Delegated Powers & Regulatory Reform Committee

6th Report of Session 2006–07

Alcohol Labelling Bill [HL]

Digital Switchover (Disclosure of Information) Bill

Justice and Security (Northern Ireland) Bill

Leasehold Information Bill [HL]

Parliamentary Constituencies (Amendment) Bill [HL]

Planning-gain Supplement (Preparations) Bill

Government amendments:

Mental Health Bill [HL]

Government response:

Welfare Reform Bill

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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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History
In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of the 2nd 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” (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.
Sixth Report

ALCOHOL LABELLING BILL [HL]

1. This private member’s bill contains two delegated powers. In each case the power is conferred on the Secretary of State (as respects England and Northern Ireland), the Welsh Ministers (as respects Wales) and the Scottish Ministers (as respects Scotland), and its exercise is subject to negative procedure in Parliament, the National Assembly for Wales and the Scottish Parliament, respectively.

2. The power at clause 1(2) allows an order to direct a warning symbol or pictogram, as specified in the order, to be carried on the container of an alcoholic drink instead of the pregnancy warning set out in clause 1(1). This is not inappropriate.

3. The power at clause 15 is a power to make commencement orders and we note that it would be more usual for such orders not to be subject to a parliamentary, Assembly, or Scottish Parliamentary procedure.

DIGITAL SWITCHOVER (DISCLOSURE OF INFORMATION) BILL

4. This bill is to give legal authority for the disclosure of social security and war pensions information, with a view to maximising take-up under the proposed Digital Switchover Help Scheme. The Department for Culture, Media and Sport have provided a delegated powers memorandum (printed at Appendix 1) to explain the delegations in clause 2. The delegations are not inappropriate and there is nothing in the bill which we wish to draw to the attention of the House.

JUSTICE AND SECURITY (NORTHERN IRELAND) BILL

5. This bill is about the eventual return to Northern Ireland of more normal security arrangements, as explained in paragraphs 3 to 14 of the Explanatory Notes. There are delegated powers to make orders, regulations or rules at clauses 6(1), 15(1) (new section 69C(12), 31, 33(5), 40(1), 42(5) (new subsection (7A)) and 7 (new section 21C(5) and (6)), 46(6) and 51(4) and (7) and paragraph 12(3) of Schedule 6. There are modifications of existing delegated powers at clauses 8(4), 45 and 46(4). The Northern Ireland Office have provided a delegated powers memorandum, printed at Appendix 2. The memorandum does not explain that a number of powers replicate those currently found on the statute book. For example, an equivalent to the power at clause 31 to close roads is currently to be found at section 94 of the Terrorism Act 2000 (relating to Northern Ireland) and was to be found in that section’s predecessors of 1996 and 1991, which do not require any parliamentary procedure.
Rules of court — clause 6

6. Clause 6 makes provision for rules of court. The memorandum states that there are “no particular parliamentary procedures applying to the making of these rules” (paragraph 5). In fact, they are appropriately subject to the negative procedure under section 56 of the Judicature (Northern Ireland) Act 1978.

Repeals — clause 40

7. Clauses 20 to 39 are about additional powers for the police and members of Her Majesty’s forces, etc. Clause 40(1) enables the Secretary of State, by order subject to affirmative procedure, to repeal clauses 20 to 39 (which could be done in stages – clause 40(2)). So clauses 20 to 39 will, if enacted, remain on the statute book unless and until the Secretary of State brings forward a draft order, it is approved and he makes it. Clause 39 provides for an annual review of clauses 20 to 31.

8. This is not necessarily inappropriate, but the memorandum (paragraphs 12 and 13) does not indicate that it is a fundamentally different arrangement from that in the Northern Ireland (Emergency Provisions) Act 1996 and Part 7 of the Terrorism Act 2000. Those Acts specified a date (which could not be postponed by order) when their provisions ceased to have effect – 5 years from coming into force in the case of the 2000 Act, subject to extension by the Terrorism (Northern Ireland) Act 2006. Within that period the provisions would expire after 12 months unless renewed or revived by affirmative order: the default position thus being expiry, not continuance.

9. We note that acceptance by the House of clause 40 involves leaving to the Secretary of State the question when, if ever, clauses 20 to 39 can be repealed, with the only element of control left to Parliament being to accept or reject a repeal at the time when the Secretary of State proposes to make it.

Establishment of Northern Ireland Police and Justice Department — clause 42(5) and (6)

10. Section 21A of the 1998 Act provides for the establishment by the Assembly of a Northern Ireland Department to carry out devolved policing and justice functions, and provides for a number of models for heading the department. New section 21B (added by clause 42(6) of the bill) makes provision for certain specified matters which the Act of the Assembly may include.

11. Clause 42(5) enables an Order in Council (subject to affirmative procedure) to be made establishing a department if the Secretary of State considers that there is no reasonable prospect that the Assembly will pass the Act required to establish the new department. The department established by the Secretary of State is required to follow one particular model – headed by a Minister and deputy Minister, as set out in Schedule 5 to the bill. (If the department is established by Order in Council in this way, then the same provisions which could have been included in the Act of the Assembly under new section 21B may instead be included in the Order in Council.)

12. The provisions are an important exception to the general rule in section 21 of the 1998 Act that the Assembly establishes new departments, but the principle is clear in the bill itself and we do not consider the delegation to be
inappropriate following, as it does, the usual practice for matters which would otherwise be dealt with by Act of the Assembly to be dealt with by Order in Council subject to a procedure at Westminster.

