cover
184. The regulations will be used to provide for payment to, or in respect of, a relevant person’s representative who is appointed in circumstances in which it is not possible to identify a suitable relative, friend or unpaid carer to fulfil the relevant person’s representative role. They will provide for payment to be made to the individual concerned, or to any organisation that provides a relevant person’s representative service.

How will they complete the legislative contribution to delivery of the policy intention
185. The regulations will, by enabling funding support, facilitate the provision of a relevant person’s representative in circumstances in which it is not possible to identify a suitable relative, friend or unpaid carer to fulfil the relevant person’s representative role.

Why delegated powers are appropriate and the reason for choosing one kind rather than another
186. This is a matter of detail that would not appropriately be placed in primary legislation.

The proposed choice of parliamentary scrutiny procedure
187. Negative: these are procedural matters which are not controversial.

Monitoring of the operation of the deprivation of liberty safeguards

The policy intention
188. To make provision for the monitoring of the operation of the deprivation of liberty safeguards in order to be confident that the safeguards are being properly implemented.

What the primary legislation says
189. Paragraphs 153 and 154 say that regulations may:

- Require one or more prescribed bodies to monitor, and report on, the operation of the deprivation of liberty procedures in relation to England.
• Give a prescribed body authority, in connection with this monitoring function, to
  • Visit hospitals and care homes
  • Visit and interview persons accommodated in hospitals and care homes
  • Require the production of and to inspect, medical records

• Enable the National Assembly for Wales to monitor, and report on, the operation of the deprivation of liberty procedures in relation to Wales, and to enable the National Assembly for Wales to direct one or more persons or bodies to carry out the monitoring functions on its behalf.

What the delegated powers will cover

190. The power will be used to establish a monitoring function for the Bournewood safeguards with the regulatory bodies for care homes and hospitals for England. In Wales, the National Assembly for Wales will require the appropriate powers to undertake any monitoring regime deemed appropriate at the due time. The focus of the monitoring will be on the operation of the Bournewood procedures by care homes and hospitals and care will be taken to ensure that the monitoring role does not cut across the role of the Court of Protection as appeal body.

How they will complete the legislative contribution to delivery of the policy intention

191. The regulations will enable arrangements to be put in place to monitor the operation of the deprivation of liberty procedures and to identify any aspects that may need to be reviewed.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

192. The use of secondary legislation will facilitate the adjustment of the monitoring arrangements should it prove necessary in the light of experience of the operation of the proposed arrangements or in the light of any future changes in arrangements for monitoring care homes and hospitals.

The proposed choice of parliamentary scrutiny procedure

193. Affirmative for regulations for England: The regulations concern which body or bodies will monitor the Bournewood safeguards and the nature of that monitoring. This is of key interest to stakeholders on the basis that it will influence the way in which the safeguards are delivered and so merits the more stringent Parliamentary scrutiny afforded by affirmative resolution. Negative resolution is proposed for regulations regarding monitoring arrangements in Wales because National Assembly for Wales is identified as the monitoring body on the face of the Bill.

Disclosure of information

The policy intention

194. To ensure that information is available to facilitate an appropriate level of monitoring of the operation of the deprivation of liberty provisions.
What the primary legislation says

195. Paragraph 155 says that regulations may require supervisory bodies and managing authorities to disclose prescribed information to prescribed bodies. Only information relevant to the deprivation of liberty procedures may be prescribed.

What the delegated powers will cover

196. The regulations will be used to require supervisory bodies and managing authorities to provide relevant information to any body or bodies that are given monitoring responsibilities.

How they will complete the legislative contribution to delivery of the policy intention

197. They will enable the monitoring body/ bodies to collect information to support and inform their monitoring of the operation of the deprivation of liberty procedures. Account will be taken in the regulations of ensuring cross border operability in sharing of information, where this is appropriate.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

198. These are matters that do not need to be covered in primary legislation. They cover aspects that might need to be reviewed, and possibly amended, in the light of experience of the operation of the procedures and they will be easier to amend if in secondary legislation.

The proposed choice of parliamentary scrutiny procedure

199. Affirmative: This is an important matter that merits the more stringent scrutiny provided by the affirmative procedure, in Parliament and the equivalent procedure in the National Assembly for Wales.

Directions by the National Assembly for Wales

The policy intention

200. In a case where a request for a standard authorisation for deprivation of liberty is made in respect of a person receiving care and treatment in a Welsh hospital, the National Assembly for Wales will, unless a Primary Care Trust commissions the care or treatment, be the supervisory body (paragraph 172). Where the National Assembly for Wales or a Local Health Board commissions care or treatment in a case where a request for a standard authorisation for deprivation of liberty is made in respect of a person in hospital in England, the National Assembly for Wales will similarly be the supervisory body (paragraph 171(3)).

What the primary legislation says

201. The National Assembly for Wales may direct a Local Health Board to exercise, in respect of the Local Health Board’s area, any functions which the National Assembly for Wales has as supervisory body, and which are specified in the direction, but must not preclude the National Assembly for Wales from exercising the functions itself. By virtue of paragraph 158(1), such a direction must be given in regulations.

202. The National Assembly for Wales may also (either through regulations or by instrument in writing - see paragraph 158(2)), give directions:-
• To the specified Local Health Board about the Board’s exercise of any delegated functions,
• For any delegated functions to be to be exercised, on behalf of the specified Local Health Board, by a committee, sub-committee, or any officer of the Board,
• For any delegated functions to be exercised by the specified Local Health Board jointly with one or more other Local Health Boards.

What the delegated powers will cover

203. The delegated powers will permit the National Assembly for Wales to delegate functions as a supervisory body to Local Health Boards, whilst also retaining the functions for certain circumstances.

How they will complete the legislative contribution to delivery of the policy intention

204. This ensures that the National Assembly for Wales can make appropriate disposition having regard to the structure of the NHS in Wales, the needs of the people in Wales, and its own policy objectives.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

205. These are administrative rather than policy matters. Using regulatory powers allows for the appropriate flexibility should circumstances warrant it.

The proposed choice of parliamentary scrutiny procedure

206. These powers are ancillary to existing powers in s16BB of the National Health Service Act 1977. The powers to issue directions under section 16BB will, once they are transferred to Welsh Ministers under the Government of Wales Act 2006, be subject to annulment in pursuance of a resolution of the Assembly by virtue of paragraph 35 of Schedule 11 to that Act. Accordingly it is appropriate that these ancillary powers become subject to the same degree of scrutiny and corresponding procedure applying to the direction making powers under section 16BB, namely negative resolution.

Supervisory bodies: care homes

The policy intention

207. A supervisory body needs to be identified in respect of every person for whom a standard or urgent deprivation of liberty authorisation is sought. The basis on which the supervisory body will normally be identified where care homes are concerned is set out in paragraphs 173 and 174. The policy aim is to ensure that any disputes between local authorities about which should be the supervisory body do not delay the operation of the deprivation of liberty procedures.

What the primary legislation says

208. Paragraph 174(6) and (7)say that regulations may be made about arrangements that are to have effect before, upon, or after the determination of any question as to the ordinary residence of a person, and that the regulations may, in particular, authorise or require a local authority to:--

• Act as a supervisory body even though it may wish to dispute that it is the supervisory body.
• Become the supervisory body in place of another local authority.
• Recover from another local authority expenditure incurred in exercising functions as the supervisory body.

What the delegated power will cover

209. The regulations will focus on situations in which there may be some doubt about which local authority should be the supervisory body, and will ensure that a local authority takes on the responsibility while any doubts are resolved.

How they will complete the legislative contribution to delivery of the policy intention

210. They will ensure that the deprivation of liberty arrangements operate smoothly in cases where there is doubt about which local authority is the relevant supervisory body.

Why delegated powers are appropriate and the reason for choosing one kind rather than another

211. The regulations will cover a matter of detail which it is not appropriate to include in primary legislation and use of secondary legislation retains flexibility should it be required by future changes in circumstances.

The proposed choice of parliamentary scrutiny procedure

212. Negative: this is non-controversial procedural matter.

Arrangements where the same body is the managing authority and supervisory body

The policy intention

213. To ensure that an appropriate degree of independence is brought to the deprivation of liberty process in the relatively minor number of cases in which the same body are both the managing authority and supervisory body, for example where a local authority itself provides a residential care home rather than purchasing the service from another organisation.

What the primary legislation says

214. Paragraph 175(3) says that the fact that a single body is both managing authority and supervisory body does not prevent it from acting in both capacities but that regulations may, in such cases, make modifications to the arrangements that usually apply.

What the delegated power will cover

215. Regulations for England will specify that the best interests assessor cannot be an employee of the supervisory body/managing authority in these circumstances. Regulations in Wales will make similar provisions to ensure the appropriate degree of independence considered to be necessary.

How will they complete the legislative contribution to delivery of the policy intention

216. Since the best interests assessment will be a crucial element of the deprivation of liberty process, specifying that the best interests assessor must be independent of the supervisory body/managing authority in England for cases where the supervisory body and managing authority are the same body will ensure that a safe degree of independence and objectivity will be brought to the assessment process. This is considered to be similarly important in Wales, and as such there will be further consultation on how this may be achieved.
Why delegated powers are appropriate and the reason for choosing one kind rather than another

217. The regulations will cover a matter ancillary to the primary legislation which, whilst it requires a statutory status, does not need to be in primary legislation.

The proposed choice of parliamentary scrutiny procedure

218. Negative: these are procedural matters about how the assessment process will be carried out. We have no reason to believe that our intention to require the Best Interests assessor to be independent of the supervisory body/managing authority would be controversial.

7 Commencement

219. Clause 44 provides that the provisions of the Bill (“other than sections 39, 41, 45 and 46 and this section”) come into force in accordance with provision made by the Secretary of State by order made by statutory instrument. Accordingly, clauses 41 (transitional provisions and savings), 44 (commencement), 45 (commencement of section 29) and 46 (extent) will come into force at the beginning of the day on which the Bill receives Royal Assent – this is implied from subsection (1) of clause 44. Section 39 comes into force in accordance with provision made by the Lord Chancellor by order made by statutory instrument (subsection (3) of clause 44).

220. Most provisions of the Bill will be commenced at such times as the Secretary of State and the Welsh Ministers (or the Lord Chancellor), as appropriate, think appropriate or expedient. It is a usual practice for such commencement provisions to be dealt with by subordinate legislation. No Parliamentary procedure will apply to such orders, which is the usual practice.
APPENDIX 3: TRIBUNALS, COURTS AND ENFORCEMENT BILL [HL]

Memorandum by the Department for Constitutional Affairs

1. This memorandum identifies provisions for delegated legislation in the Tribunals, Courts and Enforcement Bill. The aim of the memorandum is to explain the purpose of the delegated powers taken; describe why the matter is to be left to delegated legislation; and explain the procedure selected for each power and why it has been chosen.

2. The Tribunals, Courts and Enforcement Bill will:

   • Create a new, simplified statutory framework for tribunals to provide coherence and enable future reform;
   • Unify the tribunals judiciary under a Senior President;
   • Amend the existing threshold criteria for eligibility for appointment to judicial office in order to enable a wider range of applicants to apply.
   • Unify the law relating to enforcement by seizure and sale of goods, including powers of entry to premises, and provide for greater regulation of enforcement agents;
   • Allow creditors with judgments to enforce them more effectively and to have the means to find out relevant information about debtors so as to decide on appropriate enforcement mechanisms;
   • Introduce a package of measures to help those who are willing and able to pay off their debts over time and a new personal insolvency procedure for those who have fallen into debt but have no foreseeable way out of it; and
   • Provide immunity against seizure to objects which have been lent to the UK from overseas to be included in a temporary, public exhibition at a museum or gallery.

Delegated Powers

3. The Bill contains 140 clauses and 23 Schedules, some of which contain powers to make orders, rules or regulations by Statutory Instrument. It also contains clauses which clarify or amend existing powers to make tribunal procedural rules. The annex to this memorandum identifies and explains all the relevant clauses fully. A table at the back of the annex lists all of the clauses containing delegated legislation.

4. A number of the orders, rules and regulations made under the powers in this Bill will follow the negative resolution procedure. This is because the Department considers that none of the considerations set out in paragraph 78 of the Second Report of the Joint Committee on Delegated Powers (“the Brooke Report”) apply. The 1973 Joint Committee on Delegated Legislation recommended that affirmative resolution procedure was appropriate only for:

   ii) Powers to impose or increase taxation; and
   iii) Other powers of special importance, e.g. those creating serious criminal offences.

5. The annex specifically identifies 18 clauses/Schedules where the affirmative resolution procedure is provided. Those powers are to do the following:

   • Clause 11(7) – determine parties to a case before the Upper Tribunal
• Clause 13(6) – limit the grant of permission (or leave) to appeal to the Court of Appeal
• Clause 13(12) – determine the parties to a case before the Court of Appeal
• Paragraph 30(1), Schedule 5 – amend primary legislation in connection with tribunal procedure rules
• Clause 29(1) – provide for a function of a tribunal listed in Schedule 6 to be transferred to the First-tier Tribunal or Upper Tribunal
• Clause 29(3) – provide for the function to be further transferred
• Clause 30(1) – abolish a tribunal whose functions have been transferred under clause 29
• Clause 30(2) – transfer of judicial office holders from a tribunal that is abolished to the First-tier Tribunal or Upper Tribunal (the affirmative procedure only applies if the order amends or repeals primary legislation)
• Clause 30(7) – provide for the continuation of procedural rules following a primary legislation
• Clause 30(9) – make incidental, supplemental, transitional or consequential provision or for savings (the affirmative procedure only applies if the order amends or repeals primary legislation)
• Clause 31 – align the route of appeal in Wales with that in England
• Clause 32(2) – align the route of appeal in Scotland with that in England and Wales
• Clause 33 – transfer the administrative functions of a tribunal
• Clause 34 – transfer of the power to make tribunal procedural rules
• Clause 35 – add or remove tribunals from the lists in Schedule 6
• Clause 36 – amend, repeal, or revoke enactments in connection with orders under clauses 29-34
• Clause 40(1) – make an order prescribing fees for matters dealt with tribunals (affirmative resolution applies where a tribunal does not currently have such a power)
• Clause 40(3) – add to the list of tribunals for which the Lord Chancellor can make a fees order
• Clause 48(1) – to widen the range of ‘relevant qualifications’ in terms of eligibility requirements for judicial office
• Clause 48(8) – change the point at which a person is deemed to become a barrister or solicitor (for the purposes of determining their eligibility for judicial appointment)
• Paragraph 3, Schedule 15 – make a fixed deductions scheme (attachments of earnings orders) in regulations (the affirmative resolution procedure will apply to the first regulations made under paragraph 3, with the negative resolution procedure applying thereafter)
• Clause 86 – set financial thresholds for Charging Orders (the affirmative resolution procedure will apply to the first regulations made under this power, with the negative resolution procedure applying thereafter)
• Clause 95 – make regulations under clauses 87-94 (information to recover judgment debts)
• Clause 122 – make regulations relating to debt management schemes (the affirmative resolution procedure will apply to the first regulations made under this power, with the negative resolution procedure applying thereafter)

6. Full details of these provisions and the reasons why they are subject to affirmative resolution are given in the annex.

7. The Committee may wish to note that the Bill also creates a new Rule Committee, the Tribunal Procedure Rules Committee, which is modelled on the Civil Procedure Rule Committee.

TRIBUNALS, COURTS AND ENFORCEMENT BILL: delegated powers

Part 1 - Tribunals

Background

8. The policy intention underlying Part 1 of the Bill is to create a new, simplified statutory framework for tribunals, bringing the large number of existing tribunal jurisdictions together and providing a structure for new jurisdictions and appeal rights.

9. The Bill creates two new tribunals, the First-tier Tribunal and the Upper Tribunal to hear appeals from the first tier as well other specified tribunals outside that structure. The two new tribunals will, over time, be able to absorb most existing central government tribunals and will be available for any new appeal rights which Parliament may create in the future.

