

HOUSE OF LORDS

Delegated Powers & Regulatory Reform Committee

2nd Report of Session 2007-08

Alcohol Labelling Bill [HL]

Climate Change Bill [HL]

Children and Young Persons Bill [HL]

Kidney Transplant Bill [HL]

Regulatory Enforcement and Sanctions Bill [HL]

Government amendment:
Local Transport Bill [HL]

Government response:
Local Transport Bill [HL]

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session with the terms of reference “to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate 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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The members of the Delegated Powers and Regulatory Reform Committee are:

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Rt Hon. the Lord Boyd of Duncansby PC QC
The Lord Brett
The Viscount Eccles CBE
The Lord Faulkner of Worcester
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Contacts for the Delegated Powers and Regulatory Reform Committee

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Historical note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended 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.

Second Report

ALCOHOL LABELLING BILL

1. This private member's bill is in the same terms as that on which the Committee reported last session¹. There is nothing in any of the delegations which we wish to draw to the attention of the House

CHILDREN AND YOUNG PERSONS BILL [HL]

2. This bill is principally concerned with making changes to the functions of local authorities in relation to children and in particular those functions as they relate to children being looked after by the authority (Parts 1 & 2). The bill also makes provision for independent reviews of determinations about foster carers, and for a registration scheme for private foster carers (Part 3). It also amends the present arrangements for residence orders and special guardianship orders (Part 4). Apart from Part 1 and clause 12, the new provision made by the bill is introduced by way of amendment of existing Acts, mostly the Children Act 1989 and the Care Standards Act 2000.
3. The Department for Children, Schools and Families ('DCSF') have prepared a memorandum for the Committee explaining the delegated powers in the bill (printed at Appendix 1); DCSF have also provided a number of policy statements about their present intentions as to the exercise of some of those powers².
4. There are provisions in clauses 1, 7, 8, 11, 12, 13, 14, 16-19, 25, 29-31 and 39 conferring new, or affecting existing, delegated powers. In the great majority of these cases, where new powers are conferred - or existing powers are amplified - in earlier Acts, the negative procedure affords an adequate level of scrutiny, as it applies to comparable powers under those Acts. The affirmative procedure is (by virtue of clause 35(2) and (4)) provided for the more significant powers contained in clauses 1(6) & (7) and 12. Clause 1(6) enables Ministers to specify in regulations the care functions of local authorities which (subject to clause 2) may be contracted out under clause 1(1). Clause 1(7) enables regulations to provide for the bodies which are, and those which are not, bodies to which such functions may be contracted out. Clause 12 is dealt with below.

Henry VIII powers

5. Clauses 7, 12, 18 and 19 contain powers which are in effect Henry VIII powers. That in clause 7 (to make new subsections (6A) and (6B) of section 23 of the Children Act 1989 subject to regulations under subsection (6C)) merely re-enacts the same power as is presently conferred by the superseded

¹ 6th Report (2006-07) (HL Paper 61)

² Not printed, but available from the Printed Paper Office, the Library and at www.dfes.gov.uk/publications/childrenandyoungpersonsbill/

subsection (6), and remains subject to the same negative procedure. Clause 18(2) (new subsection (5B)(b)) contains a power, subject to negative resolution, to prescribe the meaning of “higher education” for the purposes of new subsection (5A), which reflects an almost identical power of definition in section 28(1) of the Teaching and Higher Education Act 1998. **We consider that the power in new subsection (5B)(b) should (like that in the 1998 Act) attract the affirmative procedure on its first exercise, because it will define the scope of the local authority’s duty under new subsection (5A).** Clause 19 inserts new section 23CA into the 1989 Act, which is (by virtue of subsection (1)(a)) to apply to a person who is “under the age of 25 or of such lesser age as may be prescribed”. As is explained in paragraph 73 of DCSF’s memorandum, the purpose of the power is to enable new section 23CA to be phased in, presumably by progressively increasing the upper age limit specified in regulations until the maximum age specified in section 23CA(1)(a) itself applies. We consider neither these delegations nor their level of scrutiny to be inappropriate.

Independent reviewing officers — clause 12

6. This clause is concerned with provision in relation to the training, accreditation, appointment and management of independent reviewing officers whose role is to monitor a local authority’s performance of its functions as respects any child it is looking after, and to discharge related duties (see clause 11, which substantially re-enacts existing provisions in section 26 of the Children Act 1989 as new sections 25A – 25C.) As is clear from pages 13 & 14 of the department’s policy statements, it is not yet known whether it will prove necessary to exercise this power at all; or, if so, whether these training etc. functions should be conferred on the Children and Family Court Advisory Support Service (‘CAFCASS’ - established under section 11 of the Criminal Justice and Court Services Act 2000) or on a new body.
7. Clause 12 is designed to leave all of these options open. It enables the Secretary of State to make an order establishing a new body corporate for the purpose, to confer on it functions of the kind set out in paragraphs (a) to (d) of subsection (2), and to make provision for transfers of property, rights and liabilities (including staff transfers), for a complaints procedure and for inspection of the new body by HM Chief Inspector of Education, Children’s Services and Skills. Alternatively, an order could provide for functions of the kind set out in subsection (2) to be conferred on CAFCASS. In either case, there is power for the order to make consequential amendments in other legislation, including Acts (subsection (7)), and to provide for the charging of fees (subsection (8)).
8. This is a wide power, particularly as the bill itself contains no provision about the constitution of the new body that may be established. Nevertheless, the functions which may be exercisable by the new body are tightly constrained by subsection (2), and the order will be subject to the affirmative procedure. Moreover, while the present need for the power is as yet uncertain, it is limited by the 7-year sunset provision in subsection (12). Accordingly, we consider neither the delegation nor the level of scrutiny to be inappropriate.

Visits to looked after children and others — clause 13(1)(b)

9. Clause 13 inserts a new section 23ZA into the Children Act 1989 (“the 1989 Act”) to place a duty on a local authority to ensure that children looked after by the authority, and certain other children and young persons, receive regular visits from a representative of the authority and that appropriate advice, support and assistance is made available to them.
10. The new section applies by virtue of subsection (1)(a) to any child being looked after by the authority; and subsection (1)(b) enables the Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales) by regulations to apply the duties imposed by that section in relation to “a child or young person ... who is of a description prescribed by regulations”.
11. We were however concerned by the extent of the power conferred by subsection (1)(b)(i). This power would enable the Secretary of State to prescribe any description of child or young person (other than ones already looked after by an authority) and there appears to be no definition of ‘young person’ for the 1989 Act as a whole. We are therefore encouraged to have received a supplementary memorandum from the department (printed at Appendix 2), in which they indicate that they intend to table an amendment to limit the scope of the power to children who immediately before entering custody were accommodated by them under section 20 of the Children Act 1989. A power limited in this way would not be inappropriate.

CLIMATE CHANGE BILL [HL]

Introduction

12. This bill was preceded by a draft bill published last session and considered by a pre-legislative scrutiny Committee of both Houses. The Joint Committee invited this Committee to comment on the delegations in the draft bill and our memorandum is both printed in their evidence volume³ and as Appendix 3 to this Report. The Department for Environment, Food and Rural Affairs (DEFRA) and the Department for Transport have prepared a memorandum for the Committee, explaining the delegated powers in the bill as now introduced and that memorandum is printed at Appendix 4.
13. In this Report, we first address how the Government have responded to the issues we raised on the draft bill and we then consider the new provision in the bill.

Matters raised on the draft bill by the Delegated Powers Committee**Alteration of carbon budgets — clause 16 of the bill**

14. When considering the draft bill, we noted that clause 13 envisaged that a carbon budget might be amended by order more than a year after the end of the budgetary period and we considered that no case had been made for the power to make retrospective changes of this nature. This concern was

³ Joint Committee on the Draft Climate Change Bill (2006-07), HL Paper 170-II, Ev182-3.

reflected in paragraph 77 of the Report from the Joint Committee, which recommended that the bill be amended to prohibit alterations to a carbon budget after the end of the budgetary period. Provision for altering carbon budgets is now contained in clause 16 of the present bill which, according to paragraph 76 of the departments' memorandum, now omits the provision about which the Committees had expressed concern. However, **the omission of the provision in question merely removes a limitation which the draft bill had placed on retrospective amendment of a budget; it does not clearly have the effect of prohibiting the amendment of a budget after the end of the budgetary period. We recommend that clause 16 be amended to make it clear that such an amendment is not permissible.**

International aviation or international shipping — clause 25

15. Under clause 15(2) of the draft bill (clause 25 of the bill) the Secretary of State had power to define by order (subject to negative procedure) what was to be regarded as “international aviation or international shipping” for the purposes of the clause. This definition serves to determine the scope of the clause as a whole and the extent of the power to make regulations conferred by subsection (3) and is thus in effect a Henry VIII power. We suggested that the order-making power should (like the regulation-making powers conferred by that clause) be subject to the affirmative procedure.
16. In relation to what is now clause 25 of the bill, the departments state at paragraph 4(b) of their memorandum that they “remains to be convinced” that the negative procedure is not appropriate and emphasise (at paragraphs 127-129) – as did we when commenting on the earlier clause – that the exercise of the power will be constrained by public law and international agreements. Nevertheless, the extent to which Part 1 of the bill should apply in the case of international aviation remains a matter of considerable controversy, and **we recommend that the order-making power at clause 25(2) should be subject to the affirmative procedure.**

Carbon units and carbon accounting — clauses 21 to 23

17. Under clauses 16 and 17 of the draft bill, the arrangements for “carbon accounting”, the amounts which could be set off against or added to the net UK emissions, were by way of a system of “carbon credits” and “carbon debits”, provision for which was left almost entirely to regulations. While we were persuaded that the delegation itself was not inappropriate, we recommended that the level of scrutiny (set by the draft bill as the negative procedure, except where an Act was being amended) should be the affirmative procedure on the first exercise of the powers. The Joint Committee went further and recommended that regulations under clause 16 should attract a super-affirmative procedure⁴. The present bill gives effect, in clause 23(2), to our recommendation but we note that the departments' memorandum (paragraph 114) does not mention the recommendation of the Joint Committee.

⁴ Report from the Joint Committee on the Draft Climate Change Bill (2006-07), HL Paper 170-I, paragraph 87.

Trading schemes — Part 3

18. The provision for trading schemes (to govern particular sectors of industry in their production or consumption of particular materials in the course of their business) was, in the draft bill, and remains now, the most significant range of delegated powers conferred. We expressed concern to the Joint Committee about the scope of the powers conferred by Part 3 of the draft bill and the extent of the provision which could be made under the powers conferred in Schedule 2. While acknowledging that the delegation might itself not be inappropriate, we were not persuaded that even the affirmative procedure would afford an adequate level of parliamentary scrutiny of the powers, given their scope.

Specific concerns

19. In our comments on the draft bill, we expressed concern that only the negative procedure would, by virtue of clause 31(3) of the draft bill, apply to the exercise of powers in that Schedule to provide for intrusive enforcement arrangements; and that it included powers to impose apparently unlimited financial penalties, to create offences without constraint as to mode of trial or maximum sentence, and to provide for appeals to the Secretary of State.
20. Clause 40(3) of the bill now requires the affirmative procedure where regulations confer new powers of enforcement, and paragraph 30 of Schedule 2 now imposes extensive constraints as to mode of trial and maximum penalties where offences are created. The bill has not however addressed our concerns about provision for civil penalties. While paragraph 187 of the memorandum suggests that the affirmative procedure would apply to regulations increasing all forms of penalties, clause 40(3)(f) of the bill in fact applies only to penalties for offences. **The departments have not made out the case for the breadth of this power. We note that the provision in paragraph 29 of Schedule 2 differs considerably from the approach taken in the Regulatory Enforcement and Sanctions Bill and we consider the former to be inappropriate in its complete lack of detail.**
21. Neither does the bill deal with (nor does the memorandum mention) our comments about provision for appeals, which under clause 40(3) could be made by regulations subject only to the negative procedure. **We recommend that the first exercise of the powers conferred by paragraph 31 of Schedule 2 should be subject to affirmative resolution.**

Level of parliamentary scrutiny

22. The Joint Committee responded to our concerns about the adequacy of parliamentary scrutiny and control over provision for trading schemes generally by recommending that a super-affirmative procedure should apply to the exercise of all powers of a kind listed in clause 31(3) of the draft bill (now clause 40(3) of this bill)⁵. The super-affirmative procedure is a two stage procedure: the Secretary of State first lays before Parliament a proposal for a draft order, to which either House may suggest amendments. He then

⁵ Report from the Joint Committee on the Draft Climate Change Bill (2006-07), HL Paper 170-I, paragraph 191.

lays the draft order itself for affirmative resolution. The draft order may or may not include any of the amendments (if any) suggested by either House.

23. The departments' memorandum does not refer to the Joint Committee's recommendation when dealing with the procedural safeguards which are to apply to the exercise of powers conferred in Schedule 2 (paragraphs 183 to 194). While referring to our concerns about the adequacy of arrangements in the draft bill for parliamentary control, the departments' memorandum merely welcomes our acknowledgment of the difficulty of requiring primary legislation for trading schemes, and summarises new requirements for consultation before regulations may be made under Part 3 (the additional requirement now in clause 40(1)(a)) and the obligation within Government to produce an impact assessment before making regulations of this nature (paragraph 183).
24. The legislative mechanism for the establishment of trading schemes is a difficult issue. We continue to acknowledge that the likely number and detailed content of trading schemes makes them unsuited to primary legislation, so that some delegation of powers for their provision is not inappropriate. But we remain concerned at the extent of the powers, given the possible consequences of such a scheme for economic performance in the sector to be regulated. **We consider that the right balance would be struck if the super-affirmative procedure were required for regulations making provision about the matters referred to in clause 40(3)(a), (b) and (d).**
25. In making this recommendation, we remind the House that the super-affirmative procedure has its limitations: i) unless the House sets up a specific scrutiny structure for such a provision, the proposal for the draft instrument lies on the Table without the House performing any specific scrutiny; ii) whether or not scrutiny takes place, the House has no power to amend the instrument – rather it suggests amendments to the Minister who makes the instrument; and iii) there is no mechanism for reconciling differences between the two Houses. **If the super-affirmative procedure is to be used effectively, it is essential that the House sets up a mechanism to scrutinise the first-stage proposal for the draft regulations.**
26. The powers conferred in Part 3 of the bill are now made exercisable by 'the relevant national authority' (defined in clause 39) rather than the Secretary of State (as in the draft bill). Clause 41 of, and Schedule 3 to, the bill introduce new arrangements for the procedural arrangements which are to apply in Parliament and in each of the devolved legislatures when an instrument subject to either the affirmative or the negative procedure is to be made by a single relevant authority or more than one such authority, or an Order in Council is to be made that (for instance) extends to two or more jurisdictions. **We draw this to the attention of the House so that, if the House adopts the course recommended at paragraph 24, it can consider what the implications might be for procedures in the devolved legislatures.**

Significant new delegations

‘Greenhouse gases’ — clauses 2(1)(b), 2(2)(b)(i), 19, 20 and 64

27. Whereas the main duty to be imposed on the Secretary of State with respect to the target for 2050 by clause 1(1) of the draft bill was by reference to a 1990 baseline defined by reference to “UK carbon dioxide emissions”, that baseline under clause 1(2) of the Bill relates to “targeted greenhouse gases”. “Greenhouse gases” is now defined in clause 64(1) by reference to the same list of gases as in the draft bill, but clause 64(2) contains a power enabling the Secretary of State to add further gases to the list by order subject to the negative procedure. “Targeted greenhouse gases” is defined in clause 19(1), as “carbon dioxide” or any other greenhouse gas designated by the Secretary of State by order, subject to the affirmative procedure.
28. Although the power conferred by clause 64(2) is a Henry VIII power, as the departments explain in paragraphs 267 and 268 of their memorandum, the power to add another gas to the list of greenhouse gases is constrained by subsection (3) in that it can only be exercised where it appears to the Secretary of State that the gas is recognised by an international or European agreement as contributing to climate change. We therefore consider the negative procedure to be adequate in this instance.

Waste reduction schemes — Part 5

29. Part 5 of the bill introduces entirely new provision for schemes to provide for incentives to occupiers of domestic premises to produce less waste and to recycle more of what they produce (clause 51 and Schedule 5), and includes provision requiring the piloting of such schemes in five local authority areas (clause 52) before any decision may be taken for the purposes of clause 54 about whether the schemes should be rolled out nationally; and, if they are not, Part 5 is to be repealed by order (clause 54(4)).
30. The provision which may be made by a local authority in its scheme is set out in a new Schedule 2AA inserted into the Environmental Protection Act 1990 by Schedule 5 to the bill. New Schedule 2AA confers powers on the Secretary of State to amend by order the pre-conditions for a scheme, the definition of “domestic premises” in paragraph 16(1) for the purposes of the Schedule, and the requirement in paragraph 7(1) that charges must not exceed the total cost of rebates and payments under the scheme. These Henry VIII powers are rightly subject to the affirmative procedure. There is also power (paragraph 12) for the Secretary of State to make regulations about the determination, collection etc. of charges in any case, which are to be subject to the negative procedure, including power in paragraph 12(2)(b) to make modifications of enactments. **We consider that this power should be subject to the affirmative procedure where it is used to amend an Act.** Paragraph 6(1) enables the Secretary of State to limit by order, subject to the negative procedure, the maximum level of charge in any financial year. In view of the controversial nature of the schemes generally, **we consider that the power at paragraph 6(1) should be subject to affirmative resolution on its first exercise and thereafter subject to affirmative resolution if it is exercised to increase charges other than to take account of changes in the value of money.**
31. An order under clause 54(2)(b) amending new Schedule 2AA before national ‘roll-out’ attracts the affirmative procedure, as does one which

repeals Part 5 of the bill should the Secretary of State decide not to apply the waste disposal scheme provisions nationally. Clause 54(3) enables amendments to Schedule 2AA to confer power on the Secretary of State to make subordinate legislation and **we consider that any such amendments should require any such subordinate legislation to be subject to a parliamentary procedure.**

Renewable transport fuels — Schedule 6

32. Schedule 6 to the bill amends Part 2 of the Energy Act 2004 to insert new provisions about renewable transport fuel (“RTF”) obligations, including (at paragraphs 2-4) new powers relating to the appointment of the administrator of the RTF scheme. These include provision about the establishment of a body corporate to act as administrator, its constitution, staff, expenditure and functions, and amplify and supplement existing provision presently in section 125 of the 2004 Act (which is replaced). Subject to one exception, the powers continue to be exercisable in an “RTF Order” under Part 2 of that Act, which attracts the affirmative procedure. The exception is the provision in new section 125C for the Secretary of State to appoint a new Administrator, whether himself, an existing body or a new body established for the purpose. Unless the order establishes a new body corporate (in which case it may include the same kind of provision for its constitution etc. as could be made by an RTF Order under section 125) or it amends primary legislation, it is to be subject only to the negative procedure. Neither the Explanatory Notes (paragraph 259) nor the memorandum (paragraphs 251-9) fully explain the circumstances in which it is envisaged that such a change of Administrator might be made and this concerns us, particularly because the original appointment by order under section 125 will have been approved by Parliament. **We draw this provision to the attention of the House as we consider that the case for an order under new section 125C to attract the negative, rather than the affirmative, procedure has not been made out.**

KIDNEY TRANSPLANT BILL [HL]

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

REGULATORY ENFORCEMENT AND SANCTIONS BILL [HL]

Introduction

34. This bill, among other things, enables subordinate legislation to prescribe, to an unprecedented extent, sanctions which may be imposed on those considered to have committed offences under a range of Acts or under subordinate legislation. The Department for Business, Enterprise and Regulatory Reform have provided a memorandum, printed at Appendix 5, on the delegations proposed in the bill.

Local Better Regulation Office — Part 1

35. Clause 1 establishes the Local Better Regulation Office (“LBRO”). It is to have a number of functions, some of which are mentioned in paragraph 6 of the memorandum.
36. In particular, the LBRO will have functions under Part 1 of the bill. These include:
- giving guidance to local authorities (as defined in clause 3) in England and Wales as to how to exercise their relevant functions (as described in clause 4) – clause 6;
 - giving directions to those local authorities relating to relevant functions – clause 7;
 - preparing lists of priority matters to which those local authorities must have regard – clause 11.

The LBRO will also have functions under Part 2 of the Bill. These include:

- nominating local authorities to be the “primary authority” for any particular regulated person – clause 23;
- dealing with references of questions under clause 26 (see Schedule 4), which can include giving directions to local authorities (see paragraphs 2(5), 3(2) and (5) and 7(1) of Schedule 4);
- giving guidance to local authorities about the operation of Part 2 – clause 31.

The Secretary of State may give the LBRO general or specific directions as to the exercise of its functions (clause 15).

“Relevant function” — clause 4

37. The functions of the LBRO are determined by reference to “relevant functions”, as defined in clause 4(1). This definition refers to the concept of a “relevant enactment”. “Relevant enactment” means the enactments specified in Schedule 3 (including subordinate legislation made under them) and regulations made under section 2(2) of the European Communities Act 1972 which relate to any of the matters set out in clause 4(3)(a) to (h). Neither the Explanatory Notes nor the memorandum indicate why the particular regulations under section 2(2) have not been specified in the bill itself, as has been done in Schedule 3 for the primary legislation. Any question whether any particular instrument falls within clause 4(3) is to be determined by direction of the Secretary of State, for which there is no prescribed publicity requirement (in contrast to directions under clause 15).
38. A direction under clause 4 has legislative character because it determines the scope of Part 1, if only in cases of doubt. **If it is not possible to list the relevant regulations under the 1972 Act in the bill itself, we consider that the Secretary of State should prescribe by statutory instrument subject to the negative procedure the regulations which fall within the matters set out in clause 4(3).**
39. Clause 4(4) enables the Secretary of State, by order subject to affirmative procedure:
- to add to, or remove from, the list in Schedule 3;

- to add to, or remove from, the list of matters in clause 4(3).

The altering of lists of this type by subordinate legislation is well precedented and in this instance is not inappropriate.

Guidance to local authorities: enforcement — clause 7

40. The LBRO may, by using the powers in clause 7, direct one or more local authorities to comply with:

- any guidance under clause 6 (clause 7(1)(a));
- any guidance under any enactment given by any other person if the guidance relates to the exercise of a relevant function (clause 7(1)(b)).

The consent of the Secretary of State (or Welsh Ministers, as appropriate) is required. Clause 15 enables the Secretary of State to give general or specific directions to the LBRO: the Secretary of State could direct the LBRO to direct an authority or group of authorities to comply with guidance.

41. As the direction under clause 7 is that any local authority to which it applies shall “comply with” the guidance, the power can be used to make mandatory, at least for some authorities, guidance which when sanctioned by Parliament in passing the Act under which it was issued was not mandatory. Under the statutory provision governing the issue of guidance, the local authority would typically be required only to have regard to it. Given the open-ended scope of clause 7(1)(b), it seems to us that the “guidance” concerned covers at least some provisions which, if made mandatory, would be of a legislative character.
42. In considering whether any parliamentary procedure need be applied to the guidance, both this Committee and the House will have considered whether or not it was mandatory. Making guidance mandatory changes the character of the guidance, and this is what the LBRO with the consent of the Secretary of State may, or at the direction of the Secretary of State must, do under clause 7. **We consider that the Minister should provide a list of the guidance to which clause 7(1)(b) refers; that the Secretary of State’s consent to directions under clause 7 should (if they will affect more than a single authority) be contained in an instrument subject to the negative procedure; and that directions by the Secretary of State under clause 15 requiring the LBRO to give directions to local authorities under clause 7 should (if they will affect more than a single authority) be given by an instrument subject to negative procedure.**

Power to dissolve LBRO — clause 17

43. Part 1 provides for the demise of the LBRO as well as for its establishment: clause 17 enables the Secretary of State, by order subject to affirmative procedure, to provide for the dissolution of the LBRO. This is a Henry VIII power (see clause 17(7)). The rationale for this is set out at paragraph 46 of the Explanatory Notes: “LBRO will be dissolved when it is deemed to have achieved its objective” and paragraph 24 of the memorandum.
44. Among the matters for which the dissolution order may provide is “the transfer of functions of LBRO to another person” (clause 17(2)(b)). The powers given to the LBRO by the bill are very considerable, including the

power to direct elected local authorities, yet it is proposed that the powers should be transferable to any person in the public or private sector, possibly including a body created specially for the purpose by subordinate legislation (clause 17(5)). **The department has not justified the power at clause 17(2)(b). Indeed, the justification for the main aspect of the power in clause 17 is that the job will have been done, in which case we would presume there would be no need to transfer the functions of the LBRO. We consider this power inappropriate unless the Minister can justify its retention.**

45. Paragraph 24 of the memorandum mentions the precedent of section 90 of the Clean Neighbourhoods and Environment Act 2005. That section is not comparable to clause 17 as it concerns a body with a limited remit, the Commission for Architecture and the Built Environment, which has no powers of direction.

Co-ordination of regulatory enforcement — Part 2

46. The purpose of Part 2 is described in paragraphs 26 to 28 of the memorandum. Clause 22(1)(b) and (c) enables the Secretary of State, by order subject to negative procedure, to prescribe, for Scotland and Northern Ireland, the functions for reserved/non-transferred matters which are “relevant functions” for the purposes of Part 2. The orders will effectively determine the scope of Part 2 for Scotland and Northern Ireland. Paragraph 30 of the memorandum explains that the power “merely allows the Secretary of State to specify a subset of the enactments in Schedule 3” but clause 22 does not confine the powers of the Secretary of State in this way. **If the power were limited to the purpose set out in the memorandum, then the negative procedure would be sufficient. If the power is not so limited, then we consider that it should be subject to affirmative resolution.**

Civil sanctions — Part 3

Purpose

47. Schedule 5 to the bill lists a number of regulators. Schedule 6 to the bill lists a number of criminal offences by reference to the statutory provisions imposing the offence. Some of these offences are triable in England and Wales only in the magistrates’ court. Others (offences triable “either way”) are triable either in the magistrates’ court or in the Crown court. The Crown court has the power to impose higher sentences. But in all contested cases the current situation is that the guilt of the alleged offender must be proved beyond reasonable doubt and the sentence given will be imposed by the court in the light of the circumstances of the case and of the offender. The maximum penalty on conviction is specified in the legislation creating the offence.
48. The purpose of Part 3 of the bill is to enable Ministers of the Crown to confer on regulators power to impose sanctions as an alternative to prosecuting the offender through the criminal courts. There are two categories of regulator on whom powers may be conferred. The first category is the “designated regulators” i.e. those listed in Schedule 5. Powers can be conferred on those regulators for any offence (under any Act) for which they have enforcement functions and which exists when the bill is passed. The

second category is the other regulators. Those regulators are ones that have enforcement functions relating to offences existing when the Bill is passed and created by an enactment specified in Schedule 6. The Crown Prosecution Service, the police and the others specified in clause 35(3) are excluded. So in practice this second category will comprise largely local authorities and Ministers.

