HOUSE OF LORDS

Delegated Powers & Regulatory Reform Committee

Second Report of Session 2009-10

Contaminated Blood (Support for Infected and Bereaved Persons) Bill [HL]

Digital Economy Bill [HL]

Equality Bill – Parts 1 to 5

Third Parties (Rights against Insurers) Bill [HL]

Ordered to be printed 16 December and published 17 December 2009

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 24

The Delegated Powers and Regulatory Reform Committee

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

Current membership

The members of the Delegated Powers and Regulatory Reform Committee are:
Lord Armstrong of Ilminster GCB CVO
Lord Blackwell
Rt Hon. the Lord Boyd of Duncansby PC QC
Rt Hon. the Lord Butler of Brockwell
Viscount Eccles CBE
Lord Goodhart QC (*Chairman*)
Lord Haskel
Rt Hon. the Lord Mayhew of Twysden QC DL
Lord Razzall CBE
Lord Soley

Registered Interests

Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office.

Publications

The Committee's reports are published by the Stationery Office by Order of the House. All publications of the Committee are on the internet at
www.parliament.uk/parliamentary_committees/dprr.cfm.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at
www.parliament.uk/about_lords/about_lords.cfm.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of the Delegated Powers and Regulatory Reform Committee, Delegated Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020-7219 3103 and the fax number is 020-7219 2571. The Committee's email address is dprr@parliament.uk.

Background Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35–I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional (permanent) committee from the beginning of Session 1994-95. The Committee also has responsibility for scrutinising 'legislative reform orders' under the Legislative and Regulatory Reform Act 2006.

Second Report

CONTAMINATED BLOOD (SUPPORT FOR INFECTED AND BEREAVED PERSONS) BILL [HL]

1. This Private Member's Bill makes provision for the benefit of persons who have been treated with and infected by contaminated blood or blood products supplied by the NHS. It requires the establishment of an advisory committee, and the introduction of a system of testing for specified medical conditions, and of schemes for the treatment and compensation of those who have been infected. Almost all of that provision is to be set out in regulations, to be made by the Secretary of State under duties imposed in clauses 1 to 4, and subject to the negative procedure.

Clause 2 – Amendment of list of conditions to be tested for

2. Clause 2(1) and (3) require the Secretary of State to establish by regulations a system for testing persons with haemophilia who have received blood or blood products, and blood donors, for the medical conditions listed in subsection (2). Subsection (5) requires the Secretary of State by regulations to 'amend the system for testing' in accordance with any recommendation made by the advisory committee (to be established by regulations under clause 1) as to the addition or removal of conditions to or from that list. **In so far as the obligation imposed in subsection (5) includes a power to amend subsection (2) itself, we recommend that the exercise of that power should be subject to the affirmative resolution.**

Clause 4 – Provision about financial compensation

3. Clause 4(1) requires the Secretary of State to provide by regulations for the payment of financial compensation for recipients of contaminated blood or blood products under the NHS, for their carers and for their widows and other dependants. Subsections (2) and (3) set out certain matters for which the regulations must, or must not, make provision. But there is nothing which requires the regulations to include provision about the way in which compensation is to be calculated or claims are to be determined; and while subsection (5) requires the Secretary of State to 'establish an appeal mechanism', it is unclear whether such provision is to be made by regulations, or who is to be the appellate body.
4. If it had appeared likely that the Bill would be enacted in its present form, we would have regarded the delegations in clause 4 as inappropriate, in view of the absence of express requirements in the Bill about the provision to be made in regulations concerning the procedure for claims, computation and appeals. As it is, in the context of this particular Bill **we recommend that, unless clause 4 can be amended to include express provision about those matters, the exercise of the powers should be subject to the affirmative procedure.**

DIGITAL ECONOMY BILL [HL]

Introduction

5. This Bill contains numerous delegated powers. There is a memorandum, printed at Appendix 1, from the Department for Culture, Media and Sport and the Department for Business, Innovation and Skills explaining the delegated powers in the Bill.

Clauses 6 to 8

6. These clauses insert three new sections into the Communications Act 2003. Clause 4 inserts a new section 124A into the 2003 Act. It is about copyright infringement reports, i.e. reports by a copyright owner, stating an apparent breach of copyright, which are sent to an internet service provider. The report may be sent only if a code (the "initial obligations code") allows it. A provider who receives a report must notify the subscriber alleged to have infringed copyright of the infringement report, but only if the initial obligations code requires the provider to do so. The code may also prescribe additional material that a notification to the subscriber must include.
7. Clause 5 inserts a new section 124B into the 2003 Act. It is about copyright infringement lists, i.e. lists which, without enabling a subscriber to be identified, set out what copyright infringement reports relate to which subscriber. If a copyright owner requests such a list, the internet service provider must provide it, but only if the initial obligations code requires the provider to do so.
8. In addition to having the specific purposes, referred to in new sections 124A and 124B, of setting out the circumstances in which reports or notifications may or must be given or lists must be provided, the initial obligations code may deal with other matters. The contents of the code, and the approval or making of the code, are dealt with in clauses 6 to 8 of the Bill, which insert new sections 124C to 124E into the 2003 Act.

Code - contents

9. A reasonable indication of the things which a code is likely to contain is apparent from new sections 124C(3), (4) and (5) and (in the case of a code made by OFCOM) 124D(4). Additionally, a code must meet the criteria specified in new section 124E. So, for example, the code must contain provisions about enforcement and those provisions may include provision for civil penalties. The Government's memorandum makes it clear that much of this is based on sections 52 to 55 and 120 to 125 of the 2003 Act which are about customer interests conditions and a code for premium rate services. Inevitably, because of the different subject matter, there will be differences between the provisions of sections 52 to 55 and 120 to 125 of the 2003 Act on the one hand and the new provisions in this Bill on the other.
10. It appears to us that, if the House accepts that OFCOM should have a role in controlling infringement of copyright, the contents of the code are generally an appropriate matter for delegated legislation. However, the analogy drawn in the Government's memorandum between these powers and the powers given to OFCOM in the 2003 Act relating to customer interests conditions and premium rate services holds good only to a certain extent. The powers in the 2003 Act are aimed at regulating the conduct of those providing a communications network or service, but the powers in this Bill are aimed at ultimately regulating the conduct of subscribers to a service (i.e. consumers).

Code - procedure

11. The procedure for the approval of the code is different according to whether OFCOM approves a code made by someone else or makes one itself. Under section 124C a code made by somebody else is simply approved administratively, with no Parliamentary involvement. But if there is no approved code, OFCOM must, under section 124D, make one. It does so by an order which is a statutory instrument, is subject to the consultation procedures set out in section 403 of the 2003 Act and is subject to negative procedure (This follows the procedures in sections 54, 55, 121 and 122 of the 2003 Act). A code made by OFCOM may do some additional things set out in section 124D; but the effect on copyright owners, internet service providers and subscribers is not materially different whether the code is merely approved by OFCOM or is actually made by OFCOM. **We consider that the negative procedure should apply when a code is approved by OFCOM, just as it does when a code is made by OFCOM.**

Clause 11

12. Clause 11 enables the Secretary of State by order subject to negative procedure to impose on internet service providers an obligation to take technical measures against particular subscribers to its service (new section 124H of the 2003 Act). "Technical measures" are defined in new section 124G(3) of the 2003 Act, inserted by clause 10. They are measures that limit a subscriber's access to the service and are thus of great significance to the subscriber.

13. We considered carefully whether this power is appropriate, and whether the negative procedure is sufficient. Paragraph 18 of the memorandum attempts to justify the choice of negative procedure on the ground that the measures are "highly technical". However, the technicality of important powers may increase rather than reduce the need for affirmative procedure. During the Second Reading the Secretary of State made clear that this was intended to be "a reserve power" (HL Debates 2 December 2009, col 745). Paragraph 17 of the memorandum says that before the Secretary of State exercises the powers, OFCOM will prepare a report providing an assessment. However, that does not appear to be a pre-condition for making the order; the enabling power says that "The Secretary of State may at any time by order impose a technical obligation on internet service providers if the Secretary of State considers it appropriate in view of (a) an assessment carried out by OFCOM under section 124G or (b) any other consideration". Nor is there any limit on the type of subscriber on whom technical measures may be imposed. In the light of these considerations, **we recommend**:

- **that orders under new section 124H be subject to affirmative procedure;**
- **that the Bill itself should impose limits on the subscribers who may be the subject to technical measures under the order, e.g. (if this is the intention) by limiting them to those who have infringed owners' copyright by means of an internet access service;**
- **that if this is to be a reserve power, exercisable only after an assessment has been prepared under new section 124G, the Bill should be amended to make that clear.**

Clauses 12 and 13

14. Clause 12 inserts section 124I into the 2003 Act. It requires OFCOM, by order subject to negative procedure, to make a code ("the technical obligations code") to regulate the technical obligations referred to in clause 11 (i.e. the obligations on service providers to take technical measures against subscribers). The matters which may be dealt with in the code include:
    - administration and enforcement by OFCOM or another person;
    - determination of appeals by subscribers;
    - arrangements for paying the costs of the functions of resolving those disputes and those appeals;
    - appeals to the First-tier Tribunal against determinations of subscriber appeals;
    - civil penalties; and
    - indemnities by copyright owners to internet service providers for the owner's infringement of the code (section 124J(4)(b)).
15. There is no explanation in the memorandum of the provision for indemnities. **We draw particular attention to the fact that OFCOM is empowered to make provision for indemnities and that there is no limit in the Bill either as to amount or the circumstances in which an indemnity may be ordered, so that the House may have the opportunity to satisfy itself that this provision is appropriate.**

Clause 14

16. New section 124K imposes a cap of £250,000 on the penalty that may be provided for by the codes introduced by the Bill. We note that there is a Henry VIII power to alter this amount (up or down), which is subject to affirmative procedure. This is in keeping with other similar provisions of the 2003 Act, and we do not consider it inappropriate.

Clause 15

17. Clause 15 inserts new section 124L into the 2003 Act. This enables the Secretary of State, by order subject to negative procedure, to specify the provision about cost contributions which must go into the initial obligations code and the technical obligations code. Paragraph 27 of the memorandum says that the basic proposition is that the costs incurred by internet service providers and OFCOM should be split equally between rights holders and the internet service providers. But that basic proposition does not seem to appear in the Bill. **We consider that if this is the Government's intention then this principle should appear on the face of the Bill. If this is not done, the orders to be made under the power in clause 15 should be subject to affirmative procedure.**

Clause 17

18. Part 1 of the Copyright, Designs and Patents Act 1988 is a very substantial piece of legislation, running to approximately 200 sections. It deals with many aspects of copyright, including the subsistence, ownership and duration of copyright, the rights of the copyright owner, acts permitted in relation to copyright works, moral rights, dealings, remedies and licensing. Part 7 of the 1988 Act contains a number of miscellaneous provisions, including provisions relating to technological measures.

19. Clause 17 inserts a new section 302A into the 1988 Act enabling the Secretary of State by order subject to affirmative procedure to amend all or any part of Parts 1 or 7 "for the purpose of preventing or reducing the infringement of copyright by means of the internet, if it appears to the Secretary of State appropriate to do so having regard to technological developments that have occurred or are likely to occur". The only additional limitation on the power is that it may not create or modify a criminal offence. The Committee considers that the justification for a power of this kind must be compelling, but we were not convinced by the brief case put forward in paragraphs 32 to 37 of the Government's memorandum. Their case is essentially that "a delegated power is necessary in the light of constant technological changes which may require legislative provision to be made at relatively short notice" (paragraph 36). **We consider that the delegated power in clause 17 is not appropriate and recommend that this clause be removed from the Bill.**

Clause 36

20. Section 58 of the Broadcasting Act 1996 makes provision for the duration and renewal of national and local radio multiplex licences, and in particular specifies the grounds on which an application may be refused. Section 58 is in Part 2 of the 1996 Act.
21. Clause 36 inserts a new section 58A into the 1996 Act enabling the Secretary of State by regulations subject to affirmative procedure to "amend section 58 and make further provision about the renewal of radio multiplex licences" and for that purpose to amend other provisions of Part 2 of the 1996 Act. There is a "sunset" provision preventing the power being exercised after 31 December 2015.
22. It is impossible to tell from the Bill whether the policy is that the licences should or should not be renewable at all, let alone for what period or on what grounds. Indeed, paragraph 56 of the memorandum candidly admits that the relevant policy decision has yet to be made. **We draw attention to the skeletal nature of the power in clause 36, to enable the House to examine it further and determine whether it is justifiable in this context.**

Clause 42 and Schedule 2

Orphan works

23. Clause 42(1) inserts new sections 116A to 116D into the Copyright, Designs and Patents Act 1988. Section 116A enables the Secretary of State by regulations to provide "for authorising a licensing body to do, or to grant licences to do, acts in relation to an orphan work which would otherwise require the consent of the copyright owner." The regulations may:
    - in effect, define the period during which something is covered by "orphan work" (section 116A(6)) including doing so by reference to guidance published from time to time by "any person" and subject to no Parliamentary procedure (section 116A(7));
    - provide for the treatment of royalties (section 116A(3));
    - provide for determining rights and obligations when a work ceases to be an orphan work.

24. There is a brief explanation of the need for this power at paragraph 79 of the memorandum.

Extended licensing schemes

25. New section 116B enables the Secretary of State by regulations to provide for authorising a licensing body to grant copyright licences in respect of works in which copyright is not owned by the body or person on whose behalf the body acts. There is a brief explanation of the need for the power at paragraph 81 of the memorandum.

Orphan rights and extended licensing schemes

26. New section 116C introduces new Schedule A1 to the 1988 Act (found at Schedule 2 to the Bill). Paragraphs 1 and 2 of Schedule A1 are about Codes of Practice, paragraph 3 is about enforcement and paragraph 4 about fees.
27. Paragraph 1 of Schedule A1 enables regulations to require a licensing body to adopt a code of practice and to set requirements for the code. It also enables the regulations to provide for a default mechanism whereby the Secretary of State or a designated person imposes a code on a licensing body.
28. Paragraph 3 enables the regulations to provide for the imposition of (apparently unlimited) financial penalties and to provide for the determinations to impose a penalty to be made by the Secretary of State or a person designated by him.
29. Under new section 116D(2)(c) the regulations may amend Part 1 of the 1988 Act and this power is not confined to consequential purposes. The Committee expects that a Henry VIII power will always be specifically and fully justified in the memorandum, but that has not been done here (paragraph 94 of the memorandum). Where the regulations amend the 1988 Act they are subject to affirmative procedure. Otherwise, they are subject only to negative procedure.

Performers' property rights

30. Part 2 of Schedule 2 to the Bill makes provision about performers' property rights which corresponds to that made by clause 42 itself about copyright.

Conclusion

31. We do not consider that the explanation of these provisions in the memorandum justifies either the delegations or the applications of the negative procedure. **The delegations in clause 42 and Schedule 2 require substantial amendment to make them acceptable. In particular, the House may wish to consider whether the following amendments should made to the Bill:**

- **inclusion of a definition in the Bill of when a work is, or ceases to be, an orphan work, even if it is accompanied by a Henry VIII power (subject to affirmative procedure) to modify it;**
- **removal of the provision enabling orphan works to be defined by reference to guidance published from time to time by "any person";**
- **removal of the power in section 116D(2)(c) to amend Part 1 of the 1988 Act, for which no justification has been shown;**
- **application of the affirmative procedure for the first regulations under each of section 116A of the 1988 Act, section 116B of the 1988**

Act, paragraph 1 of Schedule A1 to the 1988 Act (code of practice) and paragraph 3 of Schedule A1 to the 1988 Act (enforcement); and

- **the inclusion in the Bill of a maximum penalty for the purposes of paragraph 3 of Schedule A1 for the 1988 Act.**

32. **We recommend similar amendments for the equivalent provisions (where applicable) about performers' property rights in Part 2 of Schedule 2 to the Bill.**

EQUALITY BILL [HL]

Introduction

33. This is a substantial Bill. There is a memorandum from the Government Equalities Office, printed in Appendix 2, on nearly all the delegated legislative powers in the Bill, which contains a useful schedule of the powers at the end.
34. In this report we consider Parts 1 to 5 of the Bill. We plan to report on Parts 6 to 15 on 14 January, before we expect those Parts to be considered in Committee.

Clause 2 – Amending Public Sector Duty Authorities

35. Clause 1 requires the authorities specified in subsection (3), in making decisions of a strategic nature about how to exercise their functions, to have "due regard" to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.
36. Clause 2(1) enables a Minister of the Crown to amend section 1 so as to add or remove public authorities or add or remove restrictions, as described in paragraph 34 of the memorandum. (There are similar powers for Scottish Ministers and Welsh Ministers in relation to authorities exercising devolved functions.) Clause 1 may be consequentially amended (clause 2(8)).
37. This is a Henry VIII power, but paragraph 37 of the memorandum explains that "in view of the relatively narrow scope of these powers it is considered appropriate that the use of this power is subject to the negative procedure". We are not persuaded by this that the negative procedure would be appropriate. The duty under clause 1 has particular significance because it is not necessarily directly related to the statutory or other functions which a public body is required to perform. **We recommend that the affirmative procedure should apply to regulations under Clause 2.**

Clause 29 and Schedule 3

38. Subsections (1) to (5) are about the provision of services, and represent an extended and rationalised version of the legislation currently governing some strands of discrimination. Subsection (6) prohibits discrimination, harassment or victimisation in the exercise of a public function that is <u>not</u> the provision of a service to the public or a section of the public.
39. Schedule 3 contains a number of exceptions, Part 1 of which is headed "Constitutional matters". Other parts of the Schedule relate to Education, Health and Care, Immigration, Insurance, Separate and single services and Transport.

40. Paragraph 32 of Schedule 3 enables a Minister of the Crown by order subject to affirmative procedure to amend Schedule 3 to add, vary or omit exceptions to the whole of clause 29 (in the case of disability, religion or belief or sexual orientation) or clause 29(6) only (in the case of gender reassignment, pregnancy and maternity, race or sex).

41. The excepted 'constitutional matters' in paragraphs 1 to 3 of Schedule 3 cover fundamental issues such as the functions of Parliament; the preparation, making, consideration or approval of legislation; and functions of the courts. Paragraph 4 makes exceptions relating to the armed forces; and paragraph 5 the security services. In view of clause 29(6), we consider that the exceptions provided for in paragraphs 1 to 3 have a particular constitutional significance and should be diminished only by Parliament, and not by a Minister of the Crown, albeit by order subject to an affirmative procedure. **We recommend that a limitation be imposed on the power in paragraph 32 of Schedule 3 whereby it may not be used to omit or reduce in scope any of the exceptions in paragraphs 1 to 3 of Schedule 3. The House may also wish to consider whether similar considerations apply to the armed forces and the security services.**

Clause 37 – Housing, Scotland

42. This is a broad power conferred on the Scottish Ministers to "by regulations provide that a disabled person is entitled to make relevant adjustments to common parts in relation to premises in Scotland". "Common parts" and "relevant adjustments" are defined in subsection (5). Under section 202(3), the regulations are subject to affirmative procedure at the Scottish Parliament, even though at the moment the subject-matter of the Disability Discrimination Act 1995 is a reserved matter under the Scotland Act 1998. Paragraph 57 of the memorandum sheds little light on this, though paragraph 155 of the Explanatory Notes is slightly more informative. **The House may wish to invite the Government to justify in more detail the delegation to Scottish Ministers of this substantial power.**

Clause 78 – Gender Pay Gap

43. Clause 78 confers a power on a Minister of the Crown to require employers to publish information about the pay of their employees. This is a significant power but we consider that, if Parliament enacts this clause, the main principle is decided and that the power is not inappropriate in view of the affirmative procedure provided.

Clause 200 – Regulations, etc.

44. We note from the memorandum that the powers in clauses 59 and 82 are intended to be subject to negative procedure. We consider this appropriate, but it does not seem to be provided for in the Bill so a minor amendment appears necessary.

THIRD PARTIES (RIGHTS AGAINST INSURERS) BILL [HL]

45. This Bill received its formal Second Reading on 9 December, having previously been considered in Second Reading Committee on 7 December under the trial procedure for Law Commission Bills. Its purpose is to simplify and modernise the procedure governing claims for compensation made against persons who have taken out insurance against the liability in

question but have subsequently become insolvent. The Bill contains two delegated powers, in clause 19 (a power to amend the Act in respect of Northern Ireland legislation, subject to the affirmative procedure) and clause 21(2) (a commencement power). The Ministry of Justice have submitted a Memorandum to the Committee explaining both powers. There is nothing in the Bill to which we wish to draw the attention of the House.

APPENDIX 1: DIGITAL ECONOMY BILL [HL]

Memorandum by the Department for Culture, Media and Sport and the Department for Business, Innovation and Skills

Introduction

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

Background

2. The digital, information and communications sectors are vital for our economy. The UK's digital economy is worth around 8% of GDP. It is one of the sectors on which our economy increasingly depends.
3. Digital Britain, the Government's investigation into this sector was launched in autumn 2008. Following seven months of consultation and engagement with a large and diverse group of stakeholders, including consultation on Digital Britain: Interim Report published in January 2009, the Government published the Digital Britain White Paper, entitled Digital Britain: Final Report in June 2009. The White Paper is the Government's strategic vision for ensuring that the UK is at the leading edge of the global digital economy.
4. The White Paper set out detail on the implementation programme which identified that some of the actions would require legislation. The Government has therefore brought forward the Digital Economy Bill which introduces measures to support or enable actions set out in the White Paper. Necessarily, this does not include all of the areas in the White Paper.

