Delegated Powers and Regulatory Reform Committee

5th Report of Session 2006-07

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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 Brett
- The Viscount Eccles CBE
- The Baroness Fritchie DBE
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Contacts for the Delegated Powers and Regulatory Reform Committee

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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.
Fifth Report

FRAUD (TRIALS WITHOUT A JURY) BILL

1. This bill does not delegate legislative power.

PARLIAMENT (JOINT DEPARTMENTS) BILL [HL]

2. This bill does not delegate legislative power.

SERIOUS CRIME BILL [HL]

Introduction

3. This bill deals with a number of crime-related topics, including serious crime prevention orders, offences relating to encouraging or assisting crime, sharing of information, data matching and the abolition of the Assets Recovery Agency.

4. There are delegated powers to make orders or regulations at clauses 4(4), 7, 27(6) and (11), 28(6) and (11), 32, 56(3), 61(8), 62(5)(b), 66(1), 77(1), 78(2) and (3) and 81(1) and (3), paragraph 2 of Schedule 6 (new sections 32E(5) and 32G(1) and (3)), paragraphs 85 and 138 (new paragraph (cb)) of Schedule 7 and paragraph 11 of Schedule 10 (new subsection (7B)). There are also powers to make transfer schemes in Schedule 8 and modifications of, or enlargement of the scope of, existing legislative powers at clauses 27(5), 28(5), 34(4), 70(2) and (4), 72(2), (4), (6) and (8) and 73(1), paragraphs 5 and 15 of Schedule 2 and paragraphs 3 and 12 of Schedule 10. All of these powers are explained in a memorandum for the Committee by the Home Office, printed at Appendix 1.

5. The powers at clauses 4(4), 56(3) and 77 and paragraph 2 of Schedule 6 (new sections 32G(1) and (3)) and paragraph 85 of Schedule 7 are Henry VIII powers subject to affirmative procedure (which applies in the case of clause 77 only when the order amends an Act). The power at paragraph 138 of Schedule 7 is also subject to affirmative procedure. The appointed day and transitional powers at clauses 66(1), 78 and 81, and the power to make transfer schemes at Schedule 8, are subject to no parliamentary procedure. All other powers are subject to negative procedure. We wish to comment on the matters below.

Amendment of list of serious offences — clause 4(4)

6. Clause 1 enables the High Court to make a serious crime prevention order against a person if (in addition to a “would protect the public” test being satisfied) that person has been involved in serious crime. (This jurisdiction is extended to the Crown Court by clause 19.) Whether a person has, or has
not, been involved in serious crime is determined under clause 2 (England and Wales) or clause 3 (Northern Ireland) by reference to a list of offences set out in Part 1 (England and Wales) or Part 2 (Northern Ireland) of Schedule 1. Clause 5 contains examples of the type of provision that may be made by a serious crime prevention order. These include restrictions on business dealings, access to premises and travel.

7. Clause 4(4) enables the Secretary of State, by order subject to affirmative procedure, to alter the lists in Parts 1 and 2 of Schedule 1, and thus to vary the jurisdiction of the court to make a serious crime prevention order. Although this is an important power, and its exercise may impact significantly on the rights of the individual, we do not consider it inappropriate.

Exceptions — clause 7

8. Clause 7 contains a broad power for the Secretary of State to except persons from the ambit of serious crime prevention orders. As is common with powers to except from a statutory regime, the power is subject to the negative procedure. The memorandum says that “there may be certain persons that should not be capable of being subject to a serious crime prevention order because it would not be appropriate for them to be so subject”. The House may wish to seek a fuller explanation of the Government’s intentions for the use of this power.

Bodies that may be wound up — clauses 27(11) and 28(11)

9. Clause 27(1) enables a petition to be presented to the court for the winding up of a company, partnership or “relevant body” that has been convicted of an offence under clause 25 in relation to a serious crime prevention order. Clause 27(5) adapts the existing power (subject to negative procedure) in the Insolvency Act 1986 to apply the provisions of that Act with modifications to insolvent partnerships, by extending it to partnerships to which clause 27 applies; and clause 27(6) takes a similar, new, power (also subject to negative procedure) to apply the 1986 Act with modifications to a petition for the winding up of a “related body”. This enables the provisions of the 1986 Act to be adapted to bodies that are not companies. “Relevant body” is defined in clause 27(11) as a building society, an incorporated friendly society, an industrial and provident society or such other person as may be specified by order, subject to negative procedure, made by the Secretary of State. The effect of the order would be to bring other bodies within the scope of the winding up provisions. Although this power affects the scope of clause 27, it is limited in its area of application and we do not consider the negative procedure to be inappropriate. The same point arises in clause 28 in respect of Northern Ireland.

Protected information — clause 62(5)(b)

10. Clause 61 enables (but does not require) a public authority to disclose any information, as a member of a specified anti-fraud organisation, to that organisation, to other members of it and to certain others. Whilst disclosure must be in accordance with the Data Protection Act 1998, it can override any common law duty of confidence.
11. Clause 62 creates a criminal offence relating to onward disclosure of that information. But the offence applies only to the disclosure of “protected information”. This is defined in clause 62(5) as meaning certain revenue and customs information specified in the bill or “any specified information disclosed by a specified public authority”, both specifications being by order made by the Secretary of State subject to negative procedure. The definition of protected information is central to the working of the scheme. Whether or not information is protected by clause 62 from onward disclosure may impact on the extent to which public authorities will share information under clause 61. Broadening the definition will also extend the scope of the criminal offence. We thus consider that orders under clause 62 should be subject to the affirmative procedure.

Data matching — Schedule 6, paragraph 2

12. Schedule 6 inserts a new Part 2A into the Audit Commission Act 1998, enabling the Commission to conduct or arrange for data matching exercises (explained at paragraph 196 of the Explanatory Notes). New section 32A(3) limits the purposes of the data matching exercises to assisting in the prevention and detection of fraud. New section 32B limits those who must provide data to bodies subject to audit and “best value” authorities, though new section 32C enables the voluntary provision of data. New section 32D deals with the disclosure of the results of data matching.

13. New section 32G(1) and (3) enables the Secretary of State, by order subject to affirmative procedure, to add further purposes for which data matching exercises may be conducted and to add a public body (as defined in 32G(5)) to, or remove a body from, the list in 32B(2) of those who must provide data. In either case, the application of the new sections may be modified.

14. Although the justification for the power to modify is not fully explained in the memorandum, we do not consider new section 32G(1) and (3) inappropriate in the light of the affirmative procedure provided.

WELFARE REFORM BILL

Introduction

15. This bill covers a number of topics related to social security, including (at Part 1) making provision for a new benefit, “employment and support allowance”, to replace incapacity benefit and income support on the grounds of incapacity.

16. The bill contains a formidable number of delegated powers, far more than is common in a bill of this length. A memorandum from the Department for Work and Pensions (printed at Appendix 2) explains the powers and an indication of the number of delegations can be obtained from the list in the Annex to the memorandum.

17. Social security legislation already leaves a great deal to subordinate legislation, with the Acts often providing but the framework. Our predecessor Committees have had to consider the issues carefully before deciding that
recent social security bills have provided a sufficient policy framework for the exercise of the relevant powers (e.g. the bills that became the Jobseekers Act 1995 and the Welfare Reform and Pensions Act 1999). This bill follows the pattern of that recent legislation. In particular, for employment and support allowance, the amount which a person is entitled to receive is determined, as for income support, housing benefit and council tax benefit, almost wholly by reference to amounts to be set out in regulations subject to negative procedure.

18. Many of the delegated powers in the bill derive from powers which Parliament has already conferred on the Secretary of State in relation to one or more contributory or non-contributory benefits. For example, clause 16(1) to (3) (income and capital) contains powers which are almost identical to those already given to the Secretary of State for income support by section 136(3) to (5) of the Social Security Contributions and Benefits Act 1992 ("SSCBA") and for state pension credits by section 15(3) to (6) of the State Pension Credit Act 2002. We wish to comment on the matters below.

Part 1 in general

19. We start by drawing to the attention of the House how much of the provision for employment and support allowance is left to delegated legislation. This includes:

- amounts of allowance and deductions (clauses 2 to 4);
- applicable amount for determining eligibility for income-related allowance (clause 4);
- additional conditions of entitlement to components of the allowance (clauses 2 and 4);
- assessment of income and capital (clause 16), including capital maximum (Schedule 1, paragraph 6(1)(b)).

20. Even though this extent of delegation is precedented for social security, the House will wish to be aware of the significance of the powers being conferred. We do not consider Part 1 as a whole to be inappropriate because there is a just sufficiently clear policy framework in the bill itself. These elements are on the face of the bill:

- basic conditions of entitlement (clause 1(3));
- the components of an allowance (clauses 2 and 4);
- the nature of the deductions that may be made in calculating a contributory allowance (clause 3);
- contribution conditions for a contributory allowance (Part 1 of Schedule 1);
- the non-means element of eligibility for income-related allowance (paragraph 6 of Schedule 1);
- the nature of the conditions for continuing receipt which may be imposed (clauses 10 to 12).
Amounts of contributory and income-related allowance — clauses 2 and 4

21. Employment and support allowance under Part 1 of the bill is to replace incapacity benefit and incapacity-based income support.

22. Incapacity benefit is a contributory benefit, entitlement to which depends on the making of national insurance contributions. The rate of benefit, and the amount of increases for dependants, are set out in primary legislation (SSCBA Schedule 4). Section 150 of the Social Security Administration Act 1992 (“SSAA”) requires the Secretary of State to review the sums each year to see if they have retained their value against prices. If the sums have lost value, he must uprate them by order subject to affirmative procedure.

23. Income support is a non-contributory, means-tested, benefit. One of the conditions of entitlement is that a person’s income does not exceed the “applicable amount” and, if a person is entitled, the amount of benefit is the difference between his income and the “applicable amount” (SSCBA section 124). The applicable amounts are prescribed by regulations subject to negative procedure (SSCBA section 135). They may be changed by regulations subject to negative procedure, but, in addition, section 150 SSAA requires the Secretary of State to review them each year to see if they have retained their value against prices. If they have not, he may uprate them by order subject to affirmative procedure (but does not have to do so).

24. Under the bill, there will be two ways of qualifying for employment and support allowance. The first way is through having paid national insurance contributions, in which case the allowance is called a “contributory allowance”. The second way is through a means test, in which case the allowance is called an “income-related allowance”. So the contributory allowance might be seen as a replacement for incapacity benefit and the income-related allowance might be seen as a replacement for incapacity-based income support.

25. Under the bill, the amounts of both a contributory and an income-related allowance are ascertainable only by reference to regulations subject to negative procedure. In other words, the pattern for both types of allowance is similar to that taken in the current legislation for income support rather than that for incapacity benefit. The following are left to the regulations:

- the basic amount (to which other components are added and from which, for a contributory allowance, deductions are made) – clauses 2(1)(a) and 4(2)(a);
- the amount of the deductions to be made, for a contributory allowance, for payments referred to in clause 3 (pension etc.) – clause 2(1)(c);
- the amount of the support and work-related activity components – clauses 2(4)(c) and 4(6)(c).

26. Under the bill, there will be no obligation on the Secretary of State to review the amounts to see if they have retained their value, though the amendment made by paragraph 10(21) of Schedule 3 will enable the Secretary of State, if he wishes, to include increases in the annual (affirmative) up-rating order under the SSAA rather than effect them by regulations under the bill.

27. Paragraphs 26, 32 and 52 of the memorandum use annual reconsideration as an argument in favour of delegating the rate of benefit and the House may
wish to seek an explanation from the Minister as to why this is not a legal requirement.

28. Jobseeker’s allowance, like employment and support allowance under this bill, is also available through either a contributory route or a means-test route and the amounts in each case are left largely to regulations subject to negative procedure. When that allowance was first introduced, the exercise of the significant powers in an initial period was made subject to affirmative procedure, so ensuring that (at least) the first regulations would be subject to affirmative procedure. A similar arrangement applied on the introduction of incapacity benefit. **We were minded to recommend that the first regulations under all the principal powers in Part 1 should similarly be subject to affirmative resolution but note that the Government have already placed draft regulations in the Library. If the likely content of the regulations is in practice to be fully debated during the bill’s Committee stage, such a recommendation is unnecessary.**

29. There is a related issue in clauses 2 and 4 about entitlement to the support and work-related activity components of the allowance. Clauses 2(2) and (3) and 4(4) and (5) set out minimum conditions of entitlement, but the Secretary of State is given power to add other conditions by regulations subject to negative procedure. **The exercise of this power could prove controversial and the memorandum (paragraphs 29 and 49) indicates that the Government have no intention to use the power soon or frequently. We consider that regulations under clause 2(2)(c) and (3)(c) and 4(4)(c) and 5(c) should thus be subject to the affirmative procedure.**

**Limited capacity for work or work-related activity — clauses 8 and 9**

30. One of the basic conditions of entitlement to employment and support allowance is that the claimant has limited capacity for work (as defined in clause 1(4)). If the claimant has also limited capacity for work-related activity (as defined in clause 2(5)) he may be entitled to a support component of his allowance and if he does not have limited capacity for work-related activity he may be entitled to a work-related activity component. How the determination as to capacity is made is left to regulations subject to negative procedure. Clauses 8(2) and 9(2) require the determination to be made on the basis of an assessment of each individual. Though the procedures will be important, we do not consider the negative procedure inappropriate.

**Health-related amendments, work-focused interviews and work-related activity — clauses 10 to 12**

31. Clauses 10 to 12 enable regulations subject to negative procedure to impose conditions on continuing entitlement to employment and support allowance. In each case, the basic nature of the condition is specified in the bill:

- a requirement to take part in one or more work-focused health-related assessments (clause 10);
- a requirement to take part in one or more work-focused interviews (clause 11);
- a requirement to undertake work-related activity (clause 12).
32. Regulations under clauses 10 and 11 are subject to negative procedure. Regulations under clause 12 are subject to affirmative procedure for the first regulations, but negative thereafter. In each case, the regulations will not just set out the requirements, but will also set out the amount by which the allowance is to be reduced, and the duration of the reduction, where a requirement is not met. The requirement to take part in work-focused interviews (clause 11) already exists for a number of social security benefits, including income support and incapacity benefit, and clause 11 is very similar to section 2A of SSAA, inserted by the Welfare Reform and Pensions Act 1999. The power under section 2A of SSAA was subject to affirmative procedure on its first exercise, with negative procedure thereafter. The power in clause 11 can, in our opinion, be viewed as a continuation of section 2A so the negative procedure is not inappropriate.

33. The requirements to take part in work-focused health-related assessments (clause 10) and to undertake work-related activity (clause 12) are new in that they do not appear in that form in current social security legislation. Paragraphs 95 and 108 of the memorandum acknowledge this in respect of clause 12 and that the first regulations will be subject to affirmative procedure. Clause 10, although also new provision, does not attract this procedure: we have considered whether it should but have decided that the negative procedure provided is not inappropriate.

Contracting out — clause 15

34. The Deregulation and Contracting Out Act 1994 enables the Secretary of State, by order subject to affirmative procedure, to provide for the Secretary of State or local authorities to authorise their functions to be exercised by another person. This power has been exercised, in particular, by the Contracting Out (Functions relating to Social Security) Order 2000 which enables the contracting out of functions of the Secretary of State and local authorities relating to work-focused interviews connected with income support, housing benefit, council tax benefit, incapacity benefit and certain other benefits.

35. Clause 15(1) itself authorises the contracting-out of certain functions relating to employment and support allowance (in particular, the function of conducting work-focused interviews).

36. Clause 15(2) enables regulations subject to negative procedure to provide for the Secretary of State to authorise certain other functions of his to be exercised by another person. These functions include any functions under regulations under any of clauses 10 to 14 and so include the function of decision-making in relation to the reduction of benefit. Paragraphs 125 and 127 of the memorandum explain that there is no plan to use the powers for that purpose for the moment and in particular state that “it is not at this time envisaged that decision making relating to sanctions for failure to participate in work-focused health-related assessments will be contracted out”. In considering the appropriateness of the delegation, we must consider the potential use of the power rather than the Government’s intention. We draw a distinction between the contracting out of functions such as the conduct of work-focused interviews and the contracting out the sanctioning of benefits. The power proposed here would involve the negative procedure for both and we consider that the latter should be subject to affirmative procedure.
Consequential amendments — clause 27

37. Clause 27 enables regulations by the Secretary of State, subject to negative procedure, to make provision, consequential on Part 1, amending or repealing any provision of an existing Act. The memorandum (paragraph 154) does not address the Committee’s presumption (3rd Report 2002/03) that powers of this sort will be subject to affirmative procedure but in this instance we do not consider the negative procedure inappropriate given the likely nature of the provision, and the fact that the power does not extend to making incidental or supplemental provision.

Loss of housing benefit: eviction for anti-social behaviour — clause 30

38. The new powers in clause 30 are explained at paragraphs 234 to 253 of the memorandum.

39. There is a significant Henry VIII power at new section 130D(2) of SSCBA, explained at paragraphs 242 and 243 of the memorandum. An order, subject to affirmative procedure, may vary the definition of “relevant order for possession” (defined in new section 130C), with the consequence that the loss of benefit provisions might be made to apply where orders for possession are made on grounds other than those currently specified (which are anti-social behaviour related). Though the power extends to adding orders for possession on any ground, we do not consider it inappropriate, given the affirmative procedure provided.

40. New section 130F enables the Secretary of State to make regulations, subject to negative procedure, requiring information to be given. The type of information concerned is specified in the section itself (subsection (6)) and the limits as to who may be required to provide the information and to whom are also clearly set out (subsections (1), (3), (4) and (5)). The negative procedure is not inappropriate because the regulations themselves would do little more than prescribe procedures and exceptions.

41. New section 130G allows for pilot schemes by providing that regulations under any of the new sections 130B to 130F may be made so as to have effect for a limited period, in which case the regulations may be made only to apply in a limited area or to certain categories of people. The pilot regulations are not automatically subject to affirmative procedure. In contrast, pilot regulations under the Jobseekers Act 1995 and pilot regulations under clause 18 of this bill are automatically subject to affirmative procedure (even if they would otherwise be subject to negative procedure). We accept that, in this particular context, the provision made in new section 130G is not inappropriate.

Housing and council tax benefit for persons taking up employment—clause 32

42. Clauses 31 and 32 remodel existing provision for payment of an extended payment (or benefit run-on) to claimants in prescribed circumstances who take up or increase their hours of employment. Clause 32 provides that the normal housing benefit and council tax benefit rules apply in relation to benefit paid under the extended payment provisions. Subsection (1)(b) permits the Secretary of State to make, by regulations subject to negative procedure, any modifications to the general rules which he considers are required in relation to extended payments. This is described in the
memorandum as a Henry VIII power. But the effect of the power is limited to modifications necessary in connection with extended payments and the powers in SSAA which can be modified relate to the administration of benefits rather than entitlement. Accordingly, we do not consider the negative procedure inappropriate.

Social security information — clause 40

43. Clause 40 is explained at paragraphs 213 to 220 of the Explanatory Notes. Clause 40(1) inserts a new section 7B into SSAA. In particular, new section 7B(1) enables Ministers, local authorities and certain others specified in section 7A (as amended by clause 40(2)) to use “for a relevant purpose” any social security information which they hold. “Relevant purpose” is defined in section 7B(3) as any purpose prescribed by regulations which relates to a claim which is or could be made for a specified benefit. “Specified benefit” means a benefit specified in regulations. All regulations under section 7B are subject to negative procedure.

44. New section 7B(3) allows the regulations to specify any purpose relating to a claim or potential claim. It is however apparent both from the Explanatory Notes (paragraph 215) and from the memorandum (paragraph 304) that the purpose for which the power is taken is to increase the take-up of social security benefits. The negative procedure would not be inappropriate if the bill limited the power in this way. But the power currently proposed could be exercised for other purposes and, unless amended, we consider the affirmative procedure appropriate.

Information — clause 41

45. Clause 41(2) provides that information held “for a prescribed purpose” by any of the persons or bodies listed in clause 41(4)(c) to (h) which relates to any of the benefits listed in clause 41(3) may be used by that person or body for another prescribed purpose or disclosed to another person or body listed in clause 41(4)(c) to (h) for the same or another such purpose. Clause 41(8) enables the Secretary of State by regulations subject to negative procedure to prescribe the purposes, but they must be related to housing benefit or welfare services. We consider that the limitation just sufficiently narrows the scope of the power to make the negative procedure not inappropriate.

Breach of community order: loss of benefit — Schedule 3, paragraph 20

46. Section 62 of the Child Support, Pensions and Social Security Act 2000 provides for loss of certain benefits for a period when a court has found an offender in breach of a community order. The amount and manner of the reduction in benefit is left to regulations. Under section 65(4)(b) and (c) regulations setting out the reduction for income support and jobseeker’s allowance are subject to affirmative procedure.

47. Paragraph 20(3) of Schedule 3 adds employment and support allowance to the list of benefits that may be reduced and paragraph 20(2) enables regulations by the Secretary of State to provide for the amount of the reduction and for other matters. The power is very similar to that already in the 2000 Act for income support and jobseeker’s allowance, yet it is to be subject to negative procedure only. Paragraph 213 of the memorandum explains the difference by reference to the current use of the power for
jobseeker’s allowance having already been approved. The existing powers are, rightly, subject to affirmative procedure on every exercise of the power and not just the first exercise of the power. The power for employment and support allowance can be exercised independently. It is a similar power and no less important. **We thus consider that the power inserted by paragraph 20 should be subject to affirmative procedure.**

Social security fraud: loss of benefit — Schedule 3, paragraph 23

48. Section 7 of the Social Security Fraud Act 2001 provides for loss of benefit in certain cases where an offender has been convicted of benefit offences on two occasions. The amount of the reduction is left to regulations subject to affirmative procedure, with the power being similar to those in section 62 of the 2000 Act (paragraph 46 above).

49. Paragraph 23 of Schedule 3 enables employment and support allowance to be reduced and a power is taken to enable the Secretary of State by regulations to set out the amount of the reduction. But these regulations are subject to negative procedure only. The same justification is given at paragraph 213 of the memorandum as for paragraph 20 of Schedule 3 (paragraph 47 above). **We consider that the power inserted by paragraph 23 should be subject to affirmative procedure.**

Housing and council tax benefit: war pensions — Schedule 5, paragraphs 3 and 4

50. Paragraphs 3 and 4 of Schedule 5 contain powers relating to the disregard by local authorities, for their area, of additional amounts of income from war disablement or war widow’s pension. The memorandum explains at paragraphs 296 to 300 that a reason for taking the power is to remove the disregard from a current spending limit. It does not so clearly explain that the effect of the provision is to limit the pensions which may be disregarded by local authorities to those that are prescribed by regulations. But as a matter of delegated powers both the delegation and the level of scrutiny (negative procedure) are not inappropriate.

Pneumoconiosis etc.: power to amend definition of “employer” — Schedule 6

51. Schedule 6 contains two delegated powers, explained at paragraphs 349 to 355 of the memorandum. The second of these is covered at paragraph 355 and is a power by order to modify the Schedule containing the definition. This includes power to modify the basic definition in paragraph 1 of the Schedule and not just the ancillary provisions at paragraphs 2 to 7. The memorandum has not made out the case for this broad power. **We consider that a power to modify matters such as the time limits in the Schedule would not be inappropriate but that the proposed power to modify the Schedule in its entirety has not been shown to be appropriate.**
52. We reported on this bill in our 3rd Report (HL Paper 19) and have now been invited to consider a Government amendment to be moved on Report: the amendment to insert a new clause “Power to extend section 1 to other organisations” before clause 18, No 51 on the marshalled list, HL Bill 28–I. The Home Office has provided a supplementary memorandum, printed at Appendix 3.

53. Clause 1 of the bill provides that the offence of corporate manslaughter or corporate homicide can be committed by corporations, listed Government departments and other public bodies, and by police forces. There is already a power (clause 18) for the Secretary of State by order to alter the list of public bodies, in our opinion sufficiently circumscribed and not inappropriate. The penalty for the offence is an unlimited fine (clause 1(6)). Another Government amendment (No 1) would add partnerships, trade unions and employers’ associations that are (in each case) employers. The new clause would empower the Secretary of State by order subject to affirmative resolution to extend further the categories of organisation which can commit the offence, presumably with the intention of extending the offence to unincorporated bodies. This is an issue which was raised in Committee (e.g. HL Deb 11 January 2007 col GC119-20) but the memorandum does not make clear to what extent, if any, the new clause is tabled in response to that debate. The Minister should be required to give a full justification when she moves the amendment.

54. The new clause would significantly extend the scope of a bill directed until now wholly at corporations, Government departments etc.. Extending the offence beyond the types of bodies covered would be a significant step. In our view, delegating such a broad power would create unjustifiable uncertainty for the wide range of bodies which might be brought within the scope of the bill. It would also, as the memorandum indicates, raise a number of difficult issues of law, for example how a fine would be imposed on an unincorporated body. We note that the extension to partnerships has itself required several Government amendments and the power to make incidental, supplemental or consequential provision might need to be used extensively. In our opinion, the policy which Amendment 51 is capable of delivering requires a higher level of parliamentary scrutiny (including capacity to amend) than a statutory instrument subject to affirmative resolution would provide. An amendment which enabled the Minister, by affirmative order, to extend the bill to specific types of organisation might not be inappropriate (by analogy with the power already in clause 18), but the extension of the clause to organisations not identified in the primary legislation should require the authority of further primary legislation.

55. We also note that this bill originated from Law Commission recommendations, was subject to pre-legislative scrutiny and has almost completed its passage through both Houses. The more important the delegation, the closer and more careful scrutiny it needs. We have considerable difficulty with such an extension of the bill being delivered by a Report stage amendment tabled at a late stage, not least because we ourselves have not had adequate time to consider the matter.
CONCESSIONARY BUS TRAVEL BILL [HL] — GOVERNMENT RESPONSE

56. We reported on this bill in our 3rd Report (HL Paper 19) and the Government have now responded by way of a letter to the Chairman from Lord Davies of Oldham printed at Appendix 4.

FURTHER EDUCATION AND TRAINING BILL [HL] — GOVERNMENT RESPONSE

57. We reported on this bill in our 3rd Report (HL Paper 19) and the Government have now responded by way of a letter to the Chairman from Lord Adonis, Parliamentary Under Secretary of State for Schools at the Department for Education and Skills, printed at Appendix 5.

LEGAL SERVICES BILL [HL] — GOVERNMENT RESPONSE

58. We reported on this bill in our 3rd Report (HL Paper 19) and the Government have now responded by way of a letter to the Chairman from Bridget Prentice MP, Parliamentary Under Secretary of State at the Department for Constitutional Affairs, printed at Appendix 6.

PROPOSAL FOR THE DRAFT REGULATORY REFORM (COLLABORATION ETC. BETWEEN OMBUDSMEN) ORDER 2007

Introduction

59. This is a “first stage” proposal laid before Parliament on 18 December 2006 under section 6 of the Regulatory Reform Act 2001. An explanatory statement by the Cabinet Office has been laid with the proposal in accordance with section 6(2) of that Act.¹

60. The proposal would amend the Parliamentary Commissioner Act 1967 (“the 1967 Act”), the Local Government Act 1974 (“the 1974 Act”) and the Health Service Commissioners Act 1993 to allow, where appropriate, collaborative working between the Parliamentary Commissioner for Administration (“the Parliamentary Ombudsman”), the Health Service Commissioner for England (“the Health Service Ombudsman”) and the Local Government Ombudsmen, so as to provide a more efficient and streamlined service to the citizen. It is estimated that this would be used for about 50 cases per year.

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¹ Members of the House may obtain both the proposal and explanatory statement from the Printed Paper Office. Both documents are also available at:

www.cabinetoffice.gov.uk/regulation/reform/orders/proposals.asp
61. The proposals are:

- to amend all three Acts to enable the Ombudsmen to consult each other, share information, and work together on cases that are relevant to more than one of their individual jurisdictions. If the complainant consents, the proposed reforms would enable the Ombudsmen, where appropriate, to undertake joint investigations of complaints and to issue joint reports; [Articles 2–11]

- to amend all three Acts to enable the Ombudsmen to appoint and pay a mediator or other appropriate person to assist them in relation to any complaint they are investigating. This would apply to all investigations, not just those that are undertaken jointly; [Articles 12–14] and

- to amend the 1974 Act to remove the requirement for the Local Government Ombudsmen to investigate only after the authority had done so, so that joint investigations would not be held back by having to wait until the authority had investigated the complaint. (This disapplication would apply not only to joint cases but also to solo investigations by the Local Government Ombudsman where there had been an irretrievable breakdown in trust between the complainant and the authority concerned.) [Article 15]

Tests in the Regulatory Reform Act 2001

62. We are satisfied that, for each of the elements of this proposal, the requirements of the Regulatory Reform Act 2001 have been met. We note however that different Ombudsmen have different standards for the retention of information and we consider that it would be desirable, as a maintenance of necessary protection, for there to be clarity as to the policy when there is a joint investigation: either, for example, by setting a common standard or for the standard of the originating Ombudsman to apply.

Other tests

63. At 17 Articles, the proposed order cannot be said to be “large and controversial” within the definition which we set out in our 18th Report (2004–05) and we do not consider it to be an inappropriate use of the 2001 Act.

64. The amendments made by Articles 12-14 go no further than enabling the Ombudsmen to engage and pay mediators and others; they do not remove or qualify the Ombudsmen’s duty to report on maladministration in the case of each complaint and, in our view, no issue of “necessary protection” under the 2001 Act arises.

65. We note however that a number of the respondents to the consultation were unsure as to how the appointment of a mediator aligned with the function of the Ombudsmen in reporting on maladministration for the public good. Respondents were concerned that, if the Ombudsmen delegate investigations to a mediator for alternative dispute resolution, this will dilute the process into an attempt to reconcile the individuals and a discussion of financial compensation. It is not clear from the Department’s statement whether this “informal” mediation route will result in a report about whether injustice has been suffered by the complainant as a result of maladministration. Although this is not a breach of necessary protection under the 2001 Act, we consider
that it would be desirable for the Ombudsmen to publish statistics on the themes and subjects of complaints withdrawn after successful mediation.

Conclusion

66. We consider that the proposal for the draft Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 meets the requirements of the Regulatory Reform Act 2001 and is appropriate to be made under it.

PROPOSAL FOR THE DRAFT REGULATORY REFORM (DEER) (ENGLAND AND WALES) ORDER 2007

Introduction

67. This is a “first stage” proposal laid before Parliament on 18 December 2006 under section 6 of the Regulatory Reform Act 2001. An explanatory statement by the Department for Environment, Food and Rural Affairs has been laid with the proposal in accordance with section 6(2) of that Act.