49. The scheme under Part 3 must be distinguished from the two types of “civil sanctions” scheme which are more commonly to be found in existing legislation:
- (a) the system under which the offender is given the option of paying a fixed penalty as an alternative to being prosecuted and being heard in the criminal courts, but under which he may always choose to proceed to the criminal courts (e.g. selling alcohol to children);
 - (b) the system under which the behaviour in question is decriminalised altogether, i.e. the behaviour is no longer a criminal offence and it can no longer be prosecuted in the criminal courts at all, but penalties are payable if the offender is found to have contravened the statutory provision concerned (e.g. parking contraventions in London and some other parts of the country).
50. Clause 34 enables a Minister of the Crown (or Welsh Ministers), by order subject to affirmative procedure, to confer on regulators a range of powers, i.e.:
- to impose fixed monetary penalties (clause 37);
 - to impose discretionary requirements (clause 40);
 - to prohibit the carrying on of activities until specified steps have been taken (clause 44);
 - to accept undertakings to take action to secure that an offence does not continue or recur etc. (clause 48).
51. Under the bill, it will be for the regulator to take a view on whether an offence has been committed beyond reasonable doubt (fixed monetary penalties and discretionary requirements); that activity involves or is likely to involve the commission of an offence (stop notices); or that there are reasonable grounds to suspect that an offence has been committed (enforcement undertakings). At the first independent examination of the case (on appeal) it is for the defaulter to show that the regulator’s view was wrong, on a specified ground of appeal. This is different from what would happen on a prosecution (which remains an option for the regulator). On a prosecution it would be for the regulator to prove the case to the court beyond reasonable doubt. Yet the penalties which might be awarded under the bill could exceed the fine which would be likely to be imposed by a court on a conviction.

Role of this Committee

52. The question for this Committee has not been whether it is right to impose on such a scale civil sanctions which might be more severe than the existing criminal penalties likely to be imposed. The question has been whether it is appropriate to delegate to Ministers the power to confer power to impose those sanctions within the constraints of the bill. In doing so, we have of course had to have regard to the nature and impact of the policy. In their Report on this bill, the Constitution Committee said:

“The scheme envisaged in the bill will enable the transfer, on an unprecedented scale, of responsibilities for deciding guilt and imposing financial sanctions (with no upper limit) away from independent and impartial judges to officials.”

and:

“There will be no requirement for a notice of intent or an opportunity to make representations where a regulator wishes to impose a fixed monetary penalty. We are unconvinced that this meets the minimum standards of procedural fairness an accused person ought to have in relation to what are ostensibly criminal offences. The bill as currently drafted risks excluding a basic common law principle of natural justice: *audi alteram partem* (hear both sides before making a decision). The onus will be placed on the individual or company to seek first an internal review and then an appeal to the First-tier Tribunal (the new general purpose tribunal established by the Tribunals, Courts and Enforcement Act 2007).”⁶

These concerns have affected our consideration of the delegations, particularly those proposed in respect of stop notices and compensation (clauses 44 and 46) and appeals (clause 52).

General criteria for the conferral of Part 3 powers

53. Paragraphs 54 and 55 of the memorandum seek to justify conferring the powers in Part 3 by subordinate legislation. We accept that if the powers are to be given to different regulators at different times and/or for different offences at different times, subordinate legislation is the only practical way to proceed. Paragraph 54 of the memorandum suggests that the regulator will have to comply with certain principles before the Secretary of State will make an order under clause 34 in relation to that regulator, notably that the regulator has satisfied the Secretary of State that it complies with the Hampton principles of better regulation. **If the House intends that the powers in Part 3 should only be conferred in particular circumstances, then those circumstances should be set out in the bill.**
54. Though the range of regulators and offences to which Part 3 applies is considerable, and this is relevant in considering the powers, we note that it is open to the House to amend the bill if it considers there are any particular items in Schedule 5 or Schedule 6 to which the arrangements should not apply.
55. The issue for us is whether the framework in the bill gives a sufficient indication of the overall policy. In many respects, the bill sets out the principle of what an order under Part 3 must secure with considerable particularity. Examples are at clauses 38, 39, 41, 42(1) to (3), 43(3) and (4), 45 and 46(3). We comment below on our particular areas of concern but, in general, the affirmative procedure should provide an adequate safeguard against inappropriate use of the power, if combined with some amendments to the bill.

⁶ Select Committee on the Constitution, First Report (2007-08), HL Paper 16, paragraphs 7-12.

Fixed monetary penalties — clause 37

56. Fixed monetary penalties are intended to be imposed for low-level instances of non-compliance (paragraph 8 of the Explanatory Notes). The penalty is fixed: it will not relate to the severity of the offence or to the circumstances of the case.
57. Clause 37 leaves to the order the amount of the penalty, or the criteria by reference to which it is to be calculated. Though clause 37(4) provides that, for an offence triable only summarily, the penalty cannot exceed the maximum fine, there is no maximum for offences which can also be tried on indictment (“either way” offences). We are not persuaded that this distinction is justified. **The bill should specify that the maximum amount payable as a fixed monetary penalty may not exceed the maximum amount payable if the offence had been tried summarily.**

Discretionary requirements — clause 40

58. For a monetary penalty imposed as a discretionary requirement, there is no maximum in the bill, even when the offence is triable only summarily and there would therefore have been a maximum if the penalty had been imposed under clause 37. This is also significant in the context of any late payment penalty under clause 50, since the cap on the late payment penalty operates by reference to the amount of the original penalty. We accept the lack of an upper limit for either-way offences. **Unless the Government can make the case for the lack of an upper limit for offences which can only be tried summarily, the bill should specify that the maximum amount payable in such cases may not exceed the maximum amount payable if the offence had been tried summarily.**

Stop notices — clause 44

59. Clause 44 enables an order to confer power on a regulator to stop activity in certain circumstances when he reasonably believes that the activity involves or is likely to involve the commission of an offence. This is a powerful weapon for a regulator and potentially of enormous significance to the regulated person.
60. The acceptability of the delegation depends on the robustness of the compensation arrangements but clause 46 leaves it to the order to state the cases in which compensation will be awarded. In particular there is power for the order to provide that compensation is payable only in prescribed cases. **This is insufficient: for the stop notices delegation to be acceptable, the bill itself must specify the essential elements of the compensation arrangements which the House considers necessary. In particular, the bill should specify the result which any order making provision under clause 46 needs to secure.**

Appeals — clause 52

61. The rights of appeal are fundamental to the scheme which can be introduced by orders under this Part because the appeal tribunal is in effect taking the place of the magistrates’ court or Crown Court which otherwise would be dealing with the alleged offence. Until the appeal stage, all the decisions (including those taken on internal review under clause 38) are taken by the regulator.

62. The order must specify the appeal tribunal, and we accept the flexibility to prescribe some other tribunal than the First Tier Tribunal, but the bill is not otherwise prescriptive about the powers of the appeal tribunal. Clause 52(3) and (4) give an indication of matters for which the order may provide but, in contrast to some of the preceding clauses, clause 52 does not require the order to secure any particular result. **The rights of appeal are of fundamental importance to the fairness of this scheme. The bill itself should specify at least the minimum items which any order making provision under clause 52 needs to secure.**

Supplementary provision: information and entry — clause 53

63. Clause 53 enables an order, by way of supplementary provision, and for the purposes of facilitating the use of powers conferred by the order, to confer powers to require information and to confer powers of entry, search and seizure. The power at clause 53(3)(b), to authorise the use of information in evidence which could not otherwise lawfully so be used, seems to us particularly hard to justify; indeed the memorandum makes no attempt to justify any of the powers at 53(3). **We draw this to the attention of the House so that the House might seek a justification of the powers from the Minister. Without such a justification, we consider these broad delegations inappropriate, though they might appropriately be replaced by more comprehensive provision on the face of the bill or a more limited power.**

Offences under subordinate legislation — clause 60

64. The power at clause 34, so far as it relates to regulators who are not in the list in Schedule 5, does not apply to offences contained in subordinate legislation, since Schedule 6 lists only provisions of Acts. Clause 60 enlarges existing powers of Ministers to create criminal offences. All of the powers to create criminal offences listed in Schedule 7 will, under the bill, automatically include power to make, in relation to the offence, any provision which could be made in relation to regulators and offences under the provisions of Acts listed in Schedule 6 by an order under clause 34. But the regulations or orders making that provision will not be orders under Part 3 of the bill and so will not automatically attract the affirmative procedure. The procedure prescribed by the relevant enactment in Schedule 7 will apply, which in many cases will be the negative procedure. **We consider that the affirmative procedure should apply to all orders and regulations that make the provision mentioned in clause 60.**

LOCAL TRANSPORT BILL [HL]: GOVERNMENT AMENDMENT

65. We reported on this bill in our First Report (HL Paper 11). The Government have now invited us to consider an amendment to be moved in Grand Committee, printed on HL Bill 1(a). The Department for Transport have provided a supplementary memorandum on the amendment, printed at Appendix 6. There is nothing in the amendment which we wish to draw to the attention of the House.

LOCAL TRANSPORT BILL [HL]: GOVERNMENT RESPONSE

66. We reported on this bill in our First Report (HL Paper 11) and the Government have now responded by way of a letter to the Chairman from the Rt Hon. Rosie Winterton MP, Minister of State, Department for Transport, printed at Appendix 7.

APPENDIX 1: CHILDREN AND YOUNG PERSONS BILL [HL]

Memorandum by the Department for Children, Schools and Families

Introduction

1. This Memorandum identifies the provisions in the Children and Young Persons Bill which confer powers to make delegated legislation. For each power, or where appropriate, group of powers, the memorandum explains:
 - the purpose of the delegated power;
 - why matters are to be left to delegated legislation;
 - the way in which the power is expected to be used, and;
 - the nature and justification for the Parliamentary procedures which apply.
2. For the most part, the descriptions of the powers are arranged in the order that the powers appear in the Bill. In some cases, where powers are directly related, they are described together (with cross-references in the text as appropriate).
3. The Department has prepared a number of policy statements relating to the Bill to aid the process of Parliamentary scrutiny and provide further clarity about the proposed use of delegated powers. These have been circulated to members of the Committee alongside this memorandum for reference. Copies have also been placed in the library of both Houses.

The Delegation of Powers

4. In deciding whether subordinate legislation is the appropriate vehicle for any particular provision, the Department has been guided by the following criteria:
 - the desirability of not putting detailed provision on the face of the Bill;
 - the precedent of existing children's legislation, particularly the Children Act 1989; and
 - the need to ensure flexibility to respond to changing circumstances; and
 - the need to present substantive policy clearly in primary legislation.
5. The majority of the powers are regulation making powers, exercisable by the Secretary of State in relation to England, and by the Welsh Ministers in relation to Wales, and where this is the case, we have referred to the powers being exercised by "the appropriate national authority". However, in one instance the Bill requires the power to be exercised jointly and the rationale for this is explained. In addition, clause 11(1), which inserts new section 25C in the Children Act 1989, contains a power that relates to CAF/CASS⁷ functions, exercisable by the Lord Chancellor in relation to England and by the Lord Chancellor with the consent of Welsh Ministers in relation to Wales.

Background

6. The legislative framework for the provision of children's services is largely set out in the Children Act 1989. Part 3 of and Schedule 2 to the Children Act 1989 provide

⁷ The Children and Family Court Advisory Support Service

- for local authority services and support; Part 4 sets out provisions relating to care orders and supervision orders; and Part 5 deals with child protection. The Care Standards Act 2000 provides for registration of residential family centres, fostering agencies, voluntary adoption agencies and children's homes (amongst other providers of social care); regulation of these agencies and establishments through regulations made under that Act and through national minimum standards ("NMS"); and for inspection and enforcement of regulations and NMS by the Chief Inspector of Education, Children's Services and Skills ("Chief Inspector").
7. The Children Act 1989 has been amended in a number of respects. Important amendments have been made to Parts 3-5 in particular by the Children (Leaving Care) Act 2000, the Adoption and Children Act 2002 and the Children Act 2004. The Children and Young Persons Bill makes further amendments to this legislation, and in addition it amends the Care Standards Act 2000.
 8. In June 2007 the Government published a White Paper, *Care Matters: Time for Change*. This set out the Government's plans to improve the outcomes of children and young people in care by reforming the care system. The White Paper built on the proposals in the Green Paper, *Care Matters: Transforming the Lives of Children and Young People in Care* which was published for consultation in November 2006 and the conclusions of four working groups established to investigate best practice in supporting those in care. The White Paper included a commitment to amend the legislative and regulatory framework for looked after children including amendments to the statutory guidance and NMS.
 9. There exists already a substantial body of subordinate legislation made under the Children Act 1989, and Government has committed to consolidate some of this by "*bringing together all the requirements for care planning in one set of regulations and issuing accompanying statutory guidance as part of the revised Children Act 1989 guidance.*"⁸ Some of the new powers conferred in the Bill are intended to be exercised through these new care planning regulations.

Overview of the Bill

10. The primary purpose of the Bill is to deliver those aspects of the White Paper commitments that require primary legislation. The Bill also includes provisions in relation to private fostering, child death notifications to Local Safeguarding Children Boards, emergency protection orders and the powers of the Secretary of State to conduct research.
11. The Bill has five Parts which are summarised below; fuller descriptions can be found in the Explanatory Notes to the Bill.
 - Part 1 (clauses 1-6) provides for arrangements for the provision of social work services for children and young persons.
 - Part 2 (clauses 7-28) of the Bill, which principally amends Part 3 of the Children Act 1989, concerns the duties of local authorities when providing accommodation for children they look after; extends the powers of local authorities to make cash payments to children in need and their families; and provides for the appointment and functions of the independent reviewing officer ("IRO"), including a power to establish a national IRO service. It provides for the arrangements to be made for visits by local authority representatives to children and young persons living away from home; and for the appointment of independent

⁸ Care Matters: Time for Change page 25 paragraph 1.32

visitors for looked after children. In addition it imposes a duty on governing bodies of maintained schools to designate a member of staff for looked after children at the school and extends the entitlements of former relevant children to the appointment of a personal adviser and other assistance in connection with education or training. It amends the Care Standards Act 2000 to make provision for the enforcement of care standards in children's homes and other settings. It imposes a new duty on registrars of births and deaths to provide information to Local Safeguarding Children Boards regarding child deaths. It amends the powers of the Secretary of State to carry out research on the functions of local authorities. It removes restrictions on the court's powers to hear an application for the discharge of an emergency protection order.

- Part 3 (clauses 29 to 31) amends Schedule 2 to the Children Act 1989, to allow for the independent review of decisions on the suitability of foster parents; and makes some minor amendments to the provisions of the Adoption and Children Act 2002 that relate to the independent review of "qualifying determinations"⁹ under that Act. Clause 31 extends the period allowed for making regulations to establish a registration scheme for private fostering.
- Part 4 (clauses 32 to 34) makes amendments to Part 2 of the Children Act 1989 in relation to residence orders and special guardianship orders.
- Part 5 contains general and final provisions.
- There is one Schedule that deals with repeals.

Delegated Powers

12. This section covers the provisions that contain powers to make regulations, in two instances to issue statutory guidance and powers in relation to commencement. The Department has considered on a case by case basis the appropriate procedure to be followed when exercising delegated powers. In most cases it is considered that the matters are of technical or procedural detail, and in keeping with this view, all powers, with three exceptions, are made subject to the negative resolution procedure. The statutory procedure adopted for regulation making powers in clauses that amend provisions of the Children Act 1989 are consistent with the procedures for the powers in those provisions.
13. In addition this section explains the broad order making powers in Clause 12 to establish a new body or confer additional functions on CAFCASS in relation to Independent Reviewing Officers.

⁹ A determination that a prospective adopter is not suitable to adopt a child (regulation 27(4)(a) of the Adoption Agencies Regulations 2005, SI 2005/389) or, in the context of the disclosure of information related to an adoption on or after 20 December 2005, a determination not to proceed with an application for disclosure of protected information, a determination to disclose information against the express wishes of the person the information is about, or a determination not to disclose information where the person the information is about has expressed the view that the information should be disclosed (regulation 15(1) of the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005, SI 2005/888).

Part 1: Delivery of Social Work Services for Children and Young Persons

General

14. Part 1 of the Bill enables local authorities to enter into arrangements with a body corporate (referred to as a “provider of social work services” - clause 1 (3)) for the discharge by that body of some or all of the authority’s “relevant care functions”, that is its social services functions in relation to:
- individual children who are looked after by the authority; or
 - those children who were but are no longer looked after by it;
 - relevant children; former relevant children; and persons entitled to advice and assistance under section 24 of the 1989 Act (clause 1(2)).
15. Clause 6 enables the piloting of arrangements under Part 1 for a period of up to five years in particular local authorities. It is the Department’s intention to run a small number of pilots and then, subject to evaluation of those pilots, to decide whether to enable all local authorities to enter into such arrangements; or withdraw plans to enable local authorities to enter into arrangements for the discharge of their care functions.

Delegated powers in Part 1

Clause 1: Power to enter arrangements for the discharge of care functions

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: regulations made by Statutory Instrument

Parliamentary procedure: Clause 1(6) and (7) affirmative; clause 1(8) negative resolution

16. Clause 1 provides a power for local authorities to enter into arrangements with a provider of social work services for the discharge of their relevant care functions. The relevant care functions which may be the subject to arrangements are set out *subsection (2)*.
17. *Subsection (6)* provides that a provider of social work services must have regard to any guidance applicable to the discharge of those functions issued by the appropriate national authority under section 7 of the Local Authority Social Services Act 1970. The appropriate national authority has power under this provision to issue guidance to local authorities on the exercise of their social services functions (as defined) including the exercise of any discretion conferred by any enactment which local authorities must act under. This will ensure that it should make no difference in principle to the child or young person receiving services whether the services are provided by the local authority or by a provider of social work services.
18. *Subsection (6)* confers a power to make regulations to specify other social services functions which are, or are not, to be treated as relevant care functions. This power will enable Government to respond to evidence and any issues arising from the pilots as to the nature of the functions which may be delegated. Given the nature and sensitivity of the functions in question, it is appropriate for the exercise of this power to be subject to further Parliamentary scrutiny in advance.
19. The provider of social work services cannot be a local authority, (*subsection (3) (a)*). *Subsection (8)* confers a power to make regulations about the bodies corporate which

may, or may not, enter into such arrangements. The intention, during the pilot phase, is to test out a small number of arrangements with a range of corporate bodies. Consideration will be given to whether, and how to, exercise this power when the evidence from the pilots is available, and in response to any concerns arising about any particular type of provider. The Department believes that because of the sensitivity around who may discharge care functions on behalf of local authorities, exercise of these powers should be subject to further Parliamentary scrutiny in advance.

20. *Clause 1 (9)* enables regulations to provide that arrangements may be entered into for a minimum or maximum period of time. *Clause 6 (6)* prevents these regulations being made before the end of piloting period. The intention is to enable the Department to respond to any issues arising from the pilots as to the desirable length of any arrangements. This power is subject to the negative procedure.

Clause 4: Regulation of providers of social work services

21. Clause 4 provides for the regulation of providers of social work services under the Care Standards Act 2000. The intention is that this provision will only be commenced after the pilots have been evaluated, when decisions on how the powers in Clause 1 should be exercised can be based on evidence and experience of how these new arrangements will work in practice. Subject to that evaluation, if the decision is taken to extend the power to delegate function to all local authorities, all providers of social work services will be regulated as agencies under the Care Standards Act 2000 and subject to registration and inspection by the Chief Inspector, in the same way that other establishments and agencies are under the 2000 Act.
22. Section 22 of the 2000 Act enables Regulations to be made providing for the way in which an agency should be conducted and against which it will be inspected. Section 23 of the Act enables the Secretary of State to publish National Minimum Standards which must be taken into account in the course of assessment against the Regulations or in any other decision relating to registration.

Clause 5: Functions under this part to be social services functions

23. This clause adds the power to enter these arrangements to the list of functions that are social services functions for the purposes of the Local Authority Social Services Act 1970. The appropriate national authority will have power to issue guidance under which local authorities must act (section 7 of that Act), as well as power to issue directions (under section 7A), in relation to these arrangements, and therefore under which providers of social work services must act in accordance with clause 1(6).

Clause 6: Piloting and expiry of arrangements under this Part

24. The intention is to pilot these arrangements in a small number of local authorities. *Subsection (2)* provides expressly that an order bringing clause 1 into force may do so by reference to particular local authorities. *Subsection (1)* provides for the duration of piloting period and *subsection (3)* provides that Part 1 is repealed if the piloting period comes to an end after 5 years and clause 4, which provides for regulation of providers of social work services, is not commenced.
25. *Subsection (4) and (5)* provide that if an order bringing section 1(1) into force is not made by the Secretary of State, or the Welsh Ministers respectively, within five years of the Act being passed then sections 1 to 5 cease to have effect in relation to England or Wales respectively.

Part 2: Functions in relation to children and young persons

Clause 7: Support for children placed with family or friends

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: regulations made by Statutory Instrument

Parliamentary procedure: Negative

26. Clause 7 replaces section 23(6) of the Children Act 1989 with new *subsections (6A) to (6C)*. The power for the appropriate national authority to make regulations is a restatement of the existing power in section 23(6), which has not been exercised to date. The power may be exercised to include in the new care planning regulations matters hitherto addressed in statutory guidance on section 23(6), such as the matters to which the local authority must have regard when considering a placement with family and friends, and the support to be provided to local authority foster carers who are related to the child.

Clause 8: Duty to provide accommodation etc

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: regulations made by Statutory Instrument

Parliamentary procedure: Negative

27. Clause 8 (in inserting new *subsection (7B) in section 23 of the Children Act 1989*) provides for regulations to be made by the appropriate national authority that impose requirements with which local authorities must comply before they may place a child in accommodation out of their authority's area. In addition where an immediate placement is required due to the child's welfare needs (that is, the placement is made as a matter of urgency, before the requirements can be complied with), the regulations may also specify a time within which the local authority must comply with these requirements.
28. It is intended that this power will be exercised in the new care planning regulations to set out a process (such as referral of the decision for consideration by a special panel) that a local authority must follow to ensure that it has fully considered all the options for placing the child out of its area and that the decision to place out of area is made for reasons directly related to the child's welfare and for no other reason.
29. Such detailed process requirements, the precise nature of which will be the subject of consultation, will be similar to those already contained with the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (made under section 23 subsection (2) (a), (f)(ii), (5) Children Act 1989) and the Department considers that it is appropriate for exercise of these powers to be subject to the negative procedure.

Clause 11: Independent reviewing officers

30. All local authorities are required under regulations made under section 26(1) and (2) of the Children Act 1989¹⁰ to carry out regular reviews of the cases of looked after children. In addition under section 26(2) (k) they must appoint an IRO to:

¹⁰ The Review of Children's Cases Regulations 1991 (SI1991/895) in relation to England, as amended and the Review of Children's Cases (Wales) Regulations 2007 (SI2007/307) in relation to Wales

- participate in the review;
- monitor the performance of the authority's functions in respect of the review; and
- refer the child's case to a CAFCASS officer (or, in Wales, a Welsh family proceedings officer) if he considers it appropriate to do so.

31. Section 26(2A) – (2D) makes further provision for IROs.
32. Clause 11 replaces section 26 (2) (k) and (2A) to (2D) of the Children Act 1989 with new sections 25A to 25C and builds on these existing requirements relating to the appointment of IROs and their functions. This clause confers delegated powers in three different ways which are described in turn below:
- i) New sections 25A and 25B confer power to make regulations:

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

33. *Section 25A (4)* confers the power to require by regulation that the IRO be of a prescribed description. This re-enacts section 26 (2B) of the Children Act 1989, and is exercisable subject to the negative procedure. The power was used to make the Review of Children's Cases (Amendment) (England) Regulations 2004 (SI 2004/1419) ("the 2004 Regulations") which require the IRO to be registered as a social worker with the General Social Care Council; have sufficient relevant social work experience to undertake their functions; and to be independent of line management of the child's case. The Review of Children's Cases (Wales) Regulations 2007 (SI 2007/307) make similar provision in relation to Wales. It is intended that the new power will be used in a similar way.
34. *Section 25B (1) (b), (1) (d) and (2) (a)* re-enact section 26 (k) and (A) (a), of the Children Act 1989 and confer the same powers on the appropriate national authority. These enable regulations to be made to prescribe the manner in which an IRO is to carry out their functions (including participation in any review of a child's case), and require them to perform other prescribed functions. The existing powers have been exercised in the 2004 Regulations and the Welsh equivalent.
35. In relation to the manner in which statutory and other prescribed functions must be performed, the provisions will need to be detailed and therefore the Department considers that it is appropriate to address this in regulations. The Department intends to use these powers to make provision for matters currently dealt with in the 2004 Regulations and in addition to give IROs a new function of adjourning children's case reviews in circumstances where the IRO is not satisfied that the local authority has complied adequately with all the requirements relating to reviews e.g. the duty to consult the child, the child's parents and others before taking decisions with respect to the child (section 22(4) and (5) of the Children Act 1989). This new power will be particularly relevant as a check on the local authority's performance of its new duties under clauses 7-10 of this Bill in relation to placement of the child. In all the circumstances it is considered that the powers are suitable for exercise subject to the negative procedure.

- ii) New section 25B (2) (b) confers the power to issue statutory guidance:

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Guidance

Parliamentary procedure: None

36. New section 25B (2) (b) enables the appropriate national authority to give guidance to which IROs must have regard in the discharge of their functions. This will supplement regulations to be made under subsection (2) (a) and provide further detail for example as to the matters to be taken into considerations when the IRO is deciding whether, to adjourn a review if the appropriate paperwork is not available, and the action required to ensure that the child's wishes and feelings are taken appropriately into consideration. Government believes that the power to give specific guidance addressed to IROs (rather than to local authorities, as at present) will increase the effectiveness of IROs, improving their capacity to provide effective challenge to the social workers responsible for the child's case and the quality of decision making as well as supporting a consistent approach to decision-making across the country. The guidance will be enforced through the arrangements under which the IRO is appointed (whether the IRO is an officer of the authority or appointed under other contractual arrangements) and through inspection of local authority functions.

