HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

3rd Report of Session 2006-07

Cluster Munitions (Prohibition) Bill [HL]
Concessionary Bus Travel Bill [HL]
Corporate Manslaughter and Corporate Homicide Bill
Disabled Persons (Independent Living) Bill [HL]
Forced Marriage (Civil Protection) Bill [HL]
Further Education and Training Bill [HL]
Investment Exchanges and Clearing Houses Bill
Legal Services Bill [HL]

Government responses:

Consumers, Estate Agents and Redress Bill [HL]
Tribunals, Courts and Enforcement Bill [HL]

Ordered to be printed 13th December and published 14th December 2006

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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 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–I, 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.
3rd Report

CLUSTER MUNITIONS (PROHIBITION) BILL [HL]

1. This private member’s bill makes provision about the control and destruction of cluster munitions. There is one point which we wish to draw to the attention of the House.

2. Clause 3 gives the Secretary of State power by order subject to affirmative procedure to make “such additions to, omissions from or other modifications to this Act as he considers necessary to give effect to any amendment of relevant international humanitarian law”. It is not unusual for the Secretary of State to be given power to amend Acts for the purposes of giving effect to specific international obligations. We consider however that the term “relevant international humanitarian law”, which is not defined in the bill, is inappropriately wide. The delegation would not be inappropriate if the bill specified the instruments which give rise to the relevant law.

CONCESSIONARY BUS TRAVEL BILL [HL]

3. The main purpose of this bill is to extend mandatory bus travel concessions to travel on all local buses anywhere in England, i.e. there will be a national scheme rather than a large number of local schemes.

4. The delegated powers in the bill are all explained in a memorandum and supplementary memorandum for the Committee from the department for Transport, printed at Appendix 1. These powers include Henry VIII powers at clauses 8, 9, 10 and 13. We wish to mention only those at clauses 8 and 9.

Variation of scope of the national concession — clause 8

5. Sections 145 and 146 of the Transport Act 2000 set out the current arrangements for mandatory half-price concessions outside Greater London. Section 147 allows the Secretary of State (as respects England) by order subject to negative procedure¹ to amend sections 145 and 146 for certain specific purposes which allow the concessions to be widened (but not narrowed). The Greater London Authority Act 1999 provides for mandatory concessions within Greater London. The current arrangements are summarised at paragraph 4 of the Explanatory Notes.

6. Clause 1 replaces section 245 of the 2000 Act with provision about concessions for any journey starting elsewhere than on the London bus network and clause 6 makes related provision in connection with journeys starting on the London bus network. These arrangements are intended to take place as soon as the relevant provisions of the bill come into force, and the concession is for the full fare, not half of it.

¹ To which our predecessor Committee assented: 20th Report (1999-2000), paragraph 23.
7. Just as section 147 currently allows sections 145 and 146 of the 2000 Act to be amended to extend the scheme, clause 8 provides for an equivalent power in relation to the new arrangements. Whereas section 147 enables sections 145 and 146 only to be amended, clause 8, in contrast, allows any of Part 2 of the 2000 Act (i.e. any of sections 108 to 162) to be amended. But since only sections 145 to 150 are about travel concessions, in practice the power would appear to be limited by its purpose to changing only the law set out in those sections and making any associated amendments (including any such amendments to the bill itself – clause 11(3)). This point is satisfactorily addressed in paragraphs 17 to 20 of the supplementary memorandum. The purposes for which the new power can be used are set out in the bill and are comparable for a national scheme of full fare concessions to those set out in the current section 147 in relation to the non-national half-fare scheme. The new element (discount) referred to in paragraph 24 of the Explanatory Notes seems a natural consequence of the move from half to full concession. Accordingly, we do not find this delegation, or its level of scrutiny, to be inappropriate.

Variation of reimbursement, etc. arrangements — clause 9

8. The current arrangements for reimbursement of operators are summarised at paragraphs 24 to 26 of the memorandum. Clause 9 contains two principal powers, each a Henry VIII power, subject to affirmative procedure, to amend Part 2 (i.e. sections 108 to 162) of the 2000 Act. Each power is unlimited as to the particular provisions of Part 2 that may be amended but is clearly defined by the purposes for which, and in connection with which, they may be used. As with clause 8, we accept the explanation in paragraphs 17 to 20 of the supplementary memorandum but note that amendments to common provisions of part 2, such as sections 160 and 162 are not excluded if made for or in connection with the stated purpose.

9. Under clause 9(1) the purposes are those of securing that obligations to reimburse operators pass from travel concession authorities in England to the Secretary of State; and of securing that other functions of those authorities under sections 145A and 148 pass to the Secretary of State. Under clause 9(2), the purposes are those of securing that obligations to reimburse operators which fall on non-unitary district councils pass to county councils; and of securing that other functions of non-unitary authorities under sections 145A and 148 pass to county councils. These, and the ancillary powers in clause 9 are explained in paragraphs 28 to 31 of the first memorandum and the reasons for taking the powers are explained at paragraphs 32 to 35.

10. Among the items which may be included in an order transferring reimbursement obligations to the Secretary of State are some important matters of detail (clause 9(3)), including:

- provision enabling the Secretary of State to determine (rather than agree) amounts of reimbursement;
- provision about appeals by operators in connection with reimbursement including establishing an appeal body;
- provision conferring power to make regulations.

These matters are addressed in the department’s supplementary memorandum.
11. On balance, we do not consider these delegations in principle inappropriate (and they are subject to the affirmative procedure), but we have an observation on the power to subdelegate conferred by clause 9(3)(g): the power for the order itself to confer power on the Secretary of State to make regulations.

12. The reason for taking this power is explained in paragraph 4 of the supplementary memorandum. The regulations can be expected to cover much of the ground which is currently left to regulations by the existing section 149(3) (determination of amounts to be paid, manner of payment etc.), which are subject to negative procedure under section 160. If those matters were to be contained in the amendments to the 2000 Act made by the order under clause 9, the details, and all future amendments of them, would be subject to affirmative procedure; hence the power to make regulations, which need not be subject to that high level of parliamentary control.

13. We accept the principle for delegating the power. But clause 9(3)(g) does not confine the matters about which regulations may be made to matters analogous to those in section 149(3). So they could cover any of the subject-matter of the order under clause 9. Nor does clause 9 require the order to secure that any regulations are made subject to a parliamentary procedure; the procedure for the regulations will depend on what is in the order, though we imagine it is likely that, like other regulations under Part 2 of the 2000 Act, they would be made subject to negative procedure. This will be the default position if the power is inserted in Part 2 and section 160 is not amended. We consider clause 9 appropriate in general but that it would be preferable if the bill specified the matters in respect of which regulations could be made under clause 9(3)(g) and secured that any regulations made in exercise of the power conferred by the order must be subject to a parliamentary procedure.

CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE BILL

14. This bill creates a new offence of corporate manslaughter (in Scotland, corporate homicide). It can be committed only by organisations, not by individuals; nor can individuals be guilty of aiding and abetting, counselling or procuring the offence.

15. There are delegated powers at clauses 13, 14(4) and (6), 18 and 21(1), explained in a memorandum for the Committee from the Home Office, printed at Appendix 2. The powers include one at clause 13(1) which allows statutory provisions to be modified to apply to Government departments and public bodies: we consider this provision suitable for the negative procedure. The Henry VIII power at clause 18 is to amend the list in Schedule 1 of departments and other public bodies to which the bill applies. The exercise of the power is subject to the affirmative procedure, except in the limited circumstances specified in clause 18(3), as described in paragraph 56 of the Explanatory Notes and in the memorandum. Neither power is inappropriate.

16. There is nothing in this bill which we wish to draw to the attention of the House.
DISABLED PERSONS (INDEPENDENT LIVING) BILL [HL]

17. This private member’s bill, which imposes duties and creates rights about independent living by disabled people, is identical to the bill of the same title introduced last session and on which we reported in our 24th Report. We note that none of the concerns which we raised on that occasion have been addressed in this bill but hope that the sponsoring member might take the opportunity of Committee to table amendments to give effect to our recommendations. We further note that the bill confers powers on the National Assembly for Wales, which does not appear consistent with the position following the enactment of the Government of Wales Act 2006.

FORCED MARRIAGE (CIVIL PROTECTION) BILL [HL]

18. This private member’s bill makes provision for protecting individuals against being forced to enter into marriage without their free and full consent.

19. Clause 9 enables the Family Procedure Rules Committee to make provision regarding applications under the bill. Clause 9 is headed “Rules of court” and the implication is that the Committee will make the provision for applications by means of Family Procedure Rules under section 75 of the Courts Act 2003. Under section 79 of that Act the Rules are contained in a statutory instrument subject to negative procedure, which we consider appropriate.

20. The bill does not otherwise delegate legislative power and there is nothing in the bill which we wish to draw to the attention of the House.

FURTHER EDUCATION AND TRAINING BILL [HL]

21. This bill provides for new delegated powers in clauses 2, 4, 10, 15, 23, 27 and 31. It also amplifies (in clauses 19, 22 and 24) a number of existing powers, and transfers legislative powers from the Secretary of State to a statutory body (in clauses 13 and 14). The powers are explained in a memorandum and supplementary memorandum for the Committee from the Department for Education and Skills, printed at Appendix 3. There is a further order-making power conferred in the new section 24B(3) inserted by clause 4, and an enhancement of an existing regulation-making power by the new subsection (3A) inserted by clause 22(2), neither of which is mentioned in the memorandum.

22. The bill contains no Henry VIII power. Subject to the issues arising on clauses 2 and 13-16 which we discuss below, we consider both the delegation of new powers and the amplification of existing powers to be acceptable, and the negative procedure (where required) the appropriate level of parliamentary control.

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Regional councils — clause 2

23. At present, section 19 of the Learning and Skills Act 2000 (“LSA 2000”) requires the Learning and Skills Council for England (“LSCE”) to establish local councils to which the LSCE is to delegate functions. All provision for the constitution, the appointment, removal and tenure of office of members, and the governance, of the local councils is set out in section 19 of, and Schedule 2 to, LSA 2000. Under Part 1 of the bill, local councils are to be replaced by regional learning and skills councils under new sections 18A to 18C of LSA 2000 inserted by clause 2. All of the provision for regional councils which is of a kind presently set out in section 19 and Schedule 2 is to be the subject of regulations under new section 18A.

24. In paragraph 13 of its memorandum, the department seeks to justify this new delegation on the ground that it ‘gives flexibility to accommodate possible machinery of government changes in the light of the emerging city-regions agenda’, with the possibility that different councils might be structured differently ‘to reflect the arrangements that might come to exist in each region’. In the final paragraph of its supplementary memorandum on clause 2, the department supports its choice of the negative procedure for these regulations on the basis of their ‘comparatively low constitutional and legal impact’. It does, however, seem clear from the supplementary memorandum that the department’s policy as to the final shape of the new bodies is not yet settled.

25. Given the precedent of section 19 and Schedule 2, and the department’s indication that the policy is close to agreement, we are surprised that more provision about regional councils is not to be included on the face of the bill. While some of the provision presently in Schedule 2 is of a kind which is frequently left to negative procedure regulations, we note that provision about the size of the new bodies, the qualifications for membership, arrangements for the appointment of members, the nature of their tenure and the provision for their removal is also to be left to regulations. These are matters of some importance, particularly in the case of new statutory (as opposed to informal) bodies whose predecessor bodies were governed by provision wholly set out in the Act.

26. While we do not on the whole consider the delegation to be inappropriate, we consider that the first exercise of this power will be particularly significant and thus recommend that at least the first set of regulations should be subject to affirmative resolution.

Strategies for functions of Council — clause 4

27. New sections 24A(4), 24B(4) and 24C(9) inserted in LSA 2000 by clause 4, provide for the Secretary of State to give directions, which must be complied with, about strategy for the LSCE (including its form and content). Existing powers to give directions to the LSCE under section 16(4) of LSA 2000 are subject to no parliamentary control, as is usual, and this provision follows that model. While there can on occasion be a fine boundary between directions for administrative purposes and those which contain provision of a legislative character, we do not consider this provision for directions to be inappropriate.
Further education corporations — clauses 13 to 16

28. At present, the Secretary of State has power to provide by order for establishing (under section 16 of the Further and Higher Education Act 1992 (“FHEA 1992”) a body corporate to conduct a new or existing further education institution, and for dissolving (under section 27) such a body. Any such order must be made by statutory instrument, subject to the negative procedure. Clauses 13 and 14 of the bill confer these order-making powers instead on the LSCE, as respects England, and on the Welsh Ministers, as respects Wales. So far as England is concerned, the department explains (at paragraph 21 of its memorandum) that the LSCE is better placed to exercise these functions, because ‘it has a detailed knowledge about individual providers and of what provision is needed in a particular area’.

29. It is not uncommon – as the department indicates in paragraph 20 of its memorandum – for powers of this kind to be conferred on statutory bodies concerned with the regulation of particular services sectors. Moreover, the exercise of the powers by LSCE will, as a result of amendments made to section 51 of FHEA 1992 by clause 15, attract similar obligations as to prior publicity and consultation (of a kind to be specified by the Secretary of State in regulations) as presently apply before orders may be made under section 16 or 27.

30. There are, however, two further aspects of this transfer to consider. First, because no change is being made to section 89(1) of FHEA 1992, the LSCE’s orders will not be statutory instruments and so not subject to parliamentary control (as those of the Secretary of State presently are). Secondly, and more striking, is the power conferred by the new section 51A, inserted by clause 16, enabling the Secretary of State to give directions with which the LSCE must comply in the exercise of its order-making powers. In its supplementary memorandum about clause 16, the department envisages that the power of direction would not be used ‘in the normal course of events’, and argues that adequate safeguards are afforded by the new consultation arrangements under section 51 as amended.

31. It is nevertheless the case that new section 51A places no constraint on the power of direction. Taking clauses 13-16 as a whole, it would seem that those provisions could enable the Secretary of State ultimately to exercise his existing level of control over the establishment and dissolution of further education corporations in England but, by transferring the legislative mechanism for these to a statutory body, the existing arrangements for parliamentary scrutiny of such control will be dispensed with. We draw this to the attention of the House and recommend that the existing level of parliamentary control be retained, possibly by providing that the orders be made by the Secretary of State on the recommendation of the LSCE.

INVESTMENT EXCHANGES AND CLEARING HOUSES BILL

32. This bill enables the Financial Services Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses. The two delegations in the bill are explained in a memorandum for the Committee by the Treasury, printed at Appendix 4.
There is nothing in this bill which we wish to draw to the attention of the House.

LEGAL SERVICES BILL [HL]

Introduction

This bill makes new provision for regulating legal services. It does so, in particular, by setting out regulatory objectives (Part 1), by establishing a Legal Services Board (Part 2) with responsibilities including standards of regulation and by providing for approved regulators and the regulation of those regulators (Part 4).

The bill confers numerous powers of a legislative character, and imposes duties in relation to existing or new powers of a legislative character. The persons and bodies on whom powers are conferred or duties are imposed include:

- the Secretary of State;
- the Legal Services Board (LSB);
- approved regulators (including the Law Society and the General Council of the Bar);
- licensing authorities (for alternative business structures);
- the Office for Legal Complaints (OLC).

These powers and duties are explained in a memorandum and supplementary memorandum for the Committee from the Department for Constitutional Affairs (DCA), printed at Appendix 5.

Model of regulation

The model of regulation contained in the bill is that, within limits set by the bill, approved regulators and licensing authorities (“front line” regulators) should have a measure of autonomy, subject to oversight by the LSB and a framework of rules set by the LSB. The LSB itself is intended to be independent of Government (paragraph 15 of the Explanatory Notes). Our memorandum of evidence to the Joint Committee on the draft Legal Services Bill, ordered to report under a very tight timetable, said:

“It is precedent for Parliament to decide that a profession or business should regulate itself or be regulated largely free from parliamentary control: notably in the Financial Services and Markets Act 2000 (“the 2000 Act”). Whether this should be done for legal services through the proposed delegations to the Legal Services Board is a question of policy for the House rather than a question merely of delegated powers. The regulatory functions given to the Board by this draft bill include functions of a legislative character (in particular that of making rules) and there is, of course, no parliamentary control over the exercise of those functions.”

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3 “When Parliament delegates its authority to legislate to a person or body other than a Minister, such delegations are not normally subject to parliamentary proceedings because the body has no presence in Parliament and could not move their approval or resist their rejection.”
If the House approves in principle the model of regulation in the bill, it must inevitably accept that there will not be a high level of parliamentary control over the activities of the LSB, the approved regulators and the licensing authorities (we consider this question further at paragraphs 67 to 71). The House must nonetheless be satisfied that there are sufficient constraints on the exercise of such delegations to provide reassurance against their inappropriate exercise.

38. In this Report, we first consider the Secretary of State’s powers in the same way as powers conferred on the Secretary of State by any other bill; we then consider the powers given to the LSB, approved regulators, licensing authorities, and the OLC.

Powers delegated to the Secretary of State

39. Over 50 powers to make orders or regulations are given to the Secretary of State by this bill. These powers include:

- Henry VIII powers subject to negative procedure at clauses 79, 136(1), 176(3) and 177(3) and paragraph 1 of Schedule 1, paragraph 1 of Schedule 15, paragraph 71(3) of Schedule 16, paragraph 13 of Schedule 18 (new section 86A(2) and (6)) and paragraph 1(2) and (4) of Schedule 22;
- Henry VIII powers subject to affirmative procedure at clauses 23(1), 45, 61, 68, 76 and 198(3), paragraph 8 of Schedule 3, paragraph 9 of Schedule 13 and paragraph 13 of Schedule 18 (new section 86A(3)).

Powers delegated to the Secretary of State: Henry VIII powers subject to negative procedure

Alternative business structures: functions of appellate bodies—clause 79

40. Clause 79 enables the Secretary of State to establish a body to hear and determine appeals from decisions of a licensing authority which are appealable under Part 5 of the bill (e.g. under clause 94) or under licensing rules. Alternatively, the order may modify functions of the Solicitors’ Disciplinary Tribunal or the Discipline and Appeals Committee of the Council of Licensed Conveyancers to enable them to determine the appeals. Clause 79(4) enables the order to modify provisions of any past or future Act or the bill itself (“modify” includes amend – see clause 197(1)). The power is limited to making an order in a form which is the same as (or not materially different from) that annexed to a recommendation of the LSB, and clause 80 contains procedural requirements about the LSB’s recommendation. Those requirements include the need for consent of the person whose decisions are being appealed. The scope of the power is thus narrow but its subject matter, providing for appeals from decisions of the licensing authority for the new concept of alternative business structures, is significant and we consider that the power should be subject to the affirmative procedure.
Legal complaints: limitation on value of directions under ombudsman scheme — clause 135

41. Clause 135(1) sets a cap of £20,000 on the amount of compensation etc. that may be awarded on determination of a complaint under Part 6 of the bill. This will, if the bill is enacted, unusually be a limit set by Parliament and not (as it might have been) a limit set by the Secretary of State or the operator of the ombudsman scheme. Clause 136 enables the Secretary of State to amend the limit (up or down), but only if the OLC, the LSB or the LSB’s Consumer Panel recommends it. A representations procedure set out in clause 136(4) must precede the recommendation. Given these safeguards, we do not consider the negative procedure to be inappropriate.

Trade mark attorneys and patent attorneys — clauses 176 & 177

42. Clause 176 substitutes section 83 of the Trade Marks Act 1994. Under the new sections 83 and 83A the person to keep the register and to make regulations about educational, training and other requirements for registration is the Institute of Trade Mark Attorneys. The regulation-making powers of the person keeping the register are increased by the bill (as described in paragraph 230 of the memorandum). The Secretary of State is empowered by order to substitute another person or body for the Institute. Paragraph 228 of the memorandum explains that the power anticipates the possibility of a new regulator (e.g. following a merger) or possibly de-authorisation of a body but the power is not limited in that way. We consider that the functions under new sections 83 and 83A are significant and that the memorandum has not made out the case for the negative procedure for an order which appoints another body to perform them: the exercise of these powers should be subject to the affirmative procedure.

43. There is a similar point on clause 177 relating to the Chartered Institute of Patent Attorneys.

Legal Services Board & Office for Legal Complaints: numbers of appointed members — Schedules 1 & 15

44. The powers in Schedules 1 and 15 are to change the limit on the maximum number of appointed members of the LSB and the OLC. We agree that it is not inappropriate in this instance for these Henry VIII powers to be exercised by negative instrument.

Law Society Compensation Fund: borrowing limit — Schedule 16

45. Paragraph 71(3) of Schedule 16 inserts a power into the Solicitors Act 1974 to amend the £100,000 limit in the 1974 Act for borrowing for the purposes of the compensation fund. The power is exercisable only on the recommendation of the LSB and we consider the negative procedure appropriate in this instance.

Immigration advice and immigration services: list of designated qualifying regulators — Schedule 18

46. The powers in paragraph 13 of Schedule 18 are about the list of designated qualifying regulators (relevant for the purpose of entitlement to provide immigration advice). One power is to remove from the list at the request of
the body concerned and the other is to add to the list. The negative procedure reflects the position under section 86 of the Immigration and Asylum Act 1999 for those under the jurisdiction of the Immigration Services Commissioner rather than the LSB and we agree that it is not here inappropriate.

Existing approved regulators: modification — Schedule 22

47. Paragraph 1 of Schedule 22 confers a power to modify the table in paragraph 1 of Schedule 4. It is exercisable only in the very limited circumstances fully described in paragraph 1(1) of Schedule 22 and is for transitional purposes. Accordingly, we do not consider the negative procedure inappropriate.

Powers delegated to the Secretary of State: Henry VIII powers subject to affirmative procedure

48. The Secretary of State is given some very significant powers by the bill but many of them are accompanied by procedural or other restraints. For example, the power at clause 23 to extend the range of reserved legal activities is exercisable only on the recommendation of the Board following the procedure in Schedule 6. There are however 3 powers which we wish to discuss.

Exempt persons — Schedule 3(8)

49. Paragraph 8 of Schedule 3, introduced by clause 18, allows the Secretary of State to amend that Schedule to exempt persons in relation to any activity which is a reserved legal activity, to remove exemptions for any activity and to amend existing provision about exempt activities. It allows the Secretary of State to alter the scope of who is and is not subject to regulatory control, in relation to each reserved activity. An order can only be made by the Secretary of State on the recommendation of the Board. It is well precedented for exemptions to be added or removed by secondary legislation but we have not been persuaded that the memorandum (paragraphs 21 to 23) has made out the case for the width of this delegation, particularly paragraphs 8(1)(b) and 8(1)(c); and we draw this to the attention of the House so that the House might seek a fuller justification for the power.

Legal Services Board as an approved regulator — clauses 61 & 63

50. Clause 61 enables the Secretary of State to designate the LSB as an approved regulator (i.e. as a “front line” regulator) in relation to one or more reserved legal activities, and to modify the LSB’s functions to enable the LSB to discharge its functions as an approved regulator effectively and efficiently. The order must be as recommended by the LSB (clause 61(2)), after a procedure set out in clause 65. So far as an order designates the LSB as an approved regulator, it may be made only in connection with the cancellation of another body’s designation as an approved regulator or an activity becoming a reserved legal activity (clause 62(2)).

51. Where the order modifies functions of the LSB, it may give the LSB powers which may include:

- the powers set out in clause 63(2) (which include powers to make regulations, rules and compensation arrangements);
• the powers in Schedule 14 (with or without modification) to intervene in the affairs of a regulated person, including powers to decide that money can vest in the LSB and to take possession of documents.

52. The memorandum does not well justify the acquisition of this power but we do not consider the arrangements in clauses 61 and 63 to be inappropriate, for the following reason. If the intention of the bill is that the LSB should be a “front line” regulator only where there is no other suitable regulator, then it seems a reasonable approach for the order to give all the powers necessary to perform the regulatory function in relation to a particular activity, rather than for the bill to give all of the powers which might be needed. The powers set out in clause 63 are ones which it seems reasonable to suppose may be needed for regulation to be effective.

Approved regulators: modification of functions — clause 68

53. Clause 68 enables the Secretary of State by order to modify, or make other provision relating to, the functions of an approved regulator or any other body. The order must be as recommended by the LSB, following the procedure in clause 69, which involves the consent of the body to which the recommendation relates. The recommendation may be made only with a view to an order enabling the body to do one or more of the things specified in paragraphs (a) to (e) of clause 68(3). One of those is carrying out the role of approved regulator “more effectively and efficiently”. The order may confer on the body any of the powers in clause 63(2)(b) to (k), (3) and (4) and amend, in particular, any present or future Act or the bill (clause 68(6)), as well as prerogative and other instruments.

54. This power can therefore be used, for example, to alter substantial parts of the Solicitors Act 1974 (with the agreement of the Law Society) or the Administration of Justice Act 1985 (with the agreement of the Council for Licensed Conveyancers) or other Acts conferring powers on approved regulators: a highly significant power.

55. The scope of this power was noted at second reading by the Chairman of the Joint Committee on the draft bill, Lord Hunt of Wirral5. At his invitation, we sought from the department and have received a supplementary memorandum on this power6 which makes a substantially better case for this delegation than did the original memorandum (paragraphs 91 and 92). In short, the power provides a level playing field for those approved regulators who are statutory bodies and those who are not. Were it not for this power, the functions of the latter category could be changed more easily than those of the former. The power is analogous to that in section 60 of the Health Act 1999, which enables similar modification of the regulation of the medical professions. The provision in this bill is further safeguarded by the power only being exercisable on the recommendation of the LSB. Having considered the matter, we are persuaded by the case in the supplementary memorandum and do not consider the delegation inappropriate. We are also persuaded that the prospective power and the power to amend prerogative instruments is not here inappropriate.

5 HL Deb 6 December 2006 col 1179.
6 Appendix 5.
Other powers delegated to the Secretary of State

56. The other powers of the Secretary of State include five which we wish to note.

Alternative business structures: application to foreign bodies — clause 107

57. Clause 107 enables the Secretary of State by order subject to negative procedure to modify provisions of Part 5 of the bill (alternative business structures) in their application to non-UK bodies. We remarked on this power in our comments on the draft bill\(^7\), suggesting that we would seek a fuller justification for the negative procedure than that given in the department’s memorandum which accompanied the draft bill. Paragraphs 147 to 149 of the memorandum do not provide such an explanation and we accordingly recommend that this power be subject to the affirmative procedure.

Legal complaints: ombudsman scheme: parties — clause 125

58. Clause 125(5)(c) enables the Secretary of State by order subject to negative procedure to exclude descriptions of person from being a complainant for the purposes of the ombudsman scheme. Though this is an important power, we do not consider the negative procedure to be inappropriate.

Legal complaints: restricted information — clause 148 (& clause 161)

59. Clause 148 imposes restrictions on the disclosure by the OLC and ombudsman of information obtained in connection with the investigation of a complaint under Part 6 of the bill. The information concerned may include information obtained through the exercise of powers under clause 144 which are enforceable under clause 146. Clause 149 provides exceptions from clause 148, one of which is that the information may be disclosed to such persons as may be prescribed by an order of the Secretary of State for such purposes as he may prescribe (clause 149(3)(g)). The order is subject to negative procedure and the memorandum (paragraph 170) draws a parallel with the Pensions Act 2004. However, the power under that Act is limited to prescribing persons or bodies exercising regulatory functions. We would prefer the power in this bill to be similarly limited (in which case the negative procedure will suffice). If this cannot be done, then the power should be subject to the affirmative procedure.

60. A similar point arises on clause 161(3)(g) in connection with information obtained by the LSB.

Alternative business structures: designation of approved regulator as licensing authority — Schedule 10

61. Paragraph 15 of Schedule 10 enables the Secretary of State to make an order, on the recommendation of the LSB, to designate an approved regulator as a licensing authority under Part 5 (alternative business structures). The order may be made only following the procedure set out in Schedule 10 and is subject to negative procedure, as the body “will already have proved it is

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\(^7\) Report from the Joint Committee on the draft Legal Services Bill, Session 2005-06, HL Paper 232-I, Appendix 8, paragraph 3.
competent to regulate by virtue of being an approved regulator” (paragraph 97 of the memorandum). We do not consider this inappropriate.

Powers delegated to the Legal Services Board

62. The constitution of the LSB is set out in Schedule 1. The chairman and the members other than the chief executive are appointed by the Secretary of State. The Secretary of State has no general power of direction over the LSB, though in certain specific instances the LSB must act in accordance with his directions (e.g. clause 6(2) – contents of annual report) or with his consent (e.g. clause 36(4) – rules about maximum penalty).

Procedural requirements for rules etc.

63. The LSB is given extensive powers to make rules, none of which is subject to parliamentary control. There are requirements about the making of these rules set out in clause 195. (These requirements do not apply to rules made by the LSB in its capacity as an approved regulator or a licensing authority.) The requirements involve:

- publication of draft rules;
- inviting and having regard to representations;
- publication of details of any changes from the original draft;
- publication of the rules when made.

64. When making rules the LSB (as when it discharges its other functions) must act in a way that is compatible with the regulatory objectives set out in clause 1 and have regard to the public interest and certain principles referred to in clause 3(3). The LSB’s annual report (which is laid before Parliament under clause 6(4)) must deal with the discharge of the LSB’s functions.

65. In addition, the LSB is required by clause 48 to issue policy statements relating to the exercise of particular functions under Part 4 (regulation of approved regulators) and may issue policy statements on other matters. Those statements are made following a procedure set out in clause 49 which is similar to that for making rules.

66. Though the LSB is given wide powers, the bill specifies in many cases the way in which the powers must be exercised, so the bill itself provides a policy framework within which the powers are to be exercised.

Parliamentary oversight of the Legal Services Board?

67. As mentioned above, our memorandum of evidence to the Joint Committee on the draft Legal Services Bill said:

“It is precedent for Parliament to decide that a profession or business should regulate itself or be regulated largely free from parliamentary control; notably in the Financial Services and Markets Act 2000 (“the 2000 Act”). Whether this should be done for legal services through the proposed delegations to the Legal Services Board is a question of policy for the House rather than a question merely of delegated powers. The regulatory functions given to the Board by this draft bill include functions of a legislative character (in particular that of making rules) and there is, of course, no parliamentary control over the exercise of those functions. Given that such a policy would substantially reduce Parliament’s control in this
area, there are a number of aspects of these delegations which we would need to
draw to the attention of the House if this were a bill.\footnote{Report from the Joint Committee on the draft Legal Services Bill, Session 2005-06, HL Paper 232-I, Appendix 8, paragraph 4.}

We illustrated our concern with examples, each of which remains in the bill. We wish to draw the attention of the House to two powers in particular whose exercise might be said to warrant some parliamentary oversight.

68. Clause 29 (which was not in the draft bill) enables the LSB to make internal governance rules setting out requirements to be met by approved regulators. Clause 29(2) and (3) specify particular requirements which the rules must contain.

69. Clause 50 requires the LSB to make rules specifying the purposes for which amounts raised by practising fees by approved regulators may be used. (That function, for solicitors and barristers currently rests with the Secretary of State and is exercisable by order subject to affirmative procedure.) But clause 50(4) sets out matters which must be included as permitted purposes, leaving it to the LSB to specify any additional permitted purposes.

70. It is a matter of policy for the House to decide whether legal services should be largely self-regulating, subject to supervision by an oversight regulator who is free of parliamentary control (on the financial services model) or whether the objective of encouraging the independence of the legal profession (clause 1(1)(c)) requires continued parliamentary oversight. If Parliament wishes, as a matter of policy, to retain oversight of some of these matters, such as those mentioned above, a mechanism for achieving this would be required, such as conferring the power on the Secretary of State, acting only on the recommendation of the LSB, and requiring the instruments made by the Secretary of State to be subject to a parliamentary procedure. If the powers which we have discussed had been delegated to the Secretary of State rather than to the LSB, we would have considered that the negative procedure would have sufficed for each of them.

71. We would draw attention to three further powers, which the bill proposes shall be subject to the consent of the Secretary of State but which attract no parliamentary procedure. Rules under clause 36(3), setting the maximum penalty which the LSB itself can impose on an approved regulator, require the consent of the Secretary of State, as do rules under clause 93(3) setting the maximum penalty which a licensing authority can impose on a licensed body and rules under clause 166 providing for the imposition of a levy to cover the expenditure specified in clause 166(6), (7) and (8). The effect is that, though the Secretary of State may be politically accountable for his decision on consent, there is nevertheless no parliamentary control over the content of the rules which he has approved. Whether or not Parliament decides to retain oversight of the matters addressed at paragraphs 67 to 71, there is a strong case for the consent of the Secretary of State to the exercise of these three powers by the LSB being given by order subject to the negative procedure.

Powers delegated to approved regulators

72. Those who will be approved regulators when the bill comes into force are listed in the Table in paragraph 1 of Schedule 4 to the bill. So far as their
regulatory activities are governed by legislation, the bill (e.g. Schedules 16 and 17) amends the legislation in various respects. The rules made under that legislation will fall within the definition of “regulatory arrangements” in clause 20 and will be treated initially as having been approved by the LSB (see paragraph 2 of Schedule 4). But the scheme of the bill is that, to be approved, a body must have certain rules in place, regardless of from where the power to make those rules derives.

73. We do not consider it in principle inappropriate for regulatory bodies to have power to control those whom they regulate without direct parliamentary control. This is to varying degrees the position now with the regulators listed in Schedule 4. We note that the items which the regulatory arrangements must contain include:

- provision to prevent regulatory conflicts (clauses 51 and 53);
- a complaints procedure (clause 109);
- provision for disclosure of information to the OLC or an ombudsman (clause 141(2));
- provision for co-operation with ombudsman (clause 142).

