HOUSE OF LORDS

Delegated Powers & Regulatory Reform Committee

2nd Report of Session 2008-09

Cohabitation Bill [HL]

Disabled Persons (Independent Living) Bill [HL]

Dog Control Bill [HL]

Equal Pay and Flexible Working Bill [HL]

Geneva Conventions and United Nations Personnel (Protocols) Bill [HL]

Government amendments:

Banking Bill

Government response:

Local Democracy, Economic Development and Democracy Bill [HL]

Legislative reform:

Draft Legislative Reform (Minor Variations to Premises Licences and Club Premises Certificates) Order 2009

Draft Legislative Reform (Supervision of Alcohol Sales in Church and Village Halls &c.) Order 2009

Ordered to be printed 21 January and published 22 January 2009

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 21

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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The Lord Blackwell
Rt Hon. the Lord Boyd of Duncansby PC QC
The Viscount Eccles CBE
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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.

Second Report

COHABITATION BILL [HL]

1. This Private Member's Bill provides for certain forms of protection for people who are or have been 'cohabitants' (defined in clause 2) in the event of the death of one of them or in the event of their ceasing for some other reason to live together as a couple; and it makes provision enabling the life of one of them to be insured by or for the benefit of the other or for the benefit of a 'relevant child' (defined in clause 4).

2. The Bill contains delegated powers in clauses 12(9), 21(2) and (3) and 22, and in paragraph 17 of Schedule 1. Clause 25(2) also enables provisions of the Bill to be brought into force by order.

3. The affirmative procedure is required for orders under clause 22 (incidental, supplemental, consequential and transitional provision), which includes a power to amend Acts. We would not usually expect the affirmative procedure to apply to an order containing provision of that kind unless it were actually amending an Act. **We therefore recommend that clause 23(3)(a) be amended so that orders under clause 22 which do not amend primary legislation should attract the negative procedure.** There is nothing in the other delegations which we wish to draw to the attention of the House.

DISABLED PERSONS (INDEPENDENT LIVING) BILL [HL]

4. This Private Member's Bill, which makes provision about independent living for disabled persons, is similar to other Bills introduced in the 2005-06, 2006-07 and 2007-08 Sessions. We reported on each of these earlier Bills,[1] and several of our recommendations have been included in each new Bill.

5. In this Bill delegated powers to make orders or regulations are conferred at clauses 3 (definition of "disabled person"), 8(3)(g), (4)(d), (6) and (7), 10(6) and (7), 13(8), 14(5) and (8)(b), 15(5), 16(1)(a), (2) and (8), 17(4) and (5), 19(1), (2)(a), (3) and (5), 20(2), 22(3), (4)(c) and (5), 24, 26(4) and 38, and in paragraph 10(4) of Schedule 1. There are also amendments at clauses 29 and 33 which affect existing delegated powers.

6. Much of the provision in clause 26 is new. Subsection (1) requires the Secretary of State or the Welsh Ministers "to designate a public body to have the functions of investigating breaches of a person's rights under the Bill and taking appropriate enforcement action". **It is unclear to us whether it is envisaged that the nature of "appropriate enforcement action" (not defined in the Bill) is to be specified as part of the process of designation. If so, we recommend that the designations should be made by way of regulations subject to negative procedure.** We also note that the purpose of the power to make regulations under subsection (4)

[1] Session 2005-2006 [HL Paper 226], Session 2006-07 [HL Paper 19] & Session 2007-08 [HL Paper 11].

is unclear in so far as it provides that regulations under clause 26 may make "further" provision.

7. There are no other provisions which we wish to draw to the attention of the House.

DOG CONTROL BILL [HL]

8. This Private Member's Bill makes provision about the control and welfare of dogs, and repeals three related Acts. The Bill contains only one delegated power, at clause 7(5), to enable the Secretary of State to bring the resulting Act into force by order. **We recommend that the order should be made by statutory instrument, in the usual way.**

EQUAL PAY AND FLEXIBLE WORKING BILL [HL]

9. This Private Member's Bill amends the Equal Pay Act 1970 and makes provision about flexible working.

10. There is one delegated power in the Bill. Clause 1(3) inserts a new section 2ZA into the Equal Pay Act 1970 to require an employer (who has been found to have contravened a term modified or included by an equality clause) to undertake an equal pay audit and make the results available in the manner prescribed by regulations. An 'equality clause' is a provision of a woman's contract of employment which satisfies one of the conditions described in section 1(2) of that Act. The 1970 Act no longer contains any general provision about subordinate legislation under the Act, and **we therefore recommend that the new section should also provide that the regulations must be made by statutory instrument which should be subject to annulment in pursuance of a resolution of either House of Parliament.**

GENEVA CONVENTIONS AND UNITED NATIONS PERSONNEL (PROTOCOLS) BILL [HL]

11. This Bill provides for the protection against misuse of a new internationally recognised emblem, the Red Crystal, and for the extension of legal protection afforded to United Nations and associated personnel engaged in peacekeeping or emergency humanitarian activities. The Foreign and Commonwealth Office have submitted a memorandum on the Bill, printed at Appendix 1 to this Report.

12. The amendment made by clause 1(6) will enable regulations under section 6A of the Geneva Conventions Act 1957 to include provision about the new emblem (in particular provision authorising its use by certain prescribed categories of person for particular purposes). Such regulations are subject to the negative procedure.

13. There is no aspect of that or any other of the delegated powers conferred or affected by this Bill which we draw to the attention of the House.

BANKING BILL — GOVERNMENT AMENDMENTS

14. We reported on this Bill in our First Report (HL Paper 12). The Government have now invited us to consider amendments being moved at Committee stage, printed on sheet HL Bill 13—I(a). HM Treasury have provided a supplemental memorandum on the amendments, printed at Appendix 2.

Holding companies

15. Committee stage amendments 126 and 127 insert two new clauses to extend the "temporary public ownership stabilisation option" already in the Bill to the parent undertakings of banks (described for these purposes as "holding companies"). One new clause extends, subject to certain conditions, the existing delegated power in clause 13(2) to allow the Treasury to bring a holding company into temporary public ownership. The other new clause applies provisions of Part 1 of the Bill (for instance, powers to make onward share transfer orders, and property transfer orders) to holding companies in a similar way as for banks. In paragraphs 3 to 8 of the supplemental memorandum, the Treasury explain their reasons for seeking these additional powers; and, if the House is persuaded that they are necessary and satisfied as to the conditions which apply to them, we do not regard them as inappropriate. **However, we draw the attention of the House to subsection (1)(c) of the second new clause, which brings holding companies within the scope of the extremely broad power to change the law in clause 75**, to which we drew attention in our First Report (HL Paper 12, paragraph 6), and which was debated at some length during the Committee stage of the Bill (HL Debates 20 January 2009, cols 1592 to 1615).

