HOUSE OF LORDS

Delegated Powers & Regulatory Reform Committee

First Report of Session 2007–08

Disabled Persons (Independent Living) Bill [HL]

Dormant Bank and Building Society Accounts Bill [HL]

House of Lords Bill [HL]

Human Fertilisation and Embryology Bill [HL]

Local Transport Bill [HL]

Powers of Entry etc. Bill [HL]

Legislative reform:

Draft Legislative Reform (Local Authority Consent Requirements) (England and Wales) Order 2007

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The Delegated Powers and Regulatory Reform Committee

The House of Lords appoints the Committee 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 degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments".

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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 setting up 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. After the enactment 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 scrutinises legislative reform orders under the successor to the 2001 Act, the Legislative and Regulatory Reform Act 2006.

First Report

DISABLED PERSONS (INDEPENDENT LIVING) BILL [HL]

1. This private member's bill is similar to a bill of the same title introduced in the previous two sessions[1]. There are delegated powers to make orders or regulations at clauses 3 (definition of "disabled person"), 6(6) and (7), 8(3)(g), (4)(d), (6) and (7), 10(6) and (7), 13(8), 14(5) and (7)(b), 15(1) and (6), 16(1)(a), (2) and (8), 17(4), 19(1), (2)(a), (3) and (5), 21(2), 23(3) and (5), 25 and 38. There are also amendments at clauses 26(7), 29(2) and (3) and 33 which affect existing delegated powers. There is nothing in any of the delegations which we wish to draw to the attention of the House.

DORMANT BANK AND BUILDING SOCIETY ACCOUNTS BILL [HL]

2. This bill makes provision about using money from dormant bank and building society accounts for social or environmental purposes. HM Treasury has provided a memorandum, printed at Appendix 1, explaining all the delegated powers in the bill.

Smaller institutions assets limit — clause 3(4)

3. The bill contains special provision for smaller banks and building societies. Instead of transferring the whole balance of a dormant account to a reclaim fund, a smaller bank or building society may opt to transfer only part of it, the remainder being transferred to one or more charities. (The general scheme of the bill is explained at paragraphs 5 to 13 of the memorandum and paragraph 8 deals with the provision for the smaller banks and building societies.)

4. The bill defines a smaller bank or building society by reference to an assets limit of £7,000 million (clauses 2(4)(b) and 3), but the Treasury is given power by clause 3(4) to amend that limit (up or down) by order subject to negative procedure only, even though the order would amend an Act. We consider that the memorandum (paragraph 15) has made out a sufficient case for this power and we do not consider it, or the level of scrutiny, inappropriate.

Directions to the Big Lottery Fund — clause 21

5. Clause 21 requires the Big Lottery Fund to comply with any directions given to it by the Secretary of State. The directions may cover substantial and significant matters, some of which are close to being of a legislative character, and are not subject to parliamentary scrutiny or control. Were it not for the fact that this arrangements models the provision in the National Lottery etc. Act 1993, we would have recommended that some of these directions, such as those under clause 21(3)(b), specifying purposes for which the Fund may

[1] See 3rd Report (2006-07) (HL Paper 19).

or may not distribute money, be contained in a statutory instrument subject to negative resolution.

HOUSE OF LORDS BILL [HL]

6. This private member's bill makes provision to establish a Commission to make recommendations for the creation of life peerages. The main criteria for recommendation are set out in clause 5(3), and the intention of the bill is that additional criteria may be proposed (and applied) by the Commission. Proposed criteria are to be subject to negative procedure (clause 5(5)). We consider that the affirmative procedure would be more appropriate for the approval of these criteria. This could be achieved by, for example, requiring a Minister to lay a draft order containing the proposed criteria before both Houses.

HUMAN FERTILISATION AND EMBRYOLOGY BILL [HL]

7. This bill derives from the draft Human Tissue and Embryos Bill which was considered by a pre-legislative scrutiny Joint Committee last session. At the request of the Joint Committee, we provided them with a memorandum on the proposed delegations in the draft bill[2]. The Department of Health has provided a memorandum on the delegated powers in the bill, printed at Appendix 2.

8. Some of the powers in the bill were not contained in the draft bill.

"Embryo", "eggs", "sperm", "gametes" — clause 1

9. Section 1 of the 1990 Act defines "embryo", "eggs", "sperm" and "gametes". These expressions are central to the Act: for example, the basic prohibitions in sections 3 and 4 are framed in terms of embryos or gametes, e.g. the prohibition on keeping or using an embryo without a licence. Clause 1(1) to (4) of the bill amends the definitions. In addition, clause 1(5) gives a Henry VIII power to the Secretary of State, by regulations subject to affirmative procedure, to expand (but not contract) the definitions. This, and the associated restrictions on the power, are explained at paragraphs 18 to 22 of the memorandum. The power is the same as that at clause 14(5) of the draft bill.

10. The use of an affirmative procedure order to bring additional matters within the scope of an Act is well established. Since the power in this case may be used only in the light of developments in science or medicine, and cannot be used to apply the Act to items which could not reasonably be described as

[2] Report from the Joint Committee on the draft Human Tissue and Embryos Bill (Session 2006-07, HL Paper 169-I), Appendix 7.

embryos, eggs, sperm or gametes, we do not consider the approach inappropriate and the Joint Committee agreed[3].

Permitted eggs and embryos — clause 3

11. Section 3(2) of the 1990 Act (as amended by clause 3(2) of the bill) prohibits placing in a woman an embryo other than a permitted embryo, and gametes other than permitted eggs or permitted sperm. Permitted embryos, eggs and sperm are defined in new section 3ZA, inserted by clause 3(5). New section 3ZA(5) enables the Secretary of State (by regulations subject to affirmative procedure) to provide that "permitted egg" and "permitted embryo" can include an egg or embryo which has undergone a process to prevent transmission of serious mitochondrial disease. Paragraph 25 of the memorandum explains that the resulting eggs or embryos would have a genetic contribution from 3 individuals.

12. As a delegation, the power is well circumscribed with a clear principle. The extension might have serious and complicated knock-on effects (see clause 26 and paragraph 19 below), but the extent of the extension is apparent from the bill itself and can be debated and amended in the course of the bill's passage. As a matter of pure delegation, we do not consider this inappropriate and neither did the Joint Committee[4].

Inter-species embryos, etc.— clause 4(2)

13. The Human Fertilisation and Embryology Act 1990 is mainly about human embryos, eggs and sperm. Clause 4 inserts into the 1990 Act prohibitions in connection with genetic material not of human origin. In particular, new section 4A(1)(b) prohibits placing an inter-species embryo in a woman; and new section 4A(2)(b) prohibits bringing about the creation of an inter-species embryo without a licence.

14. The draft bill included a comprehensive definition of "inter-species embryo" but this bill contains two powers (each subject to affirmative procedure) which enable the definition to be altered by subordinate legislation.

15. The first power is at new section 4A(5)(e). Section 4A(5)(a) to (d) set out descriptions of embryos which are inter-species embryos for the purposes of the bill. But new section 4A(5)(e) enables regulations to add to the list i.e. to bring other embryos within the controls of the bill. This approach was advocated by some at the draft bill stage, but was expressly rejected by the Joint Committee[5]. The power would allow things to be brought within regulation which would not otherwise be regulated by the bill. Any things brought within regulation in this way could be taken out again, but the regulations could not remove from the scope of the bill, or alter, the items which are specified in section 4A(5)(a) to (d). As a result, we ourselves do not consider this power to be inappropriate.

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3 Report from the Joint Committee on the draft Human Tissue and Embryos Bill (Session 2006-07, HL Paper 169-I), paragraph 141.

4 Report from the Joint Committee on the draft Human Tissue and Embryos Bill (Session 2006-07, HL Paper 169-I), paragraph 189.

5 Report from the Joint Committee on the draft Human Tissue and Embryos Bill (Session 2006-07, HL Paper 169-I), paragraph 173.

16. The second power, in new section 4A(7), enables the Secretary of State by regulations to make "any amendment of the definition of inter-species embryo in subsection (5)" of section 4A. It is far wider than the power conferred by section 4A(5)(e) and would appear to make it redundant. In particular, it would enable any of the categories in section 4A(5)(a) to (d) to be removed, not just altered. **We consider that so wide a power in so sensitive an area is inappropriate and should be removed from the bill. A narrower power, subject to criteria and limitations set out in the bill itself (if it proved possible to draft such provision), might be appropriate and we would hope to report to the House on any such Government amendment if tabled in good time.**

Procedure for refusal, etc. of licence and reconsideration — clauses 19 and 21

17. In connection with the draft bill, we drew attention to the proposed regulatory model whereby the proposed regulatory authority was to have decided its own procedure[6]. (The draft bill proposed that the authority be the Regulatory Authority for Tissue and Embryos but, under this bill, the regulatory functions remain with the Human Fertilisation and Embryology Authority.) The bill differs from the draft bill in that the procedure on reconsideration (including provision for the membership of the appeals committee) is a matter for regulations by the Secretary of State subject to negative procedure, whereas the draft bill itself prescribed membership of the appeals committee but left the authority to decide its own procedure, by regulations subject to no Parliamentary procedure.

18. Other procedures for licensing decisions are (as with the draft bill) left to the authority itself to determine (by regulations which are a statutory instrument but are not subject to Parliamentary procedure), but there are certain minimum requirements about notice, etc. in the bill itself (substituted sections 19 and 19A of the 1990 Act – clause 19). **We consider the powers to be appropriately delegated save that the power at clause 19B(3), to require persons (not just the applicant) to give evidence or to produce documents, should be exercised by the Secretary of State and subject to the negative procedure.**

Mitochondrial donation — clause 26

19. Clause 26 is explained at paragraphs 69 to 71 of the memorandum and paragraphs 155-56 of the Explanatory Notes. The clause inserts a new section 35A into the 1990 Act which enables the Secretary of State, by regulations subject to affirmative procedure, to modify sections 31 and 31ZA to 31ZE of, and Schedule 3 to, the 1990 Act, and section 54 of the bill itself, when an egg or embryo has been created from material provided by two women. The power applies only in relation to eggs or embryos permitted by regulations under section 3ZA(5) (i.e. eggs or embryos which have been subjected to a process to prevent the transmission of serious mitochondrial disease).

20. In connection with the draft bill, we questioned why the modifications could not be set out in the bill, even if they only took effect in relation to eggs or

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6 Report from the Joint Committee on the draft Human Tissue and Embryos Bill (Session 2006-07, HL Paper 169-I), Appendix 7, paragraph 10.

embryos which were the subject of regulations under section 3ZA(5)[7]. The department have addressed this at paragraph 71 of their memorandum by saying that the time at which to decide which, if any, of the specified provisions should be modified, and how, is the time of making the regulations under section 3ZA(5). We consider that the affirmative power at clause 26 is sufficiently narrow in its scope not to be inappropriate.

Embryo testing and sex selection — Schedule 2, paragraph 3

21. Schedule 2, paragraph 3 is explained at paragraphs 33 to 37 of the memorandum. The power is to amend paragraph 1ZA of Schedule 2 to the 1990 Act, i.e. to add to, remove or alter any of the purposes for which embryo testing may be licensed. Paragraph 37 of the memorandum indicates that the likely use of this power is to add to the list. But paragraph 1ZC(3) enshrines in the bill itself the principle that embryo testing to establish sex and other practices designed to secure that any resulting child is of a particular sex are permissible only on grounds relating to the health of the resulting child. In our memorandum on the draft bill, we said "This power is not inappropriately wide in principle but, if there are any particular ways in which Parliament would not wish the power to be exercisable, those ways should be specified in the bill, in addition to the restriction about sex selection on non-health grounds.". **We draw to the attention of the House that the power at 1ZC(1) could be used to expand widely the purposes for which licences are granted for testing embryos. If the House grants this delegation, the only restriction on the purpose of testing will be that contained in paragraph 1ZC(3).**

Research licences: inter-species embryos — Schedule 2, paragraph 6

22. Schedule 2, paragraph 6 is explained at paragraphs 38 to 43, with the delegated power relating to inter-species embryos being addressed at paragraph 41.

23. Schedule 2 to the 1990 Act lists the activities for which licences may be granted. In connection with new section 4A(2) of the Act (to be inserted by clause 4(2) of the bill), which prohibits certain activity related to inter-species embryos etc. without a licence, Schedule 2 to the 1990 Act is amended to enable licences to be granted for certain activities related to inter-species embryos etc.

24. The bill has addressed our criticism of the draft bill, which enabled regulations by the Secretary of State to specify the activities which could be licensed[8].

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[7] Report from the Joint Committee on the draft Human Tissue and Embryos Bill (Session 2006-07, HL Paper 169-I), Appendix 7, paragraph 11.

[8] Report from the Joint Committee on the draft Human Tissue and Embryos Bill (Session 2006-07, HL Paper 169-I), Appendix 7, paragraphs 8 and 9.

LOCAL TRANSPORT BILL [HL]

25. This bill makes significant changes to five substantial earlier Acts. The Department for Transport has prepared a memorandum for the Committee, explaining the delegated powers in the bill, printed at Appendix 3. The memorandum includes a table which sets out each delegation although a number of the items in that table do not in fact involve the delegation of legislative power and some delegations of legislative power have been omitted.

26. The bill contains some significant delegations, either conferred in the bill itself or in amplification of existing powers under those Acts. These are in most instances similar in character to existing provisions about transport matters and are either made subject to the affirmative procedure or are inserted into, or closely reflect (as is the case with the provisions in Schedule 3 to the bill) existing statutory regimes in circumstances where the negative procedure already applies to the comparable powers.

Henry VIII powers

Power to make incidental, supplemental, consequential or saving provision — clauses 1(2), 6(3), 64 & 65

27. The bill confers several Henry VIII powers in connection with powers to make incidental, supplemental, consequential or saving provision in relation to the exercise either of existing powers (clause 1(2)) or of new powers conferred by the bill (clauses 6(3), 64 (in the new section 125B(8)), 65 (in the new section 19A(4)) and 80(4)). Clause 64 also enables (in new section 125A(6) of the Transport Act 1985) the amendment of primary legislation in connection with the power in subsection (2) to re-name the Public Transport Users' Committee established under subsection (1) of that section. Each of these powers is subject to the affirmative procedure and extends to the amendment of Acts whenever passed. The delegation of the power to amend future Acts is possibly excessive.

28. It is normally undesirable in principle for an Act of Parliament to delegate a Henry VIII power which can be used to amend Acts yet to be passed in future sessions. A power to amend future Acts can be a legitimate delegation: for example where the substantive provisions will only be exercised in a number of years' time. But the Government should justify each departure from this principle and **the House may wish to invite the Minister to make the case to the House for each of these delegations to amend future Acts.**

Bus services quality contracts schemes – clause 25

29. Clause 25(10) enables the Secretary of State by order to amend subsections (1A) and (2A) of section 127 of the Transport Act 2000 (which are inserted by clause 25), subject only to the negative procedure. The power is however confined to the variation of maximum periods within which a quality contracts scheme for bus services in England must be made or may remain in operation under that section; and it is in the same character as the existing power under section 127(10) to amend the period specified in subsection (1). When considering the bill which became the Transport Act 2000, our predecessor Committee considered both the delegation of the power and the

negative procedure to be appropriate (20th Report, 1999-2000, paragraph 21) and we take the same view here.

Integrated Transport Authorities' power to promote well being — clauses 86 - 89

30. Clause 86 enables an Integrated Transport Authority ("ITA") established under clause 67 to take action to promote or improve the economic, social and environmental well-being of its area. But the Secretary of State may, by order under clause 87(3), prevent the ITA from doing under clause 86 anything specified or described in the order. In addition, clause 88(1) enables the Secretary of State, if he thinks that an enactment, whenever passed or made, prevents or obstructs ITAs from exercising their power under clause 86(1), to amend, repeal or disapply it by order. As the Department's memorandum (paragraphs 161-164) explains, the provision made by clauses 86 – 89 is in very similar terms to that made in relation to local authorities under sections 2, 3, 5 and 9 of the Local Government Act 2000. The order-making power in clause 87(3) reflects that conferred by section 3 of the 2000 Act and is likewise subject to the affirmative procedure; and the power conferred by clause 88(1) reflects the power in section 5 of the 2000 Act and is likewise subject to a 'super-affirmative' procedure by virtue of clauses 88(5) and 89. We consider both the delegation and the level of scrutiny proposed for the powers in clauses 87(3) and 88(1) to be appropriate.

Detention of public service vehicles — clause 41 and Schedule 3

31. Clause 41 introduces Schedule 3 which in turn inserts a new Schedule 2A into the Public Passenger Vehicles Act 1981 to allow the detention of public service vehicles used without an operator's licence. The new Schedule includes delegated powers to create offences at paragraphs 18 and 19, subject to the negative resolution procedure. This is not in this case inappropriate both because the ingredients of the offences and the maximum penalties are set out on the face of the bill, and because the provision closely reflects that for goods vehicles set out in the Goods Vehicles (Licensing of Operators) Act 1995.

Additional sanctions for failures by bus operators, and operational data — clauses 55 & 56

32. Clause 55 amends section 155 of the Transport Act 2000 which enables a traffic commissioner to impose a financial penalty on an operator who fails to operate local services satisfactorily. A new subsection (1A) is inserted to make a wider range of sanctions available to the traffic commissioner: paragraphs (a) to (c) enable him to order a financial penalty, the expenditure of a specified sum on local services or compensation to passengers. Paragraph (d) confers power on the Secretary of State or the Welsh Ministers to provide by order for the commissioner to make 'such other order as may be prescribed'. Despite the potentially wide scope of this power to enable almost any other form of sanction to be prescribed, such an order would, by virtue of section 160(2) of the Transport Act 2000, be subject only to the negative procedure. There is no explanation, either in paragraph 143 of the Explanatory Notes or in paragraphs 127-128 of the memorandum, as to the nature of the additional sanctions which the department envisages might be made available to commissioners in exercise of this power. **We consider**

that the department has not made the case for the negative procedure and that this power should be subject to affirmative resolution.

33. Subsections (2) - (4) of clause 56 amend section 6 of the Transport Act 1985 which requires the registration with the traffic commissioner of local transport services. Subsection (9) of that section enables provision about registration to be made by regulations subject to the negative procedure, including provision for the records and information to be provided by service operators to the traffic commissioner and others. Clause 56(3) inserts an additional power to restrict the use that may be made of such information, and subsection (4) provides for the creation of one or more criminal offences for breaches of any such restriction. We do not consider the negative procedure to be inappropriate for the power in new subsection (10) of section 6 because the power is constrained as respects the nature of the conduct in relation to which the offence may be imposed and the maximum penalty which may be imposed.

Delegations of functions of the Secretary of State and of local authorities — clauses 73 & 74

34. Clauses 73 and 74 enable the Secretary of State by order to provide for the delegation of functions of his, or of a local authority, to an Integrated Transport Authority ('ITA') or Local Transport Authority ('LTA'). At first sight, the extent of these powers ("any function which the Secretary of State considers can appropriately be exercised" by the ITA or LTA) raises a question whether a delegation in such broad terms can be appropriate. But the sub-delegation of legislative powers, and powers to fix fees or charges, are excluded by clause 73(1)(a) from the functions which may be delegated. By virtue of clause 79, the exercise of the power is also subject to consultation of the authorities concerned, and must normally have been preceded by a scheme following a review locally. The exercise of the power is further constrained by subsections (2)(a) and (b) and (5)(a) and (b) of clause 79; and the Secretary of State's conclusions on 'appropriateness' would be reviewable by the courts against the criteria set by those subsections. Accordingly, we do not consider these delegations inappropriate.

Orders making arrangements about Integrated Transport Authorities — clauses 72 – 80

35. Clauses 72 to 80 delegate a number of order-making powers to the Secretary of State to make provision about arrangements for Integrated Transport Authorities. Clause 81 subjects all of these powers to the affirmative resolution procedure. Many of the matters delegated in these clauses justify the affirmative procedure (for example, the delegation of local authority functions) but some do not. We invite the Government to consider how they will exercise these powers to make the most efficient use of time in the two Houses. For example, the House could conveniently consider the provision if laid as a single order or if a number of orders setting up separate ITAs were laid at the same time and considered together. Staggered implementation through a large number of orders taken at different times could burden the House. If the latter scenario is likely, we might consider a mixture of negative and affirmative powers to be more appropriate.

POWERS OF ENTRY ETC. BILL [HL]

36. This private member's bill does not delegate legislative power.

DRAFT LEGISLATIVE REFORM (LOCAL AUTHORITY CONSENT REQUIREMENTS) (ENGLAND AND WALES) ORDER 2007

37. The Department for Communities and Local Government laid the first draft Legislative Reform Order (LRO) under the Legislative and Regulatory Reform Act 2006, the successor to the Regulatory Reform Act 2001, on 25 July 2007. The Department for Communities and Local Government have laid an Explanatory Document in accordance with the same Act[9].

38. The purpose of the LRO is to remove requirements for local authorities in England and Wales to seek consent before taking certain action, set out in certain provisions of:

- the Cancer Act 1939;
- the Local Government Act 1972;
- the Local Government (Overseas Assistance) Act 1993; and
- the Education Act 1996.

Procedure

39. When considering an LRO, our role is not to consider in depth the policy in the draft order, but to consider whether it is "appropriate" to be made under the 2006 Act[10]; if so, whether it meets the tests in the 2006 Act; and to consider the matters considered for other instruments by the Joint Committee on Statutory Instruments.

40. Unlike the Regulatory Reform Act 2001, which provided a single super-affirmative procedure for regulatory reform orders, the 2006 Act allows the Government to propose the negative, affirmative or super-affirmative procedure for each LRO, with Parliament (advised by this Committee and our counterpart in the Commons) allowed to upgrade the procedure if it so wishes within 30 days from the date on which the draft was laid. The Government proposed the affirmative procedure for this draft order but, on 17 October, we recommended to the House that the super-affirmative procedure should apply instead[11]. We made this recommendation because we needed to correspond further with the Government about the draft order and because we considered that we might wish to propose amendments.

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[9] Available online at http://bre.berr.gov.uk/regulation/documents/regulatory_reform/pdf/2007_legislative_%20reform_explanatory.pdf

[10] For our view on appropriateness, see our Report on the Legislative and Regulatory Reform Bill: 20th Report, Session 2005-06 (HL Paper 192), paragraphs 49-51.

[11] House of Lords Minutes of Proceedings, 17 October 2007.

Opinion of the Committee

41. Our correspondence with the Government is printed at Appendix 4. It took time and repeated effort by the Committee to get the department to make their case on each of the issues which we raised and we remind the Government that, with future LROs, the onus is on the department to demonstrate clearly in their explanatory document why each provision meets the tests in the 2006 Act.

42. The department has now satisfied us on all but one point.

43. The remaining issue relates to the draft order's amendment of section 4 of the Cancer Act 1939 which makes it an offence to publish any advertisement offering treatment for cancer. Under section 4(6) of 1939 Act, a local authority must obtain the Attorney General's consent before instituting a prosecution in England or Wales under section 4. Paragraph 2 of the draft order proposes to remove this requirement on local authorities to seek the consent of the Attorney General. We agree that, for the purposes of the 2006 Act, this removes a burden on local authorities and the Attorney General. There is however a question about the scope of the amendment. Section 4(7) of the 1939 Act refers to councils of counties and county boroughs. As made clear in the department's explanatory document, this would have covered all areas in England and Wales at the time of passing the 1939 Act. An anomaly has however since arisen because the Local Government Act 1985 abolished metropolitan county councils but did not transfer the function of prosecuting under section 4(7) of the 1939 Act to metropolitan district councils. The draft order proposes to correct this anomaly. The order-making power in the Regulatory Reform Act 2001 expressly contemplated the removal of "inconsistencies and anomalies" (section 1(1)(d)) but the 2006 Act does not include such provision (section 1). The Government have argued (in the correspondence at Appendix 4 but not in their explanatory document) that the anomaly constitutes an "administrative inconvenience" for the purpose of the 2006 Act; but we cannot agree. **While it may be sensible as a matter of policy to remove this small anomaly, we cannot agree that the absence of a power to prosecute is an administrative inconvenience within the definition of "burden" in the 2006 Act. We thus recommend that the draft order be amended so as not to extend to metropolitan district councils. With such an amendment, and amendment of the recital in respect of Wales[12], we consider that the draft order meets the tests in the Legislative and Regulatory Reform Act 2006 and is appropriate to be made under it.**

[12] With an appropriate footnote explaining the transitional arrangements.