68. The purpose of this proposal is to amend the Deer Act 1991 (“the 1991 Act”, a consolidation Act), in particular to reduce bureaucracy for those managing deer and remove restrictions on their activities that do not afford necessary protections to deer.

69. The 1991 Act is the primary piece of legislation covering the management and conservation of deer in England and Wales. The 1991 Act:

- regulates the killing of deer by addressing when, how and by whom deer may be killed;
- protects deer by setting periods of the year when deer may not be killed (“close seasons”);
- regulates the weapons that may be used to kill deer; and
- regulates the sale of venison and addresses poaching.

The 1991 Act has remained substantively unchanged since enactment but, as a result of the increasing wild deer population and the consequent increase in reported problems, DEFRA and the Forestry Commission for England undertook a policy consultation in 2004 (preliminary to the 2006 consultation on specific proposals), which drew widespread interest and support for changes to deer legislation to assist the better management of deer populations.

70. There are 12 proposals: eight would provide deer managers with more effective tools for population control and four would improve deer welfare. The proposals are:

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2 Members of the House may obtain both the proposal and explanatory statement from the Printed Paper Office. Both documents are also available at:
www.cabinetoffice.gov.uk/regulation/reform/orders/proposals.asp
Proposals intended to make deer population control more effective

Proposal A  Allow .22 centre-fire rifles to be used for shooting smaller species of deer;
Proposal D  Enable licensed taking or killing during the close season to prevent deterioration of the natural heritage;
Proposal E  Enable licensed taking or killing during the close season to preserve public health and safety;
Proposal F  Enable licensed taking or killing at night to prevent deterioration of the natural heritage;
Proposal G  Enable licensed taking or killing at night to preserve public health and safety;
Proposal H  Enable licensed taking or killing at night to prevent serious damage to property;
Proposal I  Shorten the close season for all female deer to help allow better control of population numbers where necessary, without increasing the welfare risks for dependent young; and
Proposal L  Amend the meaning of mechanically propelled vehicle in the 1991 Act to permit discharging firearms or projecting missiles from a mechanically propelled vehicle that is stationary.

Proposals intended to improve deer welfare

Proposal B  Allow any reasonable means of humanely despatching deer that are suffering due to injuries or disease;
Proposal C  Allow dependent deer to be taken or killed if they have been deprived of, or are about to be deprived of, their mother, at any time of year regardless of the close season or the time of day;
Proposal J  Introduce a close season for Chinese Water deer from 15 March to 31 October inclusive; and
Proposal K  Ensure the close season applies to hybrids of a species as well as the parent species.

Tests in the Regulatory Reform Act 2001

71. We are satisfied that, for each of the elements of this proposal, the requirements of the Regulatory Reform Act 2001 have been met.

Other considerations

72. At 6 Articles, the proposed order cannot be said to be “large and controversial” within the Committee’s definition set out in our 18th Report (2004–05) and we do not consider it to be an inappropriate use of the 2001 Act. We wish however to make two observations in relation to the responses to the consultation.

73. The four “welfare” proposals each received support from at least 95% of those who responded to the consultation and six of the “control” proposals received support from at least 70% of respondents. In contrast, the remaining two “control” proposals, F and H (to enable licensed taking or
killing of deer at night to prevent deterioration of the natural heritage, and to prevent serious damage to property), received 62% and 61% support and some of those in favour considered the proposal an option of last resort.

74. Article 5 substitutes new tables in Schedule 1 to the 1991 Act to reduce the close season for existing species of deer and to introduce a close season for Chinese water deer. The requirement to observe a close season for Chinese water deer will curtail any existing right to take or kill such deer at any time. In our opinion this new restriction does not fail to comply with section 3(1)(b) of the Regulatory Reform Act 2001. The new restriction could however have been introduced using the power at section 2(4) of the 1991 Act. This would have meant that, if the House wished to object to this element of the scheme, it could do so without objecting to the rest of the regulatory reform order.

75. We do not wish to express a view on the detail of the policy, considering it our role to report on appropriateness overall and on whether the tests set by the Regulatory Reform Act 2001 have been met. We draw these issues to the attention of the House so that the House might resolve, if it wishes, that the draft order be laid in a different form to this proposal.

Conclusion

76. We consider that the proposal for the draft Regulatory Reform (Deer) (England and Wales) Order 2007 meets the requirements of the Regulatory Reform Act 2001 and is appropriate to be made under it.

PROPOSAL FOR THE DRAFT REGULATORY REFORM (FINANCIAL SERVICES AND MARKETS ACT 2000) ORDER 2006

Introduction

77. This is a “first stage” proposal laid before Parliament on 18 December 2006 under section 6 of the Regulatory Reform Act 2001. An explanatory statement by HM Treasury has been laid with the proposal in accordance with section 6(2) of that Act.

78. The purpose of this proposal is to amend sections of the Financial Services and Markets Act 2000 (FSMA) relating to the regulatory functions of the Financial Services Authority (FSA) by removing restrictions, requirements, inconsistencies and anomalies that relate to how the FSA operates and thereby reducing burdens on the financial services sector.

79. The FSMA established a single regulatory framework for financial services and markets. It also established the FSA as the sole independent financial regulator and supervisor with powers to regulate sectors including insurance, investment business and banking. In 2003/4, the Treasury undertook a Two Year Review of FSMA to take stock of the new regulatory system after two years of operation. During the Review, various bodies representing the

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3 Members of the House may obtain both the proposal and explanatory statement from the Printed Paper Office. Both documents are also available at:

www.cabinetoffice.gov.uk/regulation/reform/orders/proposals.asp
financial services industry complained about unnecessary and disproportionate burdens and restrictions placed on industry by the FSA.

80. The proposal also forms part of a ten point action plan of reforms to wholesale and retail financial markets set out in the Government’s Pre-Budget Report 2005. The proposal would introduce:

- Changes to lighten the authorisation requirements in relation to partnerships whose members change; [Article 3]
- An amendment to remove unnecessary consultation between the FSA and regulators in other countries in the European Economic Area; [Article 4]
- Amendments to remove the obligation on the FSA to fulfil a number of procedural requirements associated with discontinuing or suspending the listing of a security; [Articles 5-7 and 11]
- Changes that would exempt the FSA from issuing a warning notice in cases where the cancellation of a sponsor’s approval has been requested by the issuer or sponsor himself; [Article 8]
- An amendment that would extend the FSA’s powers to waive or modify any (as opposed to only some) of its rules in respect of authorised and unauthorised persons; [Article 9]
- Amendments to lighten the burdens on the FSA when consulting on guidance; [Article 10] and
- An amendment to permit the FSA board to delegate the issuing of guidance. [Article 12]

Tests in the Regulatory Reform Act 2001

81. We are satisfied that, for each of the elements of this proposal, the requirements of the Regulatory Reform Act 2001 have been met.

Other tests

82. The proposed order is neither large (12 Articles), nor does its subject matter appear controversial within the definition which we set out in our 18th Report (2004–05). We note that the consultation exercises consulted on a broader range of proposals than contained in this RRO. Three proved controversial, including proposals to relax the FSA’s requirement to consult on rules, to relax its requirement to consult on other matters, and to amend the distribution of penalty income (paragraphs 213–218). These proposals are not included in this RRO.

Conclusion

83. We consider that the proposal for the draft Regulatory Reform (Financial Services and Markets Act 2000) Order 2006 meets the requirements of the Regulatory Reform Act 2001 and is appropriate to be made under it.
PROPOSAL FOR THE DRAFT REGULATORY REFORM (GAME) ORDER 2007

Introduction

84. This is a “first stage” proposal laid before Parliament on 11 December 2006 under section 6 of the Regulatory Reform Act 2001. An explanatory statement by the Department for Environment, Food and Rural Affairs has been laid with the proposal in accordance with section 6(2) of that Act.  

85. The purpose of this proposal is to abolish game licences and game dealing licences and to remove restrictions on dealing in game birds and venison during the close season. Each element is removing or reducing a burden no longer considered desirable.  

86. The 19th century Game Acts were intended to ensure that game was not killed during breeding seasons and to prevent poaching and the sale of illegally killed game. They did this in part by providing for licences to take, kill or deal in game and by prohibiting the sale of game in the close season. Refrigeration and freezing have made the latter provision an anachronism. The licensing provisions are no longer considered effective or necessary. Together, they will be replaced with an offence of selling or possessing a game bird that is known, or believed, to have been killed or taken illegally. The proposal would:

- remove the requirement to hold a game licence in order to take or kill game; [Article 2]
- remove the requirement to hold a local authority licence and an excise licence (dealing licences) in order to deal in game; [Article 3] and
- remove the restrictions on dealing in game birds and venison during the close season, permitting game to be sold by everyone all year round provided that the animal in question was lawfully killed. [Article 4]

Tests in the Regulatory Reform Act 2001

87. We are satisfied that, for each of the elements of this proposal, the requirements of the Regulatory Reform Act 2001 have been met.

Other tests

88. The proposed order is neither large (18 Articles), nor does its subject matter appear controversial within the definition which we set out in our 18th Report (2004–05). We note that the consultation exercise consulted on a broader range of proposals than contained in this RRO. Some of that broader category proved controversial, e.g. a relaxation of the rules on Sunday and Christmas Day shooting. Those proposals are not included in this RRO.

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4 Members of the House may obtain both the proposal and explanatory statement from the Printed Paper Office. Both documents are also available at:
www.cabinetoffice.gov.uk/regulation/reform/orders/proposals.asp
Conclusion

89. We consider that the proposal for the draft Regulatory Reform (Game) Order 2007 meets the requirements of the Regulatory Reform Act 2001 and is appropriate to be made under it.
APPENDIX 1: SERIOUS CRIME BILL [HL]

Memorandum by the Home Office

Introduction

1. The bill is in four Parts. Part 1 creates serious crime prevention orders. Part 2 creates offences in respect of encouraging or assisting crime to give effect to the Law Commission’s Report Inchoate Liability for Assisting and Encouraging Crime (Law Com No. 300, CM 6878, 2006). Part 3 consists of various measures to prevent or disrupt serious and other crimes. Chapter 1 of Part 3 provides a power for public authorities to share data with other members of an anti-fraud organisation specified by order made by the Secretary of State. It also provides a statutory basis for the Audit Commission’s National Fraud Initiative (which takes place once every two years). Chapter 2 of Part 3 transfers the functions of the Assets Recovery Agency to the Serious Organised Crime Agency and other public bodies and provides for the abolition of that Agency. Chapter 2 also extends the powers of those financial investigators who are accredited under section 3 of the Proceeds of Crime Act 2002 and extends the use of production orders and search and seizure warrants under Part 8 of that Act to investigations in connection with cash seized under Chapter 3 of Part 5 of that Act. Chapter 3 of Part 3 amends the application of the regulation of investigatory powers to Revenue and Customs, but does not include powers to make delegated legislation. Part 4 sets out supplementary provisions, including provisions about delegated legislation.

Part 1: Serious Crime Prevention Orders

Clause 4(4): Power to amend Schedule 1 (list of serious offences)

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: affirmative resolution

2. The power to make a serious crime prevention order is based on a person having been involved in serious crime and the aim of such an order is to prevent, restrict or disrupt that person’s involvement in serious crime. The phrases “involved in serious crime” and “involvement in serious crime” are both defined in clause 2 (for England and Wales), clause 3 (for Northern Ireland) and clause 4 (for England, Wales and Northern Ireland). The definition includes reference to the commission or facilitation of a serious offence in England and Wales or, as the case may be, Northern Ireland and, in the case of “involved in serious crime”, outside England and Wales or Northern Ireland. The term “a serious offence in England and Wales” is defined in clause 2(2) and includes an offence that is specified in Part 1 of Schedule 1. The term “a serious offence in a country outside England and Wales” is defined in clause 2(5) and includes an offence that would be an offence in England and Wales and that would be specified in Part 1 of Schedule 1 if committed in England and Wales. The term “a serious offence in Northern Ireland” is defined in clause 3(2) and includes an offence that is specified in Part 2 of Schedule 1. The term “a serious offence in a country outside Northern Ireland” is defined in clause 3(5) and includes an offence that would be an offence in Northern Ireland and that would be specified in Part 2 of Schedule 1 if committed in Northern Ireland. Clause 4(4) allows the Secretary of State to amend the lists in Schedule 1 by order. The power will enable the
lists to be kept up to date and modified when appropriate without the need for primary legislation.

3. As an order under clause 4(4) will amend primary legislation it is considered that the most appropriate parliamentary procedure is the affirmative resolution procedure; as to which, see clause 76(3).

 Clause 7: Exceptions to those who can be subject to a serious crime prevention order

 Power conferred on: Secretary of State

 Power exercisable by: Order made by statutory instrument

 Parliamentary procedure: negative resolution

4. A serious crime prevention order can be imposed on any “person”. This term includes natural persons and, by virtue of Schedule 1 to the Interpretation Act 1978 (c. 30), also includes bodies corporate and unincorporated. It is considered that there may be certain persons that should not be capable of being subject to a serious crime prevention order because it would not be appropriate for them to be so subject. This power allows the Secretary of State to make an order excluding such bodies from the ambit of the provisions. The order will be subject to the negative resolution procedure because it is considered that providing for an exception will not amount to an amendment to primary legislation and that this is the appropriate level of parliamentary scrutiny (see clause 76(6)).

Clause 27(5) and 28(5): power to make an order for the winding up of partnerships

 Power conferred on: Lord Chancellor, with the concurrence of the Secretary of State and the Lord Chief Justice

 Power exercisable by: Order made by statutory instrument

 Parliamentary procedure: negative resolution

5. Clause 27 allows a relevant applicant authority to present a petition for the winding up of a company if that company has been convicted of a breach of a serious crime prevention order and the authority considers it to be in the public interest for the company to be wound up. Clause 27(5), in relation to England and Wales, taps into the existing order making power in section 420 of the Insolvency Act 1986 (c. 45) to allow an order to be made to allow the winding up of a partnership that has been convicted of breach of a serious crime prevention order. An order under section 420, as modified by clause 27(5), will provide that the provisions of the Insolvency Act 1986 are to apply to the winding up of a partnership with such modifications as are specified in the order.

6. Clause 27(7) limits the power in subsection (5) by providing that an order made by virtue of that subsection must only allow a court to wind up a partnership if the partnership has been convicted of an offence under clause 25 and the court considers that it is just and equitable for the partnership to be wound up. The power in section 420 is subject to the negative resolution procedure and it is not considered necessary to change that position insofar as an order relates to the winding up of a partnership for breach of a serious crime prevention order.

7. Clause 28(5) makes identical provision in relation to Northern Ireland. It allows the power in Article 364 of the Insolvency (Northern Ireland) Order 1986 (SI 1986/2405
Clauses 27(6) and 28(6): power to make an order for the winding up of a relevant body

\[ \text{Power conferred on: Secretary of State} \]

\[ \text{Power exercisable by: Order made by statutory instrument} \]

\[ \text{Parliamentary procedure: negative resolution} \]

8. Clause 27 allows a relevant applicant authority to present a petition for the winding up of a company if that company has been convicted of a breach of a serious crime prevention order and the authority considers it to be in the public interest for the company to be wound up. Clause 27(6) allows the Secretary of State to make an order to allow a relevant body to be wound up. The order will apply the provisions of the Insolvency Act 1986 to a relevant body with such modifications as are specified in the order. Clause 27(7) limits the power in subsection (6) by providing that an order made by virtue of that subsection must only allow a court to wind up a relevant body if the relevant body has been convicted of an offence under clause 25 and the court considers that it is just and equitable for the relevant body to be wound up. The power is subject to the negative resolution procedure (see clause 76(6)) as this is consistent with the power in relation to partnerships referred to in clause 27(5).

9. Clause 28(6) makes identical provision in relation to Northern Ireland. It allows for the provisions of the Insolvency (Northern Ireland) Order 1986 to be applied with modifications. This power is also subject to the negative resolution procedure (see clause 76(6)). Clause 28(7) limits the operation of the power in the same way as clause 27(7).

Clauses 27(11)(d) and 28(11)(d): power to add relevant bodies

\[ \text{Power conferred on: Secretary of State} \]

\[ \text{Power exercisable by: Order made by statutory instrument} \]

\[ \text{Parliamentary procedure: negative resolution} \]

10. Clause 27(6) allows the Secretary of State to make an order to allow a “relevant body” to be wound up for breach of a serious crime prevention order. The term “relevant body” is defined in clause 27(11). Paragraphs (a) to (c) of the definition list a number of specific bodies. Paragraph (d) allows the Secretary of State to add other bodies to the list of relevant bodies. This will allow the Secretary of State to provide for the winding up of bodies that he considers ought to be capable of being wound up under these provisions. The power is subject to the negative resolution procedure (see clause 76(6)) which is considered to be the appropriate level of parliamentary scrutiny.

11. Clause 28(11)(d) provides a corresponding power to allow the Secretary of State to add to the list of Northern Ireland relevant bodies; this power is also subject to the negative resolution procedure.
Clause 32: power to make provision for overseas bodies

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: negative resolution

12. Clauses 29, 30 and 31 make provision to allow serious crime prevention orders to be made and operate in relation to bodies corporate (including limited liability partnerships), partnerships and unincorporated associations respectively. Clause 32 allows the Secretary of State to make modifications to those provisions insofar as they relate to overseas bodies. The power is subject to the negative resolution procedure (see clause 76(6)) and this is considered to be the appropriate level of parliamentary scrutiny.

Clause 34(4) and (5): power to make rules of court in respect of Crown Court proceedings

Power conferred on: Civil Procedure Rules Committee

Power exercisable by: Rules made by statutory instrument

Parliamentary procedure: negative resolution

13. Clause 19 of the Bill allows the Crown Court to make a serious crime prevention order when a person is convicted of a serious offence. Clause 20 allows the Crown Court to vary the serious crime prevention order of a person who is convicted of a serious offence. Clause 21 allows the Crown Court to vary a serious crime prevention order when a person is convicted of a breach of a serious crime prevention order. Clause 34(1) provides that the proceedings under these clauses are to be civil proceedings. This means that provision must be made for the procedure to be followed before the Crown Court because the criminal procedure rules will not apply. Clause 34(4) and (5) enable rules of court under section 1 of, and Schedule 1 to, the Civil Procedure Act 1997 (c. 12) to be made in relation to the proceedings before the Crown Court in relation to a serious crime prevention order. Clause 34(5) specifically provides that rules made under the powers conferred by clause 34(4) may, in particular, include rules of the same kind as those made in relation to the High Court. This subsection has been included because normally applications for the making and variation of serious crime prevention orders will be dealt with by the High Court.

14. The Civil Procedure Act 1997 provides for civil procedure rules to be made by the Civil Procedure Rules Committee. The rules are subject to the negative resolution procedure and it is not considered that there is any need to change that position in so far as the rules relate to the procedure before the Crown Court in relation serious crime prevention orders.
Schedule 2, paragraph 5: power of the Attorney General to make regulations about fees of legal representatives and costs and expenses of witnesses

**Power conferred on:** the Attorney General

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

**Parliamentary Procedure:** negative resolution

15. The power to apply for a serious crime prevention order is conferred, amongst others, on the Director of Public Prosecutions (“the DPP”). Part 1 of Schedule 2 to the Bill makes provision for the exercise of this function by the DPP including extending the provisions of section 14 of the Prosecution of Offences Act 1985 (c. 23) to enable the Attorney General to make regulations about the fees of legal representatives and the costs and expenses of witnesses and others who attend proceedings other than to give evidence, in relation to proceedings about serious crime prevention orders.

16. The power in the Prosecution of Offences Act 1985 is subject to the negative resolution procedure and it is not considered appropriate to change that position in so far as the regulations relate to serious crime prevention orders.

Schedule 2, paragraph 15: power of the Attorney General to make regulations about fees of legal representatives and costs and expenses of witnesses

**Power conferred on:** the Attorney General

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

**Parliamentary Procedure:** negative resolution

17. The power to apply for a serious crime prevention order is conferred, amongst others, on the Director of the Serious Fraud Office. Part 1 of Schedule 2 to the Bill makes provision for the exercise of this function by the Director of the Serious Fraud Office including extending the provisions of paragraph 8 of Schedule 1 to the Criminal Justice Act 1987 (c. 38) to enable the Attorney General to make regulations about the fees of legal representatives and the costs and expenses of witnesses and others who attend proceedings other than to give evidence, in relation to proceedings about serious crime prevention orders.

18. The power in the Criminal Justice Act 1987 is subject to the negative resolution procedure and it is not considered appropriate to change that position in so far as the regulations relate to serious crime prevention orders.
Part 2: Encouraging or assisting crime

Clause 56(3) Power to add or remove provisions where the reference to the common law offence of incitement has effect as a reference to the offences under clauses 39 and 40

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

19. Clause 56(1) provides that in the provisions listed in Part 1 of Schedule 5 to the Bill, any reference to the common law offence of inciting the commission of another offence, which is abolished in clause 54, has effect as a reference to the offences under Part 2 of the Bill. Subsection (3) provides a power for the Secretary of State to amend Part 1 of Schedule 5 either by adding or removing a provision from the list in that Part.

20. This is a limited power which will be used to provide that where there are references to the common law of incitement, these are to be read as if they are references to the new offences under Part 2 of the Bill.

21. An order under clause 56(3) is subject to the affirmative resolution procedure (see clause 76(3)). The Department considers that this would provide the appropriate level of parliamentary scrutiny.

Part 3: Other measures to prevent and disrupt serious and other crime

Chapter 1: Prevention of fraud

Clause 61(8): Power to specify an anti-fraud organisation in context of disclosure of information to prevent fraud

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

22. Clause 61(1) enables a public authority (as defined by clause 61(8)), for the purposes of preventing fraud or a particular kind of fraud, to disclose information as a member of an anti-fraud organisation or otherwise in accordance with arrangements made by such an organisation. Clause 61 does not limit the circumstances in which information may be disclosed apart from that clause (clause 61(7)). No disclosure is authorised by clause 61 if it contravenes the Data Protection Act 1998 or is prohibited by Part 1 of the Regulation of Investigatory Powers Act 2000.

23. The organisation needs to be “specified” and this is defined by clause 61(8) as specified by order made by the Secretary of State. By virtue of clause 76(6) such an order is subject to annulment in pursuance of a resolution of either House of Parliament. It is submitted that this represents the appropriate level of parliamentary scrutiny. If Parliament enacts clause 61, it will have accepted the principle of data sharing for the prevention of fraud with members of a specified anti-fraud organisation. The order enables such an organisation to be identified and thereby enables the data sharing which is envisaged by the clause to take place.
Clause 62(7): Power to specify information and public authorities for purposes of offence in clause 61

*Power conferred: Secretary of State*

*Power exercisable by: Order made by statutory instrument*

*Parliamentary procedure: Negative resolution*

24. Clause 62(1) creates an offence in respect of the further disclosure of information which has been disclosed to the person making the further disclosure by a public authority as a result of membership of an anti-fraud organisation that has been specified under clause 61 (see the definition of “anti-fraud organisation” in clause 61(8)). The offence is subject to the exceptions in clause 62(2) and the defence in clause 62(3).

25. However, the offence only applies to “protected information” within the meaning of clause 62(5). Such information is either “revenue and customs information” within the meaning of clause 62(6)(a) or “specified information” disclosed by a “specified public authority”. Under the definition of those expressions in clause 62(7), such information is information specified or described by order made by the Secretary of State and such an authority is one so specified or described. By virtue of clause 76(6), the order is subject to the negative resolution procedure. It is submitted that this is the appropriate level of parliamentary scrutiny for an order which does what the clause envisages, namely, specifying those public authorities whose information benefits from the additional protection provided by the offence in clause 62. Such an order is likely to limit the information which is so protected to information which reveals the identity of the person to whom it relates. However, as it is not known which public authorities (if any) will be specified under this power, it is not known what information of such an authority needs to be protected; hence the need to provide for this by subordinate legislation.

Schedule 6, paragraph 2 (section 32G of the Audit Commission Act 1998): Power to specify additional purposes for undertaking data-matching and to add public bodies to the mandatory list

*Power conferred on: Secretary of State*

*Power exercised by: Order made by statutory instrument*

*Parliamentary procedure: Affirmative resolution*

26. Under new section 32A(3) of the Audit Commission Act 1998, to be inserted by paragraph 2 of Schedule 6 to the Bill, the Commission may conduct data-matching exercises for the purposes of assisting in the prevention and detection of fraud. However it has been recognised that such exercises may also benefit the public in ways that extend beyond the detection and prevention of fraud, and that there should be sufficient flexibility to add further purposes if appropriate in due course. This is provided for in section 32G(1)(a)(see further below). Section 32G(1)(b) also enables the Secretary of State to modify the application of Part 2A of the Audit Commission Act 1998 (i.e. those provisions to be inserted Schedule 6 of the Bill) in relation to any new purposes that are added.

27. New section 32G(2) sets out the kinds of purposes that the Secretary of State may seek to add to section 32A(3). These include (but are not limited to) the prevention and detection of crime more generally (i.e. beyond fraud), assisting in the apprehension and prosecution of offenders and assisting in the recovery of debt owing to public bodies. It is
submitted that these types of purposes could, in due course, provide significant benefits to the public.

28. Under new section 32B, to be inserted by paragraph 2 of Schedule 6 to the Bill, there will be a mandatory duty on certain public bodies to participate in the Commission’s data-matching exercise. These include bodies that are subject to audit and English best value authorities. These bodies are currently within the Audit Commission’s statutory remit. In addition, however, there may be other bodies in the future that the Secretary of State considers should also be subject to section 32B. It is submitted that section 32G(3)(a) and (c) provide the requisite degree of flexibility, enabling the Secretary of State to add to, or remove from that list, additional public bodies as appropriate. Again, under section 32G(3)(b), the Secretary of State may modify the application of Part 2A of the Audit Commission Act 1998 to those bodies as appropriate.

29. Section 32G(4) provides that an order made under section 32G may also include such incidental, consequential or transitional provision as the Secretary of State thinks fit. It is submitted that this section should help ensure that any orders made under section 32G are fully compatible with the overall scheme of the Act.

30. Section 32G(5) defines “public body” to include bodies or persons who exercise functions of a public nature, but only to the extent of those functions. It is submitted that this achieves the correct balance, providing scope to include relevant public bodies, but also any private sector body to the extent that it might exercise public functions.

31. By virtue of section 52(1A) of the Audit Commission Act 1998 (to be inserted by paragraph 3 of Schedule 6 to the Bill) an order under new section 32G will be subject to the affirmative resolution procedure. This is regarded as appropriate having regard to the powers conferred by new section 32G(1).

Chapter 2: Proceeds of crime

Clause 66(1): Power to appoint day for the Asset Recovery Agency and the corporation sole that is its Director ceasing to exist

Power conferred: Secretary of State

Power exercised by: Order made by statutory instrument

Parliamentary procedure: None

32. Paragraphs 103 and 120 of Schedule 7 to the Bill repeal sections 1 and 2 of, and Schedule 1 to, the Proceeds of Crime Act 2002 which establish the Director of the Assets Recovery Agency and the Agency. Clause 66(1) provides for the Secretary of State by order to appoint a day on which the Agency and the corporation sole that is its Director to cease to exist. As the principle of the abolition of the Agency and Director will have been approved by Parliament in enacting Schedule 7, this Order (which resembles a commencement order) is not subject to any parliamentary procedure.
Schedule 7, paragraph 85: Power to repeal Part 6 of the Proceeds of Crime Act 2002

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

33. Part 6 of the Proceeds of Crime Act 2002, as amended by Schedule 7 to the Bill, enables the Serious Organised Crime Agency to serve notice on the Commissioners for Her Majesty’s Revenue and Customs that it will take on certain of their functions. This power is to be subject to a review by that Agency, the Commissioners and the Home Office to determine whether Revenue functions are needed by the Agency as a means to disrupt crime and deprive suspected criminals of the proceeds of their criminal acts. If it is determined that they are not, the power to repeal Part 6 in paragraph 85 of Schedule 7 to the Bill will be exercised.

34. By virtue of clause 76(3), the power to make an order repealing Part 6 is subject to the affirmative resolution procedure. This is the appropriate level of parliamentary scrutiny for an order that repeals primary legislation.

Schedule 7, paragraph 138(2): power to designate public functions as exceptions to the offence in section 40 of the Commissioners for Revenue and Customs Act 2005

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

35. Section 40(1) of the Commissioners for Revenue and Customs Act 2005 creates an offence which prohibits the Revenue and Customs Prosecution Office from disclosing information which is held by it in connection with its functions and which relates to an identifiable person. Section 40(2) sets out exceptions to this offence. The amendment made by paragraph 138(2) of Schedule 7 to the Bill inserts further exceptions. These exceptions reflect those in respect of the Director of the Assets Recovery Agency (“the Director of ARA”) in section 438(1) of the Proceeds of Crime Act 2002. Under Part 2 of Schedule 7 to the Bill, the Director of Revenue and Customs Prosecutions will acquire the functions of Director of ARA under Chapter 2 of Part 5 of the 2000 Act (civil recovery).

36. New section 40(2)(cb), to be inserted by paragraph 138(2) of Schedule 7 to the Bill enables the Secretary of State by order to create further exceptions to the offence in section 40(1) if the disclosure is made for the purposes of the exercise of a function which the Secretary of State thinks is a public function. By virtue of section 40(10A)(c) to be inserted by paragraph 138(3) of Schedule 7, such an order is subject to the affirmative resolution procedure. This power is the same as the power conferred on the Secretary of State by section 438(1)(i) and (9) of the 2002 Act. That power was also subject to the affirmative resolution procedure (see section 459(6)(a)). The power in section 438(1)(i) and (9) has been exercised and an equivalent order may be needed under this new power. The affirmative resolution procedure is seen as the appropriate level of parliamentary control in respect of a power that has an impact on the scope of a provision in primary legislation.
Schedule 8, paragraph 1: power to make a scheme transferring staff, property, rights and liabilities of the Assets Recovery Agency to the Serious Organised Crime Agency and the National Policing Improvement Agency

Power conferred on: Secretary of State

Power exercisable by: Statutory scheme

Parliamentary procedure: None

37. Clause 66(3) provides that Schedule 8 to the Bill has effect. By virtue of the definition of “transfer scheme” in paragraph 1 of Schedule 8, power is conferred on the Secretary of State to make a scheme under the powers conferred by that Schedule. The scheme is not to be made as a statutory instrument.