- iii) New section 25C confers the power to make regulations:

Powers conferred on: Lord Chancellor (exercisable only by consent of the Welsh Ministers in relation to Wales)

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

37. The Independent Reviewing Officer has an existing function to refer a child's case to an officer of CAFCASS (Children and Family Court Advisory Service) or the equivalent in Wales if they consider it appropriate to do so. (Section 26 (2A) (c) re-enacted as new section 25B (3)). Current guidance suggests the power should be used "...[i]f all other methods of resolving an identified problem [in relation to the child's case] have proved or are proving unsuccessful and there is a danger of the child's human rights being breached ... so that legal proceedings can be brought to achieve a remedy."¹¹
38. Section 25C (1) and (2) re-enact section 26 (2C) conferring powers on the Lord Chancellor to make regulations; to extend any functions of officers of CAFCASS¹² in England in respect of family proceedings to other proceedings, and require any functions of the officers to be performed in the prescribed manner; to enable them to take action on a child's case in response to a referral from an IRO. The Children and Family Court Advisory Support Services (Reviewed Case Referral) Regulations 2004, SI 2004/2187 and Children and Family Court Advisory and Support Service (Reviewed Case Referral) (Amendment) Regulations 2005, SI 2005/605 were made

¹¹ Independent Reviewing Officers Guidance, published in 2004 by DFES, paragraph 5.4.

in exercise of these powers. We consider that these matters remain appropriate for secondary legislation subject to the negative procedure.

Clause 12: Power to make further provision concerning independent reviewing officers

Powers conferred on: Secretary of State

Powers exercised by: Order

Parliamentary procedure: Affirmative

Background

39. In general terms, the powers in this clause enable the Secretary of State by order to establish national arrangements for delivery of IRO functions and related matters, either through a new body corporate or by adding these functions to the existing functions of CAFCASS.
40. Responses to the extensive *Care Matters* Green Paper consultation raised substantial and serious concerns that:
 - the IRO role is not being performed effectively across all local authorities.
 - IROs are not challenging decisions made by local authorities, even in cases where professional practice is poor and not in young people's interests.
 - insufficient weight is given to the views of the young person or to those of their parents, carers, or other professionals with a role in securing the child's welfare.
 - Where care plans are not rigorously examined at reviews, the opportunity to develop the plan in light of the child's response to interventions and changing is lost.
41. The Department considers that the changes introduced by clause 11 will, in combination with wider reforms, substantially develop the role of the IRO in a way that enables that the IRO to be a real force for improvement in the quality of local authority planning and delivery of services that meet the needs of individual looked after children.
42. There remains however the possibility that more will need to be done to ensure that the IRO is capable of having a decisive impact in cases of inadequate or poor care planning. It is possible that better results may be achieved simply by creating a specialist cadre of social workers, through providing a tailored national training and accreditation body (to introduce more consistency in performance and improve quality and expertise) and requiring local authorities to appoint as IROs social workers with such training or accreditation. Alternatively, it may prove to be necessary to make the IRO not only independent of service delivery in relation to the case (as now) but to remove the IRO partly or completely from the employment of local authorities and give the management and possibly even the function of appointing the IRO to a third party, either a new body corporate or CAFCASS.
43. This is the policy intention underlying clause 12 of the Bill, which provides the Secretary of State with a flexible power to establish national arrangements for the delivery, or support, of IRO functions and related functions, which can be tailored to meet the particular problems that may be identified at the time. Although

Ministers have no immediate intention of using the powers, it is considered necessary to take them to enable a speedy and decisive response should there be no marked improvement in the outcomes for looked after children resulting from the provisions in clause 11 within 7 years after Royal Assent.

The specific powers

44. Clause 12 (1) confers power on the Secretary of State by order to establish a new body corporate to discharge functions as may be conferred by the order; or to confer additional functions of the same nature on CAFCASS (“the recipient”¹³). Subsection (2) limits the extent of the functions that the order can confer on the recipient to those in connection with the provision of training to, accreditation of, appointment of, and the management of persons accredited or appointed as, IROs.
45. *Subsections (3)* enables the order in addition to confer on the recipient powers to do anything that is incidental or conducive to or designed to facilitate the discharge of its functions.
46. *Subsection (4)* enables the order to transfer property, right and liabilities to the recipient. Where it makes such provision in relation to the rights and liabilities of an employee, *subsection (5)* requires that the order also makes provision for the Transfer of Undertakings (Protection of Employment) Regulations 2006 to apply to that transfer. This would ensure that the employment rights of IROs are protected.
47. *Subsection (6)* enables the order to require the recipient to establish a complaints procedure.
48. *Subsection (7)* is a Henry VIII power that enables an order to modify provisions in primary or secondary legislation relating to IROs and, if conferring the functions on CAFCASS, relating to CAFCASS. This could be exercised if for example any functions in connection with the appointment or management of IROs were conferred on CAFCASS.
49. *Subsection (8)* enables the order to authorise the recipient to charge fees in relation to the functions conferred on it. This would allow for example the charging of fees for delivery of training and accreditation (see below).
50. *Subsection (9)* enables the function of the Chief Inspector under the Education and Inspections Act 2006 to be modified to enable the new body corporate to be inspected.
51. These powers will enable Ministers to act swiftly to introduce the necessary structural changes, if there is clear evidence that the changes introduced under clause 11 are insufficient to achieve sustained and significant improvements of children’s experiences while looked after. Any proposal to use the powers in clause 12 would reflect the lessons learned from the changes introduced under clause 11.
52. Before exercising the power, detailed consideration would be given to evidence from inspections by the Chief Inspector and information arising from the new annual Ministerial stocktake on looked after children (“an annual Ministerial event to review of local authorities’ progress in improving outcomes for looked after children with key stakeholders and representatives of local government, health agencies and looked after children”¹⁴). In addition the Department would undertake further consultation with local government (and representative organisations such as LGA and ADCS), IROs, looked after children and their parents and carers (and

¹³ Defined in clause 12(11).

¹⁴ “Care Matters: Time for Change” (White Paper) paragraph 1.24, page 22.

organisations representing their interests), CAFCASS, the Children's Commissioner for England, the Children's Rights Director and the courts service (Family Justice Council). Such evidence, if it demonstrated a need to take further action, would also inform Ministers decision on the most appropriate use of the power.

Sunset Clause

53. The Department intends to monitor closely progress on implementation of the changes introduced through clause 11. If Ministers are satisfied that the desired improvement in the effectiveness of IROs can be and is being achieved without establishing the national service and other provisions in the Bill have proved effective in delivering improvement in the outcomes for looked after children, it may not be necessary to exercise the power. If the power is not used within 7 years after the Act is passed, subsections (1) -(10) of clause 12 will cease to have effect (subsections (11) and (12)).

Clause 13: Duty of local authority to ensure visits to looked after children and others

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

54. Clause 13 imposes a new statutory duty on local authorities to make arrangements for visits to all looked after children and for advice, support and assistance to be available to such children should they seek it, by inserting new section 23ZA in the Children Act 1989. The duty applies regardless of whether the child is in a placement mentioned in section 23(2) (with a local authority foster carer, in an appropriate children's home or other arrangements under section 23(20(f)) and would also include looked after children who are not accommodated by the local authority, for example a child who is the subject of a care order and is serving a custodial sentence.
55. Section 23ZA (1) (b) enables the appropriate national authority by regulations to specify categories of children and young people in addition to looked after children to whom the duties are owed. The intention is to exercise this power to specify those children who immediately before entering custody were accommodated under section 20 of the Children Act 1989. These children in most cases cease to be "looked after" within the meaning of section 22 of the Children Act 1989 as soon as they cease to be accommodated by the local authority.
56. New section 23ZA subsections (3) and (4) confer additional powers on the appropriate national authority to regulate how the local authority's functions under this new section are discharged and in particular may make provision relating to the frequency of visits; the circumstances in which a person to which the section applies must visit; and the functions of the person visiting. The intention is to use these powers to set out a minimum frequency of these visits and ensure that a record of the visit is taken.
57. Similar provision is currently made with regard to children in placements with foster parents in the Fostering Services Regulations 2002 (SI 2002/57) (regulation 35) and for children placed with their parents in the Placement of Children with Parents etc. Regulations 1991 (SI 1991/893) (regulation 9).

58. This clause ensures that all looked after children will be visited; and that the appropriate national authority has power to require additional groups of children and young people to be visited; and to make further provision for the arrangements under which the visits are to be made. These are matters of detail and the Department believes that it is best for that detail to be set out in secondary legislation subject to negative procedure.

Clause 14: Independent visitors for children looked after by a local authority

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

59. Clause 14 repeals and substantially re-enacts paragraph 17 of Schedule 2 of the Children Act 1989 as new section 23ZB of the Children Act 1989. Independent visitors provide access to an independent adult volunteer who is outside the care system for looked after children who may have no other meaningful, sustained adult relationships in their lives apart from their carer and social worker.
60. The new *section 23ZB (1) (a)* confers on the appropriate national authority power by regulation prescribe the descriptions of children for whom an independent visitor must be appointed. The intention is to exercise this power (as part of new care planning regulations) to ensure that all those looked after children who are currently entitled to an independent visitor under Schedule 2 (17) namely, those who have lost contact with their parents or who only have infrequent communication with them, continue to be so entitled.
61. In addition, the local authority will be required to appoint an independent visitor where it is in the child's interests to do so (*subsection (1) (b)*).
62. *Subsection (9)* confers the power for regulations to be made as to the circumstances in which a person is to be regarded as independent of the authority (for this section). This restates paragraph 17 (7) of Schedule 2 under which The Definition of Independent Visitors (Children) Regulations 1991 (SI 1991/892) were made. The intention is that the new power will be exercised in a very similar way to the existing power to specify that a person should not be regarded as independent if they are a member of the local authority or its committees or sub-committees (whether elected or co-opted) or another officer of the local authority or the spouse or civil partner of any of these.

Clause 16: Visits to children in long term care

Powers conferred on: Secretary of State and Welsh Ministers to be exercised jointly

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

63. Clause 16 inserts new section 86A in Part 5 of the 1989 Act and introduces a requirement for the local authority (for the area in which the child is ordinarily resident) to arrange for a representative to visit the children placed in long term residential care of whom it is notified of under sections 85 (children placed by health bodies and local education authorities) and 86 (children accommodated in care homes or independent hospitals) of the Children Act 1989.

64. *Section 86A (4)* confers powers similar to those conferred by Clause 13 to make further provision by regulation in relation to the arrangements to be made under this provision and in particular in relation to the frequency of visits; the circumstances in which visiting arrangements must require a child to be visited; and the functions of the person visiting.
65. The intention is to use these powers to make provision similar to that made for visits to looked after children and others. These detailed matters that concern process rather than the principles of policy are appropriate for secondary legislation subject to the negative procedure, which will also allow flexibility to respond to practical issues that may arise when the policy is implemented.
66. This power is exercisable jointly by the Secretary of State and the Welsh Ministers. This is because of the potential for cross-border issues to arise in both countries in situations where the regulations will have effect. The health bodies mentioned in the opening of section 85(1) include some that are England only, some that Wales only, and some that are cross border bodies. An example of such joint regulation making is the Voluntary Adoption Agencies (Amendment) Regulations 2002 (SI 2005/3341), made under sections 9(1) and 140(7) and (8) of the Adoption and Children Act 2002.

Clause 17 - Designated member of staff at school for pupils looked after by a local authority

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

67. Clause 17 requires the governing body of a maintained school in England and Wales to designate a member of staff to promote the educational achievement of looked after children and relevant children who are pupils at the school. *Subsection (3)* confers the power on the appropriate national authority by regulations to prescribe the qualifications or experience (or both) that a designated person should have. This is similar to the power to prescribe the qualifications and experience of persons appointed as Special Educational Needs Coordinators under section 173 of the Education and Inspections Act 2006. It is intended to use the power to prescribe that the designated person should be a teacher.
68. These are detailed matters and flexibility is required to amend the regulations as qualifications change over time, and the power is therefore appropriate for exercise by regulation subject to the negative procedure.
69. In addition, *subsection (4)* confers power on the appropriate national authority to issue guidance to which governing bodies of maintained schools must have regard when exercising functions under the clause. The existing non-statutory guidance to schools on the role and functions of the designated teacher is “The Education of Children and Young People in Public Care” (*DH& DFEE 2000*).

Clause 18: Entitlement to payment in respect of higher education*Powers conferred on: Secretary of State and Welsh Ministers**Powers exercised by: Regulations made by Statutory Instrument**Parliamentary procedure: Negative*

70. Clause 18 amends section 23C of the Children Act 1989 to add to local authorities' duties to former relevant children (i.e. care leavers who are over 18) a requirement to make pay a sum of money to all those who pursue a course of higher education in accordance with their pathway plan.
71. New *subsection (5B)* confers the power on the appropriate national authority to prescribe the amount of the payment; the meaning of "higher education" for these purposes (which is intended to follow closely the definition used for student loans—see below); how the amount should be paid; and the circumstances in which it may be recovered. It is intended that the eligibility criteria for the payment (in terms of the courses attended) will be similar to those for student loans, as set out in regulation 6 of and Schedule 3 to the Education (Student Support) Regulations 2007 (SI 2007/176). It is also intended that regulations will specify the payment schedule, conditions in which payments would cease (e.g. if the young person ceases to attend a course) and conditions for repayment.
72. The proposed amount of the payment is linked evidence which indicates that looked after children finish HE courses with an average of £2,000 more debt than other students. It is necessary to have the flexibility to adjust the amount of the payment in light of changing economic circumstances and the particular financial pressures on former relevant children. These matters of detail are appropriate for secondary legislation subject to the negative procedure.

Clause 19: Assistance to pursue education or training*Powers conferred on: Secretary of State and Welsh Ministers**Powers exercised by: Regulations made by Statutory Instrument**Parliamentary procedure: Negative*

73. Clause 19 (2) inserts a new section 23CA in the Children Act 1989, extending the duties that local authorities owe to former relevant children to those who are over 21 years and who wish to resume education or training. *Section 23CA (1)* allows the appropriate national authority to set an upper age limit for this new duty by regulation, up to the age of 25 years. The intention is to use this power to phase the introduction of this duty.
74. Clause 19 (5) inserts new subsections in section 23E (pathway plans) of the Children Act 1989. New *subsection (1B)* confers the power to make regulations as to assessments for the purposes of existing section 23B (3) and new section 23CA. This re-enacts section 23B (5), under which the Children (Leaving Care) (Wales) Regulations 2001 (SI 2001/2189) and Children (Leaving Care) (England) Regulations 2001 (SI 2001/2874) were made and it is the intention to use the new powers in relation to section 23CA in a similar way.

Clause 25: Notification of matters relating to persons carrying on or managing children's homes etc.

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

75. Clause 25 by inserting a *new section 30A* in the Care Standards Act 2000 places a duty on the Chief Inspector or, in Wales, the Welsh Ministers, to notify each local authority in England and Wales when certain enforcement action is taken in relation to an establishment or agency regulated under Part 2 of the Care Standards Act 2000 set out in the clause.
76. The new duty applies where a decision has been taken to cancel registration of a provider or registered manager; a prosecution is being brought for an offence under Part 2 or under specified relevant legislation; or where a notice restricting accommodation is served.
77. *New section 30A(3)* confers the power to make regulations to specify the circumstances in which local authorities should be advised of a change in those circumstances by the registration authority, the aim being to give a local authority notice of a relevant, updated, position. The intention is that regulations will prescribe circumstances such as those where a prosecution is no longer proceeded with, where a provider pleads guilty or is convicted following trial, or where they successfully appeals their conviction. Further, the prescribed circumstances might include a direction of the Tribunal that a decision of the registration authority to cancel registration shall not have effect, or where a provider successfully appeals a decision of the Tribunal to confirm the authority's decision.
78. *Section 30A(4)* confers the power to make regulations specifying the information to be contained in the notification for example the name of the provider and of the relevant establishment or agency and a reference the enforcement action taken.
79. The regulations will clarify the detail of the operation of the notification procedures, and the Department believes these matters are appropriate for secondary legislation subject to the negative procedure.

Clause 29 - Independent review of determinations relating to local authority foster parents

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

80. Clause 29 inserts Schedule 2 to the Children Act 1989 new paragraph 12A.
81. *Paragraph 12A(1)(a)* provides for regulations to secure that a child is not placed with a local authority foster parent unless that person is approved as such.
82. *Paragraph 12A(1)(b)* provides for regulations to establish a procedure under which prospective or existing foster carers may apply to the appropriate national authority for an independent review, by a panel constituted by that national authority, of the determination of a fostering service provider regarding their suitability or continuing suitability to foster a child (a "qualifying determination"). There is already provision

into Fostering Services Regulations 2002, SI 2002/57, under which prospective or existing foster carers can make representations to the local authority or fostering agency where it proposes not to approve them. The new provisions replicate in the fostering regime the provisions in section 12 of the Adoption and Children Act 2002, and the regulations made under that section, which make provision for the independent review of qualifying determinations of adoption agencies regarding a person's suitability to adopt a child.

83. *Sub-paragraph (3)* of paragraph 12A make provisions relating to the duties and powers of an independent review panel, its administration and procedures, appointment of members and other matters set out in *sub-paragraph (3)*. Those matters include a duty to make a payment to the national authority of such sums as the national authority may determine, though the sums payable to the national authority must not, taking one financial year with another, exceed the costs incurred in performing the independent review functions (*sub-paragraphs (4), (5) and (9)*).
84. *Sub-paragraph (2)(b)* enables the appropriate national authority by regulations to prescribe the characteristics of determinations that are 'qualifying determinations' within the meaning of the provision. It is intended that this power should be used to clarify at what stage in the approvals process the application for independent review can be made.
85. *Paragraphs 12A(1)(a) and 12B* replace similar existing powers, currently in Schedule 2 paragraph 12 (d) and (g) respectively. The regulations made under these provisions are the Fostering Services Regulations 2002, SI 2002/57, regulations 34 and 40.
86. These matters are detailed and technical in nature. Secondary legislation will allow the detail of the process to be changed as a result of feedback or experience in operation and Department believes that they are appropriate for secondary legislation subject to the negative procedure.

Clause 30 – Independent review of determinations relating to adoption

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative

87. Clause 30 amends the existing powers in section 12 of the Adoption and Children Act 2002 enabling regulations to provide for the independent review of qualifying determinations.
88. *Subsection (2)* amends section 12 to clarify that the regulations are to provide for the application for a review to be made to the appropriate Minister, and that the review is to be by a panel constituted by that Minister.
89. *Subsections (4) to (7)* provide that the regulations may impose a duty to make a payment to the appropriate Minister of such sums as the appropriate Minister may determine, though the sums payable to the national authority must not, taking one financial year with another, exceed the costs incurred in performing the independent review functions. These provisions replace the existing powers under which it is the independent review panel which has a power to recover the costs of a review.
90. These are technical amendments to the procedural detail of the independent review mechanism in relation to adoption, to ensure conformity with what is proposed in relation to the independent review mechanism in respect of fostering. The existing

powers in section 12 of the Adoption and Children Act are subject to the negative procedure.

Clause 39: Commencement

Powers conferred on: Secretary of State and Welsh Ministers

Powers exercised by: Orders

Parliamentary procedure: None

91. Exercising the power to make commencement orders, as is customary, is not subject to any parliamentary procedure. Under clause 39(1), Welsh Ministers have power to appoint the day on which provisions in Parts 1 to 4 (apart from clauses 15, 16, 27 and 28); section 37 (repeals) and the Schedule come into force in relation to Wales. For all other purposes, under clause 39(2), the Secretary of State has power to appoint when the provisions in Parts 1-4; section 37 and the Schedule come into force. An order made under clause 39 may appoint different days for different purposes and include transitional, saving or transitory provision. An order bringing clauses 27 and 28 into force requires the consent of the Welsh Ministers.

November 2007

APPENDIX 2: CHILDREN AND YOUNG PERSONS BILL [HL]

Supplementary memorandum by the Department for Children, Schools and Families

1. The Department has reviewed Clause 13 of the Children and Young Persons Bill, and in particular the ambit of the power in the new *Section 23ZA(1)(b)* which at present extends to include all children and “young persons” (which is not defined). We have concluded that, as drafted, it is much broader than is necessary to deliver our policy which is to have the power to place the local authority under a duty to ensure a representative of theirs visits children who immediately before entering custody were accommodated by them under section 20 of the Children Act 1989. We therefore propose to table an amendment to the provision that would limit the scope of the power to impose a new duty in relation to this group of children only.

December 2007

APPENDIX 3: CLIMATE CHANGE BILL [HL]

Memorandum by the Delegated Powers and Regulatory Reform Committee to the Joint Committee on the draft Climate Change Bill

1. This memorandum responds to your invitation of 1 May to the Delegated Powers Committee to contribute to your Committee's scrutiny of the draft Climate Change Bill. We value the opportunity to contribute to the pre-legislative scrutiny of this draft bill and set out below an overview of our opinion on the proposed delegations. In making these observations, I stress that our opinion must not be taken to prejudge our position should a bill be introduced: we will report to the House at that stage on whether its provisions inappropriately delegate legislative power or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny.
2. We have been assisted by a memorandum by the Department for Environment, Food and Rural Affairs about the delegations in the bill.

Alteration of carbon budgets — clause 13(4)

3. Clause 13 enables the Secretary of State, by order subject to the affirmative resolution procedure, to revoke or amend an order under clause 4 which sets a carbon budget for a budgetary period. Certain conditions must be satisfied (subsection (3)) if the budget is to be amended after the date on which it was required to be set has passed; and a further condition (subsection (4)) if it is to be amended after the beginning of the budgetary period. But it is clear from subsection (5) that it is envisaged that the budget might be amended more than a year after the end of the budgetary period. The memorandum does not explicitly refer to this although it does emphasise the significance that budget levels are likely to have for the economy and for society generally (paragraphs 46 and 70). In view of these implications, we consider that the case has not so far been made out for a power retrospectively to amend a carbon budget after the end of the budget period.

Emissions from international aviation or shipping — clause 15(2)

4. Clause 15(1) provides that carbon dioxide emissions from international aviation or shipping do not count as emissions for the purposes of Part 1, except as provided by regulations under that section (which attract the affirmative procedure). But the Secretary of State also has power under subsection (2) to define by order (subject to the negative procedure) what is meant by "international aviation or shipping". While the exercise of the power is likely to be constrained by the United Kingdom's international obligations (paragraphs 61 and 62 of the memorandum) as well as ordinary public law principles, the order will determine the scope not only of clause 15 as a whole but also of the regulation-making power conferred by subsection (3). Moreover, the extent to which the regime of Part 1 should apply to international aviation may prove to be a controversial policy area. For these reasons, we note that, if a bill were introduced containing such an order-making power, we would suggest that the affirmative procedure was appropriate for its exercise.

Carbon credits and carbon debits — clauses 16 & 17

5. Clauses 16 and 17 provide for "carbon credits" and "carbon debits", tradable under the Kyoto Protocol among countries which have set emissions limitation targets. Clauses 16(4) and (5) and 17(2) to (4) leave the entire provision for carbon credits and debits to regulations. The memorandum asserts that the provisions will be

technical in character and will need to be flexible and responsive to changes in international agreements (paragraphs 88 and 96 to 99). We regard this as persuasive in terms of the delegation, but not necessarily the level of parliamentary control. Regulations under clause 16 modifying enactments would require affirmative resolution but all other regulations under clause 16 would be subject to the negative procedure. In view of the critical role to be played by carbon credits and debits in the calculation of the United Kingdom's performance against its 2050 target, and against its successive carbon budgets meanwhile, if a similar power were to be included in a bill, we would recommend that its first exercise should be subject to the affirmative procedure, so that the House may be assured that the basic framework for the credits and debits regime is satisfactory.

Trading schemes — Part 3 / clause 28

Appropriateness of the delegation and level of parliamentary scrutiny

6. The process by which the United Kingdom is to meet the budgets and the overall target set under Part 1 will be by way of “trading schemes” governing particular sectors of industry in their production or consumption of particular materials (predominantly fuels) in the course of their business. Provision for such schemes is to be left entirely to regulations, and paragraph 109 of the memorandum rightly describes this as the most significant delegated power in the bill.
7. The power conferred by clause 28(1) is in the most general terms imaginable, albeit that the overall purposes for which it may be exercised are set out in subsection (2)(a) and (b), and the characteristics which might enable economic activities to be included in a trading scheme are listed in clause 29(1). Those characteristics too are very widely drawn. In addition, Schedule 2 deals extensively with the kind of provision which the regulations must contain, and the further provision which they may contain.
8. In favour of the delegation, the department emphasises the extensive and technical nature of the provision which will be required (paragraph 112 of the memorandum), and the need to accommodate different kinds of scheme for different purposes (paragraphs 117 to 123 and 127) and for a flexible and responsive regime (paragraph 134). It also refers to comparable statutory regimes, in particular the Renewables Obligation imposed on electricity suppliers under sections 32 to 32C of the Electricity Act 1989, which is governed entirely by affirmative orders of the Secretary of State under extensive powers conferred by those sections. But the regime applies only to the electricity industry whereas the schemes in the bill could apply to virtually every sector of the economy and could significantly affect competition.
9. Despite the extreme breadth of this power, we acknowledge that the likely number and detailed content of trading schemes may make them unsuited to primary legislation, so that some delegation of powers for their provision may be not be inappropriate. **We have yet to be persuaded however that even the affirmative procedure provides a sufficient level of parliamentary scrutiny and control over the exercise of such extensive powers, given the possible consequences of such a scheme for economic performance in the sector to be regulated. It may be desirable to consider whether these orders could somehow be subject to more thorough scrutiny than the current procedure provides.**

“Significantly more onerous” — clause 31(3)(d)

10. Under clause 31(3), regulations which create a trading scheme are subject to affirmative resolution, as are regulations which extend the participants or activities to which a scheme applies or which extend the duration of the scheme. Subsection (3)(d) applies the affirmative resolution procedure to regulations which “make the overall requirements of a scheme significantly more onerous”. There will clearly be instances where it is beyond any doubt that revisions to a scheme make its requirements significantly more onerous, but there are likely to be other occasions where the significance of a new burden imposed by regulations is much more a matter of impression and debate. We do not at this stage wish to recommend the affirmative procedure for every exercise of powers under Part 3 of the bill, but we draw your Committee’s attention to the uncertainty of language in the current provision, and the risk it carries of challenge, by way of judicial review to regulations made under Part 3 using the negative procedure.