APPENDIX 1: DORMANT BANK AND BUILDING SOCIETY ACCOUNTS BILL [HL]

Memorandum by HM Treasury

Introduction

1. This Memorandum identifies the provisions in the Dormant Bank and Building Society Accounts Bill which confer power to make delegated legislation. It explains the purpose of the delegated power proposed; why the matter is to be dealt with in delegated legislation; and the nature and justification for any parliamentary procedures which apply.

Background

2. The 2005 Pre-Budget Report stated that where dormant accounts could not be reunited with their owners the money should be reinvested in the community, particularly in deprived communities and with a focus on youth services and financial education and exclusion. There would be an option for small locally-based financial institutions to focus on these needs in their local communities.

3. The Treasury has undertaken two consultations with regard to an unclaimed asset scheme. The first, "A UK Unclaimed Asset Scheme: a consultation", was published in March 2007. The second consultation "Unclaimed assets distribution mechanism: a consultation" was published in May 2007.

4. The Treasury Select Committee conducted an inquiry[13] into unclaimed assets. It published its report in August 2007. The Government's response to the Committee was published in October 2007[14].

Overview of the Bill

5. The purpose of the Bill is to enable a scheme to be set up whereby the balances in dormant bank and building society accounts can be transferred to a reclaim fund. The fund will hold a proportion of the balances to meet all claims for payment of their balances by dormant account holders and will make the remainder of the money available for distribution by the Big Lottery Fund for certain purposes.

6. Where a bank or building society transfers a dormant account balance to a reclaim fund, the rights which the customer has to repayment of the balance from the bank or building society become exercisable against the reclaim fund. The liability of the bank or building society to repay the customer is cancelled. This cancellation is required to ensure banks and building societies can participate in the voluntary scheme without suffering an adverse impact on their balance sheets (on which the liability would otherwise need to be recorded in line with applicable accounting rules). Building society membership rights are not intended to be affected and the Bill contains a provision which preserves those rights.

7. The Bill establishes the conditions for qualification as a reclaim fund and requires that it be authorised and regulated by the FSA. The British Bankers' Association and Building Societies Association have agreed to take steps to select or establish a

[13] "Unclaimed assets within the financial system" (Eleventh Report of Session 2006-2007) published 6 August 2007.

[14] "Unclaimed assets within the financial system: Government Response to the Committee's Eleventh Report of Session 2006-7" published 15 October 2007

body to act as a reclaim fund. It is envisaged that a reclaim fund will want to enter into agency agreements with participating institutions.

8. The Bill provides an alternative scheme for smaller banks and building societies with assets of less than £7,000 million. The scheme would permit the bank or building society to transfer an agreed proportion of the dormant account to the reclaim fund and to transfer the balance to one or more charities for distribution for the benefit of the local community or (in the case of building societies) in line with any special purposes they may have.

9. The reclaim fund's objects will include the transfer of sums, (apart from sums which it needs to retain to meet repayment claims, prudential requirements and running costs), to nominated distributors. The Big Lottery Fund will be named in the Bill as the distributor of such sums, although the Secretary of State will have power to replace it and to appoint additional distributors.

10. Sums available for distribution by the Big Lottery Fund will be apportioned by the Secretary of State between England, Wales, Scotland and Northern Ireland.

11. The Big Lottery Fund will be required to distribute money for social and environmental purposes, but more detailed spending purposes will be identified by each country for its apportioned share of the money available. For England, the spending purposes are set out in clause 17 of the Bill. The devolved administrations will each have the power to identify their spending purposes by order, and to further specify spending purposes by direction. This model follows in broad terms the approach in that part of the National Lottery etc Act 1993 for "devolved expenditure" save that under the 1993 Act the Secretary of State makes one order, after consultation, which identifies the spending areas for the whole of the United Kingdom, and the devolved administrations make directions specifying particular areas. In the Dormant Accounts Bill the devolved administrations will be free to make orders which identify spending purposes which are different to the English spending purposes set out in the Bill, provided that they fall within the "social or environmental purpose" definition.

12. The Bill sets out the powers which the Big Lottery Fund will have to distribute dormant account money. These powers are based on and similar to the powers it has to distribute money under the National Lottery etc Act 1993.

13. It is envisaged that the functions of the Secretary of State set out in this Bill will be exercised by the Secretary of State for Children, Schools and Families.

Provisions for delegated legislation

Clause 3: Power to amend assets limit

14. The Bill sets out an asset limit of £7,000 million, below which a bank or building society will be eligible to participate in the alternative scheme for small institutions. Where the bank or building society is a member of a group the asset limit is applied to the whole group. The alternative scheme allows banks and building societies, instead of transferring dormant account balances in full to the reclaim fund, to transfer an agreed proportion to the reclaim fund, and to distribute the balance to charities for the benefit of the local community or (in the case of building societies) for purposes which are in line with any distinctive purposes they may have.

15. Clause 3 (4) will permit the Treasury to amend the assets limit. It is envisaged that this power would be exercised if the existing assets limit ceased to be at a level which would allow smaller locally-based financial institutions to be eligible for this

alternative scheme. The alternative scheme is an option for qualifying banks and building societies, but any qualifying bank or building society can choose to transfer the whole of a dormant account balance to the reclaim fund, for distribution by the Big Lottery Fund. Given that the power is only to amend an alternative option to the main scheme the Treasury considers that it is appropriate that the power to amend the asset limits for inclusion in the alternative scheme is subject to the negative resolution procedure.

Clause 5: Power to give direction to a reclaim fund

16. Clause 5 defines a "reclaim fund" as a company which must have particular restricted objects (set out in subsection (1)) and whose articles of association must comply with other requirements set out in Schedule 1. Subsection (4) contains a power for the Treasury to direct a reclaim fund to give effect to any of its objects or comply with any particular obligation or prohibition which its articles of association are required to include under Schedule 1. The directors of a reclaim fund will be under a duty under the Companies Act 2006 to act in accordance with the company's constitution and promote the success of the company. Whilst it is primarily a matter for the company directors and members, this power will enable the Treasury to take action if serious concerns arise about the fund's compliance with its objects and specified articles.

17. The Treasury believes that a direction making power is the appropriate approach to enabling it to take action. The direction does no more than require a company to give effect to or comply with requirements to which it is already subject under the Bill, and which will previously have been approved by Parliament during the passage of the Bill.

Clause 16: Apportionment of dormant account money

18. Under the Bill each devolved administration will be responsible for setting the spending areas within which it wishes the Big Lottery Fund to distribute the dormant accounts money apportioned to that country. Clause 16 sets out that the money available for apportionment in each financial year is to be apportioned with prescribed percentages for expenditure in each of England, Wales, Northern Ireland and Scotland. The prescribed percentages for each country will be set out in an order made by the Secretary of State after consultation with Welsh Ministers, Scottish Ministers, the Northern Ireland Department of Finance and Personnel, the Big Lottery Fund and such other persons (if any) as the Secretary of State thinks appropriate.

19. The Secretary of State plans to take into account the relative populations of each country as a proportion of the United Kingdom when exercising this power. The power will provide the flexibility to amend the apportionment where it is appropriate to do so to reflect population shifts.

20. Because the power will be used to apportion large sums of money between the four countries, we believe it is right for it to be subject to the affirmative resolution procedure.

Clauses 18-20: Distribution of money for meeting Welsh, Scottish and Northern Ireland expenditure

21. Clause 15 of the Bill requires the Big Lottery Fund to distribute dormant account money for social or environmental purposes. Within these overall purposes, the particular purposes for which dormant account money apportioned for England

must be spent are set out in clause 17 of the Bill. The particular purposes for which dormant account money apportioned to Wales, Scotland and Northern Ireland must be spent will not be set out in the Bill. Instead clauses 18 to 20 give Welsh Ministers, Scottish Ministers and the Northern Ireland Department of Finance and Personnel respectively the power to set and amend the purposes on which dormant account money must be spent.

22. Given the importance of the powers for the countries concerned we believe that their use should be subject to approval by the National Assembly of Wales, Scottish Parliament and Northern Ireland Assembly respectively.

Clause 21: Directions to Big Lottery Fund

23. Clause 21 requires the Big Lottery fund to comply with directions given to it by the Secretary of State. In broad terms, such directions would be either spending directions or financial directions. The financial directions will enable the Secretary of State to impose financial controls on the Big Lottery fund, as a non-departmental public body. The Big Lottery Fund is accountable to Parliament through the Secretary of State, who lays the Big Lottery Fund's annual report before Parliament. The Big Lottery Fund must be consulted before any direction is made under clause 21.

24. The first set of directions, mentioned in subsection (3), are directions to the Big Lottery Fund in relation to the distribution of dormant account money. For England, the general purposes for which dormant account money may be distributed are set out in general terms in clause 17. The devolved administrations will set their general spending purposes by order made under the powers set out in clauses 18 to 20. The spending direction power will enable further detailed directions to be made to the Big Lottery Fund as to how the dormant account money should be spent.

25. Subsection (5) of clause 21 makes it clear that the power to make these spending directions will be devolved to the appropriate national body in relation to devolved expenditure.

26. Subsection (6) states that any directions in relation to distribution must not be inconsistent with the provision in clause 15 (1) that distribution must be to meet expenditure which has a social or environmental purpose. In addition such directions must not be inconsistent with the general purposes set out in clause 17 (in the case of a direction made by the Secretary of State) or in the case of the devolved administrations with an order made in relation to that country under one of clauses 18 to 20.

27. The Government has made clear the areas on which dormant account money is proposed to be spent in England. A cross-departmental working group will be set up to refine these spending areas, once there are more concrete forecasts of the amounts of money which may be available. This working group may make detailed recommendations to the Secretary of State on for example suggested spending programmes. This approach is likely to lead to the Secretary of State making more detailed, specific directions than are made to the Big Lottery Fund under the National Lottery etc Act 1993. However the devolved administrations will be free not to adopt this approach, and may prefer to make more general directions akin to those made under the National Lottery etc Act 1993. The Treasury believes that a direction making power is the appropriate way to provide further detail to the spending areas identified in the Bill for England and which will be set out by Order for each of the devolved administrations. The Treasury also believes that a more

specific direction making power is appropriate to assist the Big Lottery Fund in distributing dormant account money in accordance with Government policy.

28. Examples of the matters on which a financial direction may be made are set out in subsection (4) of clause 21. With the exception of subsection (4)(a) these provisions are similar to those provided for in the National Lottery etc Act 1993. Subsection 4(a) adds a further oversight power to impose restrictions on the arrangements into which the Big Lottery Fund may enter for the purpose of holding and investing money prior to distribution or for the purpose of making payments which the Big Lottery Fund is required to make in relation to expenses incurred by the Secretary of State of the devolved administrations. The power to enter into arrangements for the purpose of holding or investing money is a new power for the Big Lottery Fund for which there is no precedent in the National Lottery etc Act 1993. The Treasury believe that these financial controls are necessary to enable the Secretary of State properly to oversee the Big Lottery Fund. As with the National Lottery etc Act 1993, the Big Lottery Fund will publish in its annual report all directions given to it.

Clause 22: Power to prohibit distribution in certain cases

29. Clause 22 gives the Secretary of State the power by order to stop the Big Lottery Fund distributing dormant account money to a specified person if the Secretary of State considers that the Big Lottery Fund can control or materially influence the policy of that person. This is similar to a power which the Secretary of State has in relation to National Lottery distributors. The Treasury consider that such a power is necessary to ensure good governance of the distribution of dormant account money.

30. Where the making of an order under this clause would affect persons in one or more of the devolved administrations, the Secretary of State will be obliged to consult the administration or administrations concerned. The negative resolution procedure is considered appropriate for this power and also applies to the similar power in the National Lottery etc Act 1993.

Clause 23: Power to add or remove distributors

31. Under clause 15(1) the Big Lottery Fund is appointed as the sole distribution body. Clause 23 provides a power for the Secretary of State to appoint further bodies to distribute dormant account money in addition to or instead of one or more existing distribution bodies. The Big Lottery Fund has significant expertise in distributing money in the areas identified for English expenditure, and it is anticipated that it would have, or be able to acquire, expertise in areas for spending likely to be identified by the devolved administrations. However it is possible that there will be a spending area in which it has no expertise or in which there is an obvious alternative body with expertise. While it may be that the Big Lottery Fund could use its powers to delegate to acquire and utilise outside expertise, there may be occasion when it is most appropriate to appoint another body as a distribution body.

32. Clause 23 (2) specifically provides for the Secretary of State to be able to remove a distribution body for failure to follow a direction or a prohibition.

33. Clause 23 gives the Secretary of State the power to make consequential amendments and to make transitional or supplemental provisions following the addition or removal of a distributor. In the Bill the Big Lottery Fund is appointed as distributor, and referred to throughout the Bill. If another distributor was appointed or the Big Lottery Fund removed, the power in this clause would enable the Secretary of State to make the necessary consequential amendments. In addition this power could be exercised, for example, if the Secretary of State wished to set

out the spending areas for which the new body could make distributions, to otherwise set conditions on the appointment of the distributor, or if a distributor was removed to make provision to enable another distributor to take over the removed distributor's distribution activities.

34. The Secretary of State is required to consult each of the devolved administrations before exercising this power. Because the removal or appointment of a distributor may have a significant effect on the way the whole scheme works, it is considered that the exercise of these powers should be subject to the affirmative resolution procedure.

Clause 31: Commencement

35. Clause 31 provides for the Treasury to bring the preceding provisions of the Bill into force by order. Consistent with the usual practice, commencement orders under this clause are not subject to any Parliamentary procedure.

HM Treasury

November 2007

APPENDIX 2: HUMAN FERTILISATION AND EMBRYOLOGY BILL [HL]

Memorandum by the Department of Health

1. The purpose of the Human Fertilisation and Embryology Bill ("the Bill") is to amend aspects of the law relating to assisted reproduction treatment and embryo research. It implements the policy proposals contained in the White Paper *Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)* published in December 2006 (Cm 6989). The Bill was published for review by a joint committee (the Joint Committee on the Human Tissue and Embryos (draft) Bill) in May 2007. The committee published a report[15] on the Bill and the main recommendations of the committee have been incorporated into the Bill. In particular the proposed merger between the Human Fertilisation and Embryology Authority (HFEA) and the Human Tissue Authority to form the Regulatory Authority for Tissue and Embryos has been dropped. A delegated powers memorandum was produced for the draft Bill. Comments on this can be found in appendix 7 of the report.

2. The Bill comprises 69 clauses. It has three Parts and has eight Schedules. In amending the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), the Bill takes account of the amendments made by regulations[16] implementing the European Union Tissue and Cells Directive[17] as laid before Parliament on 25 April

Review of the Human Fertilisation and Embryology Act

3. The 1990 Act prohibits bringing about the creation of an embryo or keeping or using an embryo without a licence. An embryo is defined as a live human embryo where fertilisation is complete.

Treatment licences

4. Paragraph 1 of Schedule 2 to the 1990 Act sets out a list of activities which a treatment licence may authorise, including bringing about the creation of an embryo *in vitro*, keeping embryos, using gametes, placing any embryo in a woman, carrying out the "hamster test" in relation to sperm[18], and practices to ensure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose. There is also a regulation-making power to extend the list of activities.

5. A licence for treatment under the 1990 Act—

   - may be granted subject to conditions specified in the licence;
   - can only authorise an activity if the activity appears to the Human Fertilisation and Embryology Authority ("the Authority") to be necessary or desirable for the purpose of providing treatment services; and

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15 Human Tissue and Embryos (draft) Bill. Volume I: Report

16 The Human Fertilisation and Embryology (Quality and Safety) Regulations 2007

17 Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells

18 A test designed to determine fertility or normality of sperm by using it to penetrate a hamster egg (or other animal specified in directions). This must be destroyed as soon as the test is complete and, in any case, no later than the 2-cell stage.

- cannot authorise altering the genetic structure of any cell while it forms part of an embryo

(Paragraphs 1(2) to (4) of Schedule 2 to the 1990 Act).

Research Licences

6. Paragraph 3 of Schedule 2 to the 1990 Act provides that a research licence may authorise:

    - bringing about the creation of embryos *in vitro*, and
    - keeping or using embryos for the purposes of a project of research specified in the licence.

7. Paragraph 3(5) of Schedule 2 provides that the "hamster test" may also be authorised under a research licence (for explanation, see reference in paragraph 4 above).

8. A research licence under the 1990 Act—

    - may only authorise an activity if it appears to the Authority to be necessary or desirable for one of the research purposes (detailed in paragraph 3(2) of Schedule 2); and
    - may only authorise an activity if the Authority is satisfied that the proposed use of embryos is necessary for the purposes of the research;
    - may be granted subject to conditions specified in the licence;
    - cannot authorise altering the genetic structure of any cell while it forms part of an embryo.

Storage licences

9. Paragraph 2 of Schedule 2 to the 1990 Act enables a licence to authorise the storage of gametes or embryos or both. A storage licence can form part of a treatment or research licence or be free standing. A licence under paragraph 2 may be granted subject to conditions specified in the licence.

10. The 1990 Act also contains some absolute prohibitions including:

    - placing in a woman a live embryo other than a human embryo, or live gametes other than human gametes (section 3(2));
    - keeping or using an embryo after the appearance of the primitive streak (section 3(3)(a));
    - placing an embryo in any animal (section 3(3)(b));
    - keeping or using an embryo in any circumstances in which regulations prohibit its keeping or use (section 3(3)(c))[19];
    - replacing a nucleus of an embryonic cell with a nucleus taken from a cell of any person, embryo or subsequent development of an embryo (section 3(3)(d));
    - using female germ cells taken or derived from an embryo or foetus, or an embryo created by using such cells, for the purpose of providing fertility services for any woman (section 3A(1)).

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[19] No such regulations have been made.

11. The Authority functions as a statutory licensing authority and oversees all activities under the 1990 Act. The activities regulated by the Authority are, by their nature, fast moving with scientific and clinical developments continually taking place.

12. In the 1990 Act, there are several delegated powers that have already been exercised. As described above at paragraph 6 a research licence can be granted to create, use or keep an embryo for one of the research purposes listed under paragraph 3(2) of Schedule 2 to the 1990 Act. There is a regulation-making power under paragraph 3(2), which enables the Authority to authorise research activities for additional purposes as specified in regulations. The Human Fertilisation and Embryology (Research Purposes) Regulations 2001 (SI 2000/188) were made under this power. These regulations enabled the Authority to licence stem cell research[20]. This is an example of how regulation-making powers have enabled the legislation to be updated to reflect scientific developments.

13. The Government has built upon this model of regulation-making powers within the Bill to continue to allow rapid responses within a broad framework agreed by Parliament, and subject to further scrutiny by Parliament.

Overview of delegated legislative and other powers

14. The Bill contains 29 delegated powers (18 regulations, 6 orders, 4 direction-making powers and 1 scheme). Of these, many are subject to the affirmative procedure reflecting both the ethically sensitive subject matter and the Commons Science & Technology Select Committee's view that Parliament should have maximum involvement in relation to matters concerning assisted conception and embryo research. Some regulation-making powers will enable primary legislation to be amended by regulation. Such "Henry VIII powers" will be subject to the affirmative procedure.

15. A full list of all the delegated powers is in the table at Annex A. Examples of those that have been included to take account of scientific developments in the future are:

- inclusion within the definition of "sperm", "eggs" and "embryo" of things which would not otherwise fall within those definitions (clause 1(5) of the Bill, which inserts section 1 (6) into the 1990 Act));
- to allow eggs and embryos with altered mitochondrial DNA to be classified as "permitted" eggs and embryos and thus to be implanted in a woman (clause 3(5) of the Bill, which inserts section 3ZA(5) into the 1990 Act);
- to allow changes relating to embryo testing. This will allow, for example, the purposes for which embryos can be tested to be extended, where this would be desirable (paragraph 3 of Schedule 2 to the Bill which inserts paragraphs 1ZA, 1ZB and 1ZC into Schedule 3 to the 1990 Act).

16. Powers conferred by the Bill are exercisable either by the Secretary of State or in a limited number of cases by the Authority.

Territorial effect

17. In cases where the power is not conferred on the Authority, powers are to be exercised by the Secretary of State. However, the Scottish and Welsh Ministers and

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[20] The new research purposes for which research can be licensed were - (a) increasing knowledge about the development of embryos; (b) increasing knowledge about serious disease, or (c) enabling any such knowledge to be applied in developing treatments for serious disease

the Department of Health, Social Services and Public Safety in Northern Ireland must be consulted before an order is made under clause 64 containing provision which would, if included in an Act of Parliament, be within the legislative competence of the relevant Parliament or Assembly. This position reflects the fact that the Bill relates to reserved matters, but that some consequential changes (e.g. in relation to birth registration) impact upon devolved areas. The same consultation requirement applies before an order can be made under clause 30, inserting section 45A into the 1990 Act.

Analysis of powers

Clause 1: Meaning of "embryo" and "gamete"

18. Clause 1 of the Bill amends section 1 of the 1990 Act (meaning of embryo and gamete). The meaning of embryo has been amended to ensure that the 1990 Act applies to all live human embryos regardless of the manner of their creation. This brings the term "embryo" up to date with technologies that have been developed since the time of enactment of the 1990 Act, such as cell nuclear replacement.

19. The term "gametes" under section 1(4) of the 1990 Act has also been amended to expressly encompass not only mature eggs and sperm, but also immature gametogenic cells such as primary oocytes, and spermatocytes or gametes created *in vitro* (sometimes referred to as artificial gametes).

20. Clause 1(5) of the Bill inserts section 1(6) into the 1990 Act and grants a regulation-making power to the Secretary of State to expand the definition of embryos, egg, sperm or gametes. The purpose of this power is to ensure that types of embryos and gametes resulting from new scientific developments, which may not be covered by the existing provision, can be brought within the scheme of regulation. The power does not extend to allowing anything containing any nuclear or mitochondrial DNA that is not human to be treated as an embryo or as eggs, sperm or gametes. If the power were exercised, it would be possible to make any amendments to new section 4A of the amended 1990 Act (prohibitions in connection with genetic material not of human origin) as appear to the Secretary of State to be appropriate as a result of exercising the power.

21. The Department of Health does not have any immediate intention to exercise this power. The power is intended to be a means of responding, over time, to developments that may require new types of gametes and embryos to be brought within the scheme of regulation. The power will also be used to prevent uncertainty as to what falls within the scope of the 1990 Act.

22. This power is subject to the affirmative resolution procedure (by virtue of the amendment of section 45 of the 1990 Act by clause 30 of the Bill). This is appropriate because the power enables primary legislation to be modified.

Clause 3: Prohibitions in connection with embryos ("permitted eggs, sperm and embryos")

23. Clause 3 of the Bill amends section 3 of the 1990 Act to provide that only permitted embryos or gametes can be placed in a woman. A permitted embryo is defined as an embryo which has been formed by the fertilisation of a permitted egg by a permitted sperm, whose nuclear or mitochondrial DNA has not been altered and that has not had cells added (apart from by division of the embryo's own cells). Permitted eggs are defined as eggs produced or extracted from the ovaries of a woman and permitted sperm as sperm produced or extracted from the testes of a man. These

eggs and sperm must also not have been subject to any alterations to their nuclear or mitochondrial DNA.