Investment banks: insolvency

16. Committee stage amendments 174D to 174G insert new clauses which confer an exceptionally wide-ranging power to enable the Treasury to create through secondary legislation a new insolvency regime for investment banks which hold client assets or client money. The supplemental memorandum explains that difficulties arising during the administration of the UK subsidiary of Lehman Brothers have led the Treasury to review the suitability of general UK insolvency law for investment banks (paragraphs 20 and 21). The Treasury will not know whether or how they wish to exercise the power until the review is complete, which is expected to be after the completion of Parliamentary consideration of this Bill.

17. The sheer scope of the proposed power is striking. For example, subsection (1)(a) of the new clause to be inserted by amendment 174E provides that "The Treasury may by regulations ... (a) modify the law of insolvency in its application to investment banks; (b) establish a new procedure for investment banks ...". Subsections (5) and (6) of the new clause to be inserted by amendment 174F enable the regulations to amend an enactment,

and to establish a mechanism for determining which assets are, or are to be treated as, client assets. Although the new clause to be inserted by amendment 174D does provide definitions of "investment bank" and "client assets", subsection (6) enables the Treasury to amend both definitions by order.

18. There are few restrictions on the exercise of the powers. Under the clause to be inserted by amendment 174G any regulations or orders are to be subject to the affirmative procedure in both Houses; and subsection (4) provides that if the power to make regulations has not been exercised within two years of Royal Assent it will lapse (though any regulations made under the power would continue in force; and if the power has been exercised to any extent within the two years, the power will not lapse at all).

19. We are extremely concerned about the powers the Government propose to take in these amendments. The Government's own supplemental memorandum makes clear that "banking and insolvency law is highly complex" (paragraph 25); and that "developing an insolvency scheme where the emphasis lies on the return of client money, rather than on maximising the assets of the failed institution so to provide the best possible return for all creditors, marks a significant shift in UK insolvency law" (paragraph 25).

20. Under normal circumstances we would recommend outright that such broad and significant powers are inappropriate, and that substantially more provision should be set out in primary legislation. In the current situation it is for the Government to satisfy the House that exceptional circumstances justify this departure from the balance between primary and subordinate legislation which the House would usually expect.

21. Even if the House is persuaded that, exceptionally, these powers can be justified, we believe they should be subject to effective time-limiting provisions. **We therefore recommend that both the power to make regulations under these provisions, and any regulations themselves, should unconditionally cease to have effect two years after this Act receives Royal Assent (subject only to any necessary saving provision in relation to any banks which have already entered into the insolvency procedure at the expiry of the two-year period).** This would give the Government sufficient flexibility to deal with any urgent situations arising within the next two years, and provide ample time for them to bring forward further primary legislation, if they wish, for proper Parliamentary scrutiny.

LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL [HL] — GOVERNMENT RESPONSE

22. We reported on this bill in our First Report (HL Paper 12) and the Government have now responded by way of a letter to the Chairman from Baroness Andrews, Parliamentary Under-Secretary of State, Department for Communities and Local Government, printed at Appendix 3.

DRAFT LEGISLATIVE REFORM (MINOR VARIATIONS TO PREMISES LICENCES AND CLUB PREMISES CERTIFICATES) ORDER 2009

Introduction

23. This draft Legislative Reform Order (LRO) is part of a programme to make minor amendments to the Licensing Act 2003 ("the 2003 Act"). (The other LRO considered in this Report is also part of the programme.) The Order was laid by the Department for Media, Culture and Sport (DCMS) under the Legislative and Regulatory Reform Act 2006 ("the 2006 Act"). The DCMS laid an Explanatory Document (ED)[2] along with the LRO, and a further supplementary memorandum was received on 20 January (printed at Appendix 4).

Overview of the proposal

24. The purpose of the LRO is to simplify the process for applying for certain 'minor' variations to existing licences, by amending the 2003 Act.

25. Currently the procedure for seeking a variation to a licence is similar to that for a new licence and requires the application to be copied to up to nine responsible authorities (e.g. police, fire services etc), advertised in local papers, a notice to be posted at the premises and a hearing to be held if there are objections. If rejected the applicant can appeal to the local magistrates.

26. The Department state in paragraph 14 of the ED that in nearly 30% of cases the variations are clearly unlikely to impinge on the licensing objectives, and so the full process is seen as unduly burdensome. These minor variations might include, for example, the re-location of a bar, moving safety equipment to a more appropriate location or adding the performance of dance to a location that is already licensed for other entertainments.

27. The Government therefore propose this new 'minor' variations process. The process would be less burdensome for applicants in various ways, including:

- no requirement for the applicant to advertise in a local paper; nor to post a notice at the premises;
- no requirement for the applicant to copy the application to other responsible authorities, though the licensing authority will be required to copy the application to any responsible authorities they consider relevant and take into account any comments made by those authorities;
- local residents and business will not have the right to make representations;
- the licensing authority must inform the applicant of its decision within 15 days or the application is treated as refused and the fee must be returned;

28. The Government intend that the process should be restricted by the following principal conditions:

- The process could not be used for any variation relating to the sale or supply of alcohol unless it was to reduce the hours during which alcohol

[2] http://www.opsi.gov.uk/si/si2009/draft/em/ukdsiem_9780111472736_en.pdf

may be sold or supplied; or to move (without increasing) the hours during which alcohol was sold or supplied between 7am and 11pm only. (ED paragraph 16)

- The licensing authority could only grant the application if it considered that the variation proposed in the application could not have an adverse effect on the promotion of any of the licensing objectives. (The objectives set out in the 2003 Act are: the prevention of crime and disorder; public safety; the prevention of public nuisance; the protection of children from harm.)

29. As required by the 2006 Act the Government have consulted on the proposal. The results of these consultations are summarised in paragraphs 23 to 37 of, and Annexes C-E to, the ED. The ED reports that many concerns expressed during the consultations have been satisfied, in part by amendments to the LRO. It should however be noted that Newham and Westminster Councils (two central London councils with an exceptionally high number of licensed premises) remain opposed to the introduction of a 'minor variations' process along the lines proposed in the LRO. DCMS argue that most licensing authorities, LACORS (Local Authorities Coordinators of Regulatory Services), and the majority of other stakeholders do not share this view and support the minor variations process (ED paragraphs 36 and 37).

Opinion of the Committee

30. The Government have recommended the negative procedure for this LRO (meaning the LRO would only be debated if a Member specifically sought a debate), on the ground that this is a "small legislative change" that is not "highly controversial" (ED paragraph 22). Bearing in mind the high level of interest in matters relating to licensing under the Licensing Act 2003, and the concerns expressed by some local authorities, we are surprised at the Government's recommendation.