Overview of the bill

5. The purpose of the Bill is to create the legal framework needed to ensure the continued growth and competitiveness of the digital industries. In summary, the Bill:
    - Introduces obligations on internet service providers to take steps towards reducing the level of online infringement of copyright;
    - Makes changes to the public assets, remits and governance of public service broadcasters by:
        - Updating the functions of the Channel 4 Corporation ("C4C" to include the provision of high quality content across all digital platforms. OFCOM's enforcement duties are extended accordingly;
        - Updating the statutory framework for the Channel 3 and Channel 5 licences, including removing the requirement on Channel 3 licence holders to produce any Gaelic programming themselves and removing the requirement to broadcast a suitable proportion of Gaelic programme at peak times;
        - Making provision for OFCOM to provide a report on the provision of the public teletext service, and giving the Secretary of State the power to convert the duty on OFCOM to do all they can to provide that service, into a power to do so.
    - Updates the provision of news in the nations, regions and locally by:

- Introducing a new power for OFCOM to appoint and manage news providers;

- Makes provision for the regulatory framework necessary to facilitate the upgrade of radio services to Digital Audio Broadcasting (DAB), including making provision for digital switchover.
- Revises the existing analogue radio licensing regime by making changes to analogue licensing conditions and amending the terms of analogue licence renewals;
- Gives greater flexibility to OFCOM to restructure existing DAB multiplexes by allowing further extension of multiplex licences, giving OFCOM the power to re-structure current multiplexes and by changing the localness requirements contained in section 314 of the Communications Act 2003;
- Implements changes to video games classification recommended in the Byron Review, making all video games currently rated 12 and above subject to statutory age classification by a new classifications body, the Video Standards Council;
- Modifies OFCOM's general duties to include a duty, when performing its principal general duty, to have particular regard in all cases to the need to promote investment in communications infrastructure and content;
- Imposes a new duty on OFCOM to report to the Secretary of State every two years on the UK communications infrastructure and to report on internet domain names on request;
- Enables spectrum modernisation by:
  - Allowing OFCOM to make regulations requiring periodic or other payments to be made during the term of auctioned spectrum licences in specified circumstances and permitting or requiring payments by operators purchasing relinquished spectrum to those who relinquished it;
  - Allowing OFCOM to impose financial penalties for failure to meet certain licence conditions attached to wireless telegraphy licences;
- Gives enabling powers to the Secretary of State to intervene, in certain circumstances, in the management and constitution of internet domain registries to ensure that the reputation of the UK's internet economy and the interests of consumers or the public are safeguarded;
- Updates copyright licensing by:
  - Giving the Secretary of State power to make provision for the regulation of copyright licensing to enable (a) the regulation of collecting societies, (b) the conferring of extended powers on collecting societies to grant licences over works of non-members, and (c) otherwise to make provision for the granting of licences in respect of "orphan works";
  - Equalising penalties for digital and non-digital copyright infringement;
- Amends the Public Lending Right Act 1979 and the Copyright Design and Patents Act 1988 to allow inclusion for non-print formats (audio books and e-books) in the Public Lending Rights payment regime.

Provisions for delegated legislation

Clause 7: Online infringement of copyright: Code by OFCOM in the absence of an industry code

Powers conferred on: *OFCOM*

Power exercised by: *Order*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

6. Clause 7 inserts a new section 124D into the Communications Act 2003 ("2003 Act"). That provision gives OFCOM power to establish by order a code of practice regulating the two initial reduction of copyright infringement obligations on internet service providers ("ISPs") specified by the legislation, in the event that industry fails to do so.
7. The two initial obligations are specified in clauses 4 and 5 of the Bill, and broadly consist of ISPs to be made subject to two separate (albeit connected) obligations, namely, to identify and keep lists of alleged online infringers of copyright on receipt of notifications from copyright holders and to provide certain (non-identifying) information from the lists to copyright holders on request, and to send notifications to the subscribers who have been identified as (allegedly) infringing copyright.
8. For such obligations to come into effect, it will be necessary for the coming into force of a code of practice drawn up by industry or OFCOM and approved (or imposed in the absence of an industry code) by OFCOM.
9. The code will establish procedural mechanisms (including the establishment of an enforcement body, dispute resolution, standards of evidence, forms of notifications from copyright owners to ISPs) to supplement and give effect to the initial obligations to reduce online copyright infringement.
10. These powers are based on, and closely mirror, similar powers which OFCOM have under sections 52 to 55 (dealing with customer interests conditions) and sections 120 to 125 (dealing with premium rate services) of the 2003 Act, whereby OFCOM are empowered to approve industry codes or make statutory instruments for the adoption of codes of practice if industry fails to do so.
11. OFCOM are the appropriate body to undertake the work on this code of practice on online copyright infringement, as they are the sectoral regulator in respect of providers of electronic communications services (of which ISPs are a sub-category) and they have the relevant technical knowledge and expertise about the industry they regulate.
12. As in the case of the provisions in the 2003 Act from which this power is mirrored, the parliamentary procedure for the making of the order is annulment in pursuance to a resolution of either House of Parliament. As in the case of the provisions in the 2003 Act on which these provisions are based, we consider that the negative resolution procedure provides an adequate degree of parliamentary scrutiny, insofar as the subject matter of the order is mainly procedural and of a highly technical nature.
13. The consent of the Secretary of State is required for the making by OFCOM of an order under this clause.
14. For all of OFCOM's powers under the proposed legislation on the reduction of online copyright infringement, section 403 of the 2003 Act applies. This section provide for OFCOM's powers to be exercised by statutory instrument and confirms that the Statutory Instruments Act 1946 (c 36) applies. It further

provides for OFCOM to send the instrument to the Secretary of State for him to lay it in Parliament. Furthermore, OFCOM's powers are subject to stringent consultation requirements.

Clause 11: Online infringement of copyright: Introduction by the Secretary of State of requirements on ISPs for the imposition of technical measures on subscriber/s

Powers conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

15. Clause 11 inserts a new section 124H into the 2003 Act, which allows the Secretary of State to make an order to require ISPs to impose technical measures on subscribers meeting certain criteria (e.g. subscribers carrying out significant volumes of unauthorised file-sharing). The powers provide for the Secretary of State to impose a technical obligation on ISPs (which would include specification of the measure/s which ISPs must impose to their subscribers), as well as the criteria for the application of such measure/s, the steps to be taken as part of the measure/s and the time limit by which ISPs must impose the measure/s.
16. In addition, the technical/procedural aspects for the giving effect of the technical measure/s will be set out in a code of practice made by OFCOM by statutory instrument (explained below under clause 12), which will need to be in force at the same time as the order.
17. Prior to the Secretary of State exercising these powers, OFCOM will prepare a report (clause 10) providing an assessment on whether one or more technical obligations should be imposed on ISPs, which shall include an assessment on the likely efficacy of a technical measure in relation to a particular type of internet access service. The Secretary of State's decision will be based on this report or any other consideration (including consideration of the success (or not) that the initial obligations have had in reducing copyright infringement).
18. The parliamentary procedure for the making of the order is annulment by resolution of either House of Parliament. Insofar as the measures are of a highly technical nature, the negative resolution procedure would appear to be appropriate.

Clause 12: Online copyright infringement: Code made by OFCOM to regulate technical measures;

Powers conferred on: *OFCOM*

Power exercised by: *Order*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

19. Clause 12 inserts a new section 124I into the 2003 Act, which requires OFCOM to adopt, by order, a code regulating the technical obligations in force under new section 124H.
20. As in the case of the code regulating the initial obligations (clause 7), the code about obligations to limit internet access will establish the procedures (including the setting up of an appeal mechanism, enforcement provisions, sharing of costs) for the giving effect by ISPs of the technical measures specified by the Secretary of State's order.

21. As also in the case of the code for the initial obligations, OFCOM are the appropriate body to undertake the work on this code of practice on technical measures. They are the sectoral regulator in respect of providers of electronic communications services and they have the relevant technical knowledge and expertise about the industry they regulate. They will have carried out a thorough study for the preparation of the report on technical measures which they have to provide to the Secretary of State under clause 10, and which will constitute the basis on which the Secretary of State takes the decision to make an order obliging ISPs to impose technical measures on their subscribers.
22. The consent of the Secretary of State is required for the making by OFCOM of an order under this clause.
23. The parliamentary procedure for the making of the order is annulment in pursuance to a resolution of either House of Parliament. Section 403 of the 2003 Act (explained above in the context of clause 7) applies in relation to this power. As in the case of the code regulating the initial obligations (which is based on similar provisions in the 2003 Act), we consider that the negative resolution procedure provides an adequate degree of parliamentary scrutiny, insofar as the subject matter of the order is mostly procedural and of highly technical nature.

Clause 14: Online copyright infringement: Enforcement of obligations: substitution of the amount of maximum penalty

Powers conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *Affirmative resolution*

24. Clause 14 inserts a new section 124K into the 2003 Act which applies the enforcement provisions of sections 94 to 96 of the 2003 Act to a contravention of an initial obligation, a technical obligation, or an obligation to provide assistance to OFCOM under section 124G(5) (inserted by clause 10). New section 124K(4) allows the Secretary of State to amend that section to substitute the maximum penalty specified in that provision which may be imposed when ISPs commit any of the contraventions detailed above.
25. Given that the power provides for amendment of primary legislation by substituting the amount of maximum penalty currently specified in section 124K, we consider it appropriate that any order made under this power should be subject to the affirmative procedure.

Clause 15: Online copyright infringement: Apportionment of Costs

Powers conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

26. Clause 15 allows the Secretary of State to set out the detailed cost apportionment mechanisms which must be included in the codes in respect of the following costs:
    - The costs of ISPs to comply with their obligations under the legislation;
    - The costs of OFCOM in giving effect to the obligations, including as the case may be, approving the codes of practice, (or generating their own code of practice by statutory instrument);

- The costs incurred by rights holders or any other person under the, or in relation to the legislation.

27. The basic proposition is that the costs incurred by ISPs and OFCOM in giving effect to the two initial obligations (those set out in clauses 4, 5, 6, 7 and 8) should be split equally between rights holders and ISPs. The policy justification for splitting the costs equally between ISPs and rights holders is to ensure that there are appropriate incentives on all parties to seek to improve the cost-effectiveness of the overall programme of activity to prevent online copyright infringement.
28. However, the costs of giving effect to the obligations are variable, and particularly in the context of technical measures, cannot be ascertained and specified on the face of the Bill. Accordingly, flexibility is required for the Secretary of State to be able to carry out a proper assessment of how these costs arise, and who should be subject to them, and to make adjustments to the costs recovery schemes as the legislation develops (including the setting up of the codes and the introduction of technical measures).
29. With reference to technical measures, for example, it is unclear whether these costs would be entirely fixed costs or whether there would be a significant level of marginal (operating) costs, nor least because in order for technical measures to have effect, they would need to be continually updated and changed to reflect counter measures taken by file-sharers. Some of the technologies which may be relevant could potentially also be deployed commercially by ISPs as part of programme of active traffic management/prioritisation. On this basis, it would be extremely difficult to identify those costs which would be incurred as a direct result of the legislation.
30. Furthermore, it is likely that the costs of implementing technical measures will vary significantly between ISPs, according to the configuration of their networks. It will be necessary to consider whether uniform apportionment would be proportionate in these circumstances.
31. The subject matter of this order is of a technical nature, since it will introduce the principles for the setting up of mechanisms for the sharing of costs which will be further developed in the codes of practice. Accordingly, it would seem appropriate that the parliamentary procedure which applies for the making of the order is annulment in pursuance to a resolution of either House of Parliament.

Clause 17: Online copyright infringement: Power to amend copyright provisions

Powers conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *Affirmative resolution*

32. Clause 17 inserts a new section into the Copyright Designs and Patents Act 1988 ("CDPA"). It enables the Secretary of State to make provision by order to amend Part 1 or Part 7 of the CDPA for the purpose of preventing or reducing on-line copyright infringement.
33. In addition to the problems caused by services such as unlawful peer-to-peer (P2P) file-sharing and other many-to-many infringements which are dealt with by other provisions of the Bill, cyber lockers (online data repositories) and similar services have also been identified as areas where there is scope for damaging online copyright infringement to take place. This has highlighted that in a rapidly moving technological environment a response that is more flexible than relying on primary legislation is required in order to meet technological evolution. It is also recognised

that the provisions elsewhere in this legislation to reduce online copyright infringement, based upon imposing obligations onto internet service providers through the 2003 Act, will not work as readily where the notification system it sets up cannot be easily put into operation. That being the case, and with a view to taking a broad approach to reducing online infringement (such as where cyber lockers are used for unlawful sharing of copyright material) a different approach may be most appropriate, building on the remedies already available under the CDPA.

34. The power is capable of being exercised for the purposes of amending the CDPA to:
    - confer, modify or remove a power, right or duty
    - require a person to pay fees.
35. The order made under this provision is to be:
    - made by statutory instrument;
    - subject to approval by resolution of each House of Parliament; and
    - Subject to the requirement that it is made after consultation of persons likely to be affected by the order or their representatives, as the Secretary of State thinks fit.
36. We consider that a delegated power is necessary in the light of constant technological changes which may require legislative provision to be made at relatively short notice. Given that the power provides for amendment of primary legislation, we consider it appropriate that any order made under this power should be subject to the affirmative procedure.
37. This power specifically may not be used to create or modify any criminal offences.

Clause 18: Domain names: Notification of failure in relation to internet domain registry

Powers conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Annulment by resolution of either House of Parliament*

38. The provisions of clauses 18 to 20 amend the 2003 Act in order to regulate internet domain name registries. They are the entities that allocate internet domain names to end users. Internet domain names (such as www.google.co.uk) underpin the addressing system for the internet and are used to give each host or computer on the internet a unique name. The provisions give certain powers to the Secretary of State in circumstances where there has been a serious relevant failure of a registry meaning either (a) the registry itself, its end-users (owners of or applicants for domain names) or registrars (agents of end-users) have been engaging in unfair practices (such as cyber-squatting) or misusing domain names (such as deliberately registering misleading domain names), or (b) because the registry does not have adequate arrangements for dealing with complaints in connection with domain names.
39. In either case the Secretary of State may only act if the failure has adversely affected or is likely adversely to affect the reputation or availability of electronic communications networks or services provided in the UK, or the interests of consumers or the public in the UK.
40. Clause 18 inserts a new section 124N into the 2003 Act. Pursuant to this provision, if the Secretary of State wishes to exercise the powers contained in new

section 124O (inserted by clause 18) or 124Q (inserted by clause 20) of the 2003 Act, he must first notify the internet domain registry that a serious relevant failure is taking place or has taken place.

41. New section 124N(3) enables the Secretary of State to prescribe by regulations practices that are unfair or involve the misuse of internet domain names and also requirements for procedures dealing with complaints in connection with internet domain names.

42. It is considered appropriate to take a delegated power in these circumstances so that the matters to be prescribed can be updated to take into account changing use of domain names. The negative resolution procedure is appropriate because of the highly technical nature of the regulations.

Clause 19: Domain names: Power to appoint manager of designated registry

Powers conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *None*

43. Clause 19 inserts new section 124O into the 2003 Act, which gives the Secretary of State a power to make an order to appoint a manager in respect of an internet domain name registry.

44. Where the Secretary of State has notified the internet domain name registry that a serious relevant failure is or has occurred, the period for the internet domain registry to make representations has expired and the Secretary of State is satisfied that the registry has not taken adequate steps to remedy the failure, it is considered necessary to have the power for the Secretary of State to appoint a manager to take temporary control of the registry. The appointment is made by order and is designed to ensure the registry remedies the failure or the consequences of that failure. In practice this power may be used in combination with the power in new section 124Q of the 2003 Act (inserted by clause 20) to apply to the court for an amendment to the constitution of the designated registry, if there are features of the constitution which have prevented the registry from being able to remedy the failure or its consequences.

45. The purpose of the appointment would be to secure that the registry takes the steps required to remedy the failure or the consequences of it. In order to achieve this, the manager may be given functions of the registry's directors, and the order may provide for the registry's directors to be prevented from exercising functions. The Secretary of State may apply to court for directions in situations where the registry or its directors have been obstructing the manager. This would provide a means of enforcement of the Secretary of State's order, because disobeying the court's directions would amount to contempt.

46. The registry will be able to appeal against the appointment of the manager, both on the facts and the law, under section 192(1) of the 2003 Act to the Competition Appeal Tribunal (and then to the Court of Appeal on a point of law).

47. The Secretary of State must keep the order under review and must discharge it if appropriate (for example, if the registry has remedied the failure or the consequences of its failure, or if a third party has commenced insolvency proceedings against the registry).

48. It is considered that a delegated power is necessary because the appointment of a manager will only be necessary should a serious failure have taken place in relation to internet registry under new section 124N of the 2003 Act. Until such time, it

would not be possible to identify the precise functions to be exercised by the manager, nor the identity of the manager (who may need to have skills tailored to the particular circumstances).

49. It is considered appropriate that the power of the Secretary of State should not be subject to any parliamentary procedure because the fact that the registry will be able to appeal the appointment of a manager on both the facts and the law means that it there is an appropriate level of judicial scrutiny and it is not necessary to adopt the affirmative resolution procedure. The order will relate to temporary arrangements for the management of an individual registry by an individual manager, and will need to make detailed provision about the role of the manager. New section 124O is based on the powers of supervision of the Regulator of Community Interest Companies under sections 41 to 51 of the Companies (Audit, Investigation and Community Enterprise) Act 2004, and in particular upon section 47 of that Act. Such orders are not required to be made by statutory instrument and are not subject to parliamentary procedure (see section 61 of the Companies (Audit, Investigation and Community Enterprise) Act 2004).

Clause 24: Television: Amendment of s224 Communications Act 2003

Powers conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

50. Clause 24 is an amendment of an existing Henry VIII power in section 224 of the 2003 Act, which gives an initial expiry date for digital licences. The amendment in clause 24 removes the link with the date fixed for digital switchover. Digital switchover has been fixed (as it was not when the 2003 Act received Royal Asset) and is 31st December 2012. The amended provision allows the Secretary of State to extend the initial expiry date of digital licences beyond 2014.

51. It is proposed that this power be exercised by the Secretary of State, rather than the date being amended on the face of the Bill, to reflect the existing delegated power, and also because it will allow for flexibility in determining the extended date should it be necessary for this power to be exercised.

52. The order in section 224 of the 2003 Act is subject to annulment. The amendment proposed by clause 24 does not alter this. It is considered appropriate that this clause be subject to annulment because the purpose of the clause will already have been debated by Parliament during the passage of this Bill. The clause will make no substantial consequential or transitional amendments, and, moreover, the power exercised is already subject to annulment, and Parliament has already agreed that this is appropriate.

Clause 27: Television: Power to remove OFCOM's duty to secure provision of public teletext service

Powers conferred on: *Secretary of State*

Power exercised by: *Commencement Order*

Parliamentary procedure: *Affirmative resolution*

53. Clause 27 amends section 218 of the 2003 Act to remove the duty on OFCOM to do all it can to secure the provision of a public teletext service. This provision is to be commenced by commencement order, subject to the affirmative procedure.

54. The provision will only be commenced upon certain conditions being met: that the Secretary of State has laid before Parliament a report by OFCOM or that OFCOM has invited applications for the licence but is not able to re-license the teletext service, and that Secretary of State is satisfied that the making of the order is in the public interest. The provision, when commenced will make the appropriate legislative changes, but is subject to the affirmative resolution procedure in order to permit Parliament to debate at the appropriate time (after the conditions are met, which they will not be during the passage of the Bill) whether it is appropriate to remove OFCOM's duty.

Clause 36: Renewal of radio multiplex licences: Amendment of Broadcasting Act 1996

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Affirmative resolution*

55. Clause 36 adds a new section 58A into the Broadcasting Act 1996. That provision contains a power to amend Part 2 of the Broadcasting Act 1996 (and in particular section 58) by regulations for the purpose of making further provision about the renewal of radio multiplex licences. In particular, regulations made under this power may make provision about the circumstances in which OFCOM may renew a licence, the period of such renewal, the information that OFCOM may require from an applicant, the requirements that an applicant must meet, the grounds for refusal of an application, payments to be made and further conditions that may be included in a renewed licence.

56. The reason for providing for a power to amend Part 2 of the Broadcasting Act 1996 by order in this way, rather than making amendments in the Bill, is that the decisions about whether or not to extend radio multiplex licences are dependent on an agreed industry wide plan for rolling-out DAB to match FM coverage. This planning process can only begin when (a) OFCOM have the power to allow multiplexes to merge, which requires the new powers to change the frequencies allocated to multiplexes set out elsewhere in the Digital Economy Bill, and (b) when funding issues between the BBC and the commercial sector are agreed; which is not expected until late next year. The power conferred on the Secretary of State will be subject to a sunset provision, so that it cannot be exercised after 31 December 2015.

57. Given that the power provides for amendment of primary legislation relating to the regime for renewals of licences, we consider it appropriate that any order made under this power should be subject to the affirmative procedure.