24. Clause 3(5) of the Bill inserts new section 3ZA(5) into the 1990 Act and grants a regulation-making power to the Secretary of State to extend the definition of permitted egg or permitted embryo to include an egg or embryo that has had applied to it a specific process to prevent the transmission of a serious mitochondrial disease. If research demonstrates that treatment to prevent mitochondrial disease is safe and effective, it may be desirable to allow eggs or embryos which have been treated in this way to be used for reproductive purposes.

25. It is necessary for this power to be delegated to be exercised by regulations because data on safety and efficacy of this technique are not yet available. The power raises important ethical considerations because it covers the creation of an embryo using three separate genetic contributions. It is therefore appropriate that this power is subject to the affirmative procedure (see the amendment of section 45 of the 1990 Act by clause 30 of the Bill).

Clause 4: Prohibitions in connection with genetic material not of human origin

26. Clause 4 of the Bill inserts new section 4A into the 1990 Act to provide that certain types of embryo and gametes cannot be placed in a woman. This includes non-human embryos, inter-species embryos and non-human gametes. Section 4A also prevents the mixing of human and animal gametes, the creation of an inter-species embryo and the keeping or using of an inter-species embryo, without a licence. Inter-species embryos are defined in section 4A(5) as:

- human-animal hybrid embryos: created by the fertilisation of a human egg by the sperm of an animal, or fertilisation of an animal egg by a human sperm (paragraph (a)(i)) or the creation of an equivalent entity using one human pronucleus and one animal pronucleus, taken from a single cell embryo (paragraph (a)(ii))
- cytoplasmic hybrids (cybrids): created by techniques used in cloning, using human genetic material and inserting it into animal eggs or cells, which have had their genetic material removed. The embryos would genetically be predominantly human except for the presence of animal mitochondria – (paragraph (b))
- human transgenic embryos: these are embryos created by the genetic modification of a human embryo, specifically by the addition of animal nuclear or mitochondrial DNA into one or more cells of a human embryo– (paragraph (c))
- human-animal chimeras: these are human embryos, altered by the addition of one or more cells from an animal – (paragraph (d)).

27. The definition of an inter-species embryo is precise because a broad definition could have captured the whole spectrum of entities containing both human and animal DNA, including predominantly animal entities that are regulated under the Animal (Scientific Procedures) Act 1986.

28. New section 4A(5)(e) of the 1990 Act grants a regulation-making power to the Secretary of State to include other "things" within the definition of inter-species embryo under the 1990 Act. This enables other entities to be brought within regulation, for example following developments in scientific methods to combine animal and human DNA. The power is wide because the Department of Health cannot predict what form such entities will take or the methods that will be used to

create them. There may also be existing entities that the Department of Health is unaware of but that should be regulated, the power is therefore not limited to future changes in science but can respond to the current situation.

29. Another regulation-making power is taken under paragraph 6 of Schedule 3 to the Bill (amending paragraph 3(5) of Schedule 2 to the 1990 Act) to enable research licences to be granted in relation to any new forms of inter-species embryo specified under the power in section 4(5)(e) (see paragraphs 40 and 41 below).

30. Section 4A(7) of the 1990 Act also grants a regulation-making power to the Secretary of State to amend the definition of inter-species embryo under new section 4(5). This power is necessary because it will enable changes if, for example, new types of embryo are created in future that would be inappropriately captured by the definition and therefore regulated by the Authority. This could not be achieved using the regulation making power in 4A(5)(e), which only allows additional categories not changes to the existing categories.

31. As both powers, if exercised, will amend primary legislation and the remit of the Authority, it is appropriate that they are subject to affirmative procedure (see the amendment of section 45 of the 1990 Act by clause 30 of the Bill).

Clause 8: Power to contract out functions etc.

32. Clause 8 inserts new section 8B, 8C and 8D into the Act. New section 8C enables the Authority to contract out its functions. Subsections (1) and (2) of new section 8C specify certain functions that may not be contracted out. New section 8C(1)(c) confers power on the Secretary of State by order to specify other functions that may not be contracted out. The purpose of this is to ensure that where the Secretary of State considers that it would be appropriate for only the Authority to deal with a specific function, he can limit the discretion of the Authority to contract out that function. This power is subject to the negative procedure (see new section 45B(3), inserted by clause 32 (Orders under the 1990 Act).

Clause 11 and Schedule 2

Paragraph 3: Embryo testing and sex selection

33. Although the 1990 Act does not specifically address embryo testing, the courts have determined that the Authority has discretion to make licensing decisions on this issue. Paragraph 3 of Schedule 2 to the Bill inserts paragraph 1ZA to 1ZC into Schedule 2 to the 1990 Act to make express provision for embryo testing under the 1990 Act in the future.

34. Paragraph 1ZA(1) lists the purposes for which embryo testing can be carried out and clarifies that where embryo testing for an abnormality is carried out, there has to be a significant risk that a person with that abnormality will have or develop a serious illness, disability, or other medical condition.

35. Paragraph 1ZB maintains the existing policy that sex selection will only be allowed for medical reasons. Paragraph 1ZB(1) prohibits all sex selection practices. Sub-paragraph (2) makes an exception for embryo testing in accordance with paragraph 1ZA and sub-paragraph (3) makes an exception for other sex selection practices where there is a particular risk that a woman will give birth to a child who will have a serious gender related disability, medical condition or illness.

36. New paragraph 1ZC of Schedule 2 to the 1990 Act introduces a regulation-making power for the Secretary of State to amend paragraph 1ZA . The power allows any

necessary or expedient consequential amendments to be made to new paragraph 1ZB as a result of any amendments to paragraph 1ZA. However, such regulations cannot allow sex selection for non-medical reasons.

37. It is possible that in the future new techniques will be developed to test embryos for new purposes which are not covered by paragraph 1ZA(1). If considered appropriate by the Secretary of State, additional purposes could be added to the list in paragraph 1ZA(1) to enable the Authority to issue a licence for embryo testing for other purposes. If this power is exercised, these regulations will amend primary legislation in an area of particular ethical sensitivity. This power is therefore subject to the affirmative procedure (see the amendment of section 45 of the 1990 Act by clause 30 of the Bill).

Paragraph 6: Licences for research

38. Under paragraph 3 of Schedule 2 to the 1990 Act, a research licence may authorise the creation, keeping and use of human embryos for the purposes of a project of research. Paragraph 6 of Schedule 2 to the Bill substitutes new paragraphs 3 and 3A for the existing provision.

Hamster test

39. Paragraph 3(5) of Schedule 2 to the 1990 Act currently enables the Authority to grant a research licence for the mixing of sperm with the egg of a hamster (or other animal specified in directions) in order to carry out research into more effective techniques for determining the fertility or normality of sperm. New paragraph 3 (2) of Schedule 2 to the 1990 Act, as inserted by the Bill, replicates this provision and retains the power for the Authority to expand the test to other animals under directions. This direction-making power is required in case other animal eggs can be used for this purpose.

Licence conditions for new types of inter-species embryos

40. New paragraph 3 of Schedule 2 to the 1990 Act enables research licences to be granted for specified activities. This includes creating, using and keeping inter-species embryos under new section 4A(5)(a) to (d) (paragraph 3(3)).

41. New paragraph 3(5) of Schedule 2 to the 1990 Act introduces a regulation-making power to allow the Authority to issue research licences to create, use and keep new types of inter-species embryos specified in regulations under new section 4A(5)(e) – see paragraph 29). New paragraph 3(8) provides that the regulations may specify mandatory licence conditions in connection with research involving such new forms of inter-species embryos.

Research purposes

42. A research licence granted under paragraph 3 of Schedule 2 to the 1990 Act may not authorise any activity unless the Authority considers it to be necessary or desirable for one of the specified "research purposes" (paragraph 3 (2) of Schedule 2)). The list of purposes for which research may be licensed has been replaced by new paragraph 3A(2) of Schedule 2 to the 1990 Act and expanded to include research which is undertaken for the purpose of increasing knowledge, not only about serious diseases, but also about other serious medical conditions. This clarifies that licences may be granted for research into conditions such as neural trauma or other tissue damage, which are arguably not diseases. The Authority will also be able to licence research into the underlying principles of cell biology which

requires the use of embryos, where such research is dedicated to the understanding or treatment of serious diseases and medical conditions.

43. New paragraph 3A(1)(c) introduces a regulation-making power for the Secretary of State to allow research licences to be granted for additional specified purposes where this is considered necessary or desirable. This power replicates the power under paragraph 3(2) of Schedule 2 to the current 1990 Act which was exercised under SI 2001/188 (see paragraph 12 above). Provision has been made for a delegated power because the Department of Health cannot anticipate what purposes might be considered to be appropriate in the future. As this power extends the purposes for which embryos may be used in research it is appropriate that it is subject to the affirmative process (see the amendment of section 45 of the 1990 Act by clause 30 of the Bill).

Clause 19: Procedure for refusal, variation and revocation of licences

44. Clause 19 of the Bill introduces new section 19(6) of the 1990 Act and provides a regulation-making power for the Authority to make additional provisions about procedure in relation to the carrying out of functions under sections 18, 18A and 19 of the 1990 Act. New Section 18 concerns the revocation of licences either under application or of the Authority's own volition. New Section 18A concerns the variation of a licence, again either under application or of the Authority's own volition. Section 19 sets out the procedure to be followed where the Authority proposes to refuse the grant, revocation or variation of a licence or where it intends to revoke or vary a licence of its own volition or where it intends to impose conditions on the licence in accordance with provisions in Schedule 2 of the 1990 Act.

45. The procedure set out in new Section 19 includes a right for the applicant to require the Authority to consider representations before the decision is made. The regulation-making power is limited to making additional provision about the procedure to be followed where representations are made, as well as the procedure to be followed where an application is made for the revocation or variation of a licence, or if the Authority seeks to vary or revoke a licence of its own volition.

46. Among other things the regulations may deal with the procedure to be followed by the Authority in determining such applications.

47. Clause 19 of the Bill also inserts new section 19B into the 1990 Act to grant the Authority the power to make directions concerning licence applications, specifically about the form and content of applications or the information which must be supplied with an application (section 19B(1)). New section 19B(2) enables the Authority to make regulations making other provision about licence applications, in particular in relation to decision-making procedures. These regulations can include provision for requiring people to give evidence or produce specific documents and determine the admissibility of the evidence.

48. While the Bill includes provisions relating to the giving of notice about decisions and for representations to be made, detailed provisions have not been included in the Bill either about procedure or the form of application. Regulations under new section 19(6) or 19B(2) will be statutory instruments, but they are not required to be laid before Parliament. Clause 30 of the Bill amends section 45 of the 1990 Act so that only regulations made by the Secretary of State are subject to Parliamentary control.

49. The Department of Health takes the view that this is appropriate in these cases, given that the regulations will concern purely administrative and procedural matters.

Regulations made by statutory instruments provide legal certainty because they show that the text included in the regulations was in force at a particular time.

Clause 21: Reconsideration and appeals

50. Clause 21 substitutes sections 20 and 21 of, and introduces new section 20A and 20B in, the 1990 Act.

51. Substituted section 20 sets out the rights of appeal against licensing decisions of the Authority.

52. New section 20A provides that the Authority must maintain one or more appeals committees. The constitution of appeals committees and the manner in which their proceedings must be carried out will be set out in regulations made by the Secretary of State. The regulations may also provide for advisors to be appointed to appeals committees. This is so that the committees can receive specialist scientific, legal and other advice.

53. New section 20B provides that reconsideration of licensing decisions and suspension notices will be by way of a fresh decision. It provides for regulations to make provision about the procedure to be followed. Those regulations may in particular include provisions concerning the right of the appellant and the Authority to appear before the committee, for the committee to consider written representations, requirements concerning evidence and the production of documents; and requirements concerning decisions of the committee.

54. Again, detailed provisions concerning appeals have not been included on the face of the Bill because, in the Department's view, it is appropriate for these to be dealt with by regulations in order that a degree of flexibility is maintained. The nature of the decisions against which appeals may be made to the Authority may require different and specialist committees to consider them. Regulations will provide the flexibility to ensure that appeals committees may be set up to ensure that proper regard is had to the Authority's policy role as well as to ensure that appellants have confidence in their impartiality in making decisions. In addition, best practice in administrative appeals is developing over time and the regulation-making power will provide the necessary flexibility to ensure that the Authority's appeals process is kept up to date.

55. Regulations under new sections 20A and 20B must be made by the Secretary of State and are subject to the negative procedure (see the amendment of section 45 of the 1990 Act by clause 30 of the Bill

Clause 22: Directions

56. Section 24 of the 1990 Act makes provision about directions in relation to particular matters. Clause 22(4) inserts new section 24(4B) into the 1990 Act to grant a regulation-making power for the Secretary of State to require or authorise the Authority to give directions in relation to activities involving inter-species embryos (under new section 4A(2) of the 1990 Act). This power is necessary because it is not possible to anticipate all the necessary controls that may need to be placed on such research given the current low level of activity in this field. The power will allow the Department of Health to respond in the future to ensure that this area is properly regulated. Regulations under section 24(4B) will be subject to affirmative procedure (see the amendment of section 45 of the 1990 Act made by clause 30 of the Bill).

57. Clause 22(2) of the Bill inserts new section 24(3B) into the 1990 Act and provides a power for the Authority to authorise by directions the keeping of embryos in the course of the carriage between premises. This ensures that where necessary inter-species embryos can be transported without triggering the requirement for a licence. This makes equivalent provision as for embryos under section 24(3) of the 1990 Act and will avoid imposing additional regulatory burdens where this would be impractical.

58. Clause 23(3) of the Bill amends section 24(4) of the 1990 Act so that the power in section 24(4) for the Authority to issue directions authorising the import or export of gametes and embryos is extended to inter-species embryos. The directions can specify conditions and modify the licence conditions under sections 12 to 14 of the 1990 Act. This power enables the Authority to monitor and regulate import and export, it is therefore important that the power extends to inter-species embryos.

59. Clause 22(5) introduces new section 24(5A) into the 1990 Act, which enables the Authority to issue directions for the purpose of dealing with a situation arising in consequence of variation of a licence, or a licence ceasing to have effect. Further detail about these directions is found in new subsections (5B) to (5E). These subsections replace similar provision currently in section 24(7) to (10) of the 1990 Act. Directions may be required if for example a licence ceases to have effect to ensure that certainty is maintained and that information and material is secured. It is necessary for this to be determined in directions because the nature of what is required will vary according to the circumstances of each case.

Clause 24: Register of information

60. Section 31 of the 1990 Act requires the Authority to keep a register of information obtained by it which relates to the provision of treatment services to any identifiable individual, or the keeping or use of any gametes of any identifiable individual or an embryo taken from an identifiable woman. It also requires the Authority to keep a register of information obtained by it about people born as a result of treatment services. This section also makes provision for people conceived as a result of donated gametes and born since the 1990 Act came into effect to require the Authority to provide them with certain information.

61. Clause 24 replaces the existing section 31 of the 1990 Act with substituted sections 31 to 31ZE. Section 31ZA enables a donor conceived person ("the applicant") to obtain information about their donor and about whether they are related to a person who they intend to marry or enter a civil partnership with or with whom they are having or intend to have an intimate physical relationship.

62. Clause 24 of the Bill inserts new subsection 31ZA(2)(a) into the 1990 Act and empowers the Secretary of State to specify in regulations what information relating to the donor of an applicant should be provided to them by the Authority. This power corresponds to the existing power in section 31(4)(a) of the 1990 Act and, as with the existing power, is subject to affirmative procedure (see the amendments of section 45 of the 1990 Act in clause 30). If identifying information was provided to a clinic at a time when the Authority could not have been required to give information of that kind regulations cannot subsequently require the Authority to disclose it.

63. Regulations[21] were made in 2004 which prescribed the information that the Authority must provide (by virtue of section 31(4)(a) of the 1990 Act)) in response to a request from a person, who was, or may have been, born as a result of assisted conception including the use of donated sperm, eggs or embryos. The regulations specify the information that must be provided to the applicant if the donor provided the information from 1st April 2005 when the regulations came into force, including identifying information. The power to make regulations is therefore retained in case additional information needs to be set out in new regulations in the future. The 2004 regulations are retained separately rather than incorporated within the primary legislation so that any future amendments may more easily be made.

Clause 25: Restrictions on disclosure of information

64. Clause 33 of the Bill inserts new section 33A(1) of the 1990 Act and prohibits the disclosure of information contained in the register except in accordance with specified exceptions. Where the prohibition on disclosure does not apply, the common law on confidentiality and the Data Protection act 1998 will still apply.

65. Clause 25 of the Bill inserts new section 33B(1) into the 1990 Act and enables the Secretary of State to make regulations providing for additional exceptions. This is subject to the limitation of that power in section 33B(2) which does not allow the regulations to enable disclosure of information relating to donor identities or legal parenthood. This delegated power allows flexibility to introduce new categories where the prohibition on disclosure will not apply, whilst at the same time ensuring that unless an exception applies an additional layer of confidentiality applies. Where the prohibition on disclosure does not apply, the common law on confidentiality and the Data Protection Act 1998 will still apply. Regulations made under this power would require affirmative resolution (see the amendment of section 45 of the 1990 Act made by clause 30 of the Bill).

66. Clause 25 of the Bill also inserts new section 33C(1) into the 1990 Act and enables regulations to be made to require or regulate the processing of information held on the register for the purposes of research. Currently information relating to treatments cannot generally be utilised by medical researchers because of the restrictions around disclosure of information. The information on the register could be of great value for researchers enabling them to understand more about the long-term consequences of assisted conception treatments. This power is conferred on the Secretary of State to exercise if he considers it to be in the interests of improving patient care (in the case of disclosure for medical research) or in the public interest (in the case of disclosure for medical or other research). The regulation making power does have limits. The Bill provides that the Secretary of State may not enable or require the disclosure of identifying information if it would be reasonably practicable to achieve the intended purpose without the disclosure. The regulations may also require compliance with prescribed conditions in connection with the disclosure of protected information. Also, any disclosure under the regulations will still need to be consistent with the Data Protection Act 1998. There is a similar power in section 251 of the National Health Service Act 2006.

67. Under section 33C(2)(d) of the 1990 Act, the regulation-making power in section 33C(1) enables one or more bodies to be established to exercise prescribed functions in relation to processing of the protected information. This will allow a specific body to be established either in a part of the UK where there is currently

[21] Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 2004/1511). These were made under section 31(4).

not one with a similar function or one to serve the whole of the UK. This regulation-making power will allow information on the register to be utilised in specific instances. This power has been introduced to deal with the technicalities involved with establishing a process for releasing information, taking into account differences in established procedures throughout the UK. When exercising this power the Secretary of State will need to ensure that any regulations are compliant with the European Convention on Human Rights.

68. The power to make regulations under section 33C is subject to affirmative procedure (see the amendment of section 45 of the 1990 Act made by clause 30)

Clause 26: Mitochondrial donation

69. New section 35A as inserted by clause 26 grants a regulation-making power to the Secretary of State to amend specified provisions under the 1990 Act if regulations are passed under new section 3ZA(5) (see paragraph 24**)** to include embryos or eggs that have been modified to avoid the transmission of a serious mitochondrial disease in the definition or "permitted embryo" or "permitted egg". This would result in an embryo or egg being created using genetic material from two women.

70. The following provisions of the 1990 Act could be amended under this regulation-making power:

- register of information (section 31 of 1990 Act),
- provision of information (sections 31ZA-31ZD of 1990 Act),
- consent to use gametes and embryos (Schedule 3 of 1990 Act)
- parental orders (section 60).

71. For example it might be appropriate to make modifications to provisions on parental orders, to clarify that the woman who donated the egg with healthy mitochondria could not apply for a parental order on the basis of only having provided mitochondrial DNA (rather than nuclear DNA as well). Or it may be desirable to make provision that the consent must be obtained from the woman donating the egg with healthy mitochondria to be used for this specific purpose. The power to make these regulations is necessary because such changes to the 1990 Act will not be relevant until such time when the power under new section 3ZA(5) is exercised. The question of which provisions ought to apply to mitochondrial donors should be subject to consultation at the time when such regulations are made in order to ensure that the policy reflects appropriately the views of society at the time. The power is subject to affirmative procedure and is exercisable by the Secretary of State (see the amendments of section 45 of the 1990 Act made by clause 30 of the Bill).

Clause 27: Fees

72. Clause 27 inserts into the 1990 Act a new section 35B providing for fees under the Act to be determined by the Authority in a scheme subject to the approval of the Secretary of State and the Treasury. The scheme is not made by statutory instrument or subject to any parliamentary procedure. This reflects the existing position in relation to the fees mentioned in 16(6) of the 1990 Act, which are fixed administratively by the Authority. The power in the new section 35B is mentioned here for completeness, but is not regarded as a delegated legislative power.

Clause 28: Powers of inspection, entry, search and seizure, Schedule 5, paragraph 4

73. Clause 28 inserts new section 38A into the Act which provides for new Schedule 3B to have effect. It also inserts new schedule 3B (which is set out in schedule 5 to the Bill) into the Act. Paragraph 4 of this new Schedule relates to the execution of warrants and includes a regulation-making power to enable the Secretary of State to specify what information should be contained within the 'appropriate statement' given to a person on the premises during the execution of the warrant. The power is subject to negative resolution procedure (by virtue of the general provision in section 45(5) of the 1990 Act). This power is delegated to enable changes to be made to the content of the statements which must be given when the warrants are executed under Schedule 5 of the 1990 Act.

Clause 31: Power to make consequential provision

74. Clause 31 introduces new section 45A into the 1990 Act. This enable the Secretary of State to make an order to modify any provision made by or under any enactment as he sees necessary or expedient to after introducing regulations under the following provisions of the 1990 Act:

- section 1(6) – power to include things within the meaning of "embryo" and "gamete" etc.
- section 4A(5)(e) – power to include things within the meaning of "inter-species embryo"
- section 4A(7) – power to amend the definition of "inter-species embryo"

75. The power to make such amendments by order is necessary to ensure that any relevant legislation can be updated as appropriate should regulations be made to alter definitions of embryo or inter-species embryos. The Department of Health is unable to predict how the regulations will be used and therefore what other legislation might need to be modified. The order would be subject to affirmative resolution by virtue of new section 45B (4), as inserted by clause 32.

Clause 55: Parental orders: supplementary provision

76. The Bill makes provision as to parenthood in cases involving both assisted reproduction and surrogacy. There are new provisions extending the categories of couples who can apply for a parental order where a child has been conceived using the genetic material of one of the couple, and has been carried by a surrogate mother, and where specified conditions apply. Currently, only married couples can apply for a parental order. Under the new provisions, civil partners would also be able to apply, as would couples who are not married or not in a civil partnership but who are in an 'enduring family relationship'. The other provisions relating to parental orders remain the same as the existing provisions of the 1990 Act. A single person remains unable to apply, but would be able to apply to adopt the child from the surrogate mother.

77. Clause 55(1) of the Bill introduces a regulation-making power for the Secretary of State to apply certain legislation about adoption to parental orders, with any necessary modifications. It also provides a power to require that references in any enactment to adoption, an adopted child or an adoptive relationship be read as references to a parental order, a child who is the subject of such an order, or a relationship arising from such an order.

78. A similar power is currently to be found in section 30(9) of the 1990 Act and has been exercised in the Parental Orders (Human Fertilisation and Embryology) Regulations 1994 (SI 1994/2767). One provision made by these regulations, is the application to parental orders of the duty under the Adoption Act 1976 to promote the welfare of a child who may be adopted. The 1994 regulations will have to be revoked and replaced by new regulations on implementation of the Bill, in order to take account of the changes to be made by the Bill and provision made by the Adoption and Children Act 2002.

79. The purpose of this delegated power is to enable such of the existing legislation concerning adoption as is considered appropriate to be applied to parental orders, rather than replicating it all in the primary legislation. The policy to date has been to apply provisions about the effect of adoption, birth registration and so on, but not to apply provisions requiring detailed consideration of the suitability of the applicants (on the basis that at least one of them is genetically related to the child) The regulation-making power also allows for any changes that may be made in the future to adoption legislation, to also apply to parental orders. It is a delegated power because it is not possible to know what amendments to the legislation relating to adoption may be made. This regulation-making power is subject to affirmative resolution (see clause 62(4)).