31. There are issues about whether the LRO fully satisfies the tests in section 3(2)(d) and (e) of the 2006 Act (necessary protection and continuing exercise of rights).

32. An essential feature of the minor variations procedure is that there is no right for local residents and businesses to make representations about the likely effect of the grant of an application on the promotion of the licensing objectives; nor is the Secretary of State obliged by regulations to require the applicant to advertise the application and give notice of it.

33. The order specifies particular types of application which may not be made under the minor variations procedure (new sections 41A(3) and 86A(3) of the 2003 Act). (These include most applications relating to the sale or supply of alcohol paragraph 28 above). For all other variations, there is the safeguard that unless the licensing authority considers that the proposed variation could have no adverse effect on the licensing objectives, the application must be rejected. But local residents and businesses have no formal opportunity, through a representations procedure, to influence the authority's decision whether or not a variation could have an adverse effect on the promotion of the licensing objectives. We have reservations about the lack of any requirement even for a notice publicising that an application has been made. Since it is for the licensing authority to decide whether, in any

particular case, the variation would have no adverse effect on any of the licensing objectives, it seems well arguable that local residents and businesses should be able to express their views to the licensing authority and should receive sufficient notice to enable them to do so. We consider that amendments to the LRO may be desirable unless there is a more convincing justification for what is currently proposed. **Accordingly, we recommend that the super-affirmative procedure under section 18 of the 2006 Act should apply to the LRO.**

Other issues

34. We are required by our terms of reference to perform the functions carried out for other instruments by the Joint Committee on Statutory Instruments.

35. We asked the Department questions about the use of the words "sale by retail or" in new section 41A(3) of the 2003 Act (Article 2 of the LRO) and "supply" in new section 86A(3) of the 2003 Act (Article 3 of the LRO). Those provisions exclude from the minor variations procedure applications to vary licences in connection with certain alcohol-related transactions and are an essential part of the necessary protection for which the order provides. The questions and the answers from the Department are set out in the Memorandum from the Department at Appendix 4.

36. The words "sale by retail or" in section 41A(3)(d) and (e)(i) and "sold by retail or" in section 41A(3)(e)(ii) are redundant, because they are covered already by the definition of "supply of alcohol" in section 14 of the 2003 Act. The Department agrees that they serve no purpose and **we recommend that they be removed.**

37. The words "to members and guests" should be inserted after "supply of alcohol" in section 86A(3)(b) and (c)(i) and after "supplied" in section 86A(3)(c)(ii). The Department agrees that a change of this sort would be appropriate and **we recommend that it be made.**

DRAFT LEGISLATIVE REFORM (SUPERVISION OF ALCOHOL SALES IN CHURCH AND VILLAGE HALLS &C.) ORDER 2009

Overview of the proposal

38. This LRO, together with an ED, was also laid by DCMS under the 2006 Act.

39. Section 19 of the 2003 Act states that there must be no supply of alcohol under a premises licence when either there is no designated premises supervisor (DPS) in respect of the licence or where the DPS does not hold a current personal licence; and that every supply of alcohol under the premises licence must be made or authorised by the holder of a personal licence. These conditions are called the "mandatory conditions". The purpose of this LRO is to set out alternative conditions for community premises such as village or church halls. Instead of the "mandatory conditions" the Government proposes that the responsibility for authorising sales of alcohol will fall on the premises licences holder itself, which will be the committee of individuals responsible for the management of the premises. Provided the premises licence holder (ie. the management committee) had properly authorised the sale of alcohol, for example in written form through a hire agreement, an organisation or hirer using these premises for the sale of alcohol under the authority of the premises licence would not be required to obtain a personal licence.

40. Switching to these alternative provisions would not be automatic: an application would have to be made either at the start of the licence or as a separate application to vary the licence. In either case the licensing authority would be required to take into account any representations from the police. The "mandatory conditions" could be reactivated where concerns arise later in relation to any of the licensing objectives set out in the 2003 Act.

41. As required by the 2006 Act the Department has consulted on the proposal. Details are given in paragraphs 33 to 49 of, and Annexes C-E to, the ED.

Opinion of the Committee

42. **We are satisfied that the Order meets the tests in the 2006 Act and is not otherwise inappropriate for the LRO procedure.** However, given the potentially large number of premises which may be affected, and the level of interest in licensing matters under the 2003 Act, we are not content with the Government's proposal that the negative procedure should apply. **We recommend that the affirmative procedure should apply for this LRO**.

APPENDIX 1: GENEVA CONVENTIONS AND UNITED NATIONS PERSONNEL (PROTOCOLS) BILL [HL]

Memorandum by the Foreign and Commonwealth Office

1. This memorandum concerns the Geneva Conventions and United Nations Personnel (Protocols) Bill which confers certain delegated powers.

2. The Bill has two purposes, first to enable the United Kingdom to ratify the Third Additional Protocol to the Geneva Conventions, which introduced a new humanitarian symbol, the Red Crystal. It will also enable the United Kingdom to become a party to the Optional Protocol to the Convention on the Protection of Peacekeepers and Associated Personnel, which extends the protections afforded by the original Convention to those providing humanitarian, political or developmental assistance or emergency humanitarian assistance. For this purpose, the Bill amends the Geneva Conventions Act 1957 and the United Nations Personnel Act 1997.

Clause 1(6)

3. Section 6A of the Geneva Conventions Act 1957, which gives the Secretary of State power to make regulations in relation to the use of the protected emblems. This clause makes a consequential amendment so as to enable regulations to be made likewise in relation to the new humanitarian symbol. In fact, no regulations have been made under Section 6A since, in practice, more informal means have been used to authorise the use of protected emblems by bodies such as the British Red Cross.

Clause 3(1)

4. This clause allows the provisions in the Bill to be brought into force on a date to be set by order by the Secretary of State. This is so that the Secretary of State can coordinate the entry into force of the legislation with the entry into force for the United Kingdom of each of the two Protocols.

Clauses 3(3) and 3(4)

5. These two clauses enable the legislation to be extended to the Channel Islands, the Isle of Man and the British Overseas Territories. The various territories will be consulted about whether they wish the two Protocols to be applicable to them, and whether consequently they wish the legislation to be extended.

Foreign & Commonwealth Office

December 2008

APPENDIX 2: BANKING BILL — GOVERNMENT AMENDMENTS

Supplementary memorandum by HM Treasury

1. This memorandum supplements the memorandum ("the original memorandum") submitted by Her Majesty's Treasury on 4 December 2008. The Committee's response to the original memorandum was included in its First Report of Session 2008-9 published on 18 December 2008.