10. The Bill also creates a new judicial office, the Senior President of Tribunals, to oversee the tribunal judiciary. It provides for the membership of the tribunals, rights of appeal from the tribunals and the making of new Tribunal Procedure Rules, and gives the Upper Tribunal the power to exercise a limited judicial review function in certain circumstances. The Bill also replaces the Council on Tribunals with the Administrative Justice and Tribunals Council, which will have a broader view of the whole of the administrative justice system.

11. Most of the delegated powers in this Part of the Bill fall into two groups: powers to effect the transfer of the functions of existing tribunals, their members and the responsibilities of the ministers currently sponsoring them to the new tribunal structure and the Lord Chancellor; and powers relating to the internal organisation of and procedures in the new tribunals. In assigning functions to primary and secondary legislation and as between the executive and the judiciary we have sought to follow as far as is appropriate the principles implicit in the legislation governing the organisation of the courts in England and Wales.

Clause 7: Chambers: Jurisdiction and Presidents

12. Clause 7 provides for the establishment of boundaries for the jurisdictions within the First-tier and Upper Tribunal through the creation of Chambers. These Chambers will group individual jurisdictions so that similar work is dealt with within a single Chamber and can be heard by judges and members expert in the work assigned to that Chamber. Thus the First-tier and Upper Tribunal will contain a wide range of specialist jurisdictions, with specific routes of appeal. Each Chamber will be headed by a Chamber President, appointed by the Lord Chancellor, although a Chamber President may preside over one Chamber of the First-tier and one of the Upper Tier.
Clause 7(1)

**Power conferred on:** Lord Chancellor with the concurrence of the Senior President of Tribunals

**Power exercisable by:** Order made by Statutory Instrument

**Parliamentary Procedure:** Negative resolution

13. It is intended that, initially, the division into Chambers will largely follow the current jurisdictional boundaries. But the Chambers system is intended to be flexible so that it can adapt easily to changes in the workload of the tribunals. Therefore, subsection (1) provides for the Lord Chancellor, with the concurrence of the Senior President of Tribunals, to create Chambers, by order.

14. A delegated power is necessary to ensure that the system is flexible and responsive, both in the shorter and longer term. Although the largest central government tribunals are already being administered by the Tribunals Service (a new agency within the Department for Constitutional Affairs) a small number of tribunals have yet to be transferred, and a decision has yet to be made on the transfer of tribunals funded by local government.

15. The negative resolution procedure is considered appropriate because the organisation of Chambers within the First-tier and Upper Tribunals will not be controversial. This is an administrative matter that does not alter the purpose of the tribunals involved or the extent of appeal rights (this will already have been established by Parliament).

Clause 7(9)

**Power conferred on:** Lord Chancellor and the Senior President of Tribunals, each with the concurrence of the other.

**Power exercisable by:** Order made by Statutory Instrument

**Parliamentary Procedure:** Negative resolution

16. Subsection (5) provides for the Lord Chancellor and the Senior President, each with the concurrence of the other, to be able to vary by order the distribution of functions between the Chambers in either the First-tier Tribunal or the Upper Tribunal.

17. The Chambers structure is likely to evolve over time. It will need to accommodate the future transfer of tribunals from outside the new system, as well as the creation of new jurisdictions in the future. The overriding aim will be to bring together those functions which will help and improve the ability of individual jurisdictions to offer the best possible service to users, and to do so in a way which produces a cost efficient service. So, as jurisdictions from outside the existing structure join they can be added to the most appropriate chamber or perhaps an existing chamber re-structured to allow elements of it to be merged with similar incoming jurisdictions into a new chamber.

18. Again, the negative resolution procedure is considered appropriate because the organisation of Chambers within the First-tier and Upper Tribunals will not be controversial. This is an administrative matter which does not alter the purpose of the tribunals involved or the extent of appeal rights (this will already have been established by Parliament).
Schedule 4: Chambers and Chamber Presidents: Further Provision

19. Schedule 4 covers aspects of appointment, delegation, functions of the Chamber presidents and Deputy Chamber Presidents and the assignment of Judges and other members across jurisdictions. The policy intention is that an individual member of the First-tier Tribunal or Upper Tribunal may deal with cases across a range of jurisdictions, providing they have the appropriate knowledge and experience to hear any particular case. Assignment will be a judicially owned process and will be carried out by the Senior President with the concurrence of the relevant Chamber President and the member being assigned.

Paragraph 15

Power conferred on: Lord Chancellor after consultation with the Senior President of Tribunals

Power exercisable by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution

20. The Bill does not prescribe the number of members required to hear particular cases within the First-tier Tribunal or the Upper Tribunal. Although the allocation of individual members to particular hearings is a judicial function (and therefore a matter for the Senior or Chamber President), paragraph 14 of Schedule 4 enables the Lord Chancellor, after consultation with the Senior President of Tribunals, to make provision (by order) to determine the number of members of the tribunal who are to decide matters before the tribunal. The Lord Chancellor has an interest in panel composition because of the significant resource implications of multi-member panels.

21. To prescribe in primary legislation the panel composition for each tribunal, or each function of the tribunal, would result in an unwieldy and inflexible piece of legislation, unable to cater for future changes (e.g. the creation of new jurisdictions or changes in the workload of individual tribunals).

22. The power is subject to the negative resolution procedure, as close parliamentary scrutiny of detailed matters of panel composition is not thought to be appropriate. Instead, to ensure the Lord Chancellor provides a sufficient and suitable panel, composition, by virtue of subsection (8), the order may only be made following consultation with the Senior President of Tribunals.

Clause 11: Right to appeal to Upper Tribunal

23. Clause 11 sets out the basis on which appellants can exercise a right of appeal from the First-tier tribunal to the Upper Tribunal.

Clause 11(5)(f)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution

24. The basic presumption is that an appeal on a point of law from any decision of the First-tier Tribunal lies to the Upper Tribunal, subject to permission being granted, unless the decision in question has been excluded.
25. An order making power is provided at Clause 11(5)(f) which will apply both to those jurisdictions which will become part of the new structures from the outset as well as to the tribunals which may subsequently transfer. The order making power may be used to restrict appeal rights to those that existed before the tribunal’s transfer.

26. An order making power is required as it is not possible now to encompass on the face of the Bill all excluded decisions. The extent of the First-tier and Upper Tribunal is not set and other jurisdictions may be added in the future. Those decisions which are currently excluded from onward appeal and which fall within the initial ambit of the First-tier tribunal are specified at Clause 11(5) (a) to (d).

27. The Lord Chancellor’s power to make such an order is circumscribed by subsection (6). Clause 11(6)(a) preserves existing onward appeal rights wider than a point of law. This will allow the small number of jurisdictions, such as those currently before the Lands Tribunal, to continue to hear matters of fact and law. Clause 11(6)(b) stipulates that the Lord Chancellor may only specify a decision as being an excluded decision if there was no onward right of appeal prior to the transfer. As the order making power can only be used as circumscribed i.e. to preserve but not reduce appeal rights, it is appropriate for the order making power to be regulated by means of the negative procedure.

*Clause 11(7)*

*Power conferred on:* Lord Chancellor

*Power exercised by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Affirmative resolution

28. An order making power is contained at Clause 11(7), which allows the Lord Chancellor to make provision for a person to be treated as being, or to be treated as not being, a party to a case for the purposes of making an onward appeal.

29. This provision reflects the existing social security legislation, where rights of appeal are not limited to the claimant and the Secretary of State. For example, under section 14(3) of the Social Security Act 1998, an appeal to the Commissioners may be brought by “(a) the Secretary of State; (b) the claimant and such other person as may be prescribed [in regulations]; (c) [in certain circumstances] a trade union; and (d) a person from whom it is determined that any amount is recoverable under or by virtue of section 71 or 74 of the Administration Act.”). In contrast to the 1998 Act, it is not possible at present to specify in the Bill all instances where this might be appropriate, as the extent of the First-tier and Upper tribunals is not set and may extend in the future to other jurisdictions. This power will enable those jurisdictions to be added without further primary legislation.

30. This power will be regulated by means of the affirmative procedure so that Parliament can be assured, in each instance of its use, that those with a legitimate interest in an appeal are not being restricted in their access to justice.

*Clause 13: Right to appeal to Court of Appeal etc*

31. Clause 13 sets out the basis on which appellants can exercise a right of appeal from the Upper Tribunal to the Court of Appeal.
Clause 13(6)

**Power conferred on:** Lord Chancellor

**Power exercised by:** Order made by Statutory Instrument

**Parliamentary Procedure:** Affirmative resolution

32. Clause 13(6) gives the Lord Chancellor the power to limit the grant of permission (or leave) to appeal to the Court of Appeal (in England and Wales or the Court of Appeal in Northern Ireland) unless the Upper Tribunal or the relevant appellate court considers:

- that the proposed appeal would raise some important point of principle or practice, or
- that there is some other compelling reason for the relevant appellate court to hear the appeal.

33. This provision mirrors section 55(1) of the Access to Justice Act 1999, which deals with onward appeals from the High Court or county court. It is intended to restrict second appeals (from the Upper Tribunal to the Court of Appeal) on the same point unless the wider public interest test is met. The Lord Chancellor has a legitimate interest in the grant of onward appeals because of his responsibility for the provision of judicial resources. The provision is in secondary legislation because the extent of the First-tier and Upper Tribunal is not set and other jurisdictions may be added in the future. Also, this restriction may be appropriate for some functions but not for others.

34. This power will be regulated by means of the affirmative procedure so that Parliament can be assured, in each instance of its use, that those with a legitimate interest in an appeal are not being restricted in their access to justice.

Clause 13(7)(f)

**Power conferred on:** Lord Chancellor

**Power exercised by:** Order made by Statutory Instrument

**Parliamentary Procedure:** Negative resolution

35. An order making power is provided at Clause 13(7)(f) which will apply both to those jurisdictions which will become part of the new structures from its outset as well as to the tribunals which may subsequently transfer. The order making power may be used to restrict appeal rights to those that existed before the tribunal’s transfer.

36. An order making power is required as it is not possible now to encompass on the face of the Bill all excluded decisions. The extent of the First-tier and Upper Tribunal is not set and other jurisdictions may be added in the future by agreement. Those decisions which are currently excluded from onward appeal and which fall within the initial ambit of the First-tier tribunal are specified at Clause 13(7) (a) to (c).

37. The Lord Chancellor’s power to make such an order is circumscribed by subsection (8). Clause 13(8)(a) preserves existing onward appeal rights wider than a point of law. This will allow the small number of jurisdictions to continue to hear matters of fact and law. Clause 13(8)(b) stipulates that the Lord Chancellor may only specify a decision as being an excluded decision if there was no onward right of appeal prior to the transfer. As the order making power can only be used as circumscribed i.e. to preserve but not alter
appeal rights, it is appropriate for the order-making power to be regulated by means of the negative procedure.

Clause 13(12)

**Power conferred on:** Lord Chancellor

**Power exercised by:** Order made by Statutory Instrument

**Parliamentary Procedure:** Affirmative resolution

38. Clause 13(12) provides a further order making power permitting the Lord Chancellor to make provision for a person to be treated as being or to be treated as not being, a party to a case for the purposes of a further appeal.

39. This provision reflects existing provisions where rights of appeal are not limited to the claimant and the Secretary of State. Whilst there are some existing provisions that can be included on the face of the Bill it is not possible at present to specify all instances where this might be appropriate as the extent of the First-tier and Upper tribunals is not set and may extend, by agreement, in the future to other jurisdictions. This power will enable those jurisdictions to be added without further primary legislation in relation to onward appeal rights.

40. This power will be regulated by means of the affirmative procedure so that Parliament can be assured, in each instance of its use, that those with a legitimate interest in an appeal are not being restricted in their access to justice.

Clause 13(13)

**Power conferred on:** Civil Procedure Rule Committee

**Power exercised by:** Rules by statutory Instrument

**Parliamentary Procedure:** Negative resolution

41. This provision allows for rules of court to specify time limits within which applications for onward appeal must be made. These provisions are similar to those in the Access to Justice Act 1999 which allow the courts to make rules about applications for appeal. As the appeal court would be one of the civil courts, the High Court, Court of Appeal etc it is appropriate for the these rules to be made under the existing Civil Procedure Rule Committee.

42. As they deal with procedural matters, we consider the level of scrutiny already prescribed by the Civil Procedure Act 1997 is appropriate.

Clause 18: Right to appeal to Court of Appeal etc

43. Clause 18 limits the jurisdiction in respect of applications for judicial review to the upper tribunal pursuant to clause 15(1).
Clause 18(9)

Power conferred on: Civil Procedure Rule Committee
Power exercised by: Rules by statutory Instrument
Parliamentary Procedure: Negative resolution

44. This provision allows for rules of court to be made in respect of applications, permission or leave to be treated as if it had been made by the High Court. These provisions are dealing with procedural issues in the High Court. As the appeal court would be one of the civil courts, the High Court, Court of Appeal etc it is appropriate for the these rules to be made under the existing Civil Procedure Rule Committee.

Clause 22 and Schedule 5: Procedure in the First-tier Tribunal and Upper Tribunal

Schedule 5, Part 1: Tribunal Procedure Rules

45. Clause 22 together with Schedule 5 provide for the formation, membership and scope of a Tribunal Procedure Rules Committee.

Power conferred on: Tribunal Procedure Committee
Power exercised by: Rules made by statutory instrument
Parliamentary Procedure: Negative Resolution

46. Paragraphs 2 to 19 (together with clause 21(6) (Upper Tribunal’s “judicial review” jurisdiction: Scotland) and section 26(6) (Enforcement)) specify the matters on which the Committee may make rules; these are in respect to deciding concurrent functions exercisable by both the Upper and First-tier tribunals. Paragraphs 2 to 9 include such matters as: delegation to staff; time limits; repeat applications; the tribunal acting of its own initiative; the extent to which matters may be decided without a hearing and hearing may be public or private; proceedings without prior notice; representation; evidence and witnesses (including provisions relating to the payment of expenses for those attending hearings); use of information; cost and expenses; set-off and interest; arbitration; correction and setting aside of decisions on procedural grounds. Both the Rules Committee and these powers have been modelled on existing rules committees such as that for the Civil Procedure Rules. It is not possible to define these rules on the face of the Bill as they will have to cover a number of jurisdictions: both those that will be included in the First-tier and Upper tribunals from its inception as well as those that may join subsequently. In addition rules may have to be responsive to changes in the role of individual jurisdictions as appeal rights change.

47. A low level of parliamentary scrutiny is appropriate because the rules govern only practice and procedure of the tribunals. This level of scrutiny is in keeping with other rule committees.
Schedule 5, Part 2: Tribunal Procedure Committee

Paragraph 25(1)

Power conferred on: Lord Chancellor with the concurrence of the Lord Chief Justice

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution

48. Paragraphs 20-24 of Schedule 5 set out provisions governing appointments to the Tribunal Procedure Committee. The power in paragraph 25(1) would allow the Lord Chancellor, with the concurrence of the Lord Chief Justice (and the Lord President of the Court of Session and/or the Lord Chief Justice of Northern Ireland where appropriate), to amend paragraphs 20 to 24 and so change the composition of the Tribunal Procedure Committee. It would also allow the Lord Chancellor to make any consequential changes to any other provision in paragraphs 21 to 24 or in paragraph 28(7).

49. These powers reflect the provisions in section 2A of the Civil Procedure Act 1997. They are required in order to provide flexibility in the arrangements for the constitution of the Tribunal Procedure Committee in the same way that parallel provisions operate in relation to Court Rules Committees. These provisions are necessary in order to ensure that, once established, the Committee will continue to be representative of the tribunals system without the need for further primary legislation if, in the future, other tribunals join the First-tier or Upper Tribunal.

50. The exercise of this order making power by the Lord Chancellor is circumscribed by paragraph 25(2) which requires the concurrence of Lord Chief Justice of England and Wales to any change in the membership of the Committee. Further, concurrence of the Lord President is required to any change to the power of the Lord President of the Court of Session to appoint a person with experience and knowledge of the Scottish legal system under paragraph 23(1). Additionally, any order seeking to amend the ability of the Senior President to request an appropriate senior judge to make an appointment under paragraph 24(1) must have the concurrence of the Lord President and Lord Chief Justice of Northern Ireland as well as the Lord Chief Justice of England and Wales. In addition the committee has a remit which is limited (to procedural rules). Taken together these factors make it appropriate for the power to be exercised under the negative resolution process.