Abolition of deputy Ministerial office — clause 42(7)

13. Clause 42(7) inserts a new section 21C into the 1998 Act dealing with where a department exercising devolved police and justice functions is established with a Minister supported by a deputy Minister. The Northern Ireland Assembly is enabled to resolve that the deputy Ministerial office should be abolished. New subsections (4), (5) and (6) specify circumstances in which the Secretary of State must make an order, subject to negative procedure, abolishing the office. The circumstances specified in the bill are matters of ascertainable fact, not of opinion, including whether the Assembly has or has not passed a resolution. The bill also specifies from when the abolition is to take effect. So there seems no element of discretion left to the Secretary of State and for the order to be subject to the negative procedure would be inconsistent with the provision of the bill itself. In these exceptional circumstances, and although this power is a Henry VIII power, we consider that it would be preferable for there to be no parliamentary procedure for such an order. This would also be consistent with section 2 of the Northern Ireland (St Andrews Agreement) Act 2006. We accept that the same order could in this instance appropriately also make the supplementary, incidental, consequential, transitional or saving provision provided for in new section 21C(10).

Private security industry — Schedule 6, paragraph 12

14. The bill’s provisions about the private security industry in Northern Ireland are explained at paragraphs 10, 11 and 110 to 117 of the Explanatory Notes. Schedule 6 to the bill sets out interim arrangements which will apply between the repeal of Schedule 13 to the Terrorism Act 2000 and the eventual regulation of the services under the Private Security Industry Act 2001 (provided for in clause 47).

15. Paragraph 12 of Schedule 6 is not addressed in the memorandum. It contains a Henry VIII power enabling the Secretary of State by order to increase the 12 month period for the duration of a licence under the interim arrangements. Unusually for a Henry VIII power, there is no parliamentary procedure, though paragraph 12(4) provides for the order to be laid before Parliament. This is however the position for the equivalent orders under paragraph 8(3) of Schedule 13 to the 2000 Act and was the position before that for the equivalent orders under section 39(4) of the Northern Ireland (Emergency Provisions) Act 1996.

LEASEHOLD INFORMATION BILL [HL]

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

18. This bill does not delegate legislative power.

19. This private member’s bill contains one delegated power, at clause 2(2) (new section 8A(3)(b) of the Food Standards Act 1999). The power is for the Secretary of State, by regulations subject to negative procedure, to prescribe persons and bodies for whose use the nutrition profiling model must be available and the purposes for which it is to be used. The delegation is not inappropriate and there is nothing in the bill which we wish to draw to the attention of the House.

20. We reported on this bill in our 2nd Report (HL Paper 10) and have recently been invited to consider amendments to be moved on Report: amendments Nos 26, 77, 74, 78, 79, 81 and 84 on the marshalled list, HL Bill 34–I, now agreed to by the House. The Department of Health has provided a supplementary memorandum, printed at Appendix 3. There is nothing in the amendments which we wish to draw to the attention of the House.

21. We reported on this bill in our 5th Report (HL Paper 44) and the Government have now responded by way of two letters to the Chairman from Lord McKenzie of Luton, Parliamentary Under Secretary of State, Department for Work and Pension, printed at Appendix 4.
APPENDIX 1: DIGITAL SWITCHOVER (DISCLOSURE OF INFORMATION) BILL

Memorandum by the Department for Culture, Media and Sport

Introduction

1. This Memorandum is provided by the Department for Culture, Media and Sport to assist the Delegated Powers and Regulatory Reform Committee in its consideration of the Digital Switchover (Disclosure of Information) Bill. It briefly describes the Bill’s provisions; identifies the powers to make delegated legislation that it contains; explains the purpose of the proposed powers and why the matter is to be dealt with in delegated legislation; and explains the procedure proposed for each power and why it has been chosen. Some policy background has been provided where it is thought likely to be of assistance to the Committee.

Brief description of the Bill

2. “Digital switchover” is the process by which analogue television broadcasting signals will be phased out in favour of digital signals. The process will allow many more television channels to be carried using less radio spectrum than is currently used, expanding choice for consumers. Digital switchover will commence in late 2007 in Whitehaven, followed by the rest of the Borders region in 2008, and proceed ITV region by ITV region until 2013, by which time all analogue transmissions will have ceased.

3. People who do not yet have equipment suitable for receiving digital television transmissions, whether by satellite, cable or digital terrestrial television (“DTT” or more colloquially “Freeview”) will need to take steps to acquire it. A Digital Switchover Help Scheme will be established under the overall management of the BBC or a company controlled by the BBC or the Crown (or the BBC and the Crown together): the exact structure has not yet been finally determined. Under the scheme, a household will be entitled to be provided (on payment of a small fee or free of charge, depending on means) with suitable equipment, help with setting it up and any work necessary to improve their TV aerial. Such help will be available to any household that includes—

- a person aged 75 or over, or
- a person with a severe disability, i.e., if that person has an award of disability living allowance or attendance allowance, an equivalent under the war pensions or industrial injuries disablement benefit legislation, or
- a person who is blind or partially sighted.

4. The present Bill is designed to support such a Scheme. Evidence gained from small-scale trials and from consultations with charities and other experts indicates that the Scheme will best serve the needs of the target population if those administering it take active steps to communicate directly with people who appear to be entitled to help. The information needed is contained in data held for social security purposes by the Department for Work and Pensions (“DWP”) and the Department for Social Development in Northern Ireland (“DSDNI”); for war pensions purposes by the Veterans’ Administration within the Ministry of Defence; and in relation to people who are blind or partially sighted (“visual impairment information”) by local authorities or (in Northern Ireland) Health and Social Services Boards. Using that information, the administrator of the Scheme will identify people in the eligible categories and write to them, inviting them to apply for help. This should maximise take-up and (hence) help to
vulnerable people, whilst minimising form-filling for recipients, helping to reduce the costs of administering the scheme.

5. The disclosure of such information is, however, constrained by a number of legal controls, such as the law of confidentiality (public authorities owe a duty of confidentiality to people who supply them with personal information), the Data Protection Act 1998 and statutory provisions such as the Social Security Administration Act 1992, section 123. That provision makes it an offence for a social security employee to disclose social security information without “lawful authority”.