74. None of these seems inappropriate for inclusion in a regulator’s regulatory arrangements.

Powers delegated to licensing authorities

75. Part 5 of the bill is about alternative business structures. Paragraphs 174 to 179 of the Explanatory Notes describe the background. Licensable bodies are authorised by a “licensing authority”. An approved regulator may apply also to be a licensing authority, and the LSB itself is a licensing authority.

76. A licensing authority must have licensing rules. Clause 81 and Schedule 11 deal with licensing rules. They set out not only what the rules must contain, but also what they may contain (memorandum paragraphs 115 to 121). Licensing rules also play an important part in Schedule 13 about the ownership of licensed bodies (e.g. paragraphs 2(2) and 3(2)).

77. Due to the requirements in the bill for licensing rules to contain particular provision, there is a core content to the rules apparent from the bill. Nevertheless, we do to draw the attention of the House that some significant items are left to the rules:

- provision for co-operation with ombudsman (clause 142).
- the circumstances in which a financial penalty may be imposed on a licensed body (clause 93(1) and paragraph 22 of Schedule 11);
- the circumstances in which a licence may be modified (clause 84(1)(b) and paragraph 6(2) of Schedule 11) and additional circumstances in which a licence may be suspended or revoked (clause 99(11) and paragraph 25 of Schedule 11).

78. A further control over the content of a licensing authority’s rules is exercised by Schedule 10. Under paragraph 1(4) of the Schedule a regulator applying to be a licensing authority must provide details of its proposed licensing rules. The application goes through a procedure involving the LSB taking advice and representations by applicant. The LSB’s rules on how it will determine applications must require it to be satisfied that the rules comply
with clause 81 (though there are no other compulsory requirements as to content). If an order is made designating a body as a licensing authority, the licensing rules are automatically treated as approved by the LSB.

79. As with the provisions for regulatory arrangements for approved regulators, none of the delegations in Part 5 of the bill seems inappropriate.

Powers delegated to the Office for Legal Complaints

80. Clause 111 of the bill establishes the OLC. Clause 112 provides that the ombudsman scheme provided for by Part 6 is to be administered by the OLC in accordance with scheme rules made by the OLC. The rules are subject to the same procedural requirements as the LSB’s rules.

81. The precedent for this provision is the Financial Services and Markets Act 2000 (Schedule 17) and paragraph 155 of the memorandum refers to it being partly based on that Act, which has similar delegations to make scheme rules with no parliamentary oversight. Some of the significant elements of the power to make rules are explained at paragraphs 160 to 165 of the memorandum.

82. Similar issues of policy apply here as to the parliamentary oversight of the operation of the LSB (paragraphs 67 to 71). In this context we note the power at clause 124 for the OLC to exclude particular descriptions of complaint from the jurisdiction of the ombudsman scheme (to which we drew attention in our memorandum of evidence on the draft bill⁹) and to clause 133, which requires scheme rules to require respondents to pay charges. This is a matter with potential to attract controversy; though the rules may provide for the OLC to provide for charges to be refunded in specified circumstances, there is no obligation for the rules to provide for a refund where the complaint is found to be unjustified. So the extent to which the OLC decides to exercise its powers in this respect may, on policy grounds, be felt to justify some parliamentary oversight.

CONSUMERS, ESTATE AGENTS AND REDRESS BILL [HL] — GOVERNMENT RESPONSE

83. We reported on this bill in our 2nd Report (HL Paper 10) and the Government have now responded by way of a letter from Lord Truscott, Parliamentary Under-Secretary of State, Department of Trade and Industry to the Chairman, printed at Appendix 6.

⁹ Report from the Joint Committee on the draft Legal Services Bill, Session 2005-06, HL Paper 232-I, Appendix 8, paragraph 11.
84. We reported on this bill in our 2nd Report (HL Paper 10) and the Government have now responded by way of a letter from Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, Department for Constitutional Affairs to the Chairman, printed at Appendix 7.
APPENDIX 1: CONCESSIONARY BUS TRAVEL BILL [HL]

Memorandum by the Department for Transport

Introduction

1. This memorandum identifies provisions for delegated legislation in the Concessionary Bus Travel Bill. It summarises the main provisions of the Bill; identifies the delegated powers in the Bill and describes the purpose and proposed use of those powers; explains why matters have been left to delegated legislation; and explains the degree of Parliamentary control provided for and the reason for the procedure selected in each case.

Main Provision of the Bill

2. The Concessionary Bus Travel Bill, which extends only to England and Wales, contains 16 clauses and 3 schedules. Its main provisions are as follows:

• Clause 1: replaces section 145 of the Transport Act 2000 (“the 2000 Act”) with a new section 145A establishing the new national concession for England (apart from for journeys beginning on the London bus network). The effect is to extend the existing mandatory concession, which entitles permit holders to free eligible local bus travel within their local authority area between specified times, to travel on eligible local bus services anywhere in England.

• Clause 2: amends section 146 of the 2000 Act (mandatory concessions: supplementary);

• Clause 3: amends section 149 of the 2000 Act so as to place a requirement on local authorities to reimburse operators who provide concessions under section 145A of the 2000 Act in respect of journeys which start in that local authority’s area;

• Clause 4: amends section 240 of the Greater London Authority Act 1999 (“the 1999 Act”) (travel concessions on journeys in and around Greater London) so as to provide for the holders of travel concessionary permits issued elsewhere in England to be eligible for the travel concessions provided under that section;

• Clause 5: amends section 241 of the 1999 Act (reserve free travel scheme for London residents), to ensure that the ‘minimum concession’ available to London residents extends as appropriate to the holders of travel concessionary permits issued elsewhere in England;

• Clause 6: amends section 242 of the 1999 Act (requirements as to scope - of the minimum London concession) to extend the provisions to the holders of travel concessionary permits issued elsewhere in England;

• Clause 7: amends section 243 of the 1999 Act (requirements as to uniformity - of the minimum London concession) to ensure uniformity in the provision of concessions, and to ensure that permits issued by travel concession authorities under s145A(2) of the 2000 Act are recognised under the arrangements in the 1999 Act;

• Clause 8: provides a power for the Secretary of State, by order, to amend the 1999 and 2000 Acts in order to vary the national concession for England to the extent provided in that section;

• Clause 9: creates a power for the Secretary of State, by order, to amend Part 2 of the 2000 Act to vary the reimbursement and other administrative arrangements,
including the transfer of functions from non-unitary district councils to county councils (in non-metropolitan areas) or to the Secretary of State;

• Clause 10: empowers the Secretary of State to amend the 2000 and 1999 Acts, by order, so as to enable concessionary travel to be provided to holders of Welsh, Scottish and Northern Irish permits in England. It also empowers the Welsh Ministers to amend the 2000 Act, by order, so as to enable concessionary travel to be provided to holders of English, Scottish and Northern Irish permits in Wales;

• Clause 11: provides that any power conferred on the Secretary of State or the Welsh Ministers to make an order is exercisable by statutory instrument and sets out the Parliamentary procedures to be applied to such orders;

• Clause 12: defines certain terms used in the Bill;

• Clause 13: deals with minor and consequential amendments and includes a power for the Secretary of State, by order, to make such consequential amendments to other enactments and instruments as may be appropriate in consequence of any provision of the Bill when enacted;

• Clause 14: deals with the extent of the Bill;

• Clause 15: provides for the Act to come into force on a date to be appointed by the Secretary of State, and empowers the Secretary of State to make such transitional or savings provisions as appear appropriate in so doing;

• Clause 16: cites the short title;

• Schedule 1: amends Schedule 16 to the 1999 Act;

• Schedules 2 and 3: provide for minor and consequential amendments, and repeals, to the Transport Act 1985, and the 1999 and 2000 Acts. This includes the insertion of a new section 145B into the 2000 Act, restating the existing mandatory concession in Wales.

3. The Explanatory Notes which accompany the Bill set out in greater detail the background to, and purpose behind, each of the above provisions.

Delegated Powers

4. A table at the back of this document lists all of the provisions containing delegated powers in the Concessionary Bus Travel Bill and the relevant parliamentary procedure governing each power. Unless otherwise stated, these procedures are set out in clause 11.

Clause by Clause Summary

Clause 1: The national concession

5. This clause replaces the existing section 145 of the 2000 Act with a new section 145A to specify the national concession in England (other than in relation to journeys beginning on the “London Bus Network”, as defined in section 181 of the 1999 Act. These are dealt with separately under clause 4). It removes the current restriction that the concession is only available in respect of journeys within the permit holder’s local authority area by providing that holders of passes issued by any English travel concession authority (including authorities in London) can receive the concession on eligible bus journeys at the relevant time and beginning and ending in England. The different arrangements for concessionary travel in Wales, as set out in the Transport Act 2000 (as amended), have been re-stated in Schedule 2 as a new section 145B in the 2000 Act.
6. Subsection (5) of the new section 145A provides that travel concession permits issued to eligible persons by travel concession authorities in England must be issued in such form and for such period as may be specified in regulations made by the Secretary of State. By virtue of section 145(2) of the 2000 Act, it is currently a matter for each travel concession authority to determine the form and period of validity of the permit issued to residents in that authority area. In Wales, responsibility for determining the form and period of validity of permits will continue to rest, as now, with the local travel concession authority or the National Assembly for Wales.

7. The move from a local to a national concessionary travel scheme means that eligible permit holders will be able to enjoy concessionary bus travel anywhere in England. So as to ensure consistency across England and to reduce the risk of confusion, especially for operators, as to who is entitled to concessionary bus travel, the Secretary of State intends to take steps to ensure that all passes contain a common identifying feature as an aid to recognition. No decision has yet been taken as to how this might be done, but it could be a logo which would be attached to existing permits, or a requirement for all passes to be of a standard national design, which will be the same regardless as to wherever in England it has been issued. (Separate amendments to the 1999 Act under Clause 7(5) of the Bill and paragraph 5(2) of Schedule 1 to the Bill provide the Secretary of State with power to make regulations imposing similar requirements in respect of permits issued by London authorities.) In order to provide the necessary consistency, the form and period of validity is best determined centrally. However, the likely technical detail needed to prescribe the form of the permit is such that it would be best suited to secondary, rather than primary, legislation. Furthermore, the Secretary of State wishes to have the flexibility for the form and length of validity of permits to be amended in the future, in particular if reciprocal arrangements are agreed with Scotland, Wales and Northern Ireland for travel concession permits issued in each of those countries to be recognised across the whole of the United Kingdom.

8. By virtue of section 160(2) of the 2000 Act, regulations made under new section 145A(5) will be subject to the negative resolution procedure. The regulations are likely to be of a technical nature, and the scope of such an instrument extends only to determining what the national identifying features should look like, and for how long a pass should be valid before it is renewed. The Secretary of State intends to consult on the proposed use of this measure during the next nine months.

9. The provisions in new section 145A(6) and (7), which enable the Secretary of State to issue guidance to travel concession authorities to which they must have regard in determining whether a person is a disabled person, replicate for England only the existing provision in section 145(4) and (5). A similar provision for the Welsh Ministers to issue such guidance is to be found in new section 145B(6) and (7) (see paragraph 10 of Schedule 2).

10. New section 145A(8) contains a new provision under which the Secretary of State may issue guidance to travel concession authorities in England to which they must have regard in determining, for the purposes of deciding whether a person is eligible to receive a travel concession permit, whether a person has his sole or principal residence in that authority’s area.

11. The provisions in new section 145A(9) to (11), including the regulation making power in subsection (10), largely replicate, for England only, existing provisions in section 145(6) to (8). The only difference is that the provisions include a consequential amendment so as to apply to concessions available under the 1999 Act. Equivalent provision in relation to Wales, again replicating that currently found in sections 145(6) to (8) is found in new section 145B(8) to (10) as inserted in paragraph 10 of Schedule 2.
Clause 2: The national concession: supplementary.
12. This clause contains no delegated powers.

Clause 3: Reimbursement of operators
13. This clause contains no delegated powers.

Clause 4: The national concession: journeys beginning on the London Network
14. This clause contains no delegated powers but there is a provision for the Secretary of State to issue guidance on the issue of sole or principal residence for the purposes of the 1999 Act provisions equivalent to the power mentioned in paragraph 10 above.

Clause 5: Reserve Free Travel Scheme
15. This clause contains no delegated powers.

Clause 6: Requirements as to scope
16. This clause contains no delegated powers.

Clause 7: Requirements as to uniformity
17. This clause amends section 243(7) of the 1999 Act so as to confer a power on the Secretary of State to stipulate in regulations the form and period of validity of passes to be issued by London authorities relating to the concessions available on the London Bus Network. By virtue of section 420(7) of the 1999 Act, as amended by paragraph 8 of Schedule 2 to the Bill, such regulations will be subject to negative resolution procedure.

Clause 8: Variation of scope of the national concession
18. Clause 8(1) enables the Secretary of State, by order, to amend the 2000 Act and Chapter 8 of Part 4 of the 1999 Act so as to vary the scope of the national concession. The “national concession” is defined, for these purposes in subsection (2) as the travel concession which must be provided to eligible residents of England under section 145A(1) of the 2000 Act and section 242(8) of, or paragraph A1 of Schedule 16 to the 1999 Act. An order made under this section may:

- provide for the national concession to be available, in addition to those aged 60 and above and any disabled person, to people who are eligible to receive a travel concession under section 93 of the Transport Act 1985, or to people of a specified description who are eligible under section 93 (for example, people aged between 16 and 18 who are in full time education);
- extend the national concession to other modes of public transport, such as rail or light rail;
- where an order made under this section extends the availability of the national concession to additional categories of person, provide for a concessionary fare which is not a full waiver of the fare; and
- amend the specified times during which the national concession is available.

19. The clause provides that specified terms used in this provision will have the same definition as in Part 2 of the 2000 Act.

20. This provision broadly replicates the existing power in section 147 of the 2000 Act for the Secretary of State (as respects England) or the National Assembly for Wales (as respects Wales) to amend sections 145 and 146 of that Act to secure changes to the
existing mandatory concessionary scheme. As a consequence of the introduction of the
new national concession, it is necessary also to amend this order making power so as to
ensure that the Secretary of State can extend the national concessionary scheme in the
same manner, including making any consequential amendments to the 1999 Act so as to
ensure that any extension also applies to eligible services within Greater London. A
consequential amendment to section 147 of the 2000 Act, set out in paragraph 12 of
Schedule 2 to this Bill provides that the existing power, in section 147 of the 2000 Act, to
extend the concessionary fare scheme in Wales will continue to be available to the Welsh
Ministers. The new power in clause 8 of the Bill will therefore only be available to the
Secretary of State and only in respect of England.

21. Orders made under this provision are subject to the negative resolution procedure, as
are the equivalent existing powers in section 147 of the 2000 Act (which were used in
2005 to extend the original half-price travel concession to a full waiver of the fare).
Empowering the Secretary of State in this way provides a greater flexibility to extend the
concessionary scheme to additional groups of people, other modes of transport, and to
make it available at additional times of day that would not be possible if such changes
could only be brought about through primary legislation.

22. The order making power does not include a power to reduce the extent of the scheme
in England; that could only be done through primary legislation. The purpose of this Bill
is that, as enacted, it will extend the scheme only to the extent that it enables permit
holders to travel on eligible bus services anywhere in England rather than, as now, only in
the local authority area in which they live. Until the extension of the current scheme to
provide a national concession has been evaluated, both for efficiency and effectiveness, it
would not be appropriate to extend the scheme further to the extent that the order making
power provides: that would only be done once the impact of the national scheme has been
fully evaluated.

23. The Government’s policy, as set out in this Bill, is to extend the mandatory
concession available to older and disabled people so that it is available wherever they
travel in England. It is not the Government’s policy at the present time to extend the
concession to additional groups of people, other modes of transport, or to cover peak
hour services, although local authorities will retain the discretionary power to establish
such schemes in their area. However, the Secretary of State does want to retain the
flexibility to extend the national concession in such ways in the future should a policy
decision be made to do so. The Secretary of State would consult as appropriate before any
such extension.

Clause 9: Variation of reimbursement and other administrative arrangements

24. Clause 9 provides an order making power to enable the Secretary of State to vary the
arrangements for the reimbursement of operators who provide concessions under new
section 145A(1) of the 2000 Act.

25. The reimbursement arrangements for the existing concessionary fares scheme are set
out in section 149 of the 2000 Act. As it currently stands, section 149 provides that, where
an operator provides concessions under section 145(1) of that Act for eligible persons
living in a travel concession authority’s area, then the authority is under an obligation to
reimburse the operator for providing the concession.

26. The Secretary of State and the National Assembly for Wales are also currently
empowered, under section 149(3) of the 2000 Act, to make provision by regulations as to:
the determination of such reimbursement, the manner of making such payments, and the
terms on and extent to which authorities may appoint agents to act on their behalf. The
National Assembly for Wales used this power to make the Mandatory Travel Concessions
(Reimbursement Arrangements) (Wales) Regulations 2001 (S.I. 2001/3764), but this power has yet to be used in respect of England.

27. Where regulations are not in place under this provision, section 149(2) of the 2000 Act provides that the arrangements for reimbursement shall be such as the authority agrees with the operator or, where such agreement cannot be reached, as determined by the authority. Section 150 of the 2000 Act sets out a procedure for the publication of the proposed reimbursement arrangements, and a mechanism whereby an operator can apply to the Secretary of State for a modification of those arrangements, if he considers that there are special reasons why they are not appropriate for reimbursement in the context of one or more local services provided by that operator.

28. The Government’s policy is that the arrangements for reimbursing operators who provide the new national concession should, in the first instance, remain the responsibility of travel concession authorities. However, the introduction of the national concession will have an impact on the way in which reimbursement payments are calculated and administered, and the Secretary of State wants to have the flexibility to change the arrangements in the future, if appropriate. The purpose of Clause 9 of the Bill, therefore, is to empower the Secretary of State, by order, to amend certain provisions in Part 2 of the 2000 Act. Subsection (1) provides a power whereby the current obligations on travel concession authorities in England to reimburse operators for providing concessions, and the functions of those authorities under sections 145A and 148 (enforcement) of the 2000 Act, may instead be imposed on the Secretary of State. Subsection (3) provides that any order which imposes the reimbursement obligations in section 145A on the Secretary of State may in particular include provision:

- enabling the Secretary of State to determine, rather than agree, the amount of reimbursement which should be paid to operators;
- about how the level of such reimbursement should be calculated;
- about how such reimbursement should be claimed by operators;
- about the way in which operators may appeal against decisions on reimbursement;
- enabling the Secretary of State to provide for a person or body to hear such appeals;
- about consultation in relation to the reimbursement provisions;
- conferring on the Secretary of State the power to make regulations; and
- repealing sections 145A(9) to (11) of the Act.

29. Subsection (4) of Clause 9 provides that an order which imposes on the Secretary of State functions of travel concessionary authorities (as set out in new section 145A and existing section 148 of the 2000 Act) may also repeal any of subsections (6) to (8) of new section 145A of the 2000 Act.

30. Under subsection (2) of Clause 9, the Secretary of State may also make an order to amend Part 2 of the 2000 Act, so as to impose on county councils the obligation to reimburse operators for providing the concession under section 145A(1) where that obligation would otherwise fall on non-unitary district councils. Subsection (2) also empowers the Secretary of State to amend Part 2 of the 2000 Act to transfer functions of non-unitary district councils under section 145A and 148 of that Act to county councils.

31. Subsection (5) provides that if the Secretary of State makes an order under subsection (1)(a) or (2)(a), he may make an order to amend the Transport Act 1985 so as to secure that non-unitary district councils or metropolitan district councils cease to be a local
authorities for the purposes of section 93 of the Act (which enables local authorities to establish travel concession schemes which go beyond the national minimum). An order under subsection (5) may alternatively secure that such councils will only be able to establish a section 93 scheme if they do so jointly with a county council or Passenger Transport Authority for their area. Where provision is made for section 93 schemes only to be made jointly with a county council or Passenger Transport Authority, the order may also (by virtue of subsection (6)) provide that the functions of administering the resultant scheme shall be exercisable by the county council (where a non-unitary district council has joined in making the scheme) or by the relevant Passenger Transport Executive (where a metropolitan district council has joined in making the scheme).

32. Under the provisions of the Bill, as drafted, the reimbursement arrangements set out in the 2000 Act will remain in force and apply to the national concessionary scheme until such time as any of the order making powers under this Clause is used by the Secretary of State. This means that, once the national concessionary travel scheme is in place, travel concession authorities will continue to have an obligation to reimburse operators for providing concessionary travel, but the reimbursement obligation will extend to any concessionary journeys which commence in that authority’s area, regardless of where in England the pass holder lives. So, travel concession authorities will then be reimbursing operators for journeys made by people who are not resident in their local area. In some parts of England, for example areas which are popular with tourists, this may be found to impose additional costs on the administrative structures and finances of local authorities. In addition, the introduction of the national concessionary scheme is almost certain to lead to an increase in the number of concessionary journeys made in England, and therefore the level and complexity of claims for reimbursement.

33. In these circumstances, the Secretary of State wants to have the flexibility to change current arrangements so as to enable reimbursement to be administered either on a wider geographical basis (i.e. on a county-wide basis) or, potentially, centrally. Both options would provide greater consistency in the level of reimbursement made to operators, and would reduce the potentially greater administrative burden of the reimbursement arrangements on local authorities.

34. The powers included in this clause will also allow for arrangements for administering discretionary travel schemes under s93 of the 1985 Act to be placed on a consistent footing with those for administering the national concession, if it is decided to transfer functions for the national scheme to county councils. If functions for the national scheme are instead transferred to the Secretary of State some parallel simplification will still be able to be achieved for the section 93 schemes by transferring functions in relation to them to county councils. It would be unhelpful if there was no option to ensure either that both statutory and discretionary concessions were administered on the same basis or that at least a degree of “streamlining” could be put in place in relation to both sets of schemes. Without these possibilities efficiency savings from changes to the national scheme might be negated. However, any change to current administrative or reimbursement arrangements will require detailed consideration as to how it would work, and consultation both with local authorities, operators, and other Government departments.

35. There are a number of reasons, therefore, for providing that such arrangements should be provided for by secondary, rather than primary, legislation. First, the Secretary of State would like to evaluate current arrangements before deciding whether there is a need to change reimbursement arrangements and, if there is, what those changes might be. Second, it would not be practical, or a good use of Parliament’s time, for such detailed arrangements to be set out on the face of the Bill. The provisions are likely to be complex, and would be more appropriately provided in secondary legislation. This is also consistent
with the current provision in section 149(3) of the 2000 Act for further prescription of the reimbursement provisions to be in secondary legislation. Third, even if such provisions were to be included on the face of the Act, it would be prudent to have the flexibility to amend them without the need for primary legislation, should that be necessary in the light of experience of the operation in practice of the new national concession.

36. The order making power in this clause is subject to the draft affirmative resolution procedure. In addition to normal consultation requirements, this will provide Parliament with an opportunity to scrutinise any proposed use of this power in draft.

Clause 10: Reciprocal arrangements for providing travel concessions

37. This provision empowers the Secretary of State, by order, to amend the 2000 and 1999 Acts so as to provide that the concessions available to holders of an English permit, including permits issued by a London authority, are also provided, either in full or in part, to holders of permits issued in Wales, Scotland and Northern Ireland. The provision also contains a similar power for the Welsh Ministers to provide for the Welsh travel concessions to be available to holders of permits issued in England, Scotland and Northern Ireland.

38. Orders made under this provision by either the Secretary of State or the Welsh Ministers may (under subsection (3)) limit the extent to which English or Welsh travel concessions are provided to persons with permits from other parts of the United Kingdom by reference in particular:

- to the service on which the concession is to be provided;
- to the time at which the concessionary journey may begin;
- to the value of the concession to be provided.

39. An order under this provision can also (under subsection (4)) provide for a person not to benefit from a concession under the reciprocal arrangements where he would already be entitled to a concession for the relevant journey.

40. In the case of an order made by the Welsh Ministers, the power includes the ability to amend Part 2 of the 2000 Act so as to secure that an operator providing concessions in Wales may be reimbursed by the travel concession authority in whose area the journey begins.

41. Orders made under this provision would be subject to the draft affirmative resolution procedure, and would only be made at such time as there was full agreement between England, Wales, Scotland and Northern Ireland that concessionary permits issued in any of these countries would be recognised throughout the United Kingdom.

42. There are no current plans by either the Secretary of State or the Welsh Ministers to exercise these powers. It will be important before any such plans are made to ensure that the English travel concessionary scheme is working well, and there would also need to be extensive consultation with all the relevant parties on how reciprocal arrangements might work. There would also be a number of administrative issues which would need to be addressed before a UK wide reciprocal scheme could be established, in particular on the issuing and recognition of permits, the scope of such permits, and the reimbursement arrangements. Whilst such an extension to the concessionary travel scheme is unlikely in the immediate future, the Secretary of State and the Welsh Ministers still wish to have the flexibility to make such a scheme in the future, if desired, without the need to secure further primary legislation. However, given the importance of the order making power, it is appropriate that Parliament should have the opportunity to consider such proposals in draft and this is provided for by the draft affirmative procedure applying here (see Clause 11(5)).
Clause 11: Orders

43. This provision provides that any power conferred in this legislation on the Secretary of State or the Welsh Ministers to make an order is exercisable by statutory instrument, and that such orders may make different provision for different cases, purposes or areas. Orders made under sections 8, 9, 10 or 13 may include appropriate incidental, supplementary, consequential or transitional provision or savings and this can include provision to amend this Bill when enacted. This latter possibility is considered necessary in view of the complexity of the reimbursement provisions and the need to ensure that any unforeseen difficulties in revising the scope of the concession or the nature of the reimbursement provisions or in providing for reciprocal recognition of passes across the United Kingdom, as envisaged under those sections, can be adequately addressed, without the need for further primary legislation, if and when such changes are made.

44. Subsection (4) provides that order made under section 8 shall be subject to the negative resolution procedure. Subsection (5) provides that orders made under sections 9, 10 or 13 shall be subject to the draft affirmative procedure. Subsection (6) provides that an order made by the Welsh Ministers (whether alone or concurrently with the Secretary of State) may not be made unless a draft has been laid before and approved by the National Assembly for Wales.

Clause 12: Interpretation

45. This clause contains no delegated powers.

Clause 13: Minor and consequential amendments

46. Subsection (3) empowers the Secretary of State, by order, to amend any other enactment or instrument, should such amendments appear to him to be appropriate as a consequence of any provision made in this Act.

47. This “Henry VIII” power is inserted so as to ensure that, should the Secretary of State find, as a consequence of bringing these provisions into force, that other primary legislation needs to be amended, he has the power to do so without the need for further primary legislation. The power is limited to such amendments as may be needed as a consequence of provisions made in this Act. This provision would also provide a single power to enable the Secretary of State to make consequential amendments to secondary legislation, without the need to rely on a number of different order making powers from different enactments.

48. The reason for having this power is to deal with matters that cannot be foreseen or which have not been identified at this stage. In the nature of things, it is not therefore possible to predict in any detail the circumstances in which there might be a need to exercise it. The Bill does however contain detailed provisions dealing with the interrelationship between the 2000 and 1999 Act and between the 2000 Act and those provisions of the Transport Act 1985 relating to schemes under section 93 of that Act. The issues have been considered in detail but given their complexity, it is still possible that there might be unforeseen or unanticipated issues here and, if so, this power might, for example, then be needed to resolve these without having to have recourse to further primary legislation. Given that the power is there to deal with the unforeseen, there are no current plans to use it.

49. This power is subject to the draft affirmative resolution procedure, which would provide Parliament with the opportunity to scrutinise any proposed use of this power.
Clause 14: Extent

50. This clause contains no delegated powers.

Clause 15: Commencement, transitional provision and savings

51. Subsection (1) empowers the Secretary of State by order to appoint the commencement date of the Act, and to bring different provisions into force on different days. Subsection (2) provides that the Secretary of State may, by order, make any transitional provisions or savings appropriate in the context of the coming into force of any provision in this Act. As this power is limited to making any transitional or saving provisions which may be required when the Act, or any of its provisions, is brought into force, orders made under this power will not be subject to any parliamentary procedure. Subsection (3) provides a saving provision for the National Assembly for Wales in relation to the scope of its existing power under section 147 of the 2000 Act to vary the scope of the concession available in Wales. Orders made under section 147 of the 2000 Act are subject to negative resolution procedure.

Clause 16: Short title

52. This clause contains no delegated powers.

Schedule 1

53. Paragraph 5(2) inserts a new sub-paragraph (1A) into paragraph 4 of Schedule 16 to the 1999 Act to empower the Secretary of State, by regulations, to make provision about the form and period of validity of the travel concession permits issued by London authorities. This power is necessary to enable the Secretary of State to ensure consistency in the form of permits used across England. For further discussion on the power to made regulations relating to travel concession permits, please see paragraphs 6 and 7 above. This power, like the regulation making power relating to permits in new section 145A, is subject to the negative resolution procedure.

Schedule 2

54. As noted above at paragraphs 2 and 5 above, Schedule 2 (at paragraph 10) restates the concessionary fare provisions for Wales, as currently set out in section 145 of the 2000 Act, as amended by the Travel Concessions (Extension of Entitlement) (Wales) Order 2001 (S.I. 2001/3765). The schedule provides for no new delegated powers.

Schedule 3

55. This schedule contains no delegated powers.

Summary Table - Clauses containing powers to make delegated legislation

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Supplementary memorandum (provided by the department at the request of the Committee)

Introduction

1. In order to assist the Delegated Powers and Regulatory Reform Committee with consideration of the Concessionary Bus Travel Bill, the Department for Transport is providing a Supplementary Memorandum with further explanation of some aspects of the powers given to the Secretary of State under clauses 8 and 9 of the Bill.

Clause 9(1), (2) and (3) (variation of reimbursement and other administrative arrangements)

Clause 9(1) and (2)

2. It is felt by the bus industry (and the Government) that the present system under which operators in England are reimbursed for providing the national concession under s145 of the Transport Act 2000 (“the 2000 Act”) is at times costly and inefficient. It can result in a heavy administrative burden both on the operators (which, outside London, may have to apply to more than one travel concession authority for reimbursement) and the travel concession authorities (which must negotiate reimbursement arrangements with operators, meet administrative requirements set out in legislation, and often must answer appeals made against them).

3. The policy decision was therefore taken for the Bill to provide a power for the Secretary of State to streamline this process. But it remains important both to the industry, and to wider government, that this is not done without thorough consideration and consultation. Clause 9(1) and (2) provides the Secretary of State with two options for streamlining reimbursement, and other administrative functions relating to the administration of the national concession which are currently performed by travel concession authorities. The first (at clause 9(1)) is a transfer of these functions to the Secretary of State. The second (at clause 9(2)) is a transfer of the functions from non-unitary district councils to county councils. This transfer could, as drafted, be achieved by allowing the Secretary of State by order to amend Part 2 of the 2000 Act “for or in connection with securing” the transfer of these functions.

Clause 9(3)

4. This clause is illustrative of the types of provisions which might be included “for or in connection with securing” a transfer of functions to the Secretary of State under an order made under clause 9(1)(a). We are aware that there may be some concern that subsections (a) to (h) are phrased as discretions rather than obligations, especially with respect to operator’s right to appeal. The main reasons why this has been done are set out below:

   a) The Department is aware that much needs to be done in the way of consideration and consultation before decisions can be taken on the detail of any mechanics behind centralisation of the reimbursement process. The Secretary of State would expect to consult extensively on the best way to use the centralising power here before exercising it, and flexibility is therefore considered important to ensure that the interests of stakeholders can best be taken into account. Setting out a prescriptive list of obligations in advance of such consultation and further consideration may run counter to this and could well be contrary to the best interests of stakeholders.
b) We would also suggest that human rights and public law obligations on the Secretary of State to act fairly in general, and more specifically not to deprive any party of their possessions, are robust enough here for this flexibility to be allowed without any danger that an unfair system of reimbursement will result.

c) The order making power in the Bill is also ultimately constricted by the fact that anything in the order must be “for or in connection” with securing centralisation. In addition, any order would be subject to endorsement by both Houses under the affirmative resolution procedure.

d) Clause 9(3)(a) to (h) have been included primarily so that the provisions which already exist in s149 (reimbursement) and s150 (appeals) might be adapted as appropriate in the event that reimbursement is centralised so that the Secretary of State reimburses operators. At present reimbursement is carried out by local authorities. So, for example, operators’ appeals against the determination of reimbursement by travel concession authorities under s150 should no longer go to the Secretary of State, since he will be determining such reimbursement in the first place. Further background information as to why the powers in clause 9(3)(a) to (h) are included follows:

**Clause 9(3)(a)**

5. Under existing provisions (at section 149(2) of the 2000 Act) travel concession authorities are required first to attempt to agree reimbursement arrangements with operators. But if agreement cannot be reached they then have power to determine such arrangements unilaterally. The Secretary of State also currently has a power (under section 149(3) of the same Act) to make provision, by regulations (which are subject to the negative resolution procedure) with respect to the determination by travel concession authorities of the amounts to be paid to individual operators or classes of operators. Clause 9(3)(a) allows the Secretary of State to make an order giving himself power to determine rather than agree the amounts of repayment he would be required to pay to individual operators or classes of operators. In so doing he will be required to act fairly and reasonably under general administrative law principles, and, by virtue of section 6 of the Human Rights Act 1998, to act compatibly with the European Convention for the Protection of Human Rights and Fundamental Freedoms and in particular article 6 (the right to a fair and public hearing by an independent and impartial tribunal established by law in the determination of civil rights), and article 1 of Protocol 1 (the protection of property rights).

**Clause 9(3)(b) and (c)**

6. These provisions are intended to allow appropriate changes to reflect what already exists in s149(3)(a) and (b) of the 2000 Act so that, for example, regulations concerning a standard method of calculation and system for claiming payments can be provided for.

