HOUSE OF LORDS

Delegated Powers & Regulatory Reform Committee

First Report of Session 2008-09

Banking (No.2) Bill [HL]

House of Lords Bill [HL]

House of Lords (Members' Taxation Status) Bill [HL]

Local Democracy, Economic Development and Construction Bill [HL]

Marine and Coastal Access Bill [HL]

Legislative reform:

Draft Legislative Reform (Insolvency) (Advertising Requirements) Order 2009

Ordered to be printed 17 December and published 18 December 2008

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 12

The Delegated Powers and Regulatory Reform Committee

The House of Lords appoints the Committee each session with the terms of reference "to report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny; to report on documents and draft orders laid before Parliament under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006; and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments".

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History

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 now scrutinises legislative reform orders under the successor to the 2001 Act, the Legislative and Regulatory Reform Act 2006.

First Report

BANKING (NO.2) BILL [HL]

Introduction

1. This report relates to the Banking (No. 2) Bill, which received its second reading on Tuesday 16 December. We understand that this No.2 Bill will be superseded by the Banking Bill expected to complete its Commons stages on Wednesday 17 December. Although our recommendations formally relate to the No. 2 Bill, they apply equally to the Commons Bill which is to replace it.

2. The Bill makes various provisions about banking. A memorandum has been submitted by HM Treasury ('HMT') to explain the delegated powers conferred by the Bill, printed at Appendix 1.

The Special Resolution Regime: stabilisation options

3. Much of Part 1 of the Bill contains provision to supersede the Banking (Special Provisions) Act 2008, the principal powers of which will lapse in February 2009. Part 1 provides for a regime of transfer instruments and orders as the principal mechanisms to apply the three 'stabilisation options' of transfer to a private purchaser, transfer to a bridge bank, and transfer to temporary public ownership (clause 1(3)). Where transfers of securities etc. or of property, rights and liabilities take place in the context of the third stabilisation option, a transfer to public ownership, they are to be effected by orders made by HMT (see clause 13(2)). Otherwise, transfers are effected by instruments made by the Bank of England (see, for instance, clauses 11(2) and 12(2)). Share transfer orders are subject to the negative procedure (see clause 25) which is also applied to property transfer orders (clause 45(5)(a)) and other forms of transfer orders (for instance 'reverse transfer orders': clause 46(5)(a)). We note that transfer instruments made by the Bank of England are not to be statutory instruments and so are not subject to any form of Parliamentary control.

4. In our view the Government have not in their memorandum made a sufficiently strong case for the absence of any parliamentary procedure for instruments which effect a transfer to a private purchaser or a transfer to a bridge bank. It may be that the Government consider these two options to be qualitatively different from the transfer to temporary public ownership which is to be by order subject to the negative procedure. However, transfer to a bridge bank owned wholly by the Bank of England may be considered by some to be similar to temporary public ownership. In any case, **the House will wish to seek a justification from the Government for the proposed absence of any Parliamentary procedure for instruments relating to transfer to a private purchaser, and in particular for instruments relating to transfer to a bridge bank. In the absence of such a justification, the House may wish to consider applying a measure of Parliamentary control over such instruments.** In our report on the Banking (Special Provisions) Bill earlier this year, we recommended that the affirmative procedure should apply to the majority of powers to make transfer orders (5th Report, Session 2007-08, HL Paper 58). Parliament accepted,

however, the application of the negative procedure, and we do not return to the matter in this report.

Tax — clause 74

5. Clause 74(1) provides that the Treasury may by affirmative regulations make provision about the fiscal consequences of the exercise of a stabilisation power, and subsection (2) lists the taxes to which such regulations may relate. Subsection (7) contains a Henry VIII power for the Treasury to add or remove entries to the list in subsection (2), by negative order. As such orders are subject to laying before the Commons only we make no recommendation on this point. However if the clause 75 power was one which provided for the Order to be laid in both Houses we would have recommended that it should be subject to the affirmative procedure, and we invite HMT to consider this point.

Power to change law — clause 75

6. Clause 75 confers an extremely wide power enabling HMT by order to disapply or modify the effect of any enactment (other than Part 1 of the Bill) or of any rule of law not in legislation, for the purpose of enabling the powers in Part 1 of the Bill (in its application to banks, building societies, and / or credit unions) to be used effectively. The power may be exercised for general or particular purposes and is subject to the draft affirmative procedure, or the 28-day affirmative procedure in cases of urgency. HMT explain their reasons for the power in paragraphs 221 to 236 of their memorandum, stating that "in the absence of such a power ... there is a real and significant risk that the Authorities may not be able to effect fully a transfer" which "could lead to serious adverse implications for the public interest through risks to financial stability, protection of depositors or the public funds". **We make no recommendation in relation to clause 75, but we draw it to the attention of the House, so that it might satisfy itself that the rather unusual context for which Part 1 of this Bill makes provision justifies the extremely wide power taken by the clause.**

Financial Services Compensation Scheme — clauses 167-179

7. Part 4 of the Bill is concerned with funding support for the Financial Services Compensation Scheme ('FSCS') under Part 15 of the Financial Services and Markets Act 2000 ('FSMA'). The FSCS is set out in rules, made by the Financial Services Authority under section 213 of FSMA, which are not statutory instruments. Section 213(3)(b) already requires the scheme to include provision for the scheme manager to impose levies on all or any class of persons authorised to carry on activities regulated by FSMA. Clauses 167 and 168 insert, respectively, a new section 214A conferring power for regulations to enable levies to be imposed under the FSCS for the purpose of maintaining contingency funds, and a new section 214B enabling HMT to require payments to be made under the FSCS in connection with claims against banks etc. in respect of which stabilisation powers are being exercised under Part 1 of the Bill. Section 214B requires provision in regulations about the nature and amount of the payments which HMT may require.

8. The memorandum explains that no decision has yet been taken about whether there should be a contingency fund, but the circumstances in which one might be found necessary are thought to be real (paragraphs 484 and

486). In view of the affirmative procedure, we find these delegations acceptable – particularly as, in the case of section 214A, the new levy would be imposed in the context of the FSCS arrangements already provided for under the FSMA; and, in the case of new section 214B, the power to require payments is in the Bill itself and the regulations are subject to the constraints in subsections (4) and (5).

9. There is however a further power to impose levies by negative regulations under the new section 223B (inserted by clause 170) which provides for loans to the FSCS from the National Loans Fund. In paragraph 503 of the memorandum, HMT explain that the negative procedure is appropriate on grounds of urgency; but they do not say why the regulations could not be made (as opposed to being laid in draft) before being subject to an affirmative procedure, which is the procedure proposed in the Bill for many other urgent cases (see, for instance, clause 246). **We would usually expect that provision in a statutory instrument for an entirely new levy should be subject to the affirmative procedure (the draft affirmative procedure is to apply to orders under new section 214A), and we recommend that the 28-day affirmative procedure should apply in the case of new section 223B.** (Under the 28-day affirmative procedure the order could if necessary be made and come into force before approval, but would lapse if not approved by both Houses within 28 days).

Banknote Regulations and Rules — clauses 212 & 213

10. Part 6 of the Bill repeals the provisions currently governing the issue by banks of banknotes in Scotland and Northern Ireland, and enacts new provision, but only for those banks already allowed to issue banknotes. The new regime for those banks is to be contained in provisions which will be divided between regulations ("banknote regulations") to be made by HMT by affirmative statutory instrument, and "banknote rules" to be made by the Bank of England. The powers to make banknote regulations are, as HMT acknowledge in paragraph 555 of the memorandum, broadly stated and cover all aspects of "the treatment, holding and issuing of banknotes" (clause 212(1)). A wide range of more specific provision may be included in the regulations by virtue of clauses 214–7, and provision may be made for penalties and civil proceedings for non-compliance under, respectively, clauses 219 and 221. In view of the affirmative procedure we do not believe this delegation is inappropriate.

11. However, the arrangements for the allocation of provisions between regulations and rules seem unsatisfactory. Clause 213(2) provides that "banknote regulations may require or permit banknote rules to do anything which banknote regulations may do". On its face, this is a wholly unqualified power of sub-delegation. Even though the actual drafting of Part 6 (for instance, the references to "regulations or rules" in clauses 215 and 216) leaves uncertain the extent to which this is intended, there are powers exercisable in banknote regulations (for example, the power in clause 219 to enable the Bank of England to impose apparently unlimited penalties) which we would not expect to be capable of being exercisable in an instrument which did not require affirmative approval. **We recommend that the scope of the power in clause 213 to make banknote rules should be narrowed, at the least to remove the power for banknote rules to impose unlimited penalties.**

HOUSE OF LORDS BILL [HL]

12. This private member's Bill establishes a Commission to make recommendations for the creation of life peerages. We reported on the almost identical Bill introduced early in the last Session (First Report, Session 2007-08, HL Paper 11).

13. The main criteria for recommendation are set out in clause 5(3), and the intention of the Bill is that additional criteria may be proposed (and applied) by the Commission. Proposed criteria are to be subject to a negative procedure. When we considered a similar provision in last Session's Bill, we accepted that, if the role of the Commission is to propose criteria, then someone needs to approve them and that it was appropriate for Parliament to perform that role. We did however conclude that the affirmative procedure would be more appropriate for the approval of the criteria, and that this might be achieved by requiring a Minister to lay before both Houses a draft order containing the proposed criteria.

14. Clause 5(5) of the present Bill responds to that recommendation by including a requirement that the proposed criteria be laid before both Houses by a Minister, but in the form of an order subject to annulment. **We express again our view that the affirmative procedure is the more appropriate mechanism for signalling both Houses' approval of additional criteria proposed under clause 5(3).**

HOUSE OF LORDS (MEMBERS' TAXATION STATUS) BILL [HL]

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

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL [HL]

Introduction

16. This Bill is divided into 9 Parts, and covers topics ranging from local authority electoral arrangements to construction contracts. There is a memorandum from the Department for Communities and Local Government about the delegated legislative powers in the Bill, printed at Appendix 2. In addition to the provisions mentioned in the memorandum there is also a delegation to the National Assembly for Wales in clause 29.

Petition schemes

17. Chapter 2 of Part 1 of the Bill requires local authorities to make schemes to handle and respond to petitions made to them by people who live, work or study in the authority's area.

18. Clause 20 provides for the extension of these petition provisions to other bodies, including for example parish councils in England, community councils in Wales, the Greater London Authority and Transport for London. An extension to any or all of these bodies would be effected by order subject to the negative procedure. The Committee is content that the negative procedure is appropriate for the extension of the petitioning scheme to major bodies such as the Greater London Authority, but considers that its extension to much smaller bodies, with far more limited resources, has the potential to be more controversial and should require a greater degree of Parliamentary scrutiny. **We therefore recommend that any order by the Secretary of State under clause 20 to extend the petition provisions to all parish councils (or a category of them) should be subject to the affirmative procedure. The same consideration would apply to an order by the Welsh Ministers for community councils in Wales as regards the procedure in the National Assembly for Wales.**

Electoral changes — clause 53

19. Clause 53 enables the Boundary Committee for England to give effect by order to recommendations for electoral changes. By virtue of paragraph 9 of Schedule 1 to the Bill, the Boundary Committee is able to delegate any of its functions to any of its members, employees, committees or sub-committees. There is no prohibition on delegation of the function of making orders under clause 53. This would change the current position under paragraph 9(2) of Schedule 1 to the Political Parties, Elections and Referendums Act 2000 (repealed by Part 3 of Schedule 7 to the Bill), which prevents the Electoral Commission from delegating their existing powers to make electoral changes orders. **We recommend that a similar prohibition on delegation should apply to the Boundary Committee's powers under clause 53.**

Regional strategies — clause 79 (and clause 65)

20. Part 5 of the Bill is about regional strategies, which will replace the existing regional spatial strategies and regional economic strategies. Clause 79 enables the Secretary of State to give to any person exercising functions under Part 5 of the Bill directions (not subject to Parliamentary procedure) in relation to the exercise of those functions. The directions may be of a general nature (clause 79(3)). Paragraph 60 of the Department's memorandum explains that the power to give directions might be used generally or in particular cases, and points to a similar power in section 7(2) of the Regional Development Agencies Act 1998. It is true that section 7(2) of that Act enables directions to be given to a Regional Development Agency in relation to its functions of formulating etc. a strategy. But the current position for regional spatial strategies is that provision in connection with the exercise by any person of functions relating to the strategies is made by regulations by the Secretary of State subject to negative procedure under section 11 of the Planning and Compensation Act 2004.

21. Clause 74 provides for matters of procedure, etc. for the revision of strategies to be dealt with by regulations subject to negative procedure. Those matters are potentially of less significance than general directions under clause 79 which could impact on the content of the strategy. **Accordingly, we recommend that directions under clause 79 which are intended to apply generally to all responsible regional authorities (or to categories**

of them) should also be contained in regulations subject to negative procedure. Similar considerations apply to the powers of transfer in clause 65(6).

Economic Prosperity Boards (EPBs) — clause 86

22. Clauses 83 to 97 are about Economic Prosperity Boards (EPBs). Paragraph 159 of the Explanatory Notes explains that an EPB is intended to have functions relating to the economic development and regeneration of its area.

23. In the clauses a number of powers are conferred on the Secretary of State to establish and make provision about EPBs, all by order subject to affirmative procedure. In general we do not consider any of these powers inappropriate, but there is a question surrounding the extent of the power under clause 86. This enables an order to "provide for a function of a local authority that is exercisable in relation to an area within an EPB's area to be exercisable by the EPB in relation to the EPB's area". Though under clause 94 the Secretary of State must consider that establishing an EPB will improve the exercise of statutory functions relating to economic development and regeneration in the area, clause 86 does not expressly limit the functions which may be made exercisable by the EPB to those relating to economic development and regeneration. Clause 86(2) provides that a function may be included in an order only if he considers that it can be appropriately exercised by the EPB. **Nevertheless, if the intention is (as mentioned in the Explanatory Notes) that the functions of an EPB should relate to economic development and regeneration, we consider there is a good case that the limitation should be expressly set out in clause 86(1), and not left implicit.**

Property transfers — clause 110

24. Clause 110 contains an unremarkable power for the Secretary of State to make an order transferring property, rights and liabilities. The order is subject to affirmative procedure. Orders of this type are not normally subject to this high level of Parliamentary scrutiny and there is no explanation in paragraph 79 of the Department's memorandum. **Unless the intention is always to combine the order under clause 110 with an order under any of clauses 86 to 102, we recommend that the order-making power under clause 110 should be subject to the negative procedure.**

Dehybridising provision — clause 112(4)

25. Clause 112(4) disapplies the hybrid instrument procedure for orders under Part 6. **We draw this to the attention of the House, so that the House may consider whether the various consultation or consent procedures provided by the Bill are sufficient.**

MARINE AND COSTAL ACCESS BILL [HL]

Introduction

26. This large Bill is in eleven Parts. Its key elements include the introduction of a new system of marine management; changes to the way fisheries are

managed; and provisions to facilitate recreational access to the English and Welsh coast. The Bill was published in draft in the last Session, and the Committee made some observations on delegated powers to the Joint Committee established to scrutinise the draft Bill. Some of those comments have been reflected in this Bill, and we do not mention them again here. This Bill also contains several new additional delegations of legislative power. Most of the delegated powers are explained in a memorandum submitted to the Committee by the Department for Environment, Food and Rural Affairs, printed at Appendix 3. We first draw to the House's attention the new delegated powers which seem to be of significance, and we then return to one of our earlier observations on the draft Bill.

New delegated powers

Provision for Appeals — clauses 70 & 105

27. Clause 70 requires the 'appropriate licensing authority' (the Secretary of State, the Scottish or Welsh Ministers or the Department of the Environment in Northern Ireland) to provide by regulations for a right of appeal against a decision under clause 68 on an application for a marine licence, which is required by a person before he may carry on a licensable marine activity (listed in clause 63). By virtue of subsection (3), the regulations may make provision about certain procedural matters, but they may also provide for the powers of any person to whom the appeal is made. In paragraph 102 of its memorandum, the Department explains that the negative procedure is thought to be appropriate here because the same procedure applies for the regulations under clause 66 which make procedural provision about applications for, and the grant of, licences.

28. Almost identical provision about appeals is made by clause 105, which requires regulations to provide for appeals against certain notices (for instance, a notice under clause 69 to vary, revoke or suspend a marine licence). In paragraph 140 of its memorandum, the Department explains that provision about appeals under clause 105 should attract the affirmative procedure 'since the appeal process will have wide implications for operators'. (In fact, despite what the Department says in the memorandum, the powers in clause 105 will attract only the negative procedure unless clause 306(7) of the Bill is amended.)

29. We do not dissent from the Department's view that the affirmative procedure is appropriate for regulations under clause 105. **But in the absence of any clear reason why the affirmative procedure should be appropriate for appeals against the variation of a licence but not for appeals against the refusal of a licence, the same procedure should apply for regulations under clause 70, and we recommend accordingly.**

Delegation of functions: Monetary penalties — clause 95

30. Clause 95(1) enables a licensing authority to delegate designated functions of its own or of an enforcement authority to a designated person by negative order. That power is amplified by subsection (2), which allows powers to impose monetary penalties to be conferred on the delegate. When made exercisable by enforcement authorities themselves, those penalty powers must be set out in orders made under clauses 90 and 92 (to which the affirmative procedure applies). Paragraphs 130 to 132 of the memorandum

do not expressly mention the additional power conferred by clause 95(2). It would however seem that an order made in reliance on it might make similar provision in relation to the designated person as would be made under clauses 90 and 92 in relation to an enforcement authority. We also note that the Department states in paragraph 131 of its memorandum that the powers in clause 95 enable the licensing authority "to prescribe in more detail how each of the functions should be performed". **We therefore recommend that an order under clause 95 should attract the affirmative procedure, as do orders under clauses 90 and 92.**

Coastal access — clause 288

31. Part 9 of the Bill makes provision for recreational access to the English and Welsh coast. In relation to England, clause 288 provides that Natural England must prepare a scheme setting out the approach it will take when discharging its duty under the Bill to facilitate coastal access, and submit the scheme to the Secretary of State. The Secretary of State is then entitled to approve the scheme (with or without modifications) or reject it and to ask Natural England to submit a new scheme. **The Committee considers that, in view of the likely importance of, and interest in, the coastal access scheme, once a scheme submitted by Natural England has been approved, the Secretary of State should lay the scheme before Parliament.**

Works detrimental to navigation — clause 304

32. Clause 304 inserts a new Part 4A into the Energy Act 2008 to provide for the control of certain operations (for instance the construction of a submarine oil pipeline) which might obstruct or endanger navigation. New section 79N provides for the appointment of inspectors, and enables the Secretary of State to make in regulations provision about their powers (which may include powers of entry) and provision creating offences. New section 79P enables the Secretary of State to provide by order that any or all of new Part 4A is to apply with any modifications to operations in the Scottish inshore region. In paragraph 328 of its memorandum, the Department explains that the affirmative procedure is appropriate for the power conferred by new section 79N because equivalent powers in the Energy Act 2008 are affirmative; but the memorandum does not mention the power conferred by new section 79P.

33. In view of the government's intention that the affirmative procedure should apply, and the precedents in sections 13 and 27 of the Energy Act 2008, we agree that the delegation in new section 79N is not inappropriate. As respects the power in new section 79P, it is relevant that 'modify' is defined in section 106 of the Energy Act 2008 to include 'amend', and that it is at present unclear to what extent the government intend that the regime to be applied to the Scottish inshore region should differ from Part 4A of the Bill. **With that in mind, we recommend that the affirmative procedure should apply to such an order. We also note that, as drafted, the Bill appears to make no amendment to section 105 of the Energy Act 2008 to provide for the affirmative procedure for regulations under new section 79N.**

The Committee's earlier recommendations

IFC Authorities: Membership — clause 147(3)

34. Clause 145 provides for the establishment in England of inshore fisheries and conservation authorities ('IFC authorities'), and clause 147 deals in detail with the provision that the orders may make about membership of IFC authorities. Clause 147(2) requires that persons appointed by the Marine Management Organisation as members under subsection (1)(b) must be acquainted with the needs and opinions of the local fishing community and have knowledge of or expertise in marine conservation. Subsection (3) enables subsection (2) to be amended by negative order.

35. In our consideration of the draft Bill we invited the Department to make the case for the negative procedure. In paragraph 186 of their memorandum the Department now explain the purpose of the power as being to "provide flexibility … if the nature of the marine environment changes", although the power would enable either or both of the two limbs of subsection (2) to be removed entirely. The core functions of an IFC authority are enshrined in clauses 149 and 150 in terms of inshore fisheries and marine conservation. Given in particular that the Joint Committee stressed in its report the importance of IFC authority members having local knowledge and experience, it is not clear why the power to remove these qualifications has been retained. **We draw to the attention of the House the possibility that the power could be exercised so as to remove the requirement that IFC authorities must include members with experience that is particularly relevant to the authorities' core functions. If the House finds the power appropriate, we recommend that the affirmative procedure should apply.**

DRAFT LEGISLATIVE REFORM (INSOLVENCY) (ADVERTISING REQUIREMENTS) ORDER 2009

36. This draft Legislative Reform Order was laid by the Department for Business, Enterprise and Regulatory Reform (BERR) on 4 December 2008, under the Legislative and Regulatory Reform Act 2006 (the LRRA). An explanatory document was laid along with the Order.

37. The Order will amend the Insolvency Act 1986 (the 1986 Act) in relation to the advertising regime for voluntary liquidations. Under the 1986 Act, where the liquidator of a company in members' voluntary liquidation believes that the company will be unable to pay its debts in full within the period stated in the directors' statutory declaration, the liquidator must summon a meeting of creditors. Notice of the meeting must be sent to each of the known creditors. In addition, the meeting must currently be advertised both in the Gazette and at least 2 newspapers circulating in the locality in which the company's principal place of business is situated. The purpose of this Order is to remove the requirement to advertise in 2 local newspapers, and replace it with discretion for the liquidator (or company) to undertake any additional advertising that they see fit.

38. As required under the LRRA BERR have consulted on the proposal, and report that the overall response was favourable (paragraphs 34 to 44 of the explanatory document). However, the Newspaper Society objected,

principally on the grounds that the proposal underestimated the effectiveness of local newspaper advertisements in alerting creditors. BERR contend that the requirement to place newspaper advertisements for every liquidation, without consideration of the value derived from the expenditure on those advertisements, represents a disproportionate financial burden on funds that might otherwise be distributed to creditors (paragraphs 41 and 42). Under the proposal liquidators (or the company) will in any case be given the discretion to undertake whatever additional advertising seems most appropriate in the circumstances, which might include advertisements in local newspapers or other media.

39. The Committee is content that the Order meets all the tests in the LRRA, is not otherwise inappropriate for the Legislative Reform Order procedure, and should be allowed to progress as an affirmative instrument, as proposed by the Department.

APPENDIX 1: BANKING (NO.2) BILL [HL]

Memorandum by HM Treasury

Introduction

1. Following extensive consultation,[1] the Banking Bill ("the Bill") was introduced in the House of Commons on 7 October 2008. It is to be introduced into the House of Lords on 4 December 2008.

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

Policy context

3. Since July 2007, the global financial system has experienced unprecedented levels of financial instability. The causes of this instability are varied and global. They include both macroeconomic factors, such as global financial imbalances, and microeconomic factors, such as the failure of banks to manage adequately financial risk. The key trigger for the instability was the downturn in the US housing market, leading to a sharp devaluation of financial products backed by assets (particularly mortgages) heavily exposed to this market, particularly the "subprime" segment.

4. The first major institution-specific consequences of this instability in the UK were seen in the problems faced by Northern Rock plc. In the summer of 2007, Northern Rock found itself unable to finance its activities, due to a business model that was heavily exposed to markets most affected by instability. Since then, other institutions have also faced severe difficulties, notably Bradford & Bingley plc and a number of Icelandic banks. During the course of autumn 2008, the crisis has intensified and it has become clear that not just individual institutions, but the banking system as a whole that is at risk.

5. In response to these events the Government has taken a number of actions. The Banking Bill is an important part of the wider set of general measures which the Government, the Bank of England, and the FSA, have taken to restore stability to the financial system, including:

    a) measures (announced on 8 October) to address the three root causes of the financial instability: deficits in liquidity, capital and trust:

    i. at least £200 billion made available to banks under the Bank of England's Special Liquidity Scheme (SLS);

    ii. the Recapitalisation Fund makes available new Tier 1 capital to UK banks and building societies, allowing them to strengthen their resources, while maintaining their support for the real economy; and

    iii. to address concerns about trust between financial institutions, the Government established a credit guarantee scheme;

[1] Financial stability and depositor protection: strengthening the framework (January 2008)

Financial stability and depositor protection: further consultation (July 2008)

Financial stability and depositor protection: special resolution regime (July 2008)

Special resolution regime: partial property transfer safeguards (November 2008)

b) the FSA's supervisory enhancement programme and other reviews, including of liquidity regulation and remuneration;

c) the increase to £50,000, by the FSA, of the deposit protection limit of the FSCS; and

d) leading ongoing international efforts to ensure effective global coordination of supervision of financial markets.

6. Chapter 3 of the recent *Pre-Budget Report,* published on 24 November 2008, provides a comprehensive account of the development of the financial crisis and the Government's response to it.

Legislative context

7. In 1997, the Government established a new framework for financial regulation in the UK. A tripartite structure for overseeing the UK financial system was created, with distinct roles for HM Treasury ("the Treasury"), the Bank of England and the Financial Services Authority ("the FSA") (together, "the Authorities"). These arrangements set out specific responsibilities for the maintenance of overall financial stability, which are set out in a Memorandum of Understanding between the Authorities.

8. The Bank of England Act 1998 established the arrangements for the Bank's current monetary policy responsibilities. Under the Financial Services and Markets Act 2000 ("FSMA"), the banking supervision function that had previously been undertaken by the Bank was transferred to the FSA.

9. More recently, the Government brought forward the Banking (Special Provisions) Act 2008 ("the Special Provisions Act"), which received Royal Assent on 21 February 2008 in order to bring Northern Rock plc into temporary public ownership once it had become clear that it would not be possible to achieve a private sector sale of the bank which would adequately protect taxpayers' interests.

10. The Special Provisions Act[2] provides the Authorities with powers to facilitate an orderly resolution to avoid serious threats to financial stability and protect the public interest where financial assistance has been made available to a deposit-taker for the purpose of maintaining financial stability, through transfer of shares or property of a failing bank. This was brought forward as emergency legislation and in consequence contained a "sunset clause"; consequently the operative powers provided by the Special Provisions Act lapse on 20 February 2009, a year after it was passed.[3] At the time the emergency legislation was passed, the Government was already preparing permanent legislation – the Banking Bill – and gave a commitment to allow time for full Parliamentary scrutiny of this legislation.

11. The length of time that the Special Provisions Act would remain on the statute book was discussed at length during its passage, with many members of both houses arguing that a year was too long a period to retain emergency powers. However, recent events around Bradford & Bingley plc and Icelandic banks have demonstrated the importance of retaining powers on the statute book to deal with failing banks, while permanent legislation was being prepared. The events also highlight the need for permanent legislation to replace the emergency Act.

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[2] Annex C provides details on the instances in which the provisions of the Special Provisions Act have been used by the Government.

[3] See section 2(8).

The Banking Bill

12. The Banking Bill contains 255 clauses.[4] It builds on the provisions of the Special Provisions Act, providing the Authorities with a broader range of tools in order to enable them to take measures to stabilise failing banks in order to maintain financial stability and protect depositors. The clauses also provide for appropriate safeguards to ensure that counterparties' and creditors' interests are taken account of and protected insofar as appropriate.

13. This Bill also builds on the existing framework for financial services regulation to enhance the Authorities' ability to deal with crises in the banking system, to protect depositors and maintain financial stability. The Bill is comprised of eight parts, the first seven of which deal with the substantive provisions of the Bill:

    a) Part 1 establishes a permanent special resolution regime (SRR), providing the Authorities with tools to deal with banks that get into financial difficulties, to maintain financial stability and to protect depositors;

    b) Part 2 establishes the bank insolvency procedure, designed to facilitate swift payout of depositors from the Financial Services Compensation Scheme (FSCS);

    c) Part 3 provides for a bank administration procedure, to be used following a "partial property transfer" from a failing bank to ensure the resolution is effective;

    d) Part 4 brings forward measures to improve the legal framework and increase the efficiency of the FSCS;

    e) Part 5 formalises the Bank of England's role in the oversight of payment systems to ensure their strength and robustness;

    f) Part 6 contains measures to strengthen the arrangements for protecting the holders of banknotes issued by commercial banks in Scotland and Northern Ireland;

    g) Part 7 includes provisions covering a number of areas, notably those relating to the statutory responsibilities and governance of the Bank of England; and

    h) Part 8 contains miscellaneous provisions.

14. This memorandum is structured in line with the Bill, addressing the powers of each Part in turn.

PART 1: SPECIAL RESOLUTION REGIME

15. Part 1 of the Bill sets out provisions that give the Bank of England, the Treasury and the Financial Services Authority ("the FSA") ("the Authorities") significant new tools for facilitating the resolution of a failing UK deposit-taker ("failing bank").

    These measures will replace interim measures in the Banking (Special Provisions) Act 2008. Broadly speaking, they provide for failing banks to be stabilised through the exercise of stabilisation options (defined in clauses 11 – 13).

[4] Clause numbers in this memorandum relate to the Bill as amended in Commons Report.

Rationale for intervention

16. Over the past two decades, the financial integration of the world's economies has proceeded rapidly. The increasingly global and fast-moving nature of the financial markets has brought many benefits to the UK as a financial centre, and to UK consumers, who enjoy access to a world-class range of innovative and secure financial services. Increased financial globalisation also means that developments in one market can be quickly transmitted to others. The recent sustained period of disruption in global financial markets, starting in summer 2007, has had a widespread impact on firms and markets across the world, as well as in the UK.

17. Given the importance of financial stability, and the damaging effect which disruption to financial services can have on individuals, firms and the economy as a whole, it is important that the Authorities are able to deal with such threats. The Government is therefore legislating to create a special resolution regime (SRR) to help reduce the impact of failing banks on depositors and the wider economy.

Deficiencies with current resolution options – insolvency

18. Conventional UK insolvency procedures provide for the orderly winding up of failed businesses (through liquidation) and corporate rescue (through administration). However, these procedures may not be appropriate to address the position of a failing bank. This is for three key reasons:

    a) First, administration is unlikely to rescue a failing bank. The basic banking business model in a fractional-reserve banking system (like that of the UK and all modern banking systems) depends on consumer confidence. An announcement of administration would be likely to lead to a "run" on the bank, with depositors seeking to withdraw their money in anticipation of the bank's failure. Administration would also be likely to be a trigger event in the commercial agreements of the bank with its other counterparties, leading to a further asset outflow.

    b) Second, the failure of a bank can have a variety of serious consequences for financial stability. The bank may be of such a size that its failure alone would cause serious economic damage through the sheer number of account holders and counterparties who would be affected. The failure of even a small bank could lead to similar problems where that bank has an important position in a niche market. Bank failures also risk contagion, for example where the failure of a bank precipitates a loss of confidence in other similar banks. This effect is heightened by the fact that bank failures are more likely to occur at a time when other banks are also weak.

    c) Third, current liquidation procedures are not appropriate for deposit-takers. For example, depositors would lose access to banking services and may experience significant delay in receiving monies owed to them from the Financial Services Compensation Scheme (FSCS). In order to give the Authorities an insolvency option for banks that allows for fast depositor payout, the Government is legislating to create a new bank insolvency procedure (Part 2 of the Bill).

Deficiencies with current resolution options – transfer

19. In addition to insolvency, there are existing methods under which the business of banks may be transferred. If a voluntary transfer could be organised then the failure of the bank might be prevented, thereby potentially minimising risks to financial

stability and depositors, and avoiding implications for public funds. For example, a healthy bank could take over a failing bank.

20. The first route is the use of normal private transactional methods. But such methods are likely to be inappropriate for resolving a bank in crisis as they depend on the presence of a willing purchaser and a consensual transaction between that purchaser and the failing bank. Perhaps most significantly such transactions will often depend on the making of variations to third party rights. In the absence of statutory powers, such variations will require the consent of the third parties concerned. As major reorganisations of banking businesses will frequently affect the rights of multiple third parties, the requirement to obtain their consent would make swift and effective resolution of a bank in crisis virtually impossible via this method.

21. The existing regime for transferring part or all of the business of banks is through a court-sanctioned transfer under Part 7 of FSMA. In summary, a Part 7 transfer provides a process for sanctioning the transfer of some or all of the business of one bank to another. Such a transfer is consensual between the two firms and then must be considered and approved by the court. While this procedure works well for planned, non time-critical transactions between two healthy companies, it is not an appropriate mechanism for resolving failing banks, where timeliness and certainty of outcome are vital. In particular, the Part 7 procedure can take over 6 months, and is uncertain as the court may not grant approval for the scheme.

22. Annex A sets out a more detailed discussion of the deficiencies of existing deposit-taking business transfer procedures.

23. Further, a significant deficiency with the normal commercial route is that there is no ability for the Authorities to deal with various issues that may delay or disrupt the transaction, for example, change of control provisions in contractual arrangements between the failing bank and third parties may be triggered (such as providing a right for the third party to terminate existing contracts) which may mean the deposit-taker is no longer supplied with the services and goods necessary for its continued operation.

24. Thus existing methods for transferring a bank's shares or property are inappropriate for resolving a failing bank. It is for these reasons that the Government is legislating to create new tools for resolving failing banks, to replace permanently the emergency powers taken in the Special Provisions Act.

The special resolution framework

25. In putting in place a permanent framework for resolving failing banks the Banking Bill contains a special resolution framework, including objectives for the regime, general and specific conditions for using the powers, a description of the stabilisation options and compensation provisions and safeguards for some of the most invasive powers. This section provides details on the "framework" of the SRR, specifically:

    a) the stabilisation options and powers;

    b) the special resolution objectives;

    c) the general and specific conditions for intervention;

    d) the code of practice; and

    e) the banking liaison panel.

The stabilisation options and powers

26. The special resolution regime comprises three "stabilisation options" (described below), the bank insolvency procedure (described in Part 2 of this memorandum) and the bank administration produced (described in Part 3).

27. The stabilisation options are comprised of the following options:

    a) the transfer of a bank or some or all of its business to a private sector purchaser;

    b) the transfer of some or all of a bank's business to a bridge bank (a bank wholly owned by the Bank of England); or

    c) as a last resort, the transfer of the securities of a failing bank to temporary public ownership.[5]

28. Stabilisation options are exercised through the stabilisation powers (that is, the share and property transfer powers).

The objectives of the SRR

29. The SRR has five objectives as set out in clause 4. These objectives describe the aim and purpose of the SRR, framing the regime and the exercise of powers within it in terms of public interest parameters.

30. The Authorities must have regard to the special resolution objectives when acting within the SRR. Objectives one to four reflect the broader public interests in protecting the stability of the financial and banking systems of the UK whereas objective five is declaratory of and serves to emphasise the need to act proportionately by avoiding interference with property rights in contravention of the Convention rights of the Human Rights Act 1998. The objectives are to be balanced as appropriate in each case.

31. The draft code of practice provides further explanation on the meaning of each of the special resolution objectives.

General conditions

32. The Government recognises that the stabilisation powers should be exercised only in very serious situations. The stabilisation options cannot be exercised unless the two "general conditions" (clause 7) of the SRR are satisfied. These are assessed by the FSA, and relate to whether the bank is failing, or is likely to fail, to meet its regulatory "threshold conditions" under FSMA (for example, as to adequacy of resources) and to the likelihood of the bank being able to meet its threshold conditions by action other than under the SRR.

33. It is necessarily the case that a failing bank must be in severe difficulties in order to satisfy these conditions, which present a high hurdle before the stabilisation powers can be exercised. Without intervention by the Authorities using the stabilisation options it is highly likely that a bank in such a position would have its FSMA Part 4 permission to conduct authorised activities (including deposit-taking) varied or revoked by the FSA and would be unable therefore to continue operating as a deposit-taker or, indeed, to continue as a "going concern".

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[5] Technically, to a nominee of the Treasury or to a company wholly owned by the Treasury.

Specific conditions

34. Once the general conditions are met, the Bank of England, or the Treasury in the case of temporary public ownership, must then determine, in consultation with the other Authorities, whether "specific conditions" (clauses 8 and 9) are met in order to enable it to exercise a stabilisation power.

35. These specific conditions must be satisfied before the stabilisation options may be exercised. The specific conditions require the Authorities to demonstrate significant and clear public interest justifications before exercising the powers.

36. In the case of the private sector purchaser and bridge bank stabilisation options, the Bank of England may only exercise a stabilisation power if an exercise of the power is necessary, having regard to the public interest in:

    a) the stability of the financial systems of the UK;

    b) the maintenance of public confidence in the stability of the banking systems of the UK; or

    c) the protection of depositors.

37. These conditions mean that the Bank of England will have to justify the use of a stabilisation power on the basis that the action was necessary to ensure financial stability, confidence in the banking systems or the protection of depositors reasons. These strong public interest tests relate directly to the special resolution objectives.

38. Alternatively, the Bank of England may exercise the stabilisation powers to effect these stabilisation options on a recommendation from the Treasury that this is necessary to protect the public interest in circumstances where the Treasury has provided financial assistance to the bank in question for the purpose of resolving or reducing a serious threat to the stability of the UK financial systems (clause 8(4)).

39. In the case of the temporary public ownership stabilisation option, the Treasury may only exercise a stabilisation power where the exercise of the power is necessary to resolve or reduce a serious threat to the stability of the financial systems of the UK; or where the bank in question is in receipt of financial assistance provided for the purpose of resolving or reducing a serious threat to the stability of the financial systems of the UK (see clauses 9(2) and (3)).

40. The even more limited grounds on which a bank may be taken into temporary public ownership reflects the Government's belief that it should be an option of last resort. Nevertheless, temporary public sector ownership may be appropriate when financial assistance has already been provided for the purpose of resolving or reducing a serious threat to the financial systems of the UK, thereby protecting the taxpayers' interests by taking full control of the failing bank.

Code of practice

41. Clause 5 confers a power on the Treasury to make a code of practice. This will set out amongst other things how the Authorities will use the stabilisation options, the bank insolvency procedure and the bank administration procedure. This code will be laid before Parliament and each of the Authorities is required to have regard to the code. A draft code has been published for consultation.

42. This code may provide supplementary guidance for the Authorities on the general and specific conditions for using a stabilisation option, the involvement of each authority in implementing each stabilisation option, and the safeguards in legislation. In particular, it is intended that the code will include provisions on the management of bridge banks and banks in temporary public ownership.

Banking liaison panel

43. In October 2008 the Economic Secretary to the Treasury established a Banking Liaison Group, known as the "expert liaison group". The purpose of the group is to advise ministers on the development of the secondary legislation that will implement the SRR provisions of the Banking Bill. Following consultation with relevant stakeholders, the Government amended the Bill to formalise the existence of the group in legislation (clause 10). Thus the group is placed on a permanent statutory footing.[6]

44. The ELG will advise the Government on the development of secondary legislation related to Parts 1 to 3 of the Banking Bill, such as the safeguards for partial transfers. In the future, the Government anticipates that the Expert Liaison Group will also be able to help review secondary legislation in light of practical experience and developments in the financial markets. The group has already contributed significantly to the development of the partial transfer safeguard proposals on which the Government is currently consulting.

Delegated Powers

45. The SRR includes a large number of delegated powers. It also confers a large number of powers on the Bank of England. This section provides a general overview of and justification for the approach taken in the Bill. This section describes:

    a) the general roles of the Authorities;

    b) the detailed nature of the Bank and Treasury's role in delegated powers; and

    c) the mechanisms for exercising the delegated powers.

46. Overall, the Government considers that the measures listed strike the right balance between allowing the Bank of England to use its central banking expertise to take a leading role under the SRR, while providing reserve powers to ministers to protect the wider public interest.

General roles of the Authorities

47. The Bill establishes a framework for the exercise of the stabilisation options within the SRR involving each of tripartite Authorities. In practice, implementation of a stabilisation option would follow intensive consultation, at each stage of the decision-making process. However, each institution will be provided with lead responsibilities, based on their mandate and expertise:

    a) the FSA for supervisory decisions and regulatory actions, including triggering the SRR and the ongoing supervision of a firm in the SRR;

    b) the Bank of England for liquidity support and central bank activity, including implementation of the key stabilisation options; and

    c) the Treasury for public finances and the overall public interest.

48. In addition, the Financial Services Compensation Scheme ("the FSCS"), which delivers the payment of compensation, will also need to be involved in the assessment of the readiness of a bank for payout of its depositors.

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[6] The clause provides for the ELG to include representatives from the Treasury, the Financial Services Authority, the Bank of England, and the Financial Services Compensation Scheme. The clause also provides for the Treasury to appoint persons it believes are able to represent banks, and persons that, in the Treasury's opinion, have expertise in financial services and insolvency law.

Role of the Bank of England

49. The Government believes that the Bank of England is the most appropriate authority to lead in the exercise and implementation of key stabilisation options (the private sector purchaser and bridge bank options (clauses 11 and 12). Thus in order to effect these options, powers to transfer the shares and property of a failing bank are conferred upon the Bank. In addition, other incidental powers are also conferred on the Bank to ensure that the exercise of the transfer powers is fully effective.

50. The model of conferring important operational functions, especially where they are based on technical expertise, to an appropriate independent agency is well-established in the UK. The Bank of England, as the UK's central bank, has the core competences needed to implement the stabilisation options. While these capacities will clearly need to be developed to enable it to take on the additional responsibilities that this function will bring, doing so will align well with the current responsibilities and competences of the Bank of England, as banker to the banking system, and as overseer of overall systemic stability of the financial system. The Bank of England's role in this regard has been widely supported by stakeholders in the industry. It is also consistent with the recommendations of the Treasury Select Committee in the House of Commons.

51. Under the UK's tripartite framework, the Bank of England already has responsibility for important aspects of financial stability, including:

    a) ensuring the stability of the monetary system as part of its monetary policy functions, acting in the markets to deal with fluctuations in liquidity;

    b) oversight of financial system infrastructure systemically significant to the UK;

    c) maintaining a broad overview of the financial system as a whole, including advising on the implications for the UK financial stability of development in the domestic and international markets and payments systems; and

    d) undertaking, in exceptional circumstances, official financial operations through the provision of liquidity assistance or other such support operations.

52. The Government is aware that there are issues which arise from the provision of such powers to the Bank of England; for example, the office-holders of the Bank of England[7] are not democratically elected and the Bank is not directly accountable to Parliament. The Bill has therefore sought to address these issues in a number of additional ways:

    a) first, by setting parameters within which the Bank of England may exercise its powers;

    b) second, by providing backstop mechanisms to ensure ministerial involvement certain decisions and reserving the broadest powers associated with the stabilisation options to ministers; and

    c) third, by enhancing governance and accountability mechanisms.

<u>Parameters within which the Bank of England may exercise its powers</u>

[7] That is, the Governor, the Deputy Governors and the directors.

53. The Bank of England will work within the constraints built into the Bill (as described above), including having regard to the special resolution objectives (clause 4).

54. In addition, the Bank of England will be able to exercise its powers only where the general and specific conditions are met (see clauses 7 and 8).

55. The Bank of England will also have to have regard to a code of practice made by the Treasury (clause 5).

56. The Bank of England will also have to act within the limits of the powers conferred by the Bill. This will include complying with the safeguards provided for in the Bill. (The limits on the powers and detailed safeguards on their exercise are outlined further below.)

57. These factors taken together mean that the Bank of England will have to act in a manner that is in the clear and compelling public interest. Of course, an exercise of its powers may be subject to judicial review.

Backstop mechanisms for ministerial involvement

58. These are described in detail in the section setting out the role of the Treasury in the SRR. They include the following mechanisms to ensure that ministerial accountability is retained for certain of the broadest powers associated with the stabilisation options. In particular, the Treasury must consent to the Bank's exercise of the:

    a) powers to impose continuity obligations on a residual bank and former group companies of the failing bank (clauses 63 to 70); and

    b) powers in relation to pension schemes (clause 71).

59. In addition, certain key powers – the exercise of which are especially likely to give rise to difficult and sensitive issues – are reserved to the Treasury. These are outlined below.

Enhanced governance and accountability

60. Finally, the Bank of England's exercise of these powers will also be subject to new internal governance arrangement which will be put in place by the Bill.

61. In particular, the Bill will formalise the Bank of England's responsibility for financial stability, by providing it with a statutory objective for financial stability and by establishing a financial stability committee (as a sub-committee of the court of directors) with responsibility for making recommendations to Court regarding the nature and implementation of the Bank of England's financial stability strategy. The key functions of the new financial stability committee will include advising on and monitoring the Bank of England's use of the key stabilisation options and monitoring of the Bank's oversight of inter-bank payment systems.

62. The Bank of England will also be required to prepare annual reports in relation to the operation of bridge banks. These reports must be made to the Chancellor who will lay copies before each House of Parliament. Further details as to the reporting obligations of the Bank of England will also be set out in the code of practice.

Role of the Treasury

63. The Government believes that ministers should retain a role in respect of matters that involve:

a) compliance with international law – the Bill provides (clauses 76 and 77) the Treasury with reserve powers in respect of stabilisation powers exercised by the Bank which concern compliance with international law obligations of the United Kingdom (see further below, paragraphs 366 to 369);

b) the protection of the public funds – the Bill requires that the Treasury's consent must be sought by the Bank in certain circumstances, where the exercise of stabilisation options by the Bank would be likely to have implications for public funds (see further below, paragraphs 370 to 372); and

c) impact on the wider public interest – the Bill identifies two areas where exercising powers to facilitate the stabilisation options could involve decisions that reflect the wider public interest beyond the special resolution objectives and the Bank of England's statutory objectives of financial stability and monetary policy. These are the adjustment of pension rights (clause 71) and the imposition of continuity obligations (clause 63 to 70). In order to exercise these powers, the Bank must first obtain the consent of the Treasury.

64. In addition, the Bill reserves the most significant powers – for example the power to change primary or secondary legislation (clause 75), powers in relation to compensation (clauses 49 to 62) and the power to take a bank into temporary public ownership (clause 13) – to ministerial procedure through Parliament.[8]

Mechanisms for exercising delegated powers

65. The Bill makes provision for how the delegated powers it confers may be exercised. This sub-section considers in outline how stabilisation powers (that is, the share and property transfer powers) may be exercised.

The general context for the making of transfers

66. A transfer instrument or order will need to be exercisable by the Bank of England or the Treasury with immediate effect so that the Authorities have the tools available to act quickly and decisively to address problems, preserve confidence (annex B describes the importance of confidence in the financial markets) and, in particular, to minimise risks to financial stability, depositors and public funds. It is also extremely important that the Authorities can take action in a way that is certain and can command the immediate confidence of all stakeholders.

67. Any delay in undertaking the transfer is likely to result in further deterioration of the failing bank's financial health. Credit ratings agencies will reassess their calculations on the likelihood of default and any downgrade in credit ratings will push up the bank's costs of funding. There may also be implications for the regulatory capital assessment of counterparties who do deal with the bank: a higher risk of default may mean they need to hold more capital.

68. Counterparties with contractual rights to "close out" may terminate their relationship with the failing bank. Even if a counterparty does not have the contractual rights to do so, they may choose to take a loss and terminate a contract in order to avoid greater losses which may arise in the event of insolvency. In particular, the counterparty may choose that receiving some, if not all, of the monies

[8] In addition, the proposed power to take a bank holding company into temporary public ownership is reserved for ministers (see paragraph 88 to 89).

owed to them immediately is preferable to receiving more of those monies at a much later date (an insolvency procedure for a bank is likely to last many years).

69. It is necessary to avoid a delay in which persons could seek to readjust their positions in ways which would threaten or frustrate the resolution. For example, fixed-charge security holders may exercise contractual rights to close-out and retrieve their collateral, potentially removing some of the most attractive (from the perspective of a prospective private sector transferee) from the bank.

70. Moreover, private sector transferees could be deterred from seeking to acquire a failing deposit-taker if they perceive there to be a significant execution risk attached to the transfer. Indeed, a transfer to a private sector purchaser will not be possible unless institutions are certain that they will obtain complete control over the shares or property transferred to it. A private sector transferee will have commercial concerns which rely upon the successful execution of a transfer. For example, they may intend to undertake significant investment to integrate the business being transferred with their existing business. The purpose of the powers described below is to ensure that transfers under the SRR do not impose additional risk on transferees, thus maximising the opportunities for a successful resolution (particularly, private-sector solutions).

71. For these reasons the Government considers it appropriate that transfers should take effect by operation of law.

Transfer procedure – instruments

72. The Bank of England may exercise its transfer power through the making of a formal instrument, rather than an order. As the Bank is an independent corporation it executes documents (including instruments made under the power conferred by this provision) by way of affixing its common seal and acting in accordance with the procedure using it in the manner set out in the Bank of England Act 1998. Additional and particular procedural and publication requirements apply to share transfer instruments and these are set out in clause 24. These involve sending a copy of the instrument to the failing bank, the Treasury, the FSA and any other persons specified in the code of practice. Additionally, the instrument must be published on the Bank's website and in two newspapers.

Transfer procedure – orders

73. Where powers are to be exercised by the Treasury, they will be effected by way of a share transfer or property transfer order.[9] Transfer orders are made by statutory instrument subject to the negative procedure.

74. The negative procedure is deemed appropriate for two key reasons: speed and certainty.

75. First, as noted above, it is likely that any transfer order will need to be made at short notice, as was the case with Bradford & Bingley plc. Any prior requirement for each House to approve a draft order before it may come into force would cause delay, during which time the Treasury would be unable to take the necessary steps to address the failing bank. This could potentially lead to severe disruption in the financial markets, place public funds at unacceptable risk, and exacerbate financial instability.

76. Second, any requirement for an affirmative resolution within a stated period as a condition for the continuance of the Order would cause undue uncertainty. As

[9] For property transfer orders, available to the Treasury in only limited circumstances, see the discussion of clauses 45 and 46 below.

noted above, and supported by annex B, this is very important if the resolution is to be a success. Indeed, uncertainty is one of the main reasons why standard transfer procedures are not appropriate for resolving the problems caused by failing banks. This is especially likely to arise if there is a hiatus between the announcement of the outcome desired through the exercise of transfer powers and that outcome being effected by transfer powers. This is particularly significant bearing in mind the commercial environment in which the failing bank will be trading. If its counterparties do not have sufficient certainty as to its position, they will not be willing to do business with the bank. It is in the interests of certainty for all parties, and of market stability, for any transfer order to be made together with, or as soon as possible after, the announcement of the intention to exercise stabilisation powers.

77. Similarly, the 28-day affirmative procedure would be inappropriate in view of the commercial uncertainties that could surround any transfer effected under the order. The Government considers that providing that the order lapses automatically unless both Houses approve the order introduces an increased element of uncertainty which could be detrimental to the resolution. The Government considers it appropriate to select the procedure that will provide purchasers and other bank counterparties with the maximum possible amount of certainty in the transaction, while recognising the need for the transfer orders made by the Treasury to be subject to Parliamentary procedure. This is to enhance the chances of a successful resolution. Therefore the negative procedure has been chosen.

78. This approach reflects the approach taken under the Special Provisions Act.

Powers of the special resolution regime

79. The Bill provides for the exercise of five different types of power. These categories are not explicitly defined in the Bill, but are delineated in this memorandum to simplify and clarify the explanation of, and justification for, the provision made in the Bill for these powers.