Clause 56: Schedule 6: Amendments relating to parenthood in cases involving assister reproduction

80. Clause 56 provides for Schedule 6 to the Bill to take effect.

Paragraph 26 inserts new section 4ZA into the Children Act 1989: Acquisition of parental responsibility by female second parent

81. Paragraph 26 of Schedule 6 to the Bill introduces new section 4ZA to the Children Act 1989 ("the 1989 Act"). Paragraph 4ZA makes provision for the female second parent to acquire parental responsibility for a child by registering as the child's parent in the register of births under any of the enactments listed in section 4ZA(2) of the 1989 Act, by making a parental responsibility agreement with the child's mother, or by obtaining a court order. Subparagraph (3) of new section 4ZA of the 1989 Act gives power to the Secretary of State to make an order to amend the list of enactments referred to in new section 4ZA (2) of the 1989 Act. The order making power is required so that if any new legislation is introduced that allows a person to acquire parental responsibility for a child, this could be applied to those who are female second parents by virtue of the provisions in the Bill. This order would be subject to affirmative resolution according to section 104 of the Children Act 1989, as amended by paragraph 29 of Schedule 6 to the Bill.

Clause 64: Power to make consequential and transitional provision etc.

82. Clause 64 of the Bill gives power to the Secretary of State to make, by order, consequential or transitional provisions that are considered necessary or expedient to give full effect to the provisions of the Human Fertilisation and Embryology Bill. An order may in particular amend or repeal any existing primary or secondary legislation. Before making an order under this power that would fall within the legislative competence of the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly a consultation requirement is imposed. Orders under clause 64 are subject to negative resolution. However if an order amends or repeals existing legislation then the affirmative procedure will apply.

Clause 67: Extent

83. Clause 67(3) of the Bill provides that the provisions in the Bill can be extended to apply to Guernsey. The provisions can be extended either in an amended form or as they appear in the Bill. This does not enable extension to Guernsey of provisions of the Bill which amend other enactments which do not extend to Guernsey. This delegated power is an order which can be exercised by Her Majesty the Queen in Council.

Clause 66: Commencement orders

84. Clause 68(2) introduces the power to bring provisions of the Bill (other than those mentioned in clause 68(1)) into force. This is exercisable by the Secretary of State by order made by statutory instrument. In accordance with the usual practice, no Parliamentary procedure will apply to such orders.

Department of Health

November 2007

Clause No.	Section No. (Amended Act – where applicable)	Instrument	Wording	Power conferred on	Procedure (where applicable)	Reference in memo
1(5)	1(6)	Regulations	If it appears to the Secretary of State necessary or desirable to do so in the light of developments in science or medicine, regulations may provide that in this Act (except in section 4A) "embryo", "eggs", "sperm" or "gametes" includes things specified in the regulations which would not otherwise fall within the definition.	Secretary of State	Affirmative	20
3(5)	3ZA(5)	Regulations	Regulations may provide that: (a) an egg can be a permitted egg, or (b) an embryo can be a permitted embryo, even though the egg or embryo has had applied to it in prescribed circumstances a prescribed process designed to prevent the transmission of serious mitochondrial disease.	Secretary of State	Affirmative	24
4(2)	4A(5)(e)	Regulations	(5) For the purpose of this Act an inter-species embryos is— (e) such other things as may be specified in regulations.	Secretary of State	Affirmative	28
4(2)	4A(7)	Regulations	Regulations may amend the definition of inter-species embryo in subsection (5)	Secretary of State	Affirmative	30
8	8C(1)(c)	Order	This section applies to any function of the Authority other than – (c) a function excluded from this section by the Secretary of State by order.	Secretary of State	Negative	32
11 Schedule 2 paragraph 3	1ZC (Schedule 2)	Regulations	(1) Regulations may amend paragraph 1ZA (embryo testing). (2) Regulations under this paragraph which amend paragraph 1ZA may make any amendment of sub-paragraphs (2) to (4) of paragraph 1ZB (sex selection) which appears	Secretary of State	Affirmative	36

Clause No.	Section No. (Amended Act – where applicable)	Instrument	Wording	Power conferred on	Procedure (where applicable)	Reference in memo
			to the Secretary of State to be necessary or expedient in consequence of the amendment of paragraph 1ZA (embryo testing).			
Schedule 2 paragraph 6	Schedule 2 paragraph 3(2)	Directions	A licence under this paragraph may authorise mixing sperm with the egg of a hamster, or other animal specified in directions, for the purpose of developing more effective techniques for determining the fertility or normality of sperm, but only where anything which forms is destroyed when the research is complete and, in any event, no later than the two cell stage.	The Authority		39
Schedule 2 paragraph 6	Schedule 2 paragraph 3(5)	Regulations	If regulations so provide, a licence under this paragraph may authorise any of the following – (a) bringing about the creation in vitro of things that are inter-species embryos by virtue of regulations under paragraph (e) of section 4A(5), and (b) keeping or using things that inter-species embryos by virtue of regulations under that paragraph, for the purposes of a project of research specified in the licence.	Secretary of State	Affirmative	41
Schedule 2 paragraph 6	Schedule 2 paragraph 3A(1)(c)	Regulations	A licence under paragraph 3 cannot authorise any activity unless the activity appears to the Authority; to be necessary or desirable for such other purposes as may be specified in regulations.	Secretary of State	Affirmative	43
19	19(6)	Regulations	The Authority may by regulations make such additional provision about procedure in relation to the carrying out of	The Authority		48

Clause No.	Section No. (Amended Act – where applicable)	Instrument	Wording	Power conferred on	Procedure (where applicable)	Reference in memo
			functions under sections 18 and 18A (revocation and variation of a licence) and this section as it thinks fit.			
19	19B(1)	Directions	Directions may make provision about – (a) the form and content of applications under this Act, and (b) the information to be supplied with such an application	The Authority		47
19	19B(2) and (3)	Regulations	(2) The Authority may by regulations make other provision about applications under this Act. (3) Such regulations may, in particular, make provision about procedure in relation to the determination of applications under this Act and may, in particular, include – (a) provision for requiring persons to give evidence or to produce documents; (b) provision about the admissibility of evidence.	The Authority		48
21	20A(3)	Regulations	Regulations shall made provision about the membership and proceedings of appeals committees.	Secretary of State	Negative	52
21	20B(2)	Regulations	Regulations shall make provision about the procedure in relation to reconsideration.	Secretary of State	Negative	53
22	24(3B)	Directions	Directions may authorise, in such circumstances and subject to such conditions as may be specified in the directions, the keeping, by or on behalf of a person to who, a licence applies, of inter-species embryos in the course of their carriage to or from any premises.			57
22	24(4B)	Regulations	Regulations may make provision requiring or authorising the giving of directions in relation to particular matters which are specified in the	Secretary of State	Negative	56

Clause No.	Section No. (Amended Act – where applicable)	Instrument	Wording	Power conferred on	Procedure (where applicable)	Reference in memo
			regulations and relate to activities falling within section 4A2 (activities involving genetic material of human origin).			
22	24(5A)	Directions	Directions - for subsection (5) to (10) substitute (5A) to (5E). Directions may make provision for the purpose of dealing with a situations arising in consequence of – (a) the variation of a licence, or (b) a licence ceasing to have effect	The Authority	Procedure is set out in section 23 of the 1990 Act	59
24	31ZA(2)(a)	Regulations	The applicant may request the Authority to give the applicant notice stating whether of not the information contained in the register show that a person ("the donor") other than a parent of the applicant would or might, but for the relevant statutory provisions, be the parent of the applicant, and if it does show that – (a) giving the applicant so much of that information as relates to the donor as the Authority is required by regulations to give (but no other information).	Secretary of State	Affirmative	62
25	33B(1)	Regulations	Regulations may provide for additional exceptions from section 33A(1). (Power to provide for additional exceptions to 33A)	Secretary of State	Affirmative	65
25	33C(1)	Regulations	Regulations may – (a) make such provision for and in connection with requiring or regulating the processing of protected information for the purposes of medical research as the Secretary of State considers necessary or expedient in the public interest or in the interests of improving patient care, and	Secretary of State	Affirmative	66

Clause No.	Section No. (Amended Act – where applicable)	Instrument	Wording	Power conferred on	Procedure (where applicable)	Reference in memo
			b) make such provision for and in connection with requiring or regulating the processing of protected information for the purposes of any other research as the Secretary of State considers is necessary or expedient in the public interest.			
26	35A(1)	Regulations	Regulations may provide for any of the relevant provisions to have effect subject to specified modifications in relation to cases where: (a) an egg which is a permitted egg for the purposes of section 3(2) by virtue of regulations made under section 3ZA(5), or (b) an embryo which is a permitted embryo for those purposes by virtue of such regulations, has been created from material provided by two women (mitochondrial donation).	Secretary of State	Affirmative	71
27	35B(2)	Scheme	The amount of any fee charged by virtue of subsection (1) is to be fixed in accordance with a scheme made by the Authority with the approval of the Secretary of State and the Treasury.	Secretary of State		72
28 Schedule 5 paragraph 4	Schedule 3B paragraph 4(5)	Regulations	In sub-paragraphs (3)(b)(ii) and (4)(b)(ii), the references to an appropriate statement are to a statement in writing containing such information relating to the powers of the person executing the warrant and the rights and obligations of the person to whom the statement is given as may be prescribed by regulations made by the Secretary of State.	Secretary of State	Negative	73
31	45A	Order	The Secretary of State may by order make such provision modifying any	Secretary of State	Affirmative	74

Clause No.	Section No. (Amended Act – where applicable)	Instrument	Wording	Power conferred on	Procedure (where applicable)	Reference in memo
			provision made by or under any enactment as the Secretary of State considers necessary or expedient in consequence of any provision made by regulations under any of the relevant provisions of this Act.			
55(1)		Regulations	Regulations may provide: (a) for any provision of the enactments about adoption to have effect, with such modifications (if any) as may be specified in the regulations, in relation to orders under section 54, and applications for such orders, as it has effect in relation to adoption, and applications for adoption orders, and (b) for references in any enactment to adoption, an adopted child or an adoptive relationship to be read (respectively) as references to the effect of an order under section 54, a child to whom such an order applies and a relationship arising by virtue of the enactments about adoption, as applied by the regulations, and for similar expressions in connection with adoption to be read accordingly (Parental orders: supplementary provision).	Secretary of State	Affirmative	77
56 Schedule 6 paragraph 25	4ZA(3) of the Children Act 1989	Order	The Secretary of State may be order amend subsection (3) so as to add further enactments to the list in that subsection.	Secretary of State	Affirmative	81
64		Order	The Secretary of State may by order make (a) any supplementary, incidental or consequential provision, (b) any transitional or saving provision, that the Secretary of State	Secretary of State	Affirmative	82

Clause No.	Section No. (Amended Act – where applicable)	Instrument	Wording	Power conferred on	Procedure (where applicable)	Reference in memo
			considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.			
67(3)		Order	Her Majesty may be Order in Council provide for any of the provisions on this Act to extend, with or without modifications, to the Bailiwick of Guernsey.	Her Majesty the Queen		83
68(2)		Order	The remaining provisions of this Act come in to force in accordance with provision made by the Secretary of State by order.	Secretary of State		84

APPENDIX 3: LOCAL TRANSPORT BILL [HL]

Memorandum by the Department for Transport

Introduction

1. This memorandum identifies provisions for delegated legislation in the Local Transport Bill (introduced in the House of Lords on 7th November 2007 and published on 8th November 2007). It summarises the main provisions of the Bill; identifies the delegated powers in the Bill and describes the purpose and proposed use of those powers; explains why matters have been left to delegated legislation; and explains the degree of Parliamentary control provided for and the reason for the procedure selected in each case.

Background to the Bill

2. In July 2006 DfT Ministers announced that they and officials at the Department would undertake an extensive review of the bus sector with a view to taking action to increase bus patronage. This led to the publication in December 2006 of a paper entitled *Putting Passengers First*, which set out the Government's proposals for a modernised national framework for bus services.

3. Following on from this, the draft Local Transport Bill and consultation paper (*Strengthening local delivery*) was published for consultation and pre-legislative scrutiny on 22 May 2007. The Bill has since been revised in light of the views expressed during consultation and scrutiny, but the core purpose of the Bill remains to tackle congestion and improve public transport. The main elements of the Bill contain measures relating to improving the quality of local bus services, reforming local transport governance, and taking forward local road pricing schemes. It also contains measures relating to the traffic commissioners, following a separate consultation paper issued on July 26 entitled *Modernising the Traffic Commissioner System*.

4. Many of the measures contained in the Bill on local bus services and road pricing schemes consist of amendments to earlier legislation, in particular the Transport Act 2000 ("the TA 2000"). Many of the proposed amendments to bus legislation have been developed in consultation with working groups representing both local authorities and the bus industry, based on their experience of the existing legislative provisions.

Summary of the Bill

5. The Local Transport Bill, which mostly extends to England and Wales only (the provisions which extend to Scotland and Northern Ireland are listed in clause 116), contains 118 clauses and 7 Schedules. The main provisions are summarised in the table set out below. More detailed descriptions of the relevant clauses are contained in the commentary on delegated powers following the table. A full description of all the clauses can be found in the explanatory notes which accompany the Bill.

Clauses	Summary
1 - 6	Provisions relating to traffic commissioners, including the creation of a statutory post of senior traffic commissioner

7 - 11	Amendments to sections 108 - 113 of the TA 2000 on local transport plans
12 - 17	Amendments to sections 114 - 123 of the TA 2000 on quality partnership schemes
18 - 39	Amendments to sections 124 - 134 of the TA 2000 on quality contracts schemes. The provisions include the creation of a new approvals board to consider applications for quality contracts schemes in England
40	Amendments to section 153 of and Schedule 10 to the TA 2000 to apply a new competition test to voluntary partnership agreements and certain other agreements between local authorities and bus operators
41 - 62	General provisions relating to passenger transport. Includes amendments to the Transport Act 1985 ("the TA 1985") in relation to community transport and the enforcement powers of the traffic commissioners
63	Disabled Persons Transport Advisory Committee
64 - 65	Public Transport Users' Committee and Rail Passengers' Council
66 - 85	Arrangements relating to Integrated Transport Authorities, including powers for the Secretary of State to make orders about the constitutional arrangements and functions of existing Integrated Transport Authorities (ITAs) and to create new ITAs
86 - 89	ITA powers to take steps which they consider likely to promote or improve the economic, social or environmental well-being of their local community
90 - 108	Amendments to Part 3 of the TA 2000 and Schedule 23 to the GLA Act 1999 on local and London charging schemes
109 - 110	Trunk road charging schemes in Wales
111	Consequential amendment of provision relating to detention of certain goods vehicles
112 - 113	Information about foreign registered vehicles
114 - 118	Supplementary provisions

Delegated Powers

6. A table at the back of this document lists all of the provisions containing delegated powers in the Local Transport Bill and the relevant Parliamentary procedure governing each power.

Provisions for Delegated Powers

Clauses 1 to 6: The traffic commissioners

7. These clauses amend sections 3 and 4 of and Schedule 2 to the Public Passenger Vehicles Act 1981 ("the PPVA 1981"). Some new provisions are also inserted. These provisions put the current administrative appointment of a senior traffic commissioner on a statutory footing. They also remove the requirement for a traffic commissioner to be appointed to a specific traffic area in England and Wales (so

that he only has jurisdiction in that traffic area) to create greater flexibility for traffic commissioner deployment. The following clauses contain delegated powers.

Clause 1: traffic areas

8. Section 3 of the PPVA 1981 provides, for the purposes of that Act, for Great Britain to be divided into eight traffic areas. Subsection (2) empowers the Secretary of State, by order, to vary the traffic areas, either by altering the limits of existing traffic areas, or by increasing or decreasing the number of traffic areas. Subsection (3) provides that an order for varying the traffic areas may contain such consequential and incidental provisions, including in particular respects, as appear to be necessary. Such orders are affirmative instruments: the instrument must be laid after making and cannot come into force unless and until it is approved by both Houses of Parliament. This power has been exercised (see the Traffic Areas (Reorganisation) Order 1990 (S.I. 1991/288 amended by S.I. 1991/634 and 1999/1204) and the Traffic Areas (Reorganisation) (Wales) Order 1999 (S.I. 1999/1204)).

9. The purpose of clause 1, which inserts new subsections (2A) to (2C) into section 3 of the PPVA 1981, is to extend the existing power in subsection (2) so as to make such incidental, consequential, supplemental or transitional provisions, and such savings, as may be necessary or expedient in order to give full effect to any variation in the number or geographical limits of traffic areas. This includes a power to amend or modify any enactment, whenever passed or made, but only for the purposes of making such provisions or savings as prescribed in the new subsection (2A).

10. There are currently no firm plans to amend the existing traffic areas. However, following on from some of the other changes that would be made by these clauses to increase flexibility within the traffic commissioner network, it is possible that the Secretary of State may wish to do so in the future. The reason for taking the additional power described in paragraph 9 is to ensure that if, as a result of amending the number or limits of the traffic areas, consequential changes were needed to other legislation to ensure that its application remained appropriate the Secretary of State would have the necessary powers.

11. An example is section 5 of the PPVA 1981 under which, when a traffic commissioner publishes information which relates to a particular area, he is required to send copies to every chief officer of police whose area falls at least in part in that traffic area. Any enlargement of the traffic areas in England might, under strict application of this provision, lead to information being sent needlessly to certain chief officers of police. The provision might, therefore, need to be amended in consequence. The Department believes it is appropriate that such orders, in tandem with any exercise of the power to amend the traffic areas, should be affirmative instruments.

12. The justification for taking such a wide power is that it needs to be capable of being exercised at any time in the future, and therefore to amend or modify any enactments which are in force at that time, including enactments passed or made after this one. This is necessary so as to enable an order made at any time in the future to make such amendments as may be necessary to ensure an efficient and effective move to a different number of traffic areas.

13. As this provision amends the existing order making power, and is limited so that it could only be used in conjunction with an order under section 3(2) of the PPVA 1981 to amend the existing traffic areas, such amendments would be subject to the parliamentary procedure described in paragraph 8 above.

Clause 2: Traffic commissioners

14. Clause 2 amends section 4 of the PPVA 1981. That section currently provides for the Secretary of State to appoint a traffic commissioner for each traffic area (designated by virtue of section 3 of the PPVA 1981), and describes the functions of a traffic commissioner. It also requires traffic commissioners to act under the general directions of the Secretary of State.

15. The amendments to section 4 of the PPVA 1981 made by clause 2 would replace the requirement for there to be a traffic commissioner for each area. The Secretary of State would instead have the power to appoint such number of traffic commissioners for England and Wales as the Secretary of State may consider appropriate, and one single commissioner for the Scottish Traffic Area. These provisions also describe the jurisdiction of traffic commissioners. In particular, the current restriction which prevents traffic commissioners from exercising their functions outside the traffic area to which they are appointed is removed. Deployment of traffic commissioners is made a function of the senior traffic commissioner (see commentary on clause 3 below).

16. The reason for delegating the power to determine the number of traffic commissioners to the Secretary of State is to increase flexibility within the traffic commissioner network, and to reflect the new functions which would be granted to traffic commissioners through this Bill. The effect of other provisions in this Bill would be to give traffic commissioners a more prominent role in monitoring bus performance and in taking action to tackle poor punctuality. Traffic commissioners would also have new functions including the determination of applications for quality contracts schemes, and applications to register services in areas where quality partnership and quality contracts schemes were in place. Limiting the jurisdiction of traffic commissioners to one traffic area can hinder the effective performance both of these, and the existing functions of the traffic commissioners in respect of buses and goods vehicles. It is also possible that the Secretary of State might want to appoint a traffic commissioner to focus predominantly on bus punctuality across a wider area. This would not be an option under the current jurisdictional arrangements.

Clause 3: The senior traffic commissioner

17. Traffic commissioners are appointed by the Secretary of State under section 4 of the PPVA 1981 (as would be amended by clause 2), with further provisions relating to terms of service set out in Schedule 2 to that Act (as would be amended by clause 4). Traffic commissioners have a range of functions, including granting licenses to the operators of public service vehicles and goods vehicles, and the registration of local bus services. Traffic commissioners also have powers, in prescribed circumstances, to attach conditions to operators' licences, or to impose sanctions.

18. The Secretary of State currently appoints one of the traffic commissioners to be the senior traffic commissioner. This is an administrative appointment. Clause 4 inserts new sections 4A to 4C into the PPVA 1981 to put the role of the senior traffic commissioner on a statutory footing and to prescribe his powers.

19. New section 4B would confer power on the senior traffic commissioner to require traffic commissioners to act in such matters and in such places as the senior traffic commissioner may require. (Currently it is for the Secretary of State to deploy traffic commissioners to a particular traffic area, and to give them general directions.) In respect of the traffic commissioner for the Scottish Traffic Area (and deputy traffic commissioners for that area) this new power only applies to reserved

matters within the meaning of the Scotland Act 1998. This power, coupled with the wider jurisdiction for traffic commissioners (see paragraphs 14 to 16 above) would provide greater flexibility in relation to the exercise of the traffic commissioners' functions. In particular, it would allow the senior traffic commissioner to determine the most efficient and effective distribution of work between the individual traffic commissioners, taking account of the prevailing circumstances. The Department's view is that it is appropriate to grant such powers to the senior traffic commissioner, who has first hand knowledge of the work to be done and is in a stronger position to identify particular areas of need. The most effective way to distribute casework may vary from time to time and this more flexible approach is expected to deliver greater efficiency in responding to changing circumstances and pressures.

20. New section 4C would confer power on the senior traffic commissioner to give guidance or general directions to the traffic commissioners as to the carrying out of their functions under any enactment. Whilst this clause applies in Scotland, the senior traffic commissioner can only give guidance or directions to the traffic commissioner for the Scottish Traffic Area in respect of the exercise of functions that relate to reserved matters.

21. Subsections (2) and (3) of new section 4C of the PPVA 1981 set out the matters which may be included in general directions and guidance given by the senior traffic commissioner. Matters on which guidance may be given include the meaning and operation of any enactment or instrument relevant to the functions of the traffic commissioners, circumstances relating to the imposition of sanctions or penalties, and matters which should or should not be taken into account when exercising particular functions. The matters on which directions may be given include the delegation of functions to administrative staff, requests for information in connection with the exercising of functions, the publication of decisions, the procedure to be adopted when conducting inquiries, or circumstances in which a traffic commissioner should consult other traffic commissioners before exercising particular functions.

22. Subsection (4) places an obligation on the senior traffic commissioner to consult certain persons before giving directions and guidance.

23. Section 4(4)(a) of the PPVA 1981 and section 1(2) of the Goods Vehicles (Licensing of Operators) Act 1995 currently provide for traffic commissioners to act under general directions of the Secretary of State. These provisions are amended to require traffic commissioners to act under the general directions of, and to have regard to any guidance given by, the senior traffic commissioner. The existing power for the Secretary of State to give general directions to the traffic commissioners is replaced by a power to give guidance to the senior traffic commissioner as to the exercise of his functions. The senior traffic commissioner must have regard to such guidance.

24. The effect of these provisions is to delegate a number of functions to the senior traffic commissioner. The traffic commissioners, although appointed by the Secretary of State, are independent of government. These provisions enhance that independence by replacing the current power for the Secretary of State to give general directions to traffic commissioners with a power to give guidance to the senior traffic commissioner. It is then for the senior traffic commissioner (who must be a traffic commissioner) to direct and guide traffic commissioners as to the exercise of their functions. The new power for the senior traffic commissioner to deploy the traffic commissioners to such places and to carry out such functions as may be required by the senior traffic commissioner also increases effectiveness and administrative flexibility.