2. This memorandum relates to a number of amendments to the Banking Bill which the Treasury laid before Parliament on 7 January 2009. The amendments relate to the extension of the scope of the Treasury's temporary public ownership tool (clause 13(2) of the Bill, as introduced to the House of Lords) to bank holding companies; the power to make investment bank insolvency regulations; and the Banking (Special Provisions) Act 2008 in order to clarify the interpretation of the delegated power to confer powers on the independent valuer.

HOLDING COMPANIES

3. Banks, like many financial institutions, do not tend to operate in isolation or as single legal persons. Instead, they are organised as groups, generally with a single ultimate parent company and any number of subsidiaries. Banks are commonly part of such firms, and often sit below the parent company in the group structure.

4. The stabilisation options (clauses 11-13) exercisable by the securities and property transfer powers ("the transfer powers" clauses 14-32 and 33-48), which form part of the special resolution regime (as defined by clause 1(2) of the Bill are exercisable only in relation to banks (as defined in clauses 2 and 88).[3] Continuing consideration of how best to resolve failing banks has made it apparent that in some cases exercising a power conferred by the special resolution regime in relation to the bank (and not the parent undertaking) may be insufficient fully to achieve the special resolution objectives (clause 4). There are a number of reasons why this may be the case:

    1) The activities of the bank and the rest of the group may be so inter-related that the exercise of the transfer powers in relation to the bank may be insufficient (or insufficiently effective). The extent to which the imposition of continuity obligations (already provided for in clauses 63 to 70 of the Bill) addresses this concern is discussed below (see paragraphs 6 to 8).

    2) Taking action in relation to the bank may give rise to very serious difficulties with the financial stability of the rest of the group. In certain cases, the exercise of the transfer powers in relation to the bank may so disturb the operation of, and confidence in, the group as a whole that it leads to the insolvency of some or all of the other entities in the group.

        For example, where the parent undertaking of the group is dependent on the bank for its funding, the exercise of the transfer powers in relation to the bank may interfere with that funding stream and undermine market confidence in the viability of the parent undertaking to such an extent that it can no longer continue to operate.

[3] See also the following provisions of the Bill which relate to the application of the Bill to credit unions and to building societies: clauses 81, 82, 86, 127, 128, 155 and 156.

Where the other entities in the group are financial institutions, their failure may impede the achievement of the special resolution objectives (especially objectives 1 and 2). In addition, the failure of other entities in the group may give rise to difficulties in the continued operation of the bank given the interconnectedness of the group.

3) A private sector solution may be more likely on a group-wide basis than a bank only basis (particularly if other non-bank parts of the group are attractive to buyers).

5. In light of these issues, the Treasury have laid amendments to the Banking Bill which would extend the scope of the temporary public ownership stabilisation option to apply to the parent undertakings of banks (referred to in the rest of this supplemental memorandum as "holding companies").

Continuity obligations

6. The Treasury have recognised that interrelationships between different companies within a group may create difficulties for the resolution of a failing bank. For example, one particular company within the group may provide a business facility to the rest of the group such as IT services or services which relate to hedging risk. As a result, it may not be able to take action in relation to the bank in isolation. If the services being provided by the group company cease to be provided, the bank may be unable to continue to operate. In addition, the bank may, without certainty as to the continuation of the provision of the service, become an unattractive prospect to a private sector purchaser.

7. The Bill already contains provisions which seek to address this issue. Clauses 63 to 70 provide that group companies (and, where there has been a partial property transfer, the residual company) continue to provide services or facilities – "continuity obligations" – to the bank. (These powers were discussed at paragraphs 239 to 264 of the original memorandum.)

8. However, the Treasury have concluded that the imposition of continuity obligations, while remaining a vital tool in certain cases, is insufficient to address the full range of difficulties outlined above. In particular:

1) The activities of the group may be so interrelated that the imposition of continuity obligations does not suffice to ensure that the bank can continue to operate. Alternatively, securing the continuity of essential services and facilities via the imposition of continuity services may be excessively complicated or difficult in practice to operate.

2) The imposition of continuity services will not address the potential risk to other entities in the group. In particular, the imposition of continuity obligations will not prevent other group entities from becoming insolvent.

3) The application of continuity obligations may be insufficient to satisfy a private sector purchaser who may wish to purchase the entire group/aspects of it, rather than just the bank.

Delegated powers

9. Under the Treasury's amendments, the Treasury may exercise the delegated power conferred on it by clause 13(2) to bring a holding company into temporary public

ownership ("TPO"). The amendments modify delegated powers which are already conferred by the Bill. These amendments do not confer any new delegated powers.

Scope of the power

10. The Treasury consider that it is important that the powers in relation holding companies are as limited as possible. Holding companies and other companies in the group may be involved in a range of activities which have little or no connection with banking. Very careful consideration should be given before action under the special resolution regime is taken in relation to a holding company.

11. In light of these considerations, the Treasury have concluded that only the Treasury's power to take an undertaking into TPO should be exercisable in relation to a holding company. The TPO power is a power of "last resort" and subject to a higher public interest condition for use as compared to other stabilisation options (clause 9(3)). The Treasury consider that it is appropriate that action should only be taken in relation to a holding company where these conditions in clause 9(3) are satisfied. In addition, the fact that the holding company may not be carrying out activities which relate to banking (and so may not be an undertaking which the Bank of England has any particular knowledge of) suggest that it may be more appropriate for the Treasury to exercise functions in relation to a holding company. The Treasury's proposed approach also ensures that Parliament can hold the Minister exercising powers in relation to a holding company directly to account.

12. The power to take a holding company into TPO will only apply to holding companies which are incorporated or formed under the law of a part of the United Kingdom.

Conditions on exercise of the power

13. Under the amendment laid by the Treasury, a holding company may only be taken into TPO if the Financial Services Authority is satisfied that a bank in the group (or if there is more than one bank, any of them) satisfies the general conditions set out in clause 7. In addition, the Treasury must be satisfied that it is necessary to take action in respect of the holding company for the purposes specified in clause 9 (to resolve or reduce serious threat to the stability of the financial system of the United Kingdom or to protect the public interest where the Treasury have provided financial assistance in respect of a bank). The Treasury will also have to have regard to the special resolution objectives in considering the exercise of, and exercising the stabilisation option.

14. In determining whether it is necessary to take action in relation to the holding company, the Treasury will have to consider whether the action in relation to the bank would suffice for the purposes specified in clause 9 or to achieve the special resolution objectives.

Exercise of the power

15. The exercise of the power to take a holding company into TPO will be exercised by a share transfer order made by the Treasury in accordance with clause 13(2). Such orders were discussed in the original memorandum at paragraphs 122 to 154. Of particular note is that this power will be exercisable by the Treasury by statutory instrument subject to the negative procedure.