80. The five types of power are:

a) powers directly to effect the stabilisation options, which may be exercised by the Bank of England or the Treasury;

b) powers to make the stabilisation options more effective;

c) powers for the Treasury to give effect to measures mitigating the impact of the use (potential or actual) of the stabilisation powers, through provisions for safeguards and compensation;

d) powers for the Treasury to apply the provisions of the SRR to non-bank deposit-takers; and

e) miscellaneous powers.

Powers directly to effect the stabilisation options

81. These powers comprise, in the first instance the "stabilisation powers" defined in the Bill (in clause 1(4)):

a) in the case of a transfer to a private sector purchaser, the power for the Bank of England to:

i. transfer securities in a failing bank, or

ii. transfer some or all of a failing bank's property, rights and liabilities;

b) in the case of a transfer to a bridge bank, the power for the Bank of England to transfer some or all of a failing bank's property, rights and liabilities; and

c) in the case of a transfer to temporary public ownership, the power for the Treasury to transfer securities in a bank.

82. Included within these general descriptions of the stabilisation powers is a range of different types of transfer powers, including initial, supplemental, reverse and onward transfer powers, described in detail below. Also included, in relation to both share and property transfer powers, are a range of additional powers needed to give immediate effect to the exercise of the transfer powers.

Powers to make the stabilisation options more effective

83. In addition, there is a range of additional powers to give full effect to the property and share transfer powers.

84. These are additional powers, exercisable by either the Bank of England or the Treasury, designed to give full effect to the orderly resolution of a failing bank via the exercise of the stabilisation powers. They comprise:

a) powers in relation to pension schemes (clause 71);

b) enforcement (clause 72);

c) tax (clause 74);

d) a power to change law (clause 75); and

e) continuity obligations (clauses 63 – 70)

Powers to mitigate the impact of the stabilisation options

85. The Treasury's powers to mitigate the impact of the use of stabilisation options comprise:

a) powers to provide, potentially, for compensation to be paid to banks and shareholders deprived of their property, and creditors and third parties whose property rights are otherwise interfered with through making:

i. a compensation scheme order (clause 49);

ii. a resolution fund order (clause 58); and

iii. a third-party compensation order (clause 59);

b) powers to provide safeguards in relation to partial property transfers, including:

i. a scope safeguard restricting the exercise of the power (clause 47);

ii. a safeguard for security interests and set-off and netting arrangements (clause 48); and

iii. a safeguard to ensure that no creditor in a partial transfer would be left worse off than in a hypothetical insolvency of the whole bank (clause 60).

Powers to apply

86. The Treasury's powers under this section comprise:

a) the power to take a building society into temporary public ownership (clause 82);

b) the power to make provision for the distribution of a residual building society on winding up or dissolution (that is, where property transfer powers have been used to transfer property, rights and liabilities of the building society to a commercial purchaser or a bridge bank) (clause 83);

c) the power to apply the SRR to credit unions (clause 86); and

d) the power to exclude a class of institution from the interpretation of "bank" (clause 2).

Miscellaneous powers

87. The Treasury's miscellaneous powers are:

a) the power to issue a code of practice governing the operation of the SRR (clause 5);

b) the power to specify the considerations that are or are not to be taken account in determining whether action has implications for public funds (clause 78); and

c) the powers referred to above (paragraphs 63 to 64) conferring a role on the Treasury (clauses 76 to 80).

Amendments to the powers

88. As announced in the recent *Pre-Budget Report*, the Government will bring forward amendments in the House of Lords to add to the powers provided in the Bill as introduced. These changes are designed to increase the Bill's effectiveness in allowing the Authorities to deal with risks to financial stability. The Government proposes:

a) first, to extend Treasury's power to take a failing bank into temporary public ownership (where this would be in the interests of financial stability or the protection of public funds) to include bank holding companies. This power would be used in cases where the resolution of the deposit-taker in isolation would not by itself be sufficient to protect financial stability, public funds, or both; and

b) second, in response to emerging developments concerning the UK subsidiary of Lehman Brothers, which is currently under administration, to take a power in the Bill to introduce, by secondary legislation, a new insolvency procedure for investment firms which hold client assets or client money.

89. A supplementary memorandum will be submitted to the Committee addressing these amendments when they are tabled.

Powers to give effect to the stabilisation options

90. This section of the memorandum describes the stabilisation powers of the SRR. The section sets out:

a) the need for a range of options;

b) a brief explanation of the different types of transfer that may be effected by the Authorities;

c) a detailed description of the share transfer powers; and

d) a detailed description of the property transfer powers.

91. In general, in preparing the permanent replacement to the Special Provisions Act, considerable attention has been given to refining the broad powers conferred in that Act. The provisions of the Bill balance this refinement with the need to have powers fit for the purpose of resolving the extremely complex and varied affairs of failing banks.

The need for a range of options

92. The Government considers it appropriate for there to be a range of options available for resolving failing banks. Banks may fail for a large number of reasons in many different circumstances – in each case the optimal resolution will be different. In addition, long-term reforms must anticipate future problems, and cannot simply respond to the current and past difficulties in financial markets.

93. Resolutions may vary depending on whether they:

a) are private-sector or public-sector solutions;

b) are effected through share or property transfer powers; and

c) involve whole or partial transfers.

Private-sector solutions versus public-sector solutions

94. The transfer of a failing bank to a private sector purchaser (a "private sector solution") is likely to be the stabilisation option which best meets the special resolution objectives (clause 4). However, there may be circumstances in which a private sector solution is not a viable option. In these circumstances, in order to meet the special resolution objectives, the Authorities may have to take control and ownership of the banking business.

95. The aim would be to take control of the bank (or some or all of its business), take steps to restore confidence in that business, potentially put new management in place, restructure as necessary, and in due course make an onward transfer of the banking business to one or more private sector purchasers. This may either be achieved by the Bank of England (using a bridge bank) or, as a last resort, the Treasury (by taking the bank into temporary public ownership).[10]

Share powers versus property powers

96. The Government considers it appropriate for transfer powers to exist for both securities and for property, rights and liabilities (clauses 14 – 32 and clauses 33 – 48, respectively).

97. A transfer of securities offers a swift method for taking control of a failing bank. This is because of the practical impediments to the exercise of property transfer powers. For example, it is necessary to operate on a much wider class of assets, and address a much wider range of third party rights with respect to such assets, and the complicated nature of the banking business being transferred, potentially extending

[10] The draft code of practice makes provision for the governance and management of bridge banks and banks in temporary public ownership.

to multiple jurisdictions. The nature of these difficulties may mean that a property transfer is not feasible in the time available (for instance, where an intervention is necessary to act against an immediate threat to financial stability) or for the particular type of failing bank. In these situations, a transfer of securities may be most appropriate.

98. However, where feasible and appropriate, property transfers, may offer significant advantages over a transfer of securities. In broad terms, these advantages surround the flexibility to not transfer the whole of a failing bank's business.

Whole-bank transfers versus partial transfers

99. There may be circumstances where it is desirable to transfer only part of a bank.

100. The power to effect a partial transfer using the property transfer powers offers potentially significant advantages. For example, it may be possible to achieve the special resolution objectives by operating on only a limited part of the bank. This may mean that it is neither necessary nor desirable to take the whole of the bank into a resolution procedure. For example, it may be possible to protect financial stability and depositors by transferring all the retail deposits of a bank (together with matching assets) to a private sector purchaser or bridge bank, but leaving behind the remaining liabilities and assets. The act of splitting up a failing bank's business may allow the Authorities to separate healthy and desirable (from the perspective of a potential private sector purchaser) parts of a bank's balance sheet from those which may have deteriorated over the course of the bank's failure. By performing this separation the Authorities may be able to create an entity that a purchaser is prepared to acquire. The remainder of the bank may be wound up in an orderly manner.

101. The sections concerning partial transfers (paragraphs 302 to 335) offer a detailed treatment of the proposed safeguards in the Bill that will be put in place when executing a partial transfer.

Types of transfer

102. There are a number of different types of transfer orders and instruments. They are

a) initial transfers – these relate to the initial exercise of a stabilisation option;

b) onward transfers – these are transfers that follow an initial transfer and relate to the transfer of securities or property from a public-owned initial transferee;

c) supplemental transfers – these provide for the transfer of further things from a transferor to a transferee; and

d) reverse transfers – these provide for the transfer of things back from a transferee to a transferor.

Initial transfers

103. The initial stage transfers which stabilisation powers may be used to effect are as follows:

a) the Bank of England may transfer the securities of a failing bank to a private sector purchaser (clause 11(2)(a));

b) the Bank may transfer some or all of the property, rights and liabilities ("property") of a failing bank to a private sector purchaser (clause 11(2)(b));

c) the Bank may transfer some or all of a failing bank's property to a bridge bank (clause 12(2));[11] or

d) as a last resort, the Treasury may transfer the securities of a failing bank to temporary public ownership (clause 13(2)).

104. At the initial stage, the transfer powers may be exercised more than once. For example, some of a bank's property, rights and liabilities may be transferred to a private sector purchaser and some or all of the remainder may be transferred to a bridge bank.

105. Once an initial transfer has taken place, the Authorities may undertake supplemental transfers. These provide for further things to be transferred.

Supplemental transfers

106. A supplemental property transfer may follow an initial property transfer. It may provide for further property to be transferred from the failing bank. A supplemental share transfer may follow an initial share transfer. It may provide for further securities to be transferred from their original holders.

107. So, in line with the initial transfers:

a) the Bank may make a supplemental transfer of the securities of a failing bank to a private sector purchaser (clause 26);

b) the Bank may make a supplemental transfer of the property of a failing bank to a private sector purchaser (clause 42);

c) the Bank may make a supplemental transfer of the property of a failing bank to a bridge bank (clause 42); or

d) the Treasury may make a supplemental transfer of the securities of a failing bank to temporary public ownership (clause 27).

108. A supplemental transfer need not actually transfer securities or property, rights and liabilities (as the case may be). Instead it may simply make provision speaking in connection with the initial transfer, to make it more effective. For example, the Bank could make a supplemental share transfer instrument to make incidental provision (if this was not done in the original share transfer instrument).

Reverse transfers

109. Once an initial transfer has taken place, the Authorities may also undertake reverse transfers. In the case of a reverse property transfer, property may be transferred back to the failing bank. In the case of a reverse share transfer, securities may be transferred back to their original holders.

110. So, in line with supplemental transfers:

a) the Bank may make a reverse transfer of some of a bridge bank's property to a failing bank (clause 44); or

b) the Treasury may make a reverse transfer of the securities of a bank in temporary public ownership to their original holders (clause 29).

111. However, in contrast to supplemental transfers:

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[11] A "bridge bank" is a company wholly owned by the Bank of England. It will be run by the Bank and operated as a bank (albeit on a conservative basis). Any business not transferred will remain in the failing bank (otherwise then known as the "residual bank"). If the residual bank is insolvent, it will most probably be put into the bank administration procedure (as established in Part 3).

a) the Bank may not make a reverse transfer of securities back to their original holders, where they have been initially transferred to a private sector purchaser; and

b) the Bank may not make a reverse transfer of property back to the failing bank, where it has been initially transferred to a private sector purchaser.

112. These exclusions are made where transfers are made to private sector purchasers because a purchaser might not be willing to partake in a transaction if they believed the Authorities might "undo" a transfer.[12]

Onward transfers

113. The Bank may make an onward transfer of property or securities from a bridge bank. The Treasury may do the same from a bank in temporary public ownership. These transfers are designed to effect a swift onward transfer from a publicly owned bank.

114. An onward transfer may be made to any transferee. It is most likely to be made to a private sector purchaser. But the flexibility to make an onward transfer to a public sector transferee is worth having as it allows for all manner of restructuring scenarios. For example, the Bank of England could transfer part of a bridge bank to a company wholly owned by the Treasury for long-term management.

115. To this end, the Bank may effect:

a) an onward transfer of a bridge bank's securities (clause 30); or

b) an onward transfer of some or all of a bridge bank's property (clause 43).

116. The Treasury may effect:

a) an onward transfer of the securities of a bank in temporary public ownership (clause 28); or

b) an onward transfer of some or all of the property of a bank in temporary public ownership (clause 45).

117. Supplemental transfers may be made following an onward transfer. Reverse transfers may also occur, subject to the same restriction that no securities or property may be transferred back from a private sector purchaser.

The share transfer powers

118. This section sets out a discussion of the share transfer powers:

a) clauses 15 and 16 relate to the means through which a transfer of securities may be achieved;

b) clauses 17 to 23 set out matters which may be included in a share transfer instrument or order;

c) clauses 24 and 25 provide for the procedure for share transfer instruments and orders; and

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[12] The Government does not consider it appropriate for things to be transferred back from a private sector purchaser. Once a transfer has been made to a commercial transferee, it is their responsibility to manage the affairs of the business. Possessing the power to transfer things back from a private sector purchaser would introduce uncertainty into the transaction. It is unlikely that a private sector purchaser – who is likely to have a low risk appetite given the nature of the transfer – would agree to a transaction if the Authorities had the power to remove property or securities from the business without their consent.

d) clauses 26 to 31 relate to supplemental, reverse and onward share transfer orders and instruments.

Clause 15 – Share transfer instrument

Power: *To make an instrument to transfer securities*

Body: *Bank of England*

Parliamentary scrutiny: *None*

119. This clause describes share transfer instruments. Share transfer instruments are made by the Bank of England to effect the transfer of the securities of a failing bank to a private sector purchaser (the stabilisation option set out in clause 11). The instrument may also make other provision for the purposes of, or in connection with, the transfer of securities issued by a specified bank (whether or not the transfer has been or is to be effected by that instrument, by another share transfer instrument or otherwise).

120. The clause provides the flexibility to transfer specified securities in a failing bank or securities of a specified description. The decision of which securities to transfer will be made on a case-by-case basis. However, in practice it is likely that the Bank will seek to transfer all the forms of security which may confer control (for example, by way of voting rights) over the banking business.

121. For the reasons set out above in paragraphs 49 to 62,, the Government considers that it is appropriate that the Bank of England should have this power in order to effect a swift and effective transfer of shares to a private sector purchaser

Clause 16 – Share transfer order

Power: *To make an order to transfer securities*

Body: *Treasury*

Parliamentary scrutiny: *Negative procedure*

122. This clause makes provision in respect of share transfer orders, used to effect a transfer of the shares of failing bank to temporary public ownership (clause 13). As with a share transfer instrument, the order may also make other provision for the purposes of, or in connection with, the transfer of securities issued by a specified bank (whether or not the transfer has been or is to be effected by that order, by another share transfer order or otherwise).

123. A bank will only be taken into temporary public ownership as a last resort, subject to the specific conditions set out in clause 9. While it will be the intention of the Authorities to achieve private sector solutions, there may be circumstances in which it is appropriate to take a failing bank into temporary public ownership. This may be, for example, in cases where large sums of public money have been advanced to the failing bank for the purpose of resolving or reducing a serious threat to financial stability and the private sector options available at the time are not in the interests of the taxpayer. Temporary public ownership provides a stable platform for the stabilisation of the failing bank, in order that, at some future date, all or part of the bank can be sold to a private sector purchaser.

124. As noted above (paragraphs 66 to 71), it is likely that the Treasury will need to exercise its power at speed. It is important that commercial counterparties, the

wider industry, depositors and the public have confidence in the transfer, and it is necessary that the transfer is legally and economically certain. For these reasons, and those described in the general section above, the Government considers it appropriate for a transfer order to be made through the negative procedure.

Clause 17 – Effect

Power: *To make provision in relation to the effect of a share transfer order or instrument*

125. This clause provides that a transfer of securities by way of a share transfer instrument or order takes place by virtue of the instrument or order, and takes effect despite any restrictions. A share transfer instrument or order may also provide for a transfer to take effect free from any trust, liability or other encumbrance and may extinguish rights to acquire specified securities.

126. The purpose of these provisions is to ensure that a transfer of securities is effective in law and takes place in spite of any restrictions which might otherwise exist. Most straightforwardly, these transfers are avowedly non-consensual. The transfer must therefore override the normal requirement for a transferor to consent to the transfer of his property. Further provision is necessary to address the complex ways in which property may be held. For example, property may be held in trust where the legal owner of the property (the trustee) holds the property beneficially for others (the beneficiaries). The provisions of this clause, for example, make it clear that the transfer can relate to both the legal and beneficial ownership of property, ensuring that the transferee obtains full ownership of the securities transferred. The inability to produce this outcome would undermine the ability of the Authorities to resolve a failing bank in the public interest.

127. The power to extinguish rights to acquire securities is necessary in order to ensure that the transferee acquires the full control and ownership of the failing bank, with there being no question of any other persons retaining rights (or having such rights triggered) to have securities allotted to them on or following the transfer. This will be necessary, for example, in relation to a transfer into temporary public ownership, where the Treasury will need to take immediate full control and ownership of the failing bank in order to conduct the resolution. There must be no question of any other person retaining rights (or having such rights triggered) to acquire securities conferring controlling rights on or following the transfer.

128. In addition, the powers to extinguish rights to acquire securities need to be capable of dealing with the full range of securities that banks may have. Without sufficient breadth there is a risk that a deposit-taker may restructure the nature of its securities so as to make it impossible for the Authorities to make fully effective share transfers.

Clause 18 – Continuity

Power: *To make provisions concerning the continuity of actions, etc. where ownership has passed to a transferee*

129. This clause sets out that provision can be made in a share transfer instrument or order to provide for the continuity of arrangements in respect of a failing bank. In broad terms, the provision allows for a transferee (a private sector purchaser or the Treasury) to be treated as the same person as the transferor.

130. Subsection (1) enables the share transfer instrument or order to include provision that the transferee can be treated as the same person as the transferor for any purpose connected with the transfer. For example, the failing bank may have a

contract with a third party, a provision of which specifies that the third party may require the failing bank to seek its consent before a change of control can be effected, otherwise it will be released from its obligations under the contract. Such restrictions could severely undermine the ability of the Authorities to conduct the transfer. Therefore, the Authorities may make provision for the transferred deposit-taker to continue to benefit from existing contracts.

131. Subsection (2) enables the share transfer instrument or order to include provision that agreements made or other things done by or in relation to a transferor are treated as made or done by or in relation to the transferee. This provision would enable, for example, the transferee to continue to benefit from arrangements entered into by the transferor, notwithstanding any rights triggered on the transfer.

132. Subsection (3) allows for transitional provision about things transferred to be continued. This can include continuation of legal proceedings by or in relation to the transferee. Subsection (4) allows for the modification of references to the transferor in instruments or documents.

133. Subsection (5) allows for provision of information to be required or permitted between the transferor and the transferee of a share transfer instrument or order. For example, the transferee may require information about the IT services used by the transferor in order to maintain continuity of banking services to depositors. Or, for example, information may be required in relation to litigation proceedings regarding a bond agreement entered into between the transferor and the failing bank.

Clause 19 – Conversion and delisting

Power: *To make provision concerning conversion of securities and for delisting*

134. The purpose of this provision is to ensure that the Authorities can take full control and ownership of failing banks that are likely to have complex capital structures.

135. Subsection (1) provides for securities to be converted from one form or class to another. This power is vital given the complex nature of the capital structure of deposit-takers whose capital is determined by market factors and by regulatory rules, including those set out in and by virtue of the Capital Requirements Directive (2006/49).

136. Securities may be issued in a wide variety of forms. They are likely to be of a bespoke nature to banks, structured in such a way as is optimal for each institution. It may be desirable, or indeed essential, to alter the forms in which the securities are held and which classes they take. For example, it may be appropriate to simplify the securities issued by a deposit-taker on its transfer to temporary public ownership by converting particular types of securities simply into ordinary shares. The power could also be exercised to convert bearer shares[13] into ordinary shares, to prevent any confusion from ensuing as to the ownership of shares.

137. This power also applies to securities which are not transferred under the instrument or order.

138. Subsection (2) provides for the power to de-list securities issued by a failing bank on a UK regulated market. This is an important consequential provision to ensure certainty can be given to the markets as to the status of the securities of a deposit-taker on the face of the share transfer instrument or order, rather than having to

[13] Ownership in bearer shares is transferred by physical delivery of the instrument.

await the actions of the UK Listing Authority. It is relevant to many deposit-takers as banks are often listed entities.

Clause 20 – Directors

Power: *To make provision concerning the removal and appointment of directors of banks subject to share transfer instruments or orders*

139. This clause specifies that the Bank of England or Treasury may take various actions with regard to directors including appointment and removal, termination and variation of service contracts (subsection (1)). The provisions give the Authorities the necessary power to put appropriate management in place.

140. It is likely to be necessary or desirable to make appointments to the board of the transferred failing bank immediately on a share transfer order or instrument having come into effect, rather than having to rely on the corporate powers of a shareholder. It is critical that the deposit-taker has a board of directors with the appropriate expertise to manage the business. In the interests of expediency, it is considered appropriate for the Authorities to be able to appoint one or more persons to be a director (particularly, where members of the board have resigned in the period immediately preceding the transfer, or where the existing board does not contain the necessary expertise to operate the deposit-taker).

141. The appointment and removal from office of directors may, of course, be achieved through resolutions of members of the company. Although it is open to the members of a company to remove a director by resolution, special notice is required and the director has a right to protest and be heard on the resolution at that meeting. These processes are likely to be time consuming.

Clause 21 – Ancillary instruments: production, registration etc.

Power: *To make miscellaneous provisions to ensure the effectiveness of a transfer*

142. The purpose of this clause is to ensure the transfer in the circumstances where this stabilisation power is exercised is fully effective. It allows for a share transfer order or instrument to permit or require execution, issue or delivery of instruments (subsection (1)). Further, it provides that the transfer has effect irrespective of production, delivery, transfer or other dealing with an instrument and irrespective of registration (subsection (2)). A transfer instrument or order may also entitle the transferee to be registered in relation to transferred securities and to require a person to register such securities (subsection (5)). Registration of securities has the effect of making the transferee the legal owner of registered securities.

143. It is vital that a share transfer order or instrument can take effect without the intervention of any third parties who would in normal circumstances have to carry out some act (such as authorisation) or the compliance with required formalities (such as registration).

144. This clause enables immediate and effective legal control to be taken of the bank in question irrespective of the form in which its securities might, for example, be held in the form of certificated shares (transferred under a registration procedure involving certificates of transfer), uncertificated shares (transferred electronically through the Crest central securities depository, a clearing house); and in bearer form (transferred by physical delivery from one person to another).

Clause 22 – Termination rights etc.

Power: *To make provision concerning default event provisions in contracts or other agreements*

145. This clause sets out certain provisions in relation to events of default. An event of default clause is a clause in a contract that gives a specified right to a counterparty if a specified event occurs. For example, a contract could stipulate that a counterparty should have the right to terminate the contract if the bank's credit rating changes or if there is a change of control of the bank. The clause allows the Authorities to make provision for such rights not to be triggered in relation to a share transfer order or instrument. The share transfer instrument or order can allow such a default event provision to apply to a specified extent. The clause applies to the making of an instrument or order. Anything that is to be done or that may be done under (or by virtue of) the instrument or order and any action or decision taken or made under the Bill (or another enactment) that resulted in, or that was connected to the making of the instrument or instrument.

146. This clause is important since most modern commercial contracts make heavy use of these provisions.

147. A transfer of securities may be characterised as an event of default, which would give counterparties the right to terminate or modify contractual arrangements in the event that the Authorities exercise the transfer powers.

148. Clearly, any termination of key contracts would significantly reduce the likelihood of the deposit-taker being able to continue as a going concern. It could necessitate having to renegotiate contracts, potentially with new counterparties, with no guarantee that similar terms could be arranged. In extreme circumstances, for example if the majority of a bank's counterparties sought to rely on termination rights the bank would be unable to continue its operations.

149. In addition, the very act of counterparties terminating their contractual arrangements with the deposit-taker is likely to send a strong signal to the market that other counterparties should not do business with the bank. Thus, a number of counterparties closing out their contracts could lead to a wider counterparty "flight" from the deposit-taker, which could have severe consequences for the success of the resolution.

150. Therefore, this clause allows the Authorities to make provision for a share transfer instrument or order to be disregarded in determining whether a default event provision applies. Or, in other words, that such default event rights may be disapplied in relation to a transfer of control by way a share transfer order or instrument.

151. The powers are designed to be able to be tailored to the particular circumstances in question. Thus, where practicable, an event of default might be modified rather than entirely disapplied.

152. The provisions, however, could not be used to override financial collateral agreements, which are protected by the Financial Collateral Arrangements Directive (2002/47/EC), and which, in broad terms, must be allowed to take effect in accordance with their terms.

153. This is an area where, in the light of further analysis and consultation, the Government has adopted a more restricted form of the powers than those taken in the Special Provisions Act earlier this year, which, for example, apply to any person having a specified connection with a deposit-taker or any of its group undertakings.

Clause 23 – Incidental provision

Power:	*To make incidental provision in a share transfer order or instrument*

154. This clause allows for incidental, consequential, or transitional provision to be made in a share transfer order or instrument. This power is vital because of the widely varying circumstances in which these important and wide-ranging provisions may need to operate.

Clause 26 – Supplemental instruments

Power:	*To make one or more supplemental share transfer instruments*
Body:	*Bank of England*
Parliamentary scrutiny:	*None*

155. This power enables the Bank of England to make one or more further share transfer instruments, where it has made a share transfer instrument in accordance with clause 11(2) (transfer to a private sector purchaser). The purpose of this provision is to ensure that the Bank is able to make any necessary supplementary provision to give full effect to the stabilisation options.

156. In order to take control of the bank, securities that confer control rights will need to transferred. Such securities may not be limited simply to ordinary voting shares, but may include securities such as preference shares and hybrid equity-debt securities which may confer control rights in certain contingencies. But in circumstances where an extremely swift transfer of ownership of a bank is required to protect financial stability, it might not be possible to have an exhaustive list of all the bank's securities at the time of transfer. An example of the circumstances in which this may be necessary is where further due diligence reveals that a person has a class of security other than ordinary shares which nevertheless confers on that person some form of right actually or contingently to control the failing bank. Therefore it may be necessary to transfer that class of security in order for the Bank to secure the full control of the deposit-taker for a commercial purchaser. If the Bank did not have such a power then purchasers might insist on a prolonged period of due diligence before agreeing to the transfer, which could delay the conclusion of a resolution.

157. Subsection (4) specifies that the general and specific conditions (set out in clauses 7 and 8) do not apply. The initial transfer will have met the general and specific conditions. The effect of the initial transfer may have been to stabilise the position of the bank, such that the conditions are no longer met. In circumstances where the resolution still needs to be completed through the exercise of statutory powers. It is neither necessary nor desirable for each stage of the bank's resolution to have to meet various sets of conditions. The fact that the conditions are met for the initial intervention gives the Authorities warrant to take all further necessary steps to resolve the bank. A supplemental transfer is one stage of the Authorities' intervention to protect the public interest in resolving a failing bank. It is not appropriate for the making of the relevant instruments and orders to be constrained by these conditions. Of course, the Authorities still must have regard to the special resolution objectives and the provisions of the code of practice. Moreover, where the exercise of these powers interferes with property rights (for example, of the security holders concerned), the Authorities will have to be satisfied that the interference is proportionate to the public interest aim pursued.

Clause 27 – Supplemental orders

Power: *To make one or more further share transfer orders*

Body: *Treasury*

Parliamentary scrutiny: *Negative procedure*

158. This clause makes very similar provision to clause 26. The power enables the Treasury to make one or more further share transfer orders, where it has made a share transfer order in accordance with clause 13(2) (transfer to temporary public ownership). Subsection (4) specifies that that general and specific conditions (set out in clauses 7 and 9) do not apply. This is appropriate for the reasons set out in paragraph 157.

159. A negative procedure is considered appropriate in relation to the making of a supplemental order. This is because of the speed at which the Treasury may need to secure full control over the deposit-taker and in order to minimise any uncertainties associated with the transfer, which may arise should a 28-day procedure be used. The general arguments for the use of the negative procedure in relation to transfers is provided in paragraphs 73 to 78.

Clause 28 – Onward transfer

Power: *To make one or more further share transfer orders*

Body: *Treasury*

Parliamentary scrutiny: *Negative procedure*

160. This power enables the Treasury to make one or more onward share transfer orders, where it has taken a failing bank into temporary public ownership.

161. Under subsection (3) the Treasury may make a transfer order to provide for securities in temporary public ownership to be transferred to another person, and may make other provision for the purposes of, or in connection with, the transfer of securities.

162. The Government considers it appropriate that the Authorities should have onward transfer powers because of the practical restrictions on existing commercial and legislative mechanisms for transferring the ownership and business of a deposit-taker. These procedures are designed for and work well for planned, non-time critical transactions between two healthy companies. However, they are not appropriate mechanisms for resolving banks in severe financial distress, where timeliness and certainty of outcome are vital. This is discussed in further detail above, and in annex A.

163. An onward transfer to a private sector purchaser by way of a statutory order or instrument is likely to be more expeditious and may command more confidence than a transfer through existing commercial processes. Such powers provide for swift and effective transfers to a private sector purchaser, maximising the commercial opportunities and minimising risks to the purchaser.

164. Subsection (5) specifies that the general and specific conditions (set out in clauses 7 and 9) do not apply. This is appropriate for the reasons given paragraph 157.

165. While it is possible that onward transfers might not be undertaken in times of crisis or financial instability, the Government considers the negative procedure is the most

appropriate mechanism, for the reasons stated above in paragraph 159. For example, it is possible that an onward transfer may immediately follow, or occur very soon after, an initial transfer. For example, the onward transfer of Bradford & Bingley's deposit book to Abbey immediately following the initial transfer of the bank into temporary public ownership.

Clause 29 – Reverse share transfer

Power: *To make one or more reverse share transfer instruments*

Body: *Treasury*

Parliamentary scrutiny: *Negative procedure*

166. This power enables the Treasury to make one or more reverse share transfer orders, where it has taken a failing bank into temporary public ownership. It also provides for the Treasury to make reverse share transfer orders following an onward transfer to a publicly-owned transferee.

167. The Government anticipates that the situations in which a reverse transfer of securities would need to be exercised will be extremely limited. However, the Government considers it prudent and sensible to provide for the widest range of scenarios when preparing its long-term permanent reforms. This is especially the case given the likely need to exercise share transfer powers quickly, and the complex capital structures they will be acting upon.

168. In a particularly fast-burn failure it may be necessary to transfer a wide range of a failing bank's securities to temporary public ownership, despite full due diligence not having been done. This may be necessary if there is a great threat to financial stability. But, following the transfer, further examination of the securities may reveal that not all of them are necessary to achieve the resolution objectives. For example, some classes of security may not confer control. Given the extremely broad and complex nature of bank securities and the capacity for innovation in the design of new equity, debt and hybrid instruments, it cannot be discounted that there are circumstances where a reverse share transfer instrument may be needed. If this was to occur, it is very likely that such a reverse share transfer would take place very soon after the initial transfer.

169. Subsection (5) specifies that that general and specific conditions (set out in clauses 7 and 9) do not apply. This is appropriate for the reasons given paragraph 157.

170. A negative procedure is considered appropriate in relation to the making of a reverse order. This is because of the speed at which the Treasury may need to exercise the power. The general arguments for the use of the negative procedure in relation to transfers are provided in paragraphs 73 to 78.

Clause 30 – Bridge bank: share transfers

Power: *To make one or more bridge bank share transfer instruments*

Body: *Bank of England*

Parliamentary scrutiny: *None*

171. This clause makes very similar provision to clause 28, but in relation to the Bank of England and bridge banks rather than the Treasury and banks in temporary public

ownership. The power enables the Bank of England to transfer a bridge bank's securities by instrument.

172. Technically this involves the transfer of securities which have not previously been subject to a statutory transfer (as the bridge bank will have been established under the Companies Act 2006, and its shares will be held by the Bank of England). But the purpose of this power is to enable the Bank to transfer shares in a bridge bank to another person in the same way as it may transfer shares from a failing bank to a private sector purchaser. The benefits of this power are described above in relation to onward transfers (paragraphs 160 to 165).

Clause 31 – Bridge bank: reverse share transfer

Power:	*To make one or more bridge bank reverse share transfer instruments*
Body:	*Bank of England*
Parliamentary scrutiny:	*None*

173. Where the Bank of England has made a bridge bank share transfer to a publicly-owned transferee, it may make one or more bridge bank reverse share transfer instruments.

174. The power is very similar to the power that the Treasury has to make a reverse share transfer order (clause 29) where it has made an onward transfer of securities from a bank in temporary public ownership to a publicly-owned transferee.

Property transfer powers

175. This section sets out a discussion of the property transfer powers:

a) clause 33 relates to the means by which a transfer of property may be achieved;

b) clauses 34 to 40 set out matters which may be included in a share transfer instrument or order;

c) clause 41 provides for the procedure for making property transfer instruments; and

d) clauses 42 to 46 relate to supplemental, reverse and onward share transfer orders and instruments.

Clause 33 – Property transfer instrument

Power:	*To make a property transfer instrument*
Body:	*Bank of England*
Parliamentary scrutiny:	*None*

176. This clause makes provision in respect of property transfer instruments, used to effect a transfer of the transferable property, rights or liabilities (defined in clause 35) of a failing bank to a private sector purchaser or bridge bank (clauses 11 and 12). As this power is to be exercised by the Bank of England, it is exercisable by way of a formal instrument to which procedural and publication requirements apply. These are provided in clause 41. The flexibility afforded by subsection (2) reflects the different ways through which the Bank of England may seek to describe a partial

transfer. Property transfer instruments may also make other provision for the purposes of, or in connection with, the transfer of property of a failing bank.

Clause 34 – Effect

Power: *To make provision in relation to the effect of a property transfer instrument*

177. The purpose of the clause is to ensure that a transfer of property, rights or liabilities executed through an instrument is able to provide certainty of outcome and speed of execution notwithstanding restrictions that would exist in the absence of such powers.

178. This clause makes very similar to provision to that in clause 17 (discussed in paragraphs 125 to 128).

Clause 36 – Continuity

Power: *To make provisions concerning the continuity of actions etc.*

179. This clause provides powers to ensure that a transfer of property, rights or liabilities has the overall effect that the Authorities require, that any consequential matters can be dealt with and unforeseen issues (for example, with regard, for actions taken by the transferor) do not create difficulties once ownership has changed.

180. This clause makes similar provision to clause 18. However, there are some additions to make the provisions work for property transfers. This is because a transfer of property is from one legal entity to a separate legal entity; a share transfer, on the other hand, transfers ownership of the same entity.

181. Subsection (4) provides that a property transfer instrument which enables the transfer of a contract of employment may include provision about the continuity of employment. The purpose of this provision is to ensure that employees can be transferred with the business in order that it can continue to operate effectively. This provision means that employees may be transferred in a way which enables continuity of employment to be maintained, for example for the purposes of rights under employment law contingent on accruing a defined period of employment. Such a process could be extremely time-consuming and disruptive to the transfer.

182. Subsection (6) provides that in so far as rights and liabilities in respect of anything transferred are enforceable after a transfer date, a property instrument can apportion them as between the transferor and the transferee. Subsection (7) specifies that the property transfer instrument may apportion liability for tax between the transferor and the transferee. This is necessary in order to apportion tax between the transferor and the transferee, so a transferee, for example, does not have to bear an inappropriate tax burden as a result of the transfer.

183. Subsection (8) provides that the transferor and the transferee may, by agreement, modify a provision of the instrument. Such modifications are restricted to those which achieve a result that could have been achieved by the instrument, and may not transfer (or arrange the transfer of) property rights and liabilities.

184. Subsection (9) provides that the transferor must require or permit the transferor to provide the transferee with information and assistance, and vice versa. The purpose of this provision is to ensure that the transferee and transferor co-operate with one another. For example, the transferee may require information about the IT services used by the transferor in order to maintain continuity of banking services to depositors.

Clause 37 – Licenses

Power: *To make provision in relation to the effect of a property transfer instrument*

185. Subsection (1) of this clause provides that a licence in respect of property transferred shall continue to have effect notwithstanding the transfer. Subsection (2) provides that the Bank of England may disapply subsection (1) so that the normal consequences of the transfer may ensue (for example, the determination of the licence). Subsection (3) specifies that where a licence imposed rights or obligations, a property transfer instrument may apportion responsibility for exercise or compliances between the transferor and transferee.

186. The purpose of this clause is to provide flexibility to the Bank of England in effecting the transfer. It will apply to licences granted under public law (for example, planning permission to use particular property it particular ways) and under private law. For example, some licences (such as those for software) may include English law governed non-assignment clauses, which, in the event of transfer, could mean that the licence could not be transferred to the transferee. This could limit the effectiveness of the transfer, and the extent to which the resolution objectives may be achieved. This provision is necessary to ensure that the transferee has the necessary licences in place so it can continue to operate.

Clause 38 – Termination rights etc.

Power: *To make provisions concerning default event provisions in contracts of other agreements*

187. This clause is very similar to clause 22. The clause sets out certain provisions in relation to default events. The clause allows for such rights not to be triggered in relation to a property transfer.

Clause 39 – Foreign property

Power: *To make provisions concerning foreign property*

188. It is important that the Bill makes provision in respect of foreign property, which this clause does. Many banks operate in multiple jurisdictions, or are part of international groups that may have significant amounts of property governed by foreign law. It is extremely rare to find a deposit-taker that solely operates in the United Kingdom, and so not having these provisions would limit the effectiveness of the property transfer powers.

189. The compulsory transfer of property governed by foreign law (as permitted under clause 35(1)(c), (d)) may not be recognised under that law. Therefore, the purpose of this clause is to require the transferor to co-operate with the transferee to do anything necessary to ensure the transfer is effective under foreign law. This provision is very similar to that set out in paragraph 11 of Schedule 21 to the Energy Act 2004.

190. The clause provides that the mechanism for ensuring that a transferor takes appropriate action is that an obligation may be placed on a transferor. Such an obligation may be enforceable as if created by a contract. This is to increase the likelihood that persons will be willing to comply with the obligation. Any person who is unwilling to comply with it must consider whether the Authorities would be able to bring a claim for substantial damages should non-compliance prejudice the resolution and give rise to economic loss. Other contractual remedies would also be

potentially available to compel compliance with the obligation, such as an interim injunction and an order for specific performance.

191. Provisions of this nature were used in the resolution of Bradford & Bingley plc. The transfer order provided that Bradford & Bingley should, on request, take reasonable steps to make the transfer of foreign property to Abbey successful.[14]

Clause 40 – Incidental provision

Power:	*To make incidental provision in a property transfer instrument*

192. This clause allows for incidental, consequential or transitional provision to be made in a property transfer instrument. This power is important because of the widely varying circumstances in which the Bank of England may need to exercise a property transfer.

Clause 42 – Supplemental instruments

Power:	*To make one or more further property transfer instruments*
Body:	*Bank of England*
Parliamentary scrutiny:	*None*

193. This power enables the Bank of England to make one or more further property transfer instruments, where it has made a property transfer instrument in accordance with clause 11(2) (transfer to a private sector purchaser) or 12(2) (transfer to a bridge bank). The purpose of this provision is to ensure that the Bank of England is able to make any necessary supplementary provision to give full effect to its property transfer powers and any property transfer instruments made in accordance with those powers. Similar provision in relation to securities is provided by clause 26 (paragraphs 155 to 157).

194. The circumstances in which these powers may first need to be exercised in relation to a particular deposit-taker will, by their nature, be exceptional: in terms of the prevailing economic situation; the time available to make decisions to transfer; and the likelihood of there being incomplete information available to the Bank of England about the business of the deposit-taker in question. Following the initial transfer, therefore, it may become apparent to the Bank of England that it is necessary to transfer further property, assets and liabilities from the failing bank.

195. The existence of the power should increase the likelihood of an immediate private sector solution being successful, as commercial purchasers are assured that the Bank has the means to ensure the transfer is fully effective. However, a supplemental transfer would never be made simply because a private sector purchaser requested it. The action would have to meet the resolution objectives and the Bank would have to consider it necessary and proportionate.

196. It should be noted that the partial transfer safeguards[15] apply to supplemental property transfers. These offer three protections. First, the Authorities will need to provide the same degree of protection for set-off and netting arrangements. Second, security interests will need to be protected. Third, supplemental and reverse

[14] Bradford & Bingley plc Transfer of Securities and Property etc Order 2008 (S.I. 2008/2546), article 23.

[15] Provided by clauses 47, 48 and 60.

property transfers will to be taken into account when determining the compensation amount for creditors left in the residual bank.

Clause 43 – Onward transfer

Power:	*To make one or more onward property transfer instruments*
Body:	*Bank of England*
Parliamentary scrutiny:	*None*

197. This power enables the Bank of England to make one or more onward property transfer instruments, where it has made an initial property transfer instrument to transfer property, rights and liabilities to a bridge bank. This clause makes similar provision to clause 30 (paragraphs 171 to 172).

198. Subsection (4) specifies that an onward property transfer instrument may relate to property, rights or liabilities of the bridge bank whether or not they were transferred under the original instrument. This ensures that if the bridge bank has acquired any property since the initial transfer (which is likely as it will be continuing to operate as a bank, albeit on a conservative basis), that this property may be transferred as part of the onward transfer.

199. This power is designed to maximise the chances of achieving a private sector solution following use of the bridge bank stabilisation option. An onward transfer to a private sector purchaser through statutory powers is likely to be more effective and may command more confidence than a transfer through existing commercial means. This provision provides a high degree of flexibility to the Bank of England in dealing with property, assets and liabilities of a bridge bank, and means that the Bank of England is not constrained by having to find a purchaser for the whole bridge bank. So, for example, the Bank could sell part of a bridge bank's business to a private sector purchaser through an onward partial property transfer. However, the powers to put in place partial transfer safeguards will apply to such transfers.

200. In line with the other onward transfer clauses (28, 29 and 45), the nature of an onward transferee is not specified. This provides the flexibility for the Bank of England to carry out a number of restructuring scenarios. For example, part of the business could be hived-down to an onward bridge bank.[16] Or it may be appropriate to separate depositors from the rest of the bank's business. This is prudent provision, designed to ensure the Bank of England has all the necessary flexibility to resolve the banking business transferred to a bridge bank.

[16] Clause 12 provides for the concept of an "onward bridge bank". In broad terms, an onward bridge bank is a company wholly owned by the Bank of England to which property or securities of a bridge bank is transferred.

Clause 44 – Reverse property transfer

Power:	*To make one or more reverse property transfer instruments*
Body:	*Bank of England*
Parliamentary scrutiny:	*None*

201. This power enables the Bank of England to make one or more reverse property transfer instruments. The clause makes similar provision to clause 29. However, while it is very rarely likely to be necessary to effect a reverse transfer of securities, a reverse transfer of property may be justifiable in a wider range of circumstances.

202. Reverse property transfer powers are available in two situations. First, where the Bank of England has made an initial transfer to a bridge bank and wishes to transfer some of the property back to the failing bank. Second, where the Bank has a bridge bank, transfers some of its property to a publicly-owned onward transferee, and subsequently wishes to transfer some property back to the bridge bank.

203. Such provision may be vital for the success of the resolution. For example, suppose that the Bank has transferred the majority of a failing bank's business to a bridge bank. But, in due course, it may become clear that there is some small aspect of its balance sheet that is not attractive to a private sector purchaser. That item could be transferred back to the failing bank, allowing for the bridge bank to be sold. Another example is that the power to transfer back could be used if a particular class of asset suddenly deteriorated in quality. In summary, the powers may be used to optimise the balance sheet of a bridge bank. Of course, any transfer of property from a bridge bank will need to be in line with the partial transfer safeguards (discussed below in paragraphs 302 to 335).

Clause 45 – Temporary public ownership: property transfer

Power:	*To make one or more property transfer orders*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

204. This power enables the Treasury to make one or more property transfer orders to transfer property, rights or liabilities from a bank in temporary public ownership. The clause provides a similar power to clause 43. The procedure is the same as for share transfer orders as set out under clause 25.

Clause 46 – Temporary public ownership: reverse property transfer

Power:	*To make one or more reverse property transfer orders*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

205. This power provides the Treasury with the means to make a reverse property transfer from a publicly-owned onward transferee to an original bank in temporary public ownership. It makes similar provision to clause 44.

Powers to give further effect to the transfer powers

206. The Bill provides a number of additional powers which are designed to be used alongside the powers to transfer securities and property. The purpose of these powers is to give full effect to the use of the stabilisation options. This section discusses:

a) powers in relation to pension schemes;

b) tax powers;

c) the power to change law; and

d) powers in relation to group companies that contain a deposit-taker (continuity obligations).

Clause 71 – Pensions

Power: *To make provision concerning pension schemes in relation to banks*

207. This clause provides that a transfer instrument or order may make provision in relation to a pension scheme in which the failing bank is or was an employer (subsection (6)).

208. An order or instrument, may, in particular, make provision about the consequences of a transfer for a pension scheme or about property, rights and liabilities of the scheme. The instrument may, amongst other things, modify any rights and liabilities; apportion rights and liabilities; or transfer property or accrued rights to another pension scheme.

209. It is likely, particularly in the case of a property transfer, that the Authorities will need to make essential provision in a transfer instrument or order about the treatment of pension schemes. For example, if a failing bank is part of a group of companies, then all of its employees may participate in the group's pension scheme. In this situation, if the deposit-taker is transferred from the group, it is likely that the transferee will wish the employees to be transferred to either its own existing scheme or a to new scheme for all future service benefits.

210. This clause provides that the Authorities may make provision to transfer the employees from the group pension scheme. Alternatively, transitional provision may need to be made until longer-term arrangements are put in place. In the case of a partial property transfer, for example, it may be necessary to make provision to apportion pension liabilities between the failing bank and the transferee. However, the Authorities would not seek to remove accrued rights.

211. Leaving pensions matters to be dealt with through normal corporate transactional methods could jeopardise the ability of the Authorities to effect a swift and effective transfer to resolve the problems of a deposit-taker. For example, in normal commercial conditions, any reallocation of pension liabilities would almost always require the agreement of the trustees of the pension scheme. This could lead to significant delay while the trustees consider the matter, but could also result in the trustees requiring a "ransom" to secure consent.

212. Such matters may impede the resolution which would be contrary to the broader public interests in effecting the transfer. Therefore, it is appropriate that the Authorities may make provision for pensions in an instrument or order to ensure that appropriate provision can be made for employees' pension schemes, but at the same time, ensure that the conduct of the resolution is not delayed.

213. The Government recognises that this power raises wider public interest issues which go beyond the Bank of England's financial stability mandate. Therefore, as with the continuity obligations (provided by clause 63 to 70), the Government believes that it is appropriate that the Bank of England may only exercise this power with consent of the Treasury in order that ministers can consider and appropriately balance of all the material public interests.

Clause 74 – Tax

Power:	*To make regulations making provision about the fiscal consequences of the exercise of a stabilisation power*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure (House of Commons only)*

214. This provision enables the Treasury to make regulations about the fiscal consequences of the exercise of a stabilisation power. Regulations may relate to a number of taxes (see subsection (2)) and may apply to anything done in connection with an instrument or order, things transferred or otherwise affected by virtue of an instrument or order, a transferor or transferee under an instrument or order or persons otherwise affected by an instrument or order. Various kinds of provision may be made (as specified in sub-section (4); they include modifying or disapplying tax provision in an enactment in prescribed cases (subsection 4(a)) and extending, restricting or otherwise modifying a charge to tax (subsection 4(e)).

215. The Treasury may also make provision that has retrospective effect (subsection (5)(a)), in respect of things done during the period of three months before the date on which the stabilisation power is exercised or on or after that date. This provision gives the Treasury the flexibility to deal with the tax consequences of any transaction which occurs before the date of the transfer order. Three months is considered a reasonable and appropriate period for this purpose.

216. The need to exercise such powers retrospectively may arise in various ways, depending on the nature of the transfer. For example, section 410 of the Income and Corporation Taxes Act 1988 concerns arrangements for the transfer of a company to another group or consortium. Such arrangements could be, or could have begun to be, put in place before the exercise of a stabilisation power.

217. The power provided by clause 74 is broad in order to provide flexibility to the Treasury in dealing with institutions that are likely to have complex tax affairs. Flexibility is also required to deal with the range of possible tax consequences that might arise, depending on the way in which a particular stabilisation power is exercised in a particular case.

218. Delegated legislation is considered appropriate as different tax provision will be needed depending on the nature of the particular transfer, which, will, of course, vary from one institution to another. It would be inappropriate to restrict the Treasury's flexibility by attempting to make detailed provision in primary legislation.

219. The power is exercisable by regulations laid in draft before, and with the approval of, the House of Commons only in order to maintain the convention that tax matters are dealt with solely by that House. The Government considers that the affirmative resolution procedure is appropriate. For example, it is not envisaged that amendments to tax legislation may need to be made on an urgent basis. Indeed, it is likely that it may take some time to assess the tax position of the distressed bank and any particular issues arising as a result of the transfer as banks often have complex

tax arrangements. This contrasts to the position where the Treasury may need to change the application of law extremely urgently in certain circumstances (see clause 75).

Power:	*To make an order amending the taxes in relation to which regulations under this clause could be made*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure (House of Commons only)*

220. This provision enables the Treasury to amend subsection (2) to add or remove a tax in relation to which the powers under this clause can be exercised. Such a power is needed to allow for the possibility of future changes to the tax system. Delegated legislation is considered appropriate as it may not always be possible to identify all the consequential amendments to other legislation needed when new taxes are introduced or existing tax legislation is repealed. The negative procedure is considered suitable for making essentially consequential amendments of this kind. The power to annul the orders is exercisable only after the passing of a resolution by the House of Commons in order to maintain the convention that tax matters are dealt with solely by that House.

Clause 75 – Power to change law

Power:	*To amend the law*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure (although in some cases the Treasury may exercise this power using the 28-day procedure)*

General context

221. Banks are often comprised of complex, multi-jurisdictional corporate entities. Set against this background, many of the provisions of the special resolution regime interact with and sit alongside financial services, banking, company and insolvency law. So it is clear that the legislative environment is both complex and varied.

222. It is inevitable that there will be some degree of tension between the public interest objectives of resolving a bank in severe financial distress and the provisions of legislation which are designed to work in relation to a normally functioning business. For this reason the Government considers it crucial to take a power to amend the provisions of primary and secondary legislation and common law.

223. In the absence of such a power as provided for in clause 75, there is a real and significant risk that the Authorities may not be able to effect fully a transfer, which could degrade the effectiveness of the powers taken in this Bill. This could lead to serious adverse implications for the public interest through risks to financial stability, protection of depositors or the public funds. It could also reduce the likelihood of a private-sector solution being achieved.

Precedents

224. It is not unprecedented for powers such as these to be taken to ensure that Bills are made to be fully effective. This is especially the case where an entirely new regime is

introduced in an area already populated by a complex and interrelated body of primary and secondary legislation and common law. For example, section 64 of the Safeguarding Vulnerable Groups Act 2006 and section 148 of the Criminal Justice and Immigration Act 2008.[17]

225. Further, similar powers provided by the Banking (Special Provisions) Act 2008 have been used in the resolutions carried out under that legislation. In the transfer of both Northern Rock and Bradford & Bingley to the Treasury, the shadow directorship provisions of the Companies Act were disapplied.[18] In the Bradford & Bingley onward transfer, merger law was disapplied.[19]

Nature of the power

226. The purpose of the power is to provide the Treasury with the means to disapply or modify law to enable the powers of the special resolution regime to be used more effectively: clause 75(1). Subsection (4) makes clear that this power may be exercised to modify primary and secondary legislation and common law.

227. In broad terms, there are two ways in which this power could be used.

228. The first way would be for the Treasury to make a specific disapplication of or modification to law for the purposes of making the resolution of a specific bank effective. This change would only apply to the specific bank; it would be localised to the particular resolution. It would not apply to any other banks, or any other banks for which the powers of the special resolution regime were used upon.