**Clause 9(3)(d) and (e)**

7. These are discussed in the following section.

**Clause 9(3)(f)**

8. This will allow a requirement for consultation in connection with centralisation to be enshrined in legislation. Such consultation might be required prior to publication of any method for determining appeals. Given the policy decision to allow the greatest flexibility to determine matters in the light of all relevant circumstances and considerations if and
when the power comes to be exercised, it has been included as an option rather then specified as an obligation at this stage.

Clause 9(3)(g)

9. Again, this will allow flexibility to deal with such detail as how reimbursement will be calculated (etc) by regulations, if wanted. Such flexibility is similar to the current s149(3) 2000 Act power to make regulations with respect to the determination by travel concession authorities of the amounts to be paid, and the manner of making any payments. Again this power is included so that the necessarily technically detailed aspects of reimbursement arrangements following any centralisation can be dealt with in the light of all the relevant circumstances if and when centralisation is adopted (or subsequently, should technical difficulties emerge in practice).

Clause 9(3)(h)

10. Section 145A(9) to (11) of the 2000 Act, inserted by clause 1 of the Bill, will allow local authorities involved in running voluntary concessionary schemes under s93 of the Transport Act 1985 to save money by agreeing with concessionaires who are not interested in bus travel to forgo the mandatory bus travel entitlement under s145A of the 2000 Act in exchange for other concessions under s93 schemes, such as taxi tokens. The money saved by the local authority could be used to support the different concessions offered under the s93 schemes. It would not be appropriate to keep these provisions on the statute book in the event that the Secretary of State was reimbursing operators for the national concession.

Right of Appeal

11. It is likely that, if the Secretary of State determines reimbursement, then much of the current appeals mechanism under s150 will be inappropriate for handling appeals from operators in England, since, as mentioned he could not properly hear appeals about levels of reimbursement he has set. A suitable mechanism for appeals will therefore need to be substituted here.

12. Clause 9(3)(d) and (e) provides that the Secretary of State may, by order, amend Part 2 of the 2000 Act to allow operators to appeal against reimbursement arrangements determined by him under any centralised system introduced under clause 9(1)(a). The power to establish a person or body for the purpose of hearing appeals is also specifically included.

13. These sections broadly reflect what currently exists at s150(3) of the 2000 Act, and regulations which can be made at s150(6)(c). The Department’s view is that it is necessary to have the maximum flexibility here in determining the appropriate appeals mechanism so a discretionary power is more appropriate than a specific obligation. However, general requirements of public law (the need to act reasonably, fairly, and rationally) and requirements of human rights law will most likely mean the Secretary of State has to put appeals arrangements in place.

14. In particular, in determining the reimbursement, the Secretary of State will be under a duty under s6 of the Human Rights Act 1998 not to act incompatibly with the Article 1 Protocol 1 ECHR right to the peaceful enjoyment of possessions. This, we consider, includes ensuring that operators are adequately reimbursed for any fare revenue foregone in providing concessions. Section 6 of the Human Rights Act 1998 will also oblige the Secretary of State to allow operators a fair hearing in the determination of their civil rights (in accordance with Article 6 of the Convention).
15. In the Department’s view, the need to comply with these requirements, together with the sanction of judicial review, will mean that the Secretary of State will need to establish a fair appeal system for operators. The preference, though, is for flexibility to deal with these matters as is most appropriate at the time, rather than stipulating how they should be dealt with now.

16. There are some examples in the 2000 Act of instances where a similar discretion has been given to the Secretary of State, in place of an obligation:

- Section 257 of the 2000 Act inserts sections 99ZA to 99ZC into the Road Traffic Act 1988. Section 99ZA provides that regulations may make provisions about driver training courses. Section 99ZC stipulates that such regulations may provide for the approval by the Secretary of State of persons providing driving training courses, and for appeals against refusal or withdrawal of such approvals.

- Section 195 of the 2000 Act also gives a power to the Lord Chancellor to make provision (via regulations) for or in connection with the determination of disputes relating to charging or licensing schemes; appeals relating to any such determinations; and the appointment of persons to hear such appeals. (Charging schemes are schemes for imposing charges in respect of use or keeping of cars on roads, and are made by local traffic authorities. Under licensing schemes, licensing authorities can charge the occupiers of workplace premises for licences allowing the parking of a maximum number of vehicles at relevant workplaces.) Similarly, the provisions under which road user charging schemes may be made by London borough councils (contained in Schedule 23 of the Greater London Authority Act 1999) do not include a requirement for such schemes to include an appeal mechanism. Instead there is a power at paragraph 28 for the Lord Chancellor to make regulations for or in connection with the determination of disputes and appeals against such determination, and the appointment of persons to hear such appeals. SI 2001/2313 sets out procedures for appeal against charges made under any such schemes, and deals with the appointment of adjudicators to hear them.

Amending Part 2 of the 2000 Act (Clauses 8 and 9)

17. The reference in clause 9 to Part 2 of the 2000 Act is intended to make it as clear as possible that an order under that clause can amend the 2000 Act by inserting one or more new sections. There was a concern that if the Bill referred to amendment of, for instance, sections 145 to 150 of the 2000 Act, it might be thought that the order could amend those sections only, and not add new sections. Referring to amendment of Part 2 of the 2000 Act seemed to be the safest way of making clear that new sections can be added.

18. It is quite likely that an order under clause 8(1)(a), for example, would involve the addition of new sections to the 2000 Act, for the sake of clarity of the legislation. This might be achieved, for example, by inserting new sections 148A and 148B to deal with reimbursement by the Secretary of State, and amending sections 149 and 150 so that they deal only with reimbursement by travel concession authorities in Wales.

19. It is less likely that an order under clause 8 would involve the insertion of new sections into the 2000 Act. But it seemed sensible to refer to Part 2 of the 2000 Act in clause 8 as well, for consistency with clause 9 and for consistency with the reference in clause 8 to Chapter 8 of Part 4 of the 1999 Act.

20. Despite the apparent breadth of the power to amend in these clauses, there is no danger of unrelated provisions being amended, since the power to amend Part 2 is limited to amendments “for or in connection with securing” the purpose of the relevant clause.
APPENDIX 2: CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE BILL

Memorandum by the Home Office

Introduction

1. The Bill was introduced in the House of Commons on 20th July 2006 and re-introduced on 16th November 2006. References below are to the Bill as brought to the House of Lords in December 2006.

Clause 13(1): Power to adapt or modify statutory provisions about criminal proceedings in their application to proceedings under the Bill against Government departments or other listed bodies or against police forces

- **Power conferred on:** Secretary of State
- **Power exercisable by:** Order made by statutory instrument
- **Parliamentary procedure:** Negative resolution

2. Clause 1 of the Bill provides that the offence of corporate manslaughter or corporate homicide can be committed by Government departments and other listed bodies, and by police forces. However, such organisations do not have criminal liability and statutory requirements about criminal procedure do not apply to them. Clause 13 therefore provides that for the purposes of the new offence all provisions relating to criminal proceedings, evidence and sentencing apply to Government departments and other listed bodies, and to police forces. Clause 13(1) also enables any necessary adaptations and modifications to be made to existing provisions by order. For example, a reference in the rules on criminal procedure to a director or the secretary of the corporation would need modification to apply to a department or police force.

3. By virtue of clause 19(4), such orders can make different provision for different cases, and may make transitional or saving provision.

4. An order under clause 13(1) would be subject to the negative resolution procedure. The Department considers that this would provide an appropriate level of Parliamentary scrutiny, given the essentially technical and procedural nature of the order.

Clause 14(4) and (6): Power to specify the organisation against which any proceedings are to be instituted or continued where a person’s death has occurred or is alleged to have occurred in connection with the carrying out of a public organisation’s functions and there has been a subsequent transfer of those functions

- **Power conferred on:** Secretary of State
- **Power exercisable by:** Order made by statutory instrument
- **Parliamentary procedure:** Negative resolution

5. Clause 1(2) of the Bill provides that the organisations which can be guilty of the offence of corporate manslaughter or corporate homicide are bodies corporate, Government departments or other bodies listed in Schedule 1, and police forces. Clause 14 makes provision for cases where a death has or has allegedly occurred in connection with the
functions of one of those organisations, and subsequently those functions have been transferred between (or out of) those organisations. Generally, prosecutions will be commenced, or continued, against the body that currently has responsibility for the relevant function. But if the function is transferred out of the public sector entirely, proceedings will be against the body by which the function was last carried out. For machinery of Government changes, the effect of this is to place responsibility for defending proceedings with the organisation within which a function currently sits. But in order to retain the Crown’s overall liability for proceedings if a function is transferred to a non-Crown body (for example, if a function were privatised), liability remains with the Crown body that previously performed the function.

6. The powers in subsections (4) and (6) allow for a departure from the general approach. The Secretary of State may make an order specifying that any proceedings are to be instituted or, as the case may be, continued against a body other than the one which acquires or loses the functions in question as a result of the transfer.

7. It is envisaged that this provision will provide for flexibility in a case where it is appropriate not to follow the general approach. For example, where a function transfers between Government departments but there is no corresponding transfer of personnel, it might be more appropriate for the department responsible at the time of the fatality to retain liability.

8. By virtue of clause 19(4), such an order can make different provision for different cases, and may make transitional or saving provision.

9. Such orders would be subject to the negative resolution procedure. The Department considers that this would provide an appropriate level of Parliamentary scrutiny, given that an order could only transfer liability from one public body to another, and so could not actually deprive any person of any rights to redress.

Clause 18(1): Power to amend the list of Government Departments etc in Schedule 1

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<th>Power conferred on:</th>
<th>Secretary of State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative resolution, unless all the amendments made fall within clause 18(3), in which case the order requires the negative resolution procedure.</td>
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</table>

10. Schedule 1 to the Bill, read with clause 1(2)(b), sets out a list of Government departments and other public bodies which can be guilty of the offence of corporate manslaughter or corporate homicide in clause 1. The list does not include bodies corporate because these are already covered by clause 1(2)(a). Clause 18(1) contains a power for the Secretary of State to amend Schedule 1 by order. Such a power is necessary because for a variety of reasons, new departments and public bodies may be created, cease to exist, or change their names.

11. The effect of subsections (2) and (3) is that such an order will require the affirmative resolution procedure unless the only amendments it contains are due to the change in name of a department or other body, the addition of a department or body (if the reason for adding it is that it will have functions which were previously carried out by another organisation to which the offence applies) or the removal of a department or body (either because it is being abolished or because all of its functions are being transferred to another organisation to which the offence applies). In those case the negative resolution procedure is required.
12. By virtue of clause 19(4), an order can make different provision for different cases, and may make transitional or saving provision.

13. The Department considers that it is appropriate to provide for different levels of Parliamentary scrutiny in this way because it reflects the distinction between the substantive and technical changes that may be made to Schedule 1. The effect is that changes which alter the range of activities and functions to which the offence applies will need to be expressly approved by Parliament before they come into effect, but all other changes will take effect unless Parliament chooses to intervene.

*Clause 21: Commencement power*

*Power conferred on:* Secretary of State

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* None

14. Clause 21(1) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement order.

15. By virtue of clause 19(4), such orders can make different provision for different cases, and may make transitional or saving provision.

16. As is usual with commencement orders, they are not subject to any Parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by order enables the provisions to be brought into force at a convenient time.
APPENDIX 3: FURTHER EDUCATION AND TRAINING BILL [HL]

Memorandum by the Department for Education and Skills

Introduction

1. The Further Education and Training Bill (the Bill) was introduced in the House of Lords on 20 November 2006. This Memorandum sets out the delegated powers sought under the Bill. It explains in each case the purpose of the power; the reason why delegated legislation is appropriate; and the nature and reason for the parliamentary procedures that apply.

2. Drafts of the initial regulations to be made under the proposed clauses are being prepared. The Department intends to provide drafts of the regulations it intends to make to implement the Bill for the Lords committee stage.

Main provisions of the Bill

3. The Bill seeks to implement a series of reforms which will raise skills and qualification levels for young people and adults to world standards. It implements policy commitments set out in the White Paper Further Education, Raising Skills, Improving Life Chances (Cm6768) which was published in March 2006.

4. The Bill is organised into four parts, as follows:

Part 1: Provision relating to the Learning and Skills Council for England including:

a. restructuring the Learning and Skills Council

b. a new duty on the Learning and Skills Council to carry out its specified functions in accordance with: (i) the strategies of specified strategy-making bodies; and (ii) a strategy prepared by a body chaired by the Mayor of London, where provision has been made by regulations for such a body to be established

c. new duties on the Council to encourage diversity and choice of provision; and to have regard to guidance about consulting learners and employers

d. enabling the Learning and Skills Council to deliver shared services to other bodies concerned with education and training.

Part 2: Provision relating to further education institutions including:

e. the transfer of powers from the Secretary of State to the Learning and Skills Council in respect of the establishment or dissolution of further education corporations

f. the transfer of powers from the Secretary of State to the Learning and Skills Council to intervene in the management of failing or coasting colleges; and new powers to direct the removal of some members of staff and to require collaborative arrangements

g. a new power for the Secretary of State to direct to the Learning and Skills Council to exercise its powers to establish or dissolve further education corporations as he thinks fit

h. a new duty on further education colleges to have regard to guidance about consulting employers and learners
i. clarifying the powers of further education institutions to form or acquire an interest in companies and enabling further education institutions to form or become members of charitable incorporated organisations

j. enabling the Secretary of State to regulate the qualifications of all college principals

k. enabling the Privy Council to grant further education institutions the power to award foundation degrees only

**Part 3: Provision relating to industrial training levies including:**

l. amending the requirement about how Industrial Training Boards demonstrate consensus for their levy proposals, so that they can, for example, consider the views employers who are not represented by trade federations

m. requiring industrial training boards to submit levy proposals covering three years, rather than one

**Part 4: Miscellaneous and general provisions, including:**

n. clarifying the power of higher education corporations to form or acquire an interest in companies and enabling higher education corporations to form or become members of charitable incorporated organisations

o. provision for the National Assembly for Wales to make measures in relation to a range of education and training matters in Wales (further detail is at paragraphs 38-42 below).

**Territorial coverage**

5. The Bill applies to England only with the following exceptions:

   • the Secretary of State’s powers to direct removal of principals and senior post holders, to create and dissolve further education colleges will, in so far as they apply in Wales, be exercisable by the Welsh Ministers, not the Learning and Skills Council;

   • consent for colleges in Wales to form or acquire an interest in companies would be from Welsh Ministers (in England it would be from the Learning and Skills Council);

   • consent for colleges in Wales to form or become members of charitable incorporated organisations would be from Welsh Ministers (in England it would be from the Learning and Skills Council);

   • provision amending the way in which Industrial Training Boards demonstrate consensus for their levy proposals would apply in England, Wales and Scotland;

   • provision requiring Industrial Training Boards to apply for levies covering three years, rather than one, would apply in England, Wales and Scotland;

   • provision enabling the Learning and Skills Councils to operate loans for learners, the Managing Information Across Partners programme and shared services would operate in Wales, Scotland and Northern Ireland only with the consent of the devolved administrations.

**Rationale and overview of delegated powers**

6. The Bill contains powers to make delegated legislation. In considering whether matters should be on the face of the Bill or left to delegated legislation the Department has taken
account of the need to ensure that: the overall legislative framework and the substantive policy provisions are presented clearly on the face of the Bill; and the provisions of the Bill contain sufficient flexibility to enable effective implementation of policy and to respond to changing circumstances and needs.

7. In addition, we have aimed to ensure that the clarity of primary legislation is not obscured by administrative detail concerning processes and arrangements, and to that end, most of these matters have been reserved for secondary legislation. This approach will also make sure that there is opportunity to consult on the detail of procedural arrangements before they are implemented.

Parliamentary scrutiny

8. Any power to make orders or regulations under this Bill is exercisable by statutory instrument, apart from the power of the Department for Employment and Learning in Northern Ireland to make an order under section 10, which is exercisable by statutory rule.

9. The Department has considered on a case by case basis the appropriate procedure to follow in making orders and regulations. In all cases, we consider that the matters concerned are of technical or procedural detail and with this in view, all delegated powers in the Bill are subject to the negative resolution procedure.

10. The powers to make orders conferred on the devolved administrations by the Bill are subject to the appropriate negative resolution procedure applicable in the relevant devolved administration. In addition, the National Assembly for Wales is given measure making powers. This is discussed in greater detail at paragraphs 38-42 below.

Detail of delegated powers

Clause 2 – Enabling the Secretary of State to make provision about regional learning and skills regional councils

11. Clause 2 provides that the Learning and Skills Council must establish a committee (to be called a regional learning and skills council) for each area of England specified by the Secretary of State. It goes on to provide a regulation-making power for the Secretary of State to make provision about these regional councils. The clause specifies the matters that regulations may make provision about, which include the membership of a regional council; the appointment of the members and chairman of a regional council and the holding and vacation of office as a member or chairman of a regional council; the appointment of regional council staff and the conferring upon them of authority to exercise regional council functions; the conferring of authority on the chairman to exercise regional council functions; the conferring on regional council members of authority to exercise functions which the chairman is authorised to exercise; the payment by the Council of such salaries and such travelling, subsistence and other allowances to the chairman and other members of a regional council as the Secretary of State may determine; the provision of information to the Secretary of State and the attendance of a representative of the Secretary of State at regional council meetings; the validity of the proceedings of a regional council and the regulation by a regional council of its own procedure. The power is necessary to ensure that regional learning and skills councils are properly-constituted bodies, which will be able to carry out delegated functions of the national Learning and Skills Council in a particular area.

12. Currently, the national Learning and Skills Council is required to establish a local learning and skills council for each area of England specified by the Secretary of State. The new regional structure will replace this local one. The Government’s White Paper
Further Education: Raising Skills, Improving Life Chances set out the need for the Learning and Skills Council to strengthen its capacity at regional level to respond to the skills needs across a region and to establish a new streamlined accountability structure.

13. The matters in relation to the new regional learning and skills councils which will be covered by the proposed regulation-making power are broadly those which are covered in relation to the existing 47 local Learning and Skills Councils in section 19 and schedule 2 of the Learning and Skills Act 2000. Similarly, the proposal for the Secretary of State to specify the areas in England for which the Council must establish a regional council replicates the current position in section 19 of the Learning and Skills Act 2000 in relation to local Learning and Skills Councils. Addressing these matters through regulations, rather than fixing them in primary legislation, gives flexibility to accommodate possible machinery of government changes in the light of the emerging city-regions agenda. Different regional councils could be structured in different ways to reflect the particular arrangements that might come to exist in each region. This will help to achieve the more responsive structure envisaged by the White Paper.

Clause 4 – Requiring the Learning and Skills Council to carry out its functions in accordance with the strategy of certain specified strategy-making bodies

14. Clause 4 provides that the Secretary of State may by order specify a body to formulate and keep under review a strategy setting out how specified functions of the Council in relation to a specified area of England (this could be the whole of England, but may not be exclusively Greater London or a part of Greater London) are to be carried out in relation to the area. The area of England and functions in relation to which the strategy is to be formulated will be specified in the order that specifies the body which may formulate the strategy. This will enable strategies to be formulated for example in relation to specific Council functions in a specified geographical area of England or for the whole of England in relation to a particular specified sector or theme within the existing functions of the Council. The Secretary of State will have the power to issue directions and guidance in relation to the formulation and review of these strategies.

15. The Council must carry out any function to which a strategy (formulated by a specified body) relates in accordance with that strategy.

16. In addition, the clause provides that the Learning and Skills Council must carry out its functions in Greater London in accordance with a strategy formulated by a body where the Secretary of State has by regulations provided for such a body to be established. The regulations, where made, must provide for the body to consist of the Mayor of London and other members appointed by the Mayor in accordance with the regulations. They must also provide for the Mayor to be the chairman of the body. The Secretary of State will have the power to issue directions and guidance in relation to the formulation and review of the strategy.

17. The intention of this provision is to ensure that any strategy in accordance with which the Learning and Council is required to carry out its functions is a properly-formulated and appropriate one. The power to make such provision is proposed for secondary, rather than primary, legislation as the arrangements will be different for each strategy body and will change over time.

Clause 10 – Enabling the Secretary of State to specify bodies with which the Learning and Skills Council may make arrangements for the provision of certain shared services.

18. Clause 10 provides for the Secretary of State and the devolved administrations to specify by order additional persons or bodies with which the Learning and Skills Council may make arrangements for the provision by the Council of services in connection with
their functions relating to education or training. Where a person or body is specified in this way, the Learning and Skills Council will be able to enter into such arrangements, but would not be compelled to, nor would such a person or body be compelled to be a party to such arrangements. The power to specify additional persons or bodies is proposed for secondary, rather than primary, legislation, as the persons or bodies with which the Council might make such arrangements could change over time. The approach of listing in the Bill those persons or bodies with whom the Council can enter into shared services has been considered. However the list, which would need to cover bodies in Wales, Scotland and Northern Ireland, as well as England, would be unwieldy and changes to primary legislation would be needed as and when changes to primary or secondary legislation defining specific types of bodies were made. The order making approach represents a reserve power for situations that might occur in the future.

Clauses 13, 14 and 15 – Establishment and dissolution of further education corporations

19. Under clauses 13, 14 and 15 of the Bill, it is proposed that:

(i) Section 16 of the Further and Higher Education Act 1992 will be amended so that the Secretary of State’s powers to incorporate further education institutions by order will be transferred to the Learning and Skills Council. Section 51 of the Further and Higher Education Act 1992 will be amended so that before making an order to incorporate a new further education institution, the council will publish its proposal for this; allow a period for representations; and consider any representations received in the time period.

(ii) Section 27 of the Further and Higher Education Act 1992 will be amended so that the Secretary of State’s powers to dissolve further education institutions by order will be transferred to the Learning and Skills Council.

(iii) Section 51 of the Further and Higher Education Act 1992 will be amended so that before making an order to dissolve a new further education institution, the Council will publish its proposal for this; allow a period for representations; and consider any representations received in the time period.

20. Reference to clauses 13, 14 and 15 have been included in this Memorandum because they represent a significant transfer of powers from the Secretary of State to the Learning and Skills Council. (In relation to Wales, these powers are already transferred to the National Assembly for Wales; in accordance with the Government of Wales Act 2006, they will be exercisable by the Welsh Ministers.) There have been similar transfers of powers through the Enterprise Act 2002 and the Communications Act 2003. Provision in the Enterprise Act 2002 replaced earlier provision in the Fair Trading Act 1973 under which the Secretary of State made final orders in relation to mergers with provision under which the Competition Commission does so. Similarly, the Communications Act 2003 gives OFCOM various order and regulation-making powers, some of which were previously exercised by the Secretary of State.

21. The Bill seeks to transfer these powers because the Learning and Skills Council is better placed to exercise them. It has a detailed knowledge about individual providers and of what provision is needed in a particular area.

22. In seeking to transfer the powers to dissolve and incorporate further education institutions from the Secretary of State to the Learning and Skills Council, the current requirements in relation to publishing and considering representations on draft orders will remain. Hence those with an interest in a possible incorporation or dissolution of a college would have an opportunity to make representations to the Learning and Skills Council about this.
Clauses 17 and 18 – Intervention in the running of further education institutions where there are concerns about its management and/or effectiveness

23. Clauses 17 makes provision for the Learning and Skills Council to intervene in the running of further education institutions where the Council is satisfied that the institution’s affairs have been or are being mismanaged by the institution’s governing body; that the institution’s governing body have failed to discharge any duty imposed on them by or for the purposes of any Act of Parliament; that the institution’s governing body have acted or are proposing to act unreasonably with respect to any power conferred or the performance of any duty imposed by Act of Parliament; or that the performance of the institution is significantly less good than might reasonably be expected, or is failing or likely to fail to give an acceptable standard or education or training.

24. These provisions enable the implementation of proposals set out in the Government’s White Paper Further Education: Raising Skills, Improving Life Chances. It is intended that where a further education institution is not performing satisfactorily, the Learning and Skills Council will issue a formal notice with a specified short period (in most cases, one year) for improvement. If at the end of the period there is insufficient improvement, the Learning and Skills Council will implement one or more of a set of intervention options. The key types of intervention would be: change of leadership; change of governance; opening up provision to competition to find an alternative provider; and help from, or merger with, a stronger provider.

25. Some of the powers to intervene where further education institutions are not performing satisfactorily are currently with the Secretary of State. They are set out in section 57 of the Further and Higher Education Act 1992, as amended by the Learning and Skills Act 2000. Clause 17 broadly mirrors section 57, with some modifications:

(i) The Learning and Skills Council will be able to remove all or any of the members of an institution’s governing body as the Secretary of State can do now under section 57 of the Further and Higher Education Act.

(ii) The Learning and Skills Council will be able to appoint new members to an institution’s governing body, if there are vacancies, replacing the Secretary’s of State’s power under section 57 of the Further and Higher Education Act 1992 to appoint new members to a governing body, in circumstances where he has removed members.

(iii) The Learning and Skills Council will be able to give directions to the governing body of an institution as it thinks expedient as to the exercise of their powers and performance of their duties, which may include, if the governing body has the appropriate power, to dismiss particular members of staff; and to make specified arrangements for collaboration (within the meaning of section 166 of the Education and Inspections Act 2006).


27. Reference to clauses 17 and 18 have been included in this Memorandum because they represent a significant transfer of powers from the Secretary of State to the Learning and Skills Council. (In relation to Wales, the current powers are already transferred to the National Assembly for Wales; in accordance with the Government of Wales Act 2006, they will be exercisable by the Welsh Ministers.)

28. The Bill seeks to transfer some powers in relation to the running and management of further education institutions that were previously held by the Secretary of State to the Learning and Skills Council because the Council is better placed to exercise them. In particular, it will be able to judge whether it is appropriate to use a particular power and to exercise it, as part of a supportive regime involving a period of notice during which
specified improvements will be sought. In most circumstances, it would be inappropriate for the Secretary of State to intervene in the running of individual further education institutions. The Secretary of State does not monitor and support the effectiveness and running of individual further education institutions in the way that the Learning and Skills Council does, as part of its arrangements for funding further education. This distance between the Secretary of State and individual institutions is one of the reasons that the Secretary of State has made virtually no use of his powers in this area.

**Clause 19 – Power to award foundation degrees**

29. For completeness, this Memorandum draws attention to the fact that the Bill provides for amendments to section 76 of the Further and Higher Education Act 1992. Section 76 provides that the Privy Council may by order specify any institution which provides higher education as competent to grant a range of awards including degrees, diplomas and certificates. Clause 19 amends section 76 to enable the Privy Council by order to specify in addition any institution in England within the further education sector as competent to grant foundation degrees. The effect of this provision is to amend an existing order-making power of the Privy Council.

**Clause 22 – Enabling the Secretary of State to regulate the qualifications of all college Principals**

30. For completeness, this Memorandum draws attention to the fact that the Bill provides for an extension of an existing regulation-making power of the Secretary of State. Section 137 of the Education Act 2002 contains a regulation-making power in relation to the qualifications of college Principals. Subsection (3) provides that: “A provision of regulations under subsection (1) shall not apply to a person who has been appointed as the principal of an institution before commencement of the provision”. The Bill proposes repealing this sub-section in relation to England, so that the Secretary of State can regulate the qualifications of all Principals.

31. The Government intends to lay regulations under the Education Act 2002 requiring all newly appointed principals, new to the sector, to hold or be working towards a leadership qualification. It is anticipated that these regulations will come into force in September 2007. Following the passage of this Bill, these regulations would be extended to cover all serving principals who move to a new post, to be effective from September 2008.

32. The Government is planning to introduce a new qualification for college Principals, as part of its wide-ranging measures to improve the quality of further education. Whilst it is hoped that most serving Principals will choose to obtain the new qualification, a refusal by a sizeable number of them would undermine the policy of having a fully qualified workforce. Hence the Bill provides that the Secretary of State will be able to regulate in relation to all Principals.

**Clause 23 – Conditions relating to levy proposals**

33. Clause 23 amends section 11 of the Industrial Training Act 1982. The Act currently requires that an Industrial Training Board demonstrates that a levy proposal has the support of organisations representing more than half the employers, who together are likely to pay more than half the levy, before the Secretary of State imposes that levy on the industry. These organisations have traditionally taken the form of employer federations and trade associations. The clause amends this provision so that support for levy proposals can be demonstrated by wider consultation with employers, whether or not they are members of relevant organisations. It allows the Secretary of State to make regulations about the detail of how support for levy proposals is to be demonstrated, including allowing a sample of employers to be consulted.
34. Specifically, the regulations can provide for what “reasonable steps” an Industrial Training Board should take to get the views of those who are likely to pay a particular levy, ahead of the Board submitting proposals for that levy to the Secretary of State. Clause 23 provides that the regulations may include provision for taking the view of organisations of particular types prescribed in the regulations as representing the view of all those who are represented by the organisation with respect to levy proposals and using a sample of employers.

35. The Bill proposes that the detail of how consensus is to be demonstrated be provided for through regulation to allow the flexibility for an Industrial Training Board to choose an approach best suited to the profile of its own particular industry. We therefore do not think it would be appropriate to provide for it through primary legislation.

Clause 24 – Requiring Industrial Training Boards to submit levy proposals covering three years’ worth of levies.

36. For completeness, this Memorandum draws attention to the fact that the Bill provides for amendments to sections 11 and 12 of the Industrial Training Act 1982 to allow three training levies to be made under a single order. The purpose of this clause is to encourage Industrial Training Boards to take a longer-term view of their business planning and finances and to reduce the bureaucracy associated with making a new levy order every year.

Clause 31 – Commencement

37. This clause provides that with the exception of the provisions set out in subsections (1) and (2), which are to come into force on Royal Assent or two months after Royal Assent respectively, all provisions are to be commenced by order. Orders may be made, as appropriate, by the Secretary of State or Welsh Ministers.

Wales

38. The 2005 White Paper Better Governance for Wales introduced proposals to increase the Assembly’s legislative powers by delegating to the Assembly, in primary legislation, maximum discretion in making its own provisions, using its secondary legislative powers. The Government set out that it intended for Bills to be drafted in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales. As a further enhancement of the Assembly’s legislative powers, the Government proposed to enable Parliament to give the Assembly powers to modify legislation or make new provision on specific matters or within defined areas of policy within the fields in which the Assembly currently exercises functions.

39. These powers have now been defined as Assembly Measures in part 3 of the Government of Wales Act 2006 (GOWA 2006). Assembly Measures are comparable to any provision that could be made by Act of Parliament but are subject to specific restrictions set out in Part 2 of Schedule 5 of GOWA 2006. The list of twenty fields in which the Assembly currently exercises functions is set out in Part 1 of Schedule 5 to GOWA 2006, and each field will be divided into Matters. Field 5 is entitled ‘Education and Training.’

40. The enhanced legislative competency in clause 26 of this Bill takes the form of amendments to Part 1 of Schedule 5 of GOWA 2006. Clause 26 introduces matters 5.1 to 5.6 into field 5 of Schedule 5. The legislative powers conferred in clause 26 of this Bill will only be exercisable by way of Assembly Measure in accordance with Part 3 of GOWA 2006. Assembly standing order procedures will apply to the making of Assembly Measures.
and they will be enacted by being passed by the Assembly and approved by Her Majesty in Council.

41. This approach recognises that delegating legislative powers to a democratically elected Assembly is very different from delegating powers to a Minister of the Crown. It follows the approach taken with framework powers in the NHS Redress Bill and the Education and Inspections Bill. The Rt Hon Peter Hain MP, Secretary of State for Wales, in agreement with the First Minister of the National Assembly, has laid down a memorandum before Parliament which provides further information about framework powers and Assembly Measures in general, as well as the specific framework power provisions in the Education and Inspections Bill.

The table below lists the policy areas and provides examples of existing legislation that might be affected by the use of the enhanced legislative competency at 26 of the Bill.

<table>
<thead>
<tr>
<th>Provision</th>
<th>Policy area</th>
<th>Potential - impact upon</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 Matter 5.1</td>
<td>Facilities for post 16 education and training. The Assembly proposes to consider the facilities for post 16 education and training as part of the Further Education Review and to make new legislation at a future date. Subject to the outcome of the review and consultation with stakeholders, the Assembly might wish to make changes to the facilities for post 16 education and training.</td>
<td>Learning and Skills Act 2000, Part 2</td>
</tr>
<tr>
<td>25 Matter 5.2</td>
<td>The establishment, dissolution, conduct, functions, governance, staff, property, rights and liabilities of institutions concerned with the provision of further education. The enhanced legislative competence would permit the Assembly to rationalise legislation in order to simplify and clarify its application to Wales and permit the Assembly to make new provisions for the establishment and discontinuance of further education institutions and their management and governance, should these be necessary to take forward the policy in the future.</td>
<td>Education (No. 2) Act 1986, section 61; Further and Higher Education Act 1992 (Part 1, Chapter 2); Education Act 1994, Part 1; Education Act 1996, Part 9; Learning and Skills Act 2000, Part 2, Part 5; Education Act 2002, Part 8</td>
</tr>
<tr>
<td>25 Matter 5.3</td>
<td>Collaboration between schools, further education institutions, local authorities, the voluntary sector, local employers, work based learning providers and other persons. The primary purpose of this enhanced legislative competence is to enable the Assembly to introduce new forms of learning delivery through joint ventures and collaborative arrangements. This will permit the Assembly to direct the formation of collaboration arrangements, should</td>
<td>Education and Inspections Act 2006 Section 166</td>
</tr>
<tr>
<td>Matter 5.4</td>
<td>Financial resources in connection with post 16 education and training. The Assembly proposes to consider the way in which post 16 education and training is funded. There are grounds for rationalising and simplifying the statute book, to consolidate provisions of Wales in order to set them out clearly.</td>
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| 25 | - Education (Fees and Awards) Act 1983, section 1  
- Teaching and Higher Education Act 1998, Pt 2  
- Learning and Skills Act 2000, Part 2 & Part 5  
- Education Act 2002, Part 2 and Part 11 |
| Matter 5.5 | Inspection of post 16 education and training and teacher training. Subject to the outcome of the review and consultation with stakeholders, the Assembly might wish to make changes to the regime for inspection of post 16 education and training. This enhanced legislative competence would enable the Assembly to do so. |
| 25 | - Learning and Skills Act 2000, Part 4 |
| Matter 5.6 | Advice and Information relating to post 16 education and training. Subject to the outcome of the review and consultation with stakeholders, the Assembly might wish to make different provision in relation to the collection, maintenance and dissemination of information relating to post 16 education and training in Wales. This enhanced legislative competence would enable the Assembly to do so. |
| 25 | - Further and Higher Education Act 1992, Part 1, Chapter 2  
- Education Act 1997, Part 7  
- Learning and Skills Act 2000, Part 2 |
Supplementary memorandum (provided by the department at the request of the Committee)

Clause 2 – Regional councils

1. The Learning and Skills Council for England (LSC) already has nine non-statutory regional boards. The LSC Chair Chris Banks has recently made proposals to the Secretary of State about the nature of the proposed statutory regional councils, and these are in the final stages of consideration by Ministers. The detail will not be ready this week, but it will be ready before Grand Committee in January 2007.