Additional powers

16. Once a holding company is in TPO, the Treasury will have a range of powers available to it to transfer the securities and property, rights and liabilities of the holding company (discussed in the original memorandum at paragraphs 106 to 117 and 158 to 170). In particular, supplemental, reverse and onward share transfer orders (see clauses 27 to 29) and onward property transfers and reverse property transfers (clauses 45 and 46) can be made in relation to the holding company. These powers will be exercisable by statutory instrument, subject to the negative procedure. The limitations and safeguards on these powers set out in the original memorandum will apply. In particular, the limitations on partial property transfers provided for in clauses 47, 48 and 60 will apply – see paragraphs 302 to 335 of the original memorandum.

17. In addition, the Treasury consider that it is appropriate that it should have the flexibility to effect the full range of transfers in relation to the bank (or if there are more than one bank in the group, any of them), and not just the holding company. One of the key aims of the exercise of the power to take a holding company into TPO will be to resolve the position of the bank in the group, to protect and enhance public confidence in the stability of the banking systems of the United Kingdom and to take appropriate action to protect depositors. In pursuance of these objectives, it may be appropriate to make share or property transfers from the bank (for example, to transfer some or all of the property of the bank to a private sector purchaser). Therefore, for example, the Treasury may effect an onward partial property transfer from a deposit-taker that is part of a group that has been taken into TPO.

18. Again, the limitations and safeguards which apply to onward and reverse transfers where a bank has been taken into TPO will apply to such transfers from the bank where a holding company has been taken into TPO.

19. The powers to give further effect to transfers set out in paragraphs 206 to 238 of the original memorandum will also apply where the Treasury take a holding company into TPO.

INVESTMENT BANK INSOLVENCY REGULATIONS

20. In response to developments concerning the administration of the UK subsidiary of Lehman Brothers, which have emerged since the Bill's introduction to the House of Commons, the Government announced in the Pre-Budget Report,[4] that it intended to take a power in the Bill to enable the Treasury to make secondary legislation, if necessary, for a new insolvency procedure for investment firms which hold client assets or client money.[5]

Background

21. In the aftermath of the collapse of Lehman Brothers International Europe (LBIE), certain issues arising from the administration, in particular, difficulties in distributing LBIE client moneys and assets,[6] have caused the Treasury to undertake

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[4] November 2008, Cmmd 7484 at §§3.62ff.

[5] "Investment banks" are to be defined as UK institutions holding client assets, who hold a permission under Part 4 of the Financial Services and Markets Act 2000 to carry on one of more of the following regulated activities – safeguarding and administering investments, dealing in investments as principal or dealing in investments as agent.

[6] At the time LBIE entered into administration, the bank, as an investment banking and investment management company, appears to have been holding significant amounts of client money and assets (for example, cash for the purposes of the payment of securities or shares). Former clients of the bank argue

a review UK general insolvency law as it applies to investment banks and to consider whether a modified insolvency procedure for such banks is needed.

22. The need for this review has been enforced by industry commentary that insolvency regimes in other jurisdictions may be perceived to offer advantages, which may undermine the UK's competitiveness in the financial services sector. The review will focus on a number of issues, including:

    1) whether the statutory purpose of administration as provided in the Insolvency Act 1986, which requires administrators to act in the general interests of creditors as a whole, present difficulties;

    2) the procedural stages in an administration, and their application to complex investment banks and financial institutions;

    3) the treatment of unencumbered client moneys and client assets; and

    4) arrangements for the continuity of brokerage accounts.

Reasons for taking a power

23. LBIE entered administration in September 2008 and the difficulties relating to the distribution on client moneys and assets only became apparent during the course of the autumn. The Government considered the representations made to it by stakeholders and initiated a review into the issues. In view of the potential urgency of any changes to existing insolvency law which may be needed and are identified during the course of the review, the Government considers it appropriate to introduce amendments to the Bill which would provide the Treasury with the power to make regulations in response to the review's recommendations, should this be appropriate.

24. The Government considers it vital that the Treasury has the power to act swiftly on the review's recommendations in order to ensure that the appropriate insolvency regime exists for dealing with the insolvency of an investment bank and to ensure confidence in the UK financial system is maintained and enhanced. It is, of course, critical that appropriate insolvency regimes exist in order to minimise disruptions to the financial services industry and the wider economy arising from the insolvency of an investment bank and to maintain the UK's competitiveness. Should the Treasury consider that it is appropriate make regulations under this power, these would be made quickly and this intention is reinforced by the 2 year sunset provision (subsection 4, "Investment banks: Regulations: Procedure").

25. It is of course, impossible to prepare detailed provision at this stage, as there has been insufficient opportunity to carry out the extensive consultations needed in the time available in order to establish whether such modification of insolvency is necessary, feasible or desirable. It is to be noted that banking and insolvency law is highly complex and the existing UK system lays heavy emphasis on the equal treatment of all creditors. Developing an insolvency scheme where the emphasis lies on the return of client money, rather than on maximising the assets of the failed institution so to provide the best possible return for all creditors, marks a significant shift in UK insolvency law. Therefore the Government has been unable to prepare

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that this money should not form part of the insolvency estate and are seeking to recover their assets and money as quickly as possible. However, the administrators are under a statutory duty to act in the interests of the creditors as a whole and are not obliged to distribute the client assets as a priority. Furthermore, as the administrators may be personally liable if they misapply the assets of the insolvency estate and the task of identifying the client entitlements is extremely complex due to the nature of the business concerned, necessarily, the administrators are taking a prudent and time-consuming approach.

detailed provision at this stage, and instead considers taking a power in the Bill to be appropriate.

26. The Government also needs the opportunity to consider in detail the question of the extent to which the new regime would add value as the inherent complexity of the trades and contracts involved in the day to day business of an investment bank would seem to be a major contributing factor to the delay in returning of client moneys in the LBIE administration. The Government is also considering, in conjunction with the other Tripartite Authorities, whether, instead, amendments could be made to regulatory rules to enhance the protection of client money held by the bank while it is solvent so that on the bank becoming insolvent, the difficulties in returning the money are minimised.

27. The Government must, of course, have regard to the UK's international obligations including the European Convention of Human Rights, in considering whether any amendments are appropriate.

Parliamentary scrutiny

28. In view of the nature of the regulations that may be made under these powers, which may include provision which amends primary legislation, the Government considers it appropriate that the regulations should be subject to the draft affirmative procedure.

The new clauses

New clause (to be inserted after Clause 227): Investment banks: Definition.

Power: *to amend the definition of "Investment banks" and "client assets".*

Body: *Treasury*

Parliamentary scrutiny: *draft affirmative procedure*

29. This clause defines an "investment bank" as an institution holding client assets, incorporated or formed under UK law, and having permissions under Part 4 of the Financial Services and Markets Act 2000 to carry on the regulated activities of:

    (1) safeguarding and administering investments;

    (2) dealing in investments as principal; or

    (3) dealing in investments as agent.