229. By way of example only, the Treasury might wish to exercise this power to make provision about the Financial Ombudsman Scheme, established under Part 16 of FSMA. The Government would want to be able to make changes to ensure that the rights of customers of a failing bank to complain to the Ombudsman could be preserved despite a property transfer (such that the complaints were made not as against the failing bank, but as against the transferee).

230. The second way would be for the Treasury to make an disapplication of or modification to law that applied to all resolutions or a class of resolutions carried out under the special resolution regime. For example, the power could be used to disapply a particular provision of the Companies Act 2006 in relation to bridge banks. This would then apply in each resolution where the Bank of England used the bridge bank tool. It would not apply to any other banks, however.

231. It is envisaged that this form of modification would be made in the light of resolution experience. For example, it might become clear a certain provision of legislation is an impediment to resolution in general, and so it is beneficial to disapply it for all subsequent resolutions. The ability to make these amendments limits the need for resolution-specific amendments, and ensures that the tools of the special resolution regime may be "future proofed" as the financial markets and banks develop over time.

232. Subsection (3) provides that an order may make retrospective provision. This may be required in circumstances where a transfer has occurred with particular swiftness. Recent events have shown that this is perfectly possible. Given the highly complex

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[17] This power was confined to making amendments of a supplementary, incidental, consequential, transitional or transitory nature, and savings.

[18] Northern Rock plc Transfer Order 2008 (S.I. 2008/432), article 17; Bradford & Bingley plc Transfer of Securities and Property etc Order 2008 (2008/2546), article 13.

[19] ibid., article 40.

affairs of banks, it may not be possible to identify each and every precise statutory barrier in any given circumstances before making a transfer. For example, if it was necessary to amend a statutory provision which threatened to impede a property transfer, an unacceptable level of legal uncertainty would be likely to arise if the change was not deemed to have effect simultaneously with the property transfer. In a fast burn situation there is an unavoidable risk that the due diligence to identify the impediment may not be completed until after the transfer has in fact taken place.

233. But regardless of how the power is used, the modification may apply only to a bank subject to a stabilisation option. The modifications will not apply to any other bank.

Restrictions on the power

234. This is not a general power to amend legislation. It is targeted and limited. In particular the power may only be used to facilitate the use of one of the stabilisation options, and the powers supporting them. Therefore the scope of the power is severely constrained to amending legislation which affects the resolution of banks under the special resolution regime. The general and specific conditions for the exercise of the SRR powers, as provided in clauses 7, 8 and 9 – which set a high hurdle to intervention – must have already been met.

235. Further, as the exercise of the stabilisation powers requires the Treasury to have regard to the special resolution objectives (clause 4), so too will the Treasury need to have regard to the special resolution objectives when exercising this power. The exercise of the power relates, therefore, to compelling circumstances, where, for example, action is necessary to protect and enhance the stability of the financial systems of the United Kingdom.

236. It was not, and is not the Government's intention to use this power to modify or disapply parts of the Banking Bill itself, or the safeguards provided under the secondary legislation to be made under the Bill. In response to concerns expressed by stakeholders, this restriction has been made express (by an amendment to subsection (4)(a)). As a result, there is an absolute legal prohibition on, for example, using the power to disapply the protections to be put in place for security interests and set-off and netting arrangements to be made under clause 48. This is intended to provide clarity and legal certainty to commercial counterparties of banks.

Parliamentary scrutiny

237. The clause provides that any order should be subject to the draft affirmative resolution procedure.

238. However, where necessary (in practice this will involve situations of urgency), the Treasury may make the order subject to the 28-day procedure. This is because there may be circumstances in which a transfer needs to be made at extremely short notice and it is necessary to modify law in order to make it effective. Any prior requirement for each House to approve a draft order in these circumstances, before it may come into force would cause delay, during which time the Treasury would be unable to take the necessary steps to address the failing bank. This could potentially lead to severe disruption in the financial markets, place public funds at unacceptable risk, and exacerbate financial instability.

Powers in relation to groups

Background

239. Major financial firms do not tend to operate as single legal persons. Instead, they are organised as groups, generally with a single ultimate parent company and any number of subsidiaries, which may be organised into distinct sub-groups. Corporate entities within these groups are connected through shareholdings but are likely to be connected in other ways as well.

240. Bank holding companies may have hundreds of subsidiaries. It is worth noting that Northern Rock plc was an unusually simple bank in terms of corporate structure in that the holding company was the deposit-taker and the bank had very few subsidiaries.

241. There is no "general rule" about how banks organise themselves, in particular where they locate their systems. Some banks' systems are split between subsidiaries; others are all located in the holding company or a particular subsidiary. For example, the holding company may employ all of the group's employees or a specialist subsidiary may provide IT services to the whole group.

Groups and resolution

242. In consequence, it is possible that the deposit-taker may not be operational on a standalone basis. It may require the provision of essential services from other companies within the group, such as IT systems. If this is the case then removing the deposit-taker from the group will not lead to an effective resolution, as it will no longer be able to function without the provision of these intra-group services. In order to allow the banking business to continue to function effectively, specific provisions needs to be made. The continuity obligations as next considered make such provision.

Provision for placing obligations

243. The Government considers the most appropriate solution for successfully resolving deposit-takers that form part of a group of companies will normally be to impose general and special obligations upon group companies. These obligations will be restricted to ensuring that required services and facilities continue to be provided to the business transferred.

244. A general continuity obligation arises following a transfer automatically, by operation of law. The intention is that it would be replaced with a special – and specific – obligation as soon as the Authorities can determine the precise nature of the required service or facility.

245. The special obligation gives the Authorities powers to create, modify or cancel contracts between a transferee and the group companies of a residual bank and the residual bank itself[20] – but only in relation to services and facilities required to operate the banking business effectively.

246. The provisions also provide for any entity providing services or facilities to be paid reasonable consideration.

247. The Government recognises that conferring these powers on the Bank of England could involve decisions that reflect the wider public interests beyond the special resolution objectives and the Bank of England's statutory objectives of financial

[20] The exact nature of the relevant parties will vary depending on whether share or property transfer powers are exercised, as in the case of share transfer, there will be no residual bank.

stability and monetary policy. This is because former group companies of the deposit-taker may undertake business in non-financial sectors. As such, the powers may only be exercised with Treasury consent. This allows ministers to assess the broad public interest in each particular situation.

Legislative framework

248. The relevant powers in relation to group entities are:

a) powers to refine general continuity obligations following a transfer of property or securities (clauses 63 and 66);

b) powers to terminate general continuity obligations (clause 70);

c) powers to impose specific continuity obligations following a transfer of property or securities (clauses 64 and 67);

d) powers to impose general and specific obligations following an onward transfer (clauses 65 and 68); and

e) a power to set out considerations relating to concepts of "reasonable consideration" and "arm's length terms" in secondary legislation (clause 69)

Clause 63 – General continuity obligation: property transfers

Power:	*To refine a general continuity obligation following a property transfer*
Body:	*Bank of England (with Treasury consent)*
Parliamentary scrutiny:	*None*

249. The clause applies following the exercise of property transfer powers. It provides for a general continuity obligation to apply to the residual bank and its current or former group companies to provide services and facilities that are required to enable to the bridge bank or private sector purchaser to operate the transferred business effectively. Such an obligation may be enforced as if created by a contract. Such duties could be owed to more than one transferee where, for example, some banking business was transferred to a private sector purchaser and some was transferred to a bridge bank. Providers shall be paid a reasonable consideration for any services provided.

250. Although the general continuity obligation arises automatically, a discretionary power is conferred on the Bank (with Treasury consent) by subsection (6). This enables the Bank to give notices which specify for example what is required to be done under the general continuity obligation in specific circumstances.

Clause 64 – Special continuity obligation: property transfers

Power:	*To cancel and modify contracts etc. with group companies etc; power to create rights and liabilities owed by / to group companies, etc.*
Body:	*Bank of England (with Treasury consent)*
Parliamentary scrutiny:	*None*

251. The clause applies following the exercise of property transfer powers to effect a transfer of some or all of the bank's property rights and liabilities from the original bank to either a bridge bank or a private sector purchaser.

252. Immediately on the exercise of the property transfer powers the general continuity obligation of clause 63 will arise. The purpose of this power is to enable the necessary longer-term arrangements to be put in place to ensure that the bridge bank or private sector purchaser (as the case may be) can operate the business transferred effectively.

253. The special obligation gives the Bank of England the power to create, modify or cancel contracts between a transferee, a residual bank and the residual bank's current or former group companies – but only in relation to services and facilities required to operate the banking business effectively. The purpose of this power is to enable the necessary longer-term arrangements to be put in place to ensure that the bridge bank or private sector purchaser (as the case may be) can operate the business transferred.

254. In exercising the power, the Bank of England must aim to ensure that arrangements put in place are on commercial terms (subsection (3)).

255. The power may only be exercised: (1) where the Bank of England thinks it necessary to ensure the provision of services of facilities required to enable the commercial purchaser or bridge bank (as the case may be) to operate the transferred business effectively (subsection (4)(a)) and (2) with the consent of the Treasury (subsection (4)(b)).

Clause 66 – General continuity obligation: share transfer

Power:	*To refine a general continuity obligation following a share transfer*
Body:	*Bank of England (with Treasury consent) / Treasury*
Parliamentary scrutiny:	*None / None*

256. This power contains a similar power to that in clause 63, except that it is exercisable following share transfers. As a share transfer involves the transfer of ownership of the failing bank, the continuity obligation applies only to former[21] group companies of the failing bank (as there is no residual company).

[21] The precise definition is provided in clause 66(1)(b), and it extents to the subsidiaries of the failing bank, which will, by virtue of their subsidiary status, have been transferred together with the failing bank.

Clause 67 – Special continuity obligation: share transfer

Power:	*To cancel and modify contracts etc. with former group companies; power to create rights and liabilities owed by / to former group companies.*
Body:	*Bank of England (with Treasury consent) / Treasury*
Parliamentary scrutiny:	*None / Negative procedure*

257. This power contains a similar power to that in clause 64, except that it is exercisable following share transfers.

Clause 65 – Continuity obligations: onward property transfers

Power:	*To provide that continuity obligations may be imposed following an onward property transfer*
Body:	*Bank of England (with Treasury consent) / Treasury*
Parliamentary scrutiny:	*None / None*

258. This power allows the continuity obligations (both general and specific) to be extended following an onward transfer; for example, so that the onward transferee may benefit from them. However, the continuity obligations can only be extended following an onward transfer by the giving of a notice to both the person owing the obligation and the person expected to benefit from the obligation. The requirement for a reasonable consideration to be paid for services still stands.

259. An onward transfer may follow soon after an initial transfer. In the example of Bradford & Bingley, the deposit-book was transferred to Abbey immediately after the whole bank was taken into temporary public ownership.[22] In these circumstances, where required services or facilities are provided by group companies, it is likely to be necessary for former group companies or the residual bank to continue to provide services in respect of the transferred business.

260. In addition, the clause aims to provide an appropriate level of flexibility so that, for example, a continuity obligation may be owed to both an initial transferee and an onward transferee. This may be necessary if only part of a bank is sold in an onward transfer. Equally the continuity obligations could be extended to more than one onward transferee, where for example one private sector purchaser agreed to acquire part of the business and another the rest.

Clause 68 – Continuity obligations: onward share transfers

Power:	*To provide that a continuity obligation may be imposed following an onward share transfer*
Body:	*Bank of England / Treasury*
Parliamentary scrutiny:	*None / None*

261. This power contains a similar power to that in clause 66, except that it is exercisable following onward share transfers.

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[22] Bradford & Bingley plc Transfer of Securities and Property etc Order 2008 (S.I. 2008/2546), Parts 2 and 5.

Clause 69 – Consideration and terms

Power:	*To specify by order matters which are to be or not to be considered in determining consideration and terms*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

262. The Treasury may by order specify the considerations to be taken into account, or not taken into account, for determining what amounts to reasonable consideration, or in the case of the special continuity obligations, the meaning of provisions to be expected in arrangements between parties dealing at arm's length.

263. The power will be used to provide detail in secondary legislation about the nature of how consideration and terms will be determined.

Clause 70 – Continuity obligations: termination

Power:	*To provide the termination of a general continuity obligation*
Body:	*Bank of England / Treasury*
Parliamentary scrutiny:	*None / None*

264. This power provides the Authorities with the flexibility to remove a general continuity obligation that has arisen.[23] In some circumstances it may be appropriate for this to occur, for example if service arrangements can be quickly transferred to a transferee.

Powers to mitigate: compensation mechanisms and safeguards

265. This section covers the powers conferred on the Treasury to make provision for compensation for compensatable interferences in Article 1 Protocol 1 ("A1P1") European Convention on Human Rights ("ECHR") (property rights) and to restrict the scope of the partial transfer powers.

Compensation

266. The following section sets out:

a) the legislative scheme;

b) the scope of the delegated powers for compensation;

c) justification for the delegated legislative powers;

d) reasons for the degree of Parliamentary scrutiny;

e) provisions in relation to an independent valuer; and

f) a clause-by-clause commentary.

The legislative scheme

267. An exercise of the stabilisation powers will constitute an interference in a person's A1P1 right under the ECHR, which specifies that every natural or legal person is

[23] The provisions of the special continuity clauses provide for a special continuity obligation to be terminated.

entitled to the peaceful enjoyment of his possessions. This right is not absolute. Instead, a State may interfere in that right, particularly when acting for economic and public policy reasons, where that interference is lawful, proportionate and justified in the public interest.

268. For ECHR purposes, three classes of persons may be considered compensatable as a result of an exercise of the stabilisation powers

a) in the case of share transfers, those affected will be the former shareholders in the failing bank whose shares will be transferred compulsorily ("expropriated") under the exercise of stabilisation powers;

b) in the case of property transfers, the party affected will be the failing bank whose property etc will be expropriated; or

c) creditors and other third parties may also be affected, for example, if they have their contractual rights interfered with (for example, by way of an exercise of the powers to turn off events of default clauses).

269. The Government is of the view that the substantive limitations on the exercise of the stabilisation powers and the procedural steps the Authorities are obliged to take before exercising the stabilisation powers will ensure that the stabilisation powers are only used where there are significant and legitimate public interest justifications for doing so (for example, the public interests in protecting financial stability, and the protection of depositors). The Government therefore considers that any interference with Convention rights will be for a legitimate aim.

270. It is necessary, however, in order to secure the compatibility of the policy with A1P1 (and to strike a fair balance in the legislation), to include in the Bill provision for the payment of compensation where compensatable interferences in property rights have occurred.

271. The basic principle under A1P1 is that compensation for property that is expropriated must bear a reasonable relation to the value of the property in question. However, legitimate objectives of public interest may mean that compensation less than market value may be appropriate.

272. There are three principal mechanisms through which compensation can be provided. Those mechanisms are as follows:

a) Compensation schemes – these are schemes for determining whether transferors should be paid compensation and for the paying of that compensation. A compensation scheme was put in place in respect of the powers under the Special Provisions Act 2008 to bring Northern Rock into temporary public ownership.[24]

b) Third party compensation – these are schemes to pay compensation to persons other than transferors (clause 59 and 60). Further provision is made in relation to third party compensation which is considered separately below.

c) Resolution funds – a resolution fund is a scheme under which transferors have contingent right to the net proceeds arising out of the resolution of a banking business transferred to a bridge bank, or, at the discretion of the Treasury, a bank transferred to temporary public ownership (clause 58).

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[24] Northern Rock plc Compensation Scheme Order 2008 (S.I. 2008/718).

273. Clause 61 makes provision for the sources from which compensation can be paid, which include the Treasury, the FSCS and any other specified person (such as a commercial purchaser, who has agreed to acquire the bank at a specified price). The principle of FSCS funding of the resolution is discussed in detail in relation to clause 168 (paragraphs 491 to 496).

Scope of the delegated powers

274. It should first be noted that on each exercise of the stabilisation powers the Treasury is required to make either a resolution fund order or a compensation scheme order. As noted below, the Treasury may also be required to make provision for third party compensation.

275. Where there is a transfer to a private sector purchaser, the Treasury must make a compensation scheme order (clause 50).

276. Where there is a transfer to a bridge bank, the Treasury must make a resolution fund order (clause 52). The bank resolution fund in the case of the bridge bank stabilisation option would provide the failing bank whose assets and liabilities are transferred with a contingent economic interest in the proceeds of resolution (that is, those proceeds arising from the sale of the whole or parts of the bridge bank minus the costs of resolution[25]). The proceeds would be paid to the residual company and then applied in accordance for most purposes with the ordinary priorities of insolvency to the residual company's creditors (and, should there be any surplus, to shareholders of the failing bank).

277. As regards temporary public ownership, the Government recognises that there might be some circumstances where a resolution fund would be appropriate. However, it would not be appropriate in circumstances where, for example, significant amounts of public funds have already be provided to the failing bank, or exposed to significant contingent risk. Accordingly, a discretion is conferred on the Treasury to select whether a resolution fund order or a compensation scheme order should be made (clause 51).

278. The Treasury may make a compensation order and a third party compensation order where onwards transfers have been made by the Treasury or by the Bank of England.

279. The delegated powers are, therefore, largely confined to implementing the compensation mechanism appropriate to each stabilisation option. The Government recognises, however, that important matters will still need to be addressed in the orders. For example, whether there should be an independent valuation process, valuations principles to be applied by the independent valuer, who should pay any compensation, and who will be entitled to the proceeds under any resolution fund order.

Justification for delegated legislation

280. The Government believes that provision should be made in delegated legislation both to retain flexibility and to enable detailed provision, unsuited to primary legislation, to be made.

281. Flexibility is necessary in the Government's view because of the wide range of different circumstances which may arise in a bank resolution. For example:

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[25] Including sums deducted to reflect the use of public funds in the course of the resolution or their exposure to contingent risk.

a) the nature of the resolution process may mean that an independent valuer is not required to determine the amount of compensation payable (this could be the case, for example, with an auction followed by a transfer to a private sector purchaser);

b) compensation schemes need to provide for the assessment of compensation to the failing bank or to the former shareholders of the failing bank (depending on which stabilisation option has been exercised). Third parties may have been affected in very different ways by the exercise of stabilisation powers, and third party compensation orders need to be capable of addressing this; and

c) the particular circumstances of different failing bank will vary in ways which are likely to bear on the assessment of compensation. For example, a bank may or may not have received a large amount of public financial assistance. The compensation mechanisms need to be able to make appropriate provision in such circumstances, reflecting the underlying principle that compensation should not reflect value artificially created by the provision (whether actual or contingent) of public financial assistance.

282. The Government also considers it desirable to retain some discretion to determine the appropriate measure of compensation. As States enjoy a very broad margin of appreciation under the ECHR in providing for mechanisms for compensation for compensatable interferences with property rights, it would in the Government's view be wrong at this stage to prescribe a rigid framework for compensation in primary legislation.

283. Such orders may also need to make provision as to the operation of the compensation mechanism in question. This will be most significant in the case of resolution fund orders, where the order will need to make provision as to the establishment of the fund, the making of payments to it at various stages of the resolution and how such moneys are to be held and managed.

Parliamentary scrutiny

284. The Government considers that only the affirmative procedure is appropriate in relation to orders made under the compensation powers (clause 62(2)), noting the recommendations of the Committee in respect of the Special Provisions Act[26] and the amendments made thereto.

Specific aspects of compensation arrangements: independent valuer

285. The Government believes that it should have discretion to decide whether an independent valuer will be appointed to assess compensation following a transfer to a private sector purchaser. This is because in some circumstances the price agreed between the Authorities and a private sector purchaser (either following a direct or onwards transfer) would be considered to be the "market rate". In such situations the Government believes that the process of selling the institution itself would have determined the fair market rate and, as the basic principle under A1P1 is that compensation must normally bear a reasonable relation to the property expropriated, there would be no need to appoint an independent valuer to determine the compensation due to the transferors. In such circumstances, Parliament, through the draft affirmative procedure, can scrutinise the order and assess whether the provision for compensation is appropriate. Any person wishing to

[26] Fifth Report of Session 2007-08 (21 February 2008), §10.

challenge the order would also be able to apply for judicial review on the basis that the compensation provided in the order was insufficient to comply with A1P1.

286. Where the Government decides that compensation should be assessed, provision is made for this to undertaken by an independent valuer (clause 54).

287. Although provision as to the appointment, powers and remuneration of the independent valuer is left to be established in the compensation scheme order, considerable safeguards are provided on the face of the Bill as to the provision the order must make.

288. This is principally to ensure that the valuer will be seen to be independent and impartial. So safeguards are made to ensure that the valuer is appointed by an independent person (clause 54(2)), as to his security of tenure (clause 54(4)) and in relation to his remuneration and allowances (clause 56).

Specific aspects of compensation arrangements: valuation principles

289. Clause 57 sets out that the Treasury may specify valuation principles to which the independent valuer must have regard when conducting the exercise to assess the amount of compensation.

290. These valuation principles may cover a range of issues, including the method of valuation, whether certain matters should be taken (or not taken) into account by the valuer, or whether the valuer is may make particular assumptions in carrying out his functions.

291. The aim of these provisions is to allow the Government to set out the principles that it believes should be adhered to in assessing any compensation. For example, one principle – to be applied generally in determining compensation – is that the independent valuer must disregard actual or potential financial assistance provided by the Bank of England or the Treasury to the failing bank.

292. In valuing complex matters, such as for example, the worth of a banking business, which has encountered serious financial difficulties, it is appropriate that the compensation scheme order can make appropriate provision as to the basis on which the valuation exercise should be conducted. This reflects, amongst other things, the wide margin of appreciation that the ECHR affords to Contracting States in making provision for the valuation of A1P1 compensation. The independent valuer is then to value in an independent way within these parameters.

Clause-by-clause commentary

293. The orders which may be made under clauses 50 to 53, set out below, are described in clause 49. Clauses 54 to 61 elaborate the provisions which may be made under various orders.

Clause 50 – Sale to private sector purchaser

Power:	*Requirement to make compensation scheme; power to provide for third party compensation*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

294. This clause requires the Treasury to make a compensation scheme order in circumstances where there is a transfer to a private sector purchaser. If there is a partial transfer of property then a third party compensation order must be included. The section above explains the reasons for the compensation scheme being made

through secondary legislation and being subject to the draft affirmative resolution procedure.

Clause 51 – Transfer to temporary public ownership

Power:	*Requirement either to establish resolution fund or make compensation scheme; power to provide for third party compensation*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

295. In the case of a transfer to temporary public ownership, the Treasury must make either a compensation scheme order or a resolution fund order. The section above explains the reasons for the compensation order or bank resolution fund being made through secondary legislation and being subject to draft affirmative resolution procedure.

Clause 52 – Transfer to bridge bank

Power:	*Requirement to establish resolution fund; power to make order establishing compensation scheme / to provide for third party compensation*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

296. This clause requires the Treasury to make a resolution fund order when the Bank of England has transferred property to a bridge bank. In the case of a partial transfer a third party compensation order must be made. The section above explains the reasons for the bank resolution fund being made through secondary legislation and being subject to the draft affirmative resolution procedure

Clause 53 – Onward and reverse transfers

Power:	*To make provision about compensation in the case of onward and reverse transfers*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

297. The purpose of these powers is to make provision for compensation in the circumstances of the various different onward or reverse transfers which may be effected, which may also give rise to interferences in property rights, for example, those of third parties.

298. Provision is made for the Treasury to make a compensation scheme order (where appropriate) and a third party compensation order on the exercise of these powers.

Clause 55 – Independent valuer: supplemental

Power:	*To make provision about the functions etc. of independent valuers*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

299. The Treasury may by order:

a) confer functions on the independent valuer of his duties (clause 55(2)), for example, valuers may need to be able to obtain information that persons are unwilling voluntarily to disclose. Where the order is exercised to confer invasive powers such as the right to require the disclosure of information, it is to be conferred on a court or tribunal (clause 55(2)(a)), who would exercise the power on the application of the valuer; and

b) make provision about the procedure to be followed by independent valuers (clause 55(5)).

300. The Government notes that similar provision is frequently left to be made in the rules of courts or tribunals.

301. The Treasury must make provision for the reconsideration of decisions by the independent valuer, and onward appeals from an independent valuer to a court or tribunal (clause 55(6)).

Partial transfer safeguards

302. Powers are taken which seek to mitigate the effects of partial transfers. This section includes:

a) Restrictions on partial transfers (clause 47);

b) Power to protect certain interests (clause 48); and

c) Third party compensation mandatory provisions (clause 60).

Background

303. Partial transfer powers provide the Authorities with the flexibility to transfer some, but not all, of a failing bank's business. The benefits are described in detail in paragraphs 99 to 101.

304. However, stakeholders have expressed a series of concerns about the use of partial transfer powers. In particular, stakeholders have expressed concerns that the property transfer powers could be used to interfere with commercial devices which counterparties use to manage transactional risk (such as the taking of security interests or the use of set-off and netting arrangements), which could lead to increased transactional costs to banks.

305. The Government recognises these concerns; these powers enable secondary legislation to provide a calibrated package of safeguards which respond to representations made by stakeholders.

306. On 6 November 2008 the Government published a consultation document on partial transfer safeguards.[27] The document contained proposals and draft secondary legislation in relation to each of the key safeguards. In addition, as discussed above (paragraphs 43 to 44) the Economic Secretary to the Treasury has established an expert liaison group (to be placed on a statutory footing by clause 10), which will help prepare the secondary legislation for the special resolution regime, in particular in relation to partial property transfer safeguards.

307. In summary, three delegated legislative powers are included in the Bill, which may be exercised to give effect to the safeguards proposed:

a) restrictions on exercise – clause 47 provides the Treasury with a power which enable restrictions to be placed on the making of partial transfers;

b) protection of certain interests – clause 48 enables the Treasury to provide protection in relation to set-off and netting arrangements and security interests; and

c) compensation – clause 60 enables the Treasury to make provision in respect of the compensation to be paid to creditors of the residual company following a partial transfer, to reflect the principle that they should be no worse off than had the whole bank entered an insolvency procedure.

Clause 47 – Restrictions on partial transfers

Power:	*To make provision to restrict the making of partial transfers*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

308. This clause provides the Treasury with the means to place restrictions on the nature of the partial transfers that may be effected through use of the property transfer powers provided by this Part. The making of restrictions has the potential to provide bank stakeholders with greater certainty about how the property transfer powers will be used to effect partial transfers. Given the nature of the powers, stakeholder interest and technical complexity of the issue, the Government considers it appropriate to take a power in the Bill to provide for restrictions to be made, as the Authorities deem appropriate. So, for example, if further consultation with stakeholders reveals a particular facet of partial transfers which the Authorities may wish to restrict in order to provide greater certainty to the market, this clause provides the mechanism through which this can be achieved.

309. The range of ways that the Authorities may restrict partial transfers is purposefully broad. The flexibility reflects the complex range of issues which are likely to be generated in different bank resolutions. This aim cannot be achieved by confining or reducing the flexibility provided in the underlying property transfer powers. Flexible powers are necessary because the structure and nature of banking businesses are very complicated. In particular, they will involve a complicated mesh of private law rights and obligations owed between the bank and its various counterparties.

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[27] Special resolution regime: safeguards for partial property transfers (November 2008).

310. The Government considers that it is both appropriate and desirable to for safeguards of this nature to be provided in secondary legislation, rather than on the face of the Bill.

311. Any order made under this power would need to make provision at a level of detail which is inappropriate to primary legislation. This reflects the complexity of bank resolution, as noted above. It will be important to retain flexibility, including the flexibility to amend or add to the nature of the restrictions that are placed on partial transfers. The SRR is of course a new legislative regime. Experience may show that partial transfers should be more or less restricted than initially thought, to respond to continuing market reaction to these powers, or to the Authorities' developing practical expertise in resolving banks in difficulty. At the very least, the nature of the restrictions will need to be updated in line with innovation in the financial markets.

312. But in view of the significance of the issues which this power addresses, and in view of the standing nature of the provision to be made, the power is subject to the draft affirmative procedure. However, the Government intends that the first exercise of the power be made through the 28-day procedure so that this safeguard can be put in place as soon as possible following Royal Assent of the Bill (this is discussed in further detail in annex D) if necessary. In addition, the Government is committed to consulting fully on the key elements of the secondary legislation for this safeguard.

313. To this end, the Government is currently consulting on what secondary legislation should be made under clause 47. At this stage, the Government is proposing that the power should be used to place restrictions on reverse property transfers. This restriction is designed to provide certainty to creditors transferred to a bridge bank that they will not be moved back to the residual bank.

Clause 48 – Power to protect certain interests

Power:	*To make provision to protect certain interests, such as security interests and set-off and netting arrangements*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

314. This power enables certain private law rights to be protected when the property transfer powers of the Bill are exercised to effect a partial transfer (as defined in clause 47(1) and (5) and applied by subsection (2)(d)).

315. Secondary legislation made under this power will describe in detail the nature of the interests to be protected and the way in which they are to be protected. The recently published consultation document provides detail on the Government's proposals for these safeguards.

316. In very broad terms, a security interest is a specific protection taken by obtaining a property interest in the debtor's property, against which recourse can be had in defined circumstances, for example, non-payment.

317. Set-off enables reciprocal debts between parties to be discharged, again in defined circumstances. To provide an example, if party A owes party B £100 and B owes A £50, set-off would mean the separate debts are replaced by a single obligation of A to pay B £50. This offers particular advantages to creditors in insolvency.

318. "Netting" is, in broad terms, a process whereby multiple contracts are set-off against each other. However, netting also involves more complicated arrangements, which utilise the basic concept of set-off, to manage transactional risk. For example,

"close out netting" may allow all the contractual obligations of a party to be terminated on a trigger event and reduced to a single sum either owed or owing to the counterparty in question. This is often provided under industry standard master agreements, prepared by bodies such as the International Swaps and Derivatives Association (ISDA). But counterparties also make use of a range of bespoke arrangements.

319. These arrangements are crucial to the functioning of the financial markets and are an integral part of how counterparties do business with banks. It is therefore very important that the right balance is struck between the protection that the market needs to continue to use these tools, and the flexibility the Authorities require to effect appropriate partial transfers.

320. The power in clause 48 provides a broad definition of the interests to be protected. This reflects the extremely broad range of different interests which exist in this field. The interests which the power's scope needs to address include, for example, security interests granted under foreign legal systems and complicated types of set-off and netting arrangements used in particular types of specialist markets.

321. The power may provide protection to such interests in the ways set out in subsections (2) and (3). Again this flexibility is needed to reflect the complexity of the underlying arrangements and the ways in which protection might be provided.

322. The protection to be afforded, in broad terms, is to ensure that the integrity of the interest is respected (to the extent provided for in the order). So, for example, where a series of contracts are subject to a netting arrangement protected by the order, the requirement could be to transfer all such contracts or leave all such contracts behind (as to transfer some but not all would interfere with the operation of the netting arrangement).

323. In line with the safeguard provided for by clause 47, the Government proposes that the detail of the safeguard should be set out in secondary legislation. This is for two mains reasons.

324. First, implementation of the policy will require very detailed consideration of complex and varied interests in a variety of market contexts, the detail of which is appropriate to address in secondary legislation.

325. In addition, it is desirable to retain flexibility to adjust and refine this safeguard in light of experience. This is particularly important in this context, because security interests and set-off and netting arrangements have proved to be a highly innovative field. The latter in particular have developed and evolved significantly over a comparatively short period of time. Changes to the safeguard may be necessary both to ensure that it continues to protect what it is intended to protect, but also to ensure that innovations do not undermine the policy aims that the SRR is intended to serve.

326. Draft orders have been published in the 6 November 2008 consultation document. While, the precise nature of the safeguards is subject to this consultation, at this stage the Government is proposing the following set of broad protections.

327. With regard to set-off and netting, the Government is proposing to protect all contracts covered under set-off or netting agreements from disruption potentially caused by a partial transfer, except for a set of clearly defined exceptions. This protection extends to bespoke agreements, in addition to those made under industry-recognised master netting agreements. The Government considers that this safeguard provides the market with a strong and clearly defined protection, while

leaving the Authorities with sufficient flexibility to carry out appropriate partial transfers.

328. In terms of security interests, the Government is proposing that all forms of security arrangement where a creditor takes an interest in the property of the debtor should be protected, including both fixed and floating charges.

329. In view of the significance of the issues which this power is designed to address, and in view of the standing nature of the provision to be made, the power is subject to the draft affirmative procedure. However, if necessary, the first exercise of the power be made through the 28-day procedure so that this safeguard can be put in place as soon as possible following Royal Assent of the Bill (this is discussed in further detail in annex D).

Clause 60 – Third party compensation: mandatory provision

Power:	*To make regulations about third party compensation in the case of partial transfers*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

330. The general arrangements for compensation were considered above, and the concerns raised by the use of property transfer powers to effect a partial transfer of a banking business were considered under the discussion of two partial transfers safeguard powers (clauses 47 and 48).

331. The purpose of this power is to enable the Treasury to provide regulations about third party compensation orders made in the circumstances where a partial transfer of the property of a failed bank has taken place. Subsection (2) sets out the principle that in the event a residual company enters an insolvency procedure following a partial transfer of property assets and liabilities from the failing bank, "pre transfer creditors" (defined in subsection (3)(b)) should not receive less favourable treatment than would have been the case had the whole failing bank entered an insolvency procedure.

332. The Government does not consider this approach necessary to secure the compliance of the regime with the Convention rights (in particular, the protection of property rights under A1P1 of the ECHR). The Government considers arrangements for compensation considered above to be sufficient for these purposes. This measure is intended to provide additional reassurance to commercial counterparties, over and above their A1P1 protections, that should they be left in the residual bank they would not receive less favourable treatment than they would have received had it been entered an insolvency procedure before transfer.

333. Subsection (4) specifies that regulation may require a compensation scheme order or a resolution fund order to include a third party compensation order; require a third party compensation order to include provisions of a specified kind or to a specified effect; and make provision which is to be treated as forming part of a third party compensation scheme order.

334. It is intended that the determinations required to give effect to this safeguard would be made by an independent valuer (permitted by subsection (5)(c)).

335. The Government considers that it is appropriate to implement this safeguard through secondary legislation. The primary legislation clearly establishes the principle lying behind the power. As mentioned in description of the other partial

transfer safeguards, the Government believes that safeguards for partial transfers will benefit from a period of further consultation. Detailed provision will be necessary to implement the safeguard, given the complexity of the calculations it will involve and its need to interact with other provisions (such as payments in the winding up of the failing bank payments under the bank resolution fund, and onwards transfers).

Powers to apply

336. This section address powers which relate to the use or potential use of the SRR in respect of non-bank deposit-takers.

337. The powers in relation the application of the SRR provisions are:

    a) powers to apply the SRR to building societies;

    b) a power to apply the SRR to credit unions; and

    c) a power to amend the definition of a "bank".

Building societies

338. Building societies remain a popular choice among depositors. Clearly, the failure of a building society, as with that of a bank, would have serious implications for financial stability and depositors. While historically, building societies facing difficulties have often been taken over by a larger society, the Authorities consider it appropriate that Part 1 of the Bill should apply to building societies, as it does to banks, subject to some modifications. These modifications are necessary to reflect the membership structure of building societies. In particular, building societies, unlike banks, do not have a separate body of shareholders. Instead, building societies are effectively owned and controlled by their customers, who are their members.

339. The SRR provisions are applied to building societies in the following ways.

340. Property transfer instruments will apply in the same way as they do for banks, subject to certain modifications (detailed in clause 81). Property transfers to a company (as opposed to another building society) will, in principle, work in the same way as they will for banks. The main difference concerns the treatment of members' (that is, customers') shares in the building society:

    a) ordinary shares – under the property transfer powers the shares will be cancelled. The deposit element of the share will be converted into a new liability of the transferee to the customer and the "share" element (that is, the membership rights) will be cancelled, as a bank customer would not have the same rights (such as voting at general meetings) as a building society customer;

    b) deferred shares – these shares will be treated in the same way as ordinary shares. That is, they will be cancelled, and an equivalent liability (essentially, a subordinated debt of the transferee) will be created and the membership rights cancelled.

341. In the case of property transfers to another building society, the ordinary and deferred shares in the failing building society will be cancelled and replaced by new shares in the transferee. The member will obtain voting and other proprietary rights in the transferee building society, subject to any restrictions in the rules of the transferee.

342. While a transfer of securities in the sense provided for in clause 13 of the Bill is not appropriate in relation to the shares in a building society, the Bill provides for a

special procedure for transferring a building society into temporary public ownership (clause 82).

Clause 82 – Temporary public ownership

Power:	*To transfer a building society into temporary public ownership*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

343. The Government intends to make it possible to bring a failing building society into temporary public ownership for essentially the same reasons as would be the case for a bank, that is where the exercise of the power is necessary to resolve or reduce a serious threat to the stability of the financial systems of the UK; or where the building society in question is in receipt of financial assistance provided for the purpose of resolving or reducing a serious threat to the stability of the financial systems of the UK (see clause 9(2) and (3)).

344. The power to bring a deposit-taker into temporary public ownership under clause 13 would not be appropriate in the case of building societies because building society shares are different to company shares. Building societies operate on the basis of one member, one vote, so ownership of a majority of the shares does not confer control of the society. In addition, as a building society share comprises a deposit element, an exercise of the normal SRR share transfer power would mean that the shareholding members would be deprived of their deposits. Similarly, the normal SRR share transfer power would not work in the case of deferred shares, as these are unwithdrawable and are a form of unsecured subordinated debt, with voting and other rights attached. Therefore, in order to exercise this stabilisation option with respect to a building society, a new power is needed. This clause provides that the Treasury may:

a) arrange for deferred shares of a building society to be publicly owned;

b) cancel private membership rights in the building society; and

c) allow the building society to continue in business while in public ownership.

345. In principle these powers would work by transferring existing deferred shares to public ownership, or issuing new deferred shares under public ownership, and so making the Government a member of the society. Others' membership rights would then be cancelled, leaving Government as sole member of the society and able to exercise full control over it. It may be necessary to modify the memorandum or rules of the society, or modify the application of building society law to the society, to ensure that the Government exercises effective control over the society. This is possible under subsection (7).

346. The Parliamentary procedure for the powers under this section is the negative procedure. This is the same as for a transfer order made in relation to a failing bank. The Government considers that the negative procedure is appropriate here, as if these powers are ever used, it is likely that the Treasury would need to exercise them on an urgent basis.

Clause 83 – Distribution of assets on dissolution or winding up

Power:	*To provide for the distribution of surplus assets of a building society which is the subject of a property transfer power*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

347. Under the Building Societies Act 1986, where a building society is wound up, any surplus left over after satisfying creditors in full is to be distributed in accordance with the rules of the society. Section 90B of the Building Societies Act 1986, inserted by the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007, confers a power on the Treasury to ensure that on the winding up of a building society any assets of the insolvency estate are applied in satisfying liabilities to creditors or shareholders equally. This power has not yet been exercised.

348. Clause 83 confers power on the Treasury to make provision about the distribution of surplus assets of a building society which is the subject of a property transfer instrument and is later wound up or dissolved by consent. The policy in relation to property transfers under the Bill is that where shares are "transferred" by a property transfer instrument, creating equivalent deposits in the form of liabilities of the transferee, the former shareholders' rights to participate in any surplus on winding up should be preserved.

349. The power could be used to prescribe that, where a property transfer instrument has been made in relation to a society, any surplus remaining after paying all creditors and shareholders (in respect of their shares and interest) in full shall be divided between current members and former members in proportion to the values of their shareholdings at the date of the winding up (for current members) and at the date immediately before the transfer instrument (for former members).

350. The power is exercisable irrespective of whether an order has been made under section 90B of the Building Societies Act 1986.

351. As the details of how any surplus would be dealt with in this situation have not yet been fully worked out, and no order has yet been made under section 90B, there is a difficulty in dealing with this issue on the face of the Bill. Therefore the Government think it preferable to deal with this issue in secondary legislation. The power can be exercised more than once if necessary.

352. The Parliamentary procedure for the new power is the same as for an order under section 90B of the Building Societies Act 1986 – the draft affirmative – because it may be used to amend primary legislation.

Clause 85 – Consequential provision

Power:	*To provide for the amendment of an enactment in consequence of the provisions relating to building societies under Part 1*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

353. This provision confers a power on the Treasury to make provision, by order, in consequence of the sections of this Part that apply to building societies; such an order may amend or modify the effect of legislation, including tax legislation. The law relating to building societies is complex and the Government have not been able to foresee every consequential amendment to legislation that may needed. This clause provides the Treasury with the means to make consequential amendments in future so that legislation relating to building societies can be properly interrelated with the provisions of the Bill.

354. The Government consider that this power should be subject to the draft affirmative procedure as it may be used to amend primary legislation.

Credit unions

Clause 86 – Credit unions

Power:	*To make provision for the application of Part 1 (with or without modifications) to credit unions (as defined under section 31 of the Credit Unions Act 1979)*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

355. Credit unions are mutual deposit-takers which provide savings and loans facilities for associated groups of members who share a common bond such as the same occupation, locality, a particular employer etc. In order to call itself a credit union, the society must be registered as such under section 1 of the Industrial and Providential Societies Act 1965 and fulfil the conditions for being a credit union as set out in section 1 of the Credit Unions Act 1979.

356. Credit unions at the moment have relatively few depositors and assets in comparison to banks and building societies. However, the Treasury intend to make a number of reforms to the Credit Unions Act 1979, One of the aims of which is that credit unions be able to expand and become more flexible in their operations and therefore better fitted to compete with deposit takers which take other types of deposit-taker, including banks and building societies.

357. Credit unions could, in these circumstances, grow to a position where their insolvency could present a serious threat to financial stability or to depositors. This provision therefore confers on the Treasury the power to apply Part 1 of the Bill to credit unions in order that the stabilisation options could be applied to a failing credit union.

358. Credit unions are very different from banks in terms of their scope and legislative framework. Therefore a different approach in policy and legislation is needed to deal

with credit unions appropriately and further consultation with stakeholders will be necessary. Further, the provisions needed to apply the procedure to credit unions are likely to be technically complicated. Also, as mentioned above, the law relating to credit unions is likely to change in the next year. Therefore, it is appropriate to take the power to make secondary legislation in due course.

359. The Government considers that the use of the draft affirmative procedure is appropriate here to enable Parliament to scrutinise the procedure properly, given the significance of the changes to the treatment of credit unions.

360. Northern Ireland credit unions are governed by their own legislation (the Credit Unions (Northern Ireland) Order 1985). However, the power to apply the special resolution regime to Northern Ireland credit unions rests with the Treasury under clause 86.

Definition of "bank"

Clause 2 – Interpretation: "bank"

Power:	*To exclude an institution from the definition of "bank"*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

361. Clause 2 defines "bank" for the purposes of Part 1 of the Bill, by reference to an institution having a permission to undertake the regulated activity of deposit-taking under FSMA. Subsection (2) specifies that "bank" does not include a building society (within the meaning of section 119 of the Building Societies Act 1986), or a credit union (within the meaning of section 31 of the Credit Unions Act 1979). Subsection (2)(c) gives the Treasury the power to exclude by order any other class of institution.

362. Institutions undertaking financial services business may have a permission to accept deposits for purposes incidental to their main activities; they may not be "banks" as the term is commonly used. This power enables the Treasury to restrict the definition of bank in the event that it decides that it would not be appropriate for the SRR to apply to certain institutions which have deposit-taking permissions. It is prudent to take a power to this effect, especially as the nature and structure of financial services institutions is subject to constant evolution. An order made under this power is subject to the draft affirmative procedure. The Government consider this is appropriate as Parliament will wish to scrutinise any proposal by the Treasury to restrict the scope of the regime.

Miscellaneous powers

363. The miscellaneous powers of the SRR are:

a) powers in relation to the role of the Treasury;

b) the power to issue a code of practice; and

c) the power to make provision concerning enforcement of obligations.

Role of the Treasury

364. As noted above (in paragraph 49), the Bank of England is the lead authority of the SRR. However, the Treasury retains a role in respect of public finances, the overall

public interest and exercising the stabilisation option to take a bank into temporary public ownership. Clauses 76 to 80 make provision in relation to the role of the Treasury.

365. It is important that ministers retain their role in protecting the wider public interest as it is they who can make a judgement on the balance of competing public interests, and of course in making such judgements they are directly accountable to Parliament. For these reasons, whilst (with one exception – public finances) these are not strictly legislative powers, they are nevertheless considered in this memorandum.

International obligations

366. Clauses 76 and 77 provide the Treasury a role in protecting the UK's compliance with international obligations.

367. Clause 76 provides that the Bank of England may not exercise a stabilisation power in respect of a failing bank if the Treasury notifies the Bank that an exercise of the stabilisation powers would be likely to contravene an international obligation of the UK. This provision is necessary as it is ultimately ministers who are responsible for the UK's compliance with international obligations such as EU Directives and international treaties.

368. Clause 77 provides for Treasury's role in securing the UK's compliance with international obligations when the Bank of England is operating a bridge bank. The Bank of England must comply with any notice of the Treasury requiring the Bank of England to take, or not to take, specified action when operating a bridge bank, if the Treasury believes that this is necessary to ensure compliance with international law.

369. While the Bank of course has its own international obligations, it is the Government that leads in the UK's overall position with regard to international law and therefore it is right that it has a power to prevent the exercise the stabilisation powers where this would be likely to contravene an international obligation. This is a common provision that appears in other legislation, for example similar provisions appear in the Financial Services and Markets Act 2000 (section 410).

Clause 78 and 79 – Public funds: general and bridge bank

Power:	*To specify considerations which are, or are not, to be taken into account in determining whether action has implications for public funds.*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure (House of Commons only)*

370. Clauses 78 and 79 require the Bank of England, in certain circumstances, to obtain the consent of the Treasury before taking actions which would be likely to have implications for public funds (defined in clause 78(2)(a)).

371. Subsection (3) of clause 78 enables the Treasury by order to specify considerations which are to be, or not to be, taken into account in determining whether action has implications for public funds for the purposes of: subsection (1) and clause 79 subsection (2) (where the Bank of England must not take action in respect of the bridge bank without the Treasury's consent if the action would be likely to have implications for public funds).

372. This power allows the Treasury by order to set out considerations relevant to determining whether something does or does not have implications for public funds, in order to provide guidance to the Bank of England as to when Treasury consent should be sought. It is not intended that the order should seek comprehensively to define the concept.

Bridge bank report

373. Clause 80 sets out requirements for the Bank of England to report to the Treasury on the activities of a bridge bank.

374. The clause sets out requirements for the Bank of England to report to the Treasury at the end of every year on the activities of a bridge bank and for that report to be laid in Parliament. In addition, under this clause the Treasury can request a report dealing with specified matters in relation to a bridge bank.

Other miscellaneous powers

Clause 5 – Code of practice

Power:	*To issue a code of practice*
Body:	*Treasury*
Parliamentary scrutiny:	*None (although a copy will be laid before Parliament)*

375. This clause specifies the Treasury must make a code of practice about the use of the stabilisation powers; the bank insolvency procedure and the bank administration procedure. Subsection (2) sets out a number of matters on which the code may provide guidance. Subsection (3) specifies that the Authorities must have regard to the code.

376. Before issuing the code the Treasury must consult with the FSA, the Bank of England and the scheme manager of the Financial Services Compensation Scheme (clause 6(1)). The Treasury must lay a copy before Parliament (clause 6(3)).

377. The purpose of this document is to provide guidance on powers exercisable under the SRR. Its role in the special resolution framework is discussed above in paragraphs 41 to 42.

378. The Government notes that the power to issue the code of practice is not a legislative power per se. However as it will provide considerable guidance for stakeholders on how the Authorities will exercise the stabilisation powers, the Government considers it appropriate that the document should be laid in Parliament. The Government is currently consulting on a draft of the code, a copy of which is in the House Library.

379. A draft of this code of practice was included in the 6 November consultation document discussed above.

Clause 72 – Enforcement

Power:	*To make provision concerning enforcement of obligations imposed by a share transfer order or instrument or property transfer instrument*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

380. This clause allows for regulations to be made about the enforcement of an obligations under a share transfer order or instrument or a property transfer instrument. Such orders and instruments may impose all manner of obligations, by way of example only, an obligation on a registrar to register the transferee under an order or instrument as the legal owner of securities as can be required under clause 21(5). Provision may not include the creation of a criminal offence or the imposition of a penalty, but may impose jurisdiction on a court or tribunal.

Annex A – Deficiencies of existing transfer regimes

381. New statutory provisions for the transfer of banking business are required because of the practical restrictions on existing commercial and legislative mechanisms for transferring ownership or business of a deposit-taker.

382. The existing regime for transferring part or all of the business of banks (leaving aside the transfer powers in the Banking (Special Provisions) Act 2008) is Part 7 of the Financial Services and Markets Act 2000. The procedure is designed for and works well for planned, non-time critical transactions between two healthy companies, but it is not appropriate mechanisms for resolving banks in severe financial distress, where timeliness and certainty of outcome are vital.

383. The Part 7 procedure depends on the consent of the directors and shareholders of the transferor bank. The directors and shareholders of a failing bank may not be willing to take part in a scheme, indeed the directors may well be best advised to seek the protection of an insolvency procedure rather than pursuing a drawn out process. The unwillingness of directors and shareholders should not be a barrier to resolving a failed bank where the special resolution objectives are being pursued in the public interest. The Part 7 procedure includes the requirement for the court to sanction the scheme and provides the right for a person who alleges prejudice by the proposed scheme to be heard by the court. This potentially gives each counterparty of the bank an opportunity to make a representation to the court. The range of interests the court may have to consider would include the views of counterparties of the banks, employees of the bank and any others that may fall within the scope of persons who allege they would be adversely affected by the carrying out of the scheme. Each counterparty that was not to be transferred might wish to argue before the court that the transfer should not be allowed. Allowing for such a procedure is very likely to make the use of Part 7 too much of a risk for potential purchasers of a troubled bank who are likely to shy away from participating in such a transfer.

384. The court procedure takes time, and there is no guarantee that the scheme will be approved. The application to court must be publicised, and in practice the process can take a number of months to complete. In the likely situation where there is limited time to rescue a bank by selling it on to a willing private sector purchaser, and in which there is highly likely to be a strong imperative to take action before the

difficulties of the bank become public knowledge, the Part 7 procedure is likely to be too public and lengthy to be successful.

385. An application under Part 7 may expose the difficulties of the bank, and the viability of the bank while the process runs its course is likely to be doubtful. Other banks may be very unlikely to wish to deal with or lend to the bank until it becomes clear that the transfer is to take place, since if the transfer is not approved the most likely outcome would be entry into an insolvency procedure.

386. The present market turbulence in financial markets shows that reverses in the fortunes of banks can happen very quickly, thus it is necessary to have tools that can respond to such major issues very promptly.

Annex B – The importance of confidence in the deposit-taking sector

387. As recent events have demonstrated, confidence in the deposit-taking sector is crucial for the continued operation of banking services. For example, the role of a bank in making loans and taking deposits and its associated dependence on access to liquidity means that a deposit-taker is vulnerable to losses in depositor confidence. This is because the business model of a deposit-taker relies on each depositor not demanding the whole of his or her monies at any one point. Demand for deposits is the aggregate of each customer's individual demand. In times of crisis, depositors are more likely to wish to withdraw their deposit (in order to gain wealth certainty) and so this places an unanticipated call on a bank's stock of liquidity. Such increases in demand across a bank's customer portfolio are better known as "runs". In the case of Northern Rock plc, a retail run followed the announcement that the bank had received liquidity support from the Bank of England. Of course, it is also the case that such problems can arise in the wholesale context, as recent events have demonstrated.