Clause 37: Television: Amendment of s263 Communications Act 2003

Powers conferred on: *Secretary of State*

Power exercised by: *Order*

Parliamentary procedure: *Affirmative resolution*

58. Clause 37 amends the power in section 263 of the 2003 Act to disapply conditions in the regulatory regime applicable to Broadcasting Act licenses. Section 263(4) currently allows the Secretary of State by order to permit conditions to be omitted from the regulatory regime in force for that service. The amendment at clause 37

will additionally allow the Secretary of State, by order, to temporarily suspend particular provisions in licences and permit the re-introduction of provisions which have been disapplied by order under section 263(4) of the 2003 Act.

59. The amendment will permit orders to be made to relieve obligations on licence holders where, for example, there are temporary trials which render those conditions unnecessary for a period but would permit either within that order, or a subsequent order, the conditions to be re-applied to licences. The existing power is affirmative, and it is not intended to change the parliamentary procedure.

60. This power is appropriately exercisable on a delegated basis, because, by its nature, it needs to be flexible, and able to respond to the changing nature of obligations on public service broadcasters, either because of trials which are temporary in their nature, or because of changing technology and broadcasting platforms which make it appropriate to relieve conditions, or re-impose them.

Clause 38: Payment for certain wireless telegraphy licences

Powers conferred on: *OFCOM*

Power exercised by: *Regulations*

Parliamentary procedure: *None*

61. Clause 38 amends sections 12 and 14 of the Wireless Telegraphy Act 2006 ("WTA").

62. Section 12(1)(b) WTA provides OFCOM with the power to make regulations prescribing payments to be made by a licensee during the term of a licence or on its variation or revocation. Section 12 WTA, however, does not apply to licences granted under section 14 WTA, i.e. auctioned licences.

63. Proposed new section 12(6)-(9) will allow OFCOM's regulations under section 12(1)(b) to apply to auctioned licences in four specified cases, in the last two of those cases only with the consent of the Secretary of State. In brief, these cases are where-

- licensee consents
- the licence was granted for an indefinite term and included terms restricting revocation before a fixed initial period and that period has expired
- the licence was granted for a fixed term but has been varied to provide for an indefinite term
- The licence is a surrendered-spectrum licence as defined in new subsection (8).

64. Section 14 WTA provides OFCOM with the power to make regulations prescribing a procedure whereby operators wishing to be granted a wireless telegraphy licence must bid for it. Such regulations may provide for the terms, provisions and limitations subject to which such licences are granted and specify requirements which must be met by applicants for licences.

65. As part of the process for auctioning surrendered-spectrum licences, the proposed new section 14(5A) provides that all or part of the sum payable by the successful bidder for the grant of the licence or an additional sum (to be paid by the successful bidder to the relinquisher to compensate for the costs of relinquishment) is to be paid to the operator or operators who relinquished that spectrum. Currently, section 14 only allows such payments to be made to OFCOM.

66. The clause amends existing regulation making powers, which are not subject to a parliamentary procedure, but are governed by section 122 WTA which includes consultation requirements on OFCOM. It is not thought necessary for regulations made under this new provision to be subject to a different procedure. Although the amendments to section 12 will allow OFCOM to require payments during the term of auctioned licences, which it cannot do now, this only applies where the licensee consents or the licence term is extended beyond that originally granted or where the licensee is aware of the possibility of such payments before bidding for the licence. Whilst section 14 regulations may in future require successful bidders for WTA licences to pay an additional sum for the licence (to compensate the relinquisher of a predecessor licence for the costs of relinquishment), any bidder will be able to take this into account before making his bid.

Clause 39: Enforcement of licence terms

Powers conferred on: *OFCOM*

Power exercised by: *Statement of principles*

Parliamentary procedure: *None*

67. Clause 39 inserts a new section 43A into the WTA. This enables OFCOM to impose a penalty on a person if that person is or has been in contravention of a provision, term or limitation of a wireless telegraphy licence and if provision in that licence applies new section 43A to that contravention. A provision applying new section 43A to a contravention can only be included in a licence if it appears to OFCOM that the provision, term or limitation contravened is required by virtue of a direction made by the Secretary of State under section 5 of the WTA.

68. The penalty may be such amount not exceeding 10% of the relevant amount of gross revenue as OFCOM think appropriate and proportionate. The meaning of the relevant amount of gross revenue is given in section 44 of the WTA which, pursuant to clause 39(2), will apply for the purposes of section 43A as it applies for the purposes of existing section 43 of the WTA. Under section 44 WTA, OFCOM may set out a statement of principles to apply to the calculation of gross revenue. OFCOM must consult the Secretary of State and the Treasury before making or revising such a statement, must publish the statement and send a copy to the Secretary of State to lay before each House of Parliament. It is not thought necessary to amend this procedure for the purposes of the calculation of gross revenue in relation to penalties imposed under section 43A.

Clause 40: Classification of video games

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Affirmative resolution*

69. Clause 40 sets out the conditions that must be satisfied for a video game to be an exempted work under the Video Recordings Act 1984 ("the VRA 1984"). It inserts a new section 2A into the VRA 1984. Section 2A defines two conditions which if satisfied mean that a video game is an exempted work. The existing statutory exemptions for video games will continue to apply, so that those games that, if taken as a whole, i) are designed to inform, educate or instruct, or ii) are concerned with sport religion or music, will not be required to be classified

provided that they do not depict human sexual activity, gross violence or any of the other matters set out in section 2(2) and (3) of the VRA 1984.

70. New section 2A will effectively determine the lower level criteria that determine whether a game is exempted or not and therefore it will have an effect on the scope of the criminal offences in the Act. An exempted video game is not required to be classified by the designated body and supply of an exempted video game will not be subject to criminal sanction under the Act. If a game does not include any of the criteria set out in subsection (2)(a) to (h) it will be exempted. These criteria include matters such as depictions of violence, criminal activity, the misuse of drugs, swearing, and words or images intended to convey a sexual message. Such depictions or images will mean that the game is only suitable for viewing by persons aged 12 years and above, and therefore the game must be submitted for classification to the designated body.

71. In addition a video game will also be exempted if it satisfies the second condition mentioned in subsection (4) of new section 2A. That is, it is considered by the designated authority to be suitable for viewing by persons under the age of 12 and that fact is confirmed in writing.

72. The Secretary of State would have power to amend the criteria set out in section 2A(2)(a) to (h) by regulations subject to the affirmative resolution procedure. In addition the Secretary of state would have power by these regulations to add or remove further conditions for exempted video games. This will enable the Secretary of State to update and adjust these conditions to ensure that the kinds of depictions and images in video games are properly controlled and defined. This provides flexibility to provide for any future developments and new games with different content. In this way the VRA 1984 sets out the criteria that determine which games must be submitted to the designated authority for classification by reason of their content. If the criteria were not set out on the face of the Act in this way it would not be possible to discern what kinds of games fall under or out with the operation of the Act.

73. The power to make regulations includes a power to refer to documents produced by the designated authority, such as their guidelines and age rating criteria; and it also includes power to make different provision for different purposes, and transitional and saving provision.

74. Given that the power provides for amendment of primary legislation by stipulating what is an exempted video game and this affects the scope and operation of the Act, it is considered appropriate that any regulations made under this power should be subject to the affirmative procedure.

75. Section 3 of the VRA 1984 makes provision with respect to exempted supplies. This clause also inserts a new subsection (13) into section 3 to provide a power to make regulations to amend section 3. This power to amend includes power to repeal a provision in section 3 and to make further provision with respect to other cases in which the supply of a video recording is an exempted supply. Use of this regulation making power will enable the Secretary of State to determine what kinds of supply should be exempted under the Act and therefore are not subject to criminal liability. Again this will allow for some flexibility in terms of future developments to take on board new ways in which video games and other video recordings may be supplied. Given that the power provides for amendment of primary legislation by stipulating what is an exempted supply and this affects the scope and operation of the Act, it is considered appropriate that any regulations made under this power should be subject to the affirmative procedure. The power to make regulations includes power to make different provision for different purposes, and transitional and saving provision.

Clause 41: Designated authority for video games

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

76. Clause 41 introduces Schedule 1 to the Bill which makes further amendments to the VRA 1984, in particular to section 22. Section 22 of the VRA 1984 makes general provision about interpretation of the Act. Subsection (2) defines what a video recording is for the purpose of this Act in terms of the video works that is contains. The subsection provides that a video recording contains a video work if it contains information by means of which the whole or part of the video work can be produced. But where a video work contains an extract from another video work the extract is not part of the work from which it is extracted from but a part of the video work which contains the extract and hence the video recording contains that video work including the extract. In addition the video work from which the extract was taken is itself including the extract contained on a video recording.

77. New subsection 2A of section 22 provides a power for the Secretary of State to make provision about the circumstances in which a video recording does or does not contain a video work, for the purposes of the Act. This would allow provision to be made for new exceptional formats; for example, if a video game contains a whole film within it or a film contains a game within it. Section 22(2) only assists where a video work contains an extract of another work. The power to make regulations under subsection (2A) would enable the Secretary of State to make provision for these other kinds of format so that they would be appropriately interpreted under the Act.

78. It is considered that the negative resolution procedure is sufficient for these regulations given that they will deal with matters of a technical nature for interpretative purposes of the Act.

Clause 42: Licensing of Orphan Works: Amendment of Copyright Designs and Patents Act 1988

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

79. Clause 42 inserts new sections 116A and 116D and paragraphs 1A and 1D of Schedule 2A into the CDPA which allow the Secretary of State to make provision authorising licensing bodies or other persons to use and license the use of orphan works and orphan rights (copyright works and performers' rights whose owner cannot be identified or found, as defined in regulations). The reason for providing for this power is because the regulations made under the power will contain a level of detail that is more suited to secondary legislation.

80. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient because of the very technical subject matter of these regulations.

Clause 42: Licensing of Orphan Works – Definition of orphan work: Amendment of Copyright Designs and Patents Act 1988

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

81. Clause 42 inserts new section 116A(6) and (7) into the CDPA which allows the Secretary of State to define a work being or ceasing to be an orphan work in regulations and by reference to guidance published from time to time by any person. The EU Commission published due diligence guidelines in June 2008 following work done by a High Level Expert Group[1]. These guidelines work on the basis that orphan works can be used where a diligent search for the right holder has failed to identify or locate him and deal with what constitutes a diligent search by reference to the right in question. This power would enable the Secretary of State to define an orphan work by reference to these or subsequently published guidelines.

82. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient due to the highly technical subject matter of these regulations.

Clause 42: Licensing of Orphan rights – Definition of orphan rights: Amendment of Copyright Designs and Patents Act 1988

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

83. Clause 42 inserts new paragraph 1A(6) and (7) of Schedule 2A into the CDPA which allows the Secretary of State to define a performers' right as or as ceasing to be an orphan right. The work done by the EU Commission and discussed in paragraph 81 above extends to performers' rights. This power would enable the Secretary of State to define an orphan right by reference to these or subsequently published guidelines.

84. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient due to the highly technical nature of these regulations.

Clause 42: Extended licensing schemes: Amendment of Copyright Designs and Patents Act 1988

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

85. Clause 42 amends the CDPA by inserting new sections 116B and 116D and paragraphs 1B and 1D of Schedule 2A which contain powers for the Secretary of State to make regulations authorising licensing bodies to operate extended

[1] http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

licensing schemes over published works and performers' rights. Any licensing body so authorised may be subject to regulation introduced by new section 116C and paragraph 1C of Schedule 2A and Schedule A1 to the CPDA, also inserted by clause 42. The reason for providing a power to authorise licensing bodies to operate extended licensing schemes rather than making amendments in the Bill is again because the regulations made under the powers will contain a level of detail which is more suited to secondary legislation.

86. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient for these regulations because they will be of a very technical nature.

Clause 42: Regulation of licensing bodies: Amendment of Copyright Designs and Patents Act 1988

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

87. Clause 42 inserts new section 116C, paragraph 1C of Schedule 2A and Schedule A1 into the CDPA. This enables regulations to be made requiring licensing bodies to adopt codes of practice and makes provision as to the content of such a code and for failure to observe the provisions of such a code including financial penalties. A licensing body may only be required to adopt a code if it is authorised under section 116A or 116B or paragraph 1A or 1B of Schedule 2A to the CPDA or it appears to the Secretary of State that its system of self-regulation is failing to protect the interests of right owners, licensees, prospective licensees and the public. The power also enables the Secretary of State to make regulations regulating licensing bodies and other persons authorised to use or license the use of orphan works under section 116A, or orphan rights under paragraph 1A of Schedule 2A to the CPDA or to carry out extended collective licensing under section 116B or paragraph 1B of Schedule 2A.

88. The reason for providing a power to require licensing bodies to adopt a code of practice and to regulate licensing bodies and other persons authorised under section 116A or under paragraph 1A of Schedule 2A to the CPDA rather than making amendments in the Bill is again because the regulations made under the powers will contain a level of detail which is more suited to secondary legislation.

89. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient because of the highly technical nature of these regulations.

Clause 42: Copyright licensing: powers to make incidental, supplementary and consequential provision

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

90. Clause 42 amends the CDPA by inserting section 116(2)(a) giving the Secretary of State powers to make incidental, supplementary and consequential provision. The powers in section 116(2)(a) are to enable the Secretary of State to ensure that regulations regulating copyright licensing work cohesively. For example, this

power may be used to impose reporting requirements on a licensing body or other person authorised to license the use of orphan works.

91. Clause 42 further amends the CDPA by inserting paragraph 1D(1)(a) into Schedule 2A of the CDPA giving the Secretary of State powers to make incidental, supplementary and consequential provision by regulations. These powers allow for similar provision for performers' rights.

92. The reason for providing this power rather than making amendments in the Bill is again because the regulations made under the powers will contain a level of detail which is more suited to secondary legislation.

93. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient due to the highly technical nature of these regulations.

Clause 42: Amendment of the Copyright Designs and Patents Act 1988 by regulation: Amendment of Copyright Designs and Patents Act 1988

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Affirmative resolution*

94. Clause 42 amends the CDPA by inserting section 116D(2)(c) giving the Secretary of State Henry VIII powers to make regulations to amend Part I of the CDPA. The powers in section 116(2)(c) enable the Secretary of State to ensure regulations made under the powers introduced by clause 41 will work consistently with the existing provisions of the CDPA.

95. Clause 42 further amends the CDPA by inserting paragraph 1D(1)(c) into Schedule 2A of the CDPA giving the Secretary of State powers to make regulations to amend Part II of the CDPA. These powers allow for similar provision for performers' rights.

96. The reason for providing a power to amend Parts I and II of the CPDA rather than making amendments in the Bill is again because the regulations made under the powers will contain a level of detail which is more suited to secondary legislation. We expect that there would be extensive consultation on the detail of the regulations and the exercise of these powers will be subject to the affirmative procedure.

Clause 42: Delegation of powers to a person designated by the Secretary of State under the regulations: Amendment of the Copyright Designs and Patents Act 1988

Powers conferred on: *Secretary of State*

Power exercised by: *Regulations*

Parliamentary procedure: *Annulment by resolution of either House of Parliament*

97. Clause 42 introduces Schedule A1 to the CDPA and paragraph 1(3) enables the Secretary of State to make regulations delegating powers to approve a code of practice to be adopted by a licensing body to a person designated under the regulations.

98. These powers are to enable the Secretary of State to delegate these functions to a regulatory or other body which has the necessary expertise to determine an appropriate code of practice. There is no requirement to delegate.

99. Paragraph 1C of Schedule 2A applies the provisions of Schedule 1A to performers' property rights.

100. The reason for providing a power to sub-delegate these powers in regulations rather than making amendments in the Bill is that any decision to sub-delegate may depend on the nature of the licensing to which the sub-delegation relates and may be better taken at the time regulations are made.

101. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient because of the highly technical subject matter of these regulations.

Clause 42: Delegation of powers to a person designated by the Secretary of State under the regulations: Amendment of the Copyright Designs and Patents Act 1988

Powers conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Annulment by resolution of either House of Parliament*

102. Clause 42 introduces Schedule A1 to the CDPA and paragraph 3(4) enables the Secretary of State to make regulations delegating powers to determine whether there has been a breach of requirements that may be imposed under the Schedule and the imposition of any penalty for such a breach to a person designated by the Secretary of State.

103. These powers are to enable the Secretary of State to delegate these functions to a regulatory or other body which has the necessary expertise to investigate and sanction any such alleged breach. There is no requirement to delegate.

104. Paragraph 1C of Schedule 2A applies the provisions of Schedule 1A to performers' property rights.

105. The reason for providing a power to sub-delegate these powers in regulations rather than making amendments in the Bill is that any decision to sub-delegate may depend on the nature of the licensing to which the sub-delegation relates and may be better taken at the time regulations are made.

106. We expect that there will be an extensive consultation on the detail of the regulations. We consider that the negative resolution procedure is sufficient due to the highly technical nature of these regulations.

Clause 45: Power to make consequential provision

Powers conferred on:	*Secretary of State*
Power exercised by:	*Regulations*
Parliamentary procedure:	*Affirmative resolution for amendments or repeals of a provision of an Act, annulment by resolution of either House of Parliament for all other cases*

107. Clause 45 gives the Secretary of State the power to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with the amendments made by the Bill. This power is necessary as the Bill makes amendments to a number of enactments which themselves establish or are part of complex regulatory regimes. Certain necessary consequential amendments have already been identified and are included in the Bill. This power is provided in order to ensure that any consequential amendment which has not

yet been identified as being required to date may be made once identified, to ensure that the regulatory regimes continue to work as they are intended to. In addition the power allows provision to be made with respect to transitional, saving, incidental, supplementary and transitory provisions. These provisions are needed when a new legislative regime supersedes an old one. Similar precedents to this power can be found in section 259 of the Civil Partnership Act 2004, section 183 of the Education and Inspections Act 2006 and section 36 of the Borders, Citizenship and Immigration Act 2009.

108. As this power enables the Secretary of State to amend or repeal provisions of existing Acts, we consider that the affirmative resolution procedure is appropriate for those instances. In all other circumstances, regulations made under this power are subject to annulment by resolution of either House of Parliament and this is considered to be appropriate because of the likely technical nature of any such amendments.

Department for Culture, Media and Sport and the Department for Business, Innovation and Skills

November 2009

APPENDIX 2: EQUALITY BILL

Memorandum by the Government Equalities Office

Introduction

1. This memorandum identifies provisions for delegated powers in the Equality Bill. It explains the purpose of the delegated power proposed; why the matter is to be dealt with in delegated legislation; and the procedure proposed for each power and why it has been chosen. It also identifies some provisions which authorise the giving of guidance, although not all of these require any Parliamentary procedure unless specifically stated in this memorandum. It has been prepared by the Government Equalities Office, with assistance from the Department for Work and Pensions (in respect of provisions relating to disability), the Department for Children, Schools and Families and Department for Innovation, Universities and Skills (the latter Department now forming part of the Department for Business, Innovation and Skills) (in respect of provisions relating to education), the Department for Transport (in respect of provisions relating to disability and transport) and the Department for Business, Enterprise and Regulatory Reform (now the Department for Business, Innovation and Skills) (in respect of provisions relating to work exceptions).

Summary of main purposes of the Bill

2. The Bill has two main purposes – to streamline and harmonise discrimination law and to strengthen the law to support progress on equality.

Background

3. In February 2005, the Government launched the Discrimination Law Review to consider the opportunities for creating a clearer and more streamlined discrimination legislative framework of equality legislation which produces better outcomes for those who experience disadvantage. As noted in the Review's terms of reference:

> "Any proposals will have due regard to better regulation principles and take into account the need to minimise bureaucratic burdens on business and public services. A key priority will be seeking to achieve greater consistency in the protection afforded to different groups while taking into account evidence that different legal approaches may be appropriate for different groups."

4. In June 2007 the Government published a consultation paper A framework for fairness: proposals for a Single Equality Bill for Great Britain. This was followed in June and July 2008 by two Command Papers: Framework for a fairer future – the Equality Bill; and The Equality Bill – Government response to the consultation. In January 2009, the Government published the New Opportunities White Paper which, amongst other things, committed the Government to considering legislation to address disadvantage associated with socio-economic inequality.

5. The Discrimination Law Review set out to address long-term concerns about inconsistencies in the current anti-discrimination law framework, the fundamental principles of discrimination legislation and its underlying concepts. Amongst other things, the Bill brings together and re-states all the major elements of existing domestic discrimination legislation.

6. Domestic discrimination law has developed over more than 40 years – the first provisions were contained in the Race Relations Act 1965. Subsequently, other

personal characteristics have been protected from discrimination and similar conduct, sometimes as a result of domestic initiatives and sometimes through implementing European Directives.