38. The Assets Recovery Agency was established by section 1 of, and Schedule 1 to, the Proceeds of Crime Act 2002. Its Director is a corporation sole (section 1(3)). Clause 66(1) provides for the Agency and the corporation sole that it is its Director ceasing to exist. This is consequential on the amendments made to the 2002 Act by Schedule 7 to the Bill. That Schedule repeals the functions of the Director of the Assets Recovery Agency under Parts 2 and 4 of the 2002 Act and transfers the functions under Parts 1, 5, 6 and 8. Most of the functions are transferred to the Serious Organised Crime Agency (established under Part 1 of the Serious Organised Crime and Police Act 2005).

39. Paragraphs 2 to 9 of Schedule 8 to the Bill confer power to make provision for the transfer of staff, property, rights and liabilities of the Assets Recovery Agency to the Serious Organised Crime Agency and the National Policing Improvement Agency (established under Schedule 1 to the Police and Justice Act 2006). Paragraph 10 of Schedule 8 requires the Secretary of State to consult such bodies appearing to represent the interests of the Director and members of staff of the Assets Recovery Agency as he considers appropriate.

40. Similar provisions to make transfer schemes other than by order subject to parliamentary scrutiny were contained in section 58 of, and Schedule 3 to, the Serious Organised Crime and Police Act 2005 (as respects transfer to the Serious Organised Crime Agency); section 6(3) of, and Schedule 2 to, the Courts Act 2003 (as respects the abolition of Magistrates’ Courts Committee); and section 30(3) of, and Schedule 3 to, the Water Act 2003. Following these precedents, and having regard to the point that the scheme merely gives effect to transfers which will have been approved by Parliament, it is not proposed to make the scheme subject to any parliamentary procedure.

Clause 70(2) and (4): Power to specify a description of accredited financial investigator

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

41. The amendment which subsection (2) of clause 70 makes to section 45 of the Proceeds of Crime Act 2002 ensures that a financial investigator who is accredited under the scheme established under section 3 of that Act (see section 3(5)) and who exercises the power to seize property to which a restraint order applies by virtue of the amendment made by subsection (1) falls within a description of such investigators specified by order of the Secretary of State. The same comments apply to the amendment which subsection (4)
makes to section 194 of the 2002 Act (the equivalent Northern Ireland provisions) in respect of the amendment made by subsection (3).

42. The power to make such an order is set out in section 453 of the Proceeds of Crime Act 2002. An order under it is subject to the negative resolution procedure by virtue of section 459(4) of that Act. The power enables the Secretary of State to provide that a particular reference in that Act to an accredited financial investigator is a reference to such an investigator who falls within a description specified in the order. By virtue of an amendment made by clause 73(1), the description may be framed by reference to a person having undertaken particular types of training.

43. There are various existing references in the Proceeds of Crime Act 2002 where an accredited financial investigator needs to fall within a description specified in such an order in order to be able to exercise a particular power (see, for example, section 378(2)(d) and (6)(c)). The amendments made by clause 70(2) and (4) merely extend the circumstances when an order is needed to those resulting from the amendments made by clause 70(1) and (3). The level of parliamentary scrutiny remains the same and is, in the Department’s view, appropriate to the subject matter.

44. The comments made in the context of clause 70(2) and (4) apply to equivalent amendments made by clause 72(2), (4), (6) and (8) and paragraph 12 of Schedule 10.

Schedule 10, paragraph 3(2): Power to specify a description of accredited financial investigator

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

45. Paragraph 3(2) of Schedule 10 to the Bill inserts an additional paragraph into section 290(4) of the Proceeds of Crime Act 2002 to provide a definition of “senior officer” in respect of accredited financial investigators. An accredited financial investigator is a financial investigator accredited under the scheme established under section 3 of the 2002 Act. Section 290 requires the approval of such an officer before the search and seizure powers conferred by section 289 of that Act can be exercised in any case when it is not practicable to get the approval of a justice of the peace. A senior officer in this context is an accredited financial investigator who falls within a description specified for this purpose by order of the Secretary of State under section 453 of the 2002 Act. Similar provision is made in respect of officers in relation to accredited financial investigators by section 378(2)(d) and (6)(c) of that Act. Under section 459(4), such an order is subject to the negative resolution procedure and this is considered the appropriate level of parliamentary scrutiny.

Schedule 10, paragraph 11: Power to amend provision about compensation in respect of cash seized by accredited financial investigators

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

46. Chapter 3 of Part 5 of the Proceeds of Crime Act 2002 enables constables and officers of Revenue and Customs to seize cash where there are reasonable grounds to suspect that
the cash is recoverable property (within the meaning of section 316(1) of that Act) or intended for use in unlawful conduct (within the meaning of section 241 of that Act). Section 298 enables a magistrates’ court in England and Wales and Northern Ireland to order the forfeiture of such seized cash. Section 302 enables the person to whom the cash belongs or from whom it was seized to apply to a magistrates’ court for compensation where cash has been seized and no forfeiture order has been made. Section 302(7) provides for the authority which is to pay such compensation.

47. Schedule 10 to the Bill will amend Chapter 3 of Part 5 of the 2002 Act to confer the powers to recover cash on accredited financial investigators in addition to constables and officers of Revenue and Customs. Paragraph 11 of that Schedule amends section 302 by inserting a new subsection (subsection (7A)) to provide for the authority which is to pay compensation under section 302 in the case of cash seized by an accredited financial investigator when no forfeiture order has been made. New subsection (7A) makes provision for payment in the case of such investigators who are civilians employed by the police as well as members of Government departments. It also includes a provision requiring the employer of the investigator to pay in those cases for which express provision is not made (see subsection (7A)(f)).

48. In addition, paragraph 11 will insert new subsection (7B) in section 302. This will confer power to amend new subsection (7A) by order made by the Secretary of State. The reason for including this provision is that there might be a category of accredited financial investigator employed by an authority in relation to which the catch-all provision in new subsection (7A)(f) is inappropriate. This is because there may be cases, as is in the case of the police, where expenses are met otherwise than by the employer. In this context, it is necessary to note that there are no restrictions on the categories of persons who can become accredited financial investigators.

49. As the new power will amend primary legislation, section 459 of the 2002 Act (which provides for parliamentary scrutiny of orders and regulations made under it) is amended by paragraph 14(3) of Schedule 10 so that an order made under the new power will be subject to the affirmative resolution procedure. New section 459(6A), to be inserted by paragraph 14(4) of Schedule 10, will ensure that an order under the new power is not to be treated as a hybrid instrument.

Schedule 10, paragraph 12: Power to specify a description of accredited financial investigator

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

50. The powers which are to be conferred on accredited financial investigators by the amendments which Schedule 10 to the Bill will make to Chapter 3 of Part 5 of the Proceeds of Crime Act 2002 are described in the context of paragraph 11 of Schedule 10 above. Paragraph 12 of that Schedule will further amend Chapter 3 by inserting a new section (section 303A) about the exercise by accredited financial investigators of their new functions. New section 303A(1) requires that such investigators fall within a description specified in an order made by the Secretary of State for the purposes of the relevant provision in Chapter 3 under section 453 of the 2002 Act. The comments on the powers under section 453 are discussed above in the context of the amendments made by clause 70(2) and (4). Those comments apply equally to new section 303A(1).
Clause 72(2),(4),(6) and (8): Power to specify a description of accredited financial investigator

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

51. The powers conferred by the amendments made by subsections (2),(4),(6) and (8) of clause 72 relate to the amendments made by subsections (1), (3), (5) and (7), respectively. The amendments made by subsections (1), (3) and (5) add references to accredited financial investigators to the persons who can exercise the powers in sections 352 and 353 of the Proceeds of Crime Act 2002 which concern search and seizure warrants in respect of investigations under Part 8 of that Act. Subsection (7) amends section 378(3A) (which will be inserted by Schedule 9 to the Bill) to insert a reference to accredited financial investigators in the definition of “appropriate officer” in the context of detained cash investigations. In each case, the amendments made by subsections (2), (4), (6) and (8) qualify these references to accredited financial investigators to require that they fall within a description specified in an order for the purposes of these new provisions made by the Secretary of State under section 453 of the 2002 Act.

52. Orders under section 453 were discussed in the context of the amendments made by clause 70(2) and (4) (above). The comments on section 453 in relation to those amendments apply equally in relation to these amendments.

Part 4: Miscellaneous and general

Clause 77: Power to make supplementary, incidental and consequential provision

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution where primary legislation is amended or repealed; otherwise negative resolution

53. Clause 77(1) confers power on the Secretary of State by order to make such supplementary, incidental or consequential provision as he consider necessary for the purposes (general or particular) of the Bill or in consequence of provision made by or under the Bill or for giving full effect to the Bill or any such provision. The power does not extend to matters that are within the legislative competence of the Scottish Parliament (clause 77(3)). However, the power may be exercised by amending, repealing, revoking or otherwise modifying any enactment. By virtue of clause 76(3), an order under this provision is subject to the affirmative resolution procedure (if it amends or repeals primary legislation and to the negative resolution procedure if it does not (see clause 76(4) and(5)).

54. The powers conferred by this clause are wide. But there are various precedents for such a provision including section 173 of the Serious Organised Crime and Police Act 2005, section 333 of the Criminal Justice Act 2003, section 426 of the Financial Services and Markets Act 2000 and section 127 of the Postal Services Act 2000. It is possible that further provision may be necessary to ensure that crime prevention orders under Part 1 of the Bill are effective. It is also possible that further amendments to legislation may be needed in respect of the National Fraud Initiative (Schedule 6) and the abolition of the Assets Recovery Agency (Schedule 7). Indeed, as respects the latter, the amendments
which Schedules 7 and 9 make to the Proceeds of Crime Act 2002 are drafted on the assumption that Schedule 9 will come into force before Schedule 7 (see paragraph 90(30 of Schedule 7 and paragraph 96 of Schedule 9); further amendments would be needed if that is not the case.

55. As any order amending primary legislation is subject to the affirmative resolution procedure and the negative resolution procedure applies to other orders under this clause, it is submitted that the appropriate level of parliamentary scrutiny applies.

Clause 78(2) and (3): Power to make transitional and transitory provisions and savings

*Power conferred on:* Secretary of State and the Scottish Ministers

*Powers exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* None

56. Clause 78(2) is a standard provision in Bills. It enables the Secretary of State by order to make such provision as he considers appropriate for transitional, transitory and saving purposes in connection with the coming into force of any provision of the Bill. The power is likely to be exercised with the power to bring the Bill’s provisions into force by order (as to which, see the note on clause 81 below). Like that order and similar powers in other legislation (such as section 178(10) of the Serious Organised Crime and Police Act 2005), the order is not subject to any parliamentary procedure. It is not considered appropriate that it should be so subject as the power is exercisable only in the context of the coming into force of the Bill’s provisions. Clause 78(3) confers an equivalent power on the Scottish Ministers in respect of those provisions in the Bill specified in clause 81(4) which they are to bring into force.

Clause 81: Commencement power

*Power conferred on:* Secretary of State and the Scottish Ministers

*Power exercisable by:* Order made by statutory instrument

*Parliamentary procedure:* None

57. Clause 81 is the standard power to bring provisions of the Bill into force by commencement order. As usual with commencement orders, they are not subject to any parliamentary procedure. Parliament will have approved the provisions to be commenced by enacting them; commencement by order enables the provisions to be brought into force at a convenient time.

Home Office
APPENDIX 2: WELFARE REFORM BILL

Memorandum by the Department for Work and Pensions

Introduction

1. The Welfare Reform Bill was introduced in the House of Commons on 4 July 2006 and was amended in Standing Committee [and during Report]. It was introduced to the House of Lords on 11th January 2007

2. This memorandum identifies the provisions for delegated legislation in the Welfare Reform Bill. It explains the purpose of the powers, the reason why they are left to delegated legislation and the procedure selected for the powers and why it has been chosen.

3. The Bill seeks to implement many of the proposals set out in the Green Paper ‘A new deal for welfare: Empowering people to work’ (CMD 6730) which was published in January 2006 and which sought views on the proposals. Consultation ended on 21 April 2006. Over 600 responses were received. The results of the consultation, and the Government’s response, were published in June 2006 in ‘A new deal for welfare: Empowering people to work – Consultation report’ (CMD 6859).

4. The Bill is organised into the following parts;
   - Part 1 (Clauses 1-28) – Employment and Support Allowance;
   - Part 2 (Clauses 29-39) – Housing Benefit and Council Tax Benefit;
   - Part 3 (Clauses 40-48) – Social Security Administration: General;
   - Part 4 (Clauses 49-61) – Miscellaneous;
   - Part 5 (Clauses 62-69) – General; and
   - Schedules 1-8.

5. The main provisions of the Bill provide for the introduction of the proposed Employment and Support Allowance (ESA) and for changes relating to entitlement to and administration of Housing Benefit and Council Tax Benefit including the loss of Housing Benefit following eviction for anti-social behaviour. Other areas where there are delegated powers in the Bill deal with:
   - the use of benefits information and information sharing between relevant authorities;
   - local authority investigation and prosecution of benefit fraud;
   - the care and mobility components of Disability Living Allowance;
   - amendments to the Vaccine Damage Payments Act 1979;
   - payments of allowances to care home residents;
   - the Independent Living Funds; and
   - consequential amendments to existing primary legislation.

Bill measures relating to benefits for bereaved persons, loss of benefit for commission of benefit offences and overpayment recovery contain no regulations so are not covered by this memorandum.

6. The Department has followed the precedent in current social security legislation by setting out the overall legislative framework on the face of the Bill and providing for regulations and orders to set out the matters of detail. Previous examples include the

7. This approach is particularly important as the rules governing Housing Benefit (HB) and Council Tax Benefit (CTB) are, and are intended to be for the new Employment and Support Allowance, closely linked to those governing other social security benefits such as Income Support, Incapacity Benefit, Jobseeker’s Allowance and Pension Credit. This approach provides the Secretary of State with the necessary flexibility to make changes in the light of operational experience and changing circumstances. This is particularly important with the introduction of a new benefit where there may need to be ‘settling-in’ changes. For example, regulations which set out how to calculate and administer benefits are subject to regular amendment and updating to make changes to mirror and take account of new developments across other social security benefits.

Employment and Support Allowance

8. Part 1 of the Bill contains the framework of measures for the proposed Employment and Support Allowance (ESA) that will be available for people aged between 16 and State Pension age (currently 65 for men and 60 for women). The main elements of Part 1 and its associated Schedules are:

- the framework of the two elements of ESA – contributory allowance and income-related allowance;
- the conditionality framework for ESA;
- the arrangements for the administration of ESA;
- consequential amendments, following the introduction of ESA; and
- transitional arrangements to provide for existing Incapacity Benefit and Income Support cases at the point of change to have their benefit levels protected.

9. ESA will replace Incapacity Benefit and Income Support paid on grounds of incapacity. It will modernise the support provided to people of working age with a health condition or disability and introduce a new conditionality and support regime designed to help claimants to return to work where they have the capability to do so.

10. The Bill sets out the conditions of entitlement and the basic structure of ESA. In common with other income-related benefits such as Income Support, a claimant’s income (to be determined in accordance with regulations made under clause 16) will be deducted from his “applicable amount”. This is an amount which will be set out in regulations and will include the new ESA Support Component or Work-Related Activity Component.

11. Similarly, the contributory element follows many of the principles which apply to Incapacity Benefit. For example, entitlement is based on National Insurance contribution conditions, as set out in clause 1 and Part 1 of Schedule 1, and there are to be deductions for certain pension and other payments and allowances, as provided for in clauses 2 and 3.

12. The proposed delegated powers will enable regulations to provide for the detailed rules of the benefit and the way it is administered. As already stated, this will provide the Secretary of State with the flexibility to amend the detailed rules more easily, and within appropriate timescales, in the light of operational experience and other developments. This will ensure Parliamentary scrutiny is maintained. It also allows for the timely introduction of adjustments that necessarily occur from time to time, for example, for
changes to the amount of benefit or the level of the support and work-related activity components. Regulations will also provide for appropriate transitional arrangements.

Housing Benefit

13. Part 2 of the Bill includes measures to reform and improve the design and administration of Housing Benefit (HB) and Council Tax Benefit (CTB). The main elements of Part 2 would provide for secondary legislation to:

- facilitate national roll out of the Local Housing Allowance (LHA) for tenants living in the private rented sector (clause 29);
- allow a reduction, or non-payment, of Housing Benefit following eviction for anti-social behaviour and a refusal to take up rehabilitation (clause 30);
- support improvements to the extended payment scheme (clauses 31-33) and a clearer information sharing gateway between local authorities and rent officers (clause 34);
- allow changes to who Housing Benefit is normally paid (clause 36); and
- update the legislation to avoid potential discrimination regarding the treatment of income for certain war pensions (paragraphs 3 and 4 of Schedule 5).

14. Given the statutory role of local authorities in administering Housing Benefit (HB) and Council Tax Benefit (CTB), the Secretary of State has a duty (under section 176 of the Social Security Administration Act 1992) to consult with organisations that he considers to be representative of local authorities on new regulations and certain orders relating to HB and CTB. Hence, HB and CTB regulations are formally referred by the Department, in draft, to the four representative local authority associations covering England, Wales, Scotland and London for consultation. This requirement to consult will apply in the usual way to relevant orders and regulations made under the delegated powers in this Bill.

Other Bill elements

15. The clauses in Part 3 of the Bill containing delegated powers are those dealing with the sharing of social security information and benefit fraud.

Sharing of social security information

These provisions widen and clarify the extent to which information relating to social security can be shared between relevant authorities in relation to the administration of Housing Benefit. These authorities include, amongst others, local authorities that administer Housing Benefit and Council Tax Benefit, county councils in England and the Department for Work and Pensions. The provisions also deal with exchange of information relating to Housing Benefit and welfare services between the Secretary of State, local authority Housing Benefit teams and local authority teams working on the delivery of the “Supporting People” programme (which helps vulnerable people to live independently). These powers are designed to help increase take-up of benefits and simplify the administration of Housing Benefits.

Benefit Fraud

The two clauses dealing with benefit fraud would widen the current powers of local authority investigators so that they can investigate fraud committed in respect of social security benefits administered nationally by the Department for Work and
Pensions and also to allow the local authorities to bring prosecutions in respect of those benefits.

16. The clauses in Part 4 of the Bill containing delegated powers deal with a variety of topics. These provisions would:

- modify the existing delegated powers in sections 72(7) and 73(5) of the Social Security Contributions and Benefits Act, which allow the Secretary of State to prescribe circumstances in which a person is or is not taken to satisfy the conditions of entitlement to the care and mobility components of Disability Living Allowance, so that the additional entitlement conditions for children under the age of 16 years are subject to such regulations;

- in respect of Vaccine Damage Payments:
  - provide that, in such circumstances as may be specified, people of a specified description need not show that their vaccination was carried out in the United Kingdom or Isle of Man, where the vaccination was given under arrangements made by or on behalf of Her Majesty’s forces, a Government Department or other specified body;
  - allow appeal tribunals constituted in Northern Ireland to hear Vaccine Damage Payment appeal cases;
  - recast the existing rules which allow Attendance Allowance or the care component of Disability Living Allowance to be withdrawn from care home residents and others in similar situations where the costs of a disabled person’s accommodation, board and personal care are borne out of local or public funds;
  - allow the Secretary of State and the Department for Social Development in Northern Ireland to make consequential amendments to subordinate legislation as a consequence of the new power to make payments to the Independent Living Fund (2006); and
  - Clauses 57 and 58 amend the Pneumoconiosis etc. (Workers Compensation)1979 Act by substituting a new definition of ‘relevant employer’ and by updating the definition of dependant. The new definition of relevant employer is set out in schedule 6.

17. Part 5 of the Bill sets out the general provisions applying to the whole of the Bill, for example the general definitions of terms used in the Bill, the proposed territorial extent of the provisions and when provisions in the Bill could come into effect. There are delegated powers under clauses 62 ‘Northern Ireland’, 66 ‘Transition’ and 68 ‘Commencement’.

Territorial coverage

18. The Bill, with certain exceptions, extends to England, Wales and Scotland only. Clauses 41(1)-(10) 42 and 46 extend to England and Wales only. Paragraphs 1, 2, 4,11(3), 13 and 21 of Schedule 3 extend to Scotland only. A number of provisions, set out in clause 67(4) and (5) also extend, or apply only, to Northern Ireland. Certain provisions, set out in clause 67(6) also extend to the Isle of Man.

Parliamentary Scrutiny

19. The Department has considered in each case the appropriate procedure to follow in making regulations and orders. Most of the provisions deal with technical or procedural detail. On this basis and for the reasons set out in paragraphs 6 and 7 above, it is proposed that the delegated powers to make regulations or orders should be subject to negative resolution procedure, other than:
• the first regulations under clause 12;
• those regulations which by virtue of clause 18(1) are to have effect for a limited period;
• regulations under the new sections 130B(4) and 130D(2) of the Contributions and Benefits Act 1992 inserted by clause 30 of the Bill; and
• any regulations made under paragraph 9 of Schedule 6 to be inserted in the Pneumoconiosis etc. (Workers’ Compensation) Act 1979.

20. The Committee may also wish to note that, other than regulations made within six months of the primary provisions coming into force, the Department is required to submit social security regulations to the Social Security Advisory Committee for scrutiny and comment. Any benefit regulations made more than six months after the Bill provisions have been brought into force would fall within this scrutiny requirement.

General

21. All of the delegated powers, other than the powers of direction (see paragraph below), are exercisable by statutory instrument. The annex to this memorandum lists and provides references for all of the clauses containing powers to make delegated legislation. The Annex lists the provisions by which the powers are created. Provisions which illustrate how a delegated power must or may be used have not been listed, but have of course been explained where appropriate in this memorandum.

22. The commentary on clauses also includes an explanation of the proposed powers of direction in relation to the supply of information by rent officers in clause 35. It also includes an explanation of the proposed changes to the Secretary of State’s current powers of direction in section 139D of the Social Security Administration Act 1992. These changes are set out in clause 38 of the Bill. There are also direction powers at clause 14 and 46 which are explained in relation to the delegated powers in that clause.

23. All powers are exercisable by the Secretary of State, other than those inserted at sections 4(3A) and section 7A(1A) of the Vaccine Damage Payments Act 1979 by clause 56 and those inserted by clause 60(5) of the Bill which are exercisable by the Department for Social Development in Northern Ireland.

Analysis of delegated powers by clause

Clause 1 – Employment and Support Allowance

24. Clause 1 of the Bill provides for an Employment and Support Allowance (ESA) to be payable. The allowance will be payable as a “contributory allowance”, or as an “income-related allowance” (which can be paid on its own, or with the contributory allowance). The clause sets out the main conditions (“the basic conditions”) that must be met before a person can be entitled to ESA. It also provides that additional conditions need to be met in accordance with Schedule 1.

25. Although Clause 1 does not of itself contain delegated powers, the associated Schedule 1, discussed later in the commentary, does contain a number of powers.

Clause 2 – Amount of contributory allowance

26. Clause 2 provides for how the contributory allowance of ESA will be calculated. It provides that it will consist of a prescribed amount, plus, where certain conditions are fulfilled, either a support component or a work-related activity component, less certain prescribed deductions. The decision as to which component will be payable will be
determined following an assessment of whether the claimant has limited capability for work-related activity under clause 9. Given that benefit rates are reconsidered on an annual basis, it is appropriate that the amount of benefit and the components are set out in regulations rather than in primary legislation. It is also appropriate that these regulations follow the negative procedure given the need to be able to align with amounts and conditions with those in other negative provisions, for example in Income Support and Jobseeker’s Allowance.

27. Subsection (1)(a) provides the Secretary of State with the power to prescribe in regulations the benefit rate for claimants. During the assessment phase the prescribed amount will equate to the single person’s age-related amounts payable in Jobseeker's Allowance. In the main phase, there is one basic rate of the allowance, regardless of age.

28. Subsection (1)(c) provides that the amount of the contributory allowance is subject to prescribed deductions under clause 3 (see below).

29. Subsections (2) and (3) provide for the conditions of entitlement to the support component and the work-related activity component. It is not intended to impose additional conditions of entitlement at present. However, this will provide the Secretary of State with the flexibility to impose additional conditions of entitlement in the light of changing circumstances, societal change or operational experience without need for recourse to primary legislation. There are no plans to use this power in the immediate future.

30. Subsection (4)(a) provides the power to prescribe the circumstances in which the requirement for the assessment phase to have ended before a component can be paid need not apply. This would allow prescribed cases to receive the relevant component immediately should we wish to do so for certain groups in the future.

31. Subsection (4)(b) provides the power for the support component or work-related activity component to be backdated in prescribed circumstances, for example, where the assessment phase has been extended because the assessments of limited capability for work & limited capability for work-related activity have not been completed by the end of the first 13 weeks of entitlement.

32. Subsection (4)(c) enables the Secretary of State to prescribe the amount of the work-related activity and support components. Given that benefit rates are reconsidered on an annual basis, it is appropriate that the amount of benefit and the components are set out in regulations rather than in primary legislation. It is also appropriate that these regulations follow the negative procedure given the need to be able to align the amounts and conditions with those in other negative provisions, for example in Income Support and Jobseeker’s Allowance.

Clause 3 – Deductions from contributory allowance: supplementary

33. Clause 3 provides for ESA to be reduced where a claimant has income from an occupational or personal pension payment or Pension Protection Fund periodic payment above an amount to be specified in regulations. Fifty per cent of the excess income over £85 a week is deducted from Incapacity Benefit claims and it is the intention that the same deductions are to be made from ESA. The £85 limit is currently set out in primary legislation for Incapacity Benefit. It is intended that this limit will be set out in regulations for ESA, under clause 2(1)(c), to allow for flexibility to make any future change to the limit without recourse to a change in primary legislation should it be appropriate to do so; for example, due to changes in the level of pension payments generally. This provision is an established part of the current benefits system and the negative procedure provides Parliament with the appropriate level of oversight were the Government to propose any change to this amount.
34. Subsection (1)(c) of the clause provides for deductions to be made in respect of payments made to a person who is appointed to or is a member of a prescribed body carrying out public or local functions. This is intended to enable benefit to be reduced where a claimant is a local authority councillor. Incapacity Benefit is currently reduced where a councillor’s income exceeds £86.00 per week, as per section 30E of the Social Security Contributions and Benefits Act 1992 and regulations 8 and 9 of the Social Security (Incapacity Benefit) Regulations (SI1994/2946). The intention is to replicate this position; however, the power is designed to provide the flexibility to apply similar rules to other people in similar remunerated positions if it were appropriate to do so in the future. The power would also allow us to make deductions for people employed with NHS bodies. However, there is no policy intention to do so at this time.

35. Subsection (2) provides for regulations to allow for income from occupational pensions, personal pensions, public service pensions and Pension Protection Fund payments, in excess of a specified amount, to be deducted when assessing ESA and will be used to bring forward rules currently operating in Incapacity Benefit and also to extend deductions to people receiving DLA care at the highest rate.

36. Subsections (2)(a)-(d) set out further powers in relation to pension payments or Pension Protection Fund periodic payments to be deducted from future ESA claims.

37. Subsections (2)(a) and (2)(b) provide details of how regulations may set out the circumstances in which exemptions can be made. The intention is to use the power in subsection 2(b) to disregard payments where the pension payments are in connection with the death of a member of a scheme (and therefore not a personal benefit paid in connection with the claimant’s employment). Subsection (2)(a) would allow the requirement to make pension payment or Pension Protection Fund deductions in relation to certain groups to no longer be applied in the future; for example, if new financial products become available that need to be differentiated from pension payments or Pension Protection Fund payments.

38. Subsection (2)(b) provides the powers to treat a pension payment or Pension Protection Fund payment as not a pension payment for the purposes of ESA. An example of this would be where the income is not available because the occupational pension scheme is in deficit or has insufficient resources to pay the full pension. The intended provision will be similar to regulation 21(b) of the Social Security (Incapacity Benefit) Regulations 1994.

39. Subsection (2)(c) provides a power to treat prescribed sums as pension payments or Pension Protection Fund payments for the purposes of making deductions from ESA. This power would only be used if there was evidence that persons were deliberately not exercising an option to draw their pension with the intention of increasing their benefit entitlement. No such evidence has so far emerged, but this power is required in case a problem develops in the future. It is the same power as currently exists in the Incapacity Benefit regime in section 30DD(4)(b) of the Social Security Contributions and Benefits Act 1992.

40. Subsection (2)(d) provides for the apportionment of pension payments into weekly payments. For example, this will enable monthly pension payments to be converted into weekly amounts so that they can be deducted from ESA on a weekly basis. This mirrors the approach currently taken in Incapacity Benefit in regulation 24 of the Social Security (Incapacity Benefit) Regulations 1994.

41. Subsection (3) defines what a “pension payment” is for the purposes of ESA. Paragraph (b) of the definition provides the power to prescribe certain payments made under an insurance policy providing benefits in connection with physical or mental illness or disability as a pension payment. Paragraph (c) of the definition provides the power to
prescribe other payments as pension payments. This power would enable income to be taken into account if paid as regular payments after employment has ended under an insurance policy which provides a similar income to an occupational or personal pension. It would also allow the flexibility to ensure new insurance products are treated appropriately following developments in the insurance market. This power would only be used to make a significant change or to extend the current provisions after consultation with those with an interest in either providing or purchasing such products and as such, the negative resolution procedure gives Parliament the appropriate level of oversight.

42. These regulation-making powers are similar in extent to those which apply to Incapacity Benefit. The Department believes that negative regulations provide the necessary flexibility to deal with the level of detail needed to accommodate future policy changes and to keep the provision up to date.

Clause 4 – Amount of income-related allowance

43. Clause 4, together with Clause 16 and Part 2 of Schedule 1, provides the fundamental basis for the calculation of the income-related element of ESA. Entitlement is based on rules similar to those in Income Support which the income-related allowance replaces for people with a health condition or a disability. Subsection (1) provides that the amount of a claimant’s income-related allowance is the applicable amount where he has no income, or where he has an income the amount by which the applicable amount exceeds the amount of his income.

44. The negative procedure is appropriate given the need to regularly update and maintain alignment with other negative powers relating to the corresponding provisions in other benefits, such as Income Support.

45. Subsection (2)(a) of the clause provides the power to prescribe the amounts to be included in the applicable amount. This will include a personal allowance (the same as the basic rate of the contributory element where the claimant is single but higher where the claimant is a member of a couple) and additional amounts where appropriate. This includes, for example, certain housing costs where the claimant is an owner-occupier. It is intended that additional amounts will be prescribed in respect of those costs, such as mortgage interest, ground rent or service charges. These are similar to the arrangements which currently apply to Income Support.