388. A loss of confidence in one institution may result in systemic consequences. These may arise for two main reasons:

    a) Financial institutions and markets are highly interconnected, which means that the fate of one institution may be inextricably linked to the fate of another, which could cause a domino-like series of failures resulting in widespread financial instability.

    b) There are some inefficiencies regarding the transparency and comprehensiveness of publicly available information about financial intuitions. As a result, in the event of a failure of one institution, depositors may take that as an information signal – rational or otherwise – that another bank is in difficulties. This demonstrates how a loss of confidence may spread from one institution to another and act as a channel for contagion.

Annex C – Special Provisions Act orders

389. The Special Provisions Act has been used on a number of occasions since its enactment:

    a) The "Northern Rock plc Transfer Order 2008"[28] took Northern Rock into temporary public ownership, and the Northern Rock plc Compensation Scheme Order 2008[29] made provision for the

[28] S.I. 2008/432.

[29] S.I. 2008/718.

assessment of such compensation, if any, as is to be paid in relation to the transfer.

b) The "Bradford and Bingley plc Transfer of Securities and Property etc. Order 2008"[30] provided for two transfers. First, to take the bank into temporary public ownership. Second, to transfer deposit liabilities to Abbey Santander.

c) The "Heritable Bank plc Transfer of Certain Rights and Liabilities Order 2008"[31] transferred the retail deposits in Heritable to Deposits Management (Heritable) Ltd (a company wholly owned by the Treasury).

d) The "Transfer of Rights and Liabilities to ING Order 2008"[32] transferred the retail deposits of Deposits Management (Heritable) Ltd to ING Direct.

e) The "Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities Order 2008"[33] provided for two transfers. First, to transfer the rights and liabilities of Kaupthing to Deposits Management (Edge) Ltd (a company wholly owned by the Bank of England). Second, to transfer certain rights and liabilities from Deposits Management (Edge) Ltd to ING Direct.

Annex D – First exercise of certain powers

390. A number of the powers of Parts 1 to 4 provide the Treasury with the authority to make secondary legislation. Much of this secondary legislation will need to be in place before the SRR powers can be exercised effectively or to ensure that appropriate safeguards are in place when the powers are exercised.

391. For example, clauses 47 and 48 confer powers to provide safeguards in respect of partial property transfers (see above, paragraphs 308 to 329). It will be important that the orders to be made under these provisions are in place before the property transfer powers are exercised, so as for example to prevent legal certainty surrounding the validity of set-off and netting arrangements from being disrupted.

392. In light of the importance of these powers, the Government considers that these powers should need to approve the making of such instruments, and any amendments to such instruments.

393. However, an alternative approach is proposed for the first exercise of powers which it is necessary to exercise in order for the SRR powers to be exercisable effectively and subject to appropriate safeguards.

394. The Government is hoping to obtain Royal Assent before the operative provisions (that is, the transfer powers) of the Special Provisions Act expire on 20 February 2009. It may not be possible to secure debates in both Houses in time to allow all the secondary legislation which is subject to the draft affirmative procedure to be made to ensure that there is no period where the transfer powers of the Special Provisions Act have lapsed, but the provisions of the SRR are not yet in force. The Committee will note in particular the dates both Houses will be in Recess for half-term.

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[30] S.I. 2008/2546.

[31] S.I. 2008/2644.

[32] S.I. 2008/2666.

[33] S.I. 2008/2674.

395. For this reason, clause 249 of the Bill ("statutory instruments") provides that certain instruments subject to the draft affirmative procedure should be capable of being exercised by the 28-day procedure in the following limited circumstances:

    a) for the first exercise of the power; and

    b) if the Treasury consider it necessary.

396. The Treasury consider that it is appropriate to limit the use of the 28-day procedure by reference to these two, cumulative tests. In particular, it may be the case that the Treasury does not need to exercise these powers soon after Royal Assent and so it may not be necessary to use the 28-day procedure.

397. The Government considers this prudent provision to ensure that the powers of Parts 1 to 4 may be used to full effect in all circumstances. The Government believes that this approach strikes the balance between ensuring that the SRR powers conferred by the Bill are fully effective from 21 February 2009 (when the operative provisions of the Banking (Special Provisions) Act cease to have effect) while ensuring that the exercise of such powers is subject to full Parliamentary scrutiny.

398. A similar approach is adopted with respect to clauses 122 and 157, which confer power to make rules to support the bank insolvency procedure and bank administration procedure established by Part 2 and 3. The powers conferred by Parts 2 and 3 cannot be used effectively until these rules are in place. Normally there is a requirement to consult the Insolvency Rules Committee (established under section 413 of the Insolvency Act 1986) before making insolvency rules. However, this requirement is disapplied in respect of the first exercise of these powers (see, for example, clause 122(8)) so that the new rules may be brought immediately into force. Instead it is proposed that the expert liaison group (ELG) (as described in paragraphs 43 to 44) is consulted on the rules relating to the bank insolvency procedure and the bank administration procedure, prior to making these new rules. The ELG already has expertise in this area, and additional experts may be called upon, thereby ensuring that expert industry input will be applied to the Banking Bill's new insolvency rules.

PART 2: BANK INSOLVENCY

399. This sections sets out:

    a) a discussion of the need for a bank insolvency procedure;

    b) an overview of the bank insolvency procedure; and

    c) a detailed discussion of each of the delegated powers taken in this Part of the Bill.

The need for a bank insolvency procedure

400. Currently, there are no special insolvency procedures for banks. Instead insolvent banks are subject to ordinary insolvency procedures. These range from corporate rescue mechanisms, such as administration or a company voluntary arrangement, to winding up a company's affairs through formal liquidation. However, as described above, these procedures are not entirely appropriate for deposit-taking banks, primarily because the focus of these procedures is on the interests of creditors generally and there are no special provisions for the treatment of depositors which means that it may be some months before depositors receive any compensation. Such delays would have unfortunate knock-on effects for depositors and the wider economy.

401. Therefore, Part 2 of the Bill provides for a modified insolvency procedure for UK banks with depositors eligible for compensation from the Financial Services Compensation Scheme ("the FSCS").[34] The procedure, which is based largely on existing provisions for compulsory liquidation, is designed to ensure that depositors receive their FSCS compensation,[35] or alternatively, have their deposit accounts transferred to another bank, promptly. The Authorities are committed to a target of seven days for depositors to receive a proportion of their funds, with the balance in the following few days, in order to minimise the financial difficulty faced by depositors as a result of being denied access to their funds.

402. The primary purpose of the bank insolvency procedure is to speed up the payout of FSCS payments to eligible depositors (which can take several months under current arrangements). In order to be able to calculate quickly the amount of compensation owed to each depositor, the FSA is consulting on proposals, among other measures, to pay FSCS compensation on a gross rather than a net basis.[36] The Authorities believe that the introduction of this procedure should assist in preserving confidence in the banking system and reduce the likelihood of a run on a bank as depositors will be reassured that they will have access to funds within a short time should their bank enter formal insolvency.

Overview

403. The bank insolvency procedure is based on the procedure of compulsory liquidation under the Insolvency Act 1986, with amendments where required, particularly in relation to commencing the proceedings and the early stages of the insolvency, to ensure that eligible depositors are dealt with quickly.

404. Under the bank insolvency procedure, the Bank of England, the FSA or the Secretary of State (for Business, Enterprise and Regulatory Reform) may apply to the court for an order appointing a qualified insolvency practitioner as the liquidator of a UK bank with eligible depositors (clause 92). Notice of such an application must be served on the company and details concerning notification and service of an application will be set out in Rules for the bank insolvency procedure.

Grounds for applying

405. Subsection (1) of clause 93 sets out the three grounds on which an application for a bank insolvency order may be based. The first of these is on the grounds of insolvency, i.e. a bank is unable or is likely to become unable to pay its debts. An application may also be made where winding up the affairs of the bank would be in the public interest or fair (for the meaning of "fair" see the note to clause 90(8)).

406. In addition to these grounds, as the bank insolvency procedure has been designed to ensure rapid compensation payments to depositors under the terms of the FSCS, an application for a bank insolvency order may only be made where a bank has eligible depositors, as per subsections (2)(b)(i), (3)(b)(ii) and (4)(a).

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[34] The FSCS was established under the Financial Services and Markets Act 2000, Part 15 and is the UK's statutory fund of last resort for customers of authorised financial services firms. The FSCS provides compensation (up to specified limits) to eligible persons if a firm is unable, or is likely to be unable to satisfy the claims made against it.

[35] The amount owed to be calculated according to how much the depositor holds across all accounts held in that bank, up to the statutory compensation limit which is currently the first £50,000 of any loss.

[36] Paying on a net basis means that the amount of compensation owed to the depositor would be reduced by the amount (if any) that the depositor owed as a debt to the bank.

407. Subsection (2) provides that where the FSA notifies the Bank of England that the appropriate conditions for entry to the SRR have been met (clause 7(2) and (3)) the Bank of England may make an application to the court for a bank insolvency order on the grounds that the bank is either insolvent or that winding up would be fair. Given the lead role of the Bank of England in the special resolution regime, subsection (3) provides that the FSA may only apply for a bank insolvency order where the Bank of England consents. The grounds for an application for a bank insolvency order by the FSA are otherwise the same as those on which the Bank of England may present an application.

408. It may be that a bank is not technically insolvent,[37] but to protect a bank's customers and the public generally, subsection (4) allows the Secretary of State to apply for a bank insolvency order where winding up the affairs of a bank is considered to be in the public interest. This provision reflects the Secretary of State's existing powers under section 124A of the Insolvency Act 1986 to present a winding-up petition against a company where that is considered to be in the public interest.

409. In keeping with existing insolvency provisions, on the hearing of an application for a bank insolvency order the court may either make such an order, adjourn the application or dismiss it (clause 94(3)). In keeping with ordinary compulsory liquidation proceedings, the application (with modification) of section 135 of the Insolvency Act 1986 allows for the appointment of a provisional bank liquidator by the court in the period between the submission of an application for a bank insolvency order and the court hearing for the making of such an order. The provisional bank liquidator will be given limited power by the court to protect the assets of the bank for the benefit of its creditors as whole in the period between the application to the court for the bank insolvency order, and the making of that order.

Objectives of the liquidator

410. In order to speed up compensation payouts to eligible depositors by the FSCS, a bank liquidator will have unique statutory objectives (clause 96): (i) to ensure that depositors eligible for compensation under the FSCS receive prompt payment or have their accounts transferred to another financial institution as soon as reasonably practicable; and (ii) the bank's affairs are wound up to achieve the best result for the bank's creditors as a whole. Although objective 1 takes precedence, to protect the interests of creditors generally a bank liquidator would be expected to start work on achieving both objectives immediately. Once the pay-out or the transfer of accounts has been achieved, the insolvency will continue as an ordinary liquidation with minor modifications.

[37] There are a number of definitions of "inability to pay debts" as set out in section 123 of the Insolvency Act 1986, these include being cash-flow or balance-sheet insolvent.

Delegated powers

Clause 88 – Interpretation "bank"

Power:	*To exclude an institution from the interpretation of "bank"*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

411. Clause 88 defines "bank" for the purposes of Part 2 of the Bill. Subsection (2) specifies that "bank" does not include a building society (within the meaning of section 119 of the Building Societies Act 1986), or a credit union (within the meaning of section 31 of the Credit Unions Act 1979). Subsection (2)(c) gives the Treasury the power to exclude by order any other class of institution.

412. This power is necessary for the same reasons provided above in relation to clause 2. An order made under this power is subject to the draft affirmative procedure. This procedure is appropriate, as Parliament will wish to scrutinise any proposal by the Treasury to restrict the application of the bank insolvency procedure.

Clause 119 – Application of insolvency law

Power:	*To provide for the application of an enactment about insolvency to apply to bank insolvency (with or without modifications); and to amend or modify the application of an enactment about insolvency in consequence of, or in connection with, this Part*
Body:	*Secretary of State and the Treasury jointly*
Parliamentary scrutiny:	*Draft affirmative procedure*

413. This is a "Henry VIII" power which enables the Treasury and the Secretary of State jointly to make provision for an enactment about insolvency to apply to, or to amend or modify an enactment about insolvency in consequence, or in connection with, the bank insolvency procedure.

414. Clause 75(1) only provides the Treasury with the means to modify legislation to enable the powers conferred by Part 1 of the Bill (in particular the stabilisation options) to be used more effectively. In light of the limitation of clause 75, Part 2 contains additional, specific provision to enable legislation to be modified in connection with those Parts.

415. The bank insolvency procedure is based on the compulsory winding up procedures as provided for under the Insolvency Act 1986 and applies, with modifications, certain relevant provisions of that Act (predominantly provisions in Part 4 of the Insolvency Act 1986 which apply to liquidation). However, the bank insolvency procedure is not quite the same as a compulsory winding up; for example, there is no role for the Official Receiver.

416. This power enables the Treasury and the Secretary of State (acting jointly) to apply any enactment about insolvency to the bank insolvency procedure or to amend or modify the application of an enactment about insolvency in consequence of Part 2 of the Bill. An enactment includes both primary and subordinate legislation and also

includes Acts of the Scottish Parliament and an instrument made under such an Act and Northern Ireland legislation (clause 248). This power allows the Treasury and the Secretary of State some flexibility to modify the way a particular provision has been applied or to adapt the regime by applying another provision of the Insolvency Act 1986. It also means that the Treasury and the Secretary of State can amend an insolvency enactment to accommodate the bank insolvency procedure if it becomes necessary to do so.

417. This power is necessary because insolvency legislation is inherently complex and it is conceivable that not all the necessary modifications to existing insolvency law have been made in the provisions of Part 2. Until very recently there have been few recent bank insolvencies, and unforeseen complex problems may therefore emerge from on-going insolvencies that give rise to the need to make further amendments to existing insolvency law, to ensure the bank insolvency procedure is able to meet its challenging objectives. Furthermore, the law relating to insolvency, banking and financial services is constantly evolving. It is likely that further amendments in these areas of law may need to be made in order that the bank insolvency procedure is capable of being applied in the future. The Treasury therefore takes the view that it is vital to include this power. It is important to note, however, that the power is limited in scope to insolvency law.

418. This power is exercisable jointly by the Secretary of State and the Treasury, because each are responsible for different policy areas. For example, the Treasury is responsible for financial services and financial markets legislation and the Secretary of State is responsible for insolvency legislation.

419. Although any order made under this power is likely to be very technical and ought to be uncontroversial in nature, as this power may be exercised to amend primary legislation, it is appropriate that any draft order made under this power be subject to the draft affirmative procedure.[38]

Clause 120 – Role of the FSCS

Power:	*To make FSA rules to include provision about expenditure under the bank insolvency procedure, in particular money raised by way of the imposition of a levy; and sums raised in connection with the scheme*
Body:	*FSA*
Parliamentary scrutiny:	*None – FSA rules are not subject to the scrutiny of Parliament; instead they are consulted upon and put before the FSA board for consideration (see sections 152-156 of the FSMA)*

420. Part 2 of the Bill extends the scope of the FSCS's role by giving it specific functions which involve it cooperating with the bank liquidator in order that Objective 1 (clause 96(2)) can be achieved, for example by making or arranging for payments to, or in respect of, eligible depositors of a bank; and by making money available to facilitate the transfer of accounts of eligible depositors of a bank (clause 120(1)). Subsection (2) specifies that the FSCS may include provision about the expenditure under this clause.

[38] It is appropriate to note that all legislative powers under Part 2 of the Bill are appropriately limited to provisions which relate to the bank insolvency procedure.

421. Rules establishing the FSCS are made by the FSA under section 213 of the FSMA. The compensation scheme may provide for the scheme manager to have the power to impose levies on authorised persons or any class of authorised person, and may take account of the desirability of ensuring that the amount of the levies imposed on a particular class of authorised person reflects, so far as practicable, the amount of the claims made, or likely to be made (section 213(4) and (5)). Therefore, under subsection (2) of this clause, the FSA's rule-making power is expanded so as to enable the FSCS to include provision for the FSCS to levy to meet the expenditure made in pursuit of Objective 1 in Part 2 of the Bill.[39]

422. The FSA's rules are an appropriate way of making provision for this levy as the FSA has the power to make provision, for example, for the imposition of different levies in different cases under section 214(1)(c) of the FSMA. The FSA is required to consult with stakeholders if it proposes to make any rules and must publish a cost benefit analysis (section 155 of the FSMA).

Clause 122 – Rules

Power:	*To make or amend rules in relation to the bank insolvency procedure under section 411 of the Insolvency Act 1986*
Body:	*Lord Chancellor with the concurrence of the Treasury or, in the case of rules that affect court procedure, the Lord Chief Justice (England and Wales); The Treasury (Scotland)*
Parliamentary scrutiny:	*Negative procedure*

423. This provision extends the rule making power in section 411 of the Insolvency Act 1986 to apply to Part 2 of the Bill. The purpose of this provision is to ensure that the insolvency rules can be amended or made in order to give effect to the bank insolvency procedure.[40]

424. It is envisaged that most rules made under this power will concern detailed provision in respect of the day-to-day operation of the insolvency procedure, for example, the workings of the liquidation committee, the holding of creditors' meetings, and the approval process for the remuneration of the bank liquidator. However, rules are also likely to contain significant key provisions, for example in relation to the cancellation of set-off rights for eligible depositors.[41]

425. Insolvency rules made under section 411 of the Insolvency Act 1986 are made in England and Wales by the Lord Chancellor with the concurrence of the Secretary of State or, in the case of rules that affect court procedure, the Lord Chief Justice. In Scotland, the Treasury will make the rules. The clause is also applied to Northern Ireland by virtue of clause 131.

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[39] Currently the FSCS can levy to cover any compensation pay-outs it has to make in accordance with Part 15 of the FSMA. The FSCS can also levy to cover its management expenses under section 223 of the FSMA- however this is an annual standing levy to met the FSCS's running costs.

[40] Insolvency rules are rules setting out the detailed procedure of the Insolvency Act 1986.

[41] This is because, unlike under the existing system, the FSCS will not consider each and every eligible depositor's position under set-off (i.e. by deducting any amount owed by the depositor to the failing bank from the amount held on deposit by the bank for the depositor). Instead, in order to make a fast payout the FSCS will make a gross compensation payout.

426. The first set of Rules for the bank insolvency procedure and the bank administration procedure will be consulted on with an appropriate panel of experts, initially drawn from the expert liaison group (discussed above, in Part 1), rather than the usual Insolvency Rules Committee.[42] This is because the Rules Committee would be unable to consider the rules early enough for them to be in place by 21 February. Any rules are made in the form of a statutory instrument subject to the negative procedure (section 411(4)). As the rules will be technical in nature, and should be unlikely to be controversial, the negative procedure is considered to be appropriate, which is consistent with the existing provisions under section 411 of the Insolvency Act 1986.

Clause 123 – Fees

Power:	*To charge fees in respect of any proceedings in relation to Part 2 of the Bill*
Body:	*Lord Chancellor with the concurrence of the Secretary of State (England and Wales); The Secretary of State (Scotland)*
Parliamentary scrutiny:	*Laying before parliament*

427. This provision expands the scope of section 414 of the Insolvency Act 1986 and confers on the Lord Chancellor and the Secretary of State the power to provide for fees to be paid in respect of proceedings under the bank insolvency procedure. Such fees could include the payments made in relation to accounts in the Insolvency Service Account, which is maintained with the Secretary of State; fees in relation to the issue of cheques and other instruments; and fees in connection with the electronic transfer of funds. Generally, these fees are charged to cover the costs of the Insolvency Service for example in estate administration, insolvency practitioner regulation etc.

428. Section 414 of the Insolvency Act 1986 provides that such an order should be subject to being laid before Parliament. The Treasury sees no reason to deviate from this procedure.

Clause 127 – Building societies

Power:	*To make provision to apply Part 2 of the Bill to building societies in the same way as it applies to banks*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

429. Subsection (1) of this provision confers on the Treasury a power to apply the provisions of Part 2 of the Bill to building societies so that any eligible depositors can receive their FSCS payouts or for their accounts to be transferred in the same way as eligible depositors of a bank.

430. Although it is intended that the provisions of the procedure will, in principle, apply to building societies in the same way as they apply to banks, building societies do not share the same corporate characteristics as banks, and therefore the procedure will have to be tailored appropriately.

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[42] The Insolvency Rules Committee is a statutory body created under section 413 of the Insolvency Act 1986.

431. Further, as the provisions needed to apply the procedure to building societies are likely to be technically complicated, it is necessary for the Treasury to continue to consult with stakeholders in this regard. Therefore, it is appropriate that the necessary provisions are made by way of secondary legislation.

432. Although an order made under this power is unlikely to be controversial, the draft affirmative procedure is appropriate in order to provide Parliament with full opportunity to scrutinise the procedure, bearing in mind the nature of the changes to be made to the law in relation to building society insolvency.

Clause 128 – Credit unions

Power:	*To make provision to apply Part 2 of the Bill to credit unions in the same way as it applies to banks*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

433. This provision confers on the Treasury the power to apply the provisions of Part 2 of the Bill to credit unions.

434. The provisions of Part 2 of the Bill could, in principle, apply to credit unions in the same way as they apply to banks. However, the provisions will need to be subject to some modifications, which are likely to be technically complicated. Therefore, as in the case of buildings societies, it is necessary for the Treasury to continue to engage with stakeholders, including experts in the field, in this regard.

435. Although an order made under this power is unlikely to be controversial, the draft affirmative procedure is appropriate in order to provide Parliament with full opportunity to scrutinise the procedure, bearing in mind the nature of the changes to be made to the law in relation to credit union insolvency.

436. Northern Ireland credit unions are governed by their own legislation (the Credit Unions (Northern Ireland) Order 1985). However, the power to apply the bank insolvency procedure to Northern Ireland credit unions rests with the Treasury under clause 128.

Clause 129 and 130 – Partnerships and Scottish partnerships

Power:	*To make provision to apply Part 2 of the Bill to partnerships and Scottish partnerships*
Body:	*Lord Chancellor with the concurrence of the Secretary of State and the Lord Chief Justice (England and Wales; the Secretary of State (Scotland)*
Parliamentary scrutiny:	*Negative procedure*

437. The Authorities are unaware of any banks that are incorporated as partnerships or Scottish partnerships. However, this power enables the Lord Chancellor or the Secretary of State, as appropriate, to make provision to apply the provisions of the bank insolvency procedure to a bank constituted under English law or Scots law as a partnership.

438. The negative procedure is appropriate, first because the provisions of the Bill will have been subject to debate in both Houses of Parliament, and are unlikely to be

subject to significant modification in order to apply to partnerships; and second, because the order is likely to be uncontroversial and technical in nature.

Clause 132 – Consequential provision

Power: *To make provision in consequence of Part 2 of the Bill*

Body: *Treasury*

Parliamentary scrutiny: *Draft affirmative procedure*

439. This clause confers on the Treasury the power to make an order to make general provision in consequence of this Part; such a provision to include any consequential amendments needed in relation to enactments (clause 248), for example, tax legislation. It also enables the Treasury to make any necessary amendments to legislation passed before the commencement of the bank insolvency procedure.

440. Amendments to insolvency law in relation to this procedure are set out expressly on the face of the Bill. However, it is reasonable to assume that the Treasury has not been able to foresee every consequential amendment to legislation that may be needed in relation to Part 2 of the Bill. This clause provides the Treasury with the means to make consequential amendments so that the legislation relating to the insolvency of institutions connected with financial services can be properly interrelated with the bank insolvency procedure.

441. Any order prepared under this power is subject to the draft affirmative procedure as this procedure is appropriate for an instrument that may amend primary legislation.

PART 3: BANK ADMINISTRATION

442. This section sets out:

a) a discussion of the need for a bank administration procedure;

b) an overview of the bank administration procedure; and

c) a discussion of the delegated powers taken in this Part of the Bill.

The need for a bank administration procedure

443. The Authorities are of the view that a special form of insolvency procedure will often be necessary, at least in the initial stages, to deal with the affairs of a residual company of a failed bank; where it has been left in an insolvent position as a result of a partial transfer of property, assets and liabilities from a failing bank to a bridge bank or to a private sector purchaser or in respect of the residual bank in temporary public ownership as a result of a transfer to onwards transferees.[43]

444. Ordinary insolvency procedures may not be suitable to deal with the management and winding-up of the residual company, given the potential need for the residual bank to provide essential services to the transferee.[44] For example, the residual company may be needed to provide essential services (such as IT systems), which may be subject to foreign law governed non-assignment clauses, to the transferee,

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[43] The procedure may be applied in respect of an onwards transfer of property from a bank in temporary public ownership (clause 149).

[44] Under a normal insolvency process the insolvency practitioner acts solely in the interests of the creditors of the residual company and may sell on essential business services within a very short period of the company becoming insolvent in order to maximise proceeds for the insolvency estate.

until such time as it can obtain those services by other means. Without the provision of such services, it may be impossible for business transferred to the transferee to continue to operate and may limit the ability of the Authorities to achieve a successful resolution.

Overview

445. The bank administration procedure is intended to be used to operate, manage and then, where appropriate, wind up a residual company. It provides for a delay in the taking of certain steps to wind up a residual company where it is needed to provide essential services to the transferee, until such time as the bridge bank or private sector purchaser can obtain those services by other means.

446. This procedure is necessary in order to ensure that the business transferred from the residual bank can continue to be operated effectively. In the event that essential business services cannot be supplied to the transferee, the transfer may be frustrated and it is certainly unlikely that a private sector purchaser would be willing to acquire part of the business of a failing bank where essential business services cannot be supplied to the transferee.

Grounds for applying

447. Under this procedure the Bank of England may apply to the court for a bank administration order (clause 139(1)).

448. The Bank of England may apply for an order if two conditions are met: (1) there has been or is intended to be a transfer to a bridge bank or private sector purchaser tool has been exercised, and (2) the Bank of England is satisfied that (a) the residual bank is unable to pay its debts,[45] or (b) that the residual bank is likely to become unable to pay its debts (other than as a result of a share or property transfer instrument which the Bank intends to make) (clause 140).

449. The court may grant the application, adjourn the application or dismiss the application (clause 141).

Objectives of the administrator

450. A bank administrator appointed by the court will have two objectives (clause 134(1)):

    a) to provide support for a commercial purchaser or bridge bank (see clauses 135 and 136); and

    b) "normal" administration (see clause 137).

451. Objective 1 places a duty on the bank administrator to ensure the supply of necessary services and facilities to the bridge bank or to the commercial purchaser, in order to allow the business transferred to continue to operate effectively. Objective 1 is to take priority over Objective 2 (which is to rescue the company as a going concern or take other action, such as winding up, where that would be in the best interests of creditors as whole). However, the bank administrator is obliged to begin working towards both objectives immediately on appointment (clause 134(2)).

[45] See clause 163(3) for a definition of "inability to pay debts".

452. Once such services or facilities are no longer needed to be supplied to the bridge bank or the private sector purchaser, the procedure reverts to normal administration (based on Schedule B1 of the Insolvency Act 1986).

Delegated powers

Clause 145 – Sharing information

Power:	*To prescribe by regulations the classes of information that must be provided by the Bank of England/ the bridge bank/ the bank administrator and to prescribe the classes of record to which access must be allowed.*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

453. This clause provides for information sharing and information obligations between the bank administrator, the Bank of England and the bridge bank where a partial transfer from a failed bank has been effected.

454. Subsection (2) requires the Bank of England to provide the bank administrator with details of the financial situation of both the residual bank and the bridge bank within 5 days beginning with the day on which the bank administrator is appointed under the bank administration procedure. This is to inform the bank administrator of the finances of the residual company so as to enable him to draw up the statement of proposals under clause 144.

455. During the course of the bank administration, the bank administrator is able to request information from the bridge bank about its financial position if required for the purposes of pursuing Objective 1 (clause 145(3)). Similarly, the bank administrator must supply information on request to the Bank of England or the bridge bank and also provide it with access to records (clause 145(4)).

456. Subsection (5) of the clause provides that the Treasury shall prescribe by regulations the classes of information and records that are to be shared. It is intended that this power will not be exercised until the Bank of England has exercised a property transfer power under Part 1 of the Bill. The regulations will be tailored to the needs of the bridge bank and the residual company to be able to effectively operate. Before making these regulations the Treasury intends to consult with relevant parties as to the information and records likely to be needed by a bridge bank or a residual company in these circumstances.

457. Given that they will be directly connected to a specific exercise of the stabilisation tools under Part 1 of the Bill, regulations made under this power will be tailored to the resolution in question, practical and uncontroversial in nature and of little general effect. In addition, it is likely that information will need to be shared between the Bank of England, the bank administrator and the transferee as soon as the transfer has been effected, the regulations will need to be made and come into effect extremely quickly. Therefore, the Treasury considers that the negative procedure is appropriate in the circumstances.

Clause 146 – Multiple transfers: General application of this Part

Power:	*To make provision to extend the application of, and to modify, the bank administration procedure in relation to multiple transfers*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

458. This clause confers a power on the Treasury to make provision to modify the bank administration procedure where a property transfer power has been exercised more than once in relation to a failing bank, for example, where a bank's deposit book is divided up and transferred to more than one financial institution. It also allows the Treasury to extend the procedure to circumstances where, after a property transfer has taken place to a bridge bank, further property transfer instruments have been exercised (see clauses 42, 43 and 45).

459. Under the administration procedure, Objective 1 of the bank administrator is to provide support for a private sector purchaser or a bridge bank. The way this objective will be achieved will differ considerably depending on whether the transferee is a private sector purchaser or a bridge bank. With multiple onward transfers the relationships between the original residual company and the bridge bank, and the bridge bank and the onwards transferees, are likely to be complex, particularly as the bank administrator of the original residual company may have to support all the transferees and possibly the bridge bank at the same time. This might happen where the retail arm of a bridge bank needs the residual company's computer systems to operate. The scenario may arise where that business is split and sold on to two separate purchasers; however for a temporary period after the split, both buyers may need access to this IT system in order to be able to transfer the data over to their own systems.

460. Therefore, it is vital that the Treasury has a power to adapt the bank administration procedure as appropriate in order to set out specific parameters by which the bank administrator must perform his function. For example, by specifying priorities for service, subsequent property transfer etc and perhaps to counter any adverse effects on the residual company's creditors.

461. The draft affirmative procedure is appropriate in this case because the order is likely to be complex and will attract a lot of commercial interest. Therefore it is appropriate that a draft order should be subject to full Parliamentary scrutiny.

Clause 149 – Property transfer from temporary public ownership

Power:	*To make provision to extend the application of, and to modify, the bank administration procedure where the Treasury make a subsequent property transfer order following bringing a bank into temporary public ownership.*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

462. This clause confers a power on the Treasury to make provision to modify the bank administration procedure where the Treasury has transferred a failing bank, by

transfer of securities, into temporary public ownership and then makes an onward property transfer (clause 45).

463. The Government takes the view it is not appropriate in primary legislation to include a potentially significant number of detailed and complex provisions to provide for this circumstance, to make consequential amendments to the bank administration procedure (which, as drafted under this Part, is designed around the role of the Bank of England. Instead this power allows the procedure to be applied or modified to be used for a residual bank which is in temporary public ownership.

464. As this adapted procedure would sit alongside the existing clauses of the Bill, the Government considers that the draft affirmative procedure is appropriate to provide Parliament with full opportunity to scrutinise the draft clauses.

Clause 153 – Application of other law

Power:	*To provide, by order, for an enactment about insolvency or administration to apply, with or without modifications, to Part 3 of the Bill; and to amend or modify the application of an enactment about insolvency or administration in connection with or consequence of this Part*
Body:	*Secretary of State and the Treasury jointly*
Parliamentary scrutiny:	*Draft affirmative procedure*

465. This is a "Henry VIII" power which enables the Treasury and the Secretary of State for Business, Enterprise and Regulatory Reform to make provision for an enactment about insolvency to apply to; or to amend or modify an enactment about insolvency in consequence, or in connection with, the bank administration procedure. An enactment here includes both primary and secondary legislation and also includes Acts of the Scottish Parliament and any secondary legislation made under such an Act and Northern Ireland legislation (clauses 164 and 248). The clause makes similar provision to clause 119 of Part 2.

466. This power has the same effect, in relation to the bank administration procedure, as the power discussed above under clause 119 has for the bank insolvency procedure. A specific Henry VIII power relating to insolvency law is required (over and above the more general power to change law provided in Clause 75) for the reasons set out in paragraph 414.

467. The bank administration procedure is generally based on Schedule B1 to the Insolvency Act 1986 and applies, with modifications, other appropriate provisions of that Act.[46]

468. This power enables the Treasury and the Secretary of State (acting jointly) to apply any enactment about insolvency or to amend or modify the application of an enactment about insolvency in consequence of Part 3 of the Bill. This power allows the Treasury and the Secretary of State some flexibility to modify the way a particular provision has been applied or to adapt the regime by applying another provision of the Insolvency Act 1986. It also means that the Treasury and the Secretary of State can amend an insolvency enactment to accommodate the bank administration procedure if it becomes necessary to do so.

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[46] Insolvency Act provisions applied are as followed: sections 168(4) (and para 13 of Schedule 4), sections 176A, 178, 188, 213-214, 233-246, 386-387, 389-391, 423-425, 430-432, 433 and Schedule 10.

469. Paragraphs 413 to 419 set out the reasons for taking the power.

Clause 155 – Building societies

Power:	*To make provision to apply Part 3 of the Bill to building societies in the same way as it applies to banks*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

470. This clause confers on the Treasury a power to apply the provisions of Part 3 of the Bill to building societies. The purpose of this provision is to enable a building society to be placed into the bank administration procedure. The order will be made under the draft affirmative procedure. The clause is comparable to clause 127 of Part 2, which confers a power to extend the bank insolvency procedure to building societies, and similar notes apply (see paragraphs 429 to 432).

Clause 156 – Credit unions

Power:	*To make provision to apply Part 3 of the Bill to credit unions in the same way as it applies to banks*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

471. This provision confers on the Treasury the power to apply the provisions of Part 3 of the Bill concerning bank administration to credit unions. The order will be made under the affirmative resolution procedure. The clause is comparable to clause 128 of Part 2, which confers a power to extend the bank insolvency procedure to credit unions, and similar notes apply (see paragraphs 433 to 436).

Clause 157 – Rules

Power:	*To make a rules regarding the bank administration procedure under section 411 of the Insolvency Act 1986*
Body:	*Lord Chancellor with the concurrence of the Secretary of State Treasury or, in the case of rules that affect court procedure, the Lord Chief Justice (England and Wales); The Treasury (Scotland)*
Parliamentary scrutiny:	*Negative procedure*

472. This power extends the rule-making power in section 411 of the Insolvency Act 1986 to apply to Part 3 of the Bill. The purpose of this provision is to ensure that the insolvency rules can be amended or made in order to give effect to the bank administration procedure.

473. It is envisaged that the rules for the bank administration procedure are to follow closely the existing insolvency rules for administration under Schedule B1 to the Insolvency Act 1986. Given that once objective 1 has been achieved the bank administration procedure resorts to a normal administration, the great majority of the rules for normal administration will apply with only minor modification. However certain specific rules will be need for the specific provisions of objective 1.

474. Insolvency rules made in relation to the bank administration procedure will be made in accordance with the procedure set out in the discussion of clause 122. Therefore, for the reasons set out in that discussion, the negative procedure is considered to be appropriate.

Clause 158 – Fees

Power:	*To charge fees in respect of any proceedings in relation to Part 3 of the Bill*
Body:	*Lord Chancellor with the concurrence of the Secretary of State (England and Wales); The Secretary of State (Scotland)*
Parliamentary scrutiny:	*Laid before Parliament (SIP class (vi))*

475. This provision confers on the Lord Chancellor and the Secretary of State the power to provide for fees to be paid in respect of proceedings under the bank administration procedure. The order will be laid before Parliament. The clause is comparable to clause 123 of Part 2, which confers the power to provide for fees to be paid in respect of proceedings under the bank insolvency procedure, and similar notes apply (see paragraphs 427 to 428).

Clause 160 and 161 – Partnerships and Scottish partnerships

Power:	*To make provision to apply Part 3 to partnerships and Scottish partnerships*
Body:	*Lord Chancellor with the concurrence of the Secretary of State and the Lord Chief Justice; the Secretary of State (Scotland)*
Parliamentary scrutiny:	*Negative procedure*

476. The Authorities are unaware of any banks that are incorporated as partnerships. However, this power enables the Lord Chancellor to make provision to apply the provisions of the bank administration procedure to a bank constituted under English or Scots law as a partnership. This will be done under the negative procedure. The clause is comparable to clause 129 and 130 of Part 2, and similar notes apply (see paragraphs 437 to 438).

Clause 165 – Consequential provision

Power:	*To make provision in consequence of Part 3 of the Bill*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

477. This clause confers on the Treasury the power to make an order to make general provision in consequence of this Part; such a provision to include any consequential amendments to enactments (clause 248) passed before the commencement of the bank administration procedure. The order will be subject to the draft affirmative procedure. The clause is comparable to clause 132 of Part 2, which confers the power to make an order to make general provision in consequence of Part 2, and similar notes apply (see paragraphs 439 to 441).

PART 4: FINANCIAL SERVICES COMPENSATION SCHEME

478. This section sets out:

a) background to the Financial Services Compensation Scheme (FSCS); and

b) a detailed discussion of the delegated powers taken in this Part of the Bill.

Background

479. The FSCS is the statutory scheme set up by the FSA under powers conferred by Part 15 of FSMA for compensating eligible claimants (such as the depositors of banks, building societies and deposit-taking firms) in cases where authorised persons[47] are unable or are likely to be unable to satisfy claims against them.

480. In the event of the default of an authorised person, the FSCS can pay compensation (up to specified sums) to eligible claimants.[48] The FSCS will take over the claim against the firm and can stand in as a creditor in the insolvency to recover the sums paid out by way of compensation. The FSCS can also impose levies on financial services firms to meet its compensation costs and management expenses.[49]

481. Part 4 of the Bill inserts several provisions into Part 15 of FSMA including provisions enabling the Treasury to make regulations:

a) permitting the FSCS scheme manager to impose levies to build up contingency funds (clause 167);

b) specifying what expenses the FSCS scheme manager may be required to contribute to the funding for the special resolution regime (clause 168); and

c) enabling the FSCS to borrow from the National Loans Fund ("the NLF") to provide funding for such payments and to fund any expenses incurred under the scheme (clause 170).

482. Part 4 also confers power on the FSA to make rules enabling the Authority to require authorised persons to provide information which may be made available to the FSCS scheme manager (clause 173), to deem claims under the scheme to have been made (clause 171), to provide for classes of claim to be settled on an aggregate rather than an individual basis (clause 171), and a number of ancillary matters.

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[47] Persons authorised to conduct regulated activates under Part 4 of the FSMA.

[48] Set out in the FSCS scheme rules, which are made by the FSA under powers conferred in Part 15 of the FSMA.

[49] Limits on levies are set by the FSA in the scheme rules.

Delegated powers

Clause 167 – Contingency funding: Treasury regulations

Power:	*To make regulations permitting the FSCS to levy for a contingency fund*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

483. This provision (to be inserted as section 214A into Part 15 of the FSMA) confers a power on the Treasury to extend the scope of Part 15 by conferring a power on the Treasury to make regulations allowing for the pre-funding of the FSCS, if this is deemed appropriate at the time.

484. The FSCS needs ready access to liquid funds in order to be able to pay compensation under Part 15 of the FSMA or to contribute to the costs of arrangements made under Part 2 of the Bill or to do other things such as arranging for new accounts to enable eligible depositors to have their accounts transferred (clause 120) or to contribute to the costs of the exercise of stabilisation powers (clause 61). A contingency fund would provide a pool from which these expenses could be paid, without the need to resort to increased industry levies, at times when the industry may be facing difficulties, or to borrow significant funds at the time the FSCS needs to make the payout.

485. The Government envisages that regulations made in exercise of this power will be used to set out the broad framework for the contingency fund, in particular, the establishment and the management of the contingency fund. Subsection (2) of section 214A specifies the regulations may make provision, amongst other things, for the number of contingency funds that may be set up; the maximum/minimum sizes of such funds; the classes of levy payers who may be levied under such funds; the timing of the levies; the circumstances and procedures as to how the funds can pay refunds to the levy payers; how the funds (and income arising from the fund) are to be invested; the purposes for which funds are to be applied and procedure to be followed in connection with such funds (such as record keeping and the provision of information.) However, detailed operational provisions, for example detail regarding how the FSCS will collect levies, will be left to FSA rules (see further below).

486. The power to make provision for these matters has been conferred on the Treasury because the Government recognises the strength of arguments both for and against pre-funding and the need for detailed consideration of these arguments. The Government has indicated that it does not intend to impose a requirement for pre-funding now. However, this provision provides the power for the Treasury to make regulations regarding contingency funds, should it be considered appropriate at a future time.

487. It is important to note, however, that the grounds on which the levy may be collected remains the same as under the current funding arrangements; it remains a levy not a tax as the banks are paying into a fund in which they have a contingent interest (that is, the funds could potentially compensate the bank's depositors if the levy payer were ever to fail).

488. Regulations under this clause will be subject to the draft affirmative procedure. This is considered necessary and appropriate in view of the need for full Parliamentary

scrutiny and debate of the issues including, of course, the potential impact of any contingency fund levy on the FSCS's levy payers.

Clause 167 – Contingency funding: FSA rules

Power:	*To make rules with regard to a contingency fund*
Body:	*FSA*
Parliamentary scrutiny:	*None – FSA Rules are not subject to the scrutiny of Parliament; instead they are consulted upon and put before the FSA board for consideration (see section 155 of the FSMA)* [50]

489. Where the Treasury has exercised its power under section 214A to make regulations to provide for the FSCS to levy for a contingency fund, the FSA may use its existing powers under section 213 of the FSMA to make further provisions with regard to contingency funds. Such rules would make detailed provision as to the practical and operational aspects of the pre-funding regime established under the regulations, for example, how the levies are to be imposed.

490. The Government considers that it is appropriate that this operational detail be set out in FSA rules in accordance with the FSA's existing powers under Part 15 of the FSMA as set out above. Such provisions will have to be consulted on under section 155 of the FSMA and would, of course, have to be consistent with the regulations made under section 214A.

Clause 168 – Special resolution regime: Treasury regulations

Power:	*To make regulations to require the FSCS to contribute towards expenses connected with the exercise of the Part 1 stabilisation powers, specifying the expenses that the FSCS should have to contribute towards and providing how such a contribution should be determined.*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

491. This clause sets out section 214B (to be inserted into Part 15 of the FSMA) which confers a power on the Treasury to make regulations specifying when the Treasury may require the FSCS to make certain payments arising in connection with the exercise of the stabilisation powers under the special resolution regime.

492. In certain circumstances, it may be appropriate for the industry to contribute towards such costs because:

a) action under the special resolution regime is taken on public interest grounds, including financial stability and preserving the confidence in the financial system, which directly benefits the financial service industry; and

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[50] FSA rules made under powers conferred under Part 15 are mainly to be found in the Compensation Sourcebook ("COMP") in the FSA Handbook and deal with the intricacies as to how the compensation scheme works in practice, such as, for example, the qualifying conditions for paying compensation (COMP 3.2.). Rules relating to FSCS funding are to be found in Chapter 6 of the Fees Manual ("FEES") in the FSA Handbook.

b) it is appropriate for the industry to meet such costs as, without any intervention from the Authorities under the special resolution regime, the distressed bank is likely to go into insolvency and the FSCS would have had to pay compensation (which would be considerably higher than any cost of resolution) to eligible depositors (the cost of which would fall on the industry through the levy).

493. Regulations under this new section will set out the following: the expenses the scheme manager may be required to incur; and how the amounts that the FSCS is required to pay are to be verified and determined (subsection (3)). The regulations may make provision for when the FSCS must make payments; the procedures to be followed; the determination of dispute and may confer discretionary functions on certain persons (such as an auditor) (subsection (8)).

494. It is appropriate to leave such matters to secondary legislation as the matters involved are detailed and the industry will need to be consulted on such issues. Furthermore, the exact provisions of these regulations will depend on the exercise of the stabilisation tools therefore, this power enables the Treasury to make tailored provision appropriate to the failing bank in question.

495. The regulations must ensure that contributions required from the FSCS do not exceed the amount of compensation that would have been payable by the FSCS had the stabilisation powers not been exercised, and had the failing bank been unable to satisfy the claims against it (subsection (4)). This amount is to be calculated net of any amounts the FSCS would have been likely to recover in the failed bank's insolvency and also net of any actual compensation paid out to eligible depositors who, for some specific reason, have not had their deposit preserved by the exercise of the stabilisation tool (subsection (4)(a) and (b)). The regulations must provide for the appointment of an independent person to calculate the amounts specified in subsection (4)(a) and (b)).

496. These regulations are to be made by the Treasury under the affirmative procedure and will be made at the same time that the stabilisation power is exercised. The Government considers the draft affirmative procedure is appropriate in this case to give sufficient opportunity to Parliament to scrutinise the draft regulations.

Clause 168 – Special resolution regime: FSA rules

Power:	*To make rules in relation to the special resolution regime*
Body:	*FSA*
Parliamentary scrutiny:	*None – FSA Rules are not subject to the scrutiny of Parliament; instead they are consulted upon and put before the FSA board for consideration (see section 155 of the FSMA)*[51]

497. Subsection (9) provides that the FSA may make rules in accordance with section 213(1) of the FSMA, to set out operational detail as appropriate.

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[51] FSA rules made under powers conferred under Part XV are mainly to be found in the Compensation Sourcebook ("COMP") in the FSA Handbook and deal with the intricacies as to how the compensation scheme works in practice, such as, for example, the qualifying conditions for paying compensation (COMP 3.2.). Rules relating to FSCS funding are to be found in Chapter 6 of the Fees Manual ("FEES") in the FSA Handbook.

Clause 170 – Borrowing from National Loans Fund: Treasury regulations

Power:	*To make regulations as regards borrowing from the National Loans Fund*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

498. This clause sets out a new section 223B to be inserted into Part 15 of the FSMA, which confers on the Treasury power on the Treasury to make regulation as regards the borrowing limits of the FSCS.

499. In the event of a bank failure, the FSCS may need to borrow large sums of money in order to meet compensation liabilities until such time as sufficient levies can be raised to recover this sum. In such circumstances, for example, in the event of a failure of a very large bank, the FSCS might need to borrow more than could be raised by way of borrowing from commercial banks. For this reason the Government propose that the FSCS may take out a loan from the National Loans Fund ("the NLF").[52]

500. The Treasury cannot approve the making of a loan from the NLF unless it is confident that the loan will be repaid. Therefore, the Treasury could not authorise a loan to the FSCS unless it was satisfied that the FSCS could collect sufficient levies to make the necessary repayments. The purpose of the provision is therefore to enable the Treasury to set out in regulations provision for the amounts of money the FSCS may borrow from the National Loans Fund.

501. The power also provides that the Treasury may make regulations in order to permit levies to be imposed for the repayment of the loan. The regulations may set the maximum levies which the FSCS can collect; stipulate which class of levy payers are to be levied for the repayment; and the timings of any levies (subsection (4)).

502. Currently under Part 15 of the FSMA, the power to set the maximum levies that the FSCS can collect is vested in the FSA (section 213(3)(b)). The FSA must exercise its statutory powers in accordance with the relevant FSMA provisions and the general principles of administrative law. It must therefore follow the processes and procedures laid down in the FSMA when making FSCS rules and it could not give a commitment to the Treasury to make rules which had a particular effect, or undertake not to make particular changes in the future to the rules. It is appropriate, therefore, that the Treasury should have the powers to make provision about levies in regulations to ensure that the FSCS can collect sufficient levies to meet its repayment obligations to the NLF.

503. It is appropriate that such powers may be exercised by way of secondary legislation in order that the Treasury may consider and consult on what the levy figure should be, which would, of course, depend on the circumstances in question, for example, the size of the loan, and the financial climate. As the levy may need to be imposed or amended on an extremely urgent basis, for example if the FSCS had to contribute to the resolution of a failing bank and needed to borrow substantial amounts to do so and the loan was conditional on the terms on which it may be repaid, the Government considers that the negative procedure is appropriate.

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[52] The NLF can only be used to make loans where Parliament has provided for loans to be made from that fund and it is for the Treasury to determine whether a loan is made.

Clause 170 – Borrowing from National Loans Fund: FSA rules

Power:	*To amend FSA rules to provide for the FSCS to borrow from the NLF*
Body:	*FSA*
Parliamentary scrutiny:	*None – FSA Rules are not subject to the scrutiny of Parliament; instead they are consulted upon and put before the FSA board for consideration.*

504. Subsection 5 of this clause provides that the FSA may make provision about borrowing from the NLF in the compensation scheme (section 213 of the FSMA), providing that such provisions are not inconsistent with any Treasury regulations made under this clause.

505. This power extends the existing powers of the FSA under section 213 of the FSMA in order to provide that the FSCS can borrow from the NLF. It is intended that the FSA will exercise this power to set out, amongst other things, the detail as to how the FSCS will secure such a loan in practice.

506. The Government consider that it is appropriate that FSA rules set out the working detail regarding borrowing from the National Loans Fund in line with their existing powers under Part 15 of the FSMA as set out above. The FSCS can already borrow from non-governmental sources and to the extent that there is any need to do so, the FSA can already regulate this through making rules. The FSA must consult on draft rules under section 155 of the FSMA.

Clause 171 – Procedure for claims

Power:	*To make FSA rules to allow the FSCS to treat persons who are entitled to claim under the scheme as having done so.*
Body:	*FSA*
Parliamentary scrutiny:	*None – FSA Rules are not subject to the scrutiny of Parliament; instead they are consulted upon and put before the FSA board for consideration (see section 155 of the FSMA).*

507. Under the current compensation scheme set out in Part 15 of the FSMA, a claimant has to put their claim to the FSCS for its consideration before the FSCS can pay that person compensation. This significantly limits the FSCS's ability to pay out compensation claims quickly.

508. To enable the FSCS to make faster payouts under the bank insolvency procedure (Part 2 of the Bill), clause 171 inserts new subsections into section 214 of the FSMA. Section 214(1)(h) provides that FSA rules can set out the procedure to be followed in making a claim. A new subsection (1A) provides that the FSA can, under section 214(1)(h), amend its rules to provide that the FSCS can treat persons who are or may be entitled to claim under the FSCS compensations scheme as it they had followed that the full claim procedure. Furthermore, new subsection (1C) allows the FSA under section 214(1)(j) to amend its rules to provide that the FSCS can settle a class of claims without considering each claim separately.

509. This power is a minor extension of the existing powers under Part 15 of the FSMA so it is appropriate that the rule making power should rest with the FSA and be exercised in accordance with the normal procedure (section 155 FSMA procedures).

Clause 172 – Rights in insolvency

Power:	*To make FSA rules to make provision about the effect of a payment of compensation under the scheme on rights and obligations arising out of matters in connection with which the compensation was paid.*
Body:	*FSA*
Parliamentary scrutiny:	*None – FSA Rules are not subject to the scrutiny of Parliament; instead they are consulted upon and put before the FSA board for consideration (see section 155 of the FSMA).*

510. This clause amends section 215 of the FSMA. Section 215(1) is to be interpreted as enabling the FSCS to make recoveries in respect of the default of the relevant person (e.g. a failed bank) to the same extent that it has paid out compensation to an eligible claimant, and to the extent that that person would have been entitled to recover any sums. Section 215(1)(a) currently enables the FSA to make rules extinguishing the eligible claimant's rights of recovery against the relevant person (and possibly against a third party). Section 215(1)(b) enables the FSA to make rules creating a right of recovery for the FSCS, but only against the relevant person (not third parties).