Schedule 5, Part 4: Power to amend legislation in connection with Tribunal Procedure Rules

Paragraph 30(1)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution if the order amends or repeals any Act or provision of an Act; otherwise the negative resolution procedure applies

51. Paragraph 30(1), which is modelled on section 4 of the Civil Procedure Act 1997, provides the Lord Chancellor with the power to amend legislation in connection with Tribunal Procedure Rules. He may amend, repeal or revoke any enactment he considers necessary in order to facilitate the making of tribunal procedure rules.
52. The power is needed in order to ensure that any anomalies in the law relating to tribunals can be dealt with promptly and appropriately, enabling new procedures and practices to be introduced. The power will enable the Lord Chancellor to take swift remedial action. The scope of this power is narrowly defined, being limited to facilitating the making of Tribunal Procedure Rules, or in consequence of Tribunal Procedure Rules. It would not be practical or desirable to detail such provisions in primary legislation as the full scope could not be described unless the ambit of the First-tier and Upper Tribunal were fixed and static and this is not the case.

53. However, where the order affects primary legislation, the affirmative resolution procedure applies to ensure that Parliament has an opportunity to scrutinise the effect of the order on statute.

Clause 26: Enforcement

54. Clause 26 deals with the enforcement of monetary awards made by the First-tier Tribunal or the Upper Tribunal.

Clause 26(5)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution

55. Subsection (5) empowers the Lord Chancellor to make an order (in relation to decisions in England and Wales or to Northern Ireland) stipulating that a sum of a description specified in the order payable in pursuance of a decision of the First-Tier or Upper Tribunal may be recoverable as if it were payable either under an order of a county court, or under an order of the High Court, but not both.

56. This power is necessary, as the amount of the award to be enforced will determine which court should issue the warrant of control. Usually, awards over the sum of £5,000 are enforced through the High Court. Subsection (5) provides the flexibility to cater for future changes to the threshold.

57. The negative resolution procedure is being used as detailed parliamentary oversight of such changes would be inappropriate. This is because any changes to the threshold would already have been approved by Parliament in an amendment to the High Court and County Court Jurisdiction Order 1991.

Clause 29: Transfer of functions of certain tribunals

58. Clause 29 deals with the transfer of tribunal functions into the new structure.

Clause 29 (1)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

59. Subsection (1) allows Lord Chancellor, by order, to provide for a function of a scheduled tribunal (i.e. those listed in the relevant parts of Schedule 6 (see below)) to be
transferred to either the First-tier or Upper Tribunal, the employment tribunals or the Employment Appeals Tribunal. The provision allows the flexibility for transfer to both the First-tier and Upper Tier Tribunal with the question as to which of them is to exercise the function in a particular case being determined by a person under provisions of the order. It also allows the transfer of a function to the First-tier Tribunal to the extent specified in the order, and to the Upper Tribunal to the extent so specified. Parallel provisions allow corresponding flexibility in respect of employment tribunals and the Employment Appeal Tribunal. In this way, adjudicative functions that are currently spread across a wide range of tribunals can be consolidated in the new structure, better to reflect the needs of tribunal users.

Clause 29 (3)

*Power conferred on:* Lord Chancellor

*Power exercised by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Affirmative resolution

60. Subsection (3) provides that the Lord Chancellor may, by order, provide for the function to be further transferred in accordance with the provisions of subsection (1).

61. The order making powers are limited in so far as they relate to functions falling within the legislative competence of the relevant Scottish Welsh and Northern Irish legislatures. The general policy of clause 29(5) to (8) is to restrict devolved functions from being transferred to the new tribunals.

62. Under clause 29(5), the general rule is that functions of tribunals which are within the legislative competence of the Scottish Parliament or the Northern Ireland Assembly (i.e. devolved) may not be transferred to the first-tier Tribunal or Upper Tribunal. Clause 29(6) and (7) set out some exceptions. Functions in relation to appeals relating to estate agents and consumer credit, and criminal injury compensation appeals, may be transferred. But transfer of functions relating to criminal injury compensation appeals in Scotland will require the consent of Scottish Ministers.

63. Clause 29(8) provides that if any functions relating to the operation of a tribunal are exercisable by Welsh Ministers, those functions may only be transferred with the consent of the Assembly.

64. The powers given to the Lord Chancellor under subsections (1) and (3) are necessary to transfer existing tribunals already intending to join the new structures as well as to cater for the potential transfer of others (for example local government tribunals) in the future. Provision of order making powers, rather than specifying those jurisdictions which may be transferred on the face of the Bill, will provide flexibility both now and in the future.

65. Close oversight of the use of these powers will be provided by the affirmative resolution procedure (See also clause 36 below).

Clause 30: Transfers under section 29: supplementary powers

66. Where functions are transferred under clause 29, supplementary powers are needed to give the transfer full effect.
Clause 30(1)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

67. Subsection (1) gives the Lord Chancellor power to provide by order for the abolition of a tribunal whose functions have been transferred under clause 29.

68. Since the power involves the abolition, by order, of tribunals established by primary legislation, it is appropriate that oversight of its use will be provided by the affirmative resolution procedure.

Clause 30(2)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution unless the order includes an amendment or repeal of primary legislation (in which case the affirmative procedure applies)

69. Subsection (2) enables the Lord Chancellor, in transferring functions of tribunals listed in Schedule 6 (see below), to provide that where a tribunal is abolished, judicial office holders (i.e. a person who is the tribunal but is not the Secretary of State; a tribunal member; or a person who is an authorised decision-maker for a tribunal as defined in subsection (4)) are ‘mapped’ to one of the new judicial offices within either the First-tier Tribunal or the Upper Tribunal. (This power does not cover the existing office of Commissioner for the general purposes of income tax as that office is abolished by paragraph 1(1) of Schedule 8 to the Bill).

70. The power will ensure that all relevant office-holders are transferred, and that the jurisdiction can function within the new structure prior to the abolition of the original tribunal.

71. As this transfer is in effect a consequence of an order made under clause 29 it is not feasible to deal with this in primary legislation.

72. If an order made under this subsection includes an amendment or repeal of primary legislation, it is appropriate that the affirmative resolution should apply. Where an order made under this section does not do so, it is more appropriate for the negative procedure to apply (see also clause 36 below).

Clause 30(7)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution unless the order includes an amendment or repeal of primary legislation (in which case the affirmative procedure applies)

73. Subsection (7) provides that where functions of a tribunal have been transferred under section 29, the Lord Chancellor may provide, by order, for the continuation of procedural
rules following a transfer of functions, so that the jurisdiction can function within the new structure prior to the abolition of the original tribunal.

74. It is not possible or desirable to list in primary legislation every single procedural rule for every single tribunal, and it is preferable to deal with this in secondary legislation.

75. If an order made under this subsection includes an amendment or repeal of primary legislation, it is appropriate that the affirmative resolution should apply. Where an order made under this section does not do so, it is more appropriate for the negative procedure to apply.

Clause 30(9)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution unless the order includes an amendment or repeal of primary legislation (in which case the affirmative procedure applies)

76. Subsection (9) allows the Lord Chancellor to make, by order, such incidental, supplemental, transitional or consequential provision, or provision for savings as he thinks fit. The power will ensure that all relevant functions are transferred, and that the jurisdiction can function within the new structure prior to the abolition of the original tribunal.

77. It is not possible or desirable to list in primary legislation every single function of every single tribunal, and it is preferable to deal with this in secondary legislation.

78. If an order made under this subsection includes an amendment or repeal of primary legislation, it is appropriate that the affirmative resolution should apply (see also clause 36 below). Where an order made under this section does not do so, it is more appropriate for the negative procedure to apply.

Clause 31: Power to provide for appeal to Upper Tribunal from tribunals in Wales

79. Where a jurisdiction is exercised by separate tribunals for England and Wales, difficulties could arise if there were different routes of onward appeal for an English tribunal which is part of the new system, and a Welsh tribunal which is not. Clause 31 provides for an appeal to the Upper Tribunal from tribunals in Wales in two circumstances.

Clause 31(2)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

80. Subsections (1) and (2) deal with a situation where the functions of a tribunal covering England and Wales are transferred to the Upper Tribunal in respect of England only. The order-making power in subsection (2) enables the Lord Chancellor to align the route of appeal in Wales with that in England, so that in either country the appeal will lie to the Upper Tribunal rather than the court.
81. The intention is that users of these tribunals will have access to the Upper Tribunal for their onward appeals, on the same basis as users in England. As there are still tribunals which have yet to transfer into the new organisation, rather than include details of all tribunals within the Bill, it is preferred to leave the detail to secondary legislation. Because the power affects routes of appeal (and devolution issues), parliamentary scrutiny will be provided by the affirmative resolution procedure.

Clause 31(3)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

82. Subsection (3) deals with appeals from tribunals which already have a separate existence in Wales, and which are listed in Part 7 of Schedule 6 (see below). Again, the order-making power enables the Lord Chancellor to switch the route of appeal from the court to the Upper Tribunal.

83. The intention is that users of these tribunals will have access to the Upper Tribunal for their onward appeals, on the same basis as users in England. As there are still tribunals which have yet to transfer into the new organisation, rather than include details of all tribunals within the Bill, it is preferred to leave the detail to secondary legislation. Because the power affects routes of appeal (and devolution issues), parliamentary scrutiny will be provided by the affirmative resolution procedure (see also clause 36 below).

Clause 32 Power to provide for appeal to Upper Tribunal from tribunals in Scotland

84. Where a jurisdiction is exercised by separate tribunals for England and Scotland, difficulties could arise if there were different routes of onward appeal for an English tribunal which is part of the new system, and a Scottish tribunal which is not. Clause 31 provides for an appeal to the Upper Tribunal from tribunals in Scotland.

Clause 32(2)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

85. Subsections (1) and (2) deal with a situation where the functions of a tribunal covering England and Wales are transferred to the Upper Tribunal. The order-making power in subsection (2) enables the Lord Chancellor to align the route of appeal for Scotland with that in England and Wales, so that in either country the appeal will lie to the Upper Tribunal rather than the court.

86. The intention is that users of these tribunals will have access to the Upper Tribunal for their onward appeals, on the same basis as users in England and Wales. As there are still tribunals which have yet to transfer into the new organisation, rather than include details of all tribunals within the Bill, it is preferred to leave the detail to secondary legislation. Because the power affects routes of appeal (and devolution issues), parliamentary scrutiny will be provided by the affirmative resolution procedure (see also clause 36 below).
Clause 33: Transfer of Ministerial responsibilities for certain tribunals

87. When tribunals are transferred either to the First-tier Tribunal or the Upper Tribunal, any administrative functions exercisable by other ministers will need to be transferred to the Lord Chancellor.

Clause 33(1)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

88. Subsection (1) empowers the Lord Chancellor to make an order transferring to himself (or to two or more Ministers of the Crown of whom one is the Lord Chancellor, or to the other Minister of the Crown concurrently with the Lord Chancellor) the administrative functions of tribunals which are currently exercised by other Ministers (including the Commissioners for Her Majesty’s Revenue and Customs). Such functions include the operation of the tribunal (such as membership, administration, accommodation and funding) and to the provision of expenses and allowances to persons attending the tribunal or attending elsewhere in connection with proceedings before the tribunal. Subsection (4) prevents the transfer of functions that are within the legislative competence of the Scottish Parliament or Northern Ireland Assembly. The tribunals to which this power relates are those listed in the relevant part of Schedule 6 to the Bill. The power is similar to the power under section 1 of the Ministers of the Crown Act 1975 which enables transfer of functions between Ministers.

89. Subsections (7) and (8) taken together prevent functions transferred to the Lord Chancellor from being transferred to another Minister of the Crown under subsection (1) or under the Ministers of the Crown Act 1975. This will replicate the effect of section 19 and Schedule 7 of the Constitutional Reform Act 2005, entrenching judiciary-related functions in the office of the Lord Chancellor, and so helping to secure the independence of the tribunals from the departments formerly responsible for them.

90. The power to do this by order provides flexibility. Where different changes are being made simultaneously in relation to a number of tribunals (for example, jurisdictions being transferred from some tribunals to the First-tier Tribunal, and the administration of other tribunals being transferred to the Lord Chancellor without a transfer of jurisdictions) it is both more convenient and presentationally simpler to achieve the changes in a single instrument. Parliamentary scrutiny is provided by the affirmative resolution procedure (see also clause 36 below).

Clause 34: Transfer of powers to make procedural rules for certain tribunals

Clause 34(1)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

91. Subsection (1) enables the Lord Chancellor, by order, to transfer to himself or to the Tribunal Procedure Committee any power to make procedural rules for tribunals listed in
the relevant part of Schedule 6. Most of the powers that may be transferred under this clause are currently exercisable by the Secretary of State. The power will allow the Lord Chancellor to standardise the process for making rules for those tribunals listed in Schedule 6 and to transfer the responsibility for making rules for particular tribunals to the Tribunal Procedure Committee before their functions are transferred to the First-tier or Upper Tribunal.

92. Subsection (2) prevents the transfer of functions that are within the legislative competence of the Scottish Parliament or the Northern Ireland Assembly. Subsection (3) prohibits the Lord Chancellor from altering any parliamentary procedure relating to the making of the procedural rules concerned.

93. Under subsection (6), any power to make procedural rules exercised by the Tribunal Procedure Committee as a result of an order made under this section must be exercised so as to ensure that the procedures of the tribunal in question are accessible and fair; that proceedings are handled quickly and efficiently; that the rules are simple and simply expressed; and that responsibility for ensuring the quick and efficient dispatch of tribunal business rests with the tribunal’s members.

94. Again, for reasons of flexibility and simplicity, it is desirable to have a delegated power rather than using the face of the Bill. As this is a transfer of a power to make rules Parliamentary oversight is provided by means of the affirmative resolution procedure (see clause 36 below).

Clause 35: Power to amend lists of tribunals in Schedule 6

95. Clause 35 allows changes to be made to the lists in Schedule 6. Schedule 6 shows which of the powers in Chapter 2 of the Bill are exercisable in respect of which tribunals. There are three main strands, all of which provide for the transfer of functions or powers in relation to the new tribunals:

- Clause 29 deals with the transfer of tribunals’ functions, including adjudicative functions to the new tribunals under the Bill;
- Clause 33 deals with the transfer to the Lord Chancellor of executive functions in relation to tribunals; and
- Clause 34 deals with the transfer of rule-making powers to the Lord Chancellor and the Tribunal Procedure Committee.

96. Because of the number of permutations, Schedule 6 comprises seven lists:

- Part 1 lists tribunals where all three main powers are exercised;
- Part 2 lists tribunals where only the adjudicative and executive functions are to be transferred (i.e. there are no rule-making powers to transfer);
- Part 3 lists tribunals where only the adjudicative and rule-making powers are to be transferred, because all executive functions are already with the Lord Chancellor;
- Part 4 lists tribunals where only tribunals’ functions can be transferred, because agreement has not yet been reached as to the transfer of the executive and rule-making functions;
- Part 5 lists tribunals where executive functions are to be transferred to the Lord Chancellor and rule-making functions to the Tribunal Procedure Committee but no change is intended in the tribunal’s functions;
• Part 6 lists tribunals where only executive functions are to be transferred. No change is intended to the tribunal's functions, and rule-making powers are to remain with the Secretary of State; and

• Part 7 lists tribunals in Wales where appeal is intended to be to the Upper Tribunal.

Clause 35(1)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution

97. Subsection (1) enables the Lord Chancellor to add or remove tribunals from the lists in Schedule 6 so that the relevant powers can be exercised (or not exercised) in relation to those tribunals.