2. Officials believe that the direction of travel is very likely to build on the current arrangements. Thus for example, a regional council would have 10-16 members, like the future LSC National Council (see Clause 1 of the Bill), and have a Regional Chair from business, and members covering employer, Trades Union, local authority, and post16 learning interests. The previous commitment - that 40% of members would have business experience and reflect the communities they serve - would still stand.

3. We do recognise that provision about the sub-national structure of the LSC is currently in primary legislation. But we also feel that, by virtue of the nature of the provision being made (which is largely mechanistic) and its comparatively low constitutional and legal impact, negative resolution would lend the appropriate level of parliamentary scrutiny. We will be making draft illustrative regulations available for the Committee stage of the Bill in the House of Lords.

Clause 16 – Directing the Learning and Skills Council to incorporate and dissolve Further Education Corporations

4. Clause 16 provides the Secretary of State with reserve powers to direct the Learning and Skills Council (“the LSC”) to incorporate and dissolve further education corporations. It is not intended, in the normal course of events that this power will be used. However, where processes or protocols within the Learning and Skills Council prevent the prompt establishment of a new institution, it is important that the Secretary of State has the power to act.

5. Similarly it is important that the Secretary of State can direct the Learning and Skills Council to dissolve a further education corporation where, in the opinion of the Secretary of State, it has been ineffective in carrying out its duties.

6. Whilst we note the potential concern over the removal of Parliamentary scrutiny by clauses 13 and 14, read in conjunction with clause 16, we consider that the consultation process set out in regulations made under section 51 of the Further and Higher Education Act 1992 adequately safeguards the interests of the local community (and general public), as to the exercise of these powers by the Learning and Skills Council, without the need for Parliamentary scrutiny. The Learning and Skills Council will exercise the powers to incorporate and dissolve further education corporations with the benefit of its knowledge of the local area and the institution(s) concerned. As already stated, the interests of the local community and appropriate stakeholders will be protected by the consultation procedures, whereby they have an opportunity to make representations.

7. It is also perhaps worth noting that under the present protocol for publication of proposals for incorporation or dissolution, the LSC is required to notify local MPs of any proposals which may impact on their constituency and they are offered an opportunity to make representations. In revising regulations made under section 51, we intend to make this an explicit requirement on the Council.
APPENDIX 4: INVESTMENT EXCHANGES AND CLEARING HOUSES BILL

Memorandum by Her Majesty’s Treasury

Introduction

1. This memorandum identifies two provisions in the Investment Exchanges and Clearing Houses Bill which confer delegated power on the Financial Services Authority.

2. The Bill introduces in Part 18 of the Financial Services and Markets Act 2000 (“FSMA”), which provides for regulation by the Financial Services Authority (“the Authority” of investment exchanges and clearing houses, a power for the Authority to veto regulatory provisions proposed by a recognised investment exchange or a recognised clearing house that are excessive. The Bill provides that a regulatory provision is excessive if it is not required under Community or UK law and either does not pursue a reasonable regulatory objective or is disproportionate to the end to be achieved.

3. Under FSMA, the powers of the Treasury to make secondary legislation are broadly in relation to the boundaries of the areas to be regulated while the power to make specific rules in relation to the activities of firms in the financial services area generally and in relation to certain aspects of the activities of investment exchanges and clearing houses in particular is vested in the Authority. The Treasury does not have any powers to make secondary legislation in relation to any matter where the Authority has a power to make rules. In Part 18, the Treasury has power to make regulations to prescribe the recognition requirements for investment exchanges and clearing houses.

Scope of the powers

4. The delegated powers are contained in clauses 2 and 3. Clause 2 inserts into FSMA new provision as sections 300B(2) and (3) as to what may be included within the rules that can already be made under section 293 FSMA. The additional rules that can be made allow the authority to limit the scope of the notification obligation in section 300B(1), so as to reduce the burden on recognised bodies and on the Authority. Clause 3 provides for a free standing power to give directions relieving one or more recognised bodies from the obligation in section 300B(1) to notify the Authority of a specified proposed regulatory provision or a provision of a specified description or that is made in specified circumstances. The power is limited to operate for 12 months from the day that the provision comes into force.

Reasons for the powers

5. The proportion of regulatory provisions that will be likely to raise concerns about being excessive is not expected to be large. It is necessary to ensure that the obligations that have to exist to ensure that the power can be used effectively when it might be called for do not have the effect of imposing significant delay and cost on recognised bodies in respect of regulation that clearly will not raise these concerns. Rules under section 293 can deliver this result but they are likely to take at least 6 months to make, allowing for consultation with interested parties in accordance with the procedures in sections 152 to 156 FSMA. It was necessary to find a flexible means of reducing the immediate impact of the provisions to ensure so far as possible that from commencement it is possible for the Authority to deal with each body in a proportionate way. The FSA is best placed, in consultation with the recognised bodies, to devise and keep up to date the exceptions that are intended to ensure that only those proposals that potentially could raise questions about whether they are excessive are subjected to the full notification obligations. The clause 3 power will...
enable the Authority to devise limitations from the beginning of the operation of the provisions in the Bill.

**How the power will be used**

6. The rules to be made under the power in section 300B FSMA and the directions to be made under clause 3 of the Bill will be used to limit the proposed regulatory proposals that are required to be notified to the FSA. At the end of the twelve month period all the necessary limitations can be included in rules made under section 293 as extended.

**Procedure selected**

7. The power in section 293 of FSMA to make rules as extended by proposed new section 300B in clause 2 of the Bill uses the procedural provisions in sections 152 to 156 FSMA. Those provide for how the Authority’s rules are to be made and the consultation processes that are to apply.

8. The Direction making power in clause 3 can only be exercised after an application from the exchange or clearing house or if the body has consented to the particular direction applying to it. This is similar to the power in section 294 for the Authority to give a direction waiving application of a rule made under section 293.
APPENDIX 5: LEGAL SERVICES BILL [HL]

Memorandum by the Department for Constitutional Affairs

1. This memorandum identifies provisions for delegated legislation in the Legal Services Bill. It explains the purpose of the delegated powers taken; describes why the matter is to be left to delegated legislation; and explains the procedure selected for each power and why it has been chosen.


3. On 23 November 2006 the Government introduced its draft Bill on Legal Services. The Bill will:

- reform the regulation of legal services in England and Wales by:
  - putting the interests of the consumer first; and
  - encouraging more competition, innovation and transparency in the provision of legal services; but also
  - safeguarding the independence and reputation of the legal professions.

- It will do this by:

  - **A Legal Services Board (LSB)** – to provide strong and independent oversight with day-to-day regulation left to approved regulators (e.g. Bar Council, Law Society). A range of controls and sanctions will be available to the LSB if approved regulators breach its regulatory standards; for example it will have the power to direct or to censure an approved regulator. The objectives of the regulatory framework will apply to the LSB, approved regulators and the Office for Legal Complaints (OLC).

    - **Alternative Business Structures (ABS)** – to enable (subject to robust safeguards) lawyers and non-lawyers to work together on an equal footing to deliver legal and other services. External investment will also be possible.

    - **A single and fully independent Office for Legal Complaints** – to address concerns about the quality, independence, and consistency of complaints handling by the legal professions.

    - **A mechanism to protect consumers if new problems occur** – by enabling additional legal services to be brought quickly under the regulatory control of the LSB by secondary legislation.

    - **The cost of the new arrangements** will be met by the legal profession.

4. The draft Bill has already received pre-legislative scrutiny from a Joint Committee of both Houses, which reported on 25 July 2006. To accompany the draft Bill, the Department for Constitutional Affairs submitted a draft delegated powers memorandum. The response from the Delegated Powers Committee to that memorandum can be found at Appendix 8 of the Joint Committee’s report.
Delegated Powers

5. The Bill contains 204 clauses and 24 Schedules, many of which contain powers to make orders, rules or regulations by Statutory Instrument.

6. Annex A to this memorandum identifies and explains all the clauses in the draft Bill that contain delegated powers and the relevant procedure governing each power. Also at Annex B is a table that lists all the clauses that contain delegated powers.

Annex A

Legal Services Bill

Summary of Clauses that contain delegated powers

Part 2: The Legal Services Board

7. This part of the Bill sets out the structure and functions of the Legal Services Board, the new oversight regulator. It outlines the functions that the Board will have in relation to the regulatory objectives, set out at Clause 1 of the Bill, and the way it will maintain these principles. It also sets out the requirements for both appointments to, and membership of, the Board, and the powers that the Secretary of State will have in relation to these processes.

Schedule 1, paragraph 1: Legal Services Board

*Power conferred on: Secretary of State*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: negative resolution*

8. Clause 2 provides for the establishment of a body corporate to be called the Legal Services Board (‘the Board’) and introduces Schedule 1. The Schedule provides for the establishment of the Board and covers its membership; the terms of appointment and tenure of members; staffing; committees; the delegation of functions; and borrowing and accounts in relation to the Board. In particular, paragraph 1(1) indicates the maximum number of members of the Board. Paragraph 1(3) of this Schedule allows the Secretary of State to make an order to amend the maximum number of members that can be appointed to the Board.

9. This power has been left to delegated legislation because, while it is thought that the present maximum of 10 is right, it is possible that the need for a different maximum number of members may be identified once the Board is functioning, for example if the burden on members is greater than anticipated or a number of other reserved services are brought under the LSB’s oversight in the future. It is important that there is flexibility in relation to the size of the Board to ensure that the LSB can continue to exercise its functions effectively and meet the needs of consumers over time. There is no power to reduce or extend the minimum number of Board members. The order will be subject to the negative resolution procedure.
Schedule 1, paragraph 18: proceedings of the Board

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none

10. Paragraph 18 gives power to the Board to regulate its own procedure and the procedure of its committees and sub-committees. This is subject to the requirements at sub-paragraph (2) that the quorum of a committee or sub-committee must not be less than 3 and those at paragraph 17 that committees must maintain a lay majority.

11. This is suitable for a rule-making power because the Board will be best placed to determine the detail of how it should operate and it means that the Board will have flexibility to adapt to any changes over time in how it exercises its functions. To aid the Board in the day-to-day administration of its proceedings, paragraph 20(1) and (2) allows for the delegation of these rule-making powers to committees, sub-committees or an individual member of the Board or its staff. However, this power is subject to the limitations at (3) and (5) which prevent the delegation of rule-making functions except for rules for determining procedure at paragraph 18 and rules made by the Board as an approved regulator or licensing authority, which can be delegated to a nominated person. We consider that such rules do not require Parliamentary approval as they relate to the internal proceedings of the Board. Additional transparency is afforded by paragraph 18(3), which requires the Board to publish these rules.

Schedule 1, paragraph 22(2): Statement of accounts

Power conferred on: Secretary of State (with the approval of the Treasury)

Power exercisable by: direction

Parliamentary procedure: none

12. There is a duty on the LSB to keep proper financial records and accounts, and to prepare each financial year a statement of accounts. The Board must give a copy of the statement to both the Secretary of State and the Comptroller and Auditor General. The Comptroller and Auditor General must lay a copy of each statement before Parliament. Paragraph 22(2) provides that any statement must comply with directions made by the Secretary of State, with the approval of the Treasury. Such directions can be made in respect of the information and manner of the statement, the methods and principles of its preparation, and can require additional information to be provided to Parliament.

13. The power to direct the Board in this way allows for greater financial accountability. Similar powers can be found in legislation which applies to public bodies, such as the Legal Services Commission and the Legal Services Complaints Commission under the Access to Justice Act 1999. It is appropriate for the Secretary of State to have these powers as he is the lead Minister for the department sponsoring the LSB, and will be answerable to Parliament for how the LSB conducts its financial affairs. Treasury approval is standard on such directions, as it is the department responsible for the Government Accounting rules, which apply to public bodies.
Clause 6(2)(c): Annual Report

*Power conferred on:* Secretary of State

*Power exercisable by:* direction

*Parliamentary procedure:* none

14. Under Clause 6, the Board is required to prepare an annual report which details the discharge of the Board’s functions, the extent to which it has met with the objectives and such other matters as the Secretary of State may direct. The report must be submitted to Parliament. This direction power is required to ensure that the Board is fully accountable to Parliament and it enables the Secretary of State to highlight particular matters to the Board, which should be brought to the attention of the House. It is appropriate for the Secretary of State to have these powers, as he is the lead Minister for the department sponsoring the LSB, and will be answerable to Parliament for how the LSB conducts its affairs. A number of other public bodies have similar powers in their legislation, such as Ofcom under the Communications Act 2002, paragraph 12 (2) (b) of the Schedule, where the Secretary of State may direct that Ofcom’s annual report includes any other matters he considers appropriate.

Part 3: Reserved Legal Activities

15. This part of the Bill lists and defines the reserved legal activities. It explains who is entitled to carry out these activities, and the penalties for those who carry out such activities where not entitled. It sets out the transitional arrangements for those currently granted the right to carry on reserved legal activities. It also explains the process for altering the scope of the reserved legal activities, and the role of the Board and other consultees in this procedure. This part of the Bill also explains what an approved regulator is, lists the current regulators, and explains how other bodies can be approved in future. Approved regulators are the authorised bodies that regulate the reserved legal activities, and grant rights to authorised persons to carry on those activities.

Clause 15(6): Carrying on of a reserved legal activity: employers and employees etc

*Power conferred on:* Secretary of State

*Power exercisable by:* order made by statutory instrument

*Parliamentary procedure:* negative resolution

16. Clause 15 enables employed lawyers to provide legal services that are incidental to their main job, or to provide *pro bono* services, without needing to obtain an ABS licence. It does this by defining services provided by such individuals to the public or a section of the public as outside the scope of “reserved legal activities”, so long as they are not part of the employer’s business. This is to enable businesses to continue to provide incidental services in these restricted circumstances, as they can now where professional rules allow; in particular, the intention is to avoid putting new impediments in the way of *pro bono* work.

17. Under clause 15(6) the Secretary of State may by order amend the key definitions for this provision: “section of the public”, and “part of the employer’s business”. The former is to allow this exception to be restricted to groups such as fellow employees, so that ABS protection would not be removed where services were provided to members of the public who had no prior connection with the employer. The latter is to allow limitations to be
put on the amount of such work an employer can do before it will be defined as a legal services firm. The effect of the two together is to prevent businesses abusing the exception by offering services commercially to the general public without proper licensing.

18. This power is important for drawing a balance between avoiding over-regulation where the risk to the public is low, and ensuring that genuine external clients are fully protected. Circumstances requiring its use might arise with little warning, so as quick a reaction as possible would be needed. This is why the power is being delegated to the Secretary of State. It is appropriate to do so because the principle of making this exception and changing its details will already have been considered by Parliament. In addition, it can be exercised only on the Board’s recommendation (sub-section (7)).

Schedule 3, paragraph 1 (11): Exempt Persons – meaning of reserved family proceedings

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution

19. Schedule 3 defines who is an “exempt person”, in relation to each reserved legal activity.

20. By virtue of paragraph 1(7), certain persons may be exempt in proceedings heard in chambers in the High Court or a county court, but only those that are not “reserved family proceedings”. Paragraph 1(11) replicates the power at section 27(9) of the Courts and Legal Services Act 1990 for the Secretary of State, after consulting the President of the Law Society and with the concurrence of the President of the Family Division, to prescribe by order the meaning of “reserved family proceedings”. In addition, any order made under section 27(9) before the appointed day will continue to have effect following commencement of that part of the Legal Services Bill. The paragraph 1(11) order-making power is subject to negative resolution, which is the same procedure to which the existing power is subject in the Courts and Legal Services Act 1990.

Schedule 3, paragraph 8: further exempt persons

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution

21. Under paragraph 8 (1) the Secretary of State can amend this Bill to exempt persons in relation to any activity which is a reserved legal activity, to remove exemptions for any activity and to amend existing provision about exempt activities. In effect, this power alters the scope of who is and is not subject to regulatory control, in relation to each reserved activity. An order can only be made by the Secretary of State upon the recommendation of the Board.

22. It is envisaged that an order may be required where a new reserved activity has been brought under the regulatory control of the LSB, as set out at clause 23 of the Bill, and a new category of persons need to be exempted from regulation as a result. In addition, an order gives flexibility to allow persons currently exempted by Schedule 3 of the Bill to be brought within the regulatory framework if it is thought necessary.
23. The paragraph 8 power is made subject to the affirmative resolution procedure because it allows the categories of persons under the regulatory control of the Board to be varied without limitation, which affects the ambit of the Bill regime. We therefore recognise that there should be an opportunity for full Parliamentary scrutiny of any orders made under this section.

Schedule 4: Approved Regulators

24. Schedule 4 contains a number of order, rule and direction making powers in relation to designating bodies by order and altering an approved regulator’s regulatory arrangements. We have grouped similar powers together in the following paragraphs, which follow the order of Schedule 4 as closely as possible. We have also included references to points where similar powers are set out in other sections of the Bill.

25. The powers in the Schedule include:

- rules for applications to the Board,
- rules for prescribing fees;
- rules for dismissal of applications;
- rules for oral and written representations to the Board;
- rules governing decisions of the Board; and
- orders designating approved regulators

Schedule 4 paragraph 3(3); Schedule 4 paragraph 20(1); Schedule 8, paragraph 13 (2); Clause 44(3)(b) and (c); Clause 75 (3)(b); Schedule 10 paragraph 1(4); Schedule 18 paragraph 2(4) : Applications to the Board

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none - rules made by the Board are subject to the procedure at clause 195

26. These provisions allow for the Board to make rules about the way in which an application should be made in a number of places in the Bill, for example at clause 44(3)(b) where a body applies for the cancellation of its designation as an approved regulator. The rules may specify the format and the manner of an application. It is important that the Board has the flexibility to make rules in regard to applications as it will be best placed to determine what information is needed, and in what manner and form it should be received. Any rules made under these provisions will be matters of detail which do not require Parliamentary procedure, but they do receive scrutiny and input under the procedure for making rules at clause 195, which requires the Board to publish rules in draft and have regard to representations made about them.
Schedule 4, paragraph 3 (4) and other provisions (see list below): prescribed fees for applications

Power conferred on: Legal Services Board

Power exercisable by: rules, made with the Secretary of State’s approval

Parliamentary procedure: none - rules made by the Board are subject to the procedure at clause 195

27. Paragraph 3 (4) of Schedule 4 makes provision for the Board to make rules determining application fees, for example where a body applies for designation as an approved regulator. A number of similar provisions are made at clauses 44 (4), clause 75 (4), Schedule 10, paragraph 1 (5), and Schedule 18 paragraph 2(5).

28. This is an appropriate rule-making power as the Board will have the knowledge and information required to set an application fee in accordance with the costs incurred with processing an application. Rules also allow for the fee to be changed to reflect inflation or changing costs over time, and the flexibility to set differing levels of fee depending on the type of application. As with other funding rules described at clause 166 below, any rules made under this provision may only be made with the consent of the Secretary of State, to ensure the necessary accountability. To ensure further transparency, before securing Secretary of State consent, the Board will be required to publish a draft of any rules and consider any representations, as set out at clause 195.

Schedule 4, part 2 paragraph 4(2): dismissal of an application

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none - rules made by the Board are subject to the procedure at clause 195

29. Paragraph 4 (2) makes provision for the Board to make rules about the procedure and criteria that the Board will use when exercising its discretion to refuse to consider, or to continue its consideration, of an application for designation. Paragraph 2 (2) of Schedule 10 requires the Board to make similar rules in relation to the dismissal of licensing authority applications. For example the Board may wish to dismiss an application before proceeding to the consultation stage where an applicant has disregarded the rules specifying the format and content of an application.

30. It is appropriate to give the Board this power, as it will be responsible for ensuring that resources are appropriately used when carrying out its functions. The rule-making power will allow for the Board to adapt procedures to ensure efficient use of its time - for example, the Board will not have to waste time considering, and consulting on, applications which do not contain all the required information. It would not be possible to foresee all circumstances in which the Board might dismiss applications and set them out on the face of the Bill. Safeguards are provided by the requirements at clause 195 that the Board publish draft rules and have regard to any representations about those rules. In addition the Board must give the applicant notice of its decision to dismiss an application and its reasons, and must publish that notice. This provides for further transparency when the Board exercises its discretion in relation to the rules made under this section.
Schedule 4, part 2, paragraph 11 (3) (and others: see list below): procedure for oral and written representations to the Board

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none - rules made by the Board are subject to the procedure at clause 195

31. Under Schedule 4, Part 2, bodies may apply to the Board for designation as approved regulators. Upon receipt of the applications, the Board must seek the advice of a number of persons, including the Office of Fair Trading, the Consumer Panel and the Lord Chief Justice. Paragraph 11 (1) requires the Board to give the applicant a copy of the advice received, and to make rules governing the making of oral and written representations by the applicant. The applicant may make oral representations only where the Board allows them to do so. The Board will be able to set rules about the procedure and form of these representations.

32. It is appropriate that this power be delegated to the Board because it is a matter of its procedure. The Board will be best placed to determine the best way to hear representations in a range of circumstances, allowing greater flexibility for both the Board and the representatives. Under clause 195, the Board will be required to publish drafts of these rules, and consider any representations made. For these reasons, we do not consider that further scrutiny is required.

33. The Board also has a number of similar rule-making powers, which relate to statutory procedures throughout the Bill, and set out procedures for written and oral representations and the giving of evidence. These can be found at: Schedule 4, paragraphs 11(3) and 23(3); Schedule 6 paragraphs 12(2), 13(1), and 14(2); Schedule 7, paragraphs 2(5) and 10(3); Schedule 8 paragraphs 2(5), 10(5) and 21(5); Schedule 9 paragraphs 2(5) and 9(5); and Schedule 10, paragraphs 9(3), 18(5), and 25(5).

Schedule 4, part 2 (and others: see enumerated list below): rules governing decisions of the Board

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none - rules made by the Board are subject to the procedure at clause 195

34. Paragraph 13(1) requires the Board to make rules specifying how it will determine applications for designation as an approved regulator. Paragraphs 13(2) and (3) requires the rules to set out certain criteria of which the Board must be satisfied before granting an application. For example, the Board must be satisfied that the exercise of an applicant’s regulatory functions would not be prejudiced by any representative functions. Similar provisions can be found at Schedule 10, paragraph 11(1) which specifies that the Board must make rules on particular matters in relation to the consideration of applications to become designated as a licensing authority, and Schedule 18, paragraph 4 (1) in relation to regulating immigration services. Any rules made under this section must be made in accordance with the procedure at clause 195.
35. These provisions are suitable for rule-making powers, as the Board will be best placed to determine the procedure and criteria upon which it will determine applications. The rules give a degree of flexibility to the Board so that it can carry out proportionate and risk-based regulation, and enable it to respond to changes in the legal sector. Rules might, for example, only require that an approved regulator has a compensation fund when regulating a particular reserved service which involves handling large sums of client money. In all other circumstance the Board might only wish to see that appropriate indemnification arrangements have been made.

36. Such rules do not require further Parliamentary procedure, as the Bill provides for certain minimum criteria that will need to be met in an application, which will be scrutinised by Parliament during the passage of the Bill. In any case, there is provision for additional scrutiny of these rules, as the Board is required by clause 195 to publish any rules that it makes in draft and to have regard to any representations about those rules.

Schedule 4, part 2: paragraph 17(1) designation of approved regulators by order

- **Power conferred on:** Secretary of State
- **Power exercisable by:** order made by statutory instrument
- **Parliamentary procedure:** affirmative resolution

37. Paragraph 17 of Schedule 4 provides for the Board to make a recommendation to the Secretary of State to designate a body as an approved regulator. Upon designation an approved regulator will be able to authorise persons to carry on one or more reserved legal activities. In order for a body to become designated it will need to satisfy the Board that it is competent to carry out the regulatory functions. Schedule 4 sets out the procedure that the Board has to follow when considering an application from a body that wishes to be designated as an approved regulator. This procedure includes requirements to consult and to consider representations.

38. The ability to designate new regulators without the need for primary legislation will facilitate greater competition within the legal services market, benefiting both consumers and the profession. The Government considers that it is necessary to confer designation by order as an approved regulator will have considerable responsibilities and powers in respect of authorised persons. For example, regulators will be able to make and enforce rules determining the conduct of authorised persons carrying on reserved activities. It is also in the public interest that any designation is adequately scrutinised, so it is appropriate that the order will be subject to the affirmative resolution procedure. Additionally, the order may only be made upon the recommendation of the Board.

Schedule 4, paragraph 19 (3): Requirement for approval

- **Power conferred on:** Legal Services Board
- **Power exercisable by:** direction
- **Parliamentary procedure:** none

39. Clause 20 defines what is meant by regulatory arrangements of an approved regulator. By virtue of paragraph 19 of Schedule 4, if an alteration is made to those regulatory arrangements, they do not have effect unless approved for the purposes of the Bill. Sub-paragraph (2) sets out how alterations are approved. This includes where a rule is an
exempt alteration. Under subsection (3) the Board has a power to direct that a particular rule, or a general class of rules, may be exempt from approval.

40. The purpose of the power to direct is that the Board will be able to determine which rules do not require further scrutiny. For instance, rules which set out the procedures of an approved regulator’s committees are matters of administration which the Board might decide to exempt from approval. The power at paragraph 19(3) allows the Board to make risk-based decisions about the types of rules that do not need formal approval under the other procedures set out at paragraph 19(2). It also enables the Board to reduce the burden of regulation on approved regulators, and the Board itself, where rules or regulations apply to low risk areas. This flexibility is in accordance with the principles of proportionate and targeted regulation, set out at clause 3.

41. We do not consider that the power to direct should be subject to Parliamentary scrutiny, as the House will consider the principle of exemption, during the passage of the Bill. The direction itself will be a matter of detail which the Board is best placed to decide. There are the additional safeguards that the LSB must publish a direction under this section, ensuring accountability for how it exercises this power. The Board can also revoke a direction where it is no longer appropriate for rules or regulations to be exempt, providing the necessary safeguards to consumers should problems arise.

Schedule 5: authorised persons: Part 2 rights during transitional period

- Power conferred on: Secretary of State
- Power exercisable by: order made by statutory instrument
- Parliamentary procedure: none

42. In order to manage the transition between the existing regime and the new regulatory framework set out in the Bill, there will need to be a transitional period which will allow the Board and approved regulators to make adequate preparation. During this period the existing rights of authorised persons will need to be preserved. Schedule 5 sets out transitional arrangements for those granted rights of audience or rights to conduct litigation by a number of “listed bodies” in part 1 paragraph 1(2) of the Schedule; and to licensed conveyancers, detailed in paragraph 2 of the Schedule. During the transitional period, barristers, solicitors, some legal executives, licensed conveyancers, notary publics, patent agents, and trade mark attorneys are deemed to have been granted the right to carry on certain reserved legal activities.

43. At paragraph 3(1)(b) the Secretary of State can determine the day on which the transitional period ends. This has been left to delegated legislation as is usual for transitional powers. It is necessary to ensure that there is flexibility in the transitional period. It will be for the Secretary of State to make a judgement as to when the transitional period should end and functions are wholly passed to the Board. As is usual for transitional powers, no Parliamentary procedure is necessary.
**Clause 22: transitional protection for non-commercial bodies**

*Power conferred on: Secretary of State*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: none*

44. Clause 22 backs up the special provisions for non-commercial bodies by ensuring that, during a transitional period, the existing bodies are entitled to carry on reserved activities without committing an offence. Without this, many such bodies would be unable to operate before the ABS licensing regime came into effect, with the undesirable consequence that the not-for-profit sector would be seriously reduced. Clause 22(3) requires the Secretary of State to set an end-date for the transitional period, on Board recommendation. Like other transitional arrangements, this is generally considered suitable for delegation, and is exercisable without Parliamentary scrutiny.

**Clause 23: extension of the reserved legal activities**

*Power conferred on: Secretary of State*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: affirmative resolution*

45. Currently, the reserved legal activities are:

- the exercise of a right of audience
- the conduct of litigation
- reserved instrument activities
- probate activities
- notarial activities
- the administration of oaths.

46. These are set out in clause 12 of the Bill.

47. Clause 23 provides for the Secretary of State to extend this list of reserved legal activities, by order, to include currently unreserved legal activities that fall within the definition of “relevant legal activities” at clause 12(3). Legislation made under this power may amend clause 12 and Schedule 2 of the Bill.

48. In the future it is possible that other activities may be identified as suitable for regulation, for example where a new part of the legal market has developed without regulation, and is having an adverse effect on consumers. The Bill allows the flexibility to bring new legal activities under the regulatory control of the LSB. Our aim is to ensure that consumers are protected effectively with the minimum delay, and the power to extend the activities by order enables this to happen without having to go down the route of primary legislation. Because this power allows the scope of the regulatory regime to be extended it is appropriate that it be subject to affirmative resolution. As an additional safeguard, the power may only be exercised on the recommendation of the Board and prior to making such a recommendation the Board is under a statutory duty to have conducted an investigation following the process set out in Schedule 6. This includes consultation with the Consumer Panel, the OFT and the Lord Chief Justice.
Clause 24: provisional designation of approved regulators and licensing authorities

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution

49. Clause 24 contains two order-making powers. The first (in subsection (1)) allows applications and provisional designations of approved regulators and licensing authorities to be made in relation to a provisional reserved activity as if it were already a reserved activity; and the second (in subsection (3)), allows applications for authorisation and deemed licenses to be made to a provisional designated authority or the Board. Applications will be made under Part 2 of Schedule 4 or Part 1 of Schedule 10. This means that once the Board has recommended that an activity be made a reserved legal activity, the Board is able to consider and grant applications to designated regulators and licensing authorities about that activity prior to the time that the activity becomes reserved. This will ensure that there is a smooth transition between the new and old regimes, and that approved regulators are able to operate effectively as soon as the order is brought into force. Without such powers, there is a risk that no regulator would be approved on the day that an activity becomes reserved, and therefore all persons carrying on the newly reserved activity would be committing an offence under clause 14. Alternatively, the Board would have to regulate directly until a suitable regulator could be approved.

50. All order-making powers exercised under this clause will be subject to the affirmative resolution procedure, because they operate as part of the process that expands the scope of the LSB’s regulatory control to new activities.

Part 4: Regulation of Approved Regulators

51. This part of the Bill sets out the general duties of approved regulators, and the powers that the Board has to ensure that they are being carried out. It details how the Board can intervene when there is a problem, the procedures it must follow, and the persons that it must consult. The Board’s powers include target setting, censure, financial penalties, intervention directions and de-authorisation. It also requires that the Board prepare and publish a policy statement about how it will exercise its functions and impose penalties.

Clause 29: Rules relating to the exercise of regulatory functions

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none - rules made by the Board are subject to the procedure at clause 195

52. Clause 29(1) places a duty on the Board to make internal governance rules which set out the requirements to be met by approved regulators in ensuring that: the exercise of its regulatory functions are not prejudiced by any of its representative functions; and that decisions relating to the exercise of its regulatory functions are so far as reasonably practicable, taken independently from those that relate to its representative functions. Subsections (2) and (3) provide further information about the central principles of separation that must be included in the rules. These include, for example, that persons involved in the exercise of its regulatory functions are able to make representations to the
Board, OLC and approved regulators and that they have adequate resources to exercise their regulatory functions.

53. The separation of regulatory and representative functions of an approved regulator was a central recommendation of Sir David Clementi’s Review, and the Government has agreed that this requirement will increase consumer confidence in the new system. The purpose of this rule-making power is to ensure that the Board takes an active role in determining the detail of how the regulatory and representative split should work in practice. Our aim is to avoid a ‘one size fits all’ requirement on approved regulators and rules give the flexibility to determine how the minimum criteria under clause 29 should be applied to each of the approved regulators. For example, smaller regulators may need different separation arrangements from larger bodies.

54. Such rules do not require further Parliamentary procedure. The minimum criteria under clause 29 will be scrutinised by Parliament during the passage of the Bill. In addition, there is provision for additional scrutiny of these rules, as the Board is required by clause 195 to publish any rules that it makes in draft and to have regard to any representations about those rules.

Clause 29 (4): Rules relating to the exercise of regulatory functions

Power conferred on: Secretary of State

Power exercisable by: order

Parliamentary procedure: not subject to Parliamentary procedure

55. Clause 29(4) provides that the Board must make its rules under that section before the day appointed by the Secretary of State by order. The separation of regulatory and representative functions is a key aspect of policy, and it is important that rules under clause 29 are made as soon as possible after Royal Assent, to provide assurance to approved regulators about the criteria that must be met in separating their regulatory and representative functions. The Secretary of State’s power to set a date ensures that there is a timetable which the Board must comply with, but also allows that a date can be set which is consistent with other transitional and commencement orders made under the Bill. As is usual with other commencement powers, the order is not subject to Parliamentary procedure.