6. The Bill will therefore create legal authority for the disclosure of social security, war pensions and visual impairment information: clause 1(1), (2) and (3). Information falling into these categories and of a prescribed kind may be disclosed to a “relevant person” for use in connection with “switchover help functions”, such as identifying persons who may be eligible for help, contacting them and establishing their entitlement: clause 1(5). A “relevant person” includes the BBC, certain companies controlled by the BBC or the Crown, and any person engaged by the BBC, the Secretary of State or such a company to provide services or carry out functions in connection with switchover help functions: clause 1(4). It is an offence for a person who has received information by virtue of this power to disclose it without lawful authority: clause 3.

Clause 2: power to specify the information that can be disclosed

7. Clause 2 provides power for the Secretary of State to prescribe by order the precise kinds of social security, war pensions and visual impairment information that can be supplied under clause 1. It is envisaged that the orders will be made by the Secretary of State for Culture, Media and Sport.

- “Social security information” is information of a description specified by order which is held by (or on behalf of) the Secretary of State or the Department for Social Development in Northern Ireland and obtained as a result of, or for the purposes of, the exercise of functions in relation to social security.

- “War pensions information” is information of a description specified by order which is held by (or on behalf of) the Secretary of State and obtained as a result of, or for the purposes of, the exercise of functions in relation to war pensions.

- “Visual impairment information” is information of a description specified by order about persons who are blind or partially sighted contained in a register maintained—
  - in England or Wales or Scotland, by or on behalf of a local authority (as defined in clause 5(1)), or
  - in Northern Ireland, by or on behalf of a Health and Social Services Board.

8. “Social security” would, as in other statutes, encompass a range of benefits including state retirement pensions, income support, pension credit, income-based jobseeker’s allowance, disability living allowance and attendance allowance. Child support is not included.

9. “War pension” refers to a pension or other benefit for or in respect of a person who has died or been disabled in consequence of service as a member of the armed forces, and certain other pensions and benefits. See section 25 of the Social Security Act 1989.
10. Thus, the Bill will not permit access to all social security, war pensions and visual impairment information, but only those descriptions of such information that have been prescribed by order under subsection (2), (3) or (4). The precise details have not been finalised, but it is envisaged that this power will be used to specify for this purpose only the following information about an identifiable person who is eligible for help, namely—

- their name, and any alias by which they may be known, address and date of birth;
- their National Insurance number;
- whether they live in a residential care or nursing home (so helping to ensure that the right kinds of help are available in residential care and nursing home settings);
- details of any person appointed to act on their behalf (to allow such people to be contacted to alert them to the availability of help);
- whether they are entitled to help free of charge;
- in the case of visual impairment information, preferred means of communication - for example by large print, braille, or tape;
- the fact that they have died, where that is the case.

11. The order is to be made by statutory instrument and will be subject to negative resolution procedure: see subsections (5) and (6).

Justification for the power in clause 2

12. It is important that the Bill should allow disclosure only to the minimum extent necessary to operate the Scheme effectively. Otherwise, the new powers could be characterised as a disproportionate interference with individuals' privacy.

13. The Government considers that it is appropriate for this information to be specified by order rather than setting out these categories on the face of the legislation, because of the need for flexibility in the future. For example, the Scheme will operate over a period of five years or slightly longer, and it is quite possible that, during that time, experience will show that if other, or different, information was available to the Scheme's administrators, the help could be given more effectively or at a lower cost. Also, the Scheme itself might be altered in the light of experience or a change in policy, necessitating access to other or different information (although no such changes are currently contemplated).

14. In exercising her power, the Secretary of State must, of course, ensure that the order complies with the European Convention on Human Rights, especially article 8 (right to respect for private etc. life). In particular, she must ensure that the power does not give access to information to a degree that may be disproportionate to the objectives of the Scheme. The range of information set out above is considered to satisfy that test. Likewise, the order does not compel the disclosure of the information and the agencies concerned must ensure that when exercising the discretion to disclose information of the kind specified in the order, that disclosure satisfies the Data Protection Act 1998 and Human Rights Act 1998. If information is disclosed unnecessarily, the individual concerned may have a legal remedy in respect of the disclosure.

15. The Government considers that the negative resolution procedure is the appropriate level of control for an order of this nature. It is appropriate that an order affecting the disclosure of information be subject to Parliamentary scrutiny, but on the other hand, the order will only supply detail within a framework that has been debated by Parliament during the passage of the Bill, and will not raise new issues of principle that would call for an affirmative resolution procedure to be specified.
APPENDIX 2: JUSTICE AND SECURITY (NORTHERN IRELAND) BILL

Memorandum by the Northern Ireland Office

Introduction:

1. This memorandum identifies provisions for delegated legislation in the Justice and Security (Northern Ireland) Bill. The purpose of the memorandum is to explain the purpose of the delegated powers taken; describe why the matter is to be left to delegated legislation; and explain the procedure selected for each power and why it has been chosen.

2. The purpose of the Bill is to deliver a number of measures which are necessary to deliver a commitment to security normalisation in Northern Ireland. A number of special provisions relating to Northern Ireland were contained in Part VII of the Terrorism Act 2000 (“the 2000 Act”) which will cease to have effect by 31 August 2007. The Bill provides for special measures to protect jurors from intimidation and replaces the Diplock courts with a new system of non-jury trial in certain situation.

3. Some powers are necessary to enable the police and military to operate effectively after security normalisation. These include powers of arrest, entry, search and seizure. This Bill also makes provision for the regulation of the private security industry in Northern Ireland; extends the powers of the Northern Ireland Human Rights Commission; extends the remit of the Criminal Justice Inspectorate, enables the renaming of judicial tiers and makes a technical change to legal aid arrangements.

4. More detailed information about the purpose and effect of the provisions in the Bill, and the background to the proposals, can be found in the Explanatory Notes published with the Bill. The Department stands ready to provide the Committee with any further supporting details on any of the clauses that the Committee thinks fit; and to give oral evidence in support if the Committee were to consider that to be more helpful.