511. This provision amends subsections (1)(a) and (b) to allow FSA rules to be made to enable the FSCS to recover compensation it has paid from any person who is responsible for the events or situation which gave rise to the loss the eligible claimant has suffered.

512. As this provision amends an existing power for the FSA, it is consistent that it should be exercised by under FSA rules.

Clause 173 – Information

Power:	*To make FSA rules to require authorised persons to provide information which then may be made available to the FSCS*
Body:	*FSA*
Parliamentary scrutiny:	*None – FSA Rules are not subject to the scrutiny of Parliament; instead they are consulted upon and put before the FSA board for consideration (see section 155 FSMA).*

513. This power enables the FSA to make rules to require authorised persons to provide information to the FSA which may be passed on to the FSCS where that information is of a kind that may be useful to the FSCS in connection with its functions under the FSCS compensation scheme. This information sharing is likely to be necessary in order to facilitate the fast payout of depositors' claims.

514. The power is broad as regards to when such demands for information can be made and as to those whom information can be requested from. However, as one of the objectives of this power is to limit as far as possible any requests for information by the FSCS being viewed by observers as a signal of a firm's financial difficulties, the Government expects the FSA to make a rule establishing standing obligations for firms to make standardised information available where the FSA deems such information as being of a kind to be useful to the FSCS in connection with its functions under the scheme.

515. This power is to be exercised in connection with the FSA's routine functions under Part 15 of the FSMA and is also to be exercised in connection with the FSCS's functions and operation under that Part. Therefore, it is appropriate provisions regarding information gathering and sharing may be made by the FSA as part of its rules. In addition, these rules may need to be changed regularly in order to keep apace, and be consistent with, differing regulatory reporting requirements, therefore, it is appropriate that the firm's regulator should make such rules.

PART 5: INTER-BANK PAYMENT SYSTEMS

516. This section sets out:

a) an overview of inter-bank payment systems and the need for formal regulation; and

b) a detailed discussion of each of the delegated powers taken in this Part of the Bill.

Overview: inter-bank payment systems

517. Inter-bank payment systems comprise networks for the electronic transfer of cheques, money or credit between participating members.[53] A typical payment system will comprise: a scheme company or unincorporated association; members (mainly but not exclusively financial institutions); rules established by the scheme operator covering such matters as settling claims (i.e. payment instructions) between members; and a system in which members input instructions to transfer payments. In some cases, these systems are embedded in investment exchanges and clearing houses.

518. Almost every financial transaction involves some form of electronic payment therefore, robust and effective systems for payments are essential to the proper functioning of the financial markets and the economy.

The need for formal oversight and regulation

519. The inter-linkages between payment systems, banks and other financial intermediaries mean that any disruptions to payment systems could give rise to very serious consequences for continuing operation of the financial system, ultimately affecting businesses and consumers.

520. For example, problems in large value wholesale inter-bank payment systems have the potential to disrupt payments for large financial transactions and currency swaps which could lead to liquidity difficulties for participant banks, and result in contagion to other institutions, thereby causing a threat to financial stability.

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[53] Examples of such systems include systems for the payment of financial contracts such as derivatives, systems to effect automated payments such as direct debits, payroll systems and systems used by the Government for benefit payments.

Moreover, the failure of a payment system would have the potential to cause considerable inconvenience and hardship to significant numbers of businesses and people, for example if benefits payments or salary payments could not be credited to peoples' accounts.

521. At present, payment systems are not subject to formal regulation. Instead, the Bank of England undertakes oversight on a non-statutory basis, focusing on promoting the robustness and resilience of key UK inter-bank payment systems, while the FSA has a statutory responsibility for the regulation of recognised investment exchanges[54] and recognised clearing houses[55] which may include inter-bank payment systems. However, in view of the potential threats posed by payment systems to financial stability, and their importance to business and other interests throughout the UK, the Authorities consider it appropriate that to establish a formal regime for the oversight and regulation of inter-bank payment systems.

522. Accordingly, Part 5 of the Bill confers on the Bank of England powers to oversee "recognised" payment systems. Under clause 181(1), the Treasury may make a recognition order specifying that an inter-bank payment system is recognised for the purposes of this Part on the grounds that any deficiencies in the design of the system, or any disruption of its operation, would be likely to (a) threaten the stability of, or confidence in, the UK financial system; or (b) have serious consequences for business or other interests throughout the UK.

523. A recognised payment system will be required to have regard to principles (clause 185) and comply with codes of practice (clause 186), system rules (clause 187) and directions issued by the Bank of England (clause 188). Failure to comply with these measures may result in public censure (clause 194) or the imposition of a financial penalty on the operator of a recognised payment system (clause 195), and the disqualification of a person from being an operator of a recognised system (clause 197). Where it appears that a compliance failure threatens the stability of the UK financial system, or has serious consequences for business or other interests throughout the UK, the Bank of England may order the operator of the payment system to stop operating the system for a specified period, until further notice, or to close it permanently (clause 196).

Delegated powers

Clause 185 – Principles

Power: *To publish principles*

Body: *Bank of England*

Parliamentary scrutiny: *None*

524. Clause 185 confers on the Bank of England the power to publish principles to which the operators of a payment system are to have regard. The Government notes that the power to publish principles is not in itself a delegated legislative power. However, it is considered in brief here.

525. The principles are intended to provide high-level, overarching guidance on the general conduct of the operation of recognised inter-bank payment systems.

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[54] For example, the London Stock Exchange.

[55] For example, Euroclear Ltd and LCH Clearnet Ltd.

526. It is expected that the principles will largely be based upon and reflect the principles published by the Committee on Payment and Settlement Systems (CPSS): the Core Principles for Systemically Important Payment Systems.[56] This clause formalises an aspect of the existing structure of oversight, under which the Bank of England currently expects operators of inter-bank payment systems to take account of the Committee on Payment and Settlement Systems' "Core Principles for Systemically Important Payment Systems".

527. It is appropriate for the Bank of England to publish these principles because it has experience and expertise derived from its existing role as the non-statutory regulator of inter-bank payment systems in the UK.

528. If the Bank of England thinks the operator is not taking sufficient account of the principles, it can require an expert to be appointed to prepare a report on the operation of the payment system (clause 192).

Clause 186 – Codes of practice

Power:	*To publish codes of practice*
Body:	*Bank of England*
Parliamentary scrutiny:	*None*

529. This clause enables the Bank of England to publish codes of practice in relation to the operation of recognised inter-bank payment systems.

530. The codes of practice may set out uniform requirements that are to apply to all recognised inter-bank payment systems, or alternatively may be tailored to specific payment systems. They are intended to function as a flexible mechanism to set binding standards that can be applied, as appropriate, to one or more recognised inter-bank payment systems as needed.

531. The codes of practice will focus on a more specific level of detail than the principles published under clause 185. So, for example, a code of practice may require certain types of system to observe specific minimum standards in relation to business continuity, messaging standards, or levels of resilience, whereas the principles (clause 185) are intended to provide high-level, over-arching guidance.

532. This power is necessary so that the Bank of England can, where appropriate, set out requirements regarding the operation of recognized inter-bank payment systems in order to help safeguard the stability of the financial system and the reliance placed upon payment systems by business and other interests throughout the UK.

533. It is appropriate for the Bank of England to have the power to publish these codes of practice because the Bank of England has existing expertise in the operation and oversight of payment systems and is to have a new financial stability mandate. As such, the Bank of England is extremely well placed to draft the codes which will embody detail of best practice and safeguards for the purposes of, amongst others, minimising risks to financial stability.

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[56] The CPSS was set up by the G10 in 1980, which monitors and analyses developments in domestic and cross-border payment, clearing and settlement systems. The principles cover matters such as understanding and managing financial risks; operational resilience, efficiency and effective governance.

Clause 200 – Fees

Power:	*To make regulations as to the scale of fees*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

534. This provision enables the Bank of England to require operators of recognised inter-bank payment systems to pay fees. Subsection (2) provides that the requirement must relate to a scale of fees approved by the Treasury by regulations.

535. The Bank does not currently intend to charge fees for its routine oversight of payment systems under this Part, and will instead meet its costs from its overall budget for financial stability policy functions (as is presently the case for its non-statutory oversight). However, this clause would ensure that the Bank could continue to resource its oversight activity in the event that the overall funding model changed.

536. In addition, where the Bank incurs exceptional expenses in relation to its oversight activities, for example due to the engagement of an expert to compile an independent report (clause 192), the Bank may aim to recover those costs from the system concerned.

537. Although the Bank of England is best placed to regulate payment systems, the Treasury considers it appropriate to maintain control over the level of fees that may be charged.

538. It is envisaged that the level of fees would undoubtedly change over time (for example, to take into account inflation). Further, as the fee scale is likely to be detailed, it is considered appropriate that provision should be set out in secondary legislation.

539. The negative resolution procedure provides an appropriate degree of Parliamentary oversight over a subject-matter which is unlikely to be contentious. Any fees would relate to the activities performed by the Bank of England and would not be expected to exceed a cost recovery basis.

Clause 201 – Information

Power:	*To make regulations as to the sharing and publication of information*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

540. This clause enables the Bank of England to require operators of payment systems to provide information. The Bank of England may, by virtue of subsection (4), share the information with the Authorities, equivalent authorities overseas and other central banks and international banks.

541. The gathering and sharing of information plays a fundamental role in the new framework governing the formal oversight of payment systems. The very decision to recognise a payment system – the starting premise of the whole structure – in informed by information that can be obtained by virtue of this clause.

542. The sharing of information with international counterparts is important, because it allows the authorities to build up a picture of the interdependencies between systems and participants within and beyond the UK.

543. Subsection (6) enables the Treasury to make regulations to permit the disclosure of information obtained by the Bank of England under this clause to a specified person. This provision is needed in order to ensure that the Bank of England will not be impeded, subject to statutory limits, in the event that it needs to share information in relation to a recognised payment system.

544. The Bank of England may also publish information obtained by virtue of subsection (7). Subsection (8) enables the Treasury to make regulations about the manner and extent of publication.

545. This power enables the Treasury, as appropriate, both to require the Bank to make certain publications (such as the annual report it currently produces) and to set limits on the manner and extent of publication. It is envisaged that the Treasury may specify in regulations safeguards in respect of the disclosure of, for example, commercially sensitive information. It is appropriate to confer such a power on the Treasury, particularly bearing in mind the data protection and Article 8 ECHR issues arising in relation to the publication or dissemination of information obtained by the Bank.

546. It is likely that both sets of regulations will be detailed, and it would be inappropriate to set out such detail in primary legislation. In addition, secondary legislation provides the necessary flexibility to make and amend legislation as appropriate to reflect any need to share information with, for example, newly formed international bodies concerned with the regulation and oversight of inter-bank payment systems. Therefore, it is appropriate for the Treasury to have the power to legislate by way of secondary legislation. The draft regulations are likely to be uncontroversial and technical in nature, therefore, the negative resolution procedure is considered appropriate and provides Parliament with adequate opportunity to scrutinise the draft regulations.

PART 6: BANKNOTES: SCOTAND AND NORTHERN IRELAND

547. This chapter sets out a discussion of:

a) the need to repeal and replace certain existing provisions regulating banknote issuance; and

b) a detailed discussion of the delegated powers taken in this Part of the Bill.

548. A number of commercial banks in Scotland and Northern Ireland have permission to issue their own banknotes.[57] Part 6 of the Bill repeals and replaces certain existing provisions regulating this practice,[58] but only for banks which already have permission to issue banknotes.

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[57] These banks are: Scotland: Bank of Scotland (a subsidiary of HBOS); Clydesdale (a subsidiary of National Australia Bank Limited); and Royal Bank of Scotland. Northern Ireland: Bank of Ireland; First Trust Bank (trading name of AIB Group (UK) plc); Northern Bank (a subsidiary of Danske Bank); and Ulster Bank (owned by RBS).

[58] Set out for the most part in the Bank Notes (Scotland) Act 1845, the Bankers (Ireland) Act 1845 and the Bankers (Northern Ireland) Act 1928 ("the current legislation").

The need for regulatory reform

549. The existing legislation requires commercial issuing banks to hold specified assets – Bank of England notes and current UK coin – equal to their notes in circulation above a small absolute value. However, deficiencies in the current reporting regime mean that issuing banks may not currently hold assets equal to the full value of their notes in circulation at all times.

550. Moreover, as banknotes are not covered by deposit protection schemes if a note-issuing bank were to encounter financial difficulties, noteholders may become concerned that they may not be able to obtain full face value for the notes it the bank were to enter into insolvency (as defined in clause 214(6)). It is possible that this concern could lead to holders of Scottish and Northern Ireland banknotes seeking to convert their notes into Bank of England notes. In an extreme case, this in turn could destabilise the note-issuing bank and have a negative effect on its reputation. There could also be wider repercussions for the financial system more generally if it were thought that some parts of the currency were not fully backed.

551. Part 6 aims to enhance noteholder protection and afford holders of Scottish and Northern Ireland banknotes a similar level of protection to holders of Bank of England banknotes so, in the unlikely event of an issuing bank failing, they can expect to obtain value for their banknotes. The provisions enhance two key areas in order to offer this increased protection:

    a) backing assets are to be ring-fenced for the benefit of noteholders in the event of the bank's insolvency; and

    b) backing assets are to be held at all times.

552. Clauses 212 and 213 are key provisions of Part 6. They provide the powers under which the framework for the backing asset regime can be established, which underpins the Treasury's policy of providing protection for holders of banknotes issued by commercial banks in Scotland and Northern Ireland. The regulations should ensure that, in the event an authorised bank becomes insolvent, noteholders will be able to obtain full value for their notes from the backing assets. This will underpin financial stability and the security of the currency.

Delegated powers

553. This subsection is split between:

    a) powers in relation to banknote regulations; and

    b) powers in relation to banknote rules.

Banknote regulations

Clause 212 – Banknote regulations

Power:	*To make regulations about the treatment, holding and issuing of banknotes by authorised banks*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

554. This provision confers on the Treasury the power to make regulations ("banknote regulations") about the treatment, holding and issue of banknotes by authorised

banks. Subsequent clauses within this Part of the Bill make more detailed provision about what the banknote regulations may or must contain.

555. The draft affirmative resolution procedure is considered most appropriate for the banknote regulations to be made under Part 6 of the Bill. It is recognised that the powers conferred on the Treasury are quite broad in nature, although they are considered necessary for the reasons set out below. For that reason, and because the regulations themselves will confer powers on the Bank of England to make rules setting out the finer details of the regime, it is considered appropriate and necessary that Parliament should be able to debate the regulations fully. In addition, the regulations confer the power on the Treasury to modify or disapply provisions of the law about insolvency (clause 214(5)(a)) in relation to backing assets. Hence, the draft affirmative resolution procedure is most appropriate.

556. In addition, clauses 214, 215, 216, 217, 219, 220, 221 and 223 provide for what regulations made under this power may contain.

Clause 214 – Backing assets

557. Clause 214(1) provides that the banknote regulations must require authorised banks to have backing assets. This term is defined in subsection (2) to mean such assets as may be specified by the banknote regulations. Subsection (3) provides that the banknote regulations must require the banknote rules to include provision for determining the value of backing assets to be held.

558. Clause 214(4) also provides that the banknote regulations may make other provision about backing assets and sets out a non-exhaustive list of examples of such provisions.

559. As regards the power to determine what may constitute backing assets, the Bill itself specifies a number of types of assets that may be held as backing assets (subsection (2)). However, this list is not exhaustive, which means that the Treasury has the necessary flexibility to ensure banks hold appropriate backing assets. For example, in the future, it may be that banknotes and coin will be replaced by funds held in a sterling account at the Bank of England. However, this form of backing asset may not always be considered to be appropriate. Alternatively, it may be that, as banking practices develop, other forms of backing asset may be deemed to be more appropriate. Delegated legislation provides the necessary flexibility to adapt to changing circumstances.

560. Subsection (5) provides that provision may be made in banknote regulations for the treatment of backing assets in relation to insolvency. Such provisions are vital to ensure that the backing assets are properly protected for the noteholders in the event of the insolvency of the failing bank. Paragraph (a) provides that the regulations may modify or disapply provisions or rules of law about insolvency, as defined in paragraph (6). This power is needed to make technical amendments to the law of insolvency to ensure backing assets can be properly ring-fenced for the benefit of noteholders.

561. Paragraph (b) of subsection (5) confers a power to make any further provision needed to ring-fence the backing assets for the benefit of noteholders. Paragraphs (c) to (f) provide for a note exchange programme, under which, in the event of the insolvency of an authorised bank, noteholders may exchange their notes for an equivalent amount of Bank of England notes or funds. These matters will be technical. Moreover, it is envisaged that they may need to be changed and fine-tuned depending on circumstances and experience. They are therefore better suited to delegated legislation.

Clause 215 – Information

562. Clause 215 provides that the banknote regulations or rules may make provision about reports and information to be provided by authorised banks. It also provides that regulations or rules may make provision enabling the publication or disclosure of information provided in accordance with such regulations or rules. As the Bank of England will be regulating commercial issue of banknotes, it is best placed to determine which reports and information are required in order for it to fulfil this role. The information required may vary from time to time. It will also depend on other matters addressed in delegated legislation, for example, the assets specified by the regulations as constituting backing assets and the provisions for determining the value of backing assets to be held. For these reasons, the provisions on information are best placed in delegated legislation.

563. Clause 215 also provides that the banknote regulations may make provision enabling the disclosure or publication of any breaches of Part 6, the banknote regulations or the rules, or of any enforcement action taken. This is to assist in the enforcement of Part 6 of the Act, and the information which may be published may vary from time to time, depending on the circumstances. This is part of the enforcement regime and is intended to act as a deterrent against compliance failures. It also provides a mechanism under which the Treasury and the Bank of England can establish a transparent disciplinary process. It is intended that any release of information in relation to this power will be both appropriate to and supportive of the Bank of England's role as a regulator. It will also be proportionate to the breach in question. Delegated legislation is most appropriate for these purposes as it provides the necessary flexibility to enable the provisions to reflect the circumstances.

Clause 216 – Ceasing the business of issuing notes

564. Clause 216(2) provides that banknote regulations or rules to specify procedures to be followed by an authorised back that intends to stop issuing banknotes. Delegated legislation is considered most appropriate, as these matters as they will be procedural and technical and may vary from case to case.

Clause 217 – Insolvency & c.

565. Clause 217 enables the Treasury to make provision in banknote regulations in connection with the application of the special resolution regime and the insolvency of an authorised bank. Subsection (2) provides that the banknote regulations may make particular provision for the destruction of exchanged and unauthorised notes, and therefore deals with technical matters best suited to secondary legislation. Subsection (6) permits the banknote regulations to make transitional provisions in this regard. The intention of this provision is to confer the necessary flexibility to enable the failed bank's notes to be withdrawn from circulation. Delegated legislation is most appropriate for these purposes as it provides the necessary flexibility to enable the provisions to reflect the circumstances (and what happens in practice).

566. Subsection (7) enables the Treasury to specify in regulations that references to the special resolution regime are to include references to provisions of a non-UK law that serve a similar purpose. This is to enable the regime to accommodate issuing banks that are incorporated in countries other than the UK. There is currently one such issuer – the Bank of Ireland – which is incorporated in the Republic of

Ireland.[59] Delegated legislation is considered most appropriate for this purpose as there needs to be flexibility in specifying the relevant non-UK laws.

Clause 219 – Financial penalty

567. Clause 219 provides that the banknote regulations may make provision for the Bank of England to impose a penalty on an authorised bank that has failed to comply with the banknote regulations or rules. Delegated legislation is considered most suitable for these purposes. Not only must the penalty regime fit the rest of the regime, as set out in the regulations and rules, but it must also address detailed matters of procedure in relation to the imposition of penalties. This is also an area in which flexibility is required, particularly in relation to the amount of penalty that may be imposed.

Clause 220 – Termination of right to issue

568. Clause 220(7) provides that the banknote regulations may make transitional provisions where a bank loses the right to rely on clause 210. The intention of this provision is to confer the necessary flexibility to enable the failed bank's notes to be withdrawn from circulation. Delegated legislation is most appropriate for these purposes as it provides the necessary flexibility to enable the provisions to reflect changing circumstances.

Clause 221 – Application to court

569. Clause 221 provides that the banknote regulations may enable the Bank of England to apply to the High Court or the Court of Session for certain relief in respect of a failure to comply with banknote regulations or rules, or for an order designed to ensure, or facilitate monitoring of, compliance with a provision of the banknote regulations or rules.

Clause 223 – Discretionary functions

570. Clause 223 enables the Treasury to confer a discretionary function on the Bank of England. In particular, the Bank of England may require compliance with conditions, or make a permission or option subject to the approval of the Bank of England. The inclusion within delegated legislation allows the necessary flexibility for such discretionary functions to fit and be consistent with the details of the banknotes regime, as will be set out in the regulations and rules. Also, it provides the necessary flexibility going forward, for example, should further functions be required in light of the implementation of the regime. Furthermore, it is envisaged that this discretion will be used by the Bank of England to set detailed conditions as to the security measures employed at the sites where banknotes are stored and on vehicles where banknotes are transported. It would be self-defeating if these conditions were to appear in legislation, as they would then be in the public domain and available to those who may wish to breach such security measures.

[59] The Bank of Ireland is permitted to issue banknotes in Northern Ireland by virtue of the fact that the 1845 Banking Acts pre-date partition.

Banknote rules

Clause 213 – Banknote rules

Power:	*To make rules about the treatment, holding and issuing of banknotes by authorised banks*
Body:	*Bank of England*
Parliamentary scrutiny:	*The Bank of England may only make rules pursuant to powers set out in banknote regulations. The regulations are subject to an affirmative procedure, and so the powers will be scrutinised by Parliament. However, the rules themselves are not subject to Parliamentary scrutiny*

571. Clause 213(1) provides that the banknote regulations may require or permit the Bank of England to make rules ("banknote rules"). Subsection (2) provides that the banknote regulations may require or permit banknote rules to do anything banknote regulations may do. Subsequent clauses set out more detail about what the rules must or may contain.

572. The banknote rules are intended to set out more technical matters and procedures relating to the issue of banknotes, and these may touch on any aspect of the treatment, holding or issuing of banknotes. The fact that the Bank of England may only make rules where authorised to do so in the banknote regulations means that Parliament will have the opportunity to scrutinise and debate the width of the powers given to the Bank of England when it considers the banknote regulations. It was therefore considered appropriate to maintain the potential breadth of the rule-making power in the primary legislation itself.

573. It is appropriate to confer this power on the Bank of England because the Bank of England is concerned with the day-to-day detail of how the system works and is therefore able to design rules that ensure the security for the currency and the this regime works for the industry.

574. Clauses 214, 215 and 216 provide for what rules made under this power may contain.

Clause 214 – Backing assets

575. As regards the requirement for the banknote rules to include provision for determining the value of the backing assets to be held (clause 214(3)(a)), flexibility is required in relation to how this value should be determined (for example, the point at which it should be measured). This will enable any future developments or refinements to be taken into account. Furthermore, it may be necessary to provide a complicated and detailed formula for the calculation of the backing assets, and such a level of detail would be inappropriate in primary legislation. The Bank of England has the relevant expertise for determining the rules for evaluating the backing assets, and it is considered that such detail is best located in the banknote rules.

576. The matters to be addressed by banknote rules made under clause 214(3)(a) are likely to be quite detailed and technical matters, which would be inappropriate in primary legislation. For example, provisions enabling the Bank of England to determine the physical conditions under which backing assets may be held, and the circumstances in which backing assets may be held by an agent of the authorised bank.

Clause 215 – Information

577. Paragraphs 562 to 563 describe the provisions that rules under clause 215 may make.

Clause 216 – Ceasing the business of issuing notes

578. Paragraph 564 describes the provisions that rules under clause 216 may make.

PART 7: MISCELLANEOUS

579. This section sets out a number of miscellaneous provisions relating to:

a) the definition of "financial institution";

b) the functions of the FSA;

c) the provision of financial assistance to building societies; and

d) financial collateral arrangements.

Clause 227 – "Financial institution"

Power:	*To specify by order whether specified institutions or institutions of a specified class are or are not to be treated as financial institutions for the purposes of clauses 225 and 226*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

580. This provision enables the Treasury to define more precisely the kinds of financial institution other than banks to which financial assistance may be given out of money Voted by Parliament (clause 225) or to which loans may be made using money drawn from the National Loans Fund (clause 226). Such a power is needed as the term "financial institution" potentially encompasses a broad and imprecise range of businesses and it be may be necessary to put beyond doubt the businesses to which financial assistance or loans may be granted. The negative procedure is considered appropriate for a power of this kind as such orders may have to be made very quickly during a period of financial difficulties, or when Parliament is not sitting.

Clause 239 – Functions

Power:	*To disapply a provision in respect of the purpose of the FSA's functions under the Banking Bill*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

581. This clause ensures that the functions conferred on the FSA by virtue of the Banking Bill are considered functions for the purposes of the provisions of the FSMA ((see subsection (1)), the Act under which the FSA operates and any other enactment (see subsection (2)). This is to ensure that a variety of FSA powers and other provisions are available in relation to the functions under the Bill.

582. Subsection (3) of this clause enables the Treasury by order to disapply the provisions in subsections (1) and (2) to the extent specified in the order. This is in case, now or in the future, a provision may apply to the FSA's functions but there

may be a need to ensure that the provision does not apply for the purpose of the functions under the Banking Bill.

583. This provision would include the power to disapply provisions in primary legislation. Accordingly, it has been made subject to the affirmative procedure.

Clause 241 – Financial assistance to building societies

Power:	*To amend legislation in relation to building societies in order that the Treasury may be enabled to make provision for financial assistance to building societies by the Treasury, the Bank of England and other central banks including the European Central Bank, or in relation to financial assistance provided by these bodies.*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

584. The purpose of the power in this clause is substantially similar to that in section 11 of the Banking (Special Provisions) Act 2008 (c.2) which covers the same subject matter. The power concerns modifications to legislation relating to building societies for purposes relating to the provision of financial assistance to building societies by the Bank of England, other central banks (including the European Central Bank) and the Treasury. The proposed new power includes the possibility of financial assistance being provided by a wider range of public authorities and in wider circumstances that was covered by section 11 of the Special Provisions Act.

585. As with section 11 of the Special Provisions Act, the reason for the power is to remove obstacles to the provision of financial assistance by the specified authorities. The new provision covers the same ground as section 11, namely where the financial assistance is provided for the purpose of maintaining financial stability, but would also allow the relevant authority to provide funding beyond such situations in carrying out its functions.

586. The powers in question allow for the modification (or disapplication to a specified extent) of provisions of the Building Societies Act 1986, which may be obstacles to the provision of financial assistance by the listed public authorities. The provisions of the Building Societies Act 1986 in question include sections 5 (establishment, constitution and powers) (including Schedule 2), 6 (the lending limit), 7 (the funding limit) (including Schedule 2), 8 (raising funds and borrowing), 9A (restrictions on certain transactions), 9B (restriction on creating floating charges), 90 and 90A (application of companies winding up and other companies insolvency legislation to building societies) (including Schedules 15 and 15A). The power also allows for other provisions of the Building Societies Act 1986 and other legislation to be modified etc. within the scope of the specified public authorities providing financial assistance to building societies.

587. Subsection (8) of this clause may be used by the Treasury to amend section 9B of the Building Societies Act 1986 (prohibition on granting floating charges) with regard to transactions building societies may enter into in using, giving effect to or taking advantage of financial assistance received from the public authorities specified in subsection (1). The transactions in question may be entered into with third parties, other than the Authorities.

588. In particular, the Treasury has in mind the difficulties that may be faced by building societies because of their inability to grant floating charges in making financial

support received from the Authorities (typically in the form of Treasury Bills) liquid in a manner which is low-cost and low-risk for the society in question.

589. The power in subsection (8) can be exercised where the Treasury think that the order "is likely to help a building societies to use, give effect to or take advantage of financial assistance of the kind specified in subsection (1). Any amendments made under this power would be limited in scope, applying only to Section 9B of the Building Societies Act.

590. The Treasury made an order under section 11 of the Special Provisions Act (see the Building Societies (Financial Assistance) Order 2008, S.I. 2008/1427) which includes the sort of provisions likely to made under the new order-making power. It is considered right to retain this new provision as an order making power rather than making provision in primary legislation for this subject matter, for a number of reasons:

a) first, because this is a highly complex area dealing with the interactions between building society and insolvency law and the law of security, and flexibility is required in how provision can be made;

b) second, the new power is somewhat broader than the existing power in section 11, especially in relation to which authorities may provide financial assistance for the purposes of this clause.;

c) third, it is also an area requiring considerable detail to be set out which would not be appropriate in primary legislation;

d) fourth, certain provisions of building society legislation, for example, equalisation of shareholder and creditor rights in winding up and dissolution, are subject to change in the light of the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 (c.26), thus it is important that provision in this field can take account of such changes; and

e) finally, the power in subsection (8) relates to financial assistance given to building societies under schemes that have been introduced on a temporary basis during 2008; the schemes are subject to review and may change or be replaced by more permanent arrangements, hence flexibility is needed to ensure that the schemes work in particular for building societies.

591. As with section 11, this power is being taken as a precaution. It would clearly be highly undesirable for the public authorities to not be able to provide financial assistance to a building society because of a provision of building society or relevant insolvency legislation.

592. The procedure provided for the making of orders under this clause is the draft affirmative procedure, which will allow Parliament the opportunity to scrutinise the provision made which will be especially important in relation to any new provision made not presently contained in the 2008 Order.

Clause 245 and 246 – Regulations – financial collateral arrangements

Power:	*To make regulations about financial collateral arrangements*
Body:	*Treasury*
Parliamentary scrutiny:	*Draft affirmative procedure*

593. The purpose of the Treasury taking the power to make regulations generally about financial collateral arrangements is the importance of these transactions in the financial markets. The background to the power is the EU Financial Collateral Arrangements Directive (2002/47/EC). This Directive is implemented in UK law by the Financial Collateral Arrangements (No.2) Regulations 2003, S.I. 2003/3226. The power exercised to make the regulations was section 2(2) of the European Communities Act 1972 (ECA). The power under the ECA relates to the scope of the Directive and the Treasury takes the view that a wider power is necessary to allow Treasury to consider making regulations that cover a wider field in future, in order to make provision that more effectively covers the giving and taking of financial collateral under UK law. The type of issue where the new power would enable further provision to be made includes that concerning the types of security covered. The Directive requires for example that the type of security covered by financial collateral arrangements provides for control of the secured assets, but does not provide a definition of what control is. The recitals quoted below refer to control and the concept of dispossession.

> Recital 9 – "In order to limit the administrative burdens for parties using financial collateral under the scope of this Directive, the only perfection requirement which national law may impose in respect of financial collateral should be that the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf while not excluding collateral techniques where the collateral provider is allowed to substitute collateral or to withdraw excess collateral."
>
> Excerpt from recital 10 – "This Directive must however provide a balance between market efficiency and the safety of the parties to the arrangement and third parties, thereby avoiding inter alia the risk of fraud. This balance should be achieved through the scope of this Directive covering only those financial collateral arrangements which provide for some form of dispossession, i.e. the provision of the financial collateral, and where the provision of the financial collateral can be evidenced in writing or in a durable medium, ensuring thereby the traceability of that collateral."

594. This question of control may mean that certain floating charges may fall outside of the present regulations. Treasury intends to consider how this issue may be provided for in future.

595. The reason that this field should be left to secondary legislation is that this is a highly complex area which deals with dynamic markets. Therefore it is vital that Treasury to retain flexibility to make new provision in the field. This is a field covered by an EU Directive and is relevant to other EU law thus it must be possible to make changes in the light of changes to EU law in this field. Financial collateral arrangements are not only relevant to the efficiency of the financial markets (and indeed to certain other lenders and borrowers more generally), but also to financial

stability concerns, for example, the Directive makes provision for the modification of certain insolvency provisions. In present market conditions it is important that the Treasury has powers to make appropriate provision in this field.

596. The sheer complexity and technicality of the provision which needs to be made means this is an area where secondary legislative powers would typically be taken to provide a legislative regime. In particular this means that where changes to the regime are proposed, fuller consultation on the specific issue with stakeholders and experts in the field can be carried out, to ensure the regime works efficiently. The Treasury proposes to consult on any substantial changes to the coverage of regulations made under the new power.

597. The Treasury has chosen to apply the 28-day affirmative procedure to these regulations (clause 246(1)). This will give Parliament an opportunity to scrutinise all provisions made in the regulations. The provision provides that actions undertaken under the regulations before the lapse in the regulations, where either House has declined to approve the regulations are saved. This provision is against the background that legislation in this field must provide for as near legal certainty as is attainable, since the capital provided under a financial collateral arrangement is priced on the basis of the risk of the transaction. Without the provision enabling transactions prior to Parliamentary approval to be saved the market would not rely on the regulations if transactions could be overturned where the regulations were not approved. This would be particularly unfortunate if the provision made was urgently required.

598. The clause also includes power to make specified and limited provision on a retrospective basis. The reason for taking such a power is the challenge by way of judicial review in the High Court to the vires used to make the Financial Collateral Arrangements (No.2) Regulations 2003 (S.I. 2003/3226) (2003 Regulations), which implement the Directive. The High Court (Moses LJ) refused the Claimant's application for permission to apply for judicial review, and refused their application for permission to appeal that decision, on 29 September 2008. No appeal has been lodged against that judgment. Notwithstanding the failure of the challenge and the lack of appeal the Treasury believe that it is justified and perfectly reasonable and sensible to take contingency measures especially in relation to important legislation that would have a significant impact on the market were the regulations to be quashed as a result of any further challenge. The extent of the retrospective power is limited and does not cover the full range of the general power referred to in the clause, but concerns potential re-enactment of the 2003 Regulations and connected matters.

PART 8: GENERAL

599. This part makes further miscellaneous provision in relation to:

a) the definition of "financial assistance";

b) the repeal of Acts; and

c) the commencement of the provision of the Bill.

Clause 247 – "Financial assistance"

Power:	*To specify by order whether specified activities or transactions or institutions or a specified class of activity or transaction are or are not to be treated as financial assistance for the purposes of the Bill*
Body:	*Treasury*
Parliamentary scrutiny:	*Negative procedure*

600. This provision enables the Treasury to define more precisely what constitutes financial assistance. Such a power is needed as the term "financial assistance" potentially a broad range of ways in which support may be given to banks and other financial institutions in difficulty and it may be necessary to clarify what can be done. The negative procedure is considered appropriate for a power of this kind as such orders may have to be made very quickly during a period of financial difficulties, or when Parliament is not sitting.

Clause 252 – Repeal

Power:	*To repeal the Banking (Special Provisions) Act 2008*
Body:	*Treasury*
Parliamentary scrutiny:	*None*

601. This clause confers a power on the Treasury to repeal provisions of the Banking (Special Provisions) Act 2008.

Clause 253 – Commencement

Power:	*To make provision to bring into force provisions of the Banking Act*
Body:	*Treasury*
Parliamentary scrutiny:	*None*

602. This clause confers a power on the Treasury, by order, to bring into force provisions of the Act. Subsection (3) states that an order under subsection (1) may make provision generally or only in relation to specific provisions or purposes; may make different provision for different provisions or purposes; may include incidental or transitional provisions (including savings); and shall be made by statutory instrument. It is of course conventional to include such provision.

HM Treasury

December 2008

APPENDIX 2: LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL [HL]

Memorandum by the Department for Communities and Local Government

Introduction

1. This Memorandum describes the purpose and content of the Local Democracy, Economic Development and Construction Bill; identifies the provisions of the Bill which confer delegated powers on the Secretary of State and others; and explains why the power has been taken and the nature of, and the reason for the procedure selected. There are no delegated powers in Part 1 Chapter 4 – Housing or Part 8 – Construction Contracts of this Bill, which need to be bought to the attention of the Committee.

2. Any reference to the "appropriate national authority" is a reference to the Secretary of State, in relation to England, and the Welsh Ministers, in relation to Wales. A reference to the "Assembly" is a reference to the National Assembly for Wales.

Background and purpose of the Bill

3. The Bill gives effect to the Government's proposals to create opportunities for community and individual empowerment, to promote economic development and reform the construction sector.

4. In December 2007, the report of the Councillors Commission *Representing the future* was published. The report was an independent review of the incentives and barriers that encourage or deter people from standing for election as councillors. In July 2008, the Government provided a response to the report in The Government Response to the Councillors Commission which detailed the recommendations the Government would be taking forward.

5. Also in July 2008, the Government published the White Paper *Communities in Control: real people, real power* which set the Government's proposals for empowering local communities, including a duty to promote democracy, a duty on local authorities to respond to petitions, strengthening overview and scrutiny, extending the duty to involve, and establishing a "national tenant voice". These proposals are reflected in Part 1 of the Bill.

6. In January 2007, the Committee for Standards in Public Life (CSPL) published its Eleventh Report, *Review of the Electoral Commission*. As part of a package of recommendations intended to allow the Electoral Commission to focus on its core tasks relating to party political funding and campaign expenditure, the CSPL made two recommendations relating to the Boundary Committee for England:

    - the Electoral Commission should no longer have any involvement in electoral boundary matters and the provision in the Political Parties, Elections and Referendums Act 2000 to allow the transfer of boundary setting functions in England, Scotland and Wales to the Commission should be repealed; and
    - the Boundary Committee for England should become an independent body in line with local government boundary commissions in the rest of the United Kingdom.

    These recommendations are taken forward in this Bill in the provisions relating to the Boundary Committee for England.

7. In February 2001, Lord Sharman's independent review into the audit and accountability of public money *Holding to Account: The Review of Audit and Accountability for Central Government* was published. Recommendations from this review are taken forward in this Bill in the provisions relating to audit.

8. In July 2007, the Government published the *Review of Sub-National Economic Development and Regeneration*. The review set out possible reforms that could be made which would affect regions and local authorities. In March 2008, the Government published the consultation document *Prosperous Places: Taking forward the Review of Sub National Economic Development and Regeneration*. The consultation paper asked for views on a range of proposals including an integrated regional strategy, a duty on local authorities to produce an economic assessment, and statutory arrangements for sub-regional collaboration including statutory multi-area agreements and statutory sub-regions. The consultation closed on 20 June 2008. The provisions relating to economic development follow from this.

9. In March 2004, the Chancellor of the Exchequer announced a review of Part 2 of the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act) as regards England and Wales. The review was published in September 2004. As a consequence of its findings, the Secretary of State for Trade and Industry and the Welsh Assembly Government together consulted in 2005 on broad proposals to amend Part 2 of the 1996 Act. This was followed by a second consultation in the summer of 2007 which set out detailed amendments to Part 2.

10. In July 2008, the Department for Business, Enterprise and Regulatory Reform published in draft the Construction Contracts Bill for pre-legislative scrutiny. A form of the draft clauses published is taken forward in this Bill.

Summary of the Bill

11. The Bill is divided into nine Parts:

Part 1 – Democracy and Involvement -

Chapter 1 places duties on principal local authorities to promote understanding among people who live, work or study in the area of their decision-making arrangements and those of various other public authorities who provide or influence the provision of services in relation to their areas and the opportunities which exist to participate in those arrangements. A duty will also be placed on principal local authorities to promote understanding of particular civic governance roles including lay justices, courts board members, members of youth offending teams and monitoring board members.

Chapter 2 requires principal local authorities in England and Wales to make schemes for members of the public to make petitions (including electronic petitions) and for those authorities to respond to them.

Chapter 3 imposes a duty on public authorities to involve representatives of local persons in the exercise of its functions.

Chapter 4 makes provision for the Secretary of State to give financial or other support to a body that will represent the interests at national level of housing tenants in England. It also makes consequential amendments to the Housing and Regeneration Act 2008 to provide that such a body nominated by the Secretary of must be consulted on certain matters by the regulator of social housing.

Part 2 – Governance and Audit -

Chapter 1 requires unitary and top-tier local authorities to designate one of their officers as 'scrutiny officer', to support the work of the authority's overview and scrutiny committee(s), and broadens the remit of joint overview and scrutiny committees.

Chapter 2 allows for an audit authority to appoint an auditor to an entity connected to one or more local authorities in England and Wales and for the auditor to issue a public interest report where it is in the public interest to do so. For the purposes of the Chapter an "audit authority" is the Audit Commission for Local Authorities and the National Health Service in England ("the Audit Commission") and the Auditor General for Wales in Wales ("AGW").

Part 3 – Boundary Committee for England – makes provision for the establishment of an independent Boundary Committee for England ("the BCE"). It provides for the transfer of the functions of the current Boundary Committee for England, which is a statutory committee of the Electoral Commission, to the new BCE, and for the BCE to exercise those functions without the involvement of the Electoral Commission.

Part 4 – Local Authority Economic Assessments – this places a duty on principal local authorities to prepare an assessment of the economic conditions of its area. In preparing the assessment, the authority must consult "partner authorities" and other persons as appropriate.

Part 5 – Regional Strategy - regional strategies are intended to replace regional spatial strategies under Part 1 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and regional economic strategies under section 7 of the Regional Development Agencies Act 1998. A regional strategy would become part of the development plan for an area.

Part 6 – Economic Prosperity Boards and Combined Authorities – this Part provides for the creation of economic prosperity boards and combined authorities in relation to local government areas in England.

Part 7 – Multi-Area Agreements - this Part provides for multi-area agreements ("MAAs"), which are agreements between two or more local authorities and certain partner authorities, approved by the Secretary of State, that include targets for the improvement of the social, economic or environmental well-being of their areas. Under these provisions a group of local authorities can apply for a direction for a MAA to be prepared by one of them (the "responsible authority"). The result of this will be to place the responsible authority under a duty to consult partner authorities, and, where appropriate others (including persons from the voluntary and community sector and local businesses). The local and partner authorities are placed under a duty to co-operate in the development of the MAA, and to have regard to the targets in it that relate to them.

Part 8 – Construction Contracts – this Part amends Part 2 of the Housing Grants, Construction and Regeneration Act 1996. Inter alia. Part 2 of the 1996 Act gives contractors under construction contracts the right to receive periodic payments; provides for the giving of advance notice by the employer to his contractor of the amounts which he proposes to pay; and introduced the right to refer disputes under construction contracts to a quick resolution process - adjudication. Part 2 of the 1996 Act is considered to be deficient in many ways, however, and Part 8 of the Bill addresses those deficiencies. The intention is to improve certainty and clarity as regards cash flow and further encourage the parties to resolve disputes by

adjudication. As regards cash flow, Part 8 will (generally speaking) prohibit clauses in construction contracts which make periodic payments conditional upon someone performing obligations under another contract; amend the existing provisions relating to the notices given by an employer of the sums which he proposes to pay; and will introduce provisions relating to the giving of notices by the contractor. Moreover, Part 8 will introduce (in most cases) a statutory requirement on the part of the payer to pay the sums specified in these payment notices. As regards adjudication, the new legislation will ensure that any agreement by the parties to a construction contract to the effect that one party will pay the costs of adjudication is only valid in certain limited circumstances. Part 2 of the 1996 Act only applies to "written" construction contracts and Part 8 of the Bill will remove this limitation.

Part 9 – Final - this Part makes general provision for the Bill including provision for commencement.

Part 1, Chapter 1 – Duties relating to promotion of democracy

Clause 2 – Democratic arrangements of connected authorities

Powers conferred on:	*the appropriate national authority*
Powers exercised by:	*order*
Parliamentary / Assembly procedure:	*negative resolution*

12. Subsection 2(6) enables the appropriate national authority to add or remove a connected authority and change any function in respect of which any authority is connected with a principal local authority for those purposes. A connected authority is an authority listed in clause 2 which the principal local authority is required to promote understanding about. We expect the connected authorities make decisions which relate to the delivery of services in the principal local authorities' area. It also enables the appropriate national authority to make other such amendments that appear to them to be necessary or expedient in consequence of adding or removing a connected authority or function of the authority. The appropriate national authority is required to consult with relevant representatives of local government and other persons as they consider appropriate before making an order.

13. The order is required to ensure that the list of connected authorities can be updated and appropriately addresses the needs of the people to whom the duty is meant to benefit. Therefore, if there is a public body which over time is no longer relevant to the community for the purposes of the duty, it can be removed from the list of connected authorities. Similarly, if it would be useful to add a new public body onto the list of connected authorities, there is a way for this to occur. It also provides a means for names of public bodies to be updated as required.

14. We consider the negative resolution procedure to be appropriate. This will be largely an administrative process as the consultation process ensures that affected connected authorities and principal councils will be aware of the forthcoming changes and of their new responsibilities in relation to the duty.

Clause 5 – Provision of information

Powers conferred on:	*the appropriate national authority*
Powers exercised by:	*order*
Parliamentary / Assembly procedure:	*negative resolution*

15. Subsections 5(3) and 5(4) provides that the Secretary of State in relation to principal local authorities in England, or in relation to Wales, the Welsh Ministers, may by order impose requirements relating to the provision of information to principal local authorities (except district councils in two-tier areas) by connected authorities for the purposes of their duties under this Chapter. This power can also be imposed in relation to court boards, monitoring boards and youth offending teams. The power is intended to only be used as a last resort in instances where particular connected authorities or justice and monitoring bodies have consistently refused to respond to requests for information by principal local authorities and/or have not provided requested information. It is expected that generally a process of negotiation and liaison would have occurred in relation with connected authorities or justice and monitoring bodies that refuse to provide information before an order is made by the appropriate national authority. The order making power facilitates principal local authorities to fulfil their statutory duty and helps to ensure that persons who live, work or study in the area are able to get access to the information they need.

16. We consider that the negative resolution procedure is appropriate for this power given that it is expected to be used as a last resort and is a means for principal local authorities to access information.

Clause 7 – Isles of Scilly

Powers conferred on:	*Secretary of State*
Powers exercised by:	*order*
Parliamentary procedure:	*negative resolution*

17. This clause enables the Secretary of State by order to provide that the provisions relating to the duty to promote democracy are to have effect in their application to the Isles of Scilly subject to such modifications as may be specified in the order. The order would be subject to the negative resolution procedure, which is considered appropriate given the very limited application of this provision.

Part 1, Chapter 2 – Petitions to Local Authorities

Clause 14 – Requirement to take steps

Powers conferred on:	*the appropriate national authority / Secretary of State*
Powers exercised by:	*order*
Parliamentary / Assembly procedure:	*negative resolution*

18. This clause requires principal local authorities to take steps in response to valid petitions which are not vexatious, abusive or otherwise inappropriate to be dealt with, or which duplicate recent petitions, if they relate to a "relevant matter". A relevant matter includes any matter relating to a function of the authority other than one specified in an order made by the appropriate national authority for the purposes of this section. Some principal local authority functions are already subject to extensive public involvement processes, such as the processes for dealing with planning applications. This power would provide flexibility to exclude such matters from the duty to take steps in relation to petitions. In the case of principal authorities in England (except non-unitary district councils) "relevant matter" includes a matter relating to improvements in the economic, social or environmental well-being of the authority's area where any partner authority could contribute to that improvement. The power to exclude matters from the definition of relevant matter in this instance, which has no application in Wales, is exercisable by the Secretary of State.

Clause 19 – Powers of appropriate national authority

Powers conferred on:	*the appropriate national authority*
Powers exercised by:	*order / direction*
Parliamentary / Assembly procedure:	*negative resolution / none*

19. Subsection (1) enables the appropriate national authority to set out in an order what petitions schemes must or must not contain. For example, an order could be used to specify how many valid signatures on a petition should trigger a response from the principal local authority, how many signatures should trigger a full council debate, and how many signatures should trigger the holding of an officer to account. An order could also specify how quickly principal local authorities should acknowledge valid petitions or explain what steps they will take in regards to an active petition.

20. Subsection (6) empowers the appropriate national authority to direct a principal local authority to revise its petitions scheme. The power would allow intervention with a specific principal local authority, without affecting the petitions schemes of authorities whose schemes are operating in an acceptable manner. For example, the power could be used if it was felt that a specific authority's scheme specified such a high threshold for the number of signatures which trigger a response from the authority, that its petitions scheme did not effectively empower local people. The power to make a direction is not subject to any Parliamentary or Assembly procedure. Given the limited nature of this power, we consider that this is appropriate.

Clause 20(1) – Handling of petitions by other bodies

Powers conferred on:	*the appropriate national authority*
Powers exercised by:	*order*
Parliamentary / Assembly procedure:	*negative resolution*

21. This power enables the appropriate national authority to apply the petitions duties in this Chapter to a wider category of local authority. The rationale for this power is that improving the handling of petitions by these bodies could further increase the transparency of local decisions. This would be in line with similar existing powers, such as the power in section 32 of the Local Government Act 2000 for the Secretary of State to extend overview and scrutiny provisions to authorities which do not operate executive arrangements, and the power in section 23(1)(o) of the Local Government Act 2003 for the Secretary of State and Welsh Ministers to specify different types of body to which the capital finance provisions of that Act should apply. We think that negative resolution is appropriate - not least because the similar powers cited use the negative resolution procedure.

Part 1, Chapter 3 – Involvement in functions of Public Authorities

Clause 23: Duty of public authorities to secure involvement

Clause 24: Duty of public authorities to secure involvement: guidance

Powers conferred on:	*Secretary of State*
Powers exercised by:	*regulations*
Parliamentary procedure:	*negative resolution*

22. Clause 23(1) provides that where an authority to which the clause applies considers it appropriate for representatives of interested persons to be involved in the exercise in England of any of its functions, that authority must take such steps as it considers appropriate to secure that involvement. Subsection (5) gives the Secretary of State power to specify cases where the duty in subsection (1) does not apply. It is not possible at this stage to identify all cases where it may be appropriate for the Secretary of State to exercise this power to specify that the duty will not apply; subsection (5) therefore provides necessary flexibility. We consider that the negative resolution procedure provides an appropriate level of scrutiny given the nature of this power.

23. Clause 24 also gives the Secretary of State power to issue guidance in relation to the duty to secure involvement.

Part 2, Chapter 1 - Governance

Clause 28 - Functions of joint overview and scrutiny committees

Amends powers conferred on:	*Secretary of State*
Powers exercised by:	*regulations*
Parliamentary procedure:	*negative resolution*

24. Section 123 of the Local Government and Public Involvement in Health Act 2007 allows the Secretary of State to regulate to enable county councils in two tier areas to establish joint overview and scrutiny committees with one or more district councils in their area. Such committees may make reports and recommendations on matters relating to the attainment of a local improvement target in a relevant local area agreement. This clause amends section 123, broadening the power so that the Secretary of State may regulate to enable joint overview and scrutiny committees to be set up to consider any matter that affects the area of the group of partner authorities or the inhabitants of that area.

25. Under section 123, regulations may also make provision as to information which certain associated authorities may or may not disclose to a joint committee. Currently this is limited to information about the attainment of local improvement targets that relate to the associated authority. This clause amends section 123 so that regulations may make provision with respect to any information, other than that relating to crime and disorder matters.

26. Regulations made under section 123 are subject to the negative resolution procedure. The amendments made by this clause do not change the nature of the regulations that can be made to the extent that would make a different procedure more appropriate.

Part 2, Chapter 2 – Audit of entries connected with Local Authorities

Clause 30 – Overview;

Clause 47 - Regulations

Powers conferred on:	*the appropriate national authority*
Powers exercised by:	*regulations*
Parliamentary / Assembly procedure:	*negative resolution*

27. This clause gives the appropriate national authority the ability to make regulations prescribing additional conditions in relation to relevant entities which may lead to the audit authority appointing a person to carry out audit functions.