Clause 30: Performance targets and monitoring

Power conferred on: Legal Services Board

Power exercisable by: direction

Parliamentary procedure: none

56. Clause 30 (1) allows the Board to set a performance target for an approved regulator, or direct an approved regulator to set a target. The Board may use this power only where it is satisfied that the conditions set out at subsection (2) are met. A direction under this power may impose conditions with which the performance targets must conform - for example, the Board could direct that the approved regulator set itself a target of between 30 to 90 days when exercising a particular regulatory function. To ensure further transparency in the way that the Board exercises this power, the LSB must publish any target or direction. In addition, an approved regulator must publish any target set as a result of a direction made by the Board.
57. This power is one of a range of options available to the Board where an approved regulator has, through an act or omission, had an adverse impact on the regulatory objectives. The power to direct and set targets allows the Board to take action quickly where it identifies that there is a problem, and to tailor its response to the particular regulatory failure. It is not thought that this would have to comply with any further Parliamentary procedure when exercising the power as the principle behind allowing the Board to set targets would have been scrutinised in Parliament during the passage of the Bill. In addition, the direction itself would be a matter of detail and further scrutiny by Parliament would hinder the Board in acting quickly and effectively, to minimise any adverse impact on the objectives.

Clause 31: Directions

Power conferred on: Legal Services Board

Power exercisable by: direction

Parliamentary procedure: none

58. In order for the Board to be an effective regulator, it must have the necessary powers to enforce compliance with the requirements in the Bill, and to uphold high standards of regulation. Clause 31 confers power on the Board to direct an approved regulator to take steps to remedy something which has had an adverse impact on the objectives. This includes the ability to direct an approved regulator to alter its regulatory arrangements. The Board may issue a direction only where it is satisfied that the conditions at subsection (1) have been met, and it is also prohibited from issuing a direction in respect of a specific disciplinary case or other specific regulatory proceedings. This, and the duties under clause 32, which sets out the procedure at Schedule 7 (which includes requirements for giving notice to an approved regulator and for consulting with for example the Secretary of State and the OFT), safeguards against the arbitrary or inappropriate use of the direction power by the Board. Clause 33 allows a direction to be enforced on application to the High Court where the approved regulator has failed to comply with a direction.

59. The power to direct allows the Board to take action quickly where it identifies that there is a problem, and to tailor its response to the particular regulatory failure- for example, the Board could direct an approved regulator to improve its training rules if this was resulting in an adverse impact on the objectives. It is not thought that this would have to comply with any further Parliamentary procedure as the principle behind allowing the Board to direct would have been scrutinised in Parliament during the passage of the Bill. We consider that the procedure at Schedule 7, which sets out statutory obligations to consult and allow representations from the approved regulator, is sufficient for the purposes of a direction under this provision. In addition, the direction itself would be a matter of detail and further scrutiny by Parliament would hinder the Board in acting quickly and effectively, to minimise any adverse impact on the objectives.
Clause 36(3): setting a maximum amount for financial penalties

Power conferred on: Legal Services Board

Power exercisable by: rules (with the consent of the Secretary of State)

Parliamentary procedure: none.

60. Clause 36(3) places a duty on the Board to make rules, subject to the consent of the Secretary of State, prescribing the maximum amount of a financial penalty that it can impose on a failing approved regulator or licensing authority. In accordance with clause 195, the Board must publish any rules in draft and have regard to any representations made before requesting Secretary of State consent. Although the rules under clause 36 set the maximum penalty, clause 48(3) specifies that the Board must also issue a policy statement which includes that when determining the amount of penalty it must have regard to the seriousness of the act or the omission and the extent to which it was deliberate or reckless.

61. Rules have been used to determine the maximum amount of financial penalty that can be issued by the Board because flexibility is required to alter the maximum limit to reflect changes such as inflationary fluctuations over time or developments in the legal services sector (e.g. if particular regulators grow in size significantly it is possible that the maximum limit might need to be changed to reflect that growth). Such rules can be made only with the consent of the Secretary of State, to ensure accountability for the levels of penalty that the Board has discretion to issue. The procedure for making rules at clause 195 provides for additional transparency and input in that the Board will have to publish any rules about financial penalties in draft before bringing them into force. Further, clause 37 sets out procedures that must be followed before the Board can impose a financial penalty up to and including the maximum, and clause 38 sets out an appeal mechanism which prevents inappropriate use of power.

Clause 40: Intervention directions

Power conferred on: Legal Services Board

Power exercisable by: direction

Parliamentary procedure: none

62. The power to issue an intervention direction, as set out at clause 40, allows the Board, or a person appointed by the Board, to intervene in a function of an approved regulator. For example, where there is an adverse impact on the regulatory objectives because an approved regulator is failing to carry out compliance visits or monitor continued professional development standards, the Board could issue an intervention direction, and assume responsibility for that function. A further safeguard on the exercise of this power is that the Board must be satisfied that the matter cannot be adequately addressed by a direction, public censure or financial penalties. Clause 42 allows the direction to be enforced on application to the High Court.

63. Intervention directions provide an alternative to de-authorisation in that a regulator may be failing in only one particular area, and it would therefore not be appropriate to remove its authorisation entirely. The direction can also be revoked, for instance, where the regulator demonstrates that it is competent to regulate that function at some stage in the future. We consider that the power will only be used by the Board where the power to issue targets, censure, fine or direct cannot adequately address the adverse impact on the
objectives, and where it is satisfied that the conditions at subsection (1) are met. This, with the duties under clause 3, safeguards against the arbitrary or inappropriate use of the direction power by the Board.

64. The power to issue an intervention direction allows the Board to take action quickly where it identifies that there is a problem, and to tailor its response to the particular regulatory failure. It is not thought that this would have to comply with any further Parliamentary procedure when exercising the power as the principle behind allowing the Board to issue an intervention direction would have been scrutinised in Parliament during the passage of the Bill. We consider that the procedure at Schedule 8, which sets out statutory obligations to consult and allow representations from the approved regulator, is sufficient for the purposes of a direction under this provision. In addition, the direction itself would be a matter of detail and further scrutiny by Parliament would hinder the Board in acting quickly and effectively, to minimise any adverse impact on the objectives.

Clauses 40, 41 and 47: Intervention directions, further provision, and Cancellation of Designation: powers of entry etc

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none

65. Where the Board gives an intervention direction, the regulatory function that was previously exercised by the approved regulator must be exercised by the Board or a person nominated by it. As specified at clause 40 (5), the Board must make rules as to of persons that it may nominate to carry out the regulatory functions which are subject to a direction. For example, the rules may specify classes of persons who are not eligible to be nominated, where there is a conflict of interest.

66. Clause 41 and clause 47 allow the Board, on application to the High Court, to exercise search and seizure powers. If the application is granted, a person appointed by the Board may be issued a warrant allowing him to enter and search the premises of the former regulator and take possession of documents found on the premises. The Board must make rules as to the persons it may appoint to exercise the warrant.

67. The power to make rules rests with the Board as it will be best placed to determine the types of person who can, and cannot, exercise the powers in relation to intervention directions and search and seizure. Also, this will allow for greater flexibility of dealing with matters of detail in future. This is consistent with powers of entry, search and seizure in, for example, the Competition Act 1998 (s28) and the Enterprise Act 2002 (s194).

Clauses 41 and 47: Intervention directions: further provision and cancellation of designation: powers of entry etc

Power conferred on: Secretary of State

Power exercisable by: regulations

Parliamentary procedure: affirmative resolution

68. Clauses 41 and 47 set out that a judge of the High Court, Circuit judge or justice of the peace may issue a warrant to the Board or nominated persons to enter and search the premises of the former regulator and take possession of any documents specified in the
warrant. The Secretary of State must make regulations specifying further matters which
the judges must be satisfied of before issuing the warrant and regulating the exercise of a
power conferred by the warrant. This is consistent with powers of entry, search and
seizure in the Compensation Act.

69. This power of search and seizure was included to ensure that the new regulator is able
to effectively discharge its functions and is not hindered by a lack of information/material
necessary to do so. For example, the rules may specify a ‘time-limit’ within which the
Board will be able to exercise this power, which will stop the Board from entering the
premises of a Body who was de-authorised, for example, ten years ago. The negative
resolution procedure is appropriate here because, while the main safeguards in relation to
the exercise of the power are contained in the provision, it is appropriate for the additional
safeguards to be placed before Parliament. In addition to this the Secretary of State must
either act on the recommendation of the Board or consult the Board.

Clause 44: Cancellation of designation as approved regulator

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution

70. Clause 44(1) gives the Secretary of State the power to cancel a body’s designation as
an approved regulator in respect of one or more or all of its reserved legal activities. The
Secretary of State can only do this on the recommendation of the Board. Subsection (3) of
this clause provides that the Board must make a recommendation where the approved
regulator makes an application requesting to be de-authorised. This power might be
required where one or more regulators wish to merge and seek authorisation as a new
approved regulator. Subsection (5) provides that the Board may make a recommendation
where one or more of the cancellation conditions are met. The Board’s recommendation
must set out reasons.

71. This power is necessary because, while it is likely that the Board will help approved
regulators to improve areas of weakness, there may be occasions where an approved
regulator has had an adverse impact on the objectives and no other power available to the
Board is adequate to address that impact. For example, if there is evidence of failure, an
adverse impact on the objectives, and an irrevocable loss of consumer confidence in a
regulator as a result, the Board needs the ability to be able recommend cancellation of its
designation as an approved regulator, as the strongest deterrent against regulatory failure.
Such a recommendation could relate to all of the reserved legal activities an approved
regulator is authorised to regulate or one or more of them.

72. The order will be subject to the affirmative resolution procedure, as removing a
regulator’s designation would be a very serious step that requires appropriate
Parliamentary scrutiny. The Government does not believe that this should be left to
primary legislation because it would take too long to ensure the necessary consumer
protection in the serious circumstances where this power would be required.
Clause 45: cancellation of designation – further provision

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution

73. If an approved regulator has its designation in relation to one or more reserved legal activities cancelled by order under clause 44, the Board will need to recommend that provision is made to transfer regulatory responsibility for individuals granted rights by the former regulator, as defined in clause 44, to a new approved regulator. Where there is no appropriate approved regulator, the Board may need to regulate directly. This is covered in more detail at clause 61.

74. Clause 45 contains two powers exercisable by the Secretary of State. The first gives the Secretary of State the power to make modifications to provisions made under any enactment, and such transitional and consequential provisions as is necessary, to give effect to a cancellation order. The second gives the power to make transfer arrangements when a body has its designation in relation to one or more reserved legal activities cancelled by order as set out in clause 44. For example, the statutory powers of an former regulator may need to be repealed, or conferred on a new regulator.

75. It is necessary to have these powers in delegated legislation to ensure that the transfer of regulatory responsibility to a designated regulator coincides with the cancellation of designation in order to protect both the interests of the consumer and the affected authorised persons. An order is required because each cancellation of a designation will relate to a different approved regulator and transfer arrangements will need to be tailored to the individual circumstance. For this reason the power cannot specify the enactment, instrument or document, which will require amendment to give effect to transfer arrangements. However, it has been made subject to the affirmative resolution procedure to ensure that appropriate Parliamentary scrutiny is given to any amendments made to existing legislation. The provision is also exercisable only on the recommendation of the Board. As an additional safeguard, before making a recommendation to the Secretary of State, the Board must publish a draft of the order and take any representations into account, as set out at clause 46 of the Bill.

Clause 50: control of practising fees charged by approved regulators

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none. rules made by the Board subject to the procedure at clause 195

76. Clause 50 establishes a set of controls on the practising fees that approved regulators and licensing authorities may charge for permitted purposes, and subsection (3) requires the Board to set out those permitted purposes. The rules must specify that permitted purposes include those set out at subsection (4), similar to the purposes for which the Bar Council and Law Society may raise fees under sections 46 and 47 of the Access to Justice Act 1999. It will be open to the Board to determine whether other permitted purposes should be included in their rules. For these purposes practising fees also include sums payable by licensed bodies to licensed authorities.
77. Clause 50 also provides that practising fees are payable only if the Board has approved the level of the fee. The Board must also make rules about applications by the approved regulators and licensing authorities for approval of such fees, any consultation that must be carried out by the approved regulator or licensing authority prior to an application being made, and the procedures and criteria that the Board will use in considering the application. This is set out under subsection (6) and any rules under this provision must also specify the time limit for approving the application. These rules will apply, for example, where a new regulator is approved and needs to charge practising fees for regulatory purposes or where an existing regulator wishes to alter the level of fee it charges.

78. Enumeration of the permitted purposes of practising fees has been delegated to the Board in the form of a rule-making power because the Board will have access to the required information, as the day-to-day oversight body for all approved regulators and licensing authorities, to identify where fees need to be raised. This may include new areas of regulatory activity which may need to be funded in the future, over and above the list at subsection (4). Rules give the necessary flexibility for the Board to react quickly and efficiently to any such developments in regulation. The Board has also been delegated the responsibility to make rules about how fee-levels should be approved, because it will be best placed to determine the most effective process. Such rules will be a matter of detail with which the Board will be most familiar as the body receiving the applications and overseeing the applicants, and will not be suitable for Parliamentary approval. The procedure for making rules at clause 195 provides for transparency and input in the formulation of these rules by the Board. It will have to publish any rules about practising fees in draft before bringing them into force, and must take into consideration any representations made in respect of those rules as set out at clause 195.

Clause 52: Modification of provision made about regulatory conflict

Power conferred on: Legal Services Board

Power exercisable by: direction

Parliamentary procedure: none

79. Clause 52 gives the Board the power to direct an approved regulator to change its regulatory arrangements in relation to the provision it has made (or not made) to prevent regulatory conflicts with other approved regulators. The clause makes it clear that the powers exercisable are a variation on the Board’s general powers of direction under clause 31, but in this case it is also anticipated that some additional procedures may apply. The rationale for why a direction power has been used in this circumstance is the same as that set out in the memorandum at paragraph 53.

80. The need to avoid regulatory conflicts will be particularly important for approved regulators in cases where they are regulating practices which are managed by and/or employ different types of authorised persons. If, for example, the Law Society regulates partnerships of solicitors and barristers, it will need to take steps to ensure that its own rules do not conflict with the Bar Council’s rules as they apply to any barristers within the practice. This obligation on regulators of mixed practices is particularly important as the effect of Clause 51 is that in the event of a conflict, the rules of the practice regulator will override those of any other approved regulators which relate to individuals within the practice. Clause 52, however, gives approved regulators the chance to contest the prevailing position on regulatory conflict where dissatisfied by it, by applying to the Board to resolve the dispute and if necessary, direct the other regulator (“the conflicting
regulator” to alter its rules. The Board must hear representations from both regulators, and decide how the relevant provisions on regulatory conflict should apply in future, which may necessitate the exercise of its powers of direction. Subsections (3) and (4) also make it clear that approved regulators have a duty to consider any request from their members (or members’ managers/employees) to apply to the Board for a decision on regulatory conflict. This recognises the impact of conflicts between legal professional rules on the affected practitioners, and ensures that individuals have a channel through which their concerns may be addressed.

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

**Power conferred on:** Secretary of State

**Power exercisable by:** direction

**Parliamentary procedure:** none

81. Under clause 56, the OFT may report to the LSB where it is of the view that an approved regulator restricts, distorts, or prevents competition within the market for reserved legal services to any significant extent. The Board, after following the procedure at clause 57, must notify the OFT of the action, if any, it proposes to take in response to the report. Where the OFT is not satisfied that the Board has given full and proper consideration to a report, it may refer the matter to the Secretary of State under clause 58. The Secretary of State must then seek the Competition Commission’s advice. Clause 60 confers the power on the Secretary of State to issue a direction to the Board in connection with any matter raised in a report made by the OFT under clause 56. Before issuing a direction of this type the Secretary of State must consider the advice of the Competition Commission.

82. The duty to promote competition is one of the objectives set out at clause 1 of the Bill, and both the Board and approved regulators are under a duty to, so far as reasonably practicable, act in a way which is compatible with the objectives and to meet those objectives. Before deciding whether to issue a direction under this provision the Board’s decision would be based upon a balance between competition and the other objectives, for example, promoting the interests of consumers. Therefore the Secretary of State is the appropriate arbiter between the OFT and the LSB, given that he would need to make a similar decision based on the balance of the competition objective against the other statutory objectives, before deciding whether to issue a direction to the LSB under this provision. In order to safeguard against the inappropriate use of this power, clause 60(3) states that the Secretary of State must ensure that the action stated is action which the Board has power to take and is compatible with the functions and obligations imposed on the Board under the Bill. Any direction under this provision must be published, to allow for transparency and accountability in the exercise of this power. It is not thought that this power would need Parliamentary procedure when exercising it as the principle would have been scrutinised in Parliament during the passage of the Bill.
Clause 61: the Board as an approved regulator

*Power conferred on:* Secretary of State

*Power exercisable by:* order made by statutory instrument

*Parliamentary procedure:* affirmative resolution

83. There will be occasions, for example when adding to the list of reserved legal activities, where no suitable regulator has applied to act as the regulator of that legal activity/activities. In these circumstances the Board will have to have the ability to act as the approved regulator. In order for the Board to act as the regulator, it will need to take steps to ensure appropriate financial and organisational separation between its oversight activities and those it exercises as an approved regulator.

84. Clause 61(1) gives the Secretary of State the power to designate the Board as an approved regulator in relation to one or more reserved legal activities and to modify the functions of the Board with a view to enabling the Board to discharge its functions as an approved regulator efficiently and effectively. It also allows for the Secretary of State to cancel the Board’s designation in relation to one or more approved activities, for example where an appropriate regulator has been identified.

85. Because the powers that the Board will require as an approved regulator may differ according to the reserved activities and authorised persons that are to be regulated, it is necessary for it to be possible to modify its functions through secondary legislation to ensure that the Board has appropriate powers and can discharge its functions as approved regulator effectively and efficiently. **Clause 63** sets out some of the provisions which may be included in an order of this type, including powers of intervention, which are detailed at subsection (3).

86. Before recommending an order of this type, the Board will be required to present a draft order to the persons listed in **clause 65**, and will be required to have regard to any representations made to it in respect of the order.

87. An order under **clause 61** will be made subject to affirmative resolution procedure, since the power enables any enactment or instrument to be amended as the Secretary of State thinks necessary or expedient. As an additional protection, an order under this section can be made by the Secretary of State only upon the recommendation of the Board and must be published by the Board in draft first, as set out at **clause 65**.

Clause 67: Regulatory conflict and the Board as approved regulator

*Power conferred on:* Legal Services Board

*Power exercisable by:* direction

*Parliamentary procedure:* none

88. Clause 67 deals with the situation where the Board acts as an approved regulator, and provides that individuals regulated by the Board still have access to the same channels for dealing with regulatory conflicts. Such individuals may apply directly to the Board to request it to exercise its powers of direction in relation to another approved regulator with whom there is a conflict. Individuals may also ask the Board (in its capacity as an approved regulator) to alter its own provision on regulatory conflict. The rationale for why a direction power has been used in this circumstance is the same as that set out at paragraph 53.
Clause 68: modifications of the functions of approved regulators

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution

89. Clause 68 gives the Secretary of State the power to modify the functions of an approved regulator following the recommendation of the Board. The circumstances where this power may be used are set out at clause 68(3) and include: that approved regulators are able to carry out their roles more effectively and efficiently; that bodies can authorise persons (including categories of business entity) to carry on reserved legal activities that those bodies regulate; to enable bodies to be designated as an approved regulator or licensing authority in relation to one or more reserved activities; and to allow the body to take on regulatory functions in relation to immigration advice and services. The order may be subject to the conditions set out in subsection (7).

90. Clause 79 gives the Secretary of State a similar power to modify the functions of appellate bodies, which is similar to clause 68. Clause 173 also gives the Secretary of State a power to modify the functions of the Solicitors Disciplinary Tribunal. These powers are dealt with in more detail in this memorandum at paragraphs 100 and 220.

91. A power of this nature is required to ensure that a regulator or licensing authority or the Tribunal is able to modify its regulatory functions to reflect changes in the market for legal services as quickly and efficiently as possible. Changes in the market for legal services may be substantial and occur quickly, particularly under the new ABS regime, and the regulators, licensing authorities and Tribunal may need relatively quick modifications to their statutory functions in order to properly address the changes. For example, a regulator may have a power to raise fees from individuals, but in the future may need to have this expanded to apply to entities.

92. Currently, such changes have to be made by primary legislation, which does not give the necessary flexibility. In addition, given that the exact nature of the modified functions will be different for each of these bodies, and not necessarily foreseeable with precision at this time, it is necessary that any modifications can be dealt with in secondary legislation rather than in the Bill. The power is therefore required to extend to the modification of any enactment, instruments and documents. Since the order may include such amendments, and will effect changes to the regulatory functions set out in the Bill, it is appropriate that it be subject to the affirmative procedure to allow a degree of Parliamentary scrutiny. In addition, the Secretary of State may only make an order on the recommendation of the Board. Prior to making such a recommendation, the Board must publish a draft order, and have regard to any representations received.

Part 5: Alternative Business Structures

93. This part of the Bill makes provision for new, alternative business structures in legal services. This means that lawyers and non-lawyers will be able to form practices together such as legal partnerships and companies. It sets out how the Board can operate as a licensing authority for alternative business structures, and how other licensing authorities can be established. It defines the methods for constructing rules and procedures for the regulation of alternative business structures.

94. The term “alternative business structures” and “ABS firm” refer to any business structure that is at least partly managed or owned by non-lawyers, and which could deliver reserved legal services. Examples include: multi-disciplinary partnerships; limited liability
partnerships; unlimited liability incorporated practices; private limited companies; public limited companies; and mutual societies.

95. ABS firms or “licensed bodies” will be regulated by licensing authorities using licensing rules. Part 5 and Schedule 11 contain a number of obligations and powers as to the content of these rules. In general, these rules will be available for Parliamentary scrutiny when licensing authorities are designated as such. They have to be included in applications for designation and the designation of a licensing authority, which is done by order, amounts to the approval of its rules.

Schedule 10 Paragraph 15: designation of approved regulator as a licensing authority

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution

96. Clause 73 introduces Part 1 of Schedule 10. Under paragraph 15 the Secretary of State may make an order designating body as a licensing body and granting the authority to them to license providers of alternative business structures in relation to one or more reserved legal activities. Under Schedule 10 a body may make an application to the Board, and if it is satisfied that the regulator is competent to be a licensing authority, the Board may then recommend to the Secretary of State that the applicant be designated, by order, as a licensing authority for one or more of those activities.

97. Given that an approved regulator designated as a licensing authority will have considerable responsibilities and powers in respect of authorised persons, it is appropriate that a body is designated as an approved licensing authority by order. This will be by the negative resolution procedure as a body designated as a licensing authority will already have proved it is competent to regulate by virtue of being an approved regulator. As an additional safeguard, as indicated above, the Secretary of State may only make an order on the recommendation of the Board, which must be published in draft.

98. Applications for licensing authority status must include the body’s proposed licensing rules, and designation is taken automatically to constitute approval of the rules.

Clause 75: cancellation of designation as licensing authority by Order

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: affirmative resolution

99. As the Board has the power to recommend designating a licensing authority it conversely needs the ability to recommend cancelling a licensing authority’s designation. The Board can only make such a recommendation if it is satisfied that: the licensing authority’s act(s) or omission(s) have had or are likely to have an adverse impact on one of the regulatory objectives and that, in all of the circumstances of the case having regard to other powers available to the Board, it is appropriate to cancel the designation. These are the same as the reasons for cancelling designation as an approved regulator under clause 44.

100. Clause 75 makes provision, where one of these circumstances is met, for the Board to recommend to the Secretary of State to lay an order cancelling an approved regulator’s
designation as a licensing authority in relation to one or more reserved legal activities for which it is designated. This power is necessary because, while it is likely that the Board will assist licensing authorities to improve in areas of weakness, there may be occasions where an authority seriously or persistently fails to meet standards. If this were left to primary legislation it would take too long to ensure the necessary consumer protection that cancellation of designation might be needed to achieve.

101. The order will be subject to the affirmative resolution procedure. Removing a regulator’s designation would be a very serious step that would require appropriate Parliamentary scrutiny. In addition, an order can only be made by the Secretary of State on the recommendation of the Board.

Clause 76: cancellation of a designation: further provision

*Power conferred on:* Secretary of State

*Power exercisable by:* order made by statutory instrument

*Parliamentary procedure:* affirmative resolution

102. If an approved regulator has its designation as a licensing authority cancelled by order, under *clause 76*, the Board will need to recommend that provision is made to allow each person licensed, who consents to the arrangements, to be treated as having the right to continue to carry on under that licence.

103. Clause 76 contains two powers, which are exercisable by Parliamentary order. The first gives the Secretary of State the power to modify provisions made under any enactment to give effect to the removal of a body’s designation as a licensing authority in relation to one or more reserved legal activities, cancelled by order as set out in clause 75. The second gives the Secretary of State the power to make transfer arrangements or consequential provision in respect of that cancellation.

104. These powers are delegated to the Secretary of State because they will go hand in hand with an order to cancel a designation, ensuring an orderly post-cancellation period. Since an order under *clause 76* will result from a cancellation order under *clause 75*, a similar level of Parliamentary scrutiny has been set out: the affirmative resolution procedure. Orders under *clause 76* may also modify statutory provisions. An affirmative resolution procedure is therefore appropriate. As with orders under *clause 75*, an order under *clause 76* can only be made by the Secretary of State upon the recommendation of the Board.

Clause 78: cancellation of designation: Board’s powers of entry

*Duty conferred on:* Secretary of State

*Duty exercisable by:* regulations

*Parliamentary procedure:* affirmative resolution

105. When a licensing authority’s designation is cancelled, the Board may have to enter its premises to take possession of documents, in order to facilitate the transition to a new licensing authority or the cancellation process. *Clause 78(6)* obliges the Secretary of State to make regulations covering the issue and use of warrants for this purpose. This provision matches equivalent provision in *clauses 41 and 47* which is dealt with in more detail in this memorandum at paragraphs 62 and 63.
Clause 79: functions of appellate bodies

**Power conferred on:** Secretary of State

**Power exercisable by:** order

**Parliamentary procedure:** negative resolution

106. Under clause 79 the Secretary of State may by order create an appellate body or bodies to hear appeals against licensing authority decisions, or modify the functions of an existing statutory disciplinary body (the Solicitors Disciplinary Tribunal or the Discipline and Appeals Committee of the Council for Licensed Conveyancers) or other body. Its purpose is to enable licensing authorities to set up independent appeal routes for decisions where such an appeal route is prescribed for the purposes of part 5. This can be done only on the Board’s recommendation and with the consent of the licensing authority in question. It is suitable for the negative procedure because the power is limited in ambit and because it may only be exercised upon the recommendation of the Board.

Clause 81: Board’s licensing rules

**Power conferred on:** Legal Services Board

**Power exercisable by:** rules

**Parliamentary procedure:** none

107. Clause 81(1) requires the Board to make licensing rules. This is because it is automatically designated as a licensing authority for all reserved legal activities. This ensures that there will always be at least one licensing authority - the Board - able to accept applications from ABSs, so that non-commercial bodies such as not-for-profit advice agencies are not inadvertently prevented from operating. (However, the Government’s intention is that it should be confined to licensing non-commercial bodies and should not be able to do that until at least one other licensing authority has been designated.) The Board’s designation takes effect after a twelve-month period that will commence on a date ordered by the Secretary of State (discussed in the next section). The Board, acting otherwise than in its capacity as a licensing authority or as an approved regulator, then needs to approve the making or modifying of these licensing rules. These rules must also comply with the requirements set out in Schedule 11, such as structural and practice requirements.

108. An approved regulator may also make licensing rules at any time, but these will have effect only when the approved regulator has been designated as a licensing authority, and only if they comply with the requirements at Schedule 11 and have been approved by the Board.

109. A number of the basic terms common to all licensing rules are imposed by clause 81. Licensing rules **must** contain the provisions set out in clause 81(4), which includes qualification regulations, arrangements for regulating licensed bodies’ and their staffs’ conduct, arrangements for regulatory conflict as under clauses 51 and 53, the complaints provisions in clauses 109 and 142 (about complaints procedures), and any other requirements which are mandatory for the licensing rules, licensing rules **may** also contain any other provision authorised under the Bill. Both in Schedule 11 and otherwise.

110. It is appropriate to delegate the power to make licensing rules to the Board, as its position as oversight body for regulation of ABSs, as well as licensing authority for ABSs,
places it in the best position to formulate the details of licensing rules. Much of the obligatory content of these rules has already been set out in the Bill, as has much optional content, thereby providing substantial Parliamentary scrutiny.

Clause 81: setting of 12-month period for formulation of licensing rules by Board

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: none

111. Clause 81(1)(a) obliges the Board to make licensing rules before the end of the 12-month period beginning with the day appointed by the Secretary of State by order under clause 81(1).

112. This power has been left to delegated legislation, as is usual for transitional powers. It allows the Secretary of State to determine, depending on other appointed days and other factors, a suitable date for commencement of the 12-month period for formulation of licensing rules by the Board.

Clause 84: modifying licences

Duty/power conferred on: licensing authorities

Duty/power exercisable by: rules

Parliamentary procedure: none

113. Once it has been granted a licence, a licensed body may apply for it to be modified. Clause 84, taken with paragraph 6 of Schedule 11, establishes that provision must be made for this and allows licensing authorities to make rules for modifying a licence even where a licensed body has not applied for it. Licensed bodies might apply for modifications if they wanted to change the range of services they offered, or if their organisation changed so that they shifted from one category of licensing body to another. A licensing authority might want to modify licences in order to make them conform to changes in the law – permitting this without requiring applications makes the process quicker and cheaper and means that licensed bodies do not have to work out whether they need to apply for a modification.

114. It is appropriate to delegate these duties and powers to licensing authorities, since the principles behind them are set out in the Bill and will thus receive Parliamentary scrutiny.

Schedule 11: licensing rules

Duty/power conferred on: licensing authorities

Duty/power exercisable by: rules

Parliamentary procedure: none

115. Schedule 11 sets out a number of further requirements and powers as to the content of a licensing authority’s licensing rules. These refer back to Part 5 provisions as set out above and cover four broad areas: licensing procedure (Part 1), structural requirements
for licensed bodies (Part 2), practice requirements for licensed bodies (Part 3), and the
regulation of licensed bodies (Part 4).

116. In Part 1, the areas where licensing authorities must make rules are:
   • the way initial applications are made, and fees (paragraph 1(1));
   • the timetable for determining of such applications, including extensions of the
decision period (paragraph 2);
   • the way applications for modifications are made, and fees (paragraph 6(1));
   • provisions for the review of refusals or the imposition of conditions at the
   application stage (paragraph 3) and the review of refusals of modifications;
   • where necessary, the imposition of modifications without an application
   (paragraph 6(2));
   • the way applications for modifications from special bodies under clause 105 or
   104 have to be dealt with (paragraph 7); and
   • rules dealing with changes in status of special bodies (paragraph 8).

117. The powers, where licensing authorities may make rules, cover:
   • limiting the duration of licences, and how to renew them (paragraph 4(1));
   • the continuity of licences if the membership of unincorporated bodies changes
   (paragraph 5);
   • modifying licences even where a licensed body has not asked for a modification
   (paragraph 6(2)); and
   • the information that an application (including an application for renewal) must
   contain, and accompanying documents (paragraphs 1(1)(b) and 4(2)(b)).

118. In Part 2, the areas where licensing authorities must make rules are:
   • requiring licensed bodies to have at least one manager who is an authorised to
   carry out one of the legal activities for which the body is licensed (paragraph
   9(2));
   • requiring licensed bodies to have a designated Head of Legal Practice (HoLP)
   and Head of Finance & Administration (HoFA) (paragraphs 11 and 13);
   • criteria and procedures for the licensing authority to approve a HoLP or HoFA
   (paragraphs 12 and 14); and
   • procedures for instances where a licensed body no longer has a HoLP or HoFA
   (paragraphs 12 and 14).

119. In Part 3, the areas where licensing authorities must make rules are:
   • a licensed body that is not a company or limited liability partnership and has its
   registered office in England or Wales must have a practising address (paragraph
   15);
   • ensuring that licensed activities are carried on only through entitled persons
   (paragraphs 16 and 17);
   • licensed bodies having arrangements for ensuring that authorised persons
carrying out or supervising activities maintain the professional principles (clause
   1(3)) and comply with the duties in clause 169. It must also have arrangements
   for preventing non-authorised persons causing breaches of the duties of authorised
   persons in clause 169;
• preventing disqualified persons from working in licensed bodies as employees or managers (paragraph 18);
• licensed bodies having indemnity cover and compensation arrangements (paragraph 19); and
• licensed bodies accounting for clients’ money (paragraph 20).

120. In Part 4, the areas where licensing authorities must make rules cover:
• periodic payment of licensing fees (paragraph 21);
  • circumstances in which financial penalties may be imposed, and the criteria and procedures that will be applied in determining whether to impose a penalty, and the amount of the penalty (paragraph 22);
  • criteria and procedure to be used when considering whether to disqualify someone under clause 98 as HoLP, HoFA, employee, manager or owner, including reviewing disqualifications and determining whether they should cease to have effect (paragraph 23);
  • criteria and procedure to be used when deciding on any suspension or revocation of a licence under clause 99, including reviews of decisions (paragraphs 24 or 25).