98. The order-making power is constrained by subsections (2), (3) and (4). Under subsection (2)(a), a tribunal created otherwise by or under an enactment (e.g. a private tribunal) cannot be brought within the new structure. Under subsection (2)(b), tribunals created on or after the last day of the Session in which the Bill is passed may not be added to any of the lists of tribunals in Schedule 6. If either the First-tier Tribunal or Upper Tribunal is to have jurisdictions created by later legislation, then the transfer will need to be effected by that legislation rather than by the machinery of clause 35. As the two new tribunals are all-purpose in nature, it is not expected that there will be a need to create any new tribunals.

99. Subsections (2)(c) and (3) preserve the autonomous position of Welsh Ministers. Subsection (4) prevents the power being used to bring any of the ordinary courts of law into the tribunal.

100. The order-making power will provide the flexibility to cater for the potential transfer of existing tribunals (for example local government tribunals) in the future. Parliamentary scrutiny is provided for by means of the affirmative resolution procedure.

Clause 36: Orders under clauses 29-34: supplementary

101. Clause 36 provides for power to amend, repeal or revoke enactments in connection with orders under sections 29-34. Given the breadth of these powers, the safeguard of the affirmative resolution procedure is adopted in each case.

Clause 38: tribunal staff and services

102. Clause 38 provides that the Lord Chancellor may only contract out certain staff functions after making an enabling order, and subject to prior consultation with Senior President of Tribunals.
Clause 38(4)

Power conferred on:   Lord Chancellor

Power exercised by:  Order made by Statutory Instrument

Parliamentary Procedure:   Negative resolution

103. Clause 37 places the Lord Chancellor under a general duty to ensure that there is an efficient and effective system of administrative support for the new tribunals structure. Clause 38(3) operates in relation to that general duty and prohibits the Lord Chancellor from contracting out functions which involve making judicial decisions or exercising judicial discretion. Clause 34(4) further limits the Lord Chancellor by requiring any contracting out of administrative function of tribunals’ staff to be authorised by order.

104. The exercise of this power is considered suitable for delegated legislation as this provision mirrors section 2 of the Courts Act 2003 (which is in turn modelled on section 27 of the Courts Act 1971). In addition the general duty will ensure that no order could be made which would undermine efficient and effective support for tribunals.

105. The power will be subject to the negative resolution procedure, as a high level of parliamentary scrutiny is not considered necessary given the Lord Chancellor’s general duty under clause 37 and that Clause 38(3) absolutely prohibits any delegated judicial decisions or discretions from being contracted out.

Clause 40: Fees

106. Clause 40 gives the Lord Chancellor power, to make an order prescribing fees for matters dealt with by the First-tier Tribunal, Upper Tribunal, Asylum and Immigration tribunal and an added tribunal.

Clause 40(1)

Power conferred on:   Lord Chancellor

Power exercised by:  Order made by Statutory Instrument

Parliamentary Procedure: Affirmative resolution where a fee is being introduced for the first time, otherwise negative resolution

107. The order may contain provisions as to scales or rates of fees, exemptions from or reductions in fees, and remission of fees in whole or in part. Before making such an order, the Lord Chancellor must consult the Senior President of Tribunals and the Administrative Justice and Tribunals Council. Where the order alters only the amount of fee payable Treasury consent is not required.

108. This power is appropriate to delegated legislation to allow for future growth in the jurisdictions of tribunals falling within its scope without the need for further primary legislation.

109. The power has been designed to cover those tribunals which currently charge a fee for their services (including the Lands Tribunal) as well as the possibility that at some point in the future it may be appropriate to charge fees in other jurisdictions. The clause is constructed to allow additional parliamentary scrutiny, by way of the affirmative resolution procedure, where a fee in respect of a particular matter is being introduced for the first time as the introduction of fees could restrict access to justice.
Clause 40(3)

*Power conferred on:* Lord Chancellor

*Power exercised by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Affirmative resolution

110. Clause 40(3) allows the Lord Chancellor by order to add to the list of tribunals for which he can make fees orders. This power may be used in the future when other, as yet unspecified, tribunals are added to the structure. The affirmative procedure allows this to be achieved by order but with a high level of parliamentary scrutiny as fee issues relate to access to justice.

Clause 43 Abolition of the Council on Tribunals

111. The Council on Tribunals keeps under review, and reports on, the constitution and working of tribunals under its supervision, and where necessary considers and reports on the administrative procedures of statutory inquiries. It is intended that the existing Council will be abolished and replaced by a new body – the Administrative Justice and Tribunals Council (AJTC). While exercising a similar role in relation to tribunals as that currently exercised by the Council on Tribunals, the AJTC will also be charged with taking full account of the broader administrative justice landscape. When clause 43 is brought into force, the Council on Tribunals and its Scottish Committee will be abolished.

Clause 43(3)

*Power conferred on:* Lord Chancellor

*Power exercised by:* Order made by Statutory Instrument

*Parliamentary Procedure:* Negative resolution

112. Subsection (3) empowers the Lord Chancellor to transfer to the Administrative Justice and Tribunals Council any property, rights and liabilities of the Council on Tribunals and the Scottish Committee of the Council on Tribunals.

113. On the abolition of the Council on Tribunals, it will be necessary for the successor body, the AJTC, to take over any existing property, rights or liabilities. Rather than listing these of the face of the Bill, it is more appropriate to do so in secondary legislation. Since the order-making power effects an administrative transfer (no new rights or liabilities are created), a high level of parliamentary scrutiny would be inappropriate.

Schedule 7 Administrative Justice and Tribunals Council

114. Schedule 7 deals with the membership, committees and functions of the Administrative Justice and Tribunals Council.
Paragraph 26(2)

Power conferred on: Lord Chancellor; the Scottish Ministers; the Welsh Ministers

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative resolution

115. Under paragraph 15(1) of Schedule 7, the AJTC is charged with keeping under review and reporting on the constitution and working of “listed tribunals in general and each listed tribunal”.

116. Paragraph 26 of Schedule 7 defines “listed tribunal” for these purposes. Sub-paragraph (1) covers the First-tier tribunal and the Upper Tribunal. Sub-paragraph (2) provides for an authority to list additional tribunals for the purposes of AJTC oversight. Sub-paragraph (3) delineates who the listing authority may be and paragraphs (4) to (7) further circumscribe the power to list a tribunal.

117. Listing each tribunal on the face of the Bill would be cumbersome and inflexible. It is envisaged that this power will be used to designate all of the tribunals for which the present Council on Tribunals and its Scottish Committee have oversight, in order to provide continuity when the Council on Tribunals is abolished. A high level of Parliamentary scrutiny is not therefore considered necessary. The power under which tribunals are currently designated as falling within the remit of the Council on Tribunals or its Scottish Committee may be found in section 16(2) of the Tribunals and Inquiries Act 1992. That power is subject to the negative resolution procedure.

Schedule 9 tribunals: transitional provision

Part 1: General and Miscellaneous

Paragraph 2(1) (Membership of the Tribunal Procedure Committee)

Power conferred on: Lord Chancellor

Power exercised by: Order made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

118. This paragraph gives the Lord Chancellor the power to make provision for a member of a listed tribunal to be treated for the purposes of Paragraph 22(1) of Schedule 5 (the Lord Chief Justice’s appointments to the Tribunal Procedure Committee) as falling within paragraphs (a), (b) and (c) of that sub-paragraph.

119. This power will enable the Tribunal Procedure Committee to be established before the First-tier Tribunal and Upper Tribunal come into existence by drawing in membership from the existing tribunals. It will also allow tribunals intending to transfer into the First-tier Tribunal and Upper Tribunal to participate in the rule-making process before they join those structures.

120. These provisions cannot be made more specific on the face of the Bill as there is not yet a set timetable for transfer into the new structures. A high level of parliamentary scrutiny is considered unnecessary as this power can only be exercised to increase the scope of the Rule Committee’s membership (the transfer of tribunals to the new structures is of course governed by the affirmative resolution procedure) (see clause 29 above).
Part 3 Judges and other members of First-tier and Upper tribunals: pension where office acquired under clause 27(2)

**Paragraph 12(2) and (6)**

*Power conferred on:* Lord Chancellor  
*Power exercised by:* Regulations made by Statutory Instrument  
*Parliamentary Procedure:* Negative resolution

121. The Bill makes provision for office holders who are members of a non judicial pension scheme either to remain a member of that existing scheme, or elect to transfer into the judicial pension scheme established under Part 1 of the Judicial Pensions and Retirement Act 1993. Paragraph 12(2) provides for the Lord Chancellor to prescribe the circumstances, time and manner in respect of opt-in elections. Paragraph 12(6) gives the Lord Chancellor the power to prescribe the effective date to be applied when an election is made to transfer service from a non judicial pension scheme into the judicial pension scheme after the office holder has ceased to hold office.

122. It would not be possible to put this information on the face of the Bill, as the dates in question relate to the circumstances of individual office holders. The order-making power will be needed in the future as jurisdictions are brought within the remit of the First-tier and Upper Tribunal.

123. The negative resolution process is appropriate as the scope of these powers is limited to when an individual elects that change.

**Part 2: Judicial Appointments**

**Clause 48: “Relevant qualification” in section 47: further provision**

*Clause 48(1)*

*Power conferred on:* The Lord Chancellor  
*Power exercisable by:* Statutory instrument  
*Parliamentary procedure:* Affirmative resolution

124. The Bill widens the pool of authorised bodies whose members would become eligible for judicial appointment. Although it is not currently envisaged that groups other than legal executives, patents agents and trade mark attorneys will become eligible for judicial office, there is a possibility that other groups might be thought suitable in the future. This order-making power provides the flexibility to widen the range of “relevant qualifications”, and therefore to widen the pool from which judicial appointments may be made. It is appropriate to provide flexibility in a developing profession, in order to cover groups who may demonstrate in the future the appropriate skills for judicial office.

125. One example might be notaries, who carry out a range of specialist legal duties for private and commercial clients involved in international trade or with property or business overseas. Many notaries are also qualified as barristers or solicitors, but by no means all, and the Notaries Society (their representative body) refers to the notarial specialism as “the third and oldest branch of the legal profession in the United Kingdom”. Notaries do not, at present, conduct cases in court, and we are not aware of any pressure from them to
be made eligible for judicial appointment. Nevertheless, social and technological changes are already leading to increased global trade and more widespread ownership by private individuals of property and business interests abroad. It is possible to imagine such circumstances giving rise to greater demand for notaries’ skills, both within the legal profession and in some judicial functions related to their work. If it became desirable to open up some, probably specialist, judicial appointments to them, the power would enable that to be done without enacting further primary legislation.

126. Clause 48 and the order making power will ensure that eligibility criteria remain up to date and reflect any appropriate changes across the legal profession. This will allow the Lord Chancellor to extend/amend by Order the list of organisations whose qualified members are deemed eligible for those judicial offices that are specified in the Order. The Lord Chancellor would also have powers to amend the list of judicial offices. So, for example, if Fellows of the Institute of Legal Executives (ILEX) were only initially to be eligible for the District Bench, the Lord Chancellor would have the power to specify by Order that their eligibility is to be extended to other offices, such as appropriate tribunals.

127. This power is limited in that it will enable the Lord Chancellor only to amend what constitutes a “relevant qualification”. It is not intended to give the Lord Chancellor power to amend by order the number of years’ Post Qualification Legal Experience (PQLE), which is required for a particular office, or the meaning of “legal experience”.

128. The Lord Chancellor would have to consult the Lord Chief Justice and the Judicial Appointments Commission before making an Order, or amending an Order (e.g. to extend the list of judicial offices).

129. The nature and subject matter relating to the power in clause 48(1) are such that affirmative resolution is the appropriate parliamentary procedure.

Clause 48(8)

Power conferred on: The Lord Chancellor

Power exercisable by: Statutory instrument

Parliamentary procedure: Affirmative resolution

130. This is a power to allow the Lord Chancellor to amend or supplement clauses 48(5)-(7) and which is separate from the order making power in clause 48(1).

131. This power allows the Lord Chancellor to change the point at which a person is deemed to become a barrister or solicitor (for the purposes of determining their eligibility for judicial appointment), so providing the flexibility to respond to future changes in the professional regulatory rules so as to ensure they do not impact adversely on the judicial appointments arrangements. When ILEX individuals are deemed eligible under 48(1) then the Lord Chancellor may wish to supplement (5)-(7) with a provision indicating the point at which a person is deemed to become a legal executive for the purposes of the Act.

132. An intended effect would be to create a level playing field across the profession in respect of the starting point for eligibility. For example, currently solicitors are admitted to the Roll and hence start counting time towards eligibility only once they have completed their training contract, whereas barristers do so from the date they are called to the Bar and before they have finished their pupillage.

133. It is the intention that the Lord Chancellor, should, following consultation with the Lord Chief Justice and the Judicial Appointments Commission be able by Order to vary the definition of professional eligibility.
134. Given the nature of this power, it is our view that it should be subject to the affirmative resolution procedure.

Clause 53: Orders permitting disclosures to Judicial Appointments Commission

135. Clause 53 does not in itself contain a delegated power. Rather, it amends section 90 of the Justice (NI) Act 2002 (Statutory rules) so as to subject the order-making power contained in section 5A (6) (as inserted by the Constitutional Reform Act 2005) of the 2002 Act to Parliamentary control.

136. The Committee considered this order-making power during the passage of the 2005 Act. At that stage, we gave an undertaking to the Committee that we would subject it to the negative resolution procedure and that we would use an order made under section 143 of the 2005 Act to make the necessary amendment.

137. On reflection, due to questions of vires, we do not consider that it would be appropriate to use the power contained in section 143 of the 2005 Act and, therefore, we propose to make the required amendment in this Bill.

Part 3 - Enforcement by Taking Control of Goods

Background

Procedure

138. At present, the law relating to enforcement by the seizure and sale of goods is complex, unclear and confusing. It is contained in numerous statutes, secondary legislation and common law and its language is old fashioned. There are various terms that describe this enforcement process, for example execution, distress and levy and various different procedures depending on the type of debt which is being recovered.

139. Schedule 12 to the Bill unifies the law governing enforcement by seizure and sale of goods. It prescribes a new procedure to be followed by enforcement agents when seizing and selling goods pursuant to a power under a High Court writ, a county court warrant, a magistrates’ court warrant or those enactments containing a power to seize and sell goods.

Certification of bailiffs

140. Currently persons who take control of goods are not subject to any uniform regulatory system. The Bill replaces (and extends and modifies) the certification process that currently exists for bailiffs under the Distress for Rent Rules 1988. The extended and modified certification process will apply to persons taking control of goods who are not Crown employees or constables.

Commercial Rent Arrears Recovery

141. Distress for rent is a summary remedy which enables landlords to recover rent arrears owed to them without going to court, by taking goods owned by the tenant from the let premises. It is an ancient common law remedy which, over time, has been extended and modified by successive statutes.

142. A Law Commission report of 1991 concluded that distress for rent has a number of features which make it inherently unjust to tenants, third parties and to other creditors, and recommended its abolition. The Bill therefore abolishes the current law of distress for rent, but replaces it with a modified regime, to be called Commercial Rent Arrears Recovery (or CRAR), for recovering rent arrears due under leases of commercial properties only.
Clause 82: Regulations

Power conferred on:  The Lord Chancellor

Power exercisable by:  Regulation

Parliamentary procedure:  Negative resolution

143. Clause 82 of the Bill defines “prescribed” as prescribed by regulations and “regulations” to mean regulations made by the Lord Chancellor. Such definitions apply to Part 3 of the Bill, and the Lord Chancellor therefore has the power to make delegated legislation under Part 3 of the Bill. The ways in which this power is to be used are set out in paragraphs 0-0 below.

144. It is proposed that all of the Lord Chancellor’s regulation making powers under Part 3 should be subject to the negative resolution parliamentary procedure. The Department considers this to be the appropriate level of parliamentary scrutiny as the powers are not controversial and so a high level of parliamentary scrutiny is not considered to be necessary.