28. For a local authority entity to become a "qualifying entity", it needs to meet certain criteria. Subsections 30(4)(a) & (5)(a) provides that a qualifying entity in England or Wales must be connected with a local authority in England and Wales respectively and subsection 48(2)(b) makes clear that the entity must be connected with a local authority within the meaning of Part 12 of the Local Government and Public Involvement in Health Act 2007. Under clause 34 the entity must be required to have an audit under either the Companies Act 2006 or the Friendly and

Industrial and Provident Societies Act 1968 (i.e. it is not exempt under the small and medium sized companies audit threshold).

29. Subsections 30(4)(b) and (5)(b) confers powers on the appropriate national authority to specify additional conditions, by regulations, which entities would need to meet to become a "qualifying entity". Clause 47 allows for such regulations to use an expression in a condition to have the meaning given by a relevant document identified in the regulations. A relevant document is one identified for the purposes of section 21(2)(b) of the Local Government Act 2003.

30. The intention, subject to consultation, is for the qualifying criteria in regulations to define connected authorities as those defined as "subsidiary" and "joint venture" in the Code of Practice on Local Authority Accounting in the UK: A Statement of Recommended Practice (SORP). This will seek to ensure that definitions setting out the relationship between a local authority and its entities are consistent and in line with the capital finance rules in Part 1 of the Local Government Act 2003 and propriety controls as specified under Part 12 of the Local Government and Public Involvement in Health Act 2007.

31. The Committee's attention is drawn to paragraphs 26-28 of their Eleventh Report which included examination of Part 12 of the Local Government and Public Involvement in Health Bill (entities controlled by local authorities). The Committee noted that clause 213(1) of that Bill enabled the Secretary of State, by order subject to negative procedure, to require, prohibit or regulate the taking of specified actions by entities connected with a local authority. A similar power was conferred on the Welsh Ministers. The Committee noted that this power was wider than those which a Secretary of State then had in relation to companies under the control of a local authority and considered that the power should be subject to the affirmative procedure.

32. The Committee also noted that an order may identify a description of entity for the purposes of the order not only by reference to a document in existence when the order is made, but also by reference to that document as it has effect from time to time (i.e. with future amendments) or in a re-issued form. The Committee noted that the Memorandum (paragraph 276) suggested that the purpose was to allow ambulatory references to a particular document (the Code of Practice on Local Authority Accounting). The Committee recommended that the provision should not allow ambulatory references to any document whatsoever.

33. The Committee's attention is also drawn to the Government's response which is reproduced in paragraphs 14-16 of Annex 3 of the Committee's Twelfth Report. The Department agreed to change the resolution procedure to affirmative as requested by the Committee but pointed to the existing precedent for using ambulatory references to "documents" in legislation. Section 21(2)(b) of the Local Government Act 2003 allows for the definition of proper practices (for accounting purposes). The response noted that the problem with specifically referring to SORP in legislation was that the reference becomes ineffective if the document is re-issued or the name changed. However, in order to limit the document to a document used for accounting purposes, the Department agreed to restrict the ambulatory references in Part 12 so that the only document which could be referred to (for example under clause 213(6)) is a document which has been identified as containing proper practices by regulations made under section 21 of the Local Government Act 2003 Act.

34. The current power is drawn narrowly and merely permits the appropriate national authority to specify additional qualifying criteria in regulations using definitions in

the SORP consistent with other local government legislation. In the circumstances, we believe that the negative resolution procedure is appropriate.

Clause 37 – Right of entity to appoint auditor to conduct statutory audit

Powers conferred on:	*the Audit Commission in England and the AGW in Wales.*
Powers exercised by:	*publication of standard terms and conditions*
Parliamentary procedure:	*none*

35. Clause 37 provides that where an audit authority appoints an auditor to an entity, the entity may also appoint that same auditor as its statutory auditor under Part 16 of the Companies Act 2006 (including that Part as applied to LLPs) or section 4 of the Friendly and Industrial and Provident Societies Act 1968. This appointment if made will be on the standard terms and conditions (including fees) as published by the audit authority. Subsection 37(7) permits the audit authority to publish "standard terms and conditions" which the entity is to appoint on. Publishing a set of standard terms and conditions ensures that entities are not disadvantaged when negotiating with the auditor when making an appointment under this section. The entity and the appointed auditor may agree modifications to the standard set of terms and conditions.

36. The power to publish these terms and conditions is subject to a requirement that the audit authority must consult associations of local authorities and bodies of accountants as the audit authority considers appropriate and the Secretary of State (in the case of the Audit Commission) or Welsh Ministers (in the case of the Auditor General for Wales).

37. We do not believe that Parliamentary scrutiny is necessary for these issues. Under section 7 of the Audit Commission 1998 the Commission already prescribes a scale or scales of fees in respect of the audit of accounts of public bodies (including local authorities), which are required to be audited in accordance with this Act. The new provisions have the same effect in relation to fees for local authority entities as the earlier provisions have in relation to local authorities.

Clause 39 - Public interest reports;

Clause 40: Codes of practice

Powers conferred on:	*Audit Commission in England and the AGW in Wales*
Powers exercised by:	*Code of Practice*
Parliamentary procedure:	*in England, affirmative resolution of both Houses every 5 years for the Audit Commission's code of practice (but alterations to the code simply laid before Parliament – and the first exercise of the power described below is to be regarded as an alteration); in Wales the approval of the Welsh Ministers is required, additionally, the negative resolution procedure in the UK Parliament.*

38. An auditor appointed under this Chapter has the duty to make a report about any relevant matter coming to their attention when discharging their functions which they consider that it would be in the public interest to bring to the attention of the entity, the local authority or the public. This adopts one of the principles of public audit endorsed in Lord Sharman's report, namely that public auditors should be able to make the results of their audits available to the public and to democratically elected representatives. The power to undertake a public interest report is at the discretion of the auditor relying on the auditor's professional judgement and following guidance issued by the appointing audit authority in the Code of Practice.

39. Clause 40 requires the Audit Commission to include in a Code of Practice issued under section 4 of the Audit Commission Act 1998 ("the 1998 Act") provision prescribing the way in which auditors are to carry out their functions when considering their public interest reporting functions. Section 4 of the 1998 Act requires the Code to embody what appears to the Audit Commission to be the best professional practice to be adopted by auditors. The Code has an appropriate level of scrutiny attached to it as it must be approved by a resolution of each House of Parliament at intervals of not more than five years. The first exercise of the power by the Audit Commission is to be regarded as an alteration of the existing Code of practice authorised by resolutions of both Houses – and thus will trigger no further Parliamentary procedure. The obligations which will be imposed on auditors carrying out functions under clause 39 will be very similar to the existing obligations applicable to auditors appointed to audit local authorities, so it would appear to be proportionate to defer any new Parliamentary consideration of the new provisions in the Code of Practice until the following 5-yearly consideration of the Code as a whole.

40. Subsection 40(4) places a duty on the Auditor General for Wales to include provision similar to that described above in relation to the Code which it has prepared under section 16 of the Public Audit (Wales) Act 2004, which has been approved by a the Welsh Ministers and is subject to the annulment procedure in either of the Houses of Parliament.

Clause 44 - Fees

Powers conferred on:	*Audit Commission and Secretary of State in England and the AGW and Welsh Ministers in Wales*
Powers exercised by:	*prescription of scale of fees by Audit Commission and AGW; and by regulations by Secretary of State and Welsh Ministers.*
Parliamentary / Assembly procedure:	*none in relation to Audit Commission and AGW; negative resolution in relation to regulations*

41. Clause 44 provides that a fee must be paid by the entity to the appointing audit authority when an auditor discharges any functions under clause 38 (functions of auditor not appointed to conduct statutory audit) and clauses 39 to 43 (public interest reports). The audit authority may prescribe a scale of fees for the purposes of audits undertaken in clauses 38 to 43. This scale also determines the fees payable under the standard terms and conditions where the auditor is also appointed under Part 16 of the Companies Act (including that Part as applied to LLPs), or under the legislation applying to industrial and provident societies as provided for in clause 37. The audit authority is required to consult associations of local authorities and bodies of accountants as the audit authority considers appropriate.

42. There is a power for the Secretary of State in England, and the Welsh Ministers in Wales, to make regulations to prescribe a scale or scale of fees in place of any scale of fees prescribed by the audit authority. This reflects a similar provision in section 7 of the 1998 Act and section 21 of the 2004 Act. There is an obligation on the Secretary of State to consult the Audit Commission, and on the Welsh Ministers to consult the AGW, and on both to consult associations of local government and bodies of accountants, before making any regulations. The power is administrative in nature and it is considered that it is suitable for negative resolution procedure to apply and is in line with other fee setting powers.

Part 3 – Boundary Committee for England

Clause 53 – Implementation of review recommendations

Powers conferred on:	*Boundary Committee for England*
Power exercised:	*order*
Parliamentary procedure:	*draft negative resolution*

43. This clause provides that the Boundary Committee for England ("BCE") may by order give effect to recommendations for electoral changes which it has published in a report following a review. Such orders may contain incidental, consequential, supplementary or transitional provision, or savings, and may make different provision for different cases (subsection (4)). Subsection (5) also provides that such provisions may include provision applying, extending, excluding or amending or revoking any instrument made under an enactment.

44. Orders under this section are to be made by statutory instrument and are to be laid before Parliament in draft before being made. Currently, electoral changes orders are made by the Electoral Commission but are not subject to any Parliamentary procedure (nor have such orders been in the past). However, the Government considers that a process should be developed whereby the BCE is accountable to Parliament, but without having a significant impact on Parliament's time, given that the subject matter of these orders is local. It is considered that the negative procedure is the most appropriate for these orders: the affirmative procedure would seem excessive and would not represent an effective use of Parliament's time. Unusually, the clause provides for the draft negative resolution procedure to be applied. This is considered appropriate in the case of electoral arrangements where absolute certainty is required.

Clause 56 – Transfer schemes

Powers conferred on:	*Secretary of State*
Power exercised:	*order*
Parliamentary procedure:	*negative resolution*

45. This clause requires the Electoral Commission ("EC") to make a scheme for the transfer of property, rights and liabilities from the EC to the BCE. If the EC and BCE fail to agree on the provision to be included in the scheme then subsection (3) enables the Secretary of State by order to specify the provision to be included in the scheme. Subsection (4) provides that a transfer scheme must be made by 31st December 2009 or such later date as the Secretary of State may specify by order. An order made under these provisions would be subject to the negative resolution procedure in both Houses which is considered appropriate in the case of such a transfer scheme between two public bodies.

Clause 59 - Electoral changes consequential on boundary change

Powers conferred on:	*Secretary of State*
Powers exercised by:	*order*
Parliamentary procedure:	*affirmative resolution*

46. This clause amends the order-making powers of the Secretary of State under section 10 of the Local Government and Public Involvement in Health Act 2007 ("the 2007 Act"). Section 10 of the 2007 Act provides that the Secretary of State may by order implement a recommendation made to her by the BCE that there should be a local government boundary change. Subsection (2) of clause 59 inserts new subsections (6A) to (6E) into section 8 of the 2007 Act, so that where the BCE has recommended that a boundary change should be made, it can also recommend consequential changes to local government electoral arrangements (and, in relation to London, consequential changes to the constituencies of the Greater London Authority). Subsection (4) of clause 59 inserts provision into section 10 of the 2007 Act which provides that if the Secretary of State implements a boundary change recommended by the BCE without modification, the Secretary of State may also implement the BCE's recommendations in relation to electoral arrangements. If the Secretary of State proposes to implement a boundary change with modification, she

must request the BCE to recommend whether a modification is needed to their recommendations relating to electoral arrangements before she can implement them.

Clause 61 – Consequential and supplementary amendments

Powers conferred on:	*Secretary of State*
Powers exercised by:	*order*
Parliamentary procedure:	*negative / affirmative*

47. Subsection (2) gives the Secretary of State power to make consequential provision in relation this Part. The power includes power to amend primary legislation for consequential purposes. This Part may require consequential amendments to legislation – in particular secondary legislation. We have identified the main consequential changes in the Bill but this power would enable detailed amendments to secondary legislation to be made as well as providing a safeguard in case any necessary amendments to primary legislation have been missed. An order would be subject to negative resolution except where the order includes amendments of primary legislation or statutory instruments which were originally subject to an affirmative procedure, in which case the affirmative procedure would apply. We believe that this provides an appropriate level of Parliamentary scrutiny.

Schedule 3 – Interim modifications of the Local Government Act 1992

Powers conferred on:	*Boundary Committee for England*
Powers exercised by:	*order*
Parliamentary procedure:	*draft negative resolution*

48. This Schedule makes similar provision to that made by clause 53 (see above), but in relation to an interim period beginning with the day on which this Bill is passed and ending with the day immediately preceding the day on which clause 49 comes into force. During this interim period before the BCE is established as an independent body, section 17 of the Local Government Act 1992 is substituted with a new provision so that the existing Boundary Committee for England (a statutory committee of the EC) may by order give effect to recommendations for electoral changes which it has published in a report following a review. The choice of procedure and the policy reasons for that choice are explained at paragraph 44.

Part 4 – Local Authorities Economic Assessments

Clause 64 - Partner authorities

Powers conferred on:	*Secretary of State*
Powers exercised by:	*order*
Parliamentary procedure:	*negative resolution*

49. This clause lists persons who are to be partner authorities for the purposes of this part. These are the bodies and persons that a local authority must consult when preparing an economic assessment. Subsection (4) enables the Secretary of State to add persons to, and remove persons from, the lists set out in that section, and to add functions to, and remove functions from the list in subsection (3)(i). The Secretary of State also has power to make necessary or expedient consequential provision. Before using these powers the Secretary of State must consult with such representatives of local government and such other persons as he considers appropriate (subsection (5)).

50. These powers will allow the list of named partners to be kept relevant by reflecting changes in the organisations who the local authorities should consult in preparing the assessment The regulations will be subject to the negative resolution procedure which we consider provides an appropriate level of Parliamentary scrutiny given that the purpose of the power is simply to ensure that the definitions in the clause are kept up to date and to add in other bodies as named partners or to remove named partners. This may only be done following full consultation.

51. These powers are modelled on those in section 104(7) of the Local Government and Public Involvement in Health Act 2007, which make similar provision with respect to local area agreements.

Part 5 – Regional Strategy

Clause 65 – Regional strategy

Powers conferred on:	*Secretary of State*
Powers exercised by:	*direction / regulation*
Parliamentary procedure:	*none / negative resolution*

52. Clause 65 provides that on commencement of section [j400], the regional strategy for a region is so much of the existing regional spatial strategy and the regional economic strategy for that region as the Secretary of State specifies by direction. In practice it is likely that the whole of the existing regional spatial strategy would be specified but the power gives the Secretary of State flexibility to remove policies which are no longer relevant or appropriate. Although the regional strategy will consist of both the existing regional spatial strategy and the regional economic strategy, clause 76 makes it clear that for the purposes of section 38 of the Planning and Compulsory Purchase Act 2004 (which sets out what is to be the statutory development plan for an area for the purpose of determining planning applications) only those policies relating to land use will count, until such time as the regional strategy is revised. The power is exercisable by direction which we consider is

appropriate in the context of the power elsewhere for the Secretary of State to approve draft revisions (see clause 72).

53. Subsection (7) provides that in cases where a National Park straddles the boundaries of two or more regions, the Secretary of State has power by regulation to provide that the Park should be treated as falling within one region. The purpose of this is to ensure that the National Park is not subject to more than one regional strategy and is consistent with Part 1 of the Planning and Compulsory Purchase Act 2004.

Clause 68 – Review and revision by responsible regional authorities

Powers conferred on:	*Secretary of State*
Powers exercised by:	*regulations / direction*
Parliamentary procedure:	*negative resolution / none*

54. This clause provides for the revision of existing regional strategies. Subsection (5) requires revision at the time prescribed by regulations or when directed to do so by the Secretary of State. A direction can require revision of part of the strategy and in accordance with a specified timetable. In most cases, the responsible regional authorities will determine when a revision should be carried out. However, it may be desirable to set out a timetable in regulations for all regions or direct in a particular case to ensure that a draft revision is carried out as necessary. If the responsible regional authorities fail to revise in accordance with regulations or a direction, the Secretary of State may make the revision himself (see clause 73(1)).

55. Our view is that the negative resolution procedure is appropriate given the administrative nature of this power. We do not believe that the power to direct in individual cases needs to be subject to Parliamentary supervision.

Clause 71 – Matters to be taken into account in revision

Powers conferred on:	*Secretary of State*
Powers exercised by:	*regulations*
Parliamentary procedure:	*negative resolution*

56. This clause makes provision for the preparation of any draft revision of a regional strategy. Subsection (1) lists the matters which the responsible regional authorities must have regard to when formulating the revision, including national policies and regional strategies for neighbouring regions. Subsection (1)(i) requires them to have regard to such other matters as may be prescribed by the Secretary of State by regulation. This provides flexibility to add to the list as appropriate. We consider that the negative resolution procedure is appropriate for this administrative power given that the effect is simply to add to the list of matters which are required to be taken into account.

Clause 74 – Revision: supplementary

Powers conferred on:	*Secretary of State*
Powers exercised by:	*regulations / direction*
Parliamentary procedure:	*negative resolution / none*

57. This clause gives the Secretary of State power to make regulations covering procedural matters connected with revisions of a regional strategy, examinations in public (including the pay and expenses of appointed persons) and the Secretary of State's reserve powers. Examples of matters which the regulations might cover include the timetable for a draft revision, consultation requirements, publicity and documents. These are detailed matters which may change over time and we therefore think that it is appropriate to deal with them by secondary legislation. We also consider that the negative resolution procedure is appropriate for these regulations given that they concern procedural and administrative matters.

58. Where a draft revision to a strategy started before the day Part 5 is commenced and the Secretary of State considers that any step taken as part of that revision corresponds to a step required to be taken in relation to a revision under Part 5, subsection (2) allows the Secretary of State to direct that such a step be treated as having taken place for the purposes of Part 5. This means that work already undertaken on a draft revision would not necessarily be wasted. This power is similar to the existing power in section 11 of the Planning and Compulsory Purchase Act 2004.

Clause 75 – Implementation

Powers conferred on:	*Secretary of State*
Powers exercised by:	*regulations*
Parliamentary procedure:	*negative resolution*

59. This clause requires the responsible regional authorities to report on implementation in accordance with requirements specified in regulations made by the Secretary of State. This is a relatively minor administrative measure and we consider that the negative resolution procedure is suitable for this power.

Clause 79 – Guidance and directions

Powers conferred on:	*Secretary of State*
Powers exercised by:	*direction*
Parliamentary procedure:	*none*

60. As well as providing for statutory guidance, this clause gives the Secretary of State power to give directions to persons exercising functions under Part 5 in relation to the exercise of those functions – in particular to the responsible regional authorities. They might be used generally or in particular cases. The power might be used, for example, to direct the inclusion of policies on particular subject matters in draft revisions or to direct what steps must be taken and when in relation to a revision of

a strategy. A similar power of direction for regional development agencies in included in section 7(2) of the Regional Development Agencies Act 1998.

Clause 80 – Consequential provision

Powers conferred on:	*Secretary of State*
Powers exercised by:	*order*
Parliamentary procedure:	*affirmative / negative resolution*

61. Subsection (2) gives the Secretary of State power to make consequential provision in relation to this Part. The power includes power to amend primary legislation for consequential purposes. This Part may require consequential amendments to legislation – in particular secondary legislation. We have identified the main consequential changes in the Bill but this power would enable detailed amendments to secondary legislation to be made as well as providing a safeguard in case any necessary amendments to primary legislation have been missed. An order would be subject to negative resolution except where the order includes amendments of primary legislation or statutory instruments which were originally subject to an affirmative procedure, in which case the affirmative procedure would apply. We believe that this provides an appropriate level of Parliamentary scrutiny.

Part 6 – Economic Prosperity Boards and Combined Authorities

Clause 83 – EPBs and their areas

Clause 94 – Requirements in connection with establishment of EPB

Clause 97 – Requirements in connection with changes to existing EPB arrangements

Power conferred on:	*Secretary of State*
Power:	*order*
Parliamentary process:	*affirmative resolution / negative resolution*

62. Clause 83 gives the Secretary of State power to establish a body corporate known as an economic prosperity board (EPB) for an area, where certain conditions are met.

63. Clause 94 sets out the requirements in connection with establishing an EPB by order. Specifically, the Secretary of State may only make an order establishing an EPB if having regard to a scheme prepared and published by relevant authorities under clause 93, she considers that to do so is likely to improve the exercise of functions relating to economic development and regeneration in the area, and economic conditions in the area. The Secretary of State is required to consult with each county and district council in the area, and other appropriate persons, before making the order. The Secretary of State must also have regard to the need to reflect the identities and interests of local communities and the secure effective and convenient local government in making the order.

64. Clause 97 enables the Secretary of State to make an order under clauses 84 – 91 in relation to an existing EPB if having regard to a scheme prepared and published

under clause 96, the Secretary of State considers that the making of the order is likely to improve the exercise of statutory functions relating to economic development and regeneration in the area or areas to which the order relates, or economic conditions in that area or those areas. The Secretary of State is required to consult before making the order and in making the order the Secretary of State must to have regard to the need to reflect the identities and interests of local communities and secure effective and convenient local government.

65. The order making power is to ensure flexibility in the regime and so that each EPB is able to adapt to and meet the economic development and regeneration needs identified by relevant authorities. The order making approach allows for the designation of economic development areas and establishment of EPBs to be led by relevant local authorities.

66. Orders under Part 6 (apart from clause 111) are subject to affirmative resolution which we think is appropriate for this power.

Clause 84 – Constitution of EPBs

Clause 85 – Constitution: membership and voting

Power conferred on:	*Secretary of State*
Power conferred:	*order*
Parliamentary process:	*affirmative resolution*

67. Clause 84 enables the Secretary of State to make provision, by order, about the membership of the EPB, voting powers and executive arrangements. An order may not provide for the budget of an EPB to be agreed otherwise than by the EPB.

68. Clause 85 provides, among other things, that an order under clause 84 that includes provision about the number and appointment of members of an EPB must provide for a majority of the members of the EPB to be appointed from among the elected members of the EPB's constituent councils (as defined). Each representative council (as defined) must appoint at least one member

69. The power allows for flexibility in determining the appropriate constitutional arrangements for an EPB but ensures that elected members of the constituent authorities are appointed as members of EPBs to provide safeguards against any democratic deficit.

70. Subsection 85(5) provides that where appointed members of an EPB are not elected members of its constituent councils, an order by the Secretary of State must provide for those members to be non-voting members. However, voting members of EPBs may resolve that this rule may not apply to the EPB.

Clause 86 – Exercise of local authority functions

Power conferred on:	*Secretary of State*
Power conferred:	*order*
Parliamentary process:	*affirmative resolution*

71. Clause 86 enables the Secretary of State, by order, to provide for a county or district council's functions that are exercisable in an EPB area to be exercisable by the EPB, if she considers that the function can be appropriately exercised by the EPB. The order may make provision for the function to be exercisable by the EPB generally or subject to particular conditions or limitations. The order may also specify that the function is to be exercised by the EPB instead of the local authority, or for the function to be exercisable concurrently with the local authority. The EPB must perform the functions with a view to promoting the economic development and regeneration of its economic development area.

Clause 87 – Funding

Power conferred on:	*Secretary of State*
Power conferred:	*order*
Parliamentary process:	*affirmative resolution*

72. This clause enables the Secretary of State to make provision for the costs of an EPB to be made by its constituent councils. It provides for flexibility so that appropriate provision can be made for the circumstances of each EPB.

Clause 90 – Changes to boundaries of an EPB's area

Clause 91 – Dissolution of an EPB's area

Power conferred on:	*Secretary of State*
Power conferred:	*order*
Parliamentary process:	*affirmative resolution*

73. Clause 90 gives the Secretary of State power, by order, to change the boundaries of an EPB's area by adding or removing a local government area if each council to whom the section applies consents, and subject to meeting the conditions in clause 83. There is no requirement to seek the consent of individual district councils in two-tier areas however since county councils are strategically better placed to determine whether an EPB is required for their area.

74. Clause 91 gives the Secretary of State power, by order, to dissolve an EPB's area and abolish the EPB where a majority of the relevant councils consent. The relevant councils are any county council and any unitary district council for an area within the EPB's area. The purpose of this is to ensure that decisions about whether an EPB is appropriate for the area are made at the appropriate level. While it is the Secretary of State making the order, it is effectively the relevant local authorities who will determine whether such an order is required.

Clause 98 – Combined areas and combined authorities

Clause 99 – Constitution and functions: transport

Clause 100 – Constitution and functions: economic development and regeneration

Clause 101 – Changes to boundaries of a combined area

Clause 102 – Dissolution of a combined area

Clause 105 – Requirements in connection with establishment of combined authority

Clause 108 - Requirements in connection with changes to existing combined arrangements

Power conferred on:	*Secretary of State*
Power conferred:	*order*
Parliamentary procedure:	*affirmative resolution*

75. These clauses make provision for the creation of combined authorities and the conferral on them of functions that may be conferred in relation to transport and economic development and regeneration. These will be done by order of the Secretary of State. Orders may also make provision for changes to and the dissolution of the area of a combined authority.

76. Clause 99 provides that an order establishing a combined authority may make any provision which can be made in relation to an Integrated Transport Authority – covering constitutional arrangements, delegation of functions and powers to direct. The Secretary of State can also, by order provide for any function that is conferred or imposed on a Passenger Transport Executive to be exercisable by a combined authority or the executive of a combined authority.

77. Clause 100 provides that an order establishing a combined authority may make any provision which can be made in relation to an EPB with regards to the exercise of local authority functions and funding.

Clause 109 - Incidental etc. provision

Clause 110 – Transfer of property, rights and liabilities

Clause 111 – Consequential amendments

Clause 112 – Orders

Clause 113 - Guidance

Power conferred on:	*Secretary of State*
Power conferred:	*order*
Parliamentary procedure:	*affirmative resolution / negative resolution*

78. Clauses 109-111 provide that the Secretary of State may by order make incidental, consequential, transitional or supplementary provision in connection with Part 6 – including power to amend or repeal any enactment, make provision for the transfer of property, rights and liabilities, and to make consequential amendments, including to primary legislation. The purpose of these provisions is to allow for full effect to be given to an order under Part 6. An order made under clause 111 is subject to affirmative resolution procedure unless the order only contains provision amending or revoking an instrument which was itself subject to the negative resolution procedure. In that case the negative resolution procedure will apply to the order. Everything else is subject to affirmative resolution which we think provides an appropriate level of Parliamentary scrutiny of this power.

79. Clause 112 provides that if a draft instrument laid in each House of Parliament would be treated as a hybrid instrument, it is to proceed as if it were not a hybrid instrument.

80. Clause 113 provides that the Secretary of State may give guidance about anything that could be done by an authority under this Part.

Schedule 6 – Amendments relating to EPBs and combined authorities

81. The amendments apply various provisions that currently apply to joint authorities to EPBs and combined authorities. They confer the current functions of Passenger Transport Authorities, or Integrated Transport Authorities when the Local Transport Act 2008 comes into effect, on combined authorities. In putting the new bodies on the same footing as joint authorities and Integrated Transport Authorities (where it is a combined authority), they occasionally amend powers to make subordinate legislation. For example, paragraph 75 of Schedule 6 amends section 74 of the Local Government Finance Act 1988 to add combined authorities to the list of authorities who are levying bodies thereby extending the scope of the regulations which the Secretary of State may make under section 74 to empower a levying body to issue a levy to a county council or charging authority. The scope of the subordinate legislation will only be extended to the extent that they will add EPBs and combined authorities. The consequential amendments do not include any substantive change to the nature of those existing powers to make subordinate legislation. We have therefore not separately identified them in this memorandum.

Part 7 – Multi-Area Agreements

Clause 118 – Partner authorities

Powers conferred on:	*Secretary of State*
Powers exercised by:	*order*
Parliamentary procedure:	*negative resolution*

82. Clause 118 lists persons who are to be partner authorities for the purposes of the provisions of this Part. Subsection (5) enables the Secretary of State to add persons to, and remove persons from, that list, and to add functions to, and remove functions from, that list. The Secretary of State also has power to make necessary or expedient consequential provision. Before using these powers the Secretary of State must consult with such representatives of local government and such other persons as appropriate (subsection (6)).

83. These powers will allow the list of named partners to be kept relevant by reflecting changes in the organisations who would be expected to work with local authorities in developing MAAs. The regulations will be subject to the negative resolution procedure which we consider provides an appropriate level of Parliamentary scrutiny given that the purpose of the power is simply to ensure that the definitions in the clause are kept up to date and to add in other bodies as named partners or to remove named partners. This may only be done following full consultation.

84. These powers are modelled on those in section 104(7) of the Local Government and Public Involvement in Health Act 2007, which make similar provision with respect to local area agreements.

Part 9 - Final

Clauses 142 and 143 – Commencement

Powers conferred on:	*Secretary of State / Welsh Ministers / Scottish Ministers*
Powers exercised by:	*order*
Parliamentary procedure:	*none*

85. These clauses provide for commencement of the Bill. Some provisions are commenced on a specific date but most are to be commenced on a day appointed by the Secretary of State, Welsh Ministers or Scottish Ministers as the case may be. It is not subject to any Parliamentary procedure.

Department for Communities and Local Government

December 2008

APPENDIX 3: MARINE AND COSTAL ACCESS BILL [HL]

Memorandum by the Department for Environment, Food and Rural Affairs

Introduction

1. This memorandum identifies provisions for delegated powers in the Marine and Coastal Access Bill.

   It contains a summary of the Bill's main provisions and explains for each power, or group of powers:

   - its purpose;
   - why the power has been left to delegated legislation; and
   - the choice of Parliamentary scrutiny procedure.

2. The powers are normally identified in the order that they appear in the Bill. Powers contained in Schedules to the Bill will normally appear alongside the description of the Part to which they relate.

3. In preparing this memorandum, the Department has benefitted from the observations made by the Delegated Powers and Regulatory Reform Committee ("the Committee") in its contribution to the Joint Committee inquiry into the draft Bill.[60] The Department is 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 its memorandum to the Joint Committee inquiry, the Committee made seven points relating to the delegations proposed in the draft Marine Bill. Taking each of these in turn:

   (a) Special procedure for applications relating to harbour works – clauses 75 and 76

   Paragraphs 110 to 114 below explain the approach on these procedures, which takes account of the observations made by the Committee.

   (b) Offences – clause 135

   Arrangements in orders made by the Marine Management Organisation for offences for breach of conservation and interim orders have been removed and replaced by provisions on the face of the Bill.

   (c) Penalties and Undertakings

   Paragraphs 124 to 129 and 172 to 174 set out the approach to the marine licensing and marine conservation enforcement regimes, which has been revised since the draft Bill was published including to take account of the observations made by the Committee.

   (d) IFC authorities: membership – clause 147

   Paragraphs 185 to 188 explain the approach to amendments to the membership of IFC authorities, which has been revised since the draft Bill was published including to take account of the observations made by the Committee.

[60] Joint Committee report published 30 July 2008.

(e) Byelaws – clause 156

Paragraph 191 clarifies the position on emergency byelaws to take account of the observations made by the Committee.

(f) Inshore fisheries and conservation officers – clause 162

Paragraphs 196 and 197 set out the approach regarding the powers of IFC officers to take account of the observations made by the Committee.

(g) Amendment of Acts by instruments – clause 306(2)

Paragraphs 163 and 329 to 331 set out the approach to the amendment of legislation, 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 the following eleven Parts:

Part 1 - The Marine Management Organisation

Part 2 - Exclusive Economic Zone, UK Marine Area and Welsh Zone

Part 3 - Marine Planning

Part 4 - Marine Licensing

Part 5 - Nature Conservation

Part 6 - Management of Inshore Fisheries

Part 7 - Fisheries

Part 8 - Enforcement

Part 9 - Coastal Access

Part 10- Miscellaneous

Part 11 Supplementary Provisions

6. In addition to the commentary below, further description of the Parts can be found in the Explanatory Notes that accompany the Bill.

7. The Bill is in line with the current devolution settlement. Certain provisions apply across the whole of the UK whilst others apply to more restricted parts of the UK and its marine area. The commentary below provides further detail.

Part 1: The Marine Management Organisation

8. This Part, with Schedules 1, 2 and 3, establishes the Marine Management Organisation (MMO) and makes provision for its functions, powers, administrative arrangements and its membership. The MMO will deliver planning, licensing, fisheries management in and enforcement functions in the waters around England, and the offshore area for matters which are not devolved.

9. Chapter 1 provides for the establishment of an independent body, the MMO. The MMO will discharge marine functions transferred to it so that activities carried on in the marine area are regulated in a consistent and co-ordinated way and with the objective of making a contribution to the achievement of sustainable development. The Chapter contains powers for the Secretary of State to provide guidance to the MMO and to set performance objectives. Schedule 1 makes detailed provision

about the membership of the MMO, including a power for the Secretary of State to vary the number of board members.

10. Chapter 2 provides for functions under various enactments to be transferred to the MMO. Schedule 2 makes minor and consequential amendments arising from the transfer of these functions and the establishment of the MMO.

11. Chapter 3 enables marine functions (other than specified "non-delegable functions") to be transferred administratively by the Secretary of State to the MMO, or by the MMO to any "eligible body". This Chapter provides a power for the Secretary of State to amend the list of 'eligible bodies' which the MMO may authorise to carry out any of its marine functions.

12. Chapter 4 makes further provision about the MMO's general powers and duties including in respect of carrying out research providing information, advice and training, charging for its services and borrowing money. Provisions for transfer schemes (with Schedule 3) enable the Secretary of State to transfer property, rights and liabilities to and from the MMO. This Chapter also enables the Secretary of State to issue guidance and directions to the MMO, and to increase the amount of money the MMO may borrow within specified limits.

Part 2: Exclusive economic zone, UK marine area and Welsh zone

13. This part, with Schedule 4, confers a power on Her Majesty to declare an Exclusive Economic Zone in the waters around the United Kingdom in line with Part V of the United Nations Convention on the Law of the Sea. It also establishes a definition of the UK marine area which acts as a reference point for subsequent provisions establishing the geographical scope of particular regimes introduced under the Bill, e.g. those on planning and licensing, and creates a Welsh zone comprising the sea adjacent to Wales and within British fishery limits.

Part 3: Marine planning

14. This Part, with Schedules 5 and 6, provides for a new system of strategic marine planning.

15. Chapters 1 and 2 define the UK marine area and provide for the creation, amendment and withdrawal of a marine policy statement and marine plans.

16. Chapter 3 enables marine plan authorities to delegate some of their marine planning functions, and to provide guidance to their delegates on how those delegated functions should be carried out

17. Chapters 4 and 5 provide for the effect of the marine policy statement and plans on decisions in the UK marine area. The chapters require the marine plan authorities to monitor the effect of the plans and policy statement and set out how these documents may be challenged in the courts.

18. The marine policy statement will cover the whole of the UK's waters.

Part 4: Marine licensing

19. This Part, with Schedules 7 and 8, creates a new marine licensing regime to replace existing provisions in the Food and Environment Protection Act 1985 (FEPA), and the Coast Protection Act 1949. It applies across the UK, apart from in Scottish territorial waters.

20. Chapter 1 of this Part describes the activities for which a marine licence is required, and creates a power for the licensing authority to amend the list of licensable marine

activities. It also contains provisions about the licensing process, enabling the licensing authority to set and vary fees for processing licence applications, and to make regulations setting out the licensing process in greater detail, including provision for appeals.

21. Chapter 2 concerns exemptions and special cases, and contains powers enabling the licensing authority to exempt activities from the Marine Act licensing procedure. The chapter also enables ministers to determine that Marine Act licences associated with harbour and renewable energy developments should be determined according to the Harbours Order or Electricity Act licensing procedure respectively and to amend those procedures if necessary.

22. Chapter 3 makes provision for the enforcement of Marine Act licences, setting out the offences and the available enforcement action and sanctions. It contains powers to amend references to international conventions (to give effect to new international agreements) and to enable licensing authorities to impose fixed or variable monetary penalties on offenders.

23. Chapter 4 contains powers enabling licensing authorities to delegate some of their functions and prescribe how those functions should be carried out.

24. Chapter 5 contains supplementary provisions relating to the register of Marine Act licences, other powers of marine licensing authorities and application to the Crown. It also enables the licensing authority to prescribe in regulations the particulars to be included in a register of Marine Act licences.

25. Schedule 8 amends provisions in the Harbours Act relating to the licensing of harbour developments. One of these amendments is a new power for the authority currently responsible for making Harbours orders to delegate those functions to another body. These amendments to harbours legislation do not apply in Northern Ireland or Scotland.

Part 5: Nature conservation

26. This Part provides for the designation and protection of Marine Conservation Zones (MCZs) in England, Wales and Scotland. It provides for the making of associated byelaws (in England) and conservation orders (similar to byelaws) in Wales to protect these zones. It includes provisions on the grounds and process for designating MCZs, the setting of conservation objectives for MCZs, places duties on public authorities in relation to MCZs and makes further provisions about byelaws, conservation orders and offences. This Part, and Part 5, apply throughout UK waters apart from the Scottish and Northern Irish inshore regions. Following recent agreement with Scotland, that Scottish Ministers will designate areas equivalent to MCZs in Scottish offshore waters.

27. Schedule 13 contains provisions relating to notification and declaration of Sites of Special Scientific Interest (SSSIs) and National Nature Reserves (NNRs) in the subtidal zone. It includes a power for the Secretary of State to make procedural rules for hearings in connection with the declaration of subtidal SSSIs.

Part 6: Inshore Fisheries Bodies

28. This Part provides for new Inshore Fisheries and Conservation Districts to be created by order, and for new Inshore Fisheries and Conservation Authorities (IFC authorities) to be established. It also makes provision as to IFC authorities' membership, powers and duties. IFC authorities will have byelaw-making powers for the purposes of performing their duties, and the Secretary of State therefore also

has the power to regulate the procedure to be followed by IFC authorities in making byelaws. This Part also contains provisions relating to the collection of information by the Secretary of State and IFC authorities, the offences of contravening byelaws and the enforcement powers of inshore fisheries and conservation officers.

Part 7: Fisheries

29. Chapter 1 amends existing powers in the Sea Fish (Conservation) Act 1967. These powers enable regulation to promote the conservation of sea fish and provide for charges to be made for commercial fishing vessel licences.

30. Chapter 2 amends a number of provisions on shellfish management, including three existing powers, in the Sea Fisheries (Shellfish) Act 1967.

31. Chapter 3 relates to migratory and freshwater fish, and contains amendments to a number of existing powers in the Salmon and Freshwater Fisheries Act 1975 and the Water Resources Act 1991. It also amends provisions in those acts as well as the Environment Act 1995, the Salmon Act 1986 and, in relation to the Tweed and the Esk, the Scotland Act 1998. These provisions and powers apply in England and Wales, excluding the English part of the River Tweed (and its tributaries), but including the Scottish part of the Border Esk (and its tributaries).

32. Chapter 4 repeals some out-dated fisheries legislation.

Part 8: Enforcement

33. This Part consolidates enforcement powers for marine licensing, nature conservation and sea fisheries. The MMO and Welsh Ministers will appoint 'Marine Enforcement Officers', who will be able to draw on a common set of powers (rather than relying on current powers in a wide range of disparate legislation) when carrying out their duties. Scottish Ministers will appoint officers for the purposes of enforcing licensing and nature conservation. Northern Irish Ministers will appoint officers for the purposes of enforcing licensing.

Part 9: Coastal access

34. This Part places a duty ("the coastal access duty") on the Secretary of State and Natural England to secure a long-distance route around the coast of England, with (in association with that route) a margin of land accessible to the public for the purposes of open-air recreation. It contains powers for the Secretary of State to make orders applying the coastal access duty to certain islands, and inserts new provisions (including powers) into the National Parks and Access to the Countryside Act 1949, and the Countryside and Rights of Way Act 2000.

Parts 10 and 11: Miscellaneous and Supplementary

35. These two Parts contain additional provisions, including amendments to the powers and duties of Natural England and provisions on extent, interpretation and commencement etc. Clause 306 in particular relates to the regulation and order-making powers conferred by the Bill.

ANALYSIS OF EACH DELEGATED POWER

Part 1: The Marine Management Organisation

Clause 1 – General objective

Power conferred on:	*Secretary of State*
Power exercisable by:	*Guidance*
Parliamentary procedure:	*None*

36. This provision requires the Secretary of State to give guidance to the Marine Management Organisation (MMO) as to the manner in which the MMO is to seek to ensure that a contribution to the achievement of sustainable development is made. The Secretary of State must consult the MMO before giving any guidance and must consider the functions and resources of the MMO in preparing such guidance. The MMO must have regard to such guidance from the Secretary of State.

37. The Department considers it inappropriate to set out in primary legislation how the MMO is to seek to ensure a contribution to the achievement of sustainable development is made. The definition of sustainable development, and thus what needs to be done to contribute to its achievement, will evolve over time. Changes to the functions or resources of the MMO may also result in changes in how the MMO makes this contribution. Given that the Secretary of State will consult the MMO before giving any guidance and that the guidance will be published, the Department considers there is no need for Parliamentary scrutiny.

Clause 4 – Licensing of fishing boats

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary procedure:	*Negative resolution*

38. This clause transfers the Secretary of State's functions of granting fishing boat licences under section 4 of the Sea Fish (Conservation) Act 1967 to the MMO. It includes a power in subsection (7) for the Secretary of State to make an order to except from this transfer the granting of licences, or a description of licences, as specified in the order. This power gives the Secretary of State the flexibility to decide that the function of granting certain licences should not transfer to the MMO (for example, licences relating to English fishing boats operating out of Scottish ports).

39. The Department considers that negative resolution procedure is the appropriate level of scrutiny for such an order.

Clause 8 - Exemptions for operations for scientific and other purposes

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations*
Parliamentary procedure:	*Negative resolution*

40. This clause amends the Sea Fish (Conservation) Act 1967 by transferring certain functions of the Secretary of State to the MMO. It enables the Secretary of State to make regulations governing applications to the MMO for an exemption from certain restrictions relating to sea fishing. In particular, such regulations may set out the procedure to be followed for applications and may make provision for the MMO to charge a reasonable fee for dealing with such applications. It is appropriate for the procedural detail to be set out in delegated legislation as it is possible that the application procedure and the related fees may need to be changed over time. The Department considers that negative resolution procedure is the appropriate level of scrutiny for such regulations.

Clause 14 – agreements between the Secretary of State and the MMO

Power conferred on:	*Secretary of State*
Power exercisable by:	*Agreement*
Parliamentary procedure:	*None*

41. This clause provides that the Secretary of State may enter into an agreement with the MMO authorising the MMO to perform any of his marine functions. This type of agreement is akin to those provided for in the Natural Environment and Rural Communities Act 2006 (c.16).

42. This is in line with Defra's delivery strategy, which requires clearly defined roles and responsibilities between policy and delivery, and a better partnership between the two. Thus the Department is responsible for developing policy (in dialogue with delivery bodies), advising Ministers, setting national policies and standards, engaging internationally, and securing successful delivery of policy outcomes through its network of delivery bodies. The MMO will form part of the Defra Delivery Network, a set of delivery partners linked to the Departmental core and engaged in the achievement of the Department's (and Government's) overarching aims.

43. The Secretary of State may authorise the MMO to carry out the functions generally or only in relation to specified cases or areas (see subsection (1)). The arrangements will be set down in detailed agreements that will set out the parameters and conditions pertaining to the authorisation to carry out the function.

44. Key safeguards are provided in the Bill in relation to these agreements, as follows:

a. these arrangements are subject to mutual consent;

b. an agreement may be cancelled by the Secretary of State at any time;

c. the Secretary of State may still perform a function to which the agreement relates;

d. the functions that the MMO may perform are not unlimited and the Bill specifies a number of non-delegable functions (see clause 17);

e. the maximum duration of any agreement is 20 years;

f. any agreement must be in writing and published in order to bring it to the attention of persons likely to be affected by it.

Clause 15 – agreements between the MMO and eligible bodies

Power conferred on:	*MMO with the approval of the Secretary of State*
Power exercisable by:	*Agreement*
Parliamentary procedure:	*None*

45. This clause provides that the MMO may enter into an agreement with an "eligible body" to authorise that body to perform any function of the MMO in relation to the UK marine area or in relation to specified parts of that area. The approval of the Secretary of State is required for this agreement. This type of agreement is akin to those provided for in the Natural Environment and Rural Communities Act 2006 (c.16).

46. The eligible bodies listed in the Bill (clause 16) are the Environment Agency, any inshore fisheries and conservation authority (IFCA), any harbour authority, Natural England and any local fisheries committee (otherwise known as "Sea Fisheries Committees"). The Secretary of State may add further such bodies to the list by order (see paragraphs 49 to 53).

47. Under such an agreement, the eligible body may be authorised to carry out the functions generally or only in relation to specified cases or areas (see subsection (1)). The arrangements will be set down in detailed agreements that will set out the parameters and conditions pertaining to the authorisation to carry out the function. The MMO will need the ability to delegate functions to eligible bodies for the most effective discharge of its functions, for example where such eligible bodies would be better placed (due, for example, to their resources or expertise) to carry out the MMO's functions on its behalf in particular area. Examples of functions the MMO might want to transfer to these bodies are as follows:

48. The MMO is taking over the licensing function under the Conservation of Seals Act 1970, but there are a few applications each year relating to seals in freshwaters. Those applications will be dealt with by Natural England and the function will, therefore, need to be delegated to that body by the MMO using the flexible arrangements provided for in clause 15.

49. The Environment Agency will be responsible for freshwater fisheries and migratory species out to 6 nautical miles, as it is now. IFCAs will be responsible for marine species management out to 6 nautical miles – as Sea Fisheries Committees (SFC) are now – with the addition of estuaries as far as the tide flows. The MMO will be responsible for enforcement of marine nature conservation and national and EU fisheries provisions out to 200 nautical miles and for British vessels on the high seas. The MMO will take action in the inshore area where national measures are required and in cases where nature conservation is at risk from non-fisheries threats, and it may be that the MMO will wish to delegate certain functions in the area to the Environment Agency and/or SFCs (and to IFCAs when these come into existence, replacing SFCs).

50. Key safeguards are provided in the Bill in relation to these agreements, as follows:

a. these arrangements are subject to mutual consent;

b. the approval of the Secretary of State is required before the MMO may enter into an agreement (and is also needed before an agreement can be varied, unless the Secretary of State, in his approval, provides otherwise);

c. the Secretary of State may specify conditions in the approval to an agreement;

d. the Secretary of State must review the agreement every 5 years and, if it is appropriate to do so in light of that review, cancel the agreement (unless the Secretary of State specifies in the approval that these duties do not apply);

e. the functions that the MMO may perform are not unlimited and the Bill specifies a number of non-delegable functions (see clause 17);

f. the maximum duration of any agreement is 20 years;

g. any agreement must be in writing and published in order to bring it to the attention of persons likely to be affected by it.

Clause 16 - Eligible bodies

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary procedure:	*Negative resolution*

51. This is a **Henry VIII power** as it allows amendments to be made by order to the list of eligible bodies in clause 16.

52. Subsection (2) enables the Secretary of State to add or remove a body from the list of bodies or descriptions of bodies with which the MMO may enter into arrangements for the exercise of its functions. The bodies listed in the Bill are the Environment Agency, any inshore fisheries and conservation authority (IFCA), any harbour authority, Natural England and any Sea Fisheries Committee (SFC).

53. The Secretary of State may only exercise this power if satisfied that at least one of the purposes or functions of the body to be added to the list is related to, or connected with, a marine function. The power may be exercised in relation to private bodies, as well as public bodies, as these may be better placed in some cases to exercise the functions and provide value for money.

54. It is appropriate to amend this list by way of delegated legislation because the list is likely to need to be changed over time in order to take account of bodies being created, merged, disbanded or to reflect a change of name. There may also be some situations where action needs to be taken quickly to remove a body from the list and alternative arrangements put in place. One example of such a change relates to SFCs. SFCs are listed in clause 16 as eligible bodies, although it is intended that they will be replaced in due course by IFCAs. Once IFCAs are established, it is intended that the Secretary of State will exercise the power in subsection (2)(b) to remove SFCs from the list of eligible bodies.

55. Given that there is a limitation on the use of the power (in that only those bodies already exercising, or capable of exercising marine functions, can be added), the Department considers negative resolution procedure offers the appropriate level of parliamentary scrutiny.

Clause 17 – non-delegable functions

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary procedure:	*Negative resolution*

56. Subsection (3)(e) of this clause provides that the Secretary of State may prescribe those powers to fix fees and charges that the MMO or an eligible body may be authorised under an agreement to exercise.

57. Generally, the Department would not wish to authorise an eligible body to fix fees and charges as there can often be substantive issues to consider that are most appropriately decided by Ministers (and, where appropriate, with Treasury approval).

58. However, there are certain limited circumstances where regular small increases in fees or charges are not efficiently dealt with by requiring Ministerial involvement. Such decisions may be more appropriately dealt with by the body that has day-to-day managerial responsibility.

59. The Secretary of State may, therefore, want to authorise an eligible body by order to fix a relevant fee based on its own assessment of costs.

60. The Department believes that this is most appropriately dealt with by delegated legislation, and that the negative Parliamentary procedure provides the correct level of Parliamentary scrutiny.

Clause 32 - Limit on Borrowing

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary procedure:	*Affirmative resolution (HoC)*

61. Subsection (2) of this clause is a Henry VIII power as it enables the Secretary of State to increase, by order, the maximum sum that the MMO may borrow. The figure of £20m, set out in subsection (1), can be increased up to a maximum of £80m. Such a provision is needed given that the Department intend the role of the MMO to evolve and, therefore, need to provide the flexibility for it to be able to take on additional functions as and when required which might also affect the level of funding required.

62. The Department considers it appropriate that such a change should be subject to a high level of parliamentary scrutiny by the House of Commons, since sums borrowed by the MMO would normally be guaranteed by the Government. Any such order would therefore be subject to affirmative resolution procedure.

Clause 35 - Directions by the Secretary of State

Power conferred on:	*Secretary of State, after consultation with the MMO*
Power exercisable by:	*Directions*
Parliamentary procedure:	*None*

63. Subsection (1) allows the Secretary of State to give general or specific directions to the MMO regarding the exercise of its functions, with which the MMO must comply. Such directions are likely to change over time in order to take account of any alterations to the functions of the MMO, or changing priorities in relation to the marine environment. The Department considers that it is necessary to have these direction-making powers in circumstances where a body with significant responsibilities is not acting in a way that is consistent with its functions or general objective.

64. Specific reference is made in subsection (2) to the ability to give directions in relation to international agreements to which the United Kingdom or European Union is a party. This is in recognition that several such agreements relate to the marine area, including some which require member States to undertake actions which the Secretary of State may need the MMO to assist with.

65. Appropriate safeguards are provided so that, before giving directions, the Secretary of State must consult the MMO, notice of any directions must be published in the London Gazette and publicised to bring them to the attention of those likely to be affected.

66. The Department does not consider that Parliamentary scrutiny is necessary given Parliament will previously have scrutinised and approved the assumption of the relevant international obligations.

Clause 36 – Guidance by the Secretary of State

Power conferred on:	*Secretary of State*
Power exercisable by:	*Guidance*
Parliamentary procedure:	*None*

67. This power enables the Secretary of State to give guidance to the MMO regarding the exercise of its functions, to which the MMO must have regard.

68. It is not appropriate to provide for this in primary legislation. The Department considers it an appropriate safeguard that the Secretary of State will consult the MMO, and other bodies and persons as appropriate, before giving any guidance and that Parliamentary scrutiny is not, therefore, necessary.