Power to make rules of court:

5. There is provision in clause 6 of the Bill to make rules of court in relation to the new procedures for trials on indictment to be held without a jury which are set out in clauses 1 to 8, but there are no particular parliamentary procedures applying to the making of these rules. Clause 6(1) provides that rules may be made setting out further detailed procedures considered necessary or expedient for the purposes of implementing the new powers contained in this section of the Bill, but it is not considered necessary or desirable for these detailed procedures to be set out on the face of the Bill. Subsection (2) of clause 6 provides that rules of court may make provision for time limits which are to apply under these new procedures for non-jury trial, and subsection (3) provides that the power to make rules of court does not protect the general position under any other enactment which confers the power to make rules.
Clause by clause analysis of delegated powers

Clause 15: Investigations: access to prisons, &c.

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

6. This clause inserts new section 69C into the Northern Ireland Act 1998 and grants the Northern Ireland Human Rights Commission established under Part VII of that Act (the “Commission”) the power to enter specified places of detention in Northern Ireland as part of an investigation being carried out under section 69(8). Paragraphs (a) to (h) of subsection (3) of new section 69C list the places of detention to which this power relates, and this list includes, for example, a prison specified in the Schedule to the Prisons and Young Offenders Centres Rules (Northern Ireland) 1995 and a place designated under paragraph 1 of Schedule 8 to the Terrorism Act 2000. Subsection (12) of new section 69C provides that the Secretary of State may be order amend subsection (3). This power is considered necessary in the event that the need is in future identified for other places of detention to be inspected by the Commission. Clause 15(2) of the Bill provides that section 96(2) of the Northern Ireland Act 1998 is to be amended to provide that any order amending subsection (3) is to be subject to the affirmative resolution procedure.

Clause 31: Road closure: by order

Power conferred on: Secretary of State

Power exercisable by: Order

Parliamentary procedure: None

7. The Secretary of State may by order direct that a specified road be wholly or partly closed or diverted if it is necessary for the preservation of the peace or the maintenance of order. This power is necessary in the main to build peace walls where necessary to stop inter-communal violence, and to deal with parades by building structures to help police. In both instances the power may need to be exercised quickly, land may need to be requisitioned and planning permission bypassed.

8. Shifting demographics mean community interfaces are continually changing and there may need to be a peace wall built swiftly to address new or increased area of tension to protect public safety. There is no Parliamentary procedure for such an order as it is not of a nature which requires detailed scrutiny. The safeguards in the used of the power are that it may only be used if it is necessary for the preservation of the peace or the maintenance of order; any interference with personal property rights will be dealt with by way of the compensation scheme provided for in clause 37 and Schedule 4.
Clause 33: Code of practice:

- **Power conferred on:** Secretary of State
- **Power exercisable by:** Order made by Statutory Instrument
- **Parliamentary procedure:** Laid in draft and approved by both Houses; urgency procedure provided.

9. The Secretary of State may make Codes of practice in relation to the exercise of powers by police officers and members of the armed forces of powers conferred by the Bill. The Codes must be issued in draft for consultation, amended if appropriate and then laid in Parliament, and brought into operation by order.

10. Clause 35 sets out the procedure for the order, and provides that where the Secretary of State is of the opinion that it is necessary by reason of urgency the order shall be made and then laid. Unless the order is approved by both Houses within 40 days of laying, the order ceases to have effect.

11. The power is subject to affirmative resolution in normal circumstances because the codes regulate the conduct of the armed forces and the police in relation to powers some of which are intrusive of fundamental freedoms. It is appropriate that the proper exercise of those powers be subject to Parliamentary debate and scrutiny.

Clause 40: Duration

- **Power conferred on:** Secretary of State
- **Power exercisable by:** Order made by Statutory Instrument
- **Parliamentary procedure:** Laid in draft and approved by both Houses.

12. The Secretary of State may by order repeal any or all of sections 20 to 39. This power will be used as and when the security situation in Northern Ireland is such that the powers provided to the police, army and Secretary of State in the Bill cease to be necessary.

13. This order is made by way of the affirmative resolution procedure because the effect of the exercise of this power will be to amend primary legislation. The decision to repeal these provisions will depend on a judgement as to the political situation at the time. It is appropriate therefore that such an order is subject to a high degree of Parliamentary scrutiny.

Clause 42: Northern Ireland Department with policing and justice functions

- **Power conferred on:** Her Majesty in Council
- **Power exercisable by:** Order in Council made by Statutory Instrument
- **Parliamentary Procedure:** Affirmative resolution

14. Clause 42 amends section 21A of the Northern Ireland Act 1998 (as inserted by section 17 of the Northern Ireland (Miscellaneous Provisions) Act 2006, to enable the establishment of a department with policing and justice functions with an elected Minister and deputy Minister.
15. New section 21A(7A) confers a power on the Secretary of State to lay a draft Order in Council to establishing a new department of policing and justice if it appears to him that there is no reasonable prospect that the Assembly will pass an Act establishing such a department itself. (Section 21A(1) is substituted by subsection (2) of clause 42, so as to enable the Assembly to choose between a new department on conventional lines, headed by a single Northern Ireland Minister, or the alternative models set out in Schedule 4A to the Northern Ireland Act 1998).

16. The power is intended to be used to avoid the situation where there is a desire on the part of the Assembly for devolution of policing and justice, but an absence of agreement as to the departmental model to be adopted. In these circumstances, the power in subsection (7A) could be used to facilitate devolution. The power may only be used once (subsection 7D), and is limited to this departmental model only (see subsection (7A)(a) to (d)). Subsection (7B) enables the making of supplementary, incidental, consequential, or transitional provision. By way of example, this is could be used to make necessary references to the new department in other legislation.