Procedure

Schedule 12: Taking control of goods

Paragraph 7 – Notice of enforcement

145. An enforcement agent may not take control of goods unless the debtor has been given notice. Sub-paragraph (2) provides for the period of notice, the form and contents of the notice, how the notice is to be given and by whom to be stated in regulations. Sub-paragraph (4) enables the court to order that the minimum period of notice be reduced in circumstances prescribed in regulations. The purposes of these paragraphs is to ensure that the debtor is given adequate notice of the recovery action that is going to be taken against them and why, whilst also enabling the courts to order that the notice period can be reduced should circumstances lead the court to believe this to be necessary. (For example, if there is good reason to believe that the debtor will abscond or dispose of / destroy goods if given advance notice of imminent recovery action). These items are contained within regulations to give the necessary flexibility to allow regulations to be changed as circumstances dictate, should evaluation show that these powers need to be extended or tightened in the future.

146. The above also applies to the regulation making powers contained in paragraph 33, sub-paragraph (2), regarding providing notice when taking control of goods on the public highway.

Paragraph 8 – Time limit for taking control

147. Paragraph 8 provides that an enforcement agent may not take control of goods after a prescribed period (sub-paragraph (1)), that the period may be prescribed by reference to certain specified dates (sub-paragraph (2)) and that the prescribed period may be extended or further extended by the court in accordance with regulations (sub-paragraph (3)). This is to ensure that recovery action takes place and is completed within a reasonable time of the notice being issued, so that the debtor is not left with to face an open – ended threat of imminent recovery action. These items are contained within regulations to give the necessary flexibility to allow regulations to be changed as
circumstances dictate, should evaluation show that these powers need to be extended or tightened in the future.

**Paragraph 11 – Goods which may be taken**

148. An enforcement agent may only take control of goods that are not exempt from seizure. The goods that will be considered exempt from seizure will be listed in regulations. These regulations will also, however, enable the enforcement agent to take control of exempt goods in prescribed circumstances, so long as he provides the debtor with suitable and adequate replacements. (For example, regulations may exempt certain items of furniture, such as a dining table, from seizure. However, an enforcement agent may be allowed to seize a valuable antique dining table, so long as a suitable replacement dining table is provided for the debtor’s use, and no other goods of suitable value were available for seizure and sale.) These items are contained within regulations to give the necessary flexibility to allow the exempt list and prescribed circumstances to be amended as circumstances dictate.

**Paragraph 13 – Ways of taking control**

149. An enforcement agent must take control of goods in one of the specified ways. Sub-paragraph (3) provides that regulations may make further provision about taking control of goods in any of those ways. This is necessary to ensure clarity as to when it is considered that goods have been taken into legal control; and to prescribe circumstances when any or all of these methods would be considered unsuitable. These powers are left to delegated legislation to give the necessary flexibility to allow the exempt list and prescribed circumstances to be amended as circumstances dictate without the need to rely on primary legislation to do so.

**Paragraph 15 – Entry under warrant**

150. In normal circumstances, the warrant will authorise the enforcement agent to make repeated entry to the same premises. Sub-paragraph (3) will enable restrictions to be placed upon this right to repeat entry. This is necessary to prevent these powers being abused and potentially vulnerable debtors being subjected to unnecessary harassment. These powers are left to delegated legislation to give the necessary flexibility to allow the restrictions to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

**Paragraph 22 – Application for power to use reasonable force**

151. The court may issue a warrant authorising an enforcement agent to enter specified premises to search for and take control of goods and it may include in the warrant provision authorising the enforcement agent to use, if necessary, reasonable force to enter the premises. Sub-paragraph (1) provides that the court may not issue such a warrant or include such provision unless it is satisfied that prescribed conditions are met. Prescribed conditions need to be laid down because of the nature of the action being considered. Using reasonable force to enter premises – particularly if those premises are somebody’s home – is likely to be an emotive issue, and a step that should not be taken lightly. Strict conditions will therefore need to be laid down and followed before a judge should consider authorising an enforcement agent to use reasonable force to enter a premises. These powers are left to delegated legislation to give the necessary flexibility to allow the conditions to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

152. The above also applies to the regulation making powers contained in paragraph 31, sub-paragraphs (4) and (5), regarding taking control of goods on the public highway.
Paragraphs 24, 25 and 28 – Other provisions about powers of entry

153. It is intended that regulations will also cover other restrictions upon the powers of entry. This will include provisions regarding the use of force (including the use of force against persons), the power to enter and remain on premises, the information the enforcement agent must provide the debtor with having entered the premises, and the circumstances in which the enforcement agent may re-enter the premises. All the relevant circumstances and restrictions need to be laid down clearly in law, so that all parties are clear as to what their powers, rights and responsibilities are. These powers are left to delegated legislation to give the necessary flexibility to allow the relevant circumstances and restrictions to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

Paragraphs 31, 32 and 33 – Goods on a highway

154. Paragraph 31 gives an enforcement agent the power to take control of goods on the public highway provided that the court issues a warrant authorising him to do so. Regulations will make provision about the extent to which force against persons may be used.

155. By virtue of Paragraph 32, the enforcement agent may not act outside of prescribed times. Those times will be laid down in regulations made under powers granted in paragraph 32(1). However, circumstances in which the court may allow an enforcement agent to use these powers outside of those prescribed times will be laid down in regulations made under paragraph 32(2).

156. Paragraph 33 requires an enforcement agent, who takes control of goods on a highway or enters a vehicle on a highway, to give a notice to the debtor as to what he is doing. Regulations under Paragraph 33(2) will stipulate the form of the notice and the information which it must contain.

157. These powers are left to delegated legislation to give the necessary flexibility to allow the relevant circumstances and restrictions to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

Paragraph 34 – Inventory

158. Having taken control of goods, the enforcement agent must provide the debtor with a full list of all those goods taken into control. This is essential to enable all parties to know the full details of all relevant items taken into control. It is clearly to the benefit of all concerned that such an inventory be as clear and detailed as practicable. The form and layout of the inventory, and the details the inventory should contain, will therefore be laid out in regulations. This will ensure that all parties know the full details of all the relevant items taken into legal control. The form and content of the inventory will be contained in regulations to give the necessary flexibility to allow the relevant items to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

Paragraph 36 – Valuation

159. This cross-refers to regulations under paragraphs 39 and 48 regarding sale of goods and disposal of securities.

Paragraphs 39 – 43 – Sale (including place of sale)

160. The conduct of the sale of goods taken into legal control will be governed by regulations. This includes the period of time that is to elapse between seizure and sale; the notice that must be given to the debtor as to the date, time and place of sale, and how this
is given to the debtor; how the sale is to be conducted, and where; how the sale is to be advertised; and procedures for dealing with unsold goods and disposing of unclaimed goods. It is most important that should seized goods need to be sold, the debtor is given clear advice as to when and where this will happen. This gives the debtor one final chance to raise the funds to clear his debts before the goods reach the point of sale at auction. It is also only fair to the debtor that the sale is organised, advertised and conducted in such a way as to try to ensure the best possible price for their goods, should the sale go ahead. There also needs to be in place clear guidelines as to whom is responsible for, and what happens to, goods left unsold and unclaimed by the debtor at the end of the sale. These powers are left to delegated legislation to give the necessary flexibility to allow the relevant regulations to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

**Paragraphs 48 and 49 – Holding and disposal of securities**

161. Regulations under these paragraphs fulfil a similar function to those detailed above in the case of disposal of securities.

**Paragraph 50 – Application of proceeds**

162. Paragraph 50 contains provisions for the application of the proceeds from the sale of the goods taken into control and sold at auction. As goods can be seized and sold where the debtor is merely a co-owner (jointly owned goods can be seized and sold, and the third party will be entitled to a share of the proceeds of the sale), this paragraph has correctly identified that the share due to any co-owner may be a likely area of dispute between the debtor and the third party (and possibly other parties involved, such as e.g. the auctioneer). Sub-paragraph (7) therefore allows for regulations to make provision for a method of resolving such disputes. These powers are left to delegated legislation to give the necessary flexibility to allow the relevant regulations to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

**Paragraph 53 – Abandonment**

163. Paragraphs 52 to 54 outline the circumstances in which controlled goods will be considered as having been abandoned by the enforcement agent. As a general rule, goods will be considered as abandoned if they remain unsold after a correctly notified, advertised and conducted auction. However, paragraph 53 sub-paragraph (3) allows for regulations to specify other circumstances in which controlled goods will be considered as abandoned. These powers are left to delegated legislation to give the necessary flexibility to allow the relevant circumstances and restrictions to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

164. In addition, regulations under paragraph 54(2) will provide for arrangements as to how goods will be disposed of when they have been abandoned by the debtor i.e. the goods were taken into control, not sold, and have not been collected by the debtor after a prescribed period of time.

**Paragraph 60 – Third party claiming goods**

165. Paragraph 60 lays out the procedure to be followed by a third party who claims that the goods taken control of belong to him and not the debtor. Paragraph 60(3) states that the court may direct that the sale or disposal of those goods may go ahead if the applicant fails to make required payments into court. The amounts and times of those payments will be laid down in regulations made under paragraph 60(4)(a). If the value of the goods concerned is disputed, an independent valuation must be carried out in line with regulations made under paragraph 60(5)(a), and paid for in line with regulations made
under paragraph 60(5)(b). These powers are left to delegated legislation to give the necessary flexibility to allow the relevant circumstances and restrictions to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

*Paragraph 62 - Costs*

166. Paragraph 62 provides for the recovery of any costs associated with the process of seizure and sale of goods. The details as to what costs may be recovered, how they are to be recovered, and how disputes as to the validity and accuracy of costs charged are to be resolved, will all be contained in regulations. It is important that what can and cannot be charged by way of costs is laid down explicitly. Alleged abuses of the fee structure by enforcement agents are the main source of complaints from aggrieved members of the public against enforcement agents. It is also therefore important that there is a clearly laid down method for enabling any such disputes to be dealt with and complaints to be investigated. The details are to be left to delegated legislation to give the necessary flexibility to allow the relevant circumstances and restrictions to be evaluated and amended as circumstances dictate without the need to rely on primary legislation to do so.

**Certification of bailiffs**

*Clause 56: Certificates to act as an enforcement agent*

167. Under the new regulatory regime, no private enforcement agent will be allowed to act as an enforcement agent unless they hold a valid certificate, issued to them by a county court judge. Clause 56(2) states that regulations may make provisions about certificates.

168. These provisions may include matters such as the application fee for a certificate; making the issue of a certificate subject to conditions, including the lodging of a sum by way of security; limiting the purpose of any certificate; dealing with complaints against the holder of a certificate; and the procedure for suspending or cancelling a certificate.

169. These provisions are contained within regulations for a variety of reasons. Firstly, it is to mirror the existing certification process, which also contains similar provisions within regulations (The Distress for Rent Rules 1988 and the Distress for Rent (Amendment) Rules 1999).

170. Primarily, however, it is to provide the necessary flexibility to allow these items to be amended as circumstances dictate without the need for primary legislation to do so. For examples, fees may regularly need updating in line with inflation, whilst ongoing evaluation of the new regime may well help us to develop ways of improving how we deal with complaints or cancel certificates.

**Commercial Rent Arrears Recovery**

*Clause 69: The rent recoverable*

171. Clause 69 provides the means for calculating the sum that would actually be considered as “recoverable” under CRAR. These calculations are to be made using a system that will be outlined in regulations under subsection 4. These calculations will provide a sum that will be known as the net unpaid rent, which under subsection 5(a) should not include any interest or value added tax.

172. However, subsection 6 provides for a regulation power, which will enable regulations to outline specific circumstances where subsection 5(a) can be overridden so that the net unpaid amount will include interest or value added tax.
173. Setting out these powers within regulations will give the necessary flexibility to allow these exceptions to subsection 5(a) to be implemented as circumstances dictate, without the need for primary legislation. As with any new area of the law, CRAR is likely to develop in quite a fluid way and we would like to have the flexibility to adapt the system in the future, as further research and evaluation indicates how the operation of the system is progressing.

Clause 70: Intervention of the Court

174. Clause 70 provides the courts with the powers to intervene in a Commercial Rent Arrears Recovery dispute. It provides the courts with the powers to intervene, on the application of the tenant, and, should the court see fit, set aside the notice; or, alternatively, order that no further steps should be taken in relation to the rent claimed without a further order of the court.

175. Regulations under subsection 2 may make provision for the further orders that may be made, and the grounds of which the court must be satisfied before making such an order.

176. Setting out these items within regulations will give the necessary flexibility to adapt these provisions as circumstances dictate. As the new system develops, we will become more aware of circumstances where further orders would be appropriate, and the grounds on which they should be granted. As with any new area of the law, CRAR is likely to develop in quite a fluid way and we would like to have the flexibility to adapt the system in the future, as further research and evaluation indicates how the operation of the system is progressing. We would wish to be able to adapt the system without having to resort to statute every time it needs changing.

Clause 73: Right to rent from sub-tenant

177. This is best explained by way of an example. Assume that a landlord (A) rents premises to a tenant (B) and B sub-lets to a sub-tenant (C). Then assume that B defaults on his rent owed to A. In accordance with this clause, A will be permitted to serve a notice on C asking C to pay his rent (or so much of it as is owing to A) directly to A, thereby bypassing any payment from C to B. This is a unique facet of CRAR.

178. However, the landlord would of course have to give notice to B and to C of his intention to do this. The form this notice must take, the information it must contain, how it must be served, what must be done to withdraw it, and when it will take effect, will all be set out in regulations made under this clause.

179. Retaining a regulation-making power to stipulate the content of notices gives the necessary flexibility to allow the contents of notices to be changed as circumstances dictate, should evaluation show that the contents of these notices and the methods in which they are issued need to be amended in the future. A similar philosophy applies to the notices referred to in paragraph 7 of schedule 12.

Part 4 – Enforcement of Judgments and Orders

Background

180. The Department believes that responsible creditors who are owed money and have gained judgment in court should have the right to enforce that judgment. Equally, debtors should be protected from the oppressive pursuit of their debts. Part 4 of the Bill makes a number of changes to existing court-based methods of enforcing debts in the civil courts. Such methods include attachment of earnings orders (a means of securing payment of a debt by requiring an employer to make deductions direct from an employed debtor’s
earnings) and charging orders (which involve placing a charge on a debtor’s property). Part 4 also enables the High Court and county courts to request information about a debtor from among others the Department for Work and Pensions (DWP) and Commissioners for Her Majesty’s Revenue and Customs (HMRC) in order to assist in the enforcement of a judgment debt.

Clause 83 and Schedule 15: Attachment of earnings orders: deductions at fixed rates

181. This clause introduces a new scheme of fixed deductions to be made under attachment of earnings orders (“AEOs”) made by a county court to secure payment of a judgment debt, and introduces Schedule 15, which makes amendments to the Attachment of Earnings Act 1971 (“the AEA 1971”) for this purpose.

Schedule 15: Attachment of earnings orders: Deductions at fixed rates

<table>
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<th>Lord Chancellor</th>
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182. Paragraph 3 inserts a new section 6A into the AEA 1971, and subsection (2) provides a power for the Lord Chancellor to make a fixed deductions scheme in regulations. Subsections (4) and (5) provide that such regulations should be subject to the affirmative resolution parliamentary procedure for the first set of regulations made under this section, and thereafter negative. It is intended that such regulations will set out the scheme of deductions in tabular format, in a similar way as is presently used for deductions from earnings for the collection of council tax. It is envisaged that fixed deduction rates will be reviewed and revised from time to time, and as such, we consider that it is appropriate for the first such regulations to be subject to a higher level of Parliamentary scrutiny than subsequent regulations which would make minor changes to the amounts set out in fixed tables.

183. Paragraph 5 inserts a new section 9A into the AEA 1971, making provision for the suspension of AEOs made under the fixed deductions scheme. Subsection (5) enables rules of court to specify the circumstances in which a court can make or revoke a suspension order of its own motion. This is in line with section 9(3) of the AEA 1971 (power of the court to vary or discharge an AEO of its own motion).