46. The power will also be used to include certain premiums in the income-related allowance assessment. These would be a severe disability premium, an enhanced disability premium, a carer premium and a pensioner premium. It is intended that the qualification criteria for these premiums will be the same as for Income Support.

47. It is intended to use regulations in this instance to allow for changes to the personal allowance and other amounts and, if necessary, for other additions to be made in future without the need for primary legislation. This approach mirrors that followed in the other income-related benefits.

48. Subsection (3) provides the power to prescribe nil as an applicable amount. This will be used to reduce to nil the standard applicable amount for people such as those in prison or members of religious orders who are fully maintained and therefore do not require income-related support. This is similar to paragraphs 7 and 8 of Schedule 7 to the Income Support (General) Regulations 1987 (S.I. 1987/1967). Regulations are necessary to allow the Secretary of State to act promptly if other circumstances arise where it would be inappropriate to pay benefit to a person who is fully maintained by other means. It is necessary to ensure that regulations provide for an applicable amount of nil as it would otherwise be arguable that “nil” is not “an amount”.
49. Subsections (4) and (5) describe the qualifying conditions for payment of the support component and the work-related activity component. These are the same as for contributory allowance claimants in relation to clause 2. Subsections (4)(c) and (5)(c) give power to prescribe additional conditions which will provide the Secretary of State with the flexibility to impose additional conditions of entitlement in the light of changing circumstances, societal change or operational experience without need for recourse to primary legislation. There are no plans to use this power in the immediate future.

50. Subsection (6)(a) provides the power to no longer apply the requirement that the assessment phase must have ended before a component can be payable. For example, this would allow prescribed cases to receive the relevant component immediately should we wish to do so for certain groups in the future.

51. Subsection (6)(b) provides the power for the support component or work-related activity component to be backdated in prescribed circumstances. As in respect of clause 2(4)(b), an example would be where the assessment phase has been extended because the assessments of limited capability for work and limited capability for work-related activity have not been completed by the end of the first 13 weeks of entitlement.

52. Subsection (6)(c) enables the Secretary of State to prescribe the amount of the work-related activity and support components. These will be reconsidered on an annual basis so it is appropriate that the amount of benefit and the components are set out in regulations, rather than in primary legislation. It is also appropriate that these regulations follow the negative procedure given the need to be able to align the amounts and conditions with those in other negative provisions, for example in Income Support and Jobseeker's Allowance.

Clause 5 – Advance award of income-related allowance

53. Clause 5 applies to claimants who:
   • are not entitled to a contributory allowance; and
   • are not entitled to income-related allowance as their applicable amount, without the addition of a component amount, is less than their income; and
   • would have been entitled to an income-related allowance if a component amount had been payable.

54. Where these circumstances apply, regulations under subsections (2) and (3) would enable a claim for income-related allowance to be made on one date and for benefit to be payable from a later date, provided the claimant met all the other conditions of entitlement.

55. The effect of the regulations would be that the claimant’s applicable amount would include a component amount from the later date. This would mean that an award could be made at the beginning of the claim (unlike the current system where an award can only be made where a further claim is made) for a claimant who will only be entitled to the income-related ESA once the assessment phase has ended and the claimant is entitled to the work-related activity or support component. Such a claimant will not be paid any ESA any earlier than any other ESA claimant – the regulations would simply ensure the process works appropriately for such a claimant.

56. The provisions in subsection (2) cross-refer to general powers relating to benefit claims and payments in the Social Security Administration Act 1992. As a result of subsection (2), where there is to be an advance award, those provisions take effect with modifications so that appropriate arrangements for such claims can be made.
57. The regulations under this clause are intended to ensure that claimants do not find themselves in a situation where they cannot become entitled to the higher amounts in the main phase of the benefit because their income is too great to qualify for ESA during the assessment phase. The regulations are therefore purely beneficial to the claimant and the negative procedure is appropriate.

Clause 7 – Exclusion of payments below prescribed minimum

58. Clause 7 duplicates the power in section 134(4) of the Social Security Contributions and Benefits Act 1992. It allows the Secretary of State to prescribe that ESA would not be paid for very small amounts of benefit. The intention is that ESA will not be paid if entitlement is below 10 pence per week unless it is combined with another benefit. Entitlement to benefit remains and claimants receive any ‘passported’ benefits in the same way as if payment is actually made. Ministers have made it plain in Committee that the amount will remain at 10p, which is in alignment with other benefits such as Jobseeker’s Allowance and means that the negative procedure is appropriate.

Clause 8 – Limited capability for work

59. This clause refers to determination of eligibility for the ESA on the basis that the claimant, by reason of a physical or mental disease or disabling condition, is limited in his ability to work, as demonstrated by his inability to carry out specified activities, and it would not be reasonable to require him to work. The specific activities, and the extent to which a person’s capacity to perform them is limited, will be specified in regulations under subsection (1).

60. Regulations under this section would be subject to the negative resolution procedure. We consider this to be an appropriate level of scrutiny as they will be dealing with the technical detail of the assessment for limited capability for work within the framework of the clause.

61. Subsection (2) requires regulations to set out the criteria against which claimants will be assessed when determining whether they have limited capability for work and how the test will be conducted. These powers are very similar to the powers in section 171C (2) (a) and (b) of the Social Security Contributions and Benefits Act 1992, and make provision for specifying the precise nature of the test to be applied to determine whether a person has limited capability for work. The report of the review of the current test, ‘The Transformation of the Personal Capability Assessment’, has recommended changes to ensure the test remains a robust and fair assessment of entitlement to benefit. The current test is referred to in regulation 25(1) of the Social Security (Incapacity for Work) (General) Regulations 1995 and the detail of the test is set out in the Schedule to those regulations.

62. Current legislation specifies that the Personal Capability Assessment must be carried out by a doctor approved by the Secretary of State. It is intended that regulations made under clause 8 will also provide for appropriately trained healthcare professionals other than doctors who have been approved by the Secretary of State to carry out the assessment. The role of other healthcare professionals has changed and it is now recognised that they have the skill and expertise to carry out more complex tasks and could, with appropriate training, be equally adept in carrying out these assessments.

63. Subsections (3) and (4) closely resemble the powers in Section 171A of the Social Security Contributions and Benefits Act 1992, and allow for regulations to make provision about gathering evidence required to determine whether a person has limited capability for work, and about the sanctions that might be applied to a person who fails without good cause to provide the required information or to attend, or submit himself to, an arranged medical examination. Where a person does not demonstrate good cause for such
a failure, he will be treated as not having limited capability for work and will therefore not be entitled to ESA. Some examples of good cause will be set out in the regulations, and they will include the nature of a claimant’s disability and the state of his health at the time.

64. The medical assessment to determine benefit entitlement will normally be carried out during the first 13 weeks of a claim. There will, however, be a period of time after the date of claim before we are able to carry out this medical assessment. Subsections (5) and (6) allow the making of regulations to treat claimants who meet prescribed conditions as having limited capability for work until such time as the medical assessment is carried out. This power would be used, for example, to pay ESA to claimants who have supplied medical certificates from their treating medical practitioners advising them to refrain from work and who are waiting for the medical assessment to be carried out. The power is similar to that contained in section 171C(3) of the Social Security Contributions and Benefits Act 1992 and is necessary to ensure that claimants may be treated as having limited capability for work pending their medical assessment being carried out.

65. The detail of the medical assessment of limited capability for work will be provided in regulations to allow the flexibility to amend and further refine the assessment if necessary to take account of changes in medical treatments, the prevalence of disabling conditions or changes to the workplace environment.

Clause 9 – Limited capability for work-related activity

66. Clause 9 provides for determining in regulations whether a person’s capability for work-related activity is limited by his physical or mental condition and, if it is, whether his physical or mental condition is such that it is unreasonable to require him to undertake work-related activity. Where this is found to be the case, once claimants have completed the assessment phase, they will receive the support component in addition to the basic allowance of ESA and they will be placed into the ‘Support’ group. Where claimants do not satisfy the test of limited capability for work-related activity contained in the regulations made under clause 9, they will not be treated as having limited capability for work-related activity. Once they have completed the assessment phase, they will receive the work-related activity component in addition to the basic allowance, but not the support component. It is intended that the criteria for membership of the Support group will be based on the functional effects of a person’s condition.

67. Regulations under this section would be subject to the negative resolution procedure. This is considered to be an appropriate level of scrutiny as the regulations will be dealing with the technical detail of the assessment of limited capability for work-related activity within the framework set out by the clause.

68. Subsection (2) of Clause 9 requires the regulations made under subsection (1) to determine whether a person has limited capability for work-related activity by using an assessment and for the content and manner of carrying out the assessment to be set out in those regulations. The intention is that the assessment will be carried out by a healthcare professional approved by the Secretary of State.

69. Subsections (3) and (4) provide similar regulation making powers to those found in Clause 8 in relation to gathering evidence required to determine whether a person has limited capability for work-related activity.

70. Sanctions may be applied to a person for failure without good cause to provide the required information or attend for an arranged medical assessment. If a person fails, without good cause, to provide the evidence required from him, or fails to attend or to participate in an arranged medical assessment, he will be treated as not having limited capability for work-related activity.
Clause 10 – Work-focused health-related assessments

71. Clause 10 allows the Secretary of State to make regulations requiring claimants eligible for ESA, but not so functionally restricted as to be unable to engage in work-related activity, to have an additional, work-focused health-related assessment.

72. Regulations made under this clause would be subject to negative resolution. This is considered to be an appropriate level of scrutiny as the regulations will be dealing with the technical details of the assessment within the framework set out by the clause.

73. The purpose of the work-focused health-related assessment is to assess what the claimant is capable of doing and to help the claimant to articulate their hopes and expectations for the future and to explore their attitudes and beliefs about their health and its impact on their ability to work.

74. The advice from the work-focused health-related assessment will be made available to Personal Advisers, who provide Jobcentre Plus claimants with a range of skilled advice and help them engage with the labour market. The report will support actions to be taken during the claimant’s conditionality regime.

75. Regulations under subsection (1) will set out a requirement to take part in one or more work-focused health-related assessments. All claimants eligible for ESA but not in the Support group will be required to take part in a work-focused health-related assessment as part of the initial assessment process. A requirement to take part in further work-focused health-related assessments could apply when a review of benefit entitlement is carried out, if the person’s condition has changed.

76. Subsection (2) sets out some of the matters which the regulations may include. These include paragraphs (a), (b) and (d) specifying the circumstances in which someone would be subject to this requirement, provision for notifying an individual of the requirement to undertake a work-focused health-related assessment and for determining and notifying an individual of the time and place of the assessment. The intention is that, where possible, the work-focused health-related assessment will be carried out at the same appointment as the assessment of entitlement.

77. Subsection (2)(c) provides for regulations to prescribe the nature and content of the work-focused health-related assessment. It is intended that the work-focused health-related assessment will include examination of the claimant’s residual functional capacity – what the claimant can still do despite their health condition – and information about their concerns and consideration of health interventions that would improve their functional capacity.

78. Under subsection (2)(e), the regulations may set out when a individual is regarded as having, or not having, taken part in a work-focused health-related assessment. Regulations under subsection (2)(f) will set out powers for sanctions when an individual fails to take part in a work-focused assessment without good cause. Further provisions under paragraphs (g) and (h), will be made to set out matters and circumstances to be considered when determining good cause. These lists will not be exhaustive but will include matters such as the nature of a claimant’s disability and the state of his health at the time.

79. The work-focused health-related assessment will be an integral part of ESA conditionality. The sanction for failure to take part without good cause will be that the amount of ESA payable to a claimant is reduced in accordance with the regulations under subsections (3) and (4). These powers allow us the flexibility to ensure that any reduction made is appropriate and can reflect particular circumstances. If, after a reduction is made, a claimant agrees to attend and participate in the assessment, his future weekly benefit rate will be restored to the full amount ordinarily payable to him.
80. In accordance with subsection (5), the regulations are required to include a provision whereby a person who, initially, is not a member of the Support group, and is therefore subject to the requirement to have a work-focused health-related assessment, and who subsequently becomes a member of the Support group will no longer be required to have the assessment. This will ensure that claimants in such circumstances are treated in exactly the same way as those who were members of the Support group from the outset of their claim.

81. In accordance with subsection (6) the regulations may make provision for allowing waivers and deferrals of work-focused health related assessments. The intention is to use this power to specify that a waiver or deferral will be granted where there are circumstances related to a claimant’s health condition and/or other circumstances outside the claimant’s control which make it difficult or impractical for them to attend at the usual time. A waiver granted under subsection (6)(a) will allow a requirement on a claimant to attend a work-focused interview to be considered as not having applied and therefore a sanction would not be imposed. Subsection 6(b) will allow a requirement on a claimant to attend a work-focused health related assessment to not apply until a specified time and no sanction would be imposed until that time. Subsection 6(c) will allow a work-focused health related assessment to be rescheduled if a claimant is unable to attend an assessment due to circumstances outside of his control. These powers are necessary to allow for sufficient flexibility in the system to take account of claimants’ differing circumstances.

82. Subsection (7) provides for the definition of “work-focused health-related assessment” and at paragraph (c) provides for assessing other prescribed matters (other than those in paragraphs (a) and (b)) relating to a person’s physical or mental condition and the likelihood of his remaining in work. It is intended that these matters will include an individual’s attitudes and beliefs about their ability to work; their hopes and expectations about the future; and, in general rather than specific terms, what workplace adjustments might be appropriate to support a move into work.

Clause 11 – Work-focused interviews

83. “Work-focused interview” is defined in clause 11(7) as an interview by the Secretary of State conducted for purposes prescribed in regulations connected with getting the person interviewed into work or keeping them in work. Regulations under this power will set out that the purposes of a work-focused interview are assessing the person’s prospects for work, giving assistance and encouragement regarding work, identifying activities that the person might undertake regarding work, identifying training, education or rehabilitation opportunities and employment opportunities.

84. Regulations made under this clause would be subject to negative resolution. It is intended that the regulations giving effect to these requirements will be similar in a number of respects to the existing Pathways to Work programme (The Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2003 (S.I. 2003/2439) (“the Pathways to Work Regulations’’)). Evaluation of the Pathways to Work programme continues to provide evidence of what works best with the incapacity benefits claimant group. Delegated powers will assist in the effective application of the ESA conditionality regime in the future by affording the Secretary of State sufficient flexibility to change the detailed requirements in the light of experience and developments. Providing a framework of powers in primary legislation and detailed requirements in regulations will allow that flexibility.

85. Subsection (1) of this clause makes provision for regulations to impose a requirement on claimants entitled to ESA, apart from those in the Support group, to take part in a work-focused interview or interviews. Clause 11(2) and (6) set out what regulations made under clause 11 may, but are not required to, provide for.
86. Regulations under Clause 11 will provide for a conditionality regime that is similar to the conditionality regime in the Pathways to Work programme, which has widespread support in principle. The regime may need to be changed in light of operational experience or to adapt to wider changes, it is therefore intended that the negative resolution procedure will apply to regulations under Clause 11.

87. Regulations will allow the Secretary of State to require relevant persons to take part in work-focused interviews at a time of his choosing. A relevant person will be defined in regulations as someone who is entitled to ESA, is not a member of the Support group, is at least 18 years old and has not reached the age at which a woman attains State Pension age.

88. It is intended that in accordance with subsection (2)(d) regulations will allow the Secretary of State to notify the claimant of where the interview is to be held and to set out the test for when the interview may take place in a claimant’s home.

89. Regulations will set out what a claimant has to do to satisfy the requirement to take part in a work-focused interview. This will include requiring the claimant to provide certain relevant information, such as existing skills and qualifications and work history, and participate in discussions about their employability and the steps they could take to help them move into work or closer to the labour market. In this respect the regulations will be similar to the Pathways to Work Regulations. Additionally it is envisaged that when claimants are also required to undertake work-related activity then regulations would require a claimant to discuss the relevant work-related activity they had undertaken in order to participate in a work-focused interview.

90. As in the existing Pathways to Work Regulations, it is intended that the regulations will allow five days for anyone failing to take part in a work-focused interview to show they had good cause to do so. The regulations under this section will provide a non-exhaustive list of matters that can be taken into account in determining good cause, for example, difficulties with normal means of transport, caring responsibilities, accident or illness.

91. Regulations under subsection (3) will provide that if it is determined that the claimant has failed to participate in a work-focused interview and not shown good cause within the allowed time then the amount of ESA payable to that claimant will be reduced. Regulations under subsection (3) will set out how the reduction is to be determined. Subsection (4) sets out matters that these regulations may include. It is intended that regulations will provide for benefit to be reduced in two steps; by 50 per cent of the amount of the work-related activity component in each of the first four benefit weeks beginning with the week the reduction is first made; and by 100 per cent of the amount of the work-related activity component in each subsequent benefit week until certain circumstances occur. It is not intended that any claimant should face a sanction of more than the amount of the work-related activity component for failure to take part in interviews. Therefore sanctions will not take effect until the end of the assessment phase when the work-related activity component has been awarded, even for a failure to attend an interview during the assessment phase (the sanction may in some cases be imposed but it will be suspended until the end of the assessment phase). Otherwise, a sanction will start from the first day of the benefit week following a decision that the claimant had failed to take part in an interview without good cause and will stop in the week that the claimant complies with the requirement to take part in a work-focused interview. A sanction will also stop if the claimant ceases to be a relevant person for work-focused interview purposes.

92. Regulations under this section will include provisions allowing waivers and deferrals of work-focused interviews. It is intended that regulations will provide for deferral in circumstances where an interview would be of no assistance to the claimant or would be inappropriate at the time. For example, a claimant undertaking a training course might
have the requirement to attend a further interview deferred until the course was completed. Regulations will provide that an interview could be waived if the interview would not be of assistance to a claimant because they were about to start or return to work.

93. Clause 11(5) provides that regulations under section 11 must provide for the requirement to take part in work-focused interviews to cease when a claimant becomes a member of the support group. This is in keeping with the policy that it would be unreasonable to expect members of the support group to participate in work-focused interviews as a condition of receipt of their full allowance, although they can volunteer to participate in appropriate support.

Clause 12 – Work-related activity

94. Work-related activity, as defined by subsection (7) of the clause, is activity that will make it more likely the person will obtain work or be able to obtain work. Clause 12(1) provides for regulations which could require claimants who were required to take part in work-focused interviews to also undertake work-related activity. It is intended that this requirement would be imposed once the assessment phase has been completed and then apply for a fixed period. As the Secretary of State set out during Second Reading of the Bill in the House of Commons, this requirement will not apply to Incapacity Benefit claimants if they migrate to ESA. There is no intention of using this power immediately as the work-related activity requirement will be introduced over time in the light of evidence and availability of resources.

95. The introduction of a requirement to engage in work-related activity will build on the base of work-focused interviews originally piloted in the Pathways to Work programme. Having these requirements set out in regulations rather than in primary legislation would allow the Secretary of State the flexibility to apply these requirements as and when appropriate and for requirements to be changed as appropriate in the light of emerging evidence. As these regulations will impose a new requirement on ESA claimants, the affirmative resolution procedure will apply for the first set of regulations made under the clause 12 powers. Subsequent uses of the clause 12 powers will be subject to the negative resolution procedure.

96. Clause 12(1) contains a power for regulations to be made requiring ESA claimants, who are required to take part in work-focused interviews, to undertake work-related activity. Clause 12(2) and (6) sets out what regulations made under clause 12 may provide for.

97. Regulations will set out how a claimant will be notified of the requirement to undertake work-related activity.

98. Subsection (2)(c) refers to regulations setting out a minimum requirement that a claimant will have to undertake within a given period of time to satisfy the requirement to undertake work-related activity. This is envisaged being used to require that a claimant should undertake a minimum set number of ‘steps’ of work related activity within a fixed number of weeks. The intention is that the minimum requirement will apply to all claimants required to participate in work-related activity. However, the intention is also that the requirement will be waived or deferred where necessary to ensure claimants are dealt with fairly, for instance where a claimant has a fluctuating condition.

99. The definition of work-related activity in subsection (7) envisages a wide array of activities will potentially be work-related activity for an individual. However in order that a claimant could reasonably fulfil a requirement to undertake work-related activity we intend to ensure provision of support options. It is envisaged that the types of work-related activity we will provide for claimants will include such activities as:
• work tasters;
• programmes to manage health in work; and
• job search assistance.

100. Subsection (2)(d) refers to setting out circumstances where a claimant is, or is not, to be regarded as undertaking work-related activity. It is envisaged using regulations to prescribe that a person undertaking a work-focused interview in itself is not to be regarded as undertaking work-related activity.

101. Subsections (f), (g), (h), and (i) refer to regulations setting out how it should be decided whether a claimant has met the requirement to participate in work-related activity and has provided sufficient evidence to show they have met the requirement, and if not whether they had good reason to not have done so. The intention is that a claimant should be able to provide evidence to show they have completed the required number of steps of work-related activity within a given time period. For example, this could be attendance at a condition management programme. This will allow consistent monitoring of claimants’ compliance with a requirement.

102. It is envisaged that regulations will provide that the claimant will have an opportunity to demonstrate they had good cause for failing to comply with a requirement to participate in work-related activity as required under regulations. Claimants will have a set time limit in which to show good cause. This will ensure that claimants who had good cause for failing to meet their work-related activity component will not be sanctioned. This is very important to ensure confidence in the sanctioning system.

103. Regulations setting out the matters to be taken into account in determining if a person has good cause for failing to undertake work-related activity in accordance with clause 12 will need to reflect that the requirement to participate in work-related activity will be over a given period of time (intended to be a number of weeks). This will be different to good cause for missing an interview on a given day as envisaged under Clause 11. However it is envisaged that certain matters to be taken into account in determining whether a claimant has good cause including:

• that the relevant person misunderstood the requirement to take part in work-related activity due to any learning, language or literacy difficulties of the relevant person or any misleading information given to the relevant person by the officer; and
• that a fluctuating condition or disability from which the relevant person suffers made it impossible for him to participate in work-related activity.

104. Regulations under subsection (3) will provide that when a claimant has not undertaken work-related activity and not shown good cause for this, then the amount of ESA payable to him will be reduced. Subsection (4) sets out matters that regulations made under subsection (3) may provide for. It is considered that a reduction in benefit is appropriate because DWP research has found that the prospect of being sanctioned is an incentive to comply with conditionality requirements such as the work-related activity requirement. Complying with the requirement to undertake work-related activity will make it more likely that a claimant obtains or retains work.

105. Under subsection (3) it is envisaged that regulations will provide that where a reduction in ESA occurs, on its own or in combination with a reduction related to failure to meet a requirement to participate in work-focused interviews, the maximum reduction imposed will not be more than the amount of the work-related activity component.

106. Subsection (5) provides that regulations under clause 12 will provide that a requirement to undertake work-related activity shall cease when a claimant enters the
Support Group. It is not thought that it would be reasonable to require claimants in the
support group to undertake work-related activity. This confirms the intention not to
require claimants to undertake work-related activity if it is not reasonable to do so.

107. Waivers for work-related activity will be provided for by regulations under subsection
(6). That is, a requirement on a claimant to participate in work-related activity is to be
considered as not having applied and therefore a sanction could not be imposed for a
failure to undertake work-related activity. Waivers are not envisaged being applied where a
claimant will be returning to a job shortly or is on the verge of returning to work.

108. Having the combined powers to make regulations in clause 12 will provide the
Secretary of State with the necessary flexibility to accommodate future policy changes and
to update these provisions. As is Departmental practice, the intention is to commission
research on the effects of a requirement to undertake work-related activity when it is
introduced to inform evolution of the policy. As these regulations will impose a new
requirement on ESA claimants, the affirmative resolution procedure will apply for the first
set of regulations made under the clause 12 powers.

Clause 13 – Action plans in connection with work-focused interviews

109. An action plan will be provided to claimants who attend a work-focused interview, as
a record of their discussions.

110. Regulations under Clause 12 and 13 will provide for a conditionality regime that is
similar to the conditionality regime in the Pathways to Work programme, which has
widespread support in principle. It is therefore intended that the negative resolution
procedure will apply to regulations under Clause 13.

111. Subsection (1) of this clause contains a regulation making power to prescribe the
circumstances in which the Secretary of State must provide a person with an action plan.
Regulations will set out that these circumstances are where a person who was required to
participate in a work-focused interview has attended this interview. Regulations are
appropriate in this circumstance to allow for other circumstances in which the Secretary of
State must provide an action plan, in the light of experience.

112. Regulations under subsection (1) will also prescribe the purposes of the action plan.
It is envisaged that initially, when claimants are only required to take part in work-focused
interviews, the purpose of the action plan will simply be a record of what was discussed
during the interview. It would be expected to include any activity that the claimant might
take voluntarily to assist a return to work. In these respects its purpose will be the same as
in the existing Pathways to Work programme, in providing a reference document for the
claimant.

113. Subsections (2)(a), (b) and (c) provide for regulations to specify the form and
content of action plans; and the means of reviewing and updating them. It is intended that
regulations will specify that the action plan will be a written document that will contain a
record of the work-focused interview. It will also contain a record of any activity that the
claimant has agreed that he is willing to take that may make it more likely that he will
obtain or remain in work or be able to do so and other information that the Secretary of
State considers appropriate.

114. However, when regulations under clause 12 require participation in work-related
activity it is intended that the action plan would include activities, such as attending a
training programme that, if undertaken by the claimant would satisfy the work-related
activity requirement. Clause 13(3) refers to regulations under clause 13 being able to
provide for this.
115. The claimant would not be required to undertake the specific activities in the action plan, even when participation in work-related activity is required by regulations. However, if the claimant did not undertake the activities in the action plan then they would have to undertake other activity in order to satisfy the work-related activity requirement.

116. Subsections (4)(a) to (e) provide for prescribing the circumstances when a claimant can ask for their action plan to be reconsidered and setting out how this would work. It is intended to introduce this provision in regulations when it is required for claimants to undertake work-related activity. This would be in order to resolve situations where a claimant believed the steps included were inappropriate or no longer appropriate and that other steps, not agreed at the work-focused interview, should be included.

117. Having these provisions set out in regulations rather than in primary legislation would allow the Secretary of State the flexibility to apply relevant requirements as and when appropriate and for requirements to be changed in the light of evidence about the usefulness of the action plan.

Clause 14 – Directions about work-related activity

118. Clause 14 enables the Secretary of State to direct that a specific activity undertaken by an individual is not to count as meeting the requirement for work-related activity.

119. The clause provides for regulations to prescribe circumstances in which the Secretary of State can issue a direction. The aim in taking this power is to ensure that circumstances where claimants are undertaking inappropriate work-related activity can be dealt with; in particular, where this is at cost to the public purse.

120. A particular circumstance envisaged where such a direction could be applied to is for a claimant who clearly stated they are not interested in pursuing a particular type of job doing activity specifically related to preparation for that type of job. It is envisaged that a direction could be issued to stop that activity counting towards the work-related activity requirement. The claimant could meet the requirement by undertaking other types of work-related activity.

121. It is believed there may be other circumstances pertaining to a requirement to undertake work-related activity and therefore flexibility in secondary regulations to enable protection of the public purse is appropriate. Given the very wide range of activities counting as work-related activity, under the definition in Clause 12 subsection (7), it is possible that regulations will have to be revised to ensure that directions operate effectively. It is believed it is appropriate that these regulations are subject to negative resolution as they are setting out the detail of when directions will be imposed.

Clause 15 – Contracting out

122. The purpose of clause 15 is to allow the Secretary of State to authorise public, private and voluntary sector contractors to undertake various functions relating to the ESA conditionality regime as set out in clauses 10 to 14.

123. Regulations made under this clause will be subject to the negative resolution procedure as they will simply be allowing for the contracting out of functions the detail and policy for which will be contained in regulations made under other clauses of the Bill. In addition, regulations allowing for authorisations may need to take account of changes in other conditionality regulations made under the negative resolution procedure.

124. Subsection (2) enables regulations to be made that allow persons other than the Secretary of State to be authorised to exercise functions imposed on the Secretary of State under regulations made under clauses 10 to 14 and decision making functions linked to these. In common with the approach taken to previous social security legislation, the
majority of detail is contained within regulations rather than on the face of the Bill. This allows operational changes to be made in light of changing policy and as other regulations made in clauses 10 to 14 are made.

125. The intention is to use these powers to make regulations allowing the Secretary of State to authorise public, private and voluntary sector contractors to undertake functions related to work-focused interviews (clause 11) and action plans (clause 13), including requiring a claimant to take part in a work-focused interview, notifying claimants of the time and place of an interview and undertaking the interview itself. This will not, at this time, include an authorisation to undertake the decision-making process that could lead to sanctions. This will be based on the functions to be contracted out in the Pathways to Work programme currently being rolled out nationally.

126. When clauses 12 and 14 are commenced and the regulations made under them come into force it is intended to make regulations under subsection (2) allowing the Secretary of State to authorise public, private and voluntary sector providers to undertake functions of the Secretary of State in relation to work-related activity (clause 12) and directions (clause 14). At this stage regulations under clause 15(2)(b)-(e) may also provide for authorisations to include functions relating to revision, supersession and appeals decisions in accordance with the Social Security Act 1998.

127. Subsection 15(2) also allows for regulations to be made to allow contractors to be authorised to undertake various functions imposed under regulations made under Clause 10. It is envisaged that regulations may be made that will allow the Secretary of State to authorise contractors to require claimants to take part in work-focused health-related assessments in certain circumstances. In common with the approach to decision-making under clauses 11 to 14, it is not at this time envisaged that decision making relating to sanctions for failure to participate in work-focused health-related assessments will be contracted out. However, as work related activity is expanded, decision making may be extended.

128. Subsection (3) allows for regulations made under subsection (2) to define the scope of authorisations that can be issued to contractors. For example the regulations may provide that the Secretary of State could only authorise PVS contractors to exercise WFI functions or to undertake functions related to additional work-related activity only in certain areas.

**Clause 16 Income and capital: general**

129. Clause 16 sets out that the Secretary of State may prescribe how the income and capital of a claimant (and their partner) may be calculated in determining how much income-related allowance is payable. It is intended to model the regulations on the existing income-related benefit (Income Support) provisions in the Income Support (General) Regulations 1987. There is a significant amount of technical detail associated with these rules which are subject to regular amendment due to changing circumstances, and the need for the rules of the income-related benefits to remain aligned. For this reason it is appropriate that the Secretary of State should have the flexibility provided by regulation-making powers to make changes as and when necessary. The need to be able to respond quickly to changes, both in the types of income available, and to reflect case-law developments, means that the negative resolution procedure applies to these powers.