17. Clause 42(6) of the Bill inserts new section 21B into the Northern Ireland Act 1998. This extends the power just described, to enable further transitional provision to be made in connection with the new Ministerial arrangements. It can be used either by the Assembly, if the department is to be established by Act of the Assembly, or, alternatively, it may be relied upon as part of the Order in Council if that is the vehicle. Subsection (2) of new section 21B enables the Order (or Act) to prevent the establishment of the department taking immediate effect for practical purposes, while subsections (3) and (4) enable the election of Ministers designate, who then take up office at the point of devolution of policing and justice functions. This power is designed to facilitate the establishment of the new department, by enabling new Ministers to be appointed early, and help in the preparations for devolution.

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

18. Clause 42(7) inserts new section 21C of the Northern Ireland Act 1998. This provision provides for the new Ministerial arrangements to be reviewed by an Assembly committee within a certain period of time. If the Assembly resolve that the office of deputy Minister should be abolished, then the Secretary of State must respond to this by making an order abolishing that office within a reasonable period of time. (See subsection (4)). Similarly, if the time period set out in section 21C expires, without any resolution having been made, then the Secretary of State must make an order in the same terms. (See subsection (5)). Finally, it is open to the Assembly to extend the deputy Ministerial office for a further period of time. If that further period comes to an end, and is not extended, then the Secretary of State must give effect to the abolition of the deputy Ministerial office.

19. Subsection (9) of new section 21C describes what is meant by abolishing the deputy Ministerial office, and ensures that an order under this section goes no wider than is necessary to implement the Assembly resolution effectively. Subsection (10) enables the making of any supplementary, incidental, consequential, transitional or savings provisions that may be needed as part of the removal of the deputy Ministerial office. The negative resolution procedure is believed to be appropriate, because of the fact that the order is giving effect to the wishes of the Assembly, and its ambit is clearly constrained by subsection (9).
Clause 45: Altering title of resident magistrate

**Power conferred on:** The Lord Chancellor

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

**Parliamentary procedure:** Negative Resolution.

20. Clause 45 implements a recommendation of the Criminal Justice Review and amends section 102 of the Courts Act 2003 ("the 2003 Act") so as to enable the Lord Chancellor, by order, and after consultation with the Lord Chief Justice, to use his power to alter the name of the offices of resident magistrate, presiding resident magistrate and deputy resident magistrate.

21. Section 102 of the 2003 Act already enables the Lord Chancellor by order to alter the names of any of the offices of the Supreme Court of Judicature of Northern Ireland or of the county courts in Northern Ireland listed therein. In effect, therefore, this provision simply extends the power already existing in the 2003 Act, to include magistrates, and is not expected to be controversial.

22. As with any other order made under section 102 of the 2003 Act, this power is to be exercisable by statutory rule, and will be subject to annulment in pursuance of a resolution of either House of Parliament in the same manner as a statutory instrument.

Clause 46: Private Security Industry Subsection (4)

**Power conferred on:** Secretary of State

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

**Parliamentary procedure:** Negative resolution

23. This requires that when an order under section 3(3) of the Private Security Industry Act 2001 ("the 2001 Act") designating an activity in respect of Northern Ireland is made, it shall repeal Schedule 5 ("the interim arrangements"). Such an order is made in accordance with section 24 of the 2001 Act, which provides for the order to be made by negative resolution.

24. The effect of designating activities under section 3 of the 2001 Act is to make it an offence to engage in those activities without a license issued by the Security Industry Authority. Since the interim arrangements remain in place until the SIA licensing commences, in order to have a smooth switch to the SIA licensing, the designation must come into effect immediately the interim provisions are repealed. The procedure in clause 46(4) makes this a streamlined process which can take place in a single instrument.

25. The negative resolution procedure remains appropriate, despite the additional scope of an order under section 3(3) required by this clause. This is because the order has the effect only of moving from the interim arrangements to the regime in the 2001 Act. Full Parliamentary scrutiny of the substance of these provisions will have taken place during the passage of the 2001 Act and this Bill. Negative resolution therefore suffices for the order giving effect to the change.
Subsection (6)

Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None

26. Sections 46 and 47 come into force by way of order of the Secretary of State and such an order may make incidental, transitional and consequential provision. This power is necessary because there is currently a licensing scheme in Part VII which will expire on 31 August. This will enable licences issued under the 2000 Act to remain valid after the interim arrangements come into force and other make technical provision for the change from the current licensing to the interim arrangements.

27. As this exercise of power will bring into effect matters already subject to scrutiny during the passage of the Bill no Parliamentary procedure is necessary.

Clause 51: Commencement

Power conferred on: Secretary of State

Power exercisable by: Order made by Statutory Instrument

Parliamentary procedure: None

28. This power enables the Secretary of State to commence those clauses of the Bill which do not come into force on the day it is passed or on 1st August 2007, and to make transitional, or saving provisions in such an order. As this exercise of power will bring into effect matters already subject to scrutiny during the passage of the Bill no Parliamentary procedure is necessary.
S1 Conflicts of interest in professional roles: When a person may not act as the AMHP making an application or act as the medical practitioner providing a medical recommendation accompanying an application [Amendment 26 on the Marshalled List, HL Bill 34-I]

S1.1 The policy intention

S1.1.1 Section 12 of the Mental Health Act 1983 sets out general provisions as to the medical recommendations that must accompany an application for a patient's admission under the Act. Section 12(3) to (7) sets out the circumstances in which a doctor may not provide a medical recommendation because of their position either in relation to the applicant, the patient or the other practitioner providing a medical recommendation. For example, except in specified circumstances, only one of the two medical recommendations which are generally required may come from a doctor employed by the NHS hospital to which the patient is to be admitted. A Lords' amendment sought to replace the provisions of s12(3) to (7) with a regulation making power. The provisions of s12(3) to (7) are somewhat difficult to follow and because they are in primary legislation there is little scope to keep them up to date with changes in practice. For these reasons, we agree that it would be appropriate to replace these subsections with a power to make regulations that address conflicts of interest with respect to doctors making medical recommendations.