184. Paragraph 7 inserts a new Schedule 3A into the AEA 1971. Paragraph 6(4) of Schedule 3A provides an order making power for the Lord Chancellor to specify a “changeover date” (when all existing AEOs made by a county court to secure a judgment debt that are subject to the scheme of deductions specified in Part 1 of Schedule 3 to the AEA 1971, should become subject to the scheme of deductions set out in fixed tables). Paragraph 6(5) provides that such an order making power should be subject to the negative resolution parliamentary procedure. Paragraphs 13 and 14 make consequential amendments to the power at section 14(4) of the AEA 1971 (rules of court to prescribe information to be provided to the court by the debtor). Paragraphs 17 and 18 of Schedule 3A make consequential amendments to existing rule making powers in section 17(3) of the AEA 1971.
Clause 84: Attachment of earnings orders: finding the debtor’s current employer

**Power conferred on:** Lord Chancellor

**Power exercised by:** Regulation made by Statutory Instrument

**Parliamentary Procedure:** Negative resolution

185. This clause inserts sections 15A to 15D into the AEA 1971 to enable HMRC information to be provided to the courts for the purpose of re-directing a lapsed AEO.

186. Clause 84 inserts sections 15A-15C into the AEA 1971, to enable information to be provided to the courts for the purpose of re-directing a lapsed AEO, to a debtor’s current employer, by establishing an information gateway between the High Court, magistrates’ courts, county courts and Her Majesty’s Revenue and Customs, (“HMRC”). Section 15B creates an offence where a person further discloses information provided by HMRC under section 15A(5) other than for a specified permitted purpose.

187. Section 15B(8) provides a regulation making power for the Lord Chancellor to exercise, with the consent of the Commissioners for HMRC, to restrict or prohibit access to, or the supply of, information supplied by HMRC via the information gateway. It is intended that such regulations should specifically restrict rights of access of creditors and the public to information that has been supplied via the information gateway. Particularly, it is envisaged that such regulations should restrict the effect of Part 5 rule 4 of the Civil Procedure Rules 1998, (which enables parties to proceedings and other persons to obtain copies of orders made in public, such as AEOs). As the provisions whose effect we are looking to restrict are contained in secondary legislation, (rules of court), we consider that it is appropriate to provide a delegated power rather than to specify restrictions on the face of the Bill. Such a power should be a regulation rather than a rule making power to give HMRC greater control over the content of the restrictions. Section 15C provides a power for the Lord Chancellor to make regulations with the agreement of the Commissioners. Such regulation making powers are subject to the negative resolution parliamentary procedure.

Clause 86: Charging orders: power to set financial thresholds

**Power conferred on:** Lord Chancellor

**Power exercised by:** Regulations made by Statutory Instrument

**Parliamentary Procedure**

Affirmative Resolution for the first order and negative resolution thereafter

188. The Lord Chancellor is to be given regulation making powers, enabling him to provide that a charging order or order for sale may not be imposed in cases where the amount owed is less than a sum set out in those regulations. This power is set out in regulations, to allow the flexibility to amend these amounts as circumstances dictate. At the very least these sums will need occasional amendment to keep the limits in line with inflation. This will enable any such changes to be made without the need for primary legislation.

189. Clause 82 states that the first regulations he makes under these powers are subject to the affirmative resolution procedure and subsequent regulations should be subject to the negative resolution procedure.
Clause 95: Regulations

**Power conferred on:** Lord Chancellor

**Power exercised by:** Regulations made by Statutory Instrument

**Parliamentary Procedure:** Affirmative resolution (with certain exceptions)

190. This clause covers the regulation-making powers under any of clauses 87-94 relating to information requests and orders. It compels the Lord Chancellor to seek the agreement of the Commissioners for Her Majesty’s Revenue and Customs (HMRC) when making those regulations that impact on HMRC. This is established practice when working in partnership with HMRC in this way. Paragraphs 0-0 set out how the power will be used.

191. The powers are necessary because the information-sharing provisions are likely to evolve over time. In view of the sensitivities surrounding data-sharing, clause 95 specifies that regulations must be made by affirmative resolution. The exceptions to this are regulations made under clause 87 (governing how a creditor can apply to the High Court or a county court requesting information about a debtor) and clause 89 (designating an appropriate Secretary of State from whom the courts can request information), which are less sensitive matters and will therefore be subject to negative resolution procedure.

Clause 87: Application for information about action to recover judgment debt

192. Clause 87(2) specifies that an application for information about action to recover a judgment debt must comply with any provision made in regulations. We propose that such regulations should specify the circumstances in which a person may make such an application, (by way of example, following unsuccessful enforcement action or following judgment in default). Such regulation making powers are for the Lord Chancellor to exercise and should be subject to the negative resolution parliamentary procedure, (see clause 95(4) and (5)).

Clause 88: Action by the court

193. This clause specifies that a relevant court must not make an information request to the HMRC Commissioners unless regulations made under clause 94(4) and (7) are in force. This is to ensure that the scheme cannot proceed until regulations have been made which have the Commissioners’ agreement.

Clause 89: Departmental information requests

194. This clause specifies information that may be requested by the relevant court from a government department (in practice DWP and HMRC at least at first). Further feasibility studies need to be undertaken to establish what information should be obtained from other departments for the purposes of assisting a creditor to decide what information it would be appropriate to take in court to recover his debt.

195. Subsections (3)(c) and (4)(d) enable a request to be made for prescribed information. It may be the case, that whilst currently, certain information (for example, a debtor’s national insurance number) can be most easily obtained from DWP, because of the viability of electronic information links, such information might, in the future, be more easily obtained from HMRC. Therefore, to cover this eventuality, we consider that the Lord Chancellor should have regulation making powers to prescribe additional categories of information that can be requested from DWP and/or HMRC. Subsection (3) enables an information request to be made to another government department, (other than HMRC and DWP), to request prescribed information in relation to a debtor provided
that the relevant Secretary of State has been designated for the purposes of the Act. Such designation will be by regulation under Clause 89(6). The negative resolution parliamentary procedure is considered sufficient for such designation and will apply to it.

196. Regulation making powers for the Lord Chancellor under this clause are subject to the affirmative resolution parliamentary procedure (see clause 95(3), (4) and (5)).

Clause 90: Information orders

197. Subsection (1) enables the High Court and county courts to make information orders requiring prescribed third parties to provide prescribed information about the debtor. It is envisaged that the recipients of such information orders are likely to be persons such as credit reference agencies and banks, who will be asked to provide financial information relating to the debtor, but further feasibility studies will need to be undertaken. Subsections (3) to (5) make further provision about the content of such regulations.

198. These regulations can apply to specific individuals or to individuals or organisations of a particular description. This will enable the subsequent law to be appropriately framed. It will mean, for example, that banks, in general, could be ordered to provide bank account information instead of regulations having to name every bank trading in the UK.

199. Subsection (5) prevents the court using the information order scheme to obtain information from a debtor themselves or from a government department. The first exception exists because this scheme is not designed to change the Order to Obtain Information which is an extant procedure in the county courts; the second because such powers will exist as information requests.

200. Regulation making powers under this clause will be for the Lord Chancellor to exercise and will be subject to the affirmative resolution parliamentary procedure, (see clause 95(3), (4) and (5)).

Clause 93: Using the information about the debtor

201. Subsection (6) specifies that information obtained via an information order or request must not be further used or disclosed unless regulations have been made about such use and disclosure and the use or disclosure complies with such regulations.

202. Additionally subsection (7) specifies that where the information comes from HMRC, that information may only be disclosed where the Commissioners for Revenue and Customs consent. Consent can be given on a case by case basis or in a general sense.

203. We intend that such regulations will be used to put in place administrative controls over the use of information to ensure that the Article 8 rights of the debtor are protected and that the use and disclosure of such information is proportionate. Such regulations should be subject to the affirmative resolution parliamentary procedure.

Clause 94: Offence of unauthorised use or disclosure

204. This clause establishes a criminal offence for circumstances where a person discloses or uses information in an unauthorised manner. Subsection (4) specifies that use or disclosure is authorised where it is in accordance with a court order, proceeding or enactment, and is in accordance with regulations. Subsection (7) specifies that use or disclosure is authorised where it is in accordance with rules of court under subsection (7). Subsection (7) gives the Lord Chancellor power to make regulations establishing rules of court which govern access to or supply of information disclosed.
Part 5 – Debt Management and Relief

Background

Administration Orders

205. Administration Orders (AOs) are a court-administered debt management scheme for those with multiple debts. Current provisions dictate that the total included in the order must not exceed £5,000 and that there must be at least one judgment debt. The provisions governing AOs are currently set out in sections 112-117 of the County Courts Act 1984. The current scheme has little support from either the advice sector or the credit industry and the Bill takes steps to address this.

Enforcement Restriction Orders

206. Section 13(5) of the Courts and Legal Services Act (CLSA) 1990 introduced the concept of the Enforcement Restriction Order (ERO) but was never enacted due to the lack of definition of the scheme’s parameters and the type of debts that could be included. This rendered the scheme inoperable. The Bill addresses these problems by replacing relevant parts of section 13(5); reproducing the effect of some of the provisions and introducing a revised Enforcement Restriction Order (ERO) scheme. The revised scheme introduces a number of parameters that will clearly define both the scope and effect of the ERO scheme. Access will be restricted to those who have experienced a sudden and unforeseeable event that has detrimentally affected their financial position.

Debt Relief Orders

207. At present, if an individual encounters difficulty paying his debts, the remedies that are available either require him to have assets or funds available to distribute to his creditors on a regular basis or, as with bankruptcy, there is a fee to access the remedy. That means that the procedures that are currently available are inaccessible to some people, since they do not have the financial means to use them. The Bill tackles this, by creating a new remedy for the financially excluded, the Debt Relief Order.

Debt Management Schemes

208. A variety of non-statutory debt management schemes (DMSs) exist in both the voluntary and commercial sectors offering assistance to individuals with debt problems. They provide assistance in planning and managing finances and by organising repayment to creditors. Whilst schemes operate in different ways, all are reliant on creditors’ voluntary participation. The Bill enables the Lord Chancellor, or his delegate, to designate some of these schemes “approved debt management schemes”.

209. Debtors who are the subject of a plan under an approved scheme would not be vulnerable to the non-participation of a creditor because the existence of the plan would generally restrict the ability of creditors with types of debt covered by the scheme to take unilateral enforcement action.

210. Unlike existing voluntary schemes the Bill provides for regulations enabling the Lord Chancellor to allow for the writing off of the balance of debts (i.e. any amount remaining after all payments required under the plan have been made) providing the debtor has fully complied with all of the terms of the plan. This provides an incentive for compliance.

211. Such strengthened schemes may have a number of advantages compared with more formal insolvency or court-based schemes (such as the Administration Order (AO) scheme). Debtors may find them more accessible and user-friendly and they may provide a wider range of services (e.g. negotiation with creditors and help managing finances) than
formal schemes. These schemes could also be used to assist those wanting to pay their debts, but who need time, and who do not qualify for entry into the court-based AO scheme (because of insufficient surplus income) or the DRO scheme (because of having too many assets).

212. The intention is to create a framework allowing the greatest flexibility, consistent with the exercise of the ability to restrict enforcement and compose debts, for individual schemes to operate in a way that best meets the needs of their clients. In particular, it is intended that existing voluntary and commercial sector providers should be able to establish an approved DMS as part of their operation with the minimum of additional regulation.

213. It is envisaged that the framework will need to be amended over time to reflect both experience of the operation of approved DMSs alongside more formal schemes, and changes in the social and economic environment. For these reasons, the Department intends to use subordinate legislation to specify many of the features of the framework in which approved DMSs will operate. This will include requirements and minimum standards to be met by the operators and minimum requirements for the terms of such schemes (e.g. minimum planned repayments before outstanding debts can be written off).

214. The Department will undertake further research and consultation with stakeholders before exercising these powers and about the exact details to be included in regulations. This will take account, among other things, of the effectiveness of the AO reforms included in Chapter 1 of Part 5. The use of subordinate legislation to prescribe the detailed framework for approved DMSs is consistent with the need for such further consultation.

Administration Orders

Clause 98: Administration Orders

215. Clause 98 of the Bill replaces section 13 of the CLSA 1990, subsections (1) to (4) and part of subsection (5) and Part 6 of the County Courts Act 1984 (CCA 1984) with a new Part 6 of the CCA 1984. Any references to ‘sections’ in paragraphs 0-0 are to the sections of the new Part 6 of the CCA 1984.

Section 112AI: Regulations under this Part

Power conferred on: Lord Chancellor

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

216. Section 112AI enables the Lord Chancellor to make regulations for the new Part 6 of the CCA 1984. Paragraphs 0-0 below explain how it is intended to use this power. The power is necessary to ensure that the AO scheme reflects current needs and economic conditions. These powers may also be used to make changes where there is a need to react to changes in other legislation. However any such changes would be subject to consultation with stakeholders and the judiciary.

217. Regulations will be subject to the negative resolution Parliamentary procedure. The Department considers this to be the appropriate level of scrutiny as the powers are not controversial and so a high level of Parliamentary scrutiny is considered unnecessary.
218. Unlike the existing legislation, debts incurred in the course of a business and specific other debts (e.g. debts secured against an asset) will no longer be able to be included in an AO. **Section 112B(2)** provides that an order must be made for “qualifying debts” only. **Section 112AB** defines qualifying debts and includes a power for the Lord Chancellor to define in regulations debts that will not be considered to be qualifying debts.

219. It is probable that this regulation-making power will, after consultation, be used to specify those debts that are already defined as non-provable debts in bankruptcy, e.g. fines, student loans and maintenance orders in family proceedings or made under the Child Support Act 1991. This section will be used to specify any other debts that stakeholders agree should be exempt from the AO scheme. These may include debts owed to involuntary creditors (i.e. those that do not choose to advance credit/services) for example tax debts and debts owed to the water industry.

220. It is intended that the revised AO and ERO schemes, along with the proposed Debt Relief Order (DRO), being brought forward by the Insolvency Service, will be aligned with the current Individual Voluntary Arrangements and bankruptcy schemes. This will enable debtors, whose circumstances change, to move easily between the schemes.

**Total Debt & Surplus Income**

221. The current legislation (the CCA 1984) does not have the flexibility to allow the upper limit of debts to be altered in response to changes in social and economic conditions and has resulted in the debt ceiling (£5,000) remaining unchanged for 21 years. This limit is considered to be unrealistic in today’s environment,

222. **Section 13(1)** of the CLSA 1990, would have removed the upper limit entirely but this was considered undesirable. Consultation has shown a consensus that a limit is needed and that this needs to have sufficient flexibility to allow changes to be made to reflect current conditions.

223. To achieve these aims and to prevent abuse by debtors, **section 112B(6)** provides that an AO may only be made if the debtors total qualifying debts do not exceed the prescribed maximum. **Section 112AA** provides the Lord Chancellor with the power to set the maximum limit of qualifying debts that may be included in an AO.

224. A further key feature of the revised scheme is the introduction of a requirement that debtors must be able to maintain a reasonable repayment rate throughout the term of the order (up to 5 years). So, **section 112B(7)** provides that a debtor must have surplus income above a specified minimum level before they will be able to enter the scheme. **Section 112AA** empowers the Lord Chancellor to set the minimum surplus income level. In addition, **section 112AE** allows the Lord Chancellor to make regulations to define surplus income, the period over which a debtor’s surplus income is to be calculated and to allow assets to be considered when calculating surplus income. Generally, surplus income will be defined as money remaining after the payment of normal household bills.

225. When considering surplus income, the Lord Chancellor will need to take account of earnings, benefit changes, indebtedness profiles, and general economic conditions. Other publications such as the Family Expenditure Survey, published by the Office of National Statistics, will assist in these considerations.

226. Parameters such as these may need to be changed occasionally based on operational experience for the scheme to be successful. In common with other legislation where limits/parameters of this kind are set, delegated legislation is considered necessary to allow the Lord Chancellor to react quickly when and where necessary.
Repayment Requirement

227. Section 112E specifies that debtors must make repayments during the currency of an order. Sub-section (8) specifies that the court must determine the amount of instalments in accordance with regulations made by the Lord Chancellor and sub-section (9) defines payment regulations as regulations which make provision for instalments to be determined by reference to the debtor’s surplus income.