7. The domestic law is now mainly contained in the following legislation (where applicable, as subsequently amended):
    - the Equal Pay Act 1970;
    - the Sex Discrimination Act 1975;
    - the Race Relations Act 1976;
    - the Disability Discrimination Act 1995;
    - the Employment (Equality) (Religion or Belief) Regulations 2003;
    - the Employment (Equality) (Sexual Orientation) Regulations 2003;
    - the Employment Equality (Age) Regulations 2006;
    - the Equality Act 2006, Part 2;
    - the Equality Act (Sexual Orientation) Regulations 2007.
8. The Bill will repeal and replace all these enactments as they apply to Great Britain and a number of related provisions. Tables of repeals are in Schedule 27.
9. The main European Directives affecting our domestic discrimination legislation are:
    - Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women;
    - Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by the European Parliament and Council Directive 2002/73/EC;
    - Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
    - Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;
    - Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.
    - European Parliament and Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
10. In addition, in July 2008 the Commission of the European Communities published a new draft Directive which would prohibit discrimination on grounds of disability, religion or belief, sexual orientation and age, in access to goods and services, housing, education, social protection, social security and social advantage. This Directive is currently (at the time of introducing the Bill) under negotiation.
11. The provisions listed in paragraph 7 above are the main provisions which this Equality Bill brings together. The Equality Act 2006 will remain in force (as amended by the Bill) so far as it relates to the constitution and operation of the Commission for Equality and Human Rights.
12. The Bill, as well as introducing new material, effects a significant consolidation and re-statement of existing provisions and consequently many of the powers it

contains are themselves re-statements of existing provisions, but sometimes with additions to them or deletions. There is also a number of new powers. This memorandum distinguishes between the new powers, that is to say those for which there are no precedents in existing discrimination legislation, and the powers that replicate those in existing discrimination legislation.

13. The Bill relates to matters within the responsibilities of the Lord Privy Seal, the Secretary of State for Work and Pensions, the Secretary of State for Children, Schools and Families, the Secretary of State for Transport and the Secretary of State for Business, Innovation and Skills[2]. Where the Bill confers powers to make secondary legislation on a "Minister of the Crown", this means any Minister; references to a "Secretary of State" mean any Secretary of State. In practice, some of the functions conferred on the Secretary of State will be exercised by the Secretary of State for Work and Pensions, the Secretary of State for Children, Schools and Families, the Secretary of State for Transport or the Secretary of State for Business, Innovation and Skills jointly or separately. This will reflect their respective ministerial portfolios at the time. In addition, the Bill confers powers on the Scottish and Welsh Ministers to make secondary legislation imposing specific duties on certain public authorities.

14. Overall, there are 89 delegated powers in the Bill of which 20 are new powers. There are 23 powers subject to the affirmative procedure and 13 Henry VIII powers permitting amendment of primary legislation Annex A lists all the delegated powers in the Bill by clause number and Schedule number.

15. This is a large Bill and for ease and completeness each Part is described in the overview, even where, as in a number of Parts, no delegated powers arise. Many powers are conferred in Schedules and for the purposes of the overview in this memorandum they are addressed at the point that the relevant clause arises. The Schedules are described in detail after the clauses with cross references back to their parent clauses.

Overview of the Bill

16. The Bill consists of 15 Parts and 28 Schedules.

17. *Part 1* contains provisions establishing a duty on public authorities identified or described in clause 1 to have due regard to socio-economic considerations in deciding their strategic priorities.

18. *Part 2,* including Schedule1, establishes the key concepts on which the Bill is based: the characteristics that are protected (age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation, pregnancy and maternity); the definitions of direct discrimination, combined discrimination, discrimination arising from disability, indirect discrimination, harassment and victimisation. The Schedule provides supplementary material to assist in determining what counts as a disability.

19. *Part 3,* including Schedules 2 and 3, makes it unlawful to discriminate against, harass or victimise a person when providing a service (which includes the provision of goods or facilities) or when exercising a public function. This Part does not apply to discrimination because of age in respect of persons under the age of 18 or in respect of marriage and civil partnership. The Schedules set out reasonable adjustments in this field (Schedule 2) and exceptions to this prohibition (Schedule 3).

---

[2] The responsibilities and functions of the former Secretary of State for Innovation, Universities and Skills now form part of those of the Secretary of State for Business, Innovation and Skills.

20. *Part 4,* including Schedules 4 and 5, makes it unlawful to discriminate against, harass or victimise a person when disposing of or managing premises (for example, selling, transferring or letting premises). Separate provision is made in respect of common parts of premises in Scotland. The Schedules set out reasonable adjustments in this field (Schedule 4) and exceptions to this prohibition (Schedule 5).

21. *Part 5,* including Schedules 6, 7, 8 and 9, makes it unlawful to discriminate against, harass or victimise a person at work or when providing an employment service. People who are protected include: employees or job applicants (including police officers and cadets); contract workers; partners and members of limited liability partnerships; pupils of barristers or advocates; people who are appointed to personal or public offices (for example, some heads or chairs of various public bodies); people seeking or holding professional or trade qualifications; applicants for or members of a trade organisation (including a trade union, business association or professional organisation); people seeking or receiving employment services; members of local authorities; members of occupational pension schemes. This Part also contains provisions relating to equal pay (implying equality clauses on pay and pension entitlements into employment arrangements in respect of work which is equivalent or of equal value); pregnancy and maternity pay; and provisions preventing an employer relying on provision in an employment contract to prevent an employee disclosing his/her pay to a colleague. It provides for a power to make regulations about transparency as to the differences between pay for male and female employees of non-public sector employers. Schedule 6 further defines what constitutes a personal or public office. Schedule 7 sets out exceptions to the equal pay provisions, including the treatment of occupational pensions. Schedule 8 sets out reasonable adjustments in relation to work and Schedule 9 sets out exceptions to the prohibition of discrimination at work, including: exceptions where having a particular protected characteristic is a requirement for the work; exceptions relating to Ministers of religion as regards sex, sexual orientation, marriage or civil partnership, gender reassignment, religion or belief; exceptions relating to the armed forces, employment services, age including retirement, benefits, the national minimum wage, redundancy pay and life assurance; payments to women on maternity leave; and provision of services to the public

22. *Part 6,* including Schedules 10,11, 12, 13 and14, makes it unlawful for a local education authority, school proprietor or governing body to discriminate against, harass or victimise a school pupil or applicant for a school place; and for a further or higher education institution to discriminate against or victimise a student or applicant for a place as a student. In the case of schools, it does however allow different treatment based on age, gender reassignment or marriage and civil partnership; and in the case of further and higher education institutions, different treatment is allowed on the basis of marriage and civil partnership, or pregnancy or maternity. Schedule 10 places accessibility requirements on local authorities in respect of disabled pupils. Schedule 11 sets out further exceptions for single-sex schools and faith schools, as well as in relation to the curriculum and religious worship in schools, so as to preserve the ability of parents to withdraw their children from religious education and religious worship, but not from other parts of the curriculum. Schedule 12 allows exceptions for single-sex institutions, training and special benefits or facilities for married persons or civil partners. Schedule 13 sets out reasonable adjustments in the education field. Schedule 14 sets out the basis on which modifications can be made to governing instruments of educational charities and endowments to remove or modify differential treatment requirements.

23. *Part 7* including Schedules 15 and 16 makes it unlawful for associations (for example, private clubs and political organisations) to discriminate against, harass or victimise members or guests. Schedule 15 sets out reasonable adjustments for such bodies. Schedule 16 allows associations, including private clubs, to continue or be established for people who share protected characteristics, for example clubs for people of a particular religion or belief, or a particular sexual orientation. It also allows a club or association to discriminate against a pregnant woman if to do otherwise would create a risk to her health and safety. This part also allows registered political parties to establish election arrangements such as women only shortlists and extending until 2030 their possible use to increase the representation of women in Parliament and certain other elected bodies. This last provision is subject to a sunset provision in clause 105.

24. *Part 8* prohibits other forms of conduct, including discrimination against or harassment of an ex-employee or ex-pupil, for example; helping someone discriminate against, harass or victimise another; instructing a third party to discriminate against, harass or victimise another; and acting in a way which results in unlawful discrimination, harassment or victimisation. In the latter case the Commission for Equality and Human Rights may carry out enforcement action. Persons affected have individual rights of action in respect of the unlawful discrimination. This Part also determines liability of employers and of principals in relation to employees and agents.

25. *Part 9* including Schedule 17 establishes the mechanisms, procedures, time limits and remedies for enforcement of claims of discrimination, harassment and victimisation, through the civil courts (including services and public functions; premises; education; associations; public sector duties) and the employment tribunals (including work and equal pay). Different mechanisms or procedures are provided, by way of exception, for immigration cases, cases involving disabled children in schools, national security and the armed forces. Schedule 17 provides for specialist tribunals in England and Wales and Scotland to hear cases involving discrimination or another form of prohibited conduct against disabled pupils.

26. 2*Part 10* makes terms in contracts (and relevant terms in non-contractual agreements), or collective agreements or other rules of undertakings unenforceable or void, if and in so far as they result in treatment prohibited by the Bill. It also renders unenforceable contractual and relevant non-contractual terms in so far as they exclude or limit the provisions of (or under) the Bill (except for certain qualifying compromise contracts).

27. *Part 11* including Schedules 18 and 19 is to do with the promotion of equality, amongst other things. It establishes a general duty on public authorities to have due regard, when carrying out their functions, to the need: to eliminate unlawful discrimination, harassment or victimisation; to advance equality of opportunity for all persons who share a protected characteristic; to foster good relations between people who share a protected characteristic and people who do not. It includes powers for Ministers to specify authorities subject to the general duty; and powers to impose specific duties, including a power to make regulations in connection with the public procurement activity of public authorities who are also contracting authorities for the purposes of the EU Public Sector Directive, to enable better performance of the general duty (similar powers may be exercised by Scottish and Welsh Ministers in respect of public authorities in Scotland and Wales). Schedule 18 sets out exceptions to the protection afforded by the general duty, including the provision of education in schools and immigration functions. Schedule 19 lists the public authorities that are subject to the general duty.

28. *Chapter 2 of Part 11* contains provisions which enable an employer or service provider or other organisation to take positive action to alleviate disadvantage experienced by people who share a particular protected characteristic. It also includes a power to make regulations specifying action or descriptions of actions to which those provisions will not apply. This Part also includes powers enabling an employer, when deciding between two candidates who are as qualified as each other, to take account of under-representation in his/her workforce of people with particular characteristics.
29. *Part 12 and Schedule 20* require taxis, other hire vehicles, public service vehicles such as buses, and rail vehicles to be accessible to disabled people and to allow them to travel in reasonable comfort. There are powers for the Secretary of State to impose duties to ensure this is achieved, or to make exemptions. Schedule 20 contains alternative provisions in relation to rail vehicles and which would come into force only in circumstances described later in this memorandum.
30. *Part 13* and *Schedule 21* deal with consent to make reasonable adjustments to premises and to let dwelling houses.
31. *Part 14*, including *Schedules 22 and 23*, establishes exceptions to the prohibitions in the earlier parts of the Bill in relation to a range of conduct, including action required by an enactment; protection of women; educational appointments; national security; the provision of benefits by charities and sporting competitions. Clause 193 provides a power to make exceptions based on age in fields outside work. Schedule 22 deals with exceptions based on statutory authority, i.e. the requirement to act in accordance with another enactment. Schedule 23 deals with general exceptions.
32. *Part 15* including *Schedules 24, 25, 26, 27 and 28* contains a power for a Minister of the Crown to harmonise certain provisions in the Bill with changes required to comply with EU obligations and general provisions on application to the Crown, subordinate legislation, interpretation, commencement and extent. Schedule 25 sets out the territorial application of the Bill to information society services. Schedule 24 sets out provisions in the Bill to which the harmonisation power will not apply. Schedule 26 contains amendments to certain enactments. Schedule 27 contains repeals and revocations. Schedule 28 contains an index of defined expressions in the Bill.

Provisions for delegated legislation

Part 1: Socio-economic duty

Clause 2 – Power to amend clause 1

33. Clause 1 requires public authorities described in subsections (3) – (5) to have due regard, when making strategic decisions about how to exercise their functions, to the desirability of exercising them in a way designed to reduce inequalities of outcome arising from socio-economic disadvantage. It includes a power for a Minister to issue guidance which a public authority must take into account in deciding how to fulfil the duty to consider socio-economic disadvantage in deciding on strategic policies. There is no parliamentary procedure for this guidance, because it is aimed at a limited group of public authorities rather than having more general application and those authorities have to take the guidance into account before reaching strategic decisions.
34. Clause 2 provides, at subsection (1), a power for a Minister of the Crown to make regulations amending clause 1, in order to add or remove a public authority from the list of authorities which are subject to the socio-economic duty imposed by

clause 1(1). It also permits clause 1 to be amended in order to restrict the application of the duty to certain functions of an authority or to remove such a restriction. Subsection (3) prevents such regulations from imposing a duty in relation to any devolved Scottish or Welsh functions.

35. This clause also provides, at subsection (4), a power for the Scottish or the Welsh Ministers to make regulations amending clause 1 in order to add or remove a relevant authority from the list of authorities which are subject to the socio-economic duty imposed by clause 1(1). These regulations may also restrict the application of the duty to certain functions of a relevant authority or remove such a restriction. In order to make regulations under subsection (4)the Scottish or the Welsh Ministers must consult Minister of the Crown (subsection (7)). Subsection (5) defines which authorities are "relevant for the purposes of the power given to the Scottish Ministers to add authorities to the list in clause 1(3). Subsection (6) defines which authorities are "relevant authorities" for the purposes of the power given the Welsh Minsters to add authorities to the list in Clause 1. In both cases these authorities must have corresponding or similar functions to those listed in clause.

36. Subsection (7) further provides that such regulations may make any consequential amendments of clause 1 that appear necessary or expedient as a result of changing the list of authorities which are subject to the duty. This includes the power to amend s1 to enable the Scottish or the Welsh Ministers to issue guidance on how the duty should be fulfilled and to provide that relevant authorities are required to take account of any such guidance. Where they have issued such guidance the Scottish or the Welsh Ministers may also disapply the requirement for relevant authorities to take account of guidance issued by a Minister of the Crown. The power for the Scottish and the Welsh Ministers to issue their own guidance is required to ensure that where Scottish and Welsh bodies are listed, the guidance properly reflects the Scottish or Welsh policy context and administrative structures.

37. While this is, in effect, a "Henry VIII" power in the sense that it enables the Minister, or the Scottish or the Welsh Ministers, to amend primary legislation, the actual scope of the power is narrow. It enables the list of authorities subject to the socio-economic duty to be amended and any necessary consequential amendments to be made. The power is necessary to ensure that where changes to the provision of public services mean that it is appropriate to change the authorities which are subject to the duty, the necessary changes can be made quickly and simply. In view of the relatively narrow scope of these powers it is considered appropriate that the use of this power is subject to the negative procedure.

Part 2: Key concepts

Chapter 1: Protected characteristics

Clause 6 – Disability

38. Subsection (1) of clause 6 defines what is meant by having a disability. Subsection (5) is not, strictly speaking, a delegated power to make legislation. It gives a Minister of the Crown a power to issue guidance about matters to be taken into account in deciding, for example, whether in any particular case a particular person has a disability. This power is not new: it is taken from sections 3(A1) and (1) of the Disability Discrimination Act 1995, as amended.

39. Schedule 1 contains supplementary provision including delegated powers which are described fully in paragraphs 185 to 194 and in particular (in Part 2 of the Schedule) procedure for Parliamentary approval of the guidance.

40. The guidance is primarily intended for courts and tribunals hearing disability claims. However, it will also serve to assist potential claimants or respondents to determine whether the person in question is disabled for the purposes of the legislation and therefore the robustness of otherwise of a potential claim.

Chapter 2: Prohibited conduct

Clause 14 – Combined discrimination: dual characteristics

41. Clause 14 provides for the discrimination prohibited by the Bill to include discrimination because of a combination of two relevant protected characteristics ("dual discrimination") and lists the relevant characteristics for this purpose. Amongst other things it establishes that a contravention does not require that there be sufficient evidence to justify a finding of direct discrimination in respect of each protected characteristic in the combination (subsection (3). It does not apply to a combination including disability in circumstances where, were a claim of direct discrimination because of disability brought, it would come within section 112 (special educational needs), which are subject to the exclusive jurisdiction of certain specialist tribunals (subsections (5) .

42. The power in clause 14(6) allows a Minister of the Crown to make an order further prescribing the evidentiary standard or prescribing additional circumstances in which subsection (1) does not apply. It is necessary because the concept of dual discrimination is a new one in legislation and it may prove necessary to make changes in the light of experience or other changes in procedure. The power might be used, for example, to require evidence to be provided of discrimination in relation to each protected characteristic in the combination. It might be used more widely to disapply subsection (1) from additional circumstances if, for example, additional claims were subject to exclusive jurisdiction in the future or, in practice, there is an area or particular combination of claims as to which unintended consequences result

43. The power enables amendment of section 14 so that any changes resulting from its exercise (e.g., additional requirements for or restrictions on a claim of dual discrimination) are clear on the face of the Act. It needs to be a matter of secondary legislation, since it is not possible to foresee which particular areas, if any, might prove problematic in the future. In view of the fact that the power will allow amendment of the Act in a manner which will affect rights of individuals to take action under the Bill, it is for affirmative procedure under clause 200(2).

Clause 22 – Regulations

44. Clauses 20 to 22 set out requirements to make reasonable adjustments. Reasonable adjustments are steps that, under clause 20, a person (for example, an employer or service provider) must take in order to prevent a disabled person from suffering a substantial disadvantage, as a result of the application of a provision, criterion or practice (for example a particular working requirement, way of working or way of providing a service) compared with other employees or customers who are not disabled. Schedule 2 sets out further detailed requirements in relation to reasonable adjustments. Schedules 4, 8, 13, 15 do likewise in relation to premises, work, education and associations. Schedule 21 applies for the purposes of these Schedules and, in particular, to the case where, for example, a

disabled tenant must obtain the consent of another person, for example a landlord, before premises can be altered.

45. Clause 22 is a general regulation making power. Subsection (1) sets out the matters that Ministers may prescribe to be taken into account with regard to when it is reasonable for a person to have to take a particular step to prevent a disabled person suffering a substantial disadvantage, in any of the areas covered by Schedules 2,4,8,13,15 and 21. Under subsection (1) (b), the regulations may also make exceptions for particular persons from some or all the related requirements. These powers replace existing powers in the Disability Discrimination Act 1995, as amended, at sections 15C(4), 21(3), 21B(5) 21H(2), 28C(3), 31AD(6).

46. Under clause 22(2) regulations may make detailed provisions for instance as to where it is or is not reasonable for a service provider to take particular steps; to define what is or is not included in the formulation, "provision, criterion or practice"; to define things that are, or are not to be treated as physical features; and to define things that are or are not to be treated as auxiliary aids. These powers replace existing powers in the Disability Discrimination Act 1995, as amended, at sections 21(5), 21E(8), 31AD(6).

47. Finally, clause 22(3) provides a power to amend any of Schedules 2,4,8,13,15 and 21. This is a new provision to reflect the structure of the Bill which sets out reasonable adjustment duties in these Schedules. The equivalent powers were included in provisions of the Disability Discrimination Act 1995, as amended, identified in paragraphs 45 and 46 above.

48. These powers are necessary because, despite the relatively detailed provisions in this Chapter and the relevant Schedules, it is not possible to legislate in advance for every conceivable circumstance in which it may or may not be reasonable to have to take particular steps to prevent a disabled person suffering substantial disadvantage. Therefore, it may be necessary from time to time and in the light of experience for the Minister to specify that employers and service providers and the courts and tribunals must take certain matters into account; to make exceptions; define what is reasonable for an employer or service provider to do; and define what is meant by "provision, criterion or practice". The power is a Henry VIII power because it allows amendments to be made to any of the specified Schedules which contain matters of substance.

49. Since the power can be used to amend the provisions of the Bill significantly, the Bill provides that when it is used to change a provision in one of the Schedules it will be subject to the affirmative procedure (clause 200(2)). An exercise of the power that does not require such an amendment is subject to the negative procedure.

Part 3: Services and public functions

Clause 30 - Ships and hovercraft

50. Clause 30 enables a Minister of the Crown to set out in Regulations how the services provisions of the Bill apply to services provided in relation to ships and hovercraft.

51. This power is necessary so that those who provide services and those who receive them on ships and hovercraft know exactly where and when the services provisions apply. The Bill is silent on the territorial application of the services provisions generally. While that approach is acceptable in most contexts because services will be provided either within the territory of Great Britain (where the provisions will apply) or in some other territory (where they will not apply) services in relation to ships and hovercraft are different. The United Kingdom is entitled to apply its law

to vessels registered in the United Kingdom, but international law and custom limit the extent to which the provisions can be applied to non-United Kingdom registered vessels even while they are within United Kingdom waters. Without an express provision on the territorial application of the services provisions it would be uncertain where and when the services provisions applied in relation to ships and hovercraft, requiring potentially time-consuming and expensive litigation.

52. The Government's intention is to make Regulations which apply the services provisions of the Bill to ships and hovercraft within Great Britain, but with some extensions beyond this (for example, in the case of UK-registered ships), and some exceptions (for example, in the case of non-UK ships passing through UK waters), where the details of the regime would take account of international law and custom.

53. Since this power enables the setting of the territorial application of these provisions and their application to non-UK ships in UK territorial waters, the Bill provides that the Regulations will be subject to the draft affirmative resolution procedure as provided for in clause 200. The intention is for the power to be exercised so that the Regulations relating to provision of services on ships and hovercraft come into force at the same time as clause 30 of the Bill.

Part 4: Premises

Clause 36 – Leasehold premises

54. Clause 36 places a duty to make reasonable adjustments on a person who lets or manages let premises; a person who has or manages premises to let; and a person who is responsible for common parts of let premises.