Enforcement provision — Schedule 2, paragraphs 22 to 25

11. Paragraphs 22 to 25 of Schedule 2 are about enforcement provision which may be made in regulations governing trading schemes. The memorandum contains no material which seeks to justify the extent of these significant powers or the level of parliamentary control attached to them. We would pay close attention to these powers if they were included in a bill, and in particular note that we would expect a strong case to be made in relation to the following: a power to provide for intrusive enforcement arrangements not subject to the affirmative procedure (paragraph 22); a power to impose financial penalties where the bill itself does not specify or contain a mechanism for determining the maximum amount (paragraph 23); and a power to create offences and specify penalties where the mode of trial and maximum sentence are not provided for in the bill (paragraph 24).
12. Paragraph 25 enables, but does not require, regulations to confer rights of appeal against decisions made, civil penalties imposed and enforcement action taken under a trading scheme. The provision for appeals to be made to the Secretary of State is, in our opinion, inappropriate because the Secretary of State has a clear interest in securing reduction in United Kingdom carbon emissions and has the right under clause 33 to give directions to those administering trading schemes. The Joint Committee on Human Rights will no doubt have a view on the compatibility of paragraph 25 with the Convention rights, in so far as it makes it optional rather than compulsory for regulations to provide for a right of appeal.

May 2007

APPENDIX 4: CLIMATE CHANGE BILL [HL]

Memorandum by the Department for Environment, Food and Rural Affairs and the Department for Transport

Introduction

1. This memorandum has been prepared by the Department for Environment, Food and Rural Affairs and the Department for Transport and relates to the Climate Change Bill published on 15th November 2007 (“the Bill”).
2. This memorandum contains a summary of the Bill’s main provisions and identifies delegated powers.
3. In preparing this memorandum, we have benefited greatly from the observations made by the Delegated Powers and Regulatory Reform Committee (which we will refer to as “the Committee”) in their contribution to the Joint Committee inquiry into the draft Bill.¹⁵ We are grateful to the Committee for their assistance in the scrutiny of the draft Bill, which has helped improve the approach taken to the delegation of powers.
4. In their memorandum to the Joint Committee inquiry, the Committee made six points relating to the delegations proposed in the draft Climate Change Bill. Taking each of these in turn:

Alteration of carbon budgets

- Paragraphs 68 to 77 below set out the approach to the amendment of carbon budgets, which has been revised since the draft Bill was published including to take account of the observations made by the Committee;

Emissions from international aviation and shipping

- The Committee suggested that the affirmative procedure was a more appropriate approach to the power to define “international aviation and shipping”. The Committee also noted that the exercise of this power would be likely to be constrained by the United Kingdom’s international obligations as well as ordinary public law principles. For these reasons, the department remains to be convinced that the negative resolution procedure is not the most appropriate procedure in this case;

Carbon credits and carbon debits

- The department has strengthened the parliamentary scrutiny of these powers to reflect the comments made during pre-legislative scrutiny, including those given by the Committee. To provide further reassurance, we have provided that the Secretary of State must also seek and take into account the advice of the Committee on Climate Change before making the first set of carbon accounting regulations, to ensure independent and expert advice and provide further reassurance as to the robustness of the basic accounting framework;

¹⁵ <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtclimate/170/170we04.htm>

Trading schemes – appropriateness of the delegation

- Paragraphs 151 to 190 below set out the approach taken in the revised Bill, and the steps which have been taken to strengthen the independent input into and parliamentary scrutiny over the exercise of these powers;

Trading schemes – “significantly more onerous”

- We note that following pre-legislative scrutiny of the draft Bill, the Joint Committee was content with the appropriateness of this language. Paragraphs 191 to 194 give further explanation as to why the department remains to be convinced that this provision needs amendment

Trading schemes – enforcement provision

- Paragraph 170 below set out the department’s approach in this area, which has been revised since the draft Bill was published including to take account of the observations made by the Committee.

Summary of the main provisions of the bill

5. The Bill is divided into six Parts:

- Part 1 Carbon target and budgeting
- Part 2 The Committee on Climate Change
- Part 3 Trading schemes
- Part 4 Impact of and adaptation to climate change
- Part 5 Other provisions
- Part 6 General supplementary provisions

Part 1: Carbon target and budgeting

6. Part 1 of the Bill gives the Secretary of State a duty to reduce the net UK carbon account for the year 2050 to 60% below the 1990 baseline. The term “net UK carbon account” is defined in clause 22.
7. It also requires the Secretary of State to set “carbon budgets” representing UK emissions for five year periods, taking into account emissions reductions or increases for which the UK is responsible and which are to be credited or debited (measured by a system of carbon units) to the net UK carbon account, beginning with the period 2008-2012. Part 1 of the Bill includes a duty on the Secretary of State to report UK emissions levels to Parliament, and to report on the measures the Government will take to meet the objectives in Part 1.
8. Part 1 includes provision on how to calculate whether the target for 2050 has been met and how carbon budgets are to be set. It requires that the carbon budget for 2018-22 is set in a way that is consistent with both the 2050 target and the Government’s target to reduce emissions by between 26% and 32% by 2020. It allows for emissions of other greenhouse gases and emissions from international aviation or international shipping to be included in the Bill’s targets and budgets at a later date. It makes provision for the amendment of certain aspects of Part 1 of the Bill in certain circumstances, and gives a duty to make regulations setting out what carbon units can be used to ensure that the net carbon account is within budget.

Part 2: The Committee on Climate Change

9. Part 2 of the Bill establishes a new independent non-departmental public body, the Committee on Climate Change (“the Committee”). Schedule 1 sets out the Committee’s constitution.
10. The Committee is given duties to advise the Secretary of State on the levels of carbon budgets, and on the apportionment of effort between reductions in domestic emissions levels and the use of carbon units. The Committee must also advise on the amount of effort to be made by sectors of the economy in trading schemes, and other sectors of the economy.
11. The Committee is also given a function of making an annual report to Parliament on the progress that is being made towards meeting the objectives in Part 1 of the Bill. At the end of each budget period, the Committee must include in its annual report its views on how the budget was or was not met, and on action taken during the budget period to reduce UK emissions.
12. Part 2 also gives the Committee the powers it needs to deliver its advisory and reporting functions, and the Secretary of State and devolved administrations are given powers to make grants to the Committee and to issue guidance and directions to the Committee.

Part 3: Trading schemes

13. Part 3 provides the Secretary of State and the devolved administrations with a power to set up trading schemes relating to greenhouse gas emissions through secondary legislation. Trading schemes may limit activities that directly or indirectly lead to emissions of greenhouse gases (for example, cap emissions from a particular set of activities and allow trading of emissions within the cap), or they may encourage activities that directly or indirectly lead to a reduction in greenhouse gas emissions or the removal of greenhouse gases from the atmosphere.

Part 4: Impact of and adaptation to climate change

14. Part 4 gives the Secretary of State a duty to report to Parliament at least every five years on the risks of the impact of climate change and the Government’s programme for adapting to climate change. It also places a duty on the relevant Northern Ireland department to lay a programme for adapting to climate change before the Northern Ireland Assembly,

Part 5: Other provisions

15. Part 5 makes provision for waste reduction schemes and contains amendments to the provisions of the Energy Act 2004 relating to renewable transport fuel obligations. Part 5 also contains a number of miscellaneous provisions.

Part 6: General supplementary provisions

16. Part 6 makes supplementary provision.

Clauses 40, 41, 62 and 63 and Schedule 3: General provision on Regulations and Orders

17. Before considering each delegated power in the Bill, it is important to note that clauses 40, 41, 62 and 63 and Schedule 3 make general provision in relation to orders and regulations. This allows other provisions to use simpler terminology where individual order or regulation-making powers are conferred.

18. Clause 62(1) makes the standard provision that orders and regulations under the Bill are to be made by statutory instrument. Clause 62(2) makes an exception for instruments to be made by a Northern Ireland department acting alone which are to be made by statutory rule.
19. Clause 62(3) applies to extend any power to make an order or regulations. It provides that an order or regulations may:
 - (a) make different provision for different circumstances or cases;
 - (b) include supplementary, incidental or consequential provision; and
 - (c) make transitional provisions and savings.
20. The provision in paragraph (a) of clause 62(3) is a standard provision which accompanies many order and regulation-making powers. It puts beyond doubt the discretion afforded to the national authority in appropriate cases.
21. Paragraphs (b) and (c) of clause 62(3) make general provision about the scope of the delegated powers in the Bill.
22. Paragraphs (b) and (c) do not operate to expand the kinds of situation in which the powers may be used, or the procedure applicable to instruments made using those powers. It simply enables appropriate supplementary, incidental, consequential, saving or transitional provisions to be made at the same time as the exercise of the principal powers. This ensures that the national authority is able to ensure that any use of the powers can be done in a manner which is coherent and properly caters for the particular circumstances.
23. Clause 62(4) and (5) provides that any provision that may be made by order may be made by regulations, and *vice versa*. Clause 63(3) provides that any provision which may be made using the negative resolution procedure may be made using the affirmative resolution procedure.
24. These provisions have been included in order to reduce bureaucracy by allowing the powers in different parts of the Bill to be used in combination with one another. For example, clause 25(3) allows the Secretary of State to make regulations, using the affirmative resolution procedure, on the extent to which emissions from international aviation and shipping are to be counted towards UK emissions. Clause 25(2) allows the Secretary of State to define “international aviation and shipping” by order, using the negative resolution procedure. Without clauses 62(4) – (5) and 63(3) this would not be possible as orders and regulations cannot be combined in the same instrument and different parts of the same instrument cannot be made subject to different parliamentary procedure.
25. However, used together, clauses 62(4) – (5) and 63(3) would permit the Secretary of State to exercise both powers in a single statutory instrument by making regulations using the affirmative resolution procedure. These provisions do not allow the level of parliamentary scrutiny to be lowered in any case.
26. Clause 63(1) and (2) define, respectively, the procedures which apply when a delegated power of the Secretary of State refers to the “affirmative resolution procedure” or to the “negative resolution procedure”. These definitions apply the two usual procedures as standard.
27. Clause 63 does not apply to the power to make trading schemes, as this is the one delegated power in the Bill which is available to the devolved administrations as well as to the Secretary of State. It is appropriate that where the Secretary of State exercises this power, it should be subject to scrutiny in both Houses of Parliament in the usual way. Where it is exercised by any of the devolved administrations it is

appropriate that it should be subject to scrutiny in the relevant devolved legislature. Therefore the provisions in clause 63 need to be adapted to cater for this.

28. Clause 41 and Schedule 3 makes such provision. Part 1 of the Schedule defines what is meant by the “affirmative resolution procedure” and the “negative resolution procedure” where any one of the national authorities exercises this power alone.
29. Part 2 defines how these procedures are to operate where regulations are made jointly by more or one national authority acting together. The purpose of this is to ensure that each relevant legislature retains its ability to scrutinise the exercise of power by each of the national authorities.
30. Most notably, it provides that if the regulations were to be split into their constituent parts, and any of those parts would normally be subject to the affirmative procedure, then the whole instrument is to be subject to the affirmative resolution procedure. This enables provisions which would normally be subject to different levels of scrutiny to be contained in the same instrument, without lowering the level of parliamentary scrutiny applicable.
31. Where the affirmative procedure applies, the regulations may not be made unless the instrument has been laid before and approved by a resolution of each of the relevant legislatures.
32. Where the negative resolution procedure applies, nothing further must be done under the regulations if any of the relevant legislatures prays or resolves that the regulations be annulled. If that eventuality occurs, the instrument may be revoked by Order in Council.
33. Part 3 provides that where a trading scheme would fall partly within the legislative competence of the Scottish Parliament partly outside its competence, it can be made by Order in Council. Exactly the same procedural safeguards apply here as they would apply in relation to jointly made regulations. However the Order in Council procedure has been chosen here as the Scottish Government considers that for the joint exercise of powers which fall partly within their competence, Order in Council is the most appropriate route.

Part 1 — Carbon Target and Budgeting

Clause 2(1) (Power to amend the target percentage for 2050)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

34. Clause 1(1) imposes a duty on the Secretary of State to ensure that the net UK carbon account in 2050 is at least 60% lower than the total emissions of targeted greenhouse gases in the UK in the year 1990 (the 1990 baseline). This duty underlies the whole of Part I of the Bill, in that carbon budgets must be set with a view to meeting this target for 2050.
35. Clause 2 provides a delegated power for the Secretary of State to amend the 60% figure by order. This Secretary of State may only exercise this power where:
 - (a) it appears to the Secretary of State that there have been significant developments in scientific knowledge about climate change, or in

European or international law or policy, that make it appropriate to do so;
or

(b) in connection with an order designating further targeted greenhouse gases, in pursuance of the power conferred by clause 19; or

(c) in connection with regulations including emissions from international aviation or shipping in the target.

The power is subject to the affirmative resolution procedure and may only be amended once the Secretary of State has consulted and taken account of advice from the Committee on Climate Change, and given the devolved administrations an opportunity to make representations (see clause 3).

36. The power would allow the Secretary of State to increase the 60% target in the Bill (that is, make it more onerous) or reduce it (thus making it less onerous). The Secretary of State may wish to increase the target, for example, if a new international agreement were reached for either the UK or other countries to reduce their emissions by more than is currently the case.
37. The Department considers that it is necessary for Part 1 of the Bill to be flexible enough to be able to adapt to a changing international framework (like a post-Kyoto international agreement) and to the latest scientific knowledge. This legislation is intended to be in place for decades to come, and changes in scientific knowledge and international agreements are likely to change over such a long period of time. The department considers that it would be disproportionate to require new primary legislation for any such changes.
38. The Department therefore considers it appropriate for the Secretary of State to be able to change this target in the limited circumstances referred to in paragraph 35 above, as it means that the legislation can respond to the latest developments while ensuring that the overall structure remains intact.
39. The power is also available in connection with an order made under clause 19 (power to include other greenhouse gases in addition to carbon dioxide) or with regulations made under clause 25(3) (power to include international aviation or shipping).
40. The exercise of either of these powers would have the effect of significantly changing the nature of the 2050 target. If emissions of other greenhouse gases or international aviation or shipping emissions were to be included in the targets, then it is possible that this could significantly affect the achievability of the target.
41. It could make it much easier to meet, and therefore appropriate to take on a higher target, or much more difficult to meet therefore making it appropriate to adopt a less stringent target.
42. Clause 2(1)(b) also provides a power to specify a year other than the 1990 to be the baseline year for the purposes of the 2050 target. This power is only exercisable where there has been a significant change in European or international law or policy which makes it appropriate to do so.
43. Changing the baseline against which a target is to be measured is potentially as significant as amending the target itself. At present 1990 is the year which international and European agreements customarily use as a baseline against which emissions of greenhouse gases are measured. 1990 has been used as the baseline for Part 1 of this Bill for that reason, as it significantly aids transparency if all targets are to be measured against the same baseline.

44. The department therefore considers it appropriate to have this power as, if international agreements were to move away from having 1990 as the baseline year, it is likely to be appropriate to do the same for domestic targets under his Bill. Because an amendment like this would be significant and would only be appropriate in these circumstances, the Secretary of State may only exercise this power where he considers that there have been significant developments in international or European law or policy which make it appropriate to do so.
45. However, as the target figure in clause 1 and the baseline year are very important to the budgeting system in Part I of the Bill, the Department considers that such an amendment should be done in a transparent manner and be subject to a high level of parliamentary control. The power is also therefore made subject to the affirmative resolution procedure.
46. In addition, the Secretary of State must also seek the advice of the independent and expert Committee on Climate Change before taking any decision, and must allow the devolved administrations at least 3 months to offer their views. When amending the target, the Secretary of State must also make a statement as to whether and how the devolved administrations' views have been taken into account in reaching a decision.

Clause 5(1)(c) (Power to introduce a post-2050 target or target range)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

47. Clause 5(1)(b) requires that the budget encompassing the year 2050 be set consistently with the 60% target. Clause 5(1)(a) requires that the budget encompassing 2020 be set consistently with a 26-32% reduction against the baseline.
48. In addition, clause 8(2) requires that all carbon budgets are set with a view to meeting the target for 2050 and the 2020 range. Therefore, the overall trajectory of all carbon budgets will be strongly influenced by the requirement for the budgets for these periods to be set at certain levels
49. The requirement to have a system of carbon budgeting continues after 2050, but the level of the budgets is not constrained after this time, except by the UK's obligations under international law.
50. It is possible that as time moves on it will become desirable to set new targets further into the future, and that carbon budgets should be set with a view to meeting these new targets. Clause 5(1)(c) permits the Secretary of State to designate such new targets within the existing budgeting framework.
51. These targets may specify a specific percentage reduction (like the 60% reduction for 2050) or a range (like the 26 to 32% reduction for 2020) with which the budget for that period must be consistent.
52. The Department considers that it is appropriate that the Secretary of State should have power to designate such targets via secondary legislation because it allows the fundamental framework of Part I of the Bill to continue but for new long term goals to be added as time moves on.

53. This will allow the budgeting system to adapt over time to reflect the latest scientific advice, international obligations, and assessments of what levels of emissions reductions are environmentally desirable and technically and economically feasible. This power is important to ensure that the budgeting system continues to be relevant over time, and it would be undesirable to require new primary legislation for this purpose.
54. However, as the introduction of a new target or target range could have a significant impact on the continuing nature of the budgeting system, it is considered that the process for setting a new target should be highly transparent and should be subject to a high level of parliamentary control. The power is therefore subject to the affirmative resolution procedure.
55. In addition, the Secretary of State must also seek the advice of the independent and expert Committee on Climate Change before taking any decision, and must allow the devolved administrations at least 3 months to offer their views. When setting the target, the Secretary of State must also make a statement as to whether and how the devolved administrations' views have been taken into account in reaching a decision (see clause 7).

Clause 6(1) (Power to amend 2020 target range or post-2050 target)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

56. Clause 2 permits the Secretary of State to amend the target for 2050 where
 - (a) it appears to the Secretary of State that there have been significant developments in scientific knowledge about climate change, or in European or international law or policy, that make it appropriate to do so; or
 - (b) in connection with an order designating further targeted greenhouse gases, in pursuance of the power conferred by clause 19; or
 - (c) in connection with regulations including emissions from international aviation or shipping in the target.
57. Clause 6(1) grants a similar power to the Secretary of State to amend the 26 to 32% range within which the budget encompassing 2020 must be set, and any other target or range set by the Secretary of State under clause 5(1)(c).
58. This power is subject to the same conditions which apply to the power to amend the target for 2050 in clause 2 (see clause 6(2)).
59. The same considerations that apply to the power in clause 2(1) apply to this power and it is therefore made subject to the affirmative resolution procedure.
60. In addition, the Secretary of State must also seek the advice of the independent and expert Committee on Climate Change before taking any decision, and must allow the devolved administrations at least 3 months to offer their views. When amending the target, the Secretary of State must take the Committee's advice into account, and make a statement as to whether and how the devolved administrations' views have been taken into account in reaching a decision (see clause 7).

Clause 4(1)(a) and 8 (Duty to set carbon budgets for budgetary periods)

Duty imposed on: Secretary of State

Duty met by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

61. The Secretary of State has a duty to set the budget for each budget period, and must do so by order, subject to the affirmative resolution procedure.
62. One of the primary tasks of the Committee on Climate Change is to give independent, expert and authoritative advice on the level of budgets. It would not therefore be sensible for the level of budgets to be set on the face of the Bill before the Committee could be formally set up and advise on the most appropriate budget level.
63. It is therefore appropriate that these decisions be left to the Secretary of State once the Committee has been formally set up and is able to advise on the matter.
64. There are several procedural limitations to the exercise of this power. First, the Secretary of State must set the first three budgets by the end of February 2009, and all others at least 11 and a half years before the beginning of the budget period in question. This ensures that there is certainty around the UK's budgets in the medium term.
65. Secondly, before setting the budget the Secretary of State must obtain and take into account the advice of the Committee on Climate Change this ensuring that budgets will be set on the basis of independent expert advice.
66. As the level of budgets has the potential to have significant implications in relation to the economy and society more broadly, and is fundamental to ensure that the long-term target in clause 1 can be met, it is considered that it should be subject to a high level of parliamentary control. The power is therefore made subject to the affirmative resolution procedure.
67. In addition, in order to ensure that this decision takes full account of the action that can be taken by the devolved administrations to reduce emissions, the Secretary of State must consult the devolved administrations before setting the budget and give them at least three months to offer their views.

Clause 16(2) & (3) (Powers to amend carbon budgets)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

68. Clause 16(2) and (3) permit the Secretary of State to amend carbon budgets in limited circumstances.
69. Clause 4(2) requires budgets to be set at least 11 and a half years before the budget period begins. Setting legislative budgets this far into the future is desirable in order to provide a clear and transparent framework within which public policy-makers, businesses and citizens can plan with confidence.

70. However, when setting budgets this far ahead it is plausible that the assumptions upon which those decisions are taken could change significantly during the intervening period. This could, for example, leave the UK in a situation where meeting a particular budget were no longer the most cost-effective way in which to reach its long term targets; or there could be a significant relevant development within the European or international context that would alter the assumptions on which basis a particular budget or budgets had initially been set.
71. The Secretary of State therefore has a power to amend a budget *before the budget period in question begins* but only where it appears to the Secretary of State that there have been significant changes affecting the basis on which the previous decision was made. Where those conditions do not apply, the Secretary of State may not amend the budget at all.
72. In addition, the Secretary of State may not amend the budget until and unless fresh advice from the Committee on Climate Change has been sought and taken into account. This will ensure that any such decision must be taken transparently and only on the basis of independent expert advice.
73. Furthermore, in order to ensure that this decision takes full account of the action that can be taken by the devolved administrations to reduce emissions, the Secretary of State must consult the devolved administrations before amending the budget, and must allow them at least 3 months to offer their views. When amending the budget, the Secretary of State must also make a statement as to whether and how the devolved administrations' views have been taken into account in reaching a decision.
74. The power to amend the budget for a period which has begun is even more limited. The Secretary of State may only amend a budget in these circumstances where there has been a significant change affecting the basis on which the previous decision was made *since the budget period in question began*.
75. This means that any changes which took place between the budget being set and the beginning of the budget period must be disregarded – as if they had justified a change to the budget, the Secretary of State should have made such a change before the period began.
76. In its evidence to the Joint Committee, the Committee noted that clause 13(5) of the draft Bill made it clear that it was possible to amend budgets after the budget period in question had ended and expressed the view that the case for such a power had not been made out. In the light of the Committee's views, this subsection has been removed from the revised Bill.
77. As noted in the commentary on clause 8(1), the level of budgets has the potential to have significant implications for the economy and society more broadly, and is fundamental to ensure that the long term target in clause 1 can be met. It is considered that this power should be subject to a high level of parliamentary control, and it is therefore made subject to the affirmative resolution procedure.

Clause 18(1) (Power to amend length, etc, of budgetary periods)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

78. The Bill provides that Budget periods are to be 5 years in duration. This mirrors the fact that commitment periods under the Kyoto Protocol and the EU Emissions Trading scheme are also 5 years long.
79. The intention is that budget periods under the Bill should follow those set out in international and European law so as to ensure that the emissions are managed over similar time periods at international and domestic level. This will ensure that the relationship between domestic budgets under the Bill and the UK's international targets is as simple and transparent as possible.
80. However, binding targets under the Kyoto Protocol currently only extend to 2012 and it cannot be taken for granted that any future international agreement setting targets would run on a 5 yearly cycle. Should that not be the case, then it would be desirable to be able to change the length of budget periods and / or the times at which they start, in order to ensure that the periods under the Bill match those in international law.
81. Clause 18 allows therefore allows the Secretary of State to amend clause 4(1)(a) so as to alter the length of budgetary periods and the dates upon which they begin.
82. The power is limited in two ways. The first is that it may only be exercised for this purpose. If the international and European framework continues to adopt 5 yearly periods, then the Secretary of State may not exercise the power.
83. The second restriction is that the power may not be exercised in such a way to create a gap in time between budget periods altogether. So, for example, it could not be amended so that the first budget period ended at the end of 2012 and the second began in 2014.
84. It is appropriate to delegate this power to the Secretary of State so that any changes of this nature which are consequential upon changes which occur internationally or at European level can be made without the need to find parliamentary time for new primary legislation.
85. The power allows the Secretary of State to make consequential amendments to other parts of the Bill. This is necessary because many of the provisions of the Bill are based upon the assumption that budget periods will be 5 years long.
86. For example, it might be necessary or expedient to change the dates by which the Secretary of State sets the budgets; the dates by which the Committee on Climate Change must advise on certain matters; the dates by which the Secretary of State and Committee must make certain reports. Without this power, alteration of the budget periods could lead to the Bill no longer fitting together as a coherent structure.
87. While it is necessary to have this flexibility, the department considers the budget system to be crucial to the framework set out in Part 1 of the Bill and this provisions is therefore made subject to the affirmative resolution procedure. Furthermore, the Secretary of State must also consult the devolved administrations before exercising this power.

Clause 19(1)(b) and 20(1) (Power to designate a targeted greenhouse gas)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

88. The essence of Part 1 of the Bill is to require the government to set binding carbon budgets, and to ensure that the net UK carbon account does not exceed those budgets. The budget itself is a limit on the amount of “targeted greenhouse gases”. Clause 19 defines targeted greenhouse gas as carbon dioxide, and allows the Secretary of State to designate any other greenhouse gas as a targeted greenhouse gas.
89. In order to avoid dangerous levels of climate change, reductions in emissions of all greenhouse gases will be required. Including a wider basket of gases within the target would also allow for the most cost-effective abatement options to be considered across all gases. However, the department considers that it is necessary to focus first on carbon dioxide only. This is for three reasons.
90. First, this is where the deepest cuts need to be made. Carbon dioxide currently makes up around 85% of all UK emissions. Secondly, since 1990, the UK has had considerable success in abating emissions of other greenhouse gases, whereas carbon dioxide levels have remained relatively stable. Therefore a carbon dioxide only target initially will make sure that strong action is taken to abate these emissions. Thirdly, there remains considerable uncertainty about the potential to reduce other greenhouse gas emissions cost-effectively, particularly in the long-term.
91. In order to ensure that we are able to move quickly to include other greenhouse gases in our targets when the time is right, the Secretary of State has a power to add other greenhouse gases to the target in the targets in future. This is subject to a number of restrictions.
92. First, the Secretary of State must seek and take into account the advice of the Committee on Climate Change. This will ensure that any such decision would have to take account of independent and expert advice.
93. Secondly, the decision is subject to the affirmative procedure, thereby providing a high degree of parliamentary control. Finally, the Secretary of State must consult the devolved administrations prior to exercising this power, thus ensuring that their views are taken account of.
94. The Secretary of State may also make provision as to determining the amount of emissions for the year 1990. This is important as 1990 is the baseline year against which the target for 2050 is to be measured (see clause 1).
95. Clause 20(2) also makes clear that such an order may designate a different base year or base years for a greenhouse gas other than carbon dioxide.
96. This would be useful to make sure that there is consistency between the base years under the Bill and those adopted at international level. For example, under the Kyoto Protocol it has been agreed that the UK will measure reductions in emissions of carbon dioxide compared with a base year of 1990, but the Protocol allows the UK to choose to apply a different base year (1995) for emissions of hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride. For the purposes of the Kyoto Protocol, the UK has chosen to apply a different base year for

emissions of these greenhouse gases, and this clause allows for this to be reflected in the budgeting system under the Bill.