130. Subsection (1) confers the power to make regulations prescribing how income and capital (including savings and money in banks and building societies) will be calculated or estimated in certain situations. It is intended that ESA will have the same income and capital rules that currently apply in Income Support. All income of the claimant or partner will be taken into account (and reduce the amount of benefit paid) unless otherwise
disregarded. Claimants are not entitled to Income Support if they have capital assets in excess of an upper limit of £16,000. In addition where claimants have capital assets between £6,000 and £16,000 a tariff income of £1 for every £250 (or part of £250) is assumed and deducted from benefit. This will be mirrored in the rules relating to the income-related allowance.

131. Income will be disregarded where it would not be reasonable to reduce a claimant’s income related benefit due to that income. One example is where the income is specifically for something that is intended to be additional to the benefit income such as a payment in relation to the welfare foods scheme (now Healthy Start) or where taking the income into account to reduce the income–related benefit would defeat the purpose of the payment, for example, a gratuity paid to the recipient of the Victoria Cross or George Cross.

132. Capital is disregarded in similar circumstances to income and, in addition, the reasonable costs of realising the value of an asset, such as a dwelling or shares is disregarded. However, capital does not include the value of a person’s home or the value of their personal possessions.

133. Subsection (2) provides regulation-making powers to prescribe how weekly income will be assessed. It is intended that the rules will provide that income may be averaged. In averaging income for fluctuating earnings, for example, the Secretary of State may take an average for a past and current period and apply it to a future period. Or where income is received at monthly or longer intervals, the regulations will provide for how they should be calculated in relation to a week.

134. Subsection (3)(a) provides for circumstances where a person is treated as having capital or income he no longer possesses. It is intended that existing provisions in the Income Support (General) Regulations 1987 concerning deprivation of income or capital will be applied to ESA. This provision allows a claimant to be treated as having a notional income from capital no longer in their possession if they have disposed of the capital solely or mainly to secure or increase entitlement to ESA. In this way the benefit system is protected from abuse.

135. Subsection (3)(b) provides for disregards of both capital and income. For example the capital value of a claimant’s own home is disregarded. This subsection also allows the value of a second home to be disregarded too where there is good reason to do so, for example because an elderly close relative lives there. This power would also be used to fully disregard income like Disability Living Allowance when calculating income-related benefit. Certain other income (for example, war pensions) will be disregarded in part.

136. Subsections (3) (a) and (b) provide the Secretary of State with the power to treat income as capital and capital as income. For example, an advance of earnings from an employer will be treated as capital.

137. Subsection (4) provides a power to make regulations prescribing how income from capital holdings will be taken into account in calculating ESA. Normally, capital will be deemed to have an assumed tariff income for purposes of assessing entitlement. The intention is that a tariff income of £1 a week for every £250 or part thereof will be applied to capital between £6,000 (£10,000 in cases of people in residential care and nursing homes) and the upper capital limit of £16,000. This is the same way that income from capital assets is determined in other income-related benefits such as Income Support and income-based Jobseeker’s Allowance.

Clause 17 – Disqualification

138. Subsection (1) of this clause provides for regulations to set out the circumstances in which a person may be disqualified from receiving ESA or be treated as not having limited
capability for work (which would extinguish entitlement to ESA). The circumstances include situations where a claimant has limited capability for work as a result of his own misconduct, fails to comply with medical advice without good cause or fails to follow specified rules of behaviour. The intention is that the claimant may be disqualified from receiving benefit in a similar way to that set out in the Social Security (Incapacity for Work) (General) Regulations 1995. The regulations to be made under this clause would be subject to the negative resolution procedure in the same way as for the existing provision.

139. In accordance with subsection (2), the regulations are required to provide that any disqualification under this clause should not exceed a period of six weeks.

140. Subsection (3) provides that regulations will provide what matters are, or are not, to be regarded as good cause. An example of what would be considered good cause would be if taking medication recommended by the doctor or other healthcare professional had unpleasant side effects, or for another genuine reason such as fear of surgery. Refusing to undertake a course of physiotherapy to improve mobility would not be considered good cause. Claimants will have the right of appeal to an independent appeal tribunal against any decision to disqualify payment of benefit.

141. Subsection (4) provides that unless regulations provide otherwise a claimant shall be disqualified for receiving the contributory allowance for any period in which they are absent from Great Britain or undergoing imprisonment or detention in legal custody. It is intended that the Regulation-making power will be used, for example, to provide that a prisoner on remand who is subsequently released without a sentence of imprisonment or detention in legal custody being imposed would not have their benefit disqualified under this provision.

Clause 19 – Relationship with statutory payments

142. This clause makes provision for ESA’s relationship with statutory payments paid by employers, which will be the same as for Incapacity Benefit. It is appropriate that the Secretary of State should have the flexibility provided by regulation-making powers to make changes as and when necessary in view of likely changes in this area and that they should be subject to negative resolution procedure in line with standard practice in social security legislation.

143. Subsection (1) provides that ESA is not payable at the same time as Statutory Sick Pay. This is the same as for Incapacity Benefit currently.

144. Subsection (2) provides that where a claimant is entitled to Statutory Maternity Pay she is not entitled to contributory ESA, except in prescribed circumstances, which are that she continues to be in a period of limited capability for work and ESA is payable after deduction of Statutory Maternity Pay.

145. Subsection (3) allows regulations to provide that where a woman is entitled to Statutory Maternity Pay and is also entitled to a contributory ESA, the amount payable will be after the Statutory Maternity Pay has been deducted. This is similar to arrangements for Incapacity Benefit (see Regulation 7A of the Social Security (Incapacity Benefit) Regulations 1994).

146. Subsections (4), (5), (6) and (7) make similar provision to subsections (2) and (3) for Statutory Adoption Pay and Additional Statutory Paternity Pay to be deducted from ESA where a person has limited capability for work. As respects Statutory Adoption Pay, this is similar to the existing Incapacity Benefit arrangements as provided by Regulation 7B of the Social Security (Incapacity Benefit) Regulations 1994. Additional Statutory Paternity Pay is a new statutory payment introduced by the Work and Families Act 2006
and sub-sections (6) and (7) simply allow for it to be treated in the same way as the other statutory payments.

Clause 20 – Deemed entitlement for other purposes

147. Regulations may be made under this clause to enable a person who loses entitlement to ESA by the operation of any provision of, or made under, Part 1 of the Bill, the Social Security Administration Act 1992 or Chapter 2 of Part 1 of the Social Security Act 1998 to be treated as if they were still entitled to ESA. This would be for the purpose of enabling them to retain any rights and obligations which depend on that entitlement, such as the right of appeal. This is similar to provisions which currently exist for Incapacity Benefit under section 113(3) of the Social Security Contributions and Benefits Act 1992. Any regulations made under this provision would be subject to the negative resolution procedure in line with the procedure applied to the existing provision.

Clause 21 – Supplementary provisions

148. Clause 21 does not provide for secondary powers in itself but it does specify that Schedule 2 has effect. The Secondary Powers in this schedule are discussed later.

Clause 22 – Recovery of sums in respect of maintenance

149. Clause 22 is a regulation making power for making provision to enable the Secretary of State to apply for a court order to recover sums from persons who have liability to maintain an adult dependant who is claiming income-related ESA, and for those regulations to include provision on related matters, such as the enforcement of orders and the transfer of the right to receive payments. The powers mirror those in section 23 of the Jobseeker’s Act and would be used to make the same provisions as in regulation 169 of the Jobseeker’s Allowance Regulations 1996 (SI 1996/207) to enable the Secretary of State to apply to a court, for an order requiring payment, and for the Secretary of State to transfer the right to receive payment to the claimant. As the powers are to be used in the same way as the existing power in the Jobseeker’s Act which is subject to the negative resolution procedure, it is believed the same procedure is appropriate for income-related ESA.

Clause 23 – Interpretation of Part 1

150. Clause 23 provides for the interpretation of Part 1 of the Bill. The Department believes that regulations made under this clause setting out how certain words and phrases are to be interpreted or defined should be subject to negative resolution procedure as this provides the necessary flexibility to accommodate future policy changes and changes of interpretation which may occur as a result.

151. Subsection (2) of this clause provides for the assessment phase of the claim to end on such a day as may be prescribed. This enables the assessment phase to be set for a particular period (which is intended in most cases to be 13 weeks). It also enables the assessment phase to be changed; for example, to extend it beyond this period. It is intended that this will include where a claimant appeals against a decision that they are not entitled to an ESA because they do not satisfy the Personal Capability Assessment.

152. This clause also provides that the definition of a “week” may be prescribed as any seven day period for benefit purposes. This allows benefit entitlement to commence for any seven day period following a claim and ensures that entitlement can be assessed over appropriate seven day periods with reference to the day of the week the person will be paid.
Clause 24 – Regulations
153. This clause does not contain regulation-making powers but is drawn to the Committee's attention as it sets out how the ESA regulation-making powers are to be exercised.

Clause 25 – Parliamentary Control
This clause does not contain regulation-making powers but is drawn to the Committee’s attention as it sets out the Parliamentary control of the ESA regulations.

Clause 27 – Consequential amendments relating to Part 1
154. Clause 27 provides for regulations to make provisions which are consequential on Part 1 of the Bill amending, repealing or revoking any provision of an Act, including an Act of the Scottish Parliament, where that legislation was passed on or before the last day of the Session in which the Bill is passed. Although every effort was made to identify all consequential amendments for inclusion in the Bill this Henry VIII power has been taken in order to deal with any amendments which may be needed subsequently for the proper operation of ESA and its interaction with other social security benefits. The regulations will be subject to the negative resolution procedure which gives the appropriate level of Parliamentary oversight given that any amendments must be of a consequential nature. They are intended to be made for the purposes of ensuring that other legislation takes proper account of the replacement of incapacity benefit by ESA, and the change to income-related ESA in some circumstances where income support would currently be payable.
155. Clause 27 also gives effect to the amendments to other Acts in Schedule 3. Powers created or extended by those amendments are discussed in the section on Schedule 3 below.

Clause 28 – Transition relating to Part 1
156. Although Clause 28 does not of itself contain delegated powers, the associated Schedule 4, discussed later in the commentary, does contain a number of powers.

Schedule 1 – Employment and Support Allowance: additional conditions
157. Both parts of Schedule 1 provide for a substantial number of the detailed rules relating to conditions of entitlement to ESA and, as will be seen, are very closely linked to the current rules in Incapacity Benefit and Income Support. The Secretary of State will therefore need flexibility to reflect changes that may be made in other benefits – for example keeping rules in Income Support and income related ESA consistent where it is appropriate to do so.
158. Part 1 of Schedule 1 sets out the National Insurance contribution conditions which must be satisfied in order to be entitled to the contributory allowance. In effect, these are the same conditions as those that exist in Incapacity Benefit now. Part 2 of the Schedule describes the conditions which must be satisfied for a claimant to receive income-related allowance. These largely reflect the powers currently used in Income Support.
159. As the powers in the Schedule resemble existing powers relating to existing benefits, and would be applied in broadly the same way, the negative procedure is appropriate. Some drafting changes have been made to make the text easier to read, for example the first contribution condition used to be drafted with two sub-paragraphs (paragraph 2 of Schedule 3 to the 1992 Act), but has been redrafted with 3 sub-paragraphs (paragraph 1 of Schedule 1 to the Bill). The effect is exactly the same.
Conditions relating to National insurance

160. Paragraphs 1(4) (a) and (b) provide that the first contribution condition, the requirement to have paid a minimum number of contributions in one of the three tax years prior to the ESA claim, may be modified in respect of a person who has been in receipt of any prescribed description of benefit during any prescribed time or period.

161. The power at paragraph 1(4)(a) provides for the first contributory condition to be satisfied by claimants entitled to certain benefits at certain times. These groups will be set out in regulations. The intention is to use the power to replicate the provisions set out at regulation 2B(2) of the Social Security (Incapacity Benefit) Regulations 1994. These are:

- carers who were entitled to Carer’s Allowance in the relevant year, or who would have been but for the overlapping benefit rules;
- people who have been in work for more than 2 years before their claim and who were entitled to disability working allowance or the disability element of the Working Tax Credit;
- certain convicted prisoners whose conviction has been overturned and whose contribution record has been credited in relation to when they were in prison; and
- claimants who were previously entitled to ESA in the relevant year.

162. As a result of regulations to be made using the power in paragraph 1(4)(b), a modified contribution condition will apply to those groups. This will be based on the relaxation provision in regulation 2B(1) of the Social Security (Incapacity Benefit) Regulations 1994 in that the first contribution condition will be satisfied if appropriate contributions have been paid in any one tax/contribution year.

163. It is appropriate that this type of detail is in secondary legislation, with the framework of the contribution conditions set out in Schedule 1 to the Bill itself. The groups to which the relaxed form of contribution conditions will apply may need to be adapted to take into account wider changes in social security and other legislation in the future. It is therefore intended that the negative resolution procedure will apply.

164. Paragraph 3(1)(a) provides that the benefit year, which begins on the first Sunday in January, in which a benefit is claimed may be modified in prescribed circumstances. It may be necessary to do this to enable an award to be made, for example where a claimant would qualify in a subsequent benefit year to that in which the initial claim is made.

165. Paragraph 3(2) provides that the relevant benefit year for the purposes of determining whether the contribution conditions are satisfied may be modified in respect of a person who was previously entitled to, or made a claim for, ESA. It is important to ensure that previous successful or unsuccessful claims do not have unintended effects on a claimant’s entitlement to ESA. For example, this allows someone who left benefit and is covered by the linking rules to be treated as meeting the contribution conditions despite them now being in a different benefit year. These powers are necessary to make suitable provision for such claimants.

166. Paragraph 4(1)(a) provides that the normal age limit (20) for claiming ESA under the youth provisions may be extended in prescribed circumstances to age 25. It is intended to use this power to extend the age cut-off from 20 to 25 for people in education, or vocational or occupational training. This is the same as provided for Incapacity Benefit by Regulation 15 of the Social Security (Incapacity Benefit) Regulations 1994.

167. Paragraph 4(1)(c) provides that claimants claiming under the youth provisions must satisfy certain prescribed conditions relating to being resident and present in Great Britain. It is intended to use this power to require claimants to be ordinarily resident in Great Britain, without being subject to immigration control, and to have been present in
Great Britain for a total of at least 26 weeks in the year up to the date of entitlement. This is the same as for Incapacity Benefit, as per Regulation 16 of the Social Security (Incapacity Benefit) Regulations 1994.

168. Paragraph 4(3) provides the power to modify the age limit which applies to a young person reclaiming ESA under the youth provisions. It is intended that this power will be used to ensure that a person who leaves benefit can in some cases re-qualify for ESA as if they had not left. This is a linking rules provision, without which a young person, who could not otherwise meet the first and second conditions at paragraphs 1 and 2, could leave the benefit and not be able to re-qualify because he was over the age limit.

169. Paragraph 4(4) provides a power to prescribe the circumstances in which a person is or is not to be treated as receiving full-time education. This power will be used to define “full-time education” so that, for example, time spent on a course that would not be suitable for a student without a disability is excluded from being counted in the amount of education that a claimant using the youth contribution condition is undertaking. This flexible power to define the circumstances in which people are treated as receiving full-time education is important in the current climate of substantial structural changes that are being proposed to the education system.

**Conditions relating to Income-related allowance**

170. Part 2 of the Schedule provides certain additional conditions where the income-related allowance of ESA will not be paid. These are based on the arrangements which currently apply to Income Support.

171. Paragraph 6(1)(b) provides that a claimant is not entitled to income-related ESA if he has capital which exceeds the prescribed capital limit. This limit does not apply to the contributory-related element of the benefit. This limit is intended to be the same as that which applies to Income Support currently – £16,000.

172. Paragraph 6(2) provides that where a claimant is a member of a couple, the capital and income of the partner shall be treated as belonging to the claimant unless regulations prescribe otherwise. This is because the calculation of entitlement is on a household basis. An example of where this power might be used is where the claimant’s partner ceases to live permanently in the same household and therefore it becomes inappropriate to aggregate the income and capital. This provision is the same as in Income Support.

173. A claimant of the income-related ESA cannot be engaged in remunerative work as a result of the condition of entitlement set out in paragraph 6(1)(e). The definition of “remunerative work” is to be defined in regulations under paragraph 6(5) and will be defined as 16 hours or more within a week done in expectation of payment. However, it will sometimes be appropriate for some claimants who are undertaking certain types of remunerative work still to be entitled to the benefit. For example a person who is working as a child minder in their own home, or undertaking voluntary work where the only payment is to cover reasonable expenses, is not regarded as being in remunerative work. Equally, it will sometimes be appropriate for people to be treated as undertaking remunerative work even though their work may not fit within the definition. For example a person who is absent from employment without good cause is treated as still being in remunerative work. As a result, paragraph 6(3) provides that regulations may prescribe the circumstances in which a person is or is not to be treated as engaged in remunerative work.

174. Claimants in full-time advanced education (above Scottish Certificate of Education (higher level) or A-levels or equivalent) are regarded as students and are normally excluded from benefit. However, Income Support has rules which allow “disabled
students” to claim and the Government has committed to enabling disabled students to participate in full-time education while receiving income-related ESA.

175. Paragraph 6(4) provides the power to disapply the requirement in paragraph 6(1)(g) that the income-related element is not payable where a claimant is receiving education (“education” is to be defined in regulations under paragraph 6(5)). There is also a power in paragraph 6(4) to provide for when a claimant is to be treated, or not to be treated as receiving education within the meaning to be defined in paragraph 6(5). This will be set out in regulations. It is intended to use this power to prescribe the circumstances which will enable disabled students to qualify. The Secretary of State requires the flexibility provided by the regulation-making powers in the Bill to ensure that disabled students are able to qualify where appropriate and also respond to changes in education provision which could affect eligibility to benefit entitlement. It is appropriate, that in line with provision in other social security legislation the powers be subject to negative resolution procedure.

176. Paragraph 6(5) includes the definition of “couple”. There are two delegated powers in this definition – one in paragraph (b) and the other in paragraph (d). In paragraph (b), the definition of “couple” includes a man and woman who are not married but are living together as if they were, unless regulations prescribe otherwise. This is the same as Income Support currently. In paragraph (d), the definition of “couple” includes two people of the same sex who are not civil partners but are living together as if they were, unless regulations provide otherwise. This is the same as Income Support.

177. Paragraph 6(5) – the definition of “couple”, in paragraph (d), provides that two people of the same sex who are not civil partners but are living together as if they were are a couple unless regulations provide otherwise. This is the same as Income Support. The intention is to use this power in the same way as Income Support. For example, where the members of the couple were temporarily separated they would normally be a couple. However, regulations under paragraph 6(5)(d) would be used to specify, as in Income Support, that where one member is detained in legal custody pending trial or sentence or whilst serving a sentence on conviction they are not a couple.

178. Paragraph 6(7) provides that regulations may modify the provisions of paragraph 6 of this Schedule for members of polygamous marriages. This includes how benefit, income and capital in respect of the second and any subsequent spouse will be aggregated for the purposes of determining entitlement to ESA. Once again it is intended to align the rules of ESA with those in Income Support.

179. Paragraph 6(8) provides the Secretary of State with the power to prescribe in regulations the circumstances in which persons are to be treated, or not to be treated, as members of the same household. The intention is that regulations under this subsection will be modelled on the existing provisions that apply in Income Support (Regulation 16 of the Income Support (General) Regulations 1987). Here, generally, a person who is living away from the other members of the family cannot be treated as a member of the claimant’s household if that person does not intend to return to live with the rest of the family or is likely to be away for over 52 weeks. However the absent member may be treated as a member of the household if that person intends to return to live with the family and has no control over the period of absence, which is unlikely to last substantially more than 52 weeks.

180. Paragraph 6(8) will also provide that members of a couple should not be treated as members of the same household when one of them is held in a special hospital or in custody, on temporary release from custody or is permanently in residential accommodation (including residential care and nursing homes). The couple provisions need to stay aligned with those in the other income –related benefits such as Income
Support, and as with those benefits, the regulations under those provisions are made under the negative procedure.

**Schedule 2 – Employment and Support Allowance: supplementary provisions**

181. Schedule 2 contains a number of provisions, set out in the following paragraphs, which contain powers for supplementary matters relating to ESA. For example, it deals with links between periods of claiming, and circumstances when the normal rules are modified such as when a person can be treated as having limited capability for work without having satisfied the usual test. The provisions would, in many cases, be used to replicate parts of the current incapacity benefit or income support systems, or to align ESA with other benefits, such as Jobseeker’s Allowance. Due to the need for flexibility to ensure the provisions in regulations are aligned and integrated properly with other benefits, delegated powers are appropriate. In the main, the provisions need to be aligned with provisions relating to other parts of the benefit system which use the negative procedure which makes that procedure appropriate here.

**Limited capability for work**

182. Claimants will be entitled to ESA where the claimant, by reason of a physical or mental health condition, is limited in their ability to carry out specified activities and meets the threshold of limited capability for work, which will be set in regulations under clause 8. Paragraph 1 of Schedule 2 contains additional powers in relation to limited capability for work.

183. Paragraph 1(a) provides that a claimant may in prescribed circumstances be treated as either having or not having limited capability for work. An example of how it is intended to use this power would be in dealing with people who are terminally ill, to treat them as having limited capability for work so that they can qualify for ESA, even though they might not meet the threshold for limited capability for work if the usual functional test were applied to them. A specific example might be cancer of the pancreas where a person might not demonstrate the debilitating symptoms necessary to score the 15 points required to be eligible for ESA, until about 6 weeks before death was expected. Equally, this power might be used to provide for claimants undergoing certain invasive types of chemotherapy to be treated as having limited capability for work. Alternatively, this power might be used to treat pregnant women as having limited capability for work if work would put them or their unborn child at serious risk of damage, even though the woman might not actually have limited capability for work itself.

184. Paragraph 1(b) provides a regulation-making power for the question of whether a person has limited capability for work to be determined notwithstanding that he is for the time being treated as having limited capability for work under paragraph 1(a). This power, when used in combination with paragraph 1(c) of Schedule 2, enables the question of a person’s limited capability for work to be looked at again and for a determination to be made about whether the person has limited capability for work. It might be used, for example, where someone has been treated as having limited capability for work under paragraph 1(a), but after a period of time medical evidence or advice is received that the person’s condition has significantly improved and it would be appropriate to test whether or not that person has limited capability for work.

185. Paragraph 1(c) provides a regulation-making power to determine afresh, in prescribed circumstances, the question of whether a person has limited capability for work. For example, it might be used to re-determine whether someone has limited capability for work, on the basis of medical advice that their condition can be expected to improve within a given period of time or that it has improved.
**Waiting days**

186. It is intended that people will normally be excluded from receiving ESA for the first three days of a period of sickness or disability ("waiting days"). This is in order to prevent large numbers of claims for very short spells of illness.

187. Paragraph 2 enables regulations to prescribe the circumstances in which waiting days need not be served, for example:

- where a claimant makes a new claim for benefit within the period covered by the linking rules; or
- waiting days have been served already in respect of another benefit and it would cause a break in entitlement in the income-related benefit payment.

**Periods of less than a week**

188. Although ESA is a weekly benefit, there will be circumstances where it is necessary to calculate a claimant’s entitlement for only part of a week. For example, at the beginning of a claim there may be less than a week payable up to the first designated payment date, depending on the day of the week the claimant becomes entitled. Similarly part week payments may be made at the end of a claim where a claimant has limited capability for work for part of a benefit week because they have returned to work.

189. Paragraphs 3(a) and (b) therefore enable regulations to be made which will make provision for these periods of less than a week. The intention is to use these powers to provide for the calculation of benefit for part weeks and to make appropriate modifications to the way in which income is to be calculated.

**Linking periods**

190. It is intended that where two periods of limited capability for work are separated by no more than a prescribed period of time (the "linking period"), the two periods should be treated as continuous, with the intervening period being ignored for benefit payment purposes. For example, if a person claims benefit for four weeks ("the first claim"), has a break of four weeks, and then claims again ("the second claim"), this second claim is treated as a continuation of the first claim. This means that if the contribution conditions were satisfied for the first claim, they will continue to be satisfied for the second claim, and the person will now be treated as if they had already completed four weeks of the assessment phase.

191. Powers under paragraph 4(1) enable the Secretary of State to prescribe the length of the linking period. The intention is to make different provision for different circumstances which will broadly follow the linking periods which current apply to Incapacity Benefit. For example, the intention is that people will be able to leave benefit for work or training for up to 104 weeks, as now, with the reassurance that their benefit position will be protected. The intention also is that the current 8-week linking rule that bridges gaps in entitlement to Incapacity Benefit will be extended to 12 weeks in ESA to align with rules elsewhere in the benefit system, for example, in Jobseeker’s Allowance.

192. Powers under paragraph 4(2) provide that regulations can prescribe that a condition met in an earlier period of limited capability for work does not need to be met again if periods link. An example would be where in the earlier period of limited capability for work the person’s assessment phase has ended; they would not need to satisfy the assessment phase again to qualify for the work related activity or support component.
Presence in and absence from Great Britain

193. Clause 1(3)(d) provides that to be entitled to ESA a person must be in Great Britain. Paragraph 5 of Schedule 2 allows the Secretary of State to provide in regulations the circumstances in which a person is to be treated as being in Great Britain. The intention is that in order to receive the income-related element of ESA a greater degree of affiliation to Great Britain is required beyond physical presence in the country. Accordingly it is proposed that, as a condition of receiving the income-related element, a person will be required to be habitually resident in Great Britain. This will reflect the existing requirements for Income Support, income-based Jobseeker’s Allowance and Pension Credit. This does not apply to the contributory element in the same way that it does not apply to Incapacity Benefit except for those who qualify under the youth provisions.

194. Paragraph 6 allows the Secretary of State to prescribe the circumstances in which a person’s entitlement to the contributory allowance can be paid where they are absent from Great Britain. As with Incapacity Benefit, this could be a permanent absence to a European Union country, or a country which has a bi-lateral agreement with the United Kingdom. It can also be for a temporary absence.

195. Paragraph 7 allows the Secretary of State to modify any provisions in ESA for contributory allowance in respect of someone who has been employed on a ship, vessel, hovercraft or aircraft. For example, people who have been employed on board a ship or aircraft could have any entitlement to contributory ESA protected despite not having been present in Great Britain, or we could make modifications to, for example, the administration of the PCA in cases where, because claimants are outside of Great Britain, there are particular operational and practical considerations to take into account.

196. Paragraphs 8(1) and (2) enables the Secretary of State to prescribe the circumstances in which a person’s entitlement to income-related ESA may continue when temporarily absent from Great Britain. As with Incapacity Benefit, Income Support and income-based Jobseeker’s Allowance, it is intended to allow ESA to continue in payment for periods of temporary absence from Great Britain, for example, on a short holiday, or when as person is abroad receiving medical treatment.

Limited capability for work-related activity

197. The main provisions relating to limited capability for work-related activity are set out in clause 9. Regulations under paragraph 9(a) of this Schedule may provide that a person in specified circumstances can be treated as having or not having limited capability for work-related activity. For example, the intention is to treat terminally-ill claimants as having limited capability for work-related activity to give them access to the support component, even though they might not meet the threshold in the test for limited capability for work-related activity if it were applied to them.

198. Paragraph 9(b) provides a regulation-making power allowing the question of whether a person has limited capability for work-related activity to be determined notwithstanding that he is for the time being treated as having limited capability for work-related activity under paragraph 9(a). This power, when used in combination with paragraph 9(c) of Schedule 2, enables the question of a person’s limited capability for work-related activity to be looked at again and for a determination to be made about whether the person has limited capability for work-related activity. It might be used, for example, where someone has been treated as having limited capability for work-related activity under paragraph 9(a) and has been placed into the support group, but after a period of time medical evidence or advice is received that the person’s condition has significantly improved and it would be appropriate to test whether or not that person has limited capability for work-
related activity and whether or not that person should remain a member of the support group.

199. Paragraph 9(c) provides a regulation-making power to determine afresh, in prescribed circumstances, the question of whether a person has limited capability for work-related activity. For example, it might be used to re-determine whether someone has limited capability for work-related activity on the basis that there is medical advice that their condition has worsened or it has improved or that it can be expected to worsen or improve within a given period of time.

**Effect of work**

200. By the very nature of the allowance, people claiming ESA are usually limited in their capability to undertake work. It is recognised however, that most people have some capability to work, and that work can be beneficial to many claimants – for example using part time work to build up confidence, increase social inclusion, or as a ‘stepping stone’ into sustained employment, and so some work is permitted. Incapacity Benefit has a range of Permitted Work rules. It is intended that ESA will have similar rules. In order to build upon the evidence of what works and gain the maximum benefit from such rules in encouraging people to move into work, there needs to be sufficient flexibility to allow for the development of a variety of options and activities. That flexibility requires that the provisions are set out in regulations using the negative procedure.

**Treatment of allowances as “benefit”**

201. Paragraph 11 makes provision for regulations to be made as a result of which the allowance, or the contributory element, or the income-related element would be treated as benefits for the purposes of the Contributions and Benefits Act, which is the main Act governing social security benefits generally. This power will be used to ensure that ESA and its two elements can be treated in the same way as other similar provisions within the social security system.

**Attribution of reductions in cases where allowances taken to consist of two elements**

203. Paragraph 12 creates a power to prescribe how reductions to a claimant’s benefit payment will take effect in cases where the claimant is entitled to both the contributory strand and the income-related strand of the allowance. Clauses 10, 11 and 12 of the Bill, along with section 2AA of the Administration Act, enable regulations to reduce benefit where there is non-compliance with the conditionality for ESA. The intention is to use those regulations to apply appropriate sanctions to the claimant’s benefit, and in the case where a claimant is entitled to both a contributory allowance and an income-related allowance, additionally to determine what element of the allowance the sanction will effect. For example, this power would be used to ensure that a sanction applied against the contributory allowance was not made good by a corresponding increase in the income-related allowance, thereby negating the effect of the sanction.

**Advance claims**

204. Section 5(1)(c) of the Social Security Administration Act 1992 and the regulations made under that provision enable people to claim benefits in advance of their being entitled to them. Under those regulations, such a claim is either made in relation to a period after the date on which the claim is made, or it is treated as being so made. As is the case for other benefits we intend to provide for people to be able to claim ESA up to three months in advance. The power at paragraph 14 will enable the making of appropriate modifications to Part 1 of the Welfare Reform Act, by regulations, in relation to advance claims to ensure the process is appropriate.
Members of the forces

205. This allows any of the normal conditions of entitlement to be modified in respect of members of Her Majesty’s forces and provides for Her Majesty’s forces to consist of prescribed establishments and organisations in which people serve under the control of the Defence Council. This provision is required to ensure that members of the forces who are unfit for duty prior to discharge are treated similarly to people in employment who exhaust their Statutory Sick Pay entitlement. For example, currently, where service personnel have been absent from duty due to illness or disability and are discharged from the service, like people who have received Statutory Sick Pay, they do not need to serve waiting days at the beginning of their claim for Incapacity Benefit. Provisions under this power would follow those in regulation 2 of the Social Security Contributions and Benefits Act 1992 (Modifications for Her Majesty’s Forces and Incapacity Benefit) Regulations 2003 (203/737). The power would be used only to ensure that the different status of members of the Her Majesty’s forces is taken into account in the rules of the benefit, and the negative procedure is appropriate.