30. The Treasury may, by order, provide that a specified class of institution is or is not to be classed as an "investment bank" for the purposes of the "investment bank insolvency regulations" provisions. This provides the Treasury with the power to apply the provisions to a specific class of institution, in order, for example, to reflect regulatory or commercial changes.

31. Early consideration of the types of institution to which a special insolvency regime might be desirable has led us to base the definition of "investment bank" on institutions which have permission under Part 4 of the Financial Services and Markets Act 2000 to undertake activities that involve handling client money. However, it is possible that the review will identify other institutions that may not be involved in such activities but which would benefit from the new insolvency regime.

Also it is possible that institutions holding permissions for other regulated activities may need to be incorporated into the definition.

32. Furthermore, the review may indicate that there are institutions that being too small, or whose investment business is only incidental to its main business that should be expressly excluded from any special provision.

33. The order also enables the Treasury to amend the definition of "client assets". "Client assets" are defined as assets which an institution has undertaken to hold for a client (whether or not on trust and whether or not the bank has complied with the undertaking.) The order may provide that assets of a specified kind or help in specified circumstances are to be included or excluded in this definition. This power however needs to be read together with the Investment Bank: Regulations: details clause which allows the Treasury to make provision for mechanisms for determining which assets are, or are to be treated as, client assets, and for how those assets are to be treated. It also provides that the regulations can create rights in respect of client assets, and other assets, including rights that take preference, in certain cases, over creditors' rights. This means that the regulations will address how, in the insolvency of an investment bank, client assets are to be identified and will confirm rights to allow client assets to be clawed back from the assets of the bank- if rehypothecation has occurred for example. The power to amend the definition of client assets however goes further and allows the inclusion or exclusion of certain specified assets from the definition if need be, which allows flexibility for the drafting of the regulations if it transpires that in order to provide safeguards for the other stakeholders in an investment bank insolvency, certain assets should be treated in a certain way.

34. The Government considers that the order should be made under the affirmative procedure. The Government appreciates that the order-making power is drafted widely and has the scope to bring in institutions that the Treasury has not yet contemplated bringing into scope; also the definition of 'client assets' may, among other things, fundamentally affect the priority of claims in an administration. Therefore, as the order may significantly affect the way an institution is treated on its insolvency, we consider it right that Parliament is given the opportunity to fully scrutinise such an order.

35. Therefore, the Government considers this power to be appropriate in order to provide appropriate flexibility, and for future-proofing purposes.

New clause: Investment banks: Insolvency Regulations

(see also related new clauses: "Investment Banks regulations: details" and "Investment banks: regulations: procedure".)

Power:	*to make regulations to either modify the law of insolvency in its application to investment banks or establish a new insolvency procedure for these banks.*
Body:	*Treasury*
Parliamentary scrutiny:	*draft affirmative procedure*

36. The aim for the enabling power is set out in subsection (3): that the Treasury draft regulations with "regard to the desirability of"-

    1) identifying, protecting and facilitating the return of client assets,
    2) protecting creditors' rights
    3) ensuring certainty for investment banks, creditors, clients, liquidators and administrators;
    4) minimising the disruption of business and markets;
    5) maximising the efficiency and effectiveness of the financial services industry in the United Kingdom.

37. The enabling power has been drafted to give the Treasury a broad range of options so that it can either modify an existing insolvency regime, such as liquidation or administration, so to deal with the specific LBIE issues as set out above, or alternatively create a new insolvency scheme for investment banks (along the lines of existing special regimes- see for example the bank insolvency procedure as provided for in Part 2 to the Bill).

38. The "Investment banks: Insolvency Regulations: details" clause provides a fuller picture as to what the Treasury may make provision for in the regulations. In the event that the Government decides that a new insolvency regime should be created, consideration will need to be given as to whether liquidation or administration would be the more appropriate model for the modified insolvency procedure. Consideration would also need to be given to the grounds upon which the failing investment bank could be put into the new procedure, the objectives of the procedure and, as with the Special Resolution Regime (Part 1 of the Bill), consideration will have to be made as to whether the procedure should be instigated by a public body.

39. The enabling power also provides that the regulations may set out the cost consequences of the new regime - i.e. whether the insolvency estate should bear all of the costs of the procedure or whether the costs could be apportioned between the insolvency estate and other stakeholders (e.g. those benefiting from the modified aspects of the regime, such as clients in respect of the return of client moneys and assets). Currently in an administration in the UK there are no specific provisions expressly allocating expenses between clients and the general estate.

40. Furthermore, as well as general insolvency provisions, tailored provisions relating to the business of investment banks may be included, for example-

    (1) The treatment of unsettled transactions and related collateral; (subsection 6)(d)).

These are brokerage accounts with open positions at the point at which the bank failed. They may consist of unsettled exchange trades (e.g. those entered into CREST after having been executed on the London Stock Exchange); open exchange traded derivatives positions (e.g. LIFFE; EUREX); and open derivatives contracts (which may or may not be hedged and which may or may not be regarded as likely to be assets or liabilities).

> (2) The interface between special insolvency provisions/ a new special insolvency regime for investment banks and other special regimes such as the Bank Insolvency Procedure or the Bank Administration Procedure; (subsection (4)).

This would apply in relation to banks with both an investment and a deposit-taking business, to which the provisions of Parts 1-3 of the Bill could well also apply as well. Particular provision may need to be made to specify how any new procedure would work with, for example, the bank insolvency procedure.

> (3) The creation or enforcement of rights of clients re their assets held with an investment bank (including rights which take preference over other creditors' rights) to the extent that the Treasury think it necessary to provide protection in respect of client assets. Note that in making such provision, the Treasury also need to have regard to the rights of creditors; (subsection (6)(f) and (7).

This provision provides the customer with a proprietary claim in respect of assets that the firm has rehypothecated. The regulations could, for example, provide that the customer's claim for the return of their assets is converted into a right either in respect of the pool of general customer assets, or of other assets of the firm, in order to minimise some of the difficulties under the existing procedure.

Procedure

41. The final clause provides how the regulations are to be made in that they are to be subject to the draft affirmative procedure, should be consulted upon and also provides that if the enabling power has not been exercised within a 2-year period following the date on which the Act is passed, it will lapse.

42. The power is drafted to give flexibility to the structure of any new provisions yet within a framework setting out what the regulations should be drafted to achieve.

43. As explained above, the enabling power is needed to counter any perceived threat to the competitiveness of the UK financial services industry brought about by the LBIE administration. If the review concludes that a new regime is needed, then it is important, in order to cater for investment banks that get into difficulties, to bolster confidence in the UK financial system and the insolvency regime in this country and to maintain competitiveness, that there is a power in place to allow the Treasury to be able to implement fully and quickly the conclusions of the review.