55. Clause 36(8) provides a power for a Minister to make regulations that prescribe descriptions of premises to be excluded from the application of this clause.

56. The power is necessary to allow for new, unforeseen circumstances that may affect what counts as "premises" for the purposes of the prohibition. It is of a limited, technical nature and hence subject to the negative procedure under clause 200(6).

Clause 37 - Adjustments to Common Parts in Scotland

57. Clause 37 makes provision for the Scottish Ministers by regulations to provide for the entitlement of a disabled person to make adjustments to common parts of premises in Scotland. Subsection (4) sets out what in particular may be included in the regulations. Before making any regulations the Scottish Ministers must consult a Minister of the Crown. The affirmative procedure applies to these regulations.

Part 5: Work

Chapter 1: Employment, etc.

Clause 59 – Interpretation

58. Clause 59 prohibits discrimination by a local authority against a member of the authority. Clause 59(3) contains a power for Ministers, by Order, to amend subsection (2) of clause 59 to add to the list contained in it additional bodies which exercise the functions of local authorities (and therefore are to be treated as local authorities for purposes of clause 58) and subsequently delete and/or amend those bodies which have been added.

59. This power is necessary because some bodies (in addition to those listed in subsection (2)) have been or may in the future be set up specifically to undertake

functions that have been designated to local authorities. These bodies have local authority members, who have been nominated by their home local authorities to sit on these bodies. These members need to be protected from discrimination, harassment and victimisation by these bodies, in the same way that they would be protected as against their home local authority. This power enables a Minister to add such bodies (whether existing now or coming into existence in the future) to the subparagraph (2) list. An example of such a quasi-local authority body is a Port Health Authority, which among other things, is responsible for matters pertaining to the import control of food and other products and also for discerning the origin of animals brought into the country. The Hull and Goole Port Health Authority is an example of a Port Health Authority.

60. This power will be subject to the negative resolution procedure, because while effecting amendment of primary legislation, it does no more than alter a list of bodies covered by the clause and is consequent upon decisions elsewhere to set up or disband a relevant body.

Chapter 2: Occupational pension schemes

Clause 60 – Non-discrimination rule

61. Clause 60 imports into any occupational scheme a rule (the non-discrimination rule) to the effect that a trustee or manager of the scheme or an employer of a scheme member or prospective member must not discriminate against, harass or victimise a scheme member or prospective member.

62. Clause 60(8) contains a power for a Minister of the Crown to make an order specifying descriptions of rules, practices, actions or decisions relating to age that an employer or trustees or managers of a scheme may maintain or use, without being in breach of a non-discrimination rule. This power enables occupational pension schemes to maintain certain practices and procedures which might otherwise be discriminatory on grounds of age. The intention is to replicate the existing exceptions to the prohibition on age discrimination listed in Part 2 of Schedule 2 to the Employment Equality (Age) Regulations 2006 SI 2006/1031. Article 6 of Directive 2000/78/EC permits member states to provide that certain differences in treatment may be allowed provided that they are objectively and reasonably justified by a legitimate aim, and are appropriate and necessary. The intention is to specify exceptions by order (rather than in primary legislation) so as to give some degree of flexibility either where existing exceptions are no longer appropriate and necessary, or where new exceptions may need to be specified in order to achieve particular aims.

63. Clause 60(9) requires the Minister to engage in consultation prior to the making of an order allowing the establishment of new rules, practices etc. In respect of existing provisions it allows existing schemes to continue to be operated according to existing rules, etc specified in an order. In view of the relatively narrow scope of this order, it was not considered an appropriate use of Parliamentary time to subject it to the affirmative procedure, and therefore the procedure is negative

Clauses 78 - Gender pay gap information

64. Clause 78 contains a power enabling a Minister of the Crown to make regulations requiring employers with at least 250 employees in Great Britain not more than annually to publish information about the differences in pay between male and female employees. The section does not apply in the case of a person who is a public authority specified in Schedule 19 or in the clause. A failure to comply with such regulations may be enforced as a new summary only offence, punishable by a

fine not exceeding level 5 on the standard scale, and/or by some other prescribed means.

65. The power, which it is not proposed to exercise before April 2013, is necessary in case sufficient progress on gender pay publishing has not been made during the intervening period. Publication of the information in question will make any gender pay gap transparent.

66. Given the extent and impact of the power and its exercise, any regulations will be subject to the affirmative resolution procedure under subsection (5) of clause 200.

Chapter 4: Supplementary

Clause 81 – Ships and hovercraft

67. Clause 81 enables a Minister of the Crown to set out in Regulations how the employment provisions of the Bill apply to seafarers on ships and hovercraft. This power is necessary so that seafarers and their employers know exactly where and when the employment provisions apply to them.

68. The Bill is silent on the territorial application of the employment provisions generally. Seafarers are different and it is not unusual for the employment law of any given State to apply differently in the case of seafarers compared to other workers. In accordance with international law and custom, many issues relating to ships and their crews are governed by the law of the State where the ship is registered (its "flag State"); other issues may be governed by the law of the State in whose waters the ship is located. In the absence of express provision, the application of the employment provisions to seafarers in different circumstances would be unclear in many cases, and in some cases it could conflict with international law or custom or with UK policy.

69. Regulations may apply the employment provisions of the Bill to seafarers within Great Britain, but with extensions beyond this (for example, in the case of UK-registered ships), and some exceptions (for example, in the case of non-UK ships passing through UK waters), where the details of the regime would take account of international law and custom and the global practices of the shipping industry.

70. Since this power deals with the extent of application of the Bill, and particularly in respect of ships in territorial waters it provides that the Regulations will be subject to the draft affirmative resolution procedure as provided for in clause 200(5). The intention is for the power to be exercised so that the Regulations relating to seafarers come into force at the same time as Part 5 of the Bill.

Clause 82 – Offshore work

71. Clause 82 contains a power for Her Majesty to make an Order in Council which applies specified provisions of Part 5 in the case of persons in offshore work such as people working on oil rigs or offshore wind farms. It replaces existing powers under s.10 (5) Sex Discrimination Act 1975, s.8 (5) Race Relations Act and s.87 Energy Act 2004

72. This power is necessary because of the need to make clear the extent to which the Bill applies to people working on, for example, oil rigs or other offshore installations. There are precedents for territorial application to be dealt with via secondary legislation in existing employment legislation, for example section 201 Employment Rights Act 1996 (see the Employment Relations (Offshore Employment) Order 2000 (2000/1828)), and this power replicates that approach.

73. The power is to be exercised through an Order in Council because of its territorial implications. It is to be subject to the negative procedure under clause 200 for the same reason, in line with the power in section 201 Employment Rights Act 1996.

Part 6 – Education

Chapter 3: General qualifications bodies

Clause 96 – Qualifications bodies

74. Clause 96 applies the basic prohibition of discrimination, harassment and victimisation to qualifications bodies in the education field (as distinct from clause 53 which applies to qualifications bodies outside the education field).
75. Clause 96(10) provides a power for a Minister of the Crown in England, the Welsh Ministers and the Scottish Ministers to prescribe who will act as the regulator, and therefore take the decisions about reasonable adjustments referred to above, in each country.
76. These powers are subject to the negative procedure as they are technical.
77. Clause 97 contains interpretative provisions for clause 96. It provides for two powers. The first, in subsection (3) provides a power for a Minister of the Crown, the Welsh Ministers and the Scottish Ministers to specify which qualifications are relevant. It replicates a power in the Disability Discrimination Act 1995
78. Clause 97(5) provides a power for the Secretary of State to make regulations clarifying when a body which confers qualifications is not a qualifications body.
79. This power is necessary to clarify things if it is not clear whether a qualifications body falls within these provisions, or within those for professional qualifications under clause 53.
80. The power is technical and therefore subject to the negative procedure.

Part 7: Associations

Clause 105 – Time limited provision

81. This clause is linked to the provisions in clause 104 relating to the selection of candidates by registered political parties. That clause makes provision in subsection (2) which permits political parties to adopt single sex shortlists for election candidates in order to address under-representation in elected bodies.
82. Clause 105 provides for clause 104 to be repealed at the end of 2030 subject to a power for a Minster of the Crown under subsection (2) of clause 104 by order to extend the operation of the provision beyond that date.
83. An order under clause 104 is subject to the affirmative procedure since it provides for amendment of the sunset date for the provision in clause 102 and it affects the electoral process.
84. This clause also extends the expiry date for the similar provisions in section 3 of the Sex Discrimination (Election Candidates) Act until 2030, so far as they apply to Northern Ireland.

Clause 106 – Interpretation and exceptions

85. Clause 106(3) provides a Minister of the Crown with an order making power to alter the number of members needed for an organisation to be defined as an "association" for the purposes of the prohibitions on private associations discriminating etc. in the Bill.
86. This replicates the powers at section 73(1) (c) Race Relations Act 1976. The power is essentially of a technical nature affecting only the number of members for those purposes, is likely to have very limited impact and so is subject to the negative procedure.

Part 9: Enforcement

Chapter 2: Civil courts

Clause 116 – National security

87. Clause 113 sets out jurisdiction for proceedings before civil courts. Clause 116 provides a power for the Civil Procedure Rules Committee (for England and Wales) and the Sheriff Court Rules Council (for Scotland) to make rules of court which enable a court to exclude a claimant or other person from all or part of the proceedings in the interest of national security. This power also allows the court to allow whoever has been excluded to make a statement to the court before the commencement of the proceedings; and to take steps to keep secret all or part of the reasons for the court's decision secret.

88. The reason for this power is to enable sensitive matters to be heard without the presence of the claimant, his representative or an assessor. The power can only be exercised where the court thinks it is expedient to do so in the interest of national security and replicates that in s.66B(1) Sex Discrimination Act; s.67A(1) Race Relations Act; s.59A(1) Disability Discrimination Act; and Part 2 Equality Act . In view of its focus on procedural matters, it is considered appropriate for the power to be subject to the negative procedure. Rules of the court are usually made under the negative procedure in accordance with sections 12 and 144 of and Schedule 1 to Constitutional Reform Act 2005.

Chapter 5: Miscellaneous

Clause 137 – Obtaining information, etc.

89. This clause deals with the process whereby someone who thinks they have been discriminated against or suffered from another type of prohibited conduct (including unequal pay) can ask for information from the person who they believe has been the cause.

90. Subsection (2) imposes a duty on a Minister of the Crown to make regulations prescribing (a) forms by which the person alleging discrimination etc may question the alleged discriminator and (b) forms by which the alleged discriminator may answer such questions. The answering of or failure to answer such questions is admissible as evidence before a court of tribunal. Subsection (4) enables a court or tribunal to draw inference, from a failure by the alleged discriminator to answer questions from the person alleging discrimination within 8 weeks of receipt of the questionnaire form as well as from answers which are evasive or unclear.

91. Subsection (5) provides an order-making power to amend the application of the questionnaire procedure so that a court or tribunal may not draw an inference from a person's failure to answer a question or gives an evasive or equivocal answer if the answer is given in circumstances specified by order of a Minister of the Crown.

92. Under subsection (7)(a) a Minister of the Crown may by order prescribe the period within which a question must be served, if it is to be admissible as evidence – for example, the period following the time at which the alleged discrimination took place. Under subsection 7(b), a Minister of the Crown may prescribe the manner in which a question or an answer may be served.

93. This duty and related powers replicate those in s65(1), 65(3) and 64(4A) –(4C) of the Race Relations Act, s. 74(1), 74(3), 21A(7) of the Sex Discrimination Act, s.7B of the Equal Pay Act, s. 56(1), 56(4), and 56(6) of the Disability Discrimination Act, s70(1), 70(3) and 52(6 of the EA) and s33(1) and 33(4) of

the SO Regulations, s33(1),and 33(4) of the Religion or Belief Regulations and s41(1) and 41(4) of the Age Regulations. In view of the narrow administrative nature of the powers, it is considered appropriate to subject their use to the negative procedure.

Clause 138– Interest

94. Clause 138 contains:

- a power for a Minister of the Crown to make regulations enabling an employment tribunal to include interest on an amount awarded by it in proceedings under the Bill; and specifying how, for what period and at what rate interest is to be determined;
- a power for a Minister of the Crown to make regulations modifying an order made under section 14 of the Employment Tribunals Act 1996 (power to make provision as to interest on awards) where it relates to an award in proceedings under the Bill.

95. These powers replicate those in s.56(6) Race Relations Act; s.17A(7) Disability Discrimination Act; reg.30(4) Employment Equality (Sexual Orientation) Regulations 2003; reg.30(4) Employment Equality (Religion or Belief) Regulations 2003; reg.38 (4) Employment Equality (Age) Regulations 2006 as well as the Employment Tribunals (Interest on Awards in Discrimination Cases) 1996. In view of the limited nature, technicality and potential frequency with which such regulations might be made, it is considered appropriate that they should be subject to the negative procedure

Part 10: Contracts, etc.

Clause 146– Meaning of "qualifying compromise contract"

96. Clause 146 defines what is meant by a "qualifying compromise contract", that is to say a contract for purposes of clause 143(4) (b) whereby the complainant in a discrimination case or the like agrees to reach a settlement without taking the case to a court or tribunal. Subsection (4) lists certain persons who may act as an independent adviser in such a matter, and subsection (4) (d) contains a power for a Minister of the Crown to specify a person who may so act. This power is needed to add additional categories of persons to the list as appropriate, for example, Fellows of the Institute of Legal Executives employed by a solicitors' practice. It replaces existing powers in section 77 (4B) (d) of the Sex Discrimination Act 1975, section 72 (4B) (d) of the Race Relations Act 1976, and Schedule 3A, Part 1, paragraph (2)(3)(d) of the Disability Discrimination Act 1995. In view of the limited and technical nature of this power, the negative procedure is considered appropriate.

PART 11: Advancement of Equality

Chapter 1: Public sector duties

Clause 150 – Power to specify authorities subject to the public duty

97. Clause 148 imposes a general duty on public authorities to have due regard, in the exercise of their functions, to the need to eliminate unlawful discrimination, harassment, victimisation and other prohibited conduct; to advance equality of opportunity; and to foster good relations. This requirement also applies to persons who are not listed as public authorities but who are carrying out public functions. Clause 149 provides that a person specified in Schedule 19 is a public authority. Schedule 19 is divided into:

- Part 1 (public authorities general)
- Part 2(relevant Welsh authorities)
- Part 3 (relevant Scottish authorities)

98. Schedule 19 takes a "listing" approach to the question of who is, or is not, a "public authority" for the purpose of the equality duty. The Government has decided that the "listing" approach provides the necessary clarity and legal certainty so that organisations know whether or not they are subject to the duty. It should be noted, however, that a body which is not a public authority but which carries out public functions on behalf of a public authority will be subject to equality duty when exercising those functions).

99. The power in clause 150 enables a Minister of the Crown, the Welsh Ministers or the Scottish Ministers as appropriate to make regulations amending each of the Parts of Schedule 19 – this is a power of a limited nature, in that after the initial updating of the Schedule it will be used to update the Schedule further as necessary to reflect the emergence, disappearance or change of name of public authorities in England, Scotland and Wales, or of cross-border authorities which exercise their functions partly in England and partly in Wales or Scotland. A further limit on the power is that it cannot be used to make regulations that would extend the application of clause 148 unless the person making the regulations considers they are being extended to a person who does or can exercise a public function. The Minister may only include authorities in each of the different parts of the Schedule, if that authority meets the definition set out in clause 156. Finally, under clause 151 a Minister of the Crown may not make regulations under clause 150 without having consulted, or obtained the consent of the appropriate person specified in that clause. The power is modelled on that in section 71(5) of the Race Relations Act 1976, as amended.

100. In view of the relatively narrow, updating purpose of this power, and the probability that it will need to be in frequent use, the negative procedure is considered appropriate (as was the case for the power in the Race Relations Act 1976).

Clauses 152, 153 and 154 – Power to impose specific duties

101. Clause 152 provides powers for a Minister of the Crown, the Welsh Ministers and the Scottish Ministers to make regulations imposing specific duties on public authorities within their jurisdiction. Clause 153 provides power for a Minister of the Crown, the Welsh Ministers or the Scottish Ministers to make regulations imposing specific duties on cross border bodies according to the appropriate procedures set out in that clause. Clause 154(5) provides powers for a Minister of the Crown, the Welsh Ministers and the Scottish Ministers to make regulations modifying or removing duties that they have imposed using the powers in clauses 152 and 153. Clause 154(2) provides that regulations imposing specific duties may impose duties on a public authority that is a contracting authority for the purposes of the Public Sector Directive (Directive 2004/18/EC) in connection its procurement functions. Such regulations do not affect the extent of any of any other provision that may be made under clause 152 or 153.

102. This overall approach of a general duty with a power to impose specific duties follows the existing model of each of the currently separate public sector equality duties in relation to race, disability and gender. The power to impose specific duties is therefore modelled on existing powers in section 71(2) of the Race Relations Act 1975; section 49D(1)-(4) of the Disability Discrimination Act 1995, as amended; and section 76B(1) and 76C(1)-(4) of the Sex Discrimination Act 1976, as amended.

103. The use of the power to make these regulations is subject to consultation, by the Minister concerned, with the person specified in clause 152 or 151.

104. These specific duties are subordinate to the general duty and are intended to require processes or outcomes that enable public authorities better to fulfil the general duty. The provisions may also be subject to change in the light of experience. It is not therefore considered that such provisions should be set out in the primary legislation.

105. Having regard to the extent of these powers, and the nature of the specific duties as requirements on the public sector, regulations made under clauses 152 and 153 are subject to the affirmative procedure as are any regulations made under clause 154(2) that amend or repeal primary legislation. If no such amendments are made regulations made under clause 154(2), then the negative resolution procedure applies. This is because regulations made under clause 154(2) modifying or removing duties imposed under clauses 152 and 153 that do not amend or repeal primary legislation are likely to be procedural (for example, changing a reporting requirement such as a reporting date.)

Chapter 2: Positive action

Clause 157 - Positive action: general

106. Clause 157 provides that the Bill does not prohibit the use of positive action to overcome or minimise a disadvantage arising from people possessing particular protected characteristics, meet their particular needs and reduce their under-representation in relation to particular activities. Such action must be a proportionate means of achieving the relevant aim. Clause 157(3) makes provision for regulations to be made specifying action, or descriptions of action, which would not be a proportionate means of achieving any of the aims in cl.157(2). The purpose of the regulations would be to make clear what actions are not permitted under this clause. This will be used to list detailed provisions that may change from time to time and therefore the negative procedure is appropriate.

Part 12 - Disabled persons: transport

Chapter 1: Taxis

Clause 159 – Taxi accessibility

107. Clause 159(1) contains a power for the Secretary of State to make regulations ("taxi access regulations") to ensure that taxis are accessible for disabled persons, including people who are in a wheelchair. Clause 159(2) enables the regulations to cover detailed technical specifications, for example relating to the size of the taxi door opening and the floor area of the passenger compartment. Clause 159(3) further provides that the regulations may require the taxi driver to carry a wheelchair ramp or other equipment for allowing wheelchairs to be loaded and unloaded. Clause 159(4) enables the regulations to require the taxi driver to secure the wheelchair in a particular way. Clause 159(5) makes it an offence for a driver of a taxi to fail to comply with the regulations, or to drive a taxi which fails to comply.

108. These powers replace existing section 32(1)-(4) of the Disability Discrimination Act 1995 which to date has not been commenced. Therefore, the concept of a "regulated taxi" does not yet exist. The Department for Transport earlier this year (2 February 2009) launched a consultation on taxi access, pointing out that a number of reasons for not proceeding with the regulations, including design challenges, potential costs, manufacturing capability and the risk of unwanted

consequences such as a reduction in the availability of taxis for hire. The consultation offers for consideration an alternative, non-regulatory approach that would enable local licensing authorities to take into account, when deciding whether or not to grant a taxi licence, whether or not the vehicle met certain technical standards yet to be developed. The consultation ended on 24 April 2009.

109. Even though the existing powers have not been commenced, it is considered that they should remain available for use if required. The outcome of the consultation is awaited; and even if it was decided to rely mainly on technical standards for the time being, a more regulatory approach might still prove necessary if technical standards proved inadequate for the purpose. Therefore, these powers are carried forward into this Bill.

110. As was the case for the 1995 Disability Discrimination Act, the parliamentary procedure for these regulations is negative. This is because they would be highly technical and may need to be amended quite frequently to reflect future technical developments.

Clause 158 – Designated transport facilities

111. Clause 160(1) provides a power for the Secretary of State (in respect of England and Wales) and Scottish Ministers (in respect of Scotland) to make regulations that apply any taxi provision to private hire vehicles provided under a franchise agreement (for example, a railway station or a transport interchange) or to drivers of such vehicles.

112. This power replaces one in section 33 of the Disability Discrimination Act 1995. Its purpose is to extend the scope of the taxi access regulations as necessary to certain other vehicles and drivers. Like section 32 of the DDA, section 33 has not as yet been commenced. However, it is considered that the power should be available if required.

113. As was the case for the equivalent power in the DDA, these regulations are subject to the negative procedure. This is because details of the subject of legislation may vary (for example, the type of transport facility making use of private hire vehicles); they will be of a technical nature; and changing circumstances may require new legislation from time to time.