Clause 37 – Transfer schemes (and Schedule 3: Transfer schemes)

Power conferred on:	*Secretary of State*
Power exercisable by:	*Transfer scheme*
Parliamentary procedure:	*None*

69. This clause makes provision for the transfer of property, rights and liabilities to and from the MMO by way of a transfer scheme made by the Secretary of State. This enables the Secretary of State to transfer resources (including staff) from Defra (including the Marine and Fisheries Agency) and other Government Departments to the newly established MMO to enable it to carry out its functions. If any further transfers are required in future, different transfer schemes may be required.

70. Schedule 3 lays down detailed and strict parameters governing the transfer schemes, outlining technical provisions and what the schemes can cover. It is appropriate to set out these further particulars to ensure that there can be no ambiguity over what can be included in the transfer schemes. These detailed parameters render additional Parliamentary oversight unnecessary.

Schedule 1 Paragraph 6 – power to amend the number of MMO Board members

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary procedure:	*Affirmative resolution*

71. This is a Henry VIII power as it enables amendments to the number of MMO board members.

72. Paragraph 3(1) of Schedule 1 sets out the minimum and maximum numbers of MMO Board members. Paragraph 6 of Schedule 1 gives the Secretary of State power to amend this number as and when required due to an increase or decrease in the functions the MMO may be asked to undertake. The Department considers that having the detail on the face of the Bill provides an appropriate level of transparency.

73. The Department considered it appropriate that any change to the overall number of Board members should be subject to a high level of parliamentary scrutiny to provide sufficient democratic accountability. The power is, therefore, subject to affirmative resolution procedure.

Part 2: Exclusive Economic Zone, UK Marine Area and Welsh Zone

Clause 39 Power to declare an exclusive economic zone

Power conferred on:	*Her Majesty*
Power exercisable by:	*Order in Council*
Parliamentary procedure:	*Negative resolution*

74. This clause confers a power on Her Majesty to declare an Exclusive Economic Zone in the waters around the United Kingdom in line with Part V of the United Nations

Convention on the Law of the Sea. This power enables such a zone to be declared when negotiations with neighbouring States on boundary delimitation have been agreed (such negotiations are currently ongoing), but takes the opportunity afforded by the Marine Bill to establish a power similar to that adopted for the sectoral specific marine zones declared previously e.g. the renewable energy zone under the Energy Act 2004 (c.20). Given the principle of an exclusive economic zone for the United Kingdom will be subject to debate during the passage of the Marine Bill through Parliament, the Department believes that a negative resolution order in Council will be appropriate for the detail of delimiting the actual geographical extent of such a zone.

Clause 41 Creation of Welsh zone

Power conferred on:	*Secretary of State or Her Majesty*
Power exercisable by:	*Order or Order in Council*
Parliamentary procedure:	*Affirmative resolution*

75. This clause amends the Government of Wales Act 2006 (c. 32) to provide for the creation of a zone to be known as the "Welsh zone". The Welsh zone is to comprise the sea adjacent to Wales within British fishery limits. Clause jWZ01(4) and Schedule 4 amend that Act so that functions related to fishing, fisheries and fish health that are currently exercised by Welsh Ministers in relation to Wales (i.e. to the seaward limit of the territorial sea adjacent to Wales) may be transferred to Welsh Ministers in so far as they relate to the area of the Welsh zone beyond the seaward limits of the territorial sea.

76. Paragraph (b) of the definition of Welsh zone provides a power for the Secretary of State by order or Her Majesty by Order in Council to specify the waters within British fishery limits which are to be treated as "adjacent to Wales" for the purposes of the definition of "Welsh zone". The Welsh zone cannot come into existence until this subordinate legislation comes into force.

77. The Department considers that any power to extend the area over which the Welsh Ministers may exercise functions is a constitutional matter. This subordinate legislation should be subject to affirmative resolution procedure. Further, this clause amends s158 of the Government of Wales Act 2006 which provides for the Secretary of State to determine by order the waters to be treated as adjacent to Wales out as far as the seaward boundary of the territorial sea. This order is an affirmative resolution order. The Department considers that it is appropriate, therefore, for the instrument that determines the waters to be treated as adjacent to Wales for the purposes of the definition of Welsh zone also to be an affirmative resolution order and that there should be parity between these order-making powers. The same apples if the determination of waters to be treated as adjacent to Wales is made by Order in Council under s58 of the Government of Wales Act 2006. Such Orders in Council are subject to affirmative resolution procedure.

Clause 41(5) - Power to make consequential modifications and amendments

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary procedure:	*Draft affirmative or negative resolution*

78. This clause confers a power on the Secretary of State to make an order to modify or amend any Act **(Henry VIII)** or instrument that is made before the end of the session in which the Bill is passed. The purpose of this power is to enable the Secretary of State to extend other legislation to the Welsh Zone, if he thinks this is necessary.

79. Instruments that use 41(5) to modify or amend primary legislation will be subject to the draft affirmative procedure. Instruments that use 41(5) to modify or amend subordinate legislation will be subject to the negative procedure.

80. The Department considers it appropriate that where the instrument is using a power to modify or amend primary legislation it should be subject to a high level of parliamentary scrutiny. Such a level of scrutiny is not, however, considered appropriate in the case of subordinate legislation.

Part 3: Marine Planning

Clauses 47, 49 and Schedule 6 - Power to develop the Marine Policy Statement ("the MPS")

Power conferred on:	*Secretary of State,* *Scottish Ministers,* *Department of the Environment in Northern Ireland* *Welsh Ministers*
Power exercisable by:	*None*
Parliamentary procedure:	*Draft MPS will be laid before both Houses of Parliament and before the legislature of any devolved authority which intends to adopt it*

81. The power to develop the Marine Policy Statement (which will govern marine planning and direct decision making in UK waters) is not really a delegated power. However, because it was suggested (in recommendation 31 of the Parliamentary committee reports on pre-legislative scrutiny) that the MPS be subject to Parliamentary scrutiny, the Department has included reference to this power here. As the Department agreed in the Government's response to those reports (at page 78), the MPS will be laid before both Houses of Parliament and before the legislatures of any devolved authority which intends to adopt it. The Department has done this in Schedule 5(10).

Clauses 53, 54 and 55 - Delegation of functions relating to marine plans

Power conferred on:	*Secretary of State in relation to planning functions in the English inshore region and the English offshore region* *Welsh Ministers in relation to planning functions for the Welsh inshore region and the Welsh offshore region* *Department of the Environment (NI) in relation to the Northern Ireland offshore region* *Scottish Ministers in relation to the offshore area adjacent to Scotland*
Power exercisable by:	*Directions*
Parliamentary procedure:	*None*

82. Clause 53 enables any marine plan authority to direct that some or all of their marine planning functions are to be exercised by another public body. The relevant functions are those of:

- designating marine plan areas;
- keeping matters relevant to marine planning under review;
- preparing and consulting on marine plans and statements of public involvement;
- forming advisory and consultative groups to assist in preparing and consulting on marine plans;
- appraising the environmental, economic and social impacts of marine plans;
- seeking advice and assistance from public bodies on the effect of a proposed plan on their functions;
- publication of draft plans; and
- deciding whether to hold an independent investigation into a plan, and appointing an investigator.

83. The functions of adopting, withdrawing or, in the case of the Secretary of State, 'agreeing to' marine plans are excepted from this power and cannot be delegated.

84. Subsection (3) provides that such a direction may only be issued with the consent of the public body, and subsection (4) then requires the public body to comply with the direction, and confers upon it all powers necessary to do so.

85. Clause 54 requires the marine plan authority to publish the direction, and makes supplementary provisions enabling marine plan authorities to:

- place terms and conditions on the direction, and to include within it financial provisions;

- provide that the marine plan authority may exercise the delegated functions concurrently with the public body; and
- make different provision for different public bodies, areas, or cases.

86. Clause 55 enables the marine plan authority to issue further directions as to the performance by a public body of marine planning functions which have been delegated to it. Such directions are binding on the public body.

87. These provisions enable the UK administrations to make whatever arrangements they think best for the delivery of marine plans, either by separating policy from delivery, or co-locating them. It also enables the different administrations to take each other's decisions on this issue into account when deciding how best to deliver plans, and make arrangements to ensure an appropriate level of consistency and parity across borders.

88. The Department intends that the majority of the Secretary of State's planning functions in relation to the sea around England and the UK offshore area will be delegated under clause 53 to the MMO. By making the Secretary of State the marine plan authority on the face of the Bill, but enabling him to delegate his planning functions in this way, the Department intends to retain an appropriate degree of ministerial oversight of planning and to ensure that there is continued democratic accountability in marine management. This route will also reassure stakeholders that the bulk of the planning activity will be undertaken by an organisation that can take an impartial view and is accountable to several different departments. This will enable the planning activity to be steered by a range of interests and ensures a clear focus on sustainable development.

89. This is purely an administrative and procedural arrangement enabling flexibility in the performance of the marine plan authority's functions. It does not affect the requirement to comply with any procedural requirements (including public consultation) which are set out on the face of the Bill. The Secretary of State as marine plan authority retains ultimate accountability for the plan and must take into account any representations received during the consultation before adopting the plan. Directions under clauses 53 and 55 are likely principally to contain procedural guidance and instructions or constraints upon the extent of the delegation. The policies which the delegate will be reflecting in marine plans will be set out separately in the Marine Policy Statement. For these reasons, no parliamentary process is considered necessary.

Part 4: Marine Licensing

Clause 63 – power to add or remove any activity from the list of licensable marine activities

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respect those matters where they have competence* *Department of the Environment in Northern Ireland as respect those matters where it has competence* *Scottish Ministers as respect those matters where they have competence*
Power exercisable by:	*Statutory Instrument (England)* *Welsh Statutory Instrument (Wales)* *Northern Ireland Statutory Instrument (NI)* *Scottish Statutory Instrument (Scotland)*
Parliamentary Procedure:	*Affirmative resolution*

90. This is a Henry VIII power as this clause introduces a new enabling power for the licensing authority to add or remove any activity from the list of activities that require a marine licence.

91. Clause 63 sets out the licensable marine activities. In view of the long lifetime the Department expects for the Bill once enacted, it is appropriate to be able to change this list by way of delegated legislation. It is likely that it will need to be changed over time to take account of technological developments and changes in scientific knowledge which may change the Department's view of the impact of those activities on the marine environment, or to comply with future international treaties. The Department considers it disproportionate to require new primary legislation for any such changes.

92. However, given that the effect of including an activity in the list is that it will become regulated by the licensing regime, the Department considers that such an amendment should be subject to a high level of Parliamentary control. The power is therefore made subject to the affirmative resolution procedure.

93. The Department does not intend this power to be a delegable function under clause 95. In circumstances where the Secretary of State, Welsh, Scottish or Department of the Environment in Northern Ireland has delegated their licensing functions to another person, that person will not be able to amend the list of activities that require a licence.

Clause 64 - power to determine fees that may be charged in pursuance of Marine Licence application

Power conferred on:	*Secretary of State as respects England and non-devolved matters*
	Welsh Ministers as respect those matters where they have competence
	Department of the Environment in Northern Ireland as respect those matters where it has competence
	Scottish Ministers as respect those matters where they have competence
Power exercisable by:	*Regulations (England, Wales, Scotland)*
	Regulations (Northern Ireland Statutory Rule) (NI)
Parliamentary Procedure:	*Negative resolution*

94. This clause allows the licensing authority to set the fees associated with applying for a marine licence. It is a power that ministers currently exercise under section 8 of FEPA[61], which also allows a licensing authority to require a fee to be paid for a licence.

95. Clause 64 allows the licensing authority to charge for an application for a licence, such fees being determined by or in accordance with regulations. It is appropriate that the levels of these fees are set out in delegated legislation because the fees themselves will need to change regularly over time to take account of inflation. The Department considers it disproportionate to require new primary legislation for any such changes. Devolved administrations currently have the power to determine fees in their own area under FEPA and the Department does not want to reduce those powers under the Marine Bill.

96. The Department considers that such delegated legislation should be subject to negative resolution procedure.

97. This power is not intended to be a delegable function under clause 95.

[61] Food and Environment Protection Act 1985

Clause 66 – power for the licensing authority to make further provision as to the procedure for applications and how it grants them

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respect those matters where they have competence* *Department of the Environment in Northern Ireland as respect those matters where it has competence* *Scottish Ministers as respect those matters where they have competence*
Power exercisable by:	*Regulations (England, Wales, Scotland)* *Regulations (Northern Ireland Statutory Rule) (NI)*
Parliamentary Procedure:	*Negative resolution*

98. This clause introduces a new enabling power for the licensing authority to set out in more detail how the licensing applications process will work in its area. It also gives the licensing authority the power (which must be exercised) to establish a mechanism for applicants to appeal against licensing decisions.

99. Subsection (6) of Clause 66 enables the licensing authority making such regulations to prescribe in more detail the necessary procedural steps and the way in which an applicant should be notified of a determination. It is appropriate to provide for this mechanism in delegated legislation to give flexibility to each territory within the UK to fine tune how licensing procedures are to operate in their area and to determine who delivers them. While the face of the Bill already provides for a fully functioning licensing regime and establishes the broad principles under which the regime will operate, it is appropriate that the Minister can set out more details governing the assessment and treatment of applications by secondary legislation.

100. The Department considers setting out the detail of such procedural arrangements on the face of the Bill will disproportionately reduce the flexibility of the devolved territories to deliver licensing functions in their area. Given that the licensing framework is provided for on the face of the Bill, the Department considers negative resolution procedure to be appropriate for such delegated legislation.

101. This power is not intended to be a delegable function under clause 95.

Clause 70 – power to make provision for appeals against licensing decisions

Power conferred on:	*Secretary of State as respects England and non-devolved matters*
	Welsh Ministers as respect those matters where they have competence
	Department of the Environment in Northern Ireland as respect those matters where it has competence
	Scottish Ministers as respect those matters where they have competence
Power exercisable by:	*Regulations (England, Wales, Scotland)*
	Regulations (Northern Ireland Statutory Rule) (NI)
Parliamentary Procedure:	*Negative resolution*

102. This clause enables a licensing authority to make regulations providing for an applicant to appeal against the decision of a licensing authority to refuse an application for a licence or any of the conditions attached any licence granted.

103. Clause 70 sets out those provisions which may be included in regulations made by a licensing authority in establishing an appeals process.

104. The Department considers that these matters are more appropriately included in regulations than in primary legislation, as they deal with procedural detail. The Department considers setting out such further detailed arrangements on the face of the Bill will disproportionately reduce the flexibility of the devolved territories to deliver licensing functions in their area. The process for appealing against licensing decisions is part of the overall licensing and decision-making process. The Department therefore considers that regulations made under this provision should be subject to negative resolution procedure, which is the same procedure as the order under clause 66 setting out the detail of the overall licensing process.

105. This power is not intended to be a delegable function under clause 95.

Clause 71 - power for a licensing authority to specify, as regards its area, activities which will not need a marine licence

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respect those matters where they have competence* *Department of the Environment in Northern Ireland as respect those matters where it has competence* *Scottish Ministers as respect those matters where they have competence*
Power exercisable by:	*Order (England, Wales, Scotland)* *Order (Northern Ireland Statutory Rule) (NI)*
Parliamentary Procedure:	*Negative resolution*

106. This clause is a re-enactment of an enabling power already used under Part II of FEPA (section 7). It allows the licensing authority to exempt activities from the marine licensing regime.

107. There are some activities which have a low impact on the environment and therefore do not need to be regulated individually to ensure that the environment and human health are protected. It is appropriate for the licensing authority to be able to exempt such activities, or otherwise lighten the regulatory burden, through delegated legislative powers. The definitions of what would be exempt, and any constraints placed on exemptions, would, in practice, always be based on relevant evidence.

108. This power also "future-proofs" the Bill. New technologies may improve the functioning of particular activities to the extent that they no longer pose sufficient risk to warrant a licensing requirement. In the future, entirely new activities may be performed that pose little or no risk to the marine environment. The Department considers it disproportionate to require new primary legislation to provide for any such developments.

109. Devolved administrations currently have the power to exempt activities in their own areas under FEPA and the Department does not want to reduce those powers under the Bill.

110. The Department considers negative resolution procedure appropriate.

111. This power is not intended to be a delegable function under Clause 95.

Clauses 75 - Power for the Secretary of State to disapply the Marine Act licensing procedures, in lieu of Harbour Order procedures, for those developments where both procedures apply

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order (England & Wales)*
Parliamentary Procedure:	*Negative resolution*

112. Clause 75 gives the Secretary of State the power to disapply by order any parts of the Marine and Coastal Access Act licensing procedure, and to apply instead the procedure set out in the Harbours Act. It also allows the Secretary of State to modify that Harbours Act process by order.

113. The effect of this power is to enable the creation of a single process for assessing two different consents. That process will be the Harbours Act process subject to such modifications as are made in the order to enable that process to fully take account of marine licensing considerations. The purpose is to simplify the process that a developer must go through to get his/her application assessed, and in doing so reduce costs.

114. In response to the question raised by the Delegated Powers Committee in respect of the draft Bill (Annex 4 paragraph 1) as to whether any order would apply to single cases (and therefore whether the use of subordinate legislation was appropriate), the Department advises that the intent here is to catch classes of case where the relevant procedures may be varied rather than introducing an order for a specific case of two applications, although such an eventuality cannot be ruled out. For example, if the circumstances of a particular case were such as to require an order amending the Harbours Act procedures which was unlikely to be repeated. With this in mind, the Department believes that the use of an order making power here is appropriate.

115. The Department considers it appropriate that any order modifying the procedure set out in the Harbours Act is subject to negative resolution procedure. As the objective of such an order would be to ensure that the Harbours Act process fully met the requirements of the marine licensing process set out in the Marine Act, and the Department considers it appropriate to ask Parliament to consider the detail of that process through negative resolution procedure, the Department also considers negative resolution procedure to be appropriate here.

116. This power is not intended to be a delegable function under clause 95.

Clauses 76 - Power for the Secretary of State to disapply the Marine Act licensing procedures, in lieu of Electricity Act procedures, for those developments where both procedures apply

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

117. Clauses 76 gives the Secretary of State the power by order to disapply any parts of the Marine Act licensing procedure, and to apply instead the procedure set out in the Electricity Act 1989. It also allows the Secretary of State to modify that Electricity Act process by order.

118. The effect of this power is to enable the Secretary of State to create a single process for assessing two different consents. That process will be the Electricity Act process subject to such modifications as are made in the order to enable that person to take full account of marine licensing considerations. The purpose is to simplify the process that a renewable energy developer must go through to get his/her application assessed, and in doing so reduce costs.

119. In response to the question raised by the Delegated Powers Committee in respect of the draft Bill (Annex 4 paragraph 1) as to whether any order would apply to single cases (and therefore whether the use of subordinate legislation was appropriate), the Department advises that the intent here is to catch classes of case where the relevant procedures may be varied rather than introducing an order for a specific case of two applications, although such an eventuality cannot be ruled out. For example, if the circumstances of a particular case were such as to require an order amending the Electricity Act procedures which was unlikely to be repeated. With this in mind, the Department believes that the use of an order making power here is appropriate.

120. The Department considers it appropriate that any order modifying the procedure set out in the Electricity Act is subject to negative resolution procedure. As the objective of such an order would be to ensure that the Electricity Act process fully met the requirements of the marine licensing process set out in the Marine Act, and the Department considers it appropriate to ask Parliament to consider the detail of that process through negative resolution procedure. The Department also considers negative resolution procedure to be appropriate here.

121. This power is not intended to be a delegable function under clause 95.

Clause 85 – power for a licensing authority to amend by order the references to international conventions

Power conferred on:	*Secretary of State, as respects all of the UK*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

122. This is an **incidental Henry VIII power** allowing the licensing authority to make amendments to the definitions of "Convention State", "the London Convention", "the London Protocol" and "the OSPAR Convention", as listed in subsections (5)

and (6). It is consequently a power only exercisable by the Secretary of State and not by Ministers of the devolved territories.

123. It is appropriate to amend this list of conventions by delegated legislation as the list is likely to change over time in order to reflect changes in international law. The Department considers it disproportionate to require new primary legislation for any such changes.

124. The Department acknowledges the presumption that all Henry VIII powers will be subject to affirmative resolution procedures. However, as the power is limited to give effect to only those agreements which alter the provisions of, or replace, those already listed, and which would have been considered by Parliament for ratification of the corresponding Treaty, the Department considers negative resolution procedure appropriate in this case.

125. This power is not intended to be a delegable function under clause 95.

Clauses 90, 91, 92 and 93 – power for a licensing authority to confer on an enforcement authority the power to impose fixed monetary penalties; variable monetary penalties; (& Schedule 7)

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respect those matters where they have competence* *The Department of the Environment in Northern Ireland as respect those matters where it has competence* *Scottish Ministers as respect those matters where they have competence*
Power exercisable by:	*Statutory Instrument (England)* *Welsh Statutory Instrument (Wales)* *Northern Ireland Statutory Instrument (NI)* *Scottish Statutory Instrument (Scotland)*
Parliamentary Procedure:	*Affirmative resolution*

126. These clauses introduce two similar enabling powers. They allow a licensing authority to confer on a designated enforcement authority the power to impose fixed or variable monetary penalties. The powers are adapted from those outlined in Part 3 of the Regulatory Enforcement and Sanctions Act 2008.

127. These clauses together with Schedule 7 lay down detailed and strict parameters that govern the imposition of monetary penalties. Schedule 7 includes detail on costs recovery, the appeals process and consultation requirements on the enforcement authority to publish guidance on its use and enforcement of civil sanctions. Schedule 7 also specifies the provisions that orders made under clauses 90 and 92

may contain in relation to appeals, including powers which the person to whom an appeal is made has in responding to that appeal.

128. It is appropriate to set out further particulars surrounding the use of these enforcement tools in delegated legislation to enable each administration to choose the appropriate enforcement authority for its area; tailor the schemes to make them more appropriate to those areas; and set the level of any fixed monetary penalties each type of offence should attract. The latter is also subject to change over time.

129. The Department considers setting out such further arrangements on the face of the Bill would considerably reduce the flexibility that a civil sanctions scheme is intended to provide. The types of licensing breach that need addressing, and the proportionate financial penalty for that breach, will change over time. Being able to adapt the civil sanctions scheme to reflect these changes represents a valuable flexibility in the Bill.

130. Given that the power to impose civil sanctions will be conferred on regulators by the delegated legislation, it is appropriate that such legislation is subject to the higher level of Parliamentary Scrutiny that affirmative resolution procedure provides.

131. The Department does not intend this power to be a delegable function under clause 95. In circumstances where the Secretary of State, Welsh, Scottish or Department of the Environment in Northern Ireland has delegated their licensing functions to another person, that person will not therefore be able to make such an order determining who the appropriate enforcement authority will be or to specify the content of any civil sanctioning scheme.

<u>Clause 95 – power to delegate to another person any of the licensing authority's delegable functions</u>

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respect those matters where they have competence* *The Department of the Environment in Northern Ireland as respect those matters where it has competence* *Scottish Ministers as respect those matters where they have competence*
Power exercisable by:	*Order (England, Wales, Scotland)* *Order (Northern Ireland Statutory Rule) (NI)*
Parliamentary Procedure:	*Negative resolution*

132. This clause introduces a new enabling power for the licensing authority to delegate any of its licensing functions, as defined by subsections (4) and (5) of clause 95, to another body.

133. Clause 95 gives the licensing authority making such an order the ability to prescribe in more detail how each of the functions should be performed in the event it

transfers its functions to another body. As respects England, the Secretary of State as respects England intends to use this power to delegate his licensing functions to the MMO. It is appropriate to provide for this mechanism in delegated legislation to give flexibility to each territory within the UK to fine tune how licensing procedures are to operate in their area and to determine who delivers them. While the face of the Bill already provides for a fully functioning licensing regime, in the event of any such delegation of functions, it is appropriate that the Minister can set out more details governing the assessment and treatment of applications by secondary legislation.

134. The Department considers setting out such further detailed arrangements on the face of the Bill would disproportionately reduce the flexibility needed to allow the role of the MMO to develop over time and for the devolved administrations to deliver licensing functions in their area. Given that the licensing framework is provided for on the face of the Bill, the Department considers negative resolution procedure appropriate for any such order.

Clause 98 – power to determine how a licensing authority must maintain a register of licensing information

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respect those matters where they have competence* *Department of the Environment in Northern Ireland as respect those matters where it has competence* *Scottish Ministers as respect those matters where they have competence*
Power exercisable by:	*Regulations (England, Wales, Scotland)* *Regulations (Northern Ireland Statutory Rule) (NI)*
Parliamentary Procedure:	*Negative resolution*

135. This clause is a re-enactment of an enabling power already used under Part II of FEPA (section 14). It requires the licensing authority to lay out in regulations the particulars to be kept on a public register of information.

136. Clause 98 sets out the principles on which any register must be maintained and includes broad types of key information that this register must contain. It is appropriate to prescribe further detail on the type of information to be stored in delegated legislation because the type of information to be recorded is subject to change over time. This is because new activities may become licensable, any of which may require different information particulars to be recorded, and because of any changes to European legislation governing the storage and accessibility of information, such as the Access to Environmental Information and Public Participation Directives.

137. The Department considers it disproportionate to require new primary legislation for any such changes and that any such amendment should be subjected to negative resolution procedure.

138. This power is not intended to be a delegable function under clause 95.

Clause 105 – power to make provision for appeals against statutory enforcement notices.

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respects those matters where they have competence* *Department of the Environment in Northern Ireland as respects those matters where it has competence* *Scottish Ministers as respects those matters where they have competence*
Power exercisable by:	*Regulations (England, Wales, Scotland)* *Regulations (Northern Ireland Statutory Rule) (NI)*
Parliamentary Procedure:	*Affirmative Resolution*

139. This clause enables a licensing authority to make regulations providing for any person to whom a notice is issued under sections 87, 88, 99 or 101, (a compliance notice, remediation notice, stop notice or emergency safety notice) to appeal against the decision to impose it.

140. Clause 105 sets out those provisions which may be included in regulations made by a licensing authority in establishing an appeals process relating to the issue of statutory notices. These provisions may also specify ways that any person to whom an appeal is made is able to deal with that appeal.

141. Potentially, a notice could impose significant costs and disruption upon an operator and they therefore need the ability to appeal against it. For both remediation and compliance notices, the appeal will suspend the effect of the notice. This does not apply in the case of an emergency safety notice however, since the serious harm these notices are intended to prevent takes priority over the rights of the applicant in the short term.

142. The Department considers that these matters are more appropriately included in regulations than in primary legislation, as they deal with procedural detail. The Department considers setting out such further detailed arrangements on the face of the Bill will disproportionately reduce the flexibility of the devolved territories to deliver licensing functions in their area. Since the appeals process will have wider implications for operators, the Department considers that regulations made under this provision should be subject to the affirmative resolution procedure.

143. This power is not intended to be a delegable function under clause 95.

Schedule 20 paragraph 3 - Power for the authority currently making harbour orders, to delegate certain of their functions under the Harbours Act 1964 to another body

Power conferred on:	*Secretary of State as respects England and non-devolved matters* *Welsh Ministers as respect those matters where they have competence*
Power exercisable by:	*Order (England, Wales)*
Parliamentary Procedure:	*Negative resolution*

144. This paragraph introduces a new section (section 42A) to the Harbours Act 1964.

145. The clause enables the authority currently responsible for making harbour orders to delegate those functions to another body. These functions are:

- Making harbour empowerment and revision orders (ss. 16 & 14)
- Making harbour revision orders for securing harbour efficiency (s.15)
- Making orders varying powers of appointment to harbour authorities (s.15A)
- Making harbour reorganisation schemes (s.18)
- Making orders amending Acts of local application (s.60)

146. The Secretary of State intends to use this power as respects England to delegate these functions to the MMO wherever he currently exercises them. The same power would enable Welsh Ministers to delegate their functions under these sections to another body if they chose to.

147. The Secretary of State and Welsh Ministers exercise these functions now without direct Parliamentary oversight. However, the Department recognises the concerns about the lack of democratic accountability that giving a non-Ministerial body these functions would raise if they were to be exercised in exactly the same way. This clause therefore makes provision for orders to be laid before Parliament and subjected to negative resolution procedure.

148. These functions will not be further delegable by the MMO or other body. Only the current authority will have the power.

Schedule 8 paragraph 5 - Power to for disapply

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative Resolution*

149. Paragraph 4 of Schedule 8 inserts an order making power into Part 3 of the Petroleum Act 1998. Part 3 of that Act provides for a regulatory regime governing the construction and use of pipelines in waters from the landward baseline of the territorial sea to the edge of the UK continental shelf. The order will allow certain specified, or specified kinds of, pipeline to be removed from the regulatory provisions of Part 3 of the Petroleum Act. Any pipeline specified in that order will subsequently be caught by the licensing regime described in Part 4 of the Marine

Bill. It is intended that most pipelines which are not used for the conveyance of hydrocarbons or used in relation to oil and gas or other energy related activities will be included in this order, thereby bringing them within the marine licensing regime.

150. The Department considers it appropriate that any order disapplying Part 3 of the Petroleum Act to be subject to negative resolution procedure given they will still be subject to licensing but under the Marine and Coastal Access Act.

Schedule 8 paragraph 6 - Power to bring certain pipelines within the scope of Part 3 of the Petroleum Act

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative Resolution*

151. Paragraph 4 of Schedule 8 inserts an order making power into Part 3 of the Petroleum Act 1998. Part 3 of that Act provides for a regulatory regime governing the construction and use of pipelines in waters from the landward baseline of the territorial sea to the edge of the UK continental shelf. The order will allow pipelines used in connection with the exploration for, or exploitation of petroleum or the importation of petroleum into the United Kingdom, which are currently not subject to provisions of the Petroleum Act, to become subject to regulation under that Act. It will only apply to pipelines built before 1976.

152. The Department considers it appropriate that any order applying Part 3 of the Petroleum Act to be subject to negative resolution procedure.

Part 5: Nature Conservation

Clause 113 - power to designate Marine Conservation Zones

Power conferred on:	*The Secretary of State as regards England and UK offshore waters (other than Scottish offshore waters)* *Welsh Ministers as regards Wales* *Scottish Ministers as regards Scottish offshore waters*
Power exercisable by:	*Local order*
Parliamentary Procedure:	*None*

153. This provision enables the appropriate authority to designate Marine Conservation Zones (MCZs).The appropriate authority for England and UK offshore waters other than Scottish offshore waters is the Secretary of State. The Welsh Ministers are the appropriate authority for Wales. The Scottish Ministers are the appropriate authority for Scottish offshore waters. MCZs will be designated in order to conserve flora, fauna, marine habitats and geological or geomorphological features. In considering whether to designate an MCZ the appropriate authority may have regard to the economic or social consequences.

154. MCZs will be designated by local order, which will be subject to prior public consultation. The order will identify the area of the MCZ(s) and state the protected features(s) and the conservation objectives for the site. Once designated, MCZs will be conserved by a series of duties imposed on public authorities.

155. The appropriate authority will be able to amend or revoke an order by making a further order.

156. Parliamentary scrutiny of MCZ designation orders is not necessary because these will be local orders, clear parameters for the exercise of the order-making power are set out in clause 116 and the appropriate authority will normally (except where urgent action needs to be taken) consult with interests likely to be affected. This is consistent with existing practice for nature conservation site-designations such as Sites of special scientific interest, National nature reserves, Marine nature reserves and European protected sites.

Clause 123 – Advice and guidance by conservation orders

Power conferred on:	*Natural England as regards England* *The Countryside Council for Wales as regards Wales* *The Joint Nature Conservation Committee as regards UK offshore waters*
Power exercisable by:	*Guidance*
Parliamentary procedure:	*None*

157. This power enables Natural England, the Countryside Council for Wales and the Joint Nature Conservation Committee to give advice and guidance to public authorities on prescribed matters in connection with MCZs, in order to assist these authorities in carrying out their functions and in complying with their duties under clauses 121 and 122. Under clauses 121(7) 123(7) and 122(11) public authorities are obliged to have regard to advice and guidance given under clause 123 in complying with those duties.

158. Since the advice and guidance is likely to be given on a regular basis and deal with scientific and technical matters, the Department does not consider that Parliamentary scrutiny would be appropriate.

Clauses 125, 127 and 130 - powers to make byelaws in England and conservation orders in Wales

Power conferred on:	*Marine Management Organisation as respects England*
	Welsh Ministers as respects Wales
Power exercisable by:	*Local byelaws/orders*
Parliamentary Procedure:	*None*

159. These provisions enable the MMO in England, and the Welsh Ministers in Wales, to make byelaws (conservation orders in Wales) for the purpose of furthering the conservation objectives of an MCZ. A byelaw/order generally takes effect after it has been subject to public consultation. In England the byelaw must also have been confirmed by the Secretary of State. The consultation and confirmation requirements do not apply to byelaws which need to be made urgently (see below).

160. Byelaws/conservation orders in Wales can be used to prohibit or restrict unregulated activities that might otherwise hinder the conservation objectives set for an MCZ. They may make different provisions for different circumstances, such as different parts of the site, times of year or means/methods of carrying out any activity. Activities that might be regulated include:

- movement or other activities within an MCZ or on the adjacent seashore;
- entry into, or movement within, the MCZ by recreational vessels;
- restricting the speed of any vessel within or outside of an MCZ;
- anchoring by any vessel within an MCZ;
- the killing, taking, destruction, molestation or disturbance of animals or plants within the MCZ; and
- the doing of anything in the MCZ which will interfere with the seashore or seabed, or damage or disturb any object within an MCZ.

161. Byelaws/conservation orders will not apply to certain prescribed activities, such as those authorised by an authorisation granted in accordance with clause 122, activities carried out by a public authority in accordance with clause 121(2), or those necessary in the interests of crime prevention or national security.

162. The MMO or Welsh Ministers may issue permits allowing things which would otherwise result in the commission of an offence under clause 135, and can amend or revoke a byelaw/order by making a further byelaw/order.

163. Where there is an urgent need to protect an English MCZ, the MMO may make a byelaw which takes effect without prior public consultation or confirmation by the Secretary of State. However, the Bill provides that:

- the Secretary of State may revoke the byelaw;
- the need for the byelaw must be kept under review by the MMO; and
- the byelaw can remain in force for no longer than 12 months, extendable by a further order to 18 months where the MMO intends to

make a permanent byelaw and has published notice of its proposal to make the byelaw.

164. Where there is an urgent need to protect an MCZ in Wales, Welsh Ministers may make a conservation order which takes place without prior consultation.

165. Parliamentary scrutiny of byelaws/conservation orders is not appropriate because they will be local measures, and before making an order the MMO and the Welsh Ministers will carry out public consultation (except where protection measures are urgently required which precludes consultation taking place). The Department has sought to clarify the nature of these local measures by referring to them now as byelaws in England. The Department is retaining "conservation orders" for local Welsh measures to reflect the fact that these will be made by Welsh Ministers. Welsh conservation orders will not be orders for the purposes of clause 306(2) (which allows order making powers to be used to amend enactments). This addresses a concern expressed by the Delegated Powers Committee in relation to clause 306(2) and set out in Annex 4 of the Joint Committees' report.

166. The consultation draft of the Bill provided for breach of a byelaw/order to be an offence triable summarily or on indictment with a fine specified in the order but not exceeding £50,000. Clause 135 now provides for a lesser penalty. A breach will be an offence to which a fine not exceeding level 5 on the standard scale applies.

Clauses 128 and 132 - powers to make interim byelaws/conservation orders

Power conferred on:	*Marine Management Organisation as respects England,* *Welsh Ministers as respects Wales*
Power exercisable by:	*Local byelaw/order*
Parliamentary Procedure:	*None*

167. In England, clause 128 enables the MMO to make interim byelaws for the purpose of protecting any feature(s) where the MMO considers there are or may be reasons for the Secretary of State to consider designating the area as an MCZ, and the MMO thinks that there is an urgent need to protect that feature.

168. In Wales, clause 132 enables Welsh Ministers to make interim orders for the purpose of protecting any feature(s) if the Minister thinks there are or may be reasons to consider designating the area as an MCZ, and there is an urgent need to protect that feature.

169. Interim byelaws/orders can be used to impose the same types of controls as byelaws/orders (under clauses 125 and 130).

170. An interim byelaw/order must contain a description of the boundaries of the area to which it applies (which must be no greater than necessary to protect the feature(s)) and can only be made where the MMO or the Welsh Ministers consider that there is an urgent need to protect the feature(s) in question.

171. The Bill provides, in the case of interim byelaws in England, for:

- the Secretary of State to revoke an order;
- the need for the order to be kept under review by the MMO; and

- an order to remain in force for no longer than 12 months, extendable only by direction of the Secretary of State so that it remains in force until he designates the area or decides not to designate it as an MCZ.

172. In the case of interim orders in Wales, the Bill provides that the order remains in force for no longer than 12 months, unless the Welsh Ministers extend that period by making a further order.

173. Parliamentary scrutiny of interim byelaws/orders is not considered appropriate because they will be local byelaws/orders and need to be made quickly in order to protect features which are under immediate or imminent threat.

Clauses 138 and 140 - Powers to make orders in respect of fixed monetary penalties

Power conferred on:	*Secretary of State as respects England* *Welsh Ministers as respects Wales*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Affirmative resolution*

174. These provisions enable the Secretary of State as respects England, and Welsh Ministers as respects Wales, to make orders conferring powers to issue fixed monetary penalties where an offence is committed under a provision of a byelaw, (interim or urgent) in England or order in Wales (made under clauses 125, 127, 128, 130 and 132). This Order-making power will be used in England to confer the power to issue such penalties on the MMO. Welsh Ministers will exercise the power to issue penalties in Wales.

175. The powers closely mirror those outlined in Part 3 of the Regulatory Enforcement and Sanctions Bill currently before Parliament. Clauses 138 to 140 and Schedule 10 lay down detailed and strict parameters that govern the imposition of fixed monetary penalties.

176. Given that the framework in respect of fixed monetary penalties under clauses 138 and 140, is provided for on the face of the Bill, the Department considers that orders made by the Secretary of State and by the Welsh Ministers should be subject to an affirmative resolution procedure in Parliament and the National Assembly for Wales respectively. The Department undertook to do this at page 98 of the Government's response to the reports on pre-legislative scrutiny and this is achieved by clauses 138 and 306(6) and (7).

Clause 134 - power to make regulations providing for the procedure to be followed at hearings

Power conferred on:	*Welsh Ministers as respects Wales* *Secretary of State in any other case*
Power exercisable by:	*Regulations*
Parliamentary Procedure:	*Negative resolution*

177. These provisions enable the appropriate authority to make regulations setting out rules for the procedures to be followed before, during and after hearings which the appropriate authority may decide to hold.

178. The competent authority may hold a hearing for the purposes of hearing evidence to inform a decision on whether to:

- make an order designating an area as an MCZ,
- confirm/make byelaws or (in Wales) an interim order ; or
- revoke or amend urgent or interim byelaws in England.

179. The person appointed to run the hearing will have reasonable discretion to run the hearing according to local circumstances, but regulations will assist all the parties involved by providing greater clarity and certainty on important matters of procedure.

180. Given that regulations made by the Secretary of State and by the Welsh Ministers will simply set out detailed matters of administrative procedure, a negative resolution procedure before Parliament and the National Assembly for Wales respectively is considered appropriate.

Schedule 13 - power to make regulations providing for the procedure to be followed at hearings

Power conferred on:	*The Secretary of State as respects England* *Welsh Ministers as respects Wales*
Power exercisable by:	*Regulations*
Parliamentary Procedure:	*Negative resolution*

181. This Schedule amends the Wildlife and Countryside Act 1981 to enable the Secretary of State or Welsh Ministers to "call in" and make directions in connection with the notification of SSSIs in the sub-tidal area. The new provisions include a power for the "competent authority" to make regulations setting out rules for the procedures to be followed before, during and after hearings which the competent authority may decide to hold in connection with the notification of subtidal Sites of Special Scientific Interest.

182. Given that regulations made by the Secretary of State and by the Welsh Ministers will simply set out detailed matters of administrative procedure, a negative resolution procedure before Parliament and the National Assembly for Wales respectively is considered appropriate.

Part 6: Inshore Fisheries Bodies

Clauses 145, 147 and 148 - Establishment of inshore fisheries and conservation districts and membership/proceedings of inshore fisheries and conservation authorities

Power conferred on:	*The Secretary of State*
Power exercisable by:	*Statutory instrument*
Parliamentary Procedure:	*Negative resolution*

Establishing an Inshore Fisheries and Conservation District

183. Clause 145 enables the Secretary of State to establish inshore fisheries and conservation districts ("IFC districts") by order and is a partial re-enactment of section 1 of the Sea Fisheries Regulation Act 1966 which is repealed by this Act.

184. The IFC district will consist of one or more local authority areas in England that include part of the seashore together with a corresponding area of sea lying seawards from that part of the shore as specified in the order.

185. The precise extent of sea fisheries districts has been contained in secondary legislation since they were first established by the Sea Fisheries Regulation Act 1888. Minor variations in the extent of the new IFC districts will be inevitable and flexibility is needed to combine or sub-divide districts on the basis of experience and in changing circumstances. Local authority reorganisation and boundary changes may need to be reflected in the extent of particular districts.

186. Before an order is made, the Secretary of State must consult the relevant bodies. These include every council falling within the proposed IFC district; the Environment Agency; the MMO; Natural England; the authority for every IFC district that adjoins the proposed IFC district and any other persons affected. There are corresponding consultation requirements under clause 148 where the order is to be amended or revoked.

Membership

187. Clause 147 requires that the order establishing an IFC district must provide for the IFC authority to consist of persons who are members of a relevant council, persons appointed by the MMO, and other persons.

188. A delegated power **(Henry VIII)** is provided for the Secretary of State to amend the nature and descriptions of those appointed to an IFC authority and to make such other amendments to the clause as are considered necessary. Persons appointed by the MMO must be persons acquainted with the needs and opinions of the fishing community of the district and those with knowledge of, or expertise in, marine environmental matters. This will ensure that IFC authorities are able to fulfill their core purpose and duties. Providing the Secretary of State with a delegated power to amend or vary this section will provide flexibility so that if the nature of the marine environment changes, those who represent affected interests in the inshore area can also change. Where the membership is changed consequential amendments are likely to be needed in the definitions at subsection (8).

189. In addition to setting up the IFC district and establishing membership, the order must designate the number of council members and the number of appointees on each IFC authority. It may also include provisions about how a member of the authority is to be appointed and re-appointed; the correct procedures to be followed; the conduct of members; the delegation of any functions; and the payment

of allowances. These powers are delegated so that the membership and proceedings of IFC authorities can change according to their needs (i.e. because of some changing circumstance it may no longer be appropriate for IFC authority 'A' to have 'X' number of members on its committee).

190. The Department considers that a negative resolution procedure is appropriate for the making, amendment or revocation of these orders since the parameters for the exercise of the power are clearly set out on the face of the Bill. The Department considers that a negative resolution procedure is appropriate for amendments to the nature and descriptions of those appointed to an IFC authority and for any necessary consequential amendments to the clause. This is because it considers these are matters of detail which are not likely to be of significant interest to Parliament and that making the power subject to an affirmative procedure unnecessarily onerous and burdensome.

Clauses 151 to 155 inclusive - Power to make byelaws

Power conferred on:	*Inshore Fisheries and Conservation authorities*
Power exercisable by:	*Byelaw confirmed or revoked by the Secretary of State*
Parliamentary Procedure:	*None*

191. Clause 151 provides for IFC authorities to be able to make byelaws to manage the exploitation of sea fisheries resources in their district. Byelaws do not have effect until confirmed by the Secretary of State. Emergency byelaws do not need such confirmation.

192. As detailed in clause 152, IFC authority byelaws can prohibit or restrict the exploitation of sea fisheries resources (with or without permits) and the use of vessels, fishing methods or fishing gear. They can also make provision for the regulation, protection and development of fisheries for shellfish and for requiring provision of information for the purpose of enforcement of byelaws.

193. Clause 153 provides for emergency byelaws which can only be made in unforeseen cases of urgency and for a maximum of 12 months duration, extendable once (with the written agreement of the Secretary of State) for a maximum of a further 6 months. This position is unaffected by clause 156(2)(d). Clause 154 makes further provision about byelaws generally.

194. Clause 155 gives the Secretary of State the power to make an order, not subject to any Parliamentary procedure, which revokes or amends a byelaw so as to restrict its application. The power can only be exercised where the Secretary of State is satisfied that any provision made by the byelaw is unnecessary, inadequate or disproportionate. Provision is made as to consultation, power to hold a local enquiry and for publication requirements for the order.

195. It is appropriate for this level of regulation to be made through byelaws rather than Statutory Instrument as the issues to be addressed are local in nature. This approach has been taken for over 100 years and has worked well. The provision that can be made in byelaws is detailed on the face of the Bill and it would be disproportionate to take up parliamentary time for scrutiny of their exercise.

Clause 156 – Byelaws: procedure

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory Instrument*
Parliamentary Procedure:	*Negative resolution*

196. Clause 156 provides for the Secretary of State to make regulations about the procedure to be followed by an IFC authority when making byelaws and emergency byelaws – including advertising, consultation and making and confirming byelaws. The current procedure for proposing, advertising, making and confirming byelaws is made under section 5(1) of the 1966 Act in the Sea Fisheries (Byelaws) Regulations 1985.

197. This power should be delegated rather than detailed in the Bill because the nature of the byelaw-making process is dynamic and changes over time according to situation and experience. The Department considers that a negative resolution procedure is adequate for regulations governing the byelaw (and emergency byelaw) making process. There are no significant issues for Parliament to consider and the previous SI governing the byelaw-making process was not subject to parliamentary control. Certain procedural safeguards relating to publication and evidence of byelaws are contained in clauses 156 and 158.

Clause 162 – Powers of IFC Officers

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory Instrument*
Parliamentary Procedure:	*Negative resolution*

198. The Secretary of State is given **(Henry VIII)** power by subsection (4) of clause 162 to amend the list of statutory provisions that are to be enforced by IFC officers so as to take account of changes in the fisheries sector and the marine environment. Amendments may also be necessary to comply with new obligations under the Common Fisheries Policy and other EC measures.

199. The Department considers that a negative resolution procedure is appropriate and proportionate for amendments to the list of legislation to be enforced by IFC officers.

Clause 162 - Power to make consequential or transitional provision, etc.

Power conferred on:	*The Secretary of State as respects England* *Welsh Ministers as respects Wales and the Welsh zone*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

200. This power enables the Secretary of State or the Welsh Ministers to make such provision as is necessary in consequence of the repeal of the Sea Fisheries

Regulation Act 1966. In particular, provision will need to be made in respect of: the transfer of staff, rights and property from local fisheries committees to IFC authorities or the control of Welsh Ministers, the continuance in force of existing local fisheries committee byelaws and the existing cross-border local fisheries committee.

201. Given that orders under this clause made by the Secretary of State or the Welsh Ministers will address matters of detail relevant to specific local issues, a negative resolution procedure before Parliament and the National Assembly for Wales respectively is considered appropriate.

Clause 180 - Power of Welsh Ministers in relation to fisheries in Wales

Power conferred on:	*Welsh Ministers*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

202. This power enables the Welsh Ministers to make provision by order which Inshore Fisheries and Conservation Authorities can make by byelaw under clause 151, but only to the extent that the Welsh Ministers do not already have the power to make. In particular, the Sea Fish (Conservation) Act 1967 will provide the Welsh Ministers with many of the powers given to IFC Authorities.

203. Given that orders under this clause made by the Welsh Ministers will address matters of detail relevant to specific local issues, a negative resolution procedure before the National Assembly for Wales is considered appropriate.

Part 6: Fisheries

Clause 185 - amendment to existing enabling power to set size limits for sea fish (Order-making power contained in Sea Fish (Conservation) Act 1967)

Power conferred on:	*Secretary of State in relation to England* *Welsh Ministers in relation to Wales*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

204. Section 1 of the Sea Fish (Conservation) Act 1967 enables the Ministers (now the Secretary of State and the devolved administrations) to make an order: prohibiting any person from landing sea fish below a prescribed size, prohibiting the sale of sea fish below the prescribed size, and prohibiting the carriage by a relevant British fishing boat of sea fish below the prescribed size. Orders under this section may set different limits for different areas, for fish of different sexes and may restrict the landing by any person of parts of fish below the size limit set for that species.

205. Section 1 is limited in that it does not currently allow for a maximum size limit or a size range to be set or for the prohibition on carriage to apply to a vessel which is not covered by the definition of a relevant British fishing boat. Maximum limits or prescribed size ranges can act as an effective conservation measure by providing protection for both mature and immature specimens of sea fish. The conservation

benefits of such restrictions could be limited if carriage restrictions were not applied to all vessels with the potential to catch fish. Clause 185 therefore inserts amendments to provide for all the existing powers available under orders made under section 1 to apply to any requirements as to size, rather than minimum size limits only and for the carriage prohibition to apply to all relevant British vessels. The effect of these amendments is to allow Ministers to make an order setting a minimum or maximum size limit for sea fish or a size range outside of which no fish may be landed, sold or carried.

206. It is necessary to leave these powers to be exercised in delegated legislation because of the need to retain flexibility to introduce specific tailored measures to respond to conservation needs as they arise in the future. The Act provides for an order to be made by way of statutory instrument which must be laid before Parliament. This remains appropriate for the newly extended power.

Clause 186 - amendment to existing enabling power to regulate nets and other fishing gear (Order-making power contained in Sea Fish (Conservation) Act 1967)

Power conferred on:	*Secretary of State as regards England*
	Welsh Ministers as regards Wales
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

207. Section 3 of the Sea Fish (Conservation) Act 1967 enables the Ministers (now the Secretary of State and the devolved administrations) to make an order in relation to relevant British fishing boats registered in the UK, applying restrictions to nets and other fishing gear in respect of their construction, design, material and size. An order under this section may be made so as to apply only in relation to fishing for specified descriptions of sea fish, specified methods of fishing, and specified areas or periods. Section 3(2) provides that an order may be made to extend to nets and fishing gear carried within British fishery limits (excluding the Scottish zone) by Scottish fishing boats, fishing boats registered outside the UK and unregistered boats. In addition to other matters, section 3(3) and (4) provide for exemptions from the restrictions imposed by orders under this section in relation to fishing boats. Section 3(5) creates offences for fishing in contravention of any orders made under this section.

208. Section 3 does not allow restrictions to apply equally to persons fishing from the shore as to persons fishing from a boat. In certain circumstances, this limitation could undermine the conservation aim of an order made under this section. Clause 186 amends section 3 so that restrictions of this type can be made by order in respect of persons fishing from the shore of England and Wales. This clause creates new offences for any person fishing from the shore in contravention of any such restrictions and also allows for orders to exempt persons from the restrictions imposed.

209. It is necessary to leave these powers to be exercised in delegated legislation because of the need to retain flexibility to introduce specific tailored measures to respond to conservation needs as they arise in the future. The Act provides for an order to be made by way of statutory instrument which must be laid before Parliament. This remains appropriate for the newly extended power.

Clause 187 - Amendment to existing enabling power to charge for licences) Order making power already contained in Sea Fish (Conservation) Act 1967

Power conferred on:	*Secretary of State as regards England*
	Welsh Ministers as regards Wales
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

210. Section 4(1) of the Sea Fish (Conservation) Act 1967 enables the Ministers (now the Secretary of State and the devolved administrations) to make an order providing for the prohibition of certain fishing unless authorised by a licence. Section 4(4) allows an order made under section 4(1) to authorise the making of a charge for a licence.