206. In summary, the Schedule 2 powers are subject to negative resolution because in many cases they will be used to replicate parts of the current Incapacity Benefit or income support systems, or to align ESA with other benefits, such as Jobseeker’s Allowance. In the main, the alignment will be with provisions relating to other parts of the benefit system which use the negative procedure, making that procedure appropriate here.

Schedule 3 – Consequential amendments relating to Part 1

207. Schedule 3 sets out amendments to other Acts which are consequential upon Part 1 of the Welfare Reform Bill creating ESA. The schedule contains the following powers which amend or extend existing powers. The schedule, in most cases, makes no changes to the existing procedure which applies in each case, so the Government does not believe the creation of ESA justifies any changes to the level of Parliamentary oversight. This is because these consequential amendments are in the main minor, and will be used to apply existing provisions to the new benefit in the same or similar ways to existing benefits.

208. Where there are changes in the procedure relating to a power this is noted below and is because the power mirrors an existing affirmative power relating to Jobseeker’s Allowance. As the use of that power has already been approved by Parliament, the negative procedure is appropriate to the extension of those provisions in the same way to income-related ESA.

209. The first category of consequential amendments are those which have the effect of including income-related ESA within the scope of a pre-existing power which currently applies to income support and/or income-based Jobseeker’s Allowance. This has the effect of extending a pre-existing power to include income-related ESA rather than creating a new power which would not have already been considered by the Committee. The amendments included in this category are to:

- section 17A of the Children Act 1989 – paragraph 6(3);
- sections 6, 46(5) and 47(3)(b) of the Child Support Act 1991 as amended by the Child Support, Pensions and Social Security Act 2000 and as it has effect apart from that Act – paragraph 7(2) to (6);
- section 24(1) and (2)(d) of the Criminal Justice Act 1991 – paragraph 8;
- section 15A of the Social Security Administration Act 1992 – paragraph 10(5);
- section 74A of the Social Security Administration Act 1992 – paragraph 10(9);
• paragraph 6 of Sch. 5 and paragraph 6 of Sch. 8 Local Government Finance Act 1992 – paragraph 11;
• section 115 of the Immigration and Asylum Act 1999 – paragraph 18; and

210. The second category of consequential amendments are those which amend legislation so as to include income-related and contributory ESA. The amendments which achieve this in relation to provisions containing delegated powers simply extend those pre-existing powers so as to apply them as they currently apply to both Incapacity Benefit and Income Support and/or to income-based and contributory Jobseeker’s Allowance and in some cases to a range of other social security benefits. These amendments deal particularly with the administration and adjudication of an ESA. The amendments included in this category are:

• section 6A(2) of the Social Security Contributions and Benefits Act 1992 – paragraph 9(2);
• section 148 of the Social Security Contributions and Benefits Act 1992 in relation to the amendment at section 150 of the Social Security Contributions and Benefits Act 1992 – paragraph 9(11);
• sections 1, 2AA, 5, 71, 73, 122B, 124, 125, 130, 132, 150(7) and 179 of the Social Security Administration Act 1992 – paragraphs (2), (3), (4), (6), (7), (14), (16), (17), (19), (20), (21), (23) and (29);
• sections 11, 27 and 28 of the Social Security Act 1998 – paragraphs 16(4), (5) and (6); and
• section 72 of the Welfare Reform Act 1999 – paragraph 17.

211. A third category of amendments is those which insert provisions relating only to contributory ESA which currently apply to Incapacity Benefit and/or contributory Jobseeker’s Allowance. Again these amendments simply extend existing powers to ESA:

• section 22(5) of the Social Security Contributions and Benefits Act 1992 – paragraph 9(4); and
• sections 71 & 159B of the Social Security Administration Act 1992 – paragraphs 10(6) and 10(22).

212. The fourth category of amendments are those which create new delegated powers and a full explanation of those provisions is set out below.

213. Paragraph 10(23) of Schedule 3 inserts section 159C into the Social Security Administration Act 1992. This provision specifies that in certain circumstances, for example where certain other benefit income changes, the amount of a person’s income-related ESA is recalculated without a further decision being made by the Secretary of State. The new section includes a power to prescribe exceptions to this rule. For example, in income support (which has a similar power), the power has been used to specify an exception where the claimant is receiving the transitional addition to income support. In such a case section 159 of the Social Security Administration Act 1992 does not apply so a decision has to be made where there is any change to that addition.

214. The remaining new delegated powers in Schedule 3 mirror existing affirmative powers relating to Jobseeker’s Allowance. As the current use of the affirmative power in Jobseeker’s Allowance has already been approved by Parliament, and the new power relating to ESA will be used to mirror those provisions and apply them in the same way to ESA as they currently apply to Jobseeker’s Allowance, the negative resolution procedure is appropriate.
215. The two provisions concerned are the amendments made by paragraph 20 which inserts subsection 62(4A) into the Child Support, Pensions and Social Security Act 2000, and that made by paragraph 23 of Schedule 3 which inserts section 9(4B) into the Social Security Fraud Act 2001. These create powers allowing regulations to prescribe reductions in payments of income-related ESA where a person has been found to be in breach of a community order, or where a member of their family is an offender subject to a benefit reduction under the provisions of the Social Security Fraud Act. These powers mirror those in the same sections which relate to Jobseekers Allowance and may be used to provide the same rules for ESA to reductions in benefit of up to 40 per cent of the personal allowance, and to provide for lower rates of deductions in certain circumstance, such as the pregnancy of a family member.

Schedule 4 – Transition relating to Part 1

216. The use of negative powers within this Schedule is required to ensure the ability to act quickly and flexibly regarding the transitional arrangements for existing cases and respond promptly should the need arise.

217. This Schedule provides for transitional arrangements in relation to the introduction of ESA. Paragraph 1 provides a general power for regulations to make such provision as the Secretary of State considers necessary or expedient in connection with the coming into force of any provision of, or repeal, relating to Part 1 or otherwise for the purposes of, or in connection with, the transition to ESA. In addition to this general power the schedule provides specific powers in relation to those people who are on existing benefits. Existing benefits, for these purposes, means incapacity benefit (including transitional awards of incapacity benefit (paid to people previously on sickness or invalidity benefit), severe disablement allowance, and income support on grounds of incapacity for work or disability).

218. Paragraphs 2-4 provide for regulations to specify when a claim can be treated as a claim for an existing benefit and when a claim can be treated as a claim for ESA. Regulations may provide that a claim for an existing benefit made before the day that ESA comes into effect, but for a period beginning after ESA is introduced, (i.e. people making advance claims), can be treated as a claim for ESA.

219. Regulations may provide that after the appointed day (the day ESA is introduced), existing benefits cannot be claimed. Paragraph 3(c) provides that regulations may make provision for a claim to ESA to be treated as a claim for existing benefit. This may be used, for example, when someone’s benefit is backdated to a period before ESA was introduced.

220. Paragraphs 5 and 6 relate to claims that are made by those who had previously been entitled to an existing benefit, subsequently left benefit, but who can return to benefit because they are covered by linking rules. It covers those cases where the claimant’s original claim was for an existing benefit, but their subsequent claim covered by linking rules is after ESA has been introduced. Regulations may provide that these cases may be awarded ESA on terms, which match wholly or partly, the existing benefit.

221. Paragraph 7 provides for regulations to make provision for the migration of existing claimants onto ESA. These could provide for voluntary migration in prescribed circumstances, or mandatory migration. Regulations can prescribe the timing, conditions, kind and amount of any such entitlement to ESA which was previously an award for an existing benefit. It also can make provision for the termination of existing awards and for determining whether a claimant has limited capability for work-related activity (that is, that they would be in the Support group). Paragraph 7 provides for regulations to make
provisions for the conditions of continuing entitlement, or reviewing or terminating such awards.

222. Paragraphs 8 and 9 provide for regulations to make provisions for the conditions of continuing entitlement, or reviewing or terminating such awards. These paragraphs will allow regulations to be made for the protection of existing awards as they are moved on to ESA.

223. Paragraph 10 allows for regulations to modify the rules for the annual uprating of incapacity benefit and severe disablement allowance on or after the commencement of ESA.

Clause 29 – Local Housing Allowance

224. Clause 29(2) contains regulation-making powers in relation to how the Appropriate Maximum Housing Benefit (“AMHB”) is to be determined. (The AMHB is the maximum level of Housing Benefit to which an individual can be eligible, before deductions are made as a result of their income). It provides that regulations must prescribe the manner in which the AMHB is to be determined and sets out a number of regulation making powers. The existing relevant regulation making powers have been brought together in the new section 130A with some recasting, together with new powers specifically focussed on the Local Housing Allowance (LHA) approach.

225. The powers provide that, as now, the detailed rules will be contained in regulations. This includes rules setting out when case specific referrals should be made to rent officers, when case specific or generic rent officer determinations should be used to determine AMHB and when AMHB should be calculated without reference to rent officer determinations. (Generic determinations, relating to certain size properties in specific areas are required for the LHA). As is currently the case, the regulation making powers in relation to the determination of AMHB are subject to the negative procedure.

226. It is necessary to use regulation making powers to provide the Secretary of State with the flexibility to amend the detailed rules in relation to determination of AMHB without the need to amend primary legislation. The calculation of AMHB needs to take account of the wide range of tenancy types and claimant’s circumstances which change over time. It would be impracticable to put this level of detail in primary legislation. Use of the negative procedure reflects the current position and maintains the appropriate level of Parliamentary scrutiny of detailed provision of this nature.

227. Clause 29(3) relates to decision making in relation to Housing Benefit and enables regulations to prescribe the cases and circumstances in which, and the procedure by which, a superseding decision relating to Housing Benefit must be made by the appropriate relevant authority. Under the LHA this allows for the local authority to apply a new LHA rate each year to ensure that a claimant’s award is updated.

228. There is an existing regulation making power which enables the Secretary of State to prescribe the cases and circumstances in which, and the procedure by which, a superseding decision may be made by the appropriate relevant authority. That power is subject to the negative procedure as is the new power. Making such provision in secondary legislation ensures that the Secretary of State has the necessary flexibility to amend the detailed rules so that he can respond quickly to the wide range of circumstances which can arise in relation to decision making and Housing Benefit. The use of the negative procedure reflects the existing level of Parliamentary scrutiny for detailed provision in relation to decision making of this type.

229. Proposed new section 130A(2) provides that regulations must prescribe the manner in which the AMHB is to be determined. This replaces the similar power currently contained in section 130(4).
230. Proposed new section 130A(3) provides that the regulations may provide for the AMHB to be ascertained in the prescribed manner by reference to rent officer determinations. This power replaces the power contained in section 122(3) of the Housing Act 1996 which provided that regulations under section 130(4) of The Social Security Contributions and Benefits Act 1992 (Housing Benefit: manner of determining appropriate maximum benefit) may provide for benefit to be limited by reference to determinations made by rent officers in exercise of functions conferred under section 122. We intend that this power should be used, as now, to provide for case specific rent officer determinations to be used in determining AMHB in some cases and for generic rent officer determinations (i.e. LHA determinations) to be used in other cases. As now, there will be some cases where rent officer determinations are not used to determine AMHB. The new power is particularly appropriate for LHA cases because it makes it clear that AMHB make reference to rent officer determinations but does not need to be limited by such determinations.

231. Proposed new section 130A(4) provides that regulations may require an authority administering Housing Benefit in any prescribed case to apply for a rent officer determination and to do so within such time as may be specified in the regulations. This replaces the existing regulation making power in relation to applications to rent officers for determinations in section 122(5)(a) and (b) of the Housing Act 1996. This power will be necessary for cases that are exempt from the LHA. It is considered desirable that the powers relating to this matter should be in the same piece of legislation.

232. Proposed new section 130A(5) provides the power to make provision as to the circumstances in which, for the purpose of determining the AMHB, the amount of the liability a person has to make payments in respect of a dwelling in Great Britain which he occupies as his home must be taken to be the amount of a rent officer determination instead of the actual amount of that liability. This is an additional “treat as liable” power created solely for the purpose of calculating the AMHB. The existing power to make regulations to treat people as liable is contained in section 137(2)(j). It provides a power specifically focussed on the LHA approach, which it is intended to use to enable a claimant’s AMHB to exceed their rent liability if the appropriate LHA is higher than their actual rent liability. It is intended to do this by providing for a claimant’s rent liability to be treated as the amount of the appropriate LHA where that allowance is higher than the claimant’s actual rent liability.

233. Proposed new section 130A(6) provides an equivalent power to that in subsection (5) for claimants who are “treated” as having a rent liability under regulations made under the existing “treat as liable” regulation making power in section 137(2)(j) Social Security Contributions and Benefits Act. (They may be treated as having a rent liability under regulations made under section 137(2)(j) for example because it is their partner who has the actual liability. This enables either member of the couple to make the Housing Benefit claim).

234. Clause 29(3) provides for regulations to set out the cases and circumstances in which, and procedure by which a decision relating to Housing Benefit must be made by the appropriate relevant authority. It is intended to use this power to prescribe when a local authority must make a decision whether to supersede a Housing Benefit decision where for example, it should use an updated LHA determination to calculate AMHB. This is wider than the current power in Schedule 7, paragraph 4 of the Child Support, Pensions and Social Security Act 1992 which permits regulations to be made to prescribe the cases and circumstances in which a decision to supersede an earlier decision may be made rather than must be made. The wider power is considered to be necessary in order to ensure the proper implementation of the Government’s policy intentions in this area.
Clause 30 – Loss of Housing Benefit following eviction for anti-social behaviour etc.

235. Clause 30 provides for a sanction of Housing Benefit when a household has been evicted for anti-social behaviour, has subsequently refused an offer of rehabilitation services and thereafter failed to comply with a warning notice. Rehabilitation services are those that have the intention of ending, or preventing repetition of, conduct which may or has led to eviction. The new delegated powers are found in 4 sections to be inserted in the Social Security Contributions and Benefits Act 1992 by subsection 1 of the clause – subsections 130B, 130D, 130F, and 130G.

Section 130B – Loss of Housing Benefit following eviction on certain grounds

236. Subsection (4) of the proposed section 130B provides for the Secretary of State to prescribe the rate at which benefit is reduced and the circumstances in which benefit is to be payable.

237. These powers will be used to set out the level of the reduction in benefit if the conditions for the sanction have been met; when a hardship rate will be payable and the level of that hardship rate; and what should happen in circumstances where two sanctions are active on a Housing Benefit claim at the same time.

238. The Department has previously used delegated legislation to set out the detail of sanction levels and hardship. For example, the severity of a sanction made because of “two strikes” legislation is set out in the Social Security (Loss of Benefit) Regulations (SI 2001 No. 4022). This approach provides flexibility for the Department to amend the detailed rules without the need for amending primary legislation.

239. The Department recognises that the severity of the sanction and issues relating to hardship are something that Parliament will want to have the opportunity to consider in more detail. Regulations made under subsection (4) will therefore be subject to affirmative Parliamentary procedures.

240. Subsection (11) of 130B enables the Secretary of State to prescribe the form of the warning notice, which in England and Wales would have to be issued prior to a sanction being imposed. The warning notice will set out for the claimant what action he must take, and the time limit for such action, and will advise him that the amount of Housing Benefit payable could be affected if they did not comply. Any such regulations will be subject to the negative procedure.

Section 130D – Loss of Housing Benefit: supplementary

241. Subsection (1) of the proposed section 130D provides powers to the Secretary of State to prescribe circumstances in which some or the entire amount of Housing Benefit sanctioned should be paid to the claimant, with such other adjustments as may be prescribed.

242. This power will be used to set out circumstances where benefit that has been sanctioned should be repaid to the claimant. Examples of when this could happen are if the claimant successfully applies to have the relevant possession order set aside or if the claimant has made a successful appeal.

243. Subsection (2) of the proposed section 130D would provide powers to the Secretary of State to vary the definition of relevant possession orders, the making of which satisfies the first condition for application of the sanction.

244. It is not envisaged that this power will be used in the immediate future. It could be used to extend the proposal to other orders for possession, not specifically related to anti-social behaviour. For this reason the Department considers that any Order made by virtue
of this section should be subject to affirmative procedure, so that Parliament can be given the opportunity to consider any change in detail.

245. Subsection (3) of the proposed new section 130D provides powers to the Secretary of State to prescribe circumstances which may or may not constitute good cause, and those matters which should and should not be taken into account in deciding whether someone has good cause for not taking an action specified in a sanction warning notice or Scottish equivalent.

246. The Department has previously set out the detail of good cause in regulations. For example, legislation and regulations relating to circumstances in which Jobseekers Allowance is not payable are set out in primary legislation (Jobseekers Act 1995) and the good cause provisions are detailed in the Jobseekers Allowance regulations (SI 1996 No. 207).

247. The regulations will provide details of circumstances that must be taken into consideration when determining good cause. These would include duties and emergencies, such as attending funerals for close family and friends, attending court/jury service or being in an accident (travel, domestic, natural disaster). The regulations would also enable an authority to consider all the circumstances of a case; and circumstances that would give good cause automatically, such as the time to take action specified in a warning notice is less than one week after the notice was issued.

Section 130F – Information provision

248. For the provision to work effectively it will be necessary for information to be exchanged. The necessary information sharing provisions are provided in the proposed section 130F. Those who may share information and the purposes for which information may be used are generally set out in the primary legislation. The regulations will set out the operational detail of how the information sharing should take place and so it is intended that they will be made using the negative procedure. The use of delegated powers will give the Secretary of State the necessary flexibility to change the provisions in the light of changing circumstances.

249. Regulations made under subsection (1) of the proposed section 130F will require a court which makes a relevant possession order to notify the Secretary of State of it. They would also set out which other details relating to the order the court must provide. Regulations would also enable the Secretary of State to require similar information from others who may be aware of the making of a relevant order for possession, such as a landlord or local authority.

250. Regulations made under subsection (3) of the proposed section 130F will require relevant local authorities to supply relevant information held by it to the Secretary of State, or to a person providing services to him, for any purpose relating to the administration of Housing Benefit. For example, this could include information relating to whether a claimant has met any of the conditions within section 130B(1).

251. Regulations under subsection (4) of the proposed section 130F will require relevant information to be shared within and between authorities administering Housing Benefit and those providing rehabilitation services for purposes relating to the administration of Housing Benefit, for example information relating to the failure to comply with a sanction warning notice.

252. Regulations made under subsection (5) of the proposed section 130F will require relevant information to be shared within and between authorities administering Housing Benefit and those providing rehabilitation services for purposes relating to the provision of rehabilitation services. This would ensure that authorities could share relevant information should a household move from one authority area to another.
58. Subsection (7) of the proposed new section 130F will enable the Secretary of State to prescribe that information should be provided in a certain manner, for example in writing, and that information should be supplied within a certain time.

G – Pilot schemes relating to loss of Housing Benefit

253. Section 130G will provide the Secretary of State with powers to set up a pilot scheme for this proposal for a prescribed period. This power will be used to prescribe who the pilot scheme will apply to and the period for which it will run. The intention is to pilot in 10 authorities for a period of 2 years. The regulations will specify an end date for all regulations made under sections 130B to 130G. Subsection (6) would enable the Secretary of State to amend or revoke the pilot scheme through regulations.

Clauses 31 and 32 – Housing Benefit and Council Tax Benefit for persons taking up employment

254. Together these clauses remodel the existing provisions for payment of an Extended Payment (or benefit run-on) to claimants in prescribed circumstances who take up or increase their hours of employment. The main intent behind these clauses is to provide for an easier method of making extended payments and remove the requirement for those who receive extended payments to submit a fresh claim for any in-work Housing Benefit or Council Tax Benefit unless that person has moved to another authority. This will avoid the current situation where qualification for the Extended Payment ends an existing award of Housing Benefit and/or Council Tax Benefit unless that person has moved to another authority. This will avoid the current situation where qualification for the Extended Payment ends an existing award of Housing Benefit and/or Council Tax Benefit unless that person has moved to another authority. The detailed rules are expected to remain the same or similar to the current scheme, and will remain in secondary legislation to provide the flexibility to keep these under review.

255. Clause 31, subsections (1) and (2) provide the Secretary of State with the power to prescribe the basic underpinning entitlement conditions for Extended Payments of Housing Benefit/Council Tax Benefit, namely that a person entitled to Housing Benefit or Council Tax Benefit would be entitled to such a payment for a prescribed length of time when his own or his partner’s entitlement to one of a number of prescribed benefits ends, in prescribed circumstances (e.g. when he has commenced employment or increased hours or earnings), and certain prescribed conditions are satisfied (e.g. he must have been entitled to the prescribed benefit for a continuous period of 26 weeks). In particular, clause 30, subsection (2) allows for the period for which a person is entitled to an Extended Payment to be prescribed. It is intended that it will be payable for a 4 week period, as it is now.

256. The negative resolution procedure has been chosen for regulations made under these two clauses, as their purpose is to improve the operation of the current Extended Payments schemes, which are themselves subject to negative resolution.

257. The underlying objective of Extended Payments is that they act as a work incentive. The flexibility to amend the detailed provisions for entitlement has been used on a number of occasions, for example to add receipt of certain disability benefits to the list of qualifying benefits. It is considered appropriate to maintain the same degree of flexibility to respond to changing circumstances.

258. Clause 31, subsection (7) provides that calculation of an Extended Payment should be determined by regulations, as is the case under the current legislation.

259. Clause 31, subsection (9) allows the Secretary of State to prescribe in regulations how entitlement to an Extended Payment under subsection (1) interacts with an existing
entitlement, whether existing Housing Benefit or Council Tax Benefit entitlement is claimed by the Extended Payment claimant or their partner.

260. Clause 31, subsection (10) allows the Secretary of State to prescribe in regulations that where a person moves to another local authority area within the 4 week period after they take up work, any amount of Extended Payment payable by the original local authority is the sole amount of their entitlement. On the rare occasion that a claimant considers that they may be entitled to in-work Housing Benefit and Council Tax Benefit in addition to the Extended Payment entitlement, this will be payable by the new local authority and the claimant will need to claim this additional amount. However, the amount payable by the new authority will be reduced by the amount of an Extended Payment. The purpose is to avoid double-provision, and the same offsetting rules will apply where a tenant moves within the local authority.

261. Clause 31, subsection (12) allows the Secretary of State to make provision in the regulations for exceptions to the offsetting rules (described above) in prescribed circumstances; or to avoid the other partner in a couple from “double claiming” during the period of an Extended Payment. An example of the sort of exceptional circumstances envisaged under subsection (12)(a) or (c) is where somebody has an unavoidable rental liability at the same time on two properties, for example after fleeing from domestic violence.

262. The Government inserted clause 31(13) during Commons Committee stage to maintain a feature of the current schemes which allows a period of grace if a person moved home (and as a result ceased to be entitled to Housing Benefit and/or Council Tax Benefit) in the week they took up employment, or in the preceding week. This amendment was necessary, because such people would otherwise not get an Extended Payment as their entitlement to Housing Benefit would have ended before they ceased to be entitled to one of the qualifying benefits for the Extended Payment.

263. Clause 32 makes clear that the normal Housing Benefit and Council Tax Benefit rules apply in relation to benefit paid under the Extended Payment provisions. However, subsection (1)(b) permits the Secretary of State to make any modifications to the general rules which he considers are required in relation to Extended Payments. The administration provisions are defined in subsection (3) as the Administration Act and subordinate legislation made in pursuance of that Act.

264. The power to modify the Administration Act in subsection (1)(b) is a Henry VIII power. However, its effect is limited to modifications that are necessary in connection with extended payments. Moreover, the primary powers in the Administration Act relate to administration of benefits rather than entitlement and any modifications are likely to be of a relatively minor procedural nature.

265. Subsection (2) illustrates, in particular, the type of modification that could be made under the Henry VIII power in subsection 1(b). It specifically allows for such a modification to include that the payment of an Extended Payment must be made from one local authority to another, in prescribed circumstances. This would allow (for cases where a council tenant has moved between local authorities) the former authority to discharge responsibility for paying the Extended Payment by transferring the money directly to the new local authority. The new authority would then rebate the tenant’s rent/council tax account accordingly. The basic intent here is that the usual method of paying the tenant should not be disrupted in the rare cases when an Extended Payment is due and the tenant has moved to a different area. As the effect of clause 32 subsections (1)(b) and (2) is limited, negative resolution will still provide Parliament with sufficient opportunity to scrutinise any proposed modifications.
266. Clause 32, subsections (4) and (5) provide for all the regulation making powers described above in relation to Extended Payments to be exercisable by the Secretary of State, and to be subject to the negative procedure. Subsection (6) makes clear that the usual scope for regulations under the Social Security and Contributions Act 1992 to make, for example, different provisions for different classes, or exemptions for particular classes of case, or to make whatever consequential or transitional arrangements as necessary and so on, applies in relation to Extended Payments.

267. As discussed above, the provisions in clauses 31 and 32 are essentially remodelling the existing regulation-making powers, and it is considered appropriate to maintain the same scope and procedure for the delegated powers.

Clause 34 – information relating to housing benefit

268. Clause 34 amends the existing regulation making power relating to the provision of information and evidence to rent officers contained in section 5(1)(h) and (3) of the Social Security Administration Act 1992. The existing delegated power enables the Secretary of State to make regulations requiring local authorities to provide information or evidence to rent officers for the determination of a Housing Benefit claim or in connection with any question arising in connection with a claim. The amendments contained in clause 34 enable the Secretary of State to make regulations that require local authorities to provide rent officers with evidence of a prescribed description relating to an individual claim or award or to any description of claim or awards.

269. It is considered important to maintain the existing flexibility provided by a delegated power as the Secretary of State from time to time needs to change the type of information or evidence that should be provided in the light of changes to the housing market and the exact nature of the functions which rent officers are required to undertake in connection with Housing Benefit. The new delegated power, like the existing delegated power is subject to the negative procedure and it is considered that this level of Parliamentary scrutiny continues to be appropriate for regulations which make detailed provision in this area.

270. Subsection (2A) contained in subsection (2) of clause 34 would enable the Secretary of State to require prescribed persons to provide a rent officer with information or evidence of such description as is prescribed. Subsection (2B) provides that the Secretary of State may prescribe any description of information or evidence which he thinks is necessary or expedient to enable rent officers to carry out their functions under section 122 of The Housing Act 1996.

271. Subsection (2C) provides that information or evidence required to be provided by virtue of subsection (2A) may relate to an individual claim or award or to any description of claims or awards.

272. It is intended that the prescribed persons will be local authorities and that they will be required to provide basic information about Housing Benefit claims and awards each month in order that the rent officer can exclude Housing Benefit properties from the database he uses to make determinations in accordance with his functions under section 122 of the Housing Act 1996. It is also intended that regulations will require local authorities to provide certain information where the local authority is required to ask the rent officer to make a case specific determination as part of his functions under section 122 of The Housing Act 1996. It is intended that this will be information about the claimant and other occupiers, the dwelling and the tenancy which the Secretary of State considers is necessary or expedient for the rent officer to have in order to carry out the relevant case specific determination including possible visits. This would include information warning rent officers of potentially violent claimants.
273. Should local authorities fail to warn rent officers where appropriate, this power could be used to impose specific requirements in relation to warning rent officers of potential violence, although it is not necessary in the short-term because we will aim to resolve the issue by producing guidance to accompany the draft regulations.

Clause 35—Supply of information by rent officers

274. Clause 35 does not include a delegated power but includes a direction giving power and reference to this clause is included for the sake of completeness. It provides an information sharing gateway from rent officers to the Secretary of State. This clause is similar to the information sharing gateway between local authorities and the Secretary of State contained in section 122D of the Social Security Administration Act 1992.

275. Clause 35 inserts a new section 122F into the Social Security Administration Act 1992. Subsection (1) enables the Secretary of State to require a rent officer to supply Housing Benefit information held by the rent officer to, or to a person providing services to, the Secretary of State. It provides that the information may be used for specific purposes, including social security purposes.

276. Subsection (2) of the new section 122F provides that information must be supplied under subsection (1) in such manner and form, and in accordance with such requirements, as may be specified in directions given by the Secretary of State. This is equivalent to the direction giving power contained in section 122D. It enables the Secretary of State to change his requirements relating to the provision of the information and the form and manner in which it is to be provided without the need to legislate. This provides flexibility so that, where he considers it necessary, he could seek more detailed information where for example it appeared that Housing Benefit expenditure was rising unusually quickly in a particular area. Or he could ask for information to be provided in a different format where that would assist in considering a policy option.

277. Subsection (3) limits the onward disclosure of the information provided in accordance with directions. It also ensures that the information sharing provision meets the information sharing principles of the Commissioners for Her Majesty’s Revenue and Customs. (The Secretary of State’s responsibilities for the appointment, remuneration and administration of rent officers will transfer to the Commissioners for Her Majesty’s Revenue and Customs on the 1st of April 2009 and the work of the Rent Service will be integrated into the Valuation Office Agency an agency of her Majesty’s Revenue and Customs).

278. Dealing with such detail in legislation would be cumbersome and it would be difficult to respond quickly to changing information requirements.

279. As this power would not be exercisable by statutory instrument, it is not included in the Annex of delegated powers.

Clause 36—Payment of Housing Benefit

280. Clause 36 substitutes new sub-paragraphs (2), (2A) and (2B) for subsection (2) of section 134 of The Social Security Administration Act 1992, which does not contain any delegated power. The new subsection (2) provides that Housing Benefit is to be paid in such manner as is prescribed and that regulations may, in particular, provide for Housing Benefit to be paid in one or other or a combination of the methods of payment set out in the new subsection (2). Subsection (2B) provides that the new subsection (2) does not affect the existing power in section 5 to make provision in relation to the payment of benefit.
281. The existing provisions in relation to payment of benefit in section 5(1)(i)(p) and (6) are delegated powers subject to the negative procedure. It is necessary to use delegated powers subject to the negative procedure in relation to the new powers in subsection (2A) as this is an area where regulations need to be amended in the light of developments in housing and landlord and tenant law and developments relating to the financing of various types of social housing. It is therefore appropriate that the method of payment is dealt with in secondary legislation which is subject to the negative procedure.