121. It is appropriate to delegate these duties and powers to licensing authorities, since they are an integral part of licensing; the principles behind them are set out in the Bill and will thus receive Parliamentary scrutiny. In addition, the rules themselves will be included in applications for licensing authority status, which will be subject to scrutiny when the relevant orders are made.

Schedule 12, paragraph 2: entitlement to apply to Board for licence

Duty conferred on: Legal Services Board

Duty exercisable by: rules

Parliamentary procedure: none

122. Schedule 12 sets out the circumstances in which commercial bodies and the special bodies listed in clause 106 may apply to the Board, as opposed to a licensing authority, for an ABS licence. The first stage in the process is to apply to the Board for a decision that the body is entitled to apply to it for a licence, which entails asking the Board to determine whether a competent regulator and/or suitable regulatory arrangements exist. Paragraph 2(4) obliges the Board to make rules dealing with the review of those initial determinations. Because this can lead to the Board making decisions on substantive applications for licences, it is similar to the duty on licensing authorities, under Schedule 11, to make rules about reviews. It is therefore suitable for delegation.
Clause 85(4): registers of licensed bodies

Power conferred on: Legal Services Board

Power exercisable by: rules

Parliamentary procedure: none

123. Clause 85 provides that each licensing authority must keep a register of bodies licensed by it. It allows the Board to make rules about the register to be kept by the Board under this section and the register to be kept by each licensing authority. Rules made under this subsection may in particular prescribe any further information that must be contained in a register entry in relation to a licensed body or former licensed body.

124. This is a consumer protection measure, allowing potential users of licensed bodies easily to check whether firms they are thinking of using are in fact authentic licensed bodies. Examples of similar registers are those maintained by the Council for Licensed Conveyancers for licensed conveyancers and that held by Companies House.

125. This rule-making power is suitable for a delegated power because the Board will be best placed to make rules about the details of how these registers should be kept, and will also be well placed, as keeper of a register and as oversight body for the other licensing authorities, to determine whether any further information should be set out. No further Parliamentary procedure is necessary as the substance of the requirement - that certain information be kept in public registers - will have been approved by Parliament in the Bill.

Schedule 13, paragraphs 2 and 4: restricted interest and controlled interest

Power conferred on: licensing authorities

Power exercisable by order: rules

Parliamentary procedure: none

126. Schedule 13 deals with the ownership of licensed bodies and, in particular, the fitness to own test applied to people who are not authorised persons. The Bill creates a number of concepts:

- a restricted interest is the level of ownership above which the interest concerned needs to be approved by a licensing authority. It is defined in paragraph 2 of the Schedule as a material interest or, where licensing rules provide, a controlled interest;

- a material interest is the level of ownership set out in paragraph 3 - generally 10% of shares or equivalent;

- a controlled interest is any other level of ownership greater than the material interest level, as defined in paragraph 4. This allows scrutiny to be carried out again when owners take on interests greater than the basic material interest level.

127. Between them, paragraphs 2(2) and 4(4) allow licensing authorities to specify that one or more controlled interests count as restricted interests, and to set the applicable levels of ownership. It is appropriate to delegate these powers to licensing authorities, since the principles behind them are set out in the Bill and will thus receive Parliamentary scrutiny. In addition, the rules themselves will be included in applications for licensing authority status, which will be subject to scrutiny when the relevant orders are made.
Schedule 13, paragraph 3: material interest

Power conferred on: licensing authorities

Power exercisable by order: rules

Parliamentary procedure: none

128. As noted above, the basic threshold for a material interest is 10% of shares. **Paragraph 3(2)** allows licensing authorities to set a lower threshold and to define any interest in a partnership as material, regardless of size. This is to allow for the approval requirements test in **paragraph 6** to be applied at lower levels of ownership where a licensing authority is concerned that the types of service or intended clients require stricter regulation.

129. It is appropriate to delegate these powers to licensing authorities, since the principles behind them are set out in the Bill and will thus receive Parliamentary scrutiny. In addition, the rules themselves will be included in applications for licensing authority status, which will be subject to scrutiny when the relevant orders are made.

Schedule 13, paragraph 6: approval requirements

Power conferred on: licensing authorities

Power exercisable by order: rules

Parliamentary procedure: none

130. Paragraph 6 sets up the approval requirements that licensing authorities are obliged to apply to holders of restricted interests by virtue of paragraph 1. Paragraph 6(4) requires licensing rules to include criteria and procedure for doing so. Paragraph 6(3) sets out the factors that the licensing authority must consider and allows them to specify additional criteria in rules. We consider that Parliamentary scrutiny of individual rules is unnecessary because the basic principle will be scrutinised by Parliament, and because the rules will be included when applications are made for licensing authority designation.

Schedule 13, paragraph 9: interpretation of “interest” paragraphs

Power conferred on: Secretary of State

Power exercisable by order: order made by statutory instrument

Parliamentary procedure: negative resolution

131. Paragraph 9 allows the Secretary of State to make an order that changes the definitions of “material interest” and “associate”. An associate is defined in paragraph 5(1) as someone who is connected with someone who holds shares in a company that is subject to the ABS regulatory framework. The Companies Act 1985 and the Financial Services and Markets Act 2000 provide definitions of ‘connected persons’ in relation to interests and material interests. This order-making power gives flexibility to deal with any new categories of connected persons in respect of ABS or to remove categories that are no longer relevant and so is suitable for delegated powers subject to negative resolution procedure. One potential use that we expect is to take account of any changes to the FSMA controllers regime whether consequential on the forthcoming European financial
services legislation or otherwise. As an additional protection, such an order can only be
made on the recommendation of the Board.

132. Changes made as a result of this power could affect share movements generally
within the market for legal services. Furthermore, failure to comply with the requirements
of Schedule 13 is often an offence. Accordingly, any proposed changes should receive
Parliamentary scrutiny. Nonetheless, since the underlying principle will be considered by
Parliament during the passage of the Bill, these powers are suitable for delegation.

Schedule 13, paragraph 8: Board’s power to prescribe rules - time limits

_Duty conferred on:_ Board

_Duty exercisable by:_ rules

**Parliamentary procedure:** none

133. Paragraph 8 of Schedule 13 provides that where the term prescribed is used in
Schedule 13 it means prescribed by rules made by the Board. The points at which these
rules apply are all requirements to set time limits: paragraphs 17(4)(b), 28(5)(b) and
33(5)(b) (period for making representations against conditions on holding a restricted
interest); paragraphs 18, 29 and 34 (period for appealing against conditions); paragraphs
19(3)(b), 31(4)(b) and 36(5)(b) (period for making representations against objections to
holding a restricted interest); paragraphs 20, 32 and 37 (period for appealing against
objections); paragraph 25(2) (period for determining results of notification of acquiring a
restricted interest); paragraphs 33(2)(b) and 36(2) (time limit for Board to decide whether
to impose further conditions or object, respectively); paragraph 44(3) (warning period for
taking divestiture action in High Court); paragraph 45(4)(b) (time limit on restriction
notice if divestiture action not taken); paragraph 47(3) (warning period for enforcing
conditions via High Court); paragraph 50(4)(b) (period for making representations
against divestiture for exceeding share limit); and paragraph 51 (period for appealing
against divestiture for exceeding share limit).

134. This power enables different time limits to be set for different situations. This, plus
the fact that the principle will have been considered by Parliament, makes them suitable
for delegation.

Schedule 13, paragraphs 21, 23, 39: notification requirements - time limits

_Power conferred on:_ Secretary of State on recommendation of Board

_Power exercisable by:_ order

**Parliamentary procedure:** negative resolution

135. Part 3 of Schedule 13 deals with the way licensing authorities must approve
restricted interests once a licence has been issued. People who are intending to take steps
to acquire restricted interests are obliged to notify the relevant licensing authority. People
who acquire them without taking any steps (e.g. by inheritance), and people who are
initially unaware of their duty to notify because they are unaware of the underlying facts,
are also obliged to notify the authority. In addition, people who acquire shares beyond a
limit set under paragraph 38 are obliged to notify the authority. In all the latter three cases
there is a time limit for notification, which is set by the Secretary of State by order on the
Board’s recommendation.
136. This group of powers enables different notification periods to be set for different situations, and allows the period to be set and varied in the light of experience of the reasons for late notification that might arise. These have not been set up as rule-making powers for the Board or licensing authorities because the result of failing to notify within the time limit is that the person in question commits an offence. Parliamentary scrutiny of the time limit is therefore provided for, so that the practicality of suggested time limits can be considered before they take effect.

Schedule 13, paragraph 36-38: additional restrictions

**Power conferred on:** licensing authorities

**Power exercisable by order:** rules

**Parliamentary procedure:** none

137. In addition to the basic rules about interests described above, paragraphs 36-38 allow licensing authorities to make rules setting a separate limit on ownership beyond which a non-authorised person or individual non-authorised persons as a class may not have an interest at all. This is to allow for the possibility that in some circumstances, non-lawyer ownership may be undesirable regardless of fitness to own. Such rules would be approved by the order designating the licensing authority, so the Board would have to be satisfied that they were necessary; and the approval process would subject them to Parliamentary scrutiny.

Clause 93: financial penalties

**Power conferred on:** Board with the consent of the Secretary of State

**Power exercisable by:** rules

**Parliamentary procedure:** none

138. Clause 93(3) allows the Board to make rules, subject to the consent of the Secretary of State, prescribing the maximum amount of a financial penalty that a licensing authority can impose on a licensed body. The penalty is payable to the licensing authority though the licensing authority must pay it into the consolidated fund, as provided for under clause 95 (3). The Board must, with the consent of the Secretary of State, set the maximum amount for this.

139. This is subject to delegated legislation as setting the rules on the maximum amount of a financial penalty is a matter of detail, which requires flexibility in order to stay in line with inflation, to easily adjust the maximum penalty if a licensing authority’s authorisation is changed to include or exclude those services where a higher or lower penalty is more appropriate, and to reflect best regulatory practice over time.

140. Such rules can only made with the consent of the Secretary of State, to ensure accountability for the levels of penalty that licensing authorities have discretion to issue. The procedure for making rules at clause 195 provides for additional transparency in that the Board will have to publish any rules which relate to financial penalties in draft before bringing them into force.
Schedule 14, paragraph 3: money vesting in licensing authority on intervention

Power conferred on: licensing authorities

Power exercisable by: rules

Parliamentary procedure: none

141. Schedule 14 sets out the powers that licensing authorities have when intervening in licensed bodies. Paragraph 3 allows licensing rules to make provisions about the way money held by licensed bodies is treated when the licensing authority has to intervene in them, particularly where it is impossible to trace people who are beneficially entitled to the money. This matches general licensing authority provision to the specific powers of the Law Society and the CLC under their existing legislation as amended by the Bill. It is suitable for delegation because the underlying principles will be considered by Parliament.

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

Power conferred on: licensing authorities

Power exercisable by: order made by licensing authority, modifying rules

Parliamentary procedure: none

142. Licensing authorities may modify their rules to make different provision for non-commercial bodies and low-risk bodies (defined in clause 104) if any of the basic Schedule 11 provisions are unnecessary or inappropriate. Some of the Schedule 11 provisions cannot be disapplied, for instance those that cover disqualification of persons from specific roles, and suspension and revocation of licences.

143. The purpose of this power is to allow licensing authorities to take account of the lower regulatory risk that these bodies represent. Trade unions are one type of non-commercial body; they are wholly owned by their members and, where providing legal services, can usually do so only for their members. They therefore present a low risk to members of the general public. Clause 103 already disapplies the HoLP and HoFA requirements and the ownership test from trade unions. Other non-commercial bodies - not-for-profit bodies and community interest companies - are bodies with a public purpose that often provide limited services and have limited resources, and rely heavily on volunteers. Low-risk bodies are those in which non-lawyer ownership and management is small in scale, which reduces any risks associated with non-lawyer involvement. In order to keep the regulatory burden proportionate, licensing authorities will be able to disapply certain licensing requirements if they judge it is safe to do so.

144. It is appropriate to delegate these powers to licensing authorities, since the principles behind them are set out in the Bill and will thus receive Parliamentary scrutiny.
Clause 104: Power to Modify application of licensing rules etc. to special bodies

Power conferred on: Secretary of State

Power exercisable by: order

Parliamentary procedure: affirmative resolution

145. It is possible that other categories of ABS may in future be found to present lower risks that could justify taking a lighter-touch approach. Clause 104 enables the Secretary of State to lay an order adding them to the categories already subject to lighter regulation, as set out in clause 104(1)(e).

146. This power is subject to the affirmative resolution procedure because to extend the circumstances in which it is possible to remove any of the ABS regulation provisions would be a significant step. ABS regulation is designed to maximise consumer protection in using legal services; a decision to alter any of its elements would not be taken lightly. In addition, the Secretary of State will be able to lay such an order only on the Board’s recommendation.

Clause 107: foreign bodies

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution

147. This clause allows the Secretary of State to amend or modify any of the provisions set out in Part 5 to the extent that the provisions affect bodies formed under, or recognised by, law outside the UK.

148. This power is necessary in order to ensure that the provisions relating to alternative business structures can be amended to take account of different legal structures - for example to ensure that any anti-competitive effects can be ameliorated.

149. We consider that this is suitable for delegated powers. However, it is necessary that any power that allows the amendment of the safeguards and criteria set out in this Part is subject to Parliamentary scrutiny to ensure the protection of the public and firms, so this power is subject to the negative resolution procedure.

Part 6: Legal Complaints

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

151. It also makes provision for the accountability of the OLC through the Board, the framework of rules under which the OLC will establish its operating procedures, and the changes to the regulatory arrangements of approved regulators which will be necessary in consequence.
Clause 109: complaints procedures of authorised persons

Power conferred on: Board

Power exercisable by: rules

Parliamentary procedure: none

152. Clause 109 requires each approved regulator to make provision that each authorised person either has in place an in-house complaints handling procedure or participates in such a scheme. This is necessary to give consumers a chance to resolve their complaints with their lawyers in the first instance before taking them to the OLC. It will also ensure that all complaints follow a consistent procedure by having to be dealt with in-house in the first instance.

Schedule 15: OLC membership

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution

153. Schedule 15 sets out the membership of the OLC, the terms of appointment and tenure of members, staffing, committees, the delegation of functions, and funding and accounts. Paragraph 1(1) of the Schedule states that the OLC membership is to consist of a chairman appointed by the Board, and between 6 and 8 other persons (reflecting a narrower remit when compared with the Legal Services Board with between 9 and 12 members) appointed by the Board following consultation with the chairman.

154. Paragraph 1(2) allows the limit on the maximum number of members of the OLC to be amended by order of the Secretary of State. This power has been left to delegated legislation because while it is thought that the present maximum of 8 is right, it is possible that the need for a greater number of members may be identified once the OLC Board is functioning. For example if the workload on members is greater than anticipated. It is important that there is flexibility in relation to the size of the Board to ensure that it can continue to exercise its functions effectively and meet the needs of consumers over time. There is no power to reduce the minimum number of Board members. The order will be subject to the negative resolution procedure.

Clause 111 and Schedule 15, paragraph 17: The Office for Legal Complaints

Power conferred on: Office for Legal Complaints

Power exercisable by: rules

Parliamentary procedure: none

155. Clause 111 creates a body called the Office for Legal Complaints. Sub-sections (2) and (3) of clause 112 set out that the complaints scheme to be administered by the OLC is to be dealt with by scheme rules made under Part 6. The complaints scheme is to operated under a name that includes the word “ombudsman” in the title. All rules made by the OLC must be made with the consent of the Board under clause 152. The reason for specifying that the complaints scheme is to be set out in rules rather than on the face of
the legislation is to allow the OLC to create a scheme that is flexible enough to meet the changing needs of consumers. The OLC will be best placed to determine the detail of how it should operate effectively and a rule-making power gives the OLC an opportunity to adapt to any changes over time in how it exercises its functions. This mechanism is based on the Financial Ombudsman Service model.

156. Because all rules must receive the consent of the Board before they can be made, there is a safeguard in place to prevent the complaints scheme being set up and run in a way that is not fair and reasonable.

157. Paragraph 17 of Schedule 15 gives power to the OLC to regulate its own procedure and the procedure of its committees and sub-committees. This is subject to the requirements at sub-paragraph (2) that the quorum of a committee or sub-committee must not be less than 3 and those at paragraph 16 that they must maintain a lay majority. Sub-paragraph (3) requires the OLC to publish any rules of procedure made under this paragraph and as such, will be subject to the consent of the Board. This is suitable for a rule-making power as the OLC will be best placed to determine the detail of how it should operate and gives flexibility for it to adapt to any changes over time in how it exercises its functions.

Clause 127: orders under Section 125

Power conferred on: Secretary of State

Power exercisable by: order made by statutory instrument

Parliamentary procedure: negative resolution

158. Clause 127 allows the Secretary of State to determine by order the types of person that should be eligible to bring complaints to the OLC under clause 125. It is envisaged that the types of person eligible to bring complaints will be similar to those who may bring complaints to the Financial Ombudsman Service – that is, private individuals and small businesses.

159. On the advice of the Financial Ombudsman Service, the Government considers that to specify on the face of the legislation all those who should be able to make a complaint to the OLC would be restrictive. As the legal services market changes, so too will those who consider that they have a legitimate complaint about their lawyer. This may include those who are related or connected to the individual who has dealt directly with their lawyer (i.e. third parties) as well as these persons themselves. However, because each eligible complainant could potentially receive £20,000 redress, it is felt that the class of those eligible to complain should be determined by secondary legislation rather than in scheme rules. For this reason, the Secretary of State may, by order, amend the list of those eligible to bring a complaint under clause 125. This power is suitable for scrutiny under the negative resolution procedure as it is a matter of detail and the Secretary of State may only make an order if he has received a representation from the OLC, the Board or the Consumer Panel.
160. Subsection (1) of clause 130 requires the OLC to make rules setting out the procedure for making complaints under the ombudsman scheme and for the investigation, consideration and determination of complaints by an ombudsman.

161. As noted above, the reason for specifying that the complaints scheme is to be set out in rules rather than on the face of the legislation is to allow the OLC to create a scheme that is flexible enough to meet the changing needs of consumers. The OLC will be best placed to determine the detail of how it should operate effectively and a rule-making power gives the OLC an opportunity to adapt to any changes over time in how it exercises its functions. This mechanism is based on the Financial Ombudsman Service model.

162. Subsection (3) of clause 130 sets out a list of issues that may be included in scheme rules. This list is not exhaustive, but by specifying those issues that the Government considers important to include in a complaints handling scheme, it should provide reassurance to consumer groups that these matters will be included in scheme rules.

163. Under clause 131 ombudsmen may delegate any of their functions to a member of staff appointed by the OLC, except that they may not delegate the preparation of the annual report that the Chief Ombudsman is required to prepare nor the ability of a Chief ombudsman to appoint assistant ombudsmen, nor may they delegate the function of making determinations in relation to complaints. This delegation power is necessary as it is envisaged that the majority of complaints will be dealt with by caseworkers rather than ombudsmen.

164. The OLC will be partly funded by the “polluter pays” mechanism by which charges will be placed on those legal professionals who are subject to complaints (respondents). Clause 133 requires the OLC to make rules determining how these charges are determined. Subsection (2) allows the OLC flexibility to make different charges in different circumstances. The OLC will also be obliged to consult before making these rules (as is the case with all of its other rules). This is based on the Financial Ombudsman Service model.

165. Clause 134(1) sets out that the ombudsman must consider what is fair and reasonable before making a determination. Subsection (2) sets out the type of determination that the ombudsman may make.

166. Clause 136 limits the amount of redress that the ombudsman can award to £20,000. This sum is the aggregate of the amount of compensation to be paid for loss suffered and the costs involved in rectifying the work. The redress is to be payable by the respondent. Clause 136 allows the Secretary of State by order to amend the £20,000 redress limit that
the ombudsman can award. He may make such an order only if he receives representations that the limit should be amended by the OLC, the Board or the Consumer Panel, which provides an additional safeguard. It is necessary to have an order-making power as, over time, a different level of redress may be appropriate. However, because the cost of redress, and thus the impact on the legal profession, may be high, it is necessary that any changes be set out in secondary legislation and thus subject to Parliamentary oversight under the negative resolution procedure.

Clause 141: Duties to share information

*Power conferred on:* Office for Legal Complaints with the consent of the Board

*Power exercisable by:* rules

*Parliamentary procedure:* none.

167. Subsection (1) of clause 141 requires the OLC to make rules ensuring that the OLC, ombudsman and members of staff provide approved regulators with all such information as may be specified in the rules. These requirements would be set with the aim of ensuring that approved regulators receive all such information as might be necessary in carrying out their regulatory functions and that the duplication of investigations is avoided. Again, the reason for specifying that the way in which information be shared between the OLC and approved regulators be set out in rules rather than on the face of the legislation is to allow the OLC to create a scheme that is flexible enough to meet changing circumstances. In this case, the OLC and approved regulator will be best placed to determine what information should be shared and how in order to avoid duplication of complaints and to assist each body carry out their functions efficiently.

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

*Power conferred on:* Board

*Power exercisable by:* rules

*Parliamentary procedure:* none

168. Clause 142 requires that an approved regulator make rules requiring all relevant authorised persons to give the ombudsman any assistance requested of them in connection with the investigation, consideration or determination of a complaint. This is to ensure that individual lawyers do not delay the complaints procedure or withhold information necessary to assist the ombudsman in making a determination.

Clauses 149(3)(g) and 161(3)(g) – Disclosure of restricted information

*Power conferred on:* Secretary of State

*Power exercisable by:* order

*Parliamentary procedure:* negative

169. Clause 149, which applies to the OLC, and clause 161, which applies to the Board, provide that a restricted person, defined in clauses 148 and 160, may disclose restricted information to another restricted person. Subsections (3) of clauses 149 and 161 list further circumstances where the disclosure of information is not precluded. Subsections
(3)(g) of those clauses allow the Secretary of State, by order, to prescribe further persons and purposes to whom restricted information can be disclosed.

170. This power is required to ensure that any bodies which are not specified in the legislation may be disclosed for the purposes of its functions, for example other regulators such as the Financial Services Authority or the Immigration Services Commissioner. The function of this power is consistent with a similar order-making power in Part 1 of the Pensions Act 2004 which allows the Secretary of State to amend Schedule 3 listing bodies and functions for which information can be disclosed. It provides the necessary flexibility to ensure that the Board and the OLC are able to disclose important information where persons are identified after the Bill is enacted. We have prescribed an order-making power as we feel that this provides a necessary safeguard against inappropriate disclosure of restricted information. However, the order is subject to negative resolution as the order itself will be a matter of detail which does not require further scrutiny by the House. This is consistent with the order-making power under the Pensions Act.

**Clauses 149(5) and 161(5): Disclosure of restricted information**

- **Power conferred on:** Secretary of State
- **Power exercisable by:** order
- **Parliamentary procedure:** negative

171. Clauses 149(5) and 161(5) allow the Secretary of State to make an order to prevent disclosure of restricted information under the powers in clauses 149(2) and (3) and 161(2) and (3) in such circumstances or for such purposes as may be prescribed. We expect that this power will be used, for example, to prevent the disclosure of information by the OLC and the Board of legally professionally privileged material which may come into the hands of, in particular, the Board, as a result of the proper exercise of its regulatory functions. It is not appropriate to attempt to detail the circumstances and purposes on the face of legislation, first because it is possible that the required provision may change as case law develops and second because there may be other types of material or purposes that should be excluded. This provision provides an important safeguard and so should be subject to Parliamentary scrutiny, but it is about the detail of the regime and so is subject to the negative resolution procedure.

**Clause 152 and 153: consent requirements for rules and the Board’s powers in respect of rules**

- **Power conferred on:** Office for Legal Complaints with the consent of the Board
- **Power exercisable by:** rules
- **Parliamentary procedure:** none

172. Clause 152 requires the OLC to obtain the consent of the Board before making any rules. This is to ensure that the jurisdiction and operation of the ombudsman scheme is subject to regulatory oversight. In the case of rules that relate to charges under clause 133 (charges payable by respondents) the OLC must also obtain the consent of the Secretary of State. This provides the necessary oversight whilst enabling the OLC to operate a flexible complaints handling scheme that works in the interests of consumers.

173. Clause 153 allows the Board to direct the OLC to amend its rules. In doing so it must notify the OLC and publish its decision to amend the rules. It may not overturn a determination given by the ombudsman. This power is necessary as, should the Board feel
that the complaints handling scheme requires amending, for example to make it comply more fully with the regulatory objectives, it needs to be able to do so.

Part 7: Further provisions relating to the Board and the OLC

174. This part of the Bill sets out a number of miscellaneous provisions, including financial provisions, which relate to the Board and the OLC.

Clause 158: Guidance

_Power conferred on:_ Legal Services Board

_Power exercisable by:_ guidance

_Parliamentary procedure:_ none

175. Clause 158 sets out that the Board may issue guidance on a number of areas - for example, for the purpose of approved regulators meeting the regulatory objectives set out at clause 1. However, clause 158 does not require the Board to make guidance in relation to any specific functions under the Act. Where the Board does publish guidance it will be able to charge for copies, if it considers it appropriate. Following any guidance being issued, the Board may consider the extent to which an approved regulator has complied with it when exercising its regulatory functions. Any guidance issued will also apply to the Board where it is acting as approved regulator to ensure that it operates in a way consistent with best practice.

176. Powers to provide guidance are typically delegated to the persons or bodies that are in the appropriate regulatory position to offer it. Given the Board’s day-to-day oversight and regulatory functions, it will be well positioned to offer guidance to the legal sector on matters such as the operation of the Act and its rules. Guidance will be one of the tools available to the Board to achieve consistency in standards across the legal sector, and will be an effective way of communicating key messages to all approved regulators.

Clause 162: Disclosure of information to the Board

_Power conferred on:_ Secretary of State

_Power exercisable by:_ order

_Parliamentary procedure:_ negative

177. Clause 162 (1) confers the power for permitted persons to disclose information to the Board when it is exercising its functions under the Bill, including where it is acting as an approved regulator and licensing authority. Permitted persons are listed at subsection (5)(a) to (f) and include the police and the Financial Services Authority. Subsection (6) allows the Secretary of State to make an order designating other permitted persons who exercise functions which are of a public nature, including regulatory functions.

178. This power to disclose information to the Board is required as, for example, it may be appropriate for the Board to be notified of any investigation or prosecution in relation to an approved regulator, particularly if it impacts on the objectives at _clause 1_. The provision is permissive in that it imposes no obligation on the permitted persons to disclose information. The order-making power gives further flexibility to designate further types of person in the future as the need arises, for example, regulators other than the
Financial Services Authority. This power is consistent with order-making power at section 107 of the Constitutional Reform Act 2005, which is also subject to negative resolution.

**Clauses 165, 166, 167 & 168: funding and the levy**

*Power conferred on:* Legal Services Board

*Power exercisable by:* rules (with the consent of the Secretary of State)

*Parliamentary procedure:* none

179. Clause 166 requires the Board to make rules providing for a levy on approved regulators according to certain Board and OLC expenditures. The purpose of the levy is to cover the expenditure of the Board and the OLC, any expenditure of the Secretary of State incurred in establishing the Board and the OLC, and any sums received from approved regulators must be paid into the Consolidated Fund.

180. Clause 167 sets out additional matters that the rules either must or may address. For example, the Board must make rules about when and how the levy will be payable; and it may provide for different parts of the levy to be payable at different times. Levy rules may also make provision about how the levy will be collected, circumstances in which any amount of the levy may be waived, and the recovery of any sums not paid. Under clause 166(4), these rules may be made only with the consent of the Secretary of State.

181. These powers are appropriate to delegate to the Board. In determining the levy and how it will be apportioned, the Board will need to take account of a range of factors, for example it might want to add particular weight to the risk posed by an approved regulator or the number of persons a body regulates. To set out a model for how this would work in legislation would be impractical, given that the factors are likely to vary over time as the role of the Board and the legal sector develop, and it might be appropriate to add more or less weight to different factors. Rules are therefore the most appropriate way to set out how the amount of the levy will be determined and, with the knowledge of the sector that the Board will develop, it will be best placed to make decisions such as the process for determining how the levy should be apportioned. However, any rules made under this provision may be made only with the consent of the Secretary of State, to ensure the accountability necessary for the Board, as a public body. To ensure further transparency, before securing Secretary of State consent, the Board will be required to publish a draft of any rules and consider any representations, as set out at clause 195.

**Clause 166(5)(c): The levy**

*Power conferred on:* Secretary of State

*Power exercisable by:* order

*Parliamentary procedure:* affirmative

182. Clause 166 provides for the Board to make rules (dealt with above) about the imposition of a levy on leviable bodies to raise the aggregate of the leviable Board, OLC and Secretary of State expenditure. Leviable bodies are approved regulators and the claims management regulator. Clause 166(5)(c) allows the Secretary of State to prescribe further leviable bodies by order. This power permits the Secretary of State to add further bodies to those that are leviable. The bodies that are likely to be added using this power are bodies that are not yet approved regulators or licensing authorities, but might be designated in the future. Were this power not available, such bodies would benefit from
the new regulatory framework without being subject to the costs of regulation. Given that the power can require persons who are not approved regulators to be levied by the Board, we feel that it is necessary that this order is made subject to affirmative resolution.

**Part 8: Miscellaneous provisions about lawyers**

183. This part of the Bill sets out a number of miscellaneous provisions which relate to lawyers and other regulated persons who are within the scope of the Bill. This includes provisions which amend the regulatory powers of the Law Society, ITMA, CIPA and the CLC to regulate legal professionals.

**Schedules 16 and 17**

184. Schedules 16 and 17 amend the Solicitors Act 1974, the Administration of Justice Act 1985 and the Courts and Legal Services Act 1990, in order to bring the regulatory frameworks for solicitors and licensed conveyancers into line with the provisions of the Bill and allow the Law Society and Council for Licensed Conveyancers to regulate firms alongside individual practitioners. They include considerable order and rule-making powers, as the original legislation did. In general the justification for including them as delegated powers is because the underlying principles will be considered by Parliament during the passage of the Legal Services Bill. Schedule 16 applies to the Law Society; Schedule 17 to the CLC. For ease we have dealt with the Schedules together, rather than in the order of the Bill.

185. These Schedules amend a large number of existing rule-making powers in procedural terms to match the framework in the Legal Services Bill - for instance, by making the rule-making body the Law Society rather than the Council of the Law Society. Such changes are not set out in this memorandum, which deals only with new powers.

**Schedule 16: The Law Society, Solicitors, Recognised Bodies and Foreign Lawyers**

*Power conferred on:* Law Society with the approval of the Legal Services Board

*Power exercisable by:* rules

*Parliamentary procedure:* None

186. Schedule 16 contains a number of amendments to the rule and regulation making functions that under the current Solicitors Act fall to the Law Society with the concurrence of the Master of the Rolls. It is a key policy objective that all oversight functions should be exercised by a single oversight body, and therefore the approval mechanism for any rules changes the Law Society wish to make should in future rest with the Board. This Schedule provides for the transfer of those Master of the Rolls functions. The regulatory rules fall within the definition of regulatory arrangements at clause 20 of the Bill.

187. An example of how this will work in practice is that in future if the Law Society propose to make any changes to its training regulations under the new regime it will first be required to seek the approval of the Board, as set out under Part 3, Schedule 4.

188. It is appropriate that the rules are made by the Law Society as it currently exercises this function and its best placed to determine where change is required to the rules and regulatory arrangements which apply to Solicitors. This also allows for greater flexibility within the system with the added safeguard that the Board has to approve any changes.
189. In paragraph 27 of Schedule 16 the Master of the Rolls’ functions, to make regulations about practising certificates and the keeping of the register etc, have been transferred to the Law Society and will be exercised with the approval of the Board. The Master of the Rolls has agreed that it is more appropriate that these functions should rest with the Law Society, as it will be the approved regulator in the new regime.

190. In addition, the Law Society’s rule-making powers have also been enhanced to enable greater flexibility to transfer the detail from primary legislation to secondary legislation. For example we have amended section 31 of the Solicitors Act which relates to rules as to the professional conduct and discipline of solicitors as set out at paragraph 28 of Schedule 16, which now allows the Law Society to make rules as to professional practice, conduct and discipline. Its rule-making power has been extended to include rules regarding the fitness to practice of a solicitor. The purpose of this amendment is to protect the public from solicitors who are not fit to practice.

191. There are a number rule- or regulation- making and concurrence functions which will be transferred from the Master of the Rolls to the Law Society and Legal Services Board where the Board will approve the rules of the Law Society, rather than the Master of the Rolls: These can be found at: Schedule 16, paragraphs 3, 4, 10, 14, 27 (2) and (6), 28 (2), 29 (2), 30 (2), 31 (2), 34, 42(4), 78, 116, 120, and 124.

192. We have taken this opportunity to update the Law Society’s rule-making abilities, as set out in the Solicitors Act 1974 to ensure that it is equipped to regulate in the new regime. It is appropriate that it has these powers as it allows for greater flexibility in the regulatory framework, enables rules to adapt to future circumstances, and also is in keeping with the principles of better regulation.

**Schedule 16, paragraph 13: practising certificate appeals**

*Power conferred on: Law Society*

*Power exercisable by: rules*

*Parliamentary procedure: none*

193. Paragraph 13 inserts a replacement section 13 into the Solicitors Act 1974 dealing with appeals against the Law Society's decision not to issue a practising certificate or to issue one subject to conditions. The new section 13(3) allows the Law Society to make rules about the timeframe for an application for a practising certificate which is neither granted or refused and allows for appeals to be brought under this section. This provision is designed to give greater certainty over the handling of applications. It is suitable for delegation because it parallels the Law Society’s extensive rule-making powers and because the principle of this delegation will be scrutinised by Parliament.