211. Clause 187 inserts a new subsection (4A) to section 4 and a new subsection (3A) to section 22 of that Act. The effect of these insertions - which extend to England and Wales only - is to clarify that the power in section 4(4) may be used:

- to provide for the amount of any charge to be specified in, or determined in accordance with provision made by, the order;
- to make different provision in relation to different classes of licence, and
- to provide that no charge be payable in such circumstances as may be specified in the order.

212. The power to make an order made under section 4(1) which authorises charging on the basis of these amendments would be exercisable by the Secretary of State as regards England and the Welsh Ministers as regards Wales. The 1967 Act provides that an order would be made by way of statutory instrument, and subject to a negative resolution parliamentary procedure.

Clause 189 - amendment to existing power to restrict fishing for sea fish (Order making power contained in Sea Fish (Conservation) Act 1967)

Power conferred on:	*Secretary of State in relation to England*
	Welsh Ministers in relation to Wales
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

213. Section 5 of the Sea Fish (Conservation) Act 1967 enables the Ministers (now the Secretary of State and the devolved administrations) to make an order restricting fishing for sea fish of any description and by any method specified for any period and creates an offence where any fishing boat is used in contravention of an order. The order applies to any fishing boat within relevant British fishery limits. Outside those limits, the order can apply only to a relevant British fishing boat registered in the UK, or, where an order relates to fishing for salmon or migratory trout, to any fishing boat which is British-owned but not registered under the Merchant Shipping Act 1995. Any fish caught in contravention of an order made under this section must be returned immediately to the sea.

214. The restrictions apply only to fishing boats of specified types and not to persons fishing from the shore. To remedy this limitation, and to ensure that any conservation measures introduced using these powers are effective in covering all those fishing for sea fish, the amendments made by clause 189 extend the powers in section 5 from boats to persons. Offences are also created in respect of persons fishing in contravention of an order.

215. In addition to the amendments extending existing powers, clause 189 provides for restrictions to be made in an order imposing limits on how much fish a person or a fishing boat may take in any given period. Any fish caught in excess of this limit must be returned immediately to the sea. There is also new provision enabling requirements as to stowage of fishing gear to be made in an order where use of that gear is prohibited.

216. It is necessary to leave these powers to be exercised in delegated legislation because of the need to retain flexibility to introduce specific tailored measures to respond to conservation needs as they arise in the future.

217. The amendments made by all three of these clauses extend to England and Wales only and the powers to make orders on the basis of these amendments would continue to be exercisable by the Secretary of State as regards England and the Welsh Ministers as regards Wales.

218. The 1967 Act provides that orders would be made by way of statutory instrument, and subject to a negative resolution parliamentary procedure. This remains appropriate for the newly extended power.

Clause 194 – Power to specify in regulating orders, the purposes for which tolls etc may be applied

Power conferred on:	*Secretary of State in relation to England* *Welsh Ministers in relation to Wales*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

219. Section 3 of the Sea Fisheries (Shellfish) Act 1967 is amended to ensure that a regulating order which imposes tolls or royalties on anyone dredging, fishing for or taking shellfish within the boundary of the fishery may include provision permitting the grantee to apply a specified portion of those tolls or royalties in recouping costs incurred in applying for the order.

220. The purpose of this amendment is to ensure that potential applicants are not deterred from making an application for a regulating order due to the cost of the application process which currently must be borne by the applicant. The Department believes that the existing level of scrutiny in the making of regulating orders, by negative resolution, should be maintained.

Clause 201 - Power to specify new implements of fishing (amends the Sea Fisheries (Shellfish) Act 1967)

Power conferred on:	*Secretary of State in relation to England*
	Welsh Ministers in relation to Wales
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

221. The addition of new subsections 7(4)(a)(iii) and 7(4A) to the Sea Fisheries (Shellfish) Act 1967 ("the Act") allows the Secretary of State in relation to England and the Welsh Ministers in relation to Wales to specify the types of implements of fishing that may be used in the area of a several fishery in addition to those already specified in the Act, as well as restricting their use to specific times and locations within the fishery.

222. This will enable third parties to use implements of fishing to fish for 'non-specified' shellfish in a several fishery which otherwise would have been prohibited, provided that there is no detrimental effect on the fishery.

223. This power extends the Secretary of State's and Welsh Ministers' existing power in section 1 of the Act to make an order. It is appropriate that the existing level of scrutiny, by negative resolution, be maintained.

Clause 203 - Power to make orders prohibiting the taking and sale of certain lobsters independently (Power contained in the Sea Fisheries (Shellfish) Act 1967)

Power conferred on:	*Secretary of State in relation to England*
	Welsh Ministers in relation to Wales
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

224. Section 17(3) of the Sea Fisheries (Shellfish) Act 1967 is amended to allow the Secretary of State in relation to England to make an order to introduce protection for lobsters under s.17(3) independently of Welsh Ministers and Scotland and to allow Welsh Ministers in relation to Wales to make the order independently of the Secretary of State and Ministers in Scotland. Each administration will be able to act alone.

225. At present Scottish Ministers can act alone to make an order for Scotland. However the Secretary of State and Welsh Ministers are not able to act alone but must act jointly with Scottish Ministers to make orders for England and Wales. This difference in procedures was a consequence of devolution and of subsequent amendments to s.17.

226. This power extends the Secretary of State's and Welsh Ministers' existing powers in section 1 of the Act to make an order. The same level of scrutiny, negative resolution, as applied to the original power is appropriate.

Clause 205(5) - Power to add instruments to or remove instruments from the list of prohibited implements in section 1(1) of the Salmon and Freshwater Fisheries Act 1975

Power conferred on:	*Secretary of State in relation to England* *Welsh Ministers in relation to Wales*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

227. Section 1 of the Salmon and Freshwater Fisheries Act 1975 makes it an offence to use certain instruments when taking or killing salmon, trout or freshwater fish.

228. Clause 205(5) inserts a new section 1(1B), enabling the appropriate national authority to add instruments to or remove instruments from the list of prohibited instruments.

229. The purpose of this power is to ensure that the sustainability of fisheries is not compromised by new fishing instruments, or instruments which had not previously been used for taking fish. As such it is important that there be a control mechanism to ensure the sustainability of the fisheries. The appropriate national authority will use the power to prohibit those instruments which are capable of being used to take a large proportion of fish present in waters, to fish indiscriminately or to do serious harm to the fish, such that they are unlikely to survive if returned to the water.

230. The Department considers that a delegated power is necessary. It is not possible to anticipate with any real certainty the development of fishing instruments, nor their likely impact on stocks. The Department therefore considers it appropriate for the appropriate national authority to be able to prohibit the use of other instruments, or to permit the use of previously prohibited instruments as and when that becomes appropriate.

231. The Department considers it appropriate for this to be made subject to Parliamentary control by the negative resolution procedure.

Clause 207(1) – Extension to current power to licence fisheries

Power conferred on:	*Environment Agency*
Power exercisable by:	*Licence*
Parliamentary Procedure:	*None*

232. Under section 25 of the Salmon and Freshwater Fisheries Act 1975, the Environment Agency may introduce a licensing scheme to regulate the fishing for salmon, trout, eels and freshwater fish.

233. Clause 207(1) inserts a new section 25(1)(a) into the 1975 Act that extends the licensing requirements to smelt and lampreys in order that the fisheries for these species may be properly controlled and managed. Licences will be required out to 6 nautical miles; smelt and lamprey are also migratory species and this coverage will be consistent with licenses for salmon, sea trout, and eel fisheries.

234. The Department considers this extension to the licensing provisions necessary. Stocks of smelt and lamprey are in decline and no control of the fisheries is in place. This power is in line with that for other species.

235. The Department considers it appropriate that the power to license these fisheries is delegated to the Environment Agency as it is charged with managing fisheries in inland waters.

Clause 207(1) - Power to determine which fishing instruments should be subject to a licensing scheme and which should apply for individual authorisations

Power conferred on:	*Secretary of State in relation to England* *Welsh Ministers in relation to Wales*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

236. Under section 25 of the Salmon and Freshwater Fisheries Act 1975 the Environment Agency must issue licences to all who apply (subject to any Net Limitation Orders or court issued disqualification orders). However, some fisheries can seriously impact stocks or the aquatic environment and should be subject to tighter controls.

237. Clause 207 inserts a new section 25(1A) into the 1975 Act enabling the appropriate national authority to determine which fishing instruments shall be subject to a licensing scheme. Those who wish to fish using methods that are not subject to licensing under this section will be required to seek individual authorisation by the Environment Agency under the new section 27A.

238. This provision is to ensure that new methods of fishing, or those methods that are deemed capable of posing a higher risk to fish stocks or the aquatic environment are assessed before they are authorised for use.

239. At this stage, the Department intends that fishers will need to apply for authorisations for the following methods:

- Crayfish traps, eel racks, eel traps, coops, electric fishing and stake nets
- Fisheries undertaken for scientific or management purposes (such as those during a close season that would otherwise be illegal).

240. The Department considers that the power to determine which instruments be licensed and which require individual authorisation should be subject to Parliamentary control and that the negative resolution procedure is appropriate.

Clause 207(7) – Express power to impose licence conditions by way of notice on historic fixed installations

Power conferred on:	*Environment Agency*
Power exercisable by:	*Notice*
Parliamentary Procedure:	*None*

241. Certain historic fisheries (which the new legislation refers to as "historic installations") were regarded automatically as authorised fixed engines for the

purposes of the Salmon and Freshwater Fisheries Act 1975 (see sections 6(3), 7(5) and 8(5)). They relate to historic entitlements acquired by dint of user or certificate of privilege.

242. The sections referred to above are to be repealed as part of a general reform of the way in which fishing is regulated.

243. Historic installations currently require a fishing licence, and that will remain the case.

244. The privileges in issue date back to the 19th century, when pressures on migrating fish stocks were fewer and less critical, and range from fishing mill dams and weirs to fixed nets and traps. However, these fisheries have the potential to remove large numbers of fish from depleted populations.

245. Therefore, the Department considers that the Environment Agency should have an express power to manage the effort of historic installations in addition to its more general power to make byelaws (which can only apply to a broad range of methods of fishing).

246. Clause 207(7) inserts a new paragraph 14A into Schedule 2 to the Salmon and Freshwater Fisheries Act 1975. That Schedule makes detailed provision in respect of fishing licences. Paragraph 14A allows the Environment Agency to impose conditions on a licence issued in respect of an historic installation. This is done by way of notice.

247. A notice might include a limitation on the number of fish which may be taken, the times at which they may be taken and specifications as to the gear that may be used. The notice may only be given where the Environment Agency considers that it is necessary to do so for the protection of fish stocks (paragraph 14A(4)).

248. The Department considers the power to impose such conditions should be delegated to the Environment Agency as they are charged with managing fisheries in inland waters.

Clause 208(2) –Extension to current power to limit numbers of licences issued

Power conferred on:	*Environment Agency, confirmed by the appropriate national authority*
Power exercisable by:	*Order*
Parliamentary Procedure:	*None*

249. The Environment Agency is empowered through section 26 of the Salmon and Freshwater Fisheries Act 1975 to introduce Net Limitation Orders. These Orders limit effort in net and trap fisheries for salmon and sea trout fisheries by restricting the number of licences available.

250. Clause 208 extends this power to any net and trap fishery, other than those operating under historic entitlement) within the jurisdiction of the Environment Agency in order that effort in these fisheries may be restricted should effort exceed that which the stocks might sustainably support.

251. The Department considers that this extension to the Net Limitation order-making power is necessary. Stocks of smelt and lamprey are in decline and stocks of eels particularly are in a parlous state and current fisheries are not sustainable. This power is in line with that for other species.

252. The Department considers it appropriate to delegate this power to the Environment Agency as it is charged with managing fisheries in inland waters. Net Limitation Orders will remain subject to the current order-making process (set out in s26(2) of the Salmon and Freshwater Fisheries Act 1975) and will be subject to public consultation prior to confirmation by the Secretary of State and / or Welsh Ministers.

253. Clause 208 Extension to current power to limit numbers of licences issued

Power conferred on:	*Environment Agency, confirmed by the appropriate national authority*
Power exercisable by:	*Order*
Parliamentary Procedure:	*None*

254. The Environment Agency is empowered through section 26 of the Salmon and Freshwater Fisheries Act 1975 to limit effort in net and trap fisheries when effort exceeds a sustainable level.

255. Clause 208 extends this power to empower the Environment Agency to limit the numbers of fishers engaged in a net or trap fishery in order to protect the aquatic or marine environment.

256. The Department considers that this extension to the Net Limitation order-making power is necessary. A fishery may have a significant detrimental effect on a population of fauna in respect of which conservation sites have been formally designated in the vicinity of the fishery. Whilst byelaws would normally be used to control such a fishery (using powers under paragraph 6A, Schedule 25 to the Water Resources Act 1991) there may be cases where limitation of effort in the fishery is the only viable option for reducing the harm caused.

257. The Department considers it appropriate to delegate this power to the Environment Agency as it is charged with managing fisheries in inland waters. Net Limitation Orders will remain subject to the current order making process (set out in s26(2) of the Salmon and Freshwater Fisheries Act 1975) and will be subject to public consultation prior to confirmation by the Secretary of State and / or Welsh Ministers.

Clause 209 - Power to authorise fisheries

Power conferred on:	*Environment Agency*
Power exercisable by:	*Authorisation*
Parliamentary Procedure:	*None*

258. Clause 209 inserts a new section 27A into the Salmon and Freshwater Fisheries Act 1975, enabling the Environment Agency to issue authorisations for those means of fishing which are not subject to a licensing scheme. The Environment Agency will be able to refuse to grant an authorisation should the method present significant levels of exploitation or harm. Additionally, the Environment Agency will be able to place conditions on their use following the assessment.

259. The Department is introducing the power to grant (and refuse to grant) authorisations in order to ensure new and certain existing fisheries undergo environmental impact assessments before they are allowed to continue or to

develop. The Department believes that such powers are appropriate to help to protect the integrity of the aquatic environment, and to ensure the sustainability of all fisheries.

260. The Environment Agency already has the power to set conditions on a fishing licence; this is a comparable power. The Department believes the management of fisheries should be the responsibility of the Environment Agency, and that this is an appropriate power for the control of fisheries that have the potential for higher impact on stocks or the wider aquatic environment.

Clause 211 – Power to specify fish

Power conferred on:	*Secretary of State in relation to England* *Welsh Ministers in relation to Wales*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

261. Clause 211 enables the appropriate national authority to extend specified provisions to new kinds of fish.

262. The provisions which may be extended are any or all of the following:

- Prohibition on use of certain instruments (Salmon and Freshwater Fisheries Act, section 1(1));
- Provisions relating to fish roe (Salmon and Freshwater Fisheries Act, section 2(1));
- Licensing of fishing (Salmon and Freshwater Fisheries Act, section 25(1)(b));
- Authorisation of fishing (Salmon and Freshwater Fisheries Act, section 27A);
- Handling fish in suspicious circumstances (Salmon Act 1986, section 32);
- Fisheries byelaws (Water Resources Act 1991, Schedule 25, paragraph 6); and
- Agency's fisheries duties (Environment Act 1995, section 6(6)).

263. Marine fish, such as bass, mullet and flounder, may be found in fresh water, and it is possible that numbers might increase significantly such that targeted fisheries for them may develop. It is also likely that, due to climatic change or other environmental pressures, other migratory species may become resident for part of their life-cycle in English and Welsh inland waters, and for which fisheries may develop. It is therefore important that control measures can be put in place to safeguard the sustainability of such fisheries. There is no intention to lay such an order until such a fishery has developed or is developing.

264. The Department considers that this power gives the necessary flexibility to allow the appropriate national authority to determine which further kinds of fish should be subject to control. This legislation is intended to be in place for some decades, and it is not possible to anticipate the changes in migration patterns, nor whether fishers will be interested in targeting such kinds of fish. It is considered appropriate for this

to be made subject to Parliamentary control, and the negative resolution procedure is appropriate.

Clause 214(2) & (3) – Extension to current power to make byelaws

Power conferred on:	*Environment Agency*
Power exercisable by:	*Byelaws, subject to confirmation by the Secretary of State and, in Wales, the Welsh Ministers*
Parliamentary Procedure:	*None*

265. The Environment Agency is able to make byelaws to control fisheries for salmon, trout, eels and freshwater fish. Clause 214(2) and (3) inserts new words and a new subparagraph (1A) into paragraph 6 of Schedule 25 to the Water Resources Act 1991. The new provisions extends the byelaw making powers to shad, smelt, lampreys and any further fish specified by order made under new section 40A of the Salmon and Freshwater Fisheries Act 1975.

266. The Department considers this extension to the byelaw making powers appropriate, and relies on the general points made above (see clause 207(1), Extension to current power to licence fisheries).

Clause 214(4) – Power to set close times for fishing by byelaws

Power conferred on:	*Environment Agency*
Power exercisable by:	*Byelaw, subject to confirmation by the Secretary of State and, in Wales, by the Welsh Ministers.*
Parliamentary Procedure:	*None*

267. Clause 214(4) inserts a new sub-paragraph (2)(aa) into paragraph 6 of Schedule 25 to the Water Resources Act 1991. The new provision gives the Environment Agency a power to specify close seasons or times in respect of salmon, trout, eels, lamprey, smelt, shad, freshwater fish and specified fish (see power in clause 211(1) above). The current statutorily defined close seasons and times (including statutory minima) as detailed in Schedule 1 to the Salmon and Freshwater Fisheries Act 1975 will be repealed.

268. The current system is insufficiently flexible, and hinders the Environment Agency's ability to set close seasons and times that are appropriate for the kind of fish concerned and based on the best available scientific knowledge and evidence. Instead, the Environment Agency will be given the power to set close times for fishing.

269. The Environment Agency will therefore have the power to set close times on a species by species basis.

270. This power will be delegated to the Environment Agency as they are charged with managing fisheries in inland waters, and therefore need the powers so to do. The Department considers it is appropriate for provision for close seasons and times to continue to be set through byelaws, in order that they might reflect the local situation in a given area.

271. Close season and close time byelaws will remain subject to the current byelaw making process (Water Resources Act 1991 Schedule 26), and will be subject to public consultation prior to confirmation by the Secretary of State and / or Welsh Ministers.

Clause 214(5) - Power by byelaws to prohibit the taking of fish greater than a specific size

Power conferred on:	*Environment Agency*
Power exercisable by:	*Byelaw, subject to confirmation by the Secretary of State and, in Wales, by the Welsh Ministers.*
Parliamentary Procedure:	*None*

272. Clause 214(5) inserts words into paragraph 2(b)(i) of Schedule 25 to the Water Resources Act 1991. This paragraph currently only allows byelaws to set the minimum sizes of fish which may be taken. The amendment will allow byelaws to set maximum sizes also. This will protect larger fish, which may have a higher fecundity.

273. The Department considers that these further byelaw-making powers are appropriate, and relies on the general points made above (under clause 214(4), Power to set close times for fishing by byelaws).

Clause 216 – Power to introduce emergency byelaws

Power conferred on:	*Environment Agency*
Power exercisable by:	*Byelaw*
Parliamentary Procedure:	*None*

274. Clause 216 inserts a new Schedule 27 into the Water Resources Act 1991.

275. Schedule 27 sets out a procedure whereby the Environment Agency may introduce emergency byelaws in response to threats to fish stocks. The "ordinary" procedure is set out in Schedule 26.

276. In an ordinary case the Environment Agency undertakes a lengthy consultation before making a byelaw and, once the byelaw is made, must consult for a period of one month before the byelaw is submitted for confirmation.

277. Under the emergency procedure, the Environment Agency may make a byelaw without prior consultation and which will take effect without confirmation. An emergency byelaw will only remain in force for 12 months unless the appropriate authority approves its extension. An extended measure may only remain in force for a further 6 months, and the second period must be continuous from the first. It is not possible to confirm an emergency byelaw once it has expired. It needs to be made afresh.

278. Although an emergency byelaw is not subject to confirmation, the appropriate authority has a duty to revoke it where it is satisfied that it no longer needed (Schedule 27, paragraph 5(2)).

279. The Environment Agency will only be able to make emergency byelaws in reaction to an event which is harming or is likely to harm fish or threaten the marine or aquatic environment where such a byelaw would prevent or limit harm, where the

byelaw is needed urgently and the event or the likelihood of the event could not reasonably have been foreseen.

280. The Department considers that this power is appropriate, and relies on the general points made above.

Clause 221 – Extension to Power to make orders to control fisheries in the Border Rivers

Power conferred on:	*Her Majesty by Order in Council of State*
Power exercisable by:	*Statutory Instrument*
Parliamentary Procedure:	*Affirmative Resolution*

281. Section 111 of the Scotland Act 1998 formally recognises historic practices relating to the management of salmon, trout, eels and freshwater fish in the Border Rivers (the Esk and Tweed). These are managed, in the case of the Scottish part of the Esk and its tributaries, by Ministers of the Crown (and thereby the Environment Agency) and, in the case of the English part of the Tweed and its tributaries, by Scottish Ministers. This is achieved by means of an order in council which allows section 53 of the 1998 Act to be dis-applied and functions relating to the Esk and the Tweed to be conferred on a Minister of the Crown, Scottish Ministers or a public body.

282. Clause 211 amends section 111 by extending the list of fish in subsection (1) to include lampreys, smelt and shad. It also allows other species of fish to be added or removed from this list. This, together with the power conferred by clause 221(1) (see above), will ensure fisheries are managed on a catchment basis.

283. The Department considers this power is appropriate, and relies on the general points made above (see discussion on clause 211(1), Power to specify fish).

Clause 222 - Power to make regulations to regulate keeping, introduction and movement of fish to or from inland waters

Power conferred on:	*Secretary of State as respects England* *Welsh Ministers as respects Wales*
Power exercisable by:	*Regulations (England)* *Regulations (Welsh Statutory Instrument) (Wales)*
Parliamentary Procedure:	*Affirmative resolution*

284. Clause 222 gives the appropriate national authority a power to make regulations in relation to keeping any fish, introducing any fish into and / or removing any fish from inland waters.

285. The introduction of fish into the wild impacts directly on those fish stocks already present in the water by competition, predation or hybridisation. Often there are multiple movements between inland waters and holding facilities before any introduction. However the current legislation (section 30 of the Salmon and Freshwater Fisheries Act 1975) only makes it an offence to introduce live fish without the prior consent of the Environment Agency. Where releases are made

illegally, it is difficult to prove that they have taken place or who was responsible for them unless the specific activity of introduction is witnessed. The implementation of European legislation on fish disease[62] goes some way to control the movement of live fish within England and Wales, but is limited to fish health concerns. In addition, certain movements of certain non-native ("alien") species of fish are to be controlled by incoming European legislation[63]. It should also be noted that orders made under the Import of Live Fish Act 1980 also control the spread of non-native fish by making it illegal to keep or release any of a listed species in any water (including tanks and ponds) without a licence

286. The Department considers that it is appropriate to take a power to regulate by secondary legislation the keeping, introduction and removal of fish. The key aims are to produce a system of control which improves on what it currently possible and complements that to be implemented under the Alien Species Regulation.

287. The Department accepts that this power is relatively broad, in particular by being capable of applying to all fish. It also accepts that it is theoretically possible for the power to be used to regulate the movement of alien species for use in aquaculture, which may be incompatible with European law once the Alien Species Regulation has effect. However, the Department has considered the options very carefully, and takes the view that the power as drafted is the most appropriate way of proceeding. The Alien Species Regulation contains certain exceptions and derogations which will condition its scope, and therefore the extent to which it occupies the field in respect of live fish movements. While it is tolerably clear that it does not apply to native kinds of fish, its application to alien species is complex, liable to change, and subject to derogations on which policy decisions have not yet been taken.

288. Overall the Department considers that it would be unwise to attempt to draft with reference to the scope of the Alien Species Regulation, and in this situation it seems appropriate to draft a power which applies to all fish, in the awareness that the scope of the power is limited by the obligation not to breach European law. When completed this set of legislation will replace current provisions in the Import of Live Fish (England and Wales) Act 1980 and the Salmon and Freshwater Fisheries Act 1975, section 30.

289. The Department recognises the breadth of this power; accordingly, Regulations made under it will be subject to an affirmative Parliamentary procedure.

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[62] Council Directive 2006/88/EC on animal health requirements for aquaculture animals and products thereof, and on the prevention and control of certain diseases in aquatic animals (the "Aquatic Animal Health Directive")

[63] Council Regulation 708/2007 concerning the use of alien and locally absent species in aquaculture (the "Alien Species Regulation")

Part 8: Enforcement

Clause 280 - Enforcement of Community rules

Power conferred on:	*Welsh Ministers in relation to Wales, and the Secretary of State in all other cases*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

290. Section 30(1) of the Fisheries Act 1981 provides automatically for offences, penalties and enforcement powers in respect of breaches of enforceable Community restrictions unless an order has been made under section 30(2) for that restriction. Subsection (2) amends section 30(1) so as to make clear that its application extends to enforceable Community obligations (as well as restrictions). This is consistent with the remainder of the section and ensures that section 30(1) applies to all relevant Community legislation. Section 30(1) is also amended so that it applies to fishing from the shore.

291. Subsection (3) extends the scope of the existing power to make orders for the enforcement of Community rules in section 30(2) of the Fisheries Act 1981.

292. The existing power provides for the making of orders using negative resolution procedure. These amendments are a logical and proportionate extension to an existing power enabling the making of secondary legislation to enforce Community obligations and restrictions.

293. Subsection (4) inserts a further subsection to provide a power to apply the provisions of section 30(2) to Crown Dependency fishing boats outside of British fishery limits. There are precedents for this approach when legislating in respect of fisheries matters for the Crown Dependencies: see section 24 of the Sea Fish (Conservation) Act 1967 and section 21 of the Sea Fisheries Act 1968.

Clause 284 - Administrative penalties schemes

Power conferred on:	*Welsh Ministers in relation to Wales, and the Secretary of State in all other cases*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

294. This clause provides a power to make orders to apply administrative penalties in respect of fishing offences. A scheme has been established by order under section 30(2) of the Fisheries Act 1981 to enable administrative penalties to be offered in respect of Community offences. The power created by this clause will enable an order to be made in respect of non-Community offences, including breach of IFC authority byelaws and legislation protecting shellfisheries, to complement the existing scheme.

295. The existing scheme has been established using a negative resolution delegated power. This allows for flexibility in that the detail can be provided for in secondary

legislation and amended as necessary in the light of experience. The Department believes that the same legislative route should be used here.

296. Sub-section (1) confines the power to non-Community (i.e. domestic) offences. Subsection (2) defines a penalty notice and its effect and subsection (3) sets out the provisions in relation to penalty clauses that may be included in an order, for example: which offence, who may issue the penalty notice, the form and content of the notice, provision as to how the amount of any penalty might be determined and the minimum and maximum penalties.

297. Subsection (4) defines the potential geographical extent of an order and subsection (5) provides a power to apply the provisions of section 30(2) to Crown Dependency fishing boats outside of British fishery limits through an order in Council. There are precedents for this approach when legislating in respect of fisheries matters for the Crown Dependencies; see section 24 of the Sea Fish (Conservation) Act 1967 and section 21 of the Sea Fisheries Act 1968.

Part 9: Coastal Access

Clause 288 - The coastal access scheme

Power conferred on:	*Natural England*
Power exercisable by:	*Scheme*
Parliamentary Procedure:	*None*

298. Clause 288 requires Natural England to draw up a scheme setting out the approach it will take when discharging its coastal access duty, as set out in clause 286 and for the Secretary of State to approve the scheme. The approved scheme must be published. The clause provides that Natural England must act in accordance with an approved scheme in discharging its coastal access duty and that Natural England cannot prepare or submit proposals for a long-distance route pursuant to the coastal access duty until there is an approved scheme. The clause enables Natural England to subsequently revise the scheme, subject to its approval by the Secretary of State. Clause 289 provides for Natural England to review the scheme and that at least one review must be completed within three years of approval by the Secretary of State. It also requires Natural England to publish a report of each review.

299. The Department considers that the level of detail and explanation envisaged is more appropriately included within a subordinate document than in the primary legislation. The Department considers that the appropriate level of scrutiny for the scheme (or any revised scheme) should be for the scheme (or any revised scheme) to be approved by the Secretary of State. The obligation to review the scheme within three years and the requirement for the publication of the report of the review provide additional safeguards, and were inserted in response to the recommendation of the EFRA Committee at paragraph 35 of their report (mentioned in the Government's Response at paragraph 3.8.2 on page 60, and paragraph 6 on page 109).

Clause 290 - The English coast

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

300. The coastal access duty on the Secretary of State and Natural England, set out in clause 286, relates to the English coast. This clause (290) defines the English coast, for the purposes of Part 9 of the Bill, by reference to its adjacency to the sea and provides that the coast includes the coast of islands in the sea unless they are excluded.

301. This clause explains that islands are excluded unless they are "accessible islands" or they are specified by the Secretary of State by order. An "accessible island" is defined as an island to which it is possible to walk from the mainland of England or from another island (other than an excluded island) across the foreshore or by means of a bridge, tunnel or causeway. The Secretary of State's power to specify an island by order is conditional on the coast of the island being sufficiently long to enable the establishment of one or more long-distance routes around it, enabling the public to make an extensive journey on foot.

302. The Department considers that it is appropriate to provide an order-making power enabling the Secretary of State to include particular islands so that each one may be considered on its own merits. Given that the criterion for determining the inclusion or otherwise of an island is provided for in the Bill, the Department also considers that the appropriate level of parliamentary scrutiny for an order to be made under this clause is for the order to be subject to the negative resolution procedure.

Clause 292 - Long-distance routes

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations*
Parliamentary Procedure:	*Negative resolution*

303. This clause 292 inserts new sections 55A-55J into the National Parks and Access to the Countryside Act 1949 (c.97) enabling Natural England to prepare a coastal access report proposing a coastal long-distance route and making related provision.

304. New section 55E (*Consideration of reports made pursuant to the coastal access duty)* deals with the procedures for considering a coastal access report submitted by Natural England, and a decision on the coastal access report by the Secretary of State. Subsection (2) of the new section 55E enables the Secretary of State to make regulations requiring Natural England to:

- advertise coastal access reports;
- give notice of such reports to persons specified by the regulations; and
- make provision for persons with a relevant interest in affected land, access authorities for an area in which affected land is situated, local access forums in which affected land is situated, the Historic Buildings and Monuments Commission and the Environment Agency to be given

the opportunity to make representations about matters specified in the regulations..

305. These regulations may also include provision about the form of advertisements and notice of reports and the manner of advertising or giving notice; the timing of them and the form of representations ,and manner and timing of making them.

306. New section 55H (*Variation pursuant to the coastal access duty)*, relates to the variation of reports under section 55 of the 1949 Act. Section 55(1) of the 1949 Act enables Natural England to produce reports recommending variations to proposals for approved long-distance routes. If it appears to the Secretary of State (after consultation with Natural England) that a proposal for an approved route needs varying, but Natural England has not produced a report, section 55(2) enables the Secretary of State to direct that the proposal be varied. The new section 55H applies certain procedural requirements to reports under section 55(1) which are prepared pursuant to the coastal access duty. It also contains a new power enabling the Secretary of State to make regulations applying the procedural requirements (with any necessary modifications) to any directions under section 55(2), and disapplying section 55(3) in relation to any such direction. Subsection (3) provides that the Secretary of State may not make a direction under section 55(2) pursuant to the coastal access duty where there are no such regulations in force.

307. The Department considers that it is appropriate that these procedural matters are included in regulations rather than in primary legislation. The Department also considers that the appropriate level of parliamentary scrutiny for regulations to be made under this clause is for them to be subject to the negative resolution procedure, given that the regulations will largely deal with procedural matters.

Clause 293: Access to the coastal margin – new clause 3A(1)

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Affirmative resolution*

308. Clause 293 amends Part 1 of the Countryside and Rights of Way Act 2000(c.37) ("the CROW Act") by including coastal margin in the definition of access land in section 1(1) of the Act. This has the effect of extending the right of access under section 2(1) of that Act to the coastal margin, other than in relation to excepted land and land which is treated by section 15 of the Act as accessible apart from that Act. This clause also inserts a new section 3A (*Power to extend to coastal land etc: England)* into the CROW Act, which allows the Secretary of State to make an order defining the coastal margin in England.

309. This order may in particular describe land as coastal margin for the purposes of Part 1 of the CROW Act by reference to it being land over which the line of the coastal route passes, land which is within a specified distance of that line, and land which is adjacent to that land.

310. The Department considers that the level of detail of this subject matter is appropriate to be included in an order and that the order-making power introduced by clause 293 (enabling the designation of descriptions of coastal margin to which the right of access applies) is of sufficient significance to require it to be subject to the affirmative procedure. Accordingly clause 293(7) amends section 44 of the CROW Act 2000 to provide that an order made under section 3A(1) of that Act must be approved by affirmative resolution of each House of Parliament. This is

consistent with the procedure which applies to an order under section 3 of the CROW Act (power to amend the definition of "open country" so as to include a reference to coastal land or coastal land of any specified description, and to make modifications to Part 1 of the Act in its application to land which is open country, a power which will in future apply only in relation to Wales, by virtue of the amendment to section 3 made by clause 293(4)).

Clause 293: Access to the coastal margin – new clause 3A(10)(b)

Power conferred on:	*Secretary of State*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

311. Clause 293(5) inserts a new section 3A (*Power to extend to coastal land etc: England)* into the CROW Act, which allows the Secretary of State to make an order defining the descriptions of land in England which are coastal margin. Subsection (6) (a) of the new section 3A provides for a period of time, referred to as the access preparation period, between the approval of proposals for a coastal route and the right of access coming into force. This is to allow time for Natural England to make preparations such as doing work to sign the route and establishment works to make it suitable for public access (e.g. installing gates or steps) and to make directions with regard to restrictions and exclusions. Paragraph (b) of the definition of "access preparation period" (contained in subsection (10)) provides power enabling the Secretary of State to make an order appointing the day when the access preparation period ends and the right of access comes into force in relation to any land that has become coastal margin by virtue of the approval by the Secretary of State of proposals for a long-distance route.

312. The Department considers that it is appropriate to provide an order-making power enabling the Secretary of State to appoint a day when the right of access comes into force for any land that becomes coastal margin. Given that the order will deal with the timing of the commencement of the right of access, the Department also considers that the appropriate level of parliamentary scrutiny for an order to be made under this clause is for the order to be subject to the negative resolution procedure.

Clause 294 introducing Schedule 19 paragraph 4 - Appeals relating to notices under paragraph

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations*
Parliamentary Procedure:	*Negative resolution*

313. Paragraph 4 of Schedule 19 provides a right of appeal to be made against a notice given under paragraph 3, which relates to works carried out in relation to the establishment and maintenance of the route in the absence of an agreement. A person given that notice, or any other owner or occupier of the land to which the notice relates, may appeal to the Secretary of State. Sub paragraph (5) allows the Secretary of State to make regulations as to the period within which and manner in which appeals may be made, the advertising of such an appeal, and the manner in which appeals are to be considered.

314. The Department considers that these matters are more appropriately included in regulations than in primary legislation, as they deal with procedural detail. The Department also considers that the appropriate level of parliamentary scrutiny for regulations to be made under this clause is for them to be subject to the negative resolution procedure.

Clause 300 Powers of the National Assembly for Wales

Power conferred on:	*National Assembly for Wales*
Power exercisable by:	*Measures of the National Assembly*
Parliamentary Procedure:	*None: Approved by Her Majesty in Council*

315. Part 3 of the Government of Wales Act 2006 (GOWA 2006) provides that the National Assembly for Wales may pass legislation known as Assembly Measures. An Assembly Measure may include any provision that could be made by an Act of Parliament, within the limits on the Assembly's legislative competence set out in section 94 of, and Schedule 5 to, the 2006 Act.

316. Clause 300 confers legislative competence on the National Assembly for Wales, by adding two matters to Field 16 (sport and recreation) in Part 1 of Schedule 5 to GOWA 2006. The Assembly will have the power to pass Assembly Measures in relation to those matters.

317. Matter 16.1 enables the Assembly to make Measures concerning the establishment and maintenance of a route or routes for the coast of Wales to enable the public to make recreational journeys. The approach for England is set out in clause jk 102, subsection (2) which contains the objective for the creation and establishment of a route around the whole of the English coast. Matter 16.1 does not permit the Assembly to make Measures (under the procedures outlined in paragraph 2 above) to enable the public to make journeys by mechanically propelled vehicles, or to create new highways either under the Highways Act 1980, or by any other method. Executive powers are already available to the Welsh Ministers to create highways, in a similar way to the way they are created in England.

318. Matter 16.2 enables Assembly Measures to be made in relation to the securing of access to certain relevant land for the purpose of open air recreation. Relevant land may be either at the coast, or used for the purposes of open air recreation in association with land at the coast; or used for the purpose of open air recreation in association with a route in matter 16.1. The approach for England is set out in clause 286(3) of this Bill for the establishment of what is referred to as the margin in England.

319. This clause will enable the Welsh Assembly Government to bring forward proposals for legislation which are based on Welsh priorities and timescales. The Welsh Assembly Government would consult upon detailed proposals for legislative change before introducing any proposed Assembly Measure.

320. A proposed Assembly Measure will be scrutinised by the Assembly in accordance with sections 97 and 98 of GOWA 2006. In particular, GOWA 2006 specifies that the Assembly's Standing Orders must include provision for a debate and vote on the general principles of a proposed Assembly Measure, on the details of the proposal and for there to be a final stage where the proposal can be passed or rejected.

321. An explanatory memorandum giving more details about the framework powers and prepared by the Welsh Assembly Government is annexed to this document.

Clause 297 - Isles of Scilly

Power conferred on:	*Secretary of State, after consultation with the Council of the Isles of Scilly*
Power exercisable by:	*Order*
Parliamentary Procedure:	*Negative resolution*

322. Clause 297 relates to the position of the Isles of Scilly. It provides that clauses 286, 289, 291, 294, 295 to 299 and Schedule 19 do not apply to the Isles of Scilly unless an order under subsection(2) is made by the Secretary of State, who must consult the Council of the Isles of Scilly before making such an order.

323. Part 4 of the National Parks and Access to the Countryside Act 1949 applies to the Isles of Scilly, but an order under section 111 of that Act can provide for it to apply as if those Isles were a separate county (and not part of Cornwall).

324. Clause 297 makes it clear that an order under section 111 of the 1949 Act can be made in relation to Part 4 of that Act as amended by this Part of the Bill.

325. Part 1 of the CROW Act does not apply to the Isles of Scilly unless an order is made under section 100 of that Act applying it there. This clause makes it clear that an order under section 100 of the CROW Act can be made in relation to Part 1 of that Act as amended by this Part of the Bill.

326. The Department considers it appropriate for the application of this Part of the Bill to the Isles of Scilly to be governed by an order, since this is consistent with provision in section 111 of the National Parks and Access to the Countryside Act 1949 and section 100 of the CROW Act. Before applying the relevant provisions of the 1949 Act to the Isles of Scilly it will be necessary for further work to be done and for the Council of the Isles of Scilly to be consulted.

327. The Department also considers that the appropriate level of parliamentary scrutiny for an order to be made under subsection (2) of this clause is for the order to be subject to the negative resolution procedure.

Part 10: Miscellaneous

Clause 304 – Power to make regulations that give powers to inspectors assisting in the licensing and enforcement of navigational offences and to create offences linked to such activities

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations*
Parliamentary Procedure:	*Affirmative Resolution*

328. This clause inserts a number of provisions into a new Part of the Energy Act 2008. The provisions provide for the issuing of consents to ensure the navigational safety for certain operations licensable under the Energy Act 2008 or the Petroleum Act 1998. The powers for the enforcement of these consents have been replicated from Part 1 of the Energy Act.

329. Provision 79L allows the Secretary of State to appoint inspectors to assist in carrying out his functions and ensure licence holders act in accordance with the consent provisions. This is akin to the power in sections 13 and 27 of the Energy Act 2008. Sub-section (3) enables the Secretary of State to make regulations specifying the powers and duties of inspectors. Subsection (5) sets out that regulations made under this clause may provide for the creation of criminal offences. However, the power to determine the penalties for such offences is limited as set out in sub-section (5)(a) and (b).

330. The regulations may apply to inspectors and any other person acting on the direction of the Secretary of State. Since the powers and duties of inspectors, or directed persons, will need to be amended in accordance with changes to consent provisions and to reflect market developments, they are to be set out in regulations to ensure flexibility.

331. The types of power and duties to be set out in regulations may include those set out in section 108(4) of the Environment Act 1995 (c.25), such as powers to enter premises, to carry out an investigation, to require information and to take samples. However the Department acknowledges the open-ended nature of this power and therefore considers that it should be subject to affirmative resolution procedure. This is in line with the equivalent powers under sections 13 and 27 of the Energy Act 2008.

Part 11: Supplementary

Clause 306(2) – power to make incidental, consequential, supplemental, or transitional provision or saving to enactments

Power conferred on:	*Secretary of State as regards England,* *Welsh Ministers as regards Wales* *Scottish Ministers as regards Scotland* *Department of the Environment as regards Northern Ireland*
Power exercisable by:	*Regulations or Order*
Parliamentary Procedure:	*Draft affirmative or negative resolution*

332. Clause 306(1) provides that a power conferred in the Bill on Ministers or a Northern Ireland department to make orders or regulations includes power to make incidental, consequential, supplementary or transitional provision or savings. By clause 306(2) the power in sub-section (2) includes a power **(Henry VIII)** to amend enactments.

333. Instruments that use clause 306(2) to amend primary legislation will be subject to the draft affirmative procedure. Instruments that use clause 306(2) to amend subordinate legislation will be subject to the negative procedure.

334. The Department considers it appropriate that where the instrument is using the power in clause 306(2) to amend primary legislation it should be subject to a high level of parliamentary scrutiny. Such a level of scrutiny is not, however, considered appropriate in the case of subordinate legislation.

Department for Environment, Food and Rural Affairs

December 2008

Annex

WELSH ASSEMBLY GOVERNMENT MEMORANDUM ON FRAMEWORK PROVISIONS FOR THE NATIONAL ASSEMBLY FOR WALES

Introduction

335. This memorandum sets out the background and context relevant to the provisions in Part 9 of the Marine and Coastal Access Bill conferring legislative competence on the National Assembly for Wales in relation to public access to, and routes for, the coast of Wales.

Background

336. Part 3 of the Government of Wales Act 2006 (c.32) ("the Act") gives the National Assembly for Wales the power to pass legislation known as Assembly Measures. Assembly Measures will be able to make any provision that could be made by an Act of Parliament with respect to those matters, subject to the restrictions contained in the Act.

337. The Assembly may pass Measures in relation to the "matters" which are listed in 20 "fields" in Part 1 of Schedule 5 to the Act. Additions to the Assembly's legislative competence are made by adding new matters to the Fields in Part 1 of Schedule 5. The Act includes a power to add new matters by Order in Council. Acts of the UK Parliament may also add to the Assembly's legislative competence by inserting matters into Part 1 of Schedule 5 to the Act. Such provisions are referred to as "framework powers".

338. The proposed powers in the Bill would grant the Assembly law-making powers by adding two matters to Field 16 (sport and recreation).

Context

339. Current approach in Wales The Welsh Assembly Government is committed to improving public access to the coast of Wales, and in particular, to creating a new All Wales Coast Path by 2012. This is being taken forward under the Coastal Access Improvement Programme via new investment in path infrastructure, including new circular routes at the coast. The programme also includes specific provision for horse-riders, cyclists and for disabled people and is being progressed primarily under powers available under the Highways Act 1980. £1.5 million was made available for the programme in its first year (2007/8) and this has been increased to £2 million in the current financial year, with a particular focus on the All Wales Coast Path. The funding is being channelled via the Countryside Council for Wales (CCW) to the coastal local authorities to support the 'on the ground' improvements.

340. Current limitations on coastal access Analysis by the CCW has revealed that the public has access to 60% of the Welsh coastline (utilising public rights of way, National Trust land and other publicly owned land at the coast as well as some land designated as access land under the Countryside and Rights of Way Act 2000).

However the quality and extent of this access varies considerably with access often being limited to a right to pass and re-pass along a narrow coastal path, without any right of access to adjacent land for the wider purpose of open-air recreation.

341. It is also apparent that many believe they already have a right of access to the foreshore, including beaches in Wales, although this is generally not the case. Some 70% of the foreshore in Wales is owned by the Crown Estate and while they generally allow public access to this land, this is not a public right. The other 30% is in private ownership.

342. The Coastal Access Improvement Programme will further improve public access to the Welsh coast, especially through the eventual completion of the All Wales Coast Path. The programme is not designed, however, to clarify the extent of public access rights to land at the coast, nor to create additional areas of coastal land for public access for the purpose of open-air recreation.

Proposed powers for England

343. The Bill contains new provisions to secure improved public access to the English coast. The key elements include a duty on the Secretary of State and on Natural England to secure one or more long-distance routes for the English coast, as well as a margin of land along the length of the English coast for the purposes of public enjoyment. The Bill will amend existing legislation to provide for the establishment of one or more long-distance routes and for the designation of a "coastal margin" to which the public would have a right of access for the purposes of enjoyment by them in conjunction with that route or otherwise, subject to the exclusion of any areas falling within specified categories ("excepted land"). The descriptions of land in England which will be "coastal margin" will be specified in subordinate legislation. Such land may include, for example, land over which the English coastal route passes, land adjacent to that route, and beaches, cliffs, rocks and dunes and other land (primarily though not exclusively) to the seaward side of the coastal route.

Position in Wales

344. These powers could have some potential application to Wales but they have been designed specifically for England rather than for Wales. Wales starts from a different position, in that the Coastal Access Improvement Programme is already underway and the All Wales Coast Path is under construction. The existing programme relies primarily on voluntary access agreements and has the support of stakeholders, including very importantly landowners at the coast. While the Welsh Assembly Government wishes to have a coherent legislative framework for coastal access in Wales, covering both the equivalent of the long-distance route(s) and access to coastal land for the purpose of open-air recreation, it is important to it that any legislative provision should complement and build upon the current programme. This would involve full consultation with stakeholders as to how the provisions envisaged for England would need to be adapted to meet Welsh requirements and circumstances. The timing of any legislation would also need to be determined according to Welsh priorities and circumstances.

345. For these reasons the Welsh Assembly Government does not wish to include detailed provision in the Bill regarding coastal access in Wales. However, it does foresee a need for future legislation in Wales, not least to help address the limitations outlined in paragraph 10 above. The existing powers of the Welsh Ministers under section 3 of the Countryside and Rights of Way Act 2000 (which enable them to make an Order applying the access provisions in Part 1 of that Act to coastal land) are neither attractive nor suitable for the same reasons as the UK

Government has identified – i.e. their lack of flexibility to deal with the complex situation at the coast and inability to provide a continuous route around the coast. However, neither the National Assembly for Wales nor the Welsh Ministers have other powers available to them which are suitable to create permanent new or improved rights for the public to access the coast of Wales. The framework powers included in the Bill are designed to address this by providing a full range of legislative powers to support and complement current work, for example by enabling provision to be made for public access to land adjacent to the coastal path.

346. The Welsh Assembly Government has identified the following key principles which it would want to guide further developments:

a) to ensure that any new legislative provisions complement and add value to the work undertaken on the Assembly Government's Coastal Access Improvement Programme and in providing greater clarity for the public on their access rights at the coast;

b) to aim to maximise the potential benefits for public access while minimising any detrimental impact on landowners, farmers and other private and commercial interests at the coast;

c) to keep to a minimum the impact of any agreed new provisions on coastal access on arable land and other actively farmed land at the coast;

d) to develop and implement any agreed new framework provisions on coastal access in a way which encourages clarity as to the rights conferred.

347. 13. If the framework powers are enacted, the Welsh Assembly Government would propose, as the next step, to ask CCW to investigate how a statutory approach to coastal access might work in practice in Wales, while maximising the investment under the Coastal Access Improvement Programme and securing stakeholder and public support. It would then consult widely on the proposed approach before devising an Assembly Measure or Measures covering the preferred approach. In this way the Welsh Assembly Government would be able to bring forward legislation developed to meet Welsh needs, reflecting input from the people and organisations concerned and subject to full scrutiny by the National Assembly for Wales. This would not be possible without the framework powers in the Bill.

Scope of the proposed powers

348. The Bill contains provisions which will confer legislative competence upon the National Assembly for Wales in relation to two areas: firstly, the establishment and maintenance of one or more routes for the coast to enable the public to make recreational journeys, and secondly, the securing of public access to 'relevant land' for the purposes of open-air recreation. Land will be 'relevant land' if it is land at the coast, can be used for the purposes of open-air recreation in association with land at the coast, or can be used for the purposes of open-air recreation in association with the coastal route or routes. This legislative competence will be conferred by means of the insertion of two new matters into Field 16 (sport and recreation) of Part 1 of Schedule 5 of the Government of Wales Act 2006.

349. Depending on the approach taken, and the outcome of any public consultation, a Measure relating to one or both of the above areas might need to include provisions in relation to:

a) the designation of descriptions of 'relevant land' to which the public would have a right of access for the purpose of open-air recreation;

b) the nature of that right of access and the conditions under which that right may be exercised;

c) designation of descriptions of 'relevant land' which are excepted from the right of access (including any conditions that apply in relation to those descriptions of land);

d) exclusions of, or restrictions on, the right of access (for example, for nature conservation, animal welfare, public health and safety, land management, defence or national security reasons);

e) the means of access to land to which the above right of access, or other rights of access apply, or over which a coastal route passes, and boundaries to such land;

f) the dedication of land as land to which the right of access applies;

g) the establishment and maintenance of a route or routes for the coast to enable the public to make recreational journeys other than by mechanically propelled vehicles (except permitted journeys by qualifying invalid carriages);

h) the realignment, diversion or closure of the route or routes (for example in response to coastal erosion or the effects of climate change);

i) ancillary provision in relation to the right of access and the route or routes (including provision in relation to liabilities that might arise, the making of byelaws in relation to the access land, the appointment of wardens, the erection, maintenance and removal of signs and notices, and the funding of works);

j) the estuarial and upstream waters up to the first public foot crossing which are to be treated as forming part of the sea for the purposes of the right of access and the route or routes;

k) the islands (or descriptions of islands) whose coastlines are to be treated as forming part of the coast for purposes relating to the right of access and the long-distance route or routes.

350. The Bill provides for the English coastal access provisions to be binding on the Crown: for consistency, any provisions in equivalent Assembly legislation would similarly be able to bind the Crown. However, it is not the Assembly Government's intention that any Assembly Measure should alter, or permit the alteration of, the position with regard to access to land used for purposes within the responsibility of the UK Government without the agreement of the relevant Secretary of State. In this context, land at the coast used for railways, airports, ports, docks, telecommunications, gas, electricity and for military purposes is particularly relevant.

Geographical limits

351. Section 94 of the 2006 Act provides that a provision of an Assembly Measure is outside the Assembly's legislative competence if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on the Welsh Ministers, Welsh local authorities or any other public authority functions which did not relate to Wales. Any Measure made under these framework powers would therefore make provision in relation to Wales only.

Minister of the Crown functions

352. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter or remove the functions of a Minister of the Crown without the consent of the relevant Secretary of State (and may not create new Minister of the Crown functions at all). Should any future proposals for Assembly Measures impact on Minister of the Crown functions, the appropriate UK Government Departments would first be consulted and their agreement would be obtained before any change to, or modification of, those functions could be made.

353. For example, under section 28 of the Countryside and Rights of Way Act 2000, the Secretary of State may issue a direction excluding or restricting the public right of access under section 2(1) of that Act to any land in the interests of defence or national security. No Assembly Measure could contain provision to alter or remove (or allow alteration or removal of) the Secretary of State's power of direction under section 28 without the prior consent of the UK Government.

Welsh Assembly Government

December 2008