Clause 4: amendments of Schedule 2 to the PPVA 1981

25. Clause 4 amends Schedule 2 to the PPVA 1981. In particular it amends the power to appoint deputy traffic commissioners in England and Wales to reflect the changes to the appointment of traffic commissioners. Currently, the Secretary of State can appoint deputy traffic commissioners where a traffic commissioner is unable to carry out their duties, or where more capacity is needed. The amended provisions would empower the Secretary of State to appoint such number of deputy traffic commissioners for England and Wales as may be determined. Such deputies would have jurisdiction throughout England and Wales and in respect of reserved matters within the Scottish Traffic Area. The appointment and terms of office of deputy traffic commissioners in the Scottish Traffic Area are not affected by these amendments.

26. The reasons for these amendments are in line with those set out in paragraph 16 above.

Clause 6: Consequential amendments

27. The functions of traffic commissioners are set out in various Acts of Parliament. In most cases the granting of the power to exercise those functions is linked to the traffic area to which a traffic commissioner is appointed. Following on from the amendments described in paragraphs 14 to 16 above, it will be necessary to amend all these references to reflect the new jurisdiction of the traffic commissioners.

28. Clause 6 empowers the Secretary of State, by order, to make such provision as may be considered necessary or expedient to give full effect to the amendments to the PPVA 1981 contained in clauses 1 to 5. This includes a power to amend or modify any enactment, whenever passed or made, but this power is limited only to giving effect to the new provisions. The justification for taking such a wide power is as set out in paragraph 12 above.

29. The Government considers that the amendments needed to give full effect to these provisions are too numerous and detailed to include on the face of the Bill. It is therefore proposed to make the necessary amendments in secondary legislation at the appropriate time.

30. Orders made under this provision would be subject to the affirmative resolution procedure.

Clauses 12 to 17: Quality partnership schemes

31. A quality partnership scheme is a scheme made by a local transport authority under which that authority provides particular facilities at specific locations along the routes used by local bus services, and operators of local services who wish to use those facilities agree to provide services of a particular standard. The current statutory provisions are contained in sections 114 - 123 of the TA 2000. Before making such a scheme, the local authority must be satisfied that it will improve the quality of local services, or reduce or limit traffic congestion, noise or air pollution.

32. Clauses 12 to 17 amend these provisions in three main areas. First, clause 12(4) would insert new subsections (3A) to (3D) into section 114 of the TA 2000. The effect of these amendments would be to enable local authorities to impose restrictions on the registration of local services in the area of a quality partnership scheme. (Before starting to provide a local service, the operator must register details of that service with the traffic commissioner). Such restrictions would have to be specified in the scheme, and there would be an obligation on local authorities to

consult on the proposed restrictions - see the amendment to section 115 of the TA 2000 contained in clause 13. It would also be a requirement for the scheme to specify the criteria against which traffic commissioners would exercise discretion as to whether or not to accept an application to register a service in that area. Such restrictions could only be imposed where the local authority considered that the provision of additional local services in the area of a scheme may be detrimental to the provision of services under that scheme.

33. Secondly, the effect of the amendments contained in clause 12(5) to (7) would be to extend the potential scope of schemes to include requirements relating to the frequency and timings of services, and the maximum fares which may be charged. The inclusion of such provisions would only be permitted where no "admissible objections" had been received from relevant bus operators about the inclusion of such requirements (for more details see paragraphs 35 to 38 below).

34. Finally, the amendments provide for the phased implementation of quality partnership schemes and the ability to postpone any part of a scheme rather than, as now, just the whole of it.

Clause 17: regulations about schemes which specify frequencies, timings or fares

35. Clause 17 would amend and insert new provisions into section 122 of the TA 2000 (regulations about schemes). The effect would be to provide a new power for the appropriate national authority (the Secretary of State in England, or the Welsh Ministers in Wales) to make regulations to prescribe the content or operation of schemes which include requirements relating to the frequency and timing of services, and the maximum fares which may be charged (see paragraph 32 above for details).

36. New section 114(3) to (5), as would be inserted by clause 17(3), sets out the matters which may be included in regulations in respect of the inclusion of requirements as to frequencies, timings and maximum fares in a scheme. In particular, such regulations could define "admissible objections" and "relevant operator" for these purposes and prescribe the procedure for making a determination as to whether a particular objection by a particular person is admissible. Regulations could also prescribe the procedure for setting requirements as to frequencies, timings and maximum fares, and provide for such requirements to be reviewed and revised at regular intervals.

37. There are two main reasons for using regulations to prescribe such matters, rather than doing so on the face of the primary legislation. First, these are detailed procedural matters which are better suited to secondary legislation. Secondly, there is at present virtually no practical experience of the operation of quality partnership schemes and, given that frequencies, timings and maximum fares cannot currently be included in schemes, no experience of the inclusion of such requirements. Taking powers to prescribe such matters in secondary legislation will provide greater flexibility in the future to adapt the procedures in the light of experience, without the need to amend primary legislation. These regulations, in common with other regulations made under section 122, would be subject to the negative resolution procedure.

38. The existing powers for the appropriate national authority to make regulations about quality partnership schemes (section 122 of the TA 2000), and section 123 of the TA 2000, which empowers the appropriate national authority to issue guidance to authorities about the carrying out of their functions in respect of quality partnership schemes, are not amended by this Bill.

Clauses 18 to 39: Quality contracts schemes

39. A quality contracts scheme is a scheme under which the local authority determines the local bus network for the area to which the scheme relates, and local bus services in that area can only be provided under quality contracts entered into by the local authority and bus operators. The local authority can exclude certain local services, or classes of services, from the scheme. The existing provisions are to be found in sections 124 - 134 of the TA 2000.

40. Under the existing provisions a local authority, in proposing a scheme, must be satisfied that a quality contracts scheme is the "only practicable way" to implement the policies of the local transport authority as set out in its bus strategy (which must at present be produced by virtue of section 110 of the TA 2000). The scheme must then be submitted to the appropriate national authority for approval. The effect of clause 10 would be to remove the requirement for local transport areas to produce bus strategies. The new provisions on quality contracts schemes therefore require authorities to be satisfied that the scheme would contribute to the implementation of local transport policies, as defined in section 108 of the TA 2000 (as would be amended by clause 7).

41. Clauses 18 to 39 make a number of amendments to, and insert a number of new provisions into, the existing legislation. In particular, the "only practicable way" test referred to in paragraph 40 above is replaced with a set of public interest criteria which the proposed scheme must satisfy.

42. The approval role of the Secretary of State in relation to schemes in England is also removed, and proposed schemes must instead be submitted to an approvals board consisting of a traffic commissioner and two other members. Appeals against decisions of the approvals board would fall to be determined by the Transport Tribunal. Schemes in Wales would continue, as now, to be approved by the Welsh Ministers.

43. The amendments also provide for the phased implementation of quality contracts schemes, so that different provisions would be able to come into operation on different dates.

Clause 20: Approval of proposed schemes

44. Clause 20 would amend section 126 of the TA 2000 (approval of proposed schemes). The effect would be to replace the current requirement for schemes to be approved by the Secretary of State with a requirement for them to be approved by the appropriate approval authority. The appropriate approval authority in England would be the approvals board for England, and in Wales the Welsh Ministers. This is being done to strengthen the independence of decision making in relation to schemes. In particular, the Secretary of State considers it to be more appropriate for such judgments to be taken at arm's length from central government by an independent approvals body, with a specified right of appeal against the decisions of that body.

Clause 21: Approvals Boards for England

45. Clause 21 inserts a new section 126A into the TA 2000 to provide for the approvals board for England. As described in paragraph 44 above, the current function of the Secretary of State to determine applications for approval of a quality contracts scheme is to be delegated to this board in respect of applications in England only. Applications for schemes in Wales will continue, as now, to be determined by the Welsh Ministers.

46. It is important to ensure that the process for determining applications to make quality contracts schemes is fair, open and impartial. In ensuring that this is achieved, Ministers and officials at the Department for Transport can be inhibited from working with local authorities in the development of suitable schemes. The Government therefore wishes to delegate the function to an independent, transparent and impartial Board so as to free up Ministers and departmental officials to assist and advise on proposals for new schemes.

47. New section 126A provides that each board will consist of three members – a traffic commissioner (who would chair the board) and two people drawn from a panel appointed by the Secretary of State for these purposes (and who would have relevant expertise, for example in matters such as transport planning and economics). The effect of subsections (4) and (5) is to provide for the senior traffic commissioner to designate as chair the traffic commissioner considered to be most appropriate in the circumstances of each case on the basis of local knowledge unless, in that traffic commissioner's opinion, his ability to act impartially is impaired. The structure of the board is designed to ensure that impartial and fair decisions are taken by a mix of people with the appropriate expertise and local knowledge.

48. The Bill provides for appeals against decisions of an approvals board to be made to the Transport Tribunal (see new sections 126D and 126E inserted by clause 24). A further right of appeal on points of law lies to the Court of Appeal.

49. The Welsh Ministers have decided that they wish to retain responsibility for making determinations about applications for the approval of quality contracts schemes rather than to delegate it to a separate board.

Clause 22: Practice and procedure of approvals boards for England

50. This clause inserts a new section 126B into the TA 2000. It empowers the Secretary of State to prescribe in rules the practice and procedure to be followed by approvals boards for England, and for carrying into effect the powers and duties of any such boards.

51. The provisions which may be made in such rules include the procedure for making applications to the board and for the acknowledgement of such applications, the procedure for notifying relevant parties that an application has been lodged, and the timescales within which such parties may make representations to the board.

52. A power to made regulations to prescribe the timescale within which the Secretary of State would normally expect a board to reach a decision on any application to it is also provided. New section 126B(4) would place a duty on the approvals board to take all reasonable steps to reach its decision within the time prescribed. If it failed to do so, the Chair of the board would be required to prepare a statement for the Secretary of State and the local authority which has made the application for approval.

53. The purpose of rules and regulations made under this provision is to ensure an approvals boards reaches its determination in a proper and timely fashion. This is important both for authorities seeking to make a scheme and for those operators who would be affected by it. As the matters to be covered are essentially procedural, they are best suited to secondary legislation. In addition, as the concept of an approvals board is a new one, flexibility to make further changes to the practice and procedure of boards in the light of experience will be valuable. These rules and regulations would be subject to the negative resolution procedure by virtue of amendments made to section 160 of the TA 2000 by clause 22(2) and (3). This is consistent with the procedure applied to the making of other procedural rules (for

example rules made under Schedule 4 to the TA 1985 which prescribe the procedure and practice for the Transport Tribunal).

54. New section 126B empowers the Secretary of State to issue guidance about the carrying out by a board of its functions under these provisions. The board would be required to have regard to any such guidance. This guidance is not subject to any parliamentary procedure.

Clause 23: Inquiries by approvals boards for England

55. This clause inserts a new section 126C into the TA 2000. The clause applies where a local authority has made an application to the approvals board for England under section 126 of the TA 2000 for the approval of a proposed quality contracts scheme. Clause 21, which inserts a new section 126A into the TA 2000, sets out the structure and functions of the approvals board for England (see paragraphs 45 to 49 above).

56. New section 126C empowers an approvals board for England to hold an inquiry where members of a board consider it to be necessary in order to make a determination on an application for approval of a quality contracts scheme. Such inquiries must be held in public, subject to any provision made by regulations (see below).

57. The provisions in new section 126C are similar to the powers of the traffic commissioners, as set out in section 54 of the PPVA 1981, to hold inquiries in connection with the exercise of their functions. Section 54 of the PPVA 1981 empowers the Secretary of State to make regulations in connection with the holding of such inquiries (see the Public Service Vehicles (Traffic Commissioners: Publication and Inquiries) Regulations 1986, S.I. 1986/1629, amended by S.I. 1993/2754 and S.I. 2004/2682).

58. New section 126C includes a power for the Secretary of State to make regulations in respect of the holding of inquiries by approvals boards for England. The provisions in the Bill about the approvals board will not apply in Wales, so there is no corresponding power for the Welsh Ministers to make such regulations.

59. The powers in new section 126C enable the Secretary of State to make provisions as to:

- the holding of inquiries in public (subsection (4));
- the manner in which notice of an inquiry should be published (subsection (5));
- the circumstances in which the board may make an order for costs to be paid to the Secretary of State by any such party to the inquiry as the board thinks fit (subsection (6));
- the method of calculating costs to be paid under such an order and the maximum amount which may be ordered to be paid under such an order (subsection (7)); and
- restricting admission to such an inquiry (subsection (8)).

60. Regulations made under this provision would be subject to the negative resolution procedure (see section 160(2) of the TA 2000), consistent with the existing powers in section 54 of the PPVA 1981. Empowering the Secretary of State to make regulations about what are, essentially, procedural matters, increases the flexibility available to prescribe that procedure, and to vary it in the light of experience in the

future. This would be particularly important in respect of the setting of a maximum costs award which may be determined by the approvals board.

Clause 25: Making of scheme

61. Clause 25 contains mainly consequential amendments to section 127 of the TA 2000. Section 127 sets out procedural requirements in respect of the making of a quality contracts scheme, in particular the maximum period between the approval of a scheme (currently by the Secretary of State for schemes in England and the Welsh Ministers for schemes in Wales) and the making of it by the local authority, and the minimum period between the scheme being made and it coming into force. The section also prescribes that notice must be given by the local transport authority as to the making of a scheme within 14 days of it being made, the form of that notice, and what it must contain.

62. Amendments to this section contained in clause 25 would provide that the date on which a scheme can be made in England must be deferred until any appeal under the sections inserted by clauses 21 to 24 has been disposed of. The clause makes the necessary amendments to enable different parts of a scheme to come into operation on different dates, consistent with other amendments made to provisions on quality contracts schemes.

63. Section 127(10) of the TA 2000 currently empowers the appropriate national authority, by order, to vary the period prescribed in subsection 2(b) between the making of a scheme and it coming into operation. This period was amended in England by virtue of the TA 2000 (Commencement of Quality Contracts Schemes)(England) Order 2005, S.I. 2005/75.

64. Subsection (10) of clause 24 substitutes the existing section 127(10) with a new provision. This enables the appropriate national authority to vary not only the period between the making and coming into operation of a scheme, but also the period between the final outcome of an appeal against a decision of an approvals board in England and the coming into operation of a scheme (see new subsection (1A) as inserted by clause 24(4)) and the maximum period specified in section 127(1) between the approval of a scheme and it being made.

65. Orders made under section 127(10) of the TA 2000 will continue as now to be subject to the negative resolution procedure.

Clause 27: effect of scheme: different provisions taking effect on different dates

66. Clause 27 makes consequential amendments to section 129 of the TA 2000 to reflect amendments to section 127 of that Act which would enable different parts of a scheme to come into effect on different dates (see clause 25).

67. Section 129(4) of the TA 2000 prescribes the maximum period between the making of a quality contracts scheme and issuing invitations to tender for quality contracts. The prescribed period is three months or such other period as the appropriate national authority may by order specify.

68. The Department for Transport and the Welsh Assembly Government have agreed that it is not necessary to set such a maximum period, and section 129(4) is therefore repealed by clause 27(4).

Clauses 29 to 32: continuation of a scheme

69. The provisions relating to quality contracts schemes in the TA 2000 do not provide a mechanism to enable a scheme to be continued at the end of the maximum ten

year period. Should a local authority wish to do so, it would have to make the scheme again, as if from new. Clauses 29 to 32 of this Bill insert new sections 131A to 131D into the TA 2000 setting out the circumstances in which a scheme may be continued, and the procedure to be followed. Before making a final determination as to whether to continue a scheme the local authority must publish a consultation document containing the information described in new section 131A(3) (see clause 29). Once a determination has been made it must, unless it is an exempt proposal (see clause 30 and new section 131B of the TA 2000) be submitted to the appropriate approval authority.

Clause 30: approval of continuation scheme

70. Clause 30 inserts new section 131B into the TA 2000. Subsection (1) provides that section 126 of the TA 2000 (approval of scheme by appropriate approval authority) does not apply to a proposal to continue a scheme where that scheme is exempt but, in any other case, applies with the modifications set out in subsection (2).

71. An exempt proposal is defined in subsection (5) as a proposal which either satisfies certain conditions (described in subsections (6) to (10)), or is made in circumstances prescribed in regulations made by the appropriate national authority. The conditions set out in the primary legislation are quite detailed, and are based around the premise that a proposal should only be exempt where it, in effect, continues the scheme much as originally made. A proposal which extended the area of the scheme, or which would affect the operation of previously 'unregulated' services (as defined in subsection (4)), would not be exempt, and would therefore need to be submitted for approval.

72. The proposal to take a power to prescribe other circumstances in regulations is done so as to retain some flexibility for the appropriate national authority to prescribe additional circumstances if, in the light of experience, it is considered that other types of scheme may not require approval. Regulations made under this section would be subject to the negative resolution procedure.

73. Clause 31 inserts a new section 131C into the TA 2000. This new section provides a right of appeal against a decision of the local authority either that a proposal is an exempt proposal, or that a scheme which is the subject of an exempt proposal should continue in force. The right of appeal lies to the Transport Tribunal with a further right of appeal on points of law to the Court of Appeal.

Clause 35: regulations about schemes

74. Clause 35 amends section 133 of the TA 2000 (regulations about schemes). Under this section regulations may be made to prescribe a range of matters in connection with quality contracts schemes.

75. The amendments in subsections (2) and (3)(a) and (c) of clause 35 are consequential to the provisions in clauses 29 to 32 of the Bill which set out the procedure to be followed when a local transport authority wants a quality contracts scheme to continue beyond the maximum ten year period. The provision in clause 35(3)(b) inserts a power to make regulations about the procedure for determining applications for approval of a quality contracts scheme.

76. Regulations made under this section would continue, as now, to be subject to the negative resolution procedure.

Clause 36: Transitional provisions about schemes

77. Clause 36 amends section 134 of the TA 2000 (transitional provision about schemes). The amendment contained in subsection (2) is consequential to changes proposed in the Bill which would enable the coming into effect of a quality contracts scheme to be phased in over a period of time, with different provisions taking effect at different times.

78. Subsection (3) inserts a new provision into section 134(2), the effect of which is to enable regulations about transitional provisions to prescribe circumstances in which any provision of sections 89 to 92 of the TA 1985 (obligation to invite tenders) should not have effect, or should have effect with prescribed modifications. Regulations can already make similar provision in respect of sections 6 to 9 of the TA 1985 (registration of local services).

79. The effect of a quality contracts scheme is that the local authority takes control of the local bus network and, with certain exceptions, suspends the operation of the free market for bus services in that area. The transition from an unregulated market to one operated under local authority control may, potentially, be complex. The purpose of the power in section 134 is to enable the appropriate national authority to prescribe circumstances in which the normal free market provisions would not operate, or would operate to a modified extent, in the period leading up to the coming into operation of the scheme.

80. The reason for this is to try to maintain some form of stability in the provision of bus services during the transitional period. Many members of the public rely on bus services to carry out their daily tasks and it is in the public interest to ensure that the transition to a quality contracts scheme, which is intended to be of benefit to members of the public living or working in the area, does not inconvenience them. Taking the additional power described in clause 36(3) would enable, for example, modifications to be made to the normal procedure for inviting tenders to operate subsidised services where an operator needed to be found to run such services at short notice, or to carry on operating a subsidised service for longer than normal to cover a transitional period.

81. Regulations made under this section would continue, as now, to be subject to the negative resolution procedure.

Clause 37: guidance about quality contracts schemes

82. Clause 37 inserts a new section 134A into the TA 2000 to empower the appropriate national authority to issue guidance concerning performance by local transport authorities of their functions in relation to quality contracts schemes. Local transport authorities are required to have regard to any such guidance.

83. No parliamentary procedure has been prescribed for this guidance, which will be made in consultation with local authorities and the industry. This is consistent with the approach taken in the existing section 123 of the TA 2000, which provides for the issuing of guidance about quality partnership schemes.

Clause 39: power to make traffic regulation orders

84. Clause 39 amends section 1 of the Road Traffic Regulation Act 1984 ("the 1984 Act") (traffic regulation orders outside Greater London). This section empowers the traffic authority for a road outside Greater London (as defined in section 121A of the 1984 Act) to make traffic regulation orders where such an order may be expedient for one of a number of reasons. In particular, such orders may be made to

prevent danger to members of the public, to prevent damage to the road or any building on or near the road, to restrict certain types of vehicle from using a particular road, or for preserving or improving the amenities of a particular area.

85. Subsection (3A) of section 1 of the 1984 Act was inserted by the TA 2000. The purpose was to enable a local traffic authority (either a county council or a metropolitan district council) to make a traffic regulation order in respect of a road for which either the Secretary of State is, or the Welsh Ministers are, the traffic authority, provided the consent of the appropriate authority had been sought, where such an order was required for the provision of facilities pursuant to a quality partnership scheme under Part 2 of the TA 2000. The types of facilities in mind were designated bus lanes or other bus priority measures.

86. The power was not made available to local traffic authorities where such an order might be required pursuant to a quality contracts scheme. The effect of the amendments in clause 39 is to extend the power delegated to local traffic authorities to make traffic regulation orders in respect of roads for which either the Secretary of State is, or the Welsh Ministers are, the traffic authority where such an order may be necessary in order to provide facilities pursuant to a quality contract or a quality contracts scheme.

Clause 41: Detention of certain PSVs used without PSV operators' licences

87. The effect of clause 41, and Schedule 3 which it would give effect to, would be to enable a regime to be established whereby certain illegally operated public service vehicles could be detained, removed and disposed of. These are enabling powers, which would have no effect until the appropriate regulations were in place.

88. Schedule 3 to this Bill inserts a new Schedule 2A into the PPVA 1981 setting out the details of the provisions which may be made in regulations. These are very similar to the provisions in Schedule 1A to the Goods Vehicles (Licensing of Operators) Act 1995, which empowered the Secretary of State to make regulations to provide for goods vehicles and their contents to be detained when operated in contravention of the licensing requirements. Regulations were made under this provision in 2001 (see the Goods Vehicles (Enforcement Powers) Regulations 2001 – S.I. 2001/3981).

89. The powers in new Schedule 2A to the PPVA 1981 (as would be inserted by these provisions) would enable regulations to be made about the detention of property, and the mechanism for such property to be returned to its rightful owner. Regulations must also make provision requiring arrangements to be made to ensure that passengers travelling on a detained vehicle are transported in safety either to their destination or to a suitable place from which to continue their journey. Any regulations made by virtue of this Schedule would have to include provisions under which the owner of a detained vehicle could apply to the traffic commissioner for the return of that vehicle, and provide a right of appeal to the Transport Tribunal against such decisions of the traffic commissioner.

90. The reason for taking a power to establish this regime in secondary legislation is because these are, essentially, detailed procedural matters. The framework of the regulations is set out in the primary legislation in some detail, and identifies certain provisions which must be included if the regulation making power is exercised. In addition, where criminal offences could be created, the primary legislation is specific about the maximum penalty which could be imposed.

91. By virtue of section 61(1) of the PPVA 1981, regulations made under this Schedule would be subject to the negative resolution procedure. This is consistent with the

power to make regulations to establish a similar scheme for goods vehicles in the Goods Vehicles (Licensing of Operators) Act 1995 (see section 57(11) of that Act).

Clause 42: applications for registration where restrictions in force

92. Clause 42 inserts new sections 6(2A) and 6A into the TA 1985. The new section 6A applies where restrictions have been imposed on the registration of local services as part of a quality partnership scheme. An operator of public service vehicles who wants to provide local bus services must register details of the proposed service with the traffic commissioner. Under normal circumstances, the traffic commissioner has no discretion to modify or refuse the application, although powers of enforcement are available if the operator fails to provide the service in accordance with the registered particulars.

93. Clause 12 inserts new provisions into section 114 of the TA 2000 under which a local authority could impose restrictions on the registration of local services in an area in which a quality partnership scheme is in place where it is considered that such registrations could be detrimental to the scheme (see paragraph 32 above). In such cases, the traffic commissioner is to be granted discretion to refuse or modify such an application, in accordance with criteria specified by the local authority in the scheme.