**Schedule 16, paragraphs 29, 30, 32: accounts rules and trust accounts rules**

*Power conferred on: Law Society*

*Power exercisable by: rules*

*Parliamentary procedure: none*

194. Sections 32 and 33 of the Solicitors Act oblige the Law Society to make rules about opening and keeping solicitors’ client accounts. Paragraph 29 amends s.32 by extending
the duty to make rules about operating client accounts and by adding funds that are held on trust to the funds that this section governs.

195. Paragraph 30 amends the position on interest payable to clients from client accounts (s.33) by extending it to trusts. It also clarifies solicitors’ freedom to make other arrangements over interest by requiring exclusions to be set out in the relevant rules.

196. Section 34 of the Solicitors Act deals with accountants’ reports. Paragraph 32 tidies it up by replacing the detailed provisions in sub-sections (1) to (5A), which include rule-making powers, with a general power to make rules about the provision of accountants’ reports to the Law Society.

197. These are small amendments to the existing rule-making powers and are necessary for ensuring that the Law Society’s accounts rules are fully comprehensive. In other respects they are the same as the original provisions and are thus suitable for delegation in rules.

Schedule 16, paragraphs 33, 87, 119 and 120: provision for compensation fund

   Power conferred on: Law Society

   Power exercisable by: rules

   Parliamentary procedure: none

198. Section 36 of the Solicitors Act covers the Solicitors’ Compensation Fund; sub-section (2) sets out circumstances where the Law Society Council can make a grant out of the fund. Paragraph 33 adds a new power for the Law Society to specify in rules other circumstances where compensation can be awarded, reinforced by paragraphs 87(r) and 119(d), which amend the Administration of Justice Act and Courts and Legal Services Act respectively to the same effect. These provisions allow greater flexibility in awarding compensation as the Law Society will, with the consent of the LSB, be able to determine what the fund may be used for, unlike the current system where payments are fixed to loss or hardship. This will benefit consumers in cases where their solicitor has caused loss which cannot be recovered under the solicitors’ indemnity insurance arrangements. They are suitable for delegation because the basic principle will have been scrutinised by Parliament.

Schedule 16, paragraphs 41 and 95: costs of investigations

   Power conferred on: Law Society

   Power exercisable by: regulations

   Parliamentary procedure: none

199. Section 44C of the Solicitors Act enables the Law Society to recover the cost of an investigation from the person being investigated. Paragraph 41 amends it by allowing the Law Society to make regulations covering the payment of costs, and confining it to the costs of discipline investigations. This makes the section consistent with the position on complaints, where regulatory bodies are allowed to deal with discipline matters but not redress. Paragraph 95 reinforces it by making similar amendments to section 14A of the Administration of Justice Act. This improves on the present position because the Law Society does not currently have to make rules and can seek costs on any basis it liked, therefore the regulations made under this section. It is suitable for delegation because the
principle of recovering costs has been approved by Parliament already in existing legislation.

Schedule 16, paragraph 46: appeals from the Solicitors Disciplinary Tribunal

- **Power conferred on:** Law Society
- **Power exercisable by:** rules
- **Parliamentary procedure:** none

200. Some appeals from regulatory decisions made by the Law Society go straight to the High Court. Paragraph 46 allows the Law Society to make rules by which some of these appeals would be heard by the Solicitors Disciplinary Tribunal instead: decisions to remove or restore a name to the roll of solicitors at the solicitor’s request; the imposition of conditions on a practising certificate; the length of suspension of a practising certificate; the employment of people who have been struck off or suspended; and decisions on the registration of foreign lawyers. Any appeals affected by such rules would be final. The purpose of this power is to allow flexibility so that in the future, with the agreement of both the SDT and Law Society, the SDT could hear regulatory appeals if it was felt that that was more appropriate than the High Court. This is suitable for delegation as, any rules affecting the issues that will go to the SDT, as opposed to the High Court, must be agreed by the LSB.

201. The prevention of a further appeal beyond the SDT is a significant power. However, the principle will be considered by Parliament as it appears in the Schedule, and any rules have to be made with the SDT’s approval, so this is suitable for delegation.

Schedule 16, paragraph 65, Discharge of Council’s functions

- **Power conferred on:** Law Society
- **Power exercisable by:** regulatory functions
- **Parliamentary procedure:** none

202. Under paragraph 65 the Law Society is able to arrange for any of its regulatory functions, as set out in section 27 of the Bill, to be discharged by a committee of the Society and to make rules governing the treatment of any sums so vested. It is a requirement of the Bill that approved regulators take appropriate steps to separate their regulatory functions from their representative functions, as specified under clause 29. Therefore it is important that the Law Society has the ability to do so under its legislation, and is able to delegate its functions to a regulatory board.

Schedule 16, paragraph 69: intervention in solicitor’s practice

- **Power conferred on:** Law Society
- **Power exercisable by:** rules
- **Parliamentary procedure:** none

203. Schedule 1 of the Solicitors Act sets out the circumstances and ways in which the Law Society can intervene in a solicitor’s firm. Paragraph 69(6) creates a power for the
Law Society to decide that the right of the firm to receive and recover debts should be vest in the Society. Paragraph 69(7) adds a power to make rules governing the use of that power, for example setting up and control of separate bank accounts for holding monies. This is suitable for delegation because the underlying principle will be considered by Parliament in considering Schedule 16.

**Schedule 16, paragraphs 71, 87 and 120: compensation fund**

*Power conferred on:* Law Society

*Power exercisable by:* rules

*Parliamentary procedure:* none

204. Schedule 2 of the Solicitors Act contains powers to impose in specified circumstances a “special levy” on top of the annual contribution to the compensation fund. At the moment the amount can be determined by the Law Society Council but no method is specified. Paragraph 71(2) amends this by requiring the Law Society to make rules for the setting of the special levy. It is reinforced by paragraph 87(c) and 120(c), which amend the Administration of Justice Act and Courts and Legal Services Act respectively to confirm that the rate is set by the Law Society in rules. This improves on the present position because under the current arrangements, if the fund is exhausted, no further payments can be made to consumers. This provision allows the Law Society to top up the fund so that payments to consumers may be made. It is suitable for delegation because the principle of recovering costs has already been approved by Parliament in the Solicitors Act.

**Schedule 16, paragraph 71: compensation fund levy**

*Power conferred on:* Secretary of State

*Power exercisable by:* order made by statutory instrument

*Parliamentary procedure:* negative resolution

205. Schedule 2 of the Solicitors Act deals with the funding of the solicitors’ compensation fund via a levy. Paragraph 71(3) adds a new set of provisions by which the Secretary of State may, by order, change the amount payable under the levy. The current provisions allow the Law Society to borrow up to £10,000 to quickly “top up” the fund. This is important as it will not always be possible to levy solicitors in time to make an award to consumers. As the Law Society may need to make several payments at one time, thus depleting the fund quickly, this order-making power will allow the Secretary of State to change the amount that the Law Society may borrow for the fund. If this power were not here and the fund became depleted, consumers would have to wait for, possibly, up to 12 months before receiving an award. This power is suitable as it can be done only on the Board’s recommendation and the Board will be well placed to determine if such a change to the limit the Law Society may borrow is needed.
206. Paragraph 73(3) of Schedule 16 introduces a new power into section 9 of the AJA, enabling the Law Society to set application fees for the recognition of incorporated practices. This matches the Society's statutory powers to the general powers that licensing authorities will gain under Part 5 and, like them, is suitable for delegation because the principle will have been considered by Parliament.

207. Section 15(4) of the Administration of Justice Act 1985 is being amended to allow the Council to make rules as to the validity period of any licence issued. This will give the Council greater flexibility by allowing it to issue licences, which are valid for differing periods (e.g. three years, five years.) This will ease administrative costs by having fewer licences up for renewal at the same time. Section 15(4) currently states that each licence issued by the Council is valid for ‘...the period of twelve months beginning with the date of issue.’

208. It is believed that these powers should be delegated to the Council as it is best placed to determine its own licensing needs and to whom a licence should be provided for how long. As this amendment deals with a regulatory arrangement any rules made will be subject to the approval of the Legal Services Board.

209. These amendments create a new provision requiring a licensed conveyancer to deliver an accountants report to the Council within a time limit. Rules will be able to specify the time limit and will prescribe how the Council recovers expenses accrued, should a licensed conveyancer fail to provide the report within the specified time. At present, there is no such provision in the 1985 Act. The Solicitors Act 1974 at section 34 requires a solicitor to deliver an accountants report and is currently being amended to allow the Law Society to recoup costs incurred as a result of a failure to do so. The purpose of this amendment is to allow the Council to ensure accountants’ reports are delivered in a timely manner and in accordance with best business practice.
Schedule 17, paragraphs 10, 11, 27: Investigating Committee powers

Power conferred on: Investigating Committee

Power exercisable by: rules

Parliamentary procedure: none

210. This amendment to section 24 of the 1985 Act (and the insertion of a new section 24A) confers a power on the Investigating Committee (IC) allowing it to determine minor infractions of the Council’s rules and allegations of a minor nature made against a licensed conveyancer as well as for breach of conditions that have been placed on a licence. There is a similar amendment to Schedule 6 of the 1985 Act which confers the same powers of determination on the Investigating Committee but in relation to recognised bodies. The current position is that the IC may investigate the infraction/allegation/breach but must refer each one to the Discipline and Appeals Committee (DAC). This is costly and time-consuming, as the DAC is more expensive to convene than the IC and only convenes every two to three months.

211. To carry out its functions, the IC will adopt some of the powers of determination, including a power to fine, that previously sat with the DAC. These powers will be limited by the Council’s rules relating to what the IC can hear and determine and what the IC must hear and refer (e.g. Schedule 17 paragraph 10 (4) and paragraph 27). The power to fine exercisable by the IC will be determined by the Council in accordance with its rules and subject to Board approval. It is envisaged by the Council that a fine will not exceed £1000. Placing this figure in rules ensures that there is greater flexibility to increase or decrease the limit in line with inflationary fluctuations or developments in the regulation of conveyancers which are likely to happen over time.

Schedule 17, paragraphs 12 and 27: Licensed conveyancing

Power conferred on: Discipline and Appeals Committee

Power exercisable by: rules

Parliamentary procedure: none

212. Paragraph 12 which amends section 26 of the 1985 Act and gives the DAC the power to fine at a level to be determined by the Council, subject to Board approval. Currently, the fine limit is set at £3000 by statute. The purpose of the fine is to act as deterrent, so the amount of the fine needs to be proportionate. A fine level which is commensurate with the offence is therefore needed. This power is also given in relation to Schedule 6 Paragraph 4 (recognised bodies) (at Schedule 17 (paragraph 27(6)). Placing this figure in rules ensures that there is greater flexibility for the Council to increase or decrease the limit in line with inflationary fluctuations or developments in the regulation of conveyancers which are likely to happen over time.
Schedule 17, paragraph 16: provision of conveyancing services by recognised bodies

*Power conferred on: Council for Licensed Conveyancers*

*Power exercisable by: rules*

*Parliamentary procedure: none*

213. Section 32 of the Administration of Justice Act sets out the CLC’s rule-making powers. Among them is s.32(3)(a), which allows the CLC to make rules about fees for applications for recognition. Paragraph 16(6)(b) adds a power to make rules about fees for other applications, as provided elsewhere in Schedule 17.

214. Section 32(3)(c) deals with the duration of licences. Paragraph 16(6)(c) extends this by including rule-making powers for the suspension or revocation of licences and for changes in recognition caused by the membership of unincorporated bodies changing.

215. Section 32(3)(e) covers the keeping of a list. Paragraph 16(6)(e) changes it to a register, in line with the rest of the Legal Services Bill, and adds a power for rules to specify new classes of information that could be kept in the register.

216. Paragraph 16(7) is a general power for rules to make incidental, supplementary or transitional provisions, similar to the power being conferred on the Law Society (described above).

217. All these powers are natural extensions of provisions being made elsewhere in the Schedule. They are suitable for delegation because the underlying principles will be considered by Parliament.

Schedule 17, paragraph 19: administration of oaths by licensed conveyancers

*Power conferred on: Council for Licensed Conveyancers*

*Power exercisable by: rules*

*Parliamentary procedure: none*

218. Paragraph 19 inserts a new section 33A into the Administration of Justice Act that will allow the CLC to make rules for authorising licensed conveyancers to administer oaths. This is to ensure that those licensed conveyancers administering oaths are subject to the regulatory arrangements of the CLC. Any rules will be made subject to the approval of the Board, which we consider will be an appropriate safeguard.

Schedule 17, paragraph 25: Licensed conveyancing

*Power conferred on: Legal Services Board*

*Power exercisable by: rules*

*Parliamentary procedure: none*

219. This is an amendment to Schedule 4 paragraph 1 of the 1985 Act, which governs the Discipline and Appeals Committee’s (‘DAC’) procedural rules. Sub-paragraphs (3) and (4) of that paragraph remove the requirement for the Secretary of State to approve rules about the procedure and practice of the DAC.
220. This amendment is necessary because it will allow the DAC to make rules and the Board to approve them without having to obtain an order from the Secretary of State because these rules will fall within the definition of regulatory arrangements at clause 20. This will lower costs and allow a more flexible approach to rule approval, which will be necessary in the changing legal service climate. All oversight functions currently conferred on the Secretary of State will be transferred to the LSB, which is consistent with our objective to create a single, oversight regulator.

Schedule 17, paragraph 26: Intervention in Licensed Conveyancer’s Practice

   Power conferred on: Council for Licensed Conveyancers

   Power exercisable by: rules

   Parliamentary procedure: none

221. Paragraphs 5-8 of Schedule 5 to the Administration of Justice Act deal with the treatment of money held by a licensed conveyancer after a finding by the Discipline and Appeals Committee. Paragraph 6 allows the CLC to vest money in the Council, to hold it in trust for whoever is beneficially entitled to it. Paragraph 26(6) of Schedule 17 to the Legal Services Bill adds a new paragraph 6A, allowing the CLC to makes rules about the treatment of money vested in it under paragraph 6 - in particular, for cases where those beneficially entitled cannot be found. This power enhances the treatment of these funds, by encouraging the creation of general rules instead of requiring their treatment to be considered afresh each time a sum is vested in the Council. It is suitable for delegation because the underlying principles will be considered by Parliament.

Schedule 17, paragraph 26: Intervention in a licensed conveyancer’s practice

   Power conferred on: Council for Licensed Conveyancers

   Power conferred by: rules

   Parliamentary procedure: none

222. Schedule 5 of the 1985 Act sets out the circumstances and ways in which the Council can intervene in a Licensed Conveyancer’s practice. Paragraph 26 (6) creates a power for the Council to vest in itself the right of a practice to receive and recover debts. Paragraph 26(7) adds a power to make rules governing the use of that power, for example setting up and control of separate bank accounts for holding monies. This is suitable for delegation because the underlying principle will be considered by Parliament in considering Schedule 17.

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

   Power conferred on: Legal Services Board

   Power exercisable by: direction

   Parliamentary procedure: none

223. Clause 172 sets out that if the Solicitors Disciplinary Tribunal makes changes to its rules (governing procedure and practice in relation to the making, hearing and determination of applications and complaints), it may do so only with the consent of the
Board. The clause also provides a procedure for gaining the Board’s consent to a rule change. This is largely the same as the process for approving alterations to regulatory arrangements.

224. Clause 172 allows the Board to direct the Solicitors Disciplinary Tribunal under clause 31 where the SDT has failed to perform any of its functions adequately or at all. This power of direction would usually involve asking the SDT to take steps to remedy the failure in question, mitigate its effect or prevent its occurrence, but it may also require the SDT to modify its rules. The Board’s power is limited in that it cannot become involved in the decision making of the Tribunal in a specific case. The aim of the power is to allow the Board to prevent the Tribunal from mis-managing its administrative or financial functions, should this situation ever arise in the future.

Clause 173: Functions of the Tribunal

Power conferred on: Secretary of State

Power exercisable by: statutory instrument

Parliamentary procedure: affirmative resolution

225. Clause 173 allows the Secretary of State to make an order under clause 68 to modify the functions of the Solicitors Disciplinary Tribunal. The order may only be made with the consent of the Solicitors Disciplinary Tribunal. This power allows for flexibility should the Tribunal wish to change its functions, as most of the Tribunal’s functions are set out in statute. The Secretary of State can only make an order for the purpose of enabling the Tribunal to carry out its role more effectively or efficiently.

Clause 175: Commissioners for oaths

Power conferred on: Secretary of State

Power exercisable by: statutory instrument

Parliamentary procedure: negative resolution

226. Clause 175(6) allows the Secretary of State to make an order changing the fees that a person authorised as a commissioner for oaths may charge. This power is necessary, as, if the fees were left to market conditions, it is unlikely that the majority of providers would do the work for anything less than a disproportionate cost to consumers. The Secretary of State currently sets the fee (at £5 per oath). Clause 175(7) sets out that he may not amend the fee level without consulting the Board and receiving the consent of the Lord Chief Justice and the Master of the Rolls. This is an adequate safeguard and is appropriate as court officials may also administer oaths.
Clause 176 and 177: Regulation of trade mark attorneys and patent attorneys

**Power conferred on:** Secretary of State

**Power exercisable by:** statutory instrument

**Parliamentary procedure:** negative resolution

227. Clauses 176 (3) and 177 (3) insert provision in the Trade Marks Act 1994 and the Copyright, Designs and Patents Act 1988. The new paragraph 83 of the Trade Marks Act requires the Institute of Trade Mark Attorneys (ITMA) to keep a register of persons who act as an agent for others for the purpose of applying for or obtaining the registration of trade marks. The new paragraph 275 of the Copyright, Designs and Patents Act 1988, requires the Chartered Institute of Patent Attorneys (CIPA) to keep a register of persons who act as an agent for others for the purpose of applying for or obtaining patents. Subsections (4) of clauses 176 and 177 allow the Secretary of State to amend subsection (3) to require the register to be kept by a person specified in the order.

228. We consider that this power may be necessary in the future, for example where there is a new regulator following a merger, or possibly following the de-authorisation of the body. The order is subject to negative resolution as it is envisaged that such an order would follow on from those in the Bill either authorising a new body or de-authorising a body, which are subject to affirmative order. As an additional safeguard, we have provided that the Board must be consulted before an order is made.

Clause 176 and 177: Regulation of trade mark attorneys and patent attorneys

**Power conferred on:** ITMA and CIPA

**Power exercisable by:** Rules and regulations

**Parliamentary procedure:** none (subject to Board approval)

229. Clauses 176 (3) and 177 (3) insert provision in the Trade Marks Act 1994 and the Copyright, Designs and Patents Act 1988. The new paragraph 83A of the Trade Marks Act and the new paragraph 275A of the Copyright, Designs and Patents Act 1988, allows ITMA and CIPA to make a variety of rules and regulations necessary to regulate trade mark and patent attorneys. These include rules in relation to the keeping of the register, which under existing legislation are made by the Secretary of State by statutory instrument. Sections 83A and 275A give further detail about the scope of rules and regulations, which could be made by the bodies under these powers.

230. It has been necessary to expand the existing rule-making powers of ITMA and CIPA to ensure they are equipped to regulate attorneys and authorised persons under the new framework. For example, by virtue of the Bill, ITMA and CIPA will be able to regulate certain types of entity more comprehensively than they are able to at present. The power to make rules and regulations has been transferred from the Secretary of State to ITMA and CIPA, as this is consistent with the position of other approved regulators, for example the Law Society. The approved regulator will be best placed to determine the detail of the regulatory regime and how this should apply to attorneys and authorised persons. All oversight functions currently conferred on the Secretary of State will be transferred to the LSB, which is consistent with our objective to create a single, oversight regulator. Therefore, any rules made under this section will be subject to the approval of the Board.
Schedule 18: immigration advisors and immigration service providers

Power conferred on: Secretary of State, with the agreement of the Lord Chancellor

Power exercisable by: order made by statutory instrument, under section 86A of the Immigration and Asylum Act 1999

Parliamentary procedure: 86A (3) affirmative and 86A (6) by negative

231. At present the regulation of providers of immigration advice and immigration services rests with the Office of the Immigration Services Commissioner (OISC). Members of designated professional bodies (DPBs), such as the Bar Council, the Law Society and the Institute of Legal Executives (ILEX) are exempt from direct regulation by OISC by virtue of the fact that their DPBs regulate their provision of such services. However, at present, OISC has a limited oversight role in respect of the DPBs themselves. The Bill provides for the oversight of DPBs in England and Wales, in respect of immigration services, to be transferred from OISC to the Board. OISC will retain its oversight functions in respect of DPBs outside England and Wales, and of individuals providing immigration advice or services within England and Wales who are not members of DPBs.

232. Paragraph 13 of Schedule 18 inserts section 86A into the Immigration and Asylum Act 1999. Subsection (6) of section 86A allows for approved bodies to be designated by order as “designated qualifying regulators.” An order made pursuant to this provision entitles a body to authorise persons to provide immigration services and advice. Only those bodies that have successfully applied to become “qualifying regulators” under the provisions of paragraphs 2 – 5 of Schedule 18 to the Bill may become “designated qualifying regulators”. Where the Secretary of State, currently the Home Secretary, makes a designation order, it must be with the approval of the Lord Chancellor, and is subject to negative resolution.

233. Subsection (3) of section 86A provides for the Secretary of State to remove a body from the list of designated qualifying regulators by affirmative order. An order of this type must be made with the approval of the Lord Chancellor.

234. Order-making powers have been used in this instance as they are similar to the existing provision made at section 86 of the 1999 Act, which allows for the Secretary of State to add bodies to or remove bodies from the list of DPBs. To reflect section 86, an order under 86A to designate a body is subject to the negative resolution procedure, and an order removing a body from the list is subject to affirmative resolution. The Government considers that it is necessary to confer designation by order, as a designated qualifying regulator will have considerable responsibilities and powers in respect of persons providing immigration services. Given that the responsibility for overseeing designated qualifying regulators rests with the Board rather than OISC, both order-making powers under 86A are subject to the agreement of the Home Secretary and the Lord Chancellor. This is not the case for designation orders under section 86(8), which currently do not require the Lord Chancellor's approval.
Schedule 18, paragraph 14: extension of section 90 (orders by disciplinary bodies)

**Power conferred on:** Secretary of State

**Power exercisable by:** order made by statutory instrument

**Parliamentary procedure:** negative resolution

235. Section 90 of the Immigration and Asylum Act 1999 confers powers on disciplinary bodies to make orders which restrict the provision of immigration services and advice, or suspend or prohibit persons from providing immigration services. ‘Disciplinary body’ means any body, which appears to the Secretary of State to be established for the purpose of hearing disciplinary charges against a member of a designated professional body, specified by order. **Paragraph 14** widens this power so that the disciplinary bodies of designated qualifying regulators may also make the orders listed in subsection (1). This extension is necessary to ensure that designated qualifying regulators have the necessary powers to effectively regulate persons providing immigration services and advice. The power already is exercisable by negative resolution, and therefore it is considered that this level of scrutiny is appropriate.

Schedule 18: immigration advice and immigration services – transitional provisions: the transitional period

**Power conferred on:** Secretary of State

**Power exercisable by:** order made by statutory instrument

**Parliamentary procedure:** negative resolution

236. Paragraph 17(1)(b) allows the Secretary of State to appoint a day when the period of transition to the new framework for immigration advice and services ends.

237. This has been left to delegated legislation, as is usual for transitional powers. It is necessary to ensure that there is flexibility in the transitional period. It will be for the Secretary of State to make a judgement, on the recommendation of the Board (as required by **paragraph 17(3)**) as to when the transitional period should end and oversight functions pass to the Board. As is usual for transitional powers, no Parliamentary procedure is necessary.

Schedule 19, paragraphs 2 and 4: Claims management services

**Power conferred on:** Secretary of State on the recommendation of, or having consulted, the Legal Services Board

**Power exercisable by:** order made by statutory instrument

**Parliamentary procedure:** affirmative resolution

238. Schedule 19 deals with amendments to the Compensation Act 2006 to bring the regulation of claims management services under the supervision of the Legal Services Board.

239. Section 4 of the Compensation Act deals with the provision of regulated claims management services and provides the Secretary of State with an order-making power to
prescribe kinds of services, or services provided in prescribed cases or circumstances, as regulated claims management services for the purposes part 2 of the Act.

240. Under **paragraph 2 (2)** the existing order-making power is retained, but amended so that the Secretary of State may only make an order under section 4(2)(c) of the Compensation Act if it is in accordance with a recommendation by the Board, or the Secretary of State has consulted the Board.

241. This is consistent with the Secretary of State’s order-making powers under the Bill - for example at **clause 68** which provides for the modification of the functions of approved regulators.

242. A similar amendment to the Secretary of State’s order-making powers can be found at **paragraph 4**, which deals with exemptions from the requirement for authorisation. These amendments mean that the Secretary of State will be able to alter the scope of regulation either on his own initiative (in consultation with the Legal Services Board), or on the recommendation of the Board.

**Schedule 19, paragraph 3: Claims management services**

*Power conferred on: Secretary of State on the recommendation of the Legal Services Board*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: affirmative resolution*

243. Paragraph 3(2) amends section 5 of the Compensation Act so that the Secretary of State may only make an order designating a person as Regulator under s.5(1) on the recommendation of the Legal Services Board. There is also a consequential amendment to s.5(2) of the Act to provide that the Board may only recommend a person for designation if it is satisfied about the matters specified in that subsection.

244. The Secretary of State’s power to revoke a person’s designation as Regulator in s.5(8) has been amended by **paragraph 3(6)** to allow such an order to be made only on the recommendation of the Legal Services Board.

245. These powers have been amended because, under the Bill, it will be for the Board to recommend to the Secretary of State that he makes an Order to designate an approved regulator or cancel its designation as set out at **clauses 44**. It is therefore sensible that this power in the Compensation Act should be amended to reflect the Board’s involvement.

246. Similarly the Secretary of State’s power to transfer a function of the Regulator to himself by order has been amended by **paragraph 3(8)** so that it can only be exercised on the recommendation of the Board, and the powers are transferred to the Board rather than the Secretary of State. It is important that if a regulator is failing to meet its regulatory objectives then there is a power to intervene and it is for the oversight regulator (LSB) to take on this role. Under the Compensation Act this falls to the Secretary of State, but when the Bill comes into force this will be a role that the Board will take on.

247. It appropriate that this power be transferred to the Board, as it is consistent with the Board’s power to act as an approved regulator under **clause 61** of the Bill, which sets out provisions for the Board as an approved regulator.
Schedule 19, paragraphs 6 (3) and 7: Claims management services

Power conferred on: Secretary of State on the recommendation of, or having consulted, the Legal Services Board

Power exercisable by: regulations

Parliamentary procedure: affirmative resolution

248. Currently, under section 8 of the Compensation Act, the Secretary of State has the power to make regulations in relation to enforcement of the regulator.

249. Under paragraph 6(3) this has been amended to set out that in future such regulations can only be made either in accordance with a recommendation by the Board, or where the Secretary of State has consulted the Board about the making of such regulations.

250. Therefore, although we are not altering the Secretary of State’s power to make Regulations by Order, we are including a condition that the Board has to have made the recommendation or been consulted.

251. It is important that this condition is included to maintain consistency within the regulatory framework. It is also consistent with provision in the Bill at clause 68 (modification of the functions of an approved regulator) whereby the Secretary of State may by order modify the functions of an approved regulator following the recommendation of the Board.

252. There is a similar amendment made at paragraph 7 to section 9 of the Compensation Act.

Schedule 19, paragraph 11(2); Claims management services

Power conferred on: Legal Services Board

Power exercisable by: regulations

Parliamentary procedure: affirmative resolution

253. The Schedule to the Compensation Act at paragraph 7 gives the Secretary of State the power to make regulations enabling the regulator to charge fees. For example, fees can be charged in connection with an application for authorisation.

254. Paragraph 11(2) of Schedule 19 of the Bill amends this so that regulations may provide for the Board to prescribe or control the level of fees. This is sensible, as the Board will be best placed to prescribe fees as oversight regulator and this is consistent with clause 50, control of practising fees.
Schedule 19, paragraph 11(3): Claims management services

*Power conferred on:* Legal Services Board

*Power exercisable by:* regulations

*Parliamentary procedure:* none but the regulations are affirmative resolution

255. Paragraph 8 (2)(a)(ii) in the Schedule to the Compensation Act sets out that regulations shall provide that the Regulator must make rules for the professional conduct of authorised persons, subject to approval by the Secretary of State.

256. Paragraph 11(3) of the Bill amends this by transferring the approval role from the Secretary of State to the Board.

257. It is appropriate that the Board approves any rules of this nature to ensure consistency within the system as set out by clause 20 (regulatory arrangements) and Schedule 4 of the Bill whereby the Board has to approve any regulatory changes.

258. Similar provisions are made at paragraph 11(4) in relation to codes of practice. These regulations are made under section 9 of the Compensation Act, discussed above.

Clause 185: Payments in respect of pro bono representation

*Power conferred on:* Civil Procedures Rule Committee

*Power exercisable by:* rules by statutory instrument

*Parliamentary procedure:* negative resolution

259. This clause gives the court the power to order a person to make a payment to a prescribed charitable body in respect of a party’s legal representation where (i) an order for costs has been made in that party’s favour and (ii) that party’s legal representation has been provided, fully or partly, without charge (or ‘pro bono’).

260. The order-making power contained in subsection (8) of the clause gives the Secretary of State the power to prescribe the charitable body to whom the court may order a payment to be made.

261. This body will not have any direct interest in the litigation in relation to which the order is made. It will have charitable status, be limited by guarantee and be managed by a board of Trustees. It will serve the express purpose of receiving and distributing funds received to enable provision of further free legal advice, assistance or representation.

262. It is appropriate that the Secretary of State nominate a single body to receive payments to ensure that the amounts generated are able to be utilised effectively, promptly and with no bias in order to meet unmet legal need.

263. The power is circumscribed by subsection (9), which says that the prescribed body must be a charity and must facilitate the provision of free legal representation.

264. As the order-making power is so circumscribed, it is appropriate for the order-making power to be regulated by means of the negative resolution procedure.
Clause 185, paragraph 7: Payments in respect of pro bono representation

Power conferred on: Civil Procedure Rule Committee

Power exercisable by: rules by statutory instrument

Parliamentary procedure: negative resolution

265. Subsection (7) of the clause allows for rules of court-
- to specify the types of proceedings in which the court may make an order pursuant to this clause;
- to set out the procedure that is to be followed in relation to these orders. This may include the procedure to be followed to inform other parties of pro bono representation or may include the procedure to be followed to make a claim for one of these awards;
- to set out the factors to which the court will have regard when deciding whether to make the order, and the amount of any payment. This may include, for example, the type of case or the nature of the person against whom the order is made.

266. The Rules will have the effect of circumscribing the power, and relate to the practice and procedure of the court. The Civil Procedure Act 1997, which gives the Civil Procedure Rule Committee power to make rules to govern practice and procedure in the civil courts, already regulates how that power is to be exercised. The negative resolution procedure is the procedure that is prescribed by the Civil Procedure Act 1997, section 3(6) for making Civil Procedure Rules.

Schedule 22, paragraph 1: Transitional provisions

Power conferred on: Secretary of State

Power exercisable by: statutory instrument

Parliamentary procedure: affirmative resolution

267. Paragraph 1 extends the current regulatory arrangements in respect of the Secretary of State’s powers to:
- Approve changes to the rules or regulations of approved regulators;
- Approve applications for or revoke authorised body status in relation to bodies wishing to allow their members to provide advocacy or litigation services or bodies for whom that status is to be revoked; and
- Approve applications for or revoke authorised body status in relation to those bodies wishing to allow their members to provide probate services or bodies for whom that status is to be revoked.

268. Paragraph 1 does not create any new order-making or rule-making powers for the Secretary of State. It simply means that any changes made as a result of the exercise of those functions that he currently has in respect of authorising new bodies or amending the rules and regulations of existing bodies (which will continue in the period between Royal Assent and the LSB taking over its oversight function) will not be lost when the Bill is commenced. Instead this provision allows the Bill’s provisions to be amended in line with those changes so that bodies that have succeeded in becoming authorised in the period
before commencement of the regime do not have to apply again. Paragraph 1 simply prevents a regulatory lacuna between Royal Assent and the Board’s coming into force. These powers are necessary as without them, there could be no changes made to the regulation of the profession for approximately 18-24 months.

Clause 198(2) and (3): Minor and consequential provisions etc

*Power conferred on: Secretary of State*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: affirmative (subsection(3))*

269. Clause 198 provides that the Secretary of State may by order make any supplementary, incidental or consequential provisions and any transitory, transitional or saving provision that he considers necessary in relation to the Bill. This clause is a standard provision that allows the Secretary of State to make amendments to existing legislation or legislation passed in the same session that are necessary or expedient for the purposes of the Bill or in consequence or to give full effect to the Bill. Where such an order amends an enactment it will be subject to the affirmative resolution procedure to ensure proper Parliamentary scrutiny; otherwise, it will be subject to the negative procedure.

Clause 201: commencement

*Power conferred on: Secretary of State*

*Power exercisable by: order made by statutory instrument*

*Parliamentary procedure: none*

270. Clause 201 provides that the provisions of the Bill will come into force in accordance with provision to be made by the Secretary of State by order. As is usual for commencement orders, this power is not subject to Parliamentary procedure.