282. The regulation making power contained in the new subsection (2) will enable the Secretary of State to make regulations which require local authorities to pay Housing Benefit to their tenants, rather than rebating their tenants. It is intended to use the power in the new subsection (2) to extend the principle of payment to tenants to those renting from the local authority in appropriate cases, subject to safeguards. The existing powers in section 5 do not provide for this.

283. The power contained in new subsection (2), together with the existing powers in section 5, can be used to make regulations which require local authorities to pay Housing Benefit for other types of claimant either to the claimant, to someone else on his behalf or to his landlord.

Clause 38 – Directions by Secretary of State

284. Clause 38 makes changes to the Secretary of State’s powers of direction available to him, by virtue of section 139D of the Social Security Administration Act 1992, they are included here for completeness. In particular it widens the Secretary of State’s direction making powers.

285. Currently, following his consideration of a report and any local authority response to it the Secretary of State can give directions to a local authority as to the standards it must attain in respect of its administration of benefit (i.e. Housing Benefit and/or Council Tax Benefit) and the time within which it must do so. Directions can also include recommendations on the action the authority might take to attain the required standards.

286. Clause 38 would extend the Secretary of State’s power so that he could direct an authority to take such actions necessary for the purpose of improving its administration of benefits. It is necessary to take this power because not all problems in respect of a local authority’s benefit service can be covered by specifying standards to be attained. For example, it might be considered necessary that an authority should ring-fence and clear a backlog of work, develop and implement a suitable strategy for combating benefit fraud or review a part of the service that is not functioning properly.

287. The power to direct on actions would be used as a last resort when an authority is unwilling or unable to take the action necessary to address problems identified in a report.

288. Wider direction making powers are already available to the Secretary of State, by virtue of the powers in section 15 of the Local Government Act 1999. These powers can be used when an authority is failing to comply with its duties under Best Value. Amongst other things, these powers provide for the Secretary of State to direct an authority to take any action he considers necessary or expedient to comply with Best Value requirements. However, these powers are only available to the Secretary of State in respect of English authorities, as similar powers in Scotland and Wales rest with the devolved administrations.

289. In widening the Social Security Administration Act direction powers the Secretary of State would be able to take appropriate action in respect of a local authority’s benefits service in Scotland and Wales, as well as in England. This reflects the fact that benefits is a reserved matter and the Secretary of State needs to be able to act when poor
performance in respect of benefits administration is reported, whether the local authority that is failing is in England, Scotland or Wales.

290. Unlike the Best Value powers that cover all local authority functions the powers in the Social Security Administration Act are limited so that the Secretary of State can only:

• use the power if he has received a copy of a report that is concerned with Housing Benefit and/or Council Tax Benefit administration;

• use the power in relation to the local authority that was the subject of the report stating that there is a need for the authority to improve its performance and remedy failings; and

• direct on action he thinks necessary or expedient for improving the authorities functions in relation to benefits administration (including the prevention and detection of fraud).

291. Other safeguards are as follows:

• when considering a report the Secretary of State would also be able to take account of any information provided by the authority in question on its proposals for reporting failings and any other information he thinks relevant - so a balanced decision can be made on whether or not directions are appropriate;

• except in cases of emergency, the Secretary of State would be required to give the authority in question an opportunity to make representation about any proposed direction; and

• the Secretary of State would be able to vary or revoke a direction in consequence of representations made by a local authority, to rectify an error or omission or in consequence of a material change in circumstances.

292. As now, directions would only be used as a last resort. DWP’s preference is to work with authorities that need to deliver improvements. Since 1997 the Secretary of State has only used his Social Security Administration Act direction powers on three occasions, and the Local Government Act powers once in respect of benefits.

293. In the case of the direction under Local Government Act 1999, the Secretary of State directed an authority to clear a backlog of work by the end of December 2001 without compromising the speed and accuracy of non-backlog work. This direction focused on resolving a key problem, but it could not have been made under the Social Security Administration Act powers because no standard was specified in the direction. The provisions proposed rectify this situation.

294. In England when deciding on the action that should be taken in respect of an authority that is reported to be delivering an unsatisfactory benefits service, DWP would continue to take account of any protocol on intervention agreed between the Government and Local Government Association. In Scotland and Wales DWP would, as now, consult with the devolved administrations to ensure that any action taken was appropriate.

Clause 39 – Minor and consequential amendments relating to Part 2

295. Clause 39 contains no delegated powers in itself but it does give effect to Schedule 5 which does contain such powers.

Schedule 5

296. The purpose of this part is to update, clarify and ensure the avoidance of discrimination in the types of war service pension that are eligible for discretionary disregard schemes operated by local authorities. In broad terms, there is a mandatory £10
disregard that is applied to war disablement and war widow/widowers pensions when
calculating entitlement to an income-related benefit. In addition, local authorities may
decide, under sections 134(8) and 138(6) of the Social Security Administration Act 1992,
to disregard in whole or in part the income (remaining after the mandatory disregard has
been applied) from certain types of war disablement or war widow’s pension when
calculating Housing and Council Tax Benefit entitlement. In effect this means that benefit
claimants who are in receipt of the relevant war service pensions can benefit from a higher
income before their entitlement to Housing and Council Tax Benefits is withdrawn.

297. The majority of war service pensions are included in local schemes by virtue of
sections 134(8)(a) and 138(6)(a) and are not subject to spending limits. However sections
134(8)(b) and 138(6)(b) enable the Secretary of State to prescribe discretionary
modifications to the scheme by way of regulation. Such modifications are subject to a
spending limit on the part of the authority. Over time, and in the absence of a suitable
primary legislative vehicle at the relevant time, certain pensions have been included in the
discretionary schemes by this route; for example, pensions for a group of war widows,
pensions for war widowers etc.

298. Recent changes to war service pensions, including the introduction of the Armed
Forces (Pensions and Compensation) Act 2004, have highlighted the need to ensure that
the Housing Benefit and Council Tax Benefit arrangements can be updated promptly to
take account of any future changes in the relevant service provisions, otherwise war service
pensions recipients could lose out on valuable financial assistance.

299. Therefore the Bill provides for a new delegated power at paragraphs 3 and 4 of
Schedule 5. This would enable local authorities to introduce discretionary local schemes
that enable them to disregard the whole or part of any war service pension paid to a
person when deciding a claim for Housing Benefit or Council Tax Benefit but would
enable the Secretary of State to set out the qualifying benefits in regulations, subject to the
negative procedure. The intention is to use this power to replicate the current list of
eligible war service pensions, which may be included in the discretionary schemes, and to
add to this list those already prescribed in regulations, thereby ensuring they are not
subject to a spending limit.

300. The Department considers that the appropriate level of scrutiny is to subject the
definition of qualifying service pensions to the negative procedure. This is consistent with
the usual arrangements in social security legislation, particularly for a provision that is
beneficial to the recipients. And is the same level of scrutiny to which a pension may be
added to the list of service pensions that qualify for the mandatory £10 disregard across all
the income-related benefits.

Clause 40 – Social Security information

301. Clause 40 would amend the Social Security Administration Act by (a) inserting a
new section 7B to provide for the use by “relevant authorities” of social security
information in connection with the administration and promotion of claims for benefit,
and (b) amending section 7A of that Act which deals with the receipt by relevant
authorities of claims for benefit and the collection and verification of evidence relating to
claims. Also the definition of “relevant authority” is extended to include county councils
in England.

302. The clause provides for a number of new regulation-making powers (described
below). They will enable the Department to respond to changing circumstances as regards
to administration of social security benefits without the need for new primary legislation.
The proposed new powers would all be subject to the negative procedure - which the
Department considers would afford the appropriate level of scrutiny.
303. Subsection (2) of the proposed new section 7B would enable the Secretary of State to make regulations governing the procedures to be followed by a relevant authority when it receives and uses social security information that has been used or verified by another relevant authority. The intention is to ensure that information already verified should normally be accepted and used by the importing authority within certain safeguards, to avoid asking the claimant to provide the same information again. Without this, one of the objectives of the clause, to streamline administrative procedures, would be harder to achieve.

304. Subsection (3) provides for the Secretary of State to prescribe in regulations what counts as a “relevant purpose”, which must be related to either a claim or potential claim for a “specified benefit”. A purpose is relevant in this context if it increases the take-up of social security benefits to which claimants may be entitled. It is intended that regulations would allow, for example, a local authority that receives a claim for Housing Benefit from a pensioner, to use that information in encouraging the pensioner to take up any unclaimed entitlement to Pension Credit or other DWP-administered benefits.

305. Subsection (5) enables the Secretary of State to prescribe through regulations the “specified” benefits for the purposes of new section 7B – these are expected to be most social security benefits. In practice this would mean that the Secretary of State could permit the use of information in relation to a range of benefits and respond in a timely way to future changes in the nature or the names of particular benefits, without recourse to primary legislation. A similar approach was taken in section 7A (6)(d) of the Social Security Administration Act which allows the Secretary of State to prescribe relevant benefits for the purposes of facilitating claims to be taken by the Department or local authorities on behalf of one other.

306. Clause 40 (2)(b), inserts paragraph (e) into section 7A (2) of the Social Security Administration Act. The new paragraph provides for regulations to enable one relevant authority to verify claims information and evidence on behalf of another. For example, where the Department receives a claim for Housing Benefit and supporting information and evidence only relevant to the Housing Benefit claim, regulations could prescribe that the Department may verify this material on behalf of the local authority to which the claim would be forwarded. The local authority could then be required, through regulations made under subsection (2) of the proposed section 7B (described above) to use such information.

307. Subsection 2(e) adds a county council in England as a category of relevant authority for the purposes of sections 7A and the proposed 7B of the Administration Act. Section 7A (6) (c) provides for regulations enabling county councils in England to accept claims and information for specified social security benefits and to forward them to whoever administers the benefit. By virtue of regulations made under section 7A 2(e) above, English county councils will also be able to verify claims information on behalf of whoever administers the benefit.

Clause 41 - Information relation to certain benefits

308. Clause 41 deals with the exchange of information between the Secretary of State and local authority Housing Benefit teams and local authority teams working on the delivery of welfare services (the “Supporting People” programme funded by the Department for Communities and Local Government and the Devolved Administrations to help vulnerable people to live independently).

309. It is proposed that regulations are used as the reasons for information sharing will change over time with ongoing developments in the way that Supporting People is financed and administered, and as relevant policy changes in the general Housing Benefit
regulations occur (for example concerning the rules prescribing the circumstances in which payment should be made to the tenant, the landlord or another third party). Specifying these matters in secondary legislation provides a necessary degree of flexibility to continue this information sharing as relevant policy developments are made. Given the nature of these changes we believe that the negative procedure provides the appropriate level of scrutiny.

310. It provides two information sharing gateways. The first under subsection (1) provides that the Secretary of State and Housing Benefit teams can supply information to Supporting People teams (and vice versa) for the purpose of applying welfare services grants. This replaces the current provision in section 94 of the Local Government Act 2000.

311. The second gateway under subsection (2) allows Housing Benefit teams and Supporting People teams to share certain information for prescribed Housing Benefit and welfare services purposes. These purposes are prescribed under subsection (8) of this clause.

312. Regulations under subsection (8) would specify the purposes for which certain information can be used, providing the necessary level of flexibility needed to allow for future changes, while still limiting its use to purposes concerning Housing Benefit or welfare services.

313. This would allow regulations to be made enabling welfare services information, such as that concerning the vulnerability of the tenant or the probity of the landlord, to be used to inform local authority decisions on whether Housing Benefit should be paid direct to the claimant or to the landlord.

314. We considered it appropriate to use regulations to restrict powers for the information gateway in subsection (2). Information to be shared would be of a personal nature, including matters relating to a person’s medical condition and mental health. Creating a gateway for any information relating to any housing benefit or welfare service matter would be excessive.

315. The Secretary of State may make an order under subsection (7) of this clause to specify the enactments under which grants are paid and in respect of which information sharing can take place. It is considered appropriate to use regulations to specify which grants the sharing in subsection (1) can take place not only to provide for the current funding stream in place, but also to allow for policy work being considered by the Department for Communities and Local Government (DCLG) and the Welsh Assembly (WA) which is looking at using alternative grant making powers to fund welfare services.

316. Initially we intend that this power under subsection (7) is used to specify those grants made under section 93 of the Local Government Act 2000 so that the sharing currently under section 94 of that act (which this provision repeals) may continue, while allowing the Secretary of State, in the future, to specify other grants to allow for any changes in funding policy developed by DCLG or WA.

317. Information to be shared under subsection (2) will be of a personal nature. However, the Department considers that the protection provided under section 123 of the Social Security Administration Act 1992 in respect of Housing Benefit Teams and clause 42 of this Bill in respect of Supporting People teams would provide the necessary protection against any unauthorised sharing, consistent with that throughout the Social security system and in the current sharing under the Local Government Act 2000. Regulations made and the information sharing itself would have to be compatible with the European Convention on Human Rights and Data Protection law.
Clause 45 – Local authority powers to investigate benefit fraud

318. The purpose of this clause is to widen the existing powers of local authority fraud investigators to allow them to investigate fraud against national DWP administered benefits.

319. The clause amends section 110A of the Social Security Administration Act 1992. The provisions would allow a local authority to authorise investigators to use powers contained in section 109B and 109C for “relevant purposes” that relate to: the entitlement to social security benefits; whether benefit legislation has been contravened; and the prevention or detection of benefit offences. Regulations are appropriate for setting limits on the powers to prevent misuse.

320. Proposed new subsection (1B) of this section would enable the Secretary of State to prescribe the conditions under which the new powers can be used whilst new subsection (2B) would allow restrictions to be placed on the use of those powers. The intention is to put limits and safeguards in place to restrict the range of benefits that a local authority could investigate and to ensure that the powers are not misused.

321. Regulations would set out the national benefits that local authorities will be able to investigate. The Secretary of State would be able to withdraw the new powers where an authority has misused them, or is likely to misuse them. The threat from fraudsters is not static. Therefore, setting out these conditions in secondary legislation will ensure flexibility and allow the limits and safeguards to keep pace with the evolving threat from fraudsters.

Clause 46 – Local authority powers to prosecute benefit fraud

322. The purpose of this clause is to provide a power for local authorities to prosecute fraud against national benefits. The clause inserts a new section 116A into the Social Security Administration Act 1992. The provisions would allow a local authority to bring proceedings for a national benefit offence where they already have a power to prosecute offences against Housing Benefit or Council Tax Benefit. Delegated powers are needed to provide safeguards against misuse.

323. Using secondary legislation to set out these conditions and when they are satisfied allows the limits and safeguards sufficient flexibility so that they can keep pace with the evolving threat to the benefit system from fraudsters.

324. Subsection (2) of the proposed new section 116A would allow the Secretary of State to list the benefits that a local authority cannot bring proceedings against and set out the circumstances in which they cannot prosecute. It also allows him to direct that an authority not bring proceedings in particular cases. This will allow the Secretary of State to set limits to the powers and stop local authorities from bringing proceedings in certain cases, or certain types of case, such as where they are particularly difficult or sensitive.

325. Subsection (3) would allow the Secretary of State to prescribe conditions so that a local authority must not bring proceedings under it unless those conditions are satisfied. The Secretary of State would be able to withdraw the new prosecution powers from a local authority where they have misused them or are likely to misuse them.

Clause 51 – Care Component of disability living allowance: persons under the age of 16

326. Clause 51 amends section 72 of the Social Security Contributions and Benefits Act 1992. Section 72(1) contains the entitlement conditions for the care component of Disability Living Allowance. Clause 51(2) inserts a new subsection (1A) which modifies those conditions of entitlement for children on or around the age of 16.
327. Regulations made under section 72(7) of the Social Security Contributions and Benefits Act 1992 are made subject to the negative resolution procedure. This delivers a flexible system that can then respond effectively to changes in the future. Primary legislation would not provide the degree of flexibility to adapt the entitlement conditions or the application of the age conditions promptly in the future if necessary.

328. Currently section 72(7) provides the Secretary of State with regulation-making powers to prescribe (subject to section 72 subsections (5) (terminal illness) and (6) (age conditions)) the circumstances in which a person is to be taken to satisfy, or not satisfy, such of the conditions of entitlement mentioned in subsection (1) paragraphs (a) to (c) as may be prescribed. For example, regulations currently provide (and will continue to do so under the new power) that a person who suffers from renal failure and undergoes renal dialysis in specified circumstances shall be taken to satisfy either section 72(1)(b) or (c) of the Social Security Contributions and Benefits Act.

329. The power in section 72(7) is amended by clause 51(6) and (7) which removes the current reference to section 72(6) (which will cease to have effect provided by clause 51(5)) and replace it with a new section 72(7A). The new section provides for subsection (1A) which relates to the modified entitlement conditions for persons under the age of 16 to have effect subject to regulations made under section 72(7) (except as otherwise prescribed). Therefore, where regulations are made, the modified entitlement conditions will not apply unless expressly provided for.

330. It is considered appropriate to continue to use regulations to prescribe the circumstances in which the conditions of entitlement are to be taken to be satisfied or not satisfied and to be able to prescribe whether the modifications in the new subsection (1A) apply to such circumstances. This provides a necessary degree of flexibility in their application to difficult circumstances and allows for future changes, if necessary.

Clause 52 – Mobility Component of disability living allowance: persons under the age of 16

331. Clause 52 amends section 73 of the Social Security Contributions and Benefits Act 1992. Currently section 73(1) contains the entitlement conditions for the mobility component of Disability Living Allowance. New subsection (4A) replaces current subsection (4) and modifies those conditions of entitlement for children on or around the age of 16.

332. Regulations made under section 73(5) of the Social Security Contributions and Benefits Act 1992 are made subject to the negative resolution procedure. This delivers a flexible system that can then respond effectively to changes in the future. Primary legislation would not provide the degree of flexibility needed to adapt the entitlement conditions or the application of the age conditions in the future if necessary.

333. Currently section 73(5) provides the Secretary of State with regulation-making powers to prescribe (subject to section 73 subsection (4) the circumstances in which a person is to be taken to satisfy, or not to satisfy, a condition of entitlement mentioned in either subsection (1)(a) or (d) or subsection (2)(a) as may be prescribed. For example, regulations currently provide (and will continue to do so under the new power) that a person is to be taken to satisfy the conditions in section 73(1)(a) of the Social Security Contributions and Benefits Act 1992 if he has both legs amputated at levels which are either through or above the ankle.

334. Clause 52(4) provides for new subsection (4A) to have effect subject to regulations made under subsection (5) (except as otherwise prescribed).
335. It is considered appropriate to continue to use regulations to prescribe the circumstances as described above as this provides a necessary degree of flexibility in their application to difficult circumstances and allows for future changes, if it proves necessary.

Clause 55 – Overseas vaccinations

336. Clause 55 amends section 2 of the Vaccine Damage Payments Act 1979 (conditions of entitlement). It replaces the existing regulation-making power in subsection (5) with new subsections (5A) and (5B).

337. Regulations made under the existing power provides that vaccinations given outside of the UK or Isle of Man to serving members of Her Majesty’s forces or members of their families shall be treated as carried out in England where the vaccination in question has been given as part of medical facilities provided under arrangements made by or on behalf of the service authorities. This clause seeks to extend that existing power to cover a wider category of people under certain circumstances.

338. The order-making powers are subject to negative resolution. We feel it appropriate and necessary to make provision for the extension on the vaccine damage payments scheme within secondary legislation rather than making provision in primary legislation. The order-making power provides us with the degree of flexibility needed to make provision for differing circumstances and to make changes where the need arises.

339. Accordingly, new subsection (5A) provides the Secretary of State with an order-making power to set out the circumstances in which the condition of entitlement in section 2(1)(a)(i) of the Vaccine Damage Payments Act 1979, which requires that the vaccination was carried out in the UK or the Isle of Man, need not be fulfilled in order to make a claim for vaccine damage payment in certain circumstances. The order-making power applies in the case of vaccinations of persons of a description so specified in the order, which are given under arrangements made by or on behalf of Her Majesty’s forces; a government department specified in the order; or any other body specified in the order.

340. For example, if a civil servant is given a vaccination outside of the UK and Isle of Man under arrangements made by the Foreign and Commonwealth Office, for the purposes of the Act, the order may provide that the civil servant would not have to show that the vaccination was carried out in the UK or Isle of Man. However, the civil servant would still have to satisfy the other conditions of entitlement within section 2.

341. The power contained within new subsection (5A) gives the Secretary of State the power to provide that the condition contained within section 2(1)(a)(i) need not be fulfilled “in such circumstances as may be specified in the order”. One intended use of this power is to specify that the vaccination in question must have been given in line with the Department of Health’s schedule of recommended vaccinations and/or where the vaccinations given are the same products licensed for use in the UK or the Isle of Man for the disease against which the vaccination was given (or an identical equivalent).

Clause 56 – Appeals to appeal tribunal in Northern Ireland

342. If a claim for a Vaccine Damage Payment is turned down by the Secretary of State the claimant has the right to appeal the decision to an appeal tribunal. The current definition of an appeal tribunal in the 1979 Act provides that Vaccine Damage Payment appeal cases can only be heard by a Great Britain constituted appeal tribunal. Therefore, if a claimant living in Northern Ireland appeals a Vaccine Damage Payment decision, their case could only be heard by a Great Britain constituted Appeal Tribunal, and not by a Northern Ireland constituted Appeal Tribunal.

5 Regulation 5 of the Vaccine Damage Payments Regulations 1979 (SI 1979/432).
343. Clause 56 provides for section 4 (appeals to appeal tribunals) of the Vaccine Damage Payments Act 1979 to be amended in order to enable appeal tribunals constituted in Northern Ireland to hear Vaccine Damage Payments appeal cases, where the appellant lives in Northern Ireland. The clause also provides power for the Department for Social Development in Northern Ireland (DSDNI) to make regulations in relation to appeals and appeal tribunals in Northern Ireland. It is necessary to use regulations, using the negative resolution procedure, in respect of this clause to provide DSDNI the same powers as Great Britain to make detailed procedural rules for tribunals in Northern Ireland.

344. Subsection (1) provides for the Vaccine Damage Payments Act 1979 to be amended.

345. Subsection (2) provides that (a) if the Vaccine Damage Payment claimant’s address is in Northern Ireland, appeals can be heard by an appropriate appeal tribunal constituted in Northern Ireland, and (b) if the Vaccine Damage Payment claimant’s address is anywhere other than Northern Ireland, appeals can be heard by an appropriate appeal tribunal constituted in Great Britain.

346. Subsection (3) provides power for DSDNI to make regulations under section (4)(1) of the 1979 Act, to make provision in relation to the manner and timing of appeals in Northern Ireland, and to make provision in relation to proceedings before appeal tribunals constituted in Northern Ireland.

347. Subsection (4) provides DSDNI power to make provisions by regulations with respect to (a) the correction of accidental errors of an appeal tribunal in relation to a Vaccine Damage Payment appeal in Northern Ireland, and (b) the setting aside of such appeal decisions where appropriate on grounds relating to when a document relating to the appeal in which the decision was given was not sent to, or was not received by the appellant or their representative or was not received at an appropriate time by the appeal tribunal which gave the decision; or (ii) an appellant or their representative was not present at a tribunal hearing.

Clause 57 – “Relevant employer”

348. This clause has no delegated powers in itself but it does insert a Schedule into The Pneumoconiosis etc. (Workers Compensation) Act 1979, set out in Schedule 6 of the Bill, which does have delegated powers.

Schedule 6 – Definition of “relevant employer”

349. Schedule 6 is a new Schedule to be inserted into the Pneumoconiosis etc. (Workers’ Compensation) Act 1979 (“the 1979 Act”) which sets out the definition of “relevant employer” for the purposes of that Act. Paragraph 8 provides a power to prescribe relevant occupations for the purpose of the definition of “relevant employer”.

350. Regulations made under Schedule 6 will provide the flexibility to adapt quickly to any changes to related legislation or wider developments. As these powers deal with the definition of a prescribed occupation for the purposes of the relevant employer definition we consider that the negative procedure provides the appropriate level of scrutiny.

351. One aspect of the new definition of a relevant employer is that he must have employed the disabled person in a prescribed occupation. Paragraph 8(1) of the Schedule provides that a prescribed occupation in relation to a person disabled by a disease to which the 1979 Act applies means an occupation prescribed in relation to the disease by the Secretary of State by order made by statutory instrument.

352. The order is required for the purposes of the new definition of a “relevant employer” to prescribe the occupations which are relevant for each disease covered by the 1979 Act.
and the Pneumoconiosis etc. (Workers’ Compensation) (Specified Diseases) Order 1985 S.I 1985/2034.

353. The relevant diseases are pneumoconiosis, byssinosis, diffuse mesothelioma and primary carcinoma of the lung where there is evidence of one or both of the following – asbestosis, bilateral diffuse pleural thickening.

354. The occupations used to define a relevant employer for these diseases will mirror the occupations prescribed in relation to the equivalent disease under the Industrial Injuries Disablement Benefit Scheme. This is because the original intention of the Act was to make payments to those people entitled to Industrial Injuries Disablement Benefit Scheme for certain diseases who could not obtain compensation at common law. Delegated legislation is needed to mirror these occupations as they change so that we keep the legislation in line with the original and current policy.

355. Paragraph 9 provides a more general power that will be used to include or exclude people from the definition of “relevant employer” as new knowledge about the cause and development of these diseases arises. As this power provides for modification of the Schedule, any regulations made under it will be subject to affirmative resolution.

Clause 59 - Power to stop payment of allowances to care home residents

356. Clause 59 provides regulation-making powers for the Secretary of State to prescribe the circumstances in which payment of Attendance Allowance or the care component of Disability Living Allowance are withdrawn from care home residents.

357. It is intended that regulations under clause 59 would be made subject to the negative resolution procedure. The new powers in sections 67 and 72 are not open ended but are limited in scope and therefore it is considered that the negative resolution procedure is the appropriate level of parliamentary scrutiny in these circumstances.

358. Subsection (1) relates to Attendance Allowance and substitutes subsection (2) of section 67 of the Social Security Contributions and Benefits Act 1992 with new subsections (2) to (7). The new sub-section (2) provides the Secretary of State with regulation-making powers under which payment of Attendance Allowance may be withdrawn from a care home resident. Regulations will prescribe that Attendance Allowance will be withdrawn where any of the costs of any qualifying services (i.e. accommodation, board and personal care) provided in the care home are borne out of public or local funds under a specific enactment. New subsection (5) provides the Secretary of State with a regulation-making power to specify (within secondary legislation) the specified enactment for these purposes.

359. Subsection (2) substitutes subsection (8) of section 72 of the Social Security Contributions and Benefits Act 1992 with new subsections (8)-(13). The new subsections (8) and (11) provide similar regulation-making powers as for Attendance Allowance but with regard to the withdrawal of payment of the care component of Disability Living Allowance from care home residents.

360. The proposed powers would be exercisable by Order and regulations made by statutory instrument. We feel it more appropriate to specify in regulations the enactments under which any of the costs of the qualifying services provided for a care home resident must be met (out of public or local funds) to lead to a withdrawal of the payment of these benefits. Specifying the enactments in regulations, rather than in primary legislation, provides the degree of flexibility necessary to easily update the list of enactments in the event of change.
Clause 60 – Independent Living Funds

361. Clause 60 amends the Disability (Grants) Act 1993 to allow the Secretary of State and the Department for Social Development in Northern Ireland to make grants to the new Independent Living (2006) Fund. This clause provides powers to the Secretary of State, or in relation to Northern Ireland, the Department for Social Development, to make consequential amendments to subordinate legislation. The powers are exercisable by order made by statutory instrument in the case of the Secretary of State and by order made by statutory rule in the case of the Department for Social Development.

362. It is intended that both powers should be subject to the negative resolution procedure as they are powers to make consequential amendments updating references within secondary legislation to reflect the establishment of the Independent Living Funds (2006).

Clause 62 – Northern Ireland

363. This clause applies to an Order in Council under paragraph 1(1) of the Schedule to the Northern Ireland Act 2000 (legislation for Northern Ireland during suspension of devolved government). The clause provides for such an Order, provided that it contains a statement that it is made only for purposes corresponding to those of this Bill, to be subject to the negative resolution procedure.

364. Such a procedure is appropriate such an Order will only contain provisions corresponding to those of this Bill and as such Parliament will have subjected them to an appropriate degree of scrutiny.

Clause 66 – Transition

365. This clause provides a power for the Secretary of State by order made by statutory instrument to make such transitional provision or savings as he considers necessary or expedient in connection with the coming into force of the Bill except for Part 1 (dealt with in Schedule 4). By virtue of subsection (2), the power includes the power to make “incidental, supplementary and consequential provision”. This power is not subject to any Parliamentary procedure and we consider that this is appropriate given the limited scope of the power, including the fact that it may only be exercised in connection with the coming into force of provisions of the Bill.