94. The reason for including this provision is to enable the traffic commissioner to exert some control over the registration of services which, if operated in the way proposed, could be detrimental to services provided under the scheme. A quality partnership scheme can only be made where it is in the public interest. If additional services are operated within the area of a scheme which might undermine it, the result may be that the scheme fails and the public would lose the benefits of the improved bus service. The traffic commissioner, working on the basis of the registration criteria specified by the local authority, is best placed to determine whether or not the operation of additional services might be detrimental to the scheme. The provisions provide a right of appeal to the Transport Tribunal against decisions of the traffic commissioners on this matter.

95. New section 6A of the TA 1985 describes the procedure to be followed by the traffic commissioner in such circumstances. The primary legislation sets out, among other things, the circumstances in which the traffic commissioner may accept the application, the steps which must be taken by the traffic commissioner if representations are received from those notified about the application, and the options available to the traffic commissioner if his determination is that an application would be detrimental to the provision of services under a quality contracts scheme.

96. New section 6A(11) empowers the Secretary of State, and the Welsh Ministers, to make regulations to set out some of the procedural detail e.g. the procedure which the traffic commissioner must adopt in giving notice to relevant local authorities and operators, the details which must be included in an application to register a service in these circumstances, and the procedure to be followed in determining the application.

97. The matters which may be prescribed in regulations are detailed procedural matters best suited to secondary legislation. The effect of sections 134 and 135 of the TA 1985 is to apply sections 60 (general power to make regulations for purposes of Act) and 61 (exercise of regulation making powers and parliamentary control thereof) of the PPVA 1981 to regulations made under Parts 1 and 2 of the TA 1985 (this

provision would be inserted into Part 1 of the TA 1985). This power is therefore exercisable by statutory instrument subject to the negative resolution procedure.

Clause 43: applications for registration where quality contracts scheme in force

98. Clause 43 inserts new sections 6(2B) and 6B into the TA 1985. The effect is to provide for new section 6B to apply where an operator seeks to register a local service with the traffic commissioner in an area within which a quality contracts scheme is in force (see paragraphs 39 to 43 above for more information about quality contracts schemes). Section 129(1) of the TA 2000 provides that, where a quality contracts scheme is in place, no local services can be registered with the traffic commissioner (unless excepted by the scheme) and local services can only be operated under a quality contract.

99. The effect of this new provision is to ensure that an application to register a local service can be accepted by the traffic commissioner but only where the local authority has certified that the proposed service would not have an adverse effect on services provided under quality contracts. The effect of subsection (5) is to enable the Secretary of State to prescribe the time within which the service must be registered, if the traffic commissioner receives the appropriate certification from the local authority,.

100. The setting of an appropriate timescale is best left to secondary legislation following consultation with traffic commissioners and other interested parties. For the reasons described in paragraph 97 above, regulations made under this provision would be subject to the negative resolution procedure.

Clause 44: Traffic regulation conditions for anticipated traffic problems

101. Section 7 of the TA 1985 empowers a traffic commissioner, on receipt of a request from a traffic authority, to make traffic regulation conditions which must be met in the provision of local bus services. Such a request can only be submitted "in relation to a particular traffic problem", and the traffic commissioner can only impose a condition where satisfied that it is required in order to prevent danger to road users, reduce severe traffic congestion, or reduce or limit noise or air pollution.

102. Clause 44 amends section 7 of the TA 1985 to enable a request to be made to the traffic commissioner in cases where the traffic authority can reasonably foresee that a particular traffic problem is likely to arise. The purpose of this amendment is to enable appropriate action to be taken in anticipation of a problem, rather than having to wait until it has actually arisen. An example might be where there is particularly aggressive competition between bus operators on an already busy bus route leading to a large increase in the number of registered services, and increased congestion. The traffic authority might become aware of a potential problem when applications are made to register new services. This amendment would enable the authority to take appropriate action in such circumstances.

Clause 45: Transport Tribunal to decide appeals against traffic regulation conditions

103. Clause 45 amends section 9 of the TA 1985. This section currently provides a right of appeal to the Secretary of State against traffic regulation conditions imposed by a traffic commissioner under section 7 of that Act. The effect of the amendments in clause 45 is to transfer that responsibility to the Transport Tribunal. This is consistent with the appeal process in respect of other decisions of traffic commissioners.

104. Under section 9(3) of the TA 1985 the Secretary of State was empowered to make regulations prescribing the time and manner in which appeals under that section must be made, and the procedure to be followed. However Schedule 4 to the TA 1985, which sets out the constitution, powers and proceedings of the Transport Tribunal, empowers the Lord Chancellor to make general rules governing the procedure and practice of the Transport Tribunal (see the Transport Tribunal Rules 2000, S.I. 2000/3226, as amended by S.I. 2001/4041 and S.I. 2002/643).

105. The effect of the amendments made by clause 45 is to render the power in section 9(3) otiose. It is therefore repealed.

Clauses 46 and 47: use of private hire vehicles to provide local services

106. These clauses amend sections 12 and 13 of the TA 1985, and insert a new section 13A. Sections 12 and 13 currently enable holders of a taxi licence to apply to the traffic commissioner for a restricted Public Services Vehicles ("PSV") operator's licence (granted under section 12 of the PPVA 1981). Such a licence entitles the operator to use taxis to run local bus services.

107. The purpose of the amendments in these clauses is to extend this ability to the holders of private hire vehicle ("PHV") licences, thus enabling the holders of such licences to use PHVs to provide local bus services. For these purposes, a "private hire vehicle licence" is defined as a licence granted under section 48 of the Local Government (Miscellaneous Provisions) Act 1976. This excludes licences granted in the Greater London area (which are defined under separate legislation).

108. Section 12(9) of the TA 1985 contains a power for the Secretary of State to prescribe certain matters in regulations, for example the documents, plates and marks which must be carried by a taxi when it is being used to provide local bus services. Under subsection (10), the Secretary of State is empowered to prescribe those provisions in the taxi code (defined in section 13(3) of the TA 1985) which apply to a taxi when it is being used to provide local bus services.

109. Clause 46(6) extends the application of section 12(9) of the TA 1985 to licensed hire cars which are being used to provide local bus services. Clause 46(7) extends the power in section 12(10) of the 1985 Act to enable regulations to prescribe provisions in the hire car code (defined in section 13(3)) of the TA 1985) which should apply when a PHV is being used to provide local bus services.

110. By virtue of the definition of "private hire vehicle licence" (see paragraph 107 above) these provisions will not apply in Greater London until such time as Transport for London provides for them to do so. Clause 47 inserts a new section 13A into the TA 1985 to provide that Transport for London may, by order, provide that section 12 of the TA is also to apply to vehicles licensed under section 7 of the Private Hire Vehicles (London) Act 1998 (London PHV licences).

111. Clause 47 also amends section 13 of the TA 1985 to devolve to Transport for London the power to modify, by order, the taxi code and hire car code as it applies to taxis and private hire cars in London. Transport for London already has powers to make regulations in relation to taxis and private hire cars in London. Delegating the power to modify the codes which apply to the use of such vehicles in London is therefore consistent with this.

112. Orders made by the Secretary of State under this section will continue, as now, to be subject to the negative resolution procedure. The regulations will be relatively technical in nature and subject to full consultation with the industry.

113. Orders made by Transport for London will not be subject to any parliamentary procedure. This is consistent with the existing powers of Transport for London to make regulations relating to taxis and private hire vehicles in London (see section 9 of the Metropolitan Public Carriage Act 1869 and section 32 of the Private Hire Vehicles (London) Act 1998 as amended by the Greater London Authority Act 1999).

114. However, new section 13A(2) of the TA 1985 would require Transport for London to consult such representative organisations as it thinks fit before either extending the provisions in section 12 to private hire vehicles in London, or modifying the taxi or hire car code. Transport for London would also be required to print and publish any orders made under these provisions (see new section 13A(6) inserted by clause 47(8)).

Clauses 48 to 52: vehicles used under permits

115. The effect of sections 19 to 23 of the TA 1985 is to enable certain voluntary bodies to operate PSVs without the requisite operator's licence. These clauses amend these provisions, and also insert a new section 23A into the TA 1985. The purpose is to remove some of the current restrictions as to the types of vehicles which may be used under these permits, and the circumstances in which they may be used. The amendments would also enable a system to be established under which permits would be time-limited (they currently have no expiry date) and to impose requirements as to the keeping of records in relation to such permits.

116. Section 19(7) already contains a power for the Secretary of State to designate, by order, certain bodies eligible to grant permits under section 19 of the TA 1985. Clause 48(6) would amend paragraph (c) of that subsection so as to empower the Secretary of State, in such an order, to require designated bodies to keep records with regard to the permits granted, varied or revoked by that body. The current provision only requires the designated bodies to "make returns" in respect of permits granted by it. The purpose of this amendment is to improve the information available about bodies holding such permits. By virtue of section 135 of the TA 1985, orders made under this section are subject to the negative resolution procedure.

117. Clause 51 would insert a new section 23A into the TA 1985 which would empower the Secretary of State to require permits issues after a specified date to be time limited (up to a maximum of five years). Regulations under subsection (2) of this clause could set a date in the future after which all non-time limited permits not surrendered to the body which issued them would be automatically revoked. Permits surrendered to the issuing bodies would, provided applicants continued to be eligible for the grant of such a permit, be re-issued for a period not exceeding five years. Such permits would be renewable at the end of that period.

118. The effect of a grant of a permit under the existing provisions is to enable certain bodies who provide community services to operate particular type of public service vehicle without an operator's licence. This is important in enabling community groups to provide much needed services to those who might not otherwise have access to transport. It is also, however, important to ensure that proper records are maintained about those who hold permits, and for such permits to be renewed on a regular basis so as to ensure that those who hold them remain entitled to do so, and that they are providing services within the prescribed statutory restrictions.

119. Regulations made under new section 23A, or clause 51(2), would be subject to the negative resolution procedure. This is consistent with the power to make orders under section 19(7), as described in paragraph 116 above.

Clause 54: powers of traffic commissioners where services not operated as registered

120. Clause 54 inserts new sections 27A and 27B into the TA 1985. The purpose of these sections is to confer new powers on the traffic commissioners, enabling them to take appropriate steps where they consider that action taken, or not taken, by a local authority might have affected bus punctuality.

121. New clause 27A(2) confers on the traffic commissioners a power to direct a local authority to provide information connected with the performance of its network management duty under section 16 or 17 of the Traffic Management Act 2004. The traffic commissioner may also require the local authority to attend any inquiry held in connection with deciding whether enforcement action should be taken against an operator. Where the traffic commissioner identifies any remedial measures which could be taken by either the operator or the local traffic authority, he may prepare a report recommending appropriate measures.

122. New clause 27B supplements the provisions in new clause 27A(2) in respect of the power of the traffic commissioner to direct.

123. One of the purposes of measures contained in the Local Transport Bill is to facilitate improvements in the provision of local bus services and to improve patronage. Punctuality is extremely important both for existing passengers, and in encouraging more people to travel by bus, and the traffic commissioners have an important part to play in taking appropriate enforcement action against operators who repeatedly fail to operate services in accordance with registered particulars.

124. However, poor punctuality may not only be down to the bus operator. Actions either taken, or not taken, by a local authority may also play a part. The purpose of these provisions is to enable traffic commissioners, as part of their investigation of poor performance by an operator, to ask for and obtain relevant information about the role of the local authority in any operational problem. This will better equip the traffic commissioner either to make recommendations as to how performance might be improved, or to take appropriate enforcement action.

125. As the traffic commissioners are already responsible for taking enforcement action against operators, it is appropriate that they should also have the power to require local authorities to provide the information needed to determine the appropriate way forward.

Clause 55: Additional sanctions for failures by bus operators

126. Section 155 of the TA 2000 already empowers traffic commissioners to impose financial penalties on bus operators in certain circumstances (e.g. failing to operate a service as registered, or operating a service in contravention of a quality partnership or quality contracts scheme). The maximum penalty which may be imposed is £550 per licensed vehicle operated by the operator, or such other amount as the Secretary of State or the Welsh Ministers may by order specify.

127. Clause 55 amends section 155 to provide traffic commissioners with a range of options as to the sanctions that may be imposed. As well as a financial penalty, the traffic commissioner could require the operator to invest in improvements to the service, or to compensate passengers for poor performance. Where an order to

invest money or pay compensation is made, and the operator fails to comply, a higher financial penalty may be imposed.

128. The purpose of this amendment is to enable sanctions to be imposed in such a way as to bring direct benefits to passengers, through investment in the services or provision of compensation, rather than just imposing a financial penalty. Traffic commissioners already have powers of enforcement over bus operators, and are therefore the appropriate officers to have these new powers.

Clause 56: operational data

129. Clause 56(3) would insert a new subsection (9)(ka) into section 6 of the TA 1985 to enable regulations made under that section to impose restrictions on the use of information made available to traffic commissioners or other persons. This is to ensure that any confidential information provided by bus operators can be given appropriate protection.

130. The power to make regulations under section 6(9)(i) to (k) of the TA 1985, which could be used to require operators to keep certain records and pass them to traffic commissioners and other persons as required, have not yet been exercised (although other regulations have been made under this section). The Department is working with bus operators and local authorities to improve punctuality and, as a result, it is likely that regulations will be made under these particular provisions. Where confidential information is supplied, it is important to ensure that it is subject to appropriate protection.

131. Clause 56(4) inserts a new subsection (10) into section 6 of the TA 1985 to enable regulations made under the new power in paragraph (ka) to create criminal offences for a breach of any restrictions on the use of information. The maximum penalties are prescribed in that provision.

132. Regulations made under these new provisions will be subject to the negative resolution procedure, consistent with other regulations made under section 6 of the TA 1985.

Clause 57: revival of certain powers

133. Orders made under section 60(5) of the TA 1985 disapplied, amongst other things, the power in section 10(1)(viii) of the Transport Act 1968 ("the TA 1968") for Passenger Transport Executives ("PTEs") to let passenger vehicles to bus operators on hire.

134. There are circumstances in which the Department considers that it would be appropriate for PTEs to have such a power (it was never disapplied in respect of other local authorities) in particular where, by leasing a vehicle to an operator, they can ensure that the service is provided to a higher standard. The effect of clause 57 is to replace the power in section 10(1)(viii) of the TA 1968 with a power which would only apply where a service is being provided under a contract (either a subsidised service contract or a quality contract). Subsection (4) provides that orders made under section 60(5) of the TA 1985 are to cease to have effect to the extent that they prevent PTEs from using the power under section 10(1)(viii) of the TA 1985.

Clause 64: Public Transport Users' Committee for England

135. Clause 64 would insert new sections 125A and 125B into the TA 1985. The approach set out in these provisions is modelled closely on the powers conferred on

the Welsh Ministers in the Transport (Wales) Act 2006 (see sections 8 and 9 of that Act).

136. New section 125A would empower the Secretary of State, by order, to establish a body corporate to be known as the Public Transport Users' Committee for England. An order made under this power could include provision about the status and membership of the Committee, the proceedings of the Committee, and other matters such as staffing and financial arrangements.

137. New section 125B provides that the Committee may consider and make recommendations to the Secretary of State about matters relating to public passenger transport services or facilities in England. The provision would enable the Secretary of State to limit the remit of the Committee to such services or facilities of a prescribed description (e.g. local bus services). The Committee would be under an obligation to consider and make recommendations to the Secretary of State about any matter where requested to do so.

138. The Secretary of State would have power to change or remove any functions of the Committee or to confer new functions on it, or to transfer functions of the Committee to another person.

139. Orders under these new sections would be subject to the affirmative resolution procedure.

Clause 65: Power to confer non-rail functions on the Rail Passengers' Council

140. Clause 65 would insert a new section 19A into the Railways Act 2005. This new section would empower the Secretary of State to confer additional functions on the Rail Passengers' Council (established under section 19 of that Act) so as to extend its remit to local services of a prescribed description and prescribed domestic coach services to the extent that they operate in England.

141. Orders made under this section would be subject to the affirmative resolution procedure.

142. This power is being taken as alternative to the powers in clause 64 to establish a Public Transport Users' Committee. Many commentators have argued for a statutory body to be established to represent the interests of bus passengers, but there is much less consensus about how that might best be achieved. The Secretary of State will consult on the establishment of a body to represent the users of public transport. Rail passengers have such a body in the form of the Rail Passengers' Council, and one option might be to broaden the remit of that Council. An alternative would be to establish a new Public Transport Users' Committee, and perhaps to limit that body's remit to local buses and domestic coach services.

143. The powers which would be taken in clauses 64 and 65 are necessary in order to preserve options for the Secretary of State in developing proposals in the light of consultation, which would then be subject to Parliamentary scrutiny under the affirmative resolution procedure.

Clause 67: Power to establish a new ITA

Clauses 72, 77 and 78: Powers to amend constitutional arrangements of existing ITAs, to change the boundaries of ITAs and to dissolve ITAs

Clause 80: Power to make incidental etc. provision

144. Clause 67 gives the Secretary of State power by order to establish a new Integrated Transport Authority ("ITA"). Exercise of the power is subject to the requirements set out in subsections (2) to (12), including the following:

- a scheme has been prepared and published by any two or more authorities under clause 68 or 69 (or a direction has been given for them to do so under clause 69 but a scheme has not been published),
- the Secretary of State, having had regard to that scheme, considers that the establishment of the ITA is likely to improve both the exercise of statutory transport functions in the area of the proposed ITA and the effectiveness and efficiency of transport within that area (subsection (2)),
- the area to be included within the ITA complies with the requirements of subsections (4) to (6),
- the Secretary of State has consulted as described in subsections (10) and (11),
- the Secretary of State has had regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government.

145. Clauses 72, 77 and 78 give power to the Secretary of State:

- to change the constitutional arrangements of an existing ITA,
- to change the boundaries of an ITA, and
- to dissolve an ITA.

146. Exercise of the powers in clauses 72, 77 and 78 is subject to the requirements set out in clause [79], including the following:

- a scheme for statutory changes in an area has been prepared and published by one or more local authorities or ITAs, or a direction has been given for them to do so but a scheme has not been published,
- the Secretary of State has had regard to any such scheme,
- the Secretary of State considers that the making of the Order is likely to improve the exercise of statutory transport functions in the area to which the Order relates or is likely to improve the effectiveness and efficiency of transport within that area,
- the Secretary of State has consulted the persons described in subsection (4), and
- the Secretary of State has had regard to the need to reflect the identities and interests of local communities and to secure effective and convenient local government.

147. In addition:

- the Secretary of State may make an order providing for the dissolution of an ITA only where a majority of the county councils, unitary councils and district councils in the area of the ITA have given their consent (clause 79(6) and (7)),
- the Secretary of State may make an order changing the boundary of an ITA only where each of the councils described in clause 79(8) to (10) have given their consent.

148. The purpose of the powers in clauses 67, 72, 77 and 78 is to enable the arrangements made in each area for the exercise of statutory transport functions to reflect the needs of that area. The Government is committed to ensuring that the structures in place in each area reflect what works best for them, rather than a "one size fits all" approach imposed from the centre. There also needs to be the necessary flexibility to allow change to be introduced as and when it is needed for each area. This may mean new arrangements being introduced in different areas at different times, as the needs of different areas evolve and develop.

149. Clause 80 gives the Secretary of State power to make incidental etc provision for the purposes of orders under clauses 67, 72, 77 and 78, including a power to amend, repeal or revoke any enactment. The substance of clause 80 is based on provisions in sections 19, 20, 22 and 26 of the Local Government Act 1992 regarding structural and boundary changes to local government areas. Clause 80(3)(a), which enables the creation or imposition of new rights or liabilities in respect of anything transferred by or under an order, is precedented in section 100(2) of the Local Government Act 1985 and Schedule 3, paragraph 4 of the Regional Development Agencies Act 1998.

150. Clause 81 provides that orders under any of these clauses are statutory instruments and subject to affirmative resolution in each House of Parliament. This is the same procedure as is provided for in section 26(2) of the Local Government Act 1992 in relation to structural changes to local authorities.

Clause 73 Delegation of functions of the Secretary of State to an ITA

Clause 74 Delegation of local authority functions to an ITA

Clause 75 Conferral of a power to direct on an ITA

151. Clause 73 enables the Secretary of State by order to delegate to an ITA or its successor local authority any function of a Secretary of State, other than a legislative or fee-raising function, which is considered can be appropriately exercised by that ITA or local authority. The intention is that this power will be exercised on a case by case basis, according to what is appropriate in any particular circumstance. For instance, it might be the case that the Secretary of State will delegate to an ITA his functions as highway authority or traffic authority for a particular length of trunk road, where this provides a better fit with the management of the local road network. It is expected that the exercise of this power will depend on local circumstances, and may need to alter as circumstances change.

152. Clause 74 enables the Secretary of State by order to delegate to an ITA or its successor local authority any function of a local authority which is exercisable in relation to the ITA's area and which the Secretary of State considers can appropriately be exercised by the ITA or eligible local transport authority. Exercise of this power will enable an ITA to exercise specified functions of a local authority, where the Secretary of State considers that those functions can appropriately be

exercised by the ITA. The power is intended to be exercised on a case by case basis according to what is appropriate in any particular circumstances, and according to circumstances which may alter over time.

153. Clause 75 enables the Secretary of State by order to confer on an ITA, or the successor local authority to an ITA, a power to give a direction to a local highway authority or local traffic authority as to the exercise of their powers. The Secretary of State's power will enable him to give to an ITA or its successor local authority a power similar to that given to Transport for London by section 301A of the Highways Act 1980 (inserted by section 266 of the GLA Act 1999). It is however wider than that power in that clause 75(8)(e) could enable an ITA to require a local highway authority or traffic authority to exercise a power, provided that the ITA meets the authority's costs of complying with the direction.

154. The power for an ITA or its successor local authority to give a direction to a local highways authority might be used to ensure that proposed road works are modified to minimise disruption to public transport at peak congestion times, or to ensure that a local traffic authority continues a bus lane or cycle lane installed along a road by a neighbouring authority.

155. As set out in paragraph 149 above, clause 80 gives the Secretary of State power to make incidental etc provision for the purposes of an order under clauses 73 74 and 75, including a power to amend, repeal or revoke any enactment.

156. As set out in paragraph 150 above, clause 81 provides that orders under these clauses are statutory instruments and subject to affirmative resolution in each House of Parliament.

Clause 69: Power to direct a review: new ITA

Clause 71: Power to direct a review of arrangements

Clause 82: Further provision about directions

157. Clause 69 gives the Secretary of State power to direct two or more of the authorities mentioned in subsection (2) to undertake a review of transport functions in their area and to prepare and publish a scheme for the establishment of an ITA by order under clause 67. Clause 71 gives the Secretary of State power to direct one or more authorities mentioned in subsection (2) to undertake a review of transport functions in their area and to prepare and publish a scheme for the revision of any of the matters for which an order under any of clauses 72 to 78 may be made. Clause 82 provides that the directions must be in writing, and may make different provision for different cases.

158. The power of the Secretary of State to give directions is exercisable only where he considers that the review and any scheme are likely to improve the exercise of statutory functions relating to transport and/or the effectiveness and efficiency of transport. Any orders made by the Secretary of State under Chapter 2 of Part 5 of the Bill will only be made after he has taken into account facts established, and opinions formed, by local authorities in the area concerned, either in a voluntary review conducted under clause 68 or 70 or in a directed review conducted under clause 69 or 71.

159. No Parliamentary procedure is provided for the power of direction.

Clause 85 Repeal of power to reorganise functions of an ITA

160. Section 42 of the Local Government Act 1985 enables the Secretary of State, by order subject to affirmative resolution in both Houses of Parliament, to exclude a metropolitan district from a passenger transport area, to abolish a passenger transport area or to exclude a metropolitan district council from an ITA's constituent councils as respects functions of the ITAs other than those transferred to it from a metropolitan county council. This power is rendered otiose by the powers conferred on the Secretary of State by Chapter 2 of Part 5 of the Bill. It is therefore repealed.