S1.1.2 In addition, the Act does not completely address conflicts of interest with respect to the applicant, who is usually an approved social worker (ASW). The conflicts between the practitioners providing the recommendation and the applicant are covered, but not the potential conflicts of interest between the patient and the applicant. This omission was raised in Lords Committee and is of concern to ASW lobby groups. The Bill will replace ASWs with approved mental health professionals (AMHPs), who will be trained and approved individuals from a range of professions in addition to social work. Opening up these functions to a wider range of professionals increases the potential for conflicts of interest to arise, for example direct line management relationships between the applicant and the practitioner providing a medical recommendation. We therefore wish to address these potential conflicts in legislation. Placing provisions about conflicts of interest regarding AMHPs making applications in regulations, rather than in primary legislation, would allow scope to amend them if new conflicts became apparent once the new AMHP policy is in place and in response to changes in practice in the future.

S1.2 What the primary legislation says

S1.2.1 Section 12 sets out the practitioners that can provide recommendations for the purposes of an application for admission under the Act (“medical recommendation”). Subsections (3) to (7) of section 12 detail when a doctor can give a medical recommendation, and when it would be considered a conflict of interest.

S1.2.2 Subsection (3) provides that where an application is made to an NHS hospital, only one of the two medical recommendations can be given by a practitioner on the staff of that hospital. However if the patient is admitted to an NHS hospital as a private patient, or is admitted to an independent hospital, neither of the medical recommendations can come from practitioners on the staff of that hospital.

S1.2.3 However, the requirement of subsection (3) will not apply (enabling both medical recommendations to come from staff of the hospital where the application for admission is
being made) where (a) complying with the subsection would result in a delay which would create a serious risk to the health and safety of the patient; (b) if one of the practitioners works at the hospital for less than half of their total working hours in the health service; and (c) where one of the doctors is a consultant and the other is not under their direction (see subsection (4)). Subsection (6) provides that a general practitioner GP who is employed part time in a hospital shall not be considered as being a practitioner on its staff for the purpose of section 12.

S1.2.4 Subsection (5) (which also applies to guardianship applications – see subsection (7)) precludes the following people from making a medical recommendation –

(a) the applicant (who may be an approved social worker (ASW) or the nearest relative – see section 11);

(b) a professional partner of either the applicant or the other practitioner making a medical recommendation for the application;

(c) a person employed as an assistant by the applicant or practitioner making the other medical recommendation;

(d) a person who either receives or has an interest in the receipt of any payments made in relation to the maintenance of the patient;

(e) subject to subsections (3) and (4), a practitioner on the staff of a hospital to which the patient is to be admitted or the person named as guardian in the application; or

(f) the husband, wife, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, of the patient, the applicant or the practitioner making the other medical recommendation, or any of the people mentioned in (a) to (e).

S1.3 What the delegated powers will cover

S1.3.1 We would like the power to make regulations stating when an AMHP may not make an application for a patient’s admission to hospital (or for guardianship) under the Mental Health Act, and when a doctor may not make a medical recommendation accompanying such an application, because of a conflict of interest that arises because of the applicant’s / medical recommender’s direct or indirect relationship with:

- the applicant and / or a medical recommender (as relevant)
- the patient
- the hospital to which the patient is to be admitted.

We would wish to specify the circumstances in which these rules may be relaxed, for example, where to comply with them would delay the application, putting the patient or other people at serious risk.

S1.3.2. We will be consulting with stakeholders on the content of the regulations. Our initial view is that the regulations concerning conflicts of interest for doctors making medical recommendations will cover all the provisions currently in s12(3) to (7). We may also want to make amendments to reflect social changes since the Act was last debated in 1983, for example, to prevent a doctor making a medical recommendation if they are living with the patient, applicant, etc as if they were husband and wife. As mentioned above, we want the regulation making power to provide the scope to address conflicts of interest that may arise in the future due to implementation of the AMHP policy, changes in practice and wider social changes.
**S1.4 How they will complete the legislative contribution to delivery of the policy intention**

S1.4.1 For patients that need to be detained under the Mental Health Act, the primary legislation requires an application to the hospital managers that includes medical recommendations. The regulations will set out the circumstances in which an AMHP may not make an application and the circumstances in which a doctor may not make medical recommendations accompanying the application.

**S1.5 Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing (for example) directions over regulations**

S1.5.1 Regulations will provide more scope than primary legislation to amend provisions on doctor and AMHP conflicts of interest in line with changes in practice and wider social changes in the future. This will help prevent the safeguards from becoming out of date and will allow the Government to address any conflicts of interest that may arise as a result of the implementation of the Bill’s new professional roles policy, if they occur.

**S1.6 The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)**

S1.6.1 It is proposed that the regulations should be subject to negative resolution.

**S2 The right for a third party to request a decision on whether or not there is an unauthorised deprivation of liberty [Amendment 77 on the Marshalled List, HL Bill 34-I]**

**S2.1 The policy intention**

S2.1.1 The deprivation of liberty safeguards to be added to the Mental Capacity Act by the Mental Health Bill places a duty on care homes and hospitals (managing authorities) to apply for authorisation if they are depriving, or may be going to deprive, a person of liberty, who lacks capacity to consent. There is a clear duty on managing authorities to make sure that their actions in this regard are lawful.

S2.1.2 A government amendment to be debated at report would allow third parties to be able to initiate an assessment of whether or not deprivation of liberty is occurring unlawfully where managing authorities have not applied for an authorisation.

**S2.2 What the primary legislation says**

S2.2.1 If anyone is concerned that a person may be deprived of their liberty without the protection of the relevant safeguards, and they have drawn this to the attention of the managing authority, asking them to apply for an authorisation but they have not done so, they can apply to the supervisory body. The supervisory body must appoint someone who would be suitable and eligible to be a best interests assessor in the case to assess whether the person is deprived of liberty. Provision for this process is made in new paragraphs 66A to 66G to be inserted in Schedule 6 to the Mental Health Bill.