114. In Scotland, the licensing of taxis and private hire cars and their drivers is the responsibility of local authorities under powers set out in the Civic Government (Scotland) Act 1982 and associated Regulations. The different arrangements in Scotland are recognised by clause 160(1), read with clause 160(3) under which the power is exercisable by the Scottish Ministers. However, clause 160(4) enables the Secretary of State to exercise the power conferred by clause 160(3)(b) on Scottish Ministers where this is necessary to implement EU obligations.

Clause 161 – Taxi licence conditional on compliance

115. Clause 161(1) prevents a licensing authority (for example, a local authority) from granting a taxi licence unless the vehicle conforms with the relevant taxi access regulations. This clause, and the power at subsection (3), replicates provisions in section 34 of the Disability Discrimination Act 1995 but has not been commenced since its operation because it is dependent on the making of regulations under clause 160.

116. Subsection (2) allows a grace period of 28 days for renewal of a licence. Subsection (3) provides a power for the Secretary of State to make an order to remove the grace period in any particular case for example, in areas where there are no or only a few licensed taxis and such a grace period would be unnecessary.

117. This provision is unsuitable for primary legislation as it requires a power that is exercisable case by case according to the circumstances and the licensing authority concerned. It is subject to the negative procedure because it is case-specific and would not be an appropriate use of parliamentary time under the affirmative procedure.

Clause 162 – Exemption from access regulations

118. This clause contains a number of powers to do with exemptions:
    - subsection (1) provides a power for the Secretary of State to make regulations enabling a relevant licensing authority to apply for an order exempting it from the requirements of section 161 (i.e. the requirement among other things not to grant a licence to a non-conforming taxi). Subsection (2) sets out various conditions that the regulations may impose on an authority proposing to apply for an exemption order, such as a consultation and/or publication requirement. Under subsection (3), the licensing authority must be satisfied that it is inappropriate for clause 161 to apply, and that the application of this clause would result in an unacceptable reduction in the number of taxis in its area. Under subsection (6), the regulations may, as an alternative, provide that "swivel seats" (as prescribed) must be fitted to taxis where an exemption order applies;
    - subsection (5) provides a separate power for the Secretary of State to make an exemption order or to refuse to make an exemption order. Under subsection (4), before doing so he must consult the Disabled Persons Transport Advisory Committee and other persons he thinks appropriate;
119. All these powers replicate those in section 35 of the Disability Discrimination Act 1995 which has not yet been commenced. This is because commencement depends on commencement of section 32 of that Act.
120. The regulation-making powers to allow applications for exemption, and the exemption powers themselves are necessary in order to allow flexibility, in case a licensing authority in any particular area comes to the view that the compliance requirements on taxis would, amongst other things, adversely affect the availability of taxis in its area. Provisions allowing applications and exemption orders are therefore contingent on circumstances and could not be replaced by provisions in the primary legislation.
121. Such regulations and orders are both narrow in scope and geographically limited and may need to be used relatively frequently, once commenced. The negative procedure is therefore considered appropriate.

Clause 164 – Passengers in wheelchairs: exemption certificates

122. Clause 163 imposes duties on the driver of a designated taxi or designated private hire vehicle in relation to wheelchair passengers. Clause 164(1) imposes a duty on a licensing authority to issue an exemption certificate to a person to exempt them from the duties imposed by clause 163 on the basis of medical grounds or on the grounds that a driver's physical condition means it is impossible or unreasonably difficult to comply with the duties.
123. The driver of a designated vehicle will be exempt from the duties imposed by clause 163 where an exemption certificate is displayed in the vehicle in the required manner. Subsections (3) and (4) allow regulations to be made respectively for designated taxis and designated private hire vehicles prescribing

the format of the exemption certificate and the way in which it should be displayed in the vehicle.

124. While this clause has been based on section 36 of the Disability Discrimination Act 1995 it has been subject to revisions so that the duties are imposed on designated vehicles, that is vehicles appearing on a list maintained by a licensing authority under clause 165. The powers in subsections (3) and (4) are subject to the negative procedure as the exemption periods, criteria and the way the exemption certificate is displayed could be subject to change as circumstances require.

Clause 167 – Assistance dogs in taxis: exemption certificates

125. Clause 167 gives the Secretary of State the power to make regulations which prescribe the detail of exemption certificates and the manner in which such a certificate is displayed in a taxi.

126. The driver of a designated vehicle will be exempt from the duties imposed by clause 166 where an exemption certificate is displayed in the vehicle in the required manner. Subsection (4) allows regulations to be made for designated taxis prescribing the format of the exemption certificate and the way in which it should be displayed in the taxi.

127. This clause is based on section 37 of the Disability Discrimination Act 1995. The power at subsection (4) is subject to negative resolution procedure as exemption periods, criteria and the way the exemption certificate is displayed could be subject to change as circumstances require.

Clause 169 – Assistance dogs in private hire vehicles: exemption certificates

128. Clause 169 gives the Secretary of State the power to make regulations which prescribe the detail of exemption certificates and the manner in which such a certificate is displayed in a private hire vehicle.

129. The driver of a designated vehicle will be exempt from the duties imposed by clause 168 where an exemption certificate is displayed in the vehicle in the required manner. Subsection (4) allows regulations to be made for private hire vehicles prescribing the format of the exemption certificate and the way in which it should be displayed in the vehicle. This clause is based on section 37A of the Disability Discrimination Act.

130. The power at subsection (4) is like section 37A of the Disability Discrimination Act subject to negative resolution procedure as exemption periods, criteria and the way the exemption certificate is displayed could be subject to change as circumstances require.

Clause 171 - Interpretation

131. Subsection (2) of this clause refers to the powers contained in clauses 167 and 169 This gives the Secretary of State power to make a definition of an 'assistance dog'. This is subject to negative resolution procedure as the definition may be complicated and subject to change after review.

Chapter 2: Public service vehicles

Clause 172 - PSV accessibility

132. Clause 172(1) contains a power for the Secretary of State to make regulations ("PSV access regulations") to ensure that public service vehicles (buses, coaches and the like that are adapted to carrying 8 passengers or more) are accessible for disabled persons, including people who are in a wheelchair. Clause 172(2) enables

the regulations to cover detailed technical specifications, for example relating to the fitting of equipment to vehicles. Under subsection (4), the regulations may make different provision for different cases. Under subsection (5), before making the regulations the Secretary of State must consult the Disabled Persons Transport Advisory Committee and other persons he thinks appropriate.

133. These powers are similar to those applicable to taxis in clause 159. They replicate existing section 40 of the Disability Discrimination Act 1995. Section 40 has been commenced and regulations have been made in the form of the Public Service Vehicles Accessibility Regulations 2000 [SI 2000 No.1970].

134. As was the case for the Disability Discrimination Act 1995, the parliamentary procedure for these regulations is negative. This is because they may be highly technical and may need to be amended quite frequently to reflect future technical developments.

Clause 174 – Accessibility certificates

135. Clause 174 requires a public service vehicle to have been granted an accessibility certificate for an individual vehicle and an approval certificate for a vehicle type before it can be used on the road. Clause 175 deals with approval certificates. Clause 174 contains two powers relating to accessibility certificates:

- under subsection (2), a power for the Secretary of State to make regulations regarding accessibility certificates;
- under subsection (1)(a), a power for a vehicle examiner to issue an accessibility certificate.

136. This power replicates that in section 41 of the Disability Discrimination Act 1995. The regulations are dependent on changing technological developments and circumstances and the provisions are not therefore suitable for primary legislation. They are of a technical nature and it is considered that the negative procedure is appropriate.

Clause 175 – Approval certificates

137. Clause 175(1) enables the Secretary of State to approve a vehicle type if he is satisfied that it meets requirements under regulations which he has the power to make under subsection (5). He may authorise a person to make a declaration that a particular vehicle conforms to the vehicle type; and a vehicle examiner may issue an approval certificate for the vehicle, to the effect that it conforms to the approved type.

138. This power replicates that in section 42 of the Disability Discrimination Act 1995. The type approval regulations are dependent on changing technological developments and circumstances and the provisions are not therefore suitable for primary legislation. They are of a technical nature and it is considered that the negative procedure is appropriate.

Clause 176 – Special authorisations

139. Clause 176(1) provides an exception power for the Secretary of State to make an order authorising a class of or particular vehicle to be used on the road, even if does not conform to the requirements in clauses 172-175. Subsection (3) enables the Secretary of State to apply certain of those provisions, subject to any limitations or modifications.

140. This power is needed to allow flexibility where certain classes of vehicle or individual vehicles must continue to be operated even if they are non-compliant with the relevant regulations. It replicates that in section 43 of the Disability

Discrimination Act. The orders may be technical, very narrow to only one vehicle or class of vehicles and it is considered that the negative procedure is therefore appropriate.

Clause 177 – Reviews and appeal

141. Clause 177(5) provides a power for the Secretary of State to prescribe the procedure for appeals against his decision to refuse approval of a vehicle type. The power to specify appeals procedures needs to be flexible so that it can adapt to changing circumstances and detailed provisions are unsuited to primary legislation. The negative procedure is considered appropriate because the procedure is of a detailed, technical nature.

Clause 178 – Fees

142. Under clause 178(1) the Secretary of State may make regulations about fees in respect of approval and accessibility certificates for public service vehicles, including their repayment. Before making the regulations, the Secretary of State must consult, under subsection (5), such representative organisations as he thinks fit.

143. This power replicates that in section 45 of the Disability Discrimination Act 1995. Fees may need to be varied at any time and the provisions are therefore not suited to primary legislation. The matter is not considered of sufficient significance to justify anything other than the negative procedure.

Chapter 3: Rail vehicles

144. This Chapter largely re-enacts the rail vehicle accessibility provisions of the Disability Discrimination Act 1995 ("DDA 95"), as amended by the Disability Discrimination Act 2005 ("DDA 05").

145. The DDA 05 amendments have, for the main part, not been brought into force. Their commencement had been put on hold in view of the introduction, on the 1st July 2008, of new European accessibility standards for main line railways. The introduction of the new European standards has required the Government to adjust the law to "carve out" main line rail from the scope of the DDA 95 and existing domestic rail vehicle accessibility regulations.

146. The new European standards are set out in the "Technical Specification for Interoperability for Persons with Reduced Mobility" (known as the "PRM TSI"), introduced by the European Commission under the railways Interoperability Directives. To pave the way for their introduction the Government made the Rail Vehicle Accessibility (Interoperable Rail System) Regulations 2008 (SI 2008/1746).

147. The effect of these Regulations, which came into force on 7 July 2008, was to remove heavy rail vehicles (trains) from the scope of the Rail Vehicle Accessibility Regulations 1998 ("RVAR") (SI 1998/2456) and will be to remove them from the scope of Part 5 of the DDA 95 (from a date to be appointed). So the rail vehicle accessibility provisions of the Bill are written only to apply to light rail vehicles (those used on metro, underground, tram and prescribed guided transport).

148. The Department for Transport has drafted revised rail vehicle accessibility regulations, to be better tailored to the light rail sector, and reappraised the introduction of two main aspects of the DDA 05 material i.e. compliance certification and civil enforcement. Although those aspects are included in the Bill, substantively in the same terms as in the DDA 05, the Government is minded not to proceed with them. This stance has been subject to considering the outcome of the Department's concurrent stakeholder and public consultation on rail vehicle

accessibility and the associated draft regulations. That consultation was completed 1 July 2009 and an analysis of responses demonstrates broad stakeholder support for the Government's preferred approach. The terms of Clause 184 will ensure that those aspects of the DDA 05 which are no longer required will fall if not commenced in whole or in part before 31 December 2010.

Clause 180 – Rail vehicle accessibility regulations

149. Clause 180(1) provides the Secretary of State with the power to make rail vehicle accessibility regulations to ensure light rail trains, trams and certain prescribed modes of guided transport (i.e. so called "light rail vehicles") are accessible to disabled people, including wheelchair users. As indicated, the rail vehicle accessibility provisions of the Bill only apply to light rail vehicles because accessibility for main line railway vehicles (so called "heavy rail vehicles") is now regulated by European standards.

150. The Rail Vehicle Accessibility Regulations 1998[3] ("RVAR") were made under the section 46 DDA 95 power and came into force with effect from 1 November 1998. A number of amendments were subsequently made by the Rail Vehicle Accessibility (Amendment) Regulations 2000[4] .

151. Subsection (2) notes that regulations under subsection (1) may make provision as to the construction, use and maintenance of light rail vehicles for the benefit of disabled people. For example, RVAR includes requirements concerning the marking of doors to indicate they are wheelchair compatible, the setting of height standards for door controls, the maximum force needed to operate them, and the provision of passenger information systems to announce the next station etc. Other examples are provision to facilitate the boarding/alighting of passengers in wheelchairs, the provision of wheelchair spaces, their dimensions and other requirements.

152. Subsection (3) enables the regulations to contain different provisions for different classes or descriptions of light rail vehicle or the use of the same class or description of light rail vehicle in different circumstances or the use of light rail vehicles on different networks.

153. Subsections (4) and (5) include definitions for use in this section and provide the Secretary of State with powers to specify which modes of guided transport, in addition to light rail vehicles used on railways and tramways, will be within scope of the regulation-making power.

154. Subsection (6) requires the Secretary of State to make accessibility regulations so that every light rail vehicle is a regulated rail vehicle (i.e. subject to rail vehicle accessibility regulations made under clause 180) before 1 January 2020. However subsection (7) preserves the power of the Secretary of State to grant exemptions. This date has already been set for heavy rail vehicles subject to the PRM TSI under the 2008 Regulations mentioned above and consultation on the setting of an end date for light rail vehicles which will remain subject to RVAR was completed in July 2009. Stakeholders have demonstrated a clear preference for setting the same date for light rail as that already in place for heavy rail of 1 January 2020. Revised RVAR regulations giving effect to this measure are expected to come into force at the end of 2009. This power preserves the existing position as to rail vehicle accessibility and the operation of the regulations intended to be in force at the end of 2009.

---

[3] S.I. 1998/2456.

[4] S.I. 2000/3215.

155. Under subsection (8), before making regulations under subsection (1), the Secretary of State must consult the Disabled Persons Transport Advisory Committee ("DPTAC"), the Government's statutory advisers on the public passenger transport needs of disabled people, and such other persons whom the Secretary of State thinks fit.

156. As was the case for these powers under the DDA 95, the parliamentary procedure for any regulations produced in this section is negative. These delegated powers are proposed, and the negative resolution procedure chosen for their exercise, because they would be highly technical in nature and may need to be amended from time to time in response to, for example, technological innovations or to reflect advances in best practice. The designation of "guided modes" of transport may also be subject to periodic review to reflect future technical developments.

157. The powers are substantively the same as those already approved by Parliament in the Disability Discrimination Acts.

Clause 181 – Exemptions from rail vehicle accessibility regulations

158. The delegated powers in this clause replicate those in section 47 of the DDA 95.Subsection (1) enables the Secretary of State by exemption order to authorise light rail vehicles to be used in passenger service even though they do not meet the requirements of rail vehicle accessibility regulations. These powers were included in the DDA 95 in recognition of the fact that it may not be possible for some rail vehicles to comply due to, for example, their physical size (e.g. narrow gauge), or where it would be inappropriate to require full compliance (for example heritage and tourist railways and tramways).

159. Subsection (2) clarifies that an exemption order may be granted for a specified rail vehicle, vehicles of a specified description, or the use of vehicles in specified circumstances.

160. Subsection (3) provides a regulation-making power for the Secretary of State to prescribe the particulars required from a person making an application for an exemption. The Rail Vehicle (Exemption Applications) Regulations 19985 have been made under the equivalent powers in the DDA 95.

161. Subsection (4) ensures that, following receipt of an application for an exemption order, the Secretary of State must consult with DPTAC and such other persons as the Secretary of State thinks appropriate before making a decision as to whether to grant the exemption. The subsection also defines the three options available to the Secretary of State at that point i.e. either to make an order in the terms of the application, or in such other terms as the Secretary of State thinks appropriate, or to refuse the application.

162. Exemptions are only required on a case-by-case basis, as non-conformities will differ from rail vehicle to rail vehicle, and be contingent on individual circumstances and relevant technical developments. So it is considered that exemptions should be granted by secondary legislation and not by blanket provisions on the face of primary legislation.

163. The proposed exemption powers are substantively the same as those already approved by Parliament in the Disability Discrimination Acts. The Department for Transport routinely publishes details of all applications for exemption orders and their outcomes on its website6. An annual report detailing the Secretary of State's

---

[5] S.I. 1998/2457.

[6] See www.dft.gov.uk/transportforyou/access/rail/vehicles/eo.

use of the existing exemption powers is published[7] and laid before Parliament under section 67B DDA 95. This section is replicated by clause 183 of this Bill.

164. The choice of procedure for exemption orders is dealt with in the following clause.

Clause 182 - Procedure for making exemption orders

165. The delegated powers in this clause replicate those in section 67(5A) and section 67A of the DDA 95. It sets out the procedure for making an order to exempt light rail vehicles, or networks, under Clause 181 from some or all of the rail vehicle accessibility requirements.

166. Subsection (1) provides that orders may be made either under the negative resolution procedure or the draft affirmative resolution procedure.

167. Subsection (2) ensures that the Secretary of State must consult DPTAC before making a decision as to which parliamentary procedure a particular exemption order must go through.

168. Subsection (3) ensures that an exemption order may only be considered under the negative resolution procedure if regulations under subsection (4) are in place and the making of that order is in accordance with those regulations.

169. Subsection (4) enables the Secretary of State to make regulations setting out the basis on which a decision will be made as to which parliamentary procedure is to be adopted. Subsection (5) requires consultation with DPTAC, and such other persons as the Secretary of State considers appropriate, before any regulations under subsection (4) are made.

170. The Rail Vehicle Accessibility Exemption Orders (Parliamentary Procedures) Regulations 2008[8], which were themselves subject to the draft affirmative resolution procedure, were made under the DDA 95 powers equivalent to subsection (4). They provide for the circumstances in which an exemption order would normally be subject to the negative resolution procedure and those in which the draft affirmative resolution procedure would normally apply. They also contain provisions allowing the Secretary of State to decide to adopt a different procedure for a particular order having regard to representations from DPTAC.

171. The Department for Transport has published a "decision tree" on its website[9] to assist understanding of these Regulations.

172. The requirement for regulations to set out the criteria to be considered in choosing Parliamentary procedure was inserted into the DDA 1995 at the request of Peers who expressed concerns about the level of parliamentary oversight of rail vehicle accessibility exemption orders.

173. Any regulations made under subsection (4) are to be subject to the draft affirmative resolution procedure to ensure that proposed criteria are subject to that level of Parliamentary scrutiny.

Part 14: General Exceptions

Clause 191 – Charities

174. Clause 191 sets out general exceptions relating to the operation of charities. Clause 191(3)(a) provides an exception in respect of supported employment so as to be able to treat persons with a particular disability more favourably than others. It also gives the Minister a power to prescribe disabilities so that persons with

---

[7] See www.dft.gov.uk/transportforyou/access/rail/vehicles/pubs.rva.

[8] S.I. 2008/2975.

[9] See www.dft.gov.uk/162259/165234/decisiontree.pdf.

those disabilities may be treated more favourably than others for the purposes of supported employment.

175. This power is technical in nature and therefore it will be subject to the negative procedure.

Part 15 - General

Clause 196 – Harmonisation

176. Clause 196 provides a power to amend the Equality Acts, that is this Act and the Equality Act 2006, in circumstances where a community obligation is or is to be implemented using section 2(2) of the European Communities Act 1972 and there are other provisions of the Equality Acts that are similar and which are not affected by the new community obligation. It makes it possible to retain the unitary approach to discrimination law where that is the appropriate way to proceed. Any decision to use this power is subject to a requirement in subsection (3) to consult.

177. It is a significant Henry VIII power and is subject to the affirmative resolution procedure. The power is necessary to prevent further situations like that which pertains with respect to colour and nationality where these are covered by the Race Relations Act 1976 and this Bill but are outside the scope of the EC Directives on Race. This gives power for instance where a decision of the European Court of Justice requires a change to the provisions of this Bill, but the provision affected provide for elements of discrimination that are not within the scope of EU law and therefore are not affected by the ECJ decision. It enables Ministers to decide to ensure that the purely domestic concepts proceed in harmony with the EC law concepts, if after consultation they consider that is the right way to go. The alternative is that the only way such divergence can be rectified is by primary legislation. That may have the unfortunate effect of creating a gap for an unknown period during which the beneficiaries of the domestic provision are less well protected than those who can rely on the EC law concepts and requiring employers and others to have regard to the differing levels on protection..

Clause 199 – Exercise of Power

178. Clause 199 provides for the powers under the Bill provisions to be exercised by a Minister of the Crown unless specified otherwise. Subject to three exceptions all must be made by statutory instrument. Under sub-section (3), orders and regulations may make different provision for different purposes and include consequential, incidental, supplementary, transitional, transitory or saving provision. In particular, that allows for instruments under clauses 152, 195 or 208 to amend an enactment, including in the case of clause 195 and 208, this Bill. In addition, sub-section (7) provides that when making an order under clause 208 to commence a section of the Bill, any consequential, incidental, supplementary, transitional, transitory or saving provisions related to the commencement of that section may be made in a separate order and may be made either before or after commencement. By virtue of clause 199(7)(a) any such additional orders can be made whether or not the order that commences the relevant section also includes consequential or other minor provisions.