Clauses 86 to 89: Power of ITAs to promote well-being

161. Clause 86 gives to Integrated Transport Authorities a power to do anything which they consider is likely to achieve any one or more of the objects of promoting or improving the economic well-being of their area, promoting or improving the social well-being of there area, and promoting or improving the environmental well-being of their area. A power in the same terms was given to local authorities in England and Wales by section 2 of the Local Government Act 2000.

162. Clause 87(3) enables the Secretary of State, by order subject to affirmative resolution in each House of Parliament, to prevent ITAs from doing under clause 86 anything which is specified, or is of a description specified, in the order. Clause 87(5) imposes a requirement on the Secretary of State to consult certain persons as he considers appropriate before making the order. These provisions reproduce for ITAs the provision in section 3 of the Local Government Act 2000.

163. Clause 88 contains a power which enables the Secretary of State, by order subject to affirmative resolution in each House of Parliament, to amend, repeal, revoke or disapply an enactment which he thinks prevents or obstructs ITAs from exercising their power under clause 68. Clause 88 reproduces in relation to ITAs the provision made in relation to local authorities by section 5 of the Local Government Act 2000.

164. Clause 89(1) and (2) requires the Secretary of State to consult certain persons as he considers appropriate before making an order under clause 88 and to lay before each House of Parliament a document which explains the proposals, sets them out in the form of a draft order, and gives details of the consultation he has undertaken. Clause 88(3) requires this document to be laid before Parliament at least 60 days before a draft Order under clause 88 is laid before Parliament. Clause 89 reproduces for ITAs the provision made by sections 4 and 5 of the Local Government Act 2000.

Clauses 90, 93, 95 and 96: Power of ITAs to make local charging schemes

165. Clauses 90, 93 and 95 enable Integrated Transport Authorities (ITAs) to make local road charging schemes jointly with one or more local charging authorities or London charging authorities. There is no proposal for ITAs to make a charging scheme independently of the local traffic authority for the roads which are to be subject to the scheme. Under section 108 of the TA 2000 as proposed to be amended by clause 7 of and Schedule 1 to the Bill, an ITA will be a local transport authority with the statutory function of developing policies for the promotion and encouragement of safe, integrated, efficient and economic transport in its area. It will therefore be appropriate for it to have the option, where it considers it appropriate, of joining with local authorities in its area to implement those policies through road charging schemes. Clause 96 introduces Schedule 5, which makes

consequential changes to the TA 2000 to take account of these new powers of ITAs to make a charging scheme.

Clauses 91, 92 and 94: Powers of local authorities to make charging schemes

166. Clauses 91, 92 and 94 alter the purpose for which local charging authorities can exercise their existing powers to make charging schemes or joint charging schemes. They provide that such schemes may only be made if they appear desirable for the purpose of directly or indirectly facilitating the achievement of the local transport policies developed in accordance with sections 108 and 113 of the TA 2000 as proposed to be amended by Part 2 of the Bill. The provisions are therefore consequential to the changes proposed by clauses 7 to 11. (The powers in clauses 90, 93, 95 and 96 for ITAs to make charging schemes contain equivalent provision as to the purposes for which schemes may be made.)

Clause 97: abolition of requirement for confirmation of English schemes

167. Clause 97 removes in England the requirement for a road charging scheme made by a local charging authority under the TA 2000 to be confirmed by the Secretary of State.

168. Responsibility for deciding on a local charging scheme in England as a whole (rather than just in London, as at present) will therefore lie with local authorities rather than with the Secretary of State. This ensures that local authorities who wish to develop local charging schemes are free to do so in a way that is best suited to local needs, within a framework of local accountability. The Secretary of State is retaining powers under section 193 of the TA 2000 to issue guidance to local charging authorities with respect to their functions in relation to charging schemes. The Secretary of State (in Wales, the Welsh Ministers) is taking new powers in clause 104 to require local charging authorities to supply him with information about schemes.

Clause 98: abolition of power to require consultation or inquiries for English schemes

169. Clause 98 removes in England the power in section 170 of the TA 2000 for the Secretary of State to require a local charging authority to consult other persons about a proposed charging scheme. The purpose of this power as originally formulated was to enable the Secretary of State to ensure that appropriate consultation had been carried out by a charging authority on a particular scheme before he decided whether or not to confirm that scheme under section 169 of the TA 2000. The removal by clause 97 of the Secretary of State's confirmation role therefore makes this power otiose. Charging authorities, when deciding whether or not to make a charging scheme, will be subject to the usual procedural requirements for decision-making in the Local Government Acts.

Clause 99: Charges

170. Clause 99 provides that, when making a charging scheme, a charging authority can include in that scheme provision which imposes a different level of charge according to the method or means of recording, administering, collecting or paying the charge. This will enable charging authorities to alter charges according to the costs of administering the means used for payment: for instance it is expected that a scheme could provide for electronically generated payments to be made at a discount.

Clause 100: Supplementary provision as to contents of a charging scheme

171. Clause 100(1) and (2) inserts a new section 172(2A) into the TA 2000. This will enable the Secretary of State (in Wales, the Welsh Ministers) to make regulations requiring charging authorities to accept payment from specific types of road user in a specific manner. For example, a road user might wish to be able to register with one scheme, install a particular form of technology, and make an administrative arrangement with a single body for payment to be made to other local charging schemes. The Secretary of State's power to make regulations could be used to ensure that a local charging authority makes the necessary arrangements ("interoperability") for this to be possible.

172. Section 197 of the TA 2000 provides that the exercise of this power is subject to annulment in pursuance of a resolution of either House of Parliament (negative resolution procedure).

173. Clause 100(3) provides that a road outside Greater London shall not be subject to charges imposed by more than one scheme at the same time. Clause 100(3), (5) and (6) provide that a road within Greater London may be subject to charges imposed by more than one scheme if the Greater London Authority consents: (in London, Transport for London and the London boroughs each have power to make separate schemes for the same roads, whereas outside Greater London powers of two authorities in the same area can only be exercised jointly, rather than singly).

174. Clause 100(7) makes provision in relation to the manner of payment of charges under a charging scheme under the Greater London Authority Act 1999 which is equivalent to that made for schemes under the TA 2000 by clause 100(1) and (2). Section 420(6) of the Greater London Authority Act 1999 makes the exercise of this power subject to annulment in pursuance of a resolution of either House of Parliament.

Clause 101: Suspension of charging schemes

175. Clause 101 inserts a new section 172A into the TA 2000. The new section enables a charging authority to temporarily suspend a scheme either in the event of an emergency or to enable or facilitate a temporary event to take place. This enables a charging authority to make appropriate provision where there is an event of a temporary nature which could be affected by the provisions of a scheme, or where there is an emergency and the response to that emergency could be affected by the provisions of a scheme. Subsection (4) requires the charging authority to publish notice of any suspension, and subsection (5) requires it to keep the suspension under review. Where alterations to a scheme are needed over a period longer than that provided for in this clause, it is expected that the charging authority will use its powers under section 168(2) of the TA 2000 to vary or revoke a scheme.

Clause 102: interference with equipment used for charging schemes

176. Clause 102(1) amends section 173 of the TA 2000 so as to make it a criminal offence not only to interfere with equipment used in connection with a charging scheme but to interfere with the functioning of such equipment. The new provision is intended to ensure that interference with an electronic signal from charging equipment is as much as an offence as interfering with the equipment itself.

177. Clause 102(2) amends section 174 of the TA 2000, so as to enable the Secretary of State (in Wales, the Welsh Ministers) to make regulations enabling or requiring charging schemes under the TA 2000 to contain provision enabling a motor vehicle

to be examined for the purpose of ascertaining whether the functioning of any equipment has been interfered with with intent to avoid payment of a charge.

178. This regulation-making power is made subject to annulment in pursuance of a resolution of either House of Parliament by section 197 of the TA 2000.

179. Clause 102(3) to (5) makes equivalent provision as respects the Greater London Authority Act 1999 to that made in clause 102(1) and (2) for the TA 2000, with the power to make regulations being subject to annulment in pursuance of a resolution of either House of Parliament by section 420(6) of that Act.

Clause 103: Use of equipment for charging schemes

180. Clause 103(2) amends section 176 of the TA 2000 so as to give the Secretary of State (in Wales the Welsh Ministers) power to to regulate the manner in which equipment is used in connection with a charging scheme. Regulations made using this power would be able to ensure that different schemes use standard data formats so that equipment is interoperable with that of other schemes, and that equipment identification numbers are not duplicated between different schemes.

181. Section 197 of the TA 2000 makes this regulation-making power subject to annulment in pursuance of a resolution of either House of Parliament.

182. Clause 103(4) to (8) amends paragraph 29 of Schedule 23 to the Greater London Authority Act 1999, which provides for approval by the Greater London Authority of equipment used in relation to a London charging scheme. The amendments to paragraph 29 enable the Secretary of State to give notice to the Authority that the use of equipment in connection with a London charging scheme is incompatible with regulations made under section 176 as amended. The effect of such a notice is that equipment subject to such a notice may only be used in connection with a charging scheme with the consent of the Secretary of State.

Clause 107: London charging schemes: 10 year plan for share

183. Clause 107 amends paragraphs 19 to 24 of Schedule 23 to the Greater London Authority Act 1999, which make provision requiring a charging authority to include in a scheme a general 10 plan for applying the net proceeds from a scheme, and to prepare 4 year programmes for applying those proceeds. Clause 107 removes the requirements for the 10 year plan and 4 year programmes to be approved by the Secretary of State.

Clause 108: Financial proceeds of schemes

184. Clause 108 introduces Schedule 6. Part 1 of Schedule 6 makes amendments to the financial provisions relating to road user charging and workplace parking levy schemes in Schedule 12 to the TA 2000. The amendments provide that all the net proceeds of any local charging scheme must be applied by the charging authority for the purpose of directly or indirectly facilitating the achievement of the authority's local transport policies. The Secretary of State's and Welsh Ministers' existing powers to make regulations as the use to be made of the net proceeds of certain schemes in certain circumstances are repealed. Paragraphs 9 to 11 in Part 2 of Schedule 6 make equivalent amendments to Schedule 23 to the GLA Act 1999.

185. Paragraph 12 of Schedule 6 provides that, where a charging scheme in London applies to a trunk road (which it may do so subject to the consent of the Secretary of State given under paragraph 9(7) of Schedule 23), a proportion of the net proceeds of the scheme may be paid to the Secretary of State to be available to him for the

purposes of directly or indirectly facilitating the achievement of any policies or proposals relating to transport.

Clause 109: Trunk road charging in Wales

186. Clause 109 amends Schedule 5 to the Government of Wales Act 2006 so as to insert a new matter in respect of the imposing of charges for using or keeping motor vehicles on trunk roads in Wales. The purpose of this clause is to enable the National Assembly for Wales to make provision for charging on trunk roads in Wales without being subject to the restrictions set out in section 167(2) of the TA 2000. Section 167(2) provides that a trunk road charging scheme may only be made in respect of bridges or tunnels over a certain length, or in connection with a charging scheme made by a local traffic authority.

Clause 111: Vehicles used without operator's licence: power to return detained vehicles

187. Clause 111 amends the regulation making power in paragraph 8 of Schedule 1A to the Goods Vehicles (Licensing of Operators) Act 1995. The effect is to clarify that regulations may prescribe circumstances in which a detained vehicle may be returned to the owner without an application being made to the traffic commissioner. The change is made to reflect the wording in new Schedule 2A to the PPVA 1981 (see note on clause 41 above).

Department for Transport

November 2007

Summary of the Delegated Powers in the Local Transport Bill [HL]

Clause	Delegated power	Conferred on	Exercisable by	Parl'y procedure	Para ref
1	An existing delegated power (to vary the number and geographical limits of traffic areas) is extended to include power to make incidental, consequential etc. amendments in order to give full effect to any such variation. This includes a power to amend or modify any enactment, whenever passed or made.	Secretary of State	Order	Affirmative	8-13
2	Existing power for the Secretary of State to appoint	Secretary of State	Appointment of traffic commissioners	None	14-16

	one traffic commissioner per traffic area amended to allow appointment of such number of commissioners for England and Wales as he considers appropriate (and one commissioner for Scotland)				
3	Power to appoint a senior traffic commissioner (STC), and if necessary a deputy or interim STC.	Secretary of State	Appointment of senior traffic commissioner	None	17-18
3	Powers for the STC to require traffic commissioners to act in such matters, and in such places, as he may require	Senior traffic commissioner	Deployment of traffic commissioners	None	19
3	Power for the STC to give general directions and guidance to traffic commissioners.	Senior traffic commissioner	Directions and guidance to traffic commissioners	None	20-22
3	An existing power for the Secretary of State to issue *directions* to the traffic commissioners is replaced with a power for him to issue *guidance* to the *senior* traffic commissioner	Secretary of State	Guidance to the senior traffic commissioner	None	23-24
4	Amendment of power for the Secretary of State to appoint deputy traffic commissioners in England and Wales	Secretary of State	Appointment of deputy traffic commissioners in England and Wales	None	25-26
6	New power to make provisions to	Secretary of State	Order	Affirmative	27-30

	give full effect to the amendments contained in clauses 1 to 5 including a power to amend or modify any enactment.				
17	Existing power to make regulations about quality partnership schemes extended to make provision about requirements relating to frequencies, timings or maximum fares	Secretary of State (England), Welsh Ministers (Wales)	Regulations	Negative	35-37
20	Existing role of Secretary of State in approving quality contracts schemes in England is transferred to an independent Approvals Board chaired by a traffic commissioner	Approvals Board	Decision of the Board	None	44
21	New power to make provisions about the procedure and deadline for the approvals process for quality contracts schemes in England	Secretary of State	Regulations	Negative	45-49
22	New power to make provisions about the practice of the approvals boards for England	Secretary of State	Rules	Negative	50-54
22	New power to make provisions as to the time within which any approvals board should normally reach decisions	Secretary of State	Regulations	Negative	50-54

23	New power to make provisions in respect of the holding of inquiries by Approvals Boards in England	Secretary of State	Regulations	Negative	55-60
25	Existing power to vary the period between making and coming into operation of a quality contracts scheme extended to allow certain other periods to be varied	Secretary of State (England), Welsh Ministers (Wales)	Order	Negative	61-65
27	Repeal of existing power to prescribe a maximum period between making of a quality contracts scheme and the issuing of invitations to tender	N/A	N/A	N/A	66-68
30	New power to make prescribe circumstances in which the continuation of a quality contracts scheme is to be exempt from the approvals process	Secretary of State (England), Welsh Ministers (Wales)	Regulations	Negative	70-73
35	Addition of one additional item to the list of matters which regulations about quality contracts schemes may, in particular, cover	Secretary of State (England), Welsh Ministers (Wales)	Regulations	Negative	74-76
36	Extension of existing power to make transitional provision about quality contracts schemes	Secretary of State (England), Welsh Ministers (Wales) [?]	Regulations	Negative	77-81
37	New power to issue guidance	Secretary of State	Guidance	None	82-83

	concerning performance by local authorities of their functions in relation to quality contracts schemes	(England), Welsh Ministers (Wales)			
39	Extension of existing power to make traffic regulation orders in respect of certain roads where necessary in order to provide facilities pursuant to a quality contract or quality contracts scheme	Traffic authority (as defined in section 121A of the Road Traffic Regulations Act 1984)	Making of traffic regulation orders	None	84-
41 and Schedule 3	New power to make regulations to implement a regime for the detention of certain PSVs used without PSV operators' licences	Secretary of State	Regulations	Negative	87 - 91
42	Determination of applications for registration where restrictions imposed by a quality partnership scheme are in force	Traffic Commissioners	Determination of applications for registration	None	92-95
42	New power to make regulations about procedural details relating to traffic commissioner determinations	Secretary of State (England), Welsh Ministers (Wales)	Regulations	Negative	96-97
43	Determination of applications for registration in area where a quality contracts scheme is in force	Traffic Commissioners	Determination of applications for registration	None	98-100
44	Existing power for traffic commissioners to apply traffic	Traffic commissioner	Making of traffic regulation conditions	None	101 - 102

	regulation conditions extended to cover anticipated problems				
45	Appellate role for appeals against traffic regulation conditions transferred from Secretary of State to Transport Tribunal	N/A	N/A	N/A	103-105
46	Extension of existing power to prescribe provisions in the hire car code which should apply when a private hire vehicle is being used to provide local bus services	Secretary of State	Regulations	Negative	108 and 112
47	New power to provide that section 12 of the Transport Act 1985 is to apply to vehicles licensed under section 7 of the Private Hire Vehicles (London) Act 1998	Transport for London	Order	None	110- and 113-114
47	New power to modify the taxi code and hire car code as they apply in London	Transport for London	Order	None	111 and 113-114
48	New power to require "designated bodies" to keep records with regard to community transport permits granted, varied or revoked by that body	Secretary of State	Order	Negative	116
51	New power to limit the validity of new	Secretary of State	Regulations	Negative	117-1189

	permits issued under sections 19 and 22 of the Transport Act 1985, and to specify a date after which all non-time-limited permits would be revoked				
54	New power to direct a local authority to provide information connected with the performance of its network management duty under sections 16 or 17 of the Traffic Management Act 2004, and to require the local authority to attend certain inquiries	Traffic commissioners	Directions to local authorities	None	121-125
55	Provides for a broader range of sanctions that may be imposed in respect of certain failures by bus operators	Traffic commissioners	Making orders in respect of sanctions	None	126-128
56	Existing power extended to allow imposition of restrictions on the use that may be made of certain records and information, and to create related criminal offences	Secretary of State	Regulations	Negative	129-132
57	Revival of powers for PTEs in certain circumstances to hire PSVs to operators	Passenger Transport Executives	N/A	None	133-134
64	New power to establish a Public Transport Users'	Secretary of State	Order	Affirmative	135-136, 138-139

	Committee for England, and to change, remove or confer new functions on the Committee or transfer functions of the Committee to another person				
64	New power to consider and make recommendations to the Secretary of State about matters relating to public passenger transport services in England	Public Transport Users' Committee (if established by Order)	Recommendations to Secretary of State	None	137
65	New power to confer additional functions on the Rail Passenger Council so as to extend its remit to prescribed local services and domestic coach services in England	Secretary of State	Order	Affirmative	140-143
67	New power to establish a new Integrated Transport Authority (ITA)	Secretary of State	Order	Affirmative	144
72, 77 and 78	New power to change the constitutional arrangements and boundaries of an existing ITA, or to dissolve an ITA	Secretary of State	Order	Affirmative	145-148
80	New power to make incidental etc. provision for the purposes of orders under clause 67, 72, 77 and 78, including a power to amend etc. any enactment	Secretary of State	Order	Affirmative	149
73, 74 and 75	New power to delegate functions	Secretary of State	Order	Affirmative	151-156

	of the Secretary of State, or local authority functions, to an ITA; and to confer on an ITA a power to give a direction to a local highway authority or local traffic authority as to the exercise of their powers. This includes a power to make incidental etc. provision, including a power to amend etc. any enactment				
69, 71 and 82	New powers for Secretary of State to direct authorities to undertake reviews	Secretary of State	Directions	None	157-158
85	Repeal of existing power to reorganise functions of an ITA	N/A	N/A	N/A	160
87	New power for the Secretary of State to prevent ITAs from doing under clause 86 anything specified, or of anything of a specified description under their power under clause 86 (power to promote well-being)	Secretary of State	Order	Affirmative	162
88, 89	New power for the Secretary of State to amend etc an enactment which he things prevents or obstructs ITAs from exercising their power under clause 86 (power to promote well-	Secretary of State	Order	Affirmative	163-164

	being)				
90, 93, 95 and 96	New power for ITAs to make local road charging schemes jointly with one or more local charging authorities or London charging authorities	Integrated Transport Authorities	N/A	N/A	165
91, 92 and 94	Revision to the purposes for which local charging authorities can exercise existing powers to make charging schemes or joint charging schemes	Local transport authorities	N/A	N/A	166
97	Repeal of existing requirement, in England, for a road charging scheme made by a local charging authority under the TA 2000 to be confirmed by the Secretary of State	N/A	N/A	N/A	167-168
98	Repeal of existing power to require a local charging authority to consult other persons about a proposed charging scheme	N/A	N/A	N/A	169
99	Amendment to existing power to clarify that a charging scheme may impose a different level of charge according to the method or means of recording, administering, collecting or paying the charge	Charging authorities under Part 3 of the TA 2000	N/A	N/A	170

100	New power to require charging authorities to accept payment from specific types of road user in a specific manner	Secretary of State (England), Welsh Ministers (Wales)	Regulations	Negative	171-174
101	Power to temporarily suspend charging schemes	Charging authorities under Part 3 of the TA 2000	N/A	N/A	176
102	Amendment to existing power so as to enable a motor vehicle to be examined for the purpose of ascertaining whether the functioning of any equipment has been interfered with, with intend to avoid payment of a charge	Secretary of State (England), Welsh Ministers (Wales)	Regulations	Negative	177-179
103	Amendment to existing power so as to enable the regulation of the manner in which equipment used in connection with a charging scheme is used	Secretary of State (England), Welsh Ministers (Wales)	Regulations	Negative	180-182
188. 107	189. Repeal of power to approve plans and programmes for use of proceeds of scheme in London	190. N/A	191. N/A	192. N/A	193. 183
108	Repeal of existing power to make provisions as to the use of net proceeds from certain charging schemes in certain circumstances, and	N/A	N/A	N/A	184 and 185

	provision of new power for proceeds of charging a trunk road in London to be paid to the Secretary of State				
109	Power for National Assembly for Wales to make trunk road charging schemes without being subject to the restrictions in section 167(2) of the TA 2000	The National Assembly for Wales	Measure	N/A	186
111	Minor amendments of existing regulation making power to enable circumstances to be clarified when detained vehicles may be returned	The Secretary of State	Regulations	Negative	187

APPENDIX 4: DRAFT LEGISLATIVE REFROM (LOCAL AUTHORITY CONSENT REQUIREMENTS) (ENGLAND AND WALES) ORDER 2007

Letter from the Committee's Delegated Legislation Adviser to the Department for Communities and Local Government

1. The Delegated Powers and Regulatory Reform Committee will consider this Legislative Reform Order (LRO) at its meeting on 17 October 2007. There are several questions about the LRO, on which it would be helpful to receive your advice before that meeting. I would ask you, therefore, to respond to the following points by close on Monday 15 October:

2. The third recital on the first page of the LRO states that, in accordance with section 11 of the Legislative and Regulatory Reform Act 2006, the National Assembly for Wales has agreed to the making of the Order. This is at variance with statements in the Explanatory Document (ED), e.g., at paragraph 3.7: "A Legislative Reform Order which removes functions of the Welsh Ministers can only be made with the Welsh Ministers agreement under section 11 of the Act." *Please explain why the LRO as laid refers to the National Assembly for Wales, and why it is thought that the LRO complies with section 11 of the Act as amended.*

3. As regards the main proposal in relation to the Cancer Act 1939, at paragraph 4.4 the ED states: "Local authorities should comply with the Code for Crown Prosecutors..." *Please state whether local authorities' compliance with the said Code is mandatory or discretionary; and, if mandatory, as a result of what requirements.*

4. As regards the supplementary proposal in relation to the Cancer Act 1939, at paragraph 4.9 the ED states: "The proposal (as set out in the supplementary consultation on 29 June 2006) to extend Section 4 (7) of the 1939 Act to include the metropolitan district councils in metropolitan areas will remove an anomaly rather than a burden." *Please explain how, in your view, an LRO under the 2006 Act may be used to remove an anomaly, rather than a burden.*

5. As regards the proposal in relation to the Local Government (Overseas Assistance) Act 1993 (the 1993 Act), the list of parties consulted shown at Annex A2 to the ED does not appear to include bodies representative of tax-payers, who might well be affected by local authorities' decisions on offering assistance to bodies overseas. *Please advise on whether such representative bodies have been consulted; if so, what views have been expressed by them; if not, why not.*

6. Also as regards the 1993 Act proposal, sub-section 1(7), which it is not proposed should be removed by this LRO, provides that the Secretary of State "shall provide local authorities with such guidance about the exercise of their powers under this section as he thinks appropriate". If the proposed repeal of existing sub-sections 1(3), 1(4) and 1(5) is effected, *please advise whether the Secretary of State intends to provide guidance under sub-section 1(7), e.g., about the level of expenditure on assistance which local authorities might incur under the 1993 Act.*

7. As regards the proposal in relation to the Education Act 1996, at paragraph 7.9 the ED states: "We are not aware of any applications to the Secretary of State or to the Welsh Ministers [to obtain consent to make arrangements for the consideration and disposal of any complaint that the local authority, or the teacher in charge of a Pupil Referral Unit, have acted unreasonably etc.]." Please say whether there have been systematic efforts to determine if such applications have been made, and comment on whether the apparent absence of any such applications tends to indicate either

that arrangements have been made without the requisite consent or that local authorities are not complying with the duty to make arrangements.