44. The consultation requirement will ensure that there is appropriate opportunity for stakeholders and other interested parties to scrutinise the regulations.

45. As the regulations made under this power will significantly alter the way an investment bank is treated in insolvency and will alter the rights of stakeholders in the distribution of the assets (see above), we consider it right that Parliament is given the opportunity to fully scrutinise such an order.

46. Finally, the 'sunset' provision is intended to provide comfort and certainty to the markets as to when the Government may use the enabling power. As part of the Government's better regulation policy, the Government considers this is an

important provision, particularly as the outcome of the review, or events or other circumstances may dictate that regulations which may be made under these powers are not required. The sunset provision also reflects the fact that the Government does not consider that it is necessary or appropriate to take powers on a standing, permanent basis to modify how insolvency law applies to investment banks. As set out above, the purpose of this power is to ensure that if the review demonstrates that changes in the law are needed, the Government can quickly implement those changes.

THE BANKING (SPECIAL PROVISIONS) ACT 2008: INDEPENDENT VALUER

47. Although this amendment does not confer additional delegated powers it does clarify delegated powers contained in the Banking (Special Provisions) Act 2008 ("the Special Provisions Act") with respect to the ability of the Treasury to make provision about the powers of any independent valuer appointed under that Act.

48. The independent valuer appointed to assess the amount of any compensation due to the former shareholders of Northern Rock has requested powers to obtain information in order to be able to conduct the valuation exercise. Given the importance of ensuring that the valuer is able to do his work effectively, it is essential that he has appropriate powers to compel the production of information where he deems it necessary for the purposes of the valuation exercise. The Special Provisions Act - unlike the Banking Bill (clause 55(1) to (3)) - does not contain an express power to provide for the independent valuer to have information gathering powers of this kind. Therefore, to avoid any doubt on this point, the new clause inserted by this amendment declares that the Treasury may make provision make any provision of a kind that may be made under clause 55(1) to (3).

HM Treasury

January 2009

APPENDIX 3: LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL [HL] — GOVERNMENT RESPONSE

Letter to the Chairman from Baroness Andrews, Parliamentary Under-Secretary of State, Department for Communities and Local Government

1. I would like to thank for your very helpful comments and recommendations on the delegated powers contained within the Local Democracy, Economic Development and Construction Bill. I have considered the report very carefully.

2. The DPRRC report recommended five actions which would amend Clause 20 (Petitions), Clause 53 and Schedule 1 (Boundary Committee), Clause 79 (Single Regional Strategy), Clause 86 and Clause 110 (Economic Prosperity Boards). I will come to each in turn.

Clause 20 – Petitions

3. Clause 20 allows for an order to be made by the Secretary of State to extend the petition provisions to all parish councils (or a category of them). As the Bill currently stands this should is done by the negative resolution procedure. This procedure would also apply to an order by the Welsh Ministers for community councils in Wales as regards the National Assembly for Wales.

4. The Committee recommended that any order under clause 20 by the Secretary of State to extend the petition provisions to parish councils, or by Welsh Ministers to extend the provisions to community councils in Wales, should be subject to affirmative resolution.

5. I can reassure the Committee that the Government is committed to meeting the cost of any new burdens placed on parish councils, and would not make such an order without first consulting the parish council sector and its representatives.

6. In addition, as the DPPRC will know, the response to consultation must be set out in the explanatory memorandum accompanying all statutory instruments. Parliamentarians would therefore be able to assess parish councils' views on any extension of the petitions provisions, and pray against any order if they had concerns. If the Merits Committee considered the consultation to be inadequate, it could of course draw any order to the attention of the House.

7. On this basis, I believe that the negative resolution procedure remains the most appropriate procedure for orders extending the petitions provisions to parish or community councils. I hope the Committee will be able to agree.

Clause 53 and Schedule 1 – Boundary Committee

8. 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 (including giving effect to these orders) to any of its members, employees, committees or sub-committees. This changes 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.

9. The DPRRC recommendation is to amend Clause 53 and Schedule 1 to prohibit delegation of the Boundary Committee's powers under clause 53.

10. The Government is therefore positively considering the Committee's recommendation on this point.

Clause 79 – Single Regional Strategy

11. 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.

12. The DPRRC recommended that Clause 79 be amended to ensure that directions made under that clause which are intended to apply generally to all responsible regional authorities (or to categories of them) should be contained in regulations subject to negative procedures.

13. Let me reassure the Committee that the power to issue a direction would not be used for matters intended to apply generally to all (or even categories of) responsible regional authorities. Such matters would be the subject either of regulations – and therefore subject to negative procedure – or of guidance, on which the Secretary of State would consult widely.

14. Furthermore, this is consistent with the way in which powers of direction, relating to regional bodies, in existing legislation are used. In particular, there is power of direction for regional development agencies currently included in section 7(2) of the Regional Development Agencies Act 1998, as well as a power of direction in relation to the revision of strategy for regional planning bodies, in sub-sections 10(1)-(2) of the Planning and Compulsory Purchase Act 2004.

15. On this basis, I hope the Committee agrees that the present arrangements are appropriate and proportional, and that no amendment is necessary.

Clause 86 - EPBs

16. Clause 86(1) currently 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, with no express limit to these functions. The DPRRC recommended that a limit was placed in clause 86(1) so that only functions that 'relate to economic development and regeneration' could be made exercisable by the EPB.

17. As the Committee recognised, however, there are various other provisions which make it implicit that the functions that can be given to an EPB should relate to economic development and regeneration, including clause 86(2), clause 86(5), clause 94(1) and 97(1). The combined effect of these clauses is that any functions conferred on an EPB will relate to economic development and regeneration. I hope, therefore, that we can agree that it is unnecessary to make provision expressly restricting the use of the power in clause 86(1).

18. I would like to reassure the Committee that I intend to issue guidance to local authorities on the setting up and operation of EPBs, including the types of activities that they might appropriately carry out, which will provide further clarity on this issue.

Clause 110 - EPBS

19. Clause 110 contains a power for the Secretary of State to make an order transferring property, rights and liabilities. The order is subject to affirmative procedure.

20. The DPRRC stated that orders of this type are not normally subject to this high level of Parliamentary scrutiny unless the intention is always to combine the order under clause 110 with an order under any of clauses 86 to 102. They recommended that the order-making power under clause 110 should be subject to the negative procedure.

21. As the Committee have anticipated, the reason for the use of the affirmative resolution procedure is because it is expected that orders under section 110 will be made in the same instrument as orders under one or more of clauses 83, 84, 86, 87, 90, 91, 98, 99, 101, 102, to which the affirmative resolution procedure applies.