97. An order designating additional greenhouse gases as a “targeted greenhouse gas” may also make consequential amendments to the provisions of the Bill. This is a narrow power, but may be useful if for some reason the introduction of a new gas is not easily compatible with the existing framework of Part 1.

Clauses 21(2) and 22(2) (Power to make provision in respect of carbon units)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution (sometimes Affirmative)

98. The duty of the Secretary of State under clause 1(1) and 4(1)(b) is to ensure that the net UK carbon account is at or below a specific level. The net UK carbon account is defined in clause 22 as total emissions of targeted greenhouse gases in the UK, minus removals of targeted greenhouse gases from sinks; minus carbon units which are to be credited to the account; plus carbon units which are to be debited from the account.

Carbon units

99. Under the Kyoto Protocol, a number of tradable “units” exist including Assigned Amount Units (“AAUs”), Certified Emissions Reductions (“CERs”), Emissions Reductions Units (“ERUs”) and Removal Units (“RMUs”). CERs and ERUs are granted to project participants who undertake projects which are shown to result in a reduction of greenhouse gas emissions. AAUs are the units which are granted to countries in order to meet their commitments.
100. All of these units are tradable meaning that a country with an emissions limitation target under the Kyoto Protocol may purchase any of these units from elsewhere in the world and count them towards meeting its target.
101. Units of this nature will also count towards reducing the net UK carbon account by “crediting” the account. The exact units which count for these purposes and the circumstances in which they are to be regarded as crediting the account are to be prescribed by the Secretary of State in regulations.
102. It is appropriate for this decision to be delegated to secondary legislation as it is necessary to be able to respond quickly to changes in the international framework as and when certain units cease to be available or new ones become available. For example, it is not clear at present whether the current system of AAUs, CERs, RMUs and ERUs will remain in place after 2012.
103. There are safeguards in place. The Secretary of State may only allow units to be counted if they represent reductions in greenhouse gases (like CERs), an amount of permitted emissions of greenhouse gases within a capped system (like an AAU or an EU ETS allowance) or a removal of greenhouse gas emission from the atmosphere (like an RMU).
104. Furthermore, the regulations may only allow units to count towards the net UK carbon account if regulations ensure that they then cease to be available to offset other greenhouse gas emissions. This ensures the integrity of the system by making sure that units cannot be counted twice.

105. The corollary of allowing units to count towards targets and budgets is that if emissions reductions do occur within the UK (for example by companies operating within the EU Emissions Trading Scheme) and those emissions are effectively exported abroad through the sale of units, those reductions should be added back onto the net UK carbon account. Part I of the Bill deals with this through the concept of “debiting” units from the account.
106. The circumstances in which a unit is to be debited from the net UK carbon account are again to be prescribed by regulations to reflect the fact that the system needs to be responsive to changes in the international accounting procedures. It is crucial that any changes of this nature can be made at short notice as there is a risk that any point at which there is a mismatch between national and international accounting procedures could cause a loss of environmental integrity in the scheme.
107. Again there are limits on this power in that the units specified in the regulations must represent reductions in greenhouse gases (like ERUs) or an amount of permitted emissions of greenhouse gases within a capped system (like an AAU or an EU ETS allowance) or a removal of greenhouse gas emission from the atmosphere (like an RMU).

Supplementary provisions

108. In addition to the requirement to specify what a credit and debit is and when they are to be taken into account, the regulations may also make provision establishing a scheme registering and tracking the movement of units.
109. It is very likely that a system of this nature will be required in order to ensure that there is transparency as to the types and amounts of units which are to be taken into account and to ensure that there is no double counting of units.
110. Such a scheme is likely to require a significant amount of detail which is very technical in nature and it would be disproportionate to require Parliamentary time to be spent on this. Furthermore it is possible that the detailed accounting mechanisms will need to be updated from time to time as the international framework changes.
111. It is likely that the registration scheme would need to be administered by a body, so the Secretary of State has power to confer functions upon an existing body to carry out this task, and to make appropriate modifications to enactments relating to such a body. Without this power, it would not be possible to pass this task to an independent body outside of central government.
112. In case it becomes inappropriate over time for an existing body to carry out this function, the Secretary of State also has a power to establish a new body precisely for the purpose of administering such a scheme.
113. In general, the provisions of these regulations are likely to be technical and administrative in detail and therefore uncontroversial. Subject to two significant exceptions, these regulations are therefore subject to the negative resolution procedure.
114. The first exception is the first exercise of the power, which is made subject to the affirmative procedure. The purpose of this is so that Parliament may acquaint itself with, and fully debate, the fundamental principles of the accounting structure that is to be created and satisfy itself that the basic framework for the carbon accounting regime is satisfactory. This is a change from the draft Bill, which has been made in response to the Committee’s recommendation.

115. In addition, prior to the first exercise of the power, the Secretary of State must also seek and take into account the advice of the Committee on Climate Change, to ensure independent and expert advice and provide further reassurance as to the robustness of the basic accounting framework. This is also a change from the draft Bill.
116. The second exception is where the power is exercised to make modifications to primary legislation relating to a body appointed to administer the registration scheme. This is also made subject to the affirmative resolution procedure, thus ensuring that there is a high level of parliamentary scrutiny.

Clause 25(3) (Power to make provision in respect of emissions from international aviation or shipping)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

117. At present, emissions from international aviation and shipping are not counted towards the targets or budgets in Part I of the Bill. Clause 25(3) allows the Secretary of State to make regulations providing for these emissions to be counted.
118. There is at present no international agreement on how responsibility for emissions from international aviation and shipping should be apportioned between countries.
119. However, it is likely that international agreement on this issue will be reached at some point in the future. When such agreement is reached it would be appropriate for the UK's share of international aviation and shipping emissions to be taken into account towards the budgets and targets set under Part I of the Bill. This clause allows the Secretary of State to include these emissions without having to find the parliamentary time to obtain new primary legislation.
120. The power is limited in that the Secretary of State may only add these emissions where there has been a change in international or European law or policy relating to aviation or shipping, thus meaning that the power can only be exercised where there has been movement on the issue at international level.
121. The regulations may make provision as to the exact period in which emissions from international aviation and shipping are to be taken into account. This makes clear that the regulations allow the Secretary of State to provide that these emissions are to be taken into account from some point in the future, or if partway through a budget period, may provide that those emissions are to be taken into account for the entirety of that period.
122. This clause also allows the Secretary of State to define the base year for these emissions. Under the Kyoto Protocol it has been agreed that the UK will measure reductions in emissions of carbon dioxide compared with a base year of 1990. Different base years may be applied for emissions of other greenhouse gases. It is plausible that international agreement might be reached that emissions from international aviation or shipping should be measured against a different base year, or average of a number of years. This clause allows for this to be reflected in the budgeting system
123. It is appropriate for this power to be delegated to the Secretary of State so that the system of budgets can be responsive to changes in the international systems. If such

an agreement is reached it is likely that there would be strong justification to bring these emissions within the scope of Part 1 of the Bill as quickly as possible. The Department therefore considers that it would be disproportionate to have to seek valuable Parliamentary time in order to make new primary legislation bringing these emissions into the system.

124. However, the introduction of emissions from international aviation and shipping into the budgeting system would be a significant change and it is considered that it should be subject to a high level of parliamentary control. The power is therefore made subject to the affirmative resolution procedure.

Clause 25(2) (Power to define “international aviation or shipping”)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

125. As noted above, unless provided for by regulations under clause 25(3), international aviation and shipping are excluded from the scope of Part I of the Bill. This is in line with international agreements in this area.
126. Exactly which elements of aviation and shipping are to be regarded as “international” has changed from time to time in accordance with improvements in international carbon reporting practice, which is a constantly developing area.
127. It is therefore considered that it might be necessary for the Secretary of State to have power to clarify what is meant by international aviation and shipping from time to time as carbon reporting practice develops. This will allow the Secretary of State to ensure that what the UK is required to account for under Part I of the Bill is always in line with what it is required to monitor under international protocols.
128. The department notes that the Committee, in its evidence to the Joint Committee, suggested that the affirmative procedure would be appropriate for this power. The department accepts that this power will determine the scope of clause 25 as a whole and may prove to be a controversial policy area. However, the department continues to consider that the negative resolution procedure provides sufficient parliamentary scrutiny for this power.
129. This is a very limited power. For example, it would not be open to the Secretary of State to define “international aviation and shipping” as including all aviation and shipping as under the principles of public law, this would be an unreasonable exercise of the power. Furthermore, the Secretary of State will undoubtedly have to have regard to the manner in which international aviation and shipping is defined internationally. And it leaves the principle that only international aviation and shipping emissions should be excluded unchanged.
130. It is therefore considered that the negative resolution procedure should provide sufficient scrutiny in this case.

Part 2 — The Committee on Climate Change

Clause 28(4) (Power to extend period for progress report)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

131. Clause 28 requires the Committee on Climate Change to lay before Parliament and the devolved legislatures an annual report setting out its views on the progress towards meeting the targets and budgets in Part 1 of the Bill. Clause 28(3) provides that reports must be laid no later than 30th June each year. Clause 28(4) allows the Secretary of State to extend the period during which the Committee's annual report on progress must be laid before the legislatures.
132. This power is mirrored by the power in clause 29(4), which allows the Secretary of State to adjust the date by which the Secretary of State must respond to the Committee's progress report each year (see paragraphs 139-146).
133. The power in clause 28(4) is included because the reporting dates in the Bill have been chosen to allow the Committee to consider, before making its progress report, emissions data made public by convention and under international and European Union reporting requirements.
134. The power would allow the Secretary of State to make appropriate adjustments to the date if the international reporting requirements were altered. If, for example that information were to become available later in the year, then it might make sense for the Committee to be able to delay its report until it has had the opportunity to see and consider that information.
135. Before making such an order, the Secretary of State must consult the devolved administrations so as to ensure that their views are taken into account.
136. The Department considers that the negative resolution procedure is appropriate because the Secretary of State is only given the power to extend the period in which a report must be given; the Secretary of State could not exercise the power so as to remove the Committee's duty to make a progress report. Furthermore, the power cannot be used to prevent the Committee from reporting earlier if it wishes. It simply leaves open the possibility of the Committee being able to delay its report should it wish to do so.
137. Given these limitations, the Department considers that it would be unduly burdensome to require a debate in each House of Parliament before an extension could be made to the relevant period.
138. Additionally, the Merits of Statutory Instruments Committee will scrutinise any order made to adjust the reporting period and would be able to report any order which it considers likely to be of interest to the House or to be inappropriate. Such scrutiny removes the possibility that an order made using this power could go unnoticed.

Clause 29(4) (Power to extend period for response to progress report)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

139. The Committee on Climate Change is required to report annually on progress towards meeting budgets. Clause 29(1) requires the Secretary of State to respond to this report each year by 15th October. Clause 29(4) allows the Secretary of State to extend that period by Order.
140. The requirement on the Committee to make its annual progress report in the first place is contained in clause 28. Clause 29(4) requires that this report be laid before Parliament by 30th June each year, and allows the Secretary of State to extend this period by order.
141. The power in clause 29(4) to extend the date for the Secretary of State to respond is necessary because of the power in clause 28 to extend the period by which the Committee must report in the first place. If the power in clause 28 were to be exercised, thus allowing the Committee to delay its report, this may in turn make it necessary to extend the deadline for the Secretary of State to respond.
142. For example, it is plausible that the Committee might consider that it would like to delay its annual progress report until late September so that it could take into account certain information which would not have been available up until that point.
143. If this request were to be acceded to, it would be unreasonable to expect the Secretary of State to respond to that report by 15th October as it would not give sufficient time to properly consider the Committee's report. It is not in anyone's interests for the government not to have time to prepare a properly considered response to the Committee's progress report.
144. Indeed, the absence of this provision would lead there to be a strong motive for the Secretary of State to turn down any request by the Committee to extend the deadline for making its progress report beyond more than a few weeks. This is because to do so would make the Secretary of State's job of responding by 15th October much more challenging.
145. This is only a power to extend the period. It is not a power for the Secretary of State to avoid the duty altogether. It is therefore simply a power to add minor administrative flexibility. However, it is considered appropriate for this to be made subject to parliamentary control and is therefore made subject to the negative resolution procedure.
146. Before making such an order, the Secretary of State must consult the devolved administrations so as to ensure that their views are taken into account. This is particularly important as the Secretary of State must consult these administrations before responding to the Committee's report and it may be appropriate for the devolved administrations to contribute towards the response.

Schedule 1

Paragraph 1(4) (Power to alter the number of Committee members)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

147. Paragraph 1(1) of Schedule 1 provides that the Committee for Climate Change is to consist of a person appointed to chair the Committee and “not less than five and not more than eight members appointed by the Secretary of State”. Paragraph 1(4) gives the Secretary of State a power to amend, by order, those minimum and maximum figures.
148. This power has been included to allow the Secretary of State to adjust the membership figures in appropriate circumstances, for example if the Committee’s workload increased or reduced or if a different balance of skills was required. The power recognises that the volume and type of work given to the Committee may vary over time. The Department considers that is not proportionate to have to take primary legislation to make such a simple adjustment to the Committee’s constitution.
149. The Department considers that the negative resolution procedure is appropriate, because this is not so important an issue that Parliament’s time should be taken up debating it. Additionally, instruments made using the negative resolution procedure are scrutinised by the Merits of Statutory Instruments Committee, and could be reported in appropriate circumstances. There are precedents for this approach – see for example the Natural Environment and Rural Communities Act 2006 (Schedule 1, paragraph 3 and Schedule 2, paragraph 3).
150. To reflect the fact that the Committee on Climate Change is to be a jointly sponsored body, funded by the Secretary of State and the devolved administrations, the Secretary of State may only exercise this power with the consent of all of the devolved administrations.

Part 3 — Trading Schemes

Clause 36(1) (Power to make provision for trading schemes)

Power conferred on: Relevant national authority

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

151. Clause 36(1) contains the most significant delegated power in the Bill. It enables the national authorities (that is, the Secretary of State and the devolved administrations) to introduce, by regulations, trading schemes relating to greenhouse gas emissions. The power is subject to the affirmative resolution procedure and is subject to a statutory requirement to consult. It should be read in conjunction with Schedule 2 to the Bill.
152. The system of targets and carbon budgeting in Part 1 of the Bill will not in itself reduce emissions. However, it will provide a strong framework within which the

government will be required to manage emissions, for example by introducing new measures and adapting existing measures to ensure that emissions are reduced so as to stay within budgets. In order for the government to be able to deliver these measures, it will need new powers.

Trading Schemes

153. The use of trading schemes has the advantages of traditional regulation in giving a high degree of certainty of outcome, with the added benefit that they allow the market to determine how best to arrive at that outcome at the lowest cost.
154. Experience has shown that legislation establishing trading schemes¹⁶ tends to be lengthy and technical. It has also been the case that regular amendments have been made to streamline the schemes. The Department therefore considers that the subject matter is best suited to be dealt with through secondary legislation.
155. The Secretary of State and devolved administrations already have powers to make trading schemes by delegated legislation under a number of different powers. Some of these powers are very general – most notably section 2 of the Pollution Prevention and Control Act 1999 – and some very specific. Clause 36 brings the elements of each of these powers together and supplements them with some additional flexibility to allow differing elements of each of these schemes to be combined within the same scheme. This will allow the government to choose the most appropriate element for each scheme making it easier to tailor each scheme to the needs of those regulated by it.
156. In the longer term it also allows the possibility for existing and new schemes to be rationalised and adapted so that they fit together more coherently. Under the existing more specific powers, this would be much more difficult.

Restrictions on the scope of the power

157. There are two main sources of restrictions on the scope of the power:
 - (a) a trading scheme must fall within one of the categories of scheme in section 36(2); and
 - (b) Schedule 2 contains a number of factors which must be included in a trading scheme; they vary with the type of scheme being made.

The two types of trading scheme

158. Section 36(2) introduces two types of trading scheme:
 - (a) trading schemes that operate by limiting or encouraging the limitation of activities that consist of the emission of greenhouse gases or that cause or contribute, directly or indirectly, to the emission of greenhouse gases;
 - (b) trading schemes that encourage activities that cause or contribute, directly or indirectly, to the reduction of greenhouse gas emissions or the removal of greenhouse gases from the atmosphere.

In this respect, the power is limited to a narrower purpose than the existing power in section 2 of the Pollution Prevention and Control Act 1999, which allows

¹⁶ See for example the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (S.I. 2005/925) which establishes the EU Emissions Trading Scheme in the UK; The UK Greenhouse Gas Emissions Trading Scheme 2002 which established the UK Emissions Trading Scheme.

regulations to be made regulating activities which are capable of causing any environmental pollution or for the purpose of otherwise preventing or controlling emissions capable of causing any such pollution.

159. Trading schemes that operate by limiting activities include “cap and trade” schemes where total emissions for all participants are capped. Tradable allowances are issued to participants up to the level of the total cap. At the end of a trading period, each participant must have enough allowances to cover his emissions. The European Union Emissions Trading Scheme (“EU ETS”) is a good example of an existing cap and trade scheme (transposed into UK law by regulations made under section 2(2) of the European Communities Act 1972).
160. A variant on the “cap and trade” scheme is the “cap and offset” scheme. Under cap and offset schemes, each participant has a capped level of activity (usually measured in terms of emissions). If the capped level of emissions is exceeded, the participant must offset his excess emissions by purchasing emissions credits, representing equivalent reductions of emissions elsewhere.
161. Cap and trade schemes and cap and offset schemes typically focus directly on emissions (like EU ETS) but need not necessarily do so. They may also focus on activities – such as the use of electricity or other forms of energy – which indirectly cause emissions. The voluntary UK Emissions Trading Scheme which ran from 2002 to 2006 covered both direct emissions, and the use of electricity, heat and steam (referred to as “indirect emissions”).
162. The government has also recently announced that it intends to implement a new scheme – the Carbon Reduction Commitment – to apply to medium to large users of electricity. This scheme would similarly apply a cap and trade scheme to both direct and indirect emissions and it is intended that this scheme would be the first use of the power in clause 36.
163. Cap and trade schemes also have the potential to be applied upstream from the point of emission, for example by capping the supply of carbon intensive fuels. This would have the potential to provide a financial incentive for suppliers of alternative fuels which have a low carbon intensity.
164. These are notable gaps in the powers contained in the Pollution Prevention and Control Act 1999, as trading schemes made under that power may only be framed in terms of direct emissions.
165. By contrast, trading schemes framed with a view to encouraging lower-emission activities impose targets on participants. Certain activities generate certificates, which are tradable. At the end of each trading period, each participant must have enough certificates to meet his target. For example, the “Renewables Obligation” (see sections 32 to 32C of the Electricity Act 1989) requires electricity suppliers to source a specific, and annually increasing, percentage of electricity from renewable sources. The generation of renewable energy (either by a participant or by another renewable energy supplier) allows the scheme administrator to issue “green certificates” which can be collected or bought by participants as evidence that the obligation has been met.
166. The power would allow similar schemes to be set up encouraging other types of emission reduction activity. For example, the European Commission is mandated to examine whether the Energy Services Directive¹⁷ should be amended to introduce a trading scheme for “white certificates” to encourage energy efficiency. The power

¹⁷ Directive 2006/32/EC.

could be used to implement such a scheme, or to set up a similar scheme in advance.

The required elements of each type of trading scheme

167. The table below sets out the requirements of each type of trading scheme, expressed by reference to what must be provided for in the regulations setting out the scheme:

Legislation	Duty
Schemes limiting activities	
Schedule 2, para 2	Must specify operating period or periods
Schedule 2, para 3(1)	Must identify activities
Schedule 2, para 3(3)	Must specify units of measurement
Schedule 2, para 4(1)	Must identify persons to whom scheme applies
Schedule 2, para 5(4)	Must not provide for allocation to be made in return for consideration
Schedule 2, para 6(3)	Must ensure that allowances used by a participant for the purposes of a trading scheme cannot be used by the participant for any other purpose
Schedule 2, para 9(1)	Must allow trading
Schedule 2, para 9(3)	Must specify trading circumstances
Schemes encouraging activities	
Schedule 2, para 13	Must specify operating period or periods
Schedule 2, para 14(1)	Must identify activities
Schedule 2, para 14(3)	Must specify the units of measurement
Schedule 2, para 15(1)	Must identify persons to whom the scheme applies
Schedule 2, para 16	Must set a target for the total amount of activities and impose an obligation on each participant
Schedule 2, para 17	Must provide for the issue of certificates evidencing the carrying out of activities
Schedule 2, para 17(3)	Must require participants to have enough certificates to comply with obligations
Schedule 2, para 17(4)	Must contain provision for ensuring that certificates cannot be re-used
Schedule 2, para 16(1)	Must provide for trading in certificates
Schedule 2, para 16(3)	Must specify circumstances in which trading is permitted

168. Schedule 2 also contains a number of permissive elements which may be provided for in the regulations, and some of these are themselves constrained by requirements which apply if a particular policy option is chosen.

169. For example, paragraph 7 provides that if regulations made under that paragraph provide for the allocation of allowances, they must set a limit on the total amount of allowances to be allocated, and must require each participant to acquire a particular amount of credits.
170. Furthermore, paragraph 30 provides an option to create criminal offences, but – in response to the Committee’s evidence – places restrictions on the mode of trial and maximum sentences which may be imposed.
171. These restrictions limit the power to make it appropriate only for making trading schemes. The power is not broad enough to introduce other kinds of measures to tackle emissions.

The breadth of the power

172. The trading scheme power is intended to be broad enough to enable the Secretary of State or the devolved administrations to make any trading scheme he considers appropriate, within the powers set out above.
173. Part 3 of, and Schedule 2 to, the Bill include a wide range of components which may be included in the regulations establishing a trading scheme. Of particular note are the provisions setting out how activities and participants may be identified – see clause 37 on the scope of “indirect” emissions, paragraphs 3 and 14 of Schedule 2 on the identification of “activities” and paragraphs 4 and 15 on the identification of “participants”.
174. Part 3 of Schedule 2 sets out the powers in relation to the administration and enforcement of trading schemes. The Secretary of State is empowered to appoint an administrator (but not to create a new body to act as administrator).

Justification for the breadth of the powers within these limitations

175. A number of trading schemes currently operate or have operated in the UK:
- the EU Emissions Trading Scheme¹⁸
 - the Renewables Obligation¹⁹
 - UK Emissions Trading Scheme²⁰
 - Climate Change Agreements²¹.
176. Section 2 of the Pollution Prevention and Control Act 1999 (“the 1999 Act”) also enables the Secretary of State to establish trading schemes in relation to point source emissions. That power has been used, jointly with section 2(2) of the European Communities Act 1972, to transpose part of the Large Combustion Plants Directive²² through a trading scheme in NO_x and SO₂ gases and dust²³.
177. However, the 1999 Act cannot be used to establish schemes capable of dealing with indirect emissions or to establish more sophisticated measures to encourage particular activities. For example, it could not be used to establish a scheme such as

¹⁸ Established by regulations made under section 2(2) European Communities Act 1972

¹⁹ Established under sections 32 to 32C Electricity Act 1989.

²⁰ Established on a voluntary basis based on agreements between government and participants.

²¹ Established under Schedule 6 of the Finance Act 2000.

²² Directive 2001/80/EC.

²³ The Large Combustion Plants (**National Emission Reduction Plan**) **Regulations 2007 (S.I. 2007/2325)**.

the proposed Carbon Reduction Commitment as this would target indirect emissions caused by the use of electricity. Neither could it be used, for example to establish a cap and offset scheme limiting the amounts of carbon-intensive fuel supplied by fuel suppliers.

178. Where other schemes have been established using primary legislation, it has proved difficult to find opportunities to amend the legislation where changes are required in the scheme rules and procedures. Such difficulties make it hard to coordinate schemes that will be useful to encourage a single carbon price.
179. The use of trading schemes is expected to increase as the pressure introduced by Part 1 of the Bill requires further reductions in emissions. Trading schemes are often technical in nature and it is expected that amendments will be required relatively regularly – and possibly more quickly – than is allowed by the timetabling for primary legislation.
180. Experience with the existing UK Emissions Trading Scheme (UK ETS) has shown that a successful trading scheme should be fully adaptable to the rapidly changing policy (including scientific), business and regulatory contexts and as a result of this, regular review and amendment (mainly of a relatively minor nature) will be both necessary for an effective scheme and would also be beneficial from a better regulatory point of view. The UK ETS rules have so far been amended on five occasions since 2002, and the regulations which implement the EU Emissions Trading Scheme have been amended or consolidated on six occasions since original transposition in 2003.
181. The power to make trading schemes in secondary legislation will allow a more responsive and joined-up approach to this area of regulation, and allow individual schemes to be better tailored to its individual circumstances. It will be easier to keep scheme rules up-to-date, effective and imposing no more regulatory burden than is necessary, and will reduce the amount of parliamentary time taken up with matters which may be of relatively low priority for Parliament.
182. But given the scope of the powers in Part 3 of the Bill it is, of course, appropriate that there should be procedural safeguards, and these have been included in Part 3.