Clause 68 – Commencement

366. Subsection (2) provides, with certain exceptions, for the provisions of the Bill to come into force on such day as the Secretary of State may by order made by statutory instrument appoint. As is usual with powers to make commencement orders it is not subject to any Parliamentary procedure.
Annex 1: Table identifying powers to make delegated legislation in the Welfare Reform Bill

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<td>The new s.134(2) of the Social Security Administration Act 1992 to provide for payment of Housing Benefit – arrangements for paying Housing Benefit</td>
<td>Negative</td>
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<td>38</td>
<td>Directions to local authorities by the Secretary of State</td>
<td>None</td>
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<td><strong>Part 3</strong></td>
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<tr>
<td>40(1)</td>
<td>s.7B(2) of the Social Security Administration Act 1992 (&quot;the Administration Act&quot;) – use of social security information, procedure to be followed in connection with previously used or verified information</td>
<td>Negative</td>
</tr>
<tr>
<td>40(1)</td>
<td>s.7B(3) of the Administration Act – relevant purpose relating to a claim or potential claim for a specified benefit</td>
<td>Negative</td>
</tr>
<tr>
<td>40(1)</td>
<td>s.7B(5) of the Administration Act - specified benefits for the purposes of clause 40. Inserts new sub-paragraph (c) into s7A(1) of the Administration Act providing for regulations enabling claims for certain benefits to be made to English county councils or persons providing services to or authorised to exercise any function of English county councils under s7A. Inserts paragraph (e) into section 7A of the Administration Act providing for regulations to enable a relevant authority to verify claims information and evidence on behalf of another. Substitutes sub-paragraph (c) of section 7A(6) of the Administration Act- adding English county councils as a category of “relevant authority” for the purposes of sections 7A and 7B of that Act.</td>
<td>Negative</td>
</tr>
<tr>
<td>41(7)</td>
<td>Define the relevant grant-making enactment mentioned in subsection (1).</td>
<td>Negative</td>
</tr>
<tr>
<td>41(8)</td>
<td>Define prescribed purpose for which information can be held or used in subsection (2).</td>
<td>Negative</td>
</tr>
<tr>
<td>45(3)</td>
<td>In paragraph (1B) - conditions under which a local authority can authorise investigators to use powers contained in sections 109B and 109C of the Administration Act for “relevant purposes”</td>
<td>Negative</td>
</tr>
<tr>
<td>45(3)</td>
<td>In (1C) – restrict or invalidate an authorisation under 109A(2)(a), (c) or (d) of the Administration Act</td>
<td>Negative</td>
</tr>
<tr>
<td>46(2)</td>
<td>Authorities may bring proceedings except in relation to benefits or circumstances prescribed or where the Secretary of State directs they must not be brought</td>
<td>Negative</td>
</tr>
<tr>
<td>46(3)</td>
<td>Conditions that Authorities must satisfy to bring proceedings.</td>
<td>Negative</td>
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<tr>
<td><strong>Part 4</strong></td>
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<tr>
<td>51(7)</td>
<td>s. 72(7) taken together with new s. 72(7A) of the SSCBA – power to prescribe circumstances in which a person is to be taken to satisfy or not to satisfy the conditions of entitlement to the care component of Disability Living Allowance</td>
<td>Negative</td>
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<tr>
<td>52(4)</td>
<td>s. 73(5) taken together with new s. 73(5A) of the SSCBA – power to</td>
<td>Negative</td>
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<td></td>
<td>prescribe circumstances in which a person is to be taken to satisfy or not to satisfy the certain conditions of entitlement to the mobility component of Disability Living Allowance</td>
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<tr>
<td>55(2)</td>
<td>Requirement that vaccination be carried out in the UK or the Isle of Man need not be fulfilled in certain circumstances</td>
<td>Negative</td>
</tr>
<tr>
<td>56(3)</td>
<td>Department for Social Development in Northern Ireland (DSDNI) may make provisions relating to manner and timing of appeals and proceedings of appeal tribunals in relation to vaccine damage payments</td>
<td>Negative</td>
</tr>
<tr>
<td>56(4)</td>
<td>DSDNI may provide for correction of accidental errors in, and setting aside of, tribunal decisions.</td>
<td>Negative</td>
</tr>
<tr>
<td>59(1)</td>
<td>new s.67(2) of the SSCBA – power to withdraw payment of Attendance Allowance to care home residents</td>
<td>Negative</td>
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<tr>
<td>59(2)</td>
<td>new s.72(8) of the SSCBA - power to withdraw payment of care component of Disability Living Allowance to care home residents</td>
<td>Negative</td>
</tr>
<tr>
<td>60(3)</td>
<td>Independent living funds – power to make consequential amendments or revocations to secondary legislation</td>
<td>Negative</td>
</tr>
<tr>
<td>60(5)</td>
<td>Independent living funds - DSDNI to make consequential amendments or revoke enactments within a specified meaning</td>
<td>Negative</td>
</tr>
</tbody>
</table>

Part 5

| 66(1) | Secretary of State may make transitional provision or savings | Negative |
| 68(2) | Secretary of State, by Order, may bring into force specified provisions of the Act | Negative |

In Schedule 1:

<p>| p. 1(4)(a) | First condition satisfied where previously entitled to prescribed benefit during prescribed period | Negative |
| p. 1(4)(b) | Modifications where people previously entitled to prescribed benefit | Negative |
| p. 3(1)(a) | Definition of “benefit year” | Negative |
| p. 3(2) | Modifications to “relevant benefit year” in prescribed circumstances | Negative |
| p. 4(1)(a) | Circumstances when third national insurance contribution condition can apply to people aged 20-24. | Negative |
| p. 4(1)(c) | Third condition – prescribe conditions with respect to residence or presence in Great Britain | Negative |
| p. 4(3) | Disapply the age condition where claimant previously received ESA by satisfying the third condition. | Negative |
| p. 4(4) | Prescribe when a person is or is not receiving full-time education | Negative |
| p. 6(1)(b) | Prescribe the amount of capital which, if exceeded, will mean that the claimant is not entitled to the income-related allowance | Negative |
| p. 6(2) | Circumstances in which income and capital of other member of a couple not to be regarded as income and capital of claimant | Negative |
| p. 6(3) | Treating a person as engaged in, or not engaged in, remunerative work | Negative |
| p. 6(4)(a) | Treating a person as, or as not, receiving education | Negative |</p>
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<tr>
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<tbody>
<tr>
<td>6(4)(b)</td>
<td>Circumstances when requirement to not be receiving education need not apply.</td>
<td>Negative</td>
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<tr>
<td>6(5) – in (b), “couple”</td>
<td>Circumstances in which a man and woman living together as husband and wife not to be treated as a couple</td>
<td>Negative</td>
</tr>
<tr>
<td>6(5) – in (d), “couple”</td>
<td>Circumstances in which two people of the same sex living together as if they were civil partners not to be treated as a couple</td>
<td>Negative</td>
</tr>
<tr>
<td>6(5) – “education”</td>
<td>Definition of “education”</td>
<td>Negative</td>
</tr>
<tr>
<td>6(5) - “remunerative work”</td>
<td>Definition of “remunerative work”</td>
<td>Negative</td>
</tr>
<tr>
<td>6(7)</td>
<td>Modifications to income-related conditions in respect of polygamous marriages</td>
<td>Negative</td>
</tr>
<tr>
<td>6(8)</td>
<td>Treating people as, or as not, members of the same household</td>
<td>Negative</td>
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<tbody>
<tr>
<td>1(a)</td>
<td>Treating a person as having, or not having, limited capability for work</td>
<td>Negative</td>
</tr>
<tr>
<td>1(b)</td>
<td>Determining limited capability for work even though already being treated as having limited capability for work</td>
<td>Negative</td>
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<tr>
<td>1(c)</td>
<td>Circumstances in which a fresh determination of limited capability for work to be undertaken</td>
<td>Negative</td>
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<tr>
<td>2</td>
<td>Prescribing number of ‘waiting days’ at beginning of period of limited capability for work before a claimant is entitled to an employment and support allowance.</td>
<td>Negative</td>
</tr>
<tr>
<td>3</td>
<td>Making provision for entitlement and amount payable for periods of less than a week</td>
<td>Negative</td>
</tr>
<tr>
<td>4(1)</td>
<td>Circumstances in which two periods of limited capability for work, separated by no more than a prescribed length of time, are treated as one continuous period</td>
<td>Negative</td>
</tr>
<tr>
<td>4(2)</td>
<td>Where two periods link, conditions satisfied in the first period to be treated as satisfied in the later period.</td>
<td>Negative</td>
</tr>
<tr>
<td>5</td>
<td>Circumstances in which a person to be treated as being, or not being in Great Britain</td>
<td>Negative</td>
</tr>
<tr>
<td>6</td>
<td>Circumstances in which a claimant not in Great Britain may still be entitled to contributory allowance</td>
<td>Negative</td>
</tr>
<tr>
<td>7(1)(a)</td>
<td>Modifications to contributory allowance provisions in respect of employment on board a ship, vessel, hovercraft or aircraft.</td>
<td>Negative</td>
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<tr>
<td>7(1)(b)</td>
<td>Modifications to contributory allowance provisions where a claimant is outside Great Britain</td>
<td>Negative</td>
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<tr>
<td>7(1)(c)</td>
<td>Modifications to contributory allowance provisions in respect of prescribed employment in connection with continental shelf operations</td>
<td>Negative</td>
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<td>p. 8(1)</td>
<td>Circumstances where entitlement to income-related allowance continues on leaving Great Britain</td>
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<td>p. 8(2)</td>
<td>Modifications to income-related allowance provisions where entitlement to income-related allowance continues on leaving Great Britain</td>
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<td>p. 9</td>
<td>Treating as having, or not having, limited capability for work-related activity and determining afresh the question of limited capability for work-related activity.</td>
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<tr>
<td>p. 10</td>
<td>Prescribing the circumstances for treating as not entitled to ESA because of doing work</td>
<td></td>
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<tr>
<td>p. 11</td>
<td>Provide for ESA, contributory allowance or income-related allowance to be treated as a benefit, or a benefit of a prescribed description for prescribed purposes of the Social Security Contributions and Benefits Act 1992.</td>
<td></td>
</tr>
<tr>
<td>p. 12</td>
<td>Amount of reduction of the two elements of ESA (the contributory element and the income-related element)</td>
<td></td>
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<td>p. 14</td>
<td>Modifications to Part 1 in respect of advance claims</td>
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<tr>
<td>p. 15(1)</td>
<td>Modifications to Part 1 or corresponding provisions in Northern Ireland in respect of current or former members of Her Majesty’s forces</td>
<td></td>
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<tr>
<td>p. 15(2)</td>
<td>Defining “Her Majesty’s forces” - to consist of prescribed establishments and organisations</td>
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In Schedule 3: this schedule of consequential amendments extends or creates new powers into the following legislation:

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<td>p.7</td>
<td>s.6(9), (10) and (13) Child Support Act 1991 prior to its amendment by the Child Support, Pensions and Social Security Act 2000 (the 2000 Act).</td>
</tr>
<tr>
<td>p.7</td>
<td>s.6(7), (8) and (11) Child Support Act 1991 as amended by the 2000 Act</td>
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<td>s.46(5) Child Support Act 1991 prior to its amendment by the 2000 Act and as amended by that Act</td>
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<td>p.7</td>
<td>s. 47(3)(b) Child Support Act 1991 prior to its amendment by the 2000 Act and as amended by that Act</td>
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<td>s.24(1) and (2)(d) Criminal Justice Act 1991</td>
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<td>p.9</td>
<td>s.6A(2) Social Security Contributions and Benefits Act 1992</td>
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<td>p.9</td>
<td>s.22(5) Social Security Contributions and Benefits Act 1992</td>
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<td>p.10</td>
<td>s.1 Social Security Administration Act 1992</td>
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<tr>
<td>Section/Act/Paragraph</td>
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<tr>
<td>------------------------</td>
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<td>s.2AA Social Security Administration Act 1992</td>
<td>Negative</td>
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<tr>
<td>s.5 Social Security Administration Act 1992</td>
<td>Negative</td>
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<td>s.15A Social Security Administration Act 1992</td>
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<tr>
<td>s.71 Social Security Administration Act 1992</td>
<td>Negative</td>
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<tr>
<td>s.73 Social Security Administration Act 1992</td>
<td>Negative</td>
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<tr>
<td>s.74A Social Security Administration Act 1992</td>
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<tr>
<td>s.122B Social Security Administration Act 1992</td>
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<tr>
<td>s.124 Social Security Administration Act 1992</td>
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<tr>
<td>s.125 Social Security Administration Act 1992</td>
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<tr>
<td>s. 130 Social Security Administration Act 1992</td>
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</tr>
<tr>
<td>s.132 Social Security Administration Act 1992</td>
<td>Negative</td>
</tr>
<tr>
<td>s.150(7) Social Security Administration Act 1992</td>
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</tr>
<tr>
<td>s.159B Social Security Administration Act 1992</td>
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<tr>
<td>s.159C Social Security Administration Act 1992</td>
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<td>s.179 Social Security Administration Act 1992</td>
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</tr>
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<td>p.11 Paragraph 6 of Schedule 4 Local Government Finance Act 1992</td>
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</tr>
<tr>
<td>Paragraph 6 of Schedule 8 Local Government Finance Act 1992</td>
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<td>s.11 Social Security Act 1998</td>
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<tr>
<td>s.27 Social Security Act 1998</td>
<td>Negative</td>
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<tr>
<td>s.28 Social Security Act 1998</td>
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<tr>
<td>s.72 Welfare Reform and Pensions Act 1999</td>
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<td>p.18 s.115 Immigration and Asylum Act 1999</td>
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<tr>
<td>p.19 s.62A(4A) Child Support, Pensions and Social Security Act 2000</td>
<td>Negative</td>
</tr>
<tr>
<td>p.20 s.94 Local Government Act 2000</td>
<td>Negative</td>
</tr>
<tr>
<td>p.22 s.9(4B) Social Security Fraud Act 2001</td>
<td>Negative</td>
</tr>
</tbody>
</table>

In Schedule 4:

<p>| p. 1(a) | When a claim for existing benefit before appointed day is to be treated as ESA | Negative |
| p. 1(b) | When a claim for ESA can be made before appointed day | Negative |
| p. 2(a) | Exclude making a claim for an existing benefit on or after appointed day | Negative |
| p. 2(b) | When a claim for an existing benefit on or after appointed day is to be treated as a claim for ESA | Negative |
| p. 2(c) | When a claim for ESA is to be treated wholly or partly as a claim for an existing benefit | Negative |
| p. 2(d) | Exclude making of a claim for ESA by a person entitled to an existing benefit | Negative |</p>
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<tbody>
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<td>p. 3</td>
<td>When ESA is to be awarded for periods before appointed day and prescription of conditions of entitlement and amount payable in such cases</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 4(2)</td>
<td>Securing that an award of ESA is made on terms matching wholly or partly the award that would have been made if a further claim to existing benefit had been made</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 5(2)</td>
<td>Securing that an award of ESA is made on terms matching wholly or partly the award that would have resulted from conversion had entitlement to existing benefit continued</td>
<td>Negative</td>
</tr>
<tr>
<td>p.6(1)(a)</td>
<td>Convert existing awards into awards of ESA and provide for terms of conversion</td>
<td>Negative</td>
</tr>
<tr>
<td>p.6(1)(b)</td>
<td>Terminate existing awards in prescribed circumstances</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 7(a)</td>
<td>Determine continuing entitlement to ESA transitional allowance</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 7(b)</td>
<td>Review of award of transitional allowance</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 7(c)</td>
<td>Termination of award of transitional allowance</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 7(d)</td>
<td>Part 1 to have effect with prescribed modifications in relation to a person with a transitional allowance</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 7(e)</td>
<td>Revision of transitional allowance</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 8(1)</td>
<td>Circumstances when person entitled to transitional allowance immediately before retirement is to be treated as satisfying condition in p.5(2) of Schedule 3 to the SSCBA</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 9</td>
<td>Modification of uprating of Incapacity Benefit and Severe Disablement Allowance in relation to tax years on or after the appointed day</td>
<td>Negative</td>
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</table>

**In Schedule 5:**

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<tbody>
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<td>p. 3(a)</td>
<td>Discretionary disregards - qualifying benefits in respect of Housing Benefit</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 4(a)</td>
<td>Discretionary disregards - qualifying benefits in respect of Council Tax Benefit</td>
<td>Negative</td>
</tr>
</tbody>
</table>

**In Schedule 6 (to be inserted as the Sch to the 1979 Act):**

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<tbody>
<tr>
<td>p. 7(1)</td>
<td>Prescribed occupation in relation to a person disabled by a disease to which the 1979 Act applies means an occupation prescribed by the Secretary of State by Order</td>
<td>Negative</td>
</tr>
<tr>
<td>p. 8</td>
<td>Include or exclude people from the definition of “relevant employer”</td>
<td>Affirmative</td>
</tr>
</tbody>
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APPENDIX 3: CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE BILL

Supplementary Memorandum by the Home Office

1. This memorandum draws the Committee’s attention to a delegated power that is included in an amendment which the Government has tabled to the Corporate Manslaughter and Corporate Homicide Bill.

**New clause to be inserted before clause 18: Power to extend clause 1 to other organisations**

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

2. Clause 1 of the Bill provides that the offence of corporate manslaughter or corporate homicide can be committed by corporations, Government departments and other listed bodies, and by police forces. An amendment tabled by the Government seeks to add to that list partnerships, trade unions and employers’ associations that are (in each case) employers. A separate Government amendment (see Annex) seeks to insert a new clause before clause 18, containing a power for the Secretary of State by order to extend further the categories of organisation which can commit the offence. An order under this power could also make any amendment to the Act that was incidental or supplemental to, or consequential on, such an extension of the categories.

3. By virtue of clause 19(4), the order could make different provision for different cases, and make transitional or saving provision.

4. The purpose of including this power is to allow the Government, with Parliamentary approval, to make new categories of organisation capable of committing the offence of corporate manslaughter if it considers that this is appropriate to meet a gap in the law. The Government currently considers that there is a case to extend the offence to some partnerships, trade unions and employers’ associations, as these bodies, though unincorporated, are relatively easily identifiable and have a clear corporate identity. Moreover, these organisations can be sizeable bodies, employing many people, and can for practical purposes be indistinguishable from corporations. The limitation that these organisations may commit the offence only if they are employers means that they will already owe duties to the public under section 3 of the Health and Safety at Work etc Act 1974, and the extension of the Bill will therefore impose no new duties on them.

5. The Government will keep under review the need to extend the offence further. Although other forms of organisation can cause deaths through gross negligence, the Government is not aware of a practical deficiency in the existing law, since these organisations will tend to be smaller and so if there has been gross negligence it will be possible to identify an individual as responsible. Moreover, the Government is concerned that there must be clarity as to which bodies are capable of committing the offence. If the offence were extended to cover all unincorporated bodies, for example, there might be many informal clubs and societies whose members would be unsure as to whether they risked liability under the new offence.

6. However, the Government considers that it is prudent to keep open the possibility of applying the offence to other sorts of body, in the light of the operation of the new offence and in case it emerges that there is a deficiency in the law as applied to other types of
unincorporated body. In this, it is mindful of the recommendation of the Law Commission⁶ that the organisations to whom the new offence applied should be kept under review.

7. The power to make incidental, supplemental or consequential provision in subsection (2) of the new clause is considered necessary because it might be appropriate to provide, for example, that any new bodies brought within the scope of the offence owed whatever duty of care they would owe if they were bodies corporate (as the offence is based on the gross breach of a duty of care), that proceedings against such bodies could be brought in the name of the body, and that fines imposed on such bodies were to be payable out of the funds of the body. It might also be appropriate to provide that statutory provisions about criminal proceedings applied, in relation to proceedings for corporate manslaughter, to such bodies.

8. An order under the new clause would be subject to the affirmative resolution procedure. The Department considers this level of Parliamentary scrutiny is appropriate for an order that would have the effect of making new categories of body liable to a serious criminal offence.

Home Office

⁶ See Legislating the Criminal Code: Involuntary Manslaughter (Law Comm No.237), paragraph 8.55.
Letter from Lord Davies of Oldham to the Chairman.

1. I am writing in response to the Delegated Powers and Regulatory Reform Committee’s Third Report of the Session and in particular, the section on the Concessionary Bus Travel Bill. I am most grateful for this.

2. The Committee only mentioned two clauses of the Bill in detail in its Report - clauses 8 and 9. We welcome your comments, in particular your consideration that the delegation in Clause 8 and its level of scrutiny are not inappropriate and that the delegations in Clause 9 are also not in principle inappropriate.

3. We appreciate your detailed consideration of clause 9(3)(g) and the concluding observation in paragraph 13 of the Report 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”. I am pleased to say that I have today tabled an amendment to provide for this, for consideration at Lord’s Report stage of the Bill. A copy of the amendment is enclosed for ease of reference [Not printed. The Amendment appeared as Amendment 24 on the Marshalled List, HL Bill 13–R–I].

4. As you can see, new clause 9(3)(f) now limits the scope of the regulation-making powers that an order under clause 9(1)(a) can confer on the Secretary of State. It enables regulation-making powers to be conferred which correspond or are similar to the Secretary of State’s existing regulation-making powers in sections 149(3) and 150(6) and (7) of the 2000 Act. It also includes a sweep-up provision to cater for other matters of an ancillary nature for which regulations might be needed. New clause 9(3A) requires any such regulations to be made by statutory instrument subject to the negative procedure.

5. As the scope of the regulation-making powers is now more specific, we have also sought to be more specific about the kind of amendments of the 2000 Act that an order under clause 9(1)(a) might make by virtue of clause 9(3). In particular, we hope that the wording at the proposed new clause 9(3)(b), by referring to “altering” (as opposed to removing) current provisions about appeals will provide reassurance that there will be an appeal mechanism in future.

6. Finally, I have also today tabled minor, technical amendments to the Bill which are meant to clarify or improve the drafting in minor respects, for example by ensuring consistency with the wording of the Transport Act 2000 and the Greater London Authority Act 1999.
Letter from Lord Adonis, Parliamentary Under Secretary of State for Schools, Department for Education and Skill, to the Chairman.

1. Thank you for the Delegated Powers and Regulatory Reform Committee’s Third Report of Session 2006-07, covering the Further Education and Training Bill [HL]. The Government has noted your recommendations, and I am pleased overall that you find the provisions in the Bill to be acceptable. However, I note the report’s comments in relation to two areas of the Bill and I shall respond to each in turn.

Regional councils – clause 2

2. I am pleased that your report confirms that the delegation of powers proposed in clause 2 is not inappropriate. However I note your recommendation that at least the first exercise of the regulation-making power in clause 2, because of its significance, should be subject to affirmative resolution. I should take this opportunity to clarify that, like the present local learning and skills councils, the regional councils will not be separate statutory bodies. The Learning and Skills Council will continue to be a single unitary body with one Chair, one Chief Executive and one national Council. Regional councils will be committees of the national Council, exercising only those powers which the national Council chooses to delegate. Nevertheless, I recognise the Committee’s argument and we have tabled an amendment to the Bill to allow for the first exercise of the power to be subject to affirmative procedure. I would also like to confirm that I will be making available to the House, in time for Grand Committee, a draft of the regulations which relate to clause 2.

Further education corporations – clauses 13 to 16

3. I am grateful that the report recognises it is not uncommon for regulatory powers in relation to a particular services sector to be conferred on a statutory body. Moreover, is helpful that the report is clear that the exercise of the powers conferred by clauses 13 to 16 will be subject to requirements for publication of proposals and consultation. I am confident that this transfer of powers to the Learning and Skills Council for England, which has a detailed knowledge about individual providers and of employers’ and learners’ requirements in an area, will support the Government’s wish to make sure the necessary powers to act are placed in the hands of the body best placed to act. It will also serve to help streamline the system and reduce bureaucracy.

4. The Committee has drawn the attention of the House to the fact that the LSC orders will not be statutory instruments and therefore not subject to parliamentary control, and that there is no constraint on the power of direction conferred on the Secretary of State by clause 16. It is this second point which the report considers more striking. It recommended that the existing levels of Parliamentary control be retained, possibly by providing that orders be made by the Secretary of State on the recommendation of the Council.

5. I have considered the report’s recommendation very carefully. Nonetheless, I must conclude that, because of the maturity of the learning and skills sector and the level of management accountability between the LSC and the Secretary of State, it is appropriate for the LSC to exercise the power to incorporate and dissolve colleges independently.

6. However, I acknowledge the case for restricting the range of circumstances in which the Secretary of State’s power to direct can be exercised. We have therefore tabled an amendment which will restrict the Secretary of State’s power to direct the LSC to...
incorporate or dissolve an institution to circumstances in which the LSC is acting or proposing to act unreasonably in relation to its statutory duties. This, I hope you agree, provides reassurance and satisfies the main point raised in the report.

7. I should also like to take this opportunity to clarify that clauses 13 and 14 do not transfer the power to establish and dissolve further education corporations to the Welsh Ministers. The functions under section 16 and 27 of the Further and Higher Education Act 1992 were transferred to the National Assembly for Wales in 1999 by SI 1999/672 in consequence of the Government of Wales Act 1998 and will as from May of this year be exercisable by the Welsh Ministers.

8. In order to assist Parliament’s consideration of the Bill, we will be making available to the House, before Grand Committee, illustrative drafts of the regulations, orders, guidance and directions we intend to make in order to implement the Bill.
Letter from Bridget Prentice MP, Parliamentary Under Secretary of State, Department for Constitutional Affairs, to the Chairman.

1. I am writing in response to the section on the Legal Services Bill in the Delegated Powers and Regulatory Reform Committee’s Third Report of the Session. I am very grateful to you and the members of your committee for the work you have done.

2. The Government accepts the Committee’s recommendations and the following amendments have been tabled to be brought forward during Committee stage of the Bill in the House of Lords:

**Clause 36(3)** – that rules which set the maximum penalty that the Legal Services Board can impose on approved regulators will not only require the consent of the Secretary of State but also be contained in a statutory instrument subject to negative resolution. Under the Bill as drafted, the rules are made by the Legal Services Board, with the consent of the Secretary of State, without any provision for Parliamentary scrutiny.

**Clause 79** – that the power which enables the Secretary of State by order to create an appellate body or bodies to hear appeals against licensing authority decisions be made subject to an affirmative resolution. Under the Bill as drafted, the power is subject to a negative resolution.

**Clause 93(3) and (4)** – that the Board’s power to make rules as to the maximum financial penalty that can be levied against a licensed body or an individual by a licensing authority be made subject to negative resolution. Under the Bill as drafted, the power is subject only to the Secretary of State’s consent.

**Clause 107** – that the power to amend Part 5 as it applies to foreign bodies be made subject to affirmative resolution. Under the Bill as drafted, the power is subject to negative resolution.

**Clauses 149(3)(g) and 161(3)(g)** – that the power of the Secretary of State by order to prescribe further persons to whom restricted information be disclosed be amended so as to be restricted to prescribing persons exercising regulatory functions (on the model of the analogous provisions in section 86 of the Pensions Act 2004).

**Clause 166** – that “levy rules” made by the Legal Services Board under clause 166 will, as with rules under clause 36(3) as described above, be contained in a statutory instrument subject to negative resolution.

**Clause 176** – that the Secretary of State’s power by order to amend section 83(3) of the Trade Marks Act 1994, to require the register to be kept by a person specified in the order, will be made by affirmative rather than negative resolution.

**Clause 177** – that the Secretary of State’s power by order to amend section 275(3) of the Copyright, Designs and Patents Act 1988 to require the register to be kept by a person specified in the order, will be made by affirmative rather than negative resolution.

3. There were a number of other points raised by the Committee on which it may be helpful if I set out the Government’s position:

**Schedule 3, paragraph (8)**

4. The Committee, at paragraph 49 of the report, brought the power at Schedule 3, paragraph 8, to the attention of the House. In particular, the Committee felt that a fuller justification of the power was needed. We will of course be happy to provide further detail on this power during the Lords’ Committee stage. However, I hope it will be useful if I
expand on the explanation given in the memorandum in advance of any discussion in Parliament on this issue.

5. As the Committee mentioned, the power to exempt certain categories of person from regulation is not without precedent. The Compensation Act 2006, section 6(2), provides for an order of the Secretary of State to exempt certain persons, or classes of persons, subject to the affirmative resolution procedure. An order under this section has subsequently been laid in the House and is due to be debated in the near future. For example, the order exempts persons already regulated by the Financial Services Authority and Legal Practitioners so we can avoid duplication of regulation.

6. The power at Schedule 3 of the Bill serves a similar purpose to that at section 6 of the Compensation Act, in that it provides a mechanism by which specific persons can be excluded, or brought into, the regulatory framework, subject to Parliamentary oversight. Under existing legislation there are already a number of types of “exempt” persons who are able to carry out reserved legal activities, by virtue of their office, without committing an offence. For instance, officials working for local authorities have limited rights of audience in specified circumstances (see section 60 of the County Court Act 1984). Under the Bill, such persons are exempt under paragraph 1 (6) of Schedule 3. It would not be proportionate to require local authority officers to be authorised persons, as defined in clause 17, or to be regulated by an approved regulator.

7. It is also reasonable to assume that there will be similar persons, or classes of persons, that would need to be exempted from regulation in the future where a new reserved service has been brought under the regime. In addition, it might be that the exemptions set out in Schedule 3 require amending as a result of changes to reserved legal activities, such as the existing exemption for Commissioners for oaths at paragraph 6. The Government will expand further on these points as the Bill progresses through the House. However, for the reasons set out above I consider that the power at Schedule 3, paragraph (8) is appropriate and, although broad, is subject to the right level of Parliamentary scrutiny.

Clauses 29 and 50

8. I note the Committee’s points at paragraphs 67 to 70 of the report and in particular look forward to hearing the views of the House in relation to the powers at clauses 29 and 50.

Clauses 93(1), 84, 99, and 142

9. I am pleased to note the Committee’s observations at paragraph 77 about rules to be made under clauses 93(1) (circumstances for imposing financial penalty), 84 (circumstances for modifying licences), 99 (circumstances for suspending or revoking a licence), and 142 (co-operation with ombudsman), and the conclusion in paragraph 79 of the report that none of them seems inappropriate.

10. It may help the Committee if I point out that clause 142 applies both to the Board in its capacity as a licensing authority, and to other licensing authorities (because they all have to be approved regulators). In paragraph 74, the Committee said that it had no objection to the way the duty applied to approved regulators via regulatory arrangements, and did not draw the duty to Parliament’s attention. Licensing rules are part of regulatory arrangements (as provided in clause 20) and are subject to the same degree of scrutiny during the designation process as regulatory arrangements for a body seeking to become an approved regulator.
Clause 124

11. In paragraph 82 of the report, the Committee queried whether Parliamentary oversight might be justified in respect of the Office for Legal Complaints’ power in clause 124 to exclude particular descriptions of complaint from the jurisdiction of the ombudsman scheme and, in addition, in respect of scheme rules made under clause 133 to require respondents to pay charges. We have noted the Committee’s points and look forward to hearing the views of the House.

12. In relation to clause 124, the power to make rules excluding certain types of complaint from the scheme is limited by 124(2) and is subject to the oversight of the Legal Services Board. Our intention is to allow the Office for Legal Complaints the flexibility to enable it to operate effectively and it would seem somewhat anomalous to allow it to be able to make rules about the operation of the complaints scheme without parliamentary oversight with the sole exception of this clause.

13. In relation to clause 133, the current provisions are based on the Financial Services and Markets Act 2000 and, as such, a precedent already exists whereby fees may be set or waived in accordance with rules made by a complaints handling body. We would prefer the Office for Legal Complaints to have flexibility to set the case fees and to alter the rules for waiving case fees, subject of course to Legal Services Board oversight and the consent of the Secretary of State through clause 152.

14. Finally, I have referred throughout this letter to the Secretary of State as the minister with responsibilities under the Bill. However, I should draw your attention to the fact that, during Lords Committee on 9 January, my colleague Baroness Ashton accepted amendments which transfer responsibility for certain functions under the Bill from the Secretary of State to the Lord Chancellor. I mention this point, not because I consider that it materially affects any of the matters under consideration, but simply because I thought that you would wish to know.