11 October 2007

Letter from the Department for Communities and Local Government to the Committee's Delegated Legislation Adviser

1. Thank you for your e-mailed letter of 11 October 2007, advising me that the Delegated Powers and Regulatory Reform Committee will consider the Legislative Reform Order at its meeting on 17 October. In order to inform its consideration, the Committee has asked a series of questions on the various consent regimes.

2. In order for officials to respond, I had to seek advice from the relevant Government Departments who have policy responsibility for the consent regimes, and colleagues have provided replies which are as full as possible given the short deadline for responses.

3. Taking the Committee's questions each in turn;

4. The third recital on the first page of the Legislative Reform Order states that in accordance with Section 11 of the Legislative and Regulatory Reform Act 2006, the National Assembly for Wales has agreed to the making of the Order. The Committee states that this is at variance with statements in the Explanatory Document e.g. paragraph 3.7 'an LRO which removes functions of the Welsh Ministers can only be made with the Welsh Ministers agreement under Section 11 of that Act.

'Please explain why the LRO as laid refers to the National Assembly for Wales, and why it is thought that the LRO complies with Section 11 of the Act as amended'.

5. Formal consent to the draft Order was given by the National Assembly for Wales (as section 11 of the Act, at that date unamended, then required) on 27 March 2007. Welsh legal colleagues were consulted, at the time of the coming into force of the Government of Wales Act 2006, as to whether a further resolution of the Welsh Ministers should be sought in relation to the draft Order. CLG was advised that no such formal resolution would be necessary (though it is believed a submission went to the relevant Minister for information). The retention of the previous name for the government of Wales in the recital reflects the true position and the recital was drafted with the knowledge of Parliamentary Counsel (who commented that it is hard to know what else could be said).

6. As regards to the main proposal in relation to the Cancer Act 1939, at paragraph 4.4 the Explanatory Document states ' local authorities should comply with the code for Crown prosecutions'.

'Please state whether local authorities' compliance with the said code is mandatory or discretionary and if mandatory as a result of what requirements?'

7. There is clear case law (R v Chief Constable of Kent ex parte L (1991) 93 Cr. App R 416) to the effect that 'the decision of the Crown Prosecution Service to continue or discontinue criminal proceedings was subject to a Judicial Review where it could be shown that the decision was made regardless of, or clearly contrary to, a settled policy of the Director of Public Prosecutions evolved in the public interest.

8. Therefore, there is no discretion to depart from the code for Crown prosecutors (which allows for a considerable exercise of discretion in any event).

9. As regards to the supplementary proposal in relation to the Cancer Act 1939, at paragraph 4.9 the Explanatory Document states 'the proposal (as set out in the supplementary consultation in June 2006) to extend Section 4(7) of the 1939 Act to include the metropolitan district councils in metropolitan areas will remove an anomaly rather than a burden.

'Please explain how in your view, an LRO under the 2006 Act may be used to remove an anomaly rather than a burden'

10. Since the abolition of the metropolitan county councils by the Local Government Act 1985, the duty to institute proceedings under Section 4(7) of the 1939 Act has not been exercisable by any local authority within metropolitan county areas. There is no logical reason to exclude part of the country from this Act and thus provide residents in those areas with a lower level of consumer protection. This amendment would simply correct an anomaly that arose unintentionally when metropolitan councils were abolished in 1985. It would ensure that the Act applied to England as a whole rather than parts of it only. The anomaly in itself is arguably burdensome in that it leaves the law in a state of inconsistency, prevents citizens in metropolitan district council areas from enjoying full rights as consumers, and prevents such councils from being able to offer full protection to their citizens.

11. By section 1(2) of the Legislative and Regulatory Reform Act 2006, the purpose for which legislative reform orders may be made is removing or reducing a burden or overall burdens resulting directly or indirectly for any person from any legislation; and under section 1(3), a "burden" includes "(b) an administrative inconvenience" and "(c) an obstacle to efficiency. . .". Subsection 1(5) goes on to provide that an administrative inconvenience may result from the form of any legislation. The Department considers that the anomalous situation arising as a result of the form of this legislation following the enactment of the Local Government Act 1985 creates an administrative inconvenience which is burdensome in the respects described above. The Department accepts that the Explanatory Document should perhaps have expressed this point more fully, and avoided the use of language deriving from the repealed Regulatory Reform Act 2001.

12. As regards to the proposal in relation to the Local Government (Overseas Assistance) Act 1993, the list of parties consulted shown at Annex A2 of the Explanatory Document does not appear to include bodies representative of taxpayers, who might well be affected by local authorities' decisions on offering assistance to bodies overseas.

'Please advise whether such representative bodies have been consulted if so, what views have been expressed by them if not, why not'

13. The CLG did not consult representative bodies. Any decision taken by local authorities in relation to offering assistance would be part of the council's budget approved by the council which is democratically accountable to local taxpayers. Moreover, councils are required when preparing a budget to consult businesses. Accordingly, the department did not consider it appropriate to attempt to seek representative views of council taxpayers across England & Wales.

14. In relation to guidance, the Secretary of State's approach is set out in paragraph 64-74 of the Local Government White Paper's Implementation Plan and makes it clear that guidance should be sector led. The Department for Communities and Local

Government is acting in consultation with the Local Government Association but currently has no proposals to issue formal guidance if the consent requirement in the 1993 Act is removed.

15. As regards the proposal in relation to the Education Act 1996, paragraph 7.9 of the Explanatory Document states 'we are not aware of any applications to the Secretary of State or the Welsh Ministers (to obtain the consent to make arrangements for the consideration and disposal of any complaint that the local authority or teacher in charge of a Pupil Referral Unit has acted unreasonably).

'Please state whether there has been systematic efforts to determine if such applications have been made, and comment whether the apparent absence of any such application tends to indicate either that arrangements have been made without the requisite consent or that the local authority is not complying with the duty'

16. The view was initially taken that arrangements for consideration of a complaint about the curriculum in a Pupil Referral Unit did not have to be made until such a complaint had actually been made. Consequently, the Secretary of State would only have to approve such arrangements if there was a complaint.

17. However when, for the first time, a local authority voluntarily sent to the Department for Children, Schools and Families ("DCSF") a copy of a curriculum complaints procedure for a new Pupil Referral Unit for the Secretary of State's approval, legal advice stated that paragraph 6(3) of Schedule 1 could be interpreted to mean that all Pupil Referral Units should have a curriculum complaints procedure when they are established and that Secretary of State approval should be sought for the arrangements.

18. Local authorities may not have been advised of this requirement; or this may not have been the original intention of paragraph 6(3) of Schedule 1 when enacted. DCSF suggest that it is possible that authorities may been making arrangements to consider curriculum complaints without the Secretary of State's approval (either at the outset when establishing a Pupil Referral Unit or when a complaint is made) but this does not imply that there is no burden, simply that such action is outside authorities' powers. To the extent that the fresh legal advice suggests that all authorities should have complaints procedures in place before any complaint is made, DCSF might need to advise an authority establishing a new Pupil Referral Unit that Secretary of State approval is required for the complaints procedure, or, alternatively, write to every authority requiring approval for such arrangements.

15 October 2007

Letter from the Committee's Delegated Legislation Adviser to the Department for Communities and Local Government

1. The Delegated Powers and Regulatory Reform Committee considered this Legislative Reform Order (LRO) at its meeting on 17 October 2007. The Committee agreed to recommend that the super-affirmative resolution procedure should apply to the draft Order and made this recommendation to the House on 17 October.

2. The Committee had before it my letter to you of 11 October, and your reply of 15 October. It asked that clarification be sought from your Department of the following points:

- in my letter of 11 October, I asked why the LRO as laid referred to the National Assembly for Wales, rather than to Welsh Ministers, and why it was thought that the LRO complied with section 11 of the Legislative and Regulatory Reform Act 2006 (the 2006 Act) as amended. Your reply of 15 October included the statement that "the retention of the previous name for the government of Wales in the recital reflects the true position and the recital was drafted with the knowledge of Parliamentary Counsel (who commented that it is hard to know what else could be said)." The Committee considered that your reply had still not demonstrated that the LRO is compliant with the 2006 Act. *Are you able to add anything to your earlier advice, such as whether there are transitional provisions in the Government of Wales Act 2006 that may be relevant?*

- in my letter of 11 October, as regards the proposal in relation to the Cancer Act 1939 ("the 1939 Act"), I asked you to state whether local authorities' compliance with the Code for Crown Prosecutors was mandatory or discretionary. In your reply of 15 October, you stated that "there is no discretion to depart from the code for Crown prosecutors", but you exemplified this with a case involving the Crown Prosecution Service, not a local authority. The Committee is aware that some local authorities have resolved to comply with this Code, which might seem to suggest that such compliance is discretionary. *Can you demonstrate clearly that local authorities' compliance with the Code is mandatory; alternatively, if it is discretionary, can you say what safeguards would apply if the proposal were implemented?*

- in my letter of 11 October, as regards the supplementary proposal in relation to the 1939 Act, I asked you to explain how an LRO under the 2006 Act could be used to remove an anomaly, rather than a burden. In your reply of 15 October, you stated the Department's view that "the anomalous situation arising as a result of the form of this legislation [the 1939 Act] following the enactment of the Local Government Act 1985 creates an administrative inconvenience which is burdensome in the respects described [earlier in your letter]." *Can you explain more clearly how enabling metropolitan district councils to institute proceedings under the 1939 Act can be seen as the removal of a burden in terms of the 2006 Act; and, in particular, which categories of person are thought to be affected by the burden, and why (as respects each category) there is thought to be "administrative inconvenience". Since the anomaly has arisen as a result of the enactment of the Local Government Act 1985, have you considered using powers under that Act to rectify the anomaly; and, if so, why have you decided not to use such powers (e.g., under section 101)?*

- in my letter of 11 October, as regards the proposal in relation to the Local Government (Overseas Assistance) Act 1993 ("the 1993 Act"), I asked whether the Secretary of State intended to provide guidance under section 1(7) of the 1993 Act, e.g., about the level of expenditure on assistance which local authorities might incur. In your reply of 15 October, you said that your Department currently had no proposals to issue formal guidance if the consent requirement in the 1993 Act were removed. *Given that the general authorisation, which would cease under this proposal, might be seen to provide benchmarks on expenditure to inform local authorities' decisions, can you say more about why you do not consider that*

guidance under section 1(7) of the 1993 Act would be useful if the proposal went ahead?

- in my letter of 11 October, as regards the proposal in relation to the Education Act 1996, I referred to paragraph 7.9 of the Explanatory Document to the LRO which stated that the Department did not know of any applications to the Secretary of State or to the Welsh Ministers to obtain consent to make arrangements for the consideration and disposal of any complaint in relation to Pupil Referral Units (PRUs). Your reply of 15 October confirmed this position; you explained that recent legal advice had suggested that all authorities should have complaints procedures in place before any complaint was made; and you said that this implied that the relevant Department (DCSF) might need to advise an authority establishing a new PRU that the Secretary of State's approval was required for the complaints procedure, or, alternatively, write to every authority requiring approval for such arrangements. *Given that the need to obtain approval from the Secretary of State should provide certain protection (e.g., a consistent approach among authorities, and re-assurance to a local authority as to the adequacy of its arrangements), can you say whether, if the proposal were implemented, the Department would intend to issue guidance in this matter to local authorities?*

3. It would be helpful if you could reply to this letter by 8 November 2007.

18 October 2007

Letter from the Department for Communities and Local Government to the Committee's Delegated Legislation Adviser

1. Thank you for your e-mailed letter of 18 October 2007, advising me that the Delegated Powers and Regulatory Reform Committee sought further clarification on the responses we had provided to your original letter, dated 11 October 2007.

2. In order to provide as full a response as possible we have again sought advice from the relevant Government Departments who have policy responsibility for the consent regimes.

3. Taking the Committee's questions each in turn;

"in my letter of 11 October, I asked why the LRO as laid referred to the National Assembly for Wales, rather than to Welsh Ministers, and why it was thought that the LRO complied with section 11 of the Legislative and Regulatory Reform Act 2006 (the 2006 Act) as amended. Your reply of 15 October included the statement that "the retention of the previous name for the government of Wales in the recital reflects the true position and the recital was drafted with the hard to know what else could be said)." The Committee considered that your reply had still not demonstrated that the LRO is compliant with the 2006 Act. Are you able to add anything to your earlier advice, such as whether there are transitional provisions in the Government of Wales Act 2006 that may be relevant?"

4. The Committee may already have had sight of my letter to the House of Commons' Regulatory Reform Committee, which set out in greater detail the analysis of why it is thought that the LRO complies with the 2006 Act. However, for ease of reference we repeat that analysis as follow.

5. The National Assembly for Wales, constituted under the Government of Wales Act 1998, gave agreement in March 2007 to the making of the Order, in accordance

with section 11 of the LRRA 2006 as it then stood. The amendments to section 11 by the Government of Wales Act 2006 (Consequential Modifications and Transitional Provisions) Order 2007 came into force on 25 May 2007, from which date section 11(2) was amended to require the agreement of the Welsh Ministers.

6. By virtue of paragraph 38(1)(c) of schedule 11 to the Government of Wales Act 2006, a "transferred function" (in paragraphs 39 and 40) means a function which is conferred or imposed on the Welsh Ministers by a provision of any Act in consequence of the amendment of that Act by or under the Government of Wales Act 2006. For present purposes, the agreement of Welsh Ministers under section 11 of the LRRA is a "transferred function".

7. By virtue of paragraph 39 of schedule 11 to the Government of Wales Act 2006, anything that was done by or in relation to the National Assembly constituted by Government of Wales Act 1998 for the purpose of or in connection with a transferred function has effect as if done by the transferee of the transferred function, the transferee here being the Welsh Ministers. The Department therefore considers that the requirement to gain agreement of Welsh Ministers under section 11(2) has been satisfied.

8. The relevant Welsh Ministers were consulted on and agreed the draft Order before it was presented to the National Assembly for Wales in March. Welsh Ministers appointed following the National Assembly elections in May have been briefed on the Order.

"in my letter of 11 October, as regards the proposal in relation to the Cancer Act 1939 ("the 1939 Act"), I asked you to state whether local authorities' compliance with the Code for Crown Prosecutors was mandatory or discretionary. In your reply of 15 October, you stated that "there is no discretion to depart from the code for Crown prosecutors", but you exemplified this with a case involving the Crown Prosecution Service, not a local authority. The Committee is aware that some local authorities have resolved to comply with this Code, which might seem to suggest that such compliance is discretionary. Can you demonstrate clearly that local authorities' compliance with the Code is mandatory; alternatively, if it is discretionary, can you say what safeguards would apply if the proposal were implemented?"

9. Advice from the Crown Prosecution Service ("CPS") confirmed that the Code is binding on CPS prosecutors and that, in addition, all Government prosecutors are also expected to comply with the principles of the Code. However, the CPS advised that it is a matter for local authorities whether they require their prosecutors to comply with the principles of the Code. The Department of Health has no information as to which specific local authorities require their prosecutors to comply with the Code.

10. However advice from the Local Authorities' Co-Ordinators of Regulatory Services is that local authorities' own enforcement policies are based on the Code, and that generally speaking authorities will already be familiar with their obligations in this respect. Thus although compliance is discretionary, it was considered superfluous (and inconsistent with the wider policy objective of conferring greater freedom in decision-making on local authorities) to spell out any additional criteria for prosecuting, on the face of the legislation, or to impose any additional requirements on authorities by way of further guidance.

"in my letter of 11 October, as regards the supplementary proposal in relation to the 1939 Act, I asked you to explain how an LRO under the 2006 Act could be used to remove an anomaly, rather than a burden. In your reply of 15 October, you stated the Department's view that "the anomalous situation arising as a result of the form of this legislation [the

1939 Act] following the enactment of the Local Government Act 1985 creates an administrative inconvenience which is burdensome in the respects described [earlier in your letter].” Can you explain more clearly how enabling metropolitan district councils to institute proceedings under the 1939 Act can be seen as the removal of a burden in terms of the 2006 Act; and, in particular, which categories of person are thought to be affected by the burden, and why (as respects each category) there is thought to be “administrative inconvenience”. Since the anomaly has arisen as a result of the enactment of the Local Government Act 1985, have you considered using powers under that Act to rectify the anomaly; and, if so, why have you decided not to use such powers (e.g., under section 101)?”

11. In so far as this amendment may be analysed as removal of a burden which is an administrative inconvenience, the Department takes the view that the amendment relating to metropolitan district councils removes a burden, which is an administrative inconvenience resulting directly (for certain councils) and indirectly (for the public in the areas of those councils) from section 4 of the 1939 Act. It therefore falls within sections 1(1), (2) and (3)(b) of the LRRA.

12. Since the abolition of the metropolitan county councils by the Local Government Act 1985, the duty to institute proceedings under section 4(7) of the 1939 has not been exercisable by any local authority within metropolitan county areas. The exclusion of metropolitan district councils was an unintentional consequence of the abolition of metropolitan councils under the Local Government Act 1985. The effect of this is that currently, under the 1939 Act, metropolitan district councils cannot bring proceedings under section 4 of that Act against persons who take part in the publication of any advertisement offering treatment, prescribing a remedy, or offering advice in connection with treatment, for cancer. Part of the country is therefore excluded from the protection provided by section 4

13. This anomaly is a burden for members of the public in areas of such councils in that the law in relation to them is left in a state of inconsistency, which may confuse them and ultimately leave them vulnerable to the very acts which section 4 of the Cancer Act 1939 was intended to prevent. There is no logical reason to exclude part of the country from this Act nor to provide residents in those areas with a lower level of consumer protection.

14. The administrative inconvenience is also a burden for metropolitan district councils themselves. Although currently, metropolitan district councils have general powers to prosecute under section 222 of the Local Government Act 1972, the test under that section is that they can do so where they consider it expedient for the promotion or protection of the interests or inhabitants for their area**.** They cannot, though, prosecute under section 4 of the 1939 Act. The extent of the powers under section 222 is comparatively less clear and can lead to protracted argument as to whether or not a particular case falls within those powers. It is by no means certain that an authority could bring a prosecution under that section for the sort of offence envisaged by section 4 of the Cancer Act 1939. It would be more straightforward, convenient and consistent if metropolitan district councils were able to prosecute under the same legislative provisions as other authorities for the same type of offence.

15. As an alternative to the analysis above, the Department avers that in its view, the proposed amendment to include metropolitan district councils in subsection (7) is supplementary or incidental to the repeal of section 4(6) and the amendment to section 4(7), which provides councils with the discretionary power to institute proceedings (rather than imposes a duty on them to institute proceedings). Listing the authorities to which the new procedure is to apply, in terms which are consistent

with the current state of local government structure, is incidental or supplementary to the establishment of the procedure itself.

While considering amendments to the 1939 Act to be included in the proposed RRO (now the LRO) it was discovered that, since the abolition of the metropolitan county councils by the Local Government Act 1985, the duty to institute proceedings under section 4(7) of the 939 Act was not transferred to any authority within metropolitan county areas in England. Use of powers under the Local Government Act 1985 was not considered in relation to this particular issue. The Department considers it is more appropriate to make the amendments to the metropolitan district council in the context of the amendments to section 4 of the 1939 Act as a whole in the one instrument.

"in my letter of 11 October, as regards the proposal in relation to the Local Government (Overseas Assistance) Act 1993 ("the 1993 Act"), I asked whether the Secretary of State intended to provide guidance under section 1(7) of the 1993 Act, e.g., about the level of expenditure on assistance which local authorities might incur. In your reply of 15 October, you said that your Department currently had no proposals to issue formal guidance if the consent requirement in the 1993 Act were removed. Given that the general authorisation, which would cease under this proposal, might be seen to provide benchmarks on expenditure to inform local authorities' decisions, can you say more about why you do not consider that guidance under section 1(7) of the 1993 Act would be useful if the proposal went ahead?"

16. Government policy on guidance and advice to local government has evolved since the current general consent was issued in 1996. As previously explained, the policy approach is set out in the Local Government White Paper Implementation Plan and reflects a commitment to keep guidance to the minimum. This is covered in paragraph 6.10 of the Explanatory Memorandum:

> *This legislation is out of line with current approaches and local authorities should be free to incur expenditure to provide advice and assistance, in a manner they deem appropriate. This approach is consistent with provisions in the power of well-being which enables authorities to incur expenditure, without limit, where it promotes social, economic or environmental well-being of the local community. Local authorities' expenditure is audited and they should be accountable to their communities for decisions, including on providing overseas advice and assistance, where this results in local authorities incurring expenditure. We believe that this maintains necessary protections.*

17. This is the backdrop to the current position not to issue further guidance following the removal of the consent requirement in the 1993 Act but, as previously stated, the matter will be kept under review in conjunction with the Local Government Association, and the Audit Commission will also continue to monitor local government expenditure in this as in other respects.

"in my letter of 11 October, as regards the proposal in relation to the Education Act 1996, I referred to paragraph 7.9 of the Explanatory Document to the LRO which stated that the Department did not know of any applications to the Secretary of State or to the Welsh Ministers to obtain consent to make arrangements for the consideration and disposal of any complaint in relation to Pupil Referral Units (PRUs). Your reply of 15 October confirmed this position; you explained that recent legal advice had suggested that all authorities should have complaints procedures in place before any complaint was made; and you said that this implied that the relevant Department (DCSF) might need to advise an authority establishing a new PRU that the Secretary of State's approval was required for the complaints procedure, or, alternatively, write to every authority requiring approval for such arrangements. Given that the need to obtain approval from the Secretary of State should

provide certain protection (e.g., a consistent approach among authorities, and re-assurance to a local authority as to the adequacy of its arrangements), can you say whether, if the proposal were implemented, the Department would intend to issue guidance in this matter to local authorities?"

18. The Department does intend to remind local authorities about the need to establish and publicise arrangements for the handling of complaints relating to curriculum offered in their PRUs. The Education (Pupil Referral Units) (Management Committees etc.) (England) Regulations 2007 – SI 2007 No.2978 have recently been made. The relevant regulation is regulation 23 "curriculum". Associated information will be issued to authorities explaining the requirements for establishment and operation of management committees for PRUs, both for authorities and PRU practitioners.

19. In brief, the local authority, the management committee and the head of the PRU will be required to jointly make and review the policy in relation to the curriculum for the PRU. It is thought sensible, therefore, for the local authority and the management committee (which will include the head of the PRU) also to make and publicise the arrangements for considering complaints relating to the curriculum. The explanatory information will make this point clear.

20. I hope that the additional responses, as laid out above will assist the Committee in its consideration of the draft Order. The Department is grateful for the comments received from both the Lords' and Commons' Regulatory Reform Committees, and subject to Parliamentary Counsel views, we will revise the footnotes to the Order and the Explanatory Note if there is an opportunity to do so in the course of the super affirmative procedure.

8 November 2007