Procedural safeguards

183. The department has noted the Committee's evidence that, although provisions such as this may be unsuited to primary legislation, there may be a need for additional scrutiny. We welcome the Committee's recognition of the difficulties in using primary legislation for these purposes. The department considers that the draft Bill already provided for a high level of transparency and scrutiny for regulations made under this power, but nevertheless we have sought to strengthen these provisions in order to address the Committee's concerns.
184. Clause 40(1)(b) provides that the Secretary of State must consult such persons likely to be affected by the scheme as he considers appropriate before making regulations under clause 36. Although full consultation is routinely carried out in accordance with Cabinet Office guidance, it is appropriate to make it a statutory requirement where powers such as this are to be used. This requirement will ensure that those affected by the scheme will have an opportunity to express their views before any regulations are made.
185. In addition, to provide further reassurance that these powers are being exercised appropriately, clause 40(1)(a) makes it a statutory requirement for the national authority to consult the Committee on Climate Change and take its advice into account before making such regulations. This means that the national authority

would necessarily have to have regard to independent and expert advice when exercising the power. This requirement has been added since the draft Bill was published and provides a significant additional transparent check on the government's use of this power.

186. Furthermore, by convention the government routinely carries out a publicly available Impact Assessment before making regulations of this nature, thus ensuring that it is properly informed of the likely regulatory burden before taking such action. To ensure that the Secretary of State will have to fully take into account the impacts of the scheme, clause 40(2) states that the Committee's advice is explicitly required to include advice on any limit on the total amount of activities which is to be imposed under a scheme. This requirement will act as a further independent safeguard for participants.
187. Where appropriate, any regulations must be made using the affirmative resolution procedure – see clause 40(3). Following pre-legislative scrutiny of the draft Bill and consideration of the Committee's evidence to the Joint Committee we have expanded the list of situations in which the affirmative procedure is required, so that this level of Parliamentary oversight is necessary where:
- a new trading scheme is created,
 - a scheme is extended to a new class of participants or activities,
 - its duration is extended,
 - an amendment would make the requirements of a trading scheme significantly more onerous,
 - a new offence is created,
 - new enforcement powers are conferred,
 - penalties are increased,
 - regulations amend or repeal primary legislation (as to which, see paragraphs 195 to 198 of this memorandum).
188. This clearly covers a broad range of regulations which could be made. The Department considers that it is clearly appropriate to make such regulations subject to the affirmative resolution procedure in the majority of circumstances, and for the relevant legislature²⁴ to be given an opportunity to debate the scheme in question.
189. There are, however, likely to be situations where the Department considers that it would be disproportionate to use the affirmative resolution procedure. For example, where a trading scheme has already been set up, it is likely that it will be necessary to make relatively small amendments to the administration arrangements and other rules of the scheme, such as the rules on what records must be kept.
190. In those situations the negative resolution procedure is appropriate. Where the regulations are made wholly or partly by the Secretary of State, Parliament will have an opportunity to scrutinise such amendments – the policy justification will be

²⁴ Where the regulations are to be made by the Secretary of State, the instrument would be debated in both Houses of Parliament. Where they are to be made by one of the devolved administrations, it would be debated in the relevant devolved legislature. Where an instrument is made jointly by the Secretary of State and a devolved administration, the instrument is to be debated in both Houses of Parliament and in the relevant devolved legislature – see Schedule 3.

considered by the Merits of Statutory Instruments Committee – or to debate the statutory instrument.²⁵

191. The department acknowledges the Committee’s view that at times the question of whether regulations make the overall requirements of a scheme “significantly more onerous” will be a matter of impression and debate. However, we do consider that this distinction is useful.
192. One can think of examples of regulations which would make the overall requirements of a scheme more onerous, but the additional burden would not be significant. One example might be a requirement on a participant to send a document or record, which it was already required to maintain, to the administrator of the scheme once every year. The department considers that for such an amendment, the negative resolution procedure would be appropriate.
193. It is true that regulations made by negative resolution procedure could potentially be judicially reviewed on this basis and in such a case the relevant national authority would have to demonstrate to the court that the overall requirements of the scheme were not significantly more onerous. However in the converse situation there is no risk. The Committee will note that clause 63(3) means that it would be legally valid to opt for the affirmative resolution procedure even if on its face, the negative resolution procedure is appropriate.
194. The effect of this is that where there is any doubt as to the correct procedure, the Secretary of State or the relevant devolved administration making the regulations is likely to take a cautious approach and to opt for an affirmative procedure.

Clause 46 (Power to make consequential and transitional provisions)

Power conferred on: National authority

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

195. Clause 46 gives the national authorities²⁶ a “Henry VIII power” to amend, revoke or repeal any enactment he considers appropriate in consequence of making regulations under clause 36.
196. This power is being sought because there are a number of trading schemes in primary legislation or made using very narrow powers which might at some point be consolidated or replaced with schemes made using the new power. In those circumstances, it would be more convenient to make the appropriate revocation, repeal or amendment using secondary legislation because it would allow those consequential changes to be made at the most appropriate time and with suitable transitional arrangements.
197. This power will allow the burdens on business to be managed more effectively and will remove the need to make primary legislation to effect what would be minor or technical changes once the principle and contents of a new trading scheme have been debated and passed using the affirmative procedure.

²⁵ Where the regulations are made by a devolved administration, the regulations will instead be laid before the relevant devolved legislature.

²⁶ That is, the Secretary of State and the devolved administrations.

198. The procedural limitations discussed at paragraphs 183 to 194 of this memorandum will apply to consequential amendments and repeals made under this clause; in particular, consequential provisions of this kind must be made using the affirmative resolution procedure, which is appropriate where primary legislation is amended or repealed using secondary legislation.

Part 4 — Other Provisions

Waste Reduction Schemes

Introduction

199. Clause 51 and Schedule 5 (which it introduces) allow for the making of waste reduction schemes, which are schemes to incentivise occupiers of domestic premises to produce less waste and recycle more of the waste they produce. Clause 51(1) provides for Schedule 5 to amend the Environmental Protection Act 1990. It does so by adding to that Act a new section 60A, which provides that a waste collection authority whose area is in England may make a waste reduction scheme in accordance with a new Schedule to that Act, Schedule 2AA. It is Schedule 2AA which details what a waste reduction scheme is and how it must be made.
200. Clause 51(2) provides that Schedule 5 may only be brought into force in accordance with clauses 52 and 54, which allow the Secretary of State to designate certain areas where waste collection authorities may make waste reduction schemes on a pilot basis. Following a review of the pilots and a report to Parliament, waste reduction schemes may subsequently be rolled out to all other areas of England, should the Secretary of State so decide.

Schedule 5, paragraph 1, inserting section 60A into the Environmental Protection Act 1990 (Power to make a waste reduction scheme)

Power conferred on: *Waste collection authorities*

Power exercisable by: *Making a scheme*

Parliamentary procedure: *Not subject to Parliamentary procedure*

201. Section 60A allows a waste collection authority in England to make a scheme in accordance with the waste reduction provisions, initially only if it is an authority in a designated pilot area.
202. The Department considers that it is appropriate to delegate this power to local authorities for two reasons. First, the decision on whether to make a scheme should be made by the local authority, as it will take effect only in that locality, and so democratic control should be at local level, not at Parliamentary level. Secondly, the nature and purpose of a scheme means that it must be tailored to its locality and population, and the local authority is the appropriate body to do so, in consultation with residents and other local stakeholders. Accordingly, the department has sought to provide local authorities with the flexibility they will need to establish the most effective scheme for their areas.
203. The exercise of an authority's power to make a scheme is limited by certain requirements and conditions, being:
- the three conditions which it must meet before it makes a scheme (Schedule 2AA, paragraph 2);

- the power of the Secretary of State to set a limit on charges (Schedule 2AA, paragraph 6);
- the requirement that schemes must be revenue neutral (Schedule 2AA, paragraph 7);
- procedural requirements which ensure transparency and good communication (Schedule 2AA, paragraphs 8 and 10);
- a requirement to have an appeals mechanism (Schedule 2AA, paragraph 9); and
- the requirement to have regard to any guidance issued by the Secretary of State (Schedule 2AA, paragraph 15).

Clause 52(1)(a) (Power to designate the area of a waste collection authority as a pilot area)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Not subject to Parliamentary procedure

204. Clause 52(1)(a) provides a power for the Secretary of State to designate by order the area of a waste collection authority as a pilot area.
205. The Secretary of State may only make such a designation where an authority has submitted a proposal for a scheme which the Secretary of State has approved as being suitable for piloting one or more aspects of the waste reduction provisions. Following designation, the authority may make a scheme in accordance with the approved proposals.
206. The designation order must specify a time period for which the provisions are to have effect in the designated area.
207. The Department wishes to run pilots, as it recognises that waste reduction schemes could be controversial, and wishes to have firm evidence of their effectiveness before allowing them to proceed more generally.
208. The Secretary of State's power to designate pilot areas is limited by clause 52(2), which provides that he may not designate more than five areas as pilots.
209. The Department considers that it is appropriate to delegate this power to the Secretary of State as it would not be necessary for Parliament, having approved the provisions on what a scheme must and may do, to decide which areas should be made pilots; the assessment of proposed schemes can most appropriately be carried out by the Department as an administrative matter.
210. For the same reason, the Department does not consider that it is necessary to lay the order before Parliament. The consideration of the underlying proposals is not relevant to the choice of pilot area. In effect, the Secretary of State will simply be commencing the provisions in relation to particular areas; commencement orders are not generally subject to Parliamentary procedures, as they concern timing, not substantive policy.
211. Further, the decision on whether an authority wishes to seek designation is a local decision, not a decision for Parliament; accordingly, should the Secretary of State

agree that the authority's proposals are suitable for piloting, the department considers that this should suffice.

Clause 54(2)(a) (Power to provide that the waste reduction provisions shall come into force generally)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Not subject to Parliamentary procedure

212. Clause 54(2)(a) provides the Secretary of State with the power to provide by order that the waste reduction provisions in Schedule 2AA shall come into force generally across England on such date as the Secretary of State specifies in the order.
213. The Secretary of State may only make such an order following compliance with clause 53, which imposes a duty on the Secretary of State to lay before Parliament a report on the operation of the waste reduction provisions in each pilot area.
214. The report to Parliament must contain a description of each pilot scheme and how it compares with other schemes and a description of how the relevant enactments and guidance in that pilot area differed from those applying in other pilot areas and in areas not designated, and an assessment of whether a scheme has been a success. The Secretary of State's report must also review the waste reduction provisions in the light of their operation in the relevant pilot area or areas.
215. An order under clause 54(2)(a) would not be required to be laid before Parliament. Parliament will have already have scrutinised and approved the waste reduction provisions in Schedule 2AA during the passage of the Bill, so the Department does not consider that it will not be necessary for Parliament to approve the unchanged provisions again. Clause 54(2)(b), discussed below, allows for Parliament to scrutinise proposed changes to the provisions, if this is the case. The report to Parliament will provide an opportunity for Parliament to question the Secretary of State regarding the operation of the pilots.

Clause 54(2)(b) (Power to make amendments to the waste reduction provisions)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

216. Clause 54(2)(b) gives the Secretary of State the power to make by order such amendments to the waste reduction provisions in Schedule 2AA as appear necessary and expedient in the light of how they operated in the pilot areas, and to provide that the provisions as so amended shall come into force generally on a date specified in the order.
217. Clause 54(3) provides that such amendments to the waste reduction provisions may include provision conferring power on the Secretary of State to make subordinate legislation.

218. The Department considers that it is necessary for the Secretary of State to have the power to amend the waste reduction provisions in order to be able to respond to the findings of the review of pilots required by clause 53. The purpose of having the pilot schemes is to test the success of different types of schemes in different areas, and so it is necessary to have the flexibility to amend the waste reduction provisions in the light of testing.
219. The Department recognises that a high level of scrutiny should be applied to proposed amendments to the waste reduction provisions. Accordingly, clause 54(5) provides that an order making amendments is subject to the affirmative resolution procedure.
220. Furthermore, the Secretary of State's report on the pilot or pilots will have been laid before Parliament before any such order is laid. This will ensure that Parliament is well informed about the way in which the pilot or pilots have operated before it scrutinises an order to make amendments to the provisions.

Clause 54(4) (Power to repeal the waste reduction provisions, if they are not brought into force generally)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

221. Clause 54(4) provides that, should the Secretary of State decide not to make an order which rolls out the waste reduction provisions generally, he must make an order repealing the provisions.
222. The Department considers that it is necessary for the Secretary of State to be able to repeal the waste reduction provisions should he consider, in the light of his review of the pilots and his consequent report to Parliament, that the provisions should not be made available generally.
223. The Department recognises that Parliament, having approved the waste reduction provisions, must approve an order to repeal the waste reduction provisions. Accordingly, clause 54(5) provides that such an order is subject to the affirmative resolution procedure.

Schedule 2AA, (Power to amend by order paragraph 2(1) and (2) on paragraph 2(3) conditions for making a waste reduction scheme)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

224. The Government wishes to impose controls on the discretion of authorities in devising a scheme, in order to ensure that their discretion is exercised properly. Accordingly, paragraph 2(1) sets out three conditions which a waste collection authority must have satisfied before it puts a scheme into effect, being :
- (a) that a good recycling service is available to the occupiers of premises within the scheme;

- (b) that the scheme takes account of the needs of groups who might be unduly disadvantaged by it; and
 - (c) that the authority has a strategy for preventing, minimising or otherwise dealing with the unauthorised deposit or disposal of waste.
225. Paragraph 2(2)(a) defines a “recycling service” as arrangements for the collection of recyclable domestic waste from premises separately from other waste, and paragraph 2(2)(b) defines a “good” recycling service as a service which meets the standards specified in guidance issued by the Secretary of State.
226. The Department considers that it is necessary to leave the definition of a “good” recycling service to guidance in order to allow flexibility for different localities, whose needs and facilities for recycling services will differ. The Department does not wish to be too prescriptive, as different authorities will have different ways of achieving “good” recycling, for example as to at what point materials should be separated for recycling.
227. Paragraph 2(3) allows the Secretary of State by order to amend paragraph 2(1) and (2). The Department considers that it is appropriate for the Secretary of State to have this power as it may be necessary to change these conditions in the light of experience. The Secretary of State may consider it necessary to add further conditions, or to make the present conditions more or less stringent. For example, evidence may show that it is possible to be more specific as to recycling standards or as to what a strategy for dealing with unauthorised deposit of waste should contain. Accordingly, the Department considers it appropriate to allow for this flexibility.
228. Nonetheless, the Department recognises the importance of Parliament scrutinising any proposed changes to the conditions, and therefore any changes to them are subject to the affirmative resolution procedure.

Schedule 2AA, paragraph 6(1) (Power to set a limit on the amount of any charge)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

229. Paragraph 6(1) allows the Secretary of State by order to set a limit on the amount of the charge under paragraph 4 or 5 that may be imposed in respect of any premises in any financial year.
230. Paragraph 4 allows for an authority operating a scheme to require a charge in respect of the receptacles in which waste is deposited, while paragraph 5 allows for an authority to charge in respect of waste collected. The Department wishes to allow authorities to exercise their own judgement in setting the levels of charges to the level they consider will alter behaviour, but considers that the Secretary of State should have the power to impose limits on charges, if to do so is considered necessary at some future date.
231. The Department is unable at present to specify a maximum charge, as we require evidence from the pilots as the effect of particular levels of charge. However, the Department considers this to be in the nature of a reserve power, as, due to the revenue-neutrality requirement, they will be no advantage to authorities in setting higher charges than are necessary to change behaviour.

232. The Department considers that it is appropriate for such an order to be subject to the negative resolution procedure, as this is the usual procedure for this type of reserve power. The Department considers that it would be disproportionate to take up Parliamentary time with the affirmative resolution procedure. The Merits of Statutory Instruments Committee will be able to scrutinise the order and bring it to the attention of the House if they consider it necessary.

Schedule 2AA, paragraph 7(2) (Power to amend the requirement of revenue neutrality)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

233. Paragraph 7(1) provides that from year to year, and taking one year with another, the aggregate amount of charges under paragraph 4 or 5 must not exceed the aggregate amount of the rebates or other payments under the scheme. This means that where the payment of charges is required, schemes must be revenue neutral.
234. Paragraph 7(2) gives the Secretary of State the power by order to amend paragraph 7(1). Paragraph 7(3) stipulates that any such order amending paragraph 7(1) may also make consequential amendments to paragraph 4(2) or paragraph 5(2), which provide that payments in respect of receptacles and amounts of residual waste need not be related to the authority's actual costs of providing receptacles or collecting the waste.
235. The Department considers that it is appropriate to give the Secretary of State the power to make such an order as, in the light of experience, it may be considered that the requirement of revenue neutrality should be altered in order to improve the effectiveness of future waste reduction schemes. For example, the evidence may show that less restrictive rules would be more effective in changing behaviour, or would be acceptable to occupiers, or would be more efficient administratively for authorities and occupiers.
236. The Department recognises that the revenue neutrality requirement is an important aspect of the provisions which the Government wishes to test through the pilot schemes. Therefore, the Department considers that it is appropriate that Parliament, should carry out scrutiny of any proposal to alter this requirement, so that any such an order is subject to the affirmative resolution procedure.

Schedule 2AA, paragraph 12(1) (Power to make provision as to administration of schemes)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

237. Paragraph 12 gives the Secretary of State the power to make regulations as to the administration of waste reduction schemes. Paragraph 12(1) enables such regulations to make provision about:
- how the amount of any rebate or other payment is to be determined;

- how any such rebate or payment is to be given;
 - how any charge is to be determined; and
 - how any such charge is to be collected or enforced.
238. Paragraph 12(2) allows the regulations to provide that the administration of a waste reduction scheme may be integrated with the administration of council tax (and by sub-paragraph (2)(b) the regulations may provide for consequential modification of council tax legislation). Paragraph 12(3) provides further detail on this: in particular, the regulations may provide:
- (a) for including material relating to the scheme in the council tax demand notice,
 - (b) for applying the procedure for appeals about liability to council tax to questions arising under the scheme, and
 - (c) for applying the procedures on enforcement of council tax liability to any liability under the scheme.
239. These provisions are to enable necessary changes to be made to council tax legislation. For example, an authority may be able to make savings by administering charges using the same machinery as council tax.
240. The Department considers that it is appropriate to give the Secretary of State the power to make such provision as may be necessary in order to permit schemes to operate effectively, whether as pilots or more widely if the provisions are rolled out generally, and to make improvements to the provisions in the light of experience.
241. The Department recognises that the detail as to charges, rebates or other payment, and how they may relate to council tax, is important to how schemes will operate and that Parliament should be consulted. Accordingly, the power to make such regulations is subject to the negative resolution procedure. The Department considers that it would be disproportionate to take up Parliamentary time with the affirmative resolution procedure. The Merits of Statutory Instruments Committee will be able to scrutinise the order and bring it to the attention of the House if they consider it necessary.

Schedule 2AA, paragraph 16(2) (Power to amend the definition of “domestic premises”

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Affirmative resolution

242. Paragraph 16(1) defines, amongst other terms, the term “domestic premises” used in Schedule 2AA. It is defined as a building or self-contained part of a building which is used wholly for the purposes of living accommodation, a caravan that usually and for the time being is situated on a caravan site, or a moored vessel used wholly for the purposes of living accommodation.
243. Paragraph 16(2) allows the Secretary of State by order to amend the definition of “domestic premises”.
244. The Department considers it is appropriate to give the Secretary of State this power in order to allow flexibility to allow the definition to be reduced or extended in the

future. The power to extend the definition will, however, be limited by the need to exercise it rationally; for example, the definition could not be extended to include commercial premises.

245. The Department considers that it is proper that Parliament scrutinise any change to the scope of this definition; accordingly, any order is subject to the affirmative resolution procedure.

Renewable Transport Fuel Obligations

246. Clause 55 and Schedule 6 amend Chapter 5 of Part 2 of the Energy Act 2004 which provides for the Secretary of State to set up a Renewable Transport Fuel Obligations scheme (“RTFO” scheme) by order (an “RTF order”). The Bill amends the way in which the RTFO scheme may operate and who may administer the scheme.
247. The Bill also amends Chapter 5 of Part 2 of the Energy Act 2004 which provides for the Secretary of State to set up by order a renewable transport fuel obligations scheme.
248. The amendments will:
- (a) introduce a new power to replace the Administrator with a new Administrator, who may be the Secretary of State, and to transfer functions accordingly;
 - (b) amend the provisions which determine how sums received by the Administrator are to be dealt with;
 - (c) give the Secretary of State a power to issue written directions to the Administrator;
 - (d) impose a duty on the Administrator to promote the supply of sustainable fuel which has a beneficial environmental effect; and
 - (e) set up an information gateway to allow disclosure of information by Her Majesty’s Revenue and Customs to the Administrator.

Devolution arrangements

249. The powers introduced or modified by Clause 55 and Schedule 6 apply to the whole of the UK. Any RTF order or order made under the new powers introduced by Schedule 6 to the Bill will apply on a UK wide basis, and any necessary consultations with the Devolved Administrations will be undertaken when the powers are exercised. The devolution arrangements have not materially influenced the Department’s decision regarding the provisions for delegated legislation.

Description and analysis of delegated powers

250. A new power to make delegated legislation is contained in paragraph 2 of Schedule 6 to the Bill. New powers for the Secretary of State to give directions to the Administrator are contained in paragraphs 2 and 3. Full details are set out below. This section of the memorandum describes the powers taken, explains their purpose, explains why the matter is to be left to delegated legislation rather than included in the Bill and specifies the Parliamentary scrutiny procedure provided for each power.

Schedule 6, paragraph 2 (New order-making power to replace Administrator)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

251. Paragraph 2 inserts new section 125C into the Energy Act 2004. This gives the Secretary of State a new power to appoint a person as the Administrator of the RTFO scheme in place of a person previously appointed and to transfer functions from the old Administrator to the new Administrator.
252. The new Administrator must be one of the following: the Secretary of State, a pre-existing statutory body or person (that is a body or other person established or appointed by or under any enactment to carry out other functions) or a body established by an order made under new section 125C.
253. An order made under new section 125C may establish a new body corporate to be appointed as the new Administrator of the RTFO scheme and, if it does so, may make any provision that may be made in an RTF order. This means that the order may make ancillary provision for appointing members of the body, for staffing the body, for expenditure, and to regulate the procedure of the body, and may make any other appropriate provision for purposes connected with the establishment or maintenance of the body. The order may also confer discretions on the Secretary of State, the body itself or its members or staff.
254. The order may also provide for the transfer of staff, property, rights and liabilities to the new Administrator under the order and in particular the order may provide for:
- the transfer of any property, rights and liabilities to have effect subject to specified exceptions or reservations (section 125C(4)(a));
 - the creation of rights and interests (section 125C(4)(b));
 - the order to have effect notwithstanding anything which would otherwise prevent the transfer of the property, rights or liabilities (section 125C(4)(c)).
255. In addition the order may:
- provide for anything done by or in relation to the old Administrator to have effect as if done by or in relation to the new Administrator (section 124C(5)(a));
 - permit anything being done by or in relation to the old Administrator at the time of transfer to be continued by or in relation to the new Administrator (section 124C(5)(b));
 - provide for references to the old Administrator in instruments or documents to be treated as references to the new Administrator (section 124C(5)(c));
 - dissolve the old Administrator if established by order under Chapter 5 of the Energy Act (section 124C(5)(d));
 - modify any enactment relating to the old Administrator or the new Administrator as the Secretary of State considers appropriate to facilitate the transfer (section 124C(5)(e)).

256. The last of these provisions is a power to amend primary legislation by order (a so-called Henry VIII power). The power is limited to such amendments as may be appropriate to facilitate the transfer of functions from the old Administrator to the new Administrator.
257. In addition it is provided that an order which provides for the transfer of staff must provide for the Transfer of Undertakings (Protection of Employment) Regulations 2006 to apply.

Justification for using delegated legislation

258. Use of delegated legislation for this purpose is in line with the approach adopted by the Energy Act which the Bill amends. The Energy Act (section 125) provides for the appointment of the Administrator by means of an RTF order. It is necessary for the appointment of the Administrator and the replacement of the Administrator to be left to secondary legislation because this gives the Government the greatest flexibility in identifying and appointing an Administrator or new Administrator with the right capabilities to administer the scheme. It also allows an appointment or replacement to be made more quickly than if primary legislation was needed.
259. The transfer of functions to the new Administrator is also appropriate for delegated legislation. The provisions to be made on transfer of the functions of the Administrator will depend upon the particular circumstances prevailing and cannot be ascertained in advance. Furthermore the detailed nature of the provisions which will be necessary upon a transfer make them suitable for secondary legislation. The new power will enable the Administrator to be changed and his functions to be transferred to give effect to the change without making or amending an RTF order.

Parliamentary procedure

260. The new order-making power is subject to the negative resolution procedure unless the order amends an Act of Parliament or an Act of the Scottish Parliament in order to facilitate the transfer of the Administrator's functions or it establishes a body corporate to act as the new Administrator. This will allow a new Administrator to be appointed as quickly as possible. There is no requirement for consultation because the nature of the power (to appoint a new Administrator and to transfer functions to him) is such that its exercise is unlikely to be controversial.
261. If an order made under the new power amends an Act of Parliament or an Act of the Scottish Parliament in order to facilitate the transfer of the Administrator's functions, it will be subject to the affirmative resolution procedure. This will ensure that Parliament has the opportunity to scrutinise and debate any proposed amendments to primary legislation which result from the transfer of functions to the new Administrator. In this case the new power is subject to the same Parliamentary procedure as the RTF order-making power under section 125 of the Energy Act.
262. If the order made under the new power establishes a body corporate as the new Administrator, it will be subject to the affirmative resolution procedure. This will ensure that Parliament has the opportunity to scrutinise and debate any proposal to establish a new non-departmental public body (NDPB). The new order-making power is subject to the same Parliamentary procedure as the power to establish by an RTF order a new NDPB to act as the first Administrator under section 125 of the Energy Act.

Part 6 — General Supplementary Provisions

Clause 64(2) (Power to add to the list of greenhouse gases)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

263. Clause 64(1) defines the term “greenhouse gas” as six gases or groups of gases.
264. Clause 64(2) creates a power for the Secretary of State to amend the definition so as to add to the list of gases which appear in clause 64(1).
265. The list of gases currently in clause 64(1) are the gases which are recognised under the United Nations Framework Convention on Climate Change (“the UNFCCC”) as contributing towards climate change. These are the gases which countries have committed to limit under the Kyoto Protocol.
266. However, over time it may be that scientific knowledge increases and it is possible that we could discover that other gases also contribute towards climate change. In those circumstances, it would be appropriate for the Secretary of State to be able to add these other gases to the list. This would have the effect that the Secretary of State could add the gas to the system of targets and budgeting under Part 1 of the Bill, and that national authorities could introduce trading schemes to reduce the emissions, or increase the removals, of the new gases.
267. The Secretary of State’s power is limited in that a gas can only be added to the list if it appears to him that an international or European agreement or arrangement recognises that the gas in question contributes towards climate change. This ensures that any decision of the Secretary of State must be in line with international consensus.
268. Clause 64(4) provides that the power is to be subject to the negative resolution procedure. Given the technical nature of any amendment made using this limited power, it is not considered necessary to take up Parliament’s time debating any order made by the Secretary of State. The Secretary of State would have to justify any decision to make an amendment in an explanatory memorandum laid before the Merits of Statutory Instruments Committee.