228. This section may be used to specify that a formula to be used for deciding how much of a debtor’s surplus income should be taken, for example, as a monthly instalment.

Requirements imposed by an AO

229. Section 112G(2) restricts creditors with qualifying debts from pursuing any other remedy to recover the debt, unless regulations made by the Lord Chancellor provide otherwise. Section 112G(3) provides the Lord Chancellor with the power to make regulations exempting specific classes of debt from the restrictions imposed by section 112G(2).

230. This section may be used to specify any debts that it is felt should be exempt from this restriction. It is thought that this may include debts resulting from ongoing commitments (e.g. rent, utility payments) and debts owed to involuntary creditors who are unable to avoid the debt being incurred. This section will therefore ensure that such creditors are not unduly penalised by any order. The Lord Chancellor will consult with stakeholders before exercising this power.

Provision of Information

231. A key feature of this revised scheme is that debtors will be required to keep the court informed of their circumstances. Section 112M(2) sets out that, at prescribed times, the debtor must provide to the court details of his earnings, income, assets and outgoings. Section 112M(3) requires the information to be provided in respect of the debtor’s current financial position and at such times in the future as may be prescribed. By virtue of section 112M(7), the Lord Chancellor will have power to specify in regulations, what is meant by “prescribed” in this context.

232. Debtors will generally be prevented from disposing of assets while an AO is in force without first informing the court. However, if a debtor wishes to dispose of any property, by virtue of Section 112M(4) he must, within a prescribed period, provide the Court with details of the property of which he intends to dispose, any consideration (payment) which he expects to receive and any other matters which are either prescribed by regulations or specified by the Court in an individual case. To avoid overly burdening the courts, subsection 112M(5) allows the Lord Chancellor to define property that is exempt from this requirement. This will be used to provide a list of types of assets (e.g. small household appliances, goods protected by other enactments and goods that cannot be taken and sold under enforcement including tools, books and vehicles etc used by the debtor for work purposes and clothing, bedding furniture etc needed to satisfy basic domestic needs) that are exempt from this requirement regardless of their value. It will also be used to set a minimum value threshold below which the court does not need to be informed.

233. Information provided under these provisions would be readily accessible to both creditors and the court so that any change of circumstances, “windfalls” and/or proceeds from the disposal of assets can be considered promptly ensuring that an order remains appropriate throughout.

234. The intention is that a similar approach will be taken with the revised ERO scheme in order to align them with the current Individual Voluntary Arrangements and
bankruptcy schemes allowing debtors to move easily between each of the schemes if this proves to be necessary in individual circumstances.

Calculating the debtor’s qualifying debts

235. To ensure that the reformed scheme meets its objectives, the court will take into account all of the debtor’s existing qualifying debts for the purposes of meeting the prescribed maximum, regardless of whether or not a debt is due at the time of the calculation. This enables the court to consider the impact of deferred debts that will become due during the lifetime of the order and avoid the need to revoke an order where such a debt will cause the total debt to exceed the prescribed maximum once it becomes due.

236. Sections 112AD(3) and 112AD(4) allow the Lord Chancellor to make provision about how the total amount of the debtor’s qualifying debts and how any particular debts are to be calculated to ensure that a standard approach is taken to such calculations. It is likely that these limits will need to be changed in the light of operational experience and changes to other legislation.

Enforcement Restriction Orders

Clause 99: Enforcement Restriction Orders

237. Clause 99 inserts a new Part 6A in the CCA 1984 and any references to ‘sections’ in paragraphs 0-0 are to the new sections in Part 6A of CCA 1984.

Section 117X: Power to make Regulations

Power conferred on: Lord Chancellor

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative resolution

238. Delegated powers are necessary to ensure that the scheme reflects current needs and economic conditions. These powers may also be used to make changes where there is a need to react to changes in other legislation. However any changes would be subject to consultation with stakeholders and the judiciary. A further round of consultation will also be held to seek consensus about all parameters introduced by regulation before further action is taken to implement new Part 6A.

239. The power is subject to the negative resolution Parliamentary procedure. The Department considers this the appropriate level of scrutiny as the powers are not controversial and so a high level of Parliamentary scrutiny is considered unnecessary.

Power to Make an Order

240. Section 117B(2) introduces the concept of qualifying debts, defined in section 117U(1)(a) as all debts that are not secured against an asset and that are not specified in regulations under section 117U(1)(b).

241. It is probable that this regulation making power will, after consultation, be used to specify those debts that are already defined as non-provable debts in bankruptcy, e.g. fines, student loans and maintenance orders in family proceedings or made under the Child Support Act 1991. Additionally this section will be used to specify any other debts that stakeholders agree should be exempt from the ERO scheme. These may include debts
owed to involuntary creditors (i.e. those that do not choose to advance credit/services) for example tax debts and debts owed to the water industry.

242. It is intended that the revised ERO and AO schemes, along with the proposed Debt Relief Order (DRO), being brought forward by the Insolvency Service, will be aligned with the current Individual Voluntary Agreements and bankruptcy schemes. This will enable debtors, whose circumstances change, to move easily between the schemes.

**Effect of the Order**

243. Once an order is made section 117C restricts creditors with qualifying debts from presenting a bankruptcy petition against the debtor without permission from the court. Section 117D restricts creditors from any other remedy to recover the debt while an ERO is in force again without the permission of the court. Section 117D(3) provides the Lord Chancellor with the power to specify debts that are exempted from the restrictions imposed under section 117D.

244. This section may be used to specify any debts that it is felt should be exempt from this restriction. It is thought that this may include debts resulting from ongoing commitments (e.g. rent, utility payments) and debts to involuntary creditors where the debt is not incurred because of a conscious decision to advance credit/services and creditors are therefore unable to avoid the debt being incurred. For example tax debts and debts owed to the water industry. This section will therefore ensure that they are not unduly penalised by any order. The Lord Chancellor will consult with stakeholders before exercising this power.

**Power to Require Payments in Respect of Debts**

245. Section 117F permits the court to include a requirement to make payments within an ERO, where appropriate (i.e. where the debtor has surplus income). Sub-section 117F(7) and 117F(8) allow the Lord Chancellor to make regulations to set the criteria for calculating the surplus income available and to take account of assets when making this calculation. Generally, this will be defined as money remaining after the payment of normal household bills. The criteria used will be common with the AO scheme (see clause 98).

246. When considering this the Lord Chancellor will take account of earnings, benefit changes, indebtedness profiles, and general economic conditions. Other publications such as the Family Expenditure Survey, published by the Office of National Statistics, will assist in these considerations.

**Provision of Information**

247. A key feature of this revised scheme is that the debtor will be required to keep the court informed of their circumstances. Section 117J(2) sets out that, at the prescribed time, the debtor must provide to the court details of his earnings, income, assets and outgoings. Section 117J(3) requires the information to be provided in respect of the debtor's current financial position and at such times in the future as may be prescribed. By virtue of section 117J(7), the Lord Chancellor will have power to specify, in regulations, what is meant by “prescribed” in this context.

248. Debtors will generally be prevented from disposing of assets while an ERO is in force without first informing the court. In order to avoid overly burdening the courts, sub-section 117J(5) allows the Lord Chancellor to define assets that are exempt from this requirement. This will be used to provide a list of types of assets that are exempt from this requirement regardless of their value, for example small household appliances, goods protected by other enactments or goods that cannot be taken and sold under enforcement
(e.g. tools, books, vehicles used by the debtor for work purposes and clothing, bedding furniture etc needed to satisfy basic domestic needs). It will also be used to set a minimum value threshold below which the court does not need to be informed.

249. Information provided would be readily accessible to both creditors and the court so that any “windfalls” and/or proceeds from the disposal of assets can be considered promptly ensuring that an order remains appropriate throughout.

250. It is intended that a similar approach will be taken with the revised AO scheme and the proposed DRO (being brought forward separately in this Bill), to align them with the current Individual Voluntary Agreements and bankruptcy schemes. This will allow debtors, experiencing changing circumstances, to move easily between each of the schemes if necessary.

Debt Relief Orders

251. As the provisions relating to debt relief orders are being inserted into the Insolvency Act 1986 (c.45) (“the 1986 Act”), much of the secondary legislation relating to these provisions will be made using powers already contained in the Insolvency Act 1986.

252. Section 412 of the 1986 Act provides for rules to be made by the Lord Chancellor, with the concurrence of the Secretary of State, and where relevant, the Lord Chief Justice, in relation to individual insolvency procedures. These rules are made under the negative resolution procedure but there is also a requirement under section 413 of the 1986 Act to consult the Insolvency Rules Committee, which is an advisory committee to the Lord Chancellor. The current Rules are the Insolvency Rules 1986, S.I. 1986/1925 and references in the section below to “rules” and “prescribed” are to be interpreted accordingly. Provisions on existing personal insolvency procedures are to be found at Part 5 (individual voluntary arrangements) and Part 6 (bankruptcy).

253. In addition, sections 415 and 415A of the 1986 Act make provision for fees orders to be made. Section 418 of the 1986 Act makes provision for monetary limits to be set in a statutory instrument in respect of specified provisions of the 1986 Act.

Clause 100: Debt relief orders and debt restrictions orders etc.

254. Clause 100 gives effect to Schedule 17 of the Bill. Schedule 17 contains the text of new Part 7A to be inserted into the Insolvency Act 1986. References to ‘sections’ in paragraphs 0-0 are to new Part 7A.

Section 251A(4): Debt Relief Orders

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State

Power Exercisable by: Rules

Parliamentary procedure: Negative resolution

255. Only individuals who are unable to pay their debts may apply for a debt relief order. In general terms, this section makes for provision for that and specifies the type of debt – known as a qualifying debt- that will be covered by the order. It also explains the meaning of “qualifying debt”, which cannot be an “excluded debt”.

256. Paragraph 4 goes on to say that an excluded debt means” a debt of any description prescribed for the purposes of the subsection”. Excluded debts will be prescribed in rules and will include:

• Any fine imposed for an offence
• Certain obligations arising under an order made in family proceedings
• Obligations arising under a maintenance assessment under the Child Support Act 1991
• Obligations arising under a confiscation order under s1 Drug Trafficking Offences Act 1986
• Obligation arising from a liability under a Student loan

257. The list of excluded debts will mirror those which are not provable debts in bankruptcy. The matter has been left to rules so as to enable the list to be amended or updated if necessary without recourse to primary legislation. The current provision in the Insolvency Rules 1986 is Rule 12.3. Since the determination of any new debt as a non provable debt will be subject to separate parliamentary scrutiny, it is considered that negative resolution procedure provides an appropriate level of parliamentary scrutiny.

Section 251B(2)(c) and (3): Making of application

*Power conferred on:* Lord Chancellor with the concurrence of the Secretary of State

*Power Exercisable by:* Rules

*Parliamentary procedure:* Negative resolution

258. Section 251B provides for the way in which the debtor must apply to the official receiver for an order. The section sets out some of the detail about the individual’s affairs that must be included in an application for a DRO, and also makes provision for the individual insolvency rules made under section 412 to prescribe the form and manner in which the application should be made and further information that must be supplied in support of the application.

259. The form of application and the details to be supplied in support of it are procedural matters and have been left to rules to enable revisions to be made to the form of application and information required as and when necessary.

Section 251B(4)(b): Making of application

*Power conferred on:* Lord Chancellor with the sanction of the Treasury

*Power exercisable by:* Order

*Parliamentary procedure:* Only required to be laid before parliament.

260. An application is not regarded as having been made until any fee required in connection with the application by an order under section 415 has been paid. Section 415 provides for the payment of such fees under parts 7A to 11 of the Insolvency Act in respect of the performance by the official receiver of his functions as the Lord Chancellor with the sanction of the Treasury may direct. Any fee set under this provision will be sufficient to recover the official receiver’s costs of administering the case and no more.
Section 251C(7): Duty of official receiver to consider and determine application

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State

Power Exercisable by: Rules

Parliamentary procedure: Negative resolution

261. Once an application has been made the official receiver must decide whether to make, refuse or stay the application pending further enquiries. The section sets out, amongst other things, the circumstances in which the official receiver must refuse the application. If the official receiver refuses the application he must give reasons in the prescribed manner to the debtor. The form in which notice of refusal must be given to the debtor is a procedural matter and it is felt that the negative resolution procedure is an adequate safeguard for what is effectively making a description of a required notice.

Section 251D(4)(b) and (5)(b): Presumptions applicable to the determination of an application

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State

Power Exercisable by: Rules

Parliamentary procedure: Negative resolution

262. In order to ensure a uniformity of approach to the order making process the official receiver must apply certain presumptions when determining an application for a DRO. This section sets out those presumptions. Presumptions relating to the debtor’s domicile and previous insolvency history are made based on information supplied in the application and prescribed verification checks. Such checks will involve cross checking details supplied in the application or in support of it with information held elsewhere – for example with the individual insolvency register made under Rule 6A.1 of the Insolvency Rules 1986. Since the nature of the checks to be undertaken may be subject to amendment from time to time, it is thought to be appropriate to prescribe such checks as need to be made in subordinate legislation. The details of the checks to be made will be contained in the Insolvency Rules, a body of rules that as a whole are subject to negative resolution.

Section 251E(2), (4)(b), (5): Making of debt relief orders

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State

Power Exercisable by: Rules

Parliamentary procedure: Negative resolution

263. This section makes provision for the form of the DRO, including some of the matters that must be included in the order, which must be in the prescribed form. The matter has been left to subordinate legislation because it is felt that the negative resolution procedure is an adequate safeguard for what is effectively making a description of a required notice.

264. The section also makes provision for the steps that the official receiver must take once the order has been made, including providing a copy of the order to the debtor, and allows for rules to prescribe other steps he must take in particular with regard to notifying
creditors and informing them of the grounds on which they may object. These are procedural matters and it is felt that the negative resolution procedure is an adequate safeguard.

Section 251J(6): Providing assistance to the official receiver etc

*Power conferred on:  Lord Chancellor with the concurrence of the Secretary of State*

*Power Exercisable by:  Rules*

*Parliamentary procedure:  Negative resolution*

265. This section sets out the requirements imposed on the debtor with regard to assisting the official receiver in carrying out his functions. It requires the debtor to provide the official receiver with information about his affairs and attend on the official receiver. The requirement extends so far as the official receiver may reasonably require in order to carry out his functions in relation to the application or the debt relief order made as a result of it. The debtor is also under a duty to notify the official receiver if he becomes aware of any errors or omissions in his application, or changes in his circumstances, assets or income. Subsection (6) provides that the notification must “give the prescribed particulars (if any) of the matter being notified”. Such prescribed particulars as there are will be in rules. The particulars may vary depending on the nature of the information that the debtor is required to provide to the official receiver and will be matters of detail over and above the fact that the debtor’s circumstances have changed. As such it is felt more appropriate to locate them in subordinate legislation.

Section 251K (2) and (8): Objections and Investigations

*Power conferred on:  Lord Chancellor with the concurrence of the Secretary of State*

*Power Exercisable by:  Rules*

*Parliamentary procedure:  Negative resolution*

266. Creditors are permitted to object to the making of the order on specified grounds and this section makes provision for that. In particular, the section makes provision for any person specified in the order as a creditor to object to the making of the order or his inclusion in the order or to details of the debt specified. It also gives details of how the objection must be made and requires the official receiver to consider the objection. It allows the official receiver to carry out an investigation if it seems appropriate and gives a power to the official receiver to require any person to give him information and assistance.

267. Subsection (2) requires objections must be made within the prescribed time period, on prescribed grounds in the prescribed manner and supported by any information and documents as may be prescribed.

268. Given that debt relief orders arise as a result of the debtor’s inability to pay his creditors, there is wide scope for general complaints about the fact of the order itself, rather than that there has been any unfairness or irregularity. There are, however, a number of circumstances where an objection may warrant further enquiry and since these may be detailed and varied, it is felt to be necessary to identify in rules rather than in the body of the primary legislation what might constitute a complaint that would warrant this.