22. The Committee will understand, therefore, that on the basis of consistency, we would prefer to use the affirmative resolutions procedure and will be satisfied that no amendment is needed.

Clause 112(4) Dehybridising provision

Clause 112(4) disapplies the hybrid instrument procedure for orders under Part 6. The DPRRC report draws 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.

23. As the Committee are aware, hybridity procedures provide a mechanism for the House to consult particular groups of people who are affected by legislation more than others.

24. I would like to reassure the Committee and the House that we have ensured that sufficient consultation procedures have been built into this part of the Bill so that hybridity procedures are not necessary.

25. If there is anything further that you wish to discuss with me or my officials about this letter, please do not hesitate to contact me.

26. I am copying this letter to the Committee Clerk and a further copy is being placed in the Library of the House.

Department for Communities and Local Government

January 2009

APPENDIX 4: DRAFT LEGISLATIVE REFORM (MINOR VARIATIONS TO PREMISES LICENCES AND CLUB PREMISES CERTIFICATES) ORDER 2009

Letter to the Department for Culture, Media and Sport from the Clerk of the Delegated Powers and Regulatory Reform Committee

1. The Committee is to consider the draft Order at its meeting on Wednesday, 21st January. It would assist the Committee in its consideration of the draft to have a memorandum from your Department answering these questions:

2. What is the purpose of the express references to sale by retail of alcohol in new section 41A(3), in view of paragraph (a) of the definition of "supply of alcohol" in section 14 of the 2003 Act?

3. Which provision (in the Order or elsewhere) prevents the minor variations procedure being used, in relation to club premises certificates, for applications:

   — to add the sale of alcohol to guests as an activity authorised by the certificate;

   — to authorise such sales between 11pm and 7am;

   — to increase the amount of time on any day during which such sales may be made?

4. Is it considered that "supply" in new section 86A(3)(b) and (c) includes sale by retail? If so, what is the reason for that view?

5. Why was the word "supply" used in new section 86A(3)(b) and (c) in preference to "supply of alcohol to members or guests" in view of the definition of the latter in section 70 to include sales by retail to guests?

   Delegated Powers and Regulatory Reform Committee

   January 2009

Letter from the Department for Culture, Media and Sport to the Legal Adviser, Delegated Powers and Regulatory Reform Committee

1. As the lawyer responsible for the drafting of the Order, I am replying on the Department's behalf, following discussion of the issues raised with policy officials here. A memorandum is attached in response to the specific questions raised in your letter.

2. Those questions have highlighted an issue which we had not focussed on specifically before, namely how the Order will operate in the case of applications from clubs that relate specifically to the sale by retail to guests as mentioned in section 1(2)(b) of the 2003 Act.

3. As mentioned in the memorandum, upon reflection in light of the Committee's questions the Department considers that it would have been preferable to have allowed expressly for the kinds of applications referred to above by using the expression "supply of alcohol to members or guests" in the appropriate places. The references to sales by retail in the Part 3 provisions could also be omitted to aid clarity.

4. The Department is grateful to the Committee for bringing these matters to its attention.

5. The matter is not one that has been raised at any stage before in the Department's consultations on the draft Order (either informally, or in either of the two formal public consultations that have taken place). The Department also considers that the changes mentioned in paragraph 4 can fairly be seen as technical or drafting changes, especially given the breadth of the statement in the Explanatory Document concerning the uses that may be made of the minor variations procedure in connection with alcohol.

6. The Department is therefore minded to suggest that if the Committee were to recommend a procedure that does not permit the draft Order to be changed in any other way, the changes above could be made in reliance upon section 16(6) or 17(5) of the 2006 Act, as non-material changes. We would be happy to discuss this point further with the Committee if required.

Supplementary memorandum from the Department for Culture, Media and Sport

1. What is the purpose of the express references to sale by retail of alcohol in the new section 41A(3), in view of the paragraph (a) of the definition of "supply of alcohol" in section 14 of the 2003 Act?

2. Which provision (in the Order or elsewhere) prevents the minor variations procedure being used, in relation to club premises certificates, for applications:

   (a) to add the sale of alcohol to guests as an activity authorised by the certificate;

   (b) to authorise such sales between 11pm and 7am;

   (c) to increase the amount of time on any day during which such sales may be made?

3. Is it considered that "supply" in new section 86A(3)(b) and (c) includes sale by retail? If so what is the reason for that view?

4. Why was the word "supply" used in new section 86A(3)(b) and (c) in preference to "supply of alcohol to members and guests" in view of the definition of the latter in section 70 to include sales by retail to guests?

The Department's answers are as follows:

5. In view of the definition in section 14, the references serve no purpose and could be omitted.

   (a) None, save those referred to in (b) and (c)[7];

   (b) the proposed new section 86A(3)(c)(i);

   (c) the proposed new section 86A(3)(c)(ii).

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[7] Following on from the answer to question 3, where a club premises certificate already authorises the supply of alcohol to members, we do not think that an application to add the sale by retail of alcohol to guests for consumption on the premises would be an application to "add" the supply of alcohol as an activity authorised by the certificate, as that activity is already authorised, albeit in relation to a different category of persons. Therefore the limitation in section 86A(3)(b) would not prevent an application being made to authorise the sale by retail of alcohol to guests for consumption on the premises.

6. Yes, subject to the qualification below. The Department considers that in the absence of an applicable definition in the 2003 Act "the supply of alcohol" would bear its natural and ordinary meaning. This would be sufficient to include a sale by retail of alcohol by or on behalf of a club to a guest of a member of the club for consumption on the premises where the sale takes place. We have not found any case law on the point, but think it would require a substantial distortion of language to maintain that an application to authorise such sales was not an application to supply alcohol. The phrase "supply of alcohol" in subsection (3)(c)(i) and (ii) is not expressly limited by reference to the recipient of the alcohol or any other matter; and we have not been able to identify any valid reason of construction or policy that would suggest that it should be read subject to an implied restriction, e.g. so as to refer to the supply to members only, or so as to exclude supplies a component of which happened to be a sale by retail. The qualification we would make is that the "supply of alcohol" would not include *any* sale by retail of any description as it is possible to sell alcohol without supplying it (e.g. through telephone or internet sales where the supplier is a different person). However, by the above reasoning it would include any sales by retail for consumption on the premises where the sale takes place.

7. The word "supply" was thought to be sufficient to capture the activities under discussion that needed to be excluded from the scope of the minor variations process. Having reconsidered the matter in light of the Committee's questions, the Department thinks it would have been better to use the phrase "supply of alcohol to members and guests". This would be clearer, and would cover cases where a club sought to add the sale by retail to guests for consumption on the premises to its certificate for the first time (see note 1 above).

Department for Culture, Media and Sport

January 2009