Clause 66(1) (Power to specify other agreements and arrangements constituting “international carbon reporting practice”)

Power conferred on: Secretary of State

Power exercisable by: Statutory Instrument

Parliamentary procedure: Negative resolution

269. Clause 66(1) defines “international carbon reporting practice” as meaning accepted practice in relation to reporting for the purposes of the protocols to the United Nations Framework Convention on Climate Change (“the UNFCCC”). Clause 66(1) goes on to give the Secretary of State the power to specify alternative international agreements or arrangements which will constitute international carbon reporting practice.

270. This inclusion of this power foresees the possibility that the UNFCCC could be replaced with a different convention in the future. If so, the definition of “international carbon reporting practice” would be out of date, and primary legislation would be required to replace it.
271. Furthermore, it may be that monitoring protocols may become adopted under other international fora – for example it is conceivable that monitoring arrangements for aviation may be adopted under the auspices of the International Civil Aviation Organisation rather than the UNFCCC. The inclusion of the amendment power in clause 64 is intended to make any such amendment, which would be of a technical character, easier and less time-consuming.
272. Clause 66(2) provides that the power is to be subject to the negative resolution procedure. Given the technical nature of any amendment made using this limited power, it is not considered necessary to take up Parliament’s time debating any order made by the Secretary of State. The Secretary of State would have to justify any decision to make an amendment in an explanatory memorandum laid before the Merits of Statutory Instruments Committee.

Powers to give Directions

Clause 34(1) (Power to give directions to the Committee)

Power conferred on: Secretary of State / national authorities

Power exercisable by: Not specified

Parliamentary procedure: None

273. Clause 34(1) confers a power on the Secretary of State, or in some case the national authorities²⁷, to give general or specific directions to the Committee on Climate Change as to the exercise of its functions. Clause 34(6) imposes a duty on the Committee to comply with any directions so given.
274. Clause 34(4) prevents anyone from giving the Committee directions as to the contents of any advice or report. In other words the Secretary of State or national authorities could require the Committee to report by a particular date, or to take particular factors into account, but may not direct it as to what it says when it does report.
275. The power to give directions to a non-departmental public body is an important but standard element of the body’s constitution where it is independent but unelected. The power to give directions ensures that there is an adequate degree of control over a body which is accountable to the Secretary of State and the devolved administrations in relation to its use of public money. In practice, powers to issue directions to a body such as this are rarely used.
276. Clause 34(4) introduces a very important safeguard for the Committee’s independence in the exercise of its primary functions of giving advice and making progress reports; clause 34(4) secures this independence by preventing any attempt by the Secretary of State to use the direction-making power to require the Committee to give particular advice or make a favourable progress report where the Committee would otherwise not wish to do so.

²⁷ That is, the Secretary of State and the devolved administrations acting jointly.

Clause 44(1) (Power to give directions to the administrator of a trading scheme)

Power conferred on: *Relevant national authority*

Power exercisable by: *Not specified*

Parliamentary procedure: *None*

277. Clause 44(1) confers on the relevant national authority a power to give directions to the administrator of a trading scheme. The administrator would be a person or body appointed to that role under the regulations establishing the scheme. Clause 44(3) requires the administrator to comply with any directions it is given.
278. A person or body's appointment as an administrator is likely to be accompanied by a grant in relation to its work in administering the scheme. It is important that the relevant national authority (that is, the Secretary of State or devolved administration who made the trading scheme) is able to maintain the proper degree of accountability in the administration of public sector delivery, and the direction-making power is an important safeguard allowing him to do that.
279. There may also be occasions where the national authority takes a different view to the administrator of, say, the law, or situations where the national authority's policy may differ from that of the administrator. In such situations it is appropriate that the national authority should have a power of direction – it is not of such paramount importance that administrators under trading schemes should be totally independent, as compared with the functions of the Committee on Climate Change. This is a common power – for example the Secretary of State and devolved administrations have power to direct the Environment Agency and Scottish Environment Protection Agency in their role as regulator and registry administrator under the EU ETS.²⁸
280. The power is restricted in that it only permits the relevant national authority to issue directions in relation to the administrator's functions in its capacity as administrator of a trading scheme made under Part 3 of the Bill. The power would not allow the national authority to issue directions in relation to any functions which the body has under other legislation.

Schedule 6, paragraphs 2 and 3: Powers of Secretary of State to give directions to an RTFO administrator

Power conferred on: *Secretary of State*

Power exercisable by: *Not specified*

Parliamentary procedure: *None*

281. Paragraph 2 inserts new sections 125B(2) to (4) into the Energy Act 2004. It gives the Secretary of State the power to issue written directions to the Administrator as to how the Administrator exercises any powers conferred upon him under new section 125B(1)(a) or (b) (which re-enacts section 125(3)(a) and (b)) of the Energy Act to require information from transport fuel suppliers. It will allow the Secretary of State to direct the Administrator to collect information (for example relating to the volumes of fuels supplied or the environmental effects of renewable fuels

²⁸ See Greenhouse Gas Emissions Trading Scheme Regulations 2005, regulation 45, 46.

- supplied) within a specified period, using a format or methodology specified by the Secretary of State. The power includes power to revoke or vary any directions given.
282. The power to give directions to a non-departmental public body is an important but standard element of the body's constitution where it is independent but unelected. Paragraph 2 will give the Secretary of State the power to give directions to ensure that information is collected by the Administrator which is sufficient to enable the Secretary of State to monitor the effect of the RTFO scheme upon the environment, without overly burdening transport fuel suppliers. It will also enable the Secretary of State to set a standard format, methodology and timetable for the information requirement so as to enable the collection of meaningful statistics and to enable a fair comparison to be made between different fuels and different suppliers.
283. The power to give directions contained in paragraph 2 will be a reserve power, to be used only in the very unlikely event that it is needed to ensure that the Administrator imposes requirements which provide the Secretary of State with the necessary information and do not impose an excessive burden on industry.
284. The power is not subject to any Parliamentary procedure. Under the Energy Act an RTF order may empower the Administrator to set information requirements without Parliamentary scrutiny. One reason for this is that the requirements are likely to be complicated and technical. They may also need to be changed very quickly to take account of the emergence of new technologies or changes in supply chains for renewable fuels. The same considerations apply to the new power to direct; any directions given are likely to be complicated and technical and directions may need to be given or changed more quickly than would be possible if they had to be set out in primary or secondary legislation.
285. Paragraph 3 inserts new sections 126(6) - (8) into the Energy Act 2004. It gives the Secretary of State the power to issue written directions to the Administrator as to how the Administrator exercises any functions in connection with the counting or determination of amounts of transport fuel. New section 125A(1)(a) (which re-enacts section 125(2)(a) of the Energy Act) provides that an RTF order may confer powers and duties on the Administrator. Paragraph 3 will allow the Secretary of State to direct the Administrator to count amounts of transport fuel in a particular way (for example using a methodology specified by the Secretary of State). This will ensure that if an RTF order links the issue of certificates to carbon saving or sustainability, the Secretary of State can ensure that the policy is delivered by specifying the methodology to be used. The power includes power to revoke or vary any directions given.
286. The power to give directions to a non-departmental public body is an important but standard element of the body's constitution where it is independent but unelected. The power contained in paragraph 3 will be a reserve power, and in practice powers to give directions are rarely used.

287. The power is not subject to any Parliamentary procedure. Under the Energy Act an RTF order may give the Administrator powers or duties which can be exercised without Parliamentary scrutiny. One reason for this is that the exercise of a power to specify methodologies is likely to result in complicated and technical requirements. The requirements may also need to be changed very quickly to take account of the emergence of new technologies or changes in supply chains for renewable fuels. The same considerations apply to the new power to direct; any directions given are likely to be complicated and technical and directions may need to be given or changed more quickly than would be possible if they had to be set out in primary or secondary legislation.

November 2007

APPENDIX 5: REGULATORY ENFORCEMENT AND SANCTIONS BILL [HL]

Memorandum by the Department for Business, Enterprise and Regulatory Reform

Introduction

1. This memorandum describes the purpose and content of the Regulatory Enforcement and Sanctions Bill (the Bill); identifies the provisions of the Bill that confer powers to make delegated legislation; and explains in each case the purpose of the power, why the power has been left to delegated legislation, and the nature of, and reason for, the procedure selected.

Background to and purpose of Bill

2. The Bill delivers four distinct but related policy areas that are key to the delivery of the better regulation agenda.
 - Part 1 of the Bill will establish the Local Better Regulation Office (LBRO) as a statutory corporation.
 - Part 2 of the Bill seeks to secure co-ordination of regulatory enforcement by local authorities by establishing the Primary Authority Principle.
 - Part 3 of the Bill delivers key recommendations of the Macrory Report and makes provision for the introduction of an alternative system of civil sanctions for criminal regulatory offences.
 - Part 4 of the Bill empowers Ministers to place a requirement on persons exercising regulatory functions to perform their duties in a manner that conforms to the Hampton principles by removing unnecessary burdens.
3. The policy drive behind all four parts of the Bill stem from the recommendations of the Hampton Report, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (2005), which the Government accepted in full.

Part 1

4. The Hampton Report stated that, while there were many positive aspects to the work of local authority trading standards and environmental health services, there remained wide variations and inconsistencies in the application of national standards. These inconsistencies can result in uncertainty and unnecessary administrative burdens for business. In addition unco-ordinated action on the ground leads to unnecessary inspections, conflicting advice and duplication of effort at a local level.
5. Part 1 of the Bill will establish LBRO as a statutory corporation. LBRO has already been set up as a company wholly owned by the Government, with a programme spend to support best practice in local authority regulatory services. The statutory LBRO will be established with the core aim of supporting local authorities to regulate more effectively and efficiency (as announced at Pre-Budget Report 2005).
6. LBRO's role will be to:
 - improve the co-ordination and consistency of local authority regulatory enforcement through its management of the Primary Authority

Principle, resolving disputes when they arise (discussed in further detail below);

- issue guidance to local authorities in respect of their regulatory functions;
- review and revise a list of national priorities for local authority regulatory services;
- provide advice to Government on regulatory enforcement and regulatory issues associated with local government; and
- encourage best practice, and innovative approaches to the provision of local authority regulatory services, including through the use of its programme budget.

Part 2

7. Part 2 of the Bill will deliver the Government's commitment (Pre-Budget Report 2006) to place the Home and Lead Authority Principles²⁹, which will now be known collectively as the Primary Authority Principle, on a statutory footing. The Primary Authority Principle is based on the core idea that a business operating across the UK should be able to rely on a single local authority for regulatory advice and support. For example, a multi-site retailer who seeks guidance from the local authority on product labelling, should feel assured that if the guidance is followed, it will not be challenged in any of its individual outlets by other local authorities. It is intended that this will improve the consistency of advice and enforcement across local authority trading standards, environmental health, licensing and fire safety services.

Part 3

8. The Hampton Report found that regulators' penalty regimes can be cumbersome and ineffective and recommended that a comprehensive review of these regimes should take place.
9. The Macrory Review, *Regulatory Justice: Making Sanctions Effective* (2006), laid out a vision for transforming the regulatory sanctioning regime in the UK. The proposals set out by the Macrory Review were accepted in full by the Government.
10. The Review noted that the current regulatory sanctioning regime was ineffective, over reliant on criminal prosecution and lacking in flexibility. Its recommendations included introducing an alternative system of civil sanctions for regulatory offences in order to set up a modern, targeted fit for purpose sanctioning regime.
11. The new administrative sanctions include:
 - **Fixed monetary penalties (FMP):** A notice which requires a defaulter to pay a fixed monetary penalty.
 - **Discretionary requirements:** A requirement to impose a variable monetary penalty (VMP), a compliance notice or a restoration notice.
 - **Stop notices:** A notice requiring defaulters to cease carrying on an activity until the defaulter brings itself back into compliance.

²⁹ The Home and Lead Authority Principles are voluntary schemes currently run by the Local Authority Co-ordinator of Regulatory Services (LACORS) and the Health and Safety Executive (HSE) respectively. Both schemes seek to encourage consistency of regulatory enforcement by local authorities.

- **Enforcement undertakings:** These are promises offered by the defaulter to the regulator to take specific actions related to non-compliance.

Part 4

12. In July 2007 the Government published '*Next Steps on Regulatory Reform*' which said the Government was attracted to introducing a duty which could be applied to a regulator, requiring it to review its functions in order to consider whether it is imposing unnecessary burdens and to explain how it will ensure it does not impose or maintain unnecessary burdens in carrying out its functions. This proposal was first presented in the Pre-Budget Report 2005.
13. Reduction of administrative and other burdens introduced by regulators in the execution of their activities was central to the Hampton Report. The Legislative and Regulatory Reform Act 2006 (LRRRA) and the Regulator's Compliance Code implement key requirements identified in the Hampton Report. The introduction of a power to implement a duty will provide a baseline to tackle burdens underpinning these other requirements.
14. The LRRRA requires regulators to follow the five principles of better regulation which are:
 - Transparent;
 - Accountable;
 - Proportionate;
 - Consistent;
 - Targeted.
15. This Part introduces an order-making power that will enable a duty to be applied to regulators that requires them to secure that they do not impose or maintain unnecessary burdens when exercising the regulatory functions specified in the order.
16. If applied, the duty will require regulators to:
 - keep their functions under review to ensure they do not impose or maintain unnecessary burdens;
 - consider the extent to which it would be appropriate to remove or reduce burdens; and
 - where appropriate act to remove or reduce burdens;
 - publish a statement setting out what the person proposes to do in respect of the unnecessary burdens.

Delegated Powers

17. A list of all of the delegated powers contained in the Bill is set out in the table below.

CLAUSE	TITLE	SUBJECT	PROCEDURE
PART 1			
4(4)	Relevant function	Amending the schedule or clause by adding or removing enactments or matters	Affirmative resolution
17(1)	Power to dissolve LBRO	Dissolution of LBRO	Affirmative resolution
PART 2			
22(1)(b)	Relevant function	Specifying regulatory functions in respect of Scotland	Negative resolution
22(1)(c)	Relevant function	Specifying regulatory functions in respect of Northern Ireland	Negative resolution
26(6)	Enforcement action	Specify action which is or is not to be regarded as enforcement action	Negative resolution
Schedule 4, para 6(2)	Enforcement action: references to LBRO	Procedure to be followed on reference to LBRO	Negative resolution
27(1)	Enforcement action: exclusions	Prescribe circumstances in which certain provisions shall not apply	Negative resolution
PART 3			
34	Power to make orders under Part 3	Power to make provision in respect of fixed penalty notices, discretionary requirements, stop notices, and enforcement undertakings	Affirmative resolution
PART 4			
69(2) and (4)	Functions to which section 68 applies	Power to apply the duty in section 68	Affirmative resolution
PART 5			
72	Commencement		No procedure

18. In deciding whether subordinate legislation was appropriate in any particular case the Department had in mind the following criteria:
- The desirability of putting detailed technical provisions in secondary legislation rather than on the face of the Bill;
 - The need to ensure flexibility in responding to changing circumstances without requiring primary legislation;
 - The need to allow flexible timing to ensure that the drafting of technical details is right and affected parties can be consulted;
 - Precedent, given that some of the powers are similar to those already available in existing legislation.

Part 1: LBRO

19. This Part of the Bill makes provision for the establishment of LBRO as a statutory corporation, sets LBRO's objective, and gives it the following functions: (i) providing guidance to local authorities as to how to exercise their relevant functions; (ii) directing local authorities to comply with guidance issued by LBRO or another person such as a national regulator; (iii) providing financial support and assistance to local authorities; (iv) giving advice to Ministers on the way in which local authorities exercise their relevant functions; and (v) preparing and publishing a list of priorities specifying those regulatory matters to which local authorities should give priority. Part 1 applies to England and Wales only.

Clause 4: Relevant Function

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

20. Clause 4 defines the local authority functions that are within the scope of Part 1 of the Bill. Those functions fall into four broad categories of regulatory activity: (i) trading standards; (ii) environmental health; (iii) entertainment licensing and (iv) fire and rescue. In order to capture the functions falling within those categories with sufficient certainty, "relevant function" has been defined by reference to a list of enactments, and instruments made under such enactments, and, for secondary legislation made under section 2(2) of the European Communities Act 1972, by reference to the subject matters listed in clause 4(3).
21. Clause 4(4) confers on the Secretary of State a power to amend: (i) the list of enactments in Schedule 3, such as to add or remove any enactment from the list, and (ii) the list of subject matters in clause 4(3), such as to add or remove any matter from it. As such, it is a power that allows amendments to be made to primary legislation. Adjustments to the list of enactments and subject matters may be required, for example, to allow matters in respect of which there are currently no instruments under section 2(2) of the European Communities Act 1972 (for example, entertainment licensing) to be added. Whilst there is no current intention to increase or reduce the scope of Part 1 of the Bill, this power does provide flexibility to allow such changes to be made without the need for primary legislation.

22. As the power allows amendments to be made to primary legislation, including the possibility of extending the scope of Part 1 of the Bill, affirmative resolution procedure has been chosen. Parliament can, therefore, be assured that there will be appropriate scrutiny and approval of any proposed amendments.

Clause 17: Power to Dissolve LBRO

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Affirmative resolution

23. Clause 17 confers on the Secretary of State the power to dissolve LBRO and to make consequential, supplementary, incidental, and transitional provision in relation to its dissolution. Clause 17(2) includes an illustrative list of the kinds of things that an order under this clause may do. This includes repealing, revoking or amending primary legislation.
24. LBRO is established with the general objective of securing that local authorities exercise their relevant functions effectively, in a way that does not give rise to unnecessary burdens, and in a way that conforms with the following principles: regulatory activities should be carried out in a way that is transparent, accountable, proportionate, consistent and targeted only at cases where action is needed. It is hoped that LBRO will be successful in fulfilling its objective and, in the future, that it will no longer be needed, or at least will no longer be needed in its current form. This clause is based on similar provisions in the Clean Neighbourhoods and Environment Act 2005 (section 90). It allows LBRO to be dissolved and if appropriate, facilitates the transfer of its property, rights, liabilities and functions to another person. Any decision to dissolve LBRO will be taken at some point in the future when, for example, it is decided that it is no longer required in its current form. The power to make amendments that are consequential or supplemental to the dissolution of LBRO is delegated to allow such amendments to be made in a timely manner without the need for separate provision.
25. The Secretary of State is required to consult persons who may be substantially affected by the dissolution of LBRO before making any order under this clause. In addition, the power is subject to affirmative resolution procedure which will allow Parliament to debate whether or not LBRO should be dissolved.

Part 2: Coordination of Regulatory Enforcement

26. This Part of the Bill seeks to secure co-ordination of regulatory enforcement by local authorities by establishing the Primary Authority Principle. The scheme will allow regulated persons carrying on an activity in the area of two or more local authorities to have a single local authority nominated as its primary authority in respect of one or more regulatory functions. The primary authority will have the function of giving advice and guidance to the regulated person and to other local authorities about those regulatory functions. Where a local authority proposes to take enforcement action against a regulated person with a primary authority relationship, the enforcing authority must consult with the primary authority before taking the action. The primary authority can block the proposed action if it is inconsistent with advice or guidance it has previously given to the regulated person. Where the primary authority blocks the proposed enforcement action, the enforcing authority can, with LBRO's consent, refer the matter to LBRO. Where the primary authority

does not block the enforcement action, the regulated person can, with LBRO's consent, refer the matter to LBRO. A primary authority may, with LBRO's consent, instead of deciding a matter for itself, refer the matter to LBRO. On a reference, LBRO must confirm whether or not the enforcement action can proceed, or may recommend that some other enforcement action should be taken.

27. It is intended that these provisions will secure more consistent regulatory enforcement by local authorities and allow local authorities to target their regulatory resources more effectively.
28. Part 2 applies in England and Wales, Scotland and in Northern Ireland.

Clause 22(1)(b): Relevant Function

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

29. As noted at paragraph 20 above, "relevant function" is defined in Part 1 by reference to enactments listed in Schedule 3, instruments made under those enactments, and instruments made under section 2(2) of the European Communities Act 1972 with respect to certain matters. For local authorities in England and Wales, the definition of relevant function remains the same for Part 2. In relation to local authorities in Scotland, "relevant function" means a regulatory function which is exercised by that authority under an enactment and is specified for the purposes of this Part by order made by the Secretary of State. Part 2 of the Bill is to apply in Scotland only in respect of reserved matters. This is achieved by restricting the order making power such that any order may not specify a regulatory function which is conferred by provision falling within the legislative competence of the Scottish Parliament.
30. The principle that this Part of the Bill should apply in Scotland in respect of reserved matters is settled. The power merely allows the Secretary of State to specify a subset of the enactments in Schedule 3, under which it is agreed as between the Department and the Scottish Executive that the functions fall in a reserved area. Delegation will afford the time necessary to ensure that the Department and the Scottish Executive can agree which enactments give rise to functions in a reserved area. The power has been delegated in order to avoid repetitive and voluminous listing of enactments for England and Wales, and then separately for Scotland, and Northern Ireland, in the Bill itself. The power will also allow any changes to Schedule 3 to be reflected for Scotland without the need to resort to primary legislation.
31. As this power is designed only to allow detailed technical provision to be made in respect of reserved matters for Scotland (the preparation of a list of enactments), it is subject to negative resolution procedure.

Clause 22(1)(c): Relevant Function

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

32. Part 2 of the Bill will not apply in Northern Ireland in respect of matters falling within the legislative competence of the Northern Ireland Assembly. This power is the equivalent power to that listed above, and applies in order to allow that devolution arrangement to be given effect in respect of Northern Ireland. As for the power in respect of Scotland, it is subject to negative resolution procedure.

Clause 26(6): Enforcement Action

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Order made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution</i>

33. Clause 26 sets out the key features of the Primary Authority Principle: a local authority other than the primary authority must notify the primary authority before taking enforcement action against a regulated person; if the primary authority determines within five working days that the proposed action is inconsistent with advice or guidance it has previously given, it may block the enforcement action; and the enforcing authority may not proceed with the enforcement action during the five working day period.
34. The Department wishes to avoid imposing unnecessary administrative burdens where the action that the local authority proposes to take involves something short of “formal” enforcement action. The difficulty here is that regulated persons can incur significant costs amending their behaviour because a local authority indicates informally that it considers the regulated person to be in breach of regulatory requirements. Whilst these provisions are intended to minimise unnecessary costs being incurred as a result of inconsistent advice, equally, the Department wishes to avoid unnecessary bureaucracy impeding the essential, informal guidance and education function that many local authorities employ in managing their relationships with regulated persons and achieving compliance with regulatory requirements.
35. A definition of “enforcement action” is included in clause 26(5). In order to allow the definition to be finessed in light of experience, the Secretary of State, with the consent of the Welsh Ministers, is empowered under clause 26(6) to specify action which is or is not to be considered to be regarded as enforcement action. The power is delegated to provide flexibility in the light of experience of the operation of the Primary Authority Principle.
36. As the power allows detailed technical provision to be made once the scheme has been operational, negative resolution procedure has been chosen.

Clause 26(7): Schedule 4, paragraph 6(2): Enforcement Action: references to LBRO

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

37. Where a primary authority concludes that proposed enforcement action would be inconsistent with advice it has previously given, it may block the action. If it does block the action, the matter can be referred to LBRO by the enforcing authority. If it does not block the action, the matter can be referred to LBRO by the regulated person. The primary authority may itself refer the matter to LBRO instead of deciding the matter itself. Schedule 4 sets out the framework for references to LBRO to be made by the enforcing authority, the regulated person, and the primary authority.
38. On a reference, LBRO must decide whether or not: (i) the proposed enforcement action is inconsistent with advice or guidance previously given by the primary authority, (ii) the advice or guidance was correct, and (iii) the advice or guidance was properly given by the primary authority. LBRO must then, dependent upon its assessment, either confirm that the proposed enforcement action should, or should not, proceed, or, it can recommend that some other enforcement action should be taken.
39. General provision is made allowing LBRO to consult such persons as it thinks fit before making a determination and requiring LBRO to make a determination within 28 days. However, further detailed provision is likely to be necessary, for example to enable LBRO to secure the information it needs in order to make its determination. This power enables the Secretary of State to make further provision as to the procedure that will be followed for the purpose of references to LBRO.
40. The power has been delegated in order to avoid setting out detailed procedural rules in the Bill. There are numerous precedents for such an approach including, for example, section 5 of the Special Immigration Appeals Commission Act 1997 which allows the Lord Chancellor to make provision for procedural rules governing appeals to the Special Immigration Appeals Commission.
41. As the power allows detailed technical rules to be made, and does not allow changes to be made to primary legislation, it is subject to negative resolution procedure.

Clause 27(1): Enforcement Action

Power conferred on: Secretary of State

Power exercisable by: Order made by statutory instrument

Parliamentary procedure: Negative resolution

42. During consultation on the draft Bill, it became apparent that there was enforcement action in respect of which the requirement to consult the primary authority and wait five working days before taking action would be problematic. For example, where an environmental health or trading standards officer enters a supermarket and sees that there is a dropped egg on the floor, it would be inappropriate if the officer had to contact the primary authority and wait for five

working days before asking supermarket staff to clear the mess. Similarly, for many licensing issues, the key concerns will be exclusively local issues and it would not be appropriate for the enforcing authority to be required to notify the primary authority. Therefore, the Department proposes that there should be exemptions from the requirement to consult the primary authority before taking enforcement action in certain circumstances. It proved extremely difficult to specify the range of *de minimis* enforcement actions of this type which should be excluded from the prior consultation requirement in the Bill.

43. This power enables the Secretary of State, with the consent of the Welsh Ministers, to specify the kinds of enforcement action that will be exempt. Other types of action where the requirement to consult before taking such action would be problematic are where the primary authority cannot be reached, for example where there is a noise nuisance during the night, or where failure to take immediate action may jeopardise evidence of a breach.
44. Specifying what should be excluded from the requirement to consult before taking action without jeopardising the purpose of the provisions is something that can only be done via detailed technical provisions and with the use of examples. Such detail is inappropriate for primary legislation and the intention is that LBRO will work with the Department to develop a code of practice which will allow exempted actions to be described. This will be laid before Parliament appended to an order of the Secretary of State.
45. As the power is designed to allow detailed technical provision to be made in respect of the primary authority scheme, it is subject to negative resolution procedure.