S2.2.2 If the outcome of the assessment is that there is an unauthorised deprivation of liberty then the full assessment process would be completed as if a standard authorisation had been applied for. If the managing authority consider that the care regime should continue while the assessments are carried out, they will be required to issue an urgent authorisation and to obtain a standard authorisation within 7 days.
S2.2.3 Someone who is concerned that there is an unauthorised deprivation of liberty taking place, and who is not able to resolve this to their satisfaction with the managing authority, would thus be able to trigger the deprivation of liberty assessment process themselves. This is in addition to the possibility of pursuing the formal complaints process or of applying to the Court of Protection to hear the case.

S2.3 What the delegated powers will cover

S2.3.1 The delegated powers, contained in paragraph 66D(1) of Schedule 6 to the Mental Health Bill, will enable the period within which the deprivation of liberty assessment for third party purposes must be undertaken to be specified.

S2.4 How they will complete the legislative contribution to delivery of the policy intention

S2.4.1 They will enable us to ensure that the deprivation of liberty assessment for third party purposes is completed within a reasonable timescale. This is important because, if a deprivation of liberty is found to be occurring, it is essential to give it a lawful basis, and provide the relevant safeguards, as quickly as possible. Alternatively, the assessment process may conclude that deprivation of liberty is unnecessary, in which case it would need to be brought to a speedy end.

S2.5 Why delegated powers (regulation, direction, order etc.) are appropriate and the reason for choosing (for example) directions over regulations

S2.5.1 This is a procedural matter that, although important, does not need to appear on the face of the Bill. Setting the timescale by regulations will facilitate the amendment of the timescale should it prove necessary in the light of experience of the operation of the deprivation of liberty procedures. This is also consistent with the approach taken on setting timescales for other assessments in schedule 6.

S2.6 The proposed choice of parliamentary scrutiny procedure (affirmative, negative or none at all)

S2.6.1 This is a procedural issue, which does not affect the nature of the safeguards, and is therefore suitable for negative resolution.

Amendment to Bournewood regulation making powers on assessment of deprivation of liberty

S3 To enable all the deprivation of liberty assessment regulations to be made by affirmative resolution [Amendments 74 and 84 on the Marshalled List, HL Bill 34-I]

S3.1 The purpose of the amendment to clause 39 and Schedule 8 is to enable all the regulations relating to deprivation of liberty assessment issues to be contained in the same statutory instrument made by affirmative resolution. The amendments provide for this to happen in relation to both England and Wales. This will enable supervisory bodies and other interested parties to locate all of the information they need in one place.

S3.2 The proposed amendment does not alter the coverage of any of the regulation-making powers contained in Section 6 of the original Memorandum to the Delegated Powers and Regulatory Reform Committee submitted on 17 November 2006.

S3.3 The regulations relating to deprivation of liberty assessments that are able to be made by negative resolution we now intend to incorporate within regulations made by
affirmative resolution are those covered in 6.2 (Timescales for completion of assessments), 6.3 (Information to be made available to the eligibility assessor) and 6.14 (Arrangements where the same body is the managing authority and supervisory body) of the original Memorandum. The affirmative regulations that we intend to incorporate them with are those covered in 6.4 (Supervisory body to select assessors) of the original Memorandum.

Amendment to Bournewood Regulation making powers on eligibility criteria for assessors.

S4 To enable the extension of the eligibility criteria for assessors [Amendments 78 and 79 on the Marshalled List, HL Bill 34-I]

S4.1 The regulation-making power in Schedule 6, paragraph 123 was covered in Section 6.4 (Supervisory body to select assessors) of the original Memorandum to the Delegated Powers and Regulatory Reform Committee submitted on 17 November 2006. The objective of the regulation-making power is to ensure that assessments for standard authorisations of deprivation of liberty are only carried out by people who are properly equipped to undertake the assessments.

S4.2 The proposed amendment of the regulation-making power will enable the Secretary of State, and the National Assembly for Wales, to specify particular training courses that assessors must have undertaken in order to be qualified to undertake deprivation of liberty assessments, and skills that assessors must have. The amendment allows for the Secretary of State, and the National Assembly for Wales, to specify particular training courses otherwise than in regulations in order to allow for flexibility and ease of change as training courses develop.

Amendment to Bournewood regulation powers on monitoring the operation of the deprivation of liberty safeguards.

S5 Monitoring of the operation of the deprivation of liberty safeguards [Amendment 81 on the Marshalled List, HL Bill 34-I]

This supplementary Memorandum replaces Section S6.10 (Monitoring of the operation of the deprivation of liberty safeguards) of the original Memorandum to the Delegated Powers and Regulatory Reform Committee submitted on 17 November 2006. This amended version is being provided because it is intended to change the wording of the regulation-making power such that the bodies prescribed to monitor the operation of the deprivation of liberty safeguards may be given authority to require the production of, and inspect, records relating to the care and treatment of relevant people rather than just to their medical records.

S5.1 The policy intention

S5.1.1 To make provision for the monitoring of the operation of the deprivation of liberty safeguards in order to be confident that the safeguards are being properly implemented.

S5.2 What the primary legislation says

S5.2.1 Schedule 6, paragraphs 153 and 154 say that regulations may:-
• Require one or more prescribed bodies to monitor, and report on, the operation of the deprivation of liberty procedures in relation to England.
• Give a prescribed body authority, in connection with this monitoring function, to
• Visit hospitals and care homes
• Visit and interview persons accommodated in hospitals and care homes
• Require the production of, and to inspect, records relating to the care or treatment of people
• Enable the National Assembly for Wales to monitor, and report on, the operation of the deprivation of liberty procedures in relation to Wales, and to enable the National Assembly for Wales to direct one or more persons or bodies to carry out the monitoring functions on its behalf.

S5.3 What the delegated powers will cover

S5.3.1 The power will be used to establish a monitoring function for the deprivation of liberty safeguards with the regulatory bodies for care homes and hospitals for England. In Wales, the National Assembly for Wales will require the appropriate powers to undertake any monitoring regime deemed appropriate at the due time. The focus of the monitoring will be on the operation of the deprivation of liberty procedures by care homes and hospitals and care will be taken to ensure that the monitoring role does not cut across the role of the Court of Protection as appeal body.