Clause 200 – Ministers of the Crown

179. Clause 200 provides for the circumstances in which the affirmative procedure is to be applied in respect of statutory instruments made under powers in the Bill. Subsection (2) provides that all instruments containing an order or regulations that amend the Bill, another Act, or an Act of the Scottish Parliament or an Act or Measure of the National Assembly for Wales are subject to the affirmative

procedure. Exceptions to this are set out in subsection (3) and have been commented on at appropriate points in this memorandum as the powers have been described. Subsection (5) contains a list of other powers to which the affirmative procedure applies in all circumstances. Other instruments are subject to the negative procedure except those listed in subsection (7).

Clause 201 – The Welsh Ministers

180. Instruments made by Welsh Ministers are subject to the affirmative procedure if they are made under powers in clauses 152 or 153. Instruments made under the power in clause 154(5) are subject to the affirmative procedure if the regulations amend or repeal primary legislation. If no such amendments are made, then the negative resolution procedure applies.

Clause 202 – The Scottish Ministers

181. Instruments made by the Scottish Ministers are subject to the affirmative procedure if they are made under powers in clauses 37, 152 or 153. Instruments made under the power in clause 154(5) are subject to the affirmative procedure if the regulations amend or repeal primary legislation. If no such amendments are made, then the negative resolution procedure applies.

Clause 208

182. Clause 208 provides for the commencement of the Bill. It provides for the immediate commencement of section 184(2) (rail vehicle accessibility compliance) and Part 15 other than sections 198 and 203. It confers a power on Ministers to commence the rest of the Bill provisions by order on a day or days to be appointed.

Schedule 1 – Disability – supplementary provision

Part 1 – Determination of disability

183. Part 1 (paragraphs 1-9) of Schedule 1 contains supplementary provisions to do with determining disability, in relation to determining what counts (or not) at any given time as an impairment; a long-term effect; a severe disfigurement; substantial adverse effects and connected matters.

Impairment

184. Paragraph 1 provides a power for a Minister of the Crown to make regulations determining what counts, or not, as an impairment. This power replicates that in Schedule 1, paragraph (1) of the Disability Discrimination Act 1995 as amended. The reason for having this power is to be able to reflect advances in medical science, including diagnosis, that could have an effect on whether a particular condition should be treated as an impairment or not. The power is of a relatively limited nature, so is subject to the negative procedure.

Long-term effects

185. Paragraph 2(1) specifies what counts as a "long-term" effect of an impairment: if it has lasted at least 12 months; if it is likely to last for at least 12 months; or if it is likely to last for the rest of the life of the person affected. Subparagraph 2(4) contains a power for a Minister of the Crown to make regulations which, despite subparagraph (1), may prescribe where an effect is to be treated as being or not being long-term. This power replicates that in Schedule 1, paragraph 2 of the Disability Discrimination Act 1995 as amended. As with the power in paragraph 1, the reason for this power is to enable adjustments in elements of the definition of

disability to reflect advances in medical science. In view of its relatively limited nature, the use of the power is subject to the negative procedure.

Severe disfigurement

186. Under paragraph 3(1), an impairment consisting of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities. Subparagraph (2) provides a power for a Minister of the Crown to make regulations specifying circumstances in which a severe disfigurement is not to be treated as having a substantial adverse effect; and subparagraph (3) enables the regulations to cover, in particular, deliberately acquired disfigurement. This power replicates that in Schedule 1, paragraph 3 of the Disability Discrimination Act 1995 as amended. As with the powers in paragraphs 1 and 2, the reason for this power is to enable adjustments to be made to reflect advances in medical science. In view of its relatively limited nature, the use of this power is subject to the negative procedure.

Substantial adverse effects

187. Paragraph 4 provides a power for a Minister of the Crown to make regulations specifying that a particular effect on a person's ability to carry out normal day-to-day activities should be treated as being (or not being) a substantial adverse effect. This power replicates that in Schedule 1, paragraph 5 of the Disability Discrimination Act 1995 as amended. As with the previous powers in this Schedule, it is intended to enable adjustments to be made to reflect advances in medical science. In view of its relatively limited nature, the use of this power is subject to the negative procedure.

Effect of medical treatment

188. Paragraph 5(1) provides that an impairment is to be treated as having a substantial adverse effect if medical treatment is being provided to correct it and, but for that, it would be likely to have that effect. Subparagraph (3) provides a power for a Minister of the Crown to make regulations specifying impairments that are not to be treated as having a substantial adverse effect in this context. This power replicates that in Schedule 1, paragraph 6 of the Disability Discrimination Act 1995 as amended. As with the previous powers in this Schedule, it is intended to enable adjustments to be made to reflect advances in medical science. In view of its relatively limited nature, the use of this power is subject to the negative procedure.

Deemed disability

189. Paragraph 7 provides a power for a Minister of the Crown to make regulations providing for persons of specified descriptions to be treated as having disabilities; and prescribing circumstances in which a person with a disability is to be treated as no longer having the disability. This power replicates that in Schedule 1, paragraph 7 of the Disability Discrimination Act 1995 as amended. As with the previous powers in this Schedule, it is intended to enable adjustments to be made to reflect advances in medical science. In view of its relatively limited nature, the use of this power is subject to the negative procedure.

Progressive conditions

190. Paragraph 8(1) and (2) provide that a progressive condition likely to result in an impairment which has a substantial adverse effect is to be taken as such an impairment. Subparagraph (3) provides a power for a Minister of the Crown to make regulations providing for a specified condition to be treated as progressive,

or not. This power replicates that in Schedule 1, paragraph 8 of the Disability Discrimination Act 1995, as amended. As with the previous powers in this Schedule, it is intended to enable adjustments to be made to reflect advances in medical science. In view of its relatively limited nature, the use of this power is subject to the negative procedure.

191. Part 2 of Schedule 1 (paragraphs 9 to 16) contains provisions dealing with guidance. Paragraph 11 sets out some examples that guidance may give. Paragraph 13 requires the Minister to publish and consult on draft guidance. Paragraph 14 requires the Minister to lay a draft of the guidance before Parliament and each House has 40 days in which to resolve not to approve the guidance, failing which the Minister must publish the guidance as drafted.

192. Paragraph 15 provides a power for the Minister to make an order bringing the guidance into force. Such an order is subject to the negative procedure (since Parliament will already have had the opportunity to comment on the draft). Paragraph 16 enables the Minister to revise and reissue guidance or to make an order revoking the guidance. Such an order is subject to the negative procedure, in the same way as the order for bringing guidance into force.

Schedule 2 - Services and public functions: reasonable adjustments

193. Paragraph 3 makes special provision with regard to services connected with the provision of transport by land, air or water. Sub-paragraph (10) provides a power to amend this paragraph. It is necessary in order to ensure that there is sufficient flexibility in the application of these provisions in relation to particular situations. The power replicates an existing power in section 21ZA(3) of the Disability Discrimination Act 1995. It is a Henry VIII power and is therefore subject to the affirmative procedure.

Schedule 3 – Services and public functions: exceptions

194. Schedule 3 sets out exceptions from the prohibition on discrimination or other prohibited conduct in relation to the provision of goods, facilities and services and the exercise of public functions.

195. Paragraph 32(1) provides a power for a Minister of the Crown to make an order to add, vary or omit an exception to clause 28 in relation to religion or belief, disability or sexual orientation. It also provides for a Minister of the Crown to make an order to add, vary or omit an exception to section (27)(6) in relation to sex, gender reassignment, pregnancy and maternity and race. In relation to transport by air a Minister of the Crown can also vary, remove or add exceptions in relation to the provision of services and the exercise of public functions for disability only. For these purposes, it does not matter where the transport in fact is. The Minister must consult the Commission for Equality and Human Rights.

196. The power replicates an existing power from the Sex Discrimination Act 1975 and extends this to other protected characteristics. In view of the nature of this "Henry VIII" power to amend the Act, it is considered appropriate that it should be subject to the affirmative procedure.

Schedule 4 - Premises: reasonable adjustments

197. This Schedule explains how the duty to make reasonable adjustments in clause 36 applies to a controller of "let" premises or of premises "to let" and to the commonhold association where a disabled tenant (or prospective tenant) or unit holder in commonhold land or the disabled person legally occupying the property is placed at a substantial disadvantage, so that the disabled person can enjoy the premises or make use of them.

198. Paragraphs 5-7 explain how the duty to make reasonable adjustments applies in relation to common parts and set out the process that must be followed by the person responsible for the common parts (who is either a landlord or, in the case of commonhold land, the Commonhold Association) if a disabled tenant or someone on their behalf requests an adjustment. This includes a written agreement if an adjustment is agreed. In paragraph 7, sub-paragraphs 5 - 7 provide powers for a Minister of the Crown to make regulations with regard to the written agreement, including: the information that is to be provided by a party to a written agreement; requiring that information to be provided in a prescribed form; and where the requirements under the agreement are satisfied providing for the agreement to cease to have effect. This is a new power in light of the new common parts provisions.

199. Paragraph 9 confers a number of powers on a Minister of the Crown to make supplementary provision by regulations for the purposes of section 36 and Schedule 4. The powers are tailored to the circumstances of adjustment to premises for example, as to circumstances in which premises are to be treated as let, or not, to a person; or which premises are to be treated as being, or not as being, to let; or as to who is to be treated as being a person entitled to occupy premises other than as tenant or unit holder. Many of the powers provided for in paragraph 9 replicate those in section 24L of the Disability Discrimination Act 1995 as amended.

200. All the delegated powers provided for in Schedule 4 are subject to the negative procedure as they provide for matters of detail that change from time to time. The only exception to this is paragraph 9(3) which allows for amendment of the Schedule itself and so an instrument exercising this power is subject to the affirmative procedure in accordance with clause 200(2).

Schedule 5 – Premises: exceptions

201. This Schedule sets out exceptions from the prohibition against discrimination and other prohibited conduct in relation to the disposal and management of premises. Paragraph 3 makes provision for the small premises exception and sets out the circumstances in which it applies. Paragraph 4 provides that the duty to make reasonable adjustments to leasehold and commonhold premises and common parts does not apply to small premises and sets out the relevant circumstances in which it applies. Paragraph 5 provides a power for a Minister of the Crown to make an order amending or repealing paragraphs 3 or 4.

202. This power, which originated in section 14 of the Disability Discrimination Act 2005, is needed to reflect changing types of accommodation. In view of its being a "Henry VIII" power with potentially wide-ranging effect, the affirmative procedure applies in accordance with clause 200(2).

Schedule 7 – Equality of terms: exceptions

203. Schedule 7, Part 2 (paragraphs 3 to 6) deals with exceptions to the equal treatment rule in relation to occupational pensions – described as the "sex equality rule". Paragraphs 3 to 5 set out various matters where an exception applies. Paragraph 4 contains a power to prescribe the circumstances in which differences between men and women are permitted if the differences are attributable only to differences in retirement benefits to which men and women are entitled. Paragraph 5(1) permits a difference between men and women if it consists of applying prescribed actuarial factors to the calculation of the employer's contributions to an occupational pension scheme. Paragraph 5(2) permits a difference between men and women if it consists of applying to the determination of benefits of such

description as may be prescribed, actuarial factors which differ for men and women. In accordance with clause 204(1) these are prescribed by regulations. These powers replicate those in s 64(2) and (3) Pensions Act 1995 and the intention is to replicate in regulations those exceptions specified in regulations 13 – 15 of the Occupational Pension Schemes (Equal Treatment) Regulations 1995 (SI 1995/3183) made under those powers. The negative procedure is appropriate for this power in view of its technical nature.

204. Paragraph 6 provides a power for a Minister of the Crown to make regulations amending Part 2 of Schedule 7 to provide for other cases where a difference between men and women is permitted, or to amend or repeal this Part. The regulations may cover pensionable service accrued in the past, but not pensionable service before 17 May 1990, the date from which equality of treatment for accrued benefits may be claimed The power replicates that in s 64(4) Pensions Act 1995. As it allows amendment of provisions of this Act the affirmative procedure will apply in accordance with clause 200(2).

Schedule 9 – Work (exceptions)

205. Schedule 9 provides for a number of exceptions relating to work. In particular Part 2 deals with those affecting the age characteristic. Paragraph 16 contains a power that allows a Minister of the Crown by order to specify descriptions of practices, actions or decisions relating to age in respect of contributions by employers to personal pension schemes that an employer may maintain or use without breaching a non-discrimination rule. The intention is to replicate the existing exceptions to the prohibition on age discrimination listed in Part 3 of Schedule 2 to the Employment Equality (Age) Regulations 2006 SI 2006/1031.

206. The provision requires the Minister to engage in consultation prior to the making of an order which provides for exceptions other than those already in use. In view of the relatively narrow scope of this order, it was not considered an appropriate use of parliamentary time to subject it to the affirmative procedure, and therefore the procedure is negative.

Schedule 10 – Accessibility for disabled pupils

207. Schedule 10 requires local authorities to prepare accessibility strategies for the schools for which they are responsible and requires schools to prepare accessibility plans. This re-enacts provisions in the Disability Discrimination Act.

208. In accordance with paragraph 3 the Secretary of State can prescribe the frequency on which accessibility strategies or plans must be revised and the period of time which the strategy or plans must cover. As at present it is envisaged that the intervals at which strategies must be produced will directly correspond with the period to be covered by the strategy. The flexibility afforded by regulations is required to enable timescales to be altered where necessary to respond to any changes to related administrative procedures and to allow dovetailing of the strategy with other plans. These powers use the negative procedure as they are technical powers.

209. Paragraph 2(4) provides a power for a Minister of the Crown (for England) and the Welsh Ministers (for Wales) to issue guidance which a local authority or schools must take into account in preparing the accessibility strategy or plan. There is no parliamentary procedure for this guidance, because it is clarificatory, not prescriptive – local authorities are not required to follow it.

210. Paragraph 6(2) provides that a Minister of the Crown or the Welsh Ministers may prescribe services which are, or are not, to be regarded as education or a benefit, facility or service for the purposes of the Schedule. This power replicates that in

section 28D of the Disability Discrimination Act 1995. These regulation making powers are required because the boundaries of what constitutes "education" or the associated services which are covered by the duties, as opposed to other services provided by a school or local authority may require clarification. In view of its relatively limited nature, the use of the power is subject to the negative procedure

Schedule 11 – Schools: exceptions

211. Part 1 makes provision for transitional exceptions for single-sex schools from the prohibition against discrimination on grounds of sex. These provisions replicate Schedule 2 of the Sex Discrimination Act. The powers are administrative provisions which will be exercised in relation to particular schools and are excluded from the provisions of the Bill with regard to exercise of power (clause 199(3)(a)).

212. Part 2 (paragraphs 5-7) of Schedule 11 deals with exceptions for faith schools and in relation to the curriculum and religious worship in schools.

213. Paragraph 7 provides a power for a Minister of the Crown to make an order adding, amending or repealing exceptions for schools in relation to religion or belief. This replicates the power in section 50 of the Equality Act 2006. The provisions relating to the application of the prohibition of discrimination on grounds of religion or belief need to strike a fine balance, particularly in the case of schools, between banning undesirable behaviour while maintaining the status of the national curriculum and arrangements for religious worship as well as allowing schools with a religious ethos to continue to operate in a way consistent with that ethos. The purpose of the power is to allow adjustments to be made in the light of experience or changing circumstances, in order to maintain that balance. As the power would amend primary legislation use of the power should be subject to the affirmative procedure.

Schedule 12 – Further and higher education exceptions

214. Part 1 has to do with exceptions for single-sex institutions. Clause 199(3)(b) excludes this from the provisions of the Bill with regard to the exercise of power.

215. Part 2 of Schedule 12 contains a power (at paragraph 5) for a Minister of the Crown to make an order designating an institution if satisfied that the institution has a religious ethos and should benefit from the exceptions enabling a further or higher education institution with a religious ethos to admit, by preference, students of a particular religion or belief. This power will be used to cover the small number of named institutions which currently appear in Schedule 1b of the Employment Equality (Religion or Belief) Regulations 2003 We would intend to consult with the currently listed institutions as to whether they need to avail themselves of this exception and need the flexibility of an order making power to designate those which should. In view of its relatively limited nature, the use of the power is subject to the negative procedure.

Schedule 14 - Educational charities and endowments

216. Schedule 14 provides for the Minister by order (to which the requirements of clause 199 do not apply) to modify a restriction in an instrument governing an educational charity to remove a limitation of its benefits to persons of one sex. There is a residual power in the event that an educational charity is governed by an Act of Parliament for the Minister by order subject to the affirmative procedure to remove the limitation.

Schedule 17 – Disabled pupils: enforcement

217. Schedule 17 deals with proceedings for cases involving disabled pupils which are brought before specialist tribunals. In relation to a school in England, this is a First-Tier Tribunal. In relation to a school in Wales, it is a Special Educational Needs Tribunal for Wales.

218. Paragraphs 2 and 6 provide a power for the Welsh Ministers to make various procedural provisions for the operation of the Welsh Tribunals.

219. All the above powers relate to administrative procedures and, where a parliamentary procedure is required, it is considered appropriate for this to be negative.

Schedule 18 – Public sector duties: exceptions

220. Schedule 18 sets out a limited number of exceptions to the equality duty. Paragraph 5 provides a power for a Minister of the Crown to make an order amending the Schedule by adding, varying or omitting any exceptions to the duty.

221. This power is limited to amendment of the exceptions to the duty in this schedule. It reflects an earlier power in section 71 of Race Relations Act 1976 which was subject to the negative procedure and that has been retained in this Bill. .

Schedule 20 - Rail vehicle accessibility: compliance

222. This Schedule replicates sections 47A to 47M of the Disability Discrimination Act 1995 ("DDA 95") which were inserted by the Disability Discrimination Act 2005 ("DDA 05") and are not in force. The Schedule would be repealed under the provisions of Clause 184, if not brought into force (either fully or to any extent) before 31st December 2010, for the reasons explained in paragraphs 144 to 148 above.

Compliance certification

Paragraph 1 - Rail vehicle accessibility compliance certificates

223. The delegated powers in this paragraph replicate those in section 47A of the Disability Discrimination Act 1995.

224. Paragraph 1 requires certain light rail vehicles (i.e. those which are prescribed or belong to a prescribed class or description) not to be used for the carriage of passengers unless a compliance certificate is in force for them. Such certificates would be granted by the Secretary of State and would certify that he is satisfied that vehicles comply with such provisions of rail vehicle accessibility regulations (made under Clause 180) as they are required to comply with. The policy was that this provision would be applied to all new rail vehicles, and older rail vehicles as they are refurbished, from a date also to be prescribed in sub-paragraph (1) regulations. If a vehicle was so used without a compliance certificate, the Secretary of State would be empowered to require the operator to pay a penalty.

225. The paragraph contains two powers of prescription:

- under sub-paragraph (1), a power for the Secretary of State to prescribe which rail vehicles, or type of rail vehicles, would be required to have a compliance certificate;
- under sub-paragraph (7), a power for the Secretary of State to prescribe the time limit for applicants refused a certificate, to require the Secretary of State to review that decision.

226. The first of these powers would involve consideration of matters of such detail, likely to be developed over time, as not to merit Parliamentary time through the

making of primary legislation. The requirements for compliance certificates would be likely to change over time as compliance certification becomes more firmly embedded, older vehicles were refurbished to accessibility standards and the end date under clause 180(6) was reached by which time all rail vehicles must be accessible.

227. The second power would involve consideration of a detailed question of administration, also not such as to merit Parliamentary time. Indeed, the review period could change over time, in the light of experience.

228. It was therefore considered appropriate to deal with these matters in secondary legislation by negative resolution procedure.

Paragraph 2 - Regulations as to compliance certificates

229. The delegated powers in this paragraph replicate those in section 47B (1) to (3) of the DDA 95.

230. Paragraph 2 provides a power for the Secretary of State to make regulations as to compliance certificates. Sub-paragraph (2) sets out in more detail the kind of provision which may be included in such regulations, for example provision regarding the procedure for making an application for a certificate, specifying conditions to which they are subject, how long they remain in force, and dealing with failure to comply with a specified condition.

231. It is not considered the subject matter of these powers and the level of detail involved would merit primary legislation. This power would be subject to the negative resolution procedure as it would be used to specify essentially procedural matters, which could be reviewed and developed with experience of operation of the compliance certificate regime.

Paragraph 3 - Regulations as to compliance assessments

232. The delegated powers in this paragraph would replicate those in the remaining subsections of section 47B of the DDA 95.

233. Under paragraph 1(4), a compliance certificate could not be granted without a satisfactory compliance assessment having been carried out. The assessment would be carried out by a competent person who would inspect the vehicle to check for compliance with accessibility requirements and prepare a report.

234. Under sub-paragraph (3) the Secretary of State would be empowered, by regulations, to make detailed provision about compliance assessments. Under the regulations he could make provision as to the person who would have to have carried out the assessment. If that person was a person appointed by the Secretary of State (an "appointed assessor") the paragraph sets out a range of detailed matters which could also be covered by the regulations. These would include for appointed assessors to charge fees in connection with the production of a compliance assessment report, to restrict the amount of such fees, to prescribe procedures to be followed, and to make provision for the referral of disputes between an appointed assessor, and the person who requested the assessment, to the Secretary of State.