269. The section also states (subsection (8)) that subject to anything prescribed in the rules as to the procedure to be followed in carrying out an investigation under this section,
an investigation may be carried out by the official receiver in such manner as he thinks fit. It is intended that rules relating to the conduct of any investigation by the official receiver will relate to the procedures he must follow when carrying out that activity, and would act in a limiting capacity on the wide ranging power given to the official receiver by the section.

Section 251L(10) Power of official receiver to revoke or amend a Debt Relief Order

*Power conferred on:* Lord Chancellor with the concurrence of the Secretary of State

*Power Exercisable by:* Rules

*Parliamentary procedure:* Negative resolution

270. This section sets out the circumstances in which the official receiver may revoke the order and gives him a power to amend the order during the moratorium period to correct errors and omissions. Revocation may take place when information provided by the debtor to the official receiver turns out to be incomplete or misleading, or where the debtor fails to comply with his duties to provide information or attend on the official receiver. The order may also be revoked if the official receiver ought not have made the order because he ought not have been satisfied the criteria were met and also if the debtor's income and property levels change (for example following a windfall) after the order has been made and the debtor would no longer meet the criteria for obtaining an order.

271. Rules may make further provision as to the procedure to be followed by the official receiver when exercising his powers under this section. It is considered that matters relating to the procedure to be followed are more appropriately placed in rules rather than in primary legislation.

Section 251M(4): Powers of court in relation to debt relief orders

*Power conferred on:* Lord Chancellor with the concurrence of the Secretary of State

*Power Exercisable by:* Rules

*Parliamentary procedure:* Negative resolution

272. This section enables persons who are dissatisfied with the actions of the official receiver to apply to the court and for the court to give directions or make any order it thinks fit. It also enables the official receiver to make an application for directions or an order in relation to any matter arising in connection with the DRO or an application for a DRO.

273. An application to the court may, subject to anything contained in the rules, be made at any time. It is intended that such rules as may be made in relation to this section will act to limit this provision which would otherwise be unlimited.
Section 251S(4): Obtaining credit or engaging in business

*Power conferred on:* Secretary of state  
*Power exercisable by:* Order  
*Parliamentary procedure:* Negative resolution

274. This section makes it an offence, if the debtor obtains credit (either alone or jointly with another person) to the extent of a prescribed amount, or trades in a name other than that which the DRO was made, without disclosing his status. His status is that there is a moratorium in force in relation to a DRO or that there is a debt relief restrictions order in force. The section also includes an explanation of the expression “obtaining credit”.

275. There is an existing statutory instrument (The Insolvency Proceedings (Monetary Limits) Order 1986 S.I. 1986/1996) that makes provision for monetary limits as specified in the Insolvency Act 1986. As with bankruptcy, the “prescribed” amount will be included in this order as this provision will be included in the list of specified sections to be covered by the power in section 418.

Section 251U(5) and (6): Approved intermediaries

*Power conferred on:* Lord Chancellor with the concurrence of the Secretary of State  
*Power Exercisable by:* Rules  
*Parliamentary procedure:* Negative resolution

276. In order to obtain a debt relief order, the debtor must make his application to the official receiver through an approved intermediary. This section defines an approved intermediary and makes provision for rules to specify the types of activities that should be undertaken by an intermediary. This is in secondary legislation to reflect the fact that the activities relate to procedural and descriptive matters that may be subject to amendment or addition as the nature of the intermediaries work evolves over time, and allows a quick response should the need for change arise.

Section 251U(4): Approved intermediaries

*Power conferred on:* Secretary of State  
*Power exercisable by:* Regulations  
*Parliamentary procedure:* Negative resolution

277. The Secretary of state may by regulations make provision as to (a) the procedure for designating persons to be competent authorities, (b) the types of persons who may not be authorised to act as approved intermediaries, (c) the procedure for dealing with applications to competent authorities for authorisation and (d) the withdrawal of designation to act as a competent authority.

278. At present it is intended that intermediaries be drawn from the free to debtor face to face advice sector, but that over time (providing the service is free to the debtor) they may be drawn from a wider pool. Given that the system may evolve and that the matters covered by these regulations require detailed provisions rather than affecting the policy it is felt that Regulations provide the most appropriate mechanism for legislating in this area.
Schedule 18: Schedule 4ZA to the Insolvency Act 1986

279. Schedule 18 contains the text of new Schedule 4ZA to be inserted into the Insolvency Act 1986. Schedule 4ZA sets out the conditions for making a debt relief order. References to ‘paragraphs’ below are to the paragraphs in new Schedule 4ZA.

**Paragraph 6: Limit on debtor’s overall indebtedness**

*Power conferred on:* Secretary of state  
*Power exercisable by:* Order  
*Parliamentary procedure:* Negative resolution

280. The total amount of the debtor’s debts on the determination date (other than unliquidated debts and excluded debts) must not exceed the prescribed amount. There is an existing statutory instrument (The Insolvency Proceedings (Monetary Limits) Order 1986 S.I. 1986/1996) that makes provision for monetary limits as specified in the Insolvency Act 1986 and this limit will be included in the order.

281. The limit will be kept under review and amended if appropriate – for example increased to take account of increases in average indebtedness. To enable a quick response should the need arise, it is not considered to be appropriate to include the limit on indebtedness in primary legislation.

**Paragraph 7(1): Limit on debtor’s surplus monthly income**

*Power conferred on:* Secretary of state  
*Power exercisable by:* Order  
*Parliamentary procedure:* Negative resolution

282. The total amount of the debtor’s monthly surplus income on the determination date must not exceed the prescribed amount. There is an existing statutory instrument (The Insolvency Proceedings (Monetary Limits) Order 1986 S.I. 1986/1996) that makes provision for monetary limits specified in the Insolvency Act 1986 and this limit will be included in the order. The limit will be kept under review and amended if appropriate – for example increased to take account of increases in the cost of living. To enable a quick response it is not considered to be appropriate to include the limit in primary legislation.

**Paragraph 7(3): Limit on debtor’s surplus monthly income**

*Power conferred on:* Lord Chancellor with the concurrence of the Secretary of State  
*Power exercisable by:* Rules  
*Parliamentary procedure:* Negative resolution

283. Rules may make provision as to how the debtor’s monthly surplus income is to be calculated and provide descriptions of income that is to be excluded for the purposes of this paragraph.

284. It is intended to align as much as possible the calculation of surplus income with what currently happens in the advice sector when financial statements are completed and
also with the work undertaken by the official receiver when he is calculating whether or not a bankrupt can afford to make payments out of income to his creditors. Since it is desirable that these various procedures are, so far as possible, aligned, it is thought more appropriate to keep the nature of the method of calculation in rules, so as to enable them to be amended if necessary as the advice sector or the official receiver change their practices.

**Paragraph 8(1): limit on value of debtor's property.**

*Power conferred on:* Lord Chancellor with the concurrence of the Secretary of State  
*Power exercisable by:* Order  
*Parliamentary procedure:* Negative resolution

285. The total amount of the debtor’s property on the determination date must not exceed the prescribed amount. There is an existing statutory instrument (The Insolvency Proceedings (Monetary Limits) Order 1986 S.I. 1986/1996) that makes provision for monetary limits specified in the Insolvency Act 1986 and this limit will be included in the order. The limit will be kept under review and amended if appropriate. To enable a quick response it is not considered to be appropriate to include the limit in primary legislation.

**Paragraph 8(2): limit on value of debtor’s property**

*Power conferred on:* Lord Chancellor with the concurrence of the Secretary of State  
*Power exercisable by:* Rules  
*Parliamentary procedure:* Negative resolution

286. Rules may make provision as to how the value of a person’s property is to be determined and make provision for particular descriptions of property to be excluded for the purposes of the paragraph. To ensure a consistency of approach, there is a need to provide guidance to the intermediaries on the most appropriate way to value the debtor’s property, but it is felt that primary legislation is not the most appropriate mechanism to do this.

**Debt Management Schemes**

**Clause 122: Regulations**

*Power conferred on:* Lord Chancellor  
*Power exercised by:* Regulations made by Statutory Instrument  
*Parliamentary Procedure:* Affirmative resolution for the first set of regulations and negative resolution thereafter (except that certain regulations under clause 112 must always be made by affirmative resolution – see below)

287. Chapter 4 of Part 5 of the Bill sets out provisions relating to debt management schemes. Clause 122 empowers the Lord Chancellor to make regulations relating to this chapter. Paragraphs 0-0 below set out how this power will be exercised.

288. The powers within this chapter are considered necessary to provide the Lord Chancellor with flexibility to prescribe a framework within which a range of different
schemes could be approved. Different schemes could target different circumstances and could be more suitable for certain debtors than court based or Insolvency Service based debt management schemes. It is likely that the framework will need to be amended from time to time to reflect changes in the perceived needs of debtors and the debt advice sector. It is intended that the detail to be set out in regulations will reflect further evaluation of the needs of multiple debtors and the operation of other provisions in this Part. It will be developed in close consultation with stakeholders and subject to full public consultation and appropriate Regulatory Impact Assessment.

289. In order to ensure adequate Parliamentary scrutiny, the first regulations under any section of this Chapter will be subject to the affirmative procedure. Subsequent regulations will be subject to the negative procedure, except for regulations under clause 112 (which amend section 98 of the Courts Act 2003) which, given that they are altering primary legislation, will always be subject to the affirmative procedure.

Clause 103 - Approval by supervising authority

290. Clause 103(2) empowers the Lord Chancellor to make provision in regulations about conditions that must be met, and considerations that must or must not be taken into account in deciding whether to grant an approval.

291. Clause 103(3) specifies that regulations may make provision about any matter listed in Schedule 21. Regulations may therefore include conditions and/or considerations about the scheme operator, including its constitution, governance, size and financial standing together with; the terms and operation of the proposed Debt management Scheme (“DMS”). These may include its scope in terms of types of debtor that the scheme will be open to and the types of debt that could be included and its procedures and decision-making criteria (in particular, how the amount of repayments under a Debt Repayment Plan (“DRP”) should be calculated). The intention is to prescribe minimum requirements applicable to all operators and schemes while preserving maximum flexibility for scheme operators to determine their own detailed rules and procedures.

Clause 104 - Applications for approval

292. Clause 104(1) provides a procedure to be specified in regulations for making an application for approval of a debt management scheme. Clause 104(2) specifies that regulations may require an application to be in a particular form, may require information to be supplied in support of an application, and/or may require a fee to be paid.

Clause 105 - Terms of approval

293. Clause 105(2) provides that the approval of a debt management scheme is subject to any terms specified in regulations. Clause 105(3) specifies that such terms may deal with the start, expiry and/or the termination of the approval. Regulations might specify, for instance, that an approval is to last for a specified period, and that the approval might terminate in certain circumstances (e.g. in the event of the operator failing to maintain adequate insurance or complaints procedures).

294. Clause 105(4) specifies that terms may impose requirements on the scheme operator including, for example, requirements to publish the scheme and to provide statistical or financial information about its operation.

295. Clause 105(5) provides that requirements might relate to any matter listed in Schedule 21. This would include requirements relating to the possibility of changes affecting the operator or the scheme or the transfer of the operation to another body (for example, a requirement that changes or transfers must be approved by the supervising authority).
Clause 105(6) specifies that regulations may make provision about terms that must or must not be included in an approval. This, again, enables minimum requirements applicable to all schemes to be prescribed.

Restrictions

Clauses 107 to 110 impose requirements on certain creditors during the currency of a DRP or during a period of protection. (Period of protection is defined at clause 125). These clauses are based on similar provisions for AOs and EROs (set out at Chapters 1 and 2 of Part 5 of the Bill respectively). These clauses also permit the Lord Chancellor to use his regulation making powers to disapply the requirements in certain cases – see below.

Clause 107 - Presentation of bankruptcy provision

Clause 107(2) specifies that the Lord Chancellor may make regulations to disapply the restriction on issuing a bankruptcy petition against the debtor during the currency of a DRP. They might for example, specify that qualifying creditors whose debt arose after the plan had been commenced will not be subject to any restriction on issuing a bankruptcy petition.

Clause 108 - Remedies other than bankruptcy

Clause 108(2) provides that regulations may disapply the restrictions on pursuing means, other than bankruptcy, to recover qualifying debts during a period of protection. They might, for instance, exempt creditors with debts arising after the commencement of a plan who advanced credit to assist the debtor deal with urgent issues (such as the replacement of a cooker or washing machine).

Clause 109 - Charging of interest etc

Clause 109(2) provides that regulations may disapply the restriction on charging interest, fees or other charges. Such regulations might allow such charges in instances where the debtor causes an unwarranted/unjustifiable delay between a request for a plan to be arranged and the plan taking effect.

Clause 110 - Stopping supplies of gas or electricity

Clause 110(6) provides that regulations may exempt suppliers of mains gas and electricity from the restriction on stopping supply. They might be used to specify that the restriction would not apply in circumstances where the debtor is responsible for unwarranted/unjustifiable delay between a request for a plan to be arranged and the plan coming into force.

Clause 112 - Registration of plans

Clause 112(1) provides that regulations make provision about the registration of DRPs, either requested or arranged, under an approved DMS in the register of judgments and orders. Clause 112(3) specifies that such regulations may amend section 98 of the Courts Act 2003.

Clause 117 - Procedure for termination

Clause 117(1) provides for regulations to specify a procedure for terminating the approval of a DMS. Clause 117(2) provides that regulations may specify a procedure that requires notice of, and/or the reasons for, an intended termination to be given, conditions
to be met before a termination takes effect, and that may prevent the termination from taking effect unless a particular period has elapsed.

304. Regulations might specify the procedure for termination on breach of the terms of an approval. It is envisaged that either the supervising authority or the scheme operator should be able to terminate an approval. Where a scheme operator wants to end the operation of a scheme and terminate the approval, regulations might provide that the operator must give the supervising authority a particular period of notice, and must comply with certain requirements for the termination to take effect, (e.g. transferring existing plans to an alternative operator).

Clause 119 - Alternatives to termination

305. Clause 119(1) specifies that regulations may make provision for alternatives to termination of an approval. Clause 119(3) specifies that regulations may allow the supervising authority to transfer the operation of the scheme to itself or to any other body.

306. Such regulations may specify that where the supervising authority terminates an approval, it may require debt repayment plans being operated under the scheme to be transferred to itself or to another approved operator.

Clause 120 - Effects of end of approval

307. Clause 120(1) specifies that regulations may make provision about the effects if the approval of a DMS ends and clause 120(2) specifies that regulations might make provision about the treatment of debt repayment plans arranged before the scheme ended. Clause 120(3) provides that such regulations can include provision to treat a plan as though an approval had not ended or as though the plan had been made under a different approved scheme.

308. Clause 120(4) specifies that regulations may make provision about cases where the scheme operator is in breach of an obligation at the time the scheme comes to an end, and clause 120(5) specifies that this may include provision to ensure that the operator is not released from the relevant obligation by virtue of the termination.

309. Such regulations will enable the transfer of debt repayment plans between operators where an approval ends, and enables plans to be treated as though originally made under a different approved scheme. However, termination of an approval should not release an operator from all his obligations under the scheme, and such regulations should specify that certain obligations, (such as making outstanding payments to creditors), might be ongoing despite termination of an approval.

Part 7 - Miscellaneous

Clause 133 - Recovery of sums payable under compromises involving ACAS

Clause 133, Section 19A(5) and (10)

Power conferred on: Civil Procedure Rule Committee

Power exercised by: Rules by statutory Instrument

Parliamentary Procedure: Negative resolution

311. This provision allows for rules of court to be made to specify a period during which a compromise sum would not be recoverable, time limits for applications to the county court or sheriff and in respect of declarations. These provisions are dealing with procedural details in the civil courts, and the matter are ones which are of a type already being made by the Civil Procedure Rule Committee in respect of the same courts. Therefore it is appropriate that the rules are made by civil procedure rule and are subject to the negative resolution.
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</tr>
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<td></td>
<td><strong>Clause 35</strong></td>
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<td>supplemental, transitional or consequential provision or for savings or savings</td>
</tr>
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<td></td>
<td><strong>35(1)</strong></td>
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<td>Para 2(1)</td>
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