S5.3.2 The amendment to the regulation-making powers, as compared to the version originally submitted to the Committee on 17 November 2006, is to clarify what records monitoring bodies are able to require the production of. The original intention was that this authority should extend to care records, care plans and needs assessments. The purpose of the amendment to the regulation-making power is to put the matter beyond doubt in response to concerns that the previous wording could be interpreted narrowly to apply only to records about medical treatment. The monitoring bodies will require access to these wider records in order to properly fulfil their monitoring role.

S5.4 How they will complete the legislative contribution to delivery of the policy intention

S5.4.1 The regulations will enable arrangements to be put in place to monitor the operation of the deprivation of liberty procedures and to identify any aspects that may need to be reviewed.

S5.5 Why delegated powers are appropriate and the reason for choosing one kind rather than another

S5.5.1 The use of secondary legislation will facilitate the adjustment of the monitoring arrangements should it prove necessary in the light of experience of the operation of the proposed arrangements or in the light of any future changes in arrangements for monitoring care homes and hospitals.

S5.6 The proposed choice of parliamentary scrutiny procedure

S5.6.1 Affirmative: The regulations concern which body or bodies will monitor the deprivation of liberty safeguards and the nature of that monitoring. This is of key interest to stakeholders on the basis that it will influence the way in which the safeguards are delivered and so merits the more stringent Parliamentary scrutiny afforded by affirmative resolution. (An amendment is being made to enable the regulations relating to the
monitoring arrangements for Wales to be made by affirmative rather than negative resolution. This is achieved by referring to paragraph 154 of Schedule 6 to the Mental Health Bill in Clause 39(11) of the Bill.)
APPENDIX 4: WELFARE REFORM BILL — GOVERNMENT RESPONSE

First letter from Lord McKenzie of Luton, Parliamentary Under Secretary of State, Department for Work and Pension to the Chairman

1. I am writing in response to the Delegated Powers and Regulatory Reform Committee’s Fifth Report which you sent us on 2 February. I am grateful to the Committee for its consideration of the delegated powers in the Welfare Reform Bill and I note its contents, in particular its recommendations as follows. I accept them and intend to introduce amendments during Committee.

- In paragraph 29 of the Report the Committee recommends that regulations under clauses 2(2)(c) and (3)(c) and 4(4)(c) and 5(c) regarding conditions of entitlement to the support and work-related activity components should be subject to the affirmative procedure.
- In paragraph 36; that regulations under clause 15(2) relating to the contracting out of the sanctioning of benefits should be subject to affirmative procedure.
- In paragraph 47; that the power inserted by paragraph 20 of Schedule 3 should be subject to affirmative procedure.
- In paragraph 49; that the power inserted by paragraph 23 of Schedule 3 should be subject to affirmative procedure.

2. I also note the Committee’s comments in paragraph 26 and 27 in relation to the annual reconsideration of amounts of employment and support allowance. I have considered the issue further and will be tabling an amendment to section 150(1) of the Social Security Administration Act so that there is an obligation on the Secretary of State to review the relevant employment and support allowance amounts in each tax year to determine if they have retained their value.

3. I would also like to take this opportunity to comment on two other points made by the report.

4. In paragraph 44 the Committee stated that for regulations under new section 7B inserted into the Social Security Administration Act by Clause 40(1) the negative procedure would not be inappropriate were new section 7B(3) to specify that the purpose for which the power is taken is to increase the take-up of social security benefits. I am currently considering this in the light of the JCHR’s recommendation regarding the same clause.

5. In paragraph 51 the Committee ‘consider that a power to modify matters such as time limits in Schedule 6 would not be inappropriate but that the proposed power to modify the Schedule in its entirety has not been shown to be appropriate.’

6. With the power provided by paragraph 9 of Schedule 6 we are trying to achieve the ability to respond quickly to any changes or advances in medical science or knowledge in relation to the diseases covered by the Pneumoconiosis etc. (Workers’ Compensation) Act 1979, without the need for further primary legislation. However, as we consider it unlikely that we would need to change the basic definition of a relevant employer as defined in paragraph 1 of the Schedule, I agree to amend paragraph 9 at Committee so that Regulations may modify only paragraphs 2 to 7 of the Schedule. We think it is right to be able to modify paragraphs 2 to 7 because it is possible that developments in medical science or knowledge about the diseases may require the time limits set out in the Schedule to be changed in the future or for additions to the list of disregarded employers.
7. I am copying this letter to Lord Skelmersdale, Lord Oakeshott of Seagrove Bay and other peers interested in the Bill and I am placing a copy in the Libraries of both Houses.

15 February 2007

Second letter from Lord McKenzie of Luton, Parliamentary Under Secretary of State, Department for Work and Pension to the Chairman

1. I wrote to you on 15 February about the Government’s response to the fifth report of the Delegated Powers and Regulatory Reform Committee. In my letter I said we were still considering the recommendation in respect of paragraph 44 regarding clause 40 of the Bill and that I would write to you again.

2. As you know, the Committee said in respect of clause 40 that for regulations under new section 7B inserted into the Social Security Administration Act by Clause 40(1) the negative procedure would not be inappropriate were new section 7B(3) to specify that the purpose for which the power is taken is to increase the take-up of social security benefits.

3. On considering the Committee’s report on this matter as well as the recommendation of the Joint Committee on Human Rights (JCHR) on the same clause, I have decided to accept the recommendation of the JCHR. I believe that this will satisfy the concerns of both Committees.

4. A Government amendment was laid on 19 February to this effect. I enclose a copy for reference (Not printed. Amendments 108A and 108B on the Marshalled List, HL Bill 24-II).

5. I am copying this letter to Lord Skelmersdale and Lord Oakeshott of Seagrove Bay and I am placing a copy in the Libraries of both Houses.

21 February 2007