Part 3: Civil Sanctions

46. Part 3 of the Bill establishes a system of administrative sanctioning powers that may be conferred on designated regulators, or persons exercising enforcement functions in respect of specified offences, by way of Ministerial order. The regulatory bodies to whom the powers may be awarded are set out in Schedule 5 and the enactments under which the specified offences arise are set out in Schedule 6.
47. Part 3 applies in England and Wales, Scotland and Northern Ireland.

Clause 34: Power to make orders under Part 3

<i>Power conferred on:</i>	<i>Ministers of the Crown and the Welsh Ministers</i>
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<i>Power exercisable by:</i>	<i>Order made by statutory instrument</i>
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<i>Parliamentary procedure:</i>	<i>Affirmative resolution</i>
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48. The power to make orders applies in respect of each of the civil sanctions provided for in Part 3: (i) fixed monetary penalties; (ii) discretionary requirements; (iii) stop notices; and (iv) enforcement undertakings. The power enables any Minister of the Crown, or where appropriate, the Welsh Ministers, to confer upon a regulator listed in Schedule 5 (a designated regulator), or upon an authority which has an enforcement function in relation to an offence contained in any enactment listed in Schedule 6 (a designated enactment), a power to impose any one or more of the civil sanctions. The power to confer on regulators the power to impose civil sanctions is circumscribed by the very detailed and prescriptive provisions in the Bill as to the nature of the civil sanction that the regulator can impose. In particular, the

Bill specifies a number of requirements in respect of each civil sanction. These fall into three main categories: (i) the *character* of the sanctioning power that may be conferred, (ii) the *procedure* that must be followed in respect of the sanctioning power and (iii) the *effect* of the sanctioning power. These are summarised in respect of each civil sanction below.

FIXED MONETARY PENALTIES		
Character	Procedure	Effect
Regulator must be satisfied beyond reasonable doubt that the person has committed the relevant offence	Notice imposing the penalty must specify: grounds for imposing penalty, amount of penalty, how and when to pay, discounts or penalties for early or late payment, right to require review, circumstances in which regulator may not impose requirement, right of appeal and consequences of non payment	Defaulter cannot be convicted of relevant offence giving rise to the penalty
Requirement to pay prescribed amount	Defaulter must be allowed to require the regulator to review the imposition of the penalty and to appeal the decision to a tribunal	Regulator may not impose discretionary requirement or stop notice in addition to fixed monetary penalty (clause 49)
Amount calculable by reference solely to prescribed criteria	Internal review must take place within 28 days and penalty must be withdrawn if person on whom it is imposed would not be convicted of relevant offence	
For summary offences punishable by fine, amount of fixed monetary penalty must not exceed maximum amount of that fine	Grounds of appeal must include: decision based on error of fact; decision wrong in law; decision was unreasonable for any other reason	

49. In addition to the detailed, imperative provisions as to the character, procedure and effect for fixed monetary penalties set out in clauses 37-39, the Bill makes further provision as to the nature of the penalty and the appeals process, and the post-implementation review procedure that must be followed by a Minister who has made an order conferring power on a regulator to impose fixed monetary penalties.
50. An order which enables a regulator to impose fixed monetary penalties can include provision for early payment discounts, financial penalties for late payment, and for enforcement of the penalty. In respect of appeals, the order can make provision to suspend the notice pending determination of the appeal, as to the powers of any person to whom the appeal is made, and as to how any sum payable is to be recoverable. Where a power has been conferred on a regulator to impose fixed monetary penalties, the order conferring the power must secure that the regulator publishes guidance about the use of the sanction, detailing the circumstances in which the penalty is likely to be imposed, the circumstances in which it may not be imposed, what the penalty is or how it is calculated, and the rights to require review and rights of appeal. The regulator must also publish guidance as to how the penalty will be enforced.

DISCRETIONARY REQUIREMENTS		
Character	Procedure	Effect
Regulator must be satisfied beyond reasonable doubt that the person has committed the relevant offence	Regulator must issue a notice of intent outlining what action they intend to take. Notice of intent must be served specifying: grounds for proposal to impose requirement; defaulter's right to make representations; circumstances in which regulator may not impose requirement; and period within which representations should be made	Where requirements are imposed or undertakings accepted, the regulator cannot impose a fixed monetary penalty (clause 49)
Requirement to pay a monetary penalty of such amount as regulator may determine (variable monetary penalty)	After the end of the period for making representations, the regulator must determine whether or not to impose discretionary requirement (with or without modifications)	Defaulter cannot be convicted of relevant offence except where no monetary penalty has been imposed and defaulter fails to comply with any non-

DISCRETIONARY REQUIREMENTS		
Character	Procedure	Effect
		monetary requirement imposed
Requirement to take such steps as regulator may specify to secure that offence does not continue or recur	If a requirement is to be imposed, final notice must be served which includes information as to: grounds for imposing the requirement; where it includes a monetary penalty, how and when payment should be made; discounts or penalties for early or late payment; rights of appeal and consequences of non-compliance	If defaulter fails to comply with a non-monetary discretionary penalty or an undertaking, the order can confer on regulator a power to impose a monetary non-compliance penalty
Requirement to take such steps as regulator may require to secure that position is restored	Grounds of appeal must include: decision based on error of fact; decision wrong in law; that amount of penalty is unreasonable; nature of requirement is unreasonable; decision was unreasonable for any other reason	
Where requirements are imposed or undertakings accepted, the regulator cannot impose any further discretionary requirement	The order may confer on a regulator a power to accept undertakings offered by a defaulter to take action to benefit any person affected by the offence	

51. In addition to the detailed, imperative provisions as to the character, procedure and effect for discretionary requirements set out in clauses 40-43, the Bill makes further provision as to the nature of the penalty and the appeals process. In particular, clause 51(1) provides that the order conferring the power to impose discretionary requirements may include provision for the regulator to require the person upon whom the discretionary requirement is imposed to pay the costs incurred by the

regulator in relation to the imposition of the discretionary requirement. Where such provision is made, it must secure that the notice requiring payment of costs specifies the amount to be paid, the regulator may be required to provide a detailed breakdown of that amount, the person liable to pay costs is not liable to pay any costs shown to have been unnecessarily incurred and the person required to pay costs may appeal against the decision of the regulator to impose the costs and the decision of the regulator as to the amount of the costs.

52. An order can also extend any period within which criminal proceedings may be initiated against any person so as to allow for the revival of criminal liability in the case where undertakings or non-monetary discretionary requirements are not complied with. The provisions as to appeals, early payment discounts/late penalty charges (in respect of variable monetary penalties and non-compliance penalties), guidance and the requirement on the Minister to review the operation of the provision and to direct that no further notices shall be served, also apply in respect of the power to confer a power to impose discretionary requirements.

STOP NOTICES		
Character	Procedure	Effect
Requirement to cease carrying on an activity until the defaulter has taken such action as regulator may specify	Order must secure that where a stop notice is served: the person on whom it is served can appeal; if the steps in the notice have been taken, the regulator must issue a completion notice; the notice ceases to have effect on the issue of the completion certificate; the person on whom notice is served may at any time apply for completion certificate; the regulator must take a decision as to whether to issue a completion certificate within 14 days of such an application; the person may appeal against the decision not to issue a completion certificate	Defaulter who does not comply with requirement is guilty of an offence and liable on summary conviction to fine not exceeding £20,000 and/or up to 12 months' imprisonment, and on indictment to fine and/or up to 2 years' imprisonment
Requirement can only	The stop notice must	

STOP NOTICES		
Character	Procedure	Effect
<p>be applied where the regulator reasonably believes that the activity as carried on, or as likely to be carried on, by that person is causing, or presents a significant risk of causing, serious harm to human health, environment or financial interest of consumers, and the regulator reasonably believes that the activity as carried on, or as likely to be carried on, by that person involves or is likely to involve the commission of a relevant offence by that person</p>	<p>include information as to: grounds for serving the notice, rights of appeal, and consequences of non-compliance</p>	
	<p>Grounds of appeal must include: decision was based on error of fact; decision wrong in law; the decision to impose the notice was unreasonable, the requirement is unreasonable; defaulter would not, by reason of any defence, be liable to be convicted of relevant offence</p>	
	<p>Order must include provision for the regulator to establish a</p>	

STOP NOTICES		
Character	Procedure	Effect
	compensation scheme. The grounds for compensation must be specified in the order.	
	There must be a right to appeal against decision not to award compensation and decision of regulator as to amount of compensation	

53. Clause 51(2) provides that the order conferring the power to impose stop notices may include provision for a regulator to require a person upon whom a notice is served to pay the costs incurred by the regulator in relation to the notice. The requirements in respect of costs recovery are the same as for discretionary requirements.
54. The provisions as to appeals, guidance and the requirement on the Minister to review the operation of the provision and to direct that no further notices shall be served, also apply in respect of the power to confer a power to impose stop notices.

ENFORCEMENT UNDERTAKINGS		
Character	Procedure	Effect
Regulator can accept an undertaking where it has reasonable grounds to suspect that the person has committed a relevant offence and for the undertaking to have the specified effects	The order making provision empowering the regulator to accept enforcement undertakings will specify the procedure	Unless defaulter has failed to comply with the undertaking: the defaulter may not be convicted of relevant offence; and regulator may not impose fixed monetary penalty or discretionary requirement
Regulator can accept an undertaking from defaulter to take such action as may be specified within such period as may be specified		

ENFORCEMENT UNDERTAKINGS		
Character	Procedure	Effect
The action specified must be: to secure that offence is not repeated or continued; restoration of position to what it would have been if offence had not been committed; action to benefit any person affected by offence; action of a prescribed description		

55. The provisions as to guidance and the requirement on the Minister to review the operation of the provision and to direct that no further undertakings should be accepted apply in respect of the power to confer a power to accept enforcement undertakings as well.
56. The power to confer civil sanctioning powers on regulators and bodies with enforcement functions is delegated because the decision to confer any such powers will not be taken unless and until: (i) a regulator has requested that it should have access to some or all of the powers; and (ii) it has satisfied the relevant Minister of the Crown that it is compliant with the Hampton principles of better regulation. This will allow appropriate and relevant powers to be granted to regulators as and when those regulators want the powers, and can demonstrate that they are compliant with the Hampton principles of better regulation. It is not intended that all regulators and bodies with regulatory functions should have access to all of the civil sanctioning powers. Regulators and bodies should only have such powers where they are appropriate and where the regulator or body has demonstrated that it is compliant with the Hampton principles of better regulation. This power allows the granting of the powers to be undertaken flexibly.
57. The legislation also needs to cover a wide range of regulatory regimes. To attempt to cater for the peculiarities of each regime in primary legislation would be unwieldy. Allowing some of the detail to be determined through secondary legislation will enable the relevant Minister to tailor the legislation as appropriate.
58. The power is heavily circumscribed by the inclusion in the Bill of very detailed provisions as to the nature of the sanctioning power that can be conferred. The Bill specifies in great detail what each of the sanctioning powers will look like: the delegated power is merely a power to regulate access to the sanctioning provisions, a technical gateway.
59. Where by virtue of a relevant enactment a Minister of the Crown or the Welsh Ministers have the power by statutory instrument to make provision for a criminal offence and the power has been or is being exercised so as to create an offence, clause 60 allows the power to be exercised so as to confer power to impose a civil sanction. The relevant enactments are listed in Schedule 7.

60. Whilst not itself a stand-alone order making power, clause 60 extends existing order-making powers in order to allow provision for the civil sanctions in Part 3 to be made. The procedural requirements attaching to the existing powers will continue to apply. There is a precedent for such a power in section 28 of the Legislative and Regulatory Reform Act 2006.
61. Orders under Part 3 may include consequential, supplementary, incidental or transitional arrangements. The consequential provision includes provision as to how any enactment passed or made before the day on which this Act is passed applies or operates in relation to the imposition of a fixed monetary penalty, discretionary requirement or service of a stop notice, and where such an enactment applies in relation to a person convicted of a criminal offence, provision extending that enactment to a person on whom a fixed monetary penalty or discretionary requirement is imposed or a stop notice is served in relation to that offence. An order making such provision may repeal, amend or revoke an enactment.
62. The devolution arrangements in Part 3 are as follows: in respect of Wales, the Welsh Ministers may make orders conferring civil sanctioning powers where the provision relates to matters in Wales in respect of which the Welsh Ministers exercise functions. There are detailed requirements to consult with, or seek the consent of the Welsh Ministers for matters in respect of which the Welsh Ministers exercise functions and Welsh Ministers must consult the Secretary of State before making an order under this Part. As regards Scotland, orders under Part 3 may not, except for consequential purposes, make any provision which would be within the legislative competence of the Scottish Parliament. Therefore, the power is exercisable only in respect of reserved matters in relation to Scotland. If the power is to be exercised in relation to an offence in Scotland the Minister must obtain the consent of the Lord Advocate and Scottish Ministers must be consulted before an order is made in relation to a regulator which is a local authority in Scotland. As regards Northern Ireland, an order may not, save for consequential purposes, make any provision which would be within the legislative competence of the Northern Ireland Assembly if it were contained in an Act of that Assembly.
63. The Bill includes procedural safeguards in respect of the order making power. Before making an order under Part 3, the Minister must consult the regulator to whom the order relates, such organisations as are representative of persons substantially affected by the proposals, and such other persons as the Minister considers appropriate. Further, the Minister must carry out a review of the operation of the order as soon as is reasonably practicable after the end of the period of three years, beginning with the day on which the provision came into force. The Minister must consult with appropriate persons and publish the results of the review.
64. The Minister has the power to suspend a regulator's exercise of its civil sanctioning power under clause 64. The power can be used only where the Minister (including the Welsh Ministers where relevant) is satisfied that the regulator has on more than one occasion failed: (i) to comply with any duty imposed on it under this Part; (ii) to act in accordance with its guidance; or (iii) to act in accordance with the principles of better regulation set at in clause 5(2). The Minister must, before making such a direction, consult with the regulator and such other persons as are appropriate. Where a direction is made, a copy must be laid before Parliament (or the National Assembly for Wales) as appropriate.
65. As the power allows new civil sanctioning powers to be conferred in respect of existing criminal offences, and provides for amendments to be made to primary legislation, it is subject to affirmative resolution procedure. A statutory instrument

containing an order made by the Welsh Ministers may not be made unless it has been laid before and approved by resolution of the National Assembly for Wales. Together with the requirement to consult, the Department considers that this will ensure that an appropriate level of debate and scrutiny will precede the conferring of civil sanctioning powers, whilst maintaining the flexibility that is necessary to ensure that this Part of the Bill works.

Part 4: Regulatory Burdens

66. Part 4 of the Bill facilitates the imposition of a duty on persons exercising regulatory functions to secure that they do not impose or maintain unnecessary burdens. The duty will not require unnecessary burdens to be removed where removal would be impracticable or disproportionate. Where the duty is applied, the person must publish a statement setting out what they propose to do to remove the unnecessary burden, what has been done in respect of the unnecessary burden since any previous statement, and where an unnecessary burden is maintained, state why its removal would be impracticable or disproportionate.
67. Part 4 applies in England and Wales, Scotland and Northern Ireland.

Clause 69: Functions to which section 68 applies

Power conferred on: *Minister of the Crown and the Welsh Ministers*

Power exercisable by: *Order made by statutory instrument*

Parliamentary procedure: *Affirmative resolution*

68. The duty is imposed on persons exercising regulatory functions by order of a Minister of the Crown: the order will specify regulatory functions in respect of which the person exercising that function must comply with the duty set out in clause 68. Orders of Ministers of the Crown under this Part are restricted to reserved matters. Welsh Ministers have an equivalent power under clause 69(4) to make orders in respect of regulatory functions so far as exercisable in Wales if or to the extent that it relates to a matter in respect of which the Welsh Ministers exercise functions.
69. An order making power is required because it will provide appropriate flexibility both as regards the identity of those to whom the duty should be applied, and the timing of the application of the duty. It is intended that the duty will only be applied when a Minister is confident that sufficient evidence justifies its application and that it would add to existing requirements. The duty may be applied in a wide range of regulatory contexts. To attempt to cater for the peculiarities of each regime in primary legislation would be too unwieldy. Allowing some of the detail to be determined through secondary legislation will enable the relevant Minister to tailor the legislation as appropriate.
70. Orders made under this Part may make consequential, supplementary, incidental or transitional provision, including amending any enactment. The power to amend enactments is necessary to ensure that legislation, including primary legislation, conforms with the application of the duty to a regulator. It would allow, for example, for the duty to be added to founding statutes of regulators.
71. The procedural safeguards in respect of the power include a requirement that the Minister should consult any person whose regulatory functions are to be specified in

the order and any other persons the Minister considers to be appropriate, before making an order. As the power allows amendments to be made to primary legislation, it is also subject to affirmative resolution procedure.

Part 5: General

72. This Part contains the provisions as to extent and commencement.

Clause 72: Commencement

Power conferred on:

Secretary of State

Power exercisable by:

Order made by statutory instrument

Parliamentary procedure:

No Parliamentary procedure

73. The Secretary of State is empowered to bring Parts 1 to 4 of the Bill into force by commencement order. Consistent with the usual practice, the commencement orders are not subject to any Parliamentary procedure.

November 2007

APPENDIX 6: LOCAL TRANSPORT BILL [HL]: GOVERNMENT AMENDMENT

Supplementary memorandum by the Department for Transport

Introduction

1. This memorandum supplements the Memorandum submitted to the Delegated Powers and Regulatory Reform Committee on 8th November 2007 which described 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). This memorandum describes a new provision in an amendment to the Local Transport Bill [HL] which the Government intends to move in Grand Committee.

Provision for Delegated Legislation

After clause 45: fees for registration of services

2. Section 6 of the Transport Act 1985 (“TA 1985”) (registration of local bus services) provides that no “local service” (as defined in section 2 of that Act) can be provided unless particulars of that service have been registered with the appropriate traffic commissioner, and the prescribed notice period has elapsed. Such registrations may subsequently be varied or cancelled by the bus operator.
3. Section 126(1) of the TA 1985 (application of sections 52 and 56 of the 1981 Act) provides for the power under section 52(1) of the Public Passenger Vehicles Act 1981 (“PPVA 1981”) (fees for grant of licences, etc), whereby the Secretary of State may prescribe fees chargeable by traffic commissioners, to be extended so as to apply in respect of fees for certain matters contained in the TA 1985. Those matters include, at paragraph (a), fees in respect of applications for the registration of local services under section 6 of the TA 1985, and for the variation of registrations. Such fees were prescribed in the Public Service Vehicles (Registration of Local Services) Regulations 1986³⁰.
4. The purpose of the amendment to be moved in Grand Committee is to extend the range of fees which may be charged in respect of the registration of local services. The amendment would enable fees to be prescribed for the cancellation of a registration, and also for the continuation in force of registrations. That would enable a fee to be prescribed which would be payable on a regular basis whilst the registration continued in force.
5. There is a precedent for a periodic charge in section 52(1)(a)(ib) of the PPVA 1981 which permits a fee to be charged for “the continuation in force of PSV operators’ licences”. This fee is payable either every five years, or in five annual instalments.
6. One of the purposes of the Bill is to strengthen the powers of traffic commissioners with particular reference to improving punctuality of registered local bus services. Ensuring these new powers can be exercised effectively is likely to require additional resource. The Department’s policy is to ensure a more broadly based fee structure which will ensure equity across the different classes of operator and types of route. This amendment would achieve that objective.

³⁰ S.I. 1986/1671, as amended by SI 1988/1879, SI 1989/1064, SI 1994/3271, SI 2002/182, SI 2004/10, SI 2004/2250 and revoked in relation to Scotland only by SSI 2001/219.

7. Any new fees introduced by virtue of this new provision would be prescribed in regulations made under section 52 of the PPVA 1981. Sections 60 (general power to make regulations for purposes of Act) and 61 (exercise of regulation making powers and parliamentary control thereof) would also therefore apply. This means that regulations introducing the proposed new fees would, consistent with the prescription of existing fees for the registration of local services, be subject to the negative resolution procedure.
8. The Committee's attention is also brought to the Department of Transport (Fees) Order 1988 (SI 1988/643) made under section 102 of the Finance (No 2) Act 1987. This Order specifies functions whose costs are to be taken into account in determining the amount of any fee. The relevant entry in respect of fees for the registration of local services is in Table 5 number 3B. Any necessary amendments to this Order would, by virtue of section 102(5) of the Finance (No 2) Act 1988, require an affirmative resolution of the House of Commons.

November 2007

APPENDIX 7: LOCAL TRANSPORT BILL [HL]: GOVERNMENT RESPONSE

Letter to the Chairman from the Rt Hon. Rosie Winterton MP, Minister of State, Department for Transport

1. I am writing to set out the Government's response to the issues raised and points made with regard to the Local Transport Bill in the First Report (Session 2007-08) of the Delegated Powers and Regulatory Reform Committee ("the Report"). I am grateful for the Committee's efforts in scrutinising this Bill.
2. For the most part, the Report takes the view that the degree of Parliamentary scrutiny proposed for each delegated power is not inappropriate; this response therefore focuses on the small number of provisions where the Report highlighted specific points in boldface text for further consideration.
3. I should also take this opportunity to alert you to a proposed Government amendment, which is being tabled in good time for Committee stage. The effect of this amendment would be to extend an existing delegated power contained in section 126(1) of the Transport Act 1985. I enclose a brief supplementary memorandum which explains the background and the justification for the proposed approach.

Responses to points raised in the Report

Paragraphs 27-28: Henry VIII powers to amend future Acts

4. The Report noted that the Bill would confer a number of Henry VIII powers to make incidental, supplemental, consequential or saving provision, which would extend to the amendment of any enactment whenever passed or made. The Report suggests that "the House may wish to invite the Minister to make the case to the House for each for these delegations to amend future Acts". I am pleased to take the opportunity to set out that case here.
5. In essence, the point made in paragraph 28 of the Report is applicable to each of the four provisions identified: that is to say, the powers could be exercised some time into the future, and so it may be necessary for secondary legislation to amend Acts that have been passed in the intervening period. Taking the provisions in turn:
 - Clause 1(2) relates to an existing delegated power for the Secretary of State, by order, to vary the number or geographical limits of traffic areas. This power could be exercised at any point in the future, in response to changing needs and circumstances, and could involve significant reform. For example, changes in the economic structures of the industries which are regulated on a "traffic area" basis could strengthen the case for reducing the number of traffic areas, perhaps even to create just one traffic area for England. It may also become more efficient or cost effective in administrative terms to do so. If such a need were to arise in several years' time, it might be necessary to make consequential amendments to one or more Acts passed after the Local Transport Bill.
 - Clause 6(3) relates to the provisions in sections 2 to 5 of the Local Transport Bill, which would (among other things) lift the existing restriction under which a single traffic commissioner is appointed to, and only has jurisdiction in, a particular traffic area. Although the Government's intention is that these provisions should be brought into

force as soon as practicable after Royal Assent, a significant amount of preparatory work will be needed to ensure a smooth transition to the proposed new arrangements. In the event that any enactments passed in the intervening period included provision referring to, say, “the traffic commissioner for a traffic area”, an order made under clause 6(3) would need to amend that provision. The functions of traffic commissioner are wide and varied, and may be located in a number of different existing and potential future enactments.

- Clauses 64 and 65 make provision relating to the establishment of a new Public Transport Users’ Committee, or to the conferral of non-rail functions on the Rail Passengers’ Council (established under the Railways Act 2005). The purpose is to enable a statutory body to be created which would exercise functions relating to the promotion of the interests of bus passengers. Again, the case for a delegated power to amend future enactments rests upon the potential lag between enactment of the Local Transport Bill and the making of any order under clause 64 or 65.
6. The Government has made clear that it intends to consult fully with interested parties before determining how best to proceed in this area. As with clause 6(3) above, it will be important to ensure a smooth transition to any new arrangements. It is possible that, as part of such a transition, a “shadow body” could be established administratively and could operate for a period as part of any transitional arrangements. The powers that would be delegated under clauses 64 and 65 would incorporate the necessary flexibility to allow for consequential amendments to be made to any Acts passed during any such transitional period.
- Clause 80(4) relates to orders making provision about Integrated Transport Authorities. The intention is that local authorities should be able to review their local transport governance arrangements at any point in the future. It is therefore quite possible that an order could be made following a review conducted in, say, five or ten years’ time. Any such order may need to amend enactments passed during that intervening period, in order to give full effect to an area’s proposals for reform.

Paragraph 32: Additional sanctions for failures by bus operators

7. The Report notes that clause 55 would confer a power upon the Secretary of State and the Welsh Ministers to provide, by order, that additional sanctions may be imposed by traffic commissioners in respect of certain failures by bus operators. In view of the breadth of this power, the Committee took the view that the affirmative procedure would be more appropriate.
8. The Government accepts this recommendation, and intends to bring forward a suitable amendment in time for Report stage in the House of Lords.

Paragraph 35: Order-making arrangements about Integrated Transport Authorities

9. The Report also raised the issue of the number of orders which Parliament might be asked to consider under clauses 72 to 80 of the Bill. The exact number of orders to be made would, of course, depend upon how many areas decided to undertake reviews under clauses 68 and 70 of the Bill, or were directed to do so by the Secretary of State. However, we would not expect this to be a large number. Also, wherever possible, we would prefer there to be just a single order made in respect of

each existing or proposed integrated transport area. Although we cannot be sure at this stage, a reasonable estimate might be that we would expect to make fewer than ten orders over a period of around 18 to 24 months after the Bill was enacted. This would not preclude areas carrying out further reviews, which might lead to further orders, several years later. The timing and scale of any orders further into the future is harder to predict, but again we do not anticipate that this would be a very large number.

10. Given that the Bill gives areas flexibility to determine the scale and timing of the review which they undertake, we would not expect that all existing or potential integrated transport areas would be working to the same timetable. Given that, we do not believe that it would be realistic to make a single order introducing changes to all of these areas simultaneously. However, depending upon the timing of reviews, it might be possible for orders to be made in batches covering more than one area at a time. We would be happy to explore this possibility, particularly if there were concerns about placing an excessive call on Parliamentary time.
11. As these orders would potentially be making significant changes to the powers and functions of statutory bodies, we remain of the opinion that the affirmative procedure would not be inappropriate.

November 2007