Annex B

**LIST OF ALL THE DELEGATED POWERS**

<table>
<thead>
<tr>
<th>Clause No</th>
<th>Title and explanation</th>
<th>Affirmative or Negative Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schedule 1 Paragraph 1 (3)</td>
<td>The Legal Services Board: membership. This allows for the limit on the maximum number of members of the Board to be amended. This order only amends this Bill.</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 1 paragraph 18</td>
<td>The Legal Services Board: proceedings. This gives the Board the power to regulate its own procedure of its committees and sub committees.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 1 paragraph</td>
<td>The Legal Services Board: Statement of accounts. This provides that any statement must comply with directions</td>
<td>Not subject to Parliamentary</td>
</tr>
</tbody>
</table>


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<thead>
<tr>
<th>Clause No</th>
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<tbody>
<tr>
<td>22(2)</td>
<td>made by the Secretary of State with the approval of the Treasury.</td>
<td>procedure</td>
</tr>
<tr>
<td>Clause 6(2)(c)</td>
<td>Annual Report. This requires the Board to prepare an annual report, which must be submitted to Parliament. The Secretary of State may direct matters to be dealt with in the report.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 15(6)</td>
<td>Carrying on of a reserved activity. This sets out the interpretation of a person who carries on a reserved legal activity. The order-making power is set out at subsection 6.</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 3 Paragraph 1(11)</td>
<td>Exempt Persons: Rights of audience. This replicates the order-making power at section 27 (9) of the Courts and Legal Services Act 1990 to prescribe the meaning of “reserved family proceedings”</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 3 Paragraph 8(1)</td>
<td>Further exempt persons. This allows for the Secretary of State to amend the list of exempt persons. This order only amends this Bill.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Schedule 4, Paragraph 3 (3) and 20(1)</td>
<td>Applications to the Board. Allows the Board to make rules about the format and manner of an application. This rule-making power can also be found at clause 44 (3) (b), clause 75 (3) (b), Schedule 10 paragraph 1 (4), Schedule 18 paragraph 2 (4).</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 4 Paragraph 3(4)</td>
<td>The Board may make rules determining application fees, described as “prescribed fees”. Such rules must be approved by the Secretary of State. This rule-making power also can be found at Clause 44 (4), Clause 75 (4); Schedule 10 paragraph 1(5); Schedule 18 paragraph 2(5).</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 4 Paragraph 4(2)</td>
<td>Dismissal of application. This allows the Board to make rules about the procedure and set the criteria that the Board will use when exercising its discretion to dismiss an application for designation. This rule-making power can also be found at Schedule 10, paragraph 2 (2).</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 4 Paragraph 11(3)</td>
<td>Representations by applicants. This paragraph states that the Board must make rules governing the making of oral and written representations. The Board also has similar rules available under Schedule 4 paragraph 23 (3), Schedule 6 paragraphs 12(2), 13 (1), and 14(2), Schedule 7 paragraphs 2(5), and 10(3); Schedule 8, paragraphs 2 (5), 10(5), and 21(5), Schedule 9 paragraphs 2(5) and 9(5), and</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
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<td>Schedule 10, paragraphs 9 (3), 18 (5) and 25 (5).</td>
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<tr>
<td><strong>Schedule 4 Paragraph 13(1)</strong></td>
<td>Rules governing the decisions of the Board. The Board must make rules specifying how it will determine applications. Similar provisions can also be found at Schedule 10, paragraph 11(1) and Schedule 18 paragraph 4 (1).</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td><strong>Schedule 4 Paragraph 17(1)</strong></td>
<td>Designation of approved regulators by Order. This allows the Secretary of State following a recommendation from the Board to designate a body as an approved regulator in respect of the reserved legal activity or activities in question. This order only amends this Bill.</td>
<td>Affirmative</td>
</tr>
<tr>
<td><strong>Schedule 4 Paragraph 19(3)</strong></td>
<td>Requirement for approval. This direction sets out that if an alteration is made to regulatory arrangements, as at clause 20, they do not have effect unless approved for the purposes of the Bill.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td><strong>Schedule 5 Part 2 Paragraph 3(1)(b)</strong></td>
<td>Authorised Persons: Rights under transitional period. This Part sets out the transitional arrangements for those granted rights of audience or rights to conduct litigation by the bodies listed in Part 1 and allows them to continue to carry out reserved activities during that period. The Secretary of State may determine the day on which the transitional period ends.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td><strong>Clause 22 and 23(3)</strong></td>
<td>Transitional protection for not for non-commercial bodies. This allows the Secretary of State to set an end date for the transitional period. This only amends this Bill.</td>
<td>Not subject to Parliamentary procedure.</td>
</tr>
<tr>
<td><strong>Clause 23 and Schedule 6</strong></td>
<td>Extension of the reserved legal activities. This order will allow for additions to be made to the list of reserved legal activities mentioned in this Act. This order will only amend this Bill.</td>
<td>Affirmative</td>
</tr>
<tr>
<td><strong>Clause 24</strong></td>
<td>Provisional designation of approved regulators. This order will allow for the LSB to consider applications from approved regulators when a provisional recommendation has been made to regulate an unregulated legal Service. This could potentially amend other Acts.</td>
<td>Affirmative</td>
</tr>
<tr>
<td><strong>Clause 29</strong></td>
<td>Rules relating to the exercise of regulatory functions. This clause places a duty on the Board to make internal governance rules, which set out the requirements to be met by approved regulators.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td><strong>Clause 29(1)</strong></td>
<td>Rules relating to the exercise of regulatory functions. This power allows the secretary of state to set a date when rules must be made by the Board.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause No</td>
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<tr>
<td>Clause 30</td>
<td>Performance targets and monitoring. This allows the Board to set a performance target for an approved regulator or direct an approved regulator to direct a target.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 31</td>
<td>Directions. This clause allows the Board to direct an approved regulator to take steps to counter adverse impact on the objectives, mitigate its effect or prevent its occurrence or recurrence.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 36(3)</td>
<td>Financial penalties. This requires the Board to set a maximum limit for the financial penalties it may impose on an approved regulator that has for example failed to perform any of its regulatory functions. The consent of the Secretary of State is required.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 40</td>
<td>Intervention directions. This allows the Board or a person appointed by the Board to intervene in a function of the approved regulator.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clauses 40,41 and 47</td>
<td>Intervention directions: further provisions. This clause places a duty on the Board to make rules to specify the types of person who can exercise powers of search and seizure under the Bill.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clauses 41 and 47</td>
<td>Intervention directions: further provision and cancellation of designation: powers of entry. Secretary of State can make regulations setting out further matters which judges must be satisfied of before issuing a warrant.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 44</td>
<td>Cancellation of designation as approved regulator. This gives the Secretary of State the power to cancel a body's designation as an approved regulator in respect of one or more of all of its reserved legal activities. This has the potential to amend other acts.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 45</td>
<td>Cancellation of a designation: further provision. This provides the Secretary of State with two powers. The first allows the modifications to provisions made under any enactment, and such transitional and consequential provisions as necessary. The second gives the power to make transfer arrangements when a body has its designation in relation to one or more reserved activities cancelled by order.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 50</td>
<td>Control of practising fees charged by approved regulators. This allows the Board to make rules about the procedures and criteria it will apply in approving the practising fees that approved regulators may charge.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 52</td>
<td>Regulatory conflict with approved regulators. This gives the Board the power to direct an approved regulator to</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
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<td>change its regulatory arrangements in relation to the provision it has made to prevent regulatory conflicts.</td>
<td>procedure</td>
</tr>
<tr>
<td>Clause 60</td>
<td>Secretary of State’s power to give directions. This gives the Secretary of State the power to issue a direction to the Board in connection with any matter raised by the OFT.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 61</td>
<td>The Board as an approved regulator. This gives the Secretary of State the power to designate the Board as an approved regulator, to modify the functions of the Board to enable the Board to discharge its functions and also to cancel the Board’s designation as an approved regulator. This order only amends this Bill.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 67</td>
<td>Regulatory conflict and the Board as approved regulator. This is a direction power which deals with the situation where the Board acts as an approved regulator and provides that individuals regulated by the Board still have access to the same channels for dealing with regulatory conflicts.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 68</td>
<td>Modifications of the functions of approved regulators. This order allows for the modification of the functions of approved regulators other than the Board. This order could potentially amend other Acts. A similar power is at clause 79 (see below).</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 73 and Schedule 10 Part 1 Paragraph 15</td>
<td>Designation of approved regulator as licensing authority. This clause refers to Part 1 of Schedule 10 and allows the Secretary of State to make an order designating an approved regulator and granting the authority to them to license providers of alternative business structures in relation to one or more reserved legal activities. This order only amends this Bill.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 75</td>
<td>Cancellation of designation as licensing authority by Order: This gives the Board the power to make a recommendation to the Secretary of State to cancel the designation of a body as a licensing authority.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 76</td>
<td>Cancellation of a designation: further provision. This clause gives the Secretary of State two powers; the power to modify provisions to give effect to the removal of a body’s designation in relation to one or more reserved legal activities and the power to make ‘transfer arrangements’ or other consequential provisions in light of a cancellation of designation.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 78</td>
<td>Cancellation of designations: powers of entry. This obliges the Secretary of State to make regulations covering the issue and use of warrants for this purpose</td>
<td>Negative</td>
</tr>
<tr>
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<td></td>
<td>and is equivalent to the provision in clauses 41 and 47 above.</td>
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</tr>
<tr>
<td>Clause 79</td>
<td>Functions of appellate bodies: This allows the Secretary of State by order create an appellate body or bodies to hear appeals against licensing authority decisions.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 81(1)</td>
<td>Licensing rules: This section requires the Board to make licensing rules.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 81(1)(a)</td>
<td>Settling of 12 month period for formulation of licensing rules by Board: This allows the Board to make licensing rules within a 12 month period subject to Secretary of State's determination of the commencement of that 12 month period.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 84</td>
<td>Modification of licence: This allows licensing authorities to modify a license even if the licensing body has not applied for it.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 11</td>
<td>Licensing Rules: Schedule 11 sets out a number of further requirements and powers as to the content of a licensing authority’s licensing rules.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 12 Paragraph 2</td>
<td>Entitlement to make an application for a licence to the Board. This Schedule sets out the circumstances in which commercial bodies and the special bodies listed in clause 106 may apply to the Board, as opposed to a licensing authority for an ABS licence.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 85(4)</td>
<td>Registers of Licensed Bodies: This section requires the licensing authorities to keep a register of licensed body.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 13 Paragraph 2 and 4</td>
<td>Restricted interest and controlled interest. Paragraphs 2 and 4 allow licensing authorities to specify one or more controlled interests count as restricted interests and to set applicable levels of ownership.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 13 Paragraph 3</td>
<td>Material interest. This allows licensing authorities to set a lower threshold and to define any interest in a partnership as material, regardless of size.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 13 Paragraph 6</td>
<td>Approval requirements - rules made by licensing authorities.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 13 Paragraph 8</td>
<td>Board’s power to prescribe time limits</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 13, Paragraph 9</td>
<td>Interpretation of interest: Order-making power for the Secretary of State to change the definition of “material interest” and “associate”</td>
<td>Negative</td>
</tr>
<tr>
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<tr>
<td>Schedule 13 Paragraphs 21, 23 and 39</td>
<td>Notification requirements - time limits. The Secretary of State has a number of powers under this section to set time limits for notification.</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 13 Paragraphs 36-38</td>
<td>Additional restrictions. These paragraphs allow licensing authorities to make rules setting a separate limit on ownership beyond which a non–authorised person may not have an interest at all.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 93(3)</td>
<td>Financial penalties. This section allows the Board to make rules as to the maximum financial penalty that can be levied against a licensed body by a licensing authority.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 14 Paragraph 3</td>
<td>Money vesting in licensing authority on intervention. This allows licensing rules to make provisions about the way money held by licensed bodies is treated when a licensing authority has to intervene in them.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 104</td>
<td>Power to modify application of licensing rules etc to special bodies. The purpose of this power is to allow licensing authorities to take account of lower regulatory risk these bodies represent.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 104</td>
<td>Power to modify application of licensing rules etc to special bodies. This power enables the Secretary of State to add categories of ABS to the categories already subject to lighter regulation.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 107</td>
<td>Foreign Bodies, This allows the Secretary of State to amend or modify the provisions relating to bodies recognised by law outside the UK. This will assist (for example) in the amelioration of any existing anti-competitive effects.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 109</td>
<td>Complaints procedures of authorised persons. This section requires each approved regulator to ensure that each approved person has an in-house complaints handling procedure (or that they at least participate in a scheme.) This will assist the consumer in dealing with legal complaints with their lawyer in the first instance and relieve potentially burdensome loads on the OLC.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 15</td>
<td>OLC membership. Schedule 15 – Order to alter the maximum number of members</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 111 and Schedule 15, Paragraph 17</td>
<td>The Office for Legal Complaints. This section sets out the framework for the complaints scheme under Part 6.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 127</td>
<td>Orders under section 125. This section allows the Secretary of State to make an order determining the types of person that should be eligible to bring complaints to the OLC under Clause 117. The Secretary</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause No</td>
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<td>of State may only make an order under this section after a recommendation has been made by the OLC, LSB or the Consumer Panel.</td>
<td></td>
</tr>
<tr>
<td>Clauses 130, 131, 133, 134, 135</td>
<td>Operation of the ombudsman scheme. These sections set out: the procedure for making complaints under the ombudsman scheme, the procedure for the investigation, consideration and determination of complaints, the issues that may be included in the scheme rules, ombudsman delegation powers and the ‘polluter pays’ regime (which requires the OLC to determine how the charges made under this mechanism are determined.) They give the OLC a duty to consult and what the ombudsman must consider as ‘fair and reasonable’ before making a determination.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 136</td>
<td>Alteration of limit. This allows the Secretary of State to alter the limit of redress the ombudsman can award. The Secretary of State can alter the limit only after considering representations from the OLC, LSB or the Consumer Panel.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 141</td>
<td>Duties to share information. This section requires the OLC to make rules ensuring the OLC, ombudsman and members of OLC staff provide the approved regulator with information.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 142</td>
<td>Duties of authorised persons to co-operate with investigations. This requires an approved regulator to make rules requiring all relevant authorised persons to give such assistance as is needed for in the investigation, consideration or determination of a complaint.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 149(3)(g) and clause 161(3)(g)</td>
<td>Disclosure of restricted information. This is an order-making power for the Secretary of State to prescribe further persons and purposes to whom information can be disclosed.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 149(5) and clause 161(5)</td>
<td>Disclosure of restricted information. This is an order-making power for Secretary of State to prevent disclosure for prescribed purposes.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 152 and 153</td>
<td>Consent requirements for rules and the Board’s powers in respect of rules</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 158</td>
<td>Guidance. This section sets out that the Board may issue guidance on a number of areas such as guidance to approved regulators on meeting the regulatory objectives.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 162</td>
<td>Disclosure of information to the Board. This is an order-making power for the Secretary of State to specify permitted purposes who may disclose information to the Board.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause No</td>
<td>Title and explanation</td>
<td>Affirmative or Negative Resolution</td>
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</tr>
<tr>
<td>Board</td>
<td><strong>Funding and the levy: Power to make levy rules</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clauses 165,166 and 167, 168</td>
<td><strong>Funding and the levy: Order-making power to prescribe leviable bodies</strong></td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 166 (5)(c)</td>
<td><strong>The Law Society, Solicitors, Recognised Bodies and Foreign Lawyers. Schedule 16 contains a number of amendments to existing legislation, about the rule and regulation making functions that currently fall to the Law Society</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Part 1 (Paragraphs 3;4;10; 27(2) and (6); 29(2);31(2);3 4;42(4);78;11 6;120;125)</td>
<td><strong>Appeals in connection with the issue of practising certificates. This allows the Law Society with the approval of the Board to make rules for the deemed date of refusal of a practising certificate for the purposes of appeal.</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 13, (3)</td>
<td><strong>This allows the Law Society to make accounts rules and trust accounts rules.</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 29,30 ,32</td>
<td><strong>These amendments all make changes to existing legislation in respect of the Law Society’s compensation fund arrangements and allows the Law Society to make rules other circumstances where compensation can be awarded.</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 31</td>
<td><strong>This allows the Law Society to make rules in regards to inspection of practice bank accounts etc</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 32</td>
<td><strong>This sets out that the Law Society may make rules in regards to accountants reports.</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 34</td>
<td><strong>This sets out that the Law Society may make rules in regards to professional indemnity.</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraphs 41 and 95</td>
<td><strong>This allows the Law Society to make regulations prescribing the charges to be paid in regards to the costs of investigations into discipline.</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 46</td>
<td><strong>This allows the Law Society to make rules on appeals that go to the Solicitors Disciplinary Tribunal instead of directly to the High Court.</strong></td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause No</td>
<td>Title and explanation</td>
<td>Affirmative or Negative Resolution</td>
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<tr>
<td>Schedule 16 Paragraph 65</td>
<td>This allows the Society to discharge its regulatory functions to a Society committee to enable the regulatory and representative split of functions.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 69</td>
<td>Intervention in a solicitor’s practice. This creates a power vested in the Law Society, rather than Council of the Law Society to intervene in a solicitor’s practice.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraphs 71, 87, and 120</td>
<td>These amendments all make changes to existing legislation in respect of the Law Society’s compensation fund arrangements. This provision allows the Law Society to make rules for setting the special levy.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 16 Paragraph 71</td>
<td>Compensation Fund levy. This allows the Secretary of State to make an order amending the total amount payable under the levy.</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 16, Paragraph 73 (3)</td>
<td>Incorporated practices. This allows the Society to set application fees for the recognition of incorporated practices</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17 Paragraph 4(3)</td>
<td>Licensed conveyancing: Issue of Licenses by Council. This allows the Council to make rules as to the validity period of any licence issued.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17 Paragraphs 5(2)(b) and 6</td>
<td>Licensed conveyancing: Accountant’s Reports. This creates a provision requiring a licensed conveyancer to deliver an accountant’s report to the Council within a time limit specified by the Council’s rules and allows the Council to recover expenses incurred should a licensed conveyancer fail to do so.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17 Paragraphs 10, 11 and 27</td>
<td>Preliminary investigation of disciplinary cases: This amendment confers a power on the Investigating Committee to determine minor infractions of rules and allegations made of a minor nature in relation to misconduct (but not professional services). The Council must make rules about which matters can be dealt with by the Committee.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17 Paragraphs 12 and 27</td>
<td>Proceedings before Discipline and Appeals Committee: This amendment allows the Council to make rules (subject to Legal Service Board approval) providing for fines. At present, the Council has a power to fine which is limited to £3000 and it is felt that this is/is likely to become, insufficient. It also allows the DAC to reprimand a licensed conveyancer directly rather than having to refer the matter to the Council.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause No</td>
<td>Title and explanation</td>
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<tr>
<td>Schedule 17, Paragraph 16</td>
<td>Provision of conveyancing services by recognised bodies: this clause allows the CLC to make rules about fees for application for recognition, suspension or revocation of licences and changes in recognition, specification of new classes of information, incidental and supplementary or transitional provisions.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17, Paragraph 19</td>
<td>Administration of oaths by licensed conveyancers: This allows the CLC to make rules for authorising licensed conveyancers to administer oaths.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17, paragraph 25</td>
<td>Powers are conferred on the Legal Services Board to approve rules for procedure and practice of the DAC.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17, paragraph 26</td>
<td>Intervention in licensed conveyancers’ practice This allows the CLC to make rules about the treatment of money held by a licensed conveyancer after a finding by the DAC.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Schedule 17, paragraph 26</td>
<td>Intervention in licensed conveyancers’ practice Rules regarding vesting in the Council the right of a practice to receive and cover debts by setting up and controlling separate bank accounts for controlling monies.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 172</td>
<td>Board’s power to give directions to the Tribunal: This clause allows the Board to direct the Solicitors Disciplinary Tribunal.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause 173</td>
<td>Functions of the Tribunal: This clause allows the Secretary of State to make an order to modify the functions of the Solicitors Disciplinary Tribunal with the consent of the SDT.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 175</td>
<td>Commissioners for oaths: This clause allows the Secretary of State to make an order changing the fees that a Commissioner for Oaths may charge. The Secretary of State may only do so after consulting the Board and receiving the consent of the Lord Chief Justice and Master of the Rolls.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clauses 176 and 177</td>
<td>Regulation of trade mark attorneys and patent attorneys. These clauses insert provisions in the Trade Marks Act 1994 and the Copyright, Designs and Patents Act 1988 allowing CIPA and ITMA to make rules and regulations to regulate trade mark and patent attorneys.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clauses 176 and 177</td>
<td>Regulation of trade mark attorneys and patent attorneys. The power to make rules has been transferred from the Secretary of State to ITMA and CIPA.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
<tr>
<td>Clause No</td>
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</tr>
<tr>
<td>Schedule 18, Paragraph 13</td>
<td>Immigration advisors and immigration service providers: Paragraph 13 inserts section 86A into the Immigration and Asylum Act 1999 which allows for approved bodies to be designated by order as designated qualifying regulators and provides for the Secretary of State to remove bodies from the list of designated qualifying regulators.</td>
<td>86A (3) Affirmative 86A (6) Negative</td>
</tr>
<tr>
<td>Schedule 18, Paragraph 14</td>
<td>Extension of section 90 (orders by disciplinary bodies). Paragraph 14 widens the power conferred on disciplinary bodies under the Immigration and Asylum Act 1999 (to make orders which restrict the provision of immigration services and advice) so that the disciplinary bodies of designated qualifying regulators may also make the orders listed in subsection (1)</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 18, Paragraph 17</td>
<td>Immigration advisors and immigration service providers-transitional provisions. Paragraph 17 allows the Secretary of State to appoint a day when the position of transition to the new immigration advice and services framework.</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 19 Paragraphs 2 and 4</td>
<td>Claims Management Services. This sets out that the Secretary of State may not make an order under section 4(2)(c) of the Compensation Act or under subsections (1) or (2) unless it is in accordance with a recommendation of the Board or the Board has been consulted.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Schedule 19 Paragraph 3</td>
<td>Claims Management Services. This paragraph amends the Compensation Act so that the Secretary of State may only designate a person as a regulator by order following the Board’s recommendation. The Secretary of State’s power to transfer a function of the Regulator to himself can only be exercised on the recommendation of the Board.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Schedule 19 Paragraphs 6(3) and 7</td>
<td>Claims Management Services. This sets out that in future any regulations made by the Secretary of State under this section have to have been in accordance with a recommendation from the Board or the Board has to have been consulted.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Schedule 19 Paragraph 11(2)</td>
<td>Claims Management Services. This paragraph transfers the Secretary of State power to make regulations enabling the regulator to charge fees to the Board.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Schedule 19 Paragraph 11(3)</td>
<td>Claims Management Services. This sets out that if a regulator makes amendments to its rules in regards to professional misconduct that these changes have to be with the approval of the Board.</td>
<td>Not subject to Parliamentary procedure.</td>
</tr>
<tr>
<td>Clause No</td>
<td>Title and explanation</td>
<td>Affirmative or Negative Resolution</td>
</tr>
<tr>
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</tr>
<tr>
<td>Clause 185</td>
<td>Payments in respect of <em>pro bono</em> representation. This clause gives the court the power to order a person to make a payment to a prescribed charitable body in respect of a party's legal representation. Subsection (8) gives the Secretary of State the power to prescribe the charitable body.</td>
<td>Negative</td>
</tr>
<tr>
<td>Clause 185(7)</td>
<td>Payments in respect of pro bono representation: rule-making power conferred on Civil Procedure Rule Committee.</td>
<td>Negative</td>
</tr>
<tr>
<td>Schedule 22, Paragraph 1</td>
<td>Transitional powers: Secretary of State power to amend provision.</td>
<td>Affirmative</td>
</tr>
<tr>
<td>Clause 198 (2) and (3)</td>
<td>Minor and consequential provision etc. This clause allows the Secretary of State to make amendments to existing legislation that are needed to give full effect to the Bill.</td>
<td>Negative (affirmative for subsection (3))</td>
</tr>
<tr>
<td>Clause 201</td>
<td>Commencement. Provisions of the Bill will come into force on a day appointed by the Secretary of State.</td>
<td>Not subject to Parliamentary procedure</td>
</tr>
</tbody>
</table>
Supplementary memorandum (provided by the department at the request of the Committee)

1. As requested, this letter sets out further justification for the power at clause 68 of the Bill.

2. Part 1 of Schedule 4 lists the existing regulators that will be approved regulators once the Bill is brought into force. Most of those regulators are statutory bodies, or have the vires to regulate specified activities conferred through statute, for example, the Law Society, the Council for Licensed Conveyancers, the Chartered Institute of Patent Attorneys and the Institute of Trade Mark Attorneys. The current position is that the functions, duties and powers of these bodies cannot be amended, except through primary legislation. This has prevented regulators being able to adapt quickly to changes in the legal services market, and has resulted in an outdated and inflexible framework. We wish to avoid this is in the future. The Bill allows delegated legislation to be used to ensure that if the need arises, the framework can be amended appropriately to ensure that it is modern, flexible and responsive to change.

3. Clause 68 allows for the Secretary of State to modify the functions of approved regulators, and other bodies, by order, in a limited number of circumstances, that are set out at clause 68 (3). Firstly, this is necessary to give effect to the decisions of the Board, for example, where it designates a new approved regulator. The order making power would be needed to amend legislation to:
   - confer the necessary vires to regulate reserved activities or immigration activities on approved regulators, licensing authorities, or designated qualifying regulators (subsection (3)(b) and (e));
   - confer the necessary vires to regulate reserved activities or immigration activities on a body applying to be an approved regulator, licensing authority or designated qualifying regulator under section 86A of the Immigration Act (subsections (3)(a) and (d)); and
   - update the regulatory powers of an approved regulator in order that they may regulate effectively and efficiently (subsection (3)(c)).

4. In order for those powers to be effective, clause 68 (6) enables the amendment of any legislation. It has been framed widely as “any enactment…prerogative instrument or other instrument or document” because it has to capture the wide range of different types of legislation under which the various regulators are given functions. It needs to operate on yet to be enacted provision because it is impossible to identify the names or even types of legislation that would require amending in respect of future regulators.

5. We accept that the power is wide and so we have incorporated safeguards against its misuse. This is not a power exercisable by the Secretary of State of his own motion: as set out at clause 68 (2), the Secretary of State may only make an order on the recommendation of the Board accompanied by a draft order, and must make the order in either the same form as, or a form not “materially different” from, that recommended by the Board. Clause 69 also requires the Board, before making any such recommendation, to have the consent of the approved regulator or body to which the recommendation relates. In addition, the Board must publish drafts of the recommendation and order, and allow for representations to be made within a specified period. It is under a duty to have regard to any representations under section 69 (3). This provides an opportunity, even before a recommendation is made, for interested parties to raise any concerns about the proposed content of an order. Where the Board makes changes to a draft order following representations it must issue a statement detailing how the draft has altered, and the reasons for those changes. Finally, Parliament has an opportunity to scrutinise the order,
since any order made by the Secretary of State under clause 68 will be subject to affirmative resolution.

6. “Henry VIII” powers are widely used in a number of different forms in existing legislation. They provide an important mechanism for ensuring legislation is fit for purpose. Examples of such powers can be found under section 62 of the Electoral Administration Act 2006, section 14 of the Civil Jurisdiction and Judgements Act 1982, section 5 of the Local Government Act 2000. In particular, section 60 of the Health Act 1999 allows Her Majesty by Order in Council to make provision modifying the regulation of any profession named in that section, so far as appears to Her to be necessary or expedient for the purpose of securing or improving the regulation of the profession or the services which the profession provides or to which it contributes; or regulating any other profession which appears to Her to be concerned (wholly or partly) with the physical or mental health of individuals and to require regulation in pursuance of this section.

7. Without the power at clause 68 to amend existing legislation in this way, statutory regulators would be at a significant disadvantage when compared to non-statutory regulators. For example, the Law Society would require amendments to the Administration of Justice Act 1985 to confer the necessary vires to regulate alternative business structures, should it be designated as a licensing authority. Any amendments would need to be carried out by primary legislation. It is our view that it would be impractical to return to Parliament every time new vires or powers were required and would be unnecessarily time intensive. In contrast, a non-statutory body would only require changes to its rules, following designation as a licensing authority. This would not create a level playing field for regulators, and would instead confer an unfair advantage to certain types of body. We therefore think that the provision, with the safeguards we have provided, is appropriate.

Department for Constitutional Affairs

7 December 2006
Letter from the Lord Truscott, Parliamentary Under-Secretary, Department of Trade and Industry to the Chairman

1. I am grateful to the Committee for its consideration of the delegated powers contained in the Consumers, Estate Agents and Redress Bill.

2. The Committee made recommendations in respect of two powers in the Bill. The first was the power in clause 23(3)(d) by order to specify additional persons who may be required to provide information to the National Consumer Council. The second was the power in clause 58 to make regulations in respect of contracts concluded away from business premises in so far as such regulations might amend an Act of Parliament. In each case the Committee considered that the power should be subject to affirmative procedure rather than negative procedure. I have carefully considered the report and agree with what the Committee proposes in each case.

3. I have today tabled amendments, for consideration at Grand Committee, to provide that orders under clause 23(3)(d), and Regulations under clause 58 which amend Acts of Parliament should be subject to affirmative procedure.

4. I am copying this letter to Baroness Wilcox, Lord De Mauley and Lord Razzall and I am placing copies in the Libraries of both Houses.

11 December 2006
Letter from the Rt Hon. Baroness Ashton of Upholland, Parliamentary Under-Secretary, Department for Constitutional Affairs to the Chairman

1. I am writing in response to the Delegated Powers and Regulatory Reform Committee’s Second Report of the Session and in particular the section on the Tribunals, Courts and Enforcement Bill. I am most grateful for this.

2. The Government has accepted the main recommendations of the Report and I accordingly tabled the following amendments to the Bill on 7 December:

Tribunals

- Clause 8 – excluding from the functions that the Senior President can delegate to staff, the power in clause 7(9) to make orders about the allocation of functions between the chambers of the First-tier Tribunal and the Upper Tribunal. (Paragraph 21 of the Committee’s report)

- Schedule 4, Paragraph 15 – making the Lord Chancellor’s power to determine by order the number and type of members of a tribunal who are to decide matters subject to the affirmative resolution procedure. (Paragraph 22)

- Amending clause 13 so that the Upper Tribunal should only be able to exercise that power in relation to their appellate and not original jurisdiction. (Paragraph 23)

- Amending clauses 11 and 13 so that the Lord Chancellor’s power to specify which decisions are to be excluded from onward appeal be time limited. (Paragraph 24)

Judicial Appointments

- Schedule 10, paragraph 2 (3) – making the Lord Chancellor’s power to specify qualifications for the office of his nominee on the tribunal of appeal established under the London Building Acts (Amendment) Act 1939, subject to the affirmative procedure. (Paragraph 36)

Enforcement by taking control of goods

- Schedule 12, paragraphs 24 and 31 – Amending the power to make regulations under paragraphs 24 and 31 (extent to which a power to use force includes a power to use force against persons, and similar provision about goods on a highway) to provide for affirmative resolution. (Paragraph 31)

Debt Relief Orders

- New section 251U of the Insolvency Act 1986 (as set out in Schedule 17) – adding an extra sub-section to allow for use of the negative procedure for the regulations made under this section.

Debt Management Schemes

- Clause 110(6) – subjecting the power to make regulations allowing for the supply of gas or electricity to non-business debtors to be stopped, to the affirmative resolution procedure. (Paragraph 33)

- Clause 122 – making the Henry VIII power in clause 122(8) subject to the affirmative resolution procedure. (Paragraph 34)
3. The Committee also made a further recommendation in paragraph 36 of the report, about the lack of Parliamentary procedure applying to orders made under clause 30 and paragraph 2 of Schedule 9. Although you thought it could be considered transitional in nature, you contrasted it with clause 136 of the Bill, which also makes transitional provision but is subject to the negative resolution procedure. I understand that this is not normally the case for a purely transitional provision.

4. I have sought further advice on this point and this has precluded me from doing anything in time for Committee stage of the Bill and I will, if I may, come back to you on this point. If the Government accepts the Committee’s recommendation, then I will prepare an appropriate amendment in time for Report stage.

5. The Committee also noted two other points on the drafting of the Bill.

6. In paragraphs 28 and 29 of the report, the Committee brought to the attention of the House the power given to the Lord Chancellor in clause 48(1), which will effectively enable him to amend by secondary legislation the eligibility criteria for judicial office. This power has already been the subject of some debate at Second Reading. I would add that as set out in our memorandum to the Committee there may be occasions when it will be appropriate to widen the pool further, although there are no plans to do so at this stage.

7. In paragraph 33 of the report, the Committee also queried the necessity of the power in clause 110(6) allowing for the supply of gas or electricity to be stopped. Clause 110 generally prevents suppliers of electricity or gas from terminating their supply to non-business debtors. This brings the effect of such debt repayment plans in line with the county court administration and enforcement restriction orders set out in Chapters 1 and 2 of Part 5 of the Bill.

8. A major attraction of these schemes to debtors is the protection offered from enforcement. It is therefore imperative that there are robust provisions to address possible abuse. In line with the new provisions for county court administration and enforcement restriction orders set out in Chapters 1 and 2 of Part 5 of the Bill, sub-section 110(7) allows the supplier to apply to court for permission to stop supply. However, approved Debt Management Schemes, if introduced, are intended to operate largely outside the court system, allowing the court to focus on matters where there is a genuine dispute and it would be an unnecessary burden if the county court route was the only mechanism available to tackle potential abuse.

9. This issue has been specifically recognised in sub-sections 107(2), 108(2) and 109(2) which, in addition to allowing the creditor to apply to court for permission, allow the Lord Chancellor to make regulations specifying circumstances in which a creditor may be exempt from the specific restrictions on enforcement imposed by each of those sections. These provisions will ensure that in specified circumstances, abuse of the protection offered by a debt repayment plan can be tackled promptly and effectively without the need to come to court. Sub-section 110(6) will operate in the same way.

12 December 2006