235. Such detailed administrative provisions are not suited to primary legislation. They relate to detailed technical matters or matters of administration and would be likely to require periodic updating in the light of technical developments. The negative procedure is considered appropriate, in view of their technical nature and relatively narrow scope.

Paragraph 4 - Fees in respect of compliance certificates

236. The delegated powers in this paragraph replicate those in section 47C of the DDA 95.

237. This paragraph would provide a power, in sub-paragraph (1), for the Secretary of State to make regulations for the charging of fees in relation to various administrative matters including applications for, and the issuing of, compliance certificates. Under sub-paragraph (3), the regulations could also provide for fees to be repaid in specified circumstances. Sub-paragraph (4) would require the Secretary of State to consult representative organisations before making the regulations.

238. It is considered that these fee charging provisions would be appropriate for secondary legislation, by negative resolution procedure, being of too detailed a nature to merit primary legislation and would require periodic review in consultation with representative organisations, as referred to in sub-paragraph (4). This approach is often taken for such fee charging powers.

Enforcement

239. The effect of the following paragraphs would be to replace the existing criminal offence of using a regulated rail vehicle which is not compliant with rail vehicle accessibility regulations, as set out in section 46(3) and (4) of the DDA 95, with a civil enforcement regime.

Paragraph 5 - Penalty for using rail vehicle that does not conform with accessibility regulations

240. The delegated powers in this paragraph would replicate those in section 47E of the DDA 95.

241. This paragraph would enable the Secretary of State to take enforcement action if he thought that a light rail vehicle did not conform with a provision of rail vehicle accessibility regulations with which it was required to comply.

242. The Secretary of State would be given power to issue a notice setting a deadline for correction of the non compliance. If the notice was not complied with he could issue a further notice setting a final deadline for compliance. If this further notice was not complied with, the Secretary of State would have the power to require the operator of the vehicle to pay a penalty.

243. Sub-paragraphs (2) and (5) would provide the Secretary of State with the power to specify in regulations, made by negative resolution procedure, the minimum time limits he could set, in initial notices and further notices, for compliance with their requirements.

244. These minimum time limits could vary in the light of operational conditions and experience. They have a narrow scope and are matters of administrative detail in nature. For these reasons, it is considered that they would not need to be set in primary legislation and would more suited to be dealt with in regulations using the negative resolution procedure.

Paragraph 6 - Penalty for using rail vehicle otherwise than in conformity with accessibility regulations

245. The delegated powers in this paragraph replicate those in section 47F of the DDA 95.

246. This paragraph virtually replicates paragraph 5 except it relates to breach of accessibility requirements in the use of a rail vehicle (e.g. failure to operate audio and passenger information systems announcing next stop, failure to deploy a

boarding ramp, etc) rather than a breach in the fitting out of a rail vehicle (e.g. failure to make floors slip resistant, failure to provide suitable handrails, etc).

247. Again sub-paragraphs (2) and (5) would provide the Secretary of State with the power to specify in regulations, made by negative resolution procedure, the minimum time limits he could set, in initial notices and further notices, for compliance with their requirements.

248. Thus for the same reasons as apply to the paragraph 5 powers to specify minimum time limits, it is considered that the time limits for compliance with paragraph 6 notices would not need to be set in primary legislation and would be more suited to be dealt with in regulations using the negative resolution procedure.

Paragraph 9 - Penalties: amount, due date and recovery

249. The delegated powers in this paragraph replicate those in section 47J (1) to (7) of the DDA 95.

250. This paragraph would make provision for the amount, due date and recovery of penalties which could be charged under the Schedule. It stipulates that any penalty imposed by the Secretary of State (under paragraphs 1, 5, 6, 7 and 8 of the schedule) must not exceed whichever is the lesser of the maximum amount prescribed or 10 per cent of the turnover of the person on whom the penalty is imposed.

251. Sub-paragraph (2)(a) would give the Secretary of State the power to prescribe by regulation, under the negative resolution procedure, the maximum amount referred to. Sub-paragraph (4) would give the Secretary of State the power to prescribe by regulation, also under the negative resolution procedure, the time limit within which penalties demanded under the Schedule must be paid.

252. It is considered that the Secretary of State is well placed to be able to assess what would be a reasonable maximum financial limit for rail operators, given the level of interface between the Department for Transport and rail operators especially through the rail franchising process, and to keep that limit under review and adjusted over time as appropriate. However such a limit would not be absolute. This is because, by operation of sub-paragraph (2), any penalty imposed could not exceed 10 per cent of the turnover of a rail operator. Accordingly it is considered that it would be reasonable for the maximum limit, and indeed the time limit allowed for payment, to be set in secondary legislation, using the negative resolution procedure.

253. Sub-paragraph (3) stipulates that a person's turnover would be determined in accordance with regulations. The Secretary of State would be empowered to make these regulations by the draft affirmative resolution procedure. This proposed regulation making power would be similar to the power granted by section 57A (3) (penalties) of the Railways Act 1993 (which empowers the Secretary of State to specify how turnover is to be determined for the purposes of setting limits to penalties which may be imposed under that Act) and analogous powers granted in legislation relating to privatised utilities (e.g. section 27A Electricity Act 1989). It is considered reasonable for this level of detail to be set out in secondary legislation, and that adequate Parliamentary scrutiny would be achieved under the draft affirmative resolution procedure.

Paragraph 10 - Penalties: code of practice

254. The delegated powers in this paragraph replicate those in section 47J (8) to (12) of the DDA 95.

255. This paragraph would require the Secretary of State to issue a code of practice specifying matters to be considered in determining the amount of a penalty imposed under the Schedule.

256. The Secretary of State would be required, under sub-paragraph (3), to lay a draft of the code before Parliament prior to issuing it. Under sub-paragraph (4), the Secretary of State would be empowered to bring the code into operation by order made by statutory instrument using the negative resolution procedure.

257. By definition the code would be more in the nature of guidance than prescription. The paragraph would grant power for the Secretary of State to revise it in whole or in part from time to time, thus allowing flexibility for it to be refined or developed with experience of operation of the penalty system. Given the paragraph would require it to be laid before Parliament and the bringing into operation of the code would be achieved through negative resolution instrument, it is considered that it is not necessary to make it subject to a greater degree of Parliamentary scrutiny.

Paragraph 11 - Penalties: procedure

258. The delegated powers in this paragraph replicate those in section 47K of the DDA 95.

259. This paragraph sets out procedure relating to the imposition of penalties under this schedule. Sub-paragraph (3) would provide that any person who is given notification that a penalty was being imposed on them the right to object by giving notice to the Secretary of State. A notice may indicate objection against either the imposition of the penalty, or its amount. The Secretary of State would then be obliged to consider the objection and review the decision to impose a penalty.

260. Under subparagraph (4)(c), the time limit for making objections could be prescribed in regulations made by the Secretary of State. Also the Secretary of State would have to set, in regulations, a time limit for informing an objector of the conclusion of the review.

261. The regulation-making powers in this paragraph are subject to the negative resolution procedure. This is considered appropriate since they are narrow powers, addressing matters of detailed administration, and the time limits in question may need to be changed in the light of operational experience.

Schedule 21 – Reasonable adjustments: supplementary

262. Schedule 21 provides additional provisions to supplement the reasonable adjustments provisions in Schedules 2, 4, 8, 13 and 15. The purpose of this Schedule is to deal with the situation in which someone who is under a duty to make a reasonable adjustment cannot do so either because he needs to obtain consent to do so from a third party or because he is a lessee himself who needs to obtain consent from a superior landlord. Paragraph 6 provides a power for a Minister of the Crown to make regulations as to the circumstances in which a landlord may be taken to have withheld consent to the making of adjustments; to have withheld consent unreasonably; or to have acted reasonably in withholding consent. The power also includes the making of regulations as to circumstances a condition that the landlord may place on his giving consent is reasonable or unreasonable; and the supplementing or modification of provisions of Schedule 21 where the duty holder is a sub-tenant (sub-paragraph (3)). In addition, sub-paragraph (4) allows amendment of the Schedule in other circumstances. The majority of these powers replicate powers in the Disability Discrimination Act 1995 (Schedule 4, paragraphs 3, 4, 8 and 9).

263. Although sub-paragraph (3) is a Henry VIII power because it enables amendment of Schedule 21, the negative procedure is considered appropriate because the

power is relatively narrow and focused in its scope (the existing provision is also subject to the negative procedure). The other powers are also subject to the negative procedure with the exception of the one in sub-paragraph (4) which allows wider amendment of the Schedule and so is subject to the affirmative resolution procedure.

Schedule 22 – Statutory provisions [educational appointments]

264. Schedule 22 provides exceptions in cases where a person must do something under an enactment. Paragraphs 3(1) to (3) provide exceptions for appointments to certain single sex or religious educational bodies. Paragraph 3(5) provides a Minister of the Crown with a power to make an order removing the exceptions under subparagraphs (1) to (3) in the case of a specified educational establishment or university, or a class of them. This reproduces section 5 of the Employment Act 1989.

265. This power is needed to reflect the potentially changing nature of the educational system and the institutions that operate within it. In view of the relatively limited nature of the power, it is considered appropriate for it to be subject to the negative procedure as was the case with the power it replaces.

Crown, etc employment

266. Paragraphs 5(1) and (2) of Schedule 22 provide an exception for rules restricting employment in the service of the Crown or by a prescribed public body or the holding of a public office (within the meaning of section 47) to persons of particular birth, nationality, descent or residence. Paragraph 5(3) provides a power for the Minister for the Civil Service to make regulations prescribing public bodies for that purpose. To date, only 10 public bodies have been so prescribed.

267. This power is needed should it be decided to extend the application of the Civil Service Nationality Rules to employment in a new public body. Given its relatively limited scope, it is considered appropriate for it to be subject to the negative procedure.

Government Equalities Office
December 2009

Schedule

Clause Number	Guidance (G) or Power (P)	Old (O) Modified(M) New(N)	Procedure	Henry VIII
1	G	N	None	
2	P	N	Negative	Yes
6	G	O	Approval	
14(8)	P	N	Affirmative	Yes
22(1) & (2)	P	O	Negative	
22(3)	P	M	Affirmative	Yes
30	P	N	Affirmative	No

36	P	O	Negative	
37	P	N	Affirmative (Scotland only)	Yes
59	P	N	Negative	
60	P	O	Negative	
78	P	N	Affirmative	No
81	P	N	Affirmative	No
82	P (order in council)	O	Negative	
96	P	O	Negative	
105	P	N	Affirmative	No
106	P	O	Negative	
116	P	O	Negative	
137 (2)	P	M	Negative	
137(5)	P	M	Negative	
137(7)	P	M	Negative	
138	P	O	Negative	
146	P	O	Negative	
150	P	M	Negative	
152	P	M	Affirmative	No
153	P	M	Affirmative	No
154	P	M	Negative/Affirmative	
157(3)	P	N	Negative	
159	P	O	Negative	
160	P	O	Negative	
161	P	O	Negative	
162(1)	P	O	Negative	
162(5)	P	O	Negative	
164	P	M	Negative	
167	P	M	Negative	
169	P	M	Negative	
171	P	N	Negative	
172	P	O	Negative	
174(1)(a)	P	O	Negative	
174(2)	P	O	Negative	
175	P	O	Negative	

176	P	O	Negative	
177	P	O	Negative	
178	P	O	Negative	
180	P	O	Negative	
181(1)	P	O	Negative/affirmative	No
181(3)	P	O	Negative/affirmative	No
182(4)	P	O	Affirmative	No
191(3)(a)	P	N	Negative	
195	P	N	Affirmative	Yes
196	P	N	Affirmative	Yes
199	P	N	Affirmative	Yes
208	P	N	Negative/Affirmative	Yes
Schedule 1, para 1	P	O	Negative	
para 2	P	O	Negative	
Para 3	P	O	Negative	
Para 4	P	O	Negative	
Para 5	P	O	Negative	
Para 7	P	O	Negative	
Para 8	P	O	Negative	
Paras 10 -14	G	O	Approval	
15	P	O	Negative	
16	P	O	Negative	
Schedule 2, Para 3	P	N	Affirmative	Yes
Schedule 3 Para 31	P	M	Affirmative	Yes
Schedule 4, Para 7	P	O	Negative	
Para 9	P	O	Negative	
Schedule 5, Para 5	P	O	Affirmative	Yes
Schedule 7, Para 4	P	O	Negative	
Para 5	P	O	Negative	
Para 6	P	O	Affirmative	Yes
Schedule 9, para 16	P	O	Negative	

Schedule 10, Para 3	P	O	Negative	
Para 2(4)	G	N	None	
Para 6	P	O	Negative	
Schedule 11, para 7	P	O	Affirmative	Yes
Schedule 12, para 5	P	O	Negative	
Schedule 14, paras 1(3)	P	O	None	
Schedule 14, para 2(3)	P	O	Negative	
Schedule 17, para 6	P	N	Negative	
Schedule 18, para 5	P	N	Affirmative	Yes
Schedule 21, para 6	P	N	Affirmative	Yes
Schedule 22, Para 3	P	O	Negative	
Para 5(3)	P	O	Negative	
Schedule 20[10]				
1(1)	P	O	Negative	
1(7)	P	O	Negative	
2	P	O	Negative	
3	P	O	Negative	
4	P	O	Negative	
5	P	N	Negative	
6	P	O	Negative	
9(2)	P	O	Negative	
9(4)	P	O	Negative	
9(3)	P	O	Affirmative	No
10	G	N	None	

[10] Powers in Schedule 20 are enumerated in this Schedule but they will not be commenced unless the powers in chapter 3 of Part 12 are not commenced. In the light of the responses to the Department of Transport Consultation, it is now not likely that the Schedule 20 provisions be commenced. There are 12 SI powers (including 1 affirmative power) and 1 guidance power in Schedule 20. The totals set out above include the Schedule 20 powers at present.

10	P	N	Negative	
11	P	O	Negative	

Number of SI powers	91
Number of new powers	20
Number of affirmative Powers	25
Number of Henry VIII powers	14
Number of guidance powers	5

APPENDIX 3: THIRD PARTIES (RIGHTS AGAINST INSURERS) BILL [HL]

Memorandum by the Ministry of Justice

Introduction

1. This memorandum describes the purpose and content of the Third Parties (Rights against Insurers) Bill ("the Bill"). It explains the purpose of the delegated power proposed; the reason why the matter is to be dealt with in delegated legislation; and the nature and justification for the applicable parliamentary procedures.

Background of the Bill

2. The Bill will, subject to the necessary updating and a small number of minor modifications, give effect to the Law Commissions' 2001 recommendations on the law governing a third party's ability to claim directly against the insurer of an insolvent defendant (Law Com Report No 272 and Scot Law Com No 184 respectively). It will also extend the legislation to Northern Ireland.
3. The Bill has been put forward as a second bill for introduction to Parliament under a new House of Lords procedure for uncontroversial Law Commission Bills, recommended by the House of Lords Procedure Committee, in its 1st Report of the Session 2007-08.[11] More detailed information about the purpose and effect of the Bill and the background to the proposals can be found in the Explanatory Notes published with the Bill.

The Current Law Relating to Third Party Rights against Insurers

4. The scheme of the Third Parties (Rights against Insurers) Act 1930 and the Third Parties (Rights against Insurers) Act (Northern Ireland) 1930 ("the 1930 Acts") is to give a person who is owed money for an established liability a direct claim against the insurer of the debt. The person who is owed money is referred to as the "third party", the person who owes the money is the "insured" and the insurer of the debt is the "insurer". The 1930 Acts do this by effecting a statutory transfer of certain of the insured's rights under the contract of insurance to the third party.
5. The 1930 Acts only effect a statutory transfer if the insured is declared insolvent or suffers an insolvency type event.
6. In the absence of this statutory intervention, the third party would be able to recover at most a proportion of the insurance proceeds (notwithstanding that the insurance was taken out specifically to cover the particular type of loss suffered), as these would be treated as an asset of the insured and thus distributed pro rata among his creditors in the insolvency.
7. Nevertheless, the 1930 Act does not work well in practice. Its processes can be unnecessarily expensive and time-consuming to use, both for litigants and the courts; and in many cases it is of no assistance at all to third parties. Extensive consultation with a diverse range of internal and external stakeholders has confirmed that the deficiencies of the 1930 Act cause real hardship for claimants. The deficiencies of the current law and the reforms in the Bill designed to address these deficiencies are summarised in paragraphs 8 to 11 below.

   Multiple proceedings

8. Under the 1930 Act, a third party cannot issue proceedings against an insurer without first establishing the existence and amount of the insured's liability. This

[11] http://www.publications.parliament.uk/pa/ld200708/ldselect/ldprohse/63/63.pdf

may involve taking legal proceedings, which may be expensive and time-consuming. The Bill removes the need for multiple sets of proceedings by allowing the third party to issue proceedings directly against the insurer.

Dissolved companies

9. Under the 1930 Act, if the insured is a dissolved company which has been struck off the register of companies, the third party may first have to take proceedings to restore it to the register in order to be able to sue it. In removing the need for the third party to sue the insured, the Bill also removes the need for such restoration.

Information rights

10. The Bill improves the third party's rights to information about the insurance policy, allowing the third party to obtain information at an early stage about the rights transferred to him in order to enable an informed decision to be taken on whether or not to commence or continue litigation.

Insurers' technical defences

11. The Bill retains the general approach of the 1930 Act, namely that in general the rights transferred to the third party will be subject to the defences which the insurer could use against the insured. However, it introduces a limited set of exceptions designed to prevent particular injustices which would otherwise result for the third party if the insurer were entitled to rely as a defence on non-fulfilment of certain policy conditions.

Purpose and Effect of the Bill in relation to the law relating to Third Party Rights against Insurers

12. The Bill clarifies the scope of the rules governing this area of the law. In particular:

    a. It caters properly for voluntary procedures between the insured and his creditors and ensures that a third party with rights against an insurer will not be bound by a voluntary procedure to the extent of those rights;

    b. It confirms the application of the principles to include claims for liabilities voluntarily incurred by the third party;

    c. It clarifies the operation of the rules in cases with cross-border elements;

    d. It addresses omissions from the 1930 Act, in particular providing for the wide variety of insolvency type procedures to which individuals, companies and other bodies may now be subject and which may adversely affect a third party.

Delegated Powers

13. The Bill contains only two powers to make orders or regulations. The first relates to Northern Ireland (clause 19) and the second enables the Secretary of State to bring the Act into force by commencement order (Clause 20).

Clause 19 [j022] (Power to amend Act)

14. Clause 19 is included in this Bill to facilitate it being amended so as to –

    (a) substitute a reference to a provision of Northern Ireland legislation with a reference to a different provision of Northern Ireland legislation, or

    (b) add a reference to a provision of a description within subsection (2) of clause 19. A provision will be within that subsection if -

    (a) it is made by or under NI legislation , and

(b) in the opinion of the SOS, it corresponds with a provision under the law of England and Wales or the law of Scotland that is referred to in the section being amended.

15. It is preferred that this clause is included in the Bill rather than making an Order in Council under section 84(2)(a) of the Northern Ireland Act 1998 to maintain parity with the rest of the UK in this area and although such an Order could be made with UK effect that would involve quite a lengthy process and could delay the introduction of this trigger in relation to an individual being a relevant person in respect of Northern Ireland.

16. The need for clause 19 is illustrated by the proposals to introduce debt relief orders into Northern Ireland. Clause 4 of the Bill provides that an individual is a relevant person if, as per subparagraph (d) a debt relief order made under Part 7A of the Insolvency Act is in force in respect of that individual in England and Wales. Northern Ireland does not have a debt relief scheme. A Debt Relief Bill is currently being drafted to provide for such a debt relief scheme but it will not be introduced into the Northern Ireland Assembly until at least June 2010 and it is anticipated that the scheme will come into operation by December 2011. It is intended that making a debt relief Order under the Debt Relief Act to be made in Northern Ireland should constitute a trigger whereby an individual would become a "relevant person" for the purposes of the Bill. An order under clause 19 will be able to achieve this.

17. As an order under this clause will amend primary legislation it will be subject to an affirmative resolution procedure.

Clause 20 [j021] – Commencement

18. Clause 20(2) [j021] enables the Secretary of State to bring all the provisions of the Act into force on a day appointed by order. No power to make consequential, transitory, transitional or savings provisions is required. The clause 20(2) power is a standard commencement power exercisable by statutory instrument and is not subject to any parliamentary procedure.

Territorial Extent

19. The Bill generally extends to the England, Wales Scotland and Northern Ireland. The Bill does not affect any of the functions of the National Assembly for Wales or the devolved administrations in either Scotland or Northern Ireland. The new legislation will come into force across the whole of the United Kingdom at the same time.

20. Like the 1930 Act, the Law Commissions' proposals extended to Great Britain only. In Northern Ireland a scheme equivalent to the 1930 Act is provided by the Third Parties (Rights against Insurers) Act (Northern Ireland) 1930. The Law Commissions anticipated that in due course legislation in similar terms to that of their draft Bill would be introduced for Northern Ireland, given the 1930 Acts' parallel terms.

21. However, following two targeted consultation exercises in December 2006 and in December 2008, the Northern Ireland Department of Enterprise, Trade and Investment expressed a preference to have the Bill extend to Northern Ireland as part of a single, comprehensive package of measures ensuring parity across the United Kingdom.

Ministry of